Commission of the European Communities
European perspectives

# AN EVER CLOSER UNION

## A critical analysis of the Draft Treaty establishing the European Union

Roland BIEBER
Jean-Paul JACQUÉ
Joseph H.H. WEILER

Preface by
Altiero SPINELLI

**Andrea Pisano:**
**La legislatura.**
**(Florence, Museo**
**Opera del Duomo)**


**List of Contributors**

Ernst M.H. Hirsch Ballin
Luciano Bardi
Roland Bieber
Peter Brückner
Vlad Constantinesco
Jan De Meyer
David Edward
Dimitrios Evrigenis
Giorgio Gaja
Jacques Genton
Jean-Marc Hoscheit
Jean-Paul Jacqué
Thijmen Koopmans
Per Lachmann
Robert Lane
Carl Otto Lenz
Richard McAllister
James Modrall
J. Ørstrom Møller
Gianfranco Pasquino
John Pinder
John Temple Lang
Cécile J.M. Verkleij
Joseph H.H. Weiler

european perspectives

Commission of the European Communities

Roland BIEBER
Jean-Paul JACQUÉ
Joseph H.H. WEILER

# AN EVER CLOSER UNION

## A critical analysis of the Draft Treaty establishing the European Union

Preface by Altiero SPINELLI

COMMISSION OF THE EUROPEAN COMMUNITIES

Published in cooperation with the
EUROPEAN POLICY UNIT,
EUROPEAN UNIVERSITY INSTITUTE, FLORENCE

# An ever closer Union

## A critical analysis of the Draft Treaty establishing the European Union

**Roland BIEBER**
**Jean-Paul JACQUÉ**
**Joseph H. H. WEILER**

Preface by Altiero SPINELLI

THE EUROPEAN PERSPECTIVES SERIES
BRUSSELS

This publication was prepared outside the Commission of the European Communities and is intended as a contribution to public debate on the subject of the Draft Treaty establishing the European Union. It does not necessarily reflect the opinion of the Commission.

This publication is also available in:

DE ISBN 92-825-5219-5
FR ISBN 92-825-5221-7
IT ISBN 92-825-5222-5

Cataloguing data appear at the end of this publication.

The editors wish to express their thanks to Mr James Modrall for his valuable editorial assistance.

Luxembourg: Office for Official Publications of the European Communities, 1985

ISBN 92-825-5220-9

Catalogue number: CB-43-85-345-EN-C



*Printed in the FR of Germany*

# Preface

*Thanks to the European Community, our generation has seen the enduring dream of a free, united Europe beginning to come true. But the very success of the venture is presenting a fresh challenge to the democratic people of Europe.*

*Membership of the Community has doubled over the years. And the political, economic, cultural and security problems to be tackled jointly, if Europe is not to be relegated to a minor role on the international scene, have grown in number and complexity.*

*Its institutions are intrinsically inadequate. They were improvised rather than planned at the outset and have deteriorated in two respects in the interval. Firstly, they have become less democratic, power being concentrated in the hands of a few ministers and senior civil servants accountable to no one. Secondly, this arrogant oligarchy — epitomized by the protean Council — has become more impotent with the years, because six, then nine, later ten and now twelve distinct national systems are incapable of devising the long-term, forward-looking policies that Europe needs, or of providing the continuity needed for coherent development.*

*The first directly-elected European Parliament saw the inherent danger of the shortcomings of the institutions. Drawing on the political authority given it by the people of Europe — the ultimate source of legitimacy in our democracies — it took it upon itself to draft a Treaty — Constitution of a genuine European Union and presented it for ratification by the Member States of the Community.*

*The European Parliament is not composed of impractical theorists and revolutionaries. On the contrary, all the political views of the European electorate are represented in its ranks. At the end of three years of meetings and committed endeavour, the European Parliament has demonstrated that it is capable of identifying, clearly and coherently, what Europe most needs today.*

*The vote taken by the European Parliament on 14 February 1984 marked the beginning of a new, decisive chapter in the history of European integration. Europe's future will depend in no small measure on the fate of its proposal.*

*As one who assisted at the birth of the European Parliament's brainchild, I would like to take this opportunity of expressing my appreciation of the constant help and guidance provided by the European University Institute in Florence, thanks to the cooperation of its President, Werner Maihofer.*

*I welcome in particular that the Draft Treaty on the European Union is examined here in an academic perspective, which demonstrates the valid contribution of the European University Institute and its Policy Unit to the discussion on the future of the European integration.*

Altiero Spinelli
Rome, May 1985

# Contents

# Introduction

*Roland Bieber, Jean-Paul Jacqué, Joseph H. H. Weiler*

## I. Foundations

### *'Determined to lay the foundations of an ever closer union among the peoples of Europe'*[1]

The term European Union is delightfully ambiguous; It has been used as the ideological underpinning and justification for almost all proposals designed to forward the process of European integration. The most disparate visions and strategies — the Draft Act for European Union (the Genscher-Colombo proposal) on the one hand and the Draft Treaty itself on the other, to give but two recent examples — make reference to European Union. Empirically, one might as well abandon any hope of arriving at a common meaning of the term.

And yet, in the notion of Union we could be tempted to see an underlying ideal-type of European integration, a distant aspiration: a Europe which will bring about the elimination of the individual Member States as the basic units of political power and sovereignty — a Federal State, a United States of Europe. The reference to the 'Peoples' of Europe, rather than the nation States is evocative of such an ideal-type and there can be no denying that this aspiration had at least the role of a mobilizing force in certain quarters at the beginning of the post-war process of integration.

This temptation, especially at the time of institutional ferment and discussions of reform, must be rejected. Not simply, or even primarily, because of the current political unpopularity of such an ideal-type: after all to the extent that ideology and grand vision have an effect on the political process, reality always falls short of ideal types giving more reason to spell out the vision in letters somewhat larger than life.

There is a more profound reason for such a rejection. The notion of an ideal-type United States of Europe, of a European Federal State represents in a most real sense a betrayal of both the deeper aspirations of European integration and of Europe's unique contribution to current political life.

To be sure, in the lore of modern European integration the *raison d'être* for setting the process in motion was largely to negate the ravages brought about by the excesses of the modern and relatively new nation State and its ideology. (We know, of course, that the state actors negotiating the first European structures were hardly 'tainted' by such lofty aspirations and were concerned, then as now, simply to protect the interests of their nations). And yet, that very *raison d'être* compels the rejection today of a European 'superstate'. What achievement will it be, what progress will we have made, if

[1] EEC Treaty, Preamble, 1st indent.

we arrive at a point which paradoxically reinforces the very political structure towards which the European process was attempting to create a distance?

We arrive at the same conclusion when considering the significance of the last three decades and more of European integration. If the classical expressions of sovereignty are in the control of money, diplomacy, police and defence, it is clear that in the modern federation, federalism as an expression of shared rule and participation, has become a myth rather than a reality. And historically, all confederations have either disintegrated or evolved into full Federal States. By contrast, with all the known weaknesses and difficulties, Europe stands out as a unique experience in shared rule. It is a polity in which the individual nation State has not only retained its vigour, but has actually been sustained by the wider structure, but in which, at the same time, one has seen the attainment of a remarkable measure of substantive integration traditionally associated only with 'higher' forms of Federal States. In Europe, sovereignty has become, in some real sense, truly shared. What the European experience has contributed to international political reality is a demonstration of the ability to reaffirm the continued existence of the nation State albeit transferred by this very fact of shared rule within wider political integrative structure.

These notions find their most succinct and purest verbal expression in the idea of *An ever closer Union*. The term 'union', utilized in this evolutive manner, clearly covers a multitude of structures and modalities changing over time and cannot thus as suggested above, partake of a single authentic meaning. Moreover, once we direct our mind to the dualism of 'ever closer' two other basic notions come to the fore.

First, if a process is to go on for 'ever' there is an implicit affirmation of a 'never': the Union is never to be consummate, final, achieved. This is not a simple semantic exegetic interpretation. It is a reflection of a basic burden and virtue of the European construct which is, as suggested above, rooted in a balance — not a substitution — between nation State and supranational structure: this balance is, and will remain, inherently difficult and often unstable. But that is the price for a polity the virtue of which is its truly innovative character and its ability not to fall into the classical patterns of international organization or statehood.

Secondly, the 'ever closer' union phraseology suggests a strong dynamic element. A process on the move. We may compare the European polity to a bicycle: essentially unstable except when in motion. The maintenance of momentum becomes thus a major concern for the European policy maker. This characterization of Europe is clearly Sisyphean. The union will for ever remain a target for which one must toil. But as with many great ideals the search is as important as the ultimate goal.

It is in this context that we must evaluate recent initiatives at reinforcing the European construct. To posit as a virtue the delicate equilibrium between Community and Member State is not to suggest that the current structures and processes strike a right balance. By common accord the European Community of today is deeply flawed in its ability to tackle the major issues on the European agenda. Decisional processes are notoriously heavy, democratic legitimacy is increasingly problematic, competences are insufficiently bold. The danger is not crisis, but stagnation, loss of momentum, irrelevance.

Proposals for Community reform come thus, to the outside observer, under a double test: The extent to which they offer a new balance between Community (or Union) and Member States which may better address the major social, political and economic challenges, and the extent to which they are able to insert new momentum into the European process.

The Draft Treaty establishing the European Union is the most ambitious effort so far to achieve sweeping institutional and substantive reform in the European Communities, and the clearest proof of the new independence of the directly elected European Parliament. Apart from its immediate political significance, it has re-opened the debate on institutional and substantive reform of the European Communities at both the governmental and the public levels.

The contributions in this book offer a comprehensive political, economic, and legal analysis of the Draft Treaty, and a realistic assessment of the political and constitutional hurdles it faces in the Member States. As editors, our intention was not limited to an analysis only of the Draft Treaty itself. The studies in this volume examine the state of the current Communities in many of their aspects, and the observations and recommendations made by the authors may be of help to all those engaged in the ongoing discussion on the fate of the European Communities.

We have organized the studies in two parts. In the first part, after an introductory chapter giving an overview of the Draft Treaty we have a series of contributions which examine the institutional, constitutional and substantive proposals in terms of their likely ability to answer the shortcomings of the present stage of the current European Communities. Naturally, evaluations will be affected by the subjective assessment of each contributor. Our pluralistic choice of contributors coming from different Member States, from academia and from the professions, from national administrations and the Community organs ensure that a variety of perspectives get covered. In the second part of the book, we present 10 national reports which examine the constitutional and political context *vis-a-vis* the Draft Treaty in the Member States.

The first part will help us thus in analysing the substantive issues whereas the second part will provide elements for assessing the receptibility of reform within the Member States.

No one, least of all the authors themselves, believe that the Draft Treaty establishing the European Union in its current form will ever become the new 'constitution' for Europe. And although it would be patently wrong to regard the Draft Treaty as an extreme document (despite its weaknesses it has an appealing internal balance and a surprising modesty in its reformism) few can deny that its promotion has played a major role in shifting the centre of the debate.

The establishment of the *Ad Hoc* Committee on Institutional Questions (Dooge Committee) by the European Council and its report can be in large measure attributed to the momentum established by the Draft Treaty.

The Dooge report represents a paradoxical relationship to the Draft Treaty: in substance it is progeny; politically it is a counterveiling move.

The outcome of the current efforts at institutional reform will be determined by an interplay between the political forces and substantive content contained in the two documents. It becomes thus of great interest to compare the two with a view of verifying convergence and divergence.

## II – Strategies

What is the state of play on the various proposals for institutional reform? Following the 1984 elections, Parliament, through its Committee on Institutional Affairs, undertook to monitor work being done by national Parliaments on the Draft Treaty establishing the European Union, and to remain in close touch with them. A delegation therefore visited the various capitals to discuss the matter with the national authorities, Parliaments included, and to hear their comments. The next stage could be to review the Draft Treaty in the light of the views expressed and the comments made.[2]

In June 1984 the Fontainebleau European Council set up an *ad hoc* Committee for Institutional Affairs comprising the personal representatives of the Heads of State or Government.[3] This committee was asked to submit proposals for improving European cooperation. The European Council

[2] An initial stocktaking will be found in Mr Seeler's interim report of 9. 4. 1985 (A2-16/85).
[3] See p. 342 of this volume.

chose the *modus operandi,* modelled on that of the Spaak Committee appointed by the 1955 Messina Conference to prepare the ground for the conferences which were to draw up the future EEC and EAEC Treaties.

The Committee produced an interim report, presented to the Dublin European Council (December 1984), and a final report[4] which the Brussels European Council (March 1985) decided to make the main item on the agenda for the Milan European Council (June 1985).

It might be in order to compare the *ad hoc* Committee's report and the European Union Treaty but the exercise needs to be approached with caution. The documents have little in common.

The Draft Treaty is a well-worked text designed to replace the existing Treaties while the Committee's report is little more than a list of problems and suggestions. By definition, Parliament had to be exhaustive and consistent while the Committee could afford to gloss over certain issues, concentrating on matters which its members regarded as essential. The Draft Treaty was designed for entry into force as it stood while the report's sole ambition was to serve as a basis for the negotiation of a new treaty.

The Draft Treaty thus spells out procedures for bringing the Union into being and for its future operation, while the report is content to consider basic solutions to specific problems. The intrinsic value of the two documents differs. The Committee made no attempt to devise solutions acceptable to all its members. Its report sets out the majority view, minority opinions appearing as footnotes or annexes. The Committee was very divided on important issues such as voting within the Council, which means that the institution given the task of following up the report will have to reconcile these opposing views. Parliament, by contrast, made a point of searching for a compromise so that the text would be acceptable to the largest possible majority. In this respect too, the Draft Treaty is more complete than the report. However, if the two documents are read in conjunction it becomes clear that they share the same inspiration and make the same diagnosis of what is needed to achieve European Union:

(i) completion of the Community venture, in particular as regards monetary policy and freedom of movement;

(ii) promotion of economic convergence;

(iii) introduction of new policies to take account of technological developments and the need to establish a cultural Community;

(iv) aligning political cooperation and Community action and incorporating security aspects;

(v) reform of the institutions to give the Union an efficient democratic apparatus;

(vi) establishment of the bases for a genuine European citizenship.

Because of these shared objectives, there is a measure of agreement between the policies proposed and the institutional reforms recommended in the report and in the Draft Treaty. However, the proposed solutions to specific problems do differ on occasion.

With regard to policies, the two documents are very similar and the areas covered largely coincide. The major difference is that the Draft Treaty lays the emphasis on energy policy and regional policy which, curiously enough, get no mention in the report. The report opts for the topical, attaching particular importance to high technology; the Draft Treaty mentions high technology too, but deals with it in a more discreet but less complete manner. Other areas are dealt with, if not in identical terms at least in a comparable fashion, by the two documents. It would be tedious to give an exhaustive list.[5]

Two points on which the documents differ should be noted. The report seems to go further than the Draft Treaty on the question of security. Indeed, the Draft Treaty calls for a return to cooperation on

[4] The report is reproduced as Annex II of this volume, p. 330.

[5] On the Draft Treaty see Part One, Chapter VI.

the economic and political aspects of security only. Any extension of cooperation to other aspects of security would call for a unanimous decision by the European Council. The report has no such reservations and extends cooperation to all aspects of security. However, Mr Dooge (Ireland) entered a general reservation on this section of the report. Parliament's text does not go as far as the Committee's text but the formula it comes up with is a compromise between Ireland's views and those of the other Member States. As for monetary policy, the report is less than enthusiastic about the institutional stage of the European Monetary System. While the Treaty regards this as an essential step, the report sees it as no more than a possible objective.

However, these differences are minor. Both documents use the same terms to allow for the temporary differentiated application of Community law, though the report would appear to impose stricter conditions than the Draft Treaty.

Indeed the report extends differentiation to cooperation, making it possible for Member States to conclude partial agreements provided no Member State objects.[6]

However, since the report does not set out to provide ready-made operational solutions but a basis for negotiation, it is silent on the competences of the Union. The gradual implementation of the competences of the Union implicit in the principle of subsidiary and concurrent competences is missing from the report.[7]

Although it does make a distinction between political cooperation and the Union's own policies (common action), the Draft Treaty integrates the two into a single framework and harmonizes the institutional mechanism. The report takes no stand on this, leaving the question open.

With regard to the institutions, the shared inspiration is evident. Both documents set out to give the Union efficient and democratic institutions. But on this too, the Draft Treaty is more complete than the report as a comparison of the sections dealing with each institution will demonstrate.[8] Contrary to the Draft Treaty, the report does not indicate whether the European Council is to become an institution of the Union. But it suggests that it will, since the European Council would be responsible for appointing the President of the Commission. It could only do so if it were an institution of the Union, unless of course it is merely regarded as the framework in which the governments of the Member States reach the agreement provided for by the Community Treaties. The Dooge Committee considers that the European Council should give direction and political impetus to the Community.[9] The Draft Treaty advocates a similar approach. It gives the European Council the political initiative in establishing the Union.

But its role would be weakened by other institutional changes, notably the strengthening of the Commission and the granting of increased powers to Parliament. In the Draft Treaty the directional role would emerge from the programme proposed by the Commission and adopted by Parliament in the investiture debate. Cooperation would be confined to the Council framework. However, the report is more precise as to procedures, advocating the establishment of a political secretariat. The Draft Treaty on the other hand leaves the Council free to take its own procedural decisions. Both texts aim to foster unity within the Council. The report believes that this can be achieved by giving a pre-eminent role to the General Affairs Council. The Draft Treaty goes further, suggesting that specialized Council meetings be abolished, giving more permanence to national delegations which would be led by a minister specifically responsible for Union affairs. On the voting issue, the majority view of the Committee is that there would be a return to majority voting, a vote being called for automatically at the request of the Commission or three Member States. Unanimity would be required in a limited

---

[6] The possibility of partial agreements is based on Council of Europe practice. It is not totally disregarded by the Union Treaty (cf. Article 68(2)).

[7] On the Draft Treaty, see Part One, Chapter III.

[8] On the Draft Treaty, see Part One, Chapters II, IV and VIII.

[9] According to the Committeee, this role should be expanded at the expense of its current arbitrator's role. However, the decline in the arbitration role depends not on the wishes of the European Council but on the effectiveness of decision-making within the Council.

number of specified cases only. However, three members of the Committee (Greece, Denmark and the United Kingdom) advocated retention of the present system, more frequent use being made of majority voting. Mr Dooge could not accept the majority solution. Parliament's Draft Treaty accepts the pleading of a vital national interest during a 10-year transitional period, provided that this vital interest is recognized by the Commission. The vote would then be deferred. Although Parliament's solution is undoubtedly less progressive that the Committee's majority solution, it again represents a compromise between majority and minority views.

The procedure for appointing the Commission is similar in both documents. The President of the Commission would be designated by the European Council. His authority over the members would be strengthened by the fact that he is involved in their appointment.[10] The Commission would be sworn in by Parliament, thereby reaffirming its independence and its initiating and executive roles. In the Draft Treaty, although the Commission shares the right of initiative with Parliament or the Council in exceptional cases, its intervention in the legislative process is made more effective since an increased majority is required if the legislature wishes to take a decision despite Commission opposition. In the report, implicit retention of the main features of the current legislative process would allow the Commission to make use of Article 149 where the Council takes a majority decision.[11] Parliamentary control over the Commission remains unchanged.

Parliament becomes a co-legislator. In the Draft Treaty, the legislative process is the subject of specific provisions designed to balance the powers of Parliament and the Council and to obviate deadlock. The report does not recommend granting Parliament a share in decision-making except in a limited number of areas as already suggested by the Vedel report. In the event of disagreement between Parliament and the Council, a conciliation procedure would be set in train. There is no indication as to how it would end. Is this a point which has been left in abeyance or is the idea that conciliation ends with agreement between the two institutions, granting each of them the power to block progress? This would do nothing to make the legislative process more efficient.

The separation of budgetary powers is unclear. The Committee would involve Parliament in decisions on own resources in the context of multiannual planning; this links up with proposals in the Draft Treaty. However, the text is vague on Parliament's participation in the annual establishment of revenue, the coping-stone of the system. The report suggests no changes to budgetary procedure despite the innumerable disputes it has engendered.[12] Finally, the report is more restrictive than the Draft Treaty or Parliament's involvement in the conclusion of international treaties, limiting it to association and accession agreements.

Some of the solutions proposed in the report are shrouded in uncertainty because the institutional aspects have been left open. But the report also gives the impression that its authors wanted to devise proposals which could either lead to the revision of the present Treaties or to the conclusion of a new treaty to take their place.

There is also some uncertainty as to the next step contemplated by the authors of the report. It is time that they refer to the convening of an inter-governmental conference, but there is no indication as to whether this is to be convened under Article 236 EEC or in another context.

Two questions spring to mind: first the conduct of negotiations and secondly, participation in the negotiations.

On the first aspect the report sets out ideas which are mostly notes.

---

[10] The actual procedures differ: in the report the Members of the Commission are appointed by the Governments on a proposal from the President, while the Draft Treaty confers the power of appointment on the President in consultation with the European Council.

[11] The Dooge Committee does not suggest that Article 149 be amended. The Council would therefore have to take a unanimous decision if it wished to depart from the Commission's proposal (What about Parliament?). Retention of Article 149 would appear to encourage deadlock in this case.

[12] On the Draft Treaty, see Part One, Chapter V.

Negotiations would be between government representatives, with the participation of the Commission. During the course of the negotiations, there could be close contacts with Parliament in accordance with a procedure to be agreed between the conference and Parliament.

The provisional text agreed by the conference would be submitted to Parliament, which would then produce proposals. Areas of dispute would be the subject of a conciliation procedure leading to an agreed solution. Since this is a radical undertaking giving the Union a constitution — it goes without saying that agreement must be reached between governments, represented by the conference, and the people represented by Parliament. The text would then be submitted to national procedures.

The second, far more sensitive issue is whether the venture can begin before all governments are fully prepared to take part. It should be clear that the object of the exercise is to group all current or future Member States within the Union. The aim is to pull all European democracies into the net, beginning with those which have embarked on the Community venture. No one could be excluded, notably because this could raise tricky legal problems. The ideal solution would be for all to participate in the negotiations.

The possibility that some States might object to the convening of a conference cannot be allowed to stand in the way of progress. As the President of the French Republic stated in his speech to the European Parliament, a number of Heads of State or Government could call on all interested parties to join with them in drawing up the Union Treaty. This would make it clear that the other States were free to join in the process at any time. At the end of the negotiations, the conference would have to deal with the situation of those States which did not wish to join by negotiating an arrangement which respected their rights and left the door to subsequent membership open. This solution could create legal problems but these should not prove insurmountable if there was the political will to advance while preserving the acquired rights of all. The aim is not a two-speed or two-tier Europe but rather a Union comprising all Member States of the Community. Nobody regards this objective as unattainable, but the States which regard it as essential are duty-bound to inform the others unequivocally of their determination to make progress.

All that remains now is to speculate on the mandate the Milan European Council might give to such a conference. If it were to instruct the conference to examine the conclusions of the Dooge Committee and no more, there is a real risk of reform remaining a dead letter.

But it could instruct the conference to draft a treaty to replace the existing Treaties by extending the powers of the Communities and inform the institutions accordingly. This would be very close to the Spinelli approach.

It should be possible to conclude a treaty supplementing the Community Treaties and leaving them intact. However, it would be for such a treaty to govern areas which fall within the Community's jurisdiction. These would remain subject to the Community Treaties and to the decision-making process provided for them. If this were the case, it is hard to see how the integration proposed by the Treaties could be achieved given the deadlock provoked by the institutional machinery which would remain in existence.

If the new Treaty did not include matters now falling within the Community's jurisdiction, it would be confined to political cooperation and areas such as culture. The best we could hope for would be an improved version of the Fouchet proposal.

Finally, there is nothing to rule out an approach differentiated by area. On institutional reform, a treaty amending the current Community Treaties would be ideal. On political cooperation, the report's recommendations could be codified into a solemn declaration along the lines of that issued in Stuttgart. On new policies, undertakings could be given to implement these under the current Treaties.

These hypotheses are by no means exhaustive, and the Milan European Council will have a wide range of options to choose from. Even if no action is put in hand, Parliament could press ahead on its own initiative.

Whatever the outcome, the developments sparked off by the reforming ideas born of Parliament's initiative and the influence of the Draft Treaty on the Dooge Committee's report provides confirmation, if confirmation were needed, of the importance of a detailed analysis of the Draft Treaty establishing the European Union.

PART ONE

# The substance of the Draft Treaty

# Chapter I – The Draft Treaty, an overview

*by Jean-Paul Jacqué*

When the European Parliament undertook to prepare the Draft Treaty of European Union, it was not exploring virgin territory. Politically, it could draw on the various processes previously set in motion to reform the Communities or to bring about European Union: precedents and setbacks — some of them relative — were available in the form of the 1953 political community project, the Tindemans report, the Genscher-Colombo initiative and the results achieved at the Stuttgart European Council.

True, Parliament's intention seems to have been to use the same approach that was adopted in preparing the draft for the European political community, but, since, in the light of what happened with the Solemn Declaration on European Union, there was little possibility of the governments being able to produce a master plan for the compehensive development of the Communities, the only solution still available to Parliament was for it to undertake itself the preparation of a Draft Treaty and present it to the Member States and their parliaments.

Good care was taken, however, not to try and recreate the context of the 1950s. All talk of federalism and supranationality was shunned and broad compromises were arrived at with those political groups that wanted to see the rights of Member States affirmed (provisional upholding of the right of veto, caution in integrating political cooperation into the scope of the Union, etc.).

Technically, the draft drew extensively on earlier schemes. Innovation in Community institutional engineering is a rare feature and Parliament based itself as much on the Vedel report as on other papers compiled by the institutions in connection with the Tindemans report. It also extensively confirmed solutions born of practice or deriving from the case-law of the Court of Justice.

Yet the draft, as it stands, cannot be seen as a report by experts who, free of any political constraints, are casting about for ways and means to attaining European Union. It is essentially a political document which reflects a broad consensus among the political groups. Its prime virtue surely lies not in its having met with the approval of Community lawyers and technocrats but in its having been adopted by a majority of 237 votes against 31, with 43 abstentions.

It goes without saying that the quest for compromise does not justify serious flaws that render the draft impracticable; but it does explain some of the silence over a certain lack of clarity in the provisions adopted by Parliament. On several points, the discussion which has begun among the experts and is now also going on with the national parliaments should throw up new ideas which Parliament will have to consider if, as is likely, it revises the draft in response to the reactions it has prompted.

On the other hand, it would have been disturbing had the draft not reflected a broad vision — a political design for European Union — and this it indeed did. The aim of those who drafted it was to spell out the basic characteristics of the Union before considering its methods of action and planning its institutional structure.[1]

[1] This study draws on some of the arguments set forward in an article written for the *Common Market Law Review*, 1985, 1, but also considers more recent discussions.

# 1. The basic characteristics of the Union

## *a. The Union merges first and foremost as the heir of the European Communities*

It marks a step forward in a venture initiated by the Schuman Declaration.

The preamble of the Draft Treaty puts the Union clearly into that perspective and Article 7 affirms that existing Community patrimony is to be preserved. Some way, of course, had to be found to allow Community legislation to co-exist with the law of the Union. Affirmation of the principle that Community law is to continue to be maintained does not mean that such law is immutable and that the Union cannot change it. The solution adopted is to grant each piece of Community legislation a special place in the law of the Union. Such legislation can, therefore, be changed only by the procedures applicable to the relevant Union laws.

To begin with, since new laws take precedence over earlier ones, the provisions of the Union Treaty override any Community law that opposes or is incompatible with them.

In some places the Union Treaty clearly diverges from the Community Treaties, especially where the institutions are concerned. In others, it lays down new rules which may clash with Community rules. But this is exceptional. The underlying principle is that of maintaining existing Community legislation as embodied in the Treaties and the acts adopted in implementing them, so that it is grafted on to the Union Treaty. The Union's objectives do not replace those of the Community but complement them.

The place of Community legislation in the legal system of the Union depends on the nature of the Community laws concerned.

Those provisions of the Community Treaties which state the aims of the Communities and the scope of the Treaties have the same legal value as the Union Treaty and can be ammended only by the procedure invoked for revising the Treaty. The other provisions of the Treaties come under the heading of organic law and can be amended only by an organic law. The other Community acts and the measures taken in connection with the monetary system and political cooperation can only be amended by acts adopted by the Union institutions in accordance with their respective responsibilities. It is therefore the procedure for allocating powers to the different institutions which will determine the procedure for amending each act. If, say, an act clearly falls within the area assigned to the legislative authority, it can be amended only by law. Any disputes that may arise will have to be settled by the Court.

In essence, the existence of this arrangement for the Union to succeed the Community assumes that the two cannot possibly co-exist. Admittedly, Article 7 does not pretend to settle the point and the drafters of the Treaty have taken good care not to offer a solution even in the final provisions. They believed that a solution could be found only empirically, the disappearance of the Community posing scarcely any problem if all the members of the Community became members of the Union and negotiations were to be undertaken should some of them refuse to join. However, the concern to have the Union preserve the Community's patrimony is born of the conviction that the Community must disappear in order to be incorporated into the Union, for otherwise any such misgivings would be groundless, as the Community laws will continue to produce their own effect. The Union does not, therefore, emerge as an additional Community but as an entity that transcends the existing Communities while assuming their mantle.

## *b. The democratic nature of the Union*

Though designed within the framework of a democratic Europe, the Community Treaties did not particularly emphasize that aspect. Indeed, their specific nature was such that one did not expect to find in them any special references to democracy or human rights, even though, as the Court of Justice was later to demonstrate, they were to be interpreted in the light of the principles enshrined in the constitutions of all the Member States. Having a broader purpose, the Draft Treaty underlines the democratic nature of the Union. It is to be a union of democratic States and their democratic nature is one of the conditions of membership. This opening means that the Union will have to arm itself against any internal events in a Member State that might lead that country to violate the principles of democracy or fundamental rights. It was important not to disregard the Greek or Turkish precedents in the Council of Europe. As a result, Articles 4 and 44 of the draft stipulate that, should such events occur, the European Council could, with the assent of the European Parliament and once the situation has been established by the Court, take steps to deprive the country in question and its nationals of some or all of the rights enjoyed by them under the Treaty and could go so far as to suspend that country's participation in the institutions of the Union. Such sanctions would not be imposed in the case of an isolated violation, but for serious and persistent violation.

The Union itself, according to Article 4, grants

> 'every person coming within its jurisdiction the fundamental rights and freedoms derived in particular from the common principles of the Constitutions of the Member States and from the European Convention for the Protection of Human Rights and Fundamental Freedoms'.

The rights guaranteed by the convention are thus incorporated into the Union Treaty. But the Union is not bound by the surveillance machinery set up by the convention in that this would only be possible if the Union signed the convention. The wording on economic and social rights is more cautious since the Union undertakes solely to maintain and develop them to the extent that it is empowered to do so. And within a period of five years the Union will consider the possibility of its accession to the European Convention, the European Social Charter and the United Nations Covenants. These undertakings call for several comments. First, the benefit of incorporation is reserved for the European Convention, the Social Charter being excluded on the grounds that not all its provisions were accepted by all the Member States. The reference to the covenants is even more tenuous. The Union does not regard itself as bound by them and will only consider the possibility of its accession. So one is inevitably left with the thought that the majority of Parliament's members are chary of the UN Covenants, as a result of which it is only with certain reservations that they are prepared to accept that the Union can be bound by them. But even more significant is the fact that Parliament decided not to vest the new Treaty with a declaration of human rights. Many members would have liked it to open with such a declaration, but the majority appreciated the difficulty of compiling a list of fundamental rights and did not want to hold up the drafting of the Union Treaty on that account. The different political groups in the Parliament do not share the same view of fundamental rights, some placing more emphasis on civil and political rights and others on social and economic rights. Consensus, though not unattainable, will take a long time to be reached. Care must also be taken to ensure that any such declaration is compatible with the European Convention on Human Rights. For all these reasons, Article 4(3) stipulates that within a period of five years after the Treaty has come into force the Union will draw up its own list of fundamental rights in accordance with the procedure for revising the Treaty. For the time being, the principles common to the national constitutions and the European Convention constitute a minimum benchmark that is particularly satisfactory in that the competence of the Court of Justice of the Union to uphold fundamental rights is clearly affirmed (Article 43). However, the Court of Justice can intervene to protect human rights only at Union level and with respect to measures which fall within the competence of the Union and not in a more general manner, as some members would have preferred.

## c. *The Union is not intended to replace the Member States*

On the contrary, the Member States conserve their sovereignty, with the Union enjoying only limited transfers of competence. The breakdown of responsibilities between the Union and its Member States is based on the principle of subordination, meaning that action by the Union is subordinate to that of the Member States. The Union is competent only in those areas where it can act more effectively than the Member States acting separately can, largely because the scale or effects of the measures concerned extend beyond national frontiers. This principle of subordination determines not only the breakdown of responsibility as established by the Treaty, but also the way in which the Union shall use its powers when they run parallel to others, as is true in the majority of cases (Article 12). It is the last indent of the preamble to the Draft Treaty which states that the Union's exclusive powers are vested in it on the basis of the principle of subsidiarity, while Article 12(2) states expressly that clashes of responsibilities shall be decided in accordance with that principle alone. Moreover, whenever the Union acts legislatively, it must as far as possible confine itself to establishing basic principles, leaving it to the authorities responsible for applying them, and more particularly the Member States, to work out the details of their implementation. The Member States are seen here to continue to play a major role even within the Union's purview. The Treaty does not provide for the creation of a huge administration to apply these laws, but relies instead on the national authorities. This desire to meet the Member States half-way may lead to different intepretations of the law in practice if the specific national circumstances demand it. Legislators will therefore be able to stipulate time limits or transitional measures since the aim of these practical arrangements for the implementation of the law is still its ultimate 'uniform application'.

## d. *Finally, the Union is to be established gradually*

The Treaty is not likely to have its full effect until after a lengthy transition period that will enable the Member States to adapt to the new situation and will help the solidarity which unites them to gather strength. Three points highlight this gradual process. Union powers will be invoked only when the need arises, i.e. as solidarity develops. When legislating for the first time in the field of overlapping concurrent responsibilities, and most of them are concurrent, the Union must follow the procedure of organic law, i.e. a qualified majority, which implies that a fairly broad consensus is required. In external policy, the European Council can extend the scope of political cooperation by what will in all probability be a unanimous decision.[2] Finally, the Treaty cannot put an end to the principle of unanimity within the Council but does provide for a less harsh form of veto which will remain in existence for a transitional period of 10 years (Article 23(3)). The intention has been to ensure that, during the delicate period following the Union's birth, Member States will be able to ensure that vital national interests are taken into consideration. This loophole will disappear when common experience and institutional practice have enabled the States to arrive at a state of solidarity such that there is no longer any room for the pleading of vital interests. To take account of the special requirements of external relations, Article 68, by way of derogation in the event of new powers and responsibilities being transferred to the Union in this field, allows for the possibility of the pleading of vital interests being extended beyond the 10-year transitional period.[3]

All things considered, the Draft Union Treaty turns out to be much less revolutionary than might have been supposed. The Union is a direct extension of the Communities and does not constitute a 'superstate'. It is simply intended to be a more effective structure than the existing ones, hence the focus on its operations and its institutions.

---

[2] The Treaty does not establish any decision-making procedure for the European Council, which in this field would have to decide unanimously for the transfer to take place; politically, it is hard to see it doing otherwise.

[3] This introduces two different decision-making processes: one without 'veto' after 10 years for the powers and responsibilities it processed at the outset, the other without a permanent veto for those transferred in the meantime.

## 2. The action of the Union

The Draft Treaty spells out both the forms of action and the field in which each type of action shall be carried out. The main distinction made is between cooperation and common action by the Union, but the dividing lines between the areas covered by each method of action are not hard and fast and it is possible to move from one area to another.

### *a. Common action of the Union*

The term 'common action' was deliberately chosen to replace the classic expression 'common policy', it being feared that an identical name might create the idea that there was some similarity between the two terms.[4] However, the Draft Treaty sets up a system which is specific to common action. In fact, common action occurs from the moment that the Union intervenes anywhere under the responsibility of its institutions. As defined in Article 10(2):

> 'Common action means all normative, administrative, financial and judicial acts, internal or international, and the programmes and recommendations, issued by the Union itself, originating in its institutions and addressed to those institutions, or to States, or to individuals'.

The determining feature of common action is that it results from acts attributable to the Union, since it is taken by the Union's institutions.

Clearly, common action can occur only within the framework of the powers and responsibilities that the Treaty vests in the Union. Here, the Treaty distinguishes between exclusive competence and concurrent competence. This distinction, which seems to have aroused some curiosity in legal circles, is not unknown to specialists in federal law. It is found, for instance, in Articles 71 and 72 of the Basic Law of the Federal Republic of Germany. It was not unknown in Community law and is proposed explicitly by the Commission of the Communities in its report on European Union of 26 June 1975.[5]

Whenever the Treaty confers exclusive powers on the Union, this latter is alone competent to act and the 'national authorities may only legislate to the extent laid down by the law of the Union.' Questions have been asked as to where national law stands in cases falling within the exclusive competence of the Union if and when it has not produced any relevant legislation. The problem should not arise after considering the few instances in which the Union has exclusive powers and responsibilities and also in view of the fact that they mostly concern sectors which previously fell within Community competence and in which the Community has already acted. But Article 12 stipulates that 'until the Union has legislated, national legislations shall remain in force'. Can it be amended? In an initial version of the draft, the answer was unclear since any amendment had to be authorized by the Commission. This condition has now been dispensed with, but it was noted that, in the light of the case-law of the Court and since Article 13 of the draft followed the text of Article 5 of the EEC Treaty, the power of States here was subject to Commission supervision. In the case of concurrent powers and responsibilities, the Member States may act if the Union has not. Action by the Union is subject to a condition of substance and a condition of form. The basic condition is adherence to the principle of subsidiarity:

> 'The Union shall only act to carry out those tasks which may be undertaken more effectively in common than by the Member States acting separately, in particular those whose execution requires action by the Union because their dimension or effects extend beyond national frontiers'.

This ensures that the Union will exercise its concurrent powers only when its action is really necessary. The question has been asked as to how the principle of subsidiarity will be maintained. The point at issue is whether the Court would uphold an appeal for annulment based on failure to respect

---

[4] In the EEC Treaty the term 'common action' is used within the framework of the agricultural policy (Article 41) and of commercial policy (Article 111). In both cases common action is distinguished from coordination.

[5] Bull. EC, Supplement 5/75, paragraphs 12 and 13.

the principle of subsidiarity. It might find that this was a question to be left to the legislators, but it might also decide to check whether the legislators' view was not at least tainted by an obvious error. Parliament wished to leave the question open to decision by the Court. Moreover, in formal terms, the first intervention by the Union in a sector covered by concurrent competence is subject to the passing of a law adopted according to the procedure of organic law, i.e. by a qualified majority of the legislative authority consisting of Parliament and the Council. Wherever the Union has acted in a specific sector, that sector, of course, comes under the exclusive competence of the Union, i.e. the Member States cannot take any further measures unless they are so delegated by the law of the Union. The scope of the Union's exclusive powers and responsibilities is limited since they cover only free movement, the regulation of trade between Member States and the regulation of competition at Union level. In external relations, commercial policy is the only field in which the Union has exclusive competence. All the Union's other responsibilities in respect of economic policy, policy for society and external relations are concurrent, but obviously those areas in which the Communities had implemented common policies fall within the exclusive competence of the Union by virtue of the principles concerning the transfer of the existing Community legislation to the Union.

## *b. Cooperation*

According to Article 10, cooperation is conducted by the Member States within the European Council. The agreements thus reached within the European Council are implemented by the Member States, but provision has been made for them also to be implemented by the Union's institutions under the procedures laid down by the European Council.

The initial versions of the draft made a clearer distinction between cooperation and common action and showed that common action could exist only in the areas where the Union had exclusive or concurrent competence. For cooperation, the Union, or more precisely the European Council, constituted a forum of negotiation between the Member States.

The only obligation imposed on them by the Treaty was to discuss in that forum problems subject to cooperation. The wish expressed by certain British Conservatives to make the system more flexible by allowing the European Council, if need be, to call on the assistance of the other institutions within the framework of political cooperation helped to make the working of the draft more ambiguous. But it is still clear from Article 10(3) that cooperation means the commitments (in the sense of international commitments, agreements) undertaken by the Member States within the European Council (and not by the European Council). These commitments cannot be part of Union law and are governed by international law if they involve commitments intended to have the effect of laws. Reading the Treaty, one has the impression that the key area of cooperation should be political cooperation in international relations, and, apart from the chapter on international relations, cooperation is mentioned only in Articles 46 and 54. Article 46 covers the coordination of national laws in areas that fall outside the powers and responsibilities of the Union and Article 54 provides for the setting-up of a framework for industrial cooperation. While the value of these activities should not be underestimated, they are not as crucially important as political cooperation. The intention was to dovetail political cooperation into the Treaty without any basic change in operation. Article 66 broadly defines its scope since it comes into play, in the absence of common action, on issues where the interests of more than one Member State are involved, this including matters relating to the political and economic aspects of security. Article 67 defines the institutional machinery of political cooperation and, in particular, the role of the Council of the Union and the Commission, under the responsibility of the European Council. The European Council may extend the field of cooperation, 'in particular as regards armaments, sales of arms to non-member States, defence policy and disarmament' (Article 68). One can immediately see the effect of these provisions, which attempt to follow up the ideas that have been floated on the independent role that Europe might play in defence. True, the wording is cautious, since *a priori* cooperation does not extend to the military aspects of defence but only to the political and economic aspects of security in so far as any clear distinction is possible; a unanimous

decision by the Member States will be necessary in order to extend cooperation to defence in all its aspects. Nevertheless, a process has been created which can enable the Union to tackle gradually, whenever the need is unanimously felt, new areas that are just as essential as those involving defence. Here again, we find the stamp of realism. While it would have been tempting, albeit Utopian, to include these issues within the scope of the Union's competence, they appear in the small print under the heading of cooperation.

## *c. Transfers from cooperation to common action*

Originally, the draft presented by Mr Spinelli spoke of potential as well as of exclusive and concurrent powers and responsibilities. These were areas which remained subject to cooperation as long as the European Council had not decided unanimously to make them the object of common action coming under its exclusive or concurrent competence. For the sake of simplicity the Draft Treaty does not use the term 'potential competence' but allows, in some instances, for matters coming under the heading of cooperation to be transferred to that of common action by decision of the European Council after the Commission has been consulted and subject to the agreement of Parliament. The cases in which such transfer may be made are laid down in the Treaty and are mainly to be found in the sphere of international relations. Internally, this possibility can be resorted to only under Article 54 in order to convert certain forms of industrial cooperation into common Union action. Conversely, Article 68(2) stipulates that in the field of international relations any area of cooperation may become a field of common action.[6] But, cautiously, it allows for this principle to be waived in certain circumstances. First, the process may be reversed and the European Council may unanimously decide to place the field back under the heading of cooperation, or even that of competence of the Member States.[7] Secondly, in that field, the possibility of pleading a vital interest under the aforementioned procedure will be available at any time.

Though the first reservation need not concern us particularly, for the opposing opinion of one Member State will be enough to prevent reversibility, the second is more serious. It has its origins, of course, in the desire to allay national fears in the face of an extension of the Community's powers and responsibilities. A case in point is defence. The European Council might unanimously decide to include it under the heading of cooperation and then to integrate it into a common action, in other words, it might decide that it falls within the competence of the Union institutions. The intention understandably was to give Member States additional guarantees over and above the requirement that any decision to transfer these areas from the heading of cooperation to that of common action must be taken unanimously.

In the opinion of Parliament's Legal Affairs Committee, the unanimity of Member States may not be enough and national ratification procedures may be required. The Member States' representatives acting within the framework of cooperation are subject to their respective constitutional provisions and are bound by them in any commitments they enter into, which, if need be, may be subject to ratification. It is therefore not true to say that these provisions would enable a European army to be created over the heads of the national parliaments!

Though the transfer from cooperation to common action is possible in the cases explicitly provided for by the Treaty, it does not include the equivalent of Article 235 of the EEC Treaty, which allows the Council to take appropriate measures when action is necessary to attain one of the objectives of the Treaty. Those who drafted it believed that the extension of the Union's powers and responsibi-

---

[6] Article 68(4) even allows for the possibility of transferring a specific problem from the heading of cooperation to that of common action for the period required for its solution. The intention was to allow the Union to act as such solely while an international crisis lasted, as in the case of the Falklands war.

[7] The expression is clumsy, for placing a matter back under the heading of cooperation implies that it comes under the competences of the Member States again; the intention was to show that from then on the matter would be excluded from those on which cooperation was obligatory.

lities contained in the draft justified the Union's being unable to extend them beyond what was laid down. The list of powers and responsibilities is therefore exhaustive. However, in social and health policy, the use of the words 'in particular' before the list of the Union's responsibilities allows it to do things not mentioned in the text of the Treaty.

Without a detailed appraisal of the Union's powers and responsibilities being made, it is enough to note that, besides the field of international relations as just defined, they mainly cover the economic policy and policy for society, which includes not only social but also regional policy, the environment, culture, education, research and information. The aim is to achieve what was intended by the Community Treaties but has not been put in practice and also to define new fields in which Parliament has keenly felt the need for common action.

Some have expressed the fear that the scale of the Union's responsibilities may turn it into a super State (see Pinder). This view is not shared by everyone, since Mr Ehlermann believes that the part of the draft devoted to this aspect is the least innovative of all.[8] This is not the place here to become involved in this argument, but it should be recalled that an appraisal of these responsibilities is not enough to form an opinion; one must also look at the powers granted to the Union to discharge these responsibilities. In the economic sphere, the Union will more often than not play only a coordinating role and will not be able to force Member States into doing its bidding; it can only urge them to do so (see Article 50 concerning conjunctural policy, and Article 53 particularly (d) and (e) on sectoral policy). But there is no point in defining new policies without setting up the institutions capable of carrying them out.

# 3. The institutions of the Union

Institutional thinking has been on the basis of the existing system. Though changes are proposed, the present institutional machinery remains, even if an effort has been made to render it more democratic and efficient.

## *a. Changes in the institutional machinery*

At first glance there seems to be little change. The European Council, Parliament, the Commission and the Court are still there, while the Council of Ministers takes the name of the Council of the Union.

1. The European Council, the authority responsible for cooperation, remains unchanged, the main innovation being that it has been dovetailed into the framework of the Treaty. The draft contains no provisions on how the European Council is to operate, it being felt that it ought to be master of its own procedures. As for its powers, they are the same as those of the present European Council in the field of cooperation, plus the traditional powers of the head of a parliamentary State, such as that of appointing the head of the executive, the President of the Commission, and the right of address. The links between the European Council and Parliament remain as they are.

2. As regards Parliament, the Treaty leaves it to an organic law to lay down a uniform electoral procedure and does not question the allocation of seats between the Member States. The main changes concern the powers of Parliament, which was hitherto only one arm of the budgetary authority but now becomes an arm of the legislative authority as well. It will play a bigger role in the

[8] Claus Dieter Ehlermann, 'Vergleich des Verfassungsprojekts des Europäischen Parlaments mit früheren Verfassungs- und Reformprojekten' in: Schwarze/Bieber (Hrsg.) *Eine Verfassung für Europa*, Baden-Baden 1984, p. 269 (276).

conclusion of international agreements* and, while continuing to exercise a monitoring function over the Commission, will now be empowered to invest it.

3. The Council of the Union is the heir of the Council of Ministers of the Communities. Parliament wished to revert to the practice of specialized Councils and the draft provides for a single Council, whose composition is relatively permanent, since the delegations appointed by each Member State should broadly speaking remain the same as long as the State has not designated other members. Moreover, each delegation is to be led by a minister who is 'permanently and specifically responsible for Union affairs'.

This follows the old idea of Ministers for European Affairs. It is thus hoped to establish the permanence of the Council since only a change in the composition of national governments would allow any change in the chairmen of the national delegations. It is also hoped that those ministers who take part in all the Council debates will be assigned within their own countries the task of coordinating all activities relating to the Union. This would strengthen their authority and consequently that of the Council.

The Community rules have been retained for the weighting of votes in the Council. As was mentioned earlier, when the Council decides by a majority it will be possible for a transitional 10-year period to plead a vital national interest, but this possibility has been carefully kept within bounds. Following the suggestions made at the time of the Stuttgart Solemn Declaration on European Union, the Member State's vital interest must be jeopardized by the decision to be taken and recognized as such by the Commission. When this is the case, the vote is postponed so that the matter can be re-examined while the grounds for requesting postponement are published.

This solution achieves a compromise between the proponents of vital interest and those in favour of a more integrationalist solution. It has therefore come under fire from all quarters. It is attacked as confirming the Luxembourg compromise, but it has been claimed that the essential feature of a vital national interest is that only the one who pleads it can judge its authenticity. Finally, the text of the draft says nothing about repeated requests for postponements. Are they possible or not?

If they are, then we have a veto system. In the Union's infancy much will depend on practical developments and on the Commission's authority.

In terms of its powers, the Council emerges clearly as the other arm of the legislative and budgetary authority. But it performs other functions, particularly in the field of international policy. If it is regarded as a second chamber, it is a chamber vested with important powers more like the United States Senate than a weak one such as the German Bundesrat.

4. The authors of the draft wanted to turn the Commission into an executive vested with real authority, authority which it takes from its manner of appointment since that owes as much to government as to the people. The President of the Commission is to be appointed by the European Council after the European elections. He will then form his Commission after consulting the European Council. This arrangement should strengthen the Commission's cohesion since, while due consideration is given to the proposals by the Member States, it is the President who appoints the Commissioners.

The Commission, and it is here that its democratic legitimacy emerges, is invested by Parliament on the strength of its programme. It may be dismissed following a motion of censure passed by a majority of Members of Parliament and of two-thirds of the votes cast. Some observers have claimed that these rules are those of a parliamentary system but, besides the fact that they are not very different from the spirit in which the appointment of the Commission should be made since the Stuttgart Solemn Declaration, it should be pointed out that the conditions that would have to be met by a vote of censure make it hard to use, since a 'minority' Commission could remain in office as long as it

* Exogenously perhaps, since it participates in the approving of all international agreements. The fate of administrative or technical agreements should probably be reserved . . .

commands the support of a third of Parliament's members. The Commission's greater authority also derives from its powers. First and foremost, it retains its power to initiate legislation and the power to adopt the regulations necessary to implement it. And, under the legislative and budgetary procedures, it has prerogatives equivalent to a right of suspensory veto. There is no cause to fear greater instability and the Commission is assured of a voice in the legislative process.

In the case of the Court, the draft changes its method of appointment by having one half of the judges designated by Parliament and the other half by the Council of the Union. This has raised eyebrows, for it would appear to make the selection of judges a political issue, but it is based on the German experience. It does not imply any change in the rules governing the breakdown by nationalities within the Court, nor was there any call for it in the debates. The powers and responsibilities of the Court, an institution respected by Parliament in view of the essential role it plays in European integration, are widened. But the Treaty retains the litigation system for the time being. Appeals may be lodged against any acts of the Union on the basis of Article 173 pending an organic law to change all appeals consistently in accordance with the objectives set out in Article 43. This solution was preferred to the immediate preparation of new means of redress under the Treaty, as it allows more time for careful reflection. The principles proposed in Article 43 are scarcely original, since they have their origins in the reports prepared by the Court and by the Commission as part of the 'Tindemans process'.

The draft does not demolish the existing structures, therefore, but confines itself to making adjustments based on Community experience. Overall, the system is evolving in the direction of parliamentarianism, albeit a rationalized parliamentarianism, and care has been taken to preserve the role of the executive. This concern is reflected notably in the way the decision-making procedures work.

## *b. Legislative powers*

The number of different types of acts is smaller than what the Community has and is limited to laws, which are the work of Parliament and the Council with the collaboration of the Commission, and regulations and decisions, which are measures taken by the Commission to implement the laws.[10] The distinction between regulation and directive disappears. This simplification must be due to the controversy surrounding the issue of the direct effect of directives. As Article 42 of the draft stipulates that any law of the Union shall be directly applicable, it means that this is broadly speaking valid for every law.

Nevertheless, though the legal category of directive is missing from the draft, the existence of laws of the Union which are comparable to directives is not ruled out. Article 34 stipulates that the laws shall as far as possible confine themselves

> 'to determining the fundamental principles governing common action and entrust the responsible authorities in the Union or the Member States with setting out in detail the procedures for their implementation'.

It can be seen that the implementation of certain laws will be subordinate to the adoption of national measures. But if the State does not intervene, then the plaintiff will clearly be able to plead the law before the national courts whenever it confers on private individuals rights that they can invoke legally.

[10] It should be remembered that the Commission does not have exclusive powers in the implementation of the laws; the Member States may find they are given the task of applying them (Articles 13 and 34).

## c. *Legislative procedure*

The legislative procedure is organized in accordance with a two-fold requirement; respect for the institutional balance and concern for efficacy.

For reasons of efficacy, it is important that an institution cannot, by refusing to act, block the decision-making process indefinitely. Taking its cue from the budgetary procedure laid down under Article 203 of the Treaty, the draft establishes a system of deadlines on the expiry of which silence on the part of an institution is regarded as tantamount to acceptance. However, to avoid a legal text being adopted without any vote, tacit approval can mean the adoption of a law only if it has been expressly approved by the other arm of the legislative authority. The institutional balance requires each institution to share in the legislative procedure. This balance is a dual one, involving both the executive and the legislative on the one hand and Parliament and the Council of the Union on the other.

The balance between the legislative and the executive is ensured by the privileged role conferred upon the Commission in the initiation of laws and the evolution of the legislative process. The draft confirms the privileged role granted by the EEC Treaty to the Commission in the matter of initiative. Admittedly, it no longer has a monopoly of initiative, but it does play an essential role in this respect. It can present draft laws and withdraw them at any time before their adoption at first reading.[11] Moreover, if Parliament or the Council wish to submit a draft law, they must do this via the Commission, which will therefore retain technical control of the draft.

Only if the Commission refuses can one of the other institutions submit a draft directly. In view of the powers held by the Commission in the legislative process, this should happen only rarely and should even more rarely result in a law being adopted.

All drafts voted at their first reading by Parliament are sent to the Commission for its opinion. In the event of an expressly unfavourable opinion, the draft cannot be finally adopted by the Council at the first reading unless it secures a qualified majority (two-thirds of the weighted votes and the majority of delegations). Parliament cannot therefore override the wishes of the Commission unless it has the support of a substantial majority of the Council. Failing that support, the draft must go for a second reading.

The balance between the representatives of the States and the representatives of the peoples is ensured by co-decision on legislative matters. To be adopted, a law must obtain the agreement of Parliament and the Council. If that agreement is not obtained at the first reading, a conciliation committee is set up. Should a common text emerge from the negotiations within the committee, it is submitted to the vote in Parliament and the Council. A refusal to ratify the text by one of the two arms of the legislative authority will prevent its adoption definitively. If the conciliation committee cannot reach agreement, Parliament takes a decision on the basis of the draft that leaves the Council, which then has three months to oppose by qualified majority the text voted by Parliament.

If Parliament accepts the draft in the form in which it leaves the Council, there is little chance of the Council opposing it.

According to Article 38(5) Parliament may amend a text after it leaves the Council only on a proposal by the Commission, which plays a key role here. It is hence conceivable that the Council might want to prevent the text from entering into force, but it will then have to obtain more than two-thirds of the weighted votes.

In practice, Parliament cannot really have its way unless it enjoys the support of a third of the members of the Council and the full support of the Commission.

---

[11] So as to enable it to re-examine them if they are too unfavourably received or if they are liable to be the subject of amendments which would rob them of their significance.

Moreover, for a period of 10 years the possibility of vital interests being invoked must be borne in mind.

The aim is to induce the two arms of the legislative authority to reach agreement in the conciliation committee — the Council because of the risk that Parliament might act in the last resort in the event of failure and Parliament because it may in the last resort have to vote for or against the Council's text without being able to amend it.

At first sight the legislative procedure may appear complicated; but because of the various checks and balances required between the different institutions, it was not easy to create a system as simple as the one in certain individual States. Moreover, the degree of complexity is well below that of the current budgetary procedure under the Community Treaties. The constraints aim at prompting the institutions to act by joint agreement while at the same time preventing any one of them from blocking a decision.

### *d. The budgetary procedure*

Compared with the present system, the budgetary procedure has been simplified. The apportionment of the powers of the institutions is no longer tied to the classification of expenditure as compulsory and non-compulsory. The Council has the right to reject the budget, but failing rejection by the Council, Parliament may act in a last resort by a majority of its members and three-fifths of the votes cast. However, to avoid any risk of an indefinite increase in the burden that the Union would impose upon the taxpayer, raising of revenue is subject to very strict rules. The Union cannot undertake a new action unless it has obtained the necessary revenue by an organic law, which means one that is subject to stricter majority voting.

All in all, the institutional machinery of the Union has been overhauled to take account of the demands of efficacy and democracy. Parliament's powers have been increased, but there is also a desire to strengthen the Commission. In adopting the draft of the Union, Parliament was inspired not only by a wish to expand its role but in particular by an urge to establish institutions capable of implementing Union policy.

## 4. Conclusion

In this form the Draft Treaty has been submitted to the governments so that they can submit it to the national parliaments for ratification. Parliament refrained from asking too detailed questions about its entry into force. Clearly the Treaty must be regarded not as a revised version of the Community Treaties but as a new Treaty encompassing the existing Communities. It has been submitted for ratification by all the Member States and, if all of them ratify it, it could replace the existing Treaties.

However, to make entry into force conditional upon the accession of all the Member States, is to confer upon any single one of them the right of veto. The terms of Article 82 are therefore more subtle:

> 'Once this Treaty has been ratified by a majority of the Member States of the Communities whose population represents two-thirds of the total population of the Communities, the governments of the Member States which have ratified shall meet at once to decide by common accord on the procedures by and the date on which this Treaty shall enter into force'.

Some have seen in this article the possibility of sidestepping certain States and setting up a two-speed Europe. This was not the aim of the drafters. The idea is to enable States which have ratified it to urge the others to choose: either they join in the venture or they agree to negotiate their relations with

the Union with full respect for their rights acquired under the Community Treaties. Article 82 creates a strong incentive to ratify the Union Treaty as soon as the critical number of States is reached and does not allow States remaining on the sidelines to affirm their support for the Union while blocking its implementation by refusing to ratify it. Article 82 makes a choice between membership or non-membership inevitable as soon as a sufficiently large number of States have joined. Moreover, it leaves States the choice of the date of entry into force and of the arrangements for readjusting the situation of the Communities *vis-à-vis* the Union.

In other words, if the participation of all the members of the Community is the happiest solution, entry into force by a majority vote is possible at the discretion of the States that have ratified the Treaty. But at no time was it intended to encroach on the acquired rights of members who remain outside to process. If they agree to remain outside the Union while not opposing the entry into force of the Treaty, the legal situation is clear. If not, the solution lies in the negotiation of a solution by which acquired rights remain unaffected. Article 82 *in fine* paves the way for such a procedure without prejudging the substance of the solution that might be reached.

Finally, as it stands, the draft is not intangible. Parliament has undertaken to ascertain the opinions of the national parliaments; it is closely watching the work of the Dooge Committee and is considering the possibility of convening an inter-governmental conference. If this hope is fulfilled, the draft might be amended in the light of the conclusions arrived at within the framework of the negotiation with which Parliament wishes to be associated. Otherwise, Parliament will follow its own line, which means, too, that it will take account of the observations of the national parliaments in order to amend the draft wherever possible, while preserving its essential elements.

# Chapter II – The institutions and the decision-making procedure in the Draft Treaty establishing the European Union

*by Roland Bieber*

## 1. Introduction

### *a. The role of institutions in an organization*

Any organization needs institutions in order to determine, to express and to implement the intentions of the members of the organization. In political organizations, the institutions provided for by the constitution are the formalized structure through which the organization's overall power is exercised.[1] Institutions, their respective powers and their mutual relations are thus a necessary prerequisite of any organization. Institutions also represent, like the tip of the iceberg, the visible part of the entity. The very existence of an organization depends on its capacity to remain 'visible', to establish a reality for its constituent parts. Through their role in embodying the character of an organization for its members, institutions generate and aggregate consent for the organization. Consent within an organization — legitimacy — presupposes an identification of its members with the organization. Identification (or 'loyalty') can only be achieved when a minimum of stability exists within the insitutional framework.

Hence institutions fulfil essentially three functions:

(i) they promote the efficiency of an organization by providing the tools necessary for the achievement of the organization's aims;

(ii) they provide *legitimacy* for an organization through participation of members of the organization in decision-making and by rendering this process publicly accountable;

(iii) they generate *identity* by integrating social actors into the organization.

How these basic functions of an institutional system are fulfilled depends largely on the kind of institutions which a given constitution provides for and from the way in which cooperation and

[1] See Löwenstein, *Political Powers and the Governmental Process*, 1957, p. 10. Although Löwenstein, like many political scientists, uses the notion of 'institution' in a larger sense, which comprises all political actors, including political parties, it is submitted here that the fact of being formally recognized by a constitution establishes substantial difference, which needs to be taken into account. On the other hand, legal science uses the term 'institution' often in the sense of 'organization' (see Hariou, 'La théorie de l'institution et de la fondation', in *Les Cahiers de la Nouvelle Journée*, 1925, p. 44; Romano, Santi, *L'ordinamento giuridico*, 1946.
Since the following text deals with the law of the European Communities, the notion of 'institution' is used here in the meaning given to it by Article 4 of the EEC Treaty. It should be kept in mind that the German version of the Treaty uses the more specific term 'Organe'. This notion is familiar to the English-speaking reader as well. See Article 7 of the UN Charter ('Principal Organs').

mutual control are built into the institutional structure. Although any institutional system serves the same set of basic functions, the operation of institutions cannot be separated from the aims for which they have been created. Institutions and aims are in fact related to each other through a dialectical process.

These observations are valid both for States and for international organizations. In this (formal) respect, any text which lays down the guidelines for the institutional system of an organization may be considered as a constitution.[2] Depending on the number and the stability of the proper values this dialectic process has generated for the institution, however, this text may also be considered a constitution in a substantive sense. In this respect the EC Treaties are considered as either in a 'process of constitutionalization',[3] or already as a constitution.[4]

In the present EEC Treaty, Article 4 expressly relates aims and institutions by stating:

> The tasks entrusted to the Community shall be carried out by the following institutions . . .

This means, on the one hand, that the institutions do not have any function outside the scope of the Treaty and, on the other hand that the tasks shall not be carried out by *any* institution other than those provided for in the Treaties. This intrinsic link between policies and institutions has to be kept in mind when submitting proposals either for reforms of policies or of institutions.

## *b. Institutional essentials in a constitution*

On the assumption that a constitution is the formal framework for determining the aims of a political organization and providing the instruments for the achievement of those aims, a draft constitution has to provide for a minimum institutional structure. In theory, every new constitution has a free choice among possible institutions, but constitutional history shows that the variety of institutions tends to be limited and that one of the characteristic features of institutions resides in their being designed in reply to previously-existing institutions, either by developing certain features in order to make institutions more able to confront new tasks or by avoiding certain errors of past institutions.[5]

The complexity of modern institutional structures tends to echo the complexity of aims assigned to modern political organizations, namely the State and international organizations.[6] The achievement of the traditional formal aims of such organizations (aggregating public opinion, and making, implementing and interpreting laws) entails a more or less complex institutional system, but in any event requires *different* specialized institutions. The 'division of power' among several institutions permits a more specialized and therefore more efficient activity of the individual institution and limits at the same time its weight in comparison to other institutions. Any draft constitution has to assign the four traditional functions to institutions and has to determine, at least in principle, how those functions are to be exercised. It has, furthermore, to lay down rules for the establishment of the institutions, the procedure for the selection of office-holders and for the duration of their term of office. A further

---

[2] Bernhardt, the sources of Community law', in *Thirty Years of Community Law,* Commission of the EC, 1981, p. 77.

[3] Weiler, 'The Community System: The Dual Character of Supranationalism', *Yearbook of European L.,* 1981, pp. 267, 292.

[4] Schwarze, 'Verfassungsentwicklung in der Europäischen Gemeinschaft', in *Eine Verfassung für Europa,* (Schwarze, Bieber, eds) 1984, pp. 15, 23.

[5] See Mill, Stuart, *Utilitarianism, Liberty, Representative Government,* 1972, (lst ed. 1910), p. 175 *et seq.* For recent examples see Debré, *Les idées constitutionelles du Général de Gaulle,* 1974, (for the constitution of the Vth Republic). On the origins of the German Grundgesetz, see Hesse, 'Das Grundgesetz in der Entwicklung der Bundesrepbulik Deutschland', in *Handbuch des Verfassungsrechts,* (Maihofer, Vogel, eds), 1983, pp. 3-27.

[6] Most international organizations have a structure that is less complex than the structure of States, but the same trends towards complexity can be observed. Also, the different aims of international organizations lead to partly different institutions. For details see Schermers, *International Institutional Law,* 1972, and Seidl Hohenveldern, *Das Recht der Internationalen Organisationen einschließlich der supranationalen Gemeinschaften,* 4th ed., 1984, p. 9.

necessary set of rules concerns the relations among the institutions with respect to the execution of their respective tasks (e.g. the question of judicial control). Finally, an institutional system must be provided with rules which create flexibility within and among the institutions and also for the entire institutional system. This flexibility is usually achieved through some level of institutional autonomy, either expressly, through the authorization to adopt rules of procedure and to create auxiliary institutions, or tacitly through the acceptance of the principle of 'implied powers'.

## c. *The starting point for institutional proposals in the Draft Treaty establishing the European Union*

The draft is not to be considered as a blueprint of an abstract 'ideal' constitution for a European Union. The text has been designed as a constitution for an organization that comprises the members of the existing European Communities. It will not create an organization functionally separate from the EC but will be the result of an evolutionary process which has its origins in the present Treaties.[7] In this respect, the draft follows the same line of thought which has inspired proposals for a closer union among Member States ever since the ECSC was established in 1952,[8] although the first proposal, submitted in 1953, was inspired by more abstract considerations since it built on hardly any experience with the institutions of the ECSC that had shortly before been established.

Therefore, the 1984 draft bears all the signs of traditional constitution-making: it aims at maintaining a maximum of stability in the existing institutional structure, and proposes modifications considered necessary due to a change in the priority of values. It would, of course, have been possible for Parliament to design a completely new and different institutional system, but it was probably easiest to maintain the known structures as long as no consensus for deviations from them could be found, thus making the possible change 'calculable' for the MEPs. This approach also has its 'external' justification: as pointed out in the introduction, institutions serve as identification marks of an organization. The more stable institutions are, the more capable they are of generating loyalty towards the organization and its institutions. This is particularly significant in the present situation, since the loyalty of the Community citizens is one of the major shortcomings of existing institutions. It is certainly wise to base proposals for a 'new' organization on the existing institutional structure.

On this basis, it is possible to identify three different currents of thought which influenced the institutional proposals in the draft:

(i) According to Parliament the evolution of the instutional system of the EC Treaties requires major adjustments in order to increase its efficiency and its legitimacy;[9]

(ii) The new competences attributed to the Union in the draft imply a further transfer of competences from national Parliaments and would therefore require a parallel increase in parliamentary powers on the EC level;[10]

(iii) In order to promote the further process of integration, it is necessary to strengthen the independence of the organization from the Member States.[11]

These three factors could be characterized as (i) efficiency, (ii) democracy and (iii) independence.

---

[7] See Art. 7, par. II of the draft.

[8] For details see Bieber, 'Verfassungsentwicklung in der Europäischen Gemeinschaft, Formen und Verfahren', in *Eine Verfassung für Europa,* (Schwarze, Bieber, eds), 1984, pp. 49-89.

[9] This opinion is not limited to Parliament, see, for example, *The Report on European Institutions,* presented by the Committee of the Three to the European Council (1979), and the Vedel report, Supplement 4/72—Bull. EC.

[10] This line of thought was already presented in the proposals for an economic and monetary union ('Werner Plan'), in Supplement 11/70 — Bull. EC; see also the report of experts on the economic and monetary union ('Marjolin report'), 1975, Chapter IV. 1.

[11] This view can already be found in the EP Resolution of 10. 7. 1975 preceding the Tindemans report, OJ C 179, 1975, p. 23.

It seems appropriate to examine the institutional structure of the Draft Treaty in the light of experience with the institutions established by the EC Treaties and to take into account the specific aims of Parliament.[12]

## 2. The institutional system of the EC

Since the Merger Treaty of 1965, the EC Treaties [13] provide for four institutions, *Assembly, Council, Commission* and *Court.* An auxiliary institution, the *Economic and Social Committee,* fills an advisory function in regard to the Commission and the Council within the framework of the EEC and Euratom Treaties. Another auxiliary institution was established by the Treaty of 22 July 1975, which transformed the control committee into the *Court of Auditors.*[14] In addition, the institutions are surrounded by a large number of complementary entities with different legal natures.[15] Formally, the *European Council,* the conference of Heads of State or Government, acts outside the institutional structure of the Treaties, but it can meet as a Council. The 'Conference of the Representatives of the Member States', which is not an institution of the EC, but formally a type of inter-governmental cooperation, often prepares or complements EC legislation.

This institutional system reflects concepts about legitimacy of power, of due process in law and of checks and balances. But it is not modelled on a specific constitution of a State or an international organization. Legislation and executive functions are horizontally divided between the Council and the Commission, the Parliament fulfils co-decision and control functions, and judicial control is exercised by the Court. The composition of the institutions aims essentially at legitimacy. Thus all Member States are represented. Their size, determined with an eye to efficiency, depends on the tasks assigned to each. Enlargements of the EC have, therefore, led to an increase in size of the institutions.

The Treaties describe in an abstract way the powers of each institution,[16] but those enumerations are not sufficiently complete and precise to determine the role of each institution in decision-making. The different procedures for adopting legislative acts can only be inferred from the Treaty provisions providing for specific policies.

A particular feature of these procedures is the cooperation between several institutions required to adopt legislative acts. Within this cooperation, the Commission has the (formal) right of initiative and the task of preparing legislative acts, the Council has the legislative decision power and Parliament has the task of public discussion and of control over the Commission. This original system underwent considerable modifications in the form of Treaty amendments, unilateral decisions by institutions, and agreements among the institutions. The modifications strengthened the position of the Council to the detriment of the Commission and of Parliament. The institutional system, both in its original form as shaped by the Treaties and in its constitutional life, had to face increasing criticism of the efficiency, legitimacy and balance among the institutions.

---

[12] For details of Parliament's intentions, see 'Explanatory Statement' in *Report of the Committee on Institutional Affairs,* (Doc. 1-575/83/C, draftsman Mr Zecchino).
[13] Art. 4 (EEC), Art. 3 (Euratom), Art. 7 (ECSC).
[14] Art. 4, III and Art. 206 (EEC).
[15] For a detailed analysis see Hilf, *Die Organisationsstruktur der Europäischen Gemeinschaften,* 1982.
[16] Parliament, Art. 137; Council, Art. 145; Commission, Art. 155; Court, Art. 164; Ecosoc, Art. 193; Court of Auditors, Art. 206 EEC Treaty.

The most pertinent of these criticisms can be summarized as follows:[17]

(i) The institutions of the EC are still not considered by its own citizens as producing and guaranteeing solutions for vital problems.

(ii) The political options underlying decisions are hardly ever made public and are only indirectly subject to influence and control. Community citizens do not see themselves as participants in the system. In other words, it lacks representativeness. Together, the first two criticisms amount to a claim that the Community lacks legitimacy and, hence, has not attracted the loyalty of its citizens.

(iii) The efficiency of the system when producing decisions is doubtful. Furthermore, decisions often are not taken according to a proper common interest but rather according to the lowest common denominator.

To a large extent similar criticisms are made within States. But within the EC system three main amplifying factors can be identified:

(i) the incomplete legal framework governing relations between the institutions;

(ii) the dynamic conception of the organization; and

(iii) the position of Parliament, which differs from that in national constitutions.

Especially the dynamic conception of the Treaties, which applies, both to policies and to institutions, has repeatedly encouraged the institutions to question their present position. As early as 1962, and from then on at regular intervals, Parliament has submitted proposals for a substantial increase in its own powers. But these proposals were designed as modifications within the present Treaty structure. [18]

Although these proposals were dealt with separately from the preparation of a proposal for the European Union, their underlying philosophy with regard to institutions and decision-making is similar. The prevailing aim is the strengthening of the *parliamentary* and *Community* elements against the influence of national governments of the EC system.

# 3. The Draft Treaty establishing the European Union

## *a. The ideological background*

The institutions and the decision-making process occupy a central position in the approach chosen by the European Parliament towards European Union. Their key role is apparent from the fact that the relevant articles [19] cover more than one third of the entire Draft Treaty. This formal element reflects not only priorities concerning the method of achieving European Union, but also Parliament's central concern with the failures of the existing system. Parliament, in fact, expressly decided in 1982 'to maintain the institutional structure of the Community and to adjust it so that defaults are abolished and the Union on the other hand gets the possibility of executing new tasks'.[20] Altiero Spinelli has given six reasons for the initiative for a European Union, all of which are related to the mal-

[17] See analysis in the report of the Three Wise Men, *supra,* footnote 10.

[18] See in particular the reports submitted in 1981-82 on relations with Council, Commission and European Council, on the conclusion of international agreements and on political cooperation. For details see *Le Parlement Européen,* (Jacqué, Bieber, Constantinesco, Nickel, eds), 1984, p. 143 *et seq.*

[19] Arts 8, 14 - 44, 75, 76, 78-81.

[20] OJ C 238, 1982, p. 25.

functioning of the present institutional system of the Communities.[21] In fact, Parliament seems to consider the draft essentially an instrument to repair defects of the existing institutional system. This approach is radically different from the one displayed, for example, in the proposals for an economic and monetary union,[22] where institutional changes were considered as an annex to an enlargement of EC competences. Similarly, the *Tindemans report* of 1975 on the European Union suggested minor institutional improvements only as a consequence of substantive reforms. [23] One might object to Parliament's approach, that an agreement on institutions and procedures for the solution of future problems distracts from the necessary agreement on the substance of those problems. But experience shows that a well-designed institutional sub-system, like the Court of Justice, may have a larger impact on the evolution of European Union than discussions on the substance of policies that remain hypothetical because of a defective institutional system.[24]

A further objection which might be raised against the method chosen by Parliament is related to the 'reactive' character of the draft. The institutional parts of the text are heavily conditioned by the present Treaty structure; Parliament tries to 'repair' rather than to 'invent'. One might be disappointed to see a new adventure like the European Union result from the ruins of the present Treaties. Continuity is of course the safest way of avoiding major errors and of reassuring political opponents, thus a defendable way to increase 'acceptance'. But the stability of the political system, which this approach implies, is, in the light of strong negative opinion on the EC, only a relative constitutional value.

One might, therefore, regret that the requirements of an institutional system for the Union, even in the context of the present Treaties, have not been further explored. Such an analysis could have tried to establish a relationship between the competences of the Union and the necessary instruments for their implementation. Another approach could have been to evaluate critically the potential for efficiency, legitimacy and flexibility in the present institutional system and to try to submit suggestions for increasing this potential. This might have led to questions such as: Are the present institutions sufficiently representative for the people of the Union? Would, for example, a regional representation or a representation of national Parliaments (like in the draft of 1953) not be necessary? Would size, allocation of seats and electoral period of Parliament not have to be reconsidered?

The main aim of Parliament's draft obviously is to extend its own powers within the present institutional framework. One might well ask whether this step is not at the same time too large (because it shifts legislative authority from Council to Parliament) and too small (because it does not substantially increase the overall legitimacy of the institutional system).

## *b. The proposed institutional structure* [25]

The institutional structure proposed for the Union hardly differs from that existing under the present Treaties. In fact, Article 8 of the draft differs in substance from Article 4, par. 1 of the EEC Treaty only in adding the European Council to the institutions of the future Union. Parliament seems to have included it somewhat reluctantly, since the European Council is placed at the very end of the list, which otherwise follows the order as established by Article 4 (EEC).

In any event, it should be borne in mind that the European Council, although of highly symbolic value, is an emanation of national Governments. Its formal establishment and bestowment with spe-

[21] Spinelli, *Towards a European Union*, Sixth Jean Monnet Lecture, European University Institute, Florence, 1983; see also Spinelli, in *Eine Verfassung für Europa, supra*, note 4, p. 231.
[22] See *supra*, footnote 10.
[23] Supplement 1/76 — Bull. EC (Chapter V).
[24] See Weiler, *supra*, footnote 3.
[25] For the Court of Justice, see chapter IV by Judge Koopmans.

cific powers implies a major transfer of powers from national Parliaments to their respective Governments. This is particularly obvious for the power of the European Council to establish a Union competence in the field of defence policy. Suspicion of national Parliaments towards the Union is therefore likely to increase and might, in fact, create an obstacle to the approval of the draft.

In the Union, the European Parliament and the European Council will be — as they tend already to be under the existing Treaties — the two poles of interinstitutional rivalry and tension. Both will claim a maximum of autonomous legitimacy. It is doubtful whether the system proposed for the Union is sufficiently sophisticated to balance those tensions. One possibility could have consisted in strengthening Parliament by creating a 'Senate' in which national Parliaments were represented. This solution was, in fact, proposed in 1953.[26] Another method could have been to integrate fully the European Council into the institutional system. But the draft's silence about the possibility of trusting constitutional conflicts between the European Council and the Parliament to the Court, and Parliament's reluctance to provide for rules of procedure of the European Council[27] indicate that Parliament seems to accept that the European Council enjoys, like a monarch, a particular autonomy. Under the present Treaties, the legal powers of the European Council do not differ from those of the Council. The draft assigns to it the power to decide new areas of Community competences (Arts 54, 68). This innovation creates, in fact, a Treaty amendment procedure which one might locate between Articles 235 and 236. Those decisions will in most cases have to be unanimous.

With three exceptions, the proposed text on Parliament confirms the institutional position it has acquired within the EC Treaties. In particular, its composition and the term of office are not modified. The three new features concern its powers:

(i) its consultative function is transformed into *participation* in legislation and in the adoption of the budget;

(ii) it approves the appointment of the Commission and it participates in the nomination of the members of the Court and the Court of Auditors (although this elective function is not mentioned in Article 16 of the draft, which lists the powers of Parliament);

(iii) finally, a new element is the recognition of a power to conduct inquiries and to receive petitions. The really important question of the legal powers Parliament has for this purpose, however, is left to organic laws (Art. 18).

The institutional position of the Council is visibly reduced in respect to its legislative powers. According to Article 21, the Council *participates* in the legislative and budgetary procedure.[28] In its composition, the Parliament seems to adopt the idea of 'European ministers'. Article 20 of the draft provides that each representation 'shall be led by a minister who is permanently and specifically responsible for Union affairs'. This formula looks like interference into the autonomy of national Governments. It is in fact difficult to imagine that the Council would refuse the participation in its work to a minister who is designated on an *ad hoc* basis by the Head of State or the national Government.

One indication of the above-mentioned 'reactive' character of the draft can be found in Article 24, where it is stated that the Council's rules of procedure shall provide for publicity of meetings in which the Council acts as a legislative or budgetary authority. For itself Parliament did not consider such a rule necessary. In any event, its application would require substantial changes in the Council's internal rules and perhaps in its habits, although the confidentiality of Council meetings at present is often pure fiction.

Contrary to Article 5 of the Merger Treaty, combined with Article 148, par. 1 (EEC), the draft provides that the Council's rules of procedure shall be adopted by an *absolute* majority. Although this wording establishes a parallel between Parliament and Council, the notion 'absolute majority' is de-

[26] See Art. 11 of the Draft Statute, submitted by the *ad hoc* assembly on 10. 3. 1953.
[27] See Art. 32, par. 2 of the draft.
[28] See Art. 145 (EEC): '. . . have power to take decision'.

fined differently for the Council (combined majority of weighted votes and of a number of representations)[29] and for Parliament (majority of members).[30]

The new way of counting majorities in Council renders routine decisions easier, because a simple majority is also obtained from *weighted* votes, thus enabling the four 'big' countries to establish a majority.[31] But more important decisions, which require an 'absolute' majority are more difficult to take (provided that votes are taken at all).

With respect to the Commission, it should be noted that the draft establishes a link between its terms of office and the term of Parliament, thus prolonging the present four-year period to five years and underlining at the same time the political responsibility of the Commission towards Parliament.

The draft provides a somewhat awkward procedure for the Commission's appointment (Arts 25 and 16). Its President is appointed by the European Council (this appointment meaning at the same time cooption to the European Council); the President then selects the other members of the Commission. Finally, the Commission obtains 'investiture' from Parliament. This procedure comes still very close to the present selection system where Parliament has *de facto* no influence on the choice of members of the Commission, since the Governments are eager to preserve their prerogative in this respect.

Parliament's underlying assumption is that the President of the Commission, whose authority originates from the European Council, would seek an understanding with Parliament on the choice of his colleagues. This concept is likely to generate conflicts between the two rival institutions who both expect the Commission's loyalty. In any event it is at present difficult to imagine that a European Council would appoint somebody President of the Commission who has not before committed himself to a certain team.

With respect to the Court and to the Court of Auditors, the draft provides for appointment of some of its members by Parliament and by the Council (Arts 30, 33). This technique is likely to create *conflicts* among the appointing institutions, e.g. on the methods for providing for a representation of all Member States in those institutions. It would be safer to provide for a mechanism which guarantees that decisions on appointments are taken in due course before the end of the term of the outgoing member.

The Court of Auditors and the Economic and Social Committee shall no longer enjoy the privileged status conferred upon them by Article 4, pars II and III (EEC), where they are mentioned together with the main institutions. Together with the Investment Bank and the Monetary Fund they are now named 'organs' and listed in Article 33. Apart from this more politically [32] relevant reduction in status, the terminology used in Article 33 will contribute to further confusion: in the English versions those entities are called 'organs', whilst the German version uses the term 'Einrichtungen'. Until now the notion of 'organ' was used in the German version of the Treaties for the main institutions (Parliament, Council, Commission, Court). It is difficult to see why the draft did not use any internationally-recognized terminology such as, for example, that used for the Charter of the United Nations, in order to call its entities in as meaningful and least confusing a way as possible.

In its provision for the rules of procedure of the Court of Auditors, the draft repeats the omission of the EEC Treaty by failing clearly to lay down the autonomy of the Court in this respect.[33]

For the Economic and Social Committee, on the other hand, the autonomy to adopt its own rules of procedure has been recognized and is, contrary to the EEC Treaty (Art. 196, par. II), no longer subject to the approval of the Council. Furthermore, a right of initiative is formally conferred upon the ESC (Art. 33, par. 3).[34]

---

[29] Art. 23, par II of the draft.
[30] Art. 17, par II of the draft.
[31] Note the difference from Art. 148, par. I (EEC): 'majority of its members'
[32] Although it is significant for Parliament's narrow concept of representativity.
[33] A cryptic hint to the internal autonomy of the Court of Auditors can be interpreted from Article 79.
[34] This right has already been recognized by the Heads of State or Government in 1972, see final communiqué of 20. 10. 1972.

The system of 'organs' may be supplemented by the Union itself by means of an organic law (Art. 33, par. 5), thus enabling the institutional structure of the Union to grow and to differentiate according to future requirements. This last proviso in the chapter dealing with institutions and organs highlights a particular dimension of the draft: the large number of references to organic laws which shall lay down further details, coupled with general clauses such as that providing for new organs, would generate remarkable dynamics within the institutional structure of the future Union.

## *c. The decision-making system*

It should first be noted that *decision-making* also includes the *budgetary procedure*, that is to say the procedure to be followed for the adoption of the budget. The Draft Treaty in Article 76 has — as do the existing Treaties (Art. 203 (EEC)) — completely separated the legislative procedure from the budgetary procedure.[15] I wonder whether this separation is necessary. It might have been useful, in fact, to combine the two procedures. As experience shows, legislation and adopting the budget are two faces of the same coin. To ignore this identity is in fact the easiest method of creating conflicts among the institutions — and even *within* the institutions — (Budgetary Council v Foreign Ministers; Budgetary Committee v Agricultural Committee). No solution is provided for this kind of conflict.

The objection is not a formality. According to Article 38, par. 4, legislation may be adopted after the conciliation procedure by a *simple majority* of members composing Parliament. But the adoption of budget items which the Council has modified requires a *qualified majority* in Parliament according to Article 76 *et seq.* If Parliament, against opposition from the Council, has adopted legislation which established financial obligations, and if Council maintains its opposition in the budgetary procedure, it may well occur that Parliament is not able to put into the budget the money necessary to implement legislation which it has decided by itself. I wonder whether this result was intended by Parliament.

Legislative procedure is entrusted by the core Articles 36 and 38 to Parliament and Council, which emerge as the joint legislative authority.

The idea of co-decision is already achieved under the present Treaties in the budgetary field and it was proposed for legislation in the 'Vedel report' of 1972. Parliament suggests now that co-decision applies to the initiative and to the decisional phase as well. Legislation is generally initiated by the Commission. But both Parliament and Council may, if the Commission refuses, introduce legislation by themselves. This procedure (Art. 37) is not quite clear. It seems as if only the institution which previously invited the Commission to act may introduce draft legislation (Parliament *or* Council, not Parliament *and* Council). Furthermore, it is not clear what is meant by 'refuses'. Does this imply that a draft text has to be submitted within a certain time-limit before Parliament or Council may act by themselves? Can the Commission implicitly reject?

In any event, once the legislative procedure has started, a Bill may be enacted after Council and Parliament have had the opportunity to amend it and after at least one institution has approved it. The Council may reject draft legislation with varying majorities. But if it does not assemble the necessary majority for rejection within a given time-limit, Parliament alone may enact the Bill. This is an ingenious proposal which could bring forward two major achievements:

(i) a participation of Parliament in legislation; and

(ii) a way around the Council's notorious incapability to gather a 'positive' majority for the adoption of a text.

The procedure, on the other hand, establishes all necessary safeguards against legislation which is contrary to the will of a vast majority of Governments. It even provides a safeguard for individual governments by giving a formal blessing to the 'Luxembourg Compromise' of 1966 (Art. 23, par. 3).

[15] For a detailed analysis of the budgetary part of the draft, see the chapter V by Mr Ørstrøm Møller.

Unfortunately, it is not clear beyond doubt whether a Government should be allowed to block a vote in Council even beyond the time-limit in Article 38 or whether this right can be exercised only *within* this limit.

It is obvious that this decision-making process would increase the legitimacy of the Union, since it would ensure the participation of Parliament. It would facilitate decisions and it would safeguard individual States' interests. On the other hand, it might be argued that the decision-making process would become more complex and could thus lose in efficiency. This danger, however, seems marginal in the light of the time constraints put on each institution (which for certain legislative projects might be too short but could be prolonged on mutual agreement). In comparison to the present system the procedure proposed in Article 38 might well be the keystone for any further development of the present Treaties, since it would enable the Union to overcome the Communities present inertia.

But attention must be drawn to the somewhat doubtful proposal contained in Article 38, par. 5 of the draft. According to this paragraph, decisions may come into effect even if no vote has taken place in the Parliament or Council. The lack of legitimacy of decisions adopted according to this procedure, in my opinion is too great compared to any resulting increase in efficiency of the decision-making procedure. It is not compensated by the fact that, in any event, the two other institutions must approve a text. It is hardly acceptable that the consent of the directly-elected Parliament is reputed by the absence of a vote within a given time.

The procedure for the publication of laws is rather unique. According to Article 39 of the draft, the president of the institution which has taken the last express decision, shall take the necessary measures for publication. Experience with the use of Article 203, par. 7 (EEC) shows, that in case of conflict the formal power to conclude the procedure is of considerable weight. But the decision on the budget has an immediate bearing on the institutions only. Therefore a unilateral conclusion in a conflictual situation seems acceptable. In order to protect, however, the citizens confidence in the formal quality of laws, publication of laws could have been left to a 'neutral' institution, e.g. the Commission. At least their participation in the publication should have been provided for.

Finally attention is drawn to Article 41 which establishes an obligation of the institutions 'wherever possible and useful' to hear the persons affected by the measures of the institutions. This confirms the present legal situation in the EC, as established by the Court.[36]

## *d. Possible repercussions of the draft on the existing Treaties*

Parliament has carefully kept separate its proposals on institutional reforms within the framework of the existing Treaties [37] from the proposed institutional system under a new Treaty. But this separation is somewhat artificial since the institutions devised for the European Union in large part remain identical to those under the present Treaties. This close relationship provides the advantage that the solutions which were found for given problems of the Union could be used in the context of the EC Treaties. This should in itself be considered a major advantage of the draft.

In fact, the decision-making procedure proposed in Article 38, could become part of the present Treaties separately from the remaining text of the draft. Obviously, a Treaty revision in accordance with Article 236 would be necessary, but technically it would be possible, even without too many changes in the Treaty. This would establish a substantial improvement, less spectacular perhaps, but exactly for this reason probably 'easier' to be achieved.

Such a result, if seen as a step towards an 'ever closer union' would be consistent with the dynamic concept as laid down by the draft for the institutions of the Union.

---

[36] See Ehlermann, Oldekop, *Due process in administrative procedure,* Copenhagen (FIDE), 1978.
[37] See *supra,* footnote 18.

# Chapter III – Division of fields of competence between the Union and the Member States in the Draft Treaty establishing the European Union

*by Vlad Constantinesco*

In some ways the Draft Treaty establishing the European Union links up with the 'constitutionalist' as opposed to the 'functionalist' approach to integration. Like the Draft Treaty establishing a statute for the European Community, adopted by the *Ad Hoc* Assembly in Strasbourg on 10 March 1953, it is the work of a parliamentary assembly.[1] But unlike the 1953 text, the 1984 text emanates from a single Parliament elected by direct universal suffrage.

While its parliamentary credentials give the text indisputable democratic legitimacy, its origins may also explain why, despite the precautions taken,[2] the text contains imprecisions and omissions which lead at times to a lack of clarity. This is particularly true of the division of fields of competence.

This is more novel in terms of the concepts used than in the terms of the results to be achieved. It must be said from the outset that — as compared to the Communities — the Draft Treaty breaks more new ground on the institutional front than on fields of competence.[3]

The influence of federal models can be detected, notably as regards the distinction between exclusive and concurrent competence, but the Community model dominates.[4] Moreover, an obvious attempt has been made not just to avoid direct confrontation with the Governments of the Member States but to involve them in the activities and institutions of the Union.

Finally, ideological divisions between political groups are probably at the root of compromise solutions which may prove ambiguous from the legal point of view.

An analysis of the Draft Treaty[5] from the division of fields of competence angle must begin by defining the competences of the Union and then go on to consider how they are to be administered.

---

[1] The question of whether Parliament was competent to adopt the Draft Treaty in 1984 is not discussed here. The *Ad Hoc* Assembly, comprising the ECSC Assembly and the Consultative Assembly of the Council of Europe, was given a mandate by the Foreign Ministers of Germany, Belgium, France, Italy and Luxembourg on 10 September 1952 to draw up a Draft Treaty establishing a European Political Community.

[2] The Committee on Institutional Affairs was advised by a committee of lawyers consisting of Mr Capotorti, Mr Hilf, Mr Jacqué and Mr Jacobs.

[3] Cf. C. D. Ehlermann, *Vergleich des Verfassungsprojekts des Europäischen Parlaments mit früheren Verfassungs- und Reformprojekten*, in: *Eine Verfassung für Europa*. , 176 (Schwarze, Bieber eds. 1984). We will be discussing the way in which the line of demarcation is drawn between the fields of competence of the Union and those of the Member States rather than the substance of Union competence.

[4] For a discussion of the Community system, see Constantinesco, *Compétences et pouvoirs dans les Communautés Européennes* (1974).

[5] A comparison of the different language versions will clear up a number of misunderstandings which might arise from a reading of the French version alone.

# 1. Competences of the Union

The first question arising from a reading of the Draft Treaty is the nature of the competences of the Union. Since these competences are not immutable, the next question arising is their potential development.

## *a. Nature of the competences of the Union*

The relevant provisions appear in Articles 9 to 13 of Part Two of the Draft Treaty. Article 9 lists the objectives of the Union in general terms. In defining the competences of the Union, the Draft Treaty adopts a different approach to that followed in the Community Treaties and to that customarily found in federal constitutions. Indeed it might be said that the competences of the Union are defined in two steps. In the first place the Draft Treaty indicates two ways of achieving the objectives of the Union: cooperation and common action (Article 10(1)). In the second place, when it comes to defining forms of common action, the Draft Treaty, in application of the principle of subsidiarity and following federal models, introduces a distinction between exclusive and concurrent competence (Article 12).

### Distinction between common action and cooperation

The overall definition of Union competence is a functional one involving some ambiguity. The authors of the Draft Treaty obviously wanted to include political cooperation,[6] which has developed outside the Communities Treaties as such ('cooperation') as well as *acquis communautaire* ('common action').

How does common action differ from cooperation? Article 10(2) and (3) makes it clear that two distinct types of legal instruments are involved.

Thus, common action means 'all normative, administrative, financial and judicial acts, internal or international, and the programmes and recommendations, issued by the Union itself, originating in its institutions and addressed to those institutions, or to States, or to individuals.'

This disparate presentation using several criteria — scope of acts, areas in which they apply, acts which are mandatory and those which, apparently, are not, author and addressees — is complicated and may cause confusion. Would it not have been possible to adopt a broader, simpler definition (for example 'common action means all unilateral and contractual legal acts originating in the institutions of the union and attributable to it')? Recourse to the enumerative method *Enumerationsprinzip* in the interests of completeness produces needlessly tortuous drafting and superfluous detail: for example, what is the point of being told that programmes and recommendations issued by the Union itself are part of 'common action'?

Cooperation, on the face of it, is defined in simpler terms, although ambiguity has not been entirely ruled out. Article 10(3) states:

> 'Cooperation means all the commitments which the Member States undertake within the European Council.'

The measures resulting from cooperation shall be implemented by the Member States or by the institutions of the Union in accordance with the procedures laid down by the European Council.'

---

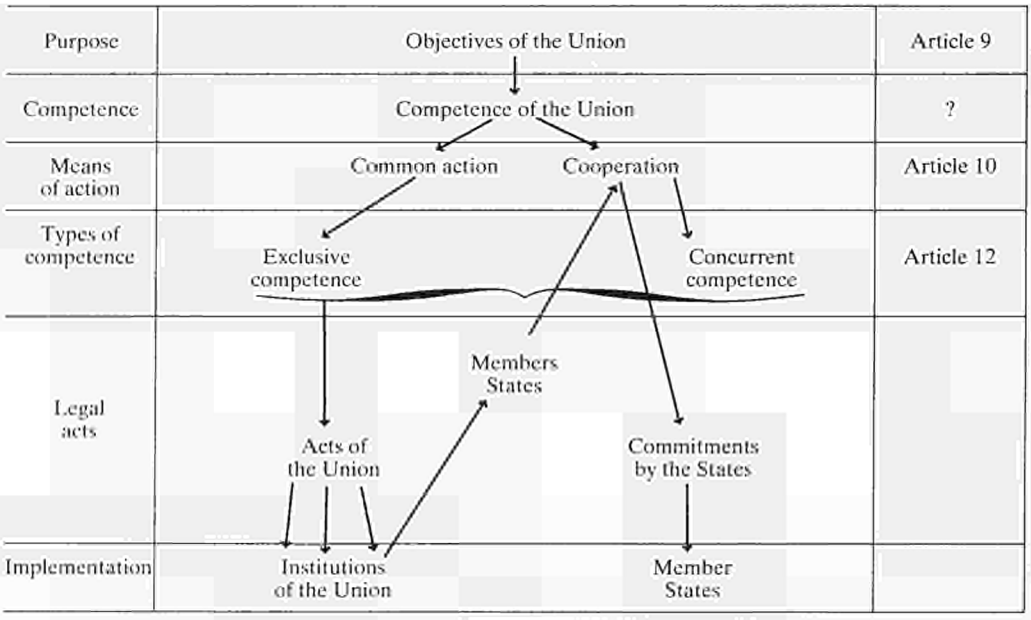
[6] On the links between political cooperation and the Community Treaties, see Charpentier, *La coopération politique entre Etats membres des Communautés européennes*, AFDI 753 (1979).

Cooperation — which now falls within the competence of the Union — takes the legal form of 'commitments'[5] undertaken by the Member States within the European Council, an institution of the Union. The ambiguity arises in the second subparagraph: if the institutions of the Union are qualified to implement commitments given in the cooperation context, they must use their armoury of instruments. But we have seen that this is how common action is defined! How then can a distinction be drawn between the two?[6]

Common action and cooperation are not confined to the 'internal' workings of the Union: this dichotomy is carried through to external competence. Title III (of Part Four) of the Draft Treaty which deals with the Union's international relations contains provisions which refer to both in relation to the Union's external activities.[7] Articles 64 and 65 deal with common action, Articles 66 and 67 with cooperation. The link with Article 10 is not always clear. The wording of Article 64(1) in particular is ambiguous:

> '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.'

This implies that the Union could act otherwise where it has exclusive or concurrent competence and prompts a further comment: the link between Union competence rather than procedures and methods of action is rather obscure. The table below may help to clarify matters.




[5] Will this lead to a replay of the debate which took place in France on the concept of 'commitment', which appears in Article 54 of the French Constitution? See the view of the Constitutional Council as presented in the report by J.P. Jacqué and V. Constantinesco, *Le Conseil Constitutionnel et le droit international et communautaire*. Colloque de Strasbourg 1982 (in preparation).

[6] Another problem may arise, presenting a further ambiguity: if the Member States implement a commitment undertaken in the cooperation context, how does this square with arrangements in relation to concurrent competence?

[7] Note the loose formulation of Article 68. Is the Union master of its competence? Is it competent to determine its own competence?

### Common action

Common action, in turn, can be organized in two distinct ways in application of the principle of subsidiarity. Union competence can be exclusive (Article 12(1)) or concurrent (Article 12(2)). This distinction and the underlying principle is borrowed from the law of Federal States. In the Draft Treaty the principle of subsidiarity applies to exclusive competence only, although logically it could be used as a basis for exclusive competence too: surely some competences are exclusive precisely because they correspond to 'tasks which may be undertaken more effectively in common than by the Member States acting separately', as stated in Article 12(2).

Exclusive competence, as in the legal theory of federalism, rules out any action by the Member States. Article 12(1) clarifies two points. Firstly, the Member States can be asked to act where the Union has exclusive competence if the law of the Union makes express provision for this. In this case the Member States will be exercising union competence nationally. Secondly, in a field of exclusive competence, national legislation remains in force until such time as the Union has legislated. The expression 'remain in force' in Article 12(1) can be interpreted in two ways: either (a) national competence remains intact, Member States being free to take whatever action they deem appropriate or (b) national competence remains in being although the national authorities are not free to translate it into legal acts ('standstill' clause). The Draft Treaty does not appear to choose between the two interpretations which co-exist within yet another ambiguity.

Concurrent competence allows the Member States to act 'so long as the Union has not legislated' (Article 12(2)). (It would have been preferable if more allowance had been made for the temporal dimension of concurrent competence in the French version, for instance by replacing 'là où' by 'là où, et tant que', however inelegant this formulation may sound). But how do Member States stand in relation to exclusive and concurrent competence? In either case, if the union has not legislated, the Member States are free to act, not necessarily in the same fashion, but this is far from clear from the wording of the text (cf. earlier comments).

Where the Union acts under exclusive competence, the national authorities are stripped of their powers *ratione materiae* in the field in question.

Where the Union acts under concurrent competence, the Member States are free to act only where the Union has not acted; conversely, they are not free to act where the Union has acted, as is the case where the Union has exclusive competence. Does 'where' designate some sort of 'geographical' area of intervention or a rung of the legislative ladder? The line between the two types of competence has not been drawn with sufficient precision.

The principle of subsidiarity underlying this division of fields of competence is spelled out in Article 12(2). It is a pity that it does not appear at the beginning of the article since application of the principle justifies the Union's exclusive and its concurrent competence.[10] Furthermore, the 'effectiveness' criterion requiring action by the Union could lead to difficulties of interpretation, notably in adversary proceedings.

## *b. Development of the competences of the Union*

The competences of the Union are not immutable and the line between them is not well drawn. Before considering the revision procedure, we must therefore look at the provisions on transfer from cooperation to common action and the way in which concurrent competence can be converted into exclusive competence.

[10] The principle has, however, been written into the Preamble, thereby confirming its general validity.

## Transfer from cooperation to common action

Article 11 is a procedural provision which indicates the conditions for transfer from one method of action to the other. But Article 11(2) also states that such transfer is irreversible: common action may not be replaced by cooperation.

The transfer procedure is not generally applicable: Article 11(1) states that it applies only in instances expressly laid down in the Draft Treaty, such as industrial cooperation (Article 54(1)) and development aid (Article 64(3)). This makes these potential fields for common action: can they therefore be regarded as 'potential competences'? I think not. We have seen that cooperation already falls within the competence of the union. The expression 'potential competence' could be ambiguous since it might be interpreted as applying to a situation where national competence is replaced by Union competence, which is not the case.

These hypothetical cases apart, there can be no transfer between cooperation and common action. The field of cooperation can, however, be extended by the European Council. Article 68(1) states that this can be done:

> 'In particular as regards armaments, sales of arms to non-member States, defence policy and disarmament.'[11]

Article 11 sets out the procedure:

> 'On a proposal from the Commission, or the Council of the Union, or the Parliament, or one or more Member States, the European Council may decide, after consulting the Commission and with the agreement of the Parliament, to bring those matters within the exclusive or concurrent competence of the Union.'

## Reversibility of transfer from cooperation to common action

Although Article 11(2) claims that the transfer from cooperation to common action is irreversible, there are two exceptions to the rule. First, under Article 68(2):

> '.. the Council of the Union, acting unanimously, may exceptionally authorize one or more Member States to derogate from some of the measures taken within the context of common action.'

Second, Article 68(3) states:

> 'By way of derogation from Article 11(2) of this Treaty, the European Council may decide to restore the fields transferred to common action in accordance with paragraph 2 above, either to cooperation or to the competence of the Member States.'

The first exception probably relates to a hypothesis similar to those governing the safeguard clauses in the Community Treaties: however, there is no reference to any time limit on the derogation.

The second introduces a mechanism for restoring competence and calls for clarification on a number of points. The first of these, brought to light by reading Article 68(2) in conjunction with Article 68(1), is that only a matter subject to cooperation and transferred to common action can be restored to cooperation. Exceptional reversibility does not apply to areas subject to common action from the outset: what is involved is retrocession of competence within the Union. However, Article 68(2) also allows retrocession of Union competence to the competence of the Member States. Is this not tantamount to a clandestine revision mechanism? Particularly since it derogates from the revision procedure instituted by Article 84?

---

[11] Does this mean that the field of cooperation is unlimited?

Although the political considerations which prompted the authors of the Draft Treaty and the majority of Parliament to adopt this system are understandable, it undoubtedly raises questions on the legal front. In the first place, the system is unclear and complicated: the provisions are scattered throughout the Draft Treaty instead of being grouped together as their importance and common function would merit. In the second place, in the case of governmental powers initially subject to cooperation being transferred to common action and finally being handed back to the Member States, is it not true that the Draft Treaty gives the European Council sole power to reduce the competences of the Union?

### Revision of the Union Treaty

The review procedure laid down in Article 84 is largely patterned on Article 236 of the EEC Treaty. Two stages are involved in both cases. The initiative lies with the Member States ('one representation within the Council of the Union'), Parliament ('one-third of the Members of the Parliament')[12] and the Commission.

These institutions may:

> '. . . submit to the legislative authority a reasoned draft law amending one or more provisions of this Treaty. The draft shall be submitted for approval to the two arms of the legislative authority which shall act in accordance with the procedure applicable to organic laws,'

that is to say, in accordance with the conditions laid down in Article 38 of the Draft Treaty. The second stage begins when the approved draft is submitted for ratification by the Member States which authorize its entry into force.

I would like to bring this brief presentation of the scope of the Union's competence to an end with two remarks. Firstly, the Draft Treaty contains no mechanism analogous to that in Article 235 of the EEC Treaty which made the development of 'secondary' policies possible. This mechanism brought an element of flexibility to the division of fields of competence and should perhaps have been retained. Secondly, demarcation of the competences of the Union corresponds to disparate criteria which are not always comprehensible.

## 2. Administration of the competences of the Union

Two problems will be examined in turn: What is the substance of the competences of the Union? How will they be implemented?

### *a. Substance of the competences of the Union*

I have no wish to encroach on the subject matter of the other reports. I will therefore confine myself to a number of specific points.

[12] In practice, it is the political groups rather than individual members who will take the initiative. Indeed Parliament only has an indirect legislative initiative under Article 37(2).

## Acquis communautaire

The *acquis communautaire* is dealt with in Article 7 of the Draft Treaty. The first paragraph is an ingenious statement of principle: 'The Union shall take over the Community patrimony'. The next four paragraphs set out how this patrimony will be treated by the Union. Different types of treatment are proposed for the various categories of rules which are regarded as part of the *acquis communautaire*,[11] depending on their authority.

Article 7(2) states that certain provisions of the Community Treaties (and associated convention and protocols):

> '. . . which concern their objectives and scope and which are not explicitly or implicitly amended by this Treaty, shall constitute part of the law of the Union. They may only be amended in accordance with the procedure for revision laid down in Article 84 of this Treaty.'

These Community rules will be given maximum protection: they will enjoy the same status as the Union Treaty. But a number of questions arise. Did the authors of the Draft Treaty consider which specific Community provisions were involved? What does the 'scope' of the Communities mean? It seems to refer to the Community's territorial competence.

What is an 'implicit' amendment of the Community Treaties? And who will evaluate it?

Article 7(3) states:

> 'The other provisions of the treaties, conventions and protocols referred to above shall also constitute part of the law of the Union, in so far as they are not incompatible with this Treaty. They may only be amended by the procedure for organic laws laid down in Article 38 of this Treaty.'

These Community provisions will be given less protection: they will form part of the law of the Union provided that they are not incompatible with the Union Treaty and will have the status of organic laws since they can be amended by that procedure only. It will be for the union legislator to establish incompatibility, possibly under the supervision of the Court.

Article 7(4) reads as follows:

> 'The acts of the European Communities, together with the measures adopted within the context of the European Monetary System and European political cooperation, shall continue to be effective, in so far as they are not incompatible with this Treaty, until such time as they have been replaced by acts or measures adopted by the institutions of the Union in accordance with their respective competences.'

Secondary Community legislation, measures to implement the European Monetary System and political cooperation are ranked below the two previous categories in the law of the Union: they will remain in force, unless the legislator finds them incompatible with the Union Treaty, until such time as they are replaced by Union acts or measures to which the Draft Treaty assigns no place in the hierarchy of rules.

Finally, Article 7(5) states:

> 'The Union shall respect all the commitments of the European Communities, in particular the agreements or conventions concluded with one or more non-member States or with an international organization.'

This provision raises an important and complex problem: the fate in the Union of international commitments entered into by the Communities. The wording is ingenious but it does not deal with all the difficulties liable to arise. Conventions concluded by the Communities will be 'respected' by the Union. What does this mean? Will the Union take over the Communities' commitments? This would be the obvious solution if membership was the same. But what happens if only some Member States

[11] For an attempt to define the *acquis communautaire* or Community patrimony, see Pescatore, RTDE 617 (1981).

join? How will the Union then respect prior Community commitments? What exactly does 'respect' mean? Is the Union bound by the Communities' commitments? Are they valid against the Union? What is the relationship between the Union and the Communities (assuming they still exist) in this field?

## Fundamental rights

The importance the Member States forming the Union attach to human rights is confirmed in the preamble to the Draft Treaty ('basing their actions on their commitment to the principles of pluralist democracy, respect for human rights and the rule of law'). Unlike the Community Treaties — which only deal with fundamental rights indirectly from the economic angle — the Draft Treaty contains specific provisions on this issue (Article 4). Here again, the essentially 'constitutionalist' character of the Draft Treaty is revealed. In the Communities, the case-law of the Court of Justice has developed in such a way that the institutions, in drawing up their acts, are required to respect the fundamental rights enshrined in the constitutions of the Member States or in international instruments ratified by the Member States. Article 4(1) 'constitutionalizes' this case-law to some extent:

> 'The Union shall protect the dignity of the individual and grant every person coming within its jurisdiction the fundamental rights and freedoms derived in particular for the common principles of the constitutions of the Member States and from the European Convention for the Protection of Human Rights and Fundamental Freedoms'.

But the Draft Treaty goes beyond this to tackle economic, social and cultural rights which are often distinguished from civil and political rights. In Article 4(2) the Union makes a commitment in respect of these rights, some of which are enshrined in national constitutions, in the European Convention and the additional protocols:

'The Union undertakes to maintain and develop, within the limits of its competences, the economic, social and cultural rights derived from the constitutions of the Member States and from the European Social Charter.'

The 'constitution' of the Union is thus enriched by new rules on the protection of fundamental rights by using the referral technique which is also to be found in, for example, the preamble to the French Constitution of 4 October 1958.

To guarantee respect for fundamental rights in the Communities, the Commission had suggested in a memorandum dated 4 April 1979 that the Community as such should accede to the European Convention on Human Rights. The Draft Treaty has drawn inspiration from this. Article 4(3) states:

> 'Within a period of five years, the Union shall take a decision on its accession to the international instruments referred to above and to the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights.'

The French text is slightly ambiguous here should the word 'délibérer' be interpreted in the sense of 'to decide' or in the sense of 'to discuss with other persons in order to reach a decision' (Dictionnaire Robert)? Depending on the answer, the provision imposes either an obligation as to ends or an obligation as to means.[14]

Finally, within the Communities, Parliament had called for a charter of fundamental rights to supplement the Treaties. It claimed that only an elected assembly could carry out this work, in the tradition of the 1791 Constituent Assembly. However, when an opportunity arose for Parliament to achieve this ambition in 1984, it understandably preferred to postpone establishment of a list of fundamental rights. The final sentence of Article 4(3) merely states:

[14] Comparison with the other language versions shows that the other languages use binding expressions ('shall take a decision', 'beschließt', 'decide' (Italian) which tends to suggest that the provision imposes an obligation as to ends.

'. . .Within the same period (five years) the Union shall adopt its own declaration on fundamental rights in accordance with the procedure for revision laid down in Article 84 of this Treaty.'

The commitment appears to be stronger here but what if the declaration is not adopted by the deadline set? Could Article 175 EEC be invoked? It can thus be seen that the Draft Treaty groups all the measures to protect fundamental rights taken separately by the Court, the Commission and Parliament, which the Council endorsed in agreeing to sign the joint declaration of 1977.

In principle the insertion of fundamental rights at the highest law-making level of the Union should have the effect of binding its institutions only. This is what emerges from Article 4(1) and (2):

'The Union shall grant every person coming within its jurisdiction . . .'

'The Union undertakes to maintain and develop, within the limits of its competences . . .'

However, Article 4(4) makes respect for fundamental rights a condition for membership of the Union:

'In the event of serious and persistent violation of democratic principles or fundamental rights by a Member State, penalties may be imposed in accordance with the provisions of Article 44 of this Treaty.'

All national competences and the exercise of these competences is thus subject to Union supervision. From the division of competences point of view it can be said that, although the substance of national competences is in no way affected, exercise of these competences is subject to compliance with common principles: this situation can be described as a limitation on the exercise of national competences or as Union supervision of national competences now linked by a common purpose. The situation is not dissimilar to that arising in relations between the Community and the Member States as regards the free movement of persons.

## Common action and cooperation

Basically, the two methods of action adopted in the Draft Treaty have the advantage of binding Community competence and political cooperation to a greater extent than is the case today.[15] These fields, now quite separate — political cooperation takes place outside the Treaties — but connected at operational and institutional level, would become an integral part of the competences of the Union. The *acquis communautaire* would be preserved by including it in common action. Political cooperation would be expressly included in the competences of the Union even if conducted by the Member States within the European Council. While all the institutions of the Union are called upon to participate in common action, cooperation would be confined to the European Council[16] which, as we have seen above, has the power to transfer a matter from cooperation to common action.[17] However, cooperation within the Union goes beyond political cooperation to include the:

'. . . coordination of national law with a view to constituting a homogeneous judicial area' (Article 46).

The establishment of this area — which does not exclude measures to be taken under common action — can, according to Article 46, take two forms:

(i) to take measures designed to reinforce the feeling of individual citizens that they are citizens of the Union.

(ii) to fight international forms of crime, including terrorism.'

---

[15] See Ehlermann, *supra*, note 3, 274.

[16] The Council of Ministers would have implementing powers.

[17] And to enlarge the field of cooperation.

As we have seen, common action corresponds to Community competence. It is divided into two types of competence which will be examined in turn.

Exclusive competence is obviously the narrower of the two. It relates to the free movement of persons, goods and capital (Article 47), competition policy (Article 48) and commercial policy (and the external aspects of exclusive competence) (Article 64).[18]

Concurrent competence covers conjunctural (*sic*) policy (Article 50), monetary and credit policies (Article 51), the progressive achievement of monetary union (Article 52),[19] the various sectoral policies: agriculture, transport, telecommunications, research and development, industry and energy (Article 53), and the measures coming under the general heading of 'policy for society':[20] social policy, health policy, consumer protection, regional policy, environmental policy, education and research policy, cultural policy and information policy (Article 55 *et seq.*).

It can be seen that concurrent competence covers all existing common policies other than commercial policy, the rules of competition and the secondary policies introduced on the basis of Article 235 EEC.

In addition to these two types of competence, Article 49 proposes that the Union take measures:

> 'to approximate the laws, regulations and administrative provisions relating to undertakings, and in particular to companies, in so far as such provisions have a direct effect on a common action of the Union.'

This same applies to national tax legislation.

This echoes Article 100 EEC which refers to the approximation of provisions laid down by law, regulation or administrative action in Member States 'as directly affect the establishment or functioning of the common market'. The approximation envisaged by the Draft Treaty obviously comes under concurrent competence although this is not expressly stated.

## *b. Implementation of the competences of the Union*

Let us now examine the way in which the Draft Treaty organizes implementation of the competences of the Union. This can be done from two different angles. First of all we will look at the legal acts available to the Union and then go on to describe the way in which these will be applied and implemented.

### *Legal acts: the law of the Union*[21]

The nature of the legal acts which the Union is empowered to adopt is clearly indicated in the case of common action but not in the case of cooperation. The Draft Treaty also defines the characteristics of the law of the Union.

---

[18] The 'doctrine' of the Court of Justice, which made its first appearance in its judgment on the AETR agreement in 1971, is thus 'constitutionalized' in the Draft Treaty.

[19] According to Article 2 EEC, these sectors come under 'approximating the economic policies of Member States'.

[20] This derives from the German 'Gesellschaftspolitik': the French rendering is rather odd. It might have been preferable to use the neologism proposed by Alexandre Marc to distinguish 'social' in the broad sense, from the 'social' in the narrow sense and speak of 'society policy'. On the other hand while the Draft Treaty is a test bed in some respects, semantic innovation might have been unwise . . .

[21] Does the expression 'law of the Union', used several times in the Draft Treaty itself, refer solely to acts adopted by the Union under common action or does it also refer to commitments which the Union undertakes in the cooperation context? I feel that the broader interpretation is the logical one but, as we shall see below, this interpretation could run counter to the authors' wishes.

## *Legal acts under common action*

The ranking of legal acts adopted by the Union under common action is reminiscent of the hierarchy of domestic laws.

At the top of the ladder are laws adopted by the Union legislator to determine the fundamental principles governing common action (Article 34).[22] Article 35 introduces the idea of differentiated application of laws:

> 'A law may be subject to time limits, or link to transitional measures which may vary according to the addressee, the implementation of its provisions where uniform application thereof would encounter specific difficulties caused by the particular situation of some of its addressees. However, such time limits and measures must be designed to facilitate the subsequent application of all the provisions of the law to all its addressees.'

Thus, express provision is made for derogation from the general and uniform effect of laws[23] which one would have expected the Draft Treaty to adopt at the same time as the definition of 'laws'. Instead of providing mechanisms for organizing operation of the safeguard clauses, which temporarily relieve a Member State of its treaty obligations so that it can apply them as soon as possible, the Draft Treaty opted for the notion popularly known as a 'two-tier Europe'. This notion reflects the situation on the ground: differentiation of Community law, whether primary or secondary, raises questions about its supposed unity.

There are two special types of law: organic laws, which govern the organization and operation of the institutions (Article 34(2) and Article 38) and budgetary laws which govern the Union's budget (Article 34(3) and Article 76). Each of these is characterized by a more binding procedure than that governing the adoption of standard laws.

One rung down the ladder are regulations and decisions whereby the Commission issues the general and individual instructions required for the implementation of laws. This power belongs exclusively to the Commission.[24]

The acts of the Union thus break with the pattern of secondary Community legislation. The disappearance of the directive, which has proved to be a useful legislative instrument, is to be regretted. However, a law can be a framework law laying down basic principles only.

## *Legal acts under cooperation*

When the Union acts by cooperation, the Draft Treaty does not give it such a complete and varied range of legal instruments. The Draft Treaty is extremely laconic on this point, merely indicating in Article 10(3) that:

> 'Cooperation means all the commitments which the Member States undertake within the European Council.'

It is thus these commitments (a term whose lack of precision we have already noted) which give legal form to Union competence represented by cooperation. They could cover a wide range of acts: communiqués, statements of intent, resolutions, agreements, etc., not all of them necessarily legal and consequently binding. One paradox — not the least remarkable — of the Draft Treaty is that compe-

---

[22] Coincidentally, it is Article 34 which defines law in the French Constitution of 4 October 1958.

[23] The principle of non-discrimination has been deliberately left out of the Draft Treaty.

[24] The Draft Treaty thus corresponds to the wish of both Parliament and the Commission to break Member States' stranglehold on the implementing powers conferred on the Commission by various procedures beginning with the management committee. See Ehlermann, *supra*, 279.

tences jointly by the Member States within an inter-governmental body are converted into Union competences!

### *Characteristics of the law of the Union*

The characteristics of the law of the Union are set out in Article 42 of the Draft Treaty. They include direct applicability (but not direct effect: according to the case-law of the Court, direct applicability is merely a means of producing direct effect), the supremacy of the law of the Union and the obligation on national courts to apply it. This last is somewhat superfluous since the supremacy of the law of the Union is expressly stated.

Here again, the basic and fundamental principles of Community law defined and redefined by the Court but not expressly included, or at least not with the same intensity, in the text of the Treaties, are consolidated and elevated to the status of 'constitutional' rules.

And again the question arises of whether the characteristics given to the law of the Union apply to common action and cooperation: did the authors of the Draft Treaty want to make the 'commitments of the Member States' directly applicable and give them precedence over national law?

## Application and implementation of the law of the Union (in the broad sense)

An analysis of the provisions of the Draft Treaty on the procedure for implementing legal acts attributable to the Union and adopted within its field of competence reveals a differentiated system. Once again we need to consider whether the act to be implemented results from common action or from cooperation before examining the general obligation to implement the law of the Union.

### *Implementation of the decisions resulting from common action*

Apart from enumerating the characteristics of the law of the Union, Article 42 of the Draft Treaty states that:

> 'Without prejudice to the powers conferred on the Commission, the implementation of the law (i.e. the law of the Union) shall be the responsibility of the authorities of the Member States.'

The Member States thus have basic implementing powers while the Commission has to be given a special implementing power. This provision reflects the Community arrangement whereby, in practical terms, the Member States are ultimately responsible for the implementation of Community law except where powers are delegated to the Commission.

Article 42 also states that:

> 'An organic law shall lay down the procedures in accordance with which the Commission shall ensure the implementation of the law.'

This takes over the Community idea that the Commission is the 'guardian of the Treaty.' In addition to recourse to Article 169 EEC, it will also be possible for the Court to intervene at the initiative of the Commisson, as will probably be laid down in the organic law provided for in Article 64 which

will extend the competence of the Court to 'sanctions on a Member State failing to fulfil its obligation under the law of the Union.'[25]

One specific and important application of this mechanism for ensuring that the Member States comply with the Union Treaty appears in Article 44 of the Draft Treaty which sets out the procedure to be followed in the event of serious and persistent violation by a Member State of democratic principles or fundamental rights or any other case of serious and persistent violation of the provisions of the Union Treaty.

Article 44 thus provides a basis for the imposition of sanctions not only where a Member State has failed to discharge its Treaty obligations but also where it has failed to comply with its own internal rules establishing democratic principles or fundamental rights. The Article 44 mechanism can therefore be used for two quite distinct purposes. In the first instance, it is logical that an instrument like the Union Treaty should organize a procedure for penalizing infringements, on a given scale and of a given duration, of its own provisions. In the second instance, the Union is given a right of inspection of matters falling within the competence of the Member States. Must we therefore assume that national competences must now be exercised in the light of the common purpose reaffirmed by the Union Treaty, thereby ceasing to be discretionary and becoming mandatory? Is this consonant with national sovereignty which, incidentally, the Union Treaty does not seriously call into question?

Article 44 of the Draft Treaty is interesting for two further reasons: firstly the procedure established and secondly the sanctions provided for.

With regard to procedure, it will be noted that the initiative lies with the Commission or Parliament, no doubt because these two institutions embody the interests of the Union as a corporate entity. Either institution may ask the Court to establish whether serious and persistent violations have taken place. It is understandable that the authors of the Draft Treaty should endeavour to ensure that the behaviour of Member States will be examined impartially, but the Court's role is bound to be delicate. Like any qualitative criterion seriousness — even more than persistence — will be difficult to assess at times. Furthermore, if the Court is required to assess an internal situation, how will it go about it? The next stage of the procedure involves the European Council taking a decision with Parliament's approval after hearing the Member State concerned. Is the insistence on Parliament's approval excessive? The vote would be taken by a simple majority (see Article 17).

The European Council has a choice between two courses of action: it can suspend 'rights deriving from the application of part or the whole of the Treaty provisions to the State in question and its nationals without prejudice to the rights acquired by the latter', or it can suspend 'participation by the State in question in the European Council, the Council of the Union and any other organ in which that State is represented as such.'

The Draft Treaty stops short of providing for expulsion. It is clear that, while the period of suspension could vary, the sanction cannot be permanent since by definition it would no longer constitute suspension. It is also worth noting that the offending State forfeits a basic element of its representation within the Union prior to suspension since it cannot participate in the vote on the sanctions in application of the '*nemo judex in causa sua*' principle.

## *Implementation of decisions resulting from cooperation*

The final sentence of Article 10 of the Draft Treaty reads as follows:

> 'The measures resulting from cooperation shall be implemented by the Member States or by the institutions of the Union in accordance with the procedures laid down by the European Council.'

[25] Could this organic law give the Court the power to annul a national law which is contrary to the law of the Union? This would ensure the effectiveness of the principle set out in Article 42 of the Draft Treaty which states that 'national courts shall apply the law of the Union'.

Here again we find the dichotomy between the Member States and the institutions of the Union. However, all the institutions of the Union would be qualified to implement cooperation and the Commission's 'monopoly' in this area would be broken.

Be that as it may, in the field of external relations, Article 67(1) of the Draft Treaty states:

> 'The European Council shall be responsible for cooperation; the Council of the Union shall be responsible for its conduct; the Commission may propose policies and actions which shall be implemented, at the request of the European Council or the Council of the Union, either by the Commission or by the Member States.'

### *The obligation to cooperate*

Article 13 of the Draft Treaty reads as follows:

> 'The Union and the Member States shall cooperate in good faith in the implementation of the law of the Union. Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Union. They shall facilitate the achievement of the Union's tasks. They shall abstain from any measure which could jeopardize the attainment of the objectives of the Union.'

This is reminiscent of Article 5 EEC to which has been added an introductory sentence referring to the spirit of cooperation and mutual trust which should govern relations between the Union and its Member States. This reflects the authors' desire to do more than take over the principle enshrined in Article 5 EEC and the interpretation given to it by the case-law of the Court. But the authors did not go so far as to introduce a 'federal loyalty' (Bundestreue) principle.

## 3. Conclusion

To sum up, it can be said that the division of fields of competence in the Draft Treaty suffers from a degree of ambiguity as regards lines of demarcation. The methods of action of the Union can be interpreted in two contradictory ways, neither of them satisfactory: either cooperation lies outside the competences of the Union — in which case it would be difficult to understand why the institutions of the Union should act — or it falls within the competences of the Union — in which case it would be difficult to understand how cooperation, and hence the scope of the competences of the Union, could be extended without recourse to the revision procedure.

Within common action, the distinction between exclusive and concurrent competences should be more clearly drawn, particularly as regards the legal situation of the Member States until such time as the Union legislates.

As to the substance of the competences of the Union, the fate of the *acquis communautaire* and fundamental rights is sometimes less than clear. As to exclusive and concurrent competence, there is no substantial change in the situation in the present Communities. As Ehlermann states:[26]

'Vergleicht man den vorgesehenen Bereich der gemeinsamen Aktionen mit dem Kompetenzenspielraum, über den die Gemeinschaften schon heute verfügen, so stellt man fest, daß nicht sehr viel hinzugefügt wird.'

Finally, the solutions for the implementation of the law of the Union, based as they are on Community and federal practice, should be effective. In relation to the Communities, I share Mr Ehlermann's

[26] *Supra*, note 3, 279.

view[26] that the Draft Treaty was inspired by a determination to change the decision-making process rather than a desire to attribute new or wider competences. The amalgam of common action and cooperation is more a reflection of the status quo than a new vision of relations between the Union and its Member States. This may be the price of political realism. Would that it were also a guarantee that the Draft Treaty will actually enter into force.

[26] *Supra*, note 3, 279.

# Chapter IV – The judicial system envisaged in the Draft Treaty

*by Thijmen Koopmans*

## 1. Introduction

The European Parliament's Draft Treaty aims, as the Preamble states, at 'continuing and reviving' the European Communities as well as the European Monetary System and European political co-operation. Among these three forms of organization, only the European Communities are relevant, it seems, as far as the judicial system is concerned. Thus, the draft seeks to 'continue and revive' the existing European Communities. The obvious approach to a discussion of the draft's meaning for the judicial system would consist, therefore, in outlining the major problems the actual functioning of the Communities has given rise to in this field.

However, that approach does not look very promising. It may be true that the draft intends to overcome a certain number of difficulties that tend to characterize the Communities' decision-making practices; the draft itself does not say so explicitly, but the explanatory statement starts by expressing Parliament's 'dissatisfaction with the Community's institutional system' and its criticism of 'the inadequate nature of the powers conferred on the Communities by the Treaties'.[1] But it is also true that this dissatisfaction and these criticisms do not touch in any way the judicial system framed by the Treaties establishing the European Communities. More particularly, they do not concern the Court of Justice and its activities. Mr Spinelli, who was perhaps more than any other member of the European Parliament actively involved in initiating and elaborating the draft, enumerated in a recent article six considerations and experiences that caused the Parliament to take the initiative, and none of these six motives had anything to do with the Court.[2] Some other authors go one step further: they consider that only the Court actually operates as an integrative force in Europe and that it is the failure of the other institutions to play such a role which induced Parliament to act.[3]

In these circumstances, it is not astonishing that the planned transition from European Communities to European Union does not, at first sight, imply major changes in the rules on the Court of Justice, or in the judicial system in general. On the contrary, many planned provisions have a familiar ring for those who have been working on the basis of the existing Treaties. Such is, for example, the case of Article 4 of the draft, on the protection of fundamental rights: in defining these rights as those 'derived in particular from the common principles of the constitutions of the Member States and from the European Convention for the Protection of Human Rights and Fundamental Freedoms', it

[1] *Report on behalf of the Committee on Institutional Affairs on the preliminary Draft Treaty establishing the European Union,* Part B, 'Explanatory Statement' (Doc. EP 1-1200/83/B), No 1.

[2] Spinelli, 'Das Verfassungsprojekt des Europäischen Parlaments', in *Eine Verfassung für Europa, Von der Europäischen Gemeinschaft zur Europäischen Union.* (Schwarze, Bieber, eds), 1984, p. 231.

[3] Example: Pernice, *Verfassungsentwurf für eine Europäische Union,* EuR 1984/2, p. 126.

adopts the formula developed by the Court's case-law and later confirmed by a 'common declaration' on human rights issued by the three other institutions.[4]

There are novelties, none the less. Jurisdiction of the Court is extended (Art. 43); a system of sanctions is devised (Art. 44); and the prospect of an 'homogeneous judicial area' is held out (Art. 46). Each of these three innovations merits our attention, but before trying to analyse them, we should like to put them immediately in their proper perspective. The scope of judicial scrutiny depends not so much on matters of jurisdiction, nor on the system of sanctions, but rather on standards applied by the courts in exercising judicial review. These standards have normally been developed over the years; this is also true in the case of the European Communites, where the Court of Justice gradually constructed a body of case-law with regard to the margins of judicial control on the basis of the legal principles that govern, in the Treaties and in the administrative law of the Member States, the division of tasks between the judiciary, on the one hand, and the political and administrative bodies on the other. It would be a dangerous misconception to think that an extension of jurisdiction could have a bearing on the standards applied for determining the scope of judicial review;[5] in that regard, the new Article 43 might remain without any effect. It is worth adding one other observation: whatever the extension of the Union's powers, economic matters will still form the core of the Union's activities, as in the days of the Communities. Institutional changes alone will not solve the problems, well-known in many legal systems, of combining the conduct of modern economic policies with the requirements of judicial review of administrative action.[6] Things tend to develop very slowly, as judicial attitudes in this respect seem to depend on deep-rooted conceptions with regard to the role of courts in general.

Those who like change may, however, derive some comfort from the idea that the draft, apart from making minor changes in the judicial system, is based on a Union with objectives that are much more ambitious than those of the existing Communities. It is well-known that the Court of Justice, in interpreting the law of the Communities, was often inclined to look at what legal provisions were meant to achieve, and that it thereby took account of the general aims of the European Communities. Its case-law on social security was, for example, entirely based on this approach;[7] the same method has been applied to more complicated issues, like those concerning the definition of obstacles to intra-Community trade. The mere fact that the Draft Treaty fixes new and much wider objectives may thus, in the long run, provide fresh inspiration to the judges. The differences are not unimportant: whereas the EEC Treaty sets out to establish a common market and to promote a harmonious development of economic activities (Art. 2), the Draft Treaty seeks to attain 'a common harmonious development of society' and to promote peace and even the exercise of full political, economic and social rights by 'all the peoples of the world' (Art. 9).

More immediate consequences for the scope of judicial action may flow from the inclusion of the protection of fundamental rights. Comparative legal studies abundantly show how much the powers of judicial review are strengthened by the courts' willingness to consider themselves the ultimate guardians of human rights; American constitutional law, in particular, has undergone a complete change, especially as far as the scope of review is concerned, since the Supreme Court started to reappraise the American Bill of Rights in the late 1940s.[8] The American example is by no means isolated: the French Conseil constitutionnel only started to play an effective role in French political life after it took the courage of interpreting the 1958 Constitution in such a way that its Preamble embodies the protection of human rights.[9]

In the light of these experiences, an analysis of the judicial system can hardly be accomplished when the wider issues raised by the Draft Treaty are not discussed. We shall, therefore, first embark upon

---

[4] OJ C 103, 1977, p. 1. The Court's case-law is summarized in Case 44/79 *Hauer* [1979] ECR 3727.
[5] See Case 191/82 *Fediol* [1983] ECR 2913.
[6] See Mégret, 'Le contrôle par le juge administratif de l'intervention économique dans les États membres de la CEE', in *Miscellanea Ganshof van der Meersch*, II, 1972, p. 579.
[7] See Case 24/75 *Petroni* [1975] ECR 1149.
[8] Examples: *Shelley* v *Kramer*, 334 US 1 (1948); *Mapp* v *Ohio*, 367 US 643 (1961).
[9] See Cappelletti and Cohen, *Comparative Constitutional Law*, Ch. 3-c, 1979, esp. pp. 50-72.

a rapid journey through the forests of jurisdiction and then steer our course to problems of substance, hoping thus finally to be able to give an overall assessment of the position of the judiciary under the Draft Treaty.

## 2. Problems of jurisdiction

### *a. General remarks*

Article 43 of the Draft Treaty adopts the Community rules governing judicial review, but it states that these rules shall be supplemented on the basis of seven 'principles'. These principles amount to seven roughly-defined extensions of jurisdiction; detailed rules are to be given later in Union legislation. The draft has no provisions on the transition from the old to the new regime; one must suppose that the old rules continue to apply as long as the legislative bodies have not yet specified the new remedies.

The seven extensions are all related to lacunae in the actual rules on jurisdiction and to difficulties in their application that have been largely discussed at conferences and in legal literature.[10] Their importance is, however, very unequal: some of them involve matters of principle, others are of a sheerly technical nature. Anyhow, it would not appear that the seven clauses of Article 43 form Parliament's response to the seven deadly sins of the Community; even pride and anger, although common elements of most political activities, are presumably far removed from the quiet world of judicial life.

### *b. Technical problems*

In the technical category, I would first range the extension of the *right of action of individuals* against acts of the Union that adversely affect them (Art. 43.1). Under the present rules, access of individuals to the Court is excessively restricted. If private individuals, including business corporations, and other 'undertakings', are not themselves the addressees of a decision, their rights of action are very limited indeed; according to Article 173 of the EEC Treaty, they have to show that the provisions of a regulation or a decision are 'of direct and individual concern' to them. Even a most liberal interpretation of these terms cannot bring the Community system into line with most national systems of administrative law, which simply require an 'interest'. Both the Court and the Commission recommended this extension in their opinions on the European Union given in 1975 at the request of the Council.[11]

Does the change also mean that private persons can attack general rules as well as individual decisions? The answer must be affirmative; the existing provisions give already such a remedy to the Council, the Commission and the Member States. The proposed change brings the system of remedies closer to French administrative law, which always recognized appeals against regulations (though not against statutes); German and Dutch law have traditionally been more cautious. The result is then that, for example, any enterprise can ask annulment of a Commission regulation on group exemptions of a certain class of agreements from the prohibitions of Article 85 (e.g. exclusive licensing of patents), if it feels adversely affected. In other words: the door is henceforth wide open. The wider access to the Court may be conducive to a heavier case-load for that institution. But it may also have important implications from a legal point of view: direct actions against general rules issued by Union institutions can also be used to bring the European Parliament's exercise of its legislative func-

[10] See, generally, Ehlermann, 'Vergleich des Verfassungsprojekts des Europäischen Parlaments mit früheren Verfassungs- und Reformprojekten', in *Eine Verfassung für Europa, supra*, pp. 269, 281-282.

[11] *Report of the Commission on European Union*, Supplement 5/75 — Bull. EC, p. 129; *Suggestions of the Court of Justice on European Union*, Supplement 7/75 — Bull. EC, p. 18.

tion under judicial control. The Court of Justice would thus have the power to review legislation in a way constitutional courts usually have. The Court itself proposed as much in its opinion on the European Union.[12]

The second item in the 'technical' category is *equal treatment for all the institutions* before the Court (Art. 43.2). This seems to imply two things. Firstly, Parliament cannot, under the existing rules, bring an action for annulment under Article 173 (EEC), although it can bring an action for failure to act under Article 175; Article 173 limits the right of action expressly, as far as Community institutions are concerned, to the Council and the Commission. This is slightly illogical, and it could perhaps be helped by a somewhat imaginative interpretation, based on the unity of the system of remedies rather than on the precise wording of the relevant provisions; it is not completely impossible that the Court of Justice might be willing to take that route.[13]

Secondly, equal treatment of institutions before the Court probably implies that the European Parliament and the Council will be entitled to submit written observations to the Court, and to argue their case orally, in procedures concerning preliminary rulings. At present, the parties to the main action, the governments of the Member States and the Commission have these rights, and the Council only if the validity or the interpretation of one of its acts is at stake.[14] In practice, the Council is only represented if the dispute involves the validity of one of its regulations; probably, therefore, Parliament will be the only institution to benefit from the principle of equal treatment. Or will perhaps the fifth institution that the Draft Treaty adds to the existing four, namely the 'European Council', develop the desire to make its views on legal matters known to the Court? It looks unlikely, but it cannot be excluded (in particular if the 'European Council' will be endowed with a separate secretariat).

The third technical item is jurisdiction of the Court to *annul an action within the context of an application for a preliminary ruling or of a plea of illegality.* This extension of jurisdiction raises a highly technical point. It is probably based on the Commission's recommendation to restore the balance between the wide powers the Court has under Article 173 on actions for annulment and the very limited possibilities opened by Article 177 regarding preliminary rulings on 'the validity . . . of acts of the institutions'.[15] The implications of the Commission's idea are not very clear. Firstly, it may mean that provisions on the effects of annulment, like Articles 174 and 176, also apply when a regulation is declared invalid in a judgment under Article 177. The Court of Justice sometimes applied these provisions already by analogy in cases on preliminary rulings,[16] but it has been severely criticized for doing so, and some of these judgements even roused the indignation of well-known French legal scholars.[17] Secondly, the Commission's proposal may, however, involve a much wider problem: if direct actions for annulment under Article 173 are well-founded, the Court declares the act in question to be 'void', which has always been taken to mean that the act has never lawfully existed; on the contrary, a declaration of invalidity under Article 177 presently implies no more than that the act is not operative in the case at hand; the judgement does not work *erga omnes*.[18]

The Draft Treaty obviously takes up this latter idea by expressly granting a power of annulment in the framework of a preliminary ruling. In practical terms, this may not be a very impressive step; the Court has already held that national courts are not obliged to ask for preliminary rulings on the validity of an act whose invalidity has already been pronounced by the Court in a different case under Article 177; the Court went out of its way to stress that national courts remained free to rein-

---

[12] *Suggestions of the Court, supra,* p. 18.
[13] See Case 230/81 *Grand-Duchy of Luxembourg* v *European Parliament* [1983] ECR 255.
[14] Article 20, Statute of the Court of Justice of the EEC.
[15] *Report of the Commission, supra,* point 128.
[16] Example: Case 4/79 *Providence agricole de la Champagne* [1980] ECR 2823.
[17] See Boulouis, *Dalloz,* 1982, pp. 10-13.
[18] See Schermers, *Judicial protection in the European Communities,* 2nd ed., 1979, par. 379 a and b; Mertens de Wilmars, 'Annulation et appréciation de validité dans le traité CEE: convergence ou divergence?' in *Europäische Gerichtsbarkeit und nationale Verfassungsgerichtsbarkeit,* (Grewe, Rupp, Schneider, eds), 1981, p. 283.

troduce the question, but that they should normally do so only if they felt doubts as to the extent of the invalidity already pronounced, or as to its consequences.[19] However, the proposed change has considerable importance for the theory of invalidity; it has often been said that the existing rules, in opening possibilities for annulment only to certain parties and within certain time-limits, and in accepting then a plea of illegality in pending litigation, with different consequences, aim at striking a balance between the requirements of legality of administrative action and legal certainty.[20] The proposed reform could be seen as sacrificing the latter for the benefit of the former.

Will the reform increase the jurisdiction of national courts? Article 184, which embodies the plea of illegality, is usually considered as the expression of a general principle; the Court of Justice said so in one of its *Simmenthal* judgments.[21] If that view is the correct one, it is possible to see the inclusion of questions of validity in Article 177 as the expression of the idea that any national court can, by way of a plea of illegality, be faced with a problem of validity, and that it was therefore necessary to extend the scope of preliminary rulings to these matters. However, if that is true, the proposal to grant a power of annulment within the context of a plea of illegality implies that national courts will be able to pronounce such an annulment, only supreme courts being bound to interrogate the Court of Justice before doing so. The monopoly of annulment, actually in the hands of the Court of Justice by virtue of Article 173, would be broken. Such a development would do great harm to the uniform application of Union law; it would also raise the delicate question whether annulment by a court of one Member State would have effect in a different Member State. For these reasons, it would seem wise not to introduce the proposed change without some accompanying measure; personally, I would be in favour of extrapolating slightly the line of the existing case-law, by providing that national courts cannot pronounce the invalidity of acts of Union institutions without first having interrogated the Court of Justice.[22] Such an amendment would amount to an increase of the number of cases in which reference to the Court is compulsory. The step appears greater than it actually is, as national courts will in practice always refer matters of validity of Community acts to the Court of Justice under Article 177. The German Finanzgerichte, very inventive in discovering validity problems, gradually developed a practice of never pronouncing an invalidity without having questioned the Court of Justice. But national courts should be obliged to follow this road if their appreciation of the validity of common rules can entail the annulment of such rules.

## *c. Declarations of principle*

Under this heading, I bring first the clause on *compulsory jurisdiction of the Court to rule on any disputes between Member States in connection with the objectives of the Union* (Art. 43.7). These objectives being framed in wide terms, almost any litigation between Member States will belong in this category. The proposal thus broadens the provisions of Article 182 (EEC). Its result is an increase of jurisdiction of the Court of Justice at the expense of that of bodies like the International Court of Justice. This is interesting enough for those who like to theorize on the legal character of the proposed Union; but its practical bearing is slight, as litigation between Member States is extremely rare.

The proposal has no relation to a recent declaration of the Heads of State or Government (European Council) to the effect that international agreements between Member States will, as far as appropriate, provide for jurisdiction of the Court of Justice in interpreting these agreements.[23] This dec-

---

[19] Case 66/80 *International Chemical Corporation* [1981] ECR 1191.

[20] See Van Rijn, *Exceptie van onwettigheid en prejudiciële procedure inzake geldigheid van gemeenschapshandelingen,* 1978, pp. 249-252.

[21] Case 92/78 *Simmenthal* [1979] ECR 777.

[22] This might in fact seem a logical consequence of the ICC judgment, *supra.*

[23] 'Solemn Declaration on European Union', of 20. 6. 1983 (Stuttgart Declaration), *Bulletin of the European Communities,* No 6-1983, point 2.5.

laration — which concerns the relations between national courts and the Court of Justice, and not those between Member States — has a completely theoretical nature; it is the agreements between Member States themselves which are to provide for the Court's jurisdiction, and the negotiating practice of the Member States' diplomats does not show an excessive zeal in that direction. The record of the Interim Committee on the Community Patent is a case in point: it first devised a 'common patent appeals court' in order to be sure that matters of validity of Community patents would be looked into by real experts, and it then came gradually round to the idea that patent law could perhaps better do without any interference of the Court of Justice. It must be admitted, though, that the Court of Justice did not increase its popularity among patent experts by holding that, under certain conditions, the principle of free movement of goods precludes patent holders from relying on rights national legislation normally attaches to patents.[24]

The second declaration of principle is the clause on jurisdiction of the Court to *impose sanctions on a Member State failing to fulfil its obligations* under the law of the Union (Art. 43.6). As long as implementing legislation is missing, it is hard to see what kind of sanctions the drafters had in mind. These sanctions do not encompass suspension of rights deriving from the application of the proposed Treaty, or non-participation in certain Union institutions, for that is the kind of sanction only the European Council can impose under Article 44 and under Article 4, par. 4 of the draft, in case of 'persistent violation' by a Member State of democratic principles or fundamental rights or of other important provisions of the Treaty. If that is so, it is difficult to see what kind of sanction the Court should impose in case of a 'normal' failure by a Member State to fulfil its obligations. Fines seem even less appropriate as a sanction for Member States than they were for great steel producers who chose to disregard the Commission's production quotas: they will not act as a deterrent. If the Member State's failure to fulfil its obligations consists of maintaining legislation not compatible with Union law, one might think of nullity of such legislation; the Court of Justice gave a little push in that direction by holding that citizens cannot be subjected to penal sanctions if the prohibitions upheld by these sanctions are incompatible with Community law according to a judgment rendered by the Court under Article 169.[25] However, such an approach is not very helpful if the Member State's failure consists of *not* having enacted certain measures.

The problem is not of the greatest importance. Firstly, although at present the judgment that finds that a Member State failed to fulfil its obligations can only give a declaration to that effect, experience shows that the Member State concerned will comply, at least in the long run. Secondly, it is far from sure that the introduction of sanctions would help to accelerate the process: more often than not, failures to act stem not so much from conscious decisions to be slow, but from somewhat untidy tactical moves by governments or government agencies, aimed at staving off peasant rebellions or trade-union pressure or at ushering a certain amount of legislation through Parliament without major accidents.

## *d. Protection of fundamental rights*

Jurisdiction of the Court of Justice for the protection of fundamental rights *vis-à-vis* the Union (Art. 43.3) has already been extolled for a number of years.[26] It is unproblematic, and at the same time it is the thin end of the wedge. It is unproblematic because everybody wants it, because it is in the line of the general evolution of the European Communities, because it would strengthen the 'Europe of the citizen' and because it would ease some existing tensions between national courts and the Court of Justice. And it is the thin end of the wedge because it may have a considerable impact on the scope of

[24] In particular: Case 119/75 *Terrapin Overseas* [1976] ECR 1039.
[25] Case 88/77 *Schonenberg* [1978] ECR 473.
[26] Example: *Report to the European Council on the European Union* of 29. 12. 1975 (Tindemans report), Supplement 1/76 — Bull. EC, Chapter IV-A-1; also in working document 481/75 of European Parliament, pp. 39 and 40.

judicial review throughout the proposed Union. We shall deal with that particular topic when discussing matters of substance and stick, for the moment, to problems of jurisdiction in the strict sense of the word.

The Commission strongly recommended this extension of the Court's jurisdiction in its 1975 opinion on the European Union. It based its suggestions on the idea of the rule of law (*Rechtsstaat*), which it also found expressed in the Court's opinion, and it concluded that a Union treaty should provide for uniform binding rules protecting the rights of individuals. Therefore, it said, individuals should have comprehensive possibilities of access to the Court if they allege breaches of human rights and fundamental freedoms, so as to enable the Court to play a key role in safeguarding these rights and freedoms.[27] These suggestions, which probably form the background of the proposed reform, may in their turn have drawn their inspiration from the German legal system, and especially from the particular form of action called *Verfassungsbeschwerde* (constitutional complaint). It is a general form of appeal to the Federal Constitutional Court available to any person alleging that his fundamental rights as guaranteed by the Federal Constitution have been denied by any statute, judicial decision or administrative act.[28]

If a right of action of such a general nature should be given to the citizens of the future European Union, its exercise will no doubt have to be qualified in order to keep the judicial system workable. In German law, for example, the rule is — subject to some exceptions — that ordinary remedies should be exhausted; without such a rule, the *Verfassungsbeschwerde* would, in a way, criss-cross through the normal remedies and appeals and so disrupt the ordinary working of the judicial system. The effect of the rule of exhaustion of remedies is that the constitutional complaint more or less functions as a kind of super-appeal, albeit with a limited scope, namely to enable the Constitutional Court to check whether the earlier judicial decisions in the case assessed the plaintiff's fundamental rights correctly. With some exaggeration, one might summarize the situation as one in which a citizen first fights his way through local court, appeals court and supreme court, and then asks the Federal Constitutional Court to test whether these judges have duly respected his fundamental rights. There are two obvious consequences: the system makes litigation long and costly, and it tends to enhance the controlling function of the Constitutional Court.

Introduction of a remedy similar to the German constitutional complaint would then provide the Court of Justice with powers to control the national courts. It might therefore provoke some hard feelings among the superior courts. It is difficult to see, however, how fundamental rights could be protected by the Court of Justice without implying a certain form of control of national courts. As it is, citizens will always be able to bring an action before a national court if they feel aggrieved in one way or another, be it by violation of their fundamental rights or otherwise. Community law, or Union law, will not diminish possibilities of access to courts existing at the national level, and a right of action before the Court of Justice will thus necessarily involve some element of scrutiny of the national courts' performance.

These considerations raise a somewhat different problem. The proposed remedy will, according to the Draft Treaty, be available in all cases where 'the protection of fundamental rights *vis-à-vis* the Union' is at stake. That expression seems to embrace violation of such rights by national bodies acting on the basis of Union law; the mechanism of the common agricultural policy is constructed in such a way that practically all individual decisions are taken by national authorities. In such a case, the aggrieved person will always first seize the national court as he would not like to lose his right to rely on other grievances than those concerned with fundamental rights. Is it open to the plaintiff, in such a case, to raise also the incompatibility of the national decision with the national constitution? Under the present Treaties, this is a matter of national constitutional law, which has given rise to well-known differences of opinion. The German Constitutional Court will probably consider that protection of fundamental rights at the Union level dispenses national courts from controlling com-

[27] *Report of the Commission, supra*, points 124 and 84.
[28] Grundgesetz, Art. 93; Bundesverfassungsgerichtsgesetz, Art. 90.

patibility with the national constitution on that particular point;[29] such would, at any rate, seem the situation if, and as far as, national bodies merely act as agents of the Union. The latter condition gives, however, rise to new problems: do, for example, tax inspectors act as agents of the Union when they levy value-added tax on certain transactions? Probably not; but in many instances, national legislation on VAT will raise exactly the same problems on human rights as the Community directives. Some national courts, like the Dutch Hoge Raad, always start from the assumption that national VAT legislation cannot be applied in a way diverging from the prevailing interpretation of the VAT directives.

Double protection of fundamental rights, on the basis of the national constitution and on the basis of the Union Treaty, therefore, cannot be excluded. To make matters worse, there may even be a treble protection, as the European Convention on Human Rights will continue to apply. The rule on the exhaustion of national remedies in that Convention[30] implies, in my view, that an individual complaint to the European Commission on Human Rights would not be admissible before the Court of Justice has rendered its judgment under Article 43 of the proposed Union Treaty. Chronologically, the Strasbourg institutions would therefore come last. This situation necessarily implies that the European Court of Human Rights will exercise a certain controlling function with regard to the decisions of the Court of Justice in this respect. Such would even be the case before the Union adheres to the European Convention in conformity with Article 4.3 of the Draft Treaty. The right of action proposed in Article 43 for the protection of human rights will thus be conducive to a kind of 'escalation' of remedies.

These consequences make it urgent to take a fresh look at the question of how to reconcile the two great systems of legal integration in Europe, that of the Communities and that based on the European Convention on Human Rights — a problem we shall return to. The same consequences also show something else: the price to be paid by European citizens for protection of their fundamental rights at the Union level is the risk of having to wait quite a while for their claim to be ultimately settled.

## *e. Supervision of national courts*

Article 43.5 intends to create a right of appeal to the Court of Justice against decisions of national courts of last instance where reference to the Court for a preliminary ruling is refused or where a preliminary ruling of the Court has been disregarded. The French text of the draft reads 'pourvoi en cassation' for right of appeal.

The proposed introduction of this remedy rests on the assumption that national courts, and supreme courts in particular, presently fail to do what they should do, and that a direct appeal to the Court of Justice will help them mend their ways. Practitioners — and the present author is among them — will have great difficulty in accepting these two basic premises. As a general proposition, it is just not true that supreme courts fail to refer matters to the Court which they ought to have referred. Most statements to the contrary rely on considerations of a purely theoretical nature, or on isolated decisions which, without any further proof, are considered as indicative of national courts' general attitudes towards Community law, and in particular towards references to the Court of Justice.[31] Such hostile behaviour on the part of national courts is very rare indeed. The duty to refer to the Court of Justice, as embodied in Article 177, par. 3 (EEC), requires national courts, and especially supreme courts, to meet two contradictory demands: on the one hand, they are to be aware that a persistent failure to refer will lead to lack of uniform application of Community law and so, ultimately, to disintegration of the Community as a legal entity; on the other hand, they should refrain from having

[29] BVerfGE, 37, No 18, Solange Beschluß, 1974.
[30] Article 26, European Convention for the Protection of Human Rights and Fundamental Freedoms.
[31] Example: Pfennig, 'Möglichkeiten der materiellen Weiterentwicklung des Gemeinschaftsrechts', in *Der Beitrag des Rechts zum europäischen Einigungsprozess*, (Carstens *et al.* eds), 1984, pp. 73, 77.

recourse automatically to the Court of Justice in all cases having something to do with Community law (for example: in all cases on VAT), even in cases where every lawyer can guess the answer the Court will give. It has never been established or, indeed, been posited, that, as a rule, supreme courts have not been able to strike a reasonable balance between these two requirements.

There is more to it. The Court's case-law assumes that Article 177 (EEC) is the expression of a general idea inherent in the Treaty's approach to the judiciary: the idea of collaboration between national courts and the Court of Justice. It is for that reason that the Court of Justice leaves a certain margin of discretion to national courts faced with the question whether or not they are obliged to refer.[32] In such a situation, granting a power of review of national decisions to the Court of Justice might amount to a change of approach, to the substitution of hierachy to collaboration.

This does not end the debate: would it be a good thing to have hierarchical relations between national courts and the Court of Justice? I wonder. Firstly, it is not at all clear whether the system of preliminary rulings will in fact work better after such a change. Secondly, we may make, tacitly, a choice on the organization of the judiciary in the European Union of the future, and we could very well have reasons to regret that choice later. In the long run, it is probably better for the European Union to have a 'Union judiciary' alongside the national judicial hierarchy, just as the United States has a dual system of courts (federal courts and state courts).[33] If that is the ultimate choice, it does not seem very obvious to begin by creating appeals from State courts to the Union court, the Court of Justice. Many observers will think (and some do think already) that the Court of Justice is to be the ordinary appeal court for any question involving Union law.[34] If the drafters of the Union Treaty were really contemplating a central position of the Court of Justice in the judicial system of the future European Union, they would have done better to create Union courts of first instance for appeals exclusively implying Union matters and turning on points of fact more than on points of law, like courts of first instance in competition matters or an administrative tribunal for staff cases. Creation of such an administrative tribunal has already been proposed by the Commission; but the Council, in its own mysterious way, discovered first a certain number of difficulties and then found a new problem to every solution. However that may be, the time seems to have come to stop bickering about the lack of enthusiasm of one or two national courts in their dealings with Community law, and to start thinking seriously about the future outlook of the judicial system in a European Union. In that respect, the Draft Treaty is a lost opportunity.

## 3. Matters of substance

### *a. The objectives of the Union*

We saw earlier that the objectives of the Union are couched in wide terms: the Preamble alludes to the notions of democracy, human rights and rule of law; the objectives of the Union mentioned in Article 9 range from a harmonious society to peace in the world; and the provisions on the policies of the Union enable the European Council, in Article 68, to include defence policy and disarmament among matters to be submitted to cooperation and, eventually, to common action. There is some political cunning in the framing of the Draft Treaty's structure: it embraces many fields of action, but it does so in such a way as to permit considering the urgency of one form of action rather than another, and to elaborate gradually, subject by subject, the global policy of the Union. This evolving model of policy-making has definite advantages for the Union's decision-making practice; but that does not mean that it facilitates the work of judges who are to put a certain activity of one of the institutions in the general framework of the activities of the European Union. In other terms: the question is whether these wider objectives of the Union can still be made operational by the courts.

---

[32] Case 283/81 *Cilfit* [1982] ECR 3415.
[33] US Const. Art. III, § 2, cl. 2.
[34] De Saint-Mihiel, *Le projet de traité institutant l'Union Européenne*, RMC, No 276, 1984, p. 149.

There is one easy answer to this: the Union takes over the Community patrimony, the famous *acquis communautaire* (Art. 7), and encompasses thereby the aims of the EEC Treaty; hence, courts can continue to base their interpretations on these aims as they did before. This answer is, however, not completely satisfactory, for the real problem is, of course, how the old EEC aims relate to the Union objectives. These objectives are new only in part: they also partially restate some of the EEC aims — but not all. For example: Article 9 of the Draft Treaty restates the aim of progressive elimination of imbalances between regions, but it is silent about fair competition; it recapitulates the prospect of free movement of persons, without mentioning free movement of goods. There might, therefore, in the view of the drafters of the Union Treaty, be a kind of order of priority between different aims and objectives. One would hope not; for it is the very notions of fair competition and free movement of goods that have been crucial, in the Court's case-law, for elaborating step by step the legal concept of a common market. Most of the *grands arrêts* have been built on the idea that a common market implies abolition of discriminatory situations and of obstacles to intra-Community traffic.

There may be an element in the Draft Treaty to counterbalance the possible loss of workable general concepts: its institutional provisions are manifestly intended to reactivate the legislattive process. This is a very important point. Everyday experience shows that in many fields of Community action, harmonization of national legislation is long overdue. Whether courts can continue to assume that Community legislation, though lacking for the moment, will be brought about in the near future and that in the meantime case-law can fill the gap is an ever more urgent question. Things get even worse when, as happens sometimes, politicians populating legislative bodies show their disdain of the Communities' objectives: can courts have resort to these same objectives when acting because nobody else does?[35] If legislative machinery remains stuck for years and years, it is no longer up to the courts to put the situation right: they are not equipped for that type of work in the long run, and they cannot go beyond the inherent limits of the judicial office.[36] The Draft Treaty aims at unlocking the wheels of the legislative machinery by giving a new shape to legislative power, which will be shared between Council and Parliament. There is no certainty that mere changes in institutional provisions will accomplish this feat, and it is beyond the scope of this paper to venture predictions.[37] But it would surely be bad for the future development of European law if judicial decisions could neither rely on clear and workable concepts on long-term aims, nor on any real upsurge of rule-making activities.

The Union's takeover of the Community patrimony implies that fundamental market freedoms, as embodied in the EEC Treaty and as elaborated by the Commission's practice and by the case-law of the Court of Justice and some national courts, will continue to be in force. These market freedoms are individual freedoms derived from the concept of a common market.[38] They have something in common with human rights; in German literature, their legal position has sometimes been characterized as *grundrechtähnlich*, as not-so-dissimilar.[39] It may be true that classical human rights, those, for example, embodied in the European Convention, find their basis in the freedom and dignity of the individual person; but some typical market freedoms, like the right to move freely or not to be discriminated against, are not far removed from this same sphere of thought. The question arises, then, how the relationship between these two categories of rights and freedoms must be seen and, in particular, which one is to prevail in case of contradictory implications.

The first thing one discovers when thinking about this problem is that most of the time the rights in these two categories reinforce each other rather than conflict. Non-discrimination in the common

---

[35] President Hans Kutscher said as much in his farewell speech to the Court: see the Court's publication on its ceremonial sittings in 1980-81 (Luxembourg, 1982), p. 25.

[36] See Koopmans, 'De polsstok van de rechter', in *Regel en praktijk*, 1979, p. 101.

[37] See Gilsdorf, 'Die Rolle der Kommission bei der gemeinschaftlichen Rechtssetzung', in *Der Beitrag des Rechts, supra*, p. 91.

[38] See for a list of these freedoms, Grabitz, 'Implementation of human rights in Community law', in *In Memoriam J.D.B. Mitchell*, 1983, p. 194.

[39] Bleckmann, 'Die Freiheiten des gemeinsamen Marktes als Grundrechte', in *Das Europa der zweiten Generation*, Gedächtnisschrift für Christoph Sasse, II, (Bieber *et al.* eds), 1981, p. 665.

market fortifies equal protection before the law, and the free development of the individual is helped by the freedom to move without being subjected to arbitrary interference by immigration police, custom officers or tax authorities. The freedom to choose one's profession as it appears in some national constitutions could hardly be effective without protection against abuse of a dominant position in the market.[40] And the gradual inclusion of aliens in the national regimes of rights and freedoms can hardly be imagined without the Community's efforts to obtain free movement of persons, and, in particular, without the limits that have thus been put on the national authorities' previously unfettered discretion to expel aliens.[41]

The remaining difficulty is what to do when there is a clash, and efforts to reconcile the effects of different freedoms fail. I would personally prefer not to take the general view that rights belonging to the classical human-rights catalogue should always and automatically override social and economic freedoms. Much depends (i) on the persons who claim protection of their rights and freedoms, human rights being primarily concerned with protecting the weak against the mighty; (ii) on the situation in which protection is claimed, those involved against their will being better suited to having their claims upheld than those who willingly accepted that situation; (iii) on the intensity of the alleged breach, freedom of expression being more liable to be violated by forbidding demonstrations than by dissolving book cartels. When nothing helps, and when, finally, the chips are down, we should probably realize that the European Union will be based on a clear political ideology, described in the opening words of the Draft Treaty as 'commitment to the principles of pluralist democracy, respect for human rights and the rule of law', but that it is not based on any choice between competing economic philosophies.[42] Wide-ranging objectives have thus their use, after all.

## *b. The judicial area*

The 'homogeneous judicial area' will be created, according to Article 46 of the draft, by cooperation between Member States, i.e. without the exercise of specific powers by Union institutions; Commission and Parliament 'may', however, submit appropriate recommendations. The degree of homogeneity of the judicial area may thus become quite relative.

The Draft Treaty does not tell us what it means by 'judicial area', but it gives two examples of measures apt to promote it. The first example is 'measures designed to reinforce the feeling of individual citizens that they are citizens of the Union'. As a good fishery policy will certainly reinforce (or even create) the fisherman's feeling that he is a citizen of the Union, a clause like this may mean anything or nothing. The most likely explanation is that the drafters have been toying with ideas like European passports, exchange of students and duty-free hand luggage. Anyway, the relation with the judicial system looks tenuous. That is certainly not so for the second example: the fight against 'international forms of crime, including terrorism'. In the past, suggestions have now and then been made to create such a crime-fighting area; for a certain time, President Giscard d'Estaing seemed to pursue the idea *(espace judiciaire)*. It is an interesting idea from a general point of view, as its implementation would extend the Union's business into the field of criminal law. Politically, there are some pitfalls in this path: experience has shown that some governments do not like to get involved in other governments' dealings with terrorist movements. Even the mere coordination of extradition practi-

---

[40] See also Waelbroeck, 'La constitution européenne et les interventions des États membres en matière économique', in *In orde, Liber amicorum Verloren van Themaat,* 1982, p. 331.

[41] Example: Article 3, Directive 64/221 for the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (OJ 56, p. 850, English Special Edition 1963-64, p. 117).

[42] The situation is similar in the Federal Republic of Germany: the Constitutional Court refers to 'wirtschaftspolitische Neutralität' (already in BVerfGE, 4, No 2).

ces can, as the Basque problem has shown these last years, implicate nations in other nations' problems, or even in the accompanying violence.

Consequently, the two examples are not very helpful for finding out what the homogeneous judicial area can be taken to mean. The Union institutions could make a virtue out of necessity by inventing a legal programme that can do justice to the ambitious wording of Article 46. Why not start a real effort to unify commercial law? Lawyers have had guilt feelings ever since Pascal's jeering observations on the 'trois degrés d'élévation du pole' that turn a whole body of case-law upside down and on the 'plaisante justice qu'une rivière borne'.[43] Modern conditions make many disparities even more difficult to understand and to accept. There is one snag: the institutions should first eliminate disparities that directly affect the establishment and functioning of the common market. And they can already do so now, on the basis of Article 100 (EEC), a provision which has given rise to many studies but whose potential is not nearly exhausted: remarkably little has been actually done so far.

Meanwhile, the judicial area could as well wait for better times. Scant comfort is offered by one of the European Parliament's working papers on the Draft Treaty, seemingly content with the following considerations: 'The creation of a judicial area will help to bring to fruition the concept of European citizenship, the main component of which is the common enjoyment of fundamental rights'.[44]

## *c. The impact of human-rights protection*

Only a few examples suffice to show that human-rights protection may conduce to quite important innovations of the law and to results that nobody had imagined before. American criminal procedure has been profoundly influenced by the US Supreme Court's stand on human rights, and the prison system of many European countries had to be reformed because of the implications of the European Convention on Human Rights. To push the matter somewhat further: for a moment it looked as if capital punishment in the US would be abolished by the court as contrary to the American Bill of Rights, as were state laws forbidding abortion.[45] I admit that these latter decisions came at a time which must by hindsight be described as one of the great epochs of judicial activism in America, a wave of activism that culminated about 180 years after the entry into force of the Bill of Rights, and one century after the introduction of the XIVth Amendment to the Constitution, which turned out to be such a great help to the Supreme Court. But I submit that comparative studies show how difficult it is to foresee changes in judicial attitudes in this respect; the French Conseil constitutionnel took everybody by surprise when it adopted its new approach in 1971.[46] In these matters, prophecies are even less reliable than weather forecasts in Great Britain.

Nobody knows, therefore, whether the Court of Justice will be tempted to spread its wings in a comparable way. At all events, the Court's position under the Draft Treaty will be inevitably reinforced. Firstly with regard to national courts: under the existing arrangements, the Court and the national constitutional courts are, in a way, competing powers in the field of human rights; but the combined effect of Articles 4 and 43 of the Draft Treaty will be to confer certain controlling powers on the Court of Justice. Secondly, the delicate balance of power between the Court and the political institutions of the Union is tipped in favour of the former: not the legislative but the judicial power of the Union will have a final say on the meaning of fundamental freedoms, and thereby on the implications of these freedoms for all rule-giving and administrative activities. Thirdly, the Court's stature in

[43] Pascal *Pensées*, No 294, (Brunschvicg ed.) 1950.
[44] *Report on behalf of the Committee on Institutional Affairs on the substance of the preliminary Draft Treaty establishing the European Union*, Part C, preparatory documents (Doc, EP 1-575/83/c, working document on the law of the Union (K. de Gucht reporting) No 71).
[45] *Furman* v *Georgia*, 408 US 288 (1972); *Roe* v *Wade*, 410 US 113 (1973).
[46] Conseil constitutionnel, 16. 7. 1971, *loi d'associations*, Rec. 29.

the eyes of the general public will increase, as it will be easier for the citizens of the Union to see the Court really as 'their' court when they have more possibilities of entering into the passions of the litigants.

Other circumstances suggest that changes of judicial attitudes, if forthcoming, will be slow. It will, in the most optimistic forecast, take years and years before Union law will touch on matters of disarmament; it might very well even take years before Union policy will cover subjects like protection of the environment, coordination of urbanization schemes or prison reform. Many areas likely to give rise to human-rights problems will thus, for the moment, be excluded from the Court's jurisdiction. The first years of the Union will probably be characterized by efforts aimed at consolidating and expanding common economic policies and at extending the common market to fisheries and to transportation. The technicians of economic law will, for the moment, hold their ground.

Some further thinking, however, gives reason to foresee that unexpected developments may nevertheless occur. The Union scheme implies, according to the Draft Treaty, jurisdiction on human rights on the part of national courts, the Court of Justice and the European Court of Human Rights; each of these categories of judges has its own contribution to make. The Strasbourg court may be more sensitive to human-rights issues, just as its Luxembourg sister institution is more liable to respond to problems regarding discrimination, or division of powers among the Union and Member States. Some mutual adjusting will be necessary. Even now, there are some areas in which Community law does not seem completely attuned to the evolutions that have taken place under the Human Rights Convention. The very liberal interpretation the Human Rights Court gives to 'civil rights' covered by the fair-trial clause of Article 6 of the Convention[47] may have important consequences for certain practices usually followed in the economic law of the Community, as, for example, in competition law.

This brings us, finally, to the future existence of two areas of legal integration in Europe: the European Union and the Council of Europe, under whose auspices the European Convention on Human Rights functions. If the Union takes shape in the way indicated by the Draft Treaty, judicial relations between these two areas will be strengthened. The Union may, therefore, become more and more the real heart of the Council of Europe. Some political developments work in the same direction. In the near future, Spain and Portugal will accede to the Communities; Turkey will, if it does not begin to take return to democracy seriously, become only a nominal member of the Council of Europe. What remains then, are chiefly the Member States of the Community and the countries bound to it by free-trade arrangements, like Sweden, Norway, Switzerland and Austria. In other words: the factual situation in the Council of Europe could be much the same as the one that is gradually evolving in the field of economic integration, where the Community takes the lead but works in close collaboration with the countries of the free-trade area. This collaboration could be intensified, also at the judicial level. At the moment, the free-trade agreements are interpreted by the Court of Justice as well as by the supreme courts of countries like Austria and Switzerland; there is a certain risk of diverging interpretations.[48] If forms could be found for instituting a judicial collaboration between the Community and these countries, the future Union might inherit a judicial structure which, if gradually extended to other Union matters, would in real terms be at the same time the judicial structure within the Council of Europe. After some time, the rift between the two organizations would vanish. Such a perspective might help to overcome certain fears among Community lawyers about a human-rights court partially composed of judges from third countries that would impose its legal views on Union institutions.

[47] *Ringeisen* v *Austria,* ECHR Series A, (13), 1971; *Sporrong and Lönnroth* v *Sweden,* ECHR Series A, (52), 1982.
[48] See Case 270/80 *Polydor* [1982] ECR 329; Case 104/81 *Kupferberg* [1982] ECR 3641.

## *d. The authority of Union law*

'A genuine rule of law in the European context', said the Court of Justice in its opinion on the European Union, 'implies binding rules which apply uniformly and which protect individual rights'. It also warned that the Union should not be given a looser legal structure than the existing Communities, as otherwise the value of Community law would be diminished.[49] It looks as if the drafters of the Union Treaty took this warning to heart. Article 42 of the draft confirms the main principles actually underlying the significance of Community law: direct applicability, precedence over national law, joint responsibility of the Commission and Member State authorities for implementation of Union law, and possibilities of invoking that law before national courts. Wider access of individuals to the Court of Justice, and continuation of the system of preliminary rulings, will do the rest.

First problem: the fact that legal rules on the authority of Union law are uniform does not necessarily mean that this authority will be perceived and endured in the same way by all the citizens of the Union. The experience with the Communities has, so far, been very eloquent on this point. Different attitudes on the authority of Community law in, say, Italy and the UK result not only from different assessments of the European Community and its law, but also from different ideas about what authority is like. More uniformity depends on the evolution of ideas that are rooted in century-old traditions and in the way people behave towards their family, the Church, the burgomaster and the tax collector. Complete uniformity seems hardly desirable, but some progress in that direction can be made. As law evasion is nowadays rapidly spreading from South to North, and insolence with regard to public authorities from North to South, we should not despair too quickly.

Second problem: is there any effective stimulus for public authorities to comply with the Union law and to take their share in its implementation? There is, of course, the mechanism of sanctions provided for by Article 44 of the Draft Treaty. It may help, but it is unwieldy: it requires a request of Parliament or Commission, a finding of a persistent violation by the Court, a hearing of the Member State concerned, a draft decision of the European Council, approval by Parliament, and a definitive decision by the European Council. That will probably mean that it can only be used in cases of exceptional gravity. What remains is the possibility for private citizens or undertakings to appeal to the direct effect of the Union law over the head of national rules of implementation; experience shows that such a way is sometimes very effective.[50] This attractive method is not always open: it cannot be used, for example, if the Union rules deny a right to somebody (e.g. to replant an old vineyard), or if they cannot be effective without collaboration of the national administration (e.g. premiums for stocking table wines for a certain period). Citizens always run the risk of drawing a blank when they rely too much on the self-propelling qualities of Union law. Compliance with Union law by the Member States will therefore probably be secured in much the same way as the one that actually ensures the observance of Community law: it is a combination of political pressure by the Commission and by interest groups, of legal means, through the threat of legal action by the Commission or by citizens, and of feelings of solidarity; even the most unwilling administration sees after some time that the common interest ought to prevail. No statesman, whatever his (or her) brinkmanship, will easily take the risk of disrupting the European construction.

Third problem: will the system of sanctions contribute to the birth of a European Union that has all the characteristics of a federal State? Without engaging in battles on labels, one might nevertheless be realistic enough to see the difference between the proposed Union and the federal States that the world has witnessed these last two centuries. No expedition of Union troops will call the defiant Member State to order. And it is perhaps better so: Robert Schuman's famous speech of 9 May 1950, which triggered off the integration process, sought exactly to displace movement of troops by more peaceful ways of coming to grips with each other.

---

[49] *Suggestions of the Court, supra*, p. 17.
[50] See in particular: Case 2/74 *Reyners* [1974] ECR 631; Case 8/81 *Ursula Becker* [1982] ECR 53.

I do not rule out, nevertheless, that the proposed system of sanctions has a certain bearing on the legal nature of the Union.[51] For me, it is especially Article 4, par. 4, on penalties against the Member State that persistently violates democratic principles, which gives the Draft Treaty its particular flavour. The Union makes itself, thereby, responsible for the Member States' carrying on their democratic traditions. Such a situation might have far-reaching effects on the international relations of the Union; but it may be too early to speculate.

## 4. The place of the judiciary

Under the Draft Treaty, the position of the judiciary will be reinforced. This increase of judicial power is in particular due to two general ideas which seem to belong to the mainstream of the views expressed in the draft: the generalization of judicial review and the judicial protection of human rights. It is pretty obvious that these ideas have been influenced by experience gained in countries with constitutional courts. It is also clear that the drafters of the Treaty focused their attention exclusively on the more general aspects of the jurisdiction of constitutional courts. It is curious to observe, in this connection, that the draft is silent on control of regularity of the elections of Members of the European Parliament — a more technical subject but one that could, even in the present situation, very well be committed to the care of the courts, and even perhaps to the care of the Court of Justice. In France, the Conseil constitutionnel has jurisdiction over *le contentieux électoral;* [52] a similar arrangement would neatly fit in the proposed Union and, perhaps, be a first little step on the way to uniform electoral procedures.[53]

The powers of the Court of Justice are strengthened by the Draft Treaty. This does not result from a reinforcement of the Court's position *vis-à-vis* the national courts, but from the place the Court has in the Union's judiciary: its powers increase primarily at the expense of the powers of the other Union institutions. Is that an advantage? Personally, I am far from sure that general theories about the correct frontier between 'the' judicial and 'the' political area or between work of 'the' courts and 'the' legislative bodies can be of any great help.[54] So much depends on the situation in which the dividing line is to be traced. It may be true, as Professor Cappelletti puts it in one of his recent books, that there is a general tendency towards an increase of judicial creativity nowadays;[55] but such a general trend does not give us a recipe for every single occasion. On the whole, however, I would not regret a certain growth of judicial power in the actual situation of European integration. There are certain things the proposed Union will probably have in common with the existing Communities; and these have been continuously troubled by their weak political structure. The Draft Treaty seeks to overcome this weakness; but it is, at the very least, questionable whether the proposed institutional changes can achieve such a result. A Union that combines an ambitious programme and far-reaching powers with a weak political structure may need a strong judiciary.

There is a second reason not to be too cautious in this respect: it is commonly acknowledged that, thus far, the Court of Justice has done its work well. The general layout of European law owes more to the patient needlework of the Court than to the defective legislative machinery or to the solemn declarations of these last years. It was the Court's case-law that developed the legal principles which support Community law — principles many of which can now be found in the Draft Treaty, like the priority of Community law, the direct effect of Community provisions and the protection of human rights. The very idea of legal principles as part of the law to be observed in the application of the

[51] See Pernice, *Verfassungsentwurf, supra,* note 3.
[52] Constitution française, Art. 59.
[53] Article 14 of the Draft Treaty seems to acquiesce in the existing lack of uniformity.
[54] See, however, my article on 'Legislature and Judiciary, Present Trends', in *New Perspectives for a Common Law of Europe,* (Cappalletti ed.), 1978, p. 309.
[55] Cappelletti, *Giudici legislatori?,* 1984, pp.19-59.

Treaties has been introduced and worked out by the Court. Its judgments have consistently, and from the very beginning in the early days of the Coal and Steel Treaty, tried to dig up the general principles of law that were gradually to form the backbone of the common law for Europe.[56] As to further evolutions, there is no need to lack confidence.

Will, then, the Court's position in the famous *équilibre institutionnel* be substantially changed? Parliament seems to think so, for the Draft Treaty modifies the method of appointing the members of the Court (judges and advocates general): under the Union Treaty, half of them will be appointed by Parliament, the other half by the Council (Art. 30, par 2). The only explanation I have been able to find in the parliamentary documents is that such a solution is 'fair and realistic'.[57] It is fair to add, however, that similar solutions exist in some countries for the appointment of members of the constitutional court.[58] The proposal to follow these solutions in the framework of the Union may underestimate the difference between a national and a Community context. Experience shows that politicians usually assume — for reasons I personally fail to understand — that the nationality of members of the Court is very important. The proposed method might thus lead to a situation where the Council would insist on the appointment of 10 or 12 judges on its part, every government represented in the Council wanting, so to say, 'his' judge; Parliament would then probably have to add as many, and the Court would become completely unmanageable. If parliamentary influence on the appointment of members of the Court is sought, I should prefer the American system of 'advice and consent': judges of the US Supreme Court are appointed by the President, but the Senate has to give the green light.[59] In fact, the American Senate developed a policy of exercising a certain control on the quality and the morality of the President's appointees in order to prevent, in particular, that a none-too-scrupulous administration could monopolize the court for its own friends. There is no reason why the European Parliament could not play a comparable role.

One final word about the place of the judiciary in the Draft Treaty's scheme. The drafters rely heavily on the courts and on judicial activities for many things they have in mind in order to get European integration again on the move; that confidence is not misplaced. They also propose specific ways in which the judiciary would get more involved in aspects of the integration process, as the proposed extensions of the Court's jurisdiction show; some of these proposals are important and interesting, although some others may disappoint. But all this should not make us forget that the real problem does not lie here: it is just feasible to make treaty provisions on jurisdiction, and that is perhaps easier than to frame a common policy on nuclear energy, or on road transport, or on river pollution. It is these policies, however, that Europe is waiting for, alongside of a great many other common policies.

European law cannot be made by lawyers alone. That may be a sobering thought for those who like to reflect on the relation between law and politics.

---

[56] Case 8/55 *Fédéchar* [1954-56] ECR 299 is an example (principle of proportionality).

[57] *Report on behalf of the Committee on Institutional Affairs, supra,* Part B, 'Explanatory Statement', P. 33 (O. Zecchino reporting).

[58] Bundesverfassungsgerichtsgesetz, Art. 5.

[59] US Const. Art II, § 2, cl. 2.

# Chapter V – Financing European integration: The European Communities and the proposed European Union

*by J. Ørstrom Møller*

## 1. Introduction

Many people regard the Community budget and the present financial problems as being of a strictly fiscal or technical nature. They look upon the budget as a book-keeping exercise which has nothing to do with the structure and contents of the Community system. This is a wrong approach. Past experience, not only in the life-span of the European Communities, but also the evolution of nation States, has given ample proof that the budget is a hinge in the historical process.

The American rebellion against British colonial rule was based upon a small fiscal question , but the political importance has never been forgotten: 'No taxation without representation'. The American rebellion was set in motion by a discontent of being taxed without having the right to determine the size of the taxation and for what purpose money was collected.

A large part of history concerning the establishment in the nineteenth century of the German Empire is a history of taxation. During that period of human history the main source of government revenue was customs duties. No wonder, then, that the first step towards unification of the German states was the 'Zollverein' in 1830.

It is an indisputable fact that no State can be created without having access to revenue. Furthermore, the size of revenue will very often determine the scope of development of a new nation State.

On top of these economic and financial considerations comes the institutional and legal aspect of which institution has the powers to collect revenue and to determine the size and composition of the expenditure side of the budget.

Much of Europe's history is a tale of continuous struggle between King and Parliament, about exactly that question. The King wanted to spend, but needed the consent of Parliament to collect the necessary revenue. Parliament, on the other hand, did not want to spend and tried to limit the King's room to manoeuvre, with the unavoidable result that an institutional clash followed. On the surface the struggle was about money, but in reality it was about who governs the realm: the King or the Parliament.

No wonder, then, that in recent years the budget has come to the forefront of Community life.

Financially, the substance and composition of the budget determine financial flows between citizens, regions and sectors in the Community, but above all between Member States. There is general agree-

ment that the financial flows which appear in the budget constitute only part — and some people think a very minor part — of the economic and financial consequences for the individual Member States of the Community. However, this has not prevented these flows from being used in a highly political battle to change the structure of the budget.

At present, the Community's budget authority is made up of three institutions: Council, Parliament, Commission. The Treaty was revised in 1970[1] and 1975[2] to increase Parliament's influence on the budget, generally in the area of the so-called non-obligatory spending.

This was regarded as a milestone 10 years ago, but Parliament now takes the view that these increased powers are insignificant, indeed totally unsatisfactory.

Pending the possibility of a further change in the Treaty, which has not until now found propitious ground in the Council, Parliament has continuously tried to expand its powers by interpreting the Treaty to its own advantage every time the budgetary procedure has produced a difference of opinion between Council and Parliament.

Not surprisingly, this has led to a constant battle between Council and Parliament during the annual budget procedure, with Parliament in the attacking role and Council as the defender. There is no need to go over that familiar ground. Suffice it to say that Parliament has won certain limited victories, but, *grosso modo*, the distribution of powers is still as foreseen when Budget Treaty II was implemented in 1975.

Since 1977, only two budgets (the 1978 budget and the 1983 budget) have been approved without any disagreement of legal or political nature between Council and Parliament. Parliament has rejected one budget (the 1980 budget). Council took Parliament to court on the 1982 budget, but did not pursue the matter after a settlement was made. Three countries took Parliament to court on the 1981 budget, but did not pursue the matter. For the 1979 budget and 1984 budget there was disagreement between the two institutions on whether the amount of non-obligatory spending complied with the rules laid down by the maximum rate of increase or whether a new rate had to be fixed by mutual agreement.

Some people maintain that the reason for Parliament's attitude towards the budget is that Parliament has no powers with regard to the Community's legislative process, which makes it unavoidable that Parliament directs its efforts towards the one area where the Treaty provides powers, that is the budget.

This theory may provide part of the answer but to our mind the main reason is quite simply that Parliament has grasped that the road to influence on Community life and the structure of the Community system is by way of the budget.

This leads to the starting point of this report, which is that the budget and the distribution of budgetary powers on the three institutions are of fundamental importance for the structure of the Community system and the way the Community will tend to develop for the rest of this century.

We are not dealing with technical questions which are only open for experts but with a political question of the highest importance for the future evolution of the European Community.

---

[1] Treaty amending Certain Budgetary Provisions of the Treaties establishing the European Communities and of the Treaty establishing a Single Council and a Single Commission of the European Communities, referred to as Budget Treaty 1, which was signed on 22.4.1970 (see OJ L 2, 2.1.1971).

[2] Budget Treaty 2, signed on 22.7.1975, was published in OJ L 359, 31.12.1977.

# 2. The present Community budget

## *a. Size of the budget*

The Community budget is small compared with national budgets as well as gross domestic product in the Community.

Since 1973 the Community budget has amounted to between 1.8% and 2.7% of national budgets. At the lower end of the range we find 1975 with 1.8% and at the top we have 1979 and 1980 with 2.7%. Compared with gross domestic product the percentage has fluctuated between 0.51% (in 1974) and 0.91% (in 1981).

There is no need to elaborate on the fact that we are operating with very small figures which have a very limited impact on national economies and play a minor role in the integration process.

The main reason why the Community budget has not grown faster is that, except for the common agricultural policy, common policies are still of an embryonic nature.

The hard fact is that the Member States have not been willing to design and adopt common policies giving rise to expenditure over a broad level, but have been quite content to confine the activities of the Community to the common agricultural policy. This seems often to be overlooked in the debate on the Community's structure.

## *b. Expenditure*

This picture is borne out by an analysis of the expenditure side of the budget.

It is dominated by the common agricultural policy, which in the period from 1973 to 1984 has taken up between 60% and 80% of total expenditure.

Both the absolute amounts and the share of the total budget have fluctuated rather wildly over the years. The highest share was realized in 1973, but 1978 comes close. The lowest point was obtained in the beginning of the 1980s when the world conjuncture was favourable (high and rising world market prices) while at the same time the internal Community production was stable.

The common agricultural policy is often criticized for its high expenditure level. This criticism does not seem to be corroborated by the figures in the annual Community budget. Measured as a percentage of gross domestic product, the common agricultural policy took up 0.36% in 1973 and, according to the approved budget for 1984, the corresponding figure for this year is 0.59%. Compared with agricultural support in other industrial nations this percentage seems rather modest. Agricultural support in the USA is running at the same level, perhaps a little higher, while Japan spends approximately three times as much.

Since the mid-1970s, the Community has increased appropriations for the Regional Fund and the Social Fund. The main purpose is to assist underdeveloped regions in the Community and to provide the Community with financial resources to alleviate the repercussions of the international economic crisis. In 1973, only the Social Fund was implemented and took up 1.2% of the total budget. In 1984 the Social Fund had been supplemented by a Regional Fund and these two funds amounted to 10.4%. This may not be good enough in view of the high ambitions, but it is not as bad as maintained by some critical voices.

The discouraging item when analysing the Community budget is the very limited size of appropriations for industry, technology and research. In 1973 total appropriations for these purposes were 72 million u.a. corresponding to 1.8% of the total budget. In 1984 total appropriations are 719 million

ECU corresponding to 2.8%. This shows clearly that the Community has not been able to launch new common policies.

It is, however, not the fault of the budget system but must be blamed on the lacking political will among Member States to adopt and implement new common policies. The Commission has forwarded a string of proposals but they have become stuck in the thick mud in the Council.

Table 1 (pages 100-101) illustrates the development of the cooperation on the expenditure side of the Community budget from 1973 to 1984.

## *c. Receipts*

The Community is financed by customs duties, agricultural import levies and up to 1% of a uniform assessment basis for value-added tax (VAT).[3]

It is remarkable that the financing of the Community is linked to the contents of the Community system.

Customs duties are collected by individual Member States but paid into the Community budget. As the Community consists of a customs union it is natural that the revenue of customs duties does not belong to any individual Member State but to the Community as such. If a Member State wishes to import from the outside world it is free to do so but it has to pay a price in the form of customs duties. This is what is called the Community preference. It is therefore no anomaly that the UK, with a higher share of its import from the outside world than the Community average, does pay in customs duties which surpass its share of Community gross domestic product. This is exactly what the system means and by producing this result it works as designed.

The same picture is seen when analysing agricultural import levies. A Community preference is one of the fundamental principles of the common agricultural policy, like it or not. These levies, therefore, produce the same result for the agricultural sector as the customs duties do for the industrial sector.

The third revenue source, and the buoyant one, is VAT receipts. This is what constitutes the financial ceiling because the present rules limit the Community's financial resource to 1% of a uniform assessment basis.

This revenue source cannot claim the same link to the contents of the Community system as is the case for customs duties and agricultural import levies. There are two reasons why the Community introduced the VAT as a financial source. Firstly, it fitted in nicely with the efforts to harmonize the basis of indirect taxation in the Community. Secondly, VAT taxes consumption and not investment.

It is interesting to note that the inclusion of VAT means a certain progressivity in the financing of the Community as consumption per head is higher in the richer Member States than in the poorer ones. Even if this was not an explicit purpose it goes some way to meet the claims of progressivity on the revenue side of the budget, which have been made by some Member States in recent years.

Table 2 (page 102) presents the total financial resources at the disposal of the Community in the period 1973-84 and the importance of the main revenue sources.

The table bears out that the agricultural import levies are volatile while the customs duties cannot be expected to increase significantly. Thus, the only buoyant element is VAT.

[3] Decision of 21.4.1970 on the replacement of financial contributions from Member States by the Communities' own resources: OJ L 94, 28.4.1970.

### *d. Significant elements in the Community's financing system*

Viewed in a historical perspective, the financing system of the Community is unique in several aspects.

First of all, Member States are legally committed to pay into the budget what is necessary to finance the common activities adopted by the Council (provided, of course, that the revenue needed does not surpass the VAT ceiling). This means in fact that the financing of the Community is not dependent on national contributions voted by national Parliaments. A refusal by a Member State to pay according to the rules of the own-resources system would constitute a breach of an international treaty and there would be no doubt how the Court of Justice would rule in such a case. The Community does not work under the threat of individual Member States withholding financial resources unless they are accommodated in one way or another. The contrast to the financing of traditional international institutions is very clear, indeed.

Secondly, the financing of the Community is not linked to the economic clout of the Member States, for example as measured by gross domestic product, but reflects the two corner stones of the Community, that is the customs union and the common agricultural policy. Also in this respect the Community breaks with the financing system of traditional international institutions.

These two factors are the basis for the own resources system, which is one of the most significant elements of the Community structure. The first factor means that the Community has access to financial resources from the time they are collected in Member States. This is why they are 'own resources'. The second factor underlines that we are dealing with a Community with 10 Member States and not a loose international cooperation encompassing 10 national States.

## 3. The Community's budgetary procedure

### *a. Different types of appropriations*

The Treaty distinguishes between obligatory and non-obligatory spending. Obligatory spending is expenditure which necessarily results from the Treaty or from acts adopted in accordance therewith. Typical examples are appropriations for the EAGGF and agreements with third countries. Non-obligatory spending is expenditure which does not necessarily result from the Treaty or from acts adopted in accordance therewith. Typical examples are appropriations for the Regional and Social Funds.

The distinction between the two types of spending is of paramount importance for the budgetary procedure and the distribution of powers among the three institutions that constitute the budget authority.

The Commission has the right of initiative in this as in other areas.

The Council has the final decision with regard to the size and composition of obligatory expenditure. This is logical. It is the Council which adopts the legal acts which constitute the basis for expenditure. Accordingly, it must be up to the Council to decide the amount necessary to carry out the obligations which follow from these legal acts. It is in accordance with the fact that Parliament does not have any legislative power that the powers of Parliament concerning obligatory spending are very limited. Had Parliament been given powers with regard to obligatory spending, it would have been

possible for Parliament to obtain legislative powers via the budgetary system. By reducing or increasing obligatory spending Parliament would have forced the Council either to change the legal acts or to face a situation where the Community could not fulfil its legal commitments. This case is one example demonstrating that the distribution of powers among institutions in the Community system, as well as the structure of the common policies and their financing, is far more coherent and well thought out than most people think when they first meet the very complicated Community system.

With Budget Treaty II of 1975 Parliament got influence on the size and composition of non-obligatory spending. Parliament has the final word with regard to size as well as composition, provided that the rules for application of the maximum rate of increase are respected.

As non-obligatory spending does not result from the Treaty or legal acts it is up to the Community institutions to fix the amount for the common activities according to political priority. There are no legally-binding commitments. The exclusive power of the Council in the legislative process does not prevent Parliament from influencing the size of appropriations for headings in the budget which are classified as non-obligatory spending.

There is a gap in the Treaty in the sense that it does not specify which appropriations are obligatory and which are non-obligatory. For a good many years this question was not raised during the annual budgetary procedure. The existing classification was taken for granted by all three institutions. This peaceful situation was broken in the autumn of 1981 when Parliament unilaterally changed the classification of some items in the budget and unilaterally decided to classify certain new items as non-obligatory spending. This was a matter of principle for the Council and as a political solution was not reached the Council took Parliament to the Court of Justice.

During the spring of 1982 a political settlement was worked out and was signed on 30 June 1982 by the Presidents of the three institutions. This common declaration contained several new elements but the most important one for the classification question is that it lists the disputed items and maps out a procedure to be followed in case of disagreement in the future. The common declaration did not prevent Parliament from unilaterally breaking the agreement with the Council in the second half of 1983 concerning the classification of amounts to be paid out to the UK.

Parliament has for a long time wished to change the Treaty, exactly on the point of distinction between obligatory and non-obligatory spending. This is, indeed, one of the major points of the Draft Treaty establishing the European Union, which we will take up later.

## *b. Existing powers of the three institutions*

According to the Treaty, there is a clear-cut distribution of powers among the three institutions that constitute the budget authority.

The Commission forwards a preliminary draft budget and takes part in the Council's deliberations and the meetings in Parliament and Parliament's budgetary committee. The role of the Commission in the budgetary procedure is thus very much like the Commission's general role as the initiator and the guardian of the Treaty.

The Council decides on the draft budget which is forwarded to Parliament. Legally this takes the form of a Council decision. It is the Council which has the final word with regard to obligatory spending, while the fixing of non-obligatory spending partly falls under the competence of Parliament.

It is the President of Parliament who declares that the budget has been finally adopted.

If important reasons warrant it, Parliament may reject the draft budget and request that a new draft be submitted to it.

Furthermore, Parliament has the final word with regard to the composition of non-obligatory spending.

The Treaty implicates a sort of ping-pong between Council and Parliament. Council forwards a draft budget before a deadline. Parliament makes amendments (non-obligatory spending) and proposes modifications (obligatory spending) within 45 days, and it is up to the Council to act on these proposals. When Council has decided on the proposed modifications the budgetary procedure for obligatory spending has been completed. With regard to amendments the Council's decisions are communicated to Parliament, which completes the budgetary procedure by finally deciding on non-obligatory spending at its December session.

By and large, this procedure has served the Community well and is a good example of how to distribute powers among various institutions with the aim of establishing an interplay leading up to a final decision backed by the consent of all involved.

This, however, supposes that all the institutions play by the rules. There are two snags in this assumption.

Firstly, the rules do not always cover the whole spectrum of possible problems, and even if they do the institutions do not always reach the same interpretation.

A typical example of this is that the Treaty contains only a general classification of obligatory versus non-obligatory spending. If and when a difference of opinions arises, it places the institutions in the dilemma of either having to negotiate a common interpretation of the said question or to take the matter to the Court of Justice, on the allegation that one of the institutions has acted illegally. Experience shows that Parliament has found it quite attractive to try to find out just how far it can go before the Council finds that a major shift in powers is taking place. This is a highly political game with the Council trying to defend its prerogatives without really knowing where to put down its foot and how firmly to defend its position.

Since 1975 Parliament has definitely gained much greater influence on the budgetary procedure by gradually pushing the interpretation of the Treaty in the direction wished by Parliament. The aim has generally been to make room for a steeper increase in non-obligatory spending than Council has voted.

Secondly, the budgetary procedure, as laid down in the Treaty, is of a legal nature.

This procedure, however, does not preclude the institutions from circumventing the Treaty and fixing an important part of the budget by a mutual agreement. Such a procedure means that political considerations replace the strictly legal procedure. As long as all three institutions are agreed that this can be done, it is possible to do it. Who shall take the matter to the Court of Justice with the allegation that one of the other institutions has acted illegally if there is political agreement between the three institutions?

It is in this respect that recent years have shown the biggest slide in the budgetary procedure compared with the strict rules in the Treaty.

The first and most spectacular example is what has happened to the maximum rate of increase. The Treaty clearly specifies how to apply a complex set of rules to respect this rate, but adds that another rate may be fixed by agreement between Council and Parliament.

Reading the Treaty, no-one can have any doubt that the possibility of fixing another rate is some sort of escape clause to be used when special circumstances make it appropriate. Otherwise, there would

be no reason for having the complex set of rules when this special paragraph could be replaced by one sentence saying that the size of non-obligatory spending is fixed by Council and Parliament by agreement. This interpretation notwithstanding, Parliament has forced a level of non-obligatory spending which surpasses the maximum rate of increase for practically all Community budgets since the late 1970s.

The driving force behind this has been the demand put forward by Parliament that there is a political need in the Community for a higher level of spending. This may be right or wrong, but it underlines the point that gradually the procedure in the Treaty is being replaced by political considerations.

This became crystal clear in the second half of 1983 when the draft budget for 1984 was being discussed. Parliament unilaterally rejected an earlier agreement between Council and Parliament concerning classification of the amounts to be paid out to the UK. Furthermore, Parliament put forward, not as a suggestion but as a claim, that agricultural spending should be reduced by a considerable amount.

What was alarming about this claim was not that it was made but that it was not made according to the rules of the Treaty. According to the Treaty, Parliament should have put forward a modification to reduce agricultural spending. This modification would have been approved unless rejected by Council by a qualified majority. After the Council decision during the Council's second reading in the middle of November 1983, the budgetary procedure for agricultural expenditure would have been finished as at this point we are dealing with obligatory expenditure.

Instead, Parliament put forward its claim at a special meeting between Council and Parliament, called during Parliament's final session in the middle of December 1983. Parliament did recognize that the budgetary procedure for agricultural spending had been finished, but supported its claim by pleading the important political considerations.

Fortunately for the respect of the Treaty, Council did not budge but chose in this case to stand firm and tell Parliament that its claim could not be met as the budgetary procedure for agricultural spending had been completed a month before.

## *c. Conclusion*

The danger of the present budgetary procedure is not that there are certain gaps where different interpretations can be put forward, but that one institution, Parliament, is fundamentally dissatisfied with the whole structure of the budgetary procedure.

Parliament is of the opinion that the strict budgetary procedure, as laid down in the Treaty, should be replaced by a continuous, political negotiation from start to end of the budgetary procedure. As it is the President of Parliament who declares the budget finally adopted, it gives Parliament the upper hand in the sense that unless Parliament is satisfied a legally-adopted budget will not be available from the beginning of the budget year.

The Council has resisted this attempt not only because it would greatly increase Parliament's influence on the budget but also because Council cannot renounce — not even implicitly — the Treaty. Such an action would create a precedent in other areas.

It is open to interpretation which line the newly-elected Parliament will follow but most indications are that it will continue the road taken by the former Parliament. If that happens, Council will, in a few years, perhaps sooner, come to a crossroads where it must make the political decision between either facing up to Parliament and maintaining its prerogatives as laid down in the Treaty or giving in to Parliament and accepting a fundamental change in the distribution of powers concerning the budgetary procedure.

# 4. The Community's present budgetary problems

## *a. Own resources*

It became clear at the end of the 1970s that the own resources, as defined in the Decision of April 1970, would not be sufficient to finance the Community in the future. Continuation of present policies would not be possible as customs duties and agricultural import levies would tend to level off, leaving the VAT revenue as the only buoyant element. It is a well-known fact that the expenditure level for the common agricultural policy is highly volatile and a steep increase for a year or two would threaten to break through the VAT ceiling.

It would be even more difficult to launch and implement new common policies. At the beginning of the 1980s an increase of the VAT revenue for the Community of 0.1% puts approximately 1 000 million ECU at the disposal of the Community. This amount is far from what would be necessary for a broad range of new common policies.

In political terms, it was perhaps more important that the enlargement with Spain and Portugal would be impossible unless the financial resources at the disposal of the Community were increased. If the VAT ceiling was maintained, it would mean that Spain and Portugal were to join quite another Community than the one they had wanted to be members of. Such a political venture was simply not feasible.

For 1982 the own resources were fully exhausted.

For 1983 the Community actually used more than was at its disposal under the own-resources system. The call-up percentage of VAT was fixed at 0.99, but expenditures equal to 675 million ECU under the common agricultural policy were carried over to 1984.

For 1984, the Commission estimates a shortfall of revenue amounting to approximately 2 000 million ECU. The Commission has asked for this amount to be placed at the disposal of the Community by advanced payments of VAT revenue from the Member States.

For 1985, the preliminary draft budget of the Commission envisages a shortfall of approximately 1 900 million ECU.

The Commission intends to solve this problem by letting the increase of the VAT ceiling to 1.4% take effect from 1 October 1985, which will make it possible to operate with a call-up percentage of VAT for the whole of 1985 of 1.12%.

It took several years and was very difficult to agree on an increase of the VAT ceiling from 1% to 1.4%. This compromise, however, must not obscure the fact that this increase will hardly be sufficient to tide the Community over until the end of the 1980s.

If we start on the assumption that the preliminary draft for 1985 is based on correct data, the Community will sail into the new era of increased VAT resources with a VAT percentage of 1.12. Add to this an estimate of 0.2% which will be needed to finance the enlargement, and the astonishing fact is that a new and further increase will impose itself. The European Council has partly foreseen this, which is why a further increase to 1.6% taking effect in 1988 is mentioned as a possibility.

The unavoidable and disheartening conclusion is that the Community may be able to finance itself until 1990 on the basis of a VAT percentage of 1.4 or 1.6 but only on the condition that the structure of the common activities is frozen in its present shape.

We will thus see six years from now a Community with one predominant common policy giving rise to expenditure, namely the common agricultural policy, and the balance of the financial resources used mainly to finance the enlargement. No new common policies giving rise to expenditure will

have been launched and implemented and the Community system will be just as unbalanced as it has been for the last 5 to 10 years.

It is remarkable that this has not really been understood when the financial problems were negotiated. Only a few countries supported a VAT increase to between 1.56% and 2%. Most Member States were quite happy that the VAT increase was limited to 1.4%. Among them were the UK and the Federal Republic of Germany, which have for years advocated a better balance between the Community's common policies. But when the Community came to the crossroads they were not willing to place the financial resources necessary to implement such a policy at the disposal of the Community.

## *b. Budgetary discipline*

A new concept has been born during the recent negotiations on the Community's future financing: budgetary discipline.

Until the meeting of the European Council in June 1983, budgetary discipline was a concept which was hardly known in Community circles, but after that juncture it has risen in importance with every meeting of the European Council.

The main idea of budgetary discipline is to define a financial framework for total Community expenditure. Before each budgetary year it is decided how much total expenditure is allowed to increase and the budget must be drawn up with respect of that ceiling.

During the first half of 1984 this approach was further refined, in the sense that a separate ceiling for agricultural expenditure and for non-obligatory expenditure was worked out. For agricultural expenditure, the idea is that the annual increase shall be lower than the growth rate of the own resources. Both figures are to be calculated on a base covering three years. Furthermore, account has to be taken of special circumstances, in particular following from the enlargement. This phrase means that the general rule is not to be applied in a strict sense but may be abrogated if and when it is deemed necessary.

It was primarily the UK, supported by the Netherlands and the Federal Republic of Germany, which managed to get approval of this idea.

For non-obligatory spending, agreement was reached that the maximum rate of increase should not be surpassed for the coming budgets. To respect this aim the Member States took it upon themselves to decide on a draft budget inside half of the maximum rate, which leaves the other half at the disposal of Parliament.

It is not difficult to see the political aim of budgetary discipline, but it is, indeed, a strange animal in the Community zoo. It is without any foundation in the Treaty or the *acquis communautaire.*

Firstly, it is doubtful, to put it mildly, whether budgetary discipline as agreed upon by the Council is in conformity with the Treaty. It may be said that the Council is free to impose upon itself any sort of discipline but this can hardly be right when the rules infringe the powers of other institutions or run counter to the Treaty.

Secondly, the idea of fixing a framework for total expenditure before the budgetary procedure is not foreseen in the Treaty and may, indeed, be said to limit the Commission's right of initiative. What is left of this right if the Council has announced beforehand that whatever the Commission puts forward and whichever arguments are used to support it, the Council has already decided what to do?

The interplay between the institutions is more or less violated in the sense that the Council has decided not to use paragraph 9 of Article 203, which foresees the possibility of fixing a new and higher maximum rate of increase. What is the purpose of having this paragraph in the Treaty if one of the

institutions decides that it cannot be used? Parliament can rightly say that the finely-tuned budgetary procedure has unilaterally been set aside by the Council, in the sense that the end result with regard to total expenditure as well as its distribution on obligatory and non-obligatory appropriations has been decided in advance by the Council.

The ceiling for agricultural expenditure may be said to question the contents of what is called obligatory expenditure. Hitherto, obligatory expenditure has been fixed at the amount which followed automatically from legal acts adopted by the Council. The amount of obligatory expenditure was, as it were, determined by the contents of the legal acts and not to be fixed at an arbitrary level by the Council.

If the ceiling is to be respected, the Council has only two possibilities. The first one is to make arbitrary cuts in agricultural spending so that the budgetary ceiling replaces the legal acts as the decisive vehicle for the size of agricultural spending. This would mean that the concept of obligatory spending was *de facto* removed from the vocabulary of the Community. The second one is to tell the Agricultural Ministers that they must shape a common agricultural policy for which expenditure does not surpass the ceiling. This is, of course, feasible, at least in theory, but it means that the policy-making of the Community is moved from one Council (Agriculture) to another (Budget). Furthermore, an interesting clash would occur in case the Agricultural Ministers are not inclined to follow the directives imposed upon them by the European Council and implemented by the Budget Ministers.

The decision not to surpass the maximum rate of increase is of course perfectly legal, but it is questionable whether it remains so if the other branch of the budget authority — Parliament — does not agree.

Under this rule, non-obligatory spending would grow at a very modest rate indeed, when measured in real terms. It is very difficult to see how the Community could take up new common policies if the growth rate of expenditure for this purpose is limited to 7% or 8%. The consequence of this policy is thus that the Community is frozen in its present shape, with the inevitable result that all problems associated with the Community's future financing will still be there at the end of the 1980s.

It is often said that as Member States are taking a very rigorous attitude towards the expenditure side of national budgets, the same should be the case where the Community budget is concerned. This attitude, which is comprehensible, is based on a wrong philosophy concerning the role of the Community and the division of responsibility between, on the one hand, the nation State and, on the other hand, the Community.

The European nation States have in the past implemented common policies over a broad range. It is only natural that these policies are being scrutinized and that expenditure often is being trimmed. From time to time existing policies have to be adapted to new circumstances and at present nearly all Member States face the unpleasant fact that public expenditure has out-grown what the economic base can sustain.

But this is not the case for the Community. The Community has only one common policy which gives rise to expenditure, namely the common agricultural policy. For this policy exactly the same scrutiny as the one applied by the nation State has been carried out to make savings. A lot of measures have been adopted to this effect. In no other area has a common policy worthy of the name been implemented. A restrictive line towards expenditure means that no common policies are being shaped. It means that the distribution of responsibility between the nation State and the Community is being left to its present status.

It is strange indeed that no serious attempt has been made to allocate certain tasks to the Community and abandon the same tasks at a national level. Such a procedure would mean that the responsibility and expenditure would be transferred from national level to Community level. Total expenditure in Europe would not rise because national expenditure would go down and Community expenditure would accordingly go up. If policies are picked with an eye to what is suited for international co-

operation it may even be cheaper for everybody concerned to let the Community do the job instead of having 10 individual nation States trying to do it at the same time!

The much-heralded concept of budgetary discipline may well turn out to be a snake in the Community paradise. Institutionally, it may trigger off a major confrontation between the different branches of the budget authority. Legally, it is doubtful whether it is in conformity with the Treaty. It may jeopardize the common agricultural policy and at the same time bar the way for other, new common policies.

## *c. Budgetary imbalance*

The most difficult point during the accession negotiations in 1970 and 1971 was the UK contribution to the Community budget. When this problem was solved it was clear that the negotiations would be successfully concluded.

United Kingdom calculations at that time pointed towards a financial burden for the UK, but it was rightly stressed by the other Member States that the calculations were based upon the assumption of a static Community. If the UK took the lead in developing the Community outside the agricultural sphere it would change the pattern of financial flows between Member States.

It is interesting to note that the UK criticism has not been static but has developed over the years. It started as a dissatisfaction with the receipts side of the budget, that is the own-resources system. The UK Government took the view that as the UK's share of imports from non-member countries was above the Community average, the UK would pay in customs duties and agricultural import levies in excess of what a GDP key would have led to. Apparently it did not make any difference that this is exactly how the own-resources system is supposed to work because of the Community preference. This approach led to the adoption of the corrective mechanism,[4] which was agreed in principle at the European Council meeting in Dublin in 1975.

A few years later the UK Government evoked once more the budgetary problem but now it was presented in the sense that the so-called UK net contribution was grossly out of line with the UK's relative standard of living. In conceptual terms, this change of approach signified that from focusing on the receipts side only the UK Government now also brought the expenditure side into the picture.

For the last five years the concept of net contribution has dominated the Community's agenda and played a major role in the Community's life.

This is regrettable — for several reasons.

Firstly, the UK's net contribution amounts to between 0.3% and 0.4% of the UK's gross domestic product. The Community as such has paid a heavy price for trying to solve a problem which cannot be said to be of importance either for the Community itself or for the UK. This point leaves aside the fact that the whole basis of calculation of net contribution is subject to criticism.[5]

Secondly, nothing in the Treaty or the *acquis communautaire* warrants the concept of net contribution. On the receipts side the own-resources system lays down that the geographical place for collecting revenue is of no importance and that there should be no link between what is paid in from a Member State and its share of Community GDP. In fact, it can be said that there is no such thing as Member States' payments to the Community budget because what Member States pay in belongs to the Community as such and the Member State is only acting as a collector.

---

[4] Council Regulation (EEC) No 1172/76 of 17.5.1976 setting up a financial mechanism: OJ L 131, 20.5.1976.
[5] See Møller, *Member States and the Community Budget*, 1982.

On the expenditure side, we distinguish between two types of appropriations in the budget. The common agricultural policy is based upon the principle that the geographical place for payments is irrelevant. It should amount to the same for the individual farmer whether he receives restitutions, sells to intervention or sells his products on the market. Thus the fact that a farmer in one country receives restitutions makes it possible for a farmer in another country to sell on the market at the going price. This is why we speak of a common policy and not of 10 individual policies which are coordinated. For the structural funds exactly the opposite applies. Here we have, at least implicitly, a geographical key to ensure that the Community assists less-developed regions in their endeavours to obtain economic growth.

This analysis shows why it makes no sense to operate with the concept of net contribution. The receipts side of the budget and the expenditure following from the common agricultural policy explicitly reject a geographical key. For the structural funds a geographical key has already been implemented. The concept of net contribution is thus a mixture of receipts and payments — mutually incompatible — based on a philosophy which is in contradiction to the very principles of the Community system.[6]

Parliament has adopted a line which has very much in common with the above analysis, which has also been stated, at least partly and in softer terms, by nearly all other Member States except the UK.

In the second half of 1983 and the beginning of 1984 an attempt was made to solve the UK budget problem by focusing exclusively on the payment side of the Community budget. The philosophy behind this approach was that the UK budget problem had arisen because of the imbalance between common policies and the resulting financial flows between Member States. A glance at the expenditure to Member States measured in percentage of their GDP shows that the UK receives a share far below the Community average. (For 1982 total expenditure amounted to 0.75% of Community GDP while payments to the UK amounted to 0.49% of the UK's GDP.) If the imbalance were corrected, it would mean that the UK's share would approach the Community average and there would be no UK budget problem. In the meantime, the Community should take upon itself to alleviate the UK problem by partly compensating the expenditure shortfall.[7]

At the European Council meeting at Fontainebleau a mechanism was approved that does not totally follow this philosophy but at least has certain resemblances. However, the fact that the Community at the same time decided to implement a budgetary discipline will mean that in four or five years' time the present imbalance between common policies will still exist and the UK's budget problem will return to the negotiating table. The weak link in the chain is that the Community did not decide to establish new common policies and to regard the mechanism to solve the UK's problem as a transitional mechanism. Instead, it must be feared that the mechanism is here to stay and that new common policies will never be permitted to take off.

## *d. Different philosophies towards the Community's financing*

What to the general public appears as a budgetary or financial question is thus a question of which philosophy to apply for the future development of the Community. The main battle is about approach and not about money, even if the two things in the long run are intertwined.

One approach — the pure one — gives full priority to the contents of the Community system, that is the common policies, and the budget is allocated a role very much in the background. What matters

[6] 'Financing the European Economic Community' Møller, *National Westminster Bank Quarterly Review*, November 1983.
[7] Proposal submitted by the Danish Government in August 1983.

are the legal acts and the substantial decisions taken by the Council. The budget is merely a book-keeping account which reflects these decisions but does not have any impact on policy. If expenditure is rising too fast or if a budgetary imbalance arises the problem is not a budgetary or financial one, but a question of whether or not the Community system works as intended. The budget is the instrument which sets off the alarm but any correction has to be taken via a change or an adaption of the existing legal acts. The budget has no role in policy-making.

The own resources should be expanded considerably. The increase of the VAT ceiling to 1.4% and possibly a further increase to 1.6% is regarded as totally insufficient. There must be enough financial manœuvring room to permit the development of new common policies while at the same time the existing common policies are continued *grosso modo* in their present shape. The role of the own-resources system is to provide financing of the common policies adopted by the Council. In principle, no financial ceiling should be applied as this will implicitly act as a brake on efforts to further the integration process.

Budgetary discipline as worked out during the first half of 1984 is a sort of anathema to this approach. For obligatory spending expenditure follows what is necessary to implement the common policies. For non-obligatory spending, appropriations necessary to launch and implement new common policies should be approved. This does not mean that the Community should spend without taking into account the harsher financial climate, but that a financial strait-jacket is totally out of order.

An analogy to national policies is rejected on the basis that a Community in an embryonic phase must necessarily face a rapid increase in spending as common policies are gradually accelerating. The concept of net contribution does not belong in this context. The own-resources system works as designed and the expenditure side of the budget may be changed if there is a need for it but, if so, it must be done by way of the common policies and not by intervention in the budget itself.

The other approach — the budgetary one — looks at the Community system from the opposite side of the spectrum.

The budget must work inside a rigorous financial framework and produce equitable financial results for each Member State. If something is wrong with the budget it should be remedied at once by direct changes in the budgetary and financial mechanisms. If such steps are incompatible with the existing common policies and the legal acts adopted by the Council, these have to be changed to produce the necessary budgetary and financial results. First priority is thus given to the budget and all the rest has to follow as best it can. It does not really matter what we do or what we do not do in conformity or not with the Community system as long as the budgetary results are satisfactory.

The analytic base for the Community system and its budget is approximately the same as for a grocer's shop. Expenditure must not exceed revenue and if it does happen expenditure has to be cut to fit the revenue available. A higher VAT ceiling can only be contemplated when a rigorous savings policy has not brought down expenditure to the level of revenue.

Budgetary discipline has been consecrated in this approach. If only the Community can bring its expenditure into line all will be well. It does not matter that the common agricultural policy is jeopardized and that the integration process is being brought to an abrupt stop.

In this approach there is a strict analogy to the nation State. When the individual Member State has to save the Community must also save. The effect of this, namely, that an existing national policy is being trimmed while the common policy of the Community is being killed before it even gets off the ground, is not being discussed.

Budgetary imbalance is another key word in this approach. The budget must show an equitable burden-sharing (the word 'profit-sharing' would be far better, as the Community is producing a surplus). Failing that, the budgetary system, including the own-resources system, should be changed. This should not be done by adapting the common policies to bring about a better balance but by way of direct changes in the budgetary system as such.

This underlines the difference in conceptual terms between those who have talked about a better balance between common policies and those who have used the term a better budgetary balance. This may sound like a question of semantics but is not at all so. It is a question of how you approach the very principles of the Community system and which role to assign to the budget.

Until 1980, the first approach (the pure approach) was the only one in the Community. There was no talk about budgetary discipline or budgetary imbalance and the concept of net contribution was never heard of.

The founding fathers of the Community had with great skill drawn up a Community which was logical in the sense that the substantial decisions taken by the Council were the determining factor and the budget did not play any role as such in policy-making. The reason for this is not difficult to comprehend. It was the only way to further the integration process where new common policies could continuously be launched and implemented. In this conceptual framework the driving force is new decisions and the financing is being provided by the Member States without questioning the growth rate of expenditure or the financial result for each individual Member State.

The founding fathers realized that a Community where the financial aspect is predominant would stop the integration process. Member States would try to save money (either to reduce total spending or to use the amount at national level) and Member States would only support the common policy if the difference between receipts and payments was positive.

This prediction of what one or the other of the two approaches would mean for the European integration process has indeed been borne out by experience during the last 5 to 10 years.

Around 1980, the picture changed, in the sense that the pure approach was no longer the only approach. One Member State, with more or less firm support from one or two other Member States, introduced the budgetary approach.

The heart of the matter of the negotiations on the Community's future financing for the last five years has been whether the pure approach should continue to be the predominant one or whether it should be replaced by the budgetary approach. This has been difficult to realize because tangible factors such as financial flows and money have been in the forefront of the picture. However, digging a little deeper we see clearly that the money question has only been a skirmish while the main battle concerning the conceptual basis for the Community has raged in the background.

The solution reached by the European Council at Fontainebleau in June 1984 may be said to safeguard the essential elements of the pure approach, while at the same time accommodating important elements of the budgetary approach. It is thus a political compromise, and as such it will undoubtedly place the Community in a difficult situation when necessary decisions are to be taken in the years ahead.

The battle has not been won by any party but a cease-fire has been concluded in the hope that the problems will diminish as the Community develops further. That is a pious hope and it remains to be seen whether it will be fulfilled.

## *e. The position of the European Parliament*

The European Parliament has for many years supported the European integration process. Indeed, it can be said that up to the mid-1970s Parliament put forward many ideas for new common policies. After that period, however, Parliament's attention has gradually focused more on institutional questions than on the contents of the Community system. Parliament has devoted more and more time to obtaining increased powers and more influence on the decision-making procedure, with the inevitable result that less time has been available for dealing with the common policies.

With regard to the budgetary question, Parliament has always defended what we termed the pure approach in the analysis under point 3 above. Not only has Parliament been a steadfast supporter of the Community system, but it has maintained its procedure concerning the budgetary system and its role even in a period where several Member States have been willing to consider important changes. On many occasions Parliament has pointed out the pitfalls and weaknesses in the special arrangements agreed in the Council as temporary solutions to the UK's budget problem. Parliament has called for a permanent solution in conformity with the principles of the Community system and within the framework of the existing own-resources system. With regard to own resources Parliament has taken the view that the existing 1% VAT ceiling is totally insufficient to finance the Community. Parliament has asked for abandonment of the ceiling, or at least introduction of a more flexible procedure to lift the ceiling if and when the need arises.

Parliament has been heavily criticized for being a spendthrift and it is correct to say that the word budgetary discipline does not play a predominant role in Parliament's vocabulary. This is, however, not surprising in view of Parliament's general philosophy regarding the Community system. Parliament's position is also more nuanced. Parliament has tried to impose savings in the common agricultural policy on the Council, without much success. Nor has the attempt to increase non-obligatory spending been successful, as the Council has not provided the necessary legal basis for new common policies.

The UK budget problem, or rather the term budgetary imbalance, has been regarded by Parliament as a result of the imbalance in the Community system and not as a strictly budgetary or financial problem. Parliament's views on the philosophy behind the Community system and the role of the budgetary system are thus logical and correspond closely to the approach which dominated the Community scene until 1980.

Parliament is the only institution which has been able to define and maintain a coherent view on the problem of the future financing of the Community. The Council has been under constant pressure from one Member State with more or less support from a few others. The Commission has found it difficult to map out the narrow road between Scylla and Charybdis. On the one hand, the Commission has by instinct defended the pure approach. On the other hand, the pressure for a political solution has pushed the Commission towards the budgetary approach.

## 5. Summary of part five – the finances of the Union (Articles 70-81)

Article 70 contains the general aims and provisions.

Article 71 concerns the revenue. The Union inherits the revenue system of the European Communities. This means that in the starting phase VAT will be the main revenue source. However, the Union may by an organic law create new and other revenue sources. Contrary to the present procedure such a step does not require ratification in Member States.

Article 72 deals with expenditure and lays down that expenditure shall finance the common policies adopted by the Union.

Article 73 proposes a system for financial equalization to alleviate excessive economic imbalance between the regions.

Article 74 puts forward a proposal to divide responsibility between the nation States and the Community. It also contains a provision for multiannual financial programmes which will provide the framework for revenue and expenditure in the years ahead.

Article 75 confirms that the budget must be in balance. It also defines the role of lending and borrowing.

Article 76 defines the budgetary procedure, which will be even more complicated than the already existing rules in Article 203 of the Treaty.

Article 77 deals with provisional twelfths in case the budget has not been approved at the beginning of the financial year.

Article 78 says that the budget is implemented by the Commission.

Article 79 deals with audit of the accounts.

Article 80 and Article 81 concern the account and discharge of the annual budget.

## 6. The main features of Parliament's proposal

### *a. General philosophy*

The starting point for the analysis of the provisions concerning the finances of the Union (Arts 70-81) is that Parliament does not wish to change the role of the budgetary system in the integration process.

Adoption of Parliament's proposal would mean that the budgetary system would play the same role as was assigned to the budgetary system in the Treaty of Rome and the *acquis communautaire* that developed in the period 1958-80. It is the legal acts adopted by the Union which determine the size of the expenditure and Member States are committed to put the necessary financial resources at the disposal of the Union. It is explicitly said that the revenue of the Union shall be utilized to guarantee the implementation of common actions undertaken by the Union.

Parliament turns a blind eye to recent ideas concerning budgetary discipline and budgetary imbalance. The role of the budget is to reflect what has been agreed upon by the decision-making institutions and the role of the financial system is to provide the necessary financial resources.

Once more Parliament turns out as the defender of the philosophy behind the Treaty of Rome and the approach designed to facilitate and further the integration process. This is not surprising when one recalls that Parliament was for many years the advocate of new common policies. With its Draft Treaty, Parliament has once more invoked the need for new common policies. The distribution of roles assigned to, on the one hand, the budget, and on the other, the contents of the Community system reflects this list of priorities.

### *b. National policies versus common policies*

An interesting feature of the Draft Treaty is that it takes on without any hesitation the distribution of responsibility between, on the one hand, national policies and, on the other, common policies. This is a task the present Community has evaded with great skill to the detriment of the Community system as well as the budgetary system. The Draft Treaty foresees that the Commission shall submit a report on the division between the Union and the Member States of the responsibility for implementing common actions and the financial burdens resulting therefrom.

The Community would be well served if this task is carried out properly. With regard to substance it would do away with the present mess where nobody knows which tasks are assigned to the Community (except for the common agricultural policy which, by the way, is gradually being renationalized by national subsidies) and which tasks are to remain at national level.

With regard to the budget, such a division of labour would provide a much better possibility for making the necessary financial resources available because it could be proved that the national treasuries would witness lower expenditure in the areas where common policies were launched. This is certainly a key feature in the Draft Treaty and it may be said without any reservations that the present Community or a future Community on the basis of the Draft Treaty — or another Treaty — will only be viable if Member States muster the political will to grasp the magnitude of this problem and find the necessary answers.

On top of the common agricultural policy, which should certainly continue to be a common policy, we would like to bring forward a few ideas of our own where the efforts wholly or partly could be transferred from national to Community level.

Industrial policy is a prime example. Not only could the Community pursue and increase efforts to improve the internal market but a common policy designed to promote industry in the entire European geographical sphere could be mapped out. In many circles it is feared that this would be a costly venture where the Community would take over lame-duck industries and run up the cost associated herewith. This is far from certain. The Community could be more selective. It could condition financial assistance on an equitable effort by private industry. It could provide equity capital instead of, or as a supplement to, loan capital. The Esprit programme is an example of how this could be done in a way that is agreeable, and hopefully profitable, to the Community, to the nation State and to private industry.

Research and technology also come to mind. In the United States or Japan there are not 10 Member States competing with each other in the same area. Europe should concentrate its research on common policies and common programmes. We should learn from the United States that only where research is linked to private industry do we get the necessary new technology. The task for Europe would then be to pool research and technology expenditure in sectors associated with the new technology and to provide the necessary framework for a fruitful cooperation between research institutes and private industry.

In the same breath, Europe should build the necessary infrastructure to transfer knowledge, not only inside each individual nation State but also to the 10 Member States. Such an infrastructure could do two things for Europe. Firstly, it could launch Europe into the era of the information society by providing the necessary tool. Secondly, it would offer a springboard for European industry into this new era as a producer and a consumer. Let us not forget that the Roman Empire was based upon transport of people. The British Empire which emerged during the industrial revolution was based upon transport of goods. In the coming age it is transport of knowledge which will be decisive, and if Europe does not master this we shall not be able to compete on an equal footing with the USA and Japan.

These are only a few examples of what can and should be done at the Community level. It illustrates the fact that the starting point in the Draft Treaty, namely national level versus Community level, is the right one. It also shows clearly that even if something, perhaps a lot, can be done without giving rise to expenditure, Europe will never be able to weather the point unless all Member States show a much clearer commitment to increase the financial resources of the Community. It is also clear that such an attitude will only emerge if the Community and the Community institutions are able to demonstrate for which purposes they need the money and that the money will be spent in an efficient way for worthwhile projects covered by common policies.

## c. Revenue

It is explicitly said in Article 71 that when the Draft Treaty enters into force the revenue of the Union shall be of the same kind as that of the European Communities. The Union inherits the revenue system from the European Communities. However, the Union may, by an organic law, amend the nature or the basis of assessment of existing sources of revenue or create new ones. Until that time, the revenue sources of the Union are thus customs duties, agricultural import levies and VAT. As the only buoyant element is VAT we will limit our analysis to that particular element.

The Draft Treaty rejects the present system, according to which an upper limit for the call-up percentage of VAT is determined in the Treaty. The Union may call up the amount of revenue necessary to finance the common policies adopted by the Council. This is in conformity with the main philosophy advanced by the Parliament concerning which is the cart and which is the ox, the Community system or the budget.

This approach is brought out clearly in Article 74, par. 2, according to which a multiannual financial programme lays down the projected development in the revenue and expenditure of the Union. These forecasts shall be revised annually and be used as a basis for the preparation of the budget. Thus, the heart of the matter is that the multiannual programme sets forth an annual increase in expenditure which governs the annual increase in the call-up percentage of VAT.

As we shall see when we analyse the expenditure side, the distinction between obligatory and non-obligatory spending is rejected, and there is thus no limit either for the annual increase in expenditure, or for the revenue sources.

Institutionally, the procedure means that the Council's exclusive powers on the revenue side of the budget are rejected in the sense that it is the Union which determines common policies, expenditures and therefore also the total amount of revenue.

This is undoubtedly a major step. The Council has up to now vigorously defended its exclusive powers with regard to the revenue side of the budget. The Commission's proposals[8] to grant Parliament a say in increases of the VAT percentage above 1.4% were rejected with near-unanimity by the Council.

There has been no development in the last 6 to 12 months indicating that the Member States would take a more favourable attitude towards granting Parliament powers on the revenue side. There is no reason to hide that nearly all Member States find it a hideous idea to transfer some of their taxation powers to the European Parliament, regardless of the procedure it would involve.

It is just as clear that this is a corner-stone in the edifice proposed in the Draft Treaty. If the European Parliament does not receive powers with regard to Community revenue, it does not make much sense to increase its powers with regard to expenditure and common policies, because Council could block the use of such powers by limiting the available revenue.

The argument is often advanced that the European Parliament will never be a real parliament without powers to tax the European citizens. It is certainly correct that no parliament has ever manifested itself without taxation but there is not much prospect that Member States are willing to cross that bridge at the present juncture.

Another argument to support taxation powers for Parliament is that it would mean a more 'responsible' parliament taking a more restrictive attitude towards expenditure. This may be right or wrong but to our mind the argument is a little bit out of context. Either it is a good thing to increase expenditure for common policies or it is a bad thing. Whether or not it would help to bring about a change in the mood of the European Parliament seems to be slightly irrelevant.

---

[8] 'The future financing of the Community — Draft decision on new own resources'. Communication from the Commission to the Council, COM(83) 270 of 6.5.1983.

The virtues of basing the Community's finances on VAT are fairly clear. The VAT system is already working. The assessment base is well-known. It has been implemented in all Member States. It is buoyant. It introduces a certain element of progressivity on the revenue side of the budget. So far, so good.

It is, however, to be regretted that the occasion has not been used to float ideas for other sources of revenue. To do so is to invite criticism for being too fanciful. But to limit the Community's revenue to VAT will pose difficulties in two respects. Firstly, there is certainly a limit to the amount of VAT revenue which the Member States will forgo. Secondly, the crucial element in the financing system — the connection between common policies and revenue sources — is not being pursued.

It would have been a good idea if the European Parliament had put forward proposals for other sources of revenue which go at least some of the way towards meeting these preoccupations.

One possibility would have been to propose an energy levy, either in the form of a direct levy on energy consumption or an energy import levy. Both possibilities are feasible and both could be combined with important progress towards a common energy policy in the Community.

Another idea could be to focus on nation State aids in the Member States. According to Articles 92 and 93 of the Treaty of Rome, Member States are authorized by the Commission to use State aids when certain conditions are fulfilled. The Community could go a step further and use the nation State aids as a tax basis for Community revenue. The system could require Member States to pay a certain percentage, for example 10%, of authorized nation State aids into the Community budget. Such a system would certainly make it less attractive to operate a State aid system in Member States. It would serve as a Community instrument to promote a more efficient industrial basis in the whole Community while at the same time providing a handsome revenue for the Community.

The Draft Treaty does not rule out that the Community may need new and other revenue sources. It is stated explicitly in Article 71, par. 2, that the existing sources of revenue may be amended or that the Union may create new revenue sources. The provisions concerning revenue sources are therefore not totally static but dynamic in the sense that it is foreseen that the Community may not in the long run be viable with a financial framework confined to the present revenue sources. It is, however, doubtful whether it will be possible to introduce new revenue sources by means of an organic law. Indeed, it may be said to be highly unlikely that the Member States will give up the need for ratification which is presently required to create new revenue sources.

The Draft Treaty maintains the present system where the Member States collect the revenue. It is, however, foreseen that the Union may set up its own revenue-collecting authorities. In legal terms, this seems to be superfluous. In any case it can be taken for granted that the Member States will not be willing to establish such authorities.

## *d. Lending and borrowing*

According to the Treaty and the present financial regulations, the Community can borrow on the international capital markets and lend the amount for specific purposes defined in a legal act adopted by the Council.

There is no general provision for the Community to borrow and lend. It can only be done when the Council has so decided and specified the amount and the aims. The legal act adopted by the Council is the pivot of the operations while the presentation in the budget is only for book-keeping purposes.

The Draft Treaty changes this situation.

The Union may authorize the Commission to issue loans. The maximum amounts are defined in the annual budget. It is explicitly said that borrowed funds may only be used to finance investments.

These provisions are not totally clear and not totally in conformity with Article 75, which says that the adopted budget must be in balance. If we are dealing with a balanced budget, as is the case for the present Community budget, loans may clearly not be used to finance expenditures covered by the budget.

This problem could be solved if the Draft Treaty contained a provision for loan financing and opened the door for a budget where revenue would not equal expenditure but this is not the case.

Then we are more or less back to square one, in the sense that loan operations can only be used for specific purposes in accordance with a legal act. If that is the idea it is difficult to see why the Draft Treaty should contain provisions on loan operations. If it is not the case it should be more clearly explained which role is assigned to lending and borrowing.

It is an open question whether the proposed lending and borrowing differ from the task already performed by the European Investment Bank.

The provisions concerning lending and borrowing are thus among the weakest and most elusive in the Draft Treaty, which is a pity because a more important and a more clearly-defined role for lending and borrowing could definitely promote the integration process.

If, on the other hand, the idea is that loan financing is brought in when receipts do not equal expenditure to balance the budget, we are in fact operating with a system where the budget *ex definitione* is balanced. Whenever there is a shortfall of revenue, loan financing builds the gap. Loan financing may thus be said to be an automatic residual.

It would have been helpful if the Draft Treaty had been clear on this point, that is whether a balanced budget means that receipts defined as revenue sources equal expenditure or a balanced budget means that receipts, including loan operations, equal expenditure.

## *e. Expenditure*

Aside from doing away with the VAT ceiling the revenue side of the budget proposed in the Draft Treaty does not differ in principle from the present own-resources system. The same analogy of continuation cannot be said to exist for the expenditure side, which in several respects differs fundamentally from the present budgetary system.

Even if the general philosophy — common policies determine expenditure — is the same in the Draft Treaty as in the Treaty of Rome and *acquis communautaire,* several important changes are introduced in the Draft Treaty.

The first and most important one is that the Draft Treaty rejects the present distinction between obligatory and non-obligatory expenditure. All expenditure is treated on an equal footing with regard to annual increase and, as we shall see later, in the budgetary procedure. This change is in conformity with the change in the legislative procedure, which rejects the hitherto exclusive powers of the Council.

Analytically, it makes good sense to supplement the proposed legislative procedure with a budgetary procedure where all sorts of expenditure are subjected to the same rules and procedures. There is no reason to distinguish between obligatory and non-obligatory spending if and when the present Community system is replaced by a system where the legal basis for expenditure is of a quite different nature.

We must bear clearly in mind that the Draft Treaty foresees a Community system, a legislative procedure and a budgetary system which differ substantially and in principle from the present system. There will be no legal acts which automatically lay down the size of expenditure, as is the case for

obligatory spending under the present rules. There is no maximum rate of increase for non-obligatory expenditure, and the finely-tuned balance between Council and Parliament, which is brought about by the present system, is replaced by quite another balance of powers. The annual increase for total expenditure is determined in the framework of multiannual financial programmes.

This is clearly one of the cases where the Draft Treaty hopes that political wisdom will prevail because it is not foreseen what happens if such programmes cannot be agreed upon or if they give rise to expenditure out of proportion with realities or what Member States are willing to accept. It is said that the programmes shall be revised annually, but that is one of many provisions which in themselves are admirable but which at the same time open possibilities for confrontation between the institutions and the Member States.

The Draft Treaty contains a modest but very useful provision which the Community should have taken up long ago, namely to evaluate annually the effectiveness of the common policies in view of the costs associated therewith. There is no doubt that for too long a period expenditure has gone on rising in the Community without a thorough analysis of the common policies and the common actions to prove whether the money is spent for the designed purposes and, if so, it is spent in the right way.

A cost-benefit analysis would do the Community a lot of good. If the result were that some of the money was not well spent then the Community could make savings and by so doing prove that is is not acting as a blind man's buff.

If, on the other hand, the analysis proves that the money was well spent the Community would remove the suspicion that this is not so and be in a much better position to increase spending.

This provision in the Draft Treaty would be a very useful instrument when deciding on the division of responsibility between, on the one hand, the national level and, on the other, the Community level and it would go a long way towards providing the basis for the multiannual financial programmes (all assuming that the analysis is carried out in an efficient way and that failures are exposed and not stowed away).

## *f. Financial equalization*

It is specifically said in Article 73 that a system of financial equalization shall be introduced in order to alleviate excessive economic imbalances between the regions. It is, however, not said how such a system should work. The starting point for an analysis must be whether it should work on the revenue or on the expenditure side of the budget.

If the idea is to introduce a financial equalization system on the revenue side the effect would be a complete change in the own-resources system. We have seen in Chapter II that the own-resources system does not take relative welfare into account. If this were to be done to ensure that Member States with a GDP per capita below Community average should pay less than Member States with a GDP per capita above Community average a complete recast of the system would be called for. Of course, such a change could be implemented if the Member States were willing to do so. But it should not be obscured that it would mean a replacement of the own-resources system by quite another system.

In legal terms, the effect would be that revenue collected in the Member States is not the property of the Community from the moment of collection because it had to be subjected to a multiplication factor reflecting relative welfare. Or, in other words, the revenue had to pass through national treasuries in order to be reduced or increased by a multiplication factor and only after that process had been completed the amount would be transferred to the Community. Such a system is perfectly feasible, but only if the national treasuries were introduced as an accounting machine between, on the one hand, the citizens and the enterprises and, on the other, the Community.

This point is more clearly seen when keeping in mind that the same effect could be obtained by paying in VAT according to the present rules and introducing a special levy on Member States with a GDP per capita above Community average and a special subsidy on Member States with a GDP below Community average.

The effects for VAT as an 'own resource' have been analysed in a recent work by G. Isaac.[9] The conclusion is that a multiplication factor means that any idea of VAT as an 'own resource' (illusory or real) cannot be maintained. In this case the Community will operate with a *taux d'appel* and not a *taux d'imposition.* If it is doubtful whether the VAT in its present shape is an 'own resource' such doubts will not any longer persist if a multiplication factor is introduced.

It is doubtful whether such a system would bring about a real equalization. It would of course mean a transfer from rich to poor Member States but it would not necessarily mean a transfer of money from rich to poor citizens.

This point can be illustrated by an example. Denmark would pay a sum of money to Greece but to do so all Danish citizens would be taxed regardless of their income and all Greek citizens regardless of their income would witness an alleviation of their fiscal burden. The implication would be that a poor Danish citizen would be taxed in order to alleviate the fiscal burden of a rich Greek citizen.

This is really the heart of the matter because it would mean that we are moving away from the idea of a Community to a more traditional pattern of international cooperation where Member States are transferring money between each other. This can hardly be what the European Parliament wants.

To avoid this effect the equalization system would have to be introduced on the expenditure side. It would mean that schemes to support poor regions and poor citizens would be implemented. The Social Fund is already performing this task with more or less success. Similar schemes or funds could be set up. With the equalization system operating on the expenditure side of the budget we are back in the mainstream of Parliament's philosophy regarding the Community system and the role of the budget.

## *g. Budgetary procedure*

In the present budgetary procedure (Article 203 of the Treaty) we have the following distribution of powers between the institutions:

(i) The Commission proposes.

(ii) The Council decides on a draft budget which is forwarded to Parliament. The Council takes the final decision with regard to obligatory spending. During the institutional interplay with Parliament, Council has an important say with regard to non-obligatory spending. It may even be said that Council by way of the maximum rate of increase exclusively can define the framework for non-obligatory spending, but not its composition.

(iii) The President of Parliament finally approves the budget. Parliament may forward modifications on obligatory spending but has no direct powers in this area. With regard to non-obligatory spending Parliament has the final word but cannot surpass the maximum rate of increase without the consent of the Council.

It is thus the Council which has the upper hand in this institutional interplay.

The Draft Treaty proposed by the European Parliament constitutes a sweeping change.

---

[9] Isaac, *Quelles Ressources pour la Communauté Européenne?*, presented to CEDECE, Toulouse, 18-20.10.1984.

It is still the task of the Commission to forward a preliminary budget. The Council finds itself stripped of all powers to decide and is relegated to the institution which makes amendments to the Commission's proposal so that Parliament can decide. Parliament is the institution which, in the end, takes all decisions with regard to size as well as composition of the budget.

It is no overstatement to say that the budgetary procedure and the distribution of powers between the institutions have been completely turned around.

It becomes clear already in the first phrase which says that the Commission forwards the draft budget to the budget authority. According to Article 203 of the Treaty the preliminary draft budget is forwarded to the Council. Under the present rules it is the Council which establishes a draft budget by a Council decision and forwards it to Parliament.

This is not the case in Article 76 in the Draft Treaty. According to the proposed procedure, the Council may approve amendments and the amended budget is forwarded to Parliament. The implication of this is that unless Council agrees on an amendment the appropriations in the Commission's draft budget stand. Under the present rules there is no appropriation unless Council takes a decision with qualified majority.

It seems to be a minor point but may not prove to be so in practice that amendments according to the Draft Treaty shall be approved by simple majority. In a Community of 12 Member States, approval of amendments calls for the vote of seven Member States. Judging by experience in recent years, it is highly unlikely that seven Member States will agree on an amendment and the proposed procedure would thus mean that the large majority of the appropriations proposed by the Commission would stand.

The next step in the procedure is a first reading by Parliament. Parliament may amend by an absolute majority the amendments of the Council. Parliament may also on its own initiative approve other amendments by a simple majority. This brings out the general thrust of the proposal, which is to increase Parliament's powers.

The third step gives the Commission the possibility of opposing amendments approved by the Council or by the Parliament. If the Commission chooses to do so, the appropriations are referred back to the relevant institution, which will have to make a fresh decision, this time by a qualified majority.

The fourth step gives the Council the right to amend the amendments approved by the Parliament. This can only be done by a qualified majority defined in Article 23, par. 2 (b) as three-fifths of the weighted votes cast.

After having done so, the Council once more forwards the draft budget to Parliament, which at its second reading may reject amendments of the Council by a qualified majority.

This finishes the budgetary procedure and Parliament finally adopts the budget by an absolute majority.

It is clear that the Council can never decide finally on an appropriation or reject amendments proposed by Parliament. The Council can only make amendments either to the original draft forwarded by the Commission or to the amendments approved by Parliament. The only powers which are given to the Council are that by a qualified majority it can request the Commission to submit a new draft.

The proposed procedure is very complex, even Byzantine. It is difficult to see why and how such a procedure is proposed when the aim quite clearly is to transfer the decision-making powers from Council to Parliament.

It is difficult to see why the Draft Treaty in some cases proposes simple majority, in other cases qualified majority and in other cases again absolute majority. It makes good sense to use different voting procedures under the present rules because of the distinction between obligatory and non-obligatory spending and the finely-tuned balance between Council and Parliament. But it does not make much

sense under the system proposed in the Draft Treaty, which does away with the distinction between different types of expenditure and places the decision-making exclusively with Parliament. It looks as if the authors have wished to forward a procedure which at least bears some resemblances to Article 203 while not containing any of the important features of this article.

## 7. The implication for economic integration

In the last 30 years economic integration, among other things in the shape of economic and monetary union, has played a predominant role in the academic and political debate. Many scholars have tried to map out ways to facilitate and promote economic integration and many studies have been produced. As the European Community is the only genuine example of economic integration, it is only natural that many of the ideas have been put forward in the European debate and that many of the European experiences have served as basis for the academic debate.

In 1977 the Commission sponsored the MacDougall report[10] on the role of public finance in European integration. The MacDougall report is the main reference work to determine whether or not financial measures will promote the integration process.

It is both disappointing and regrettable that the provisions on finance in the Draft Treaty do not really make an attempt to take up the challenge of the MacDougall report to design a budgetary and financial system suited to promote economic integration.

In fact, the MacDougall report has pointed the way ahead in calculating the size of Community expenditure necessary for different stages of the integration process. It is said that in a pre-federal integration stage Community expenditure should rise to between 2% and 2.5% of total Community gross domestic product.

The next stage could be a federation, with expenditure running at 5-7% of GDP (2-3 percentage points higher if defence expenditure is included). At this stage, the European federation would encompass many common policies to increase productivity and living standards while at the same time alleviating regional differences.

In the final stage, total Community expenditure would amount to 20-25% of GDP or perhaps even higher, placing the European federation on an equal footing with the USA.

To our mind, the Draft Treaty would have stood a better chance if it had been based firmly on the solid theoretical background provided by the MacDougall report. This could have been done by incorporating in the Draft Treaty a gradual phasing-in of higher Community expenditure as replacement for expenditure at a national level. Changes in the expenditure as well as the revenue could have been planned at predetermined levels which would have given a clear picture of where the Community is going and how fast.

The MacDougall report analyses efforts to equalize income differences in existing federations. It comes to the conclusion that inter-regional differences have been reduced by up to 40%, even if federal expenditure amounts to a very small size measured in terms of GDP. The exact figure for the USA is federal expenditure amounting to between 2% or 3% of GDP to reduce inter-regional income differences by up to 40%.

Nor is it discussed or foreseen in the Draft Treaty whether we should use the Community budget to influence the business cycle. It is quite evident that this has not been the case in the past, because a

[10] Commission of the European Communities, *MacDougall report: The role of public finance in the European Communities*, 1977.

budget of less than 1% of total Community GDP will not have any tangible effect on the business cycle. This will, however, not be true if total expenditure rises, reaching, for example, between 3% and 5% of GDP, and the possibility for influencing the business cycle will grow as expenditure rises as a percentage of GDP.

It may or it may not be the intention of the authors to see the budget in such a role but the topic is not raised, either directly or indirectly.

The same applies to the distribution of responsibility between the private and the public sectors. In many Member States this question is in the forefront of the political debate and the question of which tasks should be fulfilled by the public sector and which tasks should be taken up by the private sector is giving rise to many reports of different nature.

As a more specific measure, loan transactions can be used to promote a real European capital market. If and when lending and borrowing is included in the financing of the Community's activities, the Community clearly forgoes a possibility to promote economic integration if the opportunity is not used for building a European capital market.

In the longer perspective there seems to be a gap in the analysis concerning the relationship between monetary policy and fiscal policy. If we are to establish an economic and monetary union in Europe we have to establish consistency between what is done by monetary policy and what is done by fiscal policy. There must, so to speak, be parallel progress. This is a point which has been elaborated by Allen and Kenen.[11]

They do not find a fiscal union absolutely necessary as a supplement to a monetary union, but it would certainly facilitate things a lot. The essential point is, however, that it is difficult to ensure consistency between monetary policy and fiscal policy if decisions are taken on different levels. In this respect the Draft Treaty poses a very serious problem, indeed. If total Community expenditure rises to a magnitude where it influences the business cycle and plays a role in the integration process, fiscal decisions would be taken on national as well as Community level. It is far from certain that the same would be the case for monetary policy. In any case, we would face an acute dilemma of economic-policy decisions in different areas being taken on different levels with the clear risk that incompatible decisions are taken.

The finance provisions cannot be said to promote the integration process, and the reader of the Draft Treaty is left with the impression that this aspect was not really taken into account when the finance provisions were drawn up.

# 8. Conclusion

Our general appreciation of the finance provisions in the Draft Treaty is that it is primarily the institutional aspect which interested the authors. The main goal has clearly been not only to increase Parliament's powers but to shift nearly all of the present powers invested in the Council to the Parliament. That may be good or bad according to political preference. Clearly the authors are of the opinion that it would be good but their case is not argued properly.

With regard to the specific provisions, many of the proposals appear to be very cumbersome in practice. This goes for example for the complicated budgetary procedure in Article 76.

There is a certain logic in the institutional system put forward and the role assigned to budgetary and financial questions. The transfer of legislative powers from the Council to the Union and the remo-

[11] Allen and Kenen, *Asset Markets, Exchange Rates and Economic Integration: A synthesis*, 1980.

val of the distinction between obligatory and non-obligatory spending is a case in point, but that also means that weaknesses in the legislative and decision-making areas will have repercussions for the budgetary and finance provisions.

The general philosophy is coherent and very closely follows the one which lies behind the Treaty of Rome, that is, the contents of the Community system determine the size and composition of the budget and the own-resources system provides the necessary financial means. It is, however, regrettable that the authors have focused so narrowly on the institutional aspect of the finance provisions that the possibility for shaping a budgetary and financial system in harmony with the development of new and other common policies has not been used.

Member States are required to accept very important changes. Firstly, the expenditure level and accordingly also the revenue is fixed by the Union without any ceiling. Secondly, the Union may by an organic law (no ratification is required by Member States) introduce other revenue sources than the existing ones. Judged by recent experience it is not likely that the proposed transfer of powers to the European Parliament and the far-reaching changes regarding revenue sources will be supported by Member States.

**TABLE 1 – Distribution of payments appropriations 1973–84**
(million)

| | 1973 | | 1974 | | 1975 | | 1976 | | 1977 | |
|---|---|---|---|---|---|---|---|---|---|---|
| | u.a. | % of total | u.a. | % of total | u.a. | % of total | u.a. | % of total | u.a. | % of total |
| 1. Administration | 240 | 6.0 | 337 | 7.5 | 375 | 5.8 | 420 | 5.8 | 497 | 5.7 |
| 2. Research, technology, energy | 72 | 1.8 | 78 | 1.7 | 116 | 1.8 | 118 | 1.6 | 143 | 1.6 |
| 3. Reimbursement and support to Member States | 236 | 5.9 | 284 | 6.3 | 354 | 5.5 | 472 | 6.5 | 665 | 7.6 |
| 4. Regional Fund | – | – | – | – | 91 | 1.4 | 277 | 3.8 | 372 | 4.3 |
| 5. Special arrangements to the UK | – | – | – | – | – | – | – | – | – | – |
| 6. Social Fund | 50 | 1.2 | 237 | 5.3 | 136 | 2.1 | 256 | 3.5 | 317 | 3.6 |
| 7. EAGGF–Guarantee | 3 174 | 79.3 | 3 278 | 72.6 | 4 822 | 75.2 | 5 365 | 73.6 | 6 167 | 70.9 |
| 8. EAGGF–Guidance | 124 | 3.1 | 128 | 2.8 | 184 | 2.9 | 218 | 3.0 | 297 | 3.4 |
| 9. Third countries | 105 | 2.6 | 169 | 3.7 | 324 | 5.1 | 137 | 1.9 | 216 | 2.5 |
| 10. Miscellaneous | 4 | 0.1 | 5 | 0.1 | 9 | 0.2 | 24 | 0.3 | 31 | 0.4 |
| Total | 4 005 | 100 | 4 516 | 100 | 6 411 | 100 | 7 287 | 100 | 8 705 | 100 |

**TABLE 1 – Distribution of payments appropriations 1973–84** (contd)

| 1978 | | 1979 | | 1980 | | 1981 | | 1982 | | 1983 | | 1984[1] | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| ECU | % of total | ECU | % of total | ECU | % of total | ECU | % of total | ECU | % of total | ECU | % of total | ECU | % of total |
| 676 | 5.7 | 773 | 5.4 | 820 | 5.0 | 943 | 5.3 | 1 010 | 5.0 | 1 162 | 4.6 | 1 237 | 4.5 |
| 192 | 1.6 | 254 | 1.8 | 290 | 1.8 | 377 | 2.1 | 438 | 2.1 | 481 | 1.9 | 626 | 2.3 |
| 662 | 5.5 | 727 | 5.1 | 791 | 4.9 | 956 | 5.4 | 1 049 | 5.1 | 1 089 | 4.3 | 1 150 | 4.2 |
| 255 | 2.1 | 513 | 3.6 | 727 | 4.5 | 799 | 4.5 | 973 | 4.8 | 1 256 | 5.0 | 1 413 | 5.2 |
| – | – | – | – | 174 | 1.0 | 1 248 | 7.0 | 1 819 | 8.9 | 1 672 | 6.7 | 1 202 | 4.4 |
| 285 | 2.4 | 596 | 4.1 | 735 | 4.5 | 746 | 4.2 | 906 | 4.4 | 891 | 3.6 | 1 220 | 4.5 |
| 9 279 | 77.5 | 10 435 | 72.6 | 11 307 | 69.4 | 10 988 | 61.8 | 12 404 | 60.8 | 15 812 | 63.1 | 18 376 | 67.4 |
| 324 | 2.7 | 403 | 2.8 | 601 | 3.7 | 575 | 3.2 | 646 | 3.2 | 653 | 2.6 | 675 | 2.5 |
| 265 | 2.2 | 405 | 2.8 | 509 | 3.1 | 859 | 4.8 | 786 | 3.8 | 992 | 4.0 | 897 | 3.3 |
| 35 | 0.3 | 271 | 1.8 | 335 | 2.1 | 302 | 1.7 | 392 | 1.9 | 1 052 | 4.2 | 453 | 1.7 |
| 11 973 | 100 | 14 367 | 100 | 16 289 | 100 | 17 793 | 100 | 20 423 | 100 | 25 061 | 100 | 27 249 | 100 |

*Source:*
For 1973–82: Court of Auditor's annual report.
For 1983–84: The annual budget published in the *Official Journal of the European Communities.*

[1] Including supplementary and amending budget No 1 for 1984.

**TABLE 2 – Development of the Community's own resources 1973–84**
(million ECU)

| | 1973 | 1974 | 1975 | 1976 | 1977 | 1978 | 1979 | 1980 | 1981 | 1982 | 1983 | 1984 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Agricultural import levies | | | | | | | | | | | | |
| – Amount | 411.4 | 255.0 | 510.4 | 1 035.2 | 1 576.1 | 1 872.7 | 1 678.6 | 1 535.44 | 1 264.9 | 1 522.0 | 1 347.1 | 1 946.7 |
| – % of own resources | – | – | – | – | – | – | 10.3 | 8.6 | 6.7 | 6.9 | 5.9 | 7.7 |
| Sugar levies | | | | | | | | | | | | |
| – Amount | 98.4 | 75.1 | 79.7 | 128.5 | 202.4 | 406.2 | 464.9 | 466.94 | 482.5 | 705.8 | 948.0 | 1 003.3 |
| – % of own resources | – | – | – | – | – | – | 2.8 | 2.6 | 2.4 | 3.2 | 4.1 | 4.0 |
| Customs duties | | | | | | | | | | | | |
| – Amount | 1 986.8 | 2 737.6 | 3 151.0 | 4 064.5 | 3 927.2 | 4 390.9 | 5 189.1 | 5 905.7 | 6 392.4 | 6 815.3 | 6 988.6 | 7 623.5 |
| – % of own resources | – | – | – | – | – | – | 31.7 | 33.1 | 32.3 | 30.9 | 30.4 | 30.3 |
| Financial contribution[1] | | | | | | | | | | | | |
| – Amount | 2 257.5 | 1 904.0 | 2 152.0 | 2 482.1 | 2 494.5 | 5 329.7 | 2 302.1 | – | 151.4 | 197.0 | 217.7 | – |
| – % of own resources | – | – | – | – | – | – | – | – | – | – | – | – |
| VAT | | | | | | | | | | | | |
| – 1% of assessment basis | – | – | – | – | – | – | 9 047 | 9 910 | 11 680 | 12 974 | 13 719 | 14 608 |
| – % of own resources | – | – | – | – | – | – | 55.2 | 55.6 | 58.9 | 58.9 | 59.6 | 58.0 |
| – Call-up % (VAT %) | – | – | – | – | – | – | – | 0.73 | 0.78 | 0.92 | 0.99 | 0.99 |

*Source:* Preliminary draft budget for 1985, Vol. 7, pp. A/68, A/69, A/72.

[1] From 1973 to 1978 all Member States paid financial contributions and no Member States paid in VAT contributions. 1979 was a transitional year. Six Member States paid VAT contributions and three Member States financial contributions. From 1980 nine Member States have paid VAT contributions and Greece has paid financial contributions as the uniform assessment basis has not yet been implemented in Greece.

# Chapter VI – Economic and social powers of the European Union and the Member States: Subordinate or coordinate relationship?

*by John Pinder*

For a quarter of a century Europe has lived on the political capital invested in the Treaty of Rome. Industry, trade and agriculture have been transformed by the Common Market, the commercial and the agricultural policies laid down in that Treaty. The European Community has held fairly firm against the fragmentation of the market that bedevilled relations between its member countries in the 1930s: and it has become a trading power on the scale of the United States. But the institutions and instruments that made this possible were inherited from the founding fathers. Far too little has been done to build on that inheritance.

'Far too little': those are normative words. The norms of economic union to which they relate include a completely open internal market, for services and high technology products as well as the more ordinary manufactures; enough monetary integration to ensure against beggar-thy-neighbour devaluations within the Community and to provide a means of defence against American interest rates and the Japanese exchange rate; a common energy policy that offers a stronger defence against the effects of disruption in the international petroleum market; a common industrial policy to promote a European information technology that can compete with the Japanese and the Americans. Without such measures, our efforts to recover a dynamic and competitive European economy will remain hamstrung. With them, there should be no cause for inferiority to the great economy of the United States.

The root cause of the Community's failure to develop may be identified in the right of veto. 'How can the complex and diversified unit that the Community has become', as President Mitterrand put it in his address to the European Parliament on 24 May 1984, 'be governed by the rules of the Diet of the old kingdom of Poland, where every member could block the decisions? We all know where that led.'[1] The European Parliament's Draft Treaty proposes to eradicate this cause of Europe's impotence through the principle of Union legislation enacted by majority votes of both Council and Parliament.[2] The importance of this proposal can hardly be exaggerated. Instead of spending years discussing matters critical to our future before reaching either weak decisions or none at all, this method of legislating is designed to enable the Community to take action on them in good time: to convert common action from an unsatisfied need into an effective reality.

---

[1] *Europe Documents*, No 1312, 20. 5. 1984, Brussels, p. 6.

[2] J.P. Jacqué identifies these as the heart of the Parliament's proposals: 'instaurer le vote à la majorité qualifiée du Conseil' and 'doter le Parlement d'un droit de participer à la prise de décision législative et budgétaire'. See 'Bilan et perspective sur le plan institutionnel', in *The European Parliament on the Eve of the Second Direct Election: Balance Sheet and Prospects* (Hrbek, Jamar and Wessels eds.) 1984, p. 93. But see also the possibility under the Draft Treaty of enacting Union laws with a minority vote in the Council, discussed below.

The voting system for enacting laws by co-decision of Council and Parliament is stipulated in Articles 17, 23 and 38 of the Draft Treaty, where obstruction by veto finds no place. Unanimity is, it is true, required for amendment of the Treaty (Art. 84), appointment of the Commission's President (Art. 24 — it is assumed that the European Council will continue to use the unanimity procedure) and integration of defence and foreign policy (Arts 66-68). But it is fair to suppose that, under the procedure proposed in the Draft Treaty, economic policy would not be obstructed by individual member governments.

The Draft Treaty gives the Union the Community patrimony[3] together with the right to legislate over a vast field of economic and social policy, which includes the essential powers implied by the norms indicated above and a lot more besides. The Union's right is, properly, to be exclusive with respect to the completion of the common market and the common commercial policy (Arts 47-48, 64); and it is to share with the Member States a concurrent right to legislate on almost the whole of economic policy and a large part of social policy. This paper will go on to show, article by article, why the field for Union legislation on economic and social policy may be regarded as too extensive. But since the draft's endeavours to deal with this problem are to be found for the most part in its general and institutional provisions, it is necessary first to consider these in so far as they bear upon the issue.

## *a. Concurrent competence: a risk of overcentralization?*

'If the system of the Union is to be uniform, the law of the Union must take precedence over national law . . . This is not a question of political supremacy, but simply a condition of consistency."[4] If the European Union is to establish the essential elements of an economic union its laws must clearly have supremacy over Member States' laws as far as those elements are concerned. But where concurrent competence reaches beyond the essentials, the case for Union supremacy is not so clear. For although the term has a fine ring about it of share-and-share-alike, concurrent competence turns into exclusive competence with respect to any matter on which the Union has legislated. As Wheare put it, the authority which, 'in case of conflict, is to prevail . . . will possess, in my opinion, potential though not actual exclusive jurisdiction';[5] and Biehl observes that concurrent competence has been the most important basis for centralization in the relations between *Bund* and *Länder* in the Federal Republic of Germany.[6]

Thus it appears that the scope of concurrent competence in the Draft Treaty would allow the Union to fix the rate of any tax anywhere within its territory, to control the budgets of national or local authorities, to stop any research programme, to drive a road through any part of a member country, to determine the school curriculum and to run the health service. Although it may be objected that the Union would not in practice for a very long time, perhaps never, do such things, it is necessary to examine very carefully any aspect of its constitution that could be more centralizing than those of the existing democratic federations such as Australia, Canada, the German Federal Republic, Switzerland or the USA.

---

[3] Article 7 of the Draft Treaty includes in the Community patrimony the EC Treaties, conventions, protocols and acts, together with 'the measures adopted within the context of the European Monetary System and European political cooperation'.

[4] De Gucht, 'Working Document on the Law of the Union', in *Report drawn up on behalf of the Committee on Institutional Affairs on the substance of the preliminary Draft Treaty establishing the European Union*, Part C, preparatory documents, European Parliament Document 1-575/83/C, 15. 7. 1983, p. 11, para. 32.

[5] Wheare, *Federal Government*, 1951, (1st ed. 1946), p. 79.

[6] Biehl, 'Die Ausgestaltung des Finanzausgleichssystems in der Bundesrepublik im einzelnen', unpublished paper, 1983, p. 62 *et seq.* See also for a general discussion of centralization versus decentralization in the German context, (Biehl, 'Die Entwicklung des Finanzausgleichs in ausgewählten Bundesstaaten: Bundesrepublik Deutschland', in *Handbuch der Finanzwissenschaft*, (Neumark, Andel and Haller eds. revid. ed.), 1983, Vol IV, 3, pp. 71-122.

One reason why the European Union needs to be less centralized than the existing federations, not more, is to reflect the cultural and social diversity which is such a cherished value for the peoples of Western Europe. To err on the side of an overcentralized economic policy would moreover be particularly inappropriate when there is so much uncertainty as to which policy can deal successfully with the contemporary economy. Experiments with a variety of policies are needed; and the Union's solidarity could only suffer from attempts to enforce on the Member States a policy that failed. Much of the diversity of social policy reflects diversities of culture and society, which should be respected not suppressed; and social policy too can only benefit from variety and experiment.

More fundamentally, the danger of overcentralization has been sensed by contemporary Europeans and they do not like it, at any level of government. The contemporary reaction against over-centralization, reflected in the popularity of the slogan 'small is beautiful', is not an evanescent fashion but a profound response to a great dilemma of modern society; and a Union that does not respect this need for decentralization will not serve its people well. They could become politically alienated and the foundations of civic order be undermined if the Union were to suppress the political vitality of the local or national communities within it, as it could if it were to assume responsibility for the bulk of economic and social policy.

## *b. The Draft Treaty's attempts to limit centralization*

The principal architect of the Draft Treaty, Altiero Spinelli, was aware of the danger of over-centralization. The chief defence which he and his colleagues in the European Parliament's Committee on Institutional Affairs devised against it was the principle of subsidiarity, which according to Spinelli would make 'Union action . . . subsidiary to that of the Member States, and not vice versa'.[7]

The Draft Treaty provides that 'The Union shall only act to carry out those tasks which may be undertaken more effectively in common than by the Member States acting separately, in particular those whose execution requires action by the Union because their dimension or effects extend beyond national frontiers' (Art. 12).[8] Yet the question whether 'effects extend beyond national frontiers' is a matter of degree; and American experience shows that it can be interpreted very widely indeed. The US Constitution empowers Congress 'to regulate commerce . . . among the several States'. Not only have the words 'regulate' and 'commerce' been 'so liberally construed by the Supreme Court that the federal government now has almost complete control of the industrial and commercial life of the country'.[9] There has been further pressure to interpret 'the phrase . . . "inter-state commerce" . . . so generously that "intra-state" disappears altogether'.[10] As justices of the Supreme Court said in 1935 'There is a view of causation that would obliterate the distinction between what is national and what is local in matters of commerce. Motion at the outer rim is communicated perceptibly, though minutely, to recording instruments at the centre.[11] The Supreme Court then drew a distinction between 'direct and indirect effects'. But by 1942 the court was concerned not with whether effects were direct or indirect but whether they were substantial: 'Even if an activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on inter-state commerce, and this irrespective of whether

[7] Spinelli, 'Note on some problems of terminology', in *Report of the Committee on Institutional Affairs* , Part C, *supra*, p. 160.
[8] The Preamble expresses the intention slightly differently: 'to entrust common institutions, in accordance with the principle of subsidiarity, only with those powers to complete successfully the tasks they may carry out more satisfactorily than the States acting independently'.
[9] Goodhart, 'The constitution of the United States', in *Studies in Federal Planning*, (Ransome ed.), 1943, p. 256.
[10] Wheare, *supra*, at p. 143.
[11] Justices Cardozo and Stone, in the case *Schechter Poultry Corporation*, v *United States* (1935) 295, US 495, 554, cited in Wheare, *supra*, at p. 143.

such effect is what at some earlier time might have been defined as "direct" or "indirect".'[12] Although these cases date from four or five decades ago, they have been cited because they relate to a period when economic centralization became a big issue in the US, and hence throw some light on the possibility of this happening in Europe. They indicate that to confine Union legislation to tasks whose 'effects extend beyond national frontiers' may not provide a very significant limit to Union competence without a fairly generous concept of how substantial the effects would have to be.

Whether a task can be 'undertaken more effectively in common' depends, moreover, on the nature of the task. The Draft Treaty stipulates that the Union shall effect the approximation of the laws relating to taxation 'in so far as necessary for economic integration' (Art. 49). If economic integration is defined, as it could be, to include fiscal uniformity, this does not leave diversity much of a chance. Wherever, indeed, the Union decides to adopt uniformity in a particular field as an objective, the principle of subsidiarity is no help, because such a task can hardly be undertaken except in common.

The Basic Law of the Federal Republic of Germany provides that the central government shall have legislative rights in the field of concurrent legislation 'in so far as a necessity for regulation by federal law exists because . . . the preservation of legal or economic unity demands it, in particular the preservation of uniformity of living conditions extending beyond the territory of an individual *Land*'.[13] This provision has been interpreted, according to Biehl, as placing on the *Bund* an obligation to promote the unification of living standards in the federation, with highly-centralizing consequences for economic policy, squeezing the autonomy of both *Länder* and local authorities.[14] The European Union Draft Treaty, one of whose objectives is 'the progressive elimination of the existing imbalances between its regions' (Art. 9), may contain the potential for a similar outcome.[15]

The Preamble to the Draft Treaty does qualify its determination 'to increase solidarity between the peoples of Europe' by acknowledging the need to respect 'their historical identity, their dignity and their freedom'. But this seems to offer scant protection against the ample potential that the draft offers for objectives that would tend to uniformity. When to this is added the tendency of policy-makers in institutions that govern large areas to give weight to economies of scale rather than to the value of diversity in government of small areas,[16] the suspicion that the principle of subsidiarity may not be a strong enough guarantee against overcentralization can only be reinforced.

In addition to the principle of subsidiarity, the Draft Treaty contains two devices intended as checks to overcentralization. One of these is that laws shall 'as far as possible . . . restrict themselves to determining the fundamental principles governing common action and entrust the responsible authorities in the Union or the Member States with setting out in detail the procedures for their implementation' (Art. 34). It may be doubted, however, whether fundamental principles can be made effective without specifying their implications in a good deal of detail; and the Community's experience appears indeed to show that a directive, which is supposed to bind Member States 'as to the result to be achieved', but to 'leave to the national authorities the choice of form and methods', is frequently more detailed than a regulation, which is to be 'binding in its entirety and directly applicable in all Member States' (Treaty establishing the EEC, Art. 189).

The second device lies in the system of voting on Union legislation in Parliament and Council. Bigger majorities are required to enact organic laws than other laws; and 'a law which initiates or extends common action in a field where action has not been taken hitherto by the Union or by the Commu-

---

[12] Supreme Court in the case *Wickard* v *Filburn* (1942) 317 US 111, 125; *US* v *Darby* (1941) 312 US 100, 119; cited in Wheare, *supra*, at p. 143.

[13] English translation from MacMahon, 'The Problems of Federalism: a Survey' in *Federalism Mature and Emergent*, (Mac Mahon: ed.), 1955, pp. 3, 16.

[14] Biehl, *Die Ausgestaltung des Finanzausgleichssystems, supra*,p. 63 *et seq.* and *Die Entwicklung des Finanzausgleichs, supra*, p. 78, p. 85 *et seq.*, p. 97 *et seq.*

[15] See also Art. 45.2: 'The structural and conjunctural policies of the Union shall ... promote ... the progressive elimination of the existing imbalances between its various areas and regions', and Art. 58: 'The regional policy of the Union shall aim at reducing regional disparities ...'.

[16] See, for example, Rees, *Government by Community* , 1971, especially Chapter 2.

nities must be adopted in accordance with the procedure for organic laws' (Art. 12). The meaning of 'extends common action in a field where action has not been taken hitherto' is not absolutely clear (how can action be extended if it has not been taken hitherto?). The intention is surely to require the procedure for organic laws wherever a law would reduce the field of competence of Member States; and it might be better to express this provision in that way. The important issue is, however, the procedure for voting on organic laws, as provided in Articles 17, 23 and 38.

Organic laws may be passed by qualified majorities in the Parliament (a majority of members and two-thirds of votes cast) and in the Council (two-thirds of the weighted votes cast and a majority of the representations). If the qualified majority is obtained in the Parliament but not in the Council, however, or if the Council has amended the draft law by an absolute majority (a majority of the weighted votes cast, comprising at least half the representations), the draft is considered by a Council-Parliament Conciliation Committee. Failing agreement there, the 'text forwarded by the Council' goes back to the Parliament, which can again approve the draft by a qualified majority. The final vote must then be taken within three months in the Council, which may *reject* the draft by a qualified majority: thus the law is enacted provided that one-third plus one of the weighted votes of the member governments are in favour.

The 'text forwarded by the Council' may, of course, have been amended by an absolute majority in the Council; and if this is the text on which the Parliament votes, at least an absolute majority in the Council will have favoured the law, rather than just the one-third plus one required for the final vote. But Parliament may amend the 'text forwarded by the Council' provided that the amendments are tabled by the Commission. The Parliament can, therefore, if it has the Commission's support, overrule a weighted vote of anything up to two-thirds of the representations of the Member States. While a qualified majority in the Parliament is certainly harder to secure than a simple majority, there must still be concern that two-thirds of the votes cast by MEP's could favour steps towards excessive centralization, perhaps because they were subject to a wave of ideological fervour, political passion, or annoyance with a particular member country or minority of countries, perhaps because they failed to appreciate the cumulative effect of a series of measures each of which appeared reasonable enough in itself. It is precisely in anticipation of such errors of judgment by majorities of politicians that federal constitutions contain legal as well as political safeguards against what the founders regard as excessive encroachment on Member States' fields of jurisdiction; and the reason why the Committee on Institutional Affairs did not use the word federal in relation to the Draft Treaty cannot be that they envisaged a Union which would offer *less* safeguards for the Member States than would a federal system.

The enacting of laws against the opposition of up to two-thirds (or even up to half) of the weighted votes of the representations of the Member States can indeed hardly be what Spinelli had in mind when he wrote that 'the concept of competences in the draft . . . demands strong proof of consensus both within Parliament and in the Council any time a forward leap is envisaged'.[17] Nor can it really be said that Union action is subsidiary to that of the Member States. The Draft Treaty seems to reflect, indeed, a continuing preoccupation with the problem of a Community that is too weak in relation to the States, whereas once a Union is established with wide competences and majority voting, the problem can become the converse of strong Union and weak States. But any such preoccupation is by no means the only reason why the Draft Treaty does not embody a satisfactory solution to this problem. More significantly, the complexity and interdependence of modern economy and society have made economic and social policy so pervasive and interdependent that a clear division of

[17] Spinelli, *Towards the European Union*, sixth Jean Monnet Lecture, Florence, European University Institute, 13 June 1983. Corbett accepts that, in the case where a law is passed against a weighted majority of up to two-thirds in the Council, 'we no longer have real co-decision', but believes that 'it is surrounded by sufficient safeguards, and at the end of a long enough procedure, to be regarded as exceptional', (Corbett, 'Reform of the Council: The Bundesrat Model' in *The Federalist*, July 1984, p. 60). But the safeguards do not seem that strong, nor the procedure that long; and even were the case exceptional, a crucial competence might nevertheless be removed from Member States.

powers between Union and States has become increasingly difficult to define.[18] It should cause no surprise if second thoughts are needed on such an intractable problem.

## *c. Stronger safeguards*

If it is accepted that there is a case for stronger safeguards against overcentralization, the European Parliament may wish to consider what changes in the Draft Treaty could help meet that case, without undermining its central features of co-decision, majority votes and competence with respect to the essential elements of economic union.

One such safeguard could be a stronger voting role for the Member States' representatives in the Council, without approaching the paralysing right of veto. 'Strong proof of consensus' within the Council could be provided by the requirement of a qualified majority (two-thirds of weighted votes and a majority of the representations) if an organic law, or one that reduces the competence of Member States, is to be enacted. Even an absolute majority (a majority of the weighted votes and at least half the representations) would serve better than the one-third plus one of weighted votes proposed in the present draft.

The American cases cited earlier may indicate that a more precise definition of the reach of the phrase 'inter-state commerce' could have strengthened the propensity of the Supreme Court to interpret it in a way that gave weight to the autonomy of the States; and the German Commission on Constitutional Reform made suggestions for sharpening the wording of certain of the articles of the Basic Law that relate to the relation between *Bund* and *Land* competences, in ways that would secure greater autonomy for the *Länder*.[19] It may be worthwhile for jurists at least to consider the potential for making the principle of subsidiarity more effective by sharper definition in the Treaty and by 'spelling out further the role of the Court in defending the principle of diversity'.[20]

Something of this purpose has been served by the fifth and fourteenth amendments to the US Constitution, providing that no person be deprived 'of life, liberty and property without due process of law', which have caused the Supreme Court at times to invalidate legislation to regulate economic life.[21] The interpretation of the equivalent elements of the Canadian Constitution seemed, according to Wheare, to amount to a power for the central government to legislate on 'trade and commerce, except where it conflicts with property and civil rights in a province', with the latter phrase being given such a wide interpretation that 'the scope of "trade and commerce" has been greatly narrowed'.[22] But there was in both cases 'much uncertainty about the respective powers of general and state governments, because of the conflicting and ambiguous language adopted'.[23] In view of the greater diversity among the European peoples, it is particularly important that the Union Treaty be as clear as possible in this respect.

The Draft Treaty offers everybody within the Union's jurisdiction 'the fundamental rights and freedoms derived in particular from the common principles of the Constitutions of the Member States and from the European Convention for the Protection of Human Rights and Fundamental Free-

---

[18] This point was already made in the mid-1950s by Fischer, 'Prerequisites of Balance', in (Arthur W. Macmahon ed.), 1955 *Federalism Mature and Emergent*, p. 62, where Fischer also cited Beloff, 'The Federal Solution in its Application to Europe, Asia and Africa', *Political Studies*, June 1953, regarding the centralizing tendency in federations that has followed on the expansion of governments' economic and social responsibilities.

[19] Biehl (*Die Ausgestaltung des Finanzausgleichssystems*,supra, at p. 76) cites from a critique on this point in Grabitz, *Dezentralisierung des Politischen Handelns* , Forschungsbericht des Kommunalwissenschaftlichen Instituts der Konrad Adenauer Stiftung, 1979.

[20] Pryce, 'Towards European Union', (Report of a Federal Trust Study Group on the European Parliaments draft proposals for a new Treaty, 1983), *New Europe Papers*, 8, p. 12.

[21] Wheare, *supra*, p. 145.

[22] Ibid., p. 137.

[23] Ibid., p. 149.

doms' (Art. 4.1) and requires the Union to undertake 'to maintain and develop, within the limits of its competences, the economic, social and cultural rights derived from the constitutions of the Member States and from the European social charter'. The EEC Treaty provides that it 'shall in no way prejudice the rules in Member States governing the system of property ownership' (Art. 222); and Article 7 of the Draft Treaty makes the 'objectives and scope' of the Treaties establishing the EC into 'a part of the law of the Union' which can 'only be amended in accordance with the procedure for revision' of the Treaty, i.e. by unanimous agreement (Art. 84). If 'the rules in Member States governing the system of property ownership' are not to be counted among the 'objectives and scope' of the Rome Treaty, however, this provision could be amended by the procedure for organic laws (Art. 38). Further consideration should perhaps be given to the possibility of strengthening any of these potential bulwarks against too much centralization.

Amended voting procedures, sharper wording of general principles and guarantees of human rights may, however, not by themselves offer sufficient guard against overcentralization. We will therefore consider, in analysing article by article the Draft Treaty's sections on economic and social policy, how far the Union's powers could usefully be limited by closer definition of particular aims or fields among its competences, of the instruments it may use in relation to them, or of the conditions under which they may apply. We will at the same time try to identify those aims, fields and instruments that must be allocated to the Union if it is to create an economic union which can satisfy the essential needs of its citizens.

## *d. The common market and common commercial policy*

The aims and instruments for achieving a common internal market and an external trade policy were already given to the Community in the Treaty of Rome. Without them, there can be no economic union. The common market remains far from complete because the Community's institutions, blocked by the right of veto, have not been strong enough to ensure that the aims of the Treaty are realized. The Draft Treaty for European Union would rectify that institutional weakness; and there can be no faulting the draft for maintaining external trade and trade among the Member States as fields of exclusive Union competence. The questions that should be raised about these articles (47-49 and 64) relate, rather, to a certain excess of detail and a potential for excessive harmonization.

### External trade policy

Excess of detail can hardly be attributed to the draft's provision for external trade policy: 'in the field of commercial policy, the Union shall have exclusive competence' (Art. 64.2). The Union's competence is simply defined by the field.

Nor does the definition of the field seem likely to present undue difficulty. The Treaty of Rome uses the words 'common policy in the matter of external trade' (Art. 111.1) and that presumably includes invisible as well as visible trade. It is not so clear that the Draft Treaty provides for a common policy on all other aspects of external economic relations, which have grown increasingly important with the growth of international economic interdependence. Development aid is covered (Art. 64.3); and the provision for monetary union (Art. 52) centralizes part of currency reserves and in other ways implicitly concerns external monetary relations. But it is not so clear that the Union would have power to make policy on inward or outward investment.

## Trade among the States

The draft's treatment of internal trade is not so straightforward. Article 47.1 includes the words 'The Union . . . shall have exclusive competence for trade between Member States', which would, with the addition after 'competence' of the words 'in the field of policy' (to avoid any implication that a State-trading system might be intended) be precisely analogous to the provision for external trade policy: simple definition of a field of exclusive competence. But the draft also adds the objective 'to complete, safeguard and develop the free movement of persons, services, goods and capital within its territory' and stipulates instruments in the form of 'detailed and binding programmes and timetables', specifying the number of years within which free movement is to be achieved. Yet it is not obvious that the institutions of the Union should be told by the Treaty precisely what they must aim to do in their field of exclusive competence or how they are to do it. There can be no doubting that free movement of people, services, goods and money among the Member States must be one of the bases of the Union; and perhaps 'complete, safeguard and develop' adds something to the objectives already defined in the EC Treaties [24] without adding too much. But the detailed specification of means for attaining the objectives may be based on an inappropriate analogy with the Rome Treaty, when detailed Treaty obligations had to be employed to secure action by the Member States since the Community institutions lacked the strength to ensure that even such a central objective would be fulfilled by the development of Community policy after the Treaty had been ratified. With the institutions designed by the Draft Treaty, however, the boot is on the other foot. The Union institutions have the strength to make their own policy in any field of Union competence, without being told how to do it by a treaty ratified by the States.

When we see how far such a bare definition of competence as 'to regulate commerce . . . among the several States' has taken the US federal government into regulation of the economic affairs of the States, we may have cause to ask whether 'complete, safeguard and develop' might not give too much weight to the case for harmonization where this conflicts with cultural diversity. This again raises the question whether the Draft Treaty could better embody the value of diversity in its objectives and in some other of its provisions.

The Draft Treaty might, then, be improved by reducing the provision on internal trade to the plain definition of the field: 'The Union shall have exclusive competence in the field of policy for trade between Member States'. But this does not come high on the list of potential improvements; the Union could live with the text as it stands. Article 47 also gives the Union exclusive competence 'to complete, safeguard and develop the free movement of persons . . . and capital'. Beyond the free movement of workers, which the Treaty of Rome lays down,[25] the free movement of persons is not a matter of economic policy and so will not be considered here. The Draft Treaty requires the free movement of capital to be completed 'within a period of 10 years following the entry into force of this Treaty'; and this has to be seen in conjunction with the draft's provisions for monetary union, of which the movement of capital is one aspect (see below).

## Competition policy

The Draft Treaty gives the Union exclusive competence 'to complete and develop competition policy at the level of the Union' (Art. 48). The Rome Treaty defined the aims of competition policy as being to prevent abuse of 'a dominant position within the common market' (Art. 86) and to prohibit agreements 'which may affect trade between Member States and which have as their object or effect the

[24] 'The Community shall be based upon a customs union which shall cover all trade in goods' (Rome Treaty, Art. 9.1); 'restrictions on freedom to supply services within the Community shall be progressively abolished' (Art. 59).

[25] 'The free movement of workers shall be secured within the Community by the end of the transitional period at the latest' (Art. 48.1).

prevention, restriction or distortion of competition within the common market', five main types of such agreement being specified (Art. 85). This definition has stood the test of a quarter of a century fairly well. The main objection has been that Rome Treaty omits any safeguard against the creation of dominant positions as distinct from their abuse; and the Draft Treaty is surely right to generalize to the economy as a whole the system for authorizing mergers that is provided with respect to the coal and steel sectors in the ECSC Treaty (Art. 66). The wisdom of the words 'complete and develop competition policy at the level of the Union' is not so clear, if this gives the Union a free hand to range beyond the definitions of competition policy in the Treaties establishing the EEC and the ECSC. Might not the term 'competition policy' be stretched far beyond those limits? Does 'policy at the level of the Union' mean that the Union's competence still reaches only to agreements' likely to affect trade between the Member States', or is it less meaningful? If the answers to those questions imply scope for expansion of Union competence far beyond the concepts of the existing Treaties, it might be wiser to stick closer to those Treaties' wording that has stood the test of time fairly well.

Article 48 of the Draft Treaty contains two further points, which may respond to criticisms of the articles on competition policy in the Treaty of Rome. One concerns 'the need to prohibit any form of discrimination between public and private undertakings', here it might be argued that provisions inherited by the Union from the Rome Treaty offer adequate safeguard against this.[26] The other point enjoins the Union to bear in mind 'the need to restructure and strengthen the industry of the Union in the light of the profound disturbances which may be caused by international competition'.

It has for some time been argued that the Commission could, under the existing Treaties, authorize joint programmes of capacity reduction by hard-pressed sectors and, after insisting on the point that such programmes must show a benefit to the consumer, the Commission has begun to adapt its policy in this direction. Article 85 does indeed allow the Commission to permit any agreement 'which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possiblitity of eliminating competition in respect of a substantial part of the products in question'. If words such as 'fair share', 'not indispensable' and 'eliminating competition' are thought to load the dice too heavily against agreements that help to improve production or promote technical or economic progress, there may be a case for rectifying that more precisely in Article 48 of the Draft Treaty, rather than introducing concepts such as 'restructuring' and 'profound disturbances which may be caused by international competition', which present difficulties of interpretation and rest uneasily in what amounts to the constitution of a union of States.

## Approximation of laws and taxation

The Draft Treaty follows the Treaty of Rome in seeking to iron out those aspects of Member States' laws and taxes that distort economic transactions within the common market. The Rome Treaty provided for 'the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment or functioning of the common market' (Art. 100). The Draft Treaty, referring to 'the laws, regulations and administrative provisions relating to undertakings, and in particular to companies', sets the somewhat different objective of approximating them in so far as they 'have a direct effect on a common action of the Union' (Art. 49). The US may have left too much autonomy with the individual States in matters of company law. But local variations in 'provisions laid down by law, regulation or administrative action' may have

[26] '. . . any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market' (Rome Treaty, Art. 92).

their justification in the social and cultural diversity among European countries; and it seems desirable to preserve such variation where it does not substantially and 'directly affect the establishment or functioning' of the common market or the economic union. Might not the Draft Treaty's formulation which requires approximation where there is 'a direct effect on a common action of the Union' make it too easy for the Union to initiate common action that implies excessive uniformity, and then to steam-roller any of the Member States' policies or practices that stand in the way? If so, it might be better to return to the Rome Treaty's 'directly affect the establishment or functioning of the common market', and perhaps add 'and substantially' after 'directly'.

Article 49 of the Draft Treaty goes on to require that 'a law shall lay down a statute for European undertakings', which fills a need about which the Rome Treaty was not sufficiently explicit. Although the Commission found a justification for proposing a European company statute in order, among other things, to reduce distortions in the common market, the proposal has not been adopted. Article 49 then moves on to 'the approximation of the laws relating to taxation', which a Union law is to effect 'in so far as necessary for economic integration within the Union'. Economic integration could, as suggested earlier, be defined in such a way as to require complete fiscal uniformity throughout the Union. That this is not a fanciful suggestion shown by one of the most-quoted books on the subject, which asserts that 'total economic integration presupposes the unification of monetary, fiscal, social and countercyclical policies'.[27] Yet the structure and rates of tax are at the heart of modern politics, and of social policy in particular. The Union needs to get the money for its own expenditure (Arts 71, 75 and 76 of the Draft Treaty provide for this) and divergences between Member States' taxes should be reduced in so far as they substantially distort inter-State trade. But beyond that, the States should be left to collect their own taxes at their own rates in their own way. The alternative is likely to drain them of political vitality, by shifting to the Union the major decisions of social policy.

Two changes in Article 49 might help to guard against this. One would be, drawing in part on the wording in Article 101 of the Rome Treaty, to replace 'in so far as is necessary for economic integration' by 'in so far as Member States' taxes substantially distort the conditions of competition in the Union' (or perhaps 'substantially distort economic transactions among the Member States'). In addition, it might be appropriate to exclude personal income tax from the Union's jurisdiction. For whereas a certain measure of harmonization of company tax and indirect tax may be needed to make the economic union work efficiently, the case for interference in the States' income taxes is weaker; and this would preserve for them a *chasse gardée* where they can vary their total revenue and influence the distribution of incomes.

## *e. General economic policy*

The Member States have reached a stage of interdependence where they need a common economic policy, to help maintain equilibrium between their economies, provide a framework for their economic development, safeguard their interests in and contribute to the management of the wider international economy. The drafters of the Rome Treaty did not venture to seek a transfer of powers to this end from the States' central banks and finance ministries. The Draft Treaty is more courageous.

Article 50 gives the Union 'concurrent competence in respect of conjunctural policy, with a particular view to facilitating the coordination of economic policies within the Union'. The word 'conjunctural' has an association with the management of shorter-term trends in the economy, which may be unfortunate at a time when policies designed to be effective over a longer period tend to be viewed as more important. Perhaps the more operative term is, in any case, the 'economic policies' that are to be coordinated. But whether we speak of conjunctural or general economic policies, we have entered a field which is harder to define than trade policy, competition policy or the approximation of tax

[27] Balassa, *The Theory of Economic Integration*, 1962, p. 2.

and company law; so it is harder to envisage the limits of Union action in coordinating the economic policies of the States.

One point is quite clear: 'Laws shall lay down the conditions under which the Commission, in conjunction with the Member States, shall utilize the budgetary or financial mechanisms of the Union for conjunctural ends' (Art. 50.4). The Union is to use its money ('our money', if we are the Union's citizens) with regard for the aims of its conjunctural (better perhaps 'economic') policy. The limits to this action depend on the amount of money to be raised and spent by the Union; and the Draft Treaty sets no limit to this. Member States intending to establish the Union could well raise the question of a limit to the Union's tax-raising powers since, as the experience of the Federal Republic of Germany shows, the division of revenue between them is fundamental to the balance of power between Union and States. The Union would be too weak in relation to the States, and unable to make its proper contribution to efficiency and welfare, if it were shackled by limits of the order of magnitude that now prevails; but it might be reasonable to consider, in the light for example of the MacDougall report,[28] a limit of say 5% of the Union's GDP, which could be raised only by Treaty amendment.[29]

The limits to Union power under paragraphs 2 and 3 of Article 50 are not so easy to define. Paragraph 2 requires the Commission to 'define the guidelines and objectives to which the action of the Member States shall be subject on the basis of the principles and within the limits laid down by laws'; and paragraph 3 stipulates that laws 'shall lay down the conditions under which the Commission shall ensure that the measures taken by the Member States conform with the objectives it has defined'.[30] Thus the Union is to establish the aims of Member States' economic policies and control the means, i.e. policy instruments, by which the aims are to be achieved.

The outcome of a Member State's economic policy is a matter of common interest, because inflation or deflation is transmitted to other Member States through the economic transactions between them. It is therefore right that the Union should seek to influence the Member States' policies towards a mutually satisfactory outcome. But a requirement that the Union control 'the measures taken by the Member States', which could well become control over all their economic policy instruments — however these might be defined — is another matter.

One reason for doubting its wisdom is that the relationship between measures and outcomes is a matter of judgment, not of objective fact; and such judgments have become hazardous in these turbulent times. They offer a shaky basis for a massive incursion into the policies of the States.

A second reason for doubt is uncertainty as to the instruments which the Union might feel justified in requiring the Member States to use under its supervision. Incomes policy is a contentious issue, hotly contested by liberal economists, by politicians who believe in them and by many traditionalist trade unionists. Yet it is quite conceivable that incomes policy, which not long ago enjoyed widespread support, could again win enough support to be enacted as Union law on the basis of two-thirds of the votes cast by the Members of the European Parliament (which need be no more than a bare majority of all MEPs), together with acceptance by the Commission and by the representatives of France, Greece and Italy in the Council (or Greece, Italy, Portugal and Spain after enlargement), to name only currently socialist-led governments which could account for more than one-third of the Council's weighted votes. The Members of the last European Parliament must have thought such a Union law feasible, or they would not have voted in favour of Article 56, which provides that 'the

---

[28] Commission of the EC, *The Role of Public Finance in the European Communities*, 2 vols, April 1977.

[29] There would be less risk of a Treaty-entrenched limit stunting the development of the Union sometime in the future if Treaty amendments were to require a large majority, rather than unanimity of the Member States as proposed in Article 84.

[30] Paragraph 3 goes on to make 'the monetary, budgetary or financial aid of the Union conditional on compliance with the measures taken under paragraph 2 above'. It is normal that balance-of-payments support should be conditional on governments' compliance with policy guidelines; but it is another question whether a Union policy for supplying cheap butter to old-age pensioners should be withdrawn from those who inhabit a certain Member State, just because of recalcitrance by a government they might well have voted against, over an issue which can be quite a subjective one — as negotiations between the IMF and Brazil, for example, show.

Union may take action in the field of social and health policy, in particular in matters relating to ... collective negotiations between employers and employees, in particular with a view to the conclusion of Union-wide collective agreement'. Now it happens that the present writer shares the view that imperfections are inherent in modern labour markets to the extent that, if inflation is to be controlled, the only alternative to high unemployment is incomes policy — even if the incomes policy takes the non-statutory form of nation-wide or industry-wide (as in the FR of Germany) collective agreements between trade unions and employers' associations. But to impose this view, which may after all be mistaken, on a country where the government is bitterly opposed to incomes plicy or the trade unions are going to kick it overboard would be to court a failure of that policy and to strain solidarity within the Union up to or beyond the breaking point. The same could be said of an attempt to counter a recession or restrain a boom by investment planning (see Article 51, with its 'objective of coordinating the use of capital market resources by the creation of a European capital market committee').

Alternatively, a right-wing qualified majority of MEPs, supported by a right-wing Commission and the Governments of the United Kingdom, Denmark and Germany (or the UK, Denmark, Germany and the Netherlands after enlargement), could prohibit incomes policy or investment planning in the Member States that wanted to use those instruments. Or they might decide that budgetary laxity was generating inflation in some Member States and that national budgets therefore had to be controlled. This is quite plausible, since budgetary control was wanted by the officials and central bankers on the Werner Committee, whose widely-acclaimed report proposed that 'quantitative guidelines will be given on the principal elements of the public budgets, notably on global receipts and expenditure, the distribution of the latter between investment and consumption, and the direction and amount of the balance'.[31] Nor are bankers, officials and politicians lacking today who are convinced that budgetary control is the key to a healthy economy. Yet central control of the States' budget balances, let alone of the size of their receipts, expenditure, consumption and investment, is a concept that is alien to federal systems; and even in the highly-centralized United Kingdom, the present government has encountered great difficulty in imposing such constraints on the local authorities.

Union control over States' budgets would, then, be an infringement of their autonomy that the search for a unified economic policy could hardly justify. Not only is the economic outcome of such measures quite speculative, but consistency of the several States' economic trends, although desirable, is not an absolute necessity, with the interdependence among them, although very significant, remaining far short of the interdependence among the regions of most Member States.

With the exception of money, indeed, the idea of Union control of the States' instruments of general economic policy seems to be of dubious validity. The non-monetary instruments, such as incomes policy, budgets and quantitative planning, are highly sensitive in terms of both party-political orientation and the autonomy and vitality of the States' policies. To harness Member States' instruments of this kind to a concept as wide and general as that of the Union's economic or conjunctural policy would launch the Union into uncharted and quite likely dangerous waters. The risk of dangerous waters must sometimes be taken. But here it does not seem justified, because control over monetary policy, for which the interdependence of the national monetary systems is anyway a convincing motive, would give the Union instruments as powerful as it probably needs at its present stage of economic interdependence. A simple solution would, then, be to define the Union's concurrent competence for economic policy in terms not of this potentially enormous field, but of more specific fields and instruments: 'budgetary or financial mechanisms of the Union' (Art. 50.4) and the field of monetary policy — or, if more precision were desired, specified instruments of monetary policy. This might imply either amending the Draft Treaty in order to subject Article 50, pars 1-3 to the method of cooperation rather than concurrent competence, or deleting those three paragraphs altogether. Some unnecessary undergrowth would thus be cut from the draft, while giving the Union, in the field of monetary policy, the crucial strength that the Community now lacks.

---

[31] *Report to the Council and the Commission on the realization by stages of economic and monetary union in the Community*, (the Werner report), Supplement 11-1970 — Bull. EC, 8. 10. 1970, p. 19.

## *f. Monetary union*

Article 52 deals with monetary union. Before that, however, comes Article 51, which gives the Union 'concurrent competence as regards European[32] monetary and credit policies, with the particular objective of coordinating the use of capital market resources by the creation of a European capital market committee and the establishment of a European bank supervisory authority'. The Union is given concurrent competence with respect to monetary union in Article 52; and if there is enough difference between monetary and credit policies to justify specifying the credit policies too, this could perhaps be done in the latter article. The purpose of Article 51 seems, however, to be specifically to introduce the European capital market committee to coordinate the use of capital market resources and the European bank supervisory authority.

With free movement of money and of financial services, a common regulatory framework for banks and capital markets is a logical measure. But the 'particular objective of coordinating the use of capital market resources' seems to imply a planning of investment that is not practised in the majority of Member States and is hard to reconcile with the neo-liberal philosophy that underlies Article 33.4, which affirms that 'the European Monetary Fund shall have the autonomy required to guarantee monetary stability'. Neither the neo-liberal doctrine of Article 33.4 nor the *dirigiste* implications of Article 51 as it stands seem likely to appeal to a majority of Member States; nor do they embody principles that are essential for the establishment of the Union, even if it might later come to adopt them. Article 33.4 was not in the Institutional Committee's earlier draft[33] and the present text could afford to do without it unless the Member States want to retain it. Article 51 could be confined to the establishment of the regulatory framework for the banks and capital markets.

Article 52 requires that all Member States are to participate in the European Monetary System (52.1) and gives the Union 'concurrent competence for the progressive achievement of full monetary union' (52.2). Monetary policy will, as has already been suggested, remain a crucial field for Union policy after monetary union (however defined) has been achieved, as well as in the achieving of it. There should be no doubt about this, and it would be better to establish it in the article on the monetary system and monetary union, not just as an adjunct to credit policy as in Article 51 of the present draft. Article 52.2 could define the field of competence in such words as 'the Union shall have concurrent competence in the field of monetary policy'. The objective of full monetary union would be stated in a separate sentence.[34]

The significance of this objective depends on how 'full monetary union' is defined. In his preparatory document, the rapporteur on economic union wrote that 'the final objective, which it will be possible to achieve following a series of automatic, irreversible stages, will be that of advanced unity which may go so far as the creation of a genuine common currency which is exclusive or parallel to the national currencies'.[35] Whether the common currency is exclusive or parallel is a critical distinction, for an exclusive common currency puts an end to any monetary or currency policy conducted by the Member States. Changes in the exchange rate are no longer available to help correct disequilibria between Member States' economies, so that the whole burden of adjustment is likely to be thrown on to deflation or inflation; and if pronounced cultural or institutional differences underlie the disequilibria, the dose of deflation or inflation required to overcome them might be severe enough to endanger the Union's political stability. A parallel currency, on the other hand, gives the Union a common instrument of policy and medium for transactions, while leaving room for Member States to secure changes in their exchange rates and to conduct monetary policies alongside that of the Union.

---

[32] How can there be concurrent competence as regards 'European monetary and credit policies', when the States can hardly have competence for European policies? Should it not be concurrent competence for monetary and credit policies in so far as these substantially affect inter-State economic transactions?

[33] *Report of the Committee on Institutional Affairs,* Part A. Motion for a Resolution, European Parliament Document 1-575/83/A, 15. 7. 1983.

[34] Another drafting question: can the States really exercise competence for the 'achievement of full monetary union'? If not, the definition of the field of concurrent competence should certainly be separated from the objective of monetary union.

[35] Moreau, 'The Economic Union', in *Report of the Committee on Institutional Affairs* , Part C, *supra,* p. 57, par. 129.

Despite the risks involved in moving to an exclusive common currency, the benefits of reaching that stage would be great. The European currency would be an enormous convenience to business and to citizens. It would enhance the security of the Union's internal market against the danger of fragmentation. It would give the Union a powerful instrument to counter external monetary threats such as high American interest rates or a low Japanese exchange rate, and to participate in constructing a sound international monetary system. It would set the seal on the economic union and affirm, not just in words but in a most impressive deed, the commitment to political union among the Member States. It is therefore desirable that the definition of a full monetary union includes the creation of a common currency and the ending of exchange rate changes and of controls on movements of money among the Member States.

Article 52 of the Draft Treaty requires all Member States to participate in the European Monetary System (subject to Article 35, which allows for delays to be authorized if Union laws would cause 'specific difficulties' for particular States) and provides for an organic law[36] to 'lay down rules governing ... the procedures and the stages for attaining monetary union'. The rules are to govern in particular 'the statute and the operation of the European Monetary Fund', 'the conditions for the effective transfer to the EMF of part of the reserves of the Member States', 'the conditions for the progressive conversion of the ECU into a reserve currency and a means of payment, and its wider use' and 'the duties and obligations of the central banks in the determination of their objectives regarding money supply'. The transfer of part of the States' reserves to the EMF and the wider use of the ECU, including as a reserve currency and a means of payment, would give the Union the means to develop its monetary system, based not only on the exchange-rate mechanism and lending arrangements of the EMS but also on the promotion of the ECU as a parallel currency and on the EMF as a federal reserve bank. This system could, as it developed, increasingly secure the benefits associated with an exclusive European currency. The use of the parallel currency could, indeed, evolve to the point where changes of the States' exchange rates, even though formally permissible, were no longer practicable, and later to replace the national currencies altogether.

This could be the best route to full monetary union. But whatever the likely proportions of organic evolution and of formally enacted steps, one major barrier will probably have to be confronted: the prospect of progress to full monetary union without their explicit consent may well be more than some Member States will accept. The problem lies not just with the British or the French. The Germans, whose society has in the past been torn apart by inflation, remain acutely sensitive to the danger of catching it from their partners. The Bundesbank was hard to convince that even the fairly innocuous Stage One of the EMS was not going too far and firmly opposes the transition to Stage Two and the establishment of the European Monetary Fund. The ECU cannot at present even be used for deposits in Germany, as is done in other EC countries, on the grounds that it is linked to other Member States' currencies and hence 'regarded by the Bundesbank as an indexed unit, which cannot be used for deposits in Germany under Article 3 of the 1948 Currency Law'.[37] The German Government and Parliament could commit the Federal Republic to monetary union, despite any opposition from the Bundesbank, if the grounds for doing so appeared politically secure. But the fear of inflation is deep-rooted enough among the people to render conflict with the Bundesbank on such an issue politically dangerous; and such fears would not be allayed by Article 52.4, which allows the European Council (presumably by a unanimous vote) to suspend entry into force of the monetary laws for five years after the Treaty becomes effective. Wessels, in a commentary on the Draft Treaty, finds it singular that the draft does not require ratification by national Parliaments for the establishment of full monetary union (or of a West European defence system).[38]

---

[36] Requiring a qualified majority in the Parliament, together either with an absolute majority in the Council, or with the support of the Commission and a minimum of one-third plus one of the weighted votes in the Council (see above; we have suggested a two-thirds majority in the Council above).

[37] Lomax, *The Time is Ripe: The European Monetary System, the ECU and British Policy*, (Report of a Federal Trust Study Group), November 1984, p. 23.

[38] Wessels, 'Der Vertragsentwurf des Europäischen Parlaments für eine Europäische Union', *Europa-Archiv*, April 1984, p. 242.

If German support for the European Union Treaty were to be conditional on provision for Member States' assent to any approach to full monetary union beyond the point of no return, the European Parliament would probably wish to adapt the draft in order to accommodate the German Government. The example might be found useful of the formula for transition from the first to the second stage when establishing the EEC, which was 'conditional upon a finding that the objectives specifically laid down in the Treaty for the first stage have in fact been attained in substance' (Rome Treaty, Article 8.3); the objective this time would be sufficient compatibility among the Member States' economies to justify an expectation of continuing equilibrium among them. The Rome Treaty required unanimous agreement for its 'finding'. Qualified majorities in Council and Parliament would be preferable in the Union; but it might be necessary to settle for the unanimity procedure. The transition in this case would be to full monetary union, whether with an exclusive Union currency or, if 'national monetary symbols', as the Werner report put it, were to be retained, with 'the total and irreversible convertibility of currencies, the elimination of margins of fluctuation in exchange rates, the irrevocable fixing of parity rates and the complete liberation of movements of capital'.[19] The condition for moving to full monetary union could be incorporated in the Draft Treaty with 'the procedures and the stages for attaining monetary union' (Art. 52.3), and would deal with the timetable for the free movement of capital (Art. 47.3) as well as with the permanent locking of parities or the replacement of national currencies by a European currency.

## *g. Microeconomic policies*

The need for European industry to have secure access to a wide European market does not grow less. The third industrial revolution causes specialization and scale of output, and hence the need for the wide market, continually to increase; so measures to remove the remaining barriers within the market and to keep it open become increasingly important. The Treaty of Rome has provided most of the instruments needed for this, with its articles on the free movement of goods (Articles 9-37) and the rules governing competition (Articles 85-94, which include the control of State aids that may distort competition).

If removing distortions to competition were all that is required of microeconomic policy, these instruments of negative integration provided by the Rome Treaty as it stands would be sufficient, in the hands of the institutions of the European Union which, unlike those of the Community, would be strong enough to ensure that the instruments are fully used. But the market imperfections inherent in the modern economy as well as the social pressures generated by the third industrial revolution have caused all the European governments to introduce a wide range of industrial policies. If these policies were a temporary aberration, the instruments of negative integration could control and eventually remove them. But although there is disillusion about support for lame ducks and lax treatment of uncompetitive firms, none of the European governments shows signs of abandoning policies to promote technological development and to facilitate adjustment; and except on the implausible assumption that the structure of industry will come to approximate the perfect competition model, economic theory justifies the governments. The European Union will be born into a world where industrial policy is a necessary fact. Thus the Union's microeconomic policy cannot be confined to the extirpation of Member States' industrial policies.

One consequence of this is that the Union should recognize the validity of Member States' or firms' industrial policies where these contribute to economic progress rather than stand in its way. This is doubtless why the Draft Treaty enjoins the Union, in making its competition policy, to 'bear in mind ... the need to restructure and strengthen the industry of the Union' (Art. 48). The Community has likewise accepted the Member States' subsidies to a number of troubled industries, while trying to

[19] Werner report, p. 10.

ensure that the subsidies are linked with measures of adjustment. Thus the instruments of negative integration can be used to promote positive adjustment: subsidies to troubled sectors or agreements among those sectors' firms can be made conditional on measures to promote a return to competitiveness.

The Community's financial resources have provided it with a carrot to go with its stick. Money from the Social Fund, the Regional Fund, the European Investment Bank, the New Community Instrument and ECSC funds has been used to support industrial adjustment. The ECSC Treaty, in addition to authorizing the Community to raise loans and to levy a turnover tax of up to 1% of the value of coal and steel production (or more if a two-thirds majority in the Council so decides), gives the Community powers to influence investment, and to control production and prices if a 'manifest crisis' (Art. 58) has been declared. Thus the Community can complement its right to control Member States' subsidies by the use of its own, rather slender, financial resources; and in coal, steel and, of course, agriculture, by more direct regulation of the market. But outside these particular sectors, the Community has only a slight capacity to do more than attempt to control the industrial policies of Member States, whereas here must be a strong presumption that interdependence has reached the point where the States' policies alone are not enough, but common policies using substantial common instruments are also required.

The powers to tax and borrow that the Draft Treaty gives the Union (Art. 71.2) would make a very big difference, if the Union uses its financial resources to support its microeconomic policy. The Draft Treaty also makes particular provision, in Article 53 on 'sectoral policies', for agriculture and fisheries, energy, transport, telecommunications, industry, and research and development.

An introduction to that article specifies its concern with 'specific sectors of economic activity' and 'sectoral policies'.[40] While these terms are appropriate for agriculture and fisheries, energy, transport and telecommunications, the word 'sectoral' is not so apt with respect to industry and to research and development, where at least some of the Union's policies should apply over a much wider area than is commonly known as a sector.

The aim of the Union's sectoral policies is defined in the first sentence of Article 53 as 'to meet the particular needs for the organization, development or coordination of specific sectors of economic activity', which sounds as if the drafters had schemes of sectoral planning rather prominently in mind, even if the aim of 'development' could encompass almost any legitimate aim of policy. As if aware that the first sentence may have a *dirigiste* flavour, the next sentence may be intended to reassure liberals in that the policies 'shall, by the establishment of reliable framework conditions, in particular pursue the aim of facilitating the decisions which undertakings subject to competition must take concerning investment and innovation': the Union is to provide a framework for investment and innovation in a market economy.

To the non-lawyer, the wording of this introductory paragraph may seem unwieldy and give a slightly odd impression. But it is not necessary to raise objections provided that the jurists can assure us that it adds something significant to the draft without giving too much scope for unintended or unpredictable consequences. If the jurists are not sufficiently sure of that, the draft could be strengthened by confining this paragraph to 'the Union shall have concurrent competence in the fields of sectoral policy specified in this article, in so far as such policies substantially affect inter-State trade'.

[40] Again, the Union's concurrent competence is to apply to policies 'at the level of the Union'. But can Member States have competence for policies at Union level? Would it not be better to give the Union concurrent competence for 'sectoral policies in so far as these substantially affect inter-State trade'?

## Industry; research and development

Both paragraph d of Article 53, on research and development, and paragraph e, on industry, are concerned mainly with the instruments of Union policy, and in this both emphasize coordination and guidance of the policies of Member States. For research and development, the Union 'may draw up common strategies with a view to coordinating and guiding national activities and encouraging co-operation between the Member States and between research institutes', while for industry it 'may draw up development strategies with a view to guiding and coordinating the policies of the Member States in those industrial branches which are of particular significance to the economic and political security of the Union'.

The Draft Treaty cannot be faulted for concentrating on instruments rather than aims in these two fields. For the aims can hardly avoid being as broad as those of economic policy, which are outlined in the Preamble of the Draft and defined in Article 9.[41] But the general injunction to the Union to coordinate and guide 'national activities', in the case of research, and 'the policies of the Member States', in the case of industrial branches with particular significance for economic and political security, does not help to determine the limits to centralization in the Union. Apart from the principle of subsidiarity, there is no legal limit, it would seem, to the Union taking control of the whole of research activities in the Member States, with the power to shut down a programme of research on developing a microcomputer or even on a cure for influenza, for that matter.[42] Nor, as we have seen, is the principle of subsidiarity much help since the Draft Treaty defines the coordination of national research and development activities as an objective of Union policy — which can hardly be undertaken more effectively 'by the Member States acting separately'. More than in most other activities, freedom and variety are essential for research. The Union should surely confine itself to the promotion of research projects whose scale puts them beyond the scope of the several Member States and to cooperation with the States in encouraging research and development, rather than 'coordinating and guiding national activities', which could open the way to telling not only the public authorities in the Member States, but even eventually the researchers, what they are and are not to do. Those functions which are suitable for the Union in this field could be performed by use of the Union's financial resources, without need for powers of compulsion over the research policies of Member States, let alone of independent institutes and researchers. The Union's financial power will be such that it should be able to offer joint finance on terms that would induce Member States to cooperate, or failing that, the Union could sponsor its own projects independently, without any resort to compulsion. Thus it would be better to omit the provision for coordination of national activities and to concentrate on the remainder of the paragraph on research and development, concerning expenditure of the Union's own money on promoting research, whether on its own or jointly with others. Paragraph d would then read 'in the field of research and development, the Union may provide financial support for joint research, may take responsibility for some of the risks involved and may undertake research in its own establishments'. If omission of the sentence regarding coordination of national activities does not preclude Union control of the Member States' research policies and activities, a sentence should be added to preclude it specifically. If reference to common strategies and coordination is held to be desirable, this could be by the method of cooperation, which depends on unanimous agreement.

There must be a similar concern about the provision for 'guiding and coordinating the policies of Member States' in the field of industry. The limitation of such control to 'those industrial branches

---

[41] In particular 'the economic development of (the Union's) peoples with a free internal market and stable currency, equilibrium in external trade and constant economic growth, without discrimination between nationals or undertakings of the Member States by strengthening the capacity of the States, the citizens and their undertakings to act together to adjust their organization and activities to economic changes'; 'the progressive elimination of the imbalance between its regions'; 'the improvement of international commercial and monetary relations'; 'the harmonious and equitable development of all the peoples of the world'.

[42] If 'national activities' were interpreted as applying to Member States' public policies, the field for intervention would be limited to that extent; but it would still be very wide, particularly in relation to those Member States where public support for research and development is large.

which are of particular significance to the economic and political security of the Union' is doubtless intended to confine the scope for directive policies on the part of the Union to certain sectors that are especially security-sensitive, even if the term 'economic and political security' might permit of wide interpretation. But however wide the interpretation, the restriction to security-sensitive sectors may offer too narrow a scope for Union policy: much of industrial policy aims to promote innovation and investment and to facilitate adjustment over the whole of 'industry' (including services as well). Such matters are already the subject of Community policies on competition, State aids, external trade and expenditure from its funds and financial instruments; and it seems desirable that there should be scope for the Union to play a more positive role in promoting innovation, investment and adjustment than the Community has been able to do. It seems likely that the Community patrimony already offers the legal basis for any desired expansion of such expenditure from the resources that would be available to the Union. But if there is any doubt about this, paragraph e on industry could provide, as paragraph d on research and development does, for Union expenditure to promote innovation, investment and adjustment, whether alone or jointly with Member States.

The Esprit programme is but a small beginning to such expenditure, confined at present to research; Euratom's expenditure has also been dwarfed by that of Member States; and the large public investment in developing European aircraft has been kept separate from the Community. But Union programmes of development and investment in such high-technology branches could well be promoted on the basis of Union finance. (Article 54.1 also provides for 'industrial cooperation structures', such as, presumably, the Airbus programme, to be converted 'into a common action of the Union' if the European Council so decides).

Union funds could also help to secure adjustment in sectors with problems such as shipbuilding or a number of branches of chemicals or engineering. An aim of Article 53.e may be to ensure that rationalization programmes for such branches are not obstructed by, say, one firm or one Member State. The industrial logic of this may be impeccable, if one takes, as the present author does, a rather Japanese view of industrial policy. But unless 'branches which are of particular significance to the economic and political security of the Union' can be quite narrowly defined, the provision for Union coordination could go far to suppress the industrial policies of Member States. If such a degree of centralization is not thought desirable, there could be merit in resting the Union's industrial policy on the existing Community instruments (competition policy, control of State aids, common commercial policy), with the crucial expansion of the funds available for Union expenditure. Paragraph e could, then, refer to this Community patrimony (as does the paragraph on agriculture — see below) and provide for Union expenditure (along the lines of paragraph d on research and development); and it is for consideration whether the paragraph could stop short at that.[43] Additional instruments, that could be useful for Union policy in industry as well as other fields, would be the 'specialized European agencies' which Article 54 authorizes the Union to establish.

## Transport, telecommunications

The main concern of Articles 74 to 84 of the Rome Treaty, on transport, is to remove any distortions that affect intra-State trade. The European Investment Bank offers means for investment in 'projects of common interest to several Member States which are of such a size or nature that they cannot be entirely financed by the various means available in the individual Member States' as well as 'projects for developing less-developed regions' and some other projects 'called for by the progressive establishment of the common market' (Rome Treaty, Art. 130); and the Regional Fund and New Com-

[43] Paragraph e of Article 53 also includes two sentences about procedures. 'The Commission shall be responsible for taking the requisite implementing measures. It shall submit to the Parliament and the Council of the Union a periodic report on industrial policy problems.' Such procedures are not specified in respect of other matters amd it is not clear why the Union should not be left to fix its own procedures in this matter too, instead of having them enshrined in the Treaty. The draft would be none the worse without these two sentences.

munity Instrument could also be used to finance projects that would contribute to a Union transport network. But it remains true that 'the distinctive feature of the common transport policy is the lack of positive guidance given by the (Rome) Treaty'.[44] A transport network that makes movements of people and goods among the Member States easier is an important element in creating a political and economic union, and the Draft Treaty is right to require the Union to 'undertake common actions to ... develop the capacity of transport routes so as to create a transport network commensurate with European needs' (Art. 53.b). It may not be so certain that the Rome Treaty's provisions against discrimination and distortions in inter-State transport need to be supplemented or replaced by a further requirement for the Union to 'undertake common actions to put an end to all form of discrimination, harmonize the basic terms of competition between the various modes of transport, eliminate obstacles to trans-frontier traffic' (Draft Treaty, Art. 53.b). Nor, following our earlier argument about subsidiarity, is the requirement for the Union to 'pursue a policy designed to contribute to the economic integration of the Member States' necessarily appropriate in a Treaty designed to keep the Union to what really needs to be done in common, since 'economic integration' can be so widely defined (see above). It might be better to replace this reference to economic integration by a formulation similar to that suggested above for tax harmonization, e.g. 'in the field of transport, the Union shall remove distortions that substantially affect economic transactions among the Member States'.

The Rome Treaty has no reference to telecommunications, which have become increasingly important with the rise of information technology. The Draft Treaty remedies this omission with paragraph c of Article 53, which requires that 'in the field of telecommunications, the Union shall take common action to establish a telecommunications network ...'. Since the analogy with the case for a Union transport network is quite close, it seems odd that this is not followed, like the reference in paragraph b to the transport network, by 'commensurate with European needs'. The text continues, instead, to require common standards and harmonized tariffs. The common standards are doubtless desirable but it might be advisable to confine the requirement to harmonize tariffs by 'in so far as necessary to facilitate inter-State communications'. The text then provides that the Union 'shall exercise competence in particular with regard to the high technology sectors, research and development activities and public procurement policy'. This reference to research and development in relation to telecommunications seems to add nothing to paragraph d on research and development. It is questionable whether the 'high technology sectors' related to telecommunications should be treated differently from other high-technology sectors which would come under paragraph e on industry; and the same could be said of public procurement. If the high technology sectors and public procurement need to be mentioned here, they should surely also be mentioned elsewhere; if they do not need to be mentioned elsewhere, it is doubtful whether they should be accorded a special mention here.

## Agriculture, energy

For agriculture and fisheries, the Draft Treaty rests solely on the Rome Treaty: 'in the fields of agriculture and fisheries, the Union shall pursue a policy designed to attain the objectives laid down in Article 39 of the Treaty establishing the European Economic Community' (Draft Treaty, Article 53, par. a). Article 39 of the Rome Treaty lists five objectives: 'to increase agricultural productivity'; 'thus to ensure a fair standard of living for the agricultural community'; 'to stabilize markets'; 'to assure the availability of supplies'; 'to ensure that supplies reach consumers at reasonable prices'. Stabilization of markets and security of supplies relate to the peculiar characteristics of agricultural markets and of food as the most basic economic necessity; and prices to the consumers also relate, up to a point, to the latter characteristic. But productivity and producers' living standards are not more relevant to agriculture than to various other sectors; and the question has been asked why one group of producers should be specially favoured in this way. The answer lies, of course, in the bargain that

[44] Despicht, *Policies for Transport in the Common Market*, 1964, p. 34.

was struck when the EEC was established; and the retention of the Rome Treaty's formulation may be seen as a political condition of acceptance of the European Union Treaty.

Special treatment is also given to the field of energy in the Treaties establishing the European Community. For coal (as for steel), the objectives can be grouped under headings similar to those for agriculture, with the addition of the development of international trade (ECSC Treaty, Article 3). For atomic energy, safety and security are also stressed (Euratom Treaty, Article 2). But there is no mention in these Treaties of oil or gas, or of an overall energy policy.

As with agriculture, paragraph f on energy in Article 53 of the Draft Treaty is confined to the statement of objectives: 'in the field of energy, action by the Union shall be designed to ensure security of supplies, stability on the market of the Union and, to the extent that prices are regulated, a harmonized pricing policy compatible with fair competitive practices. It shall also be designed to encourage the development of alternative and renewable energy sources, to introduce common technical standards for efficiency, safety, the protection of the environment and of the population, and to encourage the exploitation of European sources of energy'.

Security of supplies and stability on the market are of peculiar importance with respect to energy as to agriculture; and standards for safety and for the protection of the environment and of the population also have particular significance in the field of energy. The Draft Treaty is right to give the European Union these responsibilities which the Member States are decreasingly able to carry, or where, as in the case of safety and environmental standards, actions in one Member State can have significant effects beyond national frontiers. The objective of a harmonized pricing policy to the extent that prices are regulated is also hard to gainsay, although it seems likely that this is already covered by Article 101 of the Rome Treaty, which requires the removal of any 'difference between the provisions laid down by law, regulation or administrative action in Member States (which) is distorting the conditions of competition in the common market'. Encouraging the development of alternative and renewable sources of energy as well as other European sources are worthy aims; encouraging conservation would also be a worthy aim — but this raises the question whether it is advisable to list objectives in so much detail, or whether these more detailed objectives are not implicit in the wider objectives of security and stability. There should be some reluctance to enshrine in a treaty that has many of the characteristics of a constitution specific policies that may in the future cease to be such significant priorities. But apart from this, and the perhaps unnecessary addition of 'common technical standards for efficiency' among the things that Union action is to introduce, paragraph f appears to include only objectives with respect to which a strong case can be made for common action by the Union, and not to include matters that would be better left as the exclusive province of the States. Whether, in order to preserve their proper province for the States, the Union competence should be explicitly confined to action in pursuit of the specified objectives is a matter for jurists rather than economists to judge.

## *h. Social policy*

The Institutional Affairs Committee's rapporteur on 'policy for society' was concerned to gain popular support for the European Union project. 'We cannot', he wrote, 'expect Community citizens to enthuse about a purely institutional project or support it without knowing what policies, and the substance thereof, will be implemented by institutions of the future Union'. But he went on to 'admit that a positive description of the policies aspired to cannot include many practical details if it is seen as part of a venture designed to result in the drafting of a text that could serve as a constitution'.[45] We have already encountered, in our examination of the part of the Draft Treaty concerning economic

[45] Pfennig, 'The European Union's powers in the area of policy for society', in *Report of the Committee on Institutional Affairs*, Part C, *supra*, p. 65, par. 2, p. 66, par. 5.

policy, some articles that appeared to contain unsuitable details. But the part of the draft on 'policy for society' raises doubts of another order: regarding the suitability of allowing the Union to coerce the States at all where social policies are concerned.

Article 55 of the Draft Treaty gives the Union 'concurrent competence in the field of social, health, consumer protection, regional, environmental, education and research, cultural and information policies'. Thus the Union appears to have potentially exclusive competence (see above) for social policy as a whole or, if the word 'social' is to be more narrowly interpreted than in customary English usage, at least over a very large part of social policy.

It is a normal principle of federal constitutions that functions are not transferred from the States to the federal government unless the States are unable to perform them satisfactorily; and the drafters of the European Union Treaty clearly intended the principle of subsidiarity to have the same result (see above). Proposals for federal systems usually envisage leaving the great bulk of social policy with the States.[46] Yet the constitutional defence of States' autonomy in these matters under the Draft Treaty seems to rest heavily on the principle of subsidiarity, which may as we have seen be an inadequate safeguard.

One way to limit the scope for the Union's incursion into Member States' autonomy in these fields would be to confine the Union's 'concurrent competence in the field of social, health, consumer protection, regional, environmental, education and research, cultural and information policies' (Art. 55) explicitly to only such parts of those fields as are specified in the subsequent Articles 56 to 62. Yet even this would leave some provisions with highly-centralizing potential. Thus 'the regional policy of the Union shall comprise the development of a European framework for the regional planning policies possessed by the competent authorities in each Member State' (Art. 58). If a framework is to be effective, it is necessary to ensure that the policies made within the framework do indeed conform to it: hence the possibility that the Union could veto a local authority's decision to build a road by passing a town or, conversely, could force the building of a road in the teeth of local opposition. Article 58 opens the door, then, to detailed interference by the Union in what can be very local affairs. 'The Union-wide validity and equivalence of diplomas and school, study and training periods' (Art. 60) may give the Union scope to impose excessive uniformity of curricula in schools and higher education. 'The establishment of general comparable conditions for the maintenance and creation of jobs' (Art. 56) might be interpreted extremely widely; and 'trade union rights and collective negotiations between employers and employees, in particular with a view to the conclusion of Union-wide collective agreement' has already been mentioned as an area where there could be high risks in Union intervention without local consent.

A second possibility would be for the Union to be allowed to spend its money in the fields or on the aims specified in Articles 56 to 62, or even in the very wide fields listed in Article 55, but not to interfere in legislation or expenditure by Member States, except where the Rome Treaty already provides for this (e.g. with respect to equal pay and to the size of subsidies to investments in the various regions). Harmonization of Member States' legislation could also be subject to the method of cooperation, based on unanimous agreement among the Member States.[47] If the European Parliament is not convinced by these arguments, and Union control over States' legislation is thought to be particularly important in some parts of the areas listed in Articles 55 to 62, the list of subjects specified in these articles should at least be carefully scrutinized in order to determine where the case is particularly strong, so that subordination of State to Union legislation would be confined to as short a list of subjects as possible.

---

[46] See, for example, Rossolillo, *Citta territorio istituzioni*, 1983, p. 62 *et seq.*

[47] Article 55 could then read 'The Union shall conduct its relations by the method of cooperation in the field of social, health, consumer protection, regional, environmental, education and research, cultural and information policies'.

## *i. Conclusions*

A number of ways in which the Draft Treaty might be amended have been considered, some of which may be regarded as important or even essential improvements, others as minor ameliorations that might help to make the draft stronger or more acceptable.

Perhaps the most significant single issue is whether the principle of subsidiarity can be made a more effective safeguard against the danger of overcentralization. One possibility is to define the principle more sharply, particularly in order to forestall any tendency to circumvent it by adopting inherently centralizing objectives. Another would be to give more weight to the values of diversity and decentralization in the general objectives of the Union. A third would be to ensure that the Union's guarantees of human rights are defined as effectively as possible to this end.

A different form of general safeguard would be the requirement of an absolute or a qualified majority of the votes of Member States' representations in the Council, instead of just one-third of the weighted votes plus one, if the Union is to enact laws that 'extend' its common action. (On the other hand it would seem desirable that appointment of the Commission's President and amendment of the Treaty could be decided by something short of unanimous agreement.)

None of these general safeguards seems, however, strong enough to obviate the need to define limits to the Union's action in fields specified in the Draft Treaty, in order to prevent the exercise of the Union's concurrent competence from automatically giving the Union exclusive competence over an excessively wide area. These limits may be defined in terms of the aims, fields or instuments of Union policy, or conditions that must apply if Union action is to be justified.

One of the ways in which Union activity can be limited in certain fields is by confining it to cases which 'directly affect the establishment or functioning of the common market' (as the Rome Treaty puts it, in Article 100 on the approximation of laws) or which involve 'distortions in economic transactions among the Member States', or some such formulation. Such limits have been suggested above with respect to competition policy, approximation of laws relating to undertakings, tax harmonization, transport and telecommunications; and it has been suggested that the cases be further limited to those with a substantial effect.

Other aims can in addition be allocated to the Union, such as stability of markets and security of supplies (agriculture, energy). As far as agriculture is concerned, this aim is not defined in order to limit Union activity to action taken to further it, but in order to guide Union action within the wide field of agricultural policy which is open to it. There is a case, however, for limiting any use of special Union powers allocated by the Draft Treaty in the field of energy to these and a few other specified ends such as safety and environmental protection, beyond which any action in this field would have to rest on the powers given to the Union elsewhere in the Draft Treaty, as well as in the Community Treaties. Other examples of specific aims laid down for the Union are the creation of a 'telecommunications network' and of a 'transport network commensurate with European needs'; and the Union's powers specific to these two fields could well be limited to that, together with the removal of distortions that substantially affect economic transactions among the States.

A narrower definition of fields for Union action than the Draft Treaty proposes has been suggested for competition policy (to concern the matters defined in the EEC and the ECSC Treaties), and for tax harmonization (to exclude personal income tax). A narrower definition has likewise been suggested for the field that contains the heart of the Draft Treaty's economic proposals: conjunctural (as the Draft Treaty puts it) or general economic policy. Here it is proposed that, while the Union should use any of its own financial and budgetary instruments in pursuing its general economic policy, its interventions regarding the Member States' laws, policies and instruments in this field should be confined to monetary affairs, leaving the States' and local authorities' budgets in the sphere of Member States' autonomy.

This leads on to the issue of those provisions in the Draft Treaty that give the Union concurrent competence to coordinate the policies or actions of the Member States. Where, as with monetary policy, exclusive competence for the Union is a legitimate eventual aim, such a provision is justified. Where, as with research and development, such a degree of centralization appears highly undesirable, it has been suggested that the Union's activity be based on expenditure from its own resources (which under the terms of the Draft Treaty can be very substantial), whether alone or jointly with Member States, but that no provision be made for the Union to exercise compulsion over the research policies or programmes of the States or over private research and development. Industrial policy comes somewhere between the two, but this paper, in accordance with the decentralist (or federalist) philosophy that underlies it, leans towards a formulation in the Draft Treaty similar to that suggested for research and development, bearing in mind that the Community patrimony already gives the Union important instruments of industrial policy in the form of the competition policy, the control over State aids, the common commercial policy, and the financial and budgetary resources which under the Draft Treaty can be increased so as to carry much greater weight.

Also in line with the paper's decentralist and federalist philosophy, it is suggested that the Union's power to control the States' laws, policies or expenditure on social policy should be very restricted, if indeed the Union is to have any such power beyond the few items that it inherits from the Community. The Union's power to spend its own money in these fields using the method of common action is viewed more tolerantly. Apart from this, however, the method of cooperation appears more suitable than that of common action over most if not all of this field, because the relationship between Union and States should not be based on compulsion.

The major instance with respect to which it has been suggested that Union competence could be limited by a condition is that of full monetary union, transition to which could be conditional on Member States' agreement that adequate equilibrium had been established in their mutual economic relationships.

Apart from those matters that reflect the great issue of subordinate or coordinate relationships between the Union and the States, there are some articles that contain what appears to be unnecessary detail, whose removal would strengthen the Draft Treaty. Examples are to be found in the articles on telecommunications and the free movement of goods and services.

None of these detailed criticisms of the Draft Treaty's provisions for economic and social policy should be taken as calling in question the essential principles that are embodied in the draft. The intention is quite the opposite. The draft has attracted the support of the Belgian and Italian Parliaments and President Mitterrand has said kind words about it in his address to the European Parliament on 24 May 1984;[48] and it has been on the agenda of the *Ad Hoc* Committee on Institutions established following Mitterrand's initiative at the Fontainebleau Summit. But that is a far cry from ratification of the Draft Treaty as it stands. A great deal of effort will have to be put into persuading Parliaments, the public and of course Governments if a European Union Treaty containing the Draft Treaty's essential features is to be ratified; and careful consideration of proposed amendments to the draft should both help to improve the Treaty and contribute to the process of persuasion: a sort of *engrenage* between the European Parliament and political forces in the member countries. Such a process is not only necessary if enough Governments and Parliaments are to be convinced that the Treaty should be ratified. It would also help to establish what Wessels has rightly stressed is an essential basis of the European Union: its legitimacy in the eyes of the citizens.[49]

One particular merit of giving a prominent place in such discussion to the main concern of this paper — safeguards for the proper autonomy of the Member States — could be to channel nationalist reactions in a constructive direction. Even if one does not go all the way with Friedrich's categorization of the type of constitution to which we are accustomed in the West as 'a system of effective, regular-

[48] *Supra.*
[49] *Supra,* at p. 243.

ized restraints upon the exercise of governmental power',[50] this is certainly an important requirement for the European Union Treaty. The Union should be based on a coordinate relationship between Union and States, not on the subordination of one to the other; and the preservation of sufficient autonomy for the States is an essential part of this. But it is, equally, important that the Union not be subordinate to the States in matters where Union action is necessary for the general welfare. Thus the European Parliament should not fail to defend the hard core of its draft: co-decision by Council and Parliament with no time-limits and with majority votes; basic economic powers in the fields of the internal market, monetary union and the Union's financial resources.

[50] Friedrich, 'Federal Constitutional Theory and Emergent Proposals', in Arthur W. Macmahon (ed.), *supra*, at p. 516; Friedrich refers here to his *Constitutional Government and Democracy* (revised ed.), 1950.

# Chapter VII – Foreign affairs powers and policy in the Draft Treaty establishing the European Union

*by Peter Brückner*

## 1. Introduction

In the context of the present paper, entitled 'Foreign affairs 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 of analysing and judging the relevant parts and provisions on their own merits, irrespective of the rather widespread doubt whether 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 raise 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.

## 2. 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

[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 Megret, 'Le droit de la Communauté économique européenne', *Relations Extérieures*, 12.

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 effort. Such efforts have been deployed first and foremost by the European Court of Justice, which in the *ERTA* decision 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* judgment (Case 22/70 [1971] ECR 263) is the basis for the doctrine of parallelism, whereby treaty-making power would be co-extensive with the exercise 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 *Kramer* (Cases 3, 4 and 6/76 [1976] ECR 1279) and Opinion 1/76 ([1977] ECR 741) concerning a draft agreement 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, futher controversy.

The reference to 'necessary' etc. is surprisingly similar to the language of Article 235, which in an *obiter dicta* in *ERTA* 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, par. 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 Opinion 1/76 doctrine and Article 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 Article 113, problems arose as to the interpretation of this concept in Opinions 1/75 ([1975] ECR 1355) and 1/78 ([1978] ECR 2151).

These opinions constitute, together with the *ERTA* judgment, 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 1970s 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,

[2] Article 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 (Arts 113, 229 and 231, and the afterthought in 238).

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 1970s the problem was not so much the determination of the legal parameters of Community external competence but rather the reluctance of 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 agreements still to be negotiated on a bilateral basis illustrates this difficulty.

In recent years the Eastern bloc attitude has softened in certain respects, in particular in certain multilateral forums. 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 of responding to such expectations have manifested themselves in two related respects.

Experience has shown that subjects for international negotiations, in particular in multilateral forums, 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 as well as under Member State competence. In fact, there may be a sliding scale from exclusive Community competence, potential competence, Article 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, for instance 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 (e.g. first phases of USSR sanctions), in other instances by the Member States according to national legislation (Iran).[1]

[1] The later phases of sanctions against USSR and the case of Argentina 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 pros of Community action against the cons of surrendering powers in the external field have been willing to make certain concessions along the road. Ministers have grown out of the absurdity of flying 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 unanimity.

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 negotiation procedure.

The present negotiation regime has evolved through practice, inspired largely by Article 113 procedures and by international State practice. The legal principles defended in particular by the Commission have been in constant clash with so-called 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. 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 even in areas outside Article 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 Article 235 and Article 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. Paragraph 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 does not always reflect the wishes of 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 on speaking 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 State 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 the Member States' wish to monitor closely the Commission as spokesman in external affairs. Procedures taking account of Member States' (and 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.

# 3. International relations of the Union

## *a. 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 (Arts 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. Sections 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:

(i) Article 4, par. 3, concerning the Union's accession to human rights conventions;
(ii) Article 6 on the legal personality of the Union;
(iii) Article 7 on the Community patrimony, in particular paragraph 4;
(iv) Article 16, section 1, Article 21, section 2 and Article 28, section 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, par. 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 pars 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 impression 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.

## *b. Objectives and the Treaty system of international relations*

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

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

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

Apart from these more specific comments, it seems that the language of paragraph 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), paragraph 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).

Article 10, par. 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 resumé, 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.

## *c. Analysis of the operative provisions on international relations*

Article 64, par. 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, par. 1. The provisions of Article 10, par. 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. Article 12, par. 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

[4] Paragraph 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.

institutions cannot act in areas 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 advances as an answer to our question. It is, at least, the result of a fair interpretation of Article 64, par. 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, par. 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, par. 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, par. 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.

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, par. 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, par. 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, par. 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, for example, 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 paragraph 4 of Article 64, which seems to encompass external policies under exclusive Community competence established as well on the basis of Article 235 (EEC). This, however, would hardly be a legally-secure solution.

Paragraph 2 of Article 64 confirms in particular that commercial policy remains a field of exclusive competence. Whereas Article 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

---

[6] See similar criticism in Constantinesco, Division of fields of competence between Union and the Member States, chapter III, this volume.

[7] See Weiler, 'The External Legal Relations of Non-Unitary Actors: Mixity and the Federal Principle' in *Mixed Agreements* (O'Keefe and Schermers eds), 1983.

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 paragraph 3 of Article 64, is not defined, for instance, in relation to commercial policy.

The provision prescribes that during a transitional period of 10 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 coexistence 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 paragraph 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.

Paragraph 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, for instance *vis-à-vis* certain Eastern European countries and the USSR. In other cases, for example 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 pre-emptive effects of agreements concluded on the basis of *ERTA* plus Opinion 1/76 and perhaps also of Article 235 (EEC).

This leads to an intricate question relating to the continued coexistence of Article 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 (EEC) operate in particular in relation to paragraph 4 of Article 64 (DT)?

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 paragraph 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 to observe 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

[8] See Doc. 1-575/83/B, p. 5, par. 12, 'Explanatory Statement'.

politically responsible to the 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 Article 65 seems 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, paragraph 4 refers only to international agreements but not to other international acts (unilateral legal or political acts), whereas paragraph 2 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, for instance Coreper, which, in spite of its very important role in actual practice, is not even mentioned in the draft.

Paragraph 3, concerning information of the 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 paragraph 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 in 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 wherever it has been possible to obtain unanimity, within parameters defined as 'all major policy questions of interest to 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 that is so wide and 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 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, for instance, 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 competence. However, a simple reading of the provisions of Article 68, par. 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 not under Member States competence either.

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, pars 2-4 would not make sense. However, a problem arises if — as foreseen by paragraph 1 of Article 67 — an action is to be implemented by the Commission. Is the Commission acting on behalf of 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, as for example, in the field of economic sanctions, it must be ensured that the management of political matters remains 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 voting.

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, if modified for foreign policy reasons, should 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, par. 2 *in fine*.

Article 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, Article 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 Directorate-General of Foreign Affairs?)

Paragraphs 2 and 3 use the term 'the Union' without specifying the competent institution. Otherwise, these provisions seem to contain a sufficient 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]

Paragraph 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. Paragraph 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 between 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 mentioning these subject matters is tantamount to waving the red flag 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.

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 3).

Paragraph 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 paragraph 1.

The novelty of Article 69 is that the Commission may represent the Union — and not only the institution as such — in third countries and internationl organizations. Article 69 deals with the so-called *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.

---

[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.

[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, as in France, for example. The composition of the Council should be open to some flexibility.

### *d. 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 coexistence of Article 228, par. 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, par. 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, par. 2 might, in the event, be adjusted 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 by 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 corresponding to the number 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.

## 4. 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 in 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 in the effort to obtain 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 Article 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 coexistence of a Union with a different membership to third countries.

# Chapter VIII – The institutionalization process under the Draft Treaty

*by Luciano Bardi and Gianfranco Pasquino*

## 1. Introduction*

The Draft Treaty establishing the European Union constitutes the most tangible piece of evidence so far of the new assertiveness of the directly-elected European Parliament. In Altiero Spinelli's own words, the European Parliament decided to assume, on behalf of the citizens which had elected it, the task of preparing and proposing a wide-ranging reform of the Communities, after having realized 'the obvious impossibility of overcoming the glaring contradiction between the needs of Europe and the ability of Europe run by the Council to respond to these needs'.[1]

There is widespread agreement that most of the shortcomings of the EC are due to the inadequacy of its institutions and it is quite understandable that such a staunch European as Spinelli should devote so much effort to a proposal largely centred on institutional reform. Institutional blueprints, however, always present numerous gaps and undetermined aspects which may produce results sharply contrasting with those originally envisaged by the draftsmen.[2] In the case of the Draft Treaty such an assessment is made even more difficult by the rather oblique and imprecise way in which the desirable end results are expounded by Spinelli. One can only deduce that Spinelli, convinced of the inadequacy of the Council's decision-making, envisages an institutional structure attributing more decisional power to the genuinely supranational bodies of the EC to the detriment of those expressing intergovernmental decision-making patterns.[3] The broad goal of greater supranationalism as the solution to most EC problems, however, does not allow for an assessment of the internal consistency of the set of institutional provisions contained in the Draft Treaty. Besides problems stemming from

---

* Although the conclusions and general approach of this paper were elaborated jointly, Luciano Bardi is primarily responsible for the section entitled 'The institutions of the European Community', and Gianfranco Pasquino for the section on 'Institutional reform in the Draft Treaty for a European Union'.

[1] Spinelli, *Towards the European Union*, Sixth Jean Monnet Lecture, European University Institute, Florence, 13 June 1983.

[2] Just one example very close to our hearts: Article 14 of the Draft Treaty stipulates an organic law to determine a uniform procedure for the election of the European Parliament. The existing literature, on the other hand, provides us with conclusive evidence that even apparently minor differences in electoral laws can produce radically divergent consequences for the political systems they affect. See, in particular, Rae, *The Political Consequences of Electoral Laws*, 1967; Katz, *A Theory of Parties and Electoral Systems*, 1980. On the basis of the future law, the European political system might develop in a number of different directions which are impossible to envisage here.

[3] Spinelli, *supra*. Our observation on the vagueness of Spinelli's motives, due to a variety of political and practical constraints, is only meant to underline the ensuing methodological problems. We are also aware that by implicitly defining the Council of Ministers as an inter-governmental institution we are not doing full justice to its supranational attributes. See, Weiler, *Supranationalism Revisited — Retrospective and Prospective*, European University Institute working paper, Florence, 1981. But for our purposes, the erosion of the Council's supranational features, pointed out by Weiler himself, at pp. 36-40, authorizes the more reductive definition.

defects of institutional blueprints in general, and of the Draft Treaty in particular, further analytical difficulties are to be found in the attempt to come to grips with the dynamic nature of political processes. In various political systems a number of institutions have been known to evolve in such a way as to acquire scope, importance and powers going well beyond those specifically provided for in those systems' constitutions.

Spinelli's motives may be assumed to be based on his and others' assessment of the performance and, inevitably, of the shortcomings of the EC and its decision-making institutions. But institutionalization, that is the process whereby institutions acquire their position in the political system, can be measured at various points in time on the basis of objective criteria. Certain characteristics of the internal organization of an institution indicate its ability to become externally institutionalized *vis-à-vis* other bodies interacting in the system. In particular, Samuel Huntington and Nelson Polsby agree that institutions should be adaptable, autonomous, reasonably differentiated from their environments and complex.[4]

Evaluating the present institutional balance of the EC in the light of these criteria should provide us with both an idea of the shortcomings the Draft Treaty would presumably aspire to eliminate and with a measure of the degree of institutionalization reached by each relevant EC body under the present Treaties. These findings can be examined in the light of the specific provisions of the Draft Treaty. An assessment of the institutional provisions of the Draft Treaty would thus depend on which institutions prove to have the greatest potential for further institutionalization. Our attention will be mostly devoted to internal aspects of individual EC bodies' institutional development. But each institution's internal development will have external consequences affecting all the others. The political development of the system as a whole will depend on the overall balance of relationships in the EC institutional circuit, and in this light our study of individual institutions is to be understood.

## 2. The institutions of the European Community

### *a. General problems*

The institutional set-up of the EC has suffered from a number of general problems, largely attributable to defects in the original design. It is not our intention here to proceed to a systematic evaluation of the malaise of the EC. But a quick overview will serve as a background for our analysis. As others have convincingly pointed out, the evolution of the EC has been severely hindered by the peculiar features of the Treaty of Rome. Lacking the flexibility normally characterizing constitutions, the Treaty made it impossible for the EC to develop beyond a certain point. Even if 'there is some movement in the joints of the Treaty, permitting interpretation and institutional evolution . . . the very length and specificity of the European document compounds the fact that it is a treaty requiring unanimous approval for change', thus making it 'different from a document that allows change to be made in it only with the support of a large majority of its constituent members'.[5] Such rigidity contrasts with the need for flexibility implicit in the functional and neo-functional principles embedded in the Treaties.

---

[4] The four categories will be termed respectively as: adaptability, autonomy, coherence/boundary definition, and complexity. See Huntington, 'Political Development and Political Democracy', in 17, *World Politics*, 1965, p. 386 and *Political Order in Changing Societies*, 1968; Polsby, 'The Institutionalization of the US House of Representatives', 62, *Am. Pol. Science Rev.*, 1968, p. 144. On internal and external institutionalization, see Cotta, *Classe Politica e Parlamento in Italia. 1946-1976*, 1979, p. 285 *et passim*.

[5] Krislov, Ehlermann and Weiler, *The Political Organs and the Decision-Making Process in the United States and the European Community*, forthcoming.

Individual theories of integration have demonstrated their inadequacy not only in predicting but also in explaining the evolution of the EC.[6] Some of the major problems afflicting the EC and its institutions, however, can be explained by considering the limits of the functionalist principles that informed the original communitarian design. Contrary to the hopes that interest aggregation would more and more often take place at the European level (as the formation of European trade union federations would indicate), national interest groups are protecting and entrenching themselves rather than overlapping (as the sad reality of wine and fish wars is showing), thus contributing to the endless disputes among the Member States' governments. Insulating the Commission from national governments to protect its independence, resulted in a division of the policy-making process along functionally determined lines, involving the competent branches of the national bureaucracies and ultimately strengthening the nation State.[7]

Moreover, wherever a spill-over effect has indeed taken place, enlarging the scope and augmenting the import of EC activities, it has also underlined the problem of legitimacy within the Community. Commissioners are individually appointed by the member Governments while the Commission as a whole is subject to the censure of the European Parliament. The prospect of the possible transfer of important prerogatives to a virtually unaccountable supranational institution has contributed greatly to the strengthening of the Council and to the entrenchment of the unanimity principle. Ever since the Luxembourg compromise, unanimity has been the rule, and the few instances in which majority votes have been taken in the Council to overrule individual members' paralysing vetoes must be considered as sporadic exceptions. The rationale behind all this would be that unanimity makes each member Government responsible, and accountable to its Parliament, for each Council decision. The reintroduction of majority vote would create a 'democratic deficit' which could hardly be filled under the present institutional arrangements.[8]

The trend in favour of inter-governmental decision-making was also reinforced by 'protective' reactions of governments to the monetary, energy and general economic crises of the 1970s, culminating with the official incorporation of the European Council as a Community institution in 1974. The enlargement of the Community, as well as the continuing economic difficulties experienced by all member countries, brought to the fore another major problem of the Community, that of 'own resources'. The Community has 'a right to its own resources, but it (has) no clear right to resources which (are) adequate to perform those tasks which (have) been required of it'. The Community therefore lacks autonomy and its proper functioning totally depends on supplementary allocations decided by the Council and ultimately by the Member States.[9]

Last but not least, as pointed out in the Committee of Three report on European Institutions, EC decision-making has been affected by the 'general phenomenon of an excessive load of business aggravated by slow and confused handling (which) may be summed up in the one French word *lourdeur*'.[10] Such administrative inefficiency, probably due to the decline of the institution best equipped to expedite technical procedures, the Commission, found a ratchet in the relationship of interdependence existing among the various EC institutions and the consequent need for several revisions of the same subject matter.

All of the factors listed above, while having a general, and mostly negative, impact on EC decision-making, have produced diverging effects on individual institutions. But one could also argue that the course of events could at least partially depend on the characteristics of the single institutions involved and that an institutional explanation of the present situation of the EC can be attempted.

---

[6] See Webb, 'Theoretical Perspectives and Problems' in *Policy-Making in the European Community*, (Wallace, Wallace, and Webb, eds) 2nd ed., 1983, p. 1.
[7] Henig, *Power and Decision in Europe*, 1980, pp. 4-5. On the attempts to insulate the Commission see Krislov *et al.*, *supra*.
[8] This analysis is by Marquand, *Parliament for Europe*, 1979. See also Weiler, *supra*, at pp. 32-34.
[9] Taylor, *The Limits of European Integration*, 1983, pp. 32-36.
[10] Council of the EC, *Three Wise Men's Report on European Institutions*, 1980, p. 11.

## *b. The Commission*

All commentators agree that, after an initial period during which the Commission carried out its tasks competently and efficiently, allowing for the successful take-off of the Common Market, there has been a steady and considerable decline in its powers and function-performing capabilities, to the point that now the Commission often prepares proposals actually initiated elsewhere (the European Council and Council of Ministers on all extra-Treaty policies). The Huntington-Polsby model measures adaptability according to an institution's age, which is taken to imply an acquired ability to attract new functions. In spite of its age, however, the Commission has shown very little ability to attract new functions.[11]

The lack of autonomy the Commission has in disposing of, let alone in acquiring, its own resources is certainly a very severe handicap which has hindered the Commission's performance even in areas designated as the Commission's domain in the Treaty of Rome. If the unwillingness of the member Governments to give up additional portions of their sovereignty was probably an unsurmountable obstacle for the Commission, this failure was also partially due to the Commission's structural deficiencies. In other words, the Commission is not sufficiently complex to be able to move into new policy areas. This might sound like a paradox given the large number of Directorates-General, Directorates and other sub-units into which the Commission is divided. But even so, as we have seen, the Three Wise Men tell us that the Commission is overloaded; it simply has too much work to do in its multifunctional position as initiator of Community policy, mediator, administrator and guardian of the Treaty. On the other hand, as the various subdivisions of the Commission are determined by the total number of Commissioners and Directors-General the Member States are entitled to, they do not respond to its actual task-performing needs. As pointed out in the Spierenburg report, there is 'an imbalance in the importance of the various portfolios (and the) distribution of staff between DGs does not accurately reflect the growth of departmental burdens'. Many of the sub-units tend to perform a single function, usually dealing with highly-technical aspects pertaining to a single policy area, often overlapping with the work of other sub-units belonging to different DGs. In conclusion, also considering that communication within the Commission mostly occurs vertically and almost never horizontally, not only is the Commission overloaded, but it also lacks the power of a functionally complex organization.

The Commission's lack of legitimacy 'has certainly prevented it from moving into new areas to maintain progress and meet fresh challenges' once 'the detailed guidance contained in the Treaties was gradually exhausted'.[12] As pointed out by Ernst B. Haas, the concept of legitimacy hinges on participation/representation and performance.[13] Through the early years of the Community, the Commission drew its legitimacy from the representativeness of the member Governments, the signatories of the Treaty. There is enough evidence that, with the possible exception of the honeymoon period that followed the Treaty of Rome, the Member State's grant of authority to the Commission was conditional on the preservation of some means of national control. The national quota system by which Commission officials are selected, even if it does not affect the behaviour of individual Commissioners, certainly has an impact on the institutional integrity of the Commission. Moreover, the cooptation of national officials into the decision-making process presents 'a major challenge to the

---

[11] Although Huntington uses institutionalization to explain political development, he does not tell us much about possible explanations for institutionalization. On adaptability he says that it is a function of age and environmental challenge. The former attribute is also used as an indicator of adaptability while the latter is practically dropped in the subsequent analysis (*Political Order, supra,* at pp. 13-17). This shortcoming of the model, however, does not detract from its usefulness in assessing the level of development of one institution at a given point in time and providing diachronic measures of its institutionalization. On the need for a dynamic theory of institutionalization and more powerful explanatory criteria see Sisson, 'Comparative Legislative Institutionalization: A Theoretical Explanation', in *Legislatures in Comparative Perspective,* (Kornberg ed.), 1973, and Luciano Bardi, *Direct Elections of the European Parliament. Institutional Development and Power Relations,* paper presented at the ECPR Joint Sessions of Workshops, Florence, 1980.

[12] *Three Wise Men's Report, supra,* at p. 50.

[13] Haas, *The Obsolence of Regional Integration Theory,* 1975, p. 65.

institutional identity of the Commission'. Many such officials see their EC appointment as 'a useful interlude in their national career', and, working mainly in technically-specialized committees and subcommittees involving representatives of the member countries, never develop a sense of belonging to a European civil service.[14] Their mid-career entry, frustrating the aspirations of young 'European' officials might indeed contribute to the decline of the performance (and legitimacy) of the Commission. All of these considerations warrant for the Commission the attribution of a low score on the coherence/boundary definition criterion proposed by the Huntington-Polsby model.[15]

## *c. The European Council, the Council of Ministers and Coreper*

Given their mostly inter-governmental characteristics, the European Council, Coreper, and the Council of Ministers can be considered, at least for analytical purposes, as one institution. Indeed, Coreper and the European Council can be seen as responses of the Council of Ministers to shortcomings of the institutional set up of the EC.[16]

The Council, in its various ministerial manifestations, has been expanding its policy-making and even policy-initiating powers chiefly to the detriment of the Commission. In a parallel fashion, a number of accessory institutions have been created (Secretariat) or reinforced (Coreper), giving the impression that the Council itself is becoming a permanent European institution capable of giving continuity and long-term perspectives to EC policy-making. In order to do so, the Council still needs the cooperation of the institution best equipped to expedite technical procedures, that is the Commission. But Council decision-making is also deeply affected, both in scope and efficiency, by its need to delegate the administrative preparation of its own decisions to standing or *ad hoc* working parties, set up by either the Council itself, or Coreper or even the Special Committee on Agriculture. Such working parties have an enormous importance in determining the inter-governmental nature of EC decision-making. According to Christoph Sasse, their '*de facto* autonomy . . . leaves them free to determine which decisions reach the political (Coreper-Council) level'. Despite, or maybe because of, this seldom-acknowledged importance of working parties, they are often staffed with home-based experts unfamiliar with EC methods and with little propensity for compromise. The working party member's attachment to the national position can considerably delay or even prevent decisions.[17]

The EC's cumbersome decision-making processes, now almost exclusively centred on the Council in its various forms (Council(s) hereinafter), based on lengthy preparatory stages in *ad hoc* or standing committees at various levels, and involving long bargaining sessions amongst Council members with the mediation of the Commission, reflect the institutional ambiguity of what has now become the most powerful EC institution.

In many respects, from the point of view of the would-be European political system, the Council(s) are non-institutions. They are even less autonomous and coherent than the Commission. In fact, the

---

[14] Coombes, *Politics and Bureaucracy in the European Communities,* 1970, p. 242 *et passim.* Many commentators, including most official rapporteurs (Spierenburg, Three Wise Men), indicate low morale as one of the main causes of Commission inefficiency. Low morale is in turn the product of contingent situations (such as the relative youth of many top officials, which undoubtedly is likely to delay the career of lower level employees) and is not explicitly considered in our analysis, which deals with factors affecting long-term structural changes.

[15] According to this criterion, an institution must have clearly-defined boundaries, and its members must have a sense of belonging and loyalty to it. Leadership positions must be filled by individuals recruited within the organization on the basis of universally-shared, impartial and impersonal criteria. See Polsby, *supra,* at p. 145.

[16] Henig, 'The European Community's Bicephalous Political Authority', in *Institutions and Policies of the European Community,* (Lodge ed.), 1983. According to Henig, 'to all intents and purposes (the European Council) should be considered as the Council of Ministers in its highest manifestation (even if) from a strictly legal point of view it is not the Council and does not have formal Treaty powers', at pp. 14 and 16.

[17] Sasse, Poullet, Coombes, and Duprat, *Decision-Making in the European Community,* 1977, p. 96.

Council(s) and their activities are directly controlled by the Member State Governments to which their members individually belong. Even the various ancillary organizations, such as Coreper and the whole host of *ad hoc* or standing committees and working parties, are mostly staffed with national civil servants all holding very different views as to what is to be done and how to do it.

But the very same national Governments and civil services, which may be at least partially responsible for the disappointing performance of the Community in recent years, bestow upon the Council those sources of strength which the Commission sorely lacks. The Council(s) derive from the national Parliaments, to which their individual members are accountable, the legitimacy to act in any policy area in the national (as part of EPC) or in the communitarian interest, with or without the rubber stamp of the Treaty. In this the Council(s), although meeting sporadically and in various personnel permutations, have shown remarkable adaptability exploiting the resources of national diplomatic traditions and creating new structures to perform some of the newly-acquired tasks. The wide scope of the powers of some of the Council(s) and the interchangeability of some of the ministers involved have also given them a sort of discrete functional complexity.[18]

Looked at as integral parts of the national governments and the civil services to which all their members and officials also belong, the Council(s) and related organizations even have a high degree of autonomy and coherence, even if resulting from compromise among peers.

## *d. The European Parliament*

Formally, the EP has budgetary powers, control over the executive, a legitimizing function and some legislative powers. But in practice, despite direct elections, these powers remain rather limited. Parliament's budgetary powers are formally the most important of all, but in practice they amount to much less than commonly believed. Being only on the expenditure, and not the revenue, side, they have very little impact on policies. Even the power to reject the budget as a whole has only minor practical consequences given the provision granting the Commission monthly appropriations (on the basis of the previous year's budget) until the new budget is approved.[19] Parliament can only amend non-compulsory expenses, that is expenses pertaining to policies not explicitly provided for in the Treaties. These expenses amount to no more than 20% of the whole budget. As the powers to propose modifications of compulsory expenditure and to discharge the budget are even weaker, Parliament is afforded very few opportunities to allocate resources, let alone raise them. Parliament does not even have complete control over its own expenditure, nor does it determine the salary levels of MEPs, which is done by the member Governments on the basis of national parliamentary salaries.[20] MEPs also lament the lack of a statute of the European Parliamentarian. This places them in a situation of objective personal and collective disadvantage with respect to all other EC and national officials.

All of the above factors detract from the autonomy and the coherence/boundary definition of Parliament, despite the relatively small number of dual mandates left after direct elections.[21] An evaluation of the importance of Parliament's other powers entails a discussion of its singular relationship with other EC institutions. Parliament has the power to dismiss the Commission by a qualified majority vote. Dismissal of the Commission would be a very draconian measure compared to its effects, and as such it has never been used. In any event, the new Commission would still be appointed by the

[18] Admittedly, if the Council(s) are to maintain their present crucial role in EC policy-making, they will need a permanent structure or at least an organic relationship with the Commission. This, however, may not be necessary as long as EC decision-making consists of 'pure diplomatic-style negotiations', Vedel report, at p. 27.

[19] Henig, *Power and Decision, supra,* at p. 70. On the frustration that such provision can cause for MEPs see Spinelli, *supra,* at pp. 10-11.

[20] Henig, *Power and Decision, supra,* at pp. 82-83.

[21] About 25% during the first legislature. We must not overlook the fact, however, that many consider a number of dual mandates necessary to preserve a link between the EP and its national counterparts.

member Governments. This feature of the EC institutional set-up also belittles the legitimizing function of the EP, since it has no executive body to appoint and to invest with the legitimacy it draws from the European people through direct elections.

The legislative powers of the EP amount to the power to express opinions on Commission proposals with very little or no impact on the legislative output. The emergence of the European Council as the primary policy-making unit has in fact weakened the EP's position, as it has no organic relationship with the former body. As pointed out in the Vedel report, the EP's 'consultative function is impaired by the fact that, although the Commission seeks the support of the Parliament, it enters into negotiations with the Council even before submitting its formal proposals to the latter'. Given the limits of Parliament's powers and functions little can be said about its (functional) complexity and adaptability. After direct elections, however, with the parallel increase in the size of the Assembly, the EP has developed a more diversified structure. At the same time, some of its sub-units, such as the parliamentary groups, have become themselves more salient, while the scope and number of EP activities seems also to have increased. Boosted by its new legitimacy, the EP has become more vocal on a number of issues, such as civil rights and nuclear deterrence, having international resonance. The very Draft Treaty we are here examining testifies to the EP's attempt to give itself the powers and functions of a constituent assembly.

## *e. EC decision-making: institutional explanation*

The main thrust of Spinelli's argument is that the Community must adopt a new Treaty not only to fulfil the federalist dream, but also because the present patterns of inter-governmental decision-making are to a large extent responsible for the inefficiency of EC machinery and for the declining appeal of the European ideal in at least some of the Member States. Much of the criticism of the present Communities centres on the lack of political will for integration. Without 'political will' there will be no solution to the Community's *malaise*, but it is a very fuzzy term, and a very difficult variable to operationalize. Although the motives of the individual States will probably always be particularistic, they might adopt pro-European strategies on the basis of some of those very motives. As a result of the combination of various pro- or anti-European impulses, one could conceive situations where the overall 'political will' in favour of integration might be neutral or even moderately positive. Moreover, as several federal and consociational experiences suggest, the presence of adequate institutional structures might actually help shape the 'political will' of the various would-be members of the Union.[22]

A solution to the present problems of the EC might, therefore, lie in a reformation of its institutions. But in order to avoid the pitfalls of tautology, one has to accept the view that EC institutional deficiencies may have other (structural) causes than the simple fact that member Governments do not want them to work.

The Community is still an embryonic political system and it would be naive to expect a high degree of institutionalization of its decision-making bodies. The low scores on the various criteria of institutional development detected for the three bodies we have considered should not come as a surprise. More disturbing for the 'European' cause is the trend towards a lower level of institutionalization in the evolution of the Commission, while the Council(s) seem to have at least the adaptability to fill the

[22] Recalling the difference between internal and external institutionalization, the internal development of an institution could give it the strength to respond to the challenges posed by the environment (i.e. adverse 'political will') and enhance its position in the system (external institutionalization). Such internal developments, though, can only help us explain, if not predict, possible deviations from the original institutional scheme. On the other hand, as we have seen with regard to the effects of the Treaty of Rome on the Commission and the Council(s), respectively, institutional schemes could affect individual institutions very differently.

vaccum.[23] The combination of these two trends is at the root of the decreasing dynamism, efficiency and, ultimately, 'Europeanism' of EC decision-making.

Unfortunately, as mentioned in an earlier footnote, the Huntington/Polsby model for measuring institutionalization is descriptive, not explanatory. It has been suggested that the institutionalization of an organization might be favoured by activities of its members designed to obtain credit *vis-à-vis* those to which they are accountable.[24] This is certainly not the place to attempt a revision of the institutionalization theory, and it might be enough to say that the legitimacy and accountability of an organization must be important prerequisites for its institutionalization.

As we have seen, the legitimacy of the Commission rests on the specific provisions of the Treaty and, as such, the negative institutional development of the Commission may be due to the gradual exhaustion of the tasks provided for in the Treaty or their declining importance *vis-à-vis* emerging environmental challenges (economic crisis, technological gap, defence concerns, etc.).

Strictly speaking, from an EC perspective, the Council(s) also present a very low level of institutionalization, and their remarkable adaptability in crisis situations could be hard to explain. But the Council(s) have an 'unfair' advantage over the Commission, stemming from their position between the European political system and the national ones, that allows them to escape the strait-jacket represented by the Treaty. If one considers the Council(s) as a negotiating forum for the representatives of the various branches of the national governments, rather than as an institution of the EC, 'the agreement to agree' prevailing in the Council might be more than adequate to give it the requisite coherence.

The individual members of the Council derive their legitimacy from their respective national Parliaments. As branches of national civil services, they individually have even more coherence, autonomy, and sense of collegiality; in a word more institutionalization. The desire to strike the best possible bargain might produce in the short term individual policy decisions not radically diverging from those hypothetically made by a supranational authority in the 'general interst'. But the long-term perspectives are very different. The ultimate goal of the members of the Council(s) is not the pursuit of a 'general interest'. Hence the disregard for the development of adequate structures and the lack of complexity to carry out the ever-increasing work-load, leading to inefficient operation of EC machinery.

The European Parliament is the 'odd man out' of the situation. It is now the only body with continuing 'European' legitimacy among those we have considered. As such it is struggling towards the acquisition of new functions, of more autonomy and of a greater sense of purpose. But it is too early to say whether this trend towards greater institutionalization will be enough to carry it beyond the limits of its formal powers.

Summing up, the Commission is probably still the best-equipped institution to carry out the tasks pertaining to the functioning of the Community. Parliament, on the other hand, is the only institution having the European legitimacy to sustain its initiatives. Ironically, their very supranational character has limited their internal and external institutionalization in the European political system. The development of both institutions has been hindered by the rigidity of the Treaties. The very precise determination in the Treaty of the Commission's competences seems to have denied it the legitimacy to assume the new functions required for the preservation and expansion of the system. In other words, the limits posed on the internal institutionalization of the Commission have prevented its external institutionalization as well. In the case of Parliament the exact opposite has occurred, as

[23] Not only is the Commission losing functions, showing at least rigidity if not dis-adaptability but, with enlargement and the defeat of Hallstein's dream to create a truly 'European' civil service, it is also declining in coherence/boundary definition.
[24] See Bardi, *supra*.

the very limited external powers afforded it by the Treaties have discouraged any sort of internal institutionalization.[25]

The Council(s), on the other hand, have been able to by-pass the rigidity of the Treaties, thus becoming the most important EC decision-making institutions. Their very inter-governmental nature has not only given them *ad hoc* short-term goals and consequently enormous flexibility, but has also permitted them to utilize the material and institutional resources of the Member States. Here it would seem that external institutionalization might favour the internal development of the Council(s), but the picture is not very clear. The existence of an institution specifically designed to carry out technical tasks has led the Council to enlist the cooperation of the Commission even for those policy areas outside its competence. It is possible that the structures the Commission has developed to accommodate the requests of the Council(s) will give it, once more, a more crucial role, made possible by the internal weakness of the Council(s) at the European level.

# 3. Institutional reform in the Draft Treaty for a European Union

## *a. The new institutional circuit*

If our diagnosis is correct, those bodies having weaker supranational inclinations have shown greater institutional ability to face the difficulties of the Community. The European Parliament could have provided the stimulus, the support and the legitimacy for a renewed activism by the Commission. But it would seem that the existing institutional circuit was unable to link effectively the two more supranational bodies.

Appropriately, the first institution presented and discussed in the Draft Treaty is the European Parliament. Article 16 identifies the most important functions of the European Parliament in a very modern way. Indeed, the European Parliament, as portrayed in Article 16, occupies a central position in the European political system. It participates in the three main areas of activity of other bodies: legislation, budgetary processes, international agreements. Therefore, it works closely with the Council of the Union, which is involved, according to Article 21, in the legislative and budgetary procedures and in the field of international relations, with the Commission, and to a lesser extent with the European Council. And since it will have the power to conduct inquiries and receive petitions addressed to it by the citizens of the Union, it will keep in close contact with its voters (presumably through the various parties as well).

Moreover, and most importantly, the European Parliament, though not involved in the selection of the President of the Commission and of the Commissioners, is given three important, indeed decisive, powers: it enables the Commission to take office by approving its political programme, supervises its activities, and can dismiss it as a body. The relationship between the European Parliament and the Commission comes very close to the ones established in pure parliamentary governments, though with some significant differences. These will be better appreciated following an analysis of the Commission itself.

[25] An EP with more powers would experience a dramatic increase in the salience and the sheer amount of its business. This would not only require a greater institutionalization of procedures but would also, no doubt, induce a development of the internal structure of the EP, especially of party groups and committees. Given the multilingual composition of the EP, plenary sessions have even more symbolic and practical value than in national Parliaments and party group or committee sessions, where close contact allows groups of MEPs to communicate through common languages.

There is no doubt that the Commission is meant to represent the executive in the European political system. As in all democratic regimes it is an executive which draws its legitimacy from the popular will. The (positive) peculiarity is that it enjoys a double, albeit indirect, legitimacy. The President of the Commission is designated by the European Council (whose members, by definition, enjoy the legitimacy of their respective national electorates). But the Commission as a whole will take office only after its investiture by the Parliament (that is, by the representatives specifically elected by the European electorate). Once in office, the Commission can be dismissed only after a motion of censure voted by a qualified majority of the European Parliament. Correctly interpreted, this clause entails a shift of power away from the European Council towards the European Parliament. In practice, away from an inter-governmental body towards a supranational one.

Strengthened in its legitimacy, as long as it enjoys the confidence of the European Parliament, the Commission is given the opportunity to exercise incisive powers as spelled out in Article 28:

> The Commission shall:
>
> (i) define the guidelines for action by the Union in the programme which it submits to the Parliament for its approval,
>
> (ii) introduce the measures required to initiate that action,
>
> (iii) have the right to propose draft laws and participate in the legislative procedure,
>
> (iv) issue the regulations needed to implement the laws and take the requisite implementing decisions,
>
> (v) submit the draft budget,
>
> (vi) implement the budget,
>
> (vii) represent the Union in external relations in the instances laid down by this Treaty,
>
> (viii) ensure that this Treaty and the laws of the Union are applied,
>
> (ix) exercise the other powers attributed to it by this Treaty.

Article 28 thus recognizes and codifies the Commission's role as the 'engine of action'. It attributes to the Commission the authority, the legitimacy and the powers required to become a supranational body capable of dynamic initiatives. The European Council practically loses control over the Commission following the designation of its President and its participation in the appointment of the various members of the Commission. Having become responsible to another supranational body, the European Parliament, the Commission can participate in a virtuous circle, enlarging supranational functions and powers. The lack of mechanisms to solve possible conflicts of opinions and policies between the European Council and the Commission, though, deserves some attention.

Among the mostly vague functions attributed to the European Council — the only very precise one being that of the designation of the President of the Commission — it is not clear how the European Council might prevent the President and the Commission from undertaking actions not to its liking. One can envisage some informal means of pressure, for example by formulating recommendations and undertaking commitments in the field of cooperation, informing Parliament about the activities of the Union in the fields in which it is competent to act, and, above all, exercising other powers attributed to it by the Draft Treaty. It is conceivable that through such practices the European Council might make it difficult for the Commission, even when backed by Parliament, to proceed too far in some areas. However, in the final instance, an alliance between the Commission and Parliament could produce that virtuous supranational circle intended by the drafters.

The European Council could also seek to muster support from the Council of the Union. This body, consisting of representatives of the Member States appointed by their respective Governments, will certainly be very responsive to the demands, queries, and pressures of the European Council. Its powers, however, are limited. It will, indeed, (Art. 21.1) 'participate, in accordance with (the Draft) Treaty, in the legislative and budgetary procedures and in the conclusion of international agreements'. But its suggestions can be easily overruled in important cases.

Apparently, the Council of the Union retains a major weapon in its budgetary powers. The budget is initiated and submitted, in accordance with the Treaty, by the Commission but the Council of the

Union may make its approval very difficult. This power might be used as a form of blackmail or bargaining chip when the conflict of interests and policies between the Commission and the Council of the Union itself (or the European Council, if that body succeeds in influencing the Council of the Union) is very sharp. However, in such a case it will be up to the European Parliament to decide the issue. It will not be easy, in view of the predictable cross-cutting pressures, but 'on second reading, the Parliament may reject amendments adopted by the Council only by a qualified majority. It shall adopt the budget by an absolute majority' (Art. 76.f.).

If the reasoning followed so far is correct, then neither the Commission itself nor Parliament alone are endowed by the Draft Treaty with exclusive and specific supranational powers. It is their potential and likely collaboration which promises a shift of authority in a supranational direction. This shift, alone, would represent a major achievement. Before evaluating the virtuous linkage between the Commission and Parliament, however, one must examine the way they can effectively exercise their powers and in what areas.

## *b. Issue areas*

The division of competences between the Union and the Member States is not rigidly fixed. Rather, it depends on the nature of the issue, whether it can be addressed most efficiently at the Union level (Preamble, Art. 12.2) and whether it entails transfrontier effects (Art. 12.2). According to these principles, competences may be converted from the field of cooperation to that of common action. This process, however, is not final: 'by way of derogation from Article 11.2 of this Treaty, the European Council may decide to restore fields transferred to common action in accordance with paragraph 2 above either to cooperation or to the competence of the Member States' (Art. 68.3). Even though the exceptionality of this derogation is stressed, it appears that, subject to unanimous approval by the Council of the Union, one or more Member States can refrain from 'some of the measures taken within the context of common action'. These possibilities give the European Council and the Council of the Union a powerful weapon against the supranational inclinations of the Commission. How this weapon might be used is unknown, because Article 32.2 is exceedingly vague: 'The European Council shall determine its own decision-making procedures.'

All this said, the issue areas where common action is explicitly stated and required are several and important: within a period of two years following the entry into force of the Treaty, the free movement of persons and goods; within a period of five years, the free movement of services; within a period of 10 years, the free movement of capital.

Writing some time ago in an anticipatory vein, Haas suggested that if institutional evolution were to occur along the lines of an 'asymmetrical overlap', 'legitimacy would be increased because collective performance would be better, *provided the evolving pattern of coordination were to stress the confluence of decisions relating to R&D and economic growth'*.[26] At present, in the Draft Treaty, there is no special emphasis on R&D and on economic growth. Perhaps inevitably, the number of fields to be covered by cooperation and/or common action resembles a shopping list.[27] Moreover, the evolution of the EEC has enlarged the number of fields which one way or another are affected by EEC actions, policies, and decisions. While this is definitely an instance of 'asymmetrical overlap', because there is a lack of 'a clear-cut division of competences between the centre and the member units: both share in the management of crucial fields of social and economic action', there is little doubt that recent difficulties in the relationship among EEC members are due to the inability to identify and assign priorities. Therefore, the shopping list presented in Article 53 might not mean much, in and of itself. The important step will be taken by the Commission, which is entitled, in several instances, to

[26] Haas, *supra*, at p. 85.
[27] Haas, *supra*, at p. 84.

define the guidelines and objectives to which the action of the Member States shall be subject on the basis of the principles and within the 'limits laid down by the laws' (Art. 28).

Obviously, the most important area of intervention and action is represented by the budget. The power of the purse remains a very influential element in analysing and assessing the overall distribution of power among different institutions. It has been in the past, and in all likelihood will remain in the future, an element of contention within the Union. Authority on the budget is shared by the European Parliament and the Council of the Union, which are entrusted with its adoption, and by the Commission, which submits the draft budget and is responsible for its implementation. The sorest issues in the past have concerned the transfer of resources (revenues) from Member States to the EEC and their allocation. On these points, the Draft Treaty contains some innovative propositions. In particular Article 71.3 provides for the possibility of the Union establishing its own revenue-collecting authorities, and Article 74.2 provides that 'on a proposal from the Commission, a multiannual financial programme, adopted according to the procedure for adopting laws, shall lay down the projected development in the revenue and expenditure of the Union'. Once more, the Commission is entrusted with a significant function, with the power to initiate an important programme.

## *c. Institutionalization of EC bodies and EC decision-making*

The way Union funds are collected, and their amount, will tell us a lot about the role of the Member States in the process of unification. Indeed, the financial autonomy of the Union is a clear indicator, together with its new juridical status, of its growing potential for institutionalization. The general structure of the Draft Treaty seems designed to weaken the ties between the Union and the Member States, specifically in indicating the possibilities of a transition from cooperation to common action. This observation, however, requires a caveat: some bodies, such as the European Parliament and the Commission, can and must better define their institutional boundaries; others, such as the European Council and the Council of the Union will encounter some fixed limits. Moreover, one ought not to confuse external differentiation with internal differentiation. Obviously, the European political system contains potential for both types of differentiation. Both have to be assessed and specified.

Financial and juridical autonomy leads to external differentiation from the environment. These factors are bolstered by 'consensus on the functional boundaries' of institutions 'and on the procedures for resolving disputes which come up within those boundaries'.[28] We have seen that, appropriately, the functional boundaries have been left somewhat flexible. Dispute resolution is entrusted to two bodies, the Court of Justice and a Conciliation Committee (Art. 38.4), to consist of a delegation from the Council of the Union and a delegation from the Parliament with the participation of the Commission, charged with resolving conflicts deriving from divergent views on draft laws.

The European Communities as a whole have demonstrated considerable adaptability in facing environmental challenges. The Draft Treaty itself evidences this fact. The European political system has always been characterized by complexity, that is the existence of organizational sub-units, hierarchically and functionally, and differentiation of separate types of organizational sub-units.[29] The question we must answer, in our discussion of the Draft Treaty, is which institutions present the greatest potential for institutionalization within the European political system it would create?

There is little doubt that the European Council enjoys little potential for further institutionalization. It cannot exceed certain boundaries in its autonomy from the Member States, and its adaptability is limited. Indeed, its very strength, apart from its potential for more or less supranationality, depends

[28] Huntington, *Political Order, supra,* at p. 22.
[29] Id., at p. 18.

upon its streamlined structure and close relationship and perfect linkage with the governments of the Member States. Moreover, the functions attributed to it by the Draft Treaty do not require for their performance any growth in boundary definition or any increase in complexity. It may well be that the Member States will want to endow themselves and the European Council with appropriate structures to counteract the enlargement of functions attributed to the Commission, it is more likely that a different strategy will be followed.

The candidate best equipped to impede the development of supranational patterns of EC decision-making appears to be the Council of the Union. Made up of representatives of the Member States appointed by their respective Governments and led by a minister who is permanently and specifically responsible for Union affairs, the Council of the Union is well situated for future institutionalization. Obviously, its strength will derive from its ability to interpret the wishes and preferences of individual Member States. Therefore, its autonomy will be somewhat curtailed. However, its adaptability and its complexity will be determined by the assessment of its importance by the Member States. Since Article 21 charges the Council with powers in important areas, including legislative and budgetary procedures, the conclusion of international agreements, and international relations, it is likely that the Member States will be willing to provide their representatives with all those resources needed effectively to confront the Commission and Parliament. Therefore, the adaptability, the boundary definition, and the complexity of the Council of the Union are likely to grow. Individual Member States' ministers, permanently and specifically responsible for Union affairs, will put something of their career at stake in this function and will have a vested interest in surrounding themselves with highly-competent collaborators. The very size of the delegation, as well as a sign of the interest each individual State has in European affairs, will deter *coups de main* by the Commission and/or Parliament. Moreover, a large representation could be organized in a functionally and structurally-efficient way. If and when this becomes the case, the Council of the Union will pre-empt some of the activities traditionally carried out by the European Council and become the true counterpart of the Commission and Parliament. Its internal institutionalization will favour and facilitate its external institutionalization.[30]

One can only speculate about the potential for institutionalization of the two more supranational institutions, but the past experiences of the Commission and of Parliament and the Draft Treaty itself furnish some indications. The choice of the President of the Commission by the European Council is likely to be particularly important. Presumably his designation, because of his key role, will have to be unanimous. The European Council may, therefore, tend to select individuals lacking a prominent personality.[31] It is also possible that the President's subsequent formation of the Commission will be strongly influenced by his consultation of the European Council. On the other hand, Parliament might also intervene, as we stressed above. Moreover, it is well-known that the office, especially when endowed with significant functions and exposed to appropriate historical circumstances, may shape the role. Much will, of course, depend on the relationship to be established with the European Parliament, and on the vigilance of public opinion.

In the light of past experiences and grievances, the most important factor will be the organization and structure of the Commission. It is easy to foresee a major confrontation of opinions, interests, and strategies when Article 26 is implemented: 'The structure and operation of the Commission and the statute of its members shall be determined by an organic law'. Until then we can only speculate.

If the Commission represents the executive of the European Community, then its composition ought to be fairly representative in terms of nationalities of its Member States. Its size should not exceed

[30] Since it has been intimated that evolution toward a bicameral legislature is desirable, the transformation of the Council of the Union in this direction would be welcome. See Chapter 10 of Herman and Lodge, *The European Parliament and the European Community*, 1978.

[31] A different assessment is provided by Coombes, 'The Problem of Legitimacy and the Role of Parliament', in *Decision-Making in the European Community, supra*, specifically when (at p. 345) he states that: 'To ensure that the executive was led by a figure of strong political identity and intention, the governments' representatives could be required to make this appointment by qualified majority vote. That outcome might, however, be the last desirable under certain conditions'.

that of viable cabinets, but it should not be fixed in the organic law in order to allow for that flexibility that the drafters of the Treaty have strenuously sought to build into its institutional design. Predictably, a critical choice will concern the structural autonomy and the financial independence of the Commission. Its structural organization will be better left undetermined so that new fields and new problems can be appropriately dealt with, again with flexibility. As to finances, it is in the interest of the Commission to enjoy an unrestricted allocation as well as to be able to draw on funds allotted for specific programmes.

In the past, the Commission has alternately played a very dynamic role and a rather subordinate one. Its limited internal institutionalization has impeded its performance, hence its external institutionalization. If the President and the members of the Commission are capable of exploiting their autonomy, are willing to devote their resources to strengthening the internal complexity of the Commission and to exploit all the opportunities provided by the Draft Treaty (which, admittedly, must be given shape and sanction by the organic law), then the Commission will definitely acquire a dynamic position in the overall institutional design. We believe that the Draft Treaty creates very favourable conditions for this evolution. Moreover, since an institutional arrangement takes shape through a dialectical confrontation among the different institutions which comprise it, we must not forget that the Commission will have plenty of opportunities to enlarge its role *vis-à-vis* the other institutions. Most important, by forging an alliance with the European Parliament it may be able to strengthen the Parliament, at the same time legitimizing itself. In fact, the Union's 'engine of action' is located in the circuit of this specific relationship. The flow of legitimacy and support from Parliament to the Commission and of ideas and initiatives from the Commission to Parliament is the source of most of the Union's supranational potential.

There are, however, certain risks that the European Parliament must overcome. In the critical early period, the Parliament must develop its institutional momentum. Theoretically, the European Parliament may enlarge its scope of support through the activities of various parliamentary groups. The role of transnational parties will be particularly important. The risk, as several instances of presidential governments show, is that the executive (that is the Commission) will represent general, probably progressive, supranational interests, while Parliament might become the repository of particularistic, defensive, national interests. Such a development could play against the institutionalization of Parliament in several ways.

First of all, by preventing its full working autonomy through a lack of sufficient financial allocations. This lack of resources would also make it difficult to move towards a clear differentiation from the environment (national contexts and national parties, even though in several cases the dual mandates can be considered not simply a hindrance, but also an asset if they are utilized by their holders to represent 'European' issues in their respective national Parliaments). Lack of resources will also hinder the evolution of internal complexity. In view of the several important and technically significant tasks the European Parliament will have to fulfil, expertise will be critical. Moreover, through increasing boundary definition and complexity, in interaction with the (potentially well-equipped) national representations in the Council of the Union, the European Parliament will also have to go through a process of specialization.

Past experiences show that relatively large, democratically-elected, representative assemblies have the potential for institutionalization provided their scope of support, their exercise of powers and their level of activities remain relatively balanced. There is no doubt that the European Parliament enjoys these positive elements. The Draft Treaty provides the foundations for institutionalization, even though many variables are not in the hands of Parliament as an institution but of the (usually neglected) political parties. While we have stressed that the lack of 'political will' is most of the time a poor explanation for strucutral phenomena — and tends to be utilized as an alibi for inaction — in this particular case, there is no way of denying that most of the opportunities will have to be exploited by national and transnational parties. Therefore, a major element of uncertainty remains — indeed, it looms large — as to the institutionalization of the European Parliament.

It has been remarked that 'from the mid-1960s onwards Europeans have tended to argue that majority voting in the Council and direct election of the Parliament might offer the *deus ex machina* for the integration process'.[32] It is appropriate, then, that after a brief analysis of the mostly unexploited potential of a directly-elected Parliament in light of the positive changes the Draft Treaty introduces for its role, we turn to the issue of voting.

In many cases, the unanimity requirement prevalent since the Luxembourg compromise has hindered, delayed or prevented important decisions, yet all Member States have refused to abandon the safeguard of their interests represented by individual veto powers. The persistence of unanimous voting in the workings of the Council of Ministers, however, can best be seen as less a cause than a reflection of the difficulties of the integration process. All this said, however, abandonment of unanimous voting would represent a real achievement, obliging all Member States to look for effective conciliation procedures. New rules of the game would automatically impinge upon the behaviour of the players, their expectations and their inclinations.

In a very pragmatic and cautious way the Draft Treaty creates a series of situations in which qualified majorities are necessary. When obstacles appear and an issue — such as the budget — is considered too important to be left to a simple majority, absolute or qualified majorities are required. This provision will encourage the necessary conciliation of interests and opinions. Legislative deadlock is contemplated only in extreme cases. Even then (Art. 76: 'where one of the arms of the budgetary authority has not taken a decision within the time-limit laid down by the Financial Regulation, it shall be deemed to have adopted the draft referred to it'), it can be broken by one of the bodies.

However, the Member States may apply a powerful brake. Although the Council of the Union is required to resort to the unanimity of representations (abstentions not counted) only when expressly specified by the Treaty, a major loophole remains open for the European Council. Article 32.2 explicitly allows the European Council to maintain the principle of unanimous voting by stating: 'the European Council shall determine its own decision-making procedures'. While probably unavoidable, this small clause and the way it will be translated into actual procedures represents a yardstick to measure their willingness to go beyond the limits of the past. The acceptance of majority voting would represent a real breakthrough, made possible, even though not yet likely, by the several checks and balances that can be activated by the dissenting Member States. There is no easy solution to this real stumbling block, but one possibility could be a time-limit beyond which the unanimity principle will no longer hold.

## *d. Effectiveness of institutional reform in the Draft Treaty*

Summing up, the Draft Treaty builds on many proposals for change and improvement formulated by different committees in the past. But the whole is much more than the sum of its parts (and of its intellectual and political debts). Indeed, the Draft Treaty is intended to redefine the objectives of European integration and to confer on more efficient and democratic institutions the means of attaining them.[33] It does so in a way which can be defined at the same time as pragmatic and gradualist, and ambitious.[34]

The strategy is pragmatic and gradualist because it does not aim at a total restructuring of the European institutional arrangement. It tries to provide remedies for the most serious deficiencies. In

[32] Henig, *Power and Decision, supra,* at p. 105.
[33] As explicitly stated in the Preamble.
[34] On these aspects see P. Taylor's sensible analysis, *The Limits of European Integration, supra,* at pp. 26-59.

particular, it gives a greater role to the European Parliament, legitimized by its direct election and eager to exercise its muscles. It overhauls the functions of the Commission, introducing those modifications necessary for the morale of its components and for the obviously pivotal role it must play between the Council(s) and the European Parliament. At the same time, the drafters are cautious about trimming drastically the powers and prerogatives of the Member States. They attempt no clear-cut break with the recent past, as perhaps they should have. Indeed, the drafters explicitly stress their intention to 'entrust common institutions, in accordance with the principle of subsidiarity, only with those powers required to complete successfully the tasks they may carry out more satisfactorily than the States acting independently'.[35] Behind this simple sentence lies a wide field of discretion for future initiative and action. Although still at a disadvantage *vis-à-vis* the Member States (who can still resort in many instances to the channels of traditional diplomacy or to common action within other international organizations), EC institutions are no longer formally precluded from expanding their areas of intervention, as was the case under the Treaty of Rome.

Quite clearly, the drafters are aware that they cannot start from scratch and they have taken into account the assets as well as the liabilities of the existing institutional arrangement. Moreover, they have, tried to preserve whatever institutional dynamism the existing arrangements still possess and to exploit it. At the same time, they have squarely tackled the critical problem, that of the balance, or better imbalance of powers and functions between inter-governmental bodies and supranational institutions. They aim to create the conditions for a gradual, but irresistible shift away from inter-governmental bodies to supranational institutions, specifically from the Council(s) to the institutional circuit between the Commission and Parliament.

The institutional arrangement embodied in the Draft Treaty has promise because, without any deliberate or manipulatory exclusion, it seeks to combine elements both of participation/representation and performance. Moreover, this arrangement treads the line between concentration of power in a single body, which would lead to decision-making paralysis were that body to prove unable to exercise power, and excessive diffusion of power among competing institutions, which would lead to fragmentation. While some complexity is to be found in the web of relationships tying together the Commission, the Council of the Union, and the European Parliament, there seems to be no doubt that the Commission and the Parliament enjoy a fair amount of asymmetrical overlap. This is to be considered very positive, if Haas is right — and to say the least, he is convincing — in saying that asymmetrical overlap is likely to lead to further integration. Even more so if, to use again Haas' words, the virtuous path between the Commission and Parliament leads to 'incrementalist strategies', which 'have been considered the engine of action'.[36]

## 4. Conclusions

All this said, it is time to come to a global assessment of the institutional provisions of the Draft Treaty. In the first place, the Treaty displays a profound awareness of the past difficulties and the failure of more or less encompassing blueprints for change. Unlike similar past attempts, the Draft Treaty is the product of the only popularly-elected and representative body of the European political system. It cannot be shelved or put aside without provoking a major crisis. Moreover, several parliamentary groups are committed to its ratification and important personalities have already expressed their approval. The Draft Treaty is, so to speak, a sign of the times.

[35] Again in the Preamble.

[36] Haas, *supra*, at p. 64. Of course, incrementalist strategies have also been criticized for allowing too much space to inter-governmentalism and delaying the process of integration.

However, this does not automatically mean that a shift of powers and functions from the inter-governmental bodies to the supranational institutions will necessarily follow. The Treaty indicates with all clarity the steps to be taken, the safeguards, and the goals. It is at the same time flexible, for instance in making room for intervention by the inter-governmental bodies at practically all stages in the decision-making process, and vague, for instance in the vital field of voting procedures. A number of unknowns will profoundly influence the course of the Union: the manner in which some of the several unspecified clauses will be filled and clarified; the interpretation of other clauses, allowing quite a fluctuation between inter-governmentalism and supranationalism; and, more than anything else, the development of the Commission and Parliament. However, it ought to be stressed that the Draft Treaty contains all the elements capable of leading towards supranationality in a more or less gradualist and pragmatic way.

As a matter of fact, the assertion of powers by the Commission and Parliament accompanied by growing legitimacy,[37] plus the effective institutionalization of the Council of the Union, testifying to the will of the Member States to accept greater supranationality, might create the premises for a quasi-federalist arrangement. It is possible to anticipate a gradual withering away of the European Council as the various Member States gain confidence in the Council of the Union. This body, acquiring some of the already rather limited functions of the European Council, might transform itself into a sort of second chamber representing the States, with some specific voting procedures.

It is not simply that requirements of functionality will push in that direction, but the intrinsic logic of the institutional arrangement devised in the Draft Treaty entails such a development. The accurate balance of powers among the different institutions is designed to facilitate this development, even though there is nothing compulsory nor ineluctable in it. The institutional circuit is capable of sustaining a virtuous dynamic, indeed it provides the necessary incentives for the Commission and Parliament. At the same time, it can reach an equilibrium as it is, without any further transfer of powers and functions. A stalemate will be difficult to tolerate for both the Commission and Parliament and would probably produce strains within the Council of the Union as well if, as it is to be expected, role and career expectations develop among the permanent representatives of the Member States.

Perhaps the weakest element in the overall architectural construction lies in the lack of enforcement mechanisms (explicitly mentioned only in Art. 44). The truth of the matter is, of course, that one cannot have a healthy and sound integration process founded on deterrent or blackmail measures. However, some disincentives against non-integrative behaviour ought to be provided. Another problematic point is the openness of the Treaty to accession by new Member States. New members, in the past, have slowed down the integration process (but this might be transformed into an element of strength: buying time in order to absorb and translate all the supranational impulses) and created some institutional confusion. The consolidation of the unification process will have to be postponed. Again, this postponement might be accepted in order to accommodate effectively and positively unforeseen and/or necessary modifications. It is the very manner the Treaty is drafted which would allow the accommodation of new Member States and the introduction of modifications. In fact, the Draft Treaty suggests the possibility and the desirability of an ongoing process of unification with no specific end in sight.

By far the most relevant objection to be addressed to the Draft Treaty it that is leaves too many elements unspecified, too many holes to be filled. Some of these elements and holes concern important components of the overall construction. We have already stressed that a great deal will depend on the way the issues of the voting procedures, especially in the European Council, are solved. Much also depends upon the way the Commission and the Council of the Union structure their bodies, recruit their staff, provide incentives, and test the limits of their influence, authority and political imagination. Finally, and probably most significantly, many unpredictable developments may result from

[37] For an assessment, see Wallace, Wallace and Webb (eds), *supra*. For a discussion of some fields where the challenge cannot be postponed and can be faced, see Albert, *Una sfida per l'Europa*, 1984.

the complex web of inter-relationships between institutions, particularly among the Council of the Union, the Commission and the European Parliament. It is our contention that the importance of his office will press the President of the Commission to exploit all his potential. This pressure ought to compel him (or her) to look for support from the European Parliament and to establish an alliance that will promote integration. This institutional circuit is a quasi-federalist structure in the making, capable of overcoming the foreseeable obstacles. If ratified, the Treaty contains the necessary ingredients to 'continue and revive the democratic unification of Europe': institutional wisdom and political will can produce positive outcomes.

PART TWO

# Implementing the Draft Treaty in the Member States: Constitutional and political aspects

# Chapter I – The creation of the European Union and its relation to the EEC Treaties

*by Joseph H. H. Weiler and James Modrall*

Article 82 of the Draft Treaty establishing the European Union provides:

> 'This Treaty shall be open for ratification by all the Member States of the European Communities.
>
> Once this Treaty has been ratified by a majority of the Member States of the Communities whose population represents two-thirds of the total population of the Communities, the governments of the Member States which have ratified shall meet at once to decide by common accord on the procedures by and the date on which this Treaty shall enter into force: [1]

By contrast, Article 236 of the Treaty of Rome provides that:

> 'The Government of any Member State or the Commission may submit to the Council proposals for the amendment of this Treaty.
>
> If the Council, after consulting the Assembly and, where appropriate, the Commission, delivers an opinion in favour of calling a conference of representatives of the Governments of the Member States, the conference shall be convened by the President of the Council for the purpose of determining by common accord the amendments to be made to this Treaty.
>
> The amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements.[2]

The Draft Treaty establishing the European Union is not, of course, the first international treaty which foresees the possibility of only partial ratification by Member States of the European Community.[3] The Draft Treaty establishing the European Union, however, departs dramatically from the

---

[1] The following combinations would meet the requirements of Article 82: Any combination of six States including all of the Big Four; any combination including three of the Big Four and Denmark; any combination including Italy, France, and Germany or the United Kingdom, Italy, and Germany; any combination including the United Kingdom, France, Germany and Greece or Belgium. If the United Kingdom, France, and Italy adhere, but not Germany, any combination must include the Netherlands or any of the following pairs: Greece and Denmark, Greece and Belgium, Denmark and Belgium. It is impossible for any combination of six Member States to satisfy the requirements of Article 82 unless it includes three of the Big Four. Source for population figures: *Countries of the World and their Leaders: Yearbook 1984,* 1984.

[2] For the sake of simplicity we shall deal only with the EEC; most issues are similar in the ECSC and Euratom. See Article 96 (ECSC) and Article 204 (Euratom).

[3] One example of such a treaty is the recently concluded Law of the Sea Convention. For a discussion of the roles of the Community and the Member States in that treaty, see Gaja, 'The European Community's Participation in the Law of the Sea Convention: Some Incoherencies in a Compromise Solution', 5 *Italian Yearbook of International Law,* 1980-81, p. 110. The issues raised by partial ratification of the Draft Treaty have been discussed by Nickel, *Le projet de traité instituant l'Union européenne élaboré par le Parlement européen,* forthcoming in Cahiers de Droit Européen; Lodge, Freestone and Davidson, 'Some Problems of the Draft Treaty on European Union' 9 *European Law Review,* 1984, p. 387; Groupe d'études politiques européennes, *L'Union européenne: le projet du Parlement européen aprés Fontainebleau,* 1984; de Saint-Mihiel, *Le projet de traité instituant l'Union européenne,* RMC No 276, 1984, p. 149; Catalano, 'The European Union Treaty: Legal and Institutional Legitimacy', *Crocodile,* No 11, June 1983, p. 6; Jacqué, 'The European Union Treaty and the Community Treaties', *Crocodile,* No 11, June 1983, p. 1.

past practice of the Member States; it is conceived, as presently drafted, as a 'successor' to the Treaties establishing the European Communities, not a subsidiary treaty existing within the framework of the Treaty of Rome. The High Contracting Parties are defined, in the Preamble, as the Member States of the European Communities, and it is difficult to envision the Union established by the Draft Treaty — as presently formulated — coexisting with the current EC.

The unique character of the Draft Treaty gives rise to a formal legal problem regarding the procedure established for its adoption. For if, as it seems at first blush, the Draft Treaty amounts to a massive amendment of the EC Treaties, the adoption and entry into force of the new may be incompatible with the revision provisions of the old. If, in the alternative, the Draft Treaty is not an amendment of the Community Treaties but a new treaty replacing them, we shall see that its adoption would still raise problems under public international law in the event that not all Member States adhere, and this interpretation entails other risks to the Community *acquis*.

In concrete terms, the question is whether the Member States of the Community may legally adopt the Draft Treaty otherwise than by the procedure laid out in Article 236 (EEC).

## *Some subsidiary problems relating to Article 82 (DT)*

The terms of Article 82(DT) leave unresolved the final steps that will bring the Treaty into force. Article 82(DT) does not provide, as many treaties do, for automatic entry into force upon deposit of a pre-established number of ratifications. It provides, instead, that 'the governments of the Member States . . . shall meet at once to decide by common accord on the procedures by . . . which this Treaty shall enter into force.' The need for a new common accord before entry into force leaves the parties some room to manœuvre as they seek to complete the transition from European Community to European Union.[4] Strictly speaking, from a legal point of view, the ratifying Member States would not be undertaking the obligations contained in the Draft Treaty itself, but the obligation to negotiate in good faith on the procedures by which and the time at which the Draft Treaty would enter into force.

This provision, clearly the result of a compromise, offers an important politico-legal advantage: it enables governments and parliaments to ratify the Draft Treaty, or a modified version thereof, without facing immediately the problem of the legality of non-unanimous adherence. Put more starkly, this mechanism allows proponents of the Treaty to argue, albeit legalistically, that Article 82(DT) violates neither Community nor international law because it does not, by itself, provide for the Draft Treaty's entry into force.

After ratification by the required majority, it is possible that non-adhering States would seek to negotiate an accord with the adhering States that would allow the Draft Treaty to be brought into force. One might even add that a Member State that ratified could refuse to bring the Draft Treaty into force, without violating the requirement of negotiating in good faith, if such an accord could not be reached.

This legal construction, however, only defers the real issue. In spite of its ambiguity, Article 82(DT) clearly foresees the Draft Treaty entering into force pursuant to a procedure which deviates from Article 236(EEC) and, in theory, even against the will of up to four Member States. Apparently, the very procedure of entry into force of the Draft Treaty could, especially if only some Member States take the plunge, be tainted with illegality under Community law.

---

[4] The juxtaposition of an imperative 'shall meet at once' and the facultative 'by common accord' is a classical way of reconciling incompatible interests. For a similar formulation see Art. 169 (EEC).

# 1. The relevance of the issue

The issue of the legality of the adoption procedure will arise, under one guise or another, in any future restructuring of the Community. In this legal sense it merits discussion regardless of the prospects of the Draft Treaty. Be that as it may, to many this issue might seem in some ways *politically* irrelevant: the type of legalism which gives lawyers a bad name. After all, should the required 'political will' to adopt the Draft Treaty — or an amended version thereof — emerge, that kind of legalism will probably be brushed aside. Indeed, as we shall see below, even during the life of the EEC itself there have been Treaty amendments which did not respect the revision procedure of Article 236(EEC). By contrast, in the absence of the necessary 'political will', this issue might assume a certain theological air, like the question of how many angels can dance on the head of a pin.

And yet we believe that in the Community, this seemingly hairsplitting legalism partakes of an important political dimension — greater perhaps than it could in other international-treaty-based entities. The so-called 'primacy of politics' in the issues surrounding such a dramatic shift in the architecture of Europe may add such a political dimension even to purely legal issues; especially in light of the unique role that law (and, alas, lawyers) have come to play in the Community. We propose to digress briefly to examine the origins of law's key position in the process of European integration.

## *The prominence of law in the European Community process*

Many have noted the striking and even excessive importance which legal questions assume in the EEC.[5] This state of affairs is due to a number of factors. In particular one may mention the following five considerations:

1. At the risk of stating the obvious, the Community was and is a creature of law. When a nation-State adopts or changes a constitution there is a more-or-less organic socio-political entity to which that constitution applies. There would be a 'France' with or without, say, the 1958 Constitution; there would be an Italy or a Germany with or without their post-war constitutions.[6]

Even today, over 30 years since its inception, there would not be a European Community without the Treaties. Removal of a very few legal provisions would signal the end of the Community; it will be a long time yet before the Community assumes an organic social-economic-political identity apart from its legal framework.

2. The European Court of Justice and its astute use of Article 177(EEC) introduced the rule of law into Community life in a manner which has no precedent in other international entities. The fact the national courts render final decisions based on transnational courts render final decisions based on transnational and uniform interpretation of the Treaties (and that governments can hardly disobey their *own* courts) has grafted onto the Member States a habit of obedience to European law which is more usually associated with national law.

3. Soldiers are often told that 'I can't' is the cousin of 'I don't want to.' In the Community this maxim often applies when the Member States complain: 'I can't.' Legal argument has a role here. Ilké, in his influential *How Nations Negotiate* explains: In negotiations a

[5] Ehlermann, *Die Rolle der Juristen im Rechtsetzungsprozess der EG*, 1983, from which we have drawn and to which we are indebted.

[6] Though in both these cases constitutional changes altered the complexion of the nation, unifying Italy and partitioning Germany.

> 'way of expressing firmness is to maintain that one's positions accord with legal or scientific principle . . . this is the principal function of legal . . . argument; for you do not usually make your proposal more attractive to your opponent by telling him that what you are proposing is in accordance with . . . international law. However, if you make your opponent believe that *you* think your proposal is grounded on such principles, you may have conveyed to him that your proposal is firm.'[7]

We may add that in the Community the reverse is even more true: the legal argument is a wonderful excuse for the claim 'I want to but I can't.'

4. The open-textured, almost constitutional nature of the Treaty makes legal interpretation central to the Community's development. Policy arguments masked as legal arguments abound much as in national constitutional governments.

5. Finally, the Community system displays a much higher level of constitutional-legal integration than institutional-political integration. Law often performs functions which in other polities may belong to the political sphere.[8]

These factors help to explain why any legal argument in the Community, especially over controversial issues, may assume a significance out of proportion to its apparent political importance. In the particular case of the Draft Treaty, we would single out two distinct considerations.

Assuming that the procedure for adoption of the Draft Treaty ex Article 82(DT) could be considered illegal, this *legal* fact would in our view have important political consequences. Although it is true that *unanimous* Member State political will would remove much of the urgency from the issue of procedural legality, it is more likely that, at least at first, only some of the Member States, if any, will favour the Draft Treaty enterprise. Others may display disinterest, even hostility. The legal argument will, I expect, become one of the tools which might be used by those governments *opposed* to the venture. Even more likely, a popular movement in favour of European integration along the lines of the Draft Treaty, combined with the European Parliament's relatively strong support, might embarass hostile governments, in at least some Member States, to the point that they would feel unable to voice open opposition. It might be politically convenient for governments, or political parties, to make supportive noises while searching for excuses for avoiding decisive action. An argument based on the 'need to respect the legal and constitutional requirement solemnized in the Treaty of Rome' as an obstructionist or delaying tactic is almost tailor-made for this kind of ambivalent political situation.

The second political consideration inherent in the legal issue derives in a way from the first. Sensitive to the risk that the Draft Treaty's political opponents may hide behind legal objections to the proposed implementation procedure, the Treaty's promoters tend, understandably, to go to great analytical lengths to find legal justifications for departing from Article 236(EEC), especially in situations where not all the Member States adhere to the new order. As we shall see, much of this discussion relies on international law interpretations of the Treaty of Rome. It implicitly undermines some of the constitutional underpinnings which the European Court of Justice has attributed to the Community.[9] We do not think that the battle for the Draft Treaty establishing the European Union should be fought at the expense of the Community. The danger here (admittedly, the word 'danger' betrays a value judgment) is that arguments in favour of the Draft Treaty will weaken the existing structure of the EEC and damage certain hard-won principles concerning the political-legal nature of the Community.

---

[7] Iklé, *How Nations Negotiate,* 1964, p. 202.

[8] Weiler, 'The Community System: The Dual Character of Supranationalism', 1 *Yearbook of European Law,* 1981, p. 267.

[9] Whether the Community is an international organization subject to international law or a hybrid form of quasi-federal State, subject only to its own, internal constitutional law is an issue that has excited endless debate. See, e.g., Dagtoglou, 'The legal nature of the European Community', in *Thirty years of Community law,* 1983, p. 33. This is not the place for a full discussion of that issue. Suffice it to say that legal constructs to justify the implementation of the Draft Treaty should not carry the Community backward by stressing its foundations in international law.

## 2. The entry into force of the Draft Treaty: Two basic scenarios

In this analysis of the legal-political issue of treaty revision, we will distinguish two legally and politically distinct situations. In the first scenario, all Member States decide to adhere to the Draft Treaty establishing the European Union, or a modified version therof. In the second, not all of the Member States decide to adhere. The second scenario presupposes a higher degree of political controversy and entails some additional grounds for legal opposition. We propose to examine several legal constructs through which the adoption procedure as currently embodied in Article 82 may be viewed. We will not attempt to 'adjudicate' any of these constructs. They are presented merely as a basis for discussion.

### *a. The first scenario – All Member States decide to adhere*

Let us assume, then, that all the Member States decide to adhere to the Draft Treaty establishing the European Union, or a modified version thereof. Under this scenario we assume that the Community will cease to exist when all Member States join the Union. Thus, we will not discuss, at this point, the relational problems of the Union and the Community; our principal concern is actually the procedure itself.

#### Legal construct No 1

Under this hypothesis, the Member States pursue the formal procedures provided in Article 236(EEC). Legally, of course, this would be the neatest avenue for obviating the juridical issues. The problem is political: Article 236(EEC) envisages a pathetic role for the European Parliament — it is to be consulted only on the possibility of convening an inter-governmental conference. Parliament does not play a substantive role. Moreover, we have proof in the recent dismembering of the Genscher-Colombo Draft European Act that inter-governmental negotiations, at this point in time, are not conducive to radical change. The Genscher-Colombo proposal, unworthy of the name of European Union, was far less innovative than the present Draft Treaty, yet even that proposal was reduced to the anemic Solemn Declaration. The possible fate of the current Draft Treaty may be imagined.

It may, nevertheless, be possible to continue the current mobilization process and political negotiations of the Draft Treaty establishing the European Union and then, once accord is reached, have the Member States go through the motions of Article 236(EEC). Although this avenue is certainly open in principle, it is not foreseen in Article 82(DT); we must confront the legality of that provision as it stands.

#### Legal construct No 2

If all the Member States reach accord, it is more likely that they will proceed to ratification without respect for Article 236(EEC). As already indicated, *political accord* would take the urgency out of the legal argument. None the less, it is worthwhile for two reasons to discuss this construct as well: (a) an attack on the *procedure* favoured by Parliament could be based *inter alia* on legal arguments; and (b) brief analysis of the issues under this construct will shed light on other more complex ones.

On its face, the procedure of Article 82(DT) seems incompatible with Community law. One way of overcoming this difficulty is to invoke the international legal basis of the Community. In spite of its constitutional aspects, the Treaty of Rome arguably remains an international legal instrument subject, at least for some purposes, to the traditional rules of treaty interpretation. On this premise it is not difficult to find precedents in international practice for organizational revision which disregards the organic revision clauses.[10] If we adopt the view that the Draft Treaty amounts not to an amendment of the EEC Treaty but to a new treaty replacing it, we could argue that Article 236 does not apply (a contention we will discuss later) and the validity of Article 82(DT) need be judged only under public international law. In this case, the problem could be neatly solved. Article 59 of the Vienna Convention, which to the extent that it represents a codification of customary law is binding even on non-parties, provides that:

> 'A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and: (a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty . . .'

If, by contrast, we adopt the view that the Draft Treaty amounts to a massive amendment of the EC Treaties, international law once again appears to raise no doubts about the Draft Treaty's validity, since all Member States, under this scenario, have agreed to the amendment.

What, however, of Community law?

There are well-known precedents in the history of the Community itself in which amendments to the Community Treaties were adopted without recourse to the relevant amendment procedures.[11] The force of these precedents depends on their status under Community law. It would appear that these precedents were more than anything else an early aberration rejected, in principle, by several commentators[12] and, by implication, by the Court of Justice.

The Court of Justice, indeed, struck down a Community measure approved by the Commission and the Council, unanimously, for violation of a procedural requirement perhaps less important than Article 236(EEC).[13] It goes without saying that in *Roquette Frères* the rights of the European Parliament were violated, and that is not the case here. Other interests, however, are involved as well.[14] Article 236(EEC) foresees a positive role for the Council and the Commission. Though the Council's interests may be satisfied by unanimous agreement of the Member States, the Commission's interests seem still to be violated. Because Article 236 requires an opinion from the Commission only 'where appropriate', there is some room to maintain that the Commission has no absolute rights to be violated under Article 82(DT). Furthermore, the 'citizen of the Community' has rights that must be protected, apart from those of the Member States and the Community Institutions. Courts should, in principle, protect such 'constitutional' rights from violation even by parliaments. Still, neither Article 236(EEC) nor Article 82(DT) requires a Community-wide referendum; thus, if all Member State parliaments ratify the Draft Treaty, the Community citizen's interests are protected as well under the Draft Treaty as under the Treaty of Rome.

---

[10] For example, the OECD supplanted the OEEC without following the organic amendment procedures contained in the OEEC. See Jacqué, *supra,* at p. 7; Pescatore, *L'Ordre juridique des Communautés européennes,* 2nd ed., 1973, pp. 62-63.

[11] The Convention on Common Institutions was signed with the Treaties of Rome. Although it modified portions of the ECSC Treaty, no-one objected that Article 96(ECSC) had been breached: Catalano, *supra,* at p. 2. The 'acceleration decisions' of the 1960s furnish another parallel. In *Commission* v *Italian Republic* Case 38/69 [1970] ECR 47, Italy claimed that an acceleration decision modifying the terms of the Treaty of Rome had the status of an international agreement such as those foreseen by Articles 20 and 220(EEC). The Court of Justice disagreed, rejecting Italy's claim that her declarations at the time of the decisions operated as a reservation to an international instrument. See Pescatore, *The Law of Integration,* 1974, p. 67.

[12] See, e.g., Schwarze, 'Ungeschriebene Geschäftsführungsbefugnisse für die Kommissien bei Untätigkeit des Rates? Zum Fischerei-Urteil des EuGH v. 5. 5. 1981', 17 *Europarecht,* 1982, p. 133; Bernhardt, 'The sources of Community law: the "constitution" of the Community', in *Thirty years of Community law,* 1983, pp. 73, 80-81 (FR version). But see Lodge, Freestone and Davidson, *supra,* at pp. 393-95.

[13] Case 138/79 *Roquette Frères* v *Council* [1980] ECR 3360.

[14] In this discussion we deal only with Article 236(EEC). Another actor is involved in the Coal and Steel Community; Article 96(ECSC) requires an opinion on proposed amendments from the Court of Justice.

In conclusion, within the framework of Community law, even unanimity might not suffice to legitimate a procedural deviation from Article 236 (EEC). If this were not the case, each time the Member States jointly decided to violate the Treaty they could claim that the violation constituted a unanimous amendment of the Treaty. Plainly, international law should not be allowed to prevail here.

### Legal construct No 3

A third approach to the problem of implementing the Draft Treaty would be for all the Member States to withdraw from the EEC and then adopt the Draft Treaty in accordance with the terms of Article 82(DT). The arguments used above to explain a unanimous disregard of Article 236(EEC) apply with even greater force to a unanimous decision to withdraw. The Draft Treaty's emphasis on continuity between the Community and the proposed European Union, however, suggests that its authors did not envision such a tactic.[15] Furthermore, it smacks of legal artificiality. Even a legal fiction may serve to disarm opponents of the Draft Treaty who might use legal objections as an excuse for their opposition, but it cannot fully supply the moral authority we seek from the law. This option, in any event, will be considered more fully below, in our discussion of the second scenario.

## *b. The second scenario – Only some of the Member States adhere*

Until now we have assumed that all the Member States of the Community decide to adhere to the Draft Treaty, or some modified form thereof. This hypothesis is politically unlikely, but has the virtue of simplifying the issues before us. If, as is probable, one or more Member States decline to join the European Union, the legal issues discussed above, neutralized by political agreement under the first scenario, will become weapons in the hands of the Draft Treaty's opponents. Moreover, partial adherence would raise new legal issues regarding the rights of non-adhering Member States under the EC Treaties and the possible coexistence of the Union and the Community.

Let us deal first with the claim that the Draft Treaty constitutes not an amendment to the EC Treaties but a replacement of them, so that Article 236(EEC) does not apply. Although this interpretation is appealing at first sight it raises several problems and dangers.

In the first place it destroys the *constitutionalization* of the EC Treaties that the Court of Justice has achieved over the years in collaboration with national courts. It reconstrues the EC Treaties in purely international legal terms — a step that is legally dubious from the point of view of Community law and retrograde from the point of view of the goals of European integration.

Secondly, remembering that under the second scenario only a majority of the Member States want to create the European Union, it suggests that in the future a majority of the Member States might adopt another treaty abolishing the EEC or, should the Draft Treaty be adopted, the European Union, by claiming likewise that it 'replaces' the Draft Treaty, as finally adopted. In other words, it opens the possibility of withdrawal by one or more Member States from the European Community, a possibility we discuss and reject in legal construct No 4. Worse still, it provides the majority with a means to 'kick out' the minority. In addition, it may become very difficult to draw the line between amendment and replacement. In this context, it is interesting to note that even the Draft Treaty requires unanimity for amendment (Art. 84).

Finally, and fatally, even if the requirements of Article 236(EEC) can be avoided under this construction, we must face the requirements of public international law. It is clear, for example, from Article

[15] The Draft Treaty's concern for continuity manifests itself especially in Article 7, entitled 'The Community patrimony'.

30 of the Vienna Convention, that a group of States party to a multilateral convention cannot avoid their obligations to other contracting parties simply by concluding a new treaty among themselves. Since the provisions of the Draft Treaty are clearly incompatable with the EC Treaties, this construction — that the Draft Treaty is not an amendment to but a replacement of the EC Treaties — does not clearly resolve our legal difficuties but demonstrably damages the Community *acquis*.

## Legal construct No 4

If it would be illegal, *prima facie,* for only some of the Member States to adhere to the Draft Treaty, it might be possible for those States to withdraw from the Community before concluding the European Union. This solution, which would have an air of artificiality when practised by all the Member States together, would have enormous practical and political consequences if only six or seven Member States withdrew. In that case, the legality of withdrawal would become much more than a legal quibble.

Firstly, there is the strict legal issue. Commentators differ sharply on the legality, under Community law, of unilateral withdrawal. The Treaty of Rome does not provide explicitly one way or the other, though Article 240 declares that 'this Treaty is concluded for an unlimited period."[16] Some writers maintain that this article necessarily precludes unilateral withdrawal;[17] others note that the failed European Political Community Treaty was defined as 'indissoluble', a much stronger term than 'unlimited period."[18] Under this reading, therefore, Article 240 might indicate only the Member States' intention to distinguish the Treaty of Rome and the Euratom Treaty from the ECSC Treaty, which was limited to 50 years. Thus, the term 'unlimited period' means merely 'not limited to any specific duration', rather than 'perpetual'.[19] The Court of Justice has hinted that it favours the former view, though it has not, of course, confronted the question squarely. In the case of *Commission* v *France,* France maintained that Chapter VI of the Euratom Treaty lapsed when the Council failed to confirm or amend them within the time specified in Article 76. Rejecting this interpretation, the Court stated:

> 'The Member States agreed to establish a Community of unlimited duration, having permanent institutions vested with real powers, stemming from a limitation of authority or a transfer of powers from the States to that Community.
>
> . . .
>
> Powers thus conferred could not, therefore, be withdrawn from the Community, nor could the objectives with which such powers are concerned be restored to the field of authority of the Member States alone, except by virtue of an express provision of the Treaty.
>
> . . .
>
> To admit that the whole of Chapter VI lapsed without any new provisions simultaneously coming into force would amount to accepting a break in continuity in a sphere where the Treaty, particularly by Article 2, has prescribed the pursuit of a common policy.'[20]

---

[16] Article 208 of the Euratom Treaty. Article 97 of the ECSC Treaty limits that Treaty to a term of 50 years.

[17] See, e.g., Akehurst, 'Withdrawal from International Organizations', in *Current Legal Problems,* 1979, pp. 143, 151. *Accord,* Note, Hill, 'The European Economic Community: The Right of Member State Withdrawal', 12 *Ga. J. Int'l. & Comp. L.,* 1982, p. 335.

[18] Dagtoglou, 'How Indissoluble is the Community?', in *Basic Problems of the European Community,* Oxford, 1975, p. 258. See also Dagtoglou, 'The legal nature of the European Community, *supra,* 1983, p. 42 (FR version); Lasok and Bridge, *Introduction to the Law and Institutions of the European Communities,* 2nd ed., 1976, p. 25, who agree that a Member State may withdraw 'as long as the political integration of the economic community into a more homogeneous body politic has not materialized'. Bernhardt, *supra,* 1982, at p. 85 assumes that withdrawal would be legal when he remarks that withdrawal of a Member State that has failed to maintain a democracy would be 'desirable'.

[19] Dagtoglou, *supra,* at pp. 259-260.

[20] Case 7/71 [1971] ECR 1003, 1018. Hill, *supra.*

In the absence of a clear provision regarding withdrawal in the Treaty of Rome, or a definitive reply by the Court of Justice, Article 56(1) of the Vienna Convention could come into play.[21] Article 56(1) returns to the fundamental principle of treaty interpretation, the intention of the parties.[22] Some writers take the position that State practice limits a right of withdrawal to cases where it is provided for in the treaty in question unless the parties' intent is otherwise made very clear.[23] In essence, this view does not diverge from Article 56 of the Vienna Convention; it merely seeks to require a high degree of proof before a right of withdrawal will be inferred. With respect to the Treaty of Rome, the different interpretations of Article 240(EEC) cited above illustrate how uncertain is the evidence concerning the intention of its framers.

In summary, it is not clear whether the Member States adhering to the new Treaty could legally withdraw from the Community. The majority of commentators appears to agree that no right of unilateral withdrawal exists. It is possible to suggest that withdrawal by a majority of Member States should be treated differently under Community law than unilateral withdrawal. Although tempting, this proposal is unsupported by the case-law of the Court of Justice and would open the disastrous possibility mentioned above, of a majority of Member States expelling the minority from the Community. In a political sense, of course, these objections may be irrelevant, as the British referendum on withdrawal from the EEC demonstrates. We are concerned, however, with the legal legitimacy of the new enterprise, and it would be inauspicious to appeal at the outset to the irrelevance of law. Even if there is a right of withdrawal from the Community, moreover, it could be dangerous to encourage such a tactic; the Community is a bird in the hand, the European Union is very much in the bush. Indeed, the main weakness of this argument is not legal; it is the risk of destroying the old with no assurance that it will be replaced by the new.

## Legal construct No 5

To set the stage for our discussion of the fifth and sixth constructs, let us consider the possible consequences of a rigid application of Article 236(EEC). Imagine that all the Member States, except Luxembourg, wish to adhere to the Draft Treaty.[24] Indeed, imagine that only a bare majority in the Luxembourg legislator opposes the move. Article 236 would, it appears, permit the representatives of no more than, say, 150 000 persons to thwart, legally, the desires of all other Member States and their peoples. The result clearly offends common sense; but this intuition must be translated into a legal construct that permits the non-application of Article 236(EEC) in a situation, unlike the previous constructs, where some of the Member States insist on its application.

Some commentators seek to sidestep the legal problems of adopting a new treaty outside the amendment procedures established in the Treaty of Rome by characterizing the Draft Treaty as initiating a new legal order, instead of an amendment to the Treaty of Rome.[25] That approach is appealing because of its simplicity, but it does not adequately resolve the underlying issues. If we construe the Draft Treaty as a new agreement between the Member States rather than an amendment to the Treaty

---

[21] Article 56(1) reads:
'A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:
(a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or
(b) a right of denunciation or withdrawal may be implied by the nature of the treaty.'
By its terms, the Vienna Convention applies only to treaties entering into force after the Convention itself. As the Convention was conceived as largely a codification of existing international law, its provisions may still guide our discussion.

[22] Article 56(1)(b) does not state an entirely different principle from Article 56(1)(a); it merely expresses in concrete form the concept that the nature of some treaties may give rise to a presumption that the contracting parties intended to include a right of withdrawal.

[23] E.g. Akehurst, *supra*.

[24] This situation is, of course, purely hypothetical. It is as unlikely that only one Member State would oppose the Draft Treaty as it is that Luxembourg would be the one to do so.

[25] Nickel, *supra*; Catalano, *supra*, at p. 2; Jacqué, *supra*, at p. 7.

of Rome, we run square into another problem: that a group of Member States has no power, under Community law, to enter into 'private agreements' in relation to subject matters which come within the jurisdiction of the Community.[26]

If this were not the case one would run the danger of a scenario no less disturbing than the 'recalcitrant Luxembourg'. Imagine six Member States regrouping to introduce a new vision for Europe which would, say, strengthen the role of national governments in the Community and detract from the *acquis*. (The Genscher-Colombo initiative was also termed a Draft European Act.) Could these six States, simply by calling their amendment a new legal order, which it might well amount to, be able to escape, legally, the binding effect of Article 236(EEC)? With no more, the idea of a new legal order seems plausible in a situation of unanimity (construct No 2) but problematic in a divided Community.

The situation outlined above, in which a tiny minority wants to block the will of a majority or a majority wants to circumvent Article 236(EEC) to undermine the goals of the Community, are the two 'hard cases' with which we must contend. They illustrate the need for legal principles[27] to differentiate situations in which a majority should or should not be allowed to act outside the framework of the Treaty of Rome.

## Legal construct No 6

The search for the principles alluded to in construct No 5 takes us into that delicate and profound zone where constitutional principle merges into social reality and political theory. In elaborating such principles, we must be careful clearly to define the situations in which a majority should be free of the minority veto embodied in Article 236(EEC). That veto is a safeguard designed to protect the Community structure from dismemberment by majorities.

Before trying to delineate the parameters of these rare situations in which the Member States might legitimately consider deviating from Article 236(EEC), let us see if the 'laboratories of law', history and comparative analysis, offer us any insight. Our legal training instructs us to look for precedents; the trans-legal character of our argument forces us to look to political theory. The history of constitutional reform in a nation State cannot, by definition, constitute a precedent for international law on the revision of international organizations. None the less, in light of the 'quasi-federal' character of the Community, it is instructive to examine these precedents in some detail.

The first precedent, and the one that most closely fits the facts of recent years, is the transformation of the United States from a confederation under the Articles of Confederation to a federal State under the constitution. The Articles of Confederation were the fruit of a struggle between conservative elements who favoured a strong central government and radicals who wanted to keep the central government as weak as possible.[28] In 1781, when the Articles were finally ratified by all the colonies, the radicals had clearly carried the day. The Congress established by the Articles, not unlike the

[26] Insofar as the envisaged jurisdiction of the Union comprises subject matters that fall within the exclusive competence of the Community, the principle of pre-emption precludes the Member States from entering into agreements in those areas. To the extent that the new Treaty deals with matters over which the Member States have concurrent competence, the agreement would risk violating the principle of supremacy. We have warned all along that certain rationales for justifying Article 82(DT) may risk doing grave harm to the Community *acquis;* this legal construct, which suggests that the transfer of sovereign powers from the Member States to the Community may be revoked at any time, could wreak havoc on the existing Community structure.

[27] The sort of principle that we are referring to clearly straddles the domains of law, philosophy and political science. Such principles are none the less 'legal' principles; indeed, they are essential elements of the legal edifice. The law must turn to fundamental principles when confronted by the 'hard' cases that cannot be resolved by the usual legal methods. See Dworkin, *Taking Rights Seriously,* revised ed.), 1978.

[28] The controversies leading to the final version of the articles is recounted in detail by Jensen, *The Articles of Confederation,* 1948.

Council of Ministers, was composed of members appointed by the state legislatures, who acted on the states' instructions and could be recalled at will (Art. 5). The Congress' jurisdiction was sharply limited, and it possessed no power to coerce states that disobeyed it. The Articles, like the Treaty of Rome, could be amended only by unanimous agreement of the states (Art. 13).

During the six years between the ratification of the Articles of Confederation and the Constitutional Convention, the limitations of this decentralized system of government became amply clear.[29] The stage was set for a major reorganization when Virginia and Maryland entered into a commercial agreement, even though such agreements were forbidden by Article 6 of the Articles of Confederation.[30] They called a convention in Annapolis with the stated purpose of expanding this agreement, using it as a springboard for calling a convention to thoroughly revise the Articles of Confederation, to take place in Philadelphia in 1787.[31]

Worried by these unilateral initiatives, Congress ratified the call for a convention in Philadelphia. Both the delegates to the Annapolis Convention and Congress called expressly for a convention to prepare amendments to the existing Articles of Confederation, to be submitted to Congress and then to the state legislatures in accordance with Article 13.[32]

When the Federal Convention of 1787 finally met, the delegates quickly convinced themselves that an entirely new constitution, not merely amendments to the Articles of Confederation, was required. The Constitution they produced, unlike the Articles of Confederation, was to enter into effect when ratified by only a two-thirds majority of the states (Art. 7). In fact, the Constitution did enter into effect without the states of North Carolina and Rhode Island, and the new Congress passed a statute imposing a tariff on goods from those states. The contrast between the relatively modest amendments within the framework of the Articles, called for both by the Annapolis delegates and Congress, and the Constitution, which was ratified outside the terms of Article 13, inevitably evokes the nearly simultaneous development in the Community of the Genscher-Colombo and the 'Crocodile' initiatives.

The history of the Swiss Constitution of 1848 provides a similar, though not quite parallel, precedent. The prior constitution, the Federal Pact of 1815, established a very weak central government, limited in its competences and without power to enforce any of its decisions against recalcitrant cantons. The Federal Pact, however, unlike the Articles of Confederation, contained no clause regarding amendment. None the less, a concerted effort to amend the Pact was made in 1832. In the 1840s, a series of religious conflicts led to the formation of the *Sonderbund*, a defensive league of seven predo-

---

[29] The classic picture of a nation paralysed by the weakness of its central government, painted by Fiske, *The Critical Period of American History 1783-1789*, 1888, has been much disputed in recent years. See, e.g. Jensen, *The New Nation: A History of the United States During the Confederation 1781-1789*, 1950; Morgan, *The Birth of the Republic 1763-1789*, revised ed.), 1977. Still, the consensus survives that the Confederation was hamstrung in certain areas, especially in foreign relations and commercial policy, and by its lack of power to collect taxes.

[30] The two states were, apparently, well aware that their agreement was illegal. Farrand, *The Fathers of the Constitution*, 1921, pp. 100-101.

[31] Only five states were represented at the Annapolis Convention. The failure of this convention, it has been suggested, was deliberate; it highlighted the need for radical, rather than incremental, change and provided an excuse to call the Constitutional Convention. Id. at pp. 101-103.

[32] Congress' resolution read, in part:
'Whereas, there is provision in the Articles of Confederation and perpetual Union, for making alterations therein, by the assent of a Congress of the United States, and of the legislatures of the several States . . .
*Resolved*, — [That a convention be assembled] . . . for the sole and express purpose of *revising the articles of the Confederation*, and reporting to Congress and the several legislatures such *alterations and provisions therein*, as shall, when agreed to in Congress, and confirmed by the States, render the federal Constitution *adequate to the exigencies of government and the preservation of the Union*.'
The Annapolis call was similar, calling for a convention:
'to devise *such further provisions* as shall appear to them necessary to render the Constitution of the federal government adequate to the exigencies of the Union; and to report such an act for that purpose, to the United States in Congress assembled, as when agreed to by them, and afterwards confirmed by the legislature of every State, will effectually provide for the same.'
Quoted by Madison in *The Federalist*, No 40.

minantly-Catholic cantons. Although the *Sonderbund* was arguably protected unter the Federal Pact (Art. 6), the Diet resolved to disband the league by force. The brief civil war that followed inflamed national feeling to the point that a renewed effort at constitutional revision swept through the Diet and was adopted within a year, after ratification by a majority of the cantons.

The Federal Pact provided no mechanism for amendment, but this lacuna has been interpreted as reflecting simply a tacit understanding that the Swiss Constitution could be amended only by unanimous consent of the cantons.[33] This view is borne out by the repeated attempts at revision and even by the objections of Switzerland's neighbours. Metternich objected in 1848 that the Federal Pact could not be amended by only a majority of the cantons and warned that international recognition of Switzerland's neutrality was contingent upon the terms of the Federal Pact.[34] He did not claim, significantly, that the Pact could not be modified at all, even though it contained no provision for amendment. This interpretation seemed to follow inevitably from the sovereignty of the cantons, as guaranteed in the Federal Pact. Thus, some delegates to the commission that prepared the 1832 revision proposal maintained that 'le Pacte de 1815, traité d'alliance entre vingt-deux cantons souverains, ne pouvait être valablement revisé que par la volonté concordante de tous ses signataires.'[35] Their objection, based on an international-law construction of a national constitution, is strikingly pertinent today. Adoption of the 1848 Constitution by a majority of the cantons may be seen as a triumph of a constitutional over an international view of the Federal Pact.

The adoption of the American Constitution and the Swiss Constitution of 1848 furnish telling precedents for the current situation. To be sure, these precedents do not establish a rule of international law, such as would satisfy a lawyer treating the Treaty of Rome simply as an international legal instrument. But they do point us to a new perspective on the Draft Treaty, regarding it as an integrating step in constitutional history: a 'heroic' revolutionary act.

Drawing on these historic examples, we would like to suggest a few principles, some negative and some positive, that might serve to distinguish cases in which majoritarian treaty amendment may be permitted. We do not want to obscure the fact that this construct involves an illegality. A revolution, even if 'heroic', remains a rupture of the legal order. What we are aiming at is a set of guidelines that, while acknowledging the illegality of a proposed action, would define conditions under which it could be justified. While each one of these principles is necessarily somewhat ambiguous, cumulatively they may provide a framework for analysing this and future initiatives.

1. The new legal order principle. The essence of this principle is not novelty, but a change so fundamental that it can be described as a 'legal order'. In many situations it may be difficult to specify the elements of a 'fundamental' change. It can hardly be denied, however, that a restructuring of the entire institutional structure of the Community is 'fundamental'. As we have suggested above, of course, it would be dangerous to allow anyone advocating a new legal order to neglect Article 236(EEC). The principles listed below are intended to avoid including such initiatives as the Genscher-Colombo proposal.

2. The proposed change must not detract from the *acquis* of the Community. This principle receives considerable support from the law of treaties, which must be interpreted in light of their aims and objectives. As one of the goals of the Treaty of Rome is to foster an 'ever closer union among the peoples of Europe' (Preamble), an amendmet that furthers that ideal, even though it deviates from Article 236(EEC), constitutes less of a rupture to the Community legal order.[36]

3. The proposed change must not be forced on the minority. The Member States who opt out must have their rights under the old Community respected. This stipulation raises the issue of the relations between the Community and the Union, which is discussed in construct No 7.

---

[33] Gilliard, *A History of Switzerland,* 1978, p. 91.
[34] Calgari and Agliati, 2 *Storia della Svizzera,* 1969, pp. 216-218.
[35] Rappard, *La Constitution Fedérale de la Suisse: 1848-1948,* 1948, p. 80.
[36] See Bernhardt, 'The sources of Community law: the "constitution" of the Community', in *Thirty years of Community law,* 1983, pp. 73, 81 (FR version).

4. The interests of democratic government must be preserved. In some ways, the Draft Treaty can lay claim to greater legitimacy than either the American Constitution or the Swiss Constitution. The commission that drafted the Swiss Constitution was appointed by cantonal representatives to the Diet; the framers of the American Constitution by state legislatures. By contrast, the European Parliament that provided the impetus for the Draft Treaty was directly elected by the citizens of the Member States. The ratification procedure established in Article 82, moreover, would confer a democratic authority on the Treaty equal to that of the American and Swiss Constitutions. Both broke from the procedures established in the preceding constitutional orders, reducing the unanimity requirement to some degree of majority; all three derive their authority from ratification by overwhelming majorities in democratically-elected legislatures.

Though comparisons of the procedure for ratification embodied in Article 82(DT) and the Swiss and American precedents are persuasive, the yardstick of legitimacy must ultimately be Article 236(EEC). By this standard, as well, majority ratification of the Draft Treaty satisfies the requirements of democratic legitimacy. As Madison pointed out in *The Federalist* (No 40), the interests of democracy are not served when one State, representing one-sixtieth of the nation's population, can block the will of the rest. The unanimity requirement in the Community confers a veto on one nation with a population smaller than that of Florence, a country representing 0.13% of the combined population of the common market. As one writer puts it, a 'mutual veto . . . represents negative minority rule'[37] The example of Switzerland again bears directly on the issue; the Radical authors of the 1848 Constitution 'se persuadaient facilement qu'en brusquant la légalité formelle du droit positif, ils ne feraient que servir la légitimité. Pour eux, la légitimité c'était la souveraineté du peuple. Il était donc illégitime de maintenir une confédération d'États qui était à leurs yeux la négation même du peuple suisse et dont ce peuple, dans sa grande majorité, ne voulait plus.'[38]

To be sure, majoritarianism does not represent the sole democratic value. Constitutions protect minorities on certain issues from the will of the majority. Likewise, divisions of competence in a federal or confederal system protect the minority that inhabits a given territorial division from the will of the federal or confederal majority as regards certain issues, [39] either because they are believed to be particularly local in character or because they are most efficiently managed at that level. The principle of minority protection, however, must be balanced against that of majoritarianism. Occasionally, as in the case of freedom of speech, a minority of one must be permitted to assert his right against the rest of society. We believe that the kind of right protected by Article 236(EEC), however, should not be guaranteed to that extent.

Article 236(EEC) gives a minority of one Member State a right to the maintenance of the particular institutional division established in the Treaty of Rome. The ideal division of competences in a federal or confederal system, however, is not subject to a theoretical analysis. Instead, it reflects an empirical judgment in light of values that shift over time.[40] The relativism of each division of competences suggests that a given institutional structure should not be fixed immutably. This is especially true in the Community, where the 'democratic unit',[41] the Member State, is an historical accident, not a rational division designed to maximize democratic values and efficiency. Since no reordering of national boundaries in Europe is in the offing, the Draft Treaty has tried to accommodate the conflicting demands of a democracy of nations and a democracy of peoples. From this vantage point, the unfairness of Article 236's unanimity requirement emerges. Although it may be 'undemocratic' to proceed from one stage of integration to another without the consent of all parties to the original agreement, to provide otherwise prevents the majority from reaching its own judgment on the ideal — for that group in that moment of time — division of competences within the federal or confederal

---

[37] Lijphart, *Democracy in Plural Societies* 1977, p. 36.
[38] Bridel, *Précis de Droit Constitutionnel Suisse*, 1965, pp. 46-47.
[39] See Cappelletti, Seccombe, and Weiler, *Introduction, Integration Through Law: Europe and the American Federal Experience*, Vol. 1, Book 1, (forthcoming).
[40] Dahl, 'Federalism and the Democratic Process', in *Liberal Democracy*, Nomos XXV 95, (Pennock and Chapman eds), 1983.
[41] Id.

system. The right to make such a choice is fundamental to democratic values, and should not be subject to 'negative minority rule'.

The principles we have tried to elaborate may bear practical fruit. The authors of the Draft Treaty provide for unanimous amendment (Art. 84). Our construction of the European Union as a further move away from an outmoded view of the Community as a simple international organization towards a European federation suggests that we look again at the historical examples of the United States and Switzerland. Both the 1787 and the 1848 Constitutions, adopted against the prevailing legal requirements, established the possibility of majoritarian amendment.[42] If the illegality of the Article 82(DT) procedure is to be justified on the basis of fundamental democratic values applicable to nation States, those values should likewise be incorporated in the Draft Treaty's amendment procedure. It would be more consistent, in this regard, to redraft Article 84(DT) to permit majority amendments, but this solution would clash with the requirements that certain measures be taken unanimously.[43] It would be anomalous to permit a majority to make amendments that would be more important than legislation requiring unanimity. The anomaly would be mitigated by incorporating the four principles outlined above as requirements to be satisfied in addition to two-thirds (or some other fraction) approval. These principles, however, are not readily justiciable, and they might prove vulnerable to manipulation. It seems more realistic to preserve the unanimity requirement, recognizing that pressure may someday build towards another illegal but 'revolutionary' step in European integration.

## Legal construct No 7

Whatever the legal and political justifications for a transition from European Community to European Union under the Draft Treaty, we may have to confront, in Europe, the possibility of two institutions existing side-by-side. Such a Europe *à deux vitesses* constitutes the most likely solution to the practical problem of guaranteeing the rights of Member States that do not feel ready to take the next step in European integration.[44] It should be emphasized, however, that this practical political solution does not resolve the legal issue posed by a treaty that deals with fields in which the Member States have transferred their sovereignty to the European Community and adopted outside the amendment mechanisms of the Treaty of Rome.

Europe has experimented before with parallel institutions. The practical inefficiency of this solution was recognized in the Merger Treaty of 1965, which abolished the redundant institutional structure of the three European Communities. A similar redundancy endures, however, in the separation between European political cooperation and the European Council. While that system has led to such absurdities as dividing meetings between Copenhagen and Brussels, it has nevertheless survived. This fact suggests that, for all its inefficiency, a coexisting Community and Union may prove a viable transitional solution.[45] Of course, we realize that the difficulties in coordinating the Union and the

---

[42] Art. V, US Constitution; Arts 104-107, 1848 Swiss Constitution. The failed 1832 amendment to the Federal Pact also permitted amendment by a majority of the cantons.

[43] See, for example, Article 68.2(DT), under which the Council of the Union, by unanimous vote, can authorize a Member State to derogate from measures taken by common action.

[44] This assessment does not mean that we neglect the complexities of the 'two-speed' concept, elaborated by Ehlermann, 'How Flexible is Community Law? An Unusual Approach to the Concept of "Two Speeds"',82 *Mich. L. Rev.*, 1274, 1984. See also Langeheine, *Abgestufte Integration*, 18 *Eur. R.*, 227, 1983; Grabitz and Langeheine, 'Legal Problems Related to a Proposed "Two-Tier System" of Integration Within the European Community', 18 *Common Mkt. L. Rev.*, 33 1981. If, as Ehlermann suggests, a 'two-speed Europe' would only be workable under an amended Treaty of Rome, we would be back once more to Article 236(EEC). The political forces surrounding the technical amendments necessary to implement a two-speed Europe would be different than those that might prohibit implementation of the Draft Treaty via Article 236(EEC). The most obvious reason is that unanimous approval of the Draft Treaty, in its present form, would leave no options for Member States that wish to 'stay behind', while such technical amendments would be designed precisely to provide those options. Moreover, the political objections raised above to implementation — albeit unanimously — by Article 236(EEC) would not apply to such amendments.

[45] In any case, these precedents show that coexistence cannot be dismissed as 'inconceivable'. See Nickel, *supra*, at p. 30.

Community would be far greater than those encountered so far in the Community's experiments with parallel institutions. Substantial revision of the Draft Treaty would be required, and even then it is difficult to imagine what mechanisms might be required. Ehlermann[46] suggests that the Treaty of Rome is flexible enough by itself to accommodate two speeds, and that incorporation of the *deux vitesses* idea in a separate treaty is therefore unnecessary. He may be right; but the Treaty provisions he points to may also be taken as proof that drafting the technical provisions for coordinating two institutions is feasible.

The other solution that has been suggested,[47] to negotiate some form of association between the Union and the diminished Community, offers both advantages and disadvantages. It is appealing because it would eliminate a great deal of duplication of effort and obviate the danger that nations which were members of both the Community and the Union might someday be subject to conflicting obligations. The association solution is risky, however, even as a theoretical proposal, because it presupposes that the Union members could withdraw from the still-extant Community. As noted above, we must avoid at all costs arguments that put at risk the already consolidated gains of the Community.

## 3. Conclusion

Throughout this discussion we have tried to be sensitive to the distinction between the legal and the political issues surrounding the implementation procedure envisaged by the Draft Treaty establishing the European Union. We realize fully that the legal issues we have examined are liable to be subsumed in a political accord or lost in the shuffle of political controversy; still, analysis of legal arguments at this stage of the game may prevent them from becoming political weapons. Ironically, however, perhaps the most fruitful legal construct for interpreting and justifying the Draft Treaty's departure from the terms of Article 236(EEC) has proved to be precisely the one that draws most heavily from political theory. This is true for two reasons. The other possible constructs we have discussed, especially those that apply to the probable scenario of partial ratification, entail serious risks to the Community should they be accepted in principle. Second, a political analysis is intuitively more appropriate to the revolutionary nature of the enterprise at hand. It is fitting, when considering an effort as great as that of proceeding from a 'European Confederation' to a 'European Union', to recall the basic values underlying federalism and democracy.

[46] *Supra.*
[47] *Jacqué, supra,* at p. 8; Groupe d'études politiques européennes, *supra,* at pp. 17-22.

# Chapter II – Belgium and the Draft Treaty establishing the European Union

*by Jan De Meyer*

## 1. Constitutional aspects

### *a. Compatibility of the Draft Treaty with the Belgian Constitution*

Until 1970 there were no provisions in the Belgian Constitution explicitly concerning international or supranational organizations.

There was just one article concerning treaties. It still exists at this time, and it has not been amended since its adoption in 1831.

Article 68 of the Belgian Constitution provides that the King concludes 'treaties of peace, alliance and commerce', and that he gives notice of them, with proper information, to Parliament, as soon as that may be permitted by the State's interest and security. It also provides that 'commerce treaties', 'treaties which can burden the State or oblige Belgians individually' and treaties modifying the boundaries of the State's territory require the consent of Parliament, and that the secret clauses of a treaty never can be destructive of the patent ones.[1] The existing European Community Treaties were concluded by the King's Government and approved by Parliament according to that article.

#### Debates over the ECSC and EDC Treaties

At the time of the conclusion of the ECSC Treaty, and, somewhat later, of the ill-fated EDC Treaty, constitutional objections were raised in Belgium against those Treaties, on the one hand by people who did not favour them and who were, of course, eager to fight them with legal arguments as well as with other ones, and on the other hand by jurists of the old school who believed that the participation of Belgium in supranational organizations was incompatible with the Belgian Constitution as it

[1] Full French text of Article 68: 'Le Roi commande les forces de terre et de mer, déclare la guerre, fait les traités de paix, d'alliance et de commerce. Il en donne connaissance aux Chambres aussitôt que l'intérêt et la sûreté de l'Etat le permettent, en y joignant les communications convenables. Les traités de commerce et ceux qui pourraient grever l'Etat ou lier individuellement des Belges, n'ont d'effet qu'après avoir reçu l'assentiment des Chambres. Nulle cession, nul échange, nulle adjonction de territoire ne peut avoir lieu qu'en vertu d'une loi. Dans aucun cas, les articles secrets d'un traité ne peuvent être destructifs des articles patents.'

then stood and that Belgium could not enter into such organizations without first amending its constitution.[2]

The Belgian Council of State[3] and four of the six professors then in charge of constitutional law at the Belgian universities[4] appeared to be of that opinion, which was, however, strongly opposed.[5]

The views of those who thought that the Treaties concerned were incompatible with the Belgian Constitution may be summarized as follows. They deduced from its Article 25, according to which 'all powers stem from the Nation' and 'have to be exercised in the manner prescribed by the Constitution',[6] and also from a rather absolute interpretation of State sovereignty and national independence, that Belgians could only be subject, in their own country, to Belgian authorities established by, or according to, the Belgian Constitution. They found that any transfer of sovereignty to authorities not so established, and in particular to authorities like those of the ECSC and of the EDC, was an unconstitutional delegation of State power and an infringment upon national independence. Looking in detail at the powers actually transferred by the Treaties concerned to those European authorities, which were even described in certain comments as 'foreign', they pointed out that many of these powers had to be exercised, according to the Belgian Constitution, by the authorities established by, or according to, it and that they could not, without violating the constitution, be exercised by any other authority: they referred, in particular, to the legislative, executive and judicial powers of the ECSC and of the EDC, to the fiscal powers of the ECSC, and also, of course, to the military powers of the EDC, and of NATO as well.[7]

Against those views it was observed that Article 25 of the Belgian Constitution does only concern the exercise of powers within the sphere of national public law and that it is only valid within the internal legal order of Belgium. It was also observed that nothing in that article, which has a democratic, and not a nationalistic, meaning, nor in any other provision of the Belgian Constitution, and also nothing in the general spirit of that constitution, forbade the Belgian Government and the Belgian Parliament, being the legitimate representatives of the will of the Belgian nation, to conclude and to approve, in the manner prescribed by Article 68 of the constitution, treaties establishing international or supranational organizations. It was further observed that the conclusion and the approval of such treaties did not infringe national independence, since Belgium thereby integrated itself into a larger Community and did not subject itself to a foreign power.[8]

I, for my part, stressed at that time the relativity of State constitutions and State sovereignties and the superiority for international law and supranational law, even *in statu nascendi* over national law. I held that a problem of 'constitutionality', with respect to a national constitution, cannot even arise as to the contents of a treaty between States, since the constitution of a State can only be the highest norm within the legal order of that State and cannot, as such, govern relations between States: I felt that a State constitution can be relevant only to determine the formal competence of those representing that State in such relations. I pointed out that this was the more true as to treaties like the European Community Treaties, which established a higher legal order than the legal orders of the States and which were to be seen as themselves creating constitutional law for that higher legal order.[9]

---

[2] See, for a good summary of that controversy, Ganshof Van Der Meersch, 'La constitution belge et l'évolution de l'ordre juridique international' in *Annales de droit et de sciences politiques,* No 49 1952, p. 12. See also the extended relation of the consideration by the Belgian Parliament of each of both treaties, in Smets, *Les traités internationaux devant le parlement (1945-1955),* 1978, pp. 285 — 489.

[3] See *Doc. Ch.,* 1952-53, No 163.

[4] See *Doc. Ch.,* 1952-53, No 696.

[5] See, *inter alia,* my article 'La constitution belge et l'Europe', in *Synthèses,* No 69, (February 1952), and Dabin 'Note complémentaire sur le problème de l'intégration des souverainetés', in *Annales de droit et de sciences politiques,* No 51, 1953, p. 13.

[6] Full French text of Article 25: 'Tous les pourvoirs émanent de la nation. Ils sont exercés de la manière établie par la constitution.'

[7] Ganshof Van der Meersch, *supra.*

[8] Dabin, *supra.*

[9] De Meyer, *supra.*

Other arguments, for or against, and more or less convincing, were expounded as well.

Notwithstanding any constitutional objections, the ECSC Treaty and the EDC Treaty were approved by the Belgian Parliament, respectively in 1952 and in 1954. So were also approved, in 1957, the Treaties establishing the EEC and Euratom and, later, all further Treaties concerning the European Communities.

## The 1970 amendment

In 1970 an Article 25bis was inserted into the Belgian Constitution.

It provides that 'the exercise of stated powers can be attributed by a treaty or by a law to institutions of public international law'.[10]

It was a belated result of the constitutional controversy about the European Communities.

Mainly in order to appease that dispute, the introduction of constitutional provisions concerning international or supranational organizations was initiated already at the time of the approval of the EDC Treaty.[11] It was, however, delayed by internal political difficulties,[12] and also by the Congo problem,[13] then forgotten for some time,[14] and later taken up again, together with the internal institutional reforms which were considered since 1965.[15]

Article 25bis might, of course, have been better phrased than it actually is. It contains wording which might be interpreted narrowly.[16] So might be in particular the adjective 'stated' which qualifies the substantive 'powers': that adjective was indeed used with a rather restrictive purpose, so as not to include indeterminate transfer of power.[17]

## Article 25bis and the Draft Treaty

This possibility of a restrictive interpretation of Article 25bis should, however, not entail major difficulties in the case of the Draft Treaty establishing the European Union. The Union, as proposed in the Draft Treaty, certainly has the character of an 'institution of public international law', within the meaning of Article 25bis, [18] and the competences conferred to the Union by the Draft Treaty do not appear to exceed the 'attribution of the exercise of stated powers', as envisaged in that article.

---

[10] Full French text of Article 25bis: 'L'exercise de pouvoirs déterminés peut être attribué par un traité ou par une loi à des institutions de droit international public'.

[11] The procedure to amend the constitution on that subject was initiated by the Government on 6. 10. 1953, i.e. before the approval of the EDC Treaty by the House of Representatives, on 26. 11. 1953, and by the Senate on 12. 3. 1954.

[12] The Christian Democrats blocked the procedure in 1955, as a protest against the education policy of the then ruling coalition of Socialists and Liberals. The Socialists blocked it in 1959, as a protest against the economic and social policy of the then ruling coalition of Christian Democrats and Liberals.

[13] Invoking that problem, the Government, at the beginning of 1960, asked Parliament to suspend further consideration of the matter.

[14] The procedure to amend the constitution, which was initiated in 1953, was prolonged in 1958. It was not continued in 1961.

[15] A new procedure to amend the constitution was initiated in 1965. Its principal purpose was to adopt provisions concerning the relations between the Belgian linguistic communities.

[16] This was already feared when the idea of such an article was put foward. Dabin pointedly observed, in his 'Note complémentaire' *supra*, 'le danger est que les précisions ne soient pas trop limitatives et qu'elles n'apportent trop d'entraves aux processus d'intégration nécessaire'.

[17] Those who wrote the article also wanted to make a difference between the attribution of the 'exercise' of stated powers and the attribution of those powers themselves, Such a difference can, of course, be made in theory; it appears, however, to be meanningless in practice.

[18] Whatever they may exactly mean, the terms 'institutions of public international law' were definitely not intended to exclude supranational organizations. See Wigny, *La troisième révision de la Constitution*, 1972, p. 349.

The Draft Union Treaty does not go much further than the existing Community Treaties, which are certainly covered by Article 25bis: there is only a difference in degree, not in essence, between the powers to be exercised by the Union under the Draft Treaty and those to be exercised by the Communities under the existing Treaties.

It thus appears that Article 25bis cannot be of much help to those who would like to oppose the Draft Treaty on the basis of constitutional arguments. That would not, of course, prevent them from arguing that, in their view, the powers to be exercised by the Union under the Draft Treaty are too indeterminate to be covered by that article.

If, however, any incompatibility might be deemed to exist between Article 25bis, or any other provision, of the Belgian Constitution, and the Draft Treaty establishing the European Union, I would personally feel, in the line of my earlier writings, that even restrictively phrased or restrictively interpreted provisions of a national constitution cannot prohibit supranational integration, which is, in my view, governed by general principles transcending national law: I feel that supranational integration has to be seen as an aspect of 'the right of self-determination', which 'all peoples have'[19] and which cannot be denied to the people of Europe, 'anything in the constitution or laws of any State to the contrary notwithstanding'.[20]

## *b. Procedure to be followed for Belgium to be a party to the Draft Treaty*

The procedure to be followed for Belgium to be a party to the Treaty establishing the European Union, as proposed by the European Parliament, would be governed by the already-mentioned Article 68 of the Belgian Constitution,[21] as traditionally interpreted and applied: the King's Government would conclude the Treaty, or accede to it, and would then have to obtain its approval by Parliament, before ratifying it.

### The role of the King

In so far as Article 68 concerns the King's power to conclude treaties, one might observe that it only mentions explicitly 'treaties of peace, alliance and commerce' and that it does not clearly cover treaties establishing international or supranational organizations, except, of course, to the extent that such treaties might somehow belong to one of the three categories so mentioned.

The wording thus used in Article 68 may seem to be rather narrow, but it has always been understood to imply the King's general and exclusive power to conduct relations with other States or with other subjects of international law and so as to embrace all treaties and agreements with such States and subjects: the conduct of external relations has indeed to be seen as one of the essential and exclusive duties of the King as Head of the State, one which of course he performs, like any other of his duties, on the advice of his ministers, who are responsible to Parliament.[22]

If the European Union, as proposed by the European Parliament, is to be established by a treaty between States, such a treaty must, as far as Belgium is concerned, be concluded, or acceded to, by the King's Government.

---

[19] Article 1.1 of the International Covenant on Civil and Political Rights and Article 1.1 of the International Covenant on Economic, Social and Cultural Rights.

[20] Article VI, Section 2, of the Constitution of the United States of America.

[21] See *supra*.

[22] See also the Decree of 22.11.1830, on the form of Government and Articles 63 and 64 of the Belgian Constitution.

## The consent of Parliament

Along the same lines, Article 68's requirement that Parliament consent to certain types of treaties does not clearly cover treaties establishing international or supranational organizations.

It appears, however, that the spirit, if not the explicit wording, of Article 68, requires consent for such treaties.

On the one hand, one may feel that treaties establishing international organizations and, still more, treaties, establishing supranational organizations, are, by their very nature, likely to 'burden the State' and to 'oblige Belgians individually' and that, in many cases, they have that effect indeed. On the other hand, some of those treaties, in particular the existing European Community Treaties, may be considered as 'commerce treaties'. It may, moreover, be held that treaties transferring powers to international or supranational entities are important enough to deserve a formal approval of Parliament, even if such approval is not explicitly required, as it is for treaties involving a modification of the State's boundaries.

The Treaties establishing the Council of Europe,[23] the ECSC,[24] the EEC and Euratom [25] and also the European Convention on Human Rights[26] were all submitted to the approval of Parliament. So were also the treaties and protocols additional to, or modifying them.

Likewise, the approval of Parliament was sought, *inter alia,* for the Charter of the United Nations[27] and for the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights.[28]

In practice, consent is sought for all treaties of some importance, including those concerning matters which in the domestic legal order would have to be, or usually are, decided by Parliament.

Any treaty creating something like the European Union, as proposed by the European Parliament, would, thus, need the consent of the Belgian Parliament.

## The form and effects of consent by Parliament

The consent of Parliament to a treaty has to be obtained from both Houses: the House of Representatives and the Senate. It is normally given in the form of an act of Parliament, according to the procedure followed for domestic legislation.[29]

In general, an act of Parliament approving a treaty only contains one article, according to which the treaty concerned shall 'have full effect'.[30] It may, however, also contain other provisions.

---

[23] The Statute of the Council of Europe was approved by an Act of 11. 2. 1950.
[24] The ECSC Treaty was approved by an Act of 25. 6. 1952.
[25] The EEC Treaty and the Euratom Treaty were approved by an Act of 2. 12. 1957.
[26] The European Convention on Human Rights was approved by an Act of 13. 5. 1955.
[27] The Charter of the United Nations was approved by an Act of 14. 2. 1945.
[28] The International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights were approved by an Act of 15. 5. 1981.
[29] Strictly speaking, an Act of Parliament (in French: 'loi') is formally required only for treaties involving modifications of the State's boundaries (see Article 68 of the Belgian Constitution). The consent of Parliament to any other treaty might, in theory, be given in any other form, e.g. by resolutions adopted to that effect in each of both Houses, but, in practice, it is also always given in the form of an act of Parliament.
[30] In French: 'Le traité . . . sortira son plein et entier effet'.

No qualified majority is required for the approval of any particular kind of treaties. Such a majority is specifically not required as to treaties transferring powers to international or supranational organizations.[31]

The approval of a treaty by Parliament does not oblige the King to ratify that treaty. It only authorizes him to do so: the King's Government freely decide[s] whether to ratify the treaty or not, even if it is approved by Parliament.

Likewise, the approval of a treaty by Parliament does not preclude the King's Government from later denouncing the treaty, or withdrawing from it. It would not need the approval of Parliament for such a denunciation or withdrawal.

Of course, the King's ministers are responsible to Parliament for the Government's policy as to the ratification of treaties, and also as to the denunciation of, or withdrawal from, them: parliamentary control applies to such matters, as well as to all other matters of Government policy.

## The Special Act of 8 August 1980

Complications might arise from certain provisions of the Special Act of 8 August 1980, concerning the institutions of the Flemish community, the Flemish region, the French community and the Walloon region, and of the Act of 31 December 1983, concerning the institutions of the German-speaking community.

For treaties and agreements concerning educational, cultural, health or welfare matters belonging to the domestic competence of the Flemish community, of the French community and of the German-speaking community, Article 16 of the Special Act of 8 August 1980[32] and Article 5 of the Act of 31 December 1983[33] require the consent of the community councils concerned.

Both articles are hardly compatible with the Belgian Constitution, in so far as they submit the conclusion of certain treaties with other States or other subjects of international law to the consent of bodies other than Parliament and so infringe upon the constitutional powers of the King and of Parliament.

They nevertheless exist and might be considered to apply to the Treaty establishing the European Union, as drafted by the European Parliament, since that treaty would indeed contain provisions on educational, cultural, health and welfare matters belonging, within the Belgian legal order, to the competence of the three communities concerned.

It would then be necessary to obtain not only the consent of both Houses of Parliament, but also that of the three community councils.

That would, of course, be rather cumbersome and perhaps not very reasonable, but it would not be something new. The International Covenant on Economic, Social and Cultural Rights was indeed, before being ratified by the King's Government, submitted to the approval of the Council of the

---

[31] Already since a number of years, in fact since the time of the controversy about the ECSC Treaty and the EDC Treaty, it has been proposed to insert into the Belgian Constitution a provision requiring a qualified majority for the approval of treaties transferring powers to international or supranational organizations: it was intended to amend to that effect the existing Article 68. However, no provision of that kind has been adopted so far.

[32] French text of that article: '§ 1. L'assentiment à tout traité ou accord relatif à la coopération dans les matières visées à l'article 59bis, § 2, 1° et 2°, et § 2bis, de la constitution et aux articles 4 et 5 de la présente loi est donné soit par le conseil de la communauté française, soit par le conseil flamand, soit par les deux conseils s'ils sont l'un et l'autre concernés. § 2. Les traités visés au § 1er présentés au conseil compétent par l'exécutif de la communauté'.

[33] French text of that article: 'Les articles 5, § 2 et 8 à 16 de la loi spéciale sont applicables à la communauté germanophone'.

French Community and to the approval of the Flemish Council, as well as to the approval of both Houses of Parliament.[14]

For treaties and agreements concerning, more generally, matters belonging to the domestic competence of the Flemish community, of the Flemish region, of the French community, of the Walloon region and of the German-speaking community, Article 81 of the Special Act of 8 August 1980[15] and Article 51 of the Act of 31 December 1983[16] provide that the executives of the communities and regions concerned have to be 'associated' with the negotiations as to these matters.

These articles would apply to the Treaty establishing the European Union, as drafted by the European Parliament, since that Treaty would indeed contain provisions on matters belonging, within the Belgian legal order, to the competence of the three communities and of the two regions concerned.

The executives of these communities and regions should therefore have to be informed of, and have to be consulted on, the negotiations, concerning these provisions, and they should, as to these provisions, have the opportunity to put forward their remarks, their wishes and their proposals.

## The procedure for obtaining the consent of the three communities

Quite naturally, the approval of a treaty by Parliament is sought by the Government: they initiate the procedure with a Government Bill, which they introduce to that effect in one of both Houses, in the same way as they do when promoting domestic legislation.

As far as the three Belgian communities may be concerned, the already mentioned Article 16 of the Special Act of 31 December 1983 explicitly provides that the consent of their councils to a treaty is sought by their executives.

Thus, if a treaty establishing a European Union would be signed by the Belgian Government, the normal way of seeking the approval of Parliament for such a treaty would be the introduction of a Government Bill to that effect. Likewise, the normal way of seeking its approval by the community councils would be the introduction of Government Bills to that effect by their respective executives.

## Private Member's Bills

Private Member's Bills to the effect of approving international treaties were hardly conceivable until recently. Such Bills had been tabled, but none of them ever proceeded much further.

They appear to be a form of pressure on the Government to urge the putting into effect of the treaty concerned. That was tried, without success, as to the European Social Charter, which Belgium signed in 1961 but which it has not yet ratified.[17]

---

[14] The International Covenant on Economic, Social and Cultural Rights, which was approved, together with the International Covenant on Civil and Political Rights, by an Act of 15. 5. 1981, as already mentioned above, was also approved separately by a Decree of the Council of the French Community on 6. 6. 1982, and by a Decree of the Flemish Council on 25. 1. 1983. It was not submitted to the approval of the Council of the German-speaking Community, since Article 5 of the Act of 31. 12. 1983 concerning that community did not yet exist at that time.

[15] French text of that article: Dans les matières qui relèvent de la compétence du conseil, son exécutif est associé aux négociations des accords internationaux, le roi restant le seul interlocuteur sur le plan international, dans le respect de l'article 68 de la Constitution'.

[16] French text of that article: 'Les articles 62, 68 à 73, 78,79, §§ 1 en 3, 81 et 82 de la loi spéciale sont applicables à la communauté germanophone'.

[17] See *Doc. Sénat*, 724 (1980-81), No 1.

A Private Member's Bill to approve a treaty may also be a means to make some other point. Such was the avowed purpose of a Private Member's Bill to approve the International Covenant on Economic, Social and Cultural Rights, which was introduced in the Council of the French Community, precisely in order to assert that Council's competence to approve treaties concerning matters within its domestic competence.[38] Sometime later, the Executive of the French Community introduced themselves a Bill to seek the approval of their Council for that Covenant and had it passed.[39]

There may be some doubt as to the admissibility of Private Member's Bills proposing the approval of treaties, since such Bills interfere with the King's power to conduct relations with other States or with other subjects of international law.

That difficulty should not, however, be taken too seriously since, even if passed and sanctioned, such a Bill would not oblige the Government to ratify the treaty concerned.[40]

Of course, a Private Member's Bill to approve a draft treaty or a treaty not yet concluded or not yet acceded to, by the Government, would be senseless.

# 2. Political aspects

## *a. General remarks*

The European Union, in particular as proposed in the Draft Treaty adopted by the European Parliament on 14 February 1984, seems not to be a major issue in Belgium.

There is neither serious opposition against, nor much enthusiasm for the Draft Treaty, which appears to be little known outside a rather narrow circle of people interested in European affairs. The Draft Treaty has hardly been mentioned or discussed by the mass media: neither the press, nor radio or television have given it any special attention. Parties and other similar groups are generally in favour of it, at least verbally, but mostly without much zeal: some of them uttered criticism as to certain aspects of the Draft Treaty.

## *b. The Belgian political parties and the Draft Treaty*

### Belgian Members of the European Parliament

In the European Parliament all Belgian Members[41] present at the final vote on the Draft Treaty on 14 February 1984 voted in favour of the draft and of the resolution concerning it. They included representatives of all Belgian parties represented in the Assembly except the PRL[42] (two Members belonging to that party).[43] One Flemish Liberal[44] and one Francophone Socialist[45] were not present at the vote.[46]

---

[38] *Doc. Cons. Comm. fr.*, 33, (1979-80), No 1.
[39] See *supra*.
[40] See *supra*.
[41] At the time of the vote on the Draft Treaty establishing the European Union, Belgium was represented in the European Parliament by 10 Christian Democrats (7 of the CVP, 3 of the PSC), 7 Socialists (4 of the PS, 3 of the SP), 4 Liberals (2 of the PVV, 2 of the PRL) and 3 Members belonging to 'linguistic' parties (1 of the VU, 1 of the FDF and 1 of the RW).
[42] Chanterie, Croux, Marck, Phlix, Van Rompuy, Vandewiele and Verroken of the CVP; Deschamps, Herman and Vankerhoven of the PSC; Van Hemeldonck, Van Miert and Vernimmen of the SP; Glinne, Lizin and Radoux of the PS; De Gucht of the PVV; Vandemeulebroucke of the VU; Spaak of the FDF; and Gendebien of the RW.
[43] Beyer de Ryke and Damseaux.
[44] Pauweleyn of the PVV.
[45] Dury of the PS.
[46] Those four Members had, however, signed the presence list for the sitting of 14. 2. 1984.

## The Belgian House of Representatives

On 24 May 1984 the Belgian House of Representatives[47] adopted a resolution in which the Belgian Government was requested, on the one hand, 'to take immediately the initiatives necessary in order to negotiate with the other Member States on the Draft Treaty establishing the European Union' and, on the other hand, 'to start as quickly as possible the ratification procedure, as soon as an agreement is reached between Member States on the Treaty, and to urge the Governments of the other Member States to do the same'.[48]

The resolution, which was drafted in its final form by the External Relations Committee of the House, resulted from the amalgamation of two motions. The first of them was moved on 22 March 1984 by Mr Dierickx, a leader of the Belgian Greens.[49] The other one was moved, also on 22 March 1984, by a Christian Democrat, Mrs Demeester-De Meyer;[50] it was also signed by the floor leaders of the four majority parties[51] and by those of two of the opposition parties as well.[52]

As first drafted in the External Relations Committee, the resolution referred to 'an agreement between the Member States', but the word 'the' was subsequently left out, so as not to exclude the conclusion of the Treaty between some of the Member States if not all Member States would be prepared to accept it.[53]

Of the 212 members of the House, 176, including members of all but one of the parties represented in the House,[54] and also the two independent members, took part in the vote on the resolution. They adopted it unanimously.[55]

They included 55 Christian Democrats (41 of the CVP, 14 of the PSC), 42 Socialists (22 of the PS, 20 of the SP), 47 Liberals (25 of the PVV, 22 of the PRL), the two Communists, 24 members belonging to 'linguistic' parties (18 of the VU, 3 of the FDF, the two members of the RW and the one member of the RPW), 2 Greens, the two members belonging to the UDRT-RAD and the two independent members.

The debate on the resolution, which was held on 23 May was rather short. Only Mr Dierickx, Mrs Demeester-De Meyer, the rapporteur (Mr Grootjans, a Liberal), the Minister for External Relations (Mr Tindemans), one Flemish Socialist (Mr Van Velthoven), and one Francophone Christian Democrat (Mr Thys), took the floor. They all expressed their support for the Draft Treaty.

Two of them, however, showed some scepticism.

On the one hand, Mr Dierickx uttered his fear as to what the Governments might do with the Draft Treaty, if they would negotiate on it in the usual manner. He strongly insisted that amendments to the draft, which was already a compromise, should not be dealt with by diplomats but by the European Parliament itself.[56]

---

[47] In the Belgian House of Representatives, as sitting in May 1984, there were 61 Christian Democrats (43 of the CVP, 18 of the PSC), 60 Socialists (34 of the PS, 26 of the SP), 52 Liberals (28 of the PVV, 24 of the PRL), 2 Communists, 29 members belonging to 'linguistic' parties (20 of the VU, 1 of the Vlaams Blok, 5 of the FDF, 2 of the RW, 1 of the RPW), 4 Greens (2 of Agalev and 2 of Ecolo), 2 members belonging to the UDRT-RAD and 2 independent members.

[48] In French: 'La chambre, . . . demande au Gouvernment: de prendre immédiatement les initiatives nécessaires en vue de négocier le projet, de traité instituant l'Union européenne avec les autres États membres; d'entamer le plus rapidement possible la procédure de ratification des que le traité aura fait l'objet d'un accord entre États membres et d'insister auprès des gouvernements des autres États membres pour qu'ils fassent de même': *Doc. Ch.*, 893, (1983-84), No 2, p. 6, and *Ann. Ch.* 1983-84, pp. 2929-2935 and 2975-2976.

[49] *Doc. Ch.*, 892, (1983-84), No 1.

[50] *Doc. Ch.*, 893, (1983-84), No 1.

[51] Blanckaert of the CVP, De Winter of the PVV, Henrion of the PRL and Wauthy of the PSC.

[52] Baert, of the VU, and Van der Biest, of the PS.

[53] See *Doc. Ch.*, 893, (1983-84), No 2, pp. 2 and 4-5, and *Ann. Ch.*, 1983-84, p. 2929.

[54] The one member representing the Vlaams Blok did not participate.

[55] *Ann. Ch.* 1983-1984, pp., 2975-2976.

[56] He made that point again on 24 May just before the vote on the resolution.

On the other hand, the Minister for External Relations welcomed the resolution but expressed some doubts as to what might happen to the Draft Treaty. He found it a paradox that it was put forward at a moment of crisis in the European Communities: he mentioned the problem of the accession of Spain and Portugal and the financial difficulties, in particular those concerning the British contribution. He also said that he already knew that some Member States of the Communities would never accept the Draft Treaty as adopted by the European Parliament. He nevertheless expressed the wish that the House would pass the resolution, as unanimously as possible. He declared that the Belgian Government would accept it and that they would negotiate with the other Member States in order to have a text which could be adopted by a certain number of Member States without incidents.

Before the vote on the resolution, on 24 May some reservations were expressed by one of the two Communist members of the House, Mr Fedrigo. He criticized what he found to be the capitalistic and anti-democratic action of the existing European institutions and their policy of industrial dismantlement, growing unemployment, impoverishment of the working people and social regression.

## The Belgian Senate

A motion concerning the Draft Treaty was also introduced in the Belgian Senate[57] on 20 March 1984 by Mrs De Backer-Van Ocken, a Christian Democrat and former Minister; [58] it was also signed by the floor leaders of the four majority parties[59] and by those of the three principal opposition parties.[60]

Its wording was practically the same as that of the motion which was introduced two days later in the House of Representatives by Mrs Demeester-De Meyer.

The motion of Mrs De Backer-Van Ocken is still under consideration in the External Relations Committee of the Senate.

## The Belgian Parliament and other European Treaties

It may be interesting to have a look at the votes of the Belgian Parliament on the existing Community Treaties, and on the EDC Treaty as well. It appears that on those previous occasions the Belgian parties did not show the unanimity which they presently display in their votes for the Draft Union Treaty.

The ECSC Treaty was approved by the Belgian Senate on 5 February 1952 and by the Belgian House of Representatives on 12 June 1952. In the Senate 102 Senators voted for, 4 voted against, and 58 abstained. In the House of Representatives 165 members voted for, 13 voted against and 13 abstained.

The EDC Treaty was approved by the Belgian House of Representatives on 26 November 1953 and by the Belgian Senate on 12 March 1954. In the House of Representatives 148 members voted for, 49 voted against and 3 abstained. In the Senate 125 members voted for, 40 voted against and 2 abstained.

---

[57] In the Belgian Senate, as sitting in March 1984, there were 56 Christian Democrats (40 of the CVP, 16 of the PSC), 50 Socialists (29 of the PS, 21 of the SP), 43 Liberals (23 of the PVV, 20 of the PRL), 1 Communist, 25 members belonging to 'linguistic' parties (17 of the VU, 6 of the FDF, 2 of the RPW), 5 Greens (1 of Agalev and 4 of Ecolo) and 1 member belonging to the UDRT-RAD.

[58] *Doc. Sén.*, 658, (1983-84), No 1.

[59] André of the PSC, Gijs of the CVP, Herman-Michielsens of the PVV and Wathelet of the PRL.

[60] Delmotte of the PS, Wyninckx of the SP and Van der Elst of the VU.

The EEC Treaty and the Euratom Treaty were approved by the Belgian House of Representatives on 19 November 1957 and by the Belgian Senate on 28 November 1957. In the House of Representatives 174 members voted for, 4 voted against and 2 abstained. In the Senate 134 Senators voted for, 2 voted against and 2 abstained. The votes on the ECSC and on the EDC were held under a Chris-

**Votes in the Belgian Parliament on the Community Treaties**

| | | For | | | Against | | | Abstaining | | |
|---|---|---|---|---|---|---|---|---|---|---|
| **HOUSE OF REPRESENTATIVES** | | | | | | | | | | |
| Christian Democrats | ECSC | 89 | | | 2 | | | 7 | | |
| | EDC | | 97 | | | 9 | | | 1 | |
| | EEC and Euratom | | | 82 | | | – | | | 1 |
| Socialists | ECSC | 59 | | | 5 | | | 6 | | |
| | EDC | | 39 | | | 30 | | | 1 | |
| | EEC and Euratom | | | 73 | | | – | | | – |
| Liberals | ECSC | 17 | | | 1 | | | – | | |
| | EDC | | 12 | | | 4 | | | 1 | |
| | EEC and Euratom | | | 19 | | | – | | | – |
| Communists | ECSC | – | | | 5 | | | – | | |
| | EDC | | – | | | 6 | | | – | |
| | EEC and Euratom | | | – | | | 4 | | | – |
| Flemish Nationalists[1] | ECSC | – | | | – | | | – | | |
| | EDC | | – | | | – | | | – | |
| | EEC and Euratom | | | – | | | – | | | 1 |
| Total | ECSC | 165 | | | 13 | | | 13 | | |
| | EDC | | 148 | | | 49 | | | 3 | |
| | EEC and Euratom | | | 174 | | | 4 | | | 2 |
| **SENATE** | | | | | | | | | | |
| Christian Democrats[2] | ECSC | 84 | | | 1 | | | 2[2] | | |
| | EDC | | 75 | | | 10[2] | | | 1 | |
| | EEC and Euratom | | | 64 | | | – | | | 1[2] |
| Socialists | ECSC | – | | | – | | | 56 | | |
| | EDC | | 31 | | | 26 | | | 1 | |
| | EEC and Euratom | | | 54 | | | – | | | 1 |
| Liberals | ECSC | 18 | | | – | | | – | | |
| | EDC | | 19 | | | 1 | | | – | |
| | EEC and Euratom | | | 16 | | | – | | | – |
| Communists | ECSC | – | | | 3 | | | – | | |
| | EDC | | – | | | 3 | | | – | |
| | EEC and Euratom | | | – | | | 2 | | | – |
| Total | ECSC | 102 | | | 4 | | | 58 | | |
| | EDC | | 125 | | | 40 | | | 2 | |
| | EEC and Euratom | | | 134 | | | 2 | | | 2 |

[1] Not represented in the House in 1950–54.
[2] Including one Independent Catholic.

tian Democratic Government,[61] the vote on the EEC and Euratom under a coalition Government of Socialists and Liberals.[62]

The voting behaviour of each of the parties then represented in Parliament is shown in the table on the previous page. It may be summarized as follows.

The Communists voted against each of the three Bills of Approval, in both Houses.

The Socialists massively abstained in the Senate on the Bill concerning the ECSC Treaty, but a very large majority of them approved it in the House of Representatives, with only a few others voting against or abstaining. They were rather sharply divided, in both houses, on the Bill concerning the EDC Treaty, which small majorities of them approved but which large minorities of them voted against. Later they massively voted in favour of the Bill approving the EEC Treaty and the Euratom Treaty.

The bulk of the Christian Democrats each time voted in favour of the Treaties in both Houses. Some of them, however voted against, or abstained on, the Bills concerning the ECSC and the EDC. Later, the Christian Democrats were practically unanimous in voting for the Bill concerning the EEC and Euratom.

The voting behaviour of the Liberals was very similar to that of the Christian Democrats. They even more massively supported the ECSC Treaty, and they were absolutely unanimous in voting for the EEC and Euratom Treaties. Practically all of their Senators supported the EDC, but in the House of Representatives relatively more Liberals than Christian Democrats voted against it, or obstained.

'Linguistic' parties were not represented in Parliament at the time of the votes on the ECSC and on the EDC. There was only one Flemish Nationalist in the House of Representatives at the time of the vote on the EEC and on Euratom: he abstained.

## Political parties

It appears from the voting behaviour of their representatives in the European Parliament[63] and in the Belgian Parliament[64] that the Belgian parties are generally in favour of the Draft Union Treaty.

However, on other occasions, in particular when recently campaigning for the European election of June 1984, which, in fact, all Belgian parties mainly used to show their strength on the national level, some of them have hardly referred to the Draft Union Treaty; other ones explicity mentioned it in their programmes for that election or expressed their views on it otherwise, sometimes with some criticism.

The present attitude of each of them may be summarized as follows.[65]

---

[61] At that time, there were, in the Belgian House of Representatives, 108 Christian Democrats, 77 Socialists, 20 Liberals and 7 Communists, and, in the Belgian Senate, 90 Christian Democrats, including one Independent Catholic, 62 Socialists, 20 Liberals and 3 Communists.

[62] At that time, there were, in the Belgian House of Representatives, 96 Christian Democrats, 86 Socialists, 25 Liberals, 4 Communists, 1 Flemish Nationalist, and, in the Belgian Senate, 79 Christian Democrats, including one Independent Catholic, 72 Socialists, 22 Liberals and 2 Communists.

[63] See *supra*.

[64] See *supra*.

[65] For this section of my report, I asked the leaders of all parties represented in the Belgian Parliament for information on the matter. Mr Ansiaux, of the VU, Mr Deprez of the PSC, Mr de Wasseige and Mr Humblet of the RPW, Mr Dierickx for Agalev and Ecolo, Mr Hendrick of the UDRT-RAD, Mr Massart of the RW, Mr Michel of the PRL, Mrs Spaak of the FDF, Mr Spitaels of the PS, Mr Swaelen of the CVP, Mr Van Geyt of the PCB-KPB, Mr Van Miert of the SP and Mr Verhofstadt of the PVV were kind enough to provide such information. Mr Dillen, of the Vlaams Blok, did not reply.

In their programmes for the European election of June 1984, both Belgian Socialist parties, the Francophone PS[66] and the Flemish SP[67], have explicitly supported the Draft Union Treaty. At the same time they have, in terms slightly different in form, but to a large extent equivalent in substance, asked for reforms within the framework of the existing Community system. They both want the role of the European Parliament to be strengthened and extended in the fields of legislation and of finance and, as to the control of policy, they want it in particular to be closely associated with the appointment of the Commission. They both insist that the Council should cease to serve only national interests and that it should properly apply the majority principle.

The SP have also insisted that the Commission should again be the driving force of the Community and that they should be fully independent of the national Governments: they have also advocated an extended right of access by individuals to the Court of Justice and more freedom of action for the Court of Auditors.

On their part, the PS have asked for a direct participation of the regions and of the communities, as presently existing within Belgium, in the determination of policy at the European level.

In the programme of Francophone Liberals (the PRL) for the European election of June 1984,[68] two brief mentions were made of the Draft Union Treaty: at one point to propose its adoption by a referendum in each Member State and, at another one, to propose that it should explicitly guarantee human rights and democracy. They have also proposed a strengthening of the existing Community institutions. They have insisted that the European Council should only determine general issues of policy, and that the Council should implement by majority decisions the policy so decided. They have asked for an extension of the powers of the European Parliament and they have proposed that a general mandate be given to the Commission to conduct sectoral policies. They have advocated financial solidarity within the Community and the effective creation of a European currency, with ECU notes and coins. They also have asked that the regions be represented in the European Parliament.

In their programmes for the European Election, both Green parties, Agalev and Ecolo,[69] have welcomed the Draft Union Treaty as a first step towards a democratic Europe, but they have found, that it meets their demands only in part. They want full constituent and legislative powers for the European Parliament, and a real European Government responsible to that Parliament. They have strongly insisted that the present nationalistic and bureaucratic tendencies should be eliminated and that the existing States should be decentralized so as to give real powers to the regional and local communities: the Francophone Greens have specifically asked for a Chamber of Regions to be established in addition to the existing European Parliament. The Greens have also expressed some fear of a possible European centralism and they have demanded more attention for their own ecologist and pacifist views.

The Francophone Christian Democrats (the PSC), when compaigning for the European election, described the Draft Union Treaty as an essential and important document, and pointed out that the Christian Democrat Members of the European Parliament had unanimously voted for it.[70]

The VU (Flemish Nationalists) are not very enthusiastic about the Draft Union Treaty. They criticize it in so far as it appears to maintain and to confirm the veto power of the Member States and also in so far as it allows the European Council to restore common action fields not only to cooperation but even to the competence of the Member States. They mainly regret that the Draft Treaty is founded on the existing States and not on the regions and they would like to have the Council replaced by a

---

[66] See *Le programme européen du parti socialiste pour les élections du 17 juin 1984*, 1984, pp. 4-5, 18-21.

[67] See *SP-programma voor de Europese verkiezingen van 17 juni 1984* , Chapter VII, 1984.

[68] See *Une même foi: l'Europe, la liberté*, 1984, pp. 10-11, 13, 16-17, 19-20.

[69] See *Agalev 8, Europees licht op groen, programma voor de Europese verkiezingen van 17 juni 1984*, 1984, pp. 28-29; *L'Europe des écologistes, programme Ecolo pour les élections européenes du 17 juin 1984*, 1984, p. 18; and a press communiqué of Ecolo: *Ecolo, priorité à l'Europe des régions et des citoyens*, 3. 2. 1984.

[70] See *Temps nouveaux*, No 44, 1. 6. 1984, p. 2.

Senate of the Regions. As to the role of the European Parliament they have views similar to those of the Socialists and of the Liberals.[71]

The RPW (Walloon Nationalists) criticize the draft in so far as it still appears to conceive the European Union as a confederation of States and not as a really federal system with a real Government and a real Parliament, and in so far as it ignores the regions which they want to be the basic elements of such a system, rather than the now existing national States.[72]

Both other Francophone parties, the FDF[73] and the RW,[74] fully support the Draft Treaty and want Belgium to approve it as soon as possible.

The UDRT-RAD (a right-wing middle-class party) are in favour of the Draft Treaty, at least in principle. They would, however, have it examined more closely by one of their committees, which would report on the matter by the end of this year.[75]

The other Belgian parties do not seem to have shown much interest for the Draft Union Treaty since its adoption by the European Parliament, apart from their participation in the introduction of, and in the further work on, the motions proposed on the matter in the Belgian Parliament.[76]

## *c. The Belgian social and economic organizations and the Draft Treaty* [77]

### The Central Council of the Economy and the National Labour Council

In a joint plenary session on 7 June 1984 the Central Council of the Economy and the National Labour Council unanimously adopted an opinion on European integration, which included a section dealing with institutional aspects.

In that section of their opinion, they insisted that the existing treaty rules concerning the decision-making process in the Communities should be properly observed, and they said that further inspiration should be sought in the Draft Union Treaty proposed by the European Parliament: they noted with pleasure that the Belgian House of Representatives had recently resolved to support it.

Those councils include representatives of all major economic and social organizations existing in Belgium among them the Federation of Belgian Enterprises (VBO-FEB), the Socialist, Christian Democrat and Liberal Confederations of Workers Unions (ABVV-FGTB, ACV-CSC, ACLVB-CGSLB), and the Farmers Union (Boerenbond).

The opinion of both councils thus appears to express, at least in general and guarded terms, the common approval, by all those organizations, of the idea of the Union proposed by the European Parliament.

---

[71] Information provided by Mr Anciaux, President of the VU.
[72] Information provided by Mr Humblet, Senator for the RPW.
[73] Information provided by Mrs Spaak, MP for the FDF.
[74] Information provided by Mr Massart, President of the RW.
[75] Information provided by Mr Hendrick, President of the UDRT-RAD.
[76] See *supra*.
[77] For this section of my report, I asked the leaders of the main social and economic organizations existing in Belgium for information on the views of their organizations concerning the Draft Union Treaty. Such information was kindly provided by Mr Hinnekens of the Boerenbond, by Mr Vanden Broucke of the ABVV-FGTB, and, with some more detail, by Mr Leysen of the VBO-FEB and by Mr Houthuys of the ACV-CSC.

### The Federation of Belgian Enterprises

In particular, the Federation of Belgian Enterprises (VBO-FBE), which has already for a certain time supported the idea of strengthening the European institutions, in the line of the Tindemans report of 1976, now also appears to be very much in favour of the Draft Union Treaty.

Being particularly in favour of the idea of differentiated application of common actions and policies within the existing Communities, it now appears to be specifically interested by Article 35 of the Draft Union Treaty: since that provision permits a differentiated application of Union Laws, it might, according to its views, lift the obstacle which Article 235 of the EEC Treaty seems to have been so far for the development of new policies.

### The ABVV-FGTB, the ACV-CSC and the Boerenbond

The ABVV-FGTB, the ACV-CSC, and the Boerenbond have not, as such, taken a particular position as to the Draft Union Treaty.

They respectively support the favourable attitude adopted towards it by the European Trade Union Confederation, by the European Union of Christian Democrat Workers, and by the European People's Party.

## *d. The opinion survey of March 1984*

An opinion survey was organized in Belgium for the Commission of the European Communities by Dimarso in March 1984.[78]

In one of its questions, the general idea of a European Union, was submitted to the respondents in the following terms: 'Some people say: "The Members of the European Parliament who will be elected in 1984 should, as a main aim, work towards a political union of the member countries of the Community with a European Government responsible to the European Parliament". Do you have an opinion on that point and if yes are you for (very much or to some extent) or against (to some extent or very much)?'

Twenty-four percent of the respondents did not have on opinion on the question. Fourteen percent of them were very much for, 31% to some extent for, 25% neither for nor against, 5% to some extent against, and 1% very much against the idea formulated in the question.[79]

Thus, about one half of the respondents had no opinion or were neither for nor against, and most of the other half were for, but rather 'to some extent' than 'very much', with very few people against, also rather 'to some extent' than 'very much'.

Those results of the survey might confirm the general trends which I have tried to summarize briefly at the beginning of this part of my report.

---

[78] See *Euro-Barometre*, No 21 (May 1984).
[79] See, ibid., Table 4.

# Chapter III – The European Parliament's Draft Treaty establishing a European Union – Constitutional and political implications in Denmark

*by Per Lachmann*

## 1. The Draft Treaty establishing the European Union and the Danish Constitution

### *a. The Draft Treaty establishing the European Union*

The purpose of this section is not to give a legal evaluation — let alone a political one — on the merits of the Draft Treaty establishing the European Union. It is rather to provide some *preliminary* information as to the constitutional process required in Denmark should this draft be submitted for approval in Denmark.

A few general remarks may, however, be called for. From the point of view of a lawyer who has to check into the compatibility of the draft with the national constitution, it is striking that although the draft is based on clear principles and ideas it contains quite some measure of ambiguity. No doubt part of this is due to the inability of the present reporter to fully comprehend all the intentions behind the various articles and paragraphs in the draft. Part of the ambiguity is on the other hand unquestionably contained in the basic approach chosen by the European Parliament.

While the draft is based on the *acquis communautaire*, the future legal position of the basic Community Treaties is only defined in the broadest terms. The Community Treaty provisions relating to the objectives and scope of the Treaties are part of the law of the Union, but only in so far as they are not explicitly or implicitly amended by the new Treaty. Though not formally a part of the new Treaty they may be amended only by the procedure governing Treaty amendments.

All other provisions of the Community Treaties which are not incompatible with the new Treaty are also law of the Union, but subject to amendments through the procedure for organic laws.

We would suggest that the determination as to which provisions of the Community Treaties concern their objectives and scope opens up an area of great legal uncertainty. Likewise it is impossible to have an exact idea as to which of those provisions that have been implicitly or explicitly amended by the new Treaty.

Finally the determination of any incompatibility of the 'other' Treaty provisions with the new Treaty is marked by the same kind of legal uncertainty.

A few examples may illustrate some of the difficulties:

(i) Does Article 235 of the EEC Treaty concern the 'scope' of that Treaty? In the affirmative should it be considered that the objectives in Article 9 of the draft have explicitly or implicitly replaced Article 2 (EEC) with respect to the objectives which may be pursued under Article 235?

If Article 235 is applicable under the draft, it is conceivable that not only the legislature may apply it, but also the European Council with respect to cooperation matters, and if so will the requirement of unanimity be maintained?[1]

(ii) Do Articles 30 to 36 and Article 48, par. 4 (which makes an exception for the free movement of workers with respect to the public administration) of the EEC Treaty concern the 'objectives and scope' of the Treaty of Rome, and in the affirmative have these provisions been implicitly or explicitly amended through Article 47 of the draft relating to free movements?

These are only a few of many questions which we feel unable to answer with any reasonable degree of certainty.

It seems certain that the new draft does involve fundamental amendments of the basic Treaties without, however, respecting the procedures laid down in Article 236 (EEC) and the equivalent provisions of the other basic Treaties. This of course raises delicate problems which are dealt with below, in Section VII.

The distinction — conceptually clear — between common action and cooperation also seems in the legal sphere to raise a number of questions. In particular: through what legal instruments is the cooperation exercised and executed? The European Council — the primary centre for cooperation — may, pursuant to Article 32, undertake commitments in the field of cooperation. Are such commitments part of the law of the Union which is directly applicable in the Member States pursuant to Article 42? And to what extent is the Court competent to interpret and ajudicate with respect to such commitments?[1]

Article 10, par. 2 defines common action as all the internal and external acts of the Union including among other things recommendations from the Union institutions. According to Article 46, the Commission and the Parliament may adopt recommendations with respect to cooperation undertakings regarding *espace judiciaire* and other enumerated matters. The European Council may adopt recommendations regarding all matters of cooperation pursuant to Article 32. It would logically seem to follow that such recommendations — unintentionally — would bring a cooperation action under the area of common action.

For the purpose of this paper we will assume that cooperation matters are dealt with as inter-governmental cooperation. To the extent that this assumption may be erroneous the subsequent evaluation of the constitutional implications in Denmark has to be reconsidered.

## *b. The Danish Constitution*

The Danish Constitution in its present form was adopted in 1953. Compared to other constitutions it is singularly difficult to amend. Consequently, amendments to the constitution are the extreme exception in Danish constitutional life. In this century, the constitution has only been amended in 1915 and in 1953. The requirements for amending the constitution are contained in Section 88. According to this section, a Bill to amend the constitution which has been passed by the Parliament — 'Folketing' — under the procedure for ordinary laws must be presented once more to a newly-elected Folketing. The new Folketing must then adopt the same constitutional text without any further amendments. Following the second adoption, the proposal shall be submitted for a referendum for

[1] On this point see Jacqué, *supra*.

approval with a simple majority. However, the votes in favour of the amendment must in any case amount to at least 40% of the total electorate.

This very cumbersome procedure (which was even more stringent prior to 1953) has in fact led to a kind of a politico-constitutional common wisdom that only amendments passed in unanimity by all major political parties and likely to be of such popular interest that a major turnout to the polls can be secured can be considered in Denmark.

It was exactly this very cumbersome procedure for amending the constitution which led Professor Max Sørensen to suggest to the Parliament in 1952 that provisions might be inserted allowing for transfer of constitutional powers to international authorities without amending the constitution. The Danish Constitution, originally drafted in 1849 under strong influence from the Belgian Constitution of 1831, was inspired by the Dutch constitutional provision with regard to transfer of sovereignty to international authorities. The text proposed by Max Sørensen suggested that such transfer of sovereignty could be decided by an ordinary Bill. However, a certain minority in the Folketing would have the right to request that such a Bill be ratified by the next elected Folketing prior to its entry into force. In the political process necessary to achieve unanimity among all major political parties on the constitutional amendments in 1953, however, the procedure for adoption of such a Bill was dramatically amended. A majority of five sixths of the total Folketing (i.e. 150 members out of the 179 members must vote in favour) is required. If this majority is not obtained, though a simple majority is secured, the Bill can only be promulgated if it has been submitted to a referendum in accordance with Section 42 of the constitution. Pursuant to this section, a Bill adopted by Parliament can be rejected by the electorate if a majority votes against and this majority constitutes at least 30 % of the total electorate. The provisions of Section 20 have only been used twice since 1953. The first time was Denmark's accession to the European Communities. The Bill for accession did not obtain the required five sixths and was consequently submitted for a referendum where it received the consent of almost two thirds of those voting, amounting to more than 50 % of the total electorate.

The second time of application of Section 20 was the conventions for the European patent and for a Community patent. The Bill for Danish accession to these conventions did not receive the five-sixths majority. The Bill has been considered unfit for a referendum and is therefore still on the Government's table.

The procedural aspects of the Danish provision regarding transfer of sovereignty to international authorities differ considerably from those of other Member States if not qualitatively then at least quantitatively. Also, the substantive provisions regarding transfer of sovereignty seem somewhat more strict in Denmark than in other Member States. The text of Section 20, par. 1 reads as follows:

> 'Powers vested in the authorities of the Realm under this Constitution Act may to such extent as shall be provided by statute be delegated to international authorities set up by mutual agreement with other States for the promotion of international rules of law and cooperation.'

The theoretical background for the provision is explained by Max Sørensen in the following manner in his textbook on constitutional law:

> 'It is a fundamental principle in Danish constitutional law that legal authority *vis-à-vis* citizens is exercised by organs directly established pursuant to the constitution or which, in any case, are a part of the Danish constitutional system. The legislative power lies primarily in the elected assembly. The executive power lies with the ministers responsible towards the Folketing, with the elected municipal councils or with independent executive agencies which, however, are subject to the Danish legal system as regards the regulation of their responsibility. The judicial power rests with the independent courts instituted by the constitution. It is true that the legislative power may within certain limits delegate its competence to other organs and it may to a certain extent change the distribution of competence between the courts and the administration, but this does not authorize it to transfer powers to organs which are outside the Danish constitutional system. Such a transfer of competence would not be possible without amending the constitution as it would violate the said fundamental principle that authority over citizens are exercised by Danish organs.
>
> Any power which pursuant to the constitution is exercised by the authorities of the Kingdom may be transferred pursuant to Section 20. When this provision speaks of powers vested in the autho-

rities of the realm under this Constitution Act, it is not only the specified competences in the constitution, such as the King's right to cause money to be coined (in Section 26), but also the broad categories of constitutional competences spelled out in Section 3 of the constitution (which institutes the legislative power, the executive power and the judicial power respectively).

The powers vested in the authorities of the Realm to which Section 20 refers do not include the power to amend the constitution. Pursuant to Section 88 only the legislative power and the electorate in combination can exercise this power, and it is therefore not exercised by an authority in the sense of Section 20. It is therefore not possible to transfer to an international authority the power to amend the constitution, for instance to determine that the form of government should be republican, that foreigners be given voting rights, that a person who is taken into custody is not required to be brought before a judge within 24 hours or that expropriation is possible without due compensation. It is however obvious that the very transfer of powers provided for in Section 20 may to a certain extent amend the constitution in the sense that the powers will no longer be exercised by Danish authorities as presumed in the constitution, but by the international authority to whom the powers have been transferred. In other words, Section 20 allows for the amendment of the system of competence established by the constitution, whereas the material conditions for or limitations in the exercise of these powers may not be changed.'

## *c. Section 20 and the substantive provisions of the draft*

It is possible to read Article 45 in such a way that this article, which refers to Article 9 concerning the objectives of the Union, gives the general delimitation of the powers of the Union *ratione materiae*. According to such an interpretation, the Union would be able to legislate, take executive action and actions with respect to third countries covering all subject matters referred to in Article 9. The competence of the Court would obviously cover the same fields.

Given the fact that the aims of the Union in Article 9 are described in the broadest possible terms, such interpretation would in fact imply that the Union had unlimited competence. Under Section 20 of the constitution, however, competence may only be transferred to an extent to be provided by statute. In his textbook on constitutional law Max Sørensen states that:

'this condition implies that there must be a certain level of precision with respect to the powers to be transferred.

Negatively, it may be said that it is excluded to transfer all legislative competence or judicial competence in general, etc. Even less it would be possible to transfer all powers belonging to Danish authorities and thus abolish Denmark as an independent State.

The required level of precision implies that the powers are clarified with respect to their kind — legislation, administration, judicial decisions, etc. — as well as with respect to their subject matter. The comparable provision in the Norwegian Constitution (Section 93) uses the words 'within a materially limited field'. The Danish provision must be understood in this sense. It is consequently required that all decisions which may be taken by the international organ are defined with respect to their subject matter or object.

On the other hand it cannot be demanded that this delimitation should be formulated in a narrow way. There is no quantitative criteria in the wording of the constitution. There is no basis for implying any demand that the transfer can only be made within a limited scope meaning within few subject matters or within areas of lesser importance.

Consequently, nothing prevents powers to be transferred with respect to subject matters defined in broad categories such as the provisions in the Treaty of Rome concerning the European Economic Community, in particular Article 3.'

It is obvious that under the above interpretation of Article 45, Section 20 would be inapplicable. Only a full-scale constitutional amendment could be used in such a case.

On the other hand, it would seem from the general scheme of the draft that the intention has been that the Union may only exercise competences pursuant to the individual articles of Chapters 1 to 3

of Part 4 and Part 5 regarding the finances of the Union. If this assumption is correct and Article 45 therefore could be clarified in this respect without any change in its meaning, one will have to look at the delimitations given in the various chapters in Part 4 and Part 5 of the draft.

Compared to the competence of the present Communities, the Union's competence seems to be enlarged in different ways:

(i) New areas of activity such as education, culture and health are added.

(ii) The Union competence in areas where the Community has only a very limited competence, such as taxation and social affairs, is greatly increased. The competence to impose taxes and collect the revenue as 'own income' is even without limits in the draft.

(iii) Limitations inherent in the Community Treaties with respect to the exercise of the competence are either set aside by the Union Treaty, or may possibly be set aside by decisions of the Union institutions. As said above, in Section I, it is very unclear to the present reporter to what extent this may happen.

(iv) The objectives of the Union provided for in Article 9 of the draft are considerably wider than the objectives in Articles 2 and 3 of the Treaty of Rome. Given the impact which these objectives have on the interpretation of the various substantive provisions, this will also be a factor in enlarging the competence of the Union compared to the competence of the Communities.

Nevertheless, nothing would in principle exclude the transfer of powers to this wider extent pursuant to Section 20 of the constitution. As noted by Max Sørensen, there is no requirement in the constitution with respect to the quantities of the powers transferred.

It is not possible without a very detailed study to see if the powers intended to be transferred by means of the various provisions are spelled out sufficiently clearly to meet the requirement of Section 20. This, however, would rather be a matter of drafting and clarity than of quantity.

The clarity required does not of course imply that there can be no room for future interpretations. Many important questions with respect to the present text should, however, be solved prior to a possible signature of the draft. Such questions would include:

(i) A clarification of Article 7 as discussed under Section I.

(ii) Does Article 55, which gives the Union concurrent competence in the field of social, consumer protection, regional environmental education and research, and cultural and information policies give the Union a general competence with respect to these matters subject only to the individual limitations in the following articles?

(iii) In Articles 57 to 59 and 62, the Union is given power to encourage the attainment of various objectives. Does such power limit the Union to making programmes which the Member States may or may not choose to comply with?

(iv) Pursuant to Article 56, the Union may take action with respect to social and health matters 'in particular in matters relating to' a number of specified objects. Does such wording imply that in fact any other action in the field of social and health policy which conforms to the broad objectives in Article 9 would also be possible?

(v) Article 4, par. 1 may be read to imply that the Union will have as one of its tasks to ensure the compliance of Member States with the fundamental rights of the Union. It is obvious that the Union will be under an obligation not to violate fundamental rights and not to legislate in a way which compels Member States to act contrary to the fundamental rights of the Union. However, if Article 4, par. 1 is also intended to grant authority to the Union to protect the citizens against other violations of their fundamental rights, one would have to inquire what remedies the Union would have at its disposal. It appears from paragraph 4 of Article 4 and from Article 44 that if Member States in their own right violate the human rights of their citizens, the only legal remedy for the Union is a partial suspension of the participation in the activities of the Union. If this interpretation is correct, it would seem that no powers would be transferred from Danish authorities in this respect.

It must be kept in mind that the Union may not, pursuant to Article 20, be authorized to act contrary to the substantive provisions of the constitution.

If the freedom of movement with respect to persons would include a right to all jobs in the public administration, i.e. if Article 48, par. 4 of the Treaty of Rome is considered contrary to Article 47 or if it may be amended through the adoption of an organic law, then this part of the draft would require a constitutional amendment.

Article 11 of the Draft Treaty authorizes the European Council to transfer matters of 'cooperation' to the area of 'common action'. Such transfer will inevitably imply a corresponding transfer of competence to the Union pursuant to Section 20.

However, Section 20 of the constitution does not allow the transfer of the powers contained in that section. In other words, the institutions of the Union may not be authorized via Section 20 to decide to transfer matters from national competence to Union competence. The powers which are to be transferred must be determined in the statute which transfer the powers to the Union.

Theoretically, it would be possible for the Folketing to transfer powers, so to speak, in advance in all cases covered by Article 11. Such a construction was applied at the time of Denmark's accession to the EC with respect to Article 235 of the Treaty of Rome. Where others may consider Article 235 an instrument of gradual transfer of competence to the Community, the approach taken in Denmark was to transfer in the Bill of accession all powers to the Community with respect to Article 235. In this as in all other cases, the transfer of power is subject to the understanding that the powers may still be exercised by Danish authorities until such time as they are used by the Community.

However, one may doubt whether it would be realistic to transfer in advance all powers which could be the subject of a decision pursuant to Article 11.

If decisions pursuant to Article 11 will be taken by unanimity, it would on the other hand be possible to pass the necessary Bills pursuant to Section 20 each time a subject matter would be transferred from 'cooperation' to 'common action'. The Danish Prime Minister would then have to make sure, prior to his formal acceptance of any decision pursuant to Article 11, that the necessary Bill under Section 20 of the constitution had been passed.

## *d. Section 20 and the supremacy of Union law over the fundamental rights guaranteed by the constitution*

The transfer of competence pursuant to Section 20 of the constitution does not imply that the recipient institutions may act in contravention of the fundamental rights guaranteed in the Danish Constitution.

The principle of the supremacy of the law of the Union even *vis-à-vis* national constitutions therefore raises a problem. The problem is, however, not new. It already exists in the Community as it stands.

In certain other Member States having extensive catalogues of fundamental rights, a certain national case-law already exists in this respect. In Denmark it has been considered most unlikely that a conflict would ever arise due to the fairly limited scope of the fundamental rights guaranteed in the Danish Constitution and the limitation of the competence of the Community.

The practice developed by the European Court of Justice with respect to fundamental rights has further eliminated the likelihood of any prospective conflict.

Article 4 of the draft codifies the Court's jurisprudence with respect to fundamental rights and it would — even with the expanded Union competence — be most unlikely that a conflict would arise. A further analysis of the fundamental rights guaranteed in the constitutions of the Member States

might even show that all relevant fundamental rights found in the Danish Constitution would be fully covered by the common principles of the constitutions of the Member States, which must be protected by the Court pursuant to Article 4 of the draft.

It would seem, therefore, that no new problems of principle would arise due to the fact that under Section 20 of the constitution no powers to act contrary to the fundamental rights of the constitution may be transferred.

## *e. Section 20 and the institutional set up of the Union*

Under Section 20, powers may be transferred to international authorities set up by mutual agreement.

Max Sørensen writes that the most important element in this respect is that:

> 'the authority shall be international. The transfer may thus not be made to the authorities of a foreign State. It is immaterial how the international organ is constituted and what legal position it has. It may be an organ composed of representatives of the Governments or Parliaments of the Member States. It may be a parliamentary organ elected through direct elections in the Member States in total, or it may be an independent organ the members of which are not bound by instructions from any side, such as for instance the Commission of the European Communities or an international court.
>
> The international authority shall be created by mutual agreement. . . . When the term 'mutual' is used with respect to the agreement the aim undoubtedly is not only formal in the sense that the agreement is made by mutual obligations on all the participating States. The aim is also, and in particular, that the agreement must be based on a certain principle of equality in the sense that the international authority must have the same powers with respect to all participating States and that there is no discretionary discrimination between the participating States with respect to their influence in the organization. This does not exclude, however, that the size of the population or other similar quantitative factors are taken into account in the determination of the composition of the individual organs or in the voting rules or with respect to definition of rights and duties at large.'

In general, the draft raises no problems with respect to the institutional set up of the Union.

It is remarkable, however, that the existing balance within the institutions between the larger and the smaller Member States has been dramatically changed by the draft in favour of the larger Member States. The fact that this change has not been explained in the various papers of the European Parliament might signify that this aspect has not been given much attention by Parliament.

The transfer of power from the Council to the Parliament gives the larger Member States far more influence. This is due to the fact that the composition of the Parliament gives greater weight to the relative size of the population of each Member State than the voting rules of the Council.

In a pre-federal system like the Union it seems, of course, perfectly reasonable that the 'People's Chamber' is composed with due regard for the relative size of the populations of the Member States.

However, the same logic must of course imply that in the 'State Chamber' the States are represented with equally due respect for the principle of 'one State, one vote'. It is therefore surprising that the draft does not involve any steps in that direction. If the existing balance in the institutions between larger and smaller Member States is to be preserved, the voting rules of the Council should have been changed in the direction of 'one State, one vote'.

In fact, the existing voting rules for the Council are also changed in favour of the large States. Thus, simple majority in the Council is not necessarily a majority of Governments represented, as is now the case, but may in fact be a minority consisting of no more than three Governments of larger States out of the 10 Governments represented in the Council.

'Qualified majority' similarly means in fact only a simple majority of the Governments represented in the Council if this simple majority includes most of the larger States.

It is clear that the influence of the smaller Member States is thus reduced both by the transfer of competence from the Council to the Parliament and by the proposed voting rules of the Council.

The result is that the smaller States will have a representation which is less than what would follow from, for instance, the system of the US Constitution.

On top of this, the over-representation of the larger States in the Council may only be changed by amending the Treaty, i.e. by unanimity, whereas the — smaller — over-representation of the smaller States in the Parliament may be changed by an organic law, i.e. almost by the larger States alone.

On basis of these facts one might expect a discussion in Denmark as to the requirement of a 'fair representation'.

The composition of the Court and the Commission may also be changed by an organic law. In our view it would be unthinkable that the smaller Member States lost their seats in these two institutions. A discussion with respect to these institutions would therefore focus on the lack of any legal guarantees in this respect.

The legal instruments available to the Union are mostly clear and represent a continuation of the Community's legal instruments.

The commitments and recommendation of the European Council with respect to matters of cooperation may however give rise to doubts, as mentioned in Section I. The term 'commitment' is thus in the Danish text called *forpligtelse* which means obligation. We have nevertheless assumed that such commitments are either political in nature or at any rate not part of the law of the Union which, pursuant to Article 42, is directly applicable in the Member States. Under that assumption no powers would be transferred from Danish authorities to the European Council.

## *f. Section 20 and the European Union as a quasi-federation*

We have in the preceding chapters looked into some of the main elements in determining whether Section 20 of the Danish Constitution is of application with respect to the draft presented by the European Parliament.

It may be expected, however, that in the event of the draft being submitted to the Folketing, an argument would be advanced to the effect that the draft involves more loss of sovereignty than is permissible under Section 20 of the constitution. The combination of the very wide Union competence *ratione materiae*, the limited Danish influence in the decision-making process, the unlimited right of the Union to impose taxes and the strong position of the Union as a subject of international law might, taken together, be considered beyond what may be acomplished by virtue of Section 20 of the constitution. In favour of this view it may be argued that the Union in fact is a federal State and that Section 20 only covers transfer of powers to international authorities, and not to a federal State.

Against this argument it could be pointed out that the basic meaning of the term 'international authority' in Section 20 is no doubt to exclude transfer of competence to *foreign* States. The federal State would — in our case — not be a foreign State since Denmark would be a Member State. It could further be said that Section 20 does not use the term 'international organization' but 'international authority', thus including entities which are so sovereign that they would not be classified as international organizations.

For our part, however, we would not find it unreasonable to consider adherence to a fully-fledged federal State as beyond what may be accomplished pursuant to Section 20 of the constitution. However, the Union is clearly not a fully-fledged federal State.

To go beyond this, and assume that adherence to a highly-intergrated Union which is not a fully fledged federal State could in principle not be accomplished via Section 20 of the constitution would in our view not follow from the text or legislative history of Section 20. It would, however, clearly be within the legitimate rights of the Folketing to make such a qualitative interpretation of Section 20. Under such an interpretation, the application of Section 20 could be restricted to transfer of powers of a politico-constitutional importance, which is consonant with the requirements for adopting a Bill pursuant to Section 20. An interpretation of this kind would in our view imply an evaluation of the combined impact of all the changes proposed compared with the present situation under the Community Treaties.

It should be noted that the Folketing did not rely on a qualitative interpretation with respect to the European patent conventions. A qualitative approach would clearly have resulted in an adoption of the patent conventions pursuant to Section 19 of the constitution (i.e. simple majority), without application of Section 20, as these conventions are void of any politico-constitutional importance.

## *g. Procedures for adoption in Denmark*

The Danish Constitution and legal tradition with respect to international law is dualist. Pursuant to Section 19 of the constitution, the King (Government) negotiates and ratifies international treaties. The consent of the Folketing — given as a Folketing resolution or in form of a Bill — is required in all important cases.

The implementation of treaties is generally subject to specific legislation in case, first of all, a Bill pursuant to Section 20 of the constitution.

A Bill containing the Folketing's consent to ratification pursuant to Section 19 of the constitution and provisions for transfer of powers pursuant to Section 20 would be introduced by the Government.

The Draft Treaty on the European Union obviously amends the basic EC Treaties and the Danish authorities are therefore obliged — on top of their own constitutional procedures — to follow the rules laid down in Article 236 (EEC) (and the equivalent Articles in the other Treaties). Only after completion of such procedures could a Bill properly be introduced nationally.

A private member of the Folketing could introduce the draft by a *forespørgselsdebat* (questions to the Government with a formal debate). At the end of this debate a formal motion may be adopted which could express the opinion of the Folketing with respect to the draft and request the Government to submit a Bill as described above.

## *h. Summary and conclusions*

Denmark's approval of the Draft Treaty establishing a European Union would have to be made either through an amendment to the constitution or by a Bill adopted in accordance with the special procedure in Section 20 of the constitution governing transfer of powers from Danish to international authorities.

The procedure for a constitutional amendment being very difficult and time-consuming, the focus of interest lies in examining the possibility of adhering to the Draft Treaty by way of a Bill pursuant to Section 20 of the constitution. This procedure requires either a five-sixths majority in the Folketing or a simple majority coupled with a referendum.

The Draft Treaty sometimes uses very broad language open to differing interpretations. The findings of this report are therefore subject to a number of reservations regarding the interpretations of the draft.

The power of the European Council to transfer matters of cooperation to matters of common action is difficult to comply with under the terms of Section 20 of the constitution and will probably require an amendment to the constitution unless decisions by the European Council to transfer matters of cooperation to matters of common action are taken by unanimity.

The enlarged competence of the Union *ratione materiae* is in principle compatible with Section 20 of the constitution. However, a number of clarifications in the text as to the extent of the new competences should be made prior to any Danish accession in order to comply with the requirement of Section 20 that powers may only be transferred to such extent as shall be provided by statute pursuant to Section 20.

Pending clarifications, it might be that at least one substantive provision of the constitution which reserves certain jobs in the public administration for Danish nationals would have to be amended by the procedure for constitutional amendments.

The explicit provisions regarding the supremacy of Union law would most likely not give rise to new constitutional problems in Denmark because it is unlikely that a conflict between the fundamental rights of the Danish Constitution and the fundamental rights protected by the Union would occur.

The composition and voting rules for the Parliament and the Union Council gives the smaller Member States a representation which is less than in a fully-fledged federal State, and which could become even smaller if an organic law redistributed the seats in Parliament. A discussion in Denmark with respect to 'fair' representation, as required by Section 20 of the constitution, may be expected.

The legal instruments available to the European Council in matters of cooperation are not clearly defined. A clarification may be necessary to comply with Section 20 of the constitution.

The combined effect of all the changes contained in the Draft Treaty might be considered to be of such politico-constitutional importance that a constitutional amendment rather than a Bill pursuant to Section 20 would be considered the most correct solution, but such an interpretation is probably not necessary from a legal point of view.

# 2. The Draft Treaty establishing a European Union and the political parties

## *a. The Danish political parties*

The following parties are represented in the Folketing using the traditional yet sometimes erroneous left/right order:

| | |
|---|---|
| Venstresocialisterne (Leftist Socialists) | 5 |
| Socialistisk Folkeparti (People's Socialist Party) | 21 |
| Socialdemokratiet (Social-Democratic Party) | 57 |
| (S) Det radikale Venstre (the Radical Party) | 10 |
| (G) Kristeligt Folkeparti (Christian People's Party) | 5 |
| (G) Centrumsdemokraterne (the Centre-Democrats) | 8 |
| (G) Venstre (the Liberal Party) | 23 |
| (G) Det konservative Folkeparti (the Conservative People's Party) | 42 |
| (S) De frie Demokrater (the Free Democrats) | 1 |
| Fremskridtspartiet (the Progress Party) | 5 |
| Outside the parties (the Faeroe Islands and Greenland) | 2 |
| Total | 179 |

The four parties with a (G) added form the Government. The two parties with an (S) added in general support the Government on domestic issues. This block has a practical majority, as the two members outside the parties will not both vote against the Government on a critical issue.

The list shows that Denmark is blessed with numerous parties. We shall in the following concentrate on the four most important parties, which for our purpose are the Social-Democratic Party, the Radical Party, the Conservative Party and the Liberal Party.

## *b. The Folketing debate on EC questions in May 1984*

In May 1984, the two left-wing Socialist parties in the Folketing requested a debate on the following questions to the Government:

> 'Will the Foreign Minister inform the Folketing of the Government's position on the EC policy for the next five years including the future financing of the EC, the plans for a Union, plans for incorporating new areas, such as security and culture under EC cooperation, the relation between the institutions and the safeguarding of the right of veto.'

The question was part of the campaign prior to the elections to the European Parliament, and its formulation gives an indication of the issues which the anti-EC parties wanted to become central in the campaign.

The answer of the Foreign Minister centred on the budgetary problems and the need to develop new common policies for industry, technology, research and development and energy. To the Minister, common actions in these fields:

> 'should be the centre of gravity in discussions on the future of the EC rather than long-term plans for a European Union, like the Draft Treaty establishing a European Union proposed by the European Parliament . . . Obviously, there is always room for improvements and one may always find some grounds for criticism, but the crux of the matter is that by and large EC cooperation is functioning in a way which is satisfactory and which is beneficial to Denmark.'

This approach similarly indicates how the four governmental parties wished to focus the debate prior to the European elections.

In the debate the two left-wing Socialist parties proposed a motion which was clearly designed to appeal to the anti-EC part of the Social-Democratic and Radical electorate. However, these two parties proposed their own motion with the following text:

> 'The Folketing decides, that the conservation of the right of veto and the maintenance of the distribution of powers between the Council of Ministers, the Commission and the European Parliament is the basis for Denmark's membership of the EC.
>
> The Folketing consequently rejects the Draft Treaty establishing a European Union as proposed by the European Parliament.'
>
> (The motion included another paragraph on the substantive EC cooperation.)

The adoption of this motion would in all likelihood have been secured by the two left-wing Socialist parties once their own motion had been defeated. In this situation the four parties in Government chose to vote in favour of the motion.

The formal Danish position on the Draft Treaty is thus quite clear. The draft is unequivocally rejected by both the opposition and the Government.

The most fundamental issue related to the European Union is no doubt the question of the approach. With the possible exception of the Centre-Democrats all pro-EC Danish parties are clearly functionalists. In their view, the best and in fact only possible way towards a Union is to make new common policies and strengthen the existing ones. Such endeavours are supported by all major parties. We would suggest that in this respect Danish political parties are as integrationist as parties in

most other Member States. Increases in the 'own resources' of the Community to this end are also favoured by the major parties. This is not to suggest that proposals to this end would always be favoured blindly. Special national interests as well as party interests may of course call for special positions. The fundamental point, however, remains that there is a general consensus among the major political parties in Denmark that new policies in the central areas of EC cooperation are both desirable and necessary, and that Denmark as a small State is vitally dependent on the successful outcome of such policies.

As regards the institutional set-up a broad consensus likewise exists among Danish political parties that the existing Treaties must remain the centre and basis for a Union to come.

It is a very widespread feeling among Danish politicians that progress in the essential fields of technology and industrial policy, energy policy and economic cooperation has in fact been prevented to a large extent by some of the same Governments to whom this lack of progress is taken as a proof of the need for a major institutional reform. In this Danish view organs like those proposed by the draft will meet the same resistance as the existing institutions have met and will consequently be unable to adopt — or even worse — to ensure enforcement by the Member States of programmes which these Member States have so far persistently been determined to oppose.

Major institutional reforms would therefore be a greater danger to the political authority of the institutions than the present too-slow decision-making process.

It is obvious that the Draft Treaty presented by the European Parliament, with its strong emphasis on revising the institutions and the fundamental absence of any attempt to define the future common policies, must be felt as problematic and counterproductive by the major Danish political parties.

The interventions by the Foreign Minister and the various spokesmen of the political parties in the Folketing debate referred to above confirms this. With the exception of the Centre-Democrats the Government parties were clearly embarrassed by the draft which 'is a matter for our children to decide upon once they grow up' as the spokesman for the Liberal Party put it. Any identification with the draft was clearly seen as unhelpful in the general contest for seats in the European Parliament. To the Social-Democrats and Radicals a firm rejection of the Union was undoubtedly a way to appeal to that part of their electorates to whom the EC membership is disagreeable.

The Folketing motion of May 1984 certainly is a true reflection of the fundamental and contemporary Danish position with respect to the Draft Treaty. We would, however, suggest that the motion does not give a nuanced picture of the position of the political parties voting in favour of the motion. Certain features of the Danish political scene, which we shall examine below, may explain why.

## *c. The fundamentals of Danish politics in EC matters*

It is the rule and not the exception that Danish Governmments are minority Governments. Danish domestic politics are therefore based on short-term political alliances. In foreign policy — including EC policy — the major parties have, however, traditionally maintained a more or less permanent alliance. Danish foreign policy has in this way largely been unaffected by any domestic instability.

This alliance implies that even in opposition the alliance parties exercise influence on Danish foreign policy. It also means that while in opposition the parties cannot — as in most other countries — exploit their lack of responsibility to recapture votes lost due to foreign-policy decisions.

Over the last years serious rifts have shown in the alliance on external policy between the Social-Democratic Party and the Government. This is not the place to analyse these rifts. Below we shall provide some information on the reasons for the rifts with respect to EC matters. Here we would only stress that the parties of the present Government for want of any real alternatives have accepted

a number of foreign policy motions by the Folketing which were clearly not to their liking. In other words, the nuances of opinion among the major political parties may not always be deduced from the Folketing motions under the circumstances prevailing in Danish political life. This is in particular so with respect to the Liberal and Conservative Parties, to whom no viable alternative to the big foreign-policy alliance has existed so far. Thus, the two non-Socialist Governments which have been in existence since 1973 have both had to accept Folketing motions stating that they did in fact continue the very same policy that their Social-Democratic predecessors pursued.

### The vulnerable position of the Social-Democratic and Radical Parties

The problems facing these two parties with respect to the EC may be clearly seen from the following comparison of the results of the most recent elections to the Folketing and to the European Parliament:

| | Folketing elections Jan. 1984 | EP elections June 1984 |
|---|---|---|
| Leftist Socialists | 2.7% | 1.3% |
| People's Socialist Party | 11.5% | 9.2% |
| Other small anti-EC Parties | 2.0% | not running |
| Popular movement against the EC | not running | 20.8% |
| Total anti-EC votes | 16.2% | 31.3% |
| Social-Democratic Party | 31.6% | 19.5% |
| Radical Party | 5.5% | 3.1% |
| The four parties in Government | 43.1% | 42.6% |
| Free Democrats and Progress Party | 3.6% | 3.5% |
| Total pro-EC votes | 83.8% | 68.7% |

The table shows that the pro-EC parties continue to dominate in the Folketing, having 83.8 % of the votes. However, the anti-EC share of the electorate is roughly one third of the total electorate, which, incidentally, is almost the same as in the 1972 referendum on Danish membership of the EC.

The discrepancy between the electorate and the Folketing in EC matters is, however, not evenly distributed among the parties. On the contrary, it is concentrated in the two parties that moved the motion adopted in the Folketing in May 1984, i.e. the Social-Democratic and the Radical Parties. These two parties are obviously in a vulnerable position on EC issues, having an important fraction of their electorate disagreeing with the policy of the party. They are therefore — particularly while in opposition — focusing their concern on how to maintain and (re)establish the appeal to their electorate.

## *d. The differences among the major political parties*

While Folketing debates tend to focus on points of agreement in order to continue the big foreign-policy alliance, the elections to the European Parliament necessarily involve a certain focusing on party differences. The various election manifestos adopted prior to the European elections bear witness to this.

## The Liberal Party

The Liberal Party manifesto for the European elections adheres to the general Danish consensus by stressing that the Party is basing its policy on the Treaty of Rome. However, it goes on to say that the Liberals accept Treaty amendments which strengthen the ability of the EC to act with respect to problems where common action yields the best results. According to the manifesto, the national conflicts in the Council of Ministers are increasingly harmful to Community interests. The manifesto suggests strengthening the role of the Commission to counteract this development. The right of veto is in this way maintained, though the manifesto explicitly proposes abolishing the widespread misuse of this right.

The Liberals favour an increased influence for the European Parliament. This should be achieved on the basis of the existing Treaties by way of inter-institutional agreements. It is suggested that the European Parliament, in this way, should be given the right of veto against proposals from the Commission.

The Liberals are also in favour of closer coordination between EPC and Treaty cooperation. In particular, the Parliament should be more actively integrated with EPC. Such closer coordination between Treaty cooperation and EPC should give the Community a possibility to speak and act on behalf of the Member States in order to increase the EC influence on international peace and security.

While defence matters should be left to NATO, European security arrangements should be dealt with in EPC.

The Liberal manifesto also speaks out in favour of a generally stronger involvement of the EC in education and culture, and calls for special Community initiatives in the field of education, in particular with respect to vocational training.

It should be stressed, however, that the major part of the Liberal manifesto is devoted to the policies to be pursued by the EC. The institutional sections of the manifesto are, however, important and are — in contrast to those of other parties — put in the beginning of the manifesto. It may easily be seen that the Liberal manifesto in form and to a certain extent also in substance differs in tone and content from the Folketing motion of May 1984, though it remains within its broad consensus as far as the Union is concerned.

## The Conservative Party

The Conservative approach to the institutional questions is more prudent than the Liberal. The Draft Treaty is diplomatically but firmly rejected by a repudiation of 'artificial new modes of cooperation which do not enjoy any popular support and which are therefore endangering the steady but slow progress of the Community'. In the Conservative view, the existing Treaties are a sufficient basis for cooperation, though it is emphasized that they should be used in a more complete way.

Also, the Conservatives favour strengthening the role of the Parliament, but they, in fact, only envisage a larger controlling function for the Parliament.

While the Conservatives also favour increased cooperation with respect to education, they note that the subject falls outside the Treaty, and they do not call explicitly for cooperation to take place within the Community institutions.

The Conservatives differ from the Liberals as to security policy, which in the Conservative view should be dealt with in NATO.

### The Radical Party

Compared to the two foregoing manifestos, the Radical manifesto is quite defensive in its approach. All institutional developments and increases in competence are rejected, and the importance of separating Treaty cooperation from cooperation outside the Treaty is strongly emphasized. A political or military union is specifically rejected, as is an economic and monetary union. The right of veto is strongly stressed.

The Radicals do not foresee any increased role for the European Parliament, and the democratic control of the Community must lie with the national Parliaments, according to this party.

### The Social-Democratic Party

The Social-Democratic manifesto outlines the policies which the party will support in the EC. In a second paragraph the manifesto undertakes to oppose *inter alia*:

(i) changes in the competence of the institutions;

(ii) any erosion in the right of veto;

(iii) any granting of rights to the European Parliament in matters of security and defence;

(iv) the inclusion of education and culture under Treaty cooperation.

It is obvious that the Social-Democratic manifesto — like the Radical — is designed to appease the important fraction of the party electorate which is critical of the EC. The rather poor showing of the Social-Democratic Party in the European elections is, however, sometimes explained exactly as a consequence of the lack of a clear profile in an election where a number of other parties both to the left and to the right could be either for or against further integration. In an attempt to try to clarify the party's policy the Social-Democrats have recently established a committee to study the role of Denmark in Europe and of Europe in the world. It will no doubt be of vital importance to the party, as well as to Danish policy *vis-à-vis* the EC, what this committee may achieve.

## *e. Summary and conclusions*

All leading Danish parties have in a Folketing motion rejected the Draft Treaty proposed by the European Parliament.

This rejection is an expression of a broad consensus on the approach to the European Union. The steady but slow progress of the Community is preferred to great leaps forward which cannot be implemented for want of popular support.

The centre of gravity in discussions on the future development of the Community towards a European Union should in the view of all Danish parties be new policies in the fields of industry, technology, research and development, energy, etc. General institutional reforms are rejected by all parties and the right of veto is considered a necessity also in the future.

Within this general consensus there is a clear difference between the parties with respect to smaller institutional amendments. This difference is often not clearly expressed, owing to the necessary alliance among the major parties regarding foreign policy, including EC policy. The Liberals and, to a lesser degree, the Conservatives are more open to such smaller reforms, while the Social-Democrats and the Radicals take a more defensive attitude in this respect. The Social-Democrats have, after their poor results in the latest European elections, set up a committee to study their position with respect to Europe. The outcome of this committee is difficult to forecast, yet important for the party and thereby for Denmark.

# Chapter IV – The Draft Treaty establishing the European Union: Report on the Federal Republic of Germany

*by Carl Otto Lenz*

## 1. Constitutional questions

### *a. The ratification process*

The Draft Treaty establishing the European Union, is, in the terminology of the Basic Law, a treaty 'with foreign States'. It is therefore to be concluded by the federal President (Art. 59.1). To be valid, the relevant act of the federal President requires a counter-signature by the federal Chancellor or the appropriate federal Minister (Art. 58.1). From these provisions, and from their position in Section 5 of the Basic Law, headed 'the Federal President', one may conclude that not only the competence to conclude treaties, but also the preparation of the conclusion of the treaty, is a matter for the executive, i.e. for the federal Government, responsible to Parliament.

Since the draft regulates the political relationships of the federation, and furthermore relates to objects of federal legislation, it requires the agreement or collaboration of the bodies competent for federal legislation, in the form of a federal law. This means that the federal Government must first submit the draft to the 'Bundesrat', in the usual procedure. The 'Bundestag' and 'Bundesrat' may of course call upon the Government to bring the Draft Treaty before them for debate, but this call does not replace submission by the federal Government. The draft goes back with the Bundesrat's opinion to the federal Government, which has a chance to comment on the opinion. It then goes to the Bundestag for the so-called First Reading, in which the federal Government and spokesmen for the parliamentary groups would set out their basic attitude towards the Treaty. It is then referred to the commitees; it may be taken that the Foreign Affairs Committee will draw up the decisive report for the Bundestag, while a dozen or so other committees will be called on to give opinions to the Foreign Affairs Committee (so-called joint consultation). A special problem is presented by the participation of the Europe Committee, which the Bundestag has formed. This committee, consisting half of German Bundestag members and half of German Members of the European Parliament, was set up in 1983 to advise the German Bundestag on fundamental questions of European policy. According to the procedure developed for this matter, the relevant report of the Europe Committee would go not to the full House, but only to the Foreign Affairs Committee, which is competent, and to certain other committees for joint consultation. The Europe Committee would thus not be on the same level as the classical committees of the German Bundestag, but subordinate to them; nevertheless, through it there would be a possibility of letting the views of German members active in the European Parliament be included in the discussions.

On the basis of the Foreign Affairs Committee's report containing the opinions of the other consultative committees and the result of the consultations on the views of the Europe Committee, the second (and last) debate in the German Bundestag on the law agreeing to the Draft Treaty would be held. No motions for amendments to the Draft Treaty are admissible. The Draft Treaty may only be

accepted *in toto*, or rejected. If the act of acceptance is adopted, it is transmitted to the Bundesrat. The act of acceptance is passed if the Bundesrat consents to it or another of the conditions laid down in Article 78 of the Basic Law is met. It is not passed if an objection by the Bundesrat is not overridden by the Bundestag, or if necessary consent is not secured. Going into detail here would exceed the bounds of this paper. If the act of acceptance is passed according to these provisions, it is then, after counter-signature by the appropriate members of the federal Government, signed by the federal President and published in the *Federal Law Gazette*.

Summarizing, it may be said that the joint action of the federal Government, Bundestag, Bundesrat and federal President is necessary to pass an act of acceptance of the Draft Treaty establishing the European Union.

## *b. Is amendment of the Basic Law necessary in order to implement the Treaty in the Federal Republic of Germany?*

### Preliminary remarks

The Basic Law of the Federal Republic of Germany is a very pro-integration constitution. Even the Preamble states that 'the German People' is 'animated by the resolve . . . to serve the peace of the world as an equal partner in a united Europe'. Again, Article 24 says that the Federation may by legislation transfer sovereign powers to inter-governmental institutions, may enter a system of mutual collective security for the maintenance of peace, and in doing so will consent to limitations upon its rights to sovereignty.

The text of the Preamble, which designates equal partnership of the Federal Republic of Germany in a united Europe as the appropriate form of the promotion of peace expected of the Federal Republic, constitutes not only an encouragement but also an empowerment for the federal Government, Bundestag and Bundesrat to advance along the path towards the unification of Europe, insofar as the goals of the Draft Treaty do not contradict those of the Basic Law. On a reading of the relevant articles of the Basic Law, particularly the Preamble ('to serve the peace of the world'), Article 1.2 (human rights as the basis of peace), Article 9.2 (ban on associations directed against the concept of international understanding), Article 24.2 (maintenance of peace through entering a system of mutual collective security), Article 24.3 (peaceful settlement of disputes between States), Article 26 (ban on acts tending to disturb the peaceful relations between nations, Government responsiblity for armaments production), Article 87a (armed forces only 'for defence') and the corresponding provisions of the Draft Treaty: Preamble ('resolved to strengthen and preserve peace and liberty by an ever closer union'), Article 9, 3rd and 4th indents, Article 63.1 and 63.2, the similarity of objectives and of language leaps to the eye. From the viewpoint of promoting peace, then, the Basic Law and the Draft Treaty are not in contradiction.

### The Draft Treaty and German unity

The Draft Treaty does not contradict the duty of the constitutional bodies of the Federal Republic of Germany to maintain the national and political unity of the German people and to achieve the unity and freedom of Germany in free self-determination, nor does it withdraw this obligation from them. The existing legal position is to that extent maintained, in particular Article 7 of the Germany Treaty of 1952, whereby the three Western occupying powers undertake to support the reunification of the Germans in a democratic State. Britain and France are co-signatories of that Treaty, and at the same

time members of the European Communities. The other Member States have, to the extent that they belong to the North Atlantic Alliance, joined in assuming these obligations.[1]

Ratification of the Draft Treaty would presumably not change anything in this legal position. There are, however, voices in the Federal Republic of Germany calling for this aspect to be incorporated in the Draft Treaty.

## Transfer of sovereignty

Article 24 empowers the Federation to transfer the exercise of individual sovereign powers by mere federal legislation, but does not allow abandonment of the Federal Republic of Germany's existence as a State in favour of a European State. It is true that the Draft Treaty provides for the transfer of far-reaching powers in important areas of national life to the European Union, within the limits provided therein and according to the procedures provided for. That this would end the member's existence as States is, however, neither deducible from the text nor the declared intention of its authors. A far-reaching transfer of powers ought, however, in view of the Basic Law's attitude towards European unification, seeing the Federal Republic as an equal partner in a united Europe, to be covered by Article 24, which except for the inadmissibility of transferring the core of State power, contains no other limitations in its wording.

The same conclusion is arrived at by Everling,[2] Hilf and Schwarze.[3] Moreover, the Draft Treaty allows the Member States, as such, far-reaching participation through the European Council and through the Council of the Union within the framework of the European Union. In the case of, for instance, the formation of the Commission, these go beyond the rights allowed the Bundesrat in the constitution of the Federal Republic of Germany. Again, the area of direct control by the European Union seems not to go beyond the stage already reached in the European Communities: the European Union will have specific administrative competence in the coal and steel, agriculture and competition sectors, while all other administration will, as before, continue to lie in the hands of the Member States.

On the whole, then, the advancement and intensification of European integration provided for in the Draft Treaty can be seen as integration maintaining the existence as States of the Member States and therefore also of the Federal Republic of Germany. Moreover, the fundamental structures of the Federal Republic of Germany ought not to be affected, since this is not possible even by a law amending the constitution (Art. 79.3). Here, however, the finding must be that the structures of the European Union not only do not contradict those of the Basic Law, but largely correspond to them. This is true as regards both the promotion of peace and respect for human rights (Preamble and Article 1 of the Basic Law, 3rd indent of the Preamble and Article 4 of the Draft Treaty). Likewise, the precept of democracy is further realized than the extent hitherto achieved in the European Communities (see Article 20.1 and 20.2 of the Basic Law, Articles 14-19 of the Draft Treaty). The same is true for the principle of the social State (Article 20.1 of the Basic Law). Again, the principle of constitutionality, or, better, the rule of law and judicial control (Articles 19.4, 20.1 and 20. 3 of the Basic Law) has its correspondence in the Draft Treaty (Preamble, 3rd indent, and Articles 41-44). The idea of division of powers, too, both between legislature, executive and judiciary and between Union and Member States, is reflected in the Draft Treaty (see, in particular, Part 3 (Institutional provisions), and Part 2 (The objectives, methods of action and competences of the Union), Articles 9-13, which deal in particular with delimiting the powers of the Union and those of the Member

[1] See, e.g., the final communiqué of the 16th session of the North Atlantic Council in Paris, 9-11. 5. 1955, when the Federal Republic of Germany took part for the first time; *Europe-Archive*, 1955, p. 7927, and finally, the Washington Declaration of the North Atlantic Council of 31. 5. 1984, point 7, *Federal Government Bulletin*, 1984, No 65, p. 574.

[2] *Integration*, 1/84 at pp. 12-23, esp. p. 15.

[3] *Eine Verfassung für Europa*, (Schwarze and Bieber eds), 1984, pp. 265, 32 *et seq.*

States). The principle of the federal State is likewise maintained. It is not impossible that some powers of the Union will detract from those of the *Länder,* but in this context one can hardly speak of a 'voiding of the *Länder's* existence as States'.[4] It has already been pointed out that the application of Union law remains overwhelmingly a matter for the Member States and therefore, in accordance with the distribution of powers pursuant to Articles 30, 83 *et seq.* of the Basic Law, largely a matter for the *Bundesländer.*

### *c. Conclusion*

From the viewpoint of the Basic Law, no constitutional objections to the overall conception of the Draft Treaty or the main features of its elaboration can be raised.

## 2. Prospects for the Draft Treaty

The Draft Treaty's prospects of becoming law naturally depend on the attitude of important political and social groups. These can at the moment be described as follows:

### *a. Parliaments and parties*

#### Members of the European Parliament

The German Members of the European Parliament have taken the following positions on the Draft Treaty:

(i) The German Members of the European Parliament, like those of Italy, Belgium and the Netherlands, have agreed to the Draft Treaty by a large majority. To be sure, in the German delegation, too, consent declined between the first and second votes. Though the CDU/CSU managed to raise the number of ayes by two, so that 37 out of 42 CDU/CSU members voted for the draft, in the second vote, of the SPD members 20 voted aye ( − 8), none voted no, and 5 abstained ( + 3). In the FDP too, the number of ayes fell from 4 in the first to 2 in the second vote.

(ii) The Bundestag has had two debates on the Draft Treaty. The following picture can be drawn from this:

All groups in the German Bundestag, including the Greens, have welcomed the Draft Treaty and referred it to the committees, with instructions to deliver the opinion asked for by the European Parliament within one year; i.e., the German Bundestag is prepared to enter into the debate on the Draft Treaty and not put the matter in the pending file. According to Bundestagspräsident Jenninger, the Bundestag will come to a positive conclusion.[5]

The German Bundestag has held two debates on the Draft Treaty; moreover, the group leaders have dealt with the topic, in response to the enquiries by the Association of Former POWs and the 'Europa Union'. The positions of parliamentary groups apparent from this can be summarized as follows:

CDU/CSU, SPD and FDP welcomed the European Parliament's initiative, without dwelling in detail on the Draft Treaty. The representatives of the Greens, too, welcomed the debate on the Draft Treaty, but 'because it gives a chance to sound the alarm publicly' they want to 'engage in a constitutional debate only once the time is ripe for introducing the counter-model to the present

[4] Tomuschat, *Commentary on the Bonn Basic Law*, Article 24, No 68 a.

[5] See speech by Dr Jenninger at the convention of the Union of European federalisms and the Europa Union, in Cologne on 9. 12. 1984 Bulletin of the Fed. Gov't's Press and Information Office, 14. 12. 1984, p. 1363.

European Community'.[6] Similar statements were made in the Bundestag debate on 7 July 1984 and on 7 December 1984.

Minister for State Mertes has declared on behalf of the federal Government, without prejudicing any later detailed opinion, that he 'finds a number of important principles of our own Europe policy in the European Parliament's Draft Treaty.'[7]

In view of this basically positive attitude on the part of federal Government and the groups that have Government experience, it can be reckoned that any difficulties in the parliamentary debate, which can never be ruled out, would be overcome to result in a positive opinion from the Bundestag.

The same may also be assumed of the Bunderat, since the German people would fail to understand differing opinions from the two Houses of the federal Parliament, made up of representatives of the same parties.

| | | Number of seats | Vote | Took part | Aye | No | Abstained | Did not take part |
|---|---|---|---|---|---|---|---|---|
| Federal Republic of Germany | | 81 | 1 | 69 | 67 | 0 | 2 | 12 |
| | | | 2 | 64 | 59 | 0 | 5 | 17 |
| *of which* | | | | | | | | |
| CDU | 34 | 42 | 1 | 35 (28 + 7) | 35 | 0 | 0 | 7 |
| CSU | 8 | | 2 | 37 (30 + 7) | 37 | 0 | 0 | 5 |
| SPD | | 35 | 1 | 30 | 28 | 0 | 2 | 5 |
| | | | 2 | 25 | 20 | 0 | 5 | 10 |
| FDP | | 4 | 1 | 4 | 4 | 0 | 0 | 0 |
| | | | 2 | 2 | 2 | 0 | 0 | 2 |

CDU: Christian Democratic Union.
CSU: Christian Social Union.
FDP: Free Democratic Party.
SPD: Social Democratic Party of Germany.

## Criticism of the Draft Treaty

This report would, however, be incomplete if it did not cite a few critical voices. The Draft Treaty did not play the role in the European election campaign that its authors had wished. The view has even occasionally been put forward that Europe's problems cannot be solved by 'grand political projects'. In the period leading up to the elections, there were critical voices in the press about the European Parliament. Of many examples I shall quote only two: 'Imagine there's an election and nobody goes' (*Stern*, 14 June 1984) and 'I am not going to vote today' (*Welt am Sonntag*, 17 June 1984). It would be astonishing if the authors of these articles showed any more sympathy for the European Parliament's Draft Treaty than for the second direct elections to that Parliament.

There were also critical voices from the academic community. I refer here in particular to the papers and discussion contributions at the international congress of the Institute for the Study of Integration of the Stiftung Europakolleg, held in Hamburg from 3-5 November 1983. Of many examples I shall quote here only Professor Werner von Simon of Freiburg. He quoted former Federal Chancellor Helmut Schmidt with approval: 'So we have to identify ourselves with Europe now . . . I don't believe in it'.[8]

[6] Mr Vogt, Bundestag Member for Kaiserslautern, at the 68th session of the German Bundestag, Friday, 13. 4. 1984, pp. 4788 and 4790.
[7] 68th session, 13. 4. 1984, p. 4791.
[8] *Eine Verfassung für Europa, supra*, at p. 98.

Such statements, of course, did not go unchallenged, as the report of the ensuing discussion shows.[9]

But scepticism at the draft's ambitions and its chances of realization seem to me to run like a red thread through the whole book.

The same is true of the contributions published in the magazine *Integration* (1/84) on the European Parliament's Draft Treaty. Here too I quote only one example: under the heading 'A European Constitution for Visionaries?' Werner Weidenfeld, professor at Mainz University, writes: 'The basically important and good idea of working out a European constitution has been given concrete form by the European Parliament in a way that is questionable as regards both content and procedure'.[10]

## *b. The attitude of public opinion in general*

The attitude of public opinion in general to the European Parliament's project for a European Union is hard to establish, since this question played no part in the election campaign. The problem must therefore be approached by roundabout ways. The Parliament's draft provides, roughly speaking, for the inclusion of new areas of activity among the competences of the European institutions, for increased recourse of majority decisions and for greater power for Parliament. Opinion surveys on these topics do exist.

Firstly, on the European Parliament: in late 1983, 83% of all those questioned knew of the existence of the European Parliament, as against 76% in 1979, with men at 93% being almost 20% ahead of women, at 75%. Similar figures to those for women are recorded for people with only elementary education and for workers, while people with leaving certificates, civil servants and the self-employed show figures even higher than those for men.

The increase in familiarity has not helped, however, to improve Parliament image. The number of people who had a good impression of the European Parliament's work practically halved between 1979 and 1983 (42% against 23%). The number of people with a poor impression almost tripled (from 10% to 29%). The number of those with no opinion remained almost constant (48% against 46%).

Against this background, it is hardly surprising that more than half those surveyed took the view that the ultimate decision should lie not with the European Parliament but with the Member State Governments. Nevertheless, 44% took the view that the European Parliament should take binding decisions for all member countries in a few important areas. The difference between men and women is considerable. Fifty-two percent of men are in favour of more powers for the Parliament. Forty-six percent wish to leave decision-making power to the governments, while 60% of women want this. Only 36% of women want more powers of decision for the Parliament. Against this background it is hardly astonishing that the majority of all those surveyed rejected an all-European government (56%), while only something over a quarter, namely 27% were in favour. Among men the figures were 35% for, 50% against. Among women, rejection is more than three times as strong as agreement (61% against 19%).

In line with this is the fact that more than half of those surveyed are not prepared to accept economic disadvantages in order to support poorer countries in the European Community, while 46% are prepared for this. Among men, the figures are equal (49% against 49%). Among women, readiness to accept sacrifice is smaller (44% for, 53% against).

---

[9] Id. at pp. 110-13, esp. pp. 111-12.

[10] Weidenfeld, 'A European Constitution for Visionaries?', *Integration*, 1/84 at p. 37.

As against this, environmental protection in Europe should where necessary be imposed compulsorily. Ninety-four percent favour this, with only 5% against. There are no significant differences between men and women here.

As far as German reunification is concerned, some two thirds are of the opinion that Western European unification has no effect on this, i.e. that it neither impedes (as between 16% and 19% believe) nor facilitates (15%) this process. This fits in with the general picture that only 53% of the population regarded the European elections as very important and only 62% intended to take part. The actual electoral participation lay between these two figures, namely at 56.8%.

There are, however, also figures conveying a different picture. Thus, two thirds of German feel themselves to be 'European', with European consciousness being especially marked among the middle age-groups, from 30 to 59. It rises with degree of education and professional qualification. People with leaving certificates or higher education, civil servants, the self-employed and professionals feel most European. In line with this, two thirds of Germans regard membership in the European Community as a good thing. Only 6%, not even one tenth, regard it as a bad thing. Likewise, the break-up of the European Community would be explicitly regretted by 72% of those surveyed, only 6% would welcome it and the rest are indifferent.

These figures are based on two representative surveys carried out by the Sociological Research Institute of the Konrad-Adenauer-Stiftung in October 1983 on 2 000 and in March 1984 on 3 082 German citizens entitled to vote. As the Konrad-Adenauer-Stiftung itself admits, the results are contradictory. It writes: 'Against the background of large numbers of bad reports of the European Community . . . the image of Europe among the Federal German population in March 1984 is split. On the one hand, the general agreement with the European Community and identification with the European idea has strengthened, but on the other, in Germany too it is disappointment and anger . . . that determine the assessment'. The report continues: 'But these two trends are only apparently contradictory. In fact, anger and disappointment at economic developments on the one hand seem to lead to increased support for the process of European integration on the other. The prevalent mood can perhaps be summed up by the slogan: "high time too!".'

In a more recent assessment of public opinion in Germany Bundestagspräsident Philip Jenninger said the initiative taken by President Mitterand and Federal Chancellor Kohl had been well received by German public opinion and he concluded: 'This example shows us that the feeling for European unity is just sleeping. It is immediately revived by every concrete step in the right direction.[11]

In such a situation, characterized by contradiction, the future of the project will depend on the determination of the political leadership to make the European Union a reality. The Federal Government and the great majority of the Bundestag have never left any room for doubt that they are resolved to advance along this path.

[11] *Supra*, at p. 1363. Translation by the author.

# Chapter V – Ratification and implementation of the Draft Treaty establishing the European Union: constitutional and political implications for France[1]

*by Jacques Genton*

If we are to be realistic we have to admit from the start that, in France, the exercise we have been asked to embark upon partakes somewhat of political fantasy. The Draft Treaty establishing the European Union does not, for all the great hopes pinned on it, inspire the interest it merits.

The politician, however, must not take the pessimistic view: we should rather consider the matter as a future possibility.

The written sources on which we have been able to draw in presenting this paper are few in number. They come primarily from the conclusions of the Senate and National Assembly Committees on the European Communities (the present writer has the honour to chair the Senate Committee), from certain answers published in the Official Journal, from the French Government, from European Parliament debates, from the campaign for the European elections held on 17 June 1984 in France, and from occasional articles — all too rare — in specialist publications.

## 1. Constitutional aspects

With regard to constitutional rules, the Draft Treaty raises a number of questions, to some of which there is as yet no clear-cut answer.

### *a. The power to negotiate*

Article 52 of the French Constitution confers the power to negotiate (and ratify) international treaties upon the President of the Republic. But in writing into the Draft Treaty such a novel machinery for its entry into force (Article 82), the European Parliament clearly wanted to get away from the inter-governmental negotiating procedure.

The question then arises whether Parliament's procedure is compatible with French constitutional provisions concerning international treaties and agreements. Four observations may be made here:

[1] Annex: Information report by the Senate Committee on the European Communities.

1. International Labour Organization (ILO) conventions are not drawn up within an inter-governmental agency pure and simple but in the context of the ILO's tripartite conference. They are then submitted to national authorities for ratification.

2. The existence, in general terms, of accession procedures whereby countries can become parties to an agreement without having played any part in its drafting demonstrates that negotiation and ratification are not inextricably linked.

3. The conference that the President of the French Republic suggested might be convened after the Brussels European Summit at the end of March 1984 could, if it addressed itself to the Draft Treaty, constitute this inter-governmental negotiating body. It is even conceivable that the conference might consider a Draft Treaty already amended by the European Parliament to take account of the initial reactions of the national parliaments, according to the procedure it wished to follow; these amendments might be based on the comments of the national governments.

4. Since the Fontainebleau Council (June 1984)) we have had a Committee on Institutional Affairs (the Dooge Committee, or 'Spaak 2') that might also constitute this inter-governmental negotiating body. It does not seem, however, that the text adopted by the Committee will be based directly on the Union Treaty or that it will propose that it be submitted for ratification.

## *b. Opinion of the French Parliament*

The second paragraph of the resolution on the Draft Treaty establishing the European Union, also adopted on 14 February 1984, calls on the European Parliament to solicit the national parliaments' 'opinions and comments' on the draft.

However, since the resolution procedure has disappeared from the parliamentary system of the Fifth Republic, there is no means of establishing what the majority view of the Draft Treaty is in the National Assembly and the Senate. The question then arises how views can be formulated — even if they cannot be regarded as reflecting those of the French Parliament as a whole.

There are a number of possibilities:

(i) the conclusions of the Parliamentary Committees on the European Communities; the Senate Committee presented its conclusions on 5 April 1984 (No 120/84, rapporteur: Mr Noël Berrier), the National Assembly Committee reporting on 5 June 1984 (No 11/84, rapporteur: Mr Charles Josselin, Committee Chairman);

(ii) questions for oral answer with debate (12/13 November 1984);

(iii) a fact-finding mission at the request of a Committee (Foreign Affairs or Legal).

In any event, however, it will not be possible to bring these procedures to a close by means of a vote in open session.

## *c. The test of constitutionality*

The general rule is that only laws may be referred to the Constitutional Council (Article 61 of the Constitution). Laws to ratify international agreements, however, are a special case: they may be examined while still at the bill stage if they involve an international commitment which might contain a clause contrary to the constitution (Article 54 of the Constitution).

In these circumstances:

(i) if the traditional parliamentary procedure of authorizing ratification is followed (Article 53 of the Constitution), examining the compatibility of the Draft Treaty with the constitution carries with it the risk that the Constitutional Council's ruling will lead of necessity to the difficult course of amending the constitution (Article 54); its ruling will be binding on all concerned;

(ii) if the referendum procedure is chosen to authorize ratification (Article 11 of the Constitution, see below), there would seem to be nothing to prevent the Constitutional Council from giving a ruling on the consistency of the Draft Treaty with the constitution, provided that this takes place before the vote.

## *d. Ratification by referendum*

Authorizing the ratification of the Draft Union Treaty by means of a referendum clearly falls within Article 11 of the Constitution.

Legal considerations aside, politically this procedure would undoubtedly be the best way of establishing whether the French people are 'European' enough to respond to what strongly resembles a call from a constituent assembly. Besides, the most recent referendum organized in France was also on a European theme (enlargement of the Community to include the United Kingdom in 1973).

Quite apart from the above-mentioned difficulty of testing the constitutionality of the Draft Treaty in advance, however, to opt for this procedure would be a politically difficult and courageous decision in view of the controversy surrounding referendums in France in the summer of 1984.

## *e. Transfer of sovereignty*

The question of transferring sovereignty from the State to the Union only arises in the event — still highly hypothetical — of the Union Treaty actually being put into effect.

It would seem unlikely that there should be any transfer of sovereignty immediately after ratification, since the general philosophy of the Treaty is that the Union will gradually become what the Member States in time wish it to be.

In fact, transfer of sovereignty has already occurred under the present Treaties, not least as regards agriculture, transport and foreign trade, where, according to Article 3 of the Treaty of Rome (25 March 1957), common policies were to be adopted.

In point of fact, therefore, the question of sovereignty would arise at the time of the decision to transfer it rather than at the time of ratification of the Union Treaty.

There are three comments to be made here:

1. In general terms, the inclusion of a new area in the exclusive jurisdiction of the Union is the responsibility of the Union's legislative bodies (Article 11 of the Draft Treaty). Such a transfer of powers would be carried out on the initiative of the European Council — that is to say, representatives of the national governments — and would therefore elude supervision by the national parliaments.

2. As regards the powers of the Union in the field of taxation, the creation of new own resources would also be a matter for the Union's institutions. Here, too, the national parliaments, whose authority to raise taxes dates furthest back into history, would be deprived of it. The transfer of sovereignty would then be clear.

3. If foreign policy, and therefore defence policy, were to be placed in the hands of the Union, what would the national authorities have left in terms of the typical characteristics of the exercise of sovereignty? And France's special position as a nuclear power wishing to protect its independence must not be overlooked.

These comments should be examined in the light of the decision given by the Constitutional Council on 30 December 1976 on the election of the European Parliament by direct universal suffrage. There the Council takes a restrictive view of the progress of European integration and implies that a European constitution which conferred new powers on the Union, notably in the fields of foreign policy or defence, would come into conflict with French constitutional requirements.

Under Article 86 of the Draft Treaty, the Member States may not make their ratification subject to reservations. This binding provision will do nothing to encourage acceptance of the Treaty.

## 2. Political aspects

The least one can say, in all objectivity, is that ratification of the Union Treaty presupposes a remarkable change of heart not only on the part of public opinion but also among the political parties. Indeed, the latter have been amazingly circumspect with regard to the draft, as though it were an embarrassment to them or had appeared on the scene prematurely.

Four indicators may be used to illustrate this general impression of indifference to the European Parliament's draft.

### *a. Voting and explanations of vote by French Members of the European Parliament, 14 February 1984*

In the ballot on the Draft Treaty the French Members of the European Parliament voted as follows: the Liberals and the EPP, plus one Socialist and one EPD member, voted in favour; the Communists voted against; and the Socialists, with one exception, abstained. All but one of the French members of the EPD took no part in the ballot.

Some information can also be gathered from explanations of vote and earlier statements.

1. The UDF, corresponding in part to members of the EPP ( = Centrist) and Liberal groups, came out in favour of the Draft Treaty, though there was some criticism of the institutional structure it would set up. Madame Veil, for example, saw the Treaty as an ambitious but realistic enterprise. Her detailed criticisms were directed *inter alia* at the mechanism whereby, for the ten-year transitional period during which the individual Member States would have a veto within the Council, the right to exercise the veto would be subject to the Commission's approval. Mr Edgar Faure, in an interesting *ex tempore* speech, regretted that the draft did not go far enough: he wanted the Union to have an elected president from the outset.

2. The RPR — that is, the members of the EPD group — declared its loyalty to the idea of European Union but challenged the institutional route chosen for bringing it about. The chairman of the EPD group considered the draft inappropriate, unrealistic and ill-timed; he also contested the legitimacy of Parliament's acting as a constitutent assembly. There may be signs already that this might become a highly divisive issue between the present-day opposition parties in France.

3. The French Socialists reiterated their commitment to European integration but dismissed the Draft Treaty as ill-timed and irrelevant to political realities which would have to be coped with in

the most effective way possible. Fearing that the institutional framework was an alibi, and preferring real progress to even the noblest of ideas, the spokesman for the French Socialists asked that priority should be given to what was possible and mundane in Europe. The institutional aspect would then be the complement to, or rather the culmination of, a pragmatic approach conducted with patience and tenacity. What would be the position of the Socialist Party after Mr François Mitterrand's statements in Strasbourg?

4. The French Communists took the view that the present Treaties offered untapped potential and warned against trusting a short-lived piece of wishful thinking. Preferring purposeful pragmatism to an idealism deserving of respect, they wanted to see a change in policy rather than in institutions (which, incidentally, represents a somewhat surprising *volte face* by the Communist Party with regard to the Treaties of Rome).

## *b. The European election campaign of 17 June 1984*

Observers of French politics all agree that the Union Treaty was hardly mentioned by candidates for the European elections in June 1984.

The ERE (Entente Radicale Ecologiste), led by Mr Doubin, Mr Stirn and Mr Lalonde, was the only party to make the Treaty one of the main planks in its campaign platform; its poor showing (3.3% of votes cast) suggests that the theme of European Union was not exactly a vote-catcher.

Specifically European themes were, in fact, conspicuous by their absence in the European election campaign, except for some of the 'minor' parties. It seemed as though the 'major' parties were preoccupied with the stakes of domestic politics.

## *c. Speech by Mr François Mitterrand in his capacity as President of the European Council before the European Parliament in Strasbourg on 24 May 1984*

The speech delivered in Strasbourg by the President of the French Republic on 24 May 1984 was interpreted by many observers as a dramatic gesture of approval for the Draft Treaty.

While this was rightly regarded as an important speech, however, it does call for a more sophisticated interpretation than that — without entering into polemics.

First of all, the President referred, in order to explain how he intended to revitalize European integration, to the Solemn Declaration of Stuttgart (June 1983) and the Spinelli draft. But the objectives of the Stuttgart Declaration are infinitely less ambitious than those of the Draft Treaty, so there is some ambiguity as to the precise means of promoting the emergence of a political Europe.

Also, Mr Mitterrand made frequent references to the existing Treaties and their untapped potential, thus, logically, demolishing the justification for introducing new institutional arrangements. He concluded one of his bursts of oratory on institutional questions with the words: 'This is why it is vital to consolidate the main Treaty that binds the European countries together and constitutes their fundamental law — the Treaty of Rome.'

Finally, while Mr Mitterrand may well have referred to the Draft Treaty in glowing terms, he did not say that he accepted it as it stood or in the immediate future. Asserting that 'a new situation calls for

a new treaty', he added that such a treaty 'must not, of course, be a substitute for existing treaties, but an extension of them to fields they do not currently cover'. Now, a careful examination of the Spinelli draft will make it quite clear that the institutions set up by the present Treaties could scarcely co-exist with those featured in the Draft Union Treaty. Besides, it is the inspiration behind the Draft Treaty — not the instrument itself — which, in the President's speech, suits France's purpose. France is prepared to set about building a political Europe, but not necessarily by the ways and means contained in the Union Treaty drafted by the European Parliament.

## *d. Political life since 1945*

There have been a number of constants in French political life since 1945 as regards schemes to advance European integration.

Traditionally, the heirs of Gaullism are hostile to them — or in some cases merely cautious. The extreme Left is openly opposed to them. The Christian Democrat and Social Democrat schools of thought, on the other hand, are favourably disposed and have consistently demonstrated their commitment to the idea of European integration.

Paradoxically, then, we see that attitudes towards Europe do not correspond to the Left-Right split of French politics. This is true as between parties, and it is also true of the various tendencies within each party. Because views do differ inside each political grouping with regard to the European idea. The low turnout for polls on European issues (1972 referendum, European elections from 1979 to 1984) is evidence that public opinion, that the French electorate, sets little store by Community affairs. The political parties are largely responsible for this.

As for whether the implementation of the Treaty on European Union would lead to the emergence of new parties or new political alliances, it would be a risky and entirely futile undertaking to construct scenarios for the future on this point.

*
* *

The feeble response in France from the public and the political parties to the Draft Treaty establishing a European Union, the uncertainty of its standing in French constitutional law, and the confidential proceedings at Community level of the Dooge or Spaak Committee, make it impossible to speculate on how much time will elapse before the ratification procedures are completed. For, while we must refuse to give in to pessimism, we should also be realistic.

For the moment, a constructive approach would be to look at the actual content of the draft and examine ways of improving the institutional mechanisms involved. A number of suggestions could be made here. For instance, the powers of the Union could be defined more clearly, or the European Council could be given the right to dissolve the European Parliament. Both of the French Parliamentary Committees on the European Communities have stressed these particular points.

But it was not the purpose of this paper to go into these matters.

*Annex*

# Information report by the Senate Committee on the European Communities

Senate of the French Republic: Annex to minutes of the sitting of 7 November 1984, Vol. II pp. 3-19, Doc. No 62

## CHAPTER ONE: Institutional affairs

### *Draft Treaty establishing the European Union*

Rapporteur: Mr Noël Berrier, Senator

**The origins of the Draft Treaty**

**The method of preparation selected:**

**I – The new legal framework and new fields of action**

**II – The new institutional balance**

**III – The procedure for bringing the Treaty into force**

**IV – The committee's conclusions adopted on 5 April 1984**

*
* *

The patient work done by the European Parliament, at the instigation of Mr Altiero Spinelli (Communist, Italy) and his associates in the 'Crocodile Club', on a Draft Treaty establishing the European Union has little in common with the Solemn Declaration on European Union, the successor to the Draft European Act (the Genscher-Colombo plan),[1] signed by the Heads of State or Government in Stuttgart on 19 June 1983.

Although the signatories to the Solemn Declaration did contemplate change — within existing rules and practices — the Spinelli Report is revolutionary in that it paves the way for a confederation, if not a federation of European States. What it is proposing is that Member States of the Community should ratify a new Treaty embodying a European constitution.

The approach to the revitalization of European integration is 'constitutionalist rather than 'functionalist'; or to use another classic distinction, it is 'maximalist' rather than 'minimalist'. The authors of the Draft Treaty have abandoned the pursuit of integration through action to solve the concrete economic, monetary, financial and social problems confronting the Ten and believe that the establishment of a new institutional balance is the only way of getting Europe moving again. The Draft Treaty is not an end in itself: the hope is, rather, that by creating a new decision-making mechanism and outlining new fields of action, it will provide a means of creating an authentic political power in Europe, the federal authority which the existing Community institutions have failed to become.

Although they do not discount achievements under the Community Treaties, the authors of the Draft Treaty consider that the institutions set up by them have revealed their limitations and that there is therefore a need for a

[1] See the Committee's conclusions (No 83/82) on the report by Mr Jacques Genton.

new contract to redistribute power by defining the competences and institutions of the European Union. The European Union will not, however, be created by a radical revision of the basic Treaties. Article 7 of the Draft Treaty states that the Union will take over the Community patrimony: in other words the Union Treaty will not replace the old Treaties but will rather be additional to them.

## The origins of the Draft Treaty

Even before the first European elections, Parliament had frequently criticized the separation of powers within the Community and censured the all too frequent impotence of the Council and the Member States, accusing them of lacking Community spirit and reducing common problems to inter-governmental agreements. The 1979 electoral campaign reflected these views and certain newly-elected members, of varying nationalities and political persuasions, joined Mr Spinelli in preparing proposals for institutional reform.

These led in July 1981 to the setting up of a Committee on Institutional Affairs, which was instructed to prepare a plan for reform to be presented to Parliament in stages.

A year later, in July 1982, Parliament approved the initial guidelines on the reform of the treaties and the achievement of European Union.

In September 1983 the work of the coordinating rapporteur and his six co-rapporteurs was presented to Parliament, which approved the content of the preliminary Draft Treaty establishing the European Union by a large majority.

The draft finally completed its last stages before Parliament on 14 February 1984 with the adoption of a resolution and the actual text of the Draft Treaty, which had been prepared with the help of a committee of lawyers.[2]

## The method of preparation selected

It may appear paradoxical that Parliament should have embarked on a course of institutional reform designed to lead to a European Union just when the Council was engaged in a similar exercise as a result of the Genscher-Colombo initiative.

There were two main reasons for its decision.

The first was that the objectives were so ambitious that it seemed impossible to achieve them through mere reform of existing treaties and agreements. In Parliament's view, redefinition of the competences and powers of the institutions and establishment of an organic link between the Communities, Political Cooperation and the European Monetary System was so complex that a reform through amendment of the original Treaties was out of the question.

The second was the gap in Parliament's legal powers, which do not allow it to exert any real influence on the draft texts placed before it. Amendments to the Treaties would have been made under Articles 236 EEC, 96 ECSC and 204 Euratom, which give Parliament no powers of decision.

It would therefore have been unable to exert any effective influence on the amendments discussed at the conference of representatives of governments of the Member States provided for in the revision procedure. It would have been prevented from acting by a procedure which it saw as the main reason why institutional reform had been blocked for more than 30 years. It preferred parliamentary debate to negotiations between national representatives, being convinced that the inter-governmental process would be sterile and the parliamentary one fertile. Both reason and necessity led to rejection of revision of the Community Treaties as the way forward: it corresponded neither to Parliament's objectives nor to its legal capacity.

Buttressed by its democratic legitimacy and aware, as it said itself, of its political duty, Parliament therefore decided to act without reference to the Council and propose a new political entity which would encompass all

[2] The Draft Treaty establishing the European Union was adopted by 231 votes to 31 with 43 abstentions. French Members voted as follows: Liberals and EPP (centre), one Socialist and two members of the EPD (from the RPR) voted in favour, the Communists voted against and all but one of the Socialists abstained. Altogether 130 Members, including all but two of the French members of the EPD group, were absent when the vote was taken.

that the Community had achieved on the legal, political and economic fronts and develop and expand these successes by methods of its own.

The Draft Treaty suffers from this method of preparation. The text takes the form of an international treaty which has not been negotiated by governments; indeed, governments have been extraordinarily reticent about it. It can come into force only after ratification by the Member States in accordance with their respective constitutional requirements. Clearly, Parliament has neither the legal nor the political power to establish a European Union by promulgating what is in fact its constitution. All it can do is propose the ratification of a treaty establishing the union to the Member States.

The legal impact will therefore remain nil until national governments and parliaments espouse the political will of the European Parliament and, more precisely, until it has been ratified by 'a majority of the Member States of the Communities whose population represents two-thirds of the total population of the Communities' (Article 82 of the Draft Treaty).

*
* *

The Draft Treaty put forward by the European Parliament is a highly ambitious proposal which constitutes a remarkable act of faith in the European idea. As we shall see, one of its characteristics is its internal consistency and the involvement of a committee of lawyers on the drafting side has certainly contributed to the high quality of this important text.

During preparatory work on the Draft Treaty, certain groups in Parliament vigorously contested the undertaking on grounds of both timing and realism and, as can be seen from the outcome of the final vote, this came to a head during the debates leading to adoption of the proposal in February 1984. What matters now is to assess the credibility of the Draft Treaty. Although it sets out to be the crowning achievement of the first directly-elected Parliament, the silence with which governments have so far greeted it would indicate that they have little enthusiasm for this path to European Union. Indeed, to judge from the welcome which the Heads of State or Government gave the Genscher-Colombo draft at Stuttgart in June 1983, when they adopted a watered down version with little binding force in a statement described as 'Solemn' but without political or practical impact, they are simply not ready for the great leap forward which Parliament is proposing.

However, if we are to reach a conclusion on Parliament's ambitious proposal to the Member States, without going into it in too much detail, the content of the Draft Treaty must be analysed, initially by examining the new legal framework and the new fields of action which it advocates, then by assessing the new institutional balance it seeks to establish and finally by looking at the suggested procedure for bringing the European Union into being.

## I. The new legal framework and new fields of action

The Draft Treaty challenges some of the present Community rules with the aim of furthering European integration, either through the means of action used or the fields in which action is taken.

### *A. The principle of subsidiarity*

One of the principles underlying the institutional system and the separation of powers in the Union is the principle of subsidiarity.

The explanatory statement to the Draft Treaty defines 'subsidiarity' as the principle 'under which the Union may on the one hand take action only in those cases where its intervention is likely to be more beneficial than that of the Member States acting in isolation, and is on the other hand endowed with clear instruments and procedures for initiating and furthering the appropriate action in such cases.' Put more simply, this seems to mean that the Union will act only in those areas where common action by the Member States would be more efficient than separate action. This is confirmed by the last recital of the preamble, which states that the Member States intend 'to entrust common institutions, in accordance with the principle of subsidiarity, only with those powers required to complete successfully the tasks they may carry out more satisfactorily than the States acting independently.'

The Union will have two ways of carrying out these tasks and achieving these objectives: common action and cooperation between the Member States.

Common action means that all the acts of the Union (laws, implementing regulations, executive decisions, judicial acts, international treaties, programmes and recommendations) will be directly applicable to and binding on the institutions of the Union, the Member States and their citizens, since Union law will take precedence over the municipal law of the Member States.

Where cooperation applies, by contrast, decisions will be taken by the European Council (not the Commission, Parliament or the Council) and implemented by the Member States or the institutions of the Union, in accordance with procedures laid down by the European Council. Cooperation therefore means the commitments undertaken by the Member States within the European Council (Article 10 of the Draft Treaty).

The Draft Treaty specifies the areas to be subject to these methods but makes provision for the European Council transferring matters subject to cooperation to common action. Article 11 suggests that moves could be in this direction only but Article 68(3) allows exceptions to the rule.

*Comments:*

We might well ask why subsidiarity was preferred to complementarity. To the authors of the Draft Treaty, subsidiarity appears to exclude any competition or jockeying for position between the Union and the Member States so that their work will be untainted by any form of rivalry. This could have been achieved by making their competences and action complementary, enabling them to work together rationally and harmoniously. The notion of subsidiarity, by contrast, implies that some areas would be regarded as major while others would be secondary, playing no more than a supporting role.

Subsidiarity is an obscure concept. It is also rather ambiguous, no doubt because of the very flexible dividing line between common action and cooperation, a line which the European Council would probably move, if at all in the direction of greater integration.

## *B. The three types of competence*

In relation to common action the Union will have two types of competence, exclusive and concurrent, in application of the principle of subsidiarity. The Draft Treaty also makes provision, though not in express terms, for 'potential competence', in other words matters falling within the competence of the States which could be transferred to the Union.

Where the Union has exclusive competence, only the institutions of the union, particularly the Commission, may act and national authorities may legislate only to the extent laid down by the law of the Union. The main areas of exclusive competence are the internal market and freedom of movement (Article 47), competition (Article 48) and commercial policy (Article 64). In these sectors the legislative authority will establish precise and binding timetables for the creation of a genuine internal market, as a precondition for restoring a healthy and competitive European economy. A further aim is to strengthen the European position in international negotiations.

Concurrent competence means that the Member States may continue to act so long as the Union has not legislated; the Union would have the right to intervene, without displacing national competence, in areas where European cooperation was considered to be inadequate. For a limited time concurrent competence would be exercised jointly by the Member States and the institutions of the Union in agriculture, transport, telecommunications, research, energy and industry (Article 53). Interventions, henceforth specified in the Treaty, could take a number of forms, varying from one sector to another: recommendations to the Member States, firms or local authorities, project financing or the setting up of specialized European agencies.

Besides these sectoral policies, the Union would have concurrent competence for a 'policy for society', including social policy in the broad sense of the term, consumer policy, regional policy, environmental, education and research policy, and cultural and information policy (Article 55). Concurrent competence would also apply to conjunctural policy (Article 50) and monetary and credit policies (Article 51), with an eye to the gradual achievement of full monetary union (Article 52). This means that the Union would be entitled to oversee the monetary and budgetary policies of the Member States.

What may be described as 'potential competence' covers areas which will remain within the competence of the Member States for the time being but which may be transferred to the exclusive or concurrent competence of the Union by the European Council with Parliament's approval. Initially, such areas would be managed under cooperation pending their transfer to common action; the main areas are the international relations of the Union and, more particularly European security.

These areas deserve special mention. Title III (of Part Four) of the Draft Treaty goes into the rules governing the Union's international relations in some detail. These are highly representative of the possible combinations between common action and cooperation and between exclusive and concurrent competence.

In general, as we have seen, commercial policy would fall within the exclusive competence of the Union and would be dealt with by common action. Development aid would become a matter for common action after a ten-year transitional period (Article 64). With the exception of those matters earmarked for common action, the Union would, subject to certain conditions, conduct its international relations under cooperation, particularly as far as the political and economic aspects of security are concerned. Article 68 of the Draft Treaty would allow the European Council, in a second phase, to extend cooperation to armaments, sales of arms to non-member States, defence policy and disarmament. At a later date, such matters could even be dealt with by common action, since the European Council may, to the extent required by the principle of subsidiarity, transfer a matter from cooperation to common action, for an experimental period if appropriate.

*Comments:*

The separation of powers outlined in the Draft Treaty provides great flexibility; it is progressive and open to development. Despite the derogation in Article 68(3), it is also irreversible, since no area made part of the competence of the Union can subsequently be returned to the Member States.

The flexibility of the system lies chiefly in the fact that it may be changed without amendment of the Treaty, that is to say, without a separate agreement by the Member States. The revision procedure, laid down in Article 84, is much more cumbersome since it requires ratification by the Member States in accordance with their respective constitutional procedures following approval by the two arms of the legislative authority acting in accordance with the procedure applicable to organic laws (i.e. by a qualified majority). The system provided by the Draft Treaty could, if the institutions of the Union and the European Council in particular so desired, lead to considerable progress along the road to European integration.

There is, however, some ambiguity, not to say confusion, in the mechanisms provided for in the Draft Treaty, since the rules are extremely precise on certain points but somewhat vague on others. This is particularly true of the distinction between exclusive and concurrent competence: in some cases, it is not clear which will finally apply.

Other areas, particularly the cultural aspects of the 'policy for society' and European security, raise the question of the Union's relations with the Council of Europe and the Western European Union. Although Article 65 provides for cooperation with the Council of Europe, there could be a danger of the work of the two overlapping.

Finally, the common agricultural policy, the main stay of the *acquis communautaire,* has no special place in the draft. It is merely one of the sectoral policies listed in Article 53.

## *C. The finances of the Union*

The Union will have a large degree of financial autonomy since it will be free to create new revenue or alter its own resources without ratification by the Member States. Initially, the Union will have the same revenue as the Communities, VAT revenue being calculated as a fixed percentage. New sources of revenue may be created and existing ones amended by means of an organic law.

After a ten-year period, the Union may adopt framework laws on the harmonization of taxation to the extent necessary for the purposes of economic integration. In principle, the authorities of the Member States will collect revenue but this task may be transferred to the Union's own revenue-collecting authority set up by a law of the Union.

The distinction between compulsory and non-compulsory expenditure will disappear and all expenditure made subject to the same budgetary procedure on which Parliament, acting by an absolute majority, will have the last word on second reading (Article 76).

Every five years, at the beginning of each Parliamentary term, the balance between resources and requirements will be reviewed and resources adjusted accordingly. This multiannual financial plan, revised each year, will establish the probable trend of revenue and expenditure in the light, in particular, of changes in the allocation of tasks and financial burdens between the Union and the Member States.

A financial equalization system, covering both revenue and expenditure, will be introduced to alleviate excessive economic imbalances between the regions (Article 73). Procedures for applying the system will be laid down in an organic law.

*Comments:*

The Union's ability to create new own resources without reference to the national institutions is an important innovation and symptomatic of the considerable degree of autonomy which Parliament's draft bestows on the Union.

The desire to ensure the transfer of financial resources corresponding to each transfer of competence from the Member States to the Union is inspired as much by logic as by wisdom.

Particular attention should be paid to the provisions on financial programmes (Article 74), designed to spare the Union the financial problems currently besetting the Communities and blocking any attempt at a fresh start. It remains to be seen however how reliable these financial planning techniques will be and to what extent budgetary choices can be rationalized: national experiments in this area have not always lived up to expectations.

## *D. Sanctions against the Member States*

Another important innovation which deserves a mention is the provision for sanctions against the Member States; there is no comparable mechanism in the Community Treaties.

If a Member State seriously and persistently violates democratic principles, fundamental rights or the provisions of the Union Treaty, the European Council, following establishment of this violation by the Court of Justice at the request of the Commission or Parliament, and may, with the approval of Parliament, suspend rights deriving from the application of all or part of the Treaty provisions to the Member State in question and suspend participation by the Member State in the institutions of the Union (Article 44).

*Comments:*

It appears that temporary exclusion would be applied in two situations: (a) a change of regime in a Member State whereby democratic rules and practices were no longer followed by its institutions or with regard to individuals and (b) failure by a Member State to meet its obligations, notably its financial obligations, to the Union.

The first hypothesis is similar to that considered in Article 4, which deals with fundamental rights. The system of sanctions refers to this article, which explicitly mentions the dignity of the individual, economic, social and cultural rights and all the values which derive from the constitutions of the Member States, the European Social Charter and the European Convention on Human Rights. The reference to democratic principles links up with the conditions for accession in Article 2, which states that only democratic European States may join the Union.

The second hypothesis is temporary exclusion to force a Member State to meet its obligations, whether in respect of common policies or — and this was no doubt the primary consideration — in respect of its financial contributions to the Union budget. Aware of the Community experience, the authors of the Draft Treaty wished to ensure that the integration process would not be blocked by budgetary disputes, even though sanctions are subject to very strict conditions, namely 'serious and persistent' violations of the Treaty by a Member State.

This comparatively onerous provision, which was absent from the Community Treaties, could be a useful way of preventing default by the Member States and ensuring trouble-free operation of the Union.

* * *

It can be seen that the competences of the Union are very broad. But they will extend no further than the Member States wish, since both the new legal framework and the areas of Union intervention are flexible and open to development.

The Draft Treaty takes over rather than discards the *acquis communautaire* by bringing extensive fields of action under the authority of the Union. The listing of these sectors in the Treaty is an innovation, since some of the Community's policies and actions are now carried out on the fringes of the existing Treaties.

The Union would thus exercise the existing competences of the Community in the fields covered by common policies. Its new competences will cover both economic and social matters, notably the achievement of monetary

union by a suitable institutional method, a 'policy for society' with a wide range of components, and international relations, which will be integrated into the Union's own activities, gradually developing into a common foreign policy far removed from the political cooperation between foreign ministers that we are familiar with today.

As already stated, the political and economic aspects of European security will be dealt with by cooperation but other facets of security could be handled by the institutions of the Union acting on a decision of the European Council. Hence, without resorting to the comparatively cumbersome procedure for amending the Treaty, the Union will be a political structure with the Treaty as its constitution, capable of accomodating all aspects of foreign policy and security of concern to all the peoples of the Union.

This is not the least important of Parliament's aims in advocating this reform.

## II. The new institutional balance

While the new legal framework and the new fields of action of the Union are intended to deepen and broaden Europe, an integration, the new institutional balance proposed in the Draft Treaty should do away with bottlenecks and facilitate decision-making by the institutions of the Union. The institution which gains most from this new institutional balance is the European Parliament.

The authors of the Draft Treaty set out to strengthen institutional democracy and increase institutional efficiency. The existing institutions of the Community would be retained but their competences and *modus operandi* would change considerably. The Council would no longer be the sole legislative body and the directly-elected Parliament would have joint decision-making power in all the areas of Union competence. Its powers, at present limited to the budgetary aspects of decisions, would increase considerably. The Commission, whose position in the institutional system is strengthened by the Draft Treaty, would have executive power.

### *A. The European Parliament*

Parliament is the first of the institutions of the Union to be mentioned. In name as well as composition it will remain the Parliament of the European Communities pending adoption of an organic law to bring in a uniform electoral procedure.

Parliament, like the Council, will become, a fully-fledged legislative body and so take on the attributes of a classical parliamentary assembly both in terms of powers and practices. Parliament, like the Council and the Commission, will have the right to initiate legislation. It will give a first reading to all draft laws, which it will consider in a manner spelled out in the Draft Treaty (see below).

The Parliament of the Union, like that of the Communities, will adopt the budget jointly with the Council according to a procedure which is just as complex as that used at the moment. However, as with legislation, the aim here is to prevent bottlenecks and encourage the institutions to reach a decision (see below). Parliament will also have the power to ratify treaties, to conduct investigations and to receive petitions addressed to it by citizens of the Union.

The Council will constitute one arm, and Parliament the other arm, of the legislative and budgetary authority of the Union. In addition Parliament will have greater political control over the Commission because, in addition to its present power of censure it will have power of investiture, enabling the Commission to take office following approval of its programme.

*Comments:*

The Parliament of the Union will differ from the Parliament of the Communities in its attributions (complete legislative power and greater political control over the Commission) rather than in its rules of procedure (length of term, majorities, etc.). Here too the Draft Treaty is very flexible and open to development since it leaves the Union considerable scope to shape its own institutions by specifying that amendments or additions (electoral system, investigative powers, petitions) can be laid down in an organic law, that is, with no need to resort to the much more cumbersome and restrictive revision procedure. The same could well apply to the Statute of Members of Parliament, on which the Draft Treaty is silent.

A more fundamental question is whether the very wide powers conferred on Parliament should not be balanced by the possibility of dissolution. It is difficult to see which institution other than the European Council could dis-

solve Parliament. In the dyarchy set up by the Draft Treaty, Parliament representing a 'House of the People' and the Council a 'Council of States' with no real power of political control, there is a considerable danger of the smooth functioning of the Union being disrupted by an all-powerful Parliament.

The Draft Treaty refers only to Parliament's relations with national parliaments. The present treaties go no further into this aspect. Indeed, it is practice, encouraged by parliamentary leaders, which has led to informal relations being established with national parliaments. The Draft Treaty could have institutionalized procedures for consultation and maintaining contacts. Without them the European Parliament runs the risk of isolation to its own cost, and to the detriment of an understanding of national and European problems by parliamentarians in general.

## *B. The Council of the Union*

The second arm of the legislative authority, now called the 'Council of the Union' instead of the 'Council of Ministers', loses many of its powers to the other institutions, as if the authors of the Draft Treaty wanted to clip the wings of this institution which has acted as a brake on Community decision-making.

As we have seen, the chief innovation is that the Council no longer has a virtual monopoly of legislative and budgetary power. The traditional legislative role will be shared with Parliament, and exercised 'with the active participation of the Commission', as specified in Article 36 of the Draft Treaty.

The Council is to be composed of representations of the Member States appointed by the governments, each representation being led by the minister permanently and specifically in charge of Union affairs — which imposes a new obligation on Member States in defining the composition of their governments. The votes of the representations will be weighted in accordance with Article 148 of the EEC Treaty.

Voting by simple majority will be the rule, except where expressly specified in the Draft Treaty, when voting may be by absolute or qualified majority or by unanimous decision (Article 23).

Although the right of veto is not abolished, very strict conditions will apply and, in any case, will be retained for 10 years only. Where the Union has concurrent competence, a Member State considering that its vital national interest is jeopardized at the point when the Union takes over responsibility for an area in which it has hitherto acted independently, must state why it considers this to be so. The matter will then be referred to the Commission for judgment. This is one of the ways in which national sovereignty is eroded to prevent bottlenecks in the Union's decision-making process. The provision has been widely criticized, even by Members of Parliament who voted for the text as a whole.

## *C. The Commission*

The composition and operation of the Commission of the Union will be the same as that of the Commission of the Communities until an organic law determining its structure and operation and the statute of its members comes into effect. In the initial stages it would therefore be subject to the same mechanism as Parliament, although at a later date the institutions of the Union would be free to dictate their own form and identity without revision of the Treaty.

The Commission would retain its executive powers and its role as guardian of the Treaty but it would play a much expanded role in relation to that of the Commission of the Communities. It would programme and manage common actions and initiate the resulting legislative and financial acts. Once it had set out the guidelines for action by the Union and taken appropriate steps to implement them, it would issue the regulations needed to apply the laws and prepare and implement the draft budget. It would also exercise executive power by ensuring that laws were observed and it would represent the Union internationally.

As already stated, it could not take office until it had appeared before Parliament to secure approval of its political programme and obtain investiture.

A further innovation is that once the President of the Commission has been appointed by the European Council, he would be free to constitute the Commission, a matter formerly left to governments. This would undoubtedly enhance the President's standing within the Commission.

## *D. Legislative and budgetary procedures*

Common action would be governed by the laws of the Union, which would replace the present regulations, decisions and directives. The most important of the Union's legal instruments would be the 'basic law', the constitution of the Union contained in the Treaty itself.

The laws of the Union, which would be general and abstract, would be of three different types: ordinary, budgetary and organic. Organic laws — an innovation — would deal with topics fundamental to the life of the Union, paticularly the organization and operation of the institutions. From a formal point of view, approval of an organic law would require a qualified majority (in Parliament, a majority of its members and two-thirds of the votes cast; in the Council, two-thirds of the weighted votes cast comprising a majority of the representations).

The content, aim and extent of the power to issue regulations and decisions, — a matter for the Commission (Article 40) — would be determined by law.

The legislative and budgetary procedures are interesting innovations too. They are designed to facilitate decision-making and, despite the precautions taken, suggest that there might be some arm-twisting to achieve a conclusive result.

### a. Legislative procedure (Article 38 of the Draft Treaty)

Under the Community Treaties, draft texts of regulations, directives and decisions are sent by the Commission to the Council, which then consults Parliament. Under the Union Treaty, draft laws would be referred to Parliament in the first instance. Parliament would then have six months to take a decision. The draft, with or without amendment, would then be sent to the Council with the Commission's opinion where appropriate. The Council too would have six months to take a decision.

The procedure would be terminated by the Council approving the draft by a majority, or by the Council rejecting it unanimously or, where the Commission had given an unfavourable opinion, by a qualified majority. A qualified majority would likewise be required in the case of an organic law.

If a draft law was neither approved nor rejected in this fashion, a Conciliation Committee, a sort of Joint Committee, consisting of a delegation from the Council and a delegation from Parliament would be convened. The conciliation procedure could end in one of two ways:

(i) agreement, in which case the text would be submitted to Parliament and the Council for final approval;

(ii) disagreement, in which case the Council's text would be submitted to Parliament for approval, together with any amendments by the Commission and the Commission alone. The Council could reject Parliament's text by a qualified majority within three months.

### b. Budgetary procedure (Article 76 of the Draft Treaty)

Article 76 of the Draft Treaty details a budgetary procedure which is every bit as complex as that now laid down in Article 203 of the EEC Treaty. However, in addition to abolishing the distinction between compulsory and non-compulsory expenditure, it reverses the roles of the two arms of the budgetary authority.

Parliament would adopt the budget by an absolute majority; the rejection of amendments adopted by the Council on second reading would call for a qualified majority. This is the reverse of the present situation, where the Council can reject amendments adopted by Parliament on first reading by a qualified majority.

*Comments:*

The directive has disappeared from the panoply of the Union's legal instruments and the recommendation is now confined to the European Council (Article 32). The acts of the Union, to be known as laws instead of regulations, decision and directives, will take on a decidedly more binding character.

However, Article 35 opens the door to a 'two-or-more-speed' system by allowing differentiated application of laws. Where the particular situation of some of the addressees is likely to create specific difficulties, implementation of the law could be accompanied by time limits or transitional measures. This provision will do much to mitigate the rigour inherent in the legal impact of the acts of the Union.

It is to be feared that the extension of the right to initiate legislation to three institutions — Parliament, the Commission and the Council — could lead to a proliferation of draft laws. This would be detrimental to the smooth operation and efficiency of the institutions. Despite the in-built precautions, the new legislative procedure is rather peremptory: any arm of the legislative authority which fails to act within the time allowed, loses the right to intervene. In the case of Parliament or the Council, failure to act within the time allowed, is construed as acceptance of the draft law. This means that a decision to accept or reject must be taken no later than one year after the draft law is first tabled. (i.e. on expiry of two periods of six months). This procedure may seem somewhat hurried but this is perhaps the price of preventing bottlenecks in the decision-making process and enabling integration to proceed.

As far as the budgetary procedure is concerned, it is to be feared that giving the Commission, which has the right of initiative, the power to propose amendments and exercise its right to oppose amendments could hinder the smooth operation of a procedure which sets out to be efficient and streamlined.

## *E. The European Council*

The European Council, which would comprise the Heads of State or Government of the Member States as now, plus the President of the Commission, would become an official institution of the Union. Its role would be to develop action through cooperation — which it would direct and for which it would take responsibility — and take decisions on the transfer of certain matters from cooperation to common action. In the last resort, therefore it would be for the European Council to determine Union competence and to initiate new common policies.

The European Council would also be responsible for designating the President of the Commission and taking action against defaulting Member States (Article 44).

*Comments:*

Paradoxically although the European Council becomes an institution and retains its function as the dynamo of Union policies, the authors of the Draft Treaty have tried to contain, indeed minimize, its influence and role in the new institutional structure. The European Council appears last in the list of institutions and the statement that it expresses the 'identity of the Union' (which appeared in the first revision, adopted in September 1983) has been dropped. What is more the European Council can send only communications to the other institutions. It loses its present function of issuing directives to the other institutions and acting as a 'court of appeal' when the decision-making machinery grinds to a halt. It would in fact be reduced to playing second fiddle to the other institutions, where real decision-making power would lie. The Draft Treaty is silent on the question of a permanent secretariat for the European Council and leaves it to the Heads of State or Government to determine their own decision-making procedures.

## *F. The Court of Justice*

Half the members of the Court of Justice would be appointed by Parliament, the other half by the Council of the Union. At present this is the sole prerogative of governments (Article 167, EEC). The Court's powers would be wider than at present, since it would be responsible for ensuring uniform interpretation of the law and the protection of fundamental freedoms. It could annul acts of the Union, deal with appeals against decisions of national courts and hear cases brought by individuals who felt that their rights or interests had been adversely affected.

The Court would guarantee respect for a series of fundamental rights listed in the Draft Treaty, including civil and political rights, particularly the right of asylum and the right to freedom of education, and economic, social and cultural rights, such as the right to work and protection against unemployment, the right to strike, worker participation in management and the rights of ethnic and linguistic minorities.

We have already seen that the Court would be competent to impose sanctions on Member States, even to the extent of temporary exclusion, with the agreement of the European Council (Article 44).

*Comments:*

The organization and operation of the Court will be determined by an organic law, the Court being free to adopt its own rules of procedure. Here too, the Draft Treaty is flexible and open to development, giving the Union a

large measure of autonomy to deal with its own internal affairs. As elsewhere, Parliament's position in the institutional system is strengthened by its power to appoint half the members of the Court, plus a further member if there is an odd number.

## III. The procedure for bringing the Treaty into force

The procedure for ratifying the Union Treaty and bringing it into force includes a number of unusual and original features which are worth considering.

The procedure is set out in Article 82 of the Draft Treaty and provoked criticism during the debate in Parliament on 14 February 1984. Further comments on the 'preliminaries' to ratification are contained in the resolution adopted on the same day which, like the Draft Treaty, is an amended version of the draft submitted by the Committee on Institutional Affairs.

The work preparatory to ratification falls into two phases: presentation of the Draft Treaty and consultation with national parliaments. The Treaty will enter into force once it has been ratified by a majority of the Member States of the Communities whose population represents at least two-thirds of the total population of the Communities.

### *A. Presentation of the Draft Treaty*

The first paragraph of the resolution approving the text of the Draft Treaty instructs the President of Parliament to submit it to the parliaments and governments of the Member States. The first version of the draft resolution envisaged the President being accompanied by a delegation from the Committee on Institutional Affairs but this was dropped from the final text. Parliament's Enlarged Bureau had been asked to settle this point, apparently a detail but one with considerable political implications to judge from the debates to which it gave rise.

The fact that the resolution uses the word 'submit' rather than the word 'send', normally used in Parliament's resolutions, suggests that the procedure for presenting the Draft Treaty to the Member States should have a certain solemnity. This view is reinforced by the fact that the provision appears in the first paragraph of the resolution, rather than in the last, as is normal.

So far, only the Italian authorities have received the Draft Treaty from the President of Parliament, accompanied by the chairman and rapporteur of the Committee on Institutional Affairs (both of them Italian). It should be noted that the Italian Parliament had voted in favour of the draft and asked the government to ratify it on the day that Parliament adopted the final text.

### *B. Consultation with national parliaments*

The second paragraph of the resolution 'calls on the European Parliament which will be elected on 17 June 1984 to arrange all appropriate contacts and meetings with national parliaments and to take any other useful initiatives to enable it to take account of the opinions and comments of the national parliaments.'

This would appear to be the first time that Parliament has made provision for such an operation. It is to be welcomed since there is no doubt that contacts, and even arguments, between French and European Members of Parliaments will clarify the discussion and eventually lead to useful results.

The formulation finally adopted by the European Parliament is more flexible and less hectoring, less ritualistic and more realistic, than the first version, which simply asked the next Parliament to meet national parliaments 'with a view to facilitating the adoption of the Treaty establishing the European Union.'

It is now for national parliaments to debate the Draft Treaty and give their opinions prior to the ratification procedure proper, which in France is initiated by the government. Stress is laid on the response to be given to the positions and comments of national parliaments since the purpose of the planned consultations is to allow the newly-elected European Parliament to take account of their views.

The Draft Treaty should be debated in the French Parliament in the near future. Acceptance of the novel procedure which the European Parliament was pleased to propose in no way implies acceptance of the institutional

reforms which it believed it right to advocate. A preliminary parliamentary debate — which might be the end of the matter — would also reveal the position of the French Government, which has been extremely reluctant to show its hand.

### *C. Ratification*

The reform proposed by Parliament is not a revision of the existing Treaties, which would have had to be ratified by all the Member States of the Community of Ten, but a draft of a separate treaty, which therefore lies outside the procedures for revision of the Community Treaties. As stated above, it will come into force when a majority of the Member States whose population represents two-thirds of the total population of the Communities have ratified it and the governments, meeting immediately afterwards, have decided by common accord on the procedures by and the date on which the treaty will enter into force and on 'relations with the Member States which have not yet ratified'.

This second provision, which is absent from the initial draft of the treaty, is the result of a compromise amendment inspired by the desire of a majority in the European Parliament not to exclude countries which, although long-standing members of the Communities, are not yet prepared to commit themselves to the Union.

A singularity of the mechanism for bringing the Treaty into force is that it is addressed exclusively to the Member States of the Community, although any democratic European State may apply to join the Union at a later stage (Article 2).

Ratification by a majority of the Member States, subject to a demographic qualification, is the middle way chosen by Parliament to press ahead with a reform which it favours. The formula appears flexible but in fact applies considerable pressure since it is difficult to see how two separate institutional systems — the one set up by the Community Treaties, the other by the Union Treaty — could exist side by side for any length of time. The Draft Treaty makes no explicit reference to the disappearance of the institutions of the Ten. But in practice the result would be the same because those Member States which had not ratified the new treaty would be too isolated and 'marginalized' to survive under the Community Treaties.

This is precisely what Parliament intends when, in the last paragraph of the resolution, it hopes that the treaty 'will ultimately be approved by all the Member States'. Similarly in the explanatory statement, the rapporteur says that the date of entry into force will be fixed by governments — not by the Treaty itself — to enable the ratifying States 'to move to practical action so as to encourage a decision on the part of other States who might still be hesitant'. The Committee on Institutional Affairs is clearly convinced that there is no alternative to ratification.

* * *

Despite the hopes of the European Parliament, the Draft Treaty will have no legal standing until it has been ratified by the constitutionally competent authorities of a majority of the Member States. In this context it should be noted that the French Constitution provides for a referendum procedure for the ratification of international treaties with implications for the functioning of institutions.

If the European elections of 17 June 1984 are not regarded as a suitable means of measuring popular support for reform of the type proposed by Parliament and if it is assumed that European integration cannot proceed without a clear mandate from the electorate, perhaps Article 11 of the Constitution of 4 October 1958 could be used at some point in the future to ratify the Draft Treaty.

This approach, which would be politically difficult and daring, might be the best way of establishing whether there is a 'European constituency' in France which is ready to respond to what, in many ways, resembles the call to set up a constituent assembly.

## IV. The conclusions of the committee adopted on 5 April 1984

The committee has considered the Draft Treaty establishing the European Union adopted by the European Parliament on 14 February 1984. It wishes to pay tribute to the patient work put into designing an ambitious institutional reform designed to get the Community moving again and press ahead with European integration.

It welcomes the initiative taken by Mr Spinelli and the Committee on Institutional Affairs as an act of faith in the European idea and it is grateful to the first directly-elected Parliament for having completed a project which will certainly prove to be one of its crowning achievements.

It notes that the text of the Draft Treaty forms the substance of a constitution which could lead to a real confederation, or even a federation, of the United States of Europe.

Although it recognizes the pressing and irreversible nature of some of the provisions of the Draft Treaty, it notes that the proposed institutional system and mechanisms are sufficiently flexible and open to development for the European Union to be what the Member States want it to be.

*The timing and realism of the Draft Treaty*

The Committee considers that the question of the timing and realism of the Draft Treaty can be considered only in the light of the political will of the Member States to press ahead with European integration.

It recognizes the need to assess how far this ambitious project is a dream and how far a reality. It appreciates that given the present state of the Communities there is little likelihood of the Union Treaty becoming an accomplished fact in the near future.

Although it has doubts about the real chances of the Draft Treaty being adopted in the near future, it would not deny the value, interest and importance of the work done by Parliament.

It notes that the institutional approach to progress is infinitely more difficult and hazardous then simply reinforcing past achievements. But the bottleneck in Community decision-making is such that the possibility of progress through the institutions is as worthy of study as the possibility of progress through the development of common policies within the present legal framework.

It notes that many of the provisions of the Draft Treaty, for example those dealing with the finances of the Union and the differentiated application of laws, reveal a realistic approach based on experience of the Community and considers that the charge of utopianism would be justified only if the Draft Treaty had deliberately abandoned the Community institutions in favour of a purely federal scheme.

At all events, it asserts that approval of the Draft Treaty should not be used as an excuse for refusing to revitalize common policies and give priority to 'Everyday Europe', the 'Europe of the possible'.

*On the competences of the Union*

The committee notes that from the beginning the Union would be given wide-ranging competences encompassing the existing common policies, new policies in the economic, social and cultural sectors, and activities now carried out under the European Monetary System and political cooperation.

It notes that the Union would have considerable autonomy in extending its fields of action since transfers from cooperation to common action, that is to say, from concurrent to exclusive competence, would not call for revision of the Treaty.

It approves of internal policies being extended into the field of external relations but notes that one of the aims of the Draft Treaty is to extend Union competence to the broad aspects of international relations, with particular reference to security.

*On the institutions of the Union*

The committee notes that the institutional system advocated for the Union would lie somewhere between the Communities and a confederal system and that the new institutional balance would strengthen Parliament at the Council's expense.

It finds the proposed structures and procedures ingenious and consistent, despite certain ambiguities, and it considers that the proposed mechanisms could well prevent bottlenecks forming in the decision-making process.

It emphasizes that the Draft Treaty would turn the European Parliament into a fully-fledged parliamentary assembly with complete legislative and budgetary powers.

It notes that Parliament's political control of the Commission, the executive body of the Union, would be considerably strengthened by the addition of power of investiture, to power of censure.

It considers that Parliament's wide-ranging powers should be offset by a dissolution provision since submission to the electoral process every five years is not enough to rule out malfunctions arising from an all-powerful Parliament.

It approves the authors' desire to make recourse to the right of veto in the Council exceptional, but has reservations about the wisdom of abolishing this expression of national sovereignty after a ten-year transitional period.

It also has reservations about the provision which would make the Commission the sole judge, during this period, of whether or not a vital national interest was at stake.

It considers that the Draft Treaty should contain an appeal mechanism or some other arrangement to soften the effects of this provision.

It notes that in any event a vital national interest could be invoked by a Member State only if it was closely and incontestably connected with the subject under discussion.

It considers that the Draft Treaty should institutionalize information and consultation procedures with the aim of increasing mutual understanding between national and European Members of Parliament and fostering awareness of the implications of the subjects with which they are dealing.

*On the procedure for consulting national parliaments on the Draft Treaty*

The committee is pleased that Parliament wishes to consult national parliaments on the Draft Treaty and secure their comments and reactions.

It notes that Parliament intends to take account of criticisms and suggestions made by national parliaments.

It hopes that the meetings and contacts which the European Parliament intends to arrange for this purpose will be fruitful. It therefore considers that the Senate Committee on Foreign Affairs, Defence and the Armed Forces should react favourably to representations made to it.

It considers that everything possible should be done to ensure that the Senate organizes the wide-ranging debate which an issue as important as the Draft Treaty merits.

*On the procedure for bringing the Draft Treaty into force*

The committee draws attention to the novel arrangements for bringing the Draft Treaty into force and wonders whether these are compatible with the provisions of the French Constitution governing treaties and international agreements.

# Chapter VI – Greece and the Draft Treaty establishing the European Union

*by Dimitrios Evrigenis*

## 1. Legal questions

1. When the 1975 Greek Constitution was drafted and adopted the decision to apply for membership of the European Community had already been accepted by most of the political forces represented in Parliament. It included a law-making mechanism which could be regarded as a sound constitutional basis for Greek accession to the Community. Commentators representative of all legal and political persuasions are unanimous in maintaining that, all things considered, Article 28 of the Constitution,[1] a totally new provision in terms of Greek constitutional law, not only makes accession legally possible, but also provides a basis for the permanent functional relationship created by Community membership. The only point debated for any length of time was whether paragraph 2 or paragraph 3 of Article 28 was applicable in this particular case.[2] The problem was a minor one: the controversy was, as it were, internal to the constitution, and did not question the capacity of the basic law to provide a sufficient legal basis for accession.

2. The constitutionality of accession has yet to be challenged in the courts. Greek courts — admittedly in a very small number of cases — have applied the provisions of Community law or made reference to them but have never been called upon to rule on the constitutionality issue. Nor have the courts raised the matter on their own initiative, as they are entitled to do.

3. Compared with the corresponding provisions in the constitutions of the other Member States, paragraphs 2 and 3 of Article 28 of the Greek Constitution appear to provide a broader, more flexible and more certain basis for accession. Read together these provisions deal in general and abstract terms with Greek accession to and membership in international agencies in whom powers can be vested under the Constitution. This formula allows Greece to join any Community-type international organization with no restrictions as to its identity or its powers. In theory it would be constitutionally possible for Greece to join a Community with wider competences both in quantitative and qualitative terms and with a different institutional structure and geographical composition than that of the present Community. The proposed competences of the European Union as set out in the Draft Treaty fall well within the limits set by Article 28 of the Greek Constitution.

There are of course limits to the transfer of national competences. They take two forms: firstly, the limits inherent in the (by definition) inalienable sovereignty of the applicant State, and, secondly, in the case of Greece, the limits imposed by paragraphs 2 and 3 of Article 28 since these provisions only

[1] See Annex (page 239).

[2] See on this problem and on the whole of the constitutional basis of the accession of Greece to the Community: Evrigenis, *Common Market Law Review*, 1980, p. 157 *et seq.* and the quoted bibliography at p. 162, notes 1, 2 and 3.

allow the delegation of government powers or limitations on national sovereignty (i.e. accession) where this serves an important national interest, promotes international cooperation, does not infringe human rights or the foundations of democratic government, and is effected on the basis of the principles of equality and under the condition of reciprocity. The general feeling was that these basic conditions, which can be variously regarded as political, legal or a mixture of the two, had been met in the case of accession to the Community. We think that much the same would apply to Greek participation in the conclusion of the European Union Treaty or accession to it. Indeed it might even be said that, since fundamental rights and democratic principles are better protected in the Union than in the present Community, Greek membership in the Union would be more readily welcomed, from this point of view, in constitutional terms.

4. Greek participation in the conclusion of the European Union Treaty or Greek accession to this Treaty would of necessity be subject to the approval and ratification procedure generally applied to international instruments. This is normally divided into three stages: firstly, signature of the instrument; secondly, approval by Parliament of the law sanctioning the instrument by the majority specified in paragraph 2 of Article 28 of the Constitution; and, thirdly, ratification. This mechanism implies participation by the executive and above all a government initiative. Legally, it is the government's responsibility to initiate the procedure for concluding or acceding to an international treaty.

## 2. Political considerations

Although there would be no legal obstacles to Greek participation in the conclusion of the European Union Treaty, the political outlook is far from favourable. The majority government which emerged from the 1981 elections was initially hostile to Community membership and later vacillated between withdrawal and the negotiation of a bilateral economic cooperation agreement instead. It has finally reconciled itself to the status of Member State, while pursuing a course of action which is hardly a shining example of Community solidarity. Although it has taken part in the various attempts to streamline the Community institutions, the present government is opposed in principle to a radical transformation of the structures of European cooperation along the lines proposed in the draft European Union Treaty. More openly hostile to the Community and, by extension, to the proposed Union, is the Communist Party. On the other hand, the opposition parties, currently representing approximately two-fifths of the legislature, and other minor political groupings in the centre and on the left, have an open mind on the prospect of a strengthening of European institutions. According to the opinion polls, their political line enjoys much wider support among the general public. Nevertheless, the political die is not yet cast.

Greece's attitude will be shaped not only by a balance of political forces still in the making, but also by political and economic factors that would be difficult to ignore.

*Annex*

## Article 28

1. The generally acknowledged rules of international law, as well as international conventions as of the time they are sanctioned by law and become operative according to the conditions therein shall be an integral part of domestic Greek law and shall prevail over any contrary provision of the law. The enforcement of the rules of international law and of international conventions to aliens does always depend on the condition of reciprocity.

2. To serve an important national interest and promote cooperation with other States authorities under the constitution may be vested by a convention or agreement in agencies of an international organization. A majority of three-fifths of the total number of Members of Parliament shall be necessary to vote the law sanctioning the treaty or agreement.

3. Greece shall freely proceed by law voted by the absolute majority of the total number of Members of Parliament, to limit the exercise of national sovereignty, in so far as this is dictated by an important national interest, does not infringe upon the rights of man and the foundations of democratic government and is effected on the basis of the principles of equality and under the condition of reciprocity.

# Chapter VII – The Draft Treaty establishing the European Union and the Member States: Ireland

*by John Temple-Lang*

## 1. Introduction

This paper begins by summarizing the constitutional aspects of Ireland's accession to the existing European Community Treaties, insofar as they have implications for Ireland's ratification of the proposed Treaty setting up the European Union. It then considers how far the Treaty setting up the Union may be inconsistent with the constitution of Ireland as it is at present, and how the inconsistency should be resolved. It describes the procedures, under the Irish Constitution, for amending the constitution, and for ratifying a treaty such as the Treaty setting up the Union. Lastly, it assesses the elements likely to influence public opinion in Ireland at the various stages of these procedures.

## 2. Constitutional aspects of Ireland's accession to the existing Treaties

Before Ireland's accession to the three existing European Community Treaties, it was clear that the powers of the Community institutions were incompatible with the provisions of the Constitution of Ireland of 1937 dealing with legislative, executive and judicial powers.[1]

Briefly, these provided that the sole power of making laws for the State belonged to the Oireachtas (the President and the two Houses), although subordinate legislatures were permitted. Justice was to

[1] See the Irish Government publications: *Membership of the European Communities: Implications for Ireland,* 1970, and *The Accession of Ireland to the European Communities,* 1972, of which extracts are given in Chubb, *A Source Book of Irish Government,* 1983, Ch. 11; Temple Lang, *The Common Market and Common Law,* 1966, Ch. 3; Lynch, 'The Republic of Ireland and the EEC — The Constitutional Position: I', and Temple Lang, 'The Republic of Ireland and the EEC — The Constitutional Position: II', in *Legal Problems of an Enlarged European Community,*( Bathurst, Simmonds, Hunnings and Welch, eds), 1972; Temple Lang, 'Legal and Constitutional Implications for Ireland of Adhesion to the EEC Treaty', 9 *Common Mkt. L. Rev.*, 1972, p. 167; Kelly, *The Irish Constitution,* (2nd ed.), 1984, section on Article 29 (international relations); Murphy, 'The European Community and the Irish Legal System', in *Ireland and the European Communities,* (Coombes ed.), 1983, pp. 29-37; Keatinge, 'Ireland and the World' in *Unequal Achievement: the Irish Experience 1957-1982,* (Litton ed.), 1982; see also Hederman, *The Road to Europe: Irish Attitudes 1948-61,* 1983; Lyons, *Ireland since the Famine,* 1971, pp. 543-551; Lee, *Reflections on Ireland in the EEC,* 1984.
The adoption by referendum of the Constitution of Ireland in 1937 offers a precedent for at least a partial solution to the problem of establishing the Union and making it compatible with the Community Treaties, discussed in the paper by Weiler and Modrall, this volume.
The previous Irish Constitution of 1922 was adopted, according to Irish constitutional theory, by the Irish assembly or Dáil which had proclaimed itself the legislature of an independent Irish State. In British eyes the 1922 Constitution was conferred on

be administered only by judges appointed as provided by the constitution, and the Supreme Court was to be the court of final appeal. Judges were to be appointed by the President. The executive powers of the State, including those in connection with external relations, were to be exercised only by or on the authority of the government, which was to be responsible to the Dáil (the lower house). The 1937 Constitution stressed that only the bodies established by the constitution could exercise governmental powers, to exclude any remnant of British imperial power. The effect was to exclude also the possibility of transferring any such powers to any international body such as the Community (no such body existed, of course, in 1937). The measures to grant the Community appropriate powers in Irish law constituted a transfer of powers and could not have been regarded, under Irish constitutional law, as a permissible delegation of powers.[2] The reasons why the 1937 Constitution was incompatible with the Community Treaties are also applicable to the proposed European Union Treaty.

To make it possible for Ireland to ratify the Community Treaties in 1972, some amendment to the constitution was necessary. Instead of a series of amendments altering each article of the constitution thought to be inconsistent with the Treaties, a single amendment was adopted by the Oireachtas and approved by a large (83%) majority of the people in the 1972 referendum. The amendment, in the form of an addition to Article 29 of the constitution (on international relations) provides:

> 'The State may become a member of the European Coal and Steel Community (established by Treaty signed at Paris on the 18th day of April 1951), the European Economic Community (established by Treaty signed at Rome on the 25th day of March 1957) and the European Atomic Energy Community (established by Treaty signed at Rome on the 25th day of March 1957). No provision of this constitution invalidates laws enacted, acts done or measures adopted by the State necessitated by the obligations of membership of the Communities or prevents laws enacted, acts done or measures adopted by the Communities, or institutions thereof, from having the force of law in the State.'

Several points must be made. Firstly, the provision is limited to the existing three Communities, as established by Treaties specifically mentioned. It would not, therefore, apply to a wholly new Community, though it might apply to the existing Communities if they came to be based on new Treaties. The amendment is therefore narrower than the corresponding provisions of the constitutions of the Federal Republic of Germany, Italy, Luxembourg, the Netherlands and (perhaps surprisingly) Norway.[3]

Secondly, the amendment wisely avoids listing the articles of the constitution which are, or might be thought to be, inconsistent with the powers of the institutions of the existing Communities. This means that no clarification or development of those powers under the Treaties could give rise to difficulties merely because the draftsman had failed to foresee its future incompatibility with the constitution. For example, it is now clear that the Community's powers in the areas of commercial policy[4] and fisheries[5] and in the expanding areas dealt with by Community legislation which come within Community competence under the principle stated in the AETR judgment,[6] are all exclusive powers, and that no corresponding powers remain with Member States. The exclusive nature of these powers was less clear in 1972 than it is today. This is important because omission of any list of constitutio-

---

the Irish Free State, with its dominion status, by an act of the UK Parliament. The 1922 Constitution was a compromise between Irish and British wishes. The 1937 referendum was therefore arranged to enable the people of what is now the Republic of Ireland to give an unambiguously Irish basis to a constitution drafted wholly by Irishmen. See Temple Lang, *The Common Market and Common Law*, 1966, pp. 57-64. This prompts the idea that the Union Treaty might be the subject of a simultaneous referendum in all the Member States of the Community, so that the peoples of the entire Community could vote on the same question on the same day, on the basis that those States in which a majority of the people were in favour would join the European Union. This would be very democratic, and because the will of the people is the ultimate source of law in a democracy, the best possible basis for a 'legal revolution'.

[2] Temple Lang, *The Common Market and Common Law*, 1966, pp. 40-42, 46-51.

[3] Temple Lang, *op.cit.* 9 *Common Mkt. L. Rev.*, 1972, pp. 167, 167-168.

[4] Article 113 (EEC).

[5] Case 804/79 *Commission* v *United Kingdom* [1981] ECR 1045.

[6] Case 22/70 *Commission* v *Council (AETR)* [1971] ECR 263.

nal provisions affected made it possible to avoid having to decide whether the Treaties were, or might through the development of Community law, become inconsistent with Article 5 of the constitution: 'Ireland is a sovereign, independent democratic state'. A State which has no powers in the fields of commercial policy, fisheries, or a variety of other spheres on which the Community of which it is a member has legislated is obviously less sovereign, if the phrase is permissible, than one which still retains powers in those spheres. Any list of the articles of the constitution and the Treaty provisions which might prove incompatible with them would also have to make some provision to cover the unforeseeable developments under Article 235 (EEC). A general, all-purpose amendment to the constitution was the only practical approach to the problem.

The wording of the amendment was narrow in another respect, which has given rise to doubt and some practical difficulty. It authorizes Irish legislation which would, but for the amendment, be incompatible with the constitution only if the legislation is 'necessitated by the obligations of membership of the Communities'. The question has arisen whether the Convention on a European Community Patent[7] was a measure ratification of which was 'necessitated by the obligations of membership'. Although negotiated under Community auspices, it is a convention, not a regulation or a directive. Some Irish lawyers have therefore doubted whether ratification is obligatory for Member States under Community law, even in spite of the Council declaration[8] which says that it is obligatory. These doubts are due to a narrow and, in the present writer's view, incorrect interpretation of Article 5 (EEC), rather than to a particular interpretation of the amendment to the Irish Constitution. Clearly, the question whether Member States have an obligation to ratify the convention is ultimately a question of Community law, not a question of Irish constitutional law. It seems highly unlikely that the Court of Justice, which has interpreted Article 5 widely[9] on a number of occasions, would rule that ratification was not legally necessary. However, even if that is correct, it does not follow that ratification of all conventions drafted under Community auspices, in some sense, is obligatory for Member States under Community law: the European Monetary System agreement is proof that some very important arrangements are 'optional'.

## *a. The Treaty setting up the European Union*

The first question that arises is whether the Treaty setting up the European Union (herein called 'the Union Treaty') would be covered by the 1972 amendment to the constitution of Ireland. If it was, no further constitutional amendment would be necessary. However, it seems clear that the Union Treaty could not be thought of as a mere amendment of the three existing Community Treaties, or as merely reconstituting the existing Communities under a new name. Any such interpretation is excluded by the broad scope of the new Treaty: by Article 1, which speaks of setting up the European Union; by Article 6, on the legal personality of the Union, which would be unnecessary if the Union was merely taking over the legal status of the existing Communities; by Article 7, on the *acquis communautaire;* by Article 82, which provides for the possibility that not all of the Member States of the existing Communities may initially ratify the new Treaty; and by the broader explicit scope of the new Treaty.

If the 1972 amendment to the Irish Constitution does not cover the new Treaty, the next question is whether the provisions of the new Treaty are compatible with the rest of the constitution. It is clear

---

[7] Convention for the European Patent for the Common Market, OJ L 17, 26. 1. 1976.

[8] Council declaration concerning the Convention on a European Community Patent. The question mentioned in the text arises because the Convention gives the Court of Justice power to interpret the Convention by a procedure similar to Article 177 (EEC): this would be incompatible with the articles in the Irish Constitution on judicial powers unless it is covered by the 1972 amendment.

[9] See Temple Lang, 'European Community Law, Irish Law and the Irish Legal Profession — Protection of the Individual and Co-operation between Member States and the Community', The Second Frances E. Moran Memorial Lecture, in *Dublin U. L. J.*, 1983, pp. 5, 11-18.

that they are not, for reasons essentially similar to the reasons which made an amendment to the constitution essential in 1972.

The new Treaty provides (Art. 36) that the legislative powers of the Union are exercisable by the Parliament and the Council, acting essentially on the initiative of the Commission. Under Article 42, the law of the Union is directly applicable in Member States, and prevails over national law. In addition, the Commission would have implementing legislative powers (Art. 40). These articles are not compatible with Article 15 of the Irish Constitution which (subject to the amendment to Article 29 to allow legislative powers to be given to the existing Community institutions) says that the exclusive power of making laws for the State is vested in the Oireachtas (the President and the two Houses of the legislature).

Under the new Treaty powers which are classified as executive by the Irish Constitution would be exercised by the Council and the Commission. Article 21 says that the Council would exercise powers in the field of international relations: whatever powers exactly might be conferred on the Council, they would include powers of the kind now exercised by the Community institutions, which in Ireland are exercisable (except in so far as the Community is concerned) only by the Government, under Article 29 of the constitution. The powers of the Commission are to be laid down by the basic law (*loi organique*) on that institution, but in the meantime it would have the same structure and operation as the Commission of the Communities whose executive powers, as already mentioned, would be inconsistent with the constitution of Ireland if it were not for the 1972 amendment. Specifically, Article 28 of the new Treaty says the Commission would adopt implementing regulations and take the necessary executive decisions to put Union laws into operation, would carry out the budget, represent the Union in external relations, and supervise the application of the new Treaty and the laws of the Union. These powers, however they might be subsequently defined, could not be reconciled with the Irish Constitution. Nor would it be possible for Ireland to ratify the new Treaty in the hope of being able to ensure subsequently that the basic laws governing the powers of the institutions of the Union were so drafted as to be consistent with the constitution as it stands.

The constitution of Ireland classifies governmental powers as 'legislative, executive and judicial'.[10] Monetary powers, if they had to be fitted into this classification, would be 'executive' powers. Monetary powers therefore may be exercised only by or on the authority of the Irish Government, unless their exercise is authorized by either the existing provision dealing with the European Community or the future provision dealing with the European Union. However, no express mention of monetary powers would be needed in the new Irish constitutional provision dealing with the European Union, if it is drafted broadly enough.

The new Treaty says very little about judicial powers. Article 30 provides briefly that the Court is to ensure that the law is observed in the interpretation and application of the new Treaty, and of all acts adopted under it. It provides briefly for appointment of judges by the Parliament and the Council, and says that other matters are to be dealt with by a basic law (*loi organique*). Article 43 provides for judicial control, on the lines of existing Community law, and completed by a basic law. This basic law would extend the rights of individuals to challenge legal acts adopted by the Union, give the Court express jurisdiction in fundamental rights cases involving the Union, and jurisdiction in a *procédure préjudicielle* i.e. by reference or case stated from national courts. The Court would have power to review the failure of national courts to refer questions of Union law to it, and to 'sanction' the failure of Member States to fulfil their obligations. All this would involve a very substantial increase in the jurisdiction (and the volume of work) of the Court. The Court's overall powers, therefore, however exactly they might later be defined, would be incompatible with the articles of the constitution of Ireland on the administration of justice by judges appointed by the President of Ireland, unless authorized by a new constitutional provision.

[10] Article 6 of the constitution reads 'All powers of government, legislative, executive and judicial, derive, under God, from the people . . .'

Some other comments may be useful.

Firstly, the scope of the activities of the Union, as expressly envisaged, is wider than those provided for by the existing Treaties. The new Treaty refers explicitly to citizenship (Art. 3) of the Union, fundamental rights (Art. 4), the power of enquiry of the Parliament (Art. 18), sanctions on Member States (Arts 43, 44), international crime (Art. 46), credit policy and the European Monetary System (Arts 51, 52), policies on telecommunications, research, and energy (Art. 53), health, consumers, regions, the environment, education and culture, and information (Arts 56-62, *passim*). It is more explicit about international relations than the existing Treaties (Arts 9, 63-69). It is true that much of this is little more than the existing Communities are already doing, but express provisions must inevitably result in wider and increased powers. More directly relevant to the subject of this paper, Article 68 provides that the Council may enlarge the field of cooperation to cover armaments, arms sales to third countries, defence policy, and disarmament, and may transfer a sphere from the area of cooperation between Member States to the field of common, i.e. Union, action. Less controversially, the Union is to supervise the consistency of the international policies of Member States (Art. 67) and is to use its influence to promote peaceful settlement of conflicts, security, discouragement of aggression, détente, and mutual reduction of military forces and arms on a balanced and controlled basis (Art. 63). These are objectives, not powers, but they make it obvious that the scope of the activities of the Union would not be limited to the economic and social spheres, as a reading of the existing Treaties would suggest was the initial scope of the existing Communities.

In drafting a new amendment to the constitution of Ireland to allow ratification of the new Treaty, the Irish Government will have to decide whether to limit it to the European Union, based on the new Treaty, or to make it a broader amendment permitting the Oireachtas to ratify any international agreement giving powers to international institutions, on the lines of the provisions of the German, Italian, Luxembourg, Dutch and Norwegian Constitutions. It is not clear whether, if the Irish people are willing to approve by referendum an amendment permitting Ireland to ratify the Treaty setting up the European Union, they would be significantly less willing to vote for a more general amendment. Such opposition as there will be to an amendment concerned only with the new Treaty might not be significantly stronger if the amendment were in wider terms.

Whether the future amendment to the constitution is drafted to cover only the European Union, or to cover any international or any European institutions, it is clear that, for the same reasons as in 1972, it must be a single amendment in general words, not a list of constitutional provisions being modified. If that is accepted, it follows that it is not necessary to go through the new Treaty in detail comparing it with the constitution of Ireland. Nor is it necessary to discuss how far the clauses of the new Treaty dealing with the 'organs' of the Union might come into conflict with the constitution, in the future. A problem which did not arise in 1972 concerns the European Monetary Fund which, under Article 33.4, has the independence necessary to guarantee monetary stability. This phrase glosses over the very difficult problem of the degree of independence needed to carry out (let alone to guarantee) such an objective. However, whatever the future powers of the Fund may be, they could be made consistent with the Irish Constitution by a single amendment in sufficiently general words which in any case is appropriate for other reasons.

The question of the 'organs' of the European Union, and the question of the European Community Patent Convention, discussed above, imply that the new amendment to the Irish Constitution should be worded broadly enough to cover new organs and arrangements not expressly contemplated by the new Treaty and not based on legislative measures adopted by the Union. Irish Governments will want to ensure that difficulties such as that which arose over the Community Patent Convention do not arise again. They are perhaps not likely to do so (the proposed Community trade mark measure, for example, is to be a Regulation and not a convention), but it is desirable both for Ireland and for the Community and the future Union that the problem should be dealt with. A constitutional amendment which would solve this problem would be on the following lines:

> 'The State may become a member of the European Union to be established in accordance with the Treaty signed at . . . on . . . . No provision of this constitution invalidates laws enacted, acts

done or measures adopted by the State necessitated by obligations undertaken under arrangements made by the Union or under its auspices, or prevents laws enacted, acts done or measures adopted by the Union or under its auspices or by institutions thereof, from having the force of law in the State.'

## *b. Sovereignty*

Even if the amendment is in the form of a general clause substantially similar to the 1972 amendment the question will be raised, in a political if not necessarily in a legal context, whether ratification would be consistent with the 'sovereign' status of Ireland provided for in Article 5 of the constitution. Without attempting a definition of 'sovereignty' or trying to give an exhaustive reply to the question, some points may be made.[11] Firstly, legally Ireland's sovereignty would be limited precisely as much as, but no more than, the sovereignty of every other Member State of the European Union. Politically, a small State with relatively little influence on its own gains more, on balance, by having a vote in the Council of the European Union than it loses by limiting or giving up certain powers. If, as seems likely, Ireland's economic interests would depend on it becoming a member of the European Union, then the point should be made that a State has more real sovereignty if it is prosperous than if it is not.

Secondly, sovereignty is not a precise concept, and the new Treaty is (even more than the EEC Treaty) a *traité-cadre,* a constitutional framework, not a static *traité-loi.* It is not possible to say, if the political integration of Europe proceeds on the lines envisaged by the new Treaty, at what point in the process Member States would cease to be 'sovereign', because they would transfer their sovereignty gradually to the Union, and no one act of transfer would be decisive, politically or legally. Having said that, however, since the new Treaty contemplates (notably in Art. 68) enlargement of the sphere of cooperation and transfer of particular fields from cooperation to common action, in areas including foreign policy and defence, it would be impossible to say that Member States of the Union would still be 'sovereign' after *all* the transfers of powers visualized by the new Treaty had been fully carried out. The history of federations suggests that they do not remain at a stage of partial integration: they either progress further, or they separate again.

Sovereignty *de facto,* as distinct from sovereignty *de jure,* depends on how far economic and political realities allow the State concerned to control its own destinies. In the case of a small country with a very open economy (i.e. external trade represents a very high proportion of GNP) which is heavily dependent on foreign capital, control over its economy is strictly limited. Ireland's experiment with import-substitution lasted from the 1930s until the 1950s, by which time it was obvious that its usefullness had ended.

In spite of the 'framework' nature of the new Treaty, and its reliance on *lois organiques* to fill in even very important matters, and in spite of the fact that many of its other provisions state aims and not legal powers, the new Treaty looks more like the constitution of a federation, or at least a confederation, than the existing Treaties do. This is partly because the most conspicuous change proposed is the conversion of the European Parliament into one chamber (admittedly, with limited powers) of a bicameral legislature. It is also because the new Treaty speaks explicitly of exclusive and concurrent powers (e.g. Arts 12, 47, 48, 50-53) and of the primacy of Union law (Art. 42). The 'federalist' ethos is unmistakable, although the powers which would belong exclusively to the Union as soon as the Treaty came into force would be no more extensive, at first sight, than the exclusive powers of the existing Communities. Article 64.2, for example, merely declares the existing law.[12] Article 32,

[11] Temple Lang, *The Common Market and Common Law,* 1966, pp. 39-40, 74-75.

[12] Article 113 (EEC); Opinion 1/75 *Local Cost Standard,* [1975] ECR 1355; Case 41/76 *Donckerwolcke* [1976] ECR 1921; Opinion 1/78 *International Agreement on Natural Rubber* [1979] ECR 2871; Case 70/77 *Simmenthal* [1978] ECR 1453.

however, which contemplates the enlargement of the competences of the Union, does not (as Art. 235(EEC) now does) limit the enlargement to cases where it is shown that it is 'necessary to attain, in the course of the operation of the Common Market, one of the objectives of the Community'.

In spite of this, the new Treaty retains, in Article 23, a modified version of the 'Luxembourg compromise', under which, during a transitional period of 10 years, a Member State may invoke a 'vital national interest' and, if the Commission recognizes that the interest in question comes into this category, no vote takes place and the matter is reconsidered. This clause preserves a significant element of sovereignty as long as it is in force, although its operation depends on the Commission accepting the importance of the matter for the Member State in question.

It must be clearly said that 'sovereignty' is not a precise concept, either in Irish constitutional law or (I suspect) anywhere else. It is a political concept, not a legal concept. There is no definition of sovereignty in Irish constitutional law, and no Irish case-law to clarify the concept. The Irish Constitution does not embody a hierarchy of rules or principles, so sovereignty is not, legally, a concept or a principle with higher status under the constitution than any other principle. (No doubt it has a higher status politically in Ireland than many other concepts or principles.)

Reading the draft European Union Treaty, it is possible to imagine that, if the Member States do what the Treaty contemplates, they will gradually move along a spectrum, beginning with the existing situation under Community law, towards a situation in which their sovereignty, insofar as it would still exist, would be very limited indeed. The Treaty contemplates the transfer, to the Union, of some at least of each of the *kinds* of powers which are transferred to a federation by its member States. One cannot now say how many of these powers will in fact be transferred, or in what order, or on what conditions. One therefore cannot say at what point in the future Member States would cease to be 'sovereign', even if there was a precise concept of sovereignty, which is far from being the case.

There has never previously been, as far as my knowledge extends, a treaty between independent States which contemplated transfers of governmental powers great enough to establish a federation, but which did not at once transfer those powers. Since the extent of the powers of members of a federation may vary widely, the key question in connection with the issue of sovereignty at first sight appears to be at what point the members would cease to be full subjects of public international law. But even this question is not really a useful one: States which already have no treaty-making power in the field of external trade are not fully sovereign in the conventional sense. The reality is that the concepts of 'independence' and 'sovereignty' are not appropriate to the situation created by the existing Community Treaties, or to the Union Treaty. Member States would no longer be 'sovereign' in the normal sense when foreign policy and defence had been entirely transferred to the Union, but it seems unlikely that even the transfer of these powers, assuming it occurs, would be made in one single step. Sovereignty is a bundle of powers, and so it is divisible. In the Community it is divided between the Member States and the Community itself,[13] and the same will be true in the Union.

If one asks the more practical question: 'how may a small country with an open economy best safeguard its interests in an increasingly interdependent world?', it is obvious that its interests may be *better* protected by the rights and safeguards for Member States of a federal or near-federal system than by 'sovereign' statehood without close ties by treaty or otherwise. The important question to ask is how the rights and safeguards for the interests of each Member State compare with those which would be available to it if it was neither a member of, or closely associated with, the Community or the Union. For example, Ireland, which has not been represented at international 'summit' meetings, would have greater influence at those meetings through the Community or the Union than it is ever likely to obtain in any other way.

---

[13] On the divisibility of sovereignty, see Pescatore, *The Law of Integration*, 1974, p. 30; Pescatore, *L'apport du droit communautaire au droit international public*, 1970, Cahiers de Droit européen (C.D.E.), pp. 501, 502-507.

## c. *Bringing the law of the European Union into force in Ireland*

An amendment to the constitution of Ireland must, under Article 47 of the constitution, be made by referendum. An amendment is approved if a majority of the votes cast at the referendum are in favour. There is no requirement that a certain minimum of the electorate should have voted. Voting in Ireland is not compulsory.

Every proposal for the amendment of the constitution must be initiated in the Dáil (Art. 46, Constitution). When passed (or deemed passed, under Article 23, in the case of disagreement between the two Houses) by both Houses of the Oireachtas, it is submitted to the electorate by referendum. It is signed by the President and becomes law only after the referendum has approved it.

Private Members' Bills are permitted in the Dáil, but they are extremely rare, and it is inconceivable that a Bill of such importance would be introduced by anyone except the Government. Under Article 28 of the constitution, Ireland has a system of cabinet government, in which the government normally has the support of a majority of the members of the Dáil.

An amendment to the constitution on the lines of the 1972 amendment would make it possible for Ireland to join the European Union, but would not make Ireland a member. Ratification of the new Treaty could take place only after the amendment to the constitution had been signed by the President and so passed into law. Ratification of any treaty is an act of the Government under Article 28 of the constitution and no treaty (even one expressly mentioned in an amendment to the constitution) becomes part of the domestic law of the Irish State except by an act of the Oireachtas. After the constitution had been amended, therefore, it would be necessary for the new Treaty to be enacted into law by an act similar to the European Communities Act 1972.

In that act, which is simpler and more direct than the corresponding legislation in the UK, the most important clause is s. 2, which provides:

> 'From the 1st day of January 1973, the Treaties governing the European Communities and the existing and future acts of the institutions thereof shall be binding on the State and shall be part of the domestic law thereof under the conditions laid down by these Treaties.'

This clause, because it embodies a *renvoi* to Community law, ensures that in any case of conflict between Irish law and Community law, the latter prevails. It also ensures that Community measures have, in Irish domestic law, whatever direct effects are given to them by Community law, no more and no less. The amendment to the constitution of course ensures that Community measures (and Irish measures necessitated by the obligations of membership) are immune from challenge on constitutional grounds. As between non-constitutional measures of Irish domestic law the normal rules apply (acts prevail over delegated legislation, later legislation prevails over prior legislation enacted by the same authority) so that express powers have to be given to enable e.g. the Government or a minister to amend an act, even in order to bring it into line with Community law. This was done by the 1972 Act, s. 3.

Ratification by Ireland of the new Treaty setting up the European Union would be possible only after an act essentially similar to the European Communities Act 1972 had been adopted. (Some drafting improvements could be imagined.)

The rules of Irish law concerning the supremacy of Community law, and the effects of rules of Community law which are not directly applicable, would be the same under the new Treaty as in the case of the Community Treaties,[14] unless the constitutional amendment or the implementing legislation were differently drafted. There is no reason to think that they would be.

---

[14] Temple Lang, *op. cit.*, 9 *CMLR*, 1972, pp. 171-176; Murphy, 'The European Community and the Irish Legal System', in *Ireland and the European Communities*, (Coombes ed.), 1983, pp. 29-37, who also describes the work of the Oireachtas Joint Committee on the secondary legislation of the European Communities. This Committee concerns itself with both Community secondary legislation and with Irish secondary legislation implementing Community directives and supplementing, where appropriate, Community regulations.

The Irish constitutional rules just stated appear to deal with the question, which might arise, whether the Union had exceeded its own powers. If the new provision in the constitution of Ireland corresponds to that already discussed, and if the legislation giving effect to the Union Treaty in Ireland contained a clause corresponding to that in the European Communities Act of 1972, a determination by the Community Court that the Union had, or had not, exceeded its powers, if that question was raised before it, would be binding on the Irish courts. Unless Irish public opinion altered greatly, it would be most improbable that the provisions would be deliberately drafted so as to make the Irish Supreme Court, rather than the Court of Justice, the ultimate arbiter of whether, in the view of Irish law, the Union had exceeded its powers. The only practical result of drafting the provisions in that way would be to make it possible (though no doubt it would be unlikely) for the two courts to give conflicting decisions on the question, if it ever arose. Irish public opinion is not so concerned about the possibility of the Community exceeding its powers, and is not likely to be so concerned about the possibility of the Union exceeding its (much wider) powers, that the possibility of such a conflict would be intentionally created, for the purpose of protecting Irish sovereignty or otherwise. As is explained below, Irish public opinion is not as sensitive as public opinion in certain other Member States about enlargement of the powers of the Community.

For the reasons given below in the socio-political part of this paper, it is impossible to imagine a referendum being held to allow Ireland to join the Union unless at least one of the present two large political parties was in favour. However, once the referendum was passed by the people, no further difficulty would arise unless a new government came into office which was opposed to Ireland joining the Union. Unless this happened, (which would be unlikely if the referendum had been passed by the people) the government which had promoted the referendum would be able to ensure that the legislation needed for accession was enacted.

## *d. Neutrality – Not a legal question in Ireland*

The question of Irish neutrality is discussed below, as a political question. There is nothing in the constitution of Ireland, or in any Irish legislation or Irish law, or in any treaty, on the question of Irish neutrality. It has been suggested that a provision stating Ireland's neutrality should be added to the constitution, but this suggestion seems to have no significant public support. Such a provision, if it were seriously considered, would necessitate a definition, or would at least provoke a discussion, of what is meant by Irish neutrality. A provision in the Irish Constitution stating Ireland's neutrality would ultimately be incompatible with Ireland's membership of the European Union. Once this is understood, and once the long-term economic costs of staying out of the Union have been realized, it is improbable that any movement to have such a provision added to the constitution would make significant progress.

## *e. A new Irish Constitution?*

For completeness, another possibility should be mentioned. It has been suggested from time to time that a whole new constitution should be drawn up and adopted by referendum. This would certainly be one possible way of making certain changes in the existing constitution which might not be passed by referendum if they were put to the voters separately. If, for any reason, a whole new constitution was drawn up and put to the voters in a referendum, the issues concerning Ireland's accession to the European Union (assuming that the new constitution was so drafted as to permit accession, which presumably it would be) would be combined with the issues, whatever they were, about the relative merits of the new constitution and the existing constitution. This in turn would mean that, if the new constitution was adopted, the issues concerning accession to the Union would not be decided by referendum: Ireland uses referendums only when it is necessary to amend the constitution, or to adopt a

new one, and not on policy questions, however important. The decision on accession would therefore be made by the legislature. This is not the place to discuss the desirability or otherwise of extensively altering the present constitution. It may simply be mentioned that one of the main reasons why the idea has been suggested in recent years is that it has been felt that extensive changes would be necessary to make the constitution more attractive to those people in Northern Ireland who are opposed to reunification of Ireland. However, it is obvious that constitutional changes, however extensive, might be a necessary condition but could never be a sufficient condition for reunification and that the other conditions, whatever they may turn out to be (not to mention economic and other matters) are more important.

## 3. Political aspects

This part of this paper assesses some of the elements which are likely to influence public opinion in the Republic of Ireland at the time of the referendum which would be necessary to enable Ireland to ratify the Treaty setting up the European Union.

Ireland is the only Member State of the Community which was a colony within living memory. (Legally Ireland was a province of the UK between 1800 and 1922, but most Irish people regarded its status as substantially that of a colony.) National independence is therefore not taken for granted as much as in other countries. Ireland is also the only Member State in the position of having part of what it regards as its national territory under the jurisdiction of another Member State. On the other hand, Ireland is a small country, and never had an empire. It does not feel itself to have, or to have had, a world-wide political influence which it would be reluctant to see merged into a European group of States, although there is a strong sense of fellow-feeling with Irish emigrants outside Europe, notably in the USA. Irish people are accustomed to the idea that important decisions affecting their interests are taken outside Ireland, whether in London, Washington or Brussels. They are not annoyed, as I feel that English people are often annoyed, by the thought of decisions affecting their interests being taken by 'foreigners' (even when the UK has a vote and a veto). Most Irish people are not prejudiced against the idea of the existing Community extending its powers, in the way that many Danes and English people are prejudiced against it. The 1972 referendum campaign in Ireland did not need to concern itself with reassurance against exaggerated or irrational fears. Irish people are not prejudiced against foreigners. In the 1972 referendum, no less than 83% of those voting were in favour of joining the Community, a remarkably high proportion in a country which did not experience invasion during World War II and therefore which is not greatly influenced by the argument that such a war must never be allowed to happen again.

However, there is relatively little interest in the 'European ideal' in Ireland. Only one leading Irish politician has a reputation, in Ireland or elsewhere, as being really *communautaire*. This is not merely because Ireland is not large enough to feel that Europe cannot be built without her, or to feel that she has an important responsibility in international relations. It is also because of the extent to which Irish opinion was preoccupied with the problem of Northern Ireland, even before the present troubles began there 15 years ago, in 1969.

For these and other reasons, Ireland has not played a role in the Community which has been sufficiently influential and constructive to give Irish public opinion confidence and satisfaction comparable to that derived from Ireland's involvement, in the less recent past, in the United Nations. This is partly because the activities of e.g. Ireland's first two Presidencies (during which, *inter alia,* the first two Lomé Conventions were concluded) were too complex and not conspicuous enough to be widely appreciated in Ireland.

Irish attitudes towards the Community have been primarily concerned with economics. Initially the Community was, correctly, regarded as likely to benefit Ireland economically in various ways, and to

a very important extent. More recently, there has been a tendency to criticize the Community, somewhat unfairly, for its inability to prevent or surmount world recession, increased oil prices, and unemployment in Ireland and elsewhere. This disillusionment has coincided with the unpleasant effects of (very necessary) measures taken to put Irish government finances and the national economy in order, and to reduce budget and balance-of-payments deficits, overspending, and excessive foreign borrowing. Even the very large economic benefits (especially in agriculture) which Ireland has unquestionably obtained from Community membership have not prevented these difficulties from arising, but the difficulties have caused public opinion to underestimate the benefits. However, it is important to emphasize that in Ireland, unlike some other Member States, dissatisfaction with the working of the Community does *not* imply opposition to the Community or to its aims, and shows no signs of developing into opposition to them.

## *a. The significance of Northern Ireland*

As already mentioned, the problems of Northern Ireland, and of Ireland's relations with the UK in the light of the Northern Ireland problem, have occupied the attention of many Irish people who would otherwise have been thinking about Community affairs. However, it has been a Northern Ireland politician, John Hume, who has done most to involve the Community constructively in Northern Ireland. Many people in Northern Ireland realize that they would get greater benefits from the Community if they were part of the Republic of Ireland, or if they could be treated in the same way as the Republic. But the Community has not been able to make the border between Northern Ireland and the Republic wither away.

So far, progress towards European integration is not regarded as a way (certainly not an adequate way) of solving Northern Ireland's difficulties. One of the papers written for the New Ireland Forum[15] points out that 'the structure of agriculture in the North has moved closer to that in the South although the use of MCAs has increased the cost and complexity of cross-border trade . . . membership of the Community has facilitated cooperation on issues such as cross-border development . . . . However, in 1979 economic cooperation between North and South was inhibited by the decision of the UK to stay out of the European Monetary System . . . Membership of the European Community has . . . benefited both parts of the island but the South, because of its independence, has been able to make greater use of it . . . there would be more advantages to the North if a specific agricultural policy could be developed rather than one on a UK basis'. Another Forum paper[16] pointed out that the use made by the Ireland of Community loan instruments, mainly from the European Investment Bank, has been enormously greater than the use by the North. The New Ireland Forum paper on the legal systems in Ireland[17] pointed out that Community law is likely to be a significant harmonizing factor in legal development in both jurisdictions.

However, the main report of the Forum says very little about the Community, merely mentioning[18] that an integrated economic policy for the whole country would be in the interests of both parts, since both have common interests in areas such as agriculture and regional policy which diverge from the interests of Britain.

An improvement in the situation in Northern Ireland would allow Irish people to turn more of their attention to Community affairs. More important, the more the Community can play a useful and constructive role in Northern Ireland, the more favourably public opinion in both parts of Ireland

---

[15] New Ireland Forum, *The Economic Consequences of the Division of Ireland Since 1920*, § 7.1-7, 1984.
[16] New Ireland Forum, *A Comparative Description of the Economic Structure and Situation, North and South*, § 11.1-4, 1983.
[17] New Ireland Forum, *The Legal Systems North and South*, Part 5, 1984.
[18] New Ireland Forum, *Report*, § 6.8, 1984. For a view of Northern Ireland by the European Parliament see the Haagerup report, European Parliament, *Documents de Séance 1983-84*, Doc. 1-1526/83; see also Lyons, *Ireland since the Famine*, 1971, pp. 682 *et seq.*

will regard it. Northern Ireland therefore is both a reason why Irish politicians, with the notable exception of John Hume, have given less time than they might have given to Community affairs, and is also an opportunity for the Community to make a real contribution which would not only be worthwhile in itself but would significantly increase its popularity in both parts of Ireland, and no doubt in Britain as well. Northern Ireland's problems are costing the UK some UKL 1 300 million each year, and though the corresponding cost to Ireland is less in absolute terms, it is greater in relation to the size of the country's budget. An imaginative and constructive involvement of the Community in Northern Ireland would be perfectly possible, if the UK would agree to it, and would offer a much better hope of a real long-term solution than anything which anyone has yet suggested.

## *b. Irish attitudes to European political cooperation*

European political cooperation, though useful, has so far been so modest that it is difficult to deduce much from Irish attitudes towards it. When, as in the Tindemans report in 1976, it was suggested that defence matters might be included within the sphere of political cooperation, or when it was suggested in the European Parliament that defence procurement should be dealt with by the Community, the Irish reaction was negative, but not primarily on grounds of principle. In fact Irish politicians have seen no difficulty in advocating Irish neutrality and giving at least verbal support for European integration. While avoiding publicity, successive Irish governments have cooperated pragmatically in EPC activities so far.

In a speech in the Dáil on 22 October 1981, the Minister for Foreign Affairs, Professor Dooge (Fine Gael) said:

> 'When we acceded to the Community in 1973 the position was that we not only accepted the *acquis communautaire* established by the various Treaties, we also undertook a political commitment in the context of progress towards European Union, to consult and coordinate with our partners on foreign policy in the non-Treaty inter-governmental framework of European political cooperation . . . Ireland, in common with other Member States, has been quite satisfied with the way political cooperation has developed within this framework . . . Of course, there are some issues where positions still diverge and this is how one would expect it to be, given the varying interests and traditions of the Member States and the essential flexibility and pragmatism of the way political cooperation works. Notwithstanding such divergences, the experience of all of the Ten, including Ireland, has been that to the extent the views of the Ten coincide, we have opportunities to play a far more significant and influential role and serve our interests more effectively on many issues, acting together with our partners in the Ten, than we would have as individual States acting alone . . . the London report of 13 October 1981 on European political cooperation . . . reiterates the political commitment of the Member States to consult on foreign-policy questions. An important element is the recognition that the report gives to the importance of the Treaties as the basis for further integration, and the maintenance and development of Community policies in accordance with the Treaties, before further steps can be taken to strengthen political cooperation . . . Political cooperation is concerned with coordination of foreign policy. Within that context discussion has taken place from an early stage in political cooperation of foreign-policy matters that have a security dimension . . . This has not presented a problem for Ireland . . . it is useful and important that in the London report it is clear that the scope of political cooperation on these matters is confined to *political* aspects of security and that defence or military issues as such are excluded . . . The relevant paragraph in the report, far from being an extension of the scope of political cooperation, is in fact an explicit re-statement, in a form acceptable to Ireland, of the practice established under successive Irish governments . . . the Federal German Government recently endorsed Mr Genscher's ideas on establishing a new framework for evolution to European Union . . . It is right and appropriate that we should debate those proposals on their own merits . . . in our view the commitment to political cooperation is based upon, and indeed flows from the commitment to economic integration set out in the Treaties establishing the Communities . . . it is hard to see how political cooperation can respond effectively to external problems unless internal cohesion and common interest within the Community are first of all increased and developed.'

The *Irish Times* of 27 October 1984 commented that the current Western European Union meeting took place partly because of Ireland's reluctance to go along with the original proposals of Genscher-Colombo which included regular meetings of Defence Ministers of EEC Member States, although Ireland was not the only country to object. 'The Government here, and politicians of most parties, clearly accept the WEU revival with some relief. It seemingly removes the issue of security from the forum of European political cooperation among the Ten, sparing Irish ministers the embarrassment of deciding when the political aspects of security end, and the compromising of Irish neutrality begins . . .' Having pointed out that this was a superficial view which evaded the issue, the paper went on to say that 'politicians here adopt a very jealous stance on neutrality when it is a matter of public debate at home, but manage to maintain admirable flexibility on the same topic in the context of the EEC . . . Such discrepancies are explicable only if neutrality is regarded as a matter of expediency, related to circumstances, and not a keystone of foreign policy, permanent and non-negotiable. Mr Cooney (the Irish Minister for Defence) had the courage and frankness to say so.'[19]

## *c. Irish attitudes to increased Community powers*

The attitudes of Irish politicians and of public opinion do not display the automatic objection to any increase of Community powers, or even to the full use of existing Community powers or to specific examples of Community powers such as the direct effect of Community law, which are conspicuous in some other Member States. Irish people in general are not opposed to increases in the powers of the Community. Only a very small minority in Ireland share the attitudes, summed up in the emotive word 'sovereignty', which are common in Denmark and in the United Kingdom. It has been said[20] that 'Britain, like Denmark and Greece, joined [the Community] not because it wanted to be in but because it feared to be out'. Without discussing this rather severe statement, one can say that although Ireland certainly would have been unwise to stay out once the UK joined, Irish people have never felt any of the ambivalence, to put it no more stronly, which is felt in the UK about the Community. There is no widespread or general prejudice in Ireland against the Community. The popular attitude is quite different from that in Britain.

On the other hand, proposals to increase substantially the powers of the European Parliament could give rise to objections which have not been made so far. These objections might be based on instinctive reluctance to change, or to criticisms of the way in which the European Parliament has so far used its powers. There might also be objections to a large-scale transfer of powers from national legislatures to the Council of the Union, i.e. to governments. There might certainly be objections to any provision which created exceptions to the Commissions's exclusive right to initiate measures since, once the veto has been ended, the Commission's exclusive right to initiate represents the principal safeguard for ensuring that the interests of smaller Member States will be adequately taken into account. Article 37.2 of the Draft Treaty might therefore give rise to criticism.

## *d. Irish neutrality*

Irish neutrality has never been defined. As already mentioned, it is not mentioned in the constitution. It is not the subject of any treaty. It has never been fully or authoritatively articulated. It is therefore

[19] See also D. Kennedy, 'Neutrality Stance has Changed', *Irish Times*, 15. 11. 1984, who comments that 'no real attempt has been made to reconcile this enlarged [i.e. 'far-reaching'] view of neutrality with the dominant thrust of Irish foreign policy, that is, commitment to the EEC and to European integration . . . This poses a danger to Ireland — that of being relegated to the periphery of Europe moving towards . . . a two tier Europe'.
The Fianna Fáil European Progressive Democrats election document *A Strong Voice in Europe*, 1984, stated that 'Fianna Fáil supports the process of European political cooperation . . .' but also drew a distinction between 'security' and 'military' matters, saying 'it has been suggested that European political cooperation should be extended to military affairs. Fianna Fáil is totally opposed to this idea. While Member States may discuss certain foreign-policy questions touching on the political aspects of security, Fianna Fáil is opposed to any involvement in either military or defence matters by Community institutions. This opposition is rooted in our status as a Member State which does not belong to any military alliance'.

[20] *International Herald Tribune*, 14. 7. 1984. 'When will Britain be European?'

not easy to describe, although it has been the subject of a valuable book by my colleague in Trinity College, Dublin, Patrick Keatinge.[21] In practical terms, it has merely meant that Ireland is not and has not been a member of NATO, the Western European Union, or of any military alliance. Apart from that, it is an attitude, and not really a policy. The elements which have contributed to that attitude are as follows.

The idea of Irish neutrality has been associated with independence from the UK. The Irish people did not wish to be involved in 'England's wars'. They have a certain distrust of major powers. Ireland's geographical position made it possible to stay out of conflicts in Europe without having to maintain armed forces adequate to resist invasion: Irish neutrality has been relatively cost-free. In 1938, Ireland negotiated the closing of British naval bases on Irish soil, and this made possible Ireland's neutrality in World War II. 'By 1945 the basis for a national tradition of neutrality, both as a value and a policy, had been laid'.[22] After Ireland joined the UN in 1955, and in the 1960s, the Irish Government worked for disarmament measures and progressive withdrawal of armed forces in Europe. These efforts were regarded with approval in Ireland as demonstrating an independent and constructive foreign policy, although Ireland's voting record in other respects in the UN was not very different from that of other Western European countries, or those of the other European neutrals, Austria, Finland and Sweden. Ireland never joined NATO. One reason suggested for this was that NATO member States' commitment to respect each others' territories might imply recognition of the legitimacy of British rule in Northern Ireland. However, a stronger if less explicit reason is that, for geographical reasons, the Irish people do not feel threatened by Eastern bloc forces, and so see less need for military preparedness than peoples further east. The feeling that Ireland's neutrality is in some sense morally preferable to involvement in the East-West conflict or even to membership of a defensive military alliance has been strengthened by Ireland's contributions to UN peacekeeping forces, and by the view of Irish people that peacekeeping, neutrality, and aid to developing countries are related. What can best be described as insularity has also played a role.

Ireland applied to join the European Communities in 1961. During the previous two years, and subsequently, Seán Lemass, then Taoiseach (prime minister) made a series of public statements to the effect that Ireland would involve itself in European integration without any reservations as to how far it might go in the areas of foreign policy and defence, and that in due course Ireland would cease to have a policy of neutrality. In the discussion before the referendum on Irish accession, in May 1972, the two major political parties both advocated accession, and both took the view that membership of the Community would not compromise Irish neutrality in the foreseeable future. Since the corresponding view was not held by Austria, Finland, Sweden or Switzerland, the Irish view implied (no doubt correctly) that Irish neutrality was different from the neutrality of those countries. In 1979 Jack Lynch said that Ireland had no traditional or permanent policy of neutrality, and that in the Community Ireland would ultimately cease to be neutral. In a debate in the Dáil in 1981 Charles Haughey, then Taoiseach and leader of the same political party as his two predecessors just mentioned, accepted that full political union in the Community would ultimately involve an end of Irish neutrality. Lemass had probably thought more carefully about neutrality than either of his successors, and it is clear that he did not believe that neutrality should be a brake on Ireland's participation in European integration.

Irish neutrality therefore has been an attitude which Irish people have been able to take for granted, for geographical reasons, without analysis and virtually without economic or other sacrifices. (Ireland has never had compulsory military service.) It has certainly been a less clear position than those of the four recognized European neutral States, Austria, Finland, Sweden and Switzerland. Keatinge identifies two points of view. The first is a 'moderate' or 'pragmatic' view of what national prosperity, security and independence make appropriate. This is the view of at least a majority of the two

[21] Keatinge, *A Singular Stance: Irish Neutrality in the 1980s*, 1984; Bowman, *De Valera and the Ulster Question 1917-1973*, 1982, Ch. 6. For some comments on the historical reasons for Sweden's neutrality, see 'Sweden: a survey', *The Economist*, 6-12. 10. 1984.

[22] Keatinge, *op. cit.*, p. 20.

major political parties, and the essence of it is non-membership of any military alliance. This view would imply that Irish neutrality might be lessened or given up if other national interests or aims justified doing so. The second is a more 'far-reaching' view, expressed by the small Labour Party[23] (which has been in government only as the junior partner in a coalition, and which does not seem likely to achieve power alone in the foreseeable future) and by others, mostly outside the Oireachtas. This view regards neutrality as a basic, immutable, moral principle of national policy.

Since neutrality is highly regarded by Irish opinion, but has never yet conflicted with any recognized national interest or made necessary any significant economic sacrifices, it is impossible to be certain which of these two views would be closer to Irish public opinion after careful consideration of Irish accession to the proposed Treaty on European Union. However, those who clearly advocate the second, more inflexible version of Irish neutrality are in general less representative of Irish opinion than the two major parties, though their articulate and indeed emotional advocacy of a more extreme concept of neutrality might win some public sympathy. It seems unlikely that either concept would ultimately prove enough to produce a majority of the electorate opposed to accession to a European Union. Neither of the major parties has had occasion to explain the reasons for weakening or giving up Irish neutrality for the sake of the economic and political advantages of participating in a European Union, but such an explanatory campaign by both the large parties, when the time comes, would certainly have a considerable influence on public opinion. One significant sign is that, although the Labour Party suggested in 1980 that neutrality should be written into the constitution, there is no other substantial body of opinion which wishes this to be done. However, in Ireland and elsewhere many people hope that neutralist attitudes and military weakness might enable them to avoid being involved in any possible future conflict in Europe, and the wish to avoid such involvement is an understandable one.

It should also be said that, although the Irish like to regard themselves as neutral, no Irish politician ever makes the kind of criticisms of the USA or of other European countries which have often been made by Swedish politicians, or speaks as favourably of Communist regimes as leading Greek politicians have done. Since the end of World War II hardly any action has been taken by any Irish Government in the foreign relations sphere which would have caused surprise if it had been taken by, say, the Netherlands.

## *e. Economic issues*

Economic questions formed a large part of the debate in Ireland on accession to the Communities. They would probably be important in the debate on accession to the Treaty on European Union. How they will be considered will depend on economic developments in the Community and in Ireland, in particular during the period between now and when Ireland's accession to the European Union has to be decided. We do not know how long that period will be, or how the economies will perform during it. The economic advantages of joining the European Union would also have to be compared, presumably, with (i) remaining outside the European Union but inside the Community, and (ii) leaving the Community entirely. Neither alternative is likely to be economically attractive, but neither can usefully be discussed here.

Irish public opinion would obviously be more favourable to the European Union if the Community proves itself successful economically in the coming years. It is impossible to isolate the effect of the Community on the Irish economy in 1973-84 from the effects of e.g. the energy crisis, global recession, the Northern Ireland problem and its huge cost to the Dublin Government, and Irish economic and financial policies followed during the same period. However, it is clear that membership of the

[23] Notably in the Labour Party booklet, *Ireland — a Neutral Nation*, 1981.

Community has given Ireland very large economic benefits, notably in improved access to markets on the continent, higher prices for agricultural products, and receipts from the EAGGF and the Social and Regional Funds. Ireland could have benefited more if its problems of farm structure and land-use policy, and of getting more efficient industry and public administration, had been solved. It is probable that the economic advantages for Ireland of joining the European Union and obtaining the full economic benefits of membership will be strong.

## *f. Ireland's role in the Community*

The Irish people would be more interested in and more favourable to the proposal for European Union if Ireland was playing a greater role in the Community. One major Irish initiative in the Community, if successful, would go far to convince Irish opinion that Ireland could make an important contribution. The kind of measure which would most interest Irish opinion would probably be the adoption of a Community policy, proposed and worked out by Ireland, on trade with developing countries, or of course on Northern Ireland. Irish attitudes on neutrality (quite apart from other States' views) might discourage Irish politicians from suggesting that the Community should take any major initiative to reduce international tension. Irish-inspired measures to eliminate barriers to intra-Community trade, if they were effective and far-reaching, would also help to persuade Irish opinion that European integration could bring important benefits. (Indeed, if under the present Irish Presidency the negotiations for the accession of Spain and Portugal and for the third Lomé Convention can be brought to a successful conclusion, or if a useful package of measures on intra-Community barriers were pushed through, thorough coverage by the Irish media of these achievements would have some of the effects under discussion.) Like most European peoples, the Irish tend to be exasperated with the Community not because it is too integrationist but because it is not moving fast enough, and is too often obstructed by short-sighted disputes over petty issues. The Irish would be pleased by statesmanlike leadership in the Community, especially if an Irish Government had contributed to it or provided it.

## *g. The attitudes of the main political parties*

As very few considered comments have been made by Irish politicians on the Draft Treaty, it is appropriate to summarize their attitudes to European integration generally.

Reference has been made already, in the section on Irish neutrality, to statements by the three leaders of the largest political party in Ireland, Fianna Fáil. More recently, Mr Haughey has made more inflexible statements, but he has never argued against the principle of European political integration or of Ireland's involvement in it, and it seems likely that his statements were more influenced by short-term party-political tactics than by long-term thinking. Neutrality is popular enough in Ireland to tempt politicians to accuse their opponents of failure to preserve it. On the other hand, Fianna Fáil is more old-fashioned in its outlook than the other parties and is more likely than the others to oppose, or at least to be ambivalent about, Ireland's becoming involved in European political integration. One or two Fianna Fáil members of the Dáil have made comments more consistent with the 'far-reaching' version of Irish neutrality than with the 'pragmatic' version. There is some risk that Fianna Fáil politicians may, for short-term tactical reasons, make statements which imply a less pragmatic version of neutrality than their party has previously held. There is a risk that they may do this without adequate awareness of the economic costs of a neutrality sufficient to keep Ireland out of the European Union, if their statements were to lead so far.

Of the three main political parties, the second largest, Fine Gael, now led by Dr Garret FitzGerald, is probably the most favourable to European integration. That party holds the more moderate and more pragmatic view on neutrality identified by Keatinge, and Dr FitzGerald is the most Com-

munity-minded politician in Ireland. Mr Cooney, the Minister for Defence, has recently confirmed this attitude.

The attitude of the much smaller Labour Party is less easy to summarize. The Labour Party argued against accession to the Community in 1972, though perhaps not all its members argued with conviction. It loyally accepted the verdict of the 1972 referendum. In the 1980s the Labour Party published several policy papers.[24] The paper on the European Community unreservedly supports the Community and Ireland's involvement in it (while naturally calling for more socialist policies), saying 'Labour . . . has sought, since Irish entry in 1973, to contribute fully and positively to the development of the institutions, policies and programmes of the Community, and to its overall progress.' It adds that 'Ireland's neutrality must not be compromised'. The paper on European political cooperation stressed 'the vital importance of neutrality in all of this country's international dealings'. 'Creating a socialist basis for the future of the Community does not imply any diminution of Ireland's long-standing neutral position'. European political cooperation is a 'threat to Irish neutrality' and Ireland should adopt 'a non-aligned position'. The question of what Ireland's attitude should be if the Community were to discuss military issues is left open, and the non-aligned position was undefined. The apparent implication is, however, that the Labour Party would be opposed to Ireland being involved in any developments which compromised Ireland's freedom to be 'non-aligned'. Keatinge however considers that since neither Fianna Fáil nor Labour has repudiated the commitment to eventual European Union, implying involvement in collective defence, their real position, as distinct from their rhetoric, may ultimately be essentially similar to Fine Gael's.

The attitudes and uncertainties of the three main Irish political parties were shown at the time of the vote in the European Parliament on the final Spinelli report. The Fine Gael MEPs voted for the report. Of the three Labour Party MEPs, one voted for and two voted against. The Fianna Fáil MEPs had signed the register on the day of the vote but, presumably deliberately, were not present, and so took no position, not even abstaining.

## *h. Trade unions and employer organizations*

The attitude of Irish trade unions towards Ireland's accession to the European Union Treaty is likely to be a result of two elements, the relative strength of which it is difficult to assess in advance. These two elements are, firstly, the economic advantages of joining the Union, compared with the economic results of not joining, and secondly, the extent of the feeling among trade unionists against joining, on political grounds primarily concerned with neutrality. In the short term, the economic consequences of joining will presumably be, in substance, simply a continuation of the existing situation within the Community. It is now, and may well be when the question arises, very much more difficult to say what the economic consequences of staying out of the Union would be for the Member States of the Community, if any, which decide not to join the Union. Presumably these consequences would depend, in part, on whether their reluctance to join the Union was thought to be temporary or permanent. In the case of Ireland, the economic consequences of both joining and of not joining would be affected (though much less than in 1972) by whether the UK joins or not. Probably, as in 1972, the majority of trade-union members would vote in accordance with their economic interests, as they saw them when the time came, and the leaders of the trade-union movement would tend to adopt the attitude adopted by the Labour Party, and indeed would probably largely determine that attitude.

The attitude of the employer organizations in Ireland (the Confederation of Irish Industries and the Federated Union of Employers) is almost certain to be based on their view of the economic results of

[24] Various Labour Party publications: *Ireland — a Neutral Nation*, 1981; *The European Community*, 1984; *European Political Cooperation*' 1984.

joining or not joining, and to be uninfluenced by (or little influenced by) political considerations. They would, however, be more influenced than trade unions by the argument that Ireland's interests would be better protected if Ireland continued to have the maximum influence available to it in European affairs, which would imply that Ireland should join the Union when it comes into existence.

## *i. Public opinion and the media*

In the light of what has been said above, the probable attitude of public opinion and media opinion can be summarized briefly. The media in Ireland are mostly moderate and middle-of-the-road on most issues, and do not often diverge significantly from public opinion in general on issues relevant to the European Union. Of course, different newspapers, for example, represent different tendencies within public opinion, but all the national newspapers and all, or almost all, of the provincial and local papers are, and are likely to remain, moderately 'pro-European'.

Television, which is influential, is, although State-run, not significantly government influenced on issues directly relevant to the European Union (measures have been in operation for years to prevent television from giving publicity to the IRA). However, there is a minority in the media which adheres to the more far-reaching view of Irish neutrality, and which therefore, as in 1972, will be opposed to Ireland joining the European Union, even if the economic consequences of not joining were clearly unattractive. Such minorities are vocal, and the controversies they arouse excite public interest and are therefore good media material. In 1972 what can now be seen to have been a small but vocal minority of anti-EEC opinion obtained a considerable amount of publicity, and the same viewpoint will no doubt be thoroughly aired (as indeed it should be, in view of the importance of the issues at stake) when the occasion arises. Both public opinion and the media will no doubt give a great deal of attention to the question of neutrality, both because it has been a vague concept, taken for granted rather than analysed in the past, and because it is more likely to arouse discussion and controversy than the economic issues. It will by now be clear that the writer believes that the majority attitude to Irish neutrality is the 'moderate' or 'pragmatic' one, and that although Irish public opinion supports this attitude, it is not likely to prevent Ireland from following what presumably will be its economic interests and joining the European Union.

## *j. The Catholic Church*

For completeness, mention should be made of the influence of the Roman Catholic Church in Ireland. Although it is less strong than it was, it is still greater than in most other European countries. Approximately 95 % of the population of the Republic of Ireland are Catholics. The 1937 Constitution 'recognized' the 'special position' of the Church as that of 'the great majority of the citizens', but this clause, which had never been considered as having any practical or legal effects or as being more than a statement of the obvious, was removed from the constitution, by referendum and without any opposition from the Church or from any significant body of opinion, several years ago. However, Irish Catholicism is somewhat conservative, and there was a majority in favour of the referendum to add a provision to the constitution designed to prevent both the legislature and the courts from legalizing abortion.

It seems unlikely that the Church or Catholic opinion in Ireland would take any position for or against Ireland joining the European Union. No real view of this kind emerged in the discussion before the referendum in 1972 on joining Community.

## *k. Irish opinion in a referendum on accession to the European Union: Conclusion*

It is not easy to foresee the circumstances most likely to lead governments to advocate ratification of the European Union Treaty. This might result from an economic crisis which only a more united Europe could surmount, or it might result from accumulated public impatience with the pettiness of national politicians and civil servants who are now obstructiong the operation of the Community. Or it might result primarily from creative leadership from European statesmen.

Irish public opinion would almost certainly support a major initiative in European integration if it was led by an Irish politician. In the absence of such an initiative, the result of a referendum on Ireland's accession to a European Union would depend on the attitudes of the two large Irish political parties. Accession would be impossible unless at least one of those parties was in favour of it. Either, in power, would seek the support of the other, to obtain a bipartisan attitude, as in 1972. If both were in favour, the referendum would almost certainly approve accession. If one of the two large parties opposed accession, the outcome could be doubtful. Much would depend, if the two parties disagreed, on the campaign to explain the purpose of the referendum and the reasons for joining the European Union. Of the two big parties, Fine Gael would be more likely to be in favour of joining, and Fianna Fáil would be more likely to oppose it. In the Republic of Ireland, the Labour Party would certainly be concerned by the implications of joining for Irish neutrality, but it is not clear if they would go so far as to oppose joining if the economic arguments for it were strong, as they almost certainly would be. Apart from the question of neutrality, Ireland and Irish opinion would *not* be as opposed to the incipient federalism of the European Union as the United Kingdom and Denmark would probably be. Irish opinion is not sensitive about the Community institutions having greater powers.

Fine Gael in particular has supported majority voting in the Council, strengthening the Commission, and direct elections for the European Parliament. Fianna Fáil have been less explicit, but by coincidence Fianna Fáil have only once been in power when Ireland held the Presidency (and at that period were distracted by internal questions) and so have never had occasion to see its political potential.

# Chapter VIII – The Draft Treaty establishing the European Union from an Italian viewpoint

*by Giorgio Gaja*

1. In considering the likelihood of Italy's accepting the Draft Treaty establishing the European Union or a similar text under a political perspective, one cannot help being struck by the strong support expressed for the draft. All the major political parties are in favour of European federalism; this is reflected by the media; the high percentage of voters in both direct elections of the European Parliament may also be taken, at least in part, as a sign that the electorate shares the same attitude.

With regard to the Draft Treaty, its appeal for Italian political parties is no doubt increased by the fact that it is perceived as being essentially the work of Italians: Altiero Spinelli, an independent personality who was elected on the Communist list, is justifiably considered as the 'father' of the Draft Treaty; Mauro Ferri, a Socialist, was the chairman of the Institutional Committee when the draft was approved; the Italian Christian Democrats were among its strongest supporters within the European Parliament. All the Italian members of the European Parliament, who were present when the resolution approving the Draft Treaty was adopted in February 1984, voted in favour.

When the Italian Parliament discussed the Draft Treaty, it was given overwhelming approval and hardly any criticism was voiced.[1] Parliament requested the Italian Government 'to approve within a short time the Draft Treaty, submit it to Parliament for ratification and take all the adequate steps for securing acceptance on the part of the other Member States of the European Community'. This is the gist of the almost identical operative parts of two resolutions adopted by the Senate on 10 May 1984 and by the Chamber of Deputies a month later respectively.[2] More recently, on 28 November 1984, a joint meeting of the Constitutional and Foreign Affairs Committees of the Chamber of Deputies led to a resolution requesting the Italian Government to show its 'real intention to put the Treaty establishing a European Union into force' and also to take steps for 'convening within a short time an inter-governmental conference for the adoption of a Treaty establishing a European Union on the lines of the Draft Treaty approved by the European Parliament'. The more recent resolution, while no longer advocating a unilateral acceptance of the Draft Treaty by Italy, omits to refer to any other text in spite of the results of the Fontainebleau European Council and the preliminary discussions in the Dooge Committee.

However, the overall impression of strong support for the Draft Treaty in Italy needs to be somewhat toned down. The Draft Treaty represents more a symbol than a text whose meaning is fully appraised. It would be hard to find any reference to specific provisions in the Draft Treaty in the lengthy debates concerning it which were held in the Italian Parliament. Moreover, the negative attitude taken by some Member States is increasingly perceived as giving the Draft Treaty no real pros-

[1] Some criticism of a very general nature was expressed in the Senate by a MSI (neo-fascist) representative, Mr P. Romualdi (Senato della Repubblica, IX legislatura, 110a seduta, Resoconto stenografico, p. 16 *et seq.*

[2] The text approved by the Senate referred to the 'greatest possible number of Member States' rather than to 'the other Member States'. The date of the Chamber of Deputies' approval was 6 June 1984; the Chamber had already voted a resolution on similar lines as early as 14 February 1984.

pect of ever becoming a binding text: in spite of lip-service paid to the Draft Treaty, no significant pressure appears to be exerted by Parliament for its formal approval.

2. Formal acceptance by Italy of a Treaty establishing the European Union would require, under Article 87 of the constitution the ratification, or an equivalent act, on the part of the President of the Republic — and this implies the Government's consent — and also, under Article 80, whenever there is, among other cases, a 'politically important Treaty', a law authorizing ratification approved by Parliament. In Article 80 ratification is generally understood as covering any form of acceptance of a binding text: otherwise the requirement of an authorization to be given by Parliament could easily be circumvented.[3]

In practice, Parliament occasionally discussed some draft treaties in general terms, but gave a formal authorization only in relation to treaties which had already been adopted. However, it could be maintained that Parliament's authorization may also concern a draft text — the President of the Republic could then ratify a treaty once it has been formally adopted, if the text corresponds to the draft treaty or arguably also if some unsubstantial changes are made. The reason why Parliament refrains from authorizing ratification of draft treaties seems to lie in the risk of a law being useless under the circumstances. The same reason explains why Parliament waits for a government bill relating to a treaty, as the existence of a government bill gives some indication that, once authorization is given, the treaty is likely to be ratified. However, there is nothing in the constitution preventing the approval of a private member's bill relating to a treaty. The approval of a law could then represent an instrument of pressure on the government[4] — whether the treaty has been formally adopted or not.

With regard to Parliament's role in authorizing ratification of a Treaty corresponding to the Draft Treaty, another problem arises. Article 82 of the Draft Treaty provides that, once the Treaty 'has been ratified by a majority of the Member States of the Communities whose population represents two-thirds of the total population of the Communities, the governments of the Member States which have ratified shall meet at once to decide by common accord on the procedures by and the date on which this Treaty shall enter into force'. The momentous decision concerning whether the Community should be dissolved and replaced by the Union is thus left to an agreement to be concluded by the governments of the Member States concerned.

Would a law authorizing ratification of the Treaty also cover the international agreement envisaged in Article 82? If there is no specification either way in the law, a difficult question would arise. The fact that Article 82 mentions only 'governments' gives no clear indication, since the Draft Treaty manifestly does not intend to regulate the respective role of governments and parliaments under the relevant constitutional systems. In Italian constitutional practice laws authorizing ratification have often been construed as applying also to implementing and subsidiary agreements yet to be concluded.[5] However, the case of Article 82 of the Draft Treaty establishing the European Union is arguably different. The decision that governments should take by agreement, may imply solving the most fundamental question with regard to the Union and is likely to take place under circumstances that cannot be reasonably foreseen by Parliament when the law authorizing ratification is adopted.

3. The next consideration is whether any substantive provision in the Italian Constitution facilitates the conclusion of a Treaty establishing the European Union or puts any obstacle thereto.

There is no provision in the constitution that specifically concerns the European Community or Union. Under Article 11, Italy consents to limitations to its sovereignty which are necessary for

[3] For this view see especially T. Perassi, *Scritti giuridici*, vol I, Giuffrè, Milan (1958), p. 423 and A. Cassese, in G. Branca (ed.), *Commentario della Costituzione, Arts 76-82*, Zanichelli, Bologna, Soc. ed. Il Foro italiano, Rome (1979), p. 159 *et seq.*

[4] A former leader of the PLI (liberal party), Mr G. Malagodi suggested that Parliament should discuss the Draft Treaty in its general terms in order to create pressure on European public opinion, on other Parliaments and on governments. See 'Roma rilancia l'Europa', *Il Sole-24 ore*, 21. 2. 1984.

[5] For a critical comment see A. Bernardini, 'Funzione del Parlamento italiano nella conclusione di accordi internazionali', 34 Comunità internazionale (1979), p. 577, at 591.

maintaining peace and security among nations, and favours the establishment of international organizations designed to pursue these ends. This text was written in 1947 with the United Nations in mind, but has been used in parliamentary debates and in the Constitutional Court's case-law mainly with regard to the European Community. While Article 11 could easily be interpreted as referring also to non-universal organizations, it is more difficult to read in the provision a reference to organizations that pursue the maintenance of peace and security only indirectly. However, the Constitutional Court implicitly held in 1964 in *Costa* v *Enel*[6] and expressly stated in 1973 in *Frontini*[7] that Article 11 also applies to the European Community. A politically tighter and more comprehensive organization such as the European Union would no doubt come *a fortiori* under the same constitutional provision.

One of the consequences of the applicability of Article 11 of the constitution to an organization is that Italian institutions should endeavour to promote its establishment and make Italy one of its members. All this is not very meaningful, given the difficulties in enforcing this type of obligation. A more significant consequence was drawn by the Constitutional Court in *Frontini*[8] a limitation to Italy's sovereignty may be accepted, when it comes under Article 11, by means of an ordinary law, even if this involves breaking some constitutional provisions — and thus, under ordinary circumstances, a constitutional law, adopted by a two-thirds majority and a double reading, would be required. The Court said that Article 11 'would appear to be deprived of its normative content were one to maintain that one needs a constitutional law for any limitation to sovereignty therein provided. On the contrary, it is clear that the said provision has a substantive and not only a procedural value, to the effect that it allows limitations to sovereignty under the conditions and for the purposes therein stated, thereby freeing Parliament from the need to make use of its power for revising the constitution'. This applies so far as 'fundamental principles of Italian constitutional law and basic human rights' are not at stake.[9] In 1973 the Court found that no such problem existed with regard to the European Community.

A similar approach could well be taken in respect of the European Union. Participation in the Treaty establishing the Union would not necessarily entail anything more than 'limitations to sovereignty' and would thus be consistent with the 'fundamental principles of Italian constitutional law'.[10] However, under the Treaty the Union system may evolve towards the establishment of a quasi-federal State. According to the Draft Treaty, legislative competence of Member States in many areas, their treaty-making power in even wider areas and their financial resources could be significantly curtailed through the adoption of Union acts.[11] The Constitutional Court's view in *Frontini* was that an assessment of the consistency of the Community system with the fundamental principles of Italian constitutional law has to be made in the existing circumstances, although one could hypothetically reach a different result in the future;[12] the same approach would have to be taken with regard to the Union. On the other hand, it seems reasonable to consider a Treaty in terms not only of the immediate effects under the same Treaty but also of those which are likely to come in a longer span of time.

---

[6] Decision No 14 of 7. 3. 1984, 47 Rivista di diritto internazionale (1964), p. 295 *et seq*, at 296.

[7] Decision No 183 of 27. 12. 1973, 57 Rivista di diritto internazionale (1974), p. 130 *et seq*, at 134-135.

[8] *Supra*, note 7, at 136. For a critical comment see especially G. Sperduti, 'Sulle "limitazioni di sovranità" secondo l'art. 11 della Costituzione', 28 Rivista trimestrale di diritto pubblico (1978), p. 473 *et seq*, at 482-483.

[9] This part of the *Frontini* decision (*supra*, note 7, at 136) was recently restated by the Constitutional Court in *Granita* (Decision No 170 of 8. 6. 1984). An English translation of the relevant part of this decision may be found in 21 CML Rev. (1984), at p. 763 *et seq*.

[10] *According to P. Barile, 'Rapporti fra norme primarie comunitarie e norme costituzionali e primarie italiane', 21 Comunità internazionale (1966), p. 14 et seq*, at 24, Italian institutions should not be entirely deprived of their competence, nor should the inter-institutional equilibrium be affected.

[11] Reference is made here especially to Articles 11, 12, 64, 66, 68 and 71 of the Draft Treaty. For instance, under the latter provision, 'the Union may, by an organic law, amend the nature or the basis of assessment of existing sources of revenue or create new ones' (par. 2, first sentence); this could seriously affect Member States' ability of raising funds for their own needs.

[12] According to the Court (*supra*, note 7, at 136) if Community law violated the 'fundamental principles of Italian constitutional law or basic human rights', the 'persisting consistency of the Treaty with fundamental principles' could be again assessed by the Court.

Accordingly, an assessment of the guarantees provided by that Treaty for the permanence of the sovereignty of Member States and also an evaluation of the developments which are likely to take place under the Treaty would have to be made.

Also with regard to Article 11 of the Italian Constitution a special problem arises concerning the decision that may have to be taken on whether the Treaty establishing the European Union should be put into force among fewer States than the members of the Community. Article 11 appears to require that the various options should be considered in the light of which one better serves the ends stated in the constitution, namely the maintenance of peace and security in international relations. The answer would depend on political circumstances, including the type of links which are likely to be formed between the Union and the States which are members of the Community but do not intend to participate in the Union. If under Article 11 the permanence of the Community had to be viewed as the better proposition participation in the Union could be effected only through a revision of the constitution. On the other hand, the legality of the transition from the Community to the Union would not be relevant under the Italian Constitution, since there is no general requirement in the constitution that Treaties should be respected.

4. As a final remark, it may be wise to add that the importance of constitutional arguments should not be overestimated. This type of argument is frequently invoked in parliamentary debates, but rarely has much political significance. Constitutional questions tend to be settled according to the wishes of parliamentary majority. Were the constitutionality of a law approving ratification of the European Union ever tested by the Constitutional Court, this would happen only some time after ratification and participation in the Union would by then be a *fait accompli*. Under the circumstances, the Constitutional Court would no doubt exert some measure of judicial self-restraint.

# Chapter IX – The Grand Duchy of Luxembourg and the Draft Treaty establishing the European Union

*by Jean-Marc Hoscheit*

## Introduction: Luxembourg and the European Community

The international position of the Grand Duchy of Luxembourg has since its creation been determined by its small size. Weak in military terms, dependent on foreign markets for the export of its main products, the Grand Duchy has always had to rely on international agreements and integration into larger economic entities to ensure its national survival and prosperity. From the Germanic Confederation and the Zollverein to the Belgian-Luxembourg Economic Union and the Benelux, the international political and economic status of Luxembourg has always been defined in terms of international cooperation and economic integration.[1]

This emphasis explains the positive attitudes taken by successive Luxembourg governments and the population towards further integration in a European context. Economic and political integration has always been considered as an important way to stabilize the relevant international environment of the country, to maintain the openness of foreign markets and to maximize its capacity to influence and have a say in international decision-making. In this sense 'its European commitment has allowed the Grand Duchy of Luxembourg to preserve its individuality while reinforcing its political presence on the international scene and its economic tissue.[2]

Being a founding member of the ECSC and the EEC,[3] the Grand Duchy of Luxembourg has generally adopted a position which is very favourable for deepening and extending the experience of the EEC and progressing towards continuing political integration. This general pro-integration stance has been and is based on a consensus of the main political and social forces. This also reflects the opinion of a large majority of the Luxembourg population: in a recent opinion poll, 55% of the

[1] For a discussion of the situation of small European States, see: M. Hirsch: La situation internationale des petits Etats: des systèmes politiques pénétrés — l'exemple des pays du Benelux', *Revue Française de Sciences Politiques*, 1974, pp. 1026-1055 and J.M. Hoscheit: *Les petits Etats dans les relations internationales: Le cas de la Communauté européenne*, Maastricht, European Institute of Public Administration, 1985 (mimeo).

[2] J.F. Poos, Minister for Foreign Affairs in: *Europerspectives*, 1984, No 3 (own translation).

[3] See: J. Würth-Retier: 'Du Grand-Duché de Luxembourg et de la construction européenne', in: Numéro spécial de *Studia diplomatica*, Le rôle des Belges et de la Belgique dans l'édification européenne, Vol. 34, 1981, Nos 1-4, and: J.F. Poos: *Le Luxembourg dans le Marché Commun*, Lausanne et Luxembourg, Centre de Recherches européennes, 1961.

people expressed their support for accelerating the pace of European integration. This is the second highest figure in the EC, following Italy.[4]

It is against this background, defining the longer term tendencies characterizing the European policy of the Grand Duchy of Luxembourg, that the political-institutional change introduced by the Draft Treaty establishing the European Union must be evaluated.

In the following pages, attempts will first be made to identify a few problem areas specifically for Luxembourg (1.). After this, the constitutional and procedural aspects of the implementation of the Draft Treaty will be examined (2.). In conclusion, some of the more political perspectives will be highlighted.

# 1. The Draft Treaty and Luxembourg

It must be acknowledged that against this background of a generally favourable stance towards the progress of European unification, which corresponds to a secular emphasis on international co-operation, the Draft Treaty, in its present form, includes a number of issues which are of vital importance for the future of our societies. In the Luxembourg context, three main problem areas can be identified concerning the Draft Treaty;

(i) the links between European Union and national sovereignty;

(ii) the power structure in the proposed decision-making procedures;

(iii) the seat of the Union.

## *a. European Union and national sovereignty*

The Grand Duchy of Luxembourg is a small State in the middle of western Europe. Its history as an independent entity has been closely linked to major developments in its relevant international environment. This geopolitical situation and the historical developments since 1839, the date of its formal independence, have heightened the sensitivity of the Luxembourg population to any evolution that may have a potential or real impact on the survival of the national community as an autonomous entity.[5]

This socio-psychological phenomenon must be linked to the strong cultural and economic interdependence characterizing the situation of the Grand Duchy. The antinomy between the subjective existence of a national community and the objective factors endangering the coherence of this entity was provisionally resolved after the Second World War by a number of courageous integrative steps in the security (abandonment of neutrality, membership of NATO) and the economic fields (ECSC, EEC, . . .).

These evolutions established a sort of dialectical relationship between the nation State, whose core areas are stabilized, and the European level which provides the framework for this collective management of interdependence.[6] The paradoxical conclusion therefore has been: 'national indepen-

---

[4] *Eurobarometer* No 22 (October 1984), reproduced in *EG Magazin* No 3, 15 April 1985, p. 9.

[5] See: Nos Cahiers: *Du sentiment national des Luxembourgeois*, Luxembourg, Impr. St. Paul, 1984 and the critical article by M. Hirsch: Un patriotisme de circonstance — A propos d'un débat sur l'identité nationale des Luxembourgeois', *d'Letzeburger Land*, No 32, 11 August 1978, pp. 6-7.

[6] Ch. Calmes: Du sentiment national des Luxembourgeois, in *Nos Cahiers, op. cit.*, p. 67: 'L'Europe et l'Etat national sont condamnés à se valoriser l'un l'autre pour échapper à leur déclin'.

dence by economic and political integration'. In this perspective, 'the national consciousness as it developed within a small community is, so to speak, legitimized, weighed, balanced and compensated by a reasoned adhesion to the building of Europe in the form of a confederate State'.[7]

The implicit dialectic between nation State and European level is based on a definition of the boundaries between these two systems, a definition which is not static, but the content of which can ultimately be determined by the Member States themselves. This control of the scope, level and pace of the integration process has been further enhanced as a consequence of the 1965 crisis and the 'Luxembourg compromise', leading to the *de facto* predominance of decision-making by unanimity. In this context, the concept of 'vital national interests' symbolizes the possibility for each State to prevent any encroachments into the national realm which might be perceived as threatening the survival of the national collectivity.

The question must be raised of whether the Draft Treaty in its present form leaves enough room for the legitimate articulation of national identities, the protective hard shell of which has so far been the State.

As Dr John Temple Lang points out 'it is not possible to say, if the political integration of Europe proceeds on the lines envisaged by the new Treaty, at what point in the process Member States would cease to be 'sovereign', because they would transfer their sovereignty gradually to the Union, and no one act of transfer would be decisive, politically or legally'.[8] It is precisely this uncertainty concerning the longer term consequences of the workings of the European Union and its compatibility with the preservation of legitimate interests of national entities concerning the protection of their identities, which raises a major problem that has not yet been fully addressed in the present discussion. Basic problems of political theory concerning citizenship, legitimacy, nation and State in the context of a future European Union cannot be ignored.

## *b. Decision-making procedures*

Closely linked to the question of the preservation of core interests of the nations of the Community, and especially of the smaller Member States, is the question of the design of the decision-making procedures in the Draft Treaty.

Starting from the conclusion that the present state of EC policy-making which gives every Member State ample opportunities to block decisions is highly ineffective and costly in economic and political terms, the drafters of the Treaty on European Union have developed a sophisticated decision mechanism to overcome these problems.

For a State like Luxembourg, participation in supranational organization, based to some extent on the principle of equality of states, has meant an unprecedented opportunity to influence its fate, as internationally determined, by participating actively in the Community decision-making procedures.

What is the situation now in the proposed European Union, as compared to the present state of affairs?

The Draft Treaty is based on the principle of co-decision between, on the one hand, the Council of the Union and the European Council and, on the other hand, the European Parliament. At these two levels, the situation of Luxembourg, considering its impact on decision-making, is considerably worsened.

---

[7] Ch. Calmes, *idem*, p. 68 (my translation).
[8] John Temple Lang, in the present volume.

(a) At the level of the Council of the Union (Articles 20-24), the principle of simple majority voting is introduced (Article 23; 1). Qualified majorities or unanimity are necessary only in a limited number of cases specified in the Draft Treaty.

A major innovation is introduced by the fact that the voting principle will not be 'one State — one vote', but that the votes will be weighed according to the dispositions of Article 148, para. 2 of the EEC Treaty. This means that in the new system, it would only be left with two votes out of 63, whereas in the present system, in the case of simple majority voting, Luxembourg has one vote out of 10. This marks a substantial decrease in the influencing and bargaining power of Luxembourg and of smaller Member States generally.

On the other hand, Article 23, para. 3 which structures the use of the 'vital national interest' concept by stipulating a numer of conditions is only applicable for a transitional period of 10 years. After this period no reference to this concept will be possible.

(b) At the level of the European Parliament, the decision-making powers of which are greatly strengthened, the six Luxembourg MEPs will have little chance of voicing effectively the legitimate interests of a small country in an institution composed of more than 400 MEPs. The concern that these interests may be more or less automatically outvoted is real.

In conclusion, the relative weight and influence that a country like Luxembourg can have on European policy-making will be, according to the dispositions of the Draft Treaty, drastically reduced both in the Council and in the European Parliament. In this context, this abolition of a rationalized use of the concept of 'vital national interests' after a transitional period of 10 years may prove to be detrimental to securing the support of smaller Member States for the Draft Treaty.

## *c. The seat of the Union*

A provision which causes considerable concern in Luxembourg is Article 85 of the Draft Treaty which says:

> 'The European Council shall determine the seat of the institutions. Should the European Council not have taken a decision on the seat within two years of the entry into force of this Treaty, the legislative authority shall take a final decision in accordance with the procedure to organic laws.'

Seen the political sensitivity of the debates around the seat of the European Parliament[9] this article can be interpreted as an attempt by the EP to get the control over a decision which, according to Article 216/EEC is the sole competence of the Member States. Furthermore, Article 4 of the Decision of April 1965, which was used as a legal basis in recent proceedings before the European Court of Justice, says that 'the General Secretariat of the Assembly and its departments shall remain in Luxembourg'. This legal position, the political and economic connotations of which are of great importance for the Grand Duchy, is vigorously defended by the Luxembourg Government.[10]

Add to this the political symbolism attached to the question of the seat, and it seems unlikely that the Luxembourg Government and public opinion will easily accept a move in the direction indicated by Article 85 of the Draft Treaty.

In conclusion, it seems essential therefore to clarify in the political debate the issues concerning the question of sovereignty, the input into the policy-making process and the seat of the Union in order to broaden the base of support in Luxembourg for any move towards European Union.

---

[9] See: D.J. Earnshaw: 'The European Parliament's quest for a single seat', *Journal of European Integration*, 8, 1984, 1, pp. 77-93.

[10] See: Mémorandum du Gouvernement luxembourgeois sur l'adaptation des structures institutionnelles des Communautés européennes, *Bulletin de Documentation* (Luxembourg), No 9, 1983, pp. 21-25.

# 2. The Draft Treaty and the Constitution of Luxembourg

In this part, two major questions will be asked:

(i) the issue of the compatibility of the Draft Treaty with the constitution;
(ii) the procedural mechanisms organizing the introduction of the Treaty into the domestic legal order.

This assumes that we are in a situation where agreement has been found at an inter-governmental conference on the content and objectives of a new Treaty on European Union, and that a solution accommodating most of the worries analysed above has been found.

## *a. The compatibility of the Draft Treaty with the constitution*

During the negotiations of the ECSC and the European Defence Community, the question arose of how far the transfer of rights of sovereignty to a supranational body can be covered by the Luxembourg Constitution.

This question was taken up during the constitutional revision of 1956. After heated debates,[11] the following article was included in the constitution:

> 'Art. 49A. The exercise of the powers reserved by the constitution to the legislative, executive and judiciary may be temporarily vested by treaty in institutions governed by international law'.[12]

The prudent formulation of this article is due to the deep split in opinion between, on the one side, the government, favourable to a more internationalist solution, and parts of the Parliament and the Council of State (Conseil d'État) that adopted a more restrictive attitude, on the other side. The article does not mention a transfer of sovereignty rights, it speaks only of the temporary alienation of the exercise of powers; thus introducing a sharp distinction between the sovereignty of the Luxembourg State which cannot be abandoned, and the mere exercise of powers which can be temporarily transferred. In its Opinion of 10 April 1956 on the revision of the constitution, the Council of State elaborated this theme:

> 'It is important to stress that the constitution clearly distinguishes between the origin and the exercise of sovereignty. The powers (exercise of the sovereignty) originate from the nation (which holds sovereignty). It (the sovereignty) remains indivisible, whatever may be the number, quality or scope of the powers exercised in its name. It is not modified in its essence, if the exercise of powers is freely conceded to national or international organs. In the last analysis, a habilitation of international organs does not question sovereignty itself, but the exercise of sovereignty by the national powers.'[13]

To a large degree, this view was adopted in 1956. Obviously, the question must be raised whether this approach was based on a realistic analysis of the EEC and of the extent to which the develop-

---

[11] See: Compte rendu de la Chambre des Députés, session 1955-56, and L. Schaus, Les fondements du statut international du Luxembourg: 1944-57, *Livre Jubilaire du Conseil d'Etat*, Luxembourg, 1957, esp. pp. 296-298.

[12] For an English translation of the Luxembourg Constitution, see: P. Majerus: *The Institutions of the Grand Duchy of Luxembourg*, Luxembourg, Press and Information Service, 1976.

[13] Quoted in: P. Majerus, *L'Etat luxembourgeois*, Luxembourg, Impr. St. Paul, 1977, p. 139. 'Il importe de relever que la Constitution distingue nettement entre l'origine et l'exercice de la souveraineté. Les pourvoirs (exercice de la souveraineté) émanent de la Nation (détentrice de la souveraineté). Celle-ci reste indivisible, quels que soient le nombre, la qualité ou l'ampleur des pouvoirs qui s'exercent en son nom. Elle n'est pas modifiée dans son essence, si l'exercice des pouvoirs est concédé librement soit à des organes nationaux, soit à des organes internationaux. En définitive, une habilitation des organes internationaux ne met pas en cause la souveraineté, mais l'exercice de la souveraineté par les pouvoirs nationaux.'

ment of the EC was going to have an impact on the substance of national sovereignties. Seen the fact that opting out from the EC is not foreseen in the Treaties and that the EC is instituted without any temporal limitation, it must also be questioned in how far these transfers of powers can be considered temporary.

In the context of the earlier discussion on the relations between European Union and national sovereignty, and considering the evolution of the EC after 1958, the question is open to discussion whether Article 49b of the Constitution is still adequate for, on the one hand, the present day Community and, on the other hand, the prospective European Union.

It can be argued that, in spite of the relatively restrictive formulations of the constitution, both the diplomatic history of the Grand Duchy and the realistic assessment of its position in the world would allow for more flexibility in the interpretation than the actual wording of the constitution would allow one to believe. In 1952, already, the existence of a constitutional custom was accepted to justify constitutionally the limitations of sovereignty introduced by the Paris Treaty.

In conclusion, it may thus be said that, provided the basic political consensus on the Draft Treaty is secured, the compatibility with the Luxembourg Constitution will be less of a problem. Nevertheless, the problem stands whether it will not be necessary in the context of the discussion on a global revision of the constitution, to adapt Article 49bis to the new evolutions that have determined the international position of the Grand Duchy since 1956.

## *b. Procedural aspects*[14]

The transposition of the Draft Treaty into the internal legal order will be analysed in two steps:

(i) first, by elaborating on the general principles and procedures conditioning the adoption of international treaties;

(ii) second, by examining the special case of treaties transferring the exercise of sovereignty rights to international organizations.

### General principles

The major dispositions organizing the treaty-making power and the procedures to be followed are the paragraphs 1 and 4 of Article 37 of the Constitution:

> 'Art. 37. The Grand Duke shall make treaties. These shall not come into effect until they have been sanctioned by law and published in the manner laid down for the publication of laws.
>
> . . .
>
> . . .
>
> The Grand Duke shall make the regulations and orders necessary for carrying the treaties into effect in accordance with the procedure governing measures for the execution of laws and with the effects attaching to such measures, without prejudice to matters reserved to the law by the constitution . . .'

Concerning the Draft Treaty, we will leave aside the considerations concerning the treaty-making power proper (the external phase) and we will concentrate on the legislative adoption of the treaties, which is an essential condition of its effectiveness (internal phase).

---

[14] The basic reference concerning the different aspects of international law and the Luxembourg legal system are the works of P. Pescatore, and especially the book: P. Pescatore: *Conclusion et effet des traités internationaux, selon le droit constitutionnel, les usages et la jurisprudence du Grand-Duché de Luxembourg*, Luxembourg, Office des Imprimés de l'Etat, 1964. See also: P. Majerus, *op cit.*, pp. 164-170 and 233-234.

Any treaty negotiated and ratified by the Grand Duke and the government must be submitted to the Parliament for approval before it can produce its full effects. This approval takes the form of a law, adopted according to the normal legislative procedures. This means that the government must secure a stable majority in favour of the adoption of the treaty already at the negotiation stage. 'This political responsibility of government — which expresses itself by the necessity to have a majority in parliament — linked to the specific control procedure created by Article 37 of the constitution, has as a consequence that international treaties can only be negotiated in a spirit of trust and responsibility in relation with parliament: the parliamentary control organized by Article 37 thus has also a preventive action, an orientation function, in the sense that government cannot negotiate treaties without anticipating the reactions of the organs of the legislative power, Council of State and Parliament.[15]

The adoption procedure can be briefly summarized as follows: the draft bill is submitted by government to the Council of State which drafts an advice. The revised draft bill (projet de loi) is then sent to Parliament which discusses it according to its internal regulations (discussion in standing committee(s) and in the plenary; voting procedures . . .). The official representatives of certain interests touched by the treaties (chambres professionnelles) are also consulted.

After the approbation of the adoption bill expressed by a positive vote of Parliament, the treaty is ratified and promulgated by the Grand Duke and published, together with the text of the Treaty, in the *Official Journal of Luxembourg (Mémorial).*

## Transfer of the exercise of sovereignty rights

In the context of the constitutional revision of 1956 and the discussions around the ECSC and the European Defence Community, a special disposition concerning the limitation of sovereignty entailed by the transfer of certain powers to international organizations was included, the second paragraph of Article 37 that says:

> 'The Treaties referred to in Chapter III, § 4, Art. 49A, shall be sanctioned by a law voted under the conditions laid down in Article 114, 5.'

As we have seen above, Article 49A deals with institutions governed by international law to which the exercise of certain sovereignty rights is transferred. Although it is not clearly indicated who is competent to determine whether a treaty fits into this category, it is accepted that Parliament decides itself by a simple majority vote whether to activate this special procedure. Use of this article has been made for the approbation of the Rome Treaties.

The reference to Article 114, 5 is in fact a reference to the procedure for constitutional revision. The article says that in the context of an amendment procedure:

> '. . . the Chamber shall not proceed to the vote unless at least three-quarters of the members comprising it are present, and no amendment shall be adopted unless it is backed by at least two-thirds of the votes'.

This means that treaties having a substantial impact on national sovereignty must be adopted according to the reinforced quorum and majority rules foreseen for constitutional revision. According to P. Pescatore, the justification for this disposition is evident, 'the devolution, to international organizations of prerogatives inherent to national sovereignty affects the independence of the State and the constitutional equilibrium. Therefore the approbation of such treaties must be submitted to conditions similar to those applicable to the vote of constitutional revisions'.[16]

It seems clear that, seen the important changes introduced by the Draft Treaty in the working of institutions and in the role played by the Member States, it falls within the category of treaties to be

[15] P. Pescatore, *op.cit.*, p. 50.
[16] P. Pescatore, *op, cit.*, p. 68.

adopted according to the special procedure organized by Article 37 para. 2. This obviously reinforces the pressure on the government to secure a consensus on the dispositions of the Draft Treaty. It must be noted that in the present political set-up, the support of the three main political parties represented in Parliament, the Christian Democrats (CSV), the Socialists (LSAP) and the Liberals (DP), would be sufficient to ensure a three-quarters majority.

## Conclusions

So far, the European discussion around the Draft Treaty adopted in 1984 by the European Parliament has received relatively little public attention in Luxembourg, in spite of the efforts of the European Movement to mobilize support for this effort to unblock the process of European integration.[17]

It is generally acknowledged that the present political-institutional set-up of the EC is no longer adequate in view of the important problems to be solved at a European level (convergence of economic policies; development of advanced technologies and management of the industrial restructuring process). It is also clear that the necessary political and economic economies of scale can only be produced through the strengthened solidarity between the Member States of the Community which are linked in a 'communauté de destin'.

The growing realization of the precariousness of both values and prosperity of western Europe in a turbulent international environment has prompted an acute awareness of the need for a profound institutional reform allowing the Community to regain its policy-making capacity, even if there is less agreement on the ways to proceed.[18]

In this context, the Draft Treaty establishing the European Union provides an important perspective about which objectives are to be achieved. In the vote on 14 February 1984 on the adoption by the European Parliament of the Draft Treaty, all six Luxembourg MEPs, representing the three major parties, voted in favour of the proposed text. This positive vote symbolizes less an adhesion to all the individual stipulations contained in the Draft Treaty than a political support for the realization of the middle term objectives to be achieved.[19] Identically, the electoral programmes for the 1984 European elections of the three parties represented in the EP have indicated the willingness of these parties to support the realization of the European Union.

In a recent article, Prof. J-P. Jacqué explains why, in the view of the drafters of the Treaty, the Member States should not feel threatened in their substance by the reform proposal of the European Parliament. In this view,

> 'the Union is not seen as an entity which should replace the Member States. On the contrary, the Member States retain their sovereignty, granting the Union only a limited transfer of competences. The division of competences between the Union and the Member States is arranged according to the principle of subsidiarity, i.e. that interventions of the Union are subsidiary to those of the States. The competence of the Union is limited to those spheres where its intervention is more effective than that of the States acting independently, notably where the scope or effects of the actions in question go beyond national boundaries'.[20]

---

[17] See: 'Le Mouvement Européen place ses espoirs dans le Traité d'Union Européenne', *Luxemburger Wort*, 28 April 1985.

[18] See also: J-M. Hoscheit: Réforme institutionnelle et présidence, in: J-M. Hoscheit (ed.): *The Impact of European Affairs on National Administrations — the case of the Presidency*, Maastricht, European Institute of Public Administration, 1984, Working Document 84/03.

[19] See the interview with the Luxembourg member of the Institutional Committee of the EP, Mr N. Estgen, *Luxemburger Wort*, 22 April 1985, 'Wenn ich, wie alle meine Luxemburger Kollegen, für den Text als Ganzes gestimmt habe, so weil ich als mittelfristige Lösung keine andere Alternative sehe'.

[20] J-P. Jacqué: The Draft Treaty establishing the European Union, *Common Market Law Review*, 22, 1985, p. 27.

Be it as it may, the anxiety persists, especially in smaller Member States, that the Union, once instituted and working according to the procedures designed by the EP, would develop a dynamic of its own, over which these States would not retain any substantial measure of control. This uncertainty, if it does not entail a fundamental rejection of the Draft Treaty in Luxembourg, nevertheless contributes to some prudence at the official level. The Luxembourg Foreign Minister, Mr J.F. Poos, pointed out, while receiving the Institutional Committee of the EP, that the Grand Duchy would be ready to support the Draft Treaty as far as it would harm in no way the vital interests of the country.[21]

As the discussions concerning the issues addressed in the Draft Treaty have started with renewed impetus only quite recently, it is certainly too early to judge whether it will be possible to convince the Luxembourg population that potential costs in terms of losses in sovereignty will be outweighed by political and economic gains as a consequence of the deepened solidarity in a European Union. Certainly, as former Prime Minister Pierre Werner points out, 'the improvement of the institutional aspects of the Union supposes a political doctrine which takes into due consideration the national realities while transcending them in the common interest'.[22] Whether this synergy between national aspirations and common interests can be created in the context of the European Union designed by the European Parliament remains an essential question to which convincing answers must be given in the public debate on the Draft Treaty and its ultimate objectives.

[21] La Commission institutionnelle du P.E. à Luxembourg: Beaucoup d'interrogations, *Tageblatt*, 7 April 1985.

[22] P. Werner: Idéalisme et réalisme européens, *Echos de l'Europe*, Nos 10-11, 1984. 'L'amelioration des aspects institutionnels de l'union suppose une doctrine politique tenant compte des réalités nationales, mais les dépassant dans l'intérêt commun'.

# Chapter X – The Netherlands and the Draft Treaty establishing the European Union

*by Ernst M. H. Hirsch Ballin and Cécile J. M. Verkleij*

## Introduction

This contribution is in three parts. In Part I we consider whether the Draft Treaty establishing the European Union (adopted by the European Parliament on 14 February 1984) is compatible with Dutch constitutional law. Our conclusion is that from this point of view there are no major obstacles to the Netherlands becoming a party to the proposed Treaty. In fact, for more than 30 years Dutch constitutional law has been unequivocally open to the development of the international legal order; and progress in this sphere has been greatest in the European context. In Part II we examine the reactions to the Treaty in the Dutch political arena. In general, the response has been favourable, even though the feasibility of the project is viewed with some scepticism.

## 1. Constitutional aspects

### *a. Basic principles*

A large part of Dutch constitutional law is codified in the Constitution,[1] and it is here that the rules governing the relationship between international and Community law and Dutch law are laid down. Specifically, these rules are set out in Articles 90 to 94, the first of which stipulates that:

'The Government shall promote the development of the international legal order.'

This provision has figured in the Constitution since the 1953 revision[2] and was not substantially affected by the complete revision of 1983. At first sight it appears to amount to no more than an exhortation to the Government to concern itself with the international legal order. However, although it certainly can be read as such, its implications go much further: for it can be regarded as the guiding principle behind Dutch foreign policy in the sense that foreign policy is directed primarily towards the development of the international legal order.[3] Only shortly after the principle was written into the Constitution in 1953, this pursuit of an international legal order, which is paramount in

[1] Grondwet voor het Koninkrijk der Nederlanden, 24 August 1815, as last amended by Decree (Besluit) of 17 February 1983, Stb. 1983, 70. Hereafter referred to as Grondwet.
[2] Second paragraph of Article 58, Grondwet 1953, Stb. 1953, 295.
[3] T. Koopmans, 'De Europese Gemeenschappen en het Nederlandse Staatsbestel', RM Themis 4/5 (1980), at 364.

Dutch thinking about international questions in general, took on real substance with the drafting of the Treaties establishing the European Economic Community and the European Atomic Energy Community.[4] The Netherlands has also been an active member of the Council of Europe and has played a leading role over the past decades in the protection of human rights at the international level. For the Netherlands the most concrete and far-reaching instance so far of the development of the international legal order is European integration, in particular as it has progressed under the Community Treaties, and Article 90 of the Constitution can serve as the basis for its active involvement in further progress in this field. In the course of the debate on the revision of the Constitution the Government noted, *à propos* of this guiding principle, that:

> '. . . the proposed arrangements allow for the possibility of further development of the European Community'.[5]

The Draft Treaty establishing the European Union is an instance of such further development, and the Dutch Constitution is fully capable of accommodating this under the terms of Article 90.

Article 90 has to be read in conjunction with Article 92, which can be regarded as an amplification of Article 90 in that it specifies a method for developing the international legal order. Article 92 reads:

> 'Legislative, executive and judicial powers may be conferred on international organizations by or pursuant to a treaty, subject, where necessary, to the provisions of Article 91 (3).'

This reference to conferring 'legislative, executive and judicial powers' was introduced under the 1953 revision of the Constitution.[6] Although the underlying principle was presumably the traditional three-way separation of powers, the nature of the task or tasks to be conferred is passed over in silence. Indeed Duynstee writes in his commentary on Article 67 of the 1953 Constitution (the first paragraph of which was incorporated substantially unchanged in Article 92 of the 1983 Constitution):

> 'There is a whole range of "powers conferred" on international organizations that can most definitely be classed as "legislative, executive and judicial"; this is a classification which happens to apply to the performance of almost any task.'[7]

Article 92, then, allows a new international organization to be assigned not only the normal executive powers which any international organization enjoys but also more substantial governmental powers;[8] it can be said to provide for both substantial and non-substantial powers to be conferred.[9]

Inherently, Article 92 is of fundamental importance only in respect of substantial governmental powers. It implies that the development of the international legal order referred to in Article 90 may result in the transfer of sovereign powers to international organizations. It can, of course, be argued that substantial powers could have been conferred on the European Communities without any express provision in the Constitution. However, where powers as far-reaching as those provided for in the Draft Treaty are to be conferred, it is very important that the Dutch Constitution should contain the specific provision of Article 92. The same view was expressed by the Netherlands Government during the preparatory stages of the 1983 constitutional revision:

> 'The Cals-Donner Royal Commission (Staatscommissie), following the example of de Proeve, proceeds from the assumption that legislative, executive and judicial powers can be conferred on international organizations even without any such provision in the Constitution.

---

[4] Together with the Treaty establishing the European Coal and Steel Community they will be referred to as the Community Treaties.

[5] TK 1979-80, 15049 (R 1100), No 7, at 2.; TK 1979-80, 15049 (R 1100), No 10, at 1.

[6] First paragraph of Article 67, Grondwet 1953.

[7] Duynstee himself preferred to speak of the transfer of 'sovereignty in the true sense'. See F.J.F.M. Duynstee, *Grondwetsherziening 1953, De nieuwe bepalingen omtrent de Buitenlandse Betrekkingen in de Grondwet* 8 (Deventer: Kluwer, 1954).

[8] P.J. Oud, *Het constitutioneel recht van het Koninkrijk der Nederlanden*, Part II, at 343 (Zwolle: Tjeenk Willink, 2nd ed. 1970).

[9] C.A.J.M. Kortmann, *De Grondwetsherziening 1983*, at 256 (Deventer: Kluwer, 1982).

> The view is that the power to do so can be derived from the provisions relating to treaties contained elsewhere in the Constitution. Although we do not reject this view as such, we should like to point out that the relevant article was included in the Constitution in 1953 precisely because the powers to be conferred on international organizations might well assume such proportions in the future that the constitutionality of conferring them could be challenged if no express provision existed. In our view this consideration is no less important today than it was in 1953'[10]

Since the Draft Treaty involves conferring extensive powers on the institutions of the Union, it is reassuring to note that this is compatible with the Dutch Constitution.

## *b. The Dutch Constitution and the incorporation of international law*

The incorporation of international law into Dutch law is governed by Articles 93 and 94 of the Constitution. The procedure which they prescribe could be termed monistic, which is to say that international law is directly incorporated without transposition into Dutch legislation. The rules of international law thus have 'internal effect' in Dutch law.[11]

The articles in question read as follows:

> *'Article 93*
> Provisions of treaties and of decisions by international organizations which may be binding on all persons by virtue of their content shall have binding effect upon publication.
> *Article 94*
> Where the application of any legal provision in force in the Kingdom is incompatible with the provisions of treaties or of decisions by international organizations which are binding on all persons, that provision shall not apply.'

The monistic manner of incorporation is apparent in Article 93, whereby the provisions of international law apply in Dutch law immediately upon their publication without the need for specific national legislation. Besides this internal effect, these two articles also reveal two further features of the Dutch system: first, that the monistic principle applies only to provisions of treaties or of decisions by international organizations 'which may be binding on all persons' (Article 93); and second, that international law takes precedence over Dutch law where the two conflict, although again only in the case of 'provisions which are binding on all persons' (Article 94). Such provisions are those which are so worded that they may be relied upon in the national courts, in other words they are 'self-executing' treaty provisions.[12]

The Netherlands is the only Member State of the European Communities whose constitutional system expressly provides for international law to take precedence over national law where the two are in conflict.

To what extent is this significant for the incorporation of Community law into Dutch law? The answer depends on what is held to constitute the essential basis for such incorporation and will be equally valid for the incorporation of the law flowing from the Draft Treaty; hence its importance in the present context.

There are two views on this question in the Netherlands. The first is that Community law, and international law in general, is subject to Dutch constitutional law and consequently has effect by virtue

[10] TK 1977-78, 15049 (R 1100), No 3, at 9; see also P. J. Oud, *supra,* at 336 and 341.
[11] F.C.L.M. Crijns, *Het Europese perspectief van het Nederlandse staatsrecht 16-17* (Zwolle: Tjeenk Willink, 1984).
[12] Cf. H.G. Schermers, *Judicial Protection in the European Communities* § 156, at 76 (Deventer: Kluwer, 2nd ed. 1980).

of the fact that Articles 93 and 94 give it internal effect.[13] Advocates of the second view, on the other hand, argue, that Articles 93 and 94 are not necessary for Community law to have effect in Dutch law, but that Community law has internal effect by virtue of the autonomous legal order brought into existence by the Community Treaties.[14] This has been the view taken by the Court of Justice of the European Communities.[15]

The contradiction between the two positions is, in our view, apparent rather than real. For Community law to have effect in its own right in national law[16] implies that the national constitution — which, after all, is what ultimately governs the national legal order — makes some provision for it to have internal effect. Whether this occurs by virtue of an express amendment to the Constitution or by virtue of a change in unwritten constitutional law flowing from accession to the Community Treaties is of secondary importance. From the standpoint of Community law the essence is that the existence of the Community legal order has this (Community) effect, while from the point of view of national constitutional law the weightier consideration will naturally be the constitutional change involved. And in the case of the Netherlands the Constitution had already undergone the change that would otherwise necessarily have resulted from accession to the EEC.

The law that may flow from the Draft Treaty establishing the European Union is, at all events, not dependent for its incorporation on transposition into Dutch law. In this respect the Dutch Constitution poses no obstacle to the exercise of the powers which the Draft Treaty proposes to confer on the institutions of the Union.

## *c. Approval of treaties under the Dutch Constitution*

Since legislation is not required for international law to be incorporated into Dutch law, the Dutch Parliament (States General), as co-legislator, is not involved in the process of incorporation. However, this does not mean that Parliament has no part to play where international law affects the Dutch legal order. Its role lies in the approval of treaties.[17] This is governed by Article 91 of the Constitution, the first paragraph of which reads:

> 'The Kingdom[18] cannot be bound by treaties nor can these be denounced without the prior approval of the States General. The cases in which approval is not required shall be laid down by law.[19]

This means that treaties which require ratification cannot be ratified until approval has been obtained and treaties which do not require ratification can be concluded only subject to the (required) approval being granted.[20]

The Draft Treaty will of course have to receive the approval of Parliament.

This can be done in two ways. They are dealt with in Article 91(2), which reads:

> 'The manner in which approval is to be granted shall be laid down by law, which may provide for implied approval.'

---

[13] D.H.M. Meuwissen, *De Europese Conventie en het Nederlandse recht* 61-71 (Leiden: Sijthoff, 1968); D.H.M. Meuwissen, 'De Europese Conventie en het Nederlandse recht', in 73 *Mededelingen van de Nederlandse Vereniging voor Internationaal Recht* 52 (Deventer: Kluwer, 1976). The Government and some Members of the Second Chamber also seem to incline towards this view; see TK 1979-80, 15049 (R 1100), No 7, at 16-17.

[14] Crijns, *supra*, at 5 and 23-24, and authors, cited; Duynstee, *supra*, at 17.

[15] Case 6/64 *Costa* v *ENEL* 1964 [ECR 585], 593-594; Case 26/62 *van Gend en Loos* v *Nederlandse administratie der belastingen*, 1963 [ECR 1], 12; Case 106/77 *Amministrazione delle Finanze dello Stato* v *Simmenthal*, 1978 [ECR 629] 644.

[16] Which is what Article 42 of the Draft Treaty, expressly provides.

[17] Treaties are deemed by the Government to be 'all agreements which, regardless of their form, are binding on the State in accordance with the criteria of international law': TK 1977-78, 15049 (R 1100) No 3, at 6.

[18] Kingdom in the sense of Article 3 of the Statuut voor het Koninkrijk der Nederlanden; TK 1977-78, 15049 (R 1100), No 3, at 6.

[19] See TK 1977-78, (R 1100), No 3, at 6.

[20] Kortmann, *supra*, at 253; TK 1977-78, 15049 (R 1100), No 3, at 7.

Provision is thus made for implied approval and express approval with only the former specifically mentioned, as an alternative to the latter.[21]

As no law of the kind referred to has yet been passed, the relevant article of the 1972 Constitution (Article 61) remains in force, but only in respect of implied approval.[22] A treaty is deemed to have been approved if, within 30 days of its having been laid before Parliament, no request is made by or on behalf of either Chamber or by at least one-fifth of the members of either Chamber (i.e. 30 members of the Second Chamber or 15 members of the First Chamber) that it should be expressly approved.

However, the Constitution contains no specific rules governing express approval, since Article 61 of the 1972 Constitution has ceased to apply in this respect and no other relevant provisions exist. During the debate on the amendment of the Constitution the Government stated that the substance of the law governing the manner of approval to be adopted pursuant to Article 91(2) would not be markedly different from the existing arrangements[23] laid down in Article 61 of the 1972 Constitution, whereby express approval must be given by an Act of Parliament.[24]

In view of the profound effect that the Treaty will have on Dutch law and the Constitution, it is thus clear that express approval will have to be given in the form of an act of approval.

Such an Act goes through the same parliamentary procedures as any other bill, in accordance with Article 82 of the Constitution. Under the terms of the first paragraph of that article, a bill for approval of a treaty may be introduced 'by or on behalf of the Crown[25] or by the Second Chamber of the States General'. In the case in point, then, a bill for approval of the Draft Treaty can be introduced by the Government or by one or more members of the Second Chamber — the latter provision being contained in Article 82(3). In fact, the Second Chamber has never yet made use of its right of initiative in respect of such a bill; and there is little need for it to do so. All of this presupposes that the Draft Treaty will not conflict with the Constitution. Approval of a treaty that does conflict with the Constitution is dealt with in Article 91(3), which reads:

> 'Where a treaty contains provisions that conflict with the Constitution or which will inevitably lead to conflicts with it, approval by the Chambers shall require at least a two-thirds majority of the votes cast.'

When the Treaties establishing the European Communities were approved[26] no conflict was held to exist between their content and the Constitution,[27] since the latter allows for legislative, executive and judicial powers to be conferred on international organizations. The special requirement for a two-third majority[28] did not, therefore, apply. In fact, the only occasions when this procedure has been used were for the abortive Treaty of 27 May 1952 for the establishment of a European Defence Community and the Treaty concluded on 15 August 1962 in New York between the Kingdom of the Netherlands and the Republic of Indonesia regarding Western New Guinea.[29]

---

[21] TK 1977-78, 15049 (R 1100), No 3, at 7: 'It was thought advisable to mention implicit approval specifically in the second paragraph in order to remove all possibility of doubt as to its admissibility'. Apparently no such doubt was felt to be possible in respect of explicit approval.

[22] Subparagraph (a) of the first paragraph of Additional Article XXI, Grondwet.

[23] I.e. existing at the time when the 1972 Constitution was still in force.

[24] TK 1979-80, 15049 (R 1100), No 10, at 3; TK 1979-80, 15049 (R-1100), No 7, at 7 and 8.

[25] The 'Crown' means the inviolable part of the Government, which is covered by ministerial responsibility. See A.W. Heringa and T. Zwart, *Grondwet 1983*, at 111 (Zwolle; Tjeenk Willink, 1983).

[26] Act of 21 February 1952 approving the Paris Treaty of 18 April 1951 establishing the European Coal and Steel Community and the accompanying Annexes, Protocols and the Convention on the Transitional Provisions, Stb. 1952, 83; Act of 5 December 1957, approving the Treaty establishing the European Economic Community and the accompanying Annexes, Protocols and Convention, Stb. 1957, 493; Act of 5 December 1957 approving the Treaty establishing the European Atomic Energy Community and the accompanying Annexes and Protocols, Stb. 1957, 494.

[27] TK 1956-57, 4725, No 9, at 17; TK 1956-57, 4725, No 14, at 8.

[28] At the time when the EEC and Euratom Treaties were approved this was governed by Article 63, Grondwet 1956.

[29] Approved by the Act of 22 January 1954 (Stb. 25) and the Act of 14 September 1962 (Stb. 363) respectively. For the application of this special approval procedure, see TK 1979-80, 15049 (R 1100), No 7, at 11 ( = *Naar een nieuwe Grondwet*), Documentatiereeks Vol. 26, at 69.

Under Article 81 of the Constitution, acts are passed jointly by the Government and Parliament; at present the Constitution does not make any provision for referendums on legislation.[30] Most bills are brought in by the Government, although this right is also enjoyed by the Second Chamber under the first paragraph of Article 82. In theory, therefore, it is possible for an Act approving a treaty to be passed on a proposal from the Second Chamber. In practice, however, this provision is of very little significance, since only the Government can conclude a treaty and a parliamentary initiative is likely only if, after signing a treaty, the Government judges that it need not be ratified but fails to convince Parliament that there are sound reasons for not doing so. Moreover, bills introduced by the Second Chamber, like any others, have to win acceptance by the First Chamber and the Government.

To sum up, then, the Netherlands can become a party to the Treaty establishing the European Union only if it is approved by both the Government and Parliament.

## *d. Concurrent powers under the Draft Treaty and Article 91 of the Constitution*

Following these general reflections on the relationship between the Draft Treaty and Dutch constitutional law, we propose to examine in this next section a number of specific questions raised by the Draft Treaty. The first point to note is that the Union is to enjoy considerable 'concurrent competences' under the Treaty (Articles 53 and 55, for example). Article 12(2) of the Treaty sets out a number of general provisions regarding such powers. They are governed by the principle of subsidiarity, which is meant to serve as a brake on the exercise by the institutions of the Union of the concurrent powers provided for. However, it is doubtful whether this brake can be effective since the first sentence of Article 12(2) stipulates that the Member States may not act where the Union has already legislated. Taken together with the principle of supremacy of Union law (Article 42 of the Treaty), this means that concurrent powers may grow into exclusive powers; at the very least, they contain the seeds of omnicompetence (*potentielle Allzuständigkeit*)[31] and open the way to centralist tendencies in the running of the Union.[32] Consequently, the national legislators who will have to decide whether or not to approve the Treaty — in the case of the Netherlands this means the Government and Parliament acting jointly — cannot assess precisely what powers they will be handing over. If a Parliament is to exercise its powers of approval in respect of the Treaty's substance, it must have some reasonably clear picture of the extent of the powers to be conferred on the Union. This is all the more true since the exercise of these very broadly defined concurrent powers may, in certain circumstances, lead to a conflict with the Constitution within the meaning of the third paragraph of Article 91 (see C above). In particular, this is liable to occur where concurrent powers of the Union affect basic rights anchored in the Dutch Constitution; an example is Article 60 of the Treaty, application of which could entail a restriction on the freedom of education guaranteed under Article 23 of the Constitution. Although the concurrent powers do not, in general, conflict with the Dutch Constitution, we share the view put forward by Wolfgang Wessels (and this would seem to apply to the Parliaments of all the Member States of the Community):

> 'After approval of the Union Treaty the national parliaments will not play any further role in the transfer of powers in further areas of State activity. Given the scope for wide interpretation offered by the subsidiarity clause, the extent of the concurrent legislative powers specified in particular fields and the scope for action open to the European Council in view of its virtually unlimited foreign policy powers, the Treaty makes the Union omnicompetent without providing sufficient

[30] A Royal Commission, established by the Royal Decree of 17 May 1982, Stcrt. 1982, . . . under the chairmanship of former Prime Minister Biesheuvel is considering proposals for introducing referendums.

[31] Ingolf Pernice, 'Verfassungsentwurf für eine Europäische Union', *Europarecht,* Vol. 2, 1984, at 131.

[32] Wolfgang Wessels, 'Der Vertragsentwurf des Europäischen Parlaments für eine Europäische Union', Europa-Archiv 8/1984, at 242.

guarantees for national parliaments, particular if the Court of Justice of the Union . . . should put a broad construction on the powers of the highest tier.'[33]

This means that if the Treaty is approved in its present form, the institutions and organs of the Union would be able to exercise powers under it whose extent was not envisaged at the time of approval by (among others) the Dutch Parliament. This is scarcely reconcilable with the purpose of parliamentary approval. The definition of the concurrent powers specifically provided therefore needs to be re-examined in detail.

## *e. The European Council and the position of the Dutch Prime Minister*

Under Article 8 of the Treaty the European Council, in which the Netherlands is represented by the Prime Minister, is to become one of the institutions of the Union. Article 32 of the Treaty confirms the present composition of the European Council, namely the Heads of State or Government of the Member States.

The European Council has changed the traditional division of responsibilities between the Prime Minister and the Foreign Minister in that the Prime Minister has to concern himself directly with European and foreign policy by virtue of his being a member of the European Council.

The Foreign Minister is the member of the Government responsible for coordinating foreign policy, including European policy. He thus has responsibility for ensuring optimum interdepartmental preparation of foreign and European policy. European policy is prepared and formulated at three interdepartmental levels:

1. the CEIA: the Coordinating Commitee on European Integration and Association, which is made up of officials;
2. the REZ: the Raad voor Europese Zaken (Council for European Affairs), which comes under the Cabinet;
3. the Cabinet itself.

The Prime Minister chairs both the Cabinet (Article 45 of the Constitution) and the Cabinet committees (first paragraph of Rule 17 of the Rules of Procedure of the Cabinet). The Foreign Minister is responsible for coordination on any matter raised in the REZ. The substance of decisions is dealt with by the REZ and only rarely in the full Cabinet.[34]

The Prime Minister, as presiding member of the Cabinet, is in charge of coordinating general government policy. He bears the prime responsibility for such coordination *vis-à-vis* the outside.[35]

Considering the respective tasks of the Prime Minister (coordinating general government policy, including foreign and European policy) and the Foreign Minister, it would appear essential that the latter should also be present at meetings of the European Council.

However, the institutionalization of the European Council under the Draft Treaty implies a more independent position for the Prime Minister in relation to the Cabinet and to the Foreign Minister in particular. This is hard to reconcile with the Constitution, which does not confer on the Prime Minister any power of independent action *vis-à-vis* the outside apart from his portfolio of Minister for General Affairs.[36] His position cananot be compared with that of the German Chancellor, who

---

[33] *Ibid.*

[34] M. *Kwast-van Duursen, 'De Minister-President en de Europese Raad', Internationale Spectator,* November 1984, at 658.

[35] TK 1978-79, 15424, No 1, at 2 and 3.

[36] Kortmann, *supra,* at 166 and 167; E.M.H. Hirsch Ballin, 'Reglement van Orde voor de Raad van Ministers', *Ars Aequi* 28 (1979) 10, at 606.

has the power to issue general instructions to his ministers (*Richtlinienkompetenz*) and can appoint ministers to his Cabinet, [37] nor with that of the British Prime Minister, who also appoints and dismisses ministers, and decides on the date for dissolution of the House of Commons, [38] or that of the French President, who has a direct mandate from the electorate by virtue of separate elections.[39] The way the European Council now operates — made up as it is of the Heads of State or Government together with the President of the Commission, assisted by the Ministers for Foreign Affairs and a Member of the Commission[40] indicates the difficult position in which the Foreign Minister is placed. If this were to be anchored in the Treaty, it would imply a shift in the division of responsibilities between the Prime Minister and the Foreign Minister. However, the problem is not insuperable, provided that both ministers understand that in matters dealt with by the European Council they may exercise their powers only in joint agreement. Any differences between them that they cannot clear up themselves will have to be settled by the Cabinet in accordance with its Rules of Procedure.

# 2. Political aspects

## *a. The current state of debate*

In the Dutch Parliament discussion of the Draft Treaty was slow to get under way. The Italian Chamber of Deputies gave its backing to the project on the very same day that it was adopted by the European Parliament, while the Belgian Chamber of Representatives followed suit shortly afterwards. The Danish Folketing also took little time in making up its mind, but there opinion ran in the opposite direction and on 29 May 1984 the draft was rejected by a large majority.

It was not until November 1984 that the Standing Committee on Foreign Affairs of the Second Chamber opened the procedure for examining the Treaty. After preparatory written proceedings the Committee, together with its counterpart in the First Chamber, held a hearing on 1 February 1985 at which members of the European Parliament's Committee on Institutional Affairs and members of the European Movement testified. This hearing is to be followed in March by a written and oral exchange of views with the Government. The time will then be ripe for a possible debate in the House.

In the meantime a number of statements have been made on the Treaty, both from government quarters and from individual members — notably during a debate held on 6 December 1984 on the Dublin meeting of the European Council. Other bodies such as employers' and workers' organizations have so far taken no more than preparatory steps towards a final decision on their position in 1985.

## *b. Attitudes of the political parties*

The Dutch Members of the European Parliament have, in general, vigourously supported the preparatory work on the Treaty. In the main, the attitude of politicians active in the domestic political

[37] T. Koopmans, *Vergelijkend Publiekrecht* 186 (Deventer: Kluwer, 1978).
[38] *Ibid.*, at 167-168.
[39] *Ibid.*, at 181.
[40] Solemn Declaration on European Union, signed by the European Council at its meeting in Stuttgart on 17-19 June 1983, and the statement regarding the definition of responsibilities made by the Dutch Foreign Minister; see Kwast-van Duursen, *supra*, at 660.

arena is also positive, although expectations among them as to its chances of becoming reality do not run very high.

The Prime Minister, Mr Lubbers (Christian Democrat), speaking in the First Chamber on 21 November 1984, said that, apart from the odd defect, the Treaty had many good points.[41]

In this connection G.J. Schutte — a member of the Gereformeerd Politiek Verbond, one of the smallest political parties, but a highly respected parliamentarian — remarked during a debate in the Second Chamber on the interim report by the Dooge Committee: 'In my view, Dooge is to Spinelli as reality is to Utopia . . . Is it not a waste of time and effort for the Dutch Parliament to devote its attention to the Spinelli draft, when it seems to have not the slightest chance of success among the Heads of Government, particularly in the newer Member States?'[42]

The major political parties (the Christian Democratisch Appel, the Social Democratic Partij van de Arbeid and the Liberal Volkspartij voor Vrijheid en Democratie), like the centre-left D'66 party, seem to be prepared to come down in favour of the Treaty. This, at least, is the direction in which the statements by party politicians and the party manifestos point. The parliamentary parties will set out their formal positions when the Standing Committee on Foreign Affairs considers the matters (see A). On 21 May 1984 Mr Voorhoeve, in the Second Chamber, spoke in favour of the Treaty on behalf of his parliamentary party (VVD), adding that the Netherlands should 'continue in its role as an advocate of closer European cooperation and contribute to the speedy ratification of this Treaty'. However, he also indicated some reservations regarding 'the problem of a two-speed Europe' raised by Article 82 and the section of the Treaty dealing with 'Policy for society'. The Liberal party's criticism here centred on the fact that, in its view, too many tasks were assigned to the Union in this sphere, which goes against the liberal ideal of deregulation.[43]

The general expectation is that the Dutch Second Chamber will aprove the Draft Treaty establishing the European Union by a comfortable majority, even though there may be some criticism on points of detail.

However, this is more likely to be with a view to lending weight to the argument for strengthening the European institutions, in particular the European Parliament and the Commission, than because the Treaty is expected to become reality in the near future.

## 3. Conclusions

A final assessment of the Dutch position on the Treaty — from both the constitutional and the political point of view — reveals a certain degree of ambiguity. On the one hand the Treaty is perfectly compatible with Dutch constitutional law, as express provision has existed since 1953 for the transfer of sovereign powers to international organizations and the development of the international legal order is one of the prime aims of Dutch foreign policy under the Constitution. In the political sphere, too, there is still a willingness to venture along new paths of European cooperation. On the other hand, there is an unmistakable tendency to give way to resignation as European integration marks time. Our impression is that this is at least partly reflected in the rather unhurried pace of the deliberations on the Treaty. The feeling is that a consensus on a substantial increase in powers for the Community institutions will be almost impossible to achieve between the governments in the enlarged Community. There is much greater willingness in this area among the six original Member States, but it is realized that opting for closer integration between only *some* of the Member States

[41] Hand. Ek 1984-85, at 177.
[42] Hand. TK 1984-85, at 2162 (6 December 1984).
[43] UCV97 (Vaste Comm. voor Buitenlandse Zaken), at 79-9 (21 May 1984).

would cause enormous complications. In addition there is a feeling that the Netherlands should go its own way on the problems that are of greatest general concern to the public — employment, peace and international security, and the distribution of wealth. This perhaps explains why a recent *Eurobarometer* opinion poll showed that the Dutch — despite their traditional pro-European attitude — are now more sceptical towards the idea of a United States of Europe than people in the other original Member States, although they still remain much more positive than the Danes or the British.[44]

The crucial issue for the creation of a European Union is, in our view, the question raised by Article 82 of the Treaty: the choice between stagnation or only slow-moving integration by a Europe of 10 or 12 members on the one hand and a closer Union of some of the Member States on the other. Given the wording of Article 82, it is left for the course of events to determine which option will be chosen. However, it is our impression that the countries which would be inclined *per se* to accept the Treaty are unlikely to wish to upset their relations with certain other of the present Member States. And the latter will be understandably reluctant to have to deal with a powerful bloc, such as would be formed by the European Union, within an otherwise unchanged Community. In these circumstances we are unable to see any great prospect of success for the Treaty, however favourably we may look on it. Its importance lies, in our view, in the fact that it gives form and substance to an ideal. It holds up to the governments and leaders of the Member States the goal that Europe's first parliament expects them to work towards, however, slow and laborious the process may be, an ever closer union.

[44] NRC Handelsblad, 18 January 1984.

# Chapter XI – The Draft Treaty establishing the European Union – Report on the United Kingdom

*by David Edward, Richard McAllister and Robert Lane*

## 1. Introduction

This report is in three parts. Part I deals with the question whether, assuming that the necessary political will exists, there are any strictly legal or constitutional obstacles to the United Kingdom's accession to the European Union. Our conclusion is that there are no such obstacles.

In Part II, we consider whether the political will exists. Our conclusion is that, for the time being at any rate, it does not. The United Kingdom Government has not yet taken a policy decision on the Draft Treaty, either in principle or in detail, but it is already reasonably clear that the government's position is likely to be unfavourable. Apart from the Liberal-SDP Alliance we have been unable to identify any substantial body of opinion, in Parliament or in the country generally, which favours the proposal or is even prepared to take it seriously.

Part II also considers the ways in which the Draft Treaty might reach 'the political agenda' in the United Kingdom.

In Part III, we try to explain the negative character of British attitudes, and we express some reservations of our own about the Draft Treaty.

One of the misfortunes of those who comment on European affairs in the UK is that they run the risk, if they appear enthusiastic, of being called 'Euro-fanatics' at home or, if they do not, of being called *'anti-communautaire'* elsewhere in Europe. Our report may appear negative in tone and may therefore disappoint those who look for a more positive response from the United Kingdom. But we feel that it is more important for us to state the problems, as we see them, frankly and realistically than to refrain from critical comment as a kind of personal pledge of loyalty to the Community. We believe that the cause of European Union will not be promoted, and may indeed be hindered, by sweeping the difficulties under the carpet.

## 2. Legal and constitutional implications

For the United Kingdom, the Draft Treaty establishing the European Union, like the Treaties of Paris and Rome, presents few problems of accession or incorporation. The constitutional difficulties, stemming from a largely unwritten constitution and the doctrine of the absolute supremacy of Parliament, concern entrenchment of the Treaty as an autonomous and paramount legal order.

## *a. The power to enter into the European Union*

It is almost sufficient to say that, in relation to external affairs, the United Kingdom remains a monarchy. The external treaty-making power is a prerogative right of the Crown, which cannot be impugned within the Kingdom in or by the courts.[1] As a corollary of the doctrine of Parliamentary supremacy, however, treaties are not directly applicable within the Kingdom, and the courts cannot take judicial notice of them until they are embodied in statutes enacted by Parliament. It has recently been indicated that English courts will recognize principles of customary international law as forming part of English law,[2] but this does not include treaty obligations; for these, legislation is necessary.

The legal situation was best summed up by Lord Atkin, sitting in the Judicial Committee of the Privy Council (then the 'Supreme Court' of the British Empire):

> 'Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law. If the national executive, the government of the day, decide to incur the obligations of a treaty which involve the alteration of law they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes. To make themselves as secure as possible they will often in such cases before final ratification seek to obtain from Parliament an expression of approval. But it has never been suggested, and it is not the law, that such an expression of approval operates as law, or that in law it precludes the assenting Parliament, or any subsequent Parliament, from refusing to give its sanction to any legislative proposals that may subsequently be brought before it.'[3]

Thus, the power of accession to the European Union is exclusively that of the Crown (i.e., *de facto*, the government) independent of Parliament. But the power of implementation, or of incorporation, belongs exclusively, in turn, to Parliament.

## *b. The power to implement the European Union*

The honouring of treaty obligations in the United Kingdom is both facilitated, and at the same time imperilled, by the doctrine of Parliamentary supremacy. According to that doctrine, there is no law which Parliament cannot enact, or repeal, in its ordinary legislative capacity; it can make or unmake any law whatsoever.

In elucidating the doctrine, Dicey formulated three central propositions:

> '*First*, there is no law which Parliament cannot change . . . acting in its ordinary legislative character. A Bill for reforming the House of Commons, a Bill for abolishing the House of Lords, a Bill to give London a municipality, a Bill to make valid marriages celebrated by a pretended clergyman, who is found after their celebration to be not in orders, are each equally within the competency of Parliament, they each may be passed in substantially the same manner, they none of them when passed will be, legally speaking, a whit more sacred or immutable than the others, for they each will be neither more nor less than an Act of Parliament, which can be repealed as it had been passed by Parliament, and cannot be annulled by any other power. *Secondly*, there is under the English constitution no marked or clear distinction between laws which are not fundamental or constitutional and those laws which are fundamental or constitutional . . . *Thirdly*,

---

[1] See, for example, *Rustomjee* v *The Queen* [1876] 2 QBD 69, per Lord Coleridge, CJ, at p. 74 (CA). On the treaty-making power, and the Community Treaties in particular, see *Blackburn* v *A-G* [1971] 1 WLR 1037; 2 All ER 1380; CMLR 784 (CA), and *McWhirter* v *A-G* [1972] CMLR 882 (CA).

[2] *Trendtex Trading Corp* v *Central Bank of Nigeria* [1977] QB 529; 1 All ER 881 (CA). See the earlier doctrine as enunciated by Lord Atkin in *Chung Chi Cheung* v *The King* [1939] AC 160 at p. 167 (PC): '. . . so far, at any rate, as the courts of this country are concerned, international law has no validity save in so far as its principles are accepted and adopted by our own domestic law.'

[3] *A-G Canada* v *A-G Ontario* (Labour Conventions), [1937] AC 326 at pp. 347-8 (PC).

> there does not exist . . . any person or body of persons, executive, legislative or judicial, which can pronounce void any enactment passed by the British Parliament on the ground of such enactment being opposed to the constitution, or on any ground whatever, except, of course, its being repealed by Parliament."[4]

Herein lies both the strength and the weakness of the United Kingdom constitution. The law recognizes no difference between constitutional laws, organic laws or ordinary laws. There is no hierarchy of norms; no law is 'a whit more sacred or immutable' than another. A Bill seeking the most fundamental constitutional change encounters no greater procedural obstacles than does one seeking to unite two or three English parishes. Indeed, a statute implementing the European Union could commence its Parliamentary progress as a Private Member's Bill, however unlikely that may be.

Nor are there substantive difficulties: if Parliament is supreme, it may delegate, or disable itself of, any particular power or powers it wishes. Such is the design and force, for the present Communities, of Section 2 of the European Communities Act 1972, which incorporated the Treaties of Paris and Rome.[5] But owing to the absence of any distinction between different types of laws, there exists in the United Kingdom constitution no means of entrenching legal norms. This is what Lord Scarman calls 'the helplessness of the law in the face of the legislative sovereignty of Parliament'[6] and it constitutes the apparently insurmountable problem for those who seek to draft and entrench a British Bill of Rights.[7]

The European Communities Act successfully incorporates the Community legal order in the United Kingdom for the time being but, at least according to the traditional theory of British constitutional law, it does not and cannot entrench it. The theoretical possibility of abrogation of the Community norm, by simple Parliamentary majority, remains constitutionally valid whatever the breach of Community law, and the threat of such a course from some British quarters is one of the causes of continued discomfort in viewing the commitment of the United Kingdom to the Communities.

The rigours of strict adherence to the doctrine of Parliamentary supremacy have been mitigated, in the view of some judges, by British membership of the present Communities. Lord Denning, Master of the Rolls, suggested in an *obiter dictum* in 1979 that the doctrine of implied repeal *(lex posterior derogat lege priore)* no longer operates in English law to nullify Community obligations in the face of unintentionally inconsistent subsequent statute law; for Parliament to abrogate the Community Treaties it must do so intentionally and expressly.[8] Implied support for this proposition is indicated in a more recent judgment of Lord Diplock in the House of Lords.[9] But it seems to be the case that, if Parliament chose to legislate explicitly, the courts could not refuse to give effect to its will. So long as Parliamentary sovereignty is indestructible by legislation or by any other means, constitutional theory can accommodate no more.

There is one possible procedure, as yet not fully tested in the courts, by which laws *may* become entrenched in the United Kingdom. It was not attempted in the enactment of the European Communities Act, but might be considered if the government sought to implement the European Union. What are called 'manner and form' statutes impose procedural restraints upon the future activities of Parliament in the manner prescribed by the statute. The area of sovereign power, as distinct from procedure, remains limitless; but by this theory, sovereignty is divisible between Parliament as ordinarily constituted and Parliament as constituted under the entrenched provisions of the manner and form statute.

Thus, according to this theory, Parliament could by statute incorporate the obligations of the European Union within the domestic system of the United Kingdom, and provide within the statute

---

[4] Dicey, *The Law of the Constitution*, 1965, 10th ed., pp. 88-91.
[5] 20 & 21 Eliz. II, c. 68.
[6] *English Law — The New Dimension*, 1974, p. 15.
[7] See, for example, Wade, *Constitutional Fundamentals*, 1980, pp. 22-40; Stacey, *A New Bill of Rights for Britain*, 1973.
[8] *Macarthys Ltd* v *Smith* [1979] 3 All ER 325 at p. 329; 3 CMLR 44 at p. 47 (CA).
[9] *Garland* v *British Rail Engineering Ltd* [1983] 2 AC 751 at p. 771.

itself that it may not be amended or repealed save by recourse to some specific procedure — say, a weighted majority in Parliament. Any ordinary (purported) statute subsequently seeking to abrogate the Union by repeal of the incorporating statute (or parts of it) would then be a nullity.

There has been some judicial recognition of manner and form restraints, particularly in the Commonwealth,[10] although some opinion denies their existence.[11] There is also some debate as to what may legitimately constitute such a restraint. Nevertheless, such a device might fruitfully be incorporated into any enabling statute for the European Union, and if successful would more closely align British constitutional adherence to Community norms to that of other Member States.

Subject to that, the question of United Kingdom accession to the European Union is ultimately a question of political reality rather than constitutional or legal theory. It would depend on the political will of the government of the day and the size of its Parliamentary majority. The risks for a government seeking to accede to the Union and to incorporate its provisions in domestic law are illustrated by the history of accession to the present Communities.

The election manifesto of the Conservative Party in 1970 and, after the election, the Conservative Government's White Paper. 'The United Kingdom and the European Communities', contained a commitment to entry if the terms were acceptable. After negotiation, the Government secured a majority of 102 in the House of Commons on a motion approving the principle of entry. On the second reading of the European Communities Bill, however, the Government's majority was reduced to 8, and the majority on third reading was only 17. Thus, notwithstanding accession, the obligations arising from accession were incorporated in domestic law by, but only by, the slimmest of margins.

Finally, we should briefly mention the theoretical possibilities of legislation by Private Member's Bill or by a Bill introduced in the House of Lords rather than the House of Commons.

The Government could not be compelled, against its will, to accede to the Union by a Private Member's Bill; nor would a Private Member's Bill seeking to incorporate the law of the Union in domestic law have any prospects of success against the will of the Government. The same applies to a Bill introduced in the House of Lords, where the Government does not necessarily command a majority, since the legislation would have to pass the Commons. The only usefulness of a Private Member's Bill would be as a means of stimulating debate.

It is possible that, if the Government were anxious to legislate and were uncertain of its majority in the House of Commons, a European Union Bill would be introduced first in the House of Lords, where it might receive more sympathetic consideration, so blunting the edge of opposition in the House of Commons. This is not probable. In the absence of a clear majority in the House of Commons, a Government would not be likely to attempt to legislate at all.

---

[10] See *A-G New South Wales* v *Trethowan* [1932] AC 526 (PC); *Harris* v *Minister of the Interior* [1952] 2 SALR 428 (SC); *Bribery Commissioner* v *Ranasinghe* [1965] AC 192 (PC); but *Kashavananda* v *State of Kerala* [1973] 1 SCR 231 (Indian SC).

[11] See, for example, Dicey, *supra*, at pp. 64-70; Wade, 'The Basis of Legal Sovereignty', *Camb.L.J.*, 1955, p. 172. See also *Ellen Street Estates* v *Minister of Health* [1934] 1 KB 590. The traditional view of Parliamentary sovereignty was most recently upheld in *Manuel* v *Attorney-General* [1983] Ch. 77. The case concerned the competence of Parliament in the patriation of the Canadian Constitution, and was not directly concerned with the validity of a manner and form restraint. In the course of his judgment Sir Robert Megarry, V-C, said (at p. 86), 'If I leave on one side the European Communities Act 1972 and all that flows from it, and also the Parliament Acts 1911 and 1949, which do not affect this case, I am bound to say that from first to last I have heard nothing in this case to make me doubt the simple rule that the duty of the court is to obey and apply every Act of Parliament, and that the court cannot hold any such Act to be *ultra vires*. Of course there may be questions about what the Act means, and of course there is power to hold statutory instruments and other subordinate legislation *ultra vires*. But once an instrument is recognized as being an Act of Parliament, no English court can refuse to obey it or question its validity'.

# 3. Socio-political assessment

This part of the report is divided into seven sections. Section 1 sets out the public reactions of Government ministers and, in summary form, the points made to us in informal discussion with Government sources. Section 2 deals with the political (as opposed to strictly legal) difficulties for a Government seeking to promote a Treaty for European Union, and with the ways in which the present Draft Treaty might reach the political agenda in Parliament. Section 3 deals with attitudes of the major UK political parties. It discusses in turn: the present attitudes of the four main parties; the likelihood of any significant changes of attitude in the near future; and the relationship of the views of MEPs on the one hand, and those of MPs and home-based party research departments and activists on the other. Section 4 sketches the views, in so far as they have been formulated, of leading interest groups. Section 5 deals with the European Movement. Section 6 comments on the attitudes of the media. Section 7 deals with public opinion as a whole.

## *a. The Government*

### Public attitudes

At the time of writing, the United Kingdom Government had not adopted a definite policy on the Draft Treaty. But a good indication of the Government's initial reaction has been given by Mr Malcolm Rifkind, Minister of State at the Foreign and Commonwealth Office and UK representative on the *ad hoc* ('Dooge') committee on institutions of the Community set up at the Fontainebleau Summit.

Answering a Parliamentary question in the House of Commons on 27 June 1984, Mr Rifkind said:

> 'Although there are some aspects of the Spinelli report to which we do not object, we have made it clear that there are some proposals that we cannot support. I draw special attention to the proposal to phase out the national veto after 10 years and the proposal to increase the powers of the European Parliament. We have made it clear that those are the two main recommendations that we cannot support'[12]

In answer to other Parliamentary questions, both Mr Rifkind and the Prime Minister have stressed the scope available under the existing treaties:

> The Prime Minister: 'We are not convinced of the need for a new treaty since the existing treaties provide plenty of scope for the further development of the Community.'[13]
> Mr Rifkind: 'Our view is that the existing treaties provide for the further development of the Community and we are not persuaded of the need for a new treaty.'[14]

At the time of the first debates in the European Parliament on the new treaty (September 1983), Mr Rifkind gave a yet more general view of the Government's approach:

> 'The European Parliament has focused our attention on the issue [how the Community can be improved] . . . in its debate on [the Spinelli] report which argues for a more elaborate Community structure with greater powers for its central institutions. That is not our approach. To us, institutions must be subservient to policies. Closer cooperation should not be forced but must grow out of practical ways in which as a Community we can work together for our common good. Substance and reality must come before form.'[15]

He went on to list some of the concrete areas where 'working together can pay real dividends.'

---

[12] Answer to Mr Proctor, *Hansard*, 27. 6. 1984, col. 988.
[13] Answer to Mr Body, *Hansard*, 14. 5. 1984, col. 1.
[14] Answer to Mr Lofthouse, *Hansard*, 21. 3. 1984, col. 452.
[15] Speech by Mr Rifkind to Scottish CBI members, Dundee, 23. 9. 1983.

## Informal indications

The public pronouncements quoted above show that the United Kingdom Government is likely to be opposed in principle to two to the fundamental features of the Draft Treaty: the phasing out of the veto and the increase in the powers of the Parliament. In informal discussion, other areas of concern have been identified, some of them no less fundamental. We set out the points as they have been made to us in summary form:

1. *Relationship with the Community Treaties:* There is nothing to prevent the parties to the Community Treaties agreeing to a new Treaty which would supersede the existing treaties. But such agreement must be unanimous. The provision in the Draft Treaty whereby it would take effect once ratified by Member States representing two-thirds of the population of the Community is contrary to international law (Articles 41 and 54 of the Vienna Convention on the Law of Treaties).

2. *Competence:* Articles 11 and 12 have the effect of making it considerably easier than it now is to give competence to the Union rather than proceed by cooperation among the Member States. It is not clear what sort of majority in Council would be required to make the step from cooperation to common action.

3. *Appointment of the Court of Justice:* Article 30 gives the Parliament the function of appointing half of the members of the Court, the other half being appointed by the Council. Not only would this destroy the convention that the Court of Justice is composed of judges representing each of the national law systems of the Community, but it is inherently objectionable for the legislature to appoint the judiciary. There is nothing comparable in the procedure for appointment of international tribunals. The nearest parallel is the nomination of candidates for judges on the European Court of Human Rights by the national groups in the Council of Europe Assembly — but those nominations are in effect made by the States parties. It is an almost universal constitutional practice in domestic law for the executive to appoint the judiciary, which, once appointed, is entirely independent. This provision would politicize the appointment of the judges in a most undesirable way.

4. *Legislation:* The effect of Article 38(4) seems to be that a Council draft amended by the Commission and adopted by the Parliament will pass into law unless the Council can muster a qualified majority to reject it.

5. *Budget:* The effect of Article 71(2) is that the procedure for adopting organic laws applies to amendment of the present system of own resources or creation of any new system to replace it. That gives the Parliament a substantial role in a decision which at present is in the hands of the Council and Member States (on a proposal by the Commission) under Article 201(EEC). Article 72 effectively abolishes the present distinction between obligatory and non-obligatory expenditure. Article 76 changes the present budgetary procedure and, as a result of the change brought about by Article 72, gives Parliament powers in relation to obligatory expenditure far beyond what it now has. By Article 76(2)(f) Parliament may on second reading reject by a qualified majority amendments adopted by the Council. This gives Parliament the last word on *all* budgetary issues and, in effect, the power to force the Member States to increase domestic taxation.

6. *The Commission:* In addition to its role in tabling amendments to legislation under Article 39, Article 40 gives the Commission the exclusive power to issue regulations and decisions required for the implementation of laws. It only has to inform Parliament and the Council. The Commission is also given the right to oppose amendments approved by Council or by Parliament to the budget on its first reading, such opposition having the result that the relevant arm of the budgetary authority must take a fresh decision by qualified majority on second reading. On the other hand, the Commission loses its exclusive right to initiate legislation: by Article 37(2) it must introduce a draft if asked to do so by Parliament or Council, or if it fails to do so, Parliament or Council may introduce a draft.

7. *Judicial review:* Article 43 extends the powers of review by the ECJ considerably. One point (which could be an improvement on the present situation) is that an equal right of appeal and equal

treatment is given for all the institutions before the Court of Justice. This would appear to have the effect of giving a right of action against the Parliament, which does not now exist in a number of instances. The article gives the Court jurisdiction to impose sanctions on a Member State 'failing to fulfil its obligation under the law of the Union'. Similar power is given to the European Council in cases of persistent violation of fundamental laws, by Article 44. In relation to fundamental laws, under Article 4 the Union is to take a decision on its accession to the European Convention on Human Rights (ECHR) and the UN Covenants. The UK Government has hitherto strenuously opposed the idea of Community accession to the ECHR and would have similar objections to its accession to the covenants.

8. *Monetary matters:* The Draft Treaty envisages radical moves towards monetary union under its provisions on the European monetary system and fund. Participation would be obligatory as would the partial election of national reserves to the EMF. The role of the ECU would be expanded to that of a reserve currency.

9. *Defence:* The objectives of the Draft Treaty refer to security and defence matters. These are not elaborated in any coherent manner but there are references to cooperation in fields ranging from arms sales, MBFR and disarmament to general security (Article 9). These aims are unlikely to be acceptable to all the Member States.

10. *Forms of cooperation:* The Draft Treaty proposes two levels of combined action by Member States: common action and cooperation, the former referring to areas where the Union has exclusive compentence. Political cooperation itself is implicitly covered by cooperation but both headings remain obscure at key points in the Draft Treaty.

11. *General:* The Draft Treaty attempts to codify a far wider range of activities than is currently covered by the Community Treaties but without sufficient detail to make for consistency or clarity. In addition, it allows for operational practices to be decided by institutions and other bodies at a later stage. This presumably means that the ultimate power to determine the shape of Union institutions would rest with the Parliament.

## *b. Parliament*

We have suggested in Part I that when a Government has made up its mind and has a reasonable majority in the House of Commons, it can do almost whatever it wishes. However, in the 1970s and 1980s, it has become less clear that this is so. Situations have arisen where a Government has needed to rely on the support or benevolent neutrality of other groups, the 'Lib-Lab Pact' of 1977/78 being one notable example. While this is not in itself unprecedented, the European Community has become a new and separate ideological issue in British politics, and has already been responsible for upsetting what were once thought to be the 'normal' processes of government in the United Kingdom.

It is worth recalling that, after accession in 1973, the issue of membership did not vanish from the political agenda in the United Kingdom: instead, new precedents were set which might be followed again over this or any other proposal for European Union. In particular, in 1974 the Labour Party committed itself in its election manifesto to renegotiate the terms of entry and to hold a referendum on them. After the election the Labour Government declared itself bound by the result of the referendum. This, it has been held,[16] had the effect of usurping the sovereignty of Parliament. It certainly makes it even more difficult to define with any precision where the law stops and politics begin!

It may well be that, even if a future Government were committed to a Treaty for European Union and secured the approval of Parliament, it would now also feel bound to submit to a binding referen-

[16] Budge, *et al.*, *The New British Political System*, 1983, p. 139.

dum. Thus, Government support for accession to a new treaty is still a necessary, but perhaps not a *sufficient*, condition of accession.

The 1975 referendum campaign also marked another departure from 'normal' UK practice — this time over collective Cabinet responsibility. Labour ministers were seen to oppose one another in the referendum campaign. Again, this happened *after* accession had been accomplished by a relatively united (Conservative) Cabinet, relatively sure of its Commons majority. The events of 1975 were a way of getting the Labour Party 'off the hook' of its own deep divisions on the issue: but such problems could recur over European Union, whatever the party of Government.

As to the ways in which the Draft Treaty now proposed might be brought to Parliament's attention, the following possibilities exist. (It is important to emphasize that they are not equivalent to one another, in the sense that, if followed, they would lead to the same result. Some might be inappropriate in the circumstances, and more than one might be followed concurrently. Except in the last case, we concentrate on what might be done in the House of Commons).

(i) *Government motion.* We think this unlikely, unless considerable pressure were generated from the Dooge Committee and/or there were evidence of consensus on modification of the Draft Treaty such as to render it more to the Government's liking.

(ii) *Opposition motion* (on an 'Opposition Day'). This would have to be thought to have political benefits for the Opposition outweighing any embarrassing revelation of differences. The Liberals have one such day at their disposal, half of which they have made available to the SDP.

(iii) *Private Member's* (Monday or Friday) *Motion.* This would normally be easy for the Government to neutralize or defeat. If taken in Private Members' time, whatever was said would not have the status of *definitive* consideration of the text of the Draft Treaty by the House.

(iv) *A 'Ten Minute Rule' Bill.* This is usually regarded as a useful method of ventilating the ideas which such a Bill contains; it is perhaps not a likely channel for consideration of the Draft Treaty.

(v) *Questions.* See the previous section.

(vi) *Consideration by a select committee of the House of Commons.* Potentially, three committees might be involved: the European Legislation, etc. Committee, the Foreign Affairs Committee, and the Treasury and Civil Service Committee. The terms of reference of the European Legislation Committee are to 'consider draft proposals by the Commission of the European Communities for legislation, and other documents published for submission to the Council of Ministers or to the European Council, and to report whether these raise questions of legal or political importance . . .', etc. At present the Draft Treaty does not come within these terms of reference; but if, for example, it or its substance became a discussion document at a European Council, then it would come within the terms of reference and be a candidate to be recommended for debate, at which stage the Government would have to arrange for the House to debate it. A final report of the Dooge Committee would also be a candidate.

Both the Foreign Affairs Committee and the Treasury and Civil Service Committee have shown considerable interest since the latter part of 1983.

(vii) *Consideration by the House of Lords Select Committee on the European Communities.* The terms of reference of this committee are different from, and wider than, those of the equivalent Commons committee: 'to consider Community proposals, whether in draft or otherwise, obtain all necessary information about them, and report on those which, in the opinion of the committee, raise important questions of policy or principle and on other questions to which the committee consider that the special attention of the House should be drawn . . .'. The Draft Treaty is clearly within the terms of reference of the Lord's Committee; and the committee, and individual members of it, have already been involved in deciding how best to proceed, and are at the time of writing (January 1985) involved in further steps.

The committee is expected to decide in late January or early February 1985 whether to set up an *ad hoc* Committee on the Draft Treaty (*ad hoc* because the Draft Treaty does not fall neatly into one of the Lord's subcommittee categories). Members of the committee are to visit the Institu-

tional Affairs Committee of the European Parliament in February. EP Members, in turn, will be in the UK in April 1985 as part of their general tour to each national Parliament.

## *c. The political parties*

As mentioned in the introduction, we have been unable to identifiy any substantial body of opinion in the UK, outside the Alliance parties (Liberals and Social Democrats), which favours the Draft Treaty or is even prepared to take it seriously. A very good indicator of the importance attached by a British political party to a particular issue in any year is its place in the agenda of the Party Conference in September/October. In 1984, even the Liberal Party, the most enthusiastic for the Union, only held a debate on the '1984 Euro elections'. The motion for debate lamented the party's performance, along with that of its SDP Alliance partner, in the EP elections; and was highly critical of its EP partners in the Federation of European Liberals and Democrats (ELD). There was hardly a mention of the Draft Treaty.

### The Conservative Party

As the party of Government, having no need to take account of any coalition considerations, the attitude of the Conservatives is crucial for at least the next three years. It is, however, necessary to distinguish 'the Government' from the Conservative Party at large in the UK; and to distinguish both from Conservative MEPs.

The attitudes of the Conservative Party as a whole have been summarized by the Party's Research Department as follows:
Firstly,

> There is a belief that the *time is not ripe* for European Union, although this does not diminish the support *in principle* for the *general idea in due course* (emphasis added).

Such qualifications speak volumes. The project is firmly in the category of 'not for today'! Secondly,

> There is the strongly held view that, since the UK has an unwritten constitution unlike most of the rest of our Community partners, . . . an 'evolutionary' process towards European Union is more desirable than a 'revolutionary' approach (by means of a Treaty).

Whilst the line of reasoning here may not be obvious, it probably reflects unease that there would be no constitutional 'bulwark' against progressive erosion of UK 'sovereignty'.

Many of these reservations are shared by several Conservative MEPs. This is so despite the votes cast in favour of the Draft Treaty by many of them. (The group voted on 14 February 1984: 22 in favour, 5 abstentions, 6 against, 28 not voting.) A free vote was allowed despite a certain amount of resistance to it by party managers back home. 'Explanations of vote' followed soon after. A fairly typical example of the true meaning of a vote in favour came from Christopher Jackson, MEP:

> 'Undoubtedly some of the ideas in the Draft Treaty are controversial, for example its recommendations concerning the veto. I was among those who voted for the draft as deserving further discussion yet made clear the importance they attach to the continuation of the veto . . .'[17]

At the time of the free vote in the EP (14 February 1984) Derek Prag, MEP, explained the EDG's stance thus:

> 'The essential difference within the group — and it is a fair and legitimate difference to anyone who knows the history both of the United Kingdom and of Denmark — is between those who

[17] Letter to *The Times*, London, 12. 6. 1984.

> believe that written treaties are necessary in a voluntary union or community of peoples and those who believe in organic development, the evolutionary process, gradualism and pragmatism.'[18]

Thus, if there appears to be a degree of ambiguity about Conservative attitudes to the Draft Treaty at present, it is not one which affords much comfort to the Treaty's promoters. *Any* House of Commons vote on the Draft Treaty will see most Conservatives vote as they are told by the party managers — reflecting the ministerial views already quoted. A few would break ranks; rather more might abstain.

## The Labour Party

According to a party research officer, the Labour Party has 'to the best of my knowledge . . . never made a formal statement on the question of European Union'. Commenting on the absence of substantial documentation, he added 'That might of itself be a significant reflection of the importance attached to the issue by the Labour Party'.

There appears to be no great difference between the Party's stance in the EP and its stance at home; and no likelihood of Labour supporting the Draft Treaty. At Community level, in the 1984 manifesto of the Confederation of the Socialist Parties, Labour entered a reserve stating that it 'did not support' the sections on 'Institutional improvements in favour of the EP' and 'An improved financial system'. Labour is also absent from the annex declaring PSI and PSDI support for the Draft Treaty.[19]

Indeed, Labour's own *national* manifesto for the 1984 European elections was careful to leave open the 'withdrawal' option. It stated that

> '[EEC] rules may stand in the way of a Labour Government when it acts to cut unemployment. It is in this context that we believe that Britain, like all Member States, must retain the option of withdrawal from the EEC.'

This is of course a careful compromise: but the compromise operates in reverse as well. Those most in favour of 'full-hearted' UK membership of the EC do not wish to expose themselves too far by any open support for the Draft Treaty.

## The Liberal Party

The Liberals have been unequivocal in their support for the Draft Treaty. They have, however, no voice in the EP and only a very small voice in the UK House of Commons. From their point of view, much the most promising place in which to fight for a debate on the Draft Treaty is the House of Lords. They have more representatives there (including such 'elder statesmen' as Lord Gladwyn). numerous and often influential SDP allies, and independent 'cross-bench' sympathizers. A debate in the House of Lords could be no more than an attempt to 'show the flag', undertaken without any expectation that a majority for the Draft Treaty in the Lords (itself unlikely) could 'shame' the Commons into agreement.

The 'Liberal Programme for Europe' (1983) declared 'We have been fully committed to the goal of political and economic union for the peoples of Europe since . . . 1958'. The document closed by emphasizing 'the importance of working towards European federation' but, perhaps significantly, it did not mention the Spinelli proposals, which were due for debate in the European Parliament immediately after its publication.

The next step was the drafting of the *joint* Liberal-SDP Alliance manifesto for the 1984 EP elections. In Chapter VI ('An Effective Democratic Europe') the parties had an opportunity to 'go firm' on the

[18] EP Debates, No 1-309/32; 14. 2. 1984.
[19] Labour Manifesto, 9. 3. 1984, pp. 31-32.

Draft Treaty. They did not. Indeed, one person actively involved in the drafting had the impression that, even at this level of attention and awareness, almost no-one had heard of the Draft Treaty. Chapter VI itself is delphic at crucial points:

> 'We want to streamline the Community's structure and its methods of decision-making. This can be done *without changing the Treaties* . . .
> The use of the veto in the Council must be *severely restricted* . . . . Alliance MEPs will seek to join with *like-minded* MEPs . . . in the construction of *an ever-closer union* among the peoples of Europe.[20]

Equally significant was the absence of debate on the Draft Treaty at the party's assembly in the late summer of 1984. Attention was focused instead on the party's unhappy relations with the ELD, and its delicate relations with the British SDP, to which we now turn.

### The Social Democrats

Michael Gallagher of the SDP was the sole Alliance MEP until June 1984. Voting for the Draft Treaty, he said,

> 'I wish to put it beyond doubt that the Alliance is solidly behind the development of European co-operation along the lines set out in this preliminary Draft Treaty.'

Party sources have indicated, however, that they have been under little pressure so far to justify their position on the Draft Treaty, although they have on occasion been attacked by the Conservatives about it. It has caused some, though not serious, strain in their relations with the Liberals. There is more than a hint of difference in the approaches of some of the SDP's own leaders.

The generally favourable orientation of the SDP should not conceal two qualifications. Firstly, Dr David Owen (now leader of the party) is clearly less enthusiastic about the Draft Treaty than either the Liberals or his own predecessor, Mr Roy Jenkins. Secondly, the SDP is not at all likely to expose itself to any political risk, or 'high profile' in favour of the Draft Treaty. It is regarded as a good *idea* in the long term, but at present as a 'non-starter' in UK terms.

On the veto, the SDP's consistent line has been to argue for reduction rather than abolition; they succeeded in getting this written into the Alliance manifesto. Beyond this, there has been no detailed statement that can be regarded as authoritative since an article by Mr Jenkins in *The Guardian* in 1982.

## *d. Interest groups*

### The Confederation of British Industry (CBI)

The CBI has not, to date, produced any detailed reaction to the Draft Treaty, and does not appear to have plans to do so. Its reactions to *parts* of the Draft Treaty, and to its general thrust, may be inferred from such documents as the 1983 conference note, 'Making the EC Work Better: Managing Recovery'; and more especially the short pamphlet issued just before the 1984 EP elections, 'Making Europe Work Better: how MEPs can help British Business'. Under the heading, 'No to a two-tier Community', the CBI says:

> '. . . unification of the internal market . . . must be the major policy objective. Proposal for a Community policy which would divide the Member States into two . . . are inconsistent with this objective and must be opposed.'

---

[20] Alliance Manifesto, *Let's Get Europe Working Together*, 1984, pp. 24-26.

And on decision-making:

> 'Better decision-making will not be achieved without moving *towards* majority voting *where the Treaty (of Rome) allows it.* Insistence on unanimity for everything blocks progress towards a true Common Market.'

The CBI's insistence was on thorough consultation in early stages of Community legislation ('There must be no recurrence of the "Vredeling rabbit" pulled out of a hat . . .'). Heavy emphasis was placed on the completion and simplification of the internal market, ending non-tariff barriers and establishing full liberalization for services. On many individual policy areas, the CBI said things very similar to the Draft Treaty, but its complete silence on the Draft Treaty itself indicated the CBI view that it should be possible to accomplish most that is desired through the existing Treaties, with only piecemeal change. There is no indication that the CBI intends to make the Draft Treaty a major issue, or that it is prepared to go to the barricades or push the Government on behalf of it.

## The Institute of Directors

The attitude of the British Institute of Directors very closely parallels that of the CBI and those other employers' organizations in the Community. In its submission to the incoming Commission[21] (January 1985), the Institute set the achievement of a 'genuine common market' for goods, services and transport as the overriding priority, to be achieved by 1988, and warned of the irreversible shift in the economic centre of gravity to the Pacific rim.

The Institute warned specifically against allowing any talk of a Draft Treaty for European Union to distract from this immediate, practical and priority task. Interestingly, however, the Institute was prepared to envisage suspension of the right of veto in the Council of Ministers, but on proposals 'which are clearly designed only to develop the internal market': a formula close to that of the CBI quoted above.

## The Trades Union Congress (TUC)

The TUC has, at the time of writing, not yet discussed the Draft Treaty in General Council, and thus has no formal 'corporate' view. It is clear however, that the TUC has 'no love for Spinelli', though it is quite favourably disposed to certain specific orientations of the Draft Treaty.

The attitudes reported here are therefore those of TUC researchers, who have read the Draft Treaty, rather than its members, most of whom have not. They are in favour of retaining 'unanimous voting', i.e. the veto. They are against the grant of additional powers to the EP in general. They do not favour notions of defence and security policy at Union level. They respond 'more positively' to political cooperation, and feel there should be 'more of it', without specifying the mechanics. Co-operative (pluri-national) industrial projects are viewed as 'very important to us', as is the extension of policy in the social field, particularly as concerns workers' rights and conditions. However, they question whether a change in the institutional arrangements is needed to generate the political will to carry through such policies. They note, with dissatisfaction, that the 'primacy of the CAP' is not called into question in the Draft Treaty.

[21] *The Common Market: An Agenda for Jobs and Economic Growth.*

## *e. The European Movement*

We have stressed the striking *lack* of position of many UK bodies on the Draft Treaty at the time of writing. Much the same could have been said before the referendum on 'renegotiation': the relatively high turnout of voters was due in no small part to 'propagandizing' groups, for and against. The European Movement acted then, and would probably act again, as a main umbrella organization for those wishing to 'go forward'. It is an inter-party body, drawing support from as wide a spectrum as possible, as is well reflected in its list of office-bearers, patrons and presidents. It is notable, however, that it can count on few prominent Labour figures, mainly from the right of the party.

The European Movement has over 30 'associated organizations', several of which have a degree of influence over policy in one or other of the political parties. It has, more than any other body in the UK, given both prominence and a relatively positive press to the Draft Treaty. (Substantial articles by, for example, Dr Roy Pryce (March-April 1984) and Mr Derek Prag (July-August 1984) have ensured, at least, that none of these associated organizations has any excuse for not having considered the Draft Treaty rather fully).

It remains the case that the European Movement to date has not been galvanized into action on behalf of the Draft Treaty. It proved, over the 1975 referendum, a highly effective body once engaged; and it might do so again. Without it, certainly, the Draft Treaty would have much less of an audience and less exposure in the UK.

## *f. The media*

The British media gave the Draft Treaty their usual, sporadic attention. This can be gauged from the press: there were flurries of interest in September 1983 and February 1984 when the votes were due. Even these were mainly confined to the 'quality' newspapers, whose reaction might best be described as darkly sceptical. Later, they ignored it. The popular press, when it did not simply ignore the Draft Treaty, was scathing.

'Visionary' was probably the commonest of the polite epithets used to describe the Treaty. First, some examples from *The Times* and *The Guardian* beginning in September 1983:

> 'The vision . . . will be one step nearer reality. Except that it will *not* happen. Not in the next couple of years and probably not for many more years to come . . .. Tomorrow's proposals . . . have simply become worthy attempts to keep the idea of unity alive amid the yawns of the public and most politicians.'[22]
>
> 'The Draft Treaty will probably remain for many years little more than a theoretical nudge in the direction of unity . . .. National governments . . . are in no mood for handing over significant powers to a supranational body.'[23]
>
> 'Federal union likely to remain just a vision.'[24]
>
> '[I]ts chances of being implemented in the foreseeable future are remote in the extreme. The Parliament recognized this in agreeing to send its resolution direct to the 10 national parliaments for consideration, rather than sending it to the Council of Ministers . . .. Several countries, including Britain, would certainly veto any proposal which would do away with the right to a veto.'[25]

*The Economist* was a little more positive. Its headline (18. 2. 1984) read:

> 'The EEC speeds up from a snail's pace to a crawl.'

---

[22] Clough, 'European Union: an Impossible Dream?', *The Times*, London, 12. 9. 1983.
[23] *The Guardian*, 14. 9. 1983.
[24] Headline, *The Guardian*, 15. 9. 1983.
[25] *The Times*, 15. 2. 1984.

If British attitudes are hard to understand, it should not be forgotten that this is the diet on which 'informed' opinion has been fed.

*The Financial Times* was kinder, but still tended to play down the practical importance and likelihood of implementation of the Draft Treaty. It is perhaps worth quoting at greater length as a fairly accurate reflection of sympathetic but agnostic opinion in the UK:

> 'The Draft Treaty is a political statement and not a blueprint which puts the Community in imminent danger of fundamental change. Governments are not even obliged to take much notice of it, although it is to be submitted to national parliaments for ratification . . .
>
> But its actual relevance is more likely to derive from the way it feeds into the growing debate over how to make the Community more effective — or rather, how to preserve it from impotence and disarray . . .
>
> [T]he Draft Treaty . . . gives some expression to popular demands for a more effective Community.'[26]

## *g. Public opinion*

In the light of the foregoing, it might be expected that public opinion in the UK would be universally hostile to Draft Treaty. Unfortunately, most of the questions posed in leading surveys are not of a form to enable us to say whether this is so or not. The evidence is best described as, first, inconclusive and, second, paradoxical.

As was pointed out by the tireless Mr Prag, the Eurobarometer poll carried out in October 1983 in the UK indicated that 70% of those questioned were 'in favour of the unification of western Europe.' Further, this percentage has not dropped much below 60 in the years that the polls have been carried out, whatever the state of opinion at the time about the common market. The difficulty with such questions is obvious: they are so vague and high-sounding that to oppose them is akin to opposing virtue. They in no way evaluate views concerning the form and scope of 'union' nor what interviewees would be prepared to forego to attain certain objectives.

It is possible to make much or little, in regard to the Draft Treaty's prospects, of such data as the October 1983 *Eurobarometer* study (published December 1983). The *general* picture was a somewhat more positive (or at least less negative) attitude toward the European Community in the UK in 1982 and 1983 (after something of a nadir in 1980/81). This general picture emerges from the three 'basic' questions regularly asked.[27]

Narrowing down to the role of the European Parliament, *Eurobarometer* indicated middle-of-the-range views in the UK about the *present* effectiveness of the EP, and a fairly significant shift between April and October 1983 in favour of an increase in its role in *future*.

| Role of EP *should* be: | April 1983 % | October 1983 |
|---|---|---|
| More | 34 | 48 |
| Less | 27 | 20 |
| About same | 20 | 17 |
| Don't know | 19 | 15 |

Again, this question in no way investigated the problems of modality, *quid pro quo*, implied 'costs' and consequences from the UK's point of view. The newly-introduced questions in the 1983 survey sought to explore 'what sort of EP for what sort of Europe' — thus edging closer to the issues which

[26] 1984, at p. 3.
[27] *Eurobarometer*, December 1983, No 20, at p. 46 *et seq.*

the Draft Treaty seeks to address, but still evidence of, at best, an indirect and unreliable kind. The three questions sought to evaluate: (a) the EP's technical function: its powers to control the way the Community functions and the budget; (b) its perceived *remoteness* from people's problems; (c) its 'constituent' role — how far the new (post-1984) EP should 'work towards a political union of member countries, with a European Government responsible to the EP'.

In brief, *Eurobarometer's* findings here were that the UK was third lowest on the 'enhanced control' question, but not by very much; was highest of the 'remoteness from people's problems' question; and was middle of the range in degree of positive support for a 'constituent' role for the EP (Yes 60%; No 18%; Don't know 22%).

Direct elections were perceived as an 'event with important consequences' by 44% of the UK 1983 sample, a modest decline from 47% in the period 1976-78; this again put the UK in the middle of the range, and was one of the smallest losses of support. One reason for scepticism about the data is the famous 'propensity to vote' question. Responses that interviewees were 'certain' or 'probable' to vote were used as a predictor of the level of actual turnout: the UK percentage of 'certain + probable' was said to be 69% — hardly, in the light of events, the 'excellent indicator of voting propensity' claimed by *Eurobarometer*.[28]

One might indeed point to the dismal level of turnout in the 1984 EP elections as a better indication of public opinion. But it may be replied that this in part reflects disillusion with exactly the shortcomings to which the Draft Treaty addresses itself; this too appears unconvincing.

The basic point is that most — even supposedly 'well-informed' — people in the UK have so far not even heard of the Draft Treaty; still fewer have the slightest notion of its content, status or modalities. And if these were conveyed to them in the form of such questions as 'Would you favour the ending of the UK veto?', or in terms of taxation powers, there is little doubt what the answers would be.

## *h. Conclusion*

On present evidence, there is no prospect of the UK House of Commons voting in favour of the Draft Treaty in this Parliament. The likelihood of the House of Lords doing so is greater, but not much greater, than zero. The Prime Minister's personal opposition to such notions is legendary.

It is just conceivable that the issue could arise in the event of an inconclusive result at the next general election. But this too is most unlikely. Only if one or both of the Alliance parties (improbably but successfully) made it a condition for participation in a pact with another party; or if, against present evidence, the Alliance parties were to make sweeping gains, might this happen. It is fair to point out that an extra 10%, say, of the popular vote would have produced such gains for the Alliance at the last election. It is fair to reply that even in an election whose outcome was in little doubt, that extra 10% failed to materialize.

# 4. Personal assessment

The attitude of the United Kingdom must seem, and indeed is, very discouraging. But the promoters of the Draft Treaty should perhaps bear three things in mind.

[28] Id. at p. 76.

Firstly, membership of the Community was 'sold' to the British public primarily as an *economic* benefit. The political advantages of European integration were — perhaps wisely at the time — underplayed, except to sophisticated audiences. British accession was followed almost immediately by severe economic depression; and the problems of adapting to a completely new type of political and judicial system — 'foreign' in every sense to British preconceptions and ways of working — were acute. The result is that the Community ideal has failed to capture the British imagination and, more fundamentally, that closer political integration is not seen as the natural development of the existing Communities.

Secondly, the fact that the United Kingdom does not have a written constitution, and seems to have no machinery for entrenchment of treaty obligations, is indicative of an important feature of the British temperament and outlook. There is little awareness of 'the State' or its 'institutions'. Personal loyalty is more to the person of the monarch than to the monarchy as such. Most citizens are far more aware of the fact that they are English, Scottish or (despite partition) Irish than that they are British or that they are citizens of 'the United Kingdom' (which is hardly more than a term of art for the purposes of international relations). There is an innate preference for allowing institutions to develop, as the failure of all attempts radically to reform the second chamber of Parliament (the House of Lords) shows. The idea that important political ends can be achieved by creating new institutions, and the symbolic significance of creating them, are not regarded as self-evident.

Thirdly, the British approach to legislation and, in the commercial field, to the making of contracts involves looking carefully at the 'small print' and leaving as little to chance as possible. Every foreseeable eventuality must be provided for in advance. There is therefore an inherent unwillingness to agree the principles and allow the details to look after themselves. The close attention already given by the UK Government to the small print of the Draft Treaty is simply a natural instinct. And it has not gone unnoticed that, when politicians in other countries have expressed enthusiasm for the European Union, the small print of their speeches contains many of the same reservations on essential points.

We do not therefore find it surprising that the British attitude to *this* Draft Treaty, coming at this time, is negative. Indeed, we have serious reservations of our own, which we mention in a moment. We do, on the other hand, detect a growing awareness — at least amongst those who are directly involved — of the urgent importance of finding a way to make the Communities work better, and of the benefits that closer European integration can bring. The attitudes of the CBI and the Institute of Directors reported in Part II are particularly significant in this respect.

In support of the view that proposals for European Union could have the effect of diverting attention from the urgent task of making the existing Communities work better, it can be argued that the most significant step towards integration of the United States was neither the Declaration of Independence nor the framing of the constitution, but the decision in the 'Steamship Monopoly Case' (*Gibbons* v *Ogden,* 1824) when the Supreme Court vigorously, extended the Commerce Clause. In the Community we have, as it were, started with the Commerce Clause. *If* the existing Communities and their institutions are capable of being made to work, the practical benefits seen to be produced by them would lead naturally to greater enthusiasm for the next step towards European Union. At this stage, the European Union could simply be a new and unwelcome apple of discord.

For our own part, we are particularly concerned about four features of the Draft Treaty:

(i) The proposed constitution of the Court of Justice of the European Union, and the exercise of judicial control;

(ii) The proposed constitution of the legislature and, specifically, the proposal for a unicameral Parliament;

(iii) The extent to which the Draft Treaty provides for the effective exercise of executive power;

(iv) The *droits acquis* of non-acceding Member States.

## *a. The Court of Justice*

The Court of Justice (like the Supreme Court in the United States) has made a spectacular contribution to the process of European integration. One of the reasons why it has been able to do so has been that the objects of the Communities are, in important respects, both limited and clearly defined by the Treaties. In particular, the EEC Treaty sets out with some precision the ends to be achieved and, expressly or by implication, the social and economic theory underlying these prescriptions.

The specific prescriptions of the existing Treaties, the doctrine of direct effect and the machinery of Article 177 have all made it possible for the Court to treat what are essentially social and economic issues as legal issues. Further, the Court has been able, on the basis of the Treaties, to define with some precision the line of demarcation between the competences of the Communities and those of the Member States. We must, however, question whether this dynamic role of the Court would have been tolerable, in British eyes at least, if the jurisdiction of the Court had not itself been limited by the scope of the Treaties.

The Draft Treaty offers no clear definition of the jurisdiction of the Court, of the ends to be achieved or of the underlying social and economic theory. It is, at any rate, not clear to us which of the 'principles' of the EEC Treaty (far less the detailed rules of later articles) are to be regarded as 'expressly or implicitly amended by this Treaty' (Art. 7.2(DT)). To what extent, for example, could the legislative organs of the European Union lawfully adopt a *dirigiste* competition policy in place of the existing free-market policy, permit restrictive trading agreements or encourage the creation of public or private cartels or monopolies?

The choice between a regulated economy and a free-market economy is clearly a political choice about which, as is evident, the governments of Member States may differ. Nevertheless, for the EEC, the choice has been made in the Treaty and the Court can give effect to the political choice by applying the Treaty. We do not, at the moment, see how the Court could do so if it had first to decide whether or not the political choice had in fact been made.

The difficulty would be all the greater if the Court were forced to decide between the interests of a majority of Member States which had ratified the Treaty for the European Union and those of a minority which had not. Suppose, for example, that a European Union consisting of seven of the existing Member States were to legislate in favour of greater State aids for ailing industries, abandoning the strict controls on State aids under the existing Treaties; and suppose that this were seriously to affect the competitive position of undertakings in the non-acceding Member States who would (unless they are to be deprived of *droits acquis*) continue to be members, together with the acceding majority, of the existing Communities. Would the legislation of the European Union be lawful or not?

It is not enough to say that this question would be decided by the Court of Justice in the light of all the Treaties, since the question then is 'Which Court of Justice?' Article 30 of the Draft Treaty provides for the reconstitution of the Court of Justice of the Communities under an organic law of the European Union, and for the appointment of at least half of its members by the Parliament. That being so, the Court of Justice of the European Union *cannot* be the same as the Court of Justice of the Communities. Would the Court of Justice of the Communities continue to exist? If so, how would a conflict between that Court and the new Court of the European Union be resolved?

We offer this example, not as a juridico-philosophical conundrum, but because it seems to us to be a serious possibility that a minority of the existing Member States would not be prepared to ratify the Draft Treaty. The problems created by such a situation are problems which, in our opinion, the promoters of the Draft Treaty must face.

Further, even if all the existing Member States were to ratify the Draft Treaty, one must ask whether, given the extensive competence of the legislative organs of the European Union, the Court of Justice could continue to exercise the same sort of judicial control as it exercises at present. As Professor

Jacqúe has pointed out in his general report to the recent FIDE Congress on 'The Principle of Equality in Economic Law' (p. 16), judicial control presents less difficulty in the context of *compétence liée* than where a wide margin of appreciation is left to the administration. While the point is not precisely the same, there is already some evidence that, as the application of the existing Treaties proceeds further into the margin of appreciation, the Court finds it increasingly difficult to be 'adventurous'. One of the reasons, we would suggest, is that judicial control must, if it is to be acceptable, itself be controlled.

## *b. The Parliament*

The Parliament envisaged in the Draft Treaty is a unicameral Parliament, and it is proposed that it should have legislative powers. A bicameral legislature is characteristic of federal constitutions, and experience shows that a second Chamber can play a valuable role in preserving the precarious equilibrium of federal structures.

It has been suggested that a bicameral legislature is achieved for the European Union by sharing the legislative function between the Parliament and the Council — the Parliament being the Lower Chamber (or popular assembly) whose will should ultimately prevail, and the Council the Upper Chamber representing the 'regions' or 'provinces' (the Member States). It seems to us, however, that the suggested analogy between the legislative system proposed in the Draft Treaty and existing bicameral legislatures is unsound for three reasons.

Firstly, although Article 14 of the Draft Treaty purports to make the Parliament a popular assembly of the traditional type, its composition is left to be determined later. In the meanwhile, 'the procedure [for its election] shall be that for the election of the Parliament of the European Communities.' The structure of the existing Parliament is related only indirectly to the distribution of population and is weighted in favour of the smaller Member States. The Draft Treaty offers no guarantee of change in this respect and it is most unlikely that the smaller Member States would consent to removal of the weighting in their favour. This is all the more improbable because Article 22 of the Draft Treaty provides for voting in Council to be weighted, as at present, in favour of the larger Member States. 'Regional' weighting in both Chambers of the legislature and, in particular, weighting in favour of the smaller and less powerful regions in the Lower Chamber, and in favour of the larger and more powerful regions in the upper, is not found in any other bicameral system known to us.

Secondly, the Council is, by its nature, representative of *government* — of *executive* power. The interests of the executive organs of government are not necessarily, and certainly not always, identical with the interests of the legislator. This does not become any the less true where the executive of the Member States is given a legislative function within the wider context of the Community, as experience has shown. In some bicameral system the members of the Upper Chamber are nominated or appointed by the executive (e.g. Canada and, to a large extent *de facto,* the United Kingdom), but this is wholly different from a system in which the executive itself performs the legislative function of the Upper Chamber.

Thirdly, the Council does not represent the 'regions' or 'provinces' of the Community. It represents the *central* governments of 10 or 12 nation States as they happen to exist in the late twentieth century after more than a millennium of historical development. Some States can be said to represent a single 'people' or at least a virtually indissoluble union of peoples; others are much more fissile. In some States government has become highly centralized and is frequently criticized for being insensitive to the claims of the regions; in others a careful balance between the conflicting claims of the regions is maintained, either formally or by convention, by the constitutional system. There is, at most, a limited value in comparisons between the nation States of Europe and the States or provinces of the United States, Austrialia or even Canada (probably the closest analogy). The European situation, historically and in other respects, is infinitely more complex.

We therefore suggest that it is not possible, even theoretically, to justifiy the legislative system proposed in the Draft Treaty by analogy with existing bicameral systems. The fact that the system proposed in the Draft Treaty is different does not, of course, necessarily mean that it is a bad system. In any event, any proposal for European Union must, if it is to stand any chance of success, recognize the claims to sovereignty of the European nation States as they exist. For that reason, if for no other, there must be a body such as the Council having some power in relation to legislation. But if the purpose of European Union is to move towards a *Europe des peuples,* it seems surprising that the system proposed in the Draft Treaty would tend, if anything, to entrench *l'Europe des états,* since it does nothing to recognize the underlying diversity and aspirations of the 'peoples' who live within the political map. Separatist movements already exist in several Member States and the system proposed in the Draft Treaty, so far from uniting peoples, might only serve to aggravate this trend.

In the case with which we are most familiar, we cannot believe that more than five million Scots would be prepared to accept a situation in which they were able to elect only eight members of the Lower Chamber and had to rely on central government in London to represent their interests in the Upper Chamber, while smaller countries had (actually and/or proportionately) much greater representation in the lower chamber *and* separate representation in the Upper Chamber. We are confident that other minorities would feel the same.

On the other hand, a truly bicameral Parliament, with weighting in favour of minorities in the Upper Chamber, could enhance the attraction of European Union to such minorities as well as introducing a potentially useful additional institution.

## *c. The executive*

As we understand it, the Draft Treaty presupposes that the Commission, deriving its mandate from the Parliament, would be capable of performing the functions assigned in other constitutions to the executive. This appears to presuppose, in turn, that the sole function of the executive is to execute the will of the legislature. We suggest that this is not so.

It is an essential function of the executive to make political choices. Given the potentially vast range of competence of the European Union, the choices to be made would be numerous and, in many cases, urgent. Is it clear that a Commission enjoying no direct popular mandate would be capable, acceptably, of exercising such choices? We would suggest that, at any rate, it is not self-evident.

## *d. 'Droits acquis'*

The provisional view of British Government sources (see Part II, Section 1) is that Article 82 of the Draft Treaty, which provides for the entry into force of the Treaty upon ratification by Member States representing two-thirds of the population of the Community, would, if given effect, be contrary to international law. For our own part, we have, to put it at its lowest, grave misgivings about the lawfulness of Article 82 — particularly since the existing Treaties contain express provision for amendment by common accord of the Member States (Arts 236(EEC), 96(ECSC) and 204(EAEC)).

Whatever the lawfulness of the entry into force of the new Treaty without the common accord of the existing Member States and whatever the legal device adopted to achieve it,[29] it seems to us to be

[29] It has been suggested, for example, that there might be a coordinated unilateral withdrawal of the ratifying Member States from the existing Communities before the entry into force of the Draft Treaty. The issues raised by Article 82 of the Draft Treaty are discussed elsewhere in this volume: see Weiler and Modrall, *The Creation of the European Union and its Relation to the EEC Treaties.*

clear, as a matter both of Community law and of international law, that the majority of the parties to the existing Treaties cannot, by entering into a new Treaty, deprive the minority of the *droits acquis* enjoyed by them under the existing Treaties. In the case of the Community Treaties, this must be especially so since the Court, in *Van Gend en Loos,* has emphasized that the beneficiaries of the Community Treaties are 'peoples' and not just States. Any attempt by the majority to deprive the minority of *droits acquis* would therefore strike at the moral foundations of the Community and of Community law.

It may be suggested that the Draft Treaty seeks only to preserve and enhance the *acquis communautaire;* therefore the population of non-ratifying Member States will be deprived of nothing. But is it not equally arguable that the Draft Treaty offers a majority of the existing Member States the opportunity to appropriate to themselves the *acquis communautaire* to the detriment of the non-consenting minority?

The answer to this question depends on how one defines the *acquis communautaire.* But we would suggest that it consists, not simply in such individual rights as the right of free movement, but in acceptance of the economic philosophy and the institutional framework enshrined in the existing Treaties. The example given above of a situation in which the European Union sought to alter the legislation on State aids seems to us to illustrate that the *acquis communautaire* does consist, at least in part, in the philosophical and institutional substructure of the existing Communities. It therefore seems to us to be unavoidable that unanimity in bringing about the European Union in the form proposed is a moral, as well as a legal imperative.

# Annexes

ANNEX I

# Draft Treaty establishing the European Union[1]

— With a view to continuing and reviving the democratic unification of Europe, of which the European Communities, the European Monetary System and European political cooperation represent the first achievements, and convinced that it is increasingly important for Europe to assert its identity;

— Welcoming the positive results achieved so far, but aware of the present need to redefine the objectives of European integration, and to confer on more efficient and more democratic institutions the means of attaining them;

— Basing their actions on their commitment to the principles of pluralist democracy, respect for human rights and the rule of law;

— Reaffirming their 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;

— Resolved to strengthen and preserve peace and liberty by an ever closer union, and calling on the other peoples of Europe who share their ideal to join in their efforts;

— Determined to increase solidarity between the peoples of Europe, while respecting their historical identity, their dignity and their freedom within the framework of freely accepted common institutions;

— Convinced of the need to enable local and regional authorities to participate by appropriate methods in the unification of Europe;

— Desirous of attaining their common objectives progressively, accepting the requisite transitional periods and submitting all further development for the approval of their peoples and States;

— Intending to entrust common institutions, in accordance with the priniciple of subsidiarity, only with those powers required to complete successfully the tasks they may carry out more satisfactorily than the States acting independently;

The High Contracting Parties, Member States of the European Communities, have decided to create a European Union.

[1] Adopted by the European Parliament on the 14 February 1984 (OJ 77/1984, p. 33).

# PART ONE: The Union

## Article 1 – Creation of the Union

By this Treaty, the High Contracting Parties establish among themselves a European Union.

## Article 2 – Accession of new members

Any democratic European State may apply to become a member of the Union. The procedures for accession, together with any adjustments which accession entails, shall be the subject of a treaty between the Union and the applicant State. That treaty shall be concluded in accordance with the procedure laid down in Article 65 of this treaty.

An accession treaty which entails revision of this Treaty may not be concluded until the revision procedure laid down in Article 84 of this Treaty has been completed.

## Article 3 – Citizenship of the Union

The citizen of the Member States shall *ipso facto* be citizens of the Union. Citizenship of the Union shall be dependent upon citizenship of a Member State; it may not be independently acquired or forfeited. Citizens of the Union shall take part in the political life of the Union in the forms laid down by this Treaty, enjoy the rights granted to them by the legal system of the Union and be subject to its laws.

## Article 4 – Fundamental rights

1. The Union shall protect the dignity of the individual and grant every person coming within its jurisdiction the fundamental rights and freedoms derived in particular from the common principles of the constitutions of the Member States and from the European Convention for the Protection of Human Rights and Fundamental Freedoms.

2. The Union undertakes to maintain and develop, within the limits of its competences, the economic, social and cultural rights derived from the constitutions of the Member States and from the European social charter.

3. Within a period of five years, the Union shall take a decision on its accession to the international instruments referred to above and to the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights. Within the same period, the Union shall adopt its own declaration on fundamental rights in accordance with the procedure for revision laid down in Article 84 of this Treaty.

4. In the event of serious and persistent violation of democratic principles or fundamental rights by a Member State, penalties may be imposed in accordance with the provisions of Article 44 of this Treaty.

## Article 5 – Territory of the Union

The territory of the Union shall consist of all the territories of the Member States as specified by the Treaty establishing the European Economic Community and by the treaties of accession, account being taken of obligations arising out of international law.

## Article 6 – Legal personality of the Union

The Union shall have legal personality. In each of the Member States, the Union shall enjoy the most extensive legal capacity accorded to legal persons under national legislation. It may, in particular, acquire or dispose of movable and immovable property and may be a party to legal proceedings. In international relations, the Union shall enjoy the legal capacity it requires to perform its functions and attain its objectives.

## Article 7 – The Community patrimony

1. The Union shall take over the Community patrimony.

2. The provisions of the Treaties establishing the European Communities and of the conventions and protocols relating thereto which concern their objectives and scope and which are not explicitly or implicitly amended by this Treaty, shall constitute part of the law of the Union. They may only be amended in accordance with the procedure for revision laid down in Article 84 of this Treaty.

3. The other provisions of the treaties, conventions and protocols referred to above shall also constitute part of the law of the Union, in so far as they are not incompatible with this Treaty. They may only be amended by the procedure for organic laws laid down in Article 38 of this Treaty.

4. The acts of the European Communities, together with the measures adopted within the context of the European Monetary System and European political cooperation, shall continue to be effective, in so far as they are not incompatible with this Treaty, until such time as they have been replaced by acts or measures adopted by the institutions of the Union in accordance with their respective competences.

5. The Union shall respect all the commitments of the European Communities, in particular the agreements or conventions concluded with one or more non-member States or with an international organization.

## Article 8 – Institutions of the Union

The fulfilment of the tasks conferred on the Union shall be the responsibility of its institutions and its organs. The institutions of the Union shall be:
— the European Parliament,
— the Council of the Union,
— the Commission,
— the Court of Justice,
— the European Council.

# PART TWO: The objectives, methods of action and competences of the Union

## Article 9 – Objectives

The objectives of the Union shall be:

— the attainment of a humane and harmonious development of society based principally on endeavours to attain full employment, the progressive elimination of the existing imbalances between its regions, protection and improvement in the quality of the environment, scientific progress and the cultural development of its peoples,

— the economic development of its peoples with a free internal market and stable currency, equilibrium in external trade and constant economic growth, without discrimination between nationals or undertakings of the Member States by strengthening the capacity of the States, their citizens and their undertakings to act together to adjust their organization and activities to economic changes,

— the promotion in international relations of security, peace, cooperation, détente, disarmament and the free movement of persons and ideas, together with the improvement of international, commercial and monetary relations,

— the harmonious and equitable development of all the peoples of the world to enable them to escape from under-development and hunger and exercise their full political, economic and social rights.

## Article 10 – Methods of action

1. To attain these objectives, the Union shall act either by common action or by cooperation between the Member States; the fields within which each method applies shall be determined by this Treaty.

2. Common action means all normative, administrative, financial and judicial acts, internal or international, and the programmes and recommendations, issued by the Union itself, originating in its institutions and addressed to those institutions, or to States, or to individuals.

3. Cooperation means all the commitments which the Member States undertake within the European Council. The measures resulting from cooperation shall be implemented by the Member States or by the institutions of the Union in accordance with the procedures laid down by the European Council.

## Article 11 – Transfer from cooperation to common action

1. In the instances laid down in Articles 54 (1) and 68 (2) of this Treaty, a matter subject to the method of cooperation between Member States may become the subject of common action. On a proposal from the Commission, or the Council of the Union, or the Parliament, or one or more Member States, the European Council may decide, after consulting the Commission and with the agreement of the Parliament, to bring those matters within the exclusive or concurrent competence of the Union.

2. In the fields subject to common action, common action may not be replaced by cooperation.

## Article 12 – Competences

1. Where this Treaty confers exclusive competence on the Union, the institutions of the Union shall have sole power to act; national authorities may only legislate to the extent laid down by the law of the Union. Until the Union has legislated, national legislation shall remain in force.

2. Where this Treaty confers concurrent competence on the Union, the Member States shall continue to act so long as the Union has not legislated. The Union shall only act to carry out those tasks which may be undertaken

more effectively in common than by the Member States acting separately, in particular those whose execution requires action by the Union because their dimension or effects extend beyond national frontiers. A law which initiates or extends common action in a field where action has not been taken hitherto by the Union or by the Communities must be adopted in accordance with the procedure for organic laws.

## Article 13 – Implementation of the law of the Union

The Union and the Member States shall cooperate in good faith in the implementation of the law of the Union. Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Union. They shall facilitate the achievement of the Union's tasks. They shall abstain from any measures which could jeopardize the attainment of the objectives of the Union.

# PART THREE: Institutional provisions

## *Title I – The institutions of the Union*

### Article 14 – The European Parliament

The European Parliament shall be elected by direct universal suffrage in a free and secret vote by the citizens of the Union. The term of each Parliament shall be five years.

An organic law shall lay down a uniform electoral procedure; until such a law comes into force, the procedure applicable shall be that for the election of the Parliament of the European Communities.

### Article 15 – Members of Parliament

The Member of the Parliament shall act and vote in an individual and personal capacity. They may not be bound by any instruction nor receive a binding mandate.

### Article 16 – Functions of the Parliament

The Parliament shall:

— participate, in accordance with this Treaty, in the legislative and budgetary procedures and in the conclusion of international agreements,

— enable the Commission to take office by approving its political programme,

— exercise political supervision over the Commission,

— have power to adopt by a qualified majority a motion of censure requiring the members of the Commission to resign as a body,

— have the power to conduct inquiries and receive petitions addressed to it by citizens of the Union,

— exercise the other powers attributed to it by this Treaty.

### Article 17 – Majorities in the Parliament

1. The Parliament shall vote by a simple majority, i.e. a majority of votes cast, abstentions not counted.

2. Where expressly specified by this Treaty, the Parliament shall vote:

(a) either by an absolute majority, i.e. a majority of its members;

(b) or by a qualified majority, i.e. a majority of its members and of two-thirds of votes cast, abstentions not counted. On the second reading of the budget, the qualified majority required shall be a majority of the Members of Parliament and three-fifths of votes cast, abstentions not counted.

### Article 18 – Power to conduct inquiries and right of petition

The procedures for the exercise of the power of the Parliament to conduct inquiries and of the right of citizens to address petitions to the Parliament shall be laid down by organic laws.

## Article 19 – Rules of procedure of the Parliament

The Parliament shall adopt its rules of procedure by an absolute majority.

## Article 20 – The Council of the Union

The Council of the Union shall consist of representations of the Member States appointed by their respective governments; each representation shall be led by a minister who is permanently and specifically responsible for Union affairs.

## Article 21 – Functions of the Council of the Union

The Council shall:

— participate, in accordance with this Treaty, in the legislative and budgetary procedures and in the conclusion of international agreements,

— exercise the powers attributed to it in the field of international relations and answer written and oral questions tabled by Members of the Parliament in this field,

— exercise the other powers attributed to it by this Treaty.

## Article 22 – Weighting of votes in the Council of the Union

The votes of the representations shall be weighted in accordance with the provisions of Article 148 (2) of the Treaty establishing the European Economic Community. In the event of the accession of new Member States, the weighting of their votes shall be laid down in the treaty of accession.

## Article 23 – Majorities in the Council of the Union

1. The Council shall vote by a simple majority, i.e. a majority of the weighted votes cast, abstentions not counted.

2. Where expressly specified by this Treaty, the Council shall vote:

(a) either by an absolute majority, i.e. by a majority of the weighted votes cast, abstentions not counted, comprising at least half of the representations;

(b) or by a qualified majority, i.e. by a majority of two-thirds of the weighted votes cast, abstentions not counted, comprising a majority of the representations. On the second reading of the budget, the qualified majority required shall be a majority of three-fifths of the weighted votes cast, abstentions not counted, comprising a majority of the representations;

(c) or by unanimity of representations, abstentions not counted.

3. During a transitional period of 10 years, where a representation invokes a vital national interest which is jeopardized by the decision to be taken and recognized as such by the Commission, the vote shall be postponed so that the matter may be re-examined. The grounds for requesting a postponement shall be published.

## Article 24 – Rules of procedure of the Council of the Union

The Council shall adopt its rules of procedure by an absolute majority. These rules shall lay down that meetings in which the Council is acting as a legislative or budgetary authority shall be open to the public.

## Article 25 – The Commission

The Commission shall take office within a period of six months following the election of the Parliament.

At the beginning of each parliamentary term, the European Council shall designate the President of the Commission. The President shall constitute the Commission after consulting the European Council. The Commission shall submit its programme to the Parliament. It shall take office after its investiture by the Parliament. It shall remain in office until the investiture of a new Commission.

## Article 26 – Membership of the Commission

The structure and operation of the Commission and the statute of its members shall be determined by an organic law. Until such a law comes into force, the rules governing the structure and operation of the Commission of the European Communities and the statute of its members shall apply to the Commission of the Union.

## Article 27 – Rules of procedure of the Commission

The Commission shall adopt its rules of procedure.

## Article 28 – Functions of the Commission

The Commission shall:
— define the guidelines for action by the Union in the programme which it submits to the Parliament for its approval,
— introduce the measures required to initiate that action,
— have the right to propose draft laws and participate in the legislative procedure,
— issue the regulations needed to implement the laws and take the requisite implementing decisions,
— submit the draft budget,
— implement the budget,
— represent the Union in external relations in the instances laid down by this Treaty,
— ensure that this Treaty and the laws of the Union are applied, and
— exercise the other powers attributed to it by this Treaty.

## Article 29 – Responsibility of the Commission to the Parliament

1. The Commission shall be responsible to the Parliament.

2. It shall answer written and oral questions tabled by Members of the Parliament.

3. The members of the Commission shall resign as a body in the event of Parliament's adopting a motion of censure by a qualified majority. The vote on a motion of censure shall be by public ballot and not be held until at least three days after the motion has been tabled.

4. On the adoption of a motion of censure a new Commission shall be constituted in accordance with the procedure laid down in Article 25 of this Treaty. Pending the investiture of the new Commission, the Commission which has been censured shall be responsible for day-to-day business.

## Article 30 – The Court of Justice

1. The Court of Justice shall ensure that in the interpretation and application of this Treaty, and of any act adopted pursuant thereto, the law is observed.

2. Half the members of the Court shall be appointed by the Parliament and half by the Council of the Union. Where there is an odd number of members, the Parliament shall appoint one more than the Council.

3. The organization of the Court, the number and statute of its members and the duration of their term of office shall be governed by an organic law which shall also lay down the procedure and majorities required for their appointment. Until such a law comes into force, the relevant provisions laid down in the Community Treaties and their implementing measures shall apply to the Court of Justice of the Union.

4. The Court shall adopt its rules of procedure.

## Article 31 – The European Council

The European Council shall consist of the Heads of State or Government of the Member States of the Union and the President of the Commission who shall participate in the work of the European Council except for the debate on the designation of his successor and the drafting of communications and recommendations to the Commission.

## Article 32 – Functions of the European Council

1. The European Council shall:
— formulate recommendations and undertake commitments in the field of cooperation,
— take decisions in the cases laid down by this Treaty and in accordance with the provisions of Article 11 thereof on the extension of the competences of the Union,
— designate the President of the Commission,
— address communications to the other institutions of the Union,
— periodically inform the Parliament of the activities of the Union in the field in which it is competent to act,
— answer written and oral questions tabled by the Members of the Parliament,
— exercise the other powers attributed to it by this Treaty.

2. The European Council shall determine its own decision-making procedures.

## Article 33 – Organs of the Union

1. The Union shall have the following organs:
— the Court of Auditors,
— the Economic and Social Committee,
— the European Investment Bank,
— the European Monetary Fund.

Organic laws shall lay down the rules governing the competences and powers of these organs, their organization and their membership.

2. Half the members of the Court of Auditors shall be appointed by the Parliament and half by the Council of the Union.

3. The Economic and Social Committee shall be an organ which advises the Commission, the Parliament, the Council of the Union and the European Council; it may address to them opinions drawn up on its own initiative. The Committee shall be consulted on every proposal which has a determining influence on the drawing up and implementation of economic policy and policy for society. The Commission shall adopt its rules of procedure.

The membership of the Committee shall ensure adequate representation of the various categories of economic and social activity.

4. The European Monetary Fund shall have the autonomy required to guarantee monetary stability.

5. Each of the organs referred to above shall be governed by the provisions applicable to the corresponding Community organs at the moment when this Treaty enters into force.

The Union may create other organs necessary for its operation by means of an organic law.

## *Title II – Acts of the Union*

### Article 34 – Definition of laws

1. Laws shall lay down the rules governing common action. As far as possible, they shall restrict themselves to determining the fundamental principles governing common action and entrust the responsible authorities in the Union or the Member States with setting out in detail the procedures for their implementation.

2. The organization and operation of the institutions and other matters expressly provided for in this Treaty shall be governed by organic laws adopted in accordance with the specific procedures laid down in Article 38 of this Treaty.

3. Budgetary laws shall be adopted pursuant to the provision of Article 76 of this Treaty.

### Article 35 – Differentiated application of laws

A law may subject to time-limits, or link to transitional measures which may vary according to the addressee, the implementation of its provisions where uniform application thereof would encounter specific difficulties caused by the particular situation of some of its addressees. However such time-limits and measures must be designed to facilitate the subsequent application of all the provisions of the law to all its addressees.

### Article 36 – Legislative authority

The Parliament and the Council of the Union shall jointly exercise legislative authority with the active participation of the Commission.

### Article 37 – Right to propose draft laws and amendments thereto

1. The Commission shall have the right to propose draft laws. It may withdraw a draft law it has submitted at any time until the Parliament or the Council of the Union have expressly adopted it on first reading.

2. On a reasoned request from the Parliament or the Council, the Commission shall submit a draft law conforming to such request. If the Commission declines to do so, the Parliament or the Council may, in accordance with procedures laid down in their rules of procedure, introduce a draft law conforming to their original request. The Commission must express its opinion on the draft.

3. Under the conditions laid down in Article 38 of this Treaty:

— the Commission may put forward amendments to any draft law. Such amendments must be put to the vote as a matter of priority,

— Members of the Parliament and national representations within the Council may similarly put forward amendments during the debates within their respective institutions.

## Article 38 – Voting procedure for draft laws

1. All draft laws shall be submitted to the Parliament. Within a period of six months, it may approve the draft with or without amendment. In the case of draft organic laws, the Parliament may amend them by an absolute majority; their approval shall require a qualified majority.

Where the majority required for approval of the draft is not secured, the Commission shall have the right to amend it and to submit it to the Parliament again.

2. The draft law, approved by the Parliament with or without amendment, shall be forwarded to the Council of the Union. With a period of one month following approval by the Parliament, the Comission may deliver an opinion which shall also be forwarded to the Council.

3. The Council shall take a decision within a period of six months. Where it approves the draft by an absolute majority without amending it, or where it rejects it unanimously, the legislative procedure is terminated.

Where the Commission has expressly delivered an unfavourable opinion on the draft, or in the case of a draft organic law, the Council may by a qualified majority approve the draft without amending it or reject it, in which cases the legislative procedure is terminated.

Where the draft has been put to the vote but has not secured the majorities referred to above, or where the draft has been amended by a simple majority or, in the case of organic laws, by an absolute majority, the conciliation procedure laid down in paragraph 4 below shall be opened.

4. In the cases provided for in the final subparagraph of paragraph 3 above, the Conciliation Committee shall be convened. The Committee shall consist of a delegation from the Council of the Union and a delegation from the Parliament. The Commission shall participate in the work of the Committee.

Where, within a period of three months, the Committee reaches agreement on a joint text, that text shall be submitted for approval to the Parliament and the Council; they shall take a decision by an absolute majority or, in the case of organic laws, by a qualified majority within a period of three months. No amendments shall be admissible.

Where, within the period referred to above the Committee fails to reach agreement, the text forwarded by the Council shall be submitted for approval to the Parliament which shall, within a period of three months, take a decision by an absolute majority or, in the case of organic laws, by a qualified majority. Only amendments tabled by the Commission shall be admissible. Within a period of three months, the Council may reject by a qualified majority the text adopted by the Parliament. No amendments shall then be admissible.

5. Without prejudice to Article 23 (3) of this Treaty, where the Parliament or the Council fails to submit the draft to a vote within the time-limits laid down, the draft shall be deemed to have been adopted by the institution which has not taken a decision. However, a law may not be regarded as having been adopted unless it has been expressly approved either by the Parliament or by the Council.

6. Where a particular situation so requires, the Parliament and the Council may, by common accord, extend the time-limits laid down in this article.

## Article 39 – Publication of laws

Without prejudice to Article 76 (4) of this Treaty, the President of the arm of the legislative authority which has taken the last express decision shall establish that the legislative procedure has been completed and shall cause laws to be published without delay in the Official Journal of the Union.

## Article 40 – Power to issue regulations

The Commission shall determine the regulations and decisions required for the implementation of laws in accordance with the procedures laid down by those laws. Regulations shall be published in the Official Journal of the Union; decisions shall be notified to the addressees. The Parliament and the Council of the Union shall be immediately informed thereof.

## Article 41 – Hearing of persons affected

Before adopting any measure, the institutions of the Union shall, wherever possible and useful, hear the persons thereby affected. Laws of the Union shall lay down the procedures for such hearings.

## Article 42 – The law of the Union

The law of the Union shall be directly applicable in the Member States. It shall take precedence over national law. Without prejudice to the powers conferred on the Commission, the implementation of the law shall be the responsibility of the authorities of the Member States. An organic law shall lay down the procedures in accordance with which the Commission shall ensure the implementation of the law. National courts shall apply the law of the Union.

## Article 43 – Judicial review

The Community rules governing judicial review shall apply to the Union. They shall be supplemented by an organic law on the basis of the following principles:

— extension of the right of action of individuals against acts of the Union adversely affecting them,

— equal right of appeal and equal treatment for all the institutions before the Court of Justice,

— jurisdiction of the Court for the protection of fundamental rights *vis-à-vis* the Union,

— jurisidiction of the Court to annul an act of the Union within the context of an application for a preliminary ruling or of a plea of illegality,

— creation of a right of appeal to the Court against the decisions of national courts of last instance where reference to the Court for a preliminary ruling is refused or where a preliminary ruling of the Court has been disregarded,

— jurisdiction of the Court to impose sanctions on a Member State failing to fulfil its obligation under the law of the Union,

— compulsory jurisdiction of the Court to rule on any dispute between Member States in connection with the objectives of the Union.

## Article 44 – Sanctions

In the case provided for in Article 4(4) of this Treaty, and in every other case of serious and persistent violation by a Member State of the provisions of the Treaty, established by the Court of Justice at the request of the Parliament or the Commission, the European Council may, after hearing the Member State concerned and with the approval of the Parliament, take measures:

— suspending the rights deriving from the application of part or the whole of the Treaty provisions to the State in question and its nationals without prejudice to the rights acquired by the latter,

— which may go as far as suspending participation by the State in question in the European Council, the Council of the Union and any other organ in which that State is represented as such.

The State in question shall not participate in the vote on the sanctions.

# PART FOUR: The policies of the Union

### Article 45 – General provisions

1. Starting from the Community patrimony, the Union shall continue the actions already undertaken and undertake new actions in compliance with this Treaty and, in particular, with Article 9 thereof.

2. The structural and conjunctural policies of the Union shall be drawn up and implemented so as to promote, together with balanced expansion throughout the Union, the progressive elimination of the existing imbalances between its various areas and regions.

### Article 46 – Homogeneous judicial area

In addition to the fields subject to common action, the coordination of national law with a view to constituting a homogeneous judicial area shall be carried out in accordance with the method of cooperation. This shall be done in particular:

— to take measures designed to reinforce the feeling of individual citizens that they are citizens of the Union,

— to fight international forms of crime, including terrorism.

The Commission and the Parliament may submit appropriate recommendations to the European Council.

## *Title I – Economic policy*

### Article 47 – Internal market and freedom of movement

1. The Union shall have exclusive competence to complete, safeguard and develop the free movement of persons, services, goods and capital within its territory; it shall have exclusive competence for trade between Member States.

2. This liberalization process shall take place on the basis of detailed and binding programmes and timetables laid down by the legislative authority in accordance with the procedures for adopting laws. The Commission shall adopt the implementing procedures for those programmes.

3. Through those programmes, the Union must attain:

— within a period of two years following the entry into force on this Treaty, the free movement of persons and goods: this implies in particular the abolition of personal checks at internal frontiers,

— within a period of five years following the entry into force of this Treaty, the free movement of services, including banking and all forms of insurance,

— within a period of 10 years following the entry into force of this Treaty, the free movement of capital.

### Article 48 – Competition

The Union shall have exclusive competence to complete and develop competition policy at the level of the Union, bearing in mind:

— the need to establish a system for the authorization of concentrations of undertakings based on the criteria laid down by Article 66 of the Treaty establishing the European Coal and Steel Community,

— the need to restructure and strengthen the industry of the Union in the light of the profound disturbances which may be caused by international competition,

— the need to prohibit any form of discrimination between private and public undertakings.

## Article 49 – Approximation of the laws relating to undertakings and taxation

The Union shall take measures designed to approximate the laws, regulations and administrative provisions relating to undertakings, and in particular to companies, in so far as such provisions have a direct effect on a common action of the Union. A law shall lay down a statute for European undertakings.

In so far as necessary for economic integration within the Union, a law shall effect the approximation of the laws relating to taxation.

## Article 50 – Conjunctural policy

1. The Union shall have concurrent competence in respect of conjunctural policy, with a particular view of facilitating the coordination of economic policies within the Union.

2. The Commission shall define the guidelines and objectives to which the action of the Member States shall be subject on the basis of the principles and within the limits laid down by laws.

3. Laws shall lay down the conditions under which the Commission shall ensure that the measures taken by the Member States conform with the objectives it has defined. Laws shall authorize the Commission to make the monetary, budgetary or financial aid of the Union conditional on compliance with the measures taken under paragraph 2 above.

4. Laws shall lay down the conditions under which the Commission, in conjunction with the Member States, shall utilize the budgetary or financial mechanisms of the Union for conjunctural ends.

## Article 51 – Credit policy

The Union shall exercise concurrent competence as regards European monetary and credit policies, with the particular objective of coordinating the use of capital market resources by the creation of a European capital market committee and the establishment of a European bank supervisory authority.

## Article 52 – European Monetary System

1. All the Member States shall participate in the European Monetary System, subject to the principle set out in Article 35 of this Treaty.

2. The Union shall have concurrent competence for the progressive achievement of full monetary union.

3. An organic law shall lay down rules governing:

— the statute and the operation of the European Monetary Fund in accordance with Article 33 of this Treaty,

— the conditions for the effective transfer to the European Monetary Fund of part of the reserves of the Member States,

— the conditions for the progressive conversion of the ECU into a reserve currency and a means of payment, and its wider use,

— the procedures and the stages for attaining monetary union,

— the duties and obligations of the central banks in the determination of their objectives regarding money supply.

4. During the five years following the entry into force of this Treaty, by derogation from Articles 36, 38 and 39 thereof, the European Council may suspend the entry into force of the organic laws referred to above within a period of one month following their adoption and refer them back to the Parliament and the Council of the Union for fresh consideration.

## Article 53 – Sectoral policies

In order to meet the particular needs for the organization, development or coordination of specific sectors of economic activity, the Union shall have concurrent competence with the Member States to pursue sectoral policies at the level of the Union. In the fields referred to below, such policies shall, by the establishment of reliable framework conditions, in particular pursue the aim of facilitating the decisions which undertakings subject to competition must take concerning investment innovation.

The sectors concerned are in particular:
— argiculture and fisheries,
— transport,
— telecommunications,
— research and development,
— industry,
— energy.

(a) In the fields of agriculture and fisheries, the Union shall pursue a policy designed to attain the objectives laid down in Article 39 of the Treaty establishing the European Economic Community.

(b) In the field of transport, the Union shall pursue a policy designed to contribute to the economic integration of the Member States. It shall, in particular, undertake common actions to put an end to all forms of discrimination, harmonize the basic terms of competition between the various modes of transport, eliminate obstacles to transfrontier traffic and develop the capacity of transport routes so as to create a transport network commensurate with European needs.

(c) In the field of telecommunications, the Union shall take common action to establish a telecommunications network with common standards and harmonize tariffs; it shall exercise competence in particular with regard to the high technology sectors, research and development activities and public procurement policy.

(d) In the field of research and development, the Union may draw up common strategies with a view to coordinating and guiding national activities and encouraging cooperation between the Member States and between research institutes. It may provide financial support for joint research, may take responsibility for some of the risks involved and may undertake research in its own establishments.

(e) In the field of industry, the Union may draw up development strategies with a view to guiding and coordinating the policies of the Member States in those industrial branches which are of particular significance to the economic and political security of the Union. The Commission shall be responsible for taking the requisite implementing measures. It shall submit to the Parliament and the Council of the Union a periodic report on industrial policy problems.

(f) In the field of energy, action by the Union shall be designed to ensure security of supplies, stability on the market of the Union and, to the extent that prices are regulated, a harmonized pricing policy compatible with fair competitive practices. It shall also be designed to encourage the development of alternative and renewable energy sources, to introduce common technical standards for efficiency, safety, the protection of the environment and of the population, and to encourage the exploitation of European sources of energy.

## Article 54 – Other forms of cooperation

1. Where Member States have taken the initiative to establish industrial cooperation structures outside the scope of this Treaty, the European Council may, if the common interest justifies it, decide to convert those forms of cooperation into a common action of the Union.

2. In specific sectors subject to common action, laws may establish specialized European agencies and define those forms of supervision applicable thereto.

## *Title II – Policy for society*

### Article 55 – General provisions

The Union shall have concurrent competence in the field of social, health, consumer protection, regional, environmental, education and research, cultural and information policies.

### Article 56 – Social and health policy

The Union may take action in the field of social and health policy, in particular in matters relating to:

— employment, and in particular the establishment of general comparable conditions for the maintenance and creation of jobs,
— the law on labour and working conditions,
— equality between men and women,
— vocational training and further training,
— social security and welfare,
— protection against occupational accidents and diseases,
— work hygiene,
— trade union rights and collective negotiations between employers and employees, in particular with a view to the conclusion of Union-wide collective agreement,
— forms of worker participation in decisions affecting their working life and the organization of undertakings,
— the determination of the extent to which citizens of non-member States may benefit from equal treatment,
— the approximation of the rules governing research into and the manufacture, properties and marketing of pharmaceutical products,
— the prevention of addiction,
— the coordination of mutual aid in the event of epidemics or disasters.

### Article 57 – Consumer policy

The Union may lay down rules designed to protect the health and safety of consumers and their economic interests, particularly in the event of damage. The Union may encourage action to promote consumer education, information and consultation.

### Article 58 – Regional policy

The regional policy of the Union shall aim at reducing regional disparities and, in particular, the under-development of the least-favoured regions, by injecting new life into those regions so as to ensure their subsequent development and by helping to create the conditions likely to put an end to the excessive concentration of migration towards certain industrial centres.

The regional policy of the Union shall, in addition, encourage transfrontier regional cooperation.

The regional policy of the Union shall comprise:

— the development of a European framework for the regional planning policies pursued by the competent authorities in each Member State,
— the promotion of investment and infrastructure projects which bring national programmes into the framework of an overall concept,
— the implementation of integrated programmes of the Union on behalf of certain regions, drawn up in collaboration with the representatives of the people concerned, and, where possible, the direct allocation of the requisite funds to the regions concerned.

### Article 59 – Environmental policy

In the field of the environment, the Union shall aim at preventing or, taking account as far as possible of the 'polluter pays' principle, at redressing any damage which is beyond the capabilities of the individual Member State or which requires a collective solution. It shall encourage a policy of the rational utilization of natural resources, of exploiting renewable raw materials and of recycling waste which takes account of environmental protection requirements.

The Union shall take measures designed to provide for animal protection.

### Article 60 – Education and research policy

In order to create a context which will help inculcate in the public an awareness of the Union's own identity and to ensure a minimum standard of training creating the opportunity for free choice of career, job or training establishment anywhere in the Union, the Union shall take measures concerning:

— the definition of objectives for common or comparable training programmes,

— the Union-wide validity and euqivalence of diplomas and school, study and training periods,

— the promotion of scientific research.

### Article 61 – Cultural policy

1. The Union may take measures to:

— promote cultural and linguistic understanding between the citizens of the Union,

— publicize the cultural life of the Union both at home and abroad,

— establish youth exchange programmes.

2. The European University Institute and the European Foundation shall become establishments of the Union.

3. Laws shall lay down rules governing the approximation of the law of copyright and the free movement of cultural works.

### Article 62 – Information policy

The Union shall encourage the exchange of information and access to information for its citizens. To this end, it shall eliminate obstacles to the free movement of information, whilst ensuring the broadest possible competition and diversity of types of organization in this field. It shall encourage cooperation between radio and television companies for the purpose of producing Union-wide programmes.

## *Title III – International relations of the Union*

### Article 63 – Principles and methods of action

1. The Union shall direct its efforts in international relations towards the achievement of peace through the peaceful settlement of conflicts and towards security, the deterrence of aggression, détente, the mutual balances and verifiable reduction of military forces and armaments, respect for human rights, the raising of living standards in the Third World, the expansion and improvement of international economic and monetary relations in general and trade in particular and the strengthening of international organization.

2. In the international sphere, the Union shall endeavour to attain the objectives set out in Article 9 of this Treaty. It shall act either by common action or by cooperation.

## Article 64 – Common action

1. 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.

2. In the field of commercial policy, the Union shall have exclusive competence.

3. The Union shall pursue a development aid policy. During a transitional period of 10 years, this policy as a whole shall progressively become the subject of common action by the Union. In so far as the Member States continue to pursue independent programmes, the Union shall define the framework within which it will ensure the coordination of such programmes with its own policy, whilst observing current international commitments.

4. Where certain external policies fall within the exclusive competence of the European Communities pursuant to the Treaties establishing them, but where that competence has not been fully exercised, a law shall lay down the procedures required for it to be fully exercised within a period which may not exceed five years.

## Article 65 – Conduct of common action

1. In the exercise of its competences, the Union shall be represented by the Commission in its relations with non-member States and international organizations. In particular, the Commission shall negotiate international agreements on behalf of the Union. It shall be responsible for liaison with all international organizations and shall cooperate with the Council of Europe, in particular in the cultural sector.

2. The Council of the Union may issue the Commission with guidelines for the conduct of international action; it must issue such guidelines, after approving them by an absolute majority, where the Commission is involved in drafting acts and negotiating agreements which will create international obligations for the Union.

3. The Parliament shall be informed, in good time and in accordance with appropriate procedures, of every action of the institutions competent in the field of international policy.

4. The Parliament and the Council of the Union, both acting by an absolute majority, shall approve international agreements and instruct the President of the Commission to deposit the instruments of ratification.

## Article 66 – Cooperation

The Union shall conduct its international relations by the method of cooperation where Article 64 of this Treaty is not applicable and where they involve:

— matters directly concerning the interests of several Member States of the Union,

— or fields in which the Member States acting individually cannot act as efficiently as the Union,

— or fields where a policy of the Union appears necessary to supplement the foreign policies pursued on the responsibility of the Member States.

— or matters relating to the political and economic aspects of security.

## Article 67 – Conduct of cooperation

In the fields referred to in Article 66 of this Treaty:

1. The European Council shall be responsible for cooperation; the Council of the Union shall be responsible for its conduct; the Commission may propose policies and actions which shall be implemented, at the request of the European Council or the Council of the Union, either by the Commission or by the Member States.
2. The Union shall ensure that the international policy guidelines of the Member States are consistent.
3. It shall coordinate the positions of the Member States during the negotiation of international agreements and within the framework of international organizations.
4. In an emergency, where immediate action is necessary, a Member State particularly concerned may act individually after informing the European Council and the Commission.

5. The European Council may call on its President, on the President of the Council of the Union or on the Commission to act as spokesman of the Union.

## Article 68 – Extension of the field of cooperation and transfer from cooperation to common action

1. The European Council may extend the field of cooperation, in particular as regards armaments, sales of arms to non-member States, defence policy and disarmament.

2. Under the conditions laid down in Article 11 of this Treaty, the European Council may decide to transfer a particular field of cooperation to common action in external policy. In that event, the provisions laid down in Article 23(3) of this Treaty shall apply without any time-limit. Bearing in mind the principle laid down in Article 35 of this Treaty, the Council of the Union, acting unanimously, may exceptionally authorize one or more Member States to derogate from some of the measures taken within the context of common action.

3. By way of derogation from Article 11(2) of this Treaty, the European Council may decide to restore the fields transferred to common action in accordance with paragraph 2 above, either to cooperation or to the competence of the Member States.

4. Under the conditions laid down in paragraph 2 above, the European Council may decide to transfer a specific problem to common action for the period required for its solution. In that event, paragraph 3 above shall not apply.

## Article 69 – Right of representation abroad

1. The Commission may, with the approval of the Council of the Union, establish respresentation in non-member States and international organizations.

2. Such representations shall be responsible for representing the Union in all matters subject to common action. They may also, in collaboration with the diplomatic agent of the Member State holding the presidency of the European Council, coordinate the dipomatic activity of the Member States in the fields subject to cooperation.

3. In non-member States and international organizations where there is no representation of the Union, it shall be represented by the diplomatic agent of the Member State currently holding the presidency of the European Council or else by the diplomatic agent of another Member State.

# PART FIVE: The finances of the Union

## Article 70 – General provisions

1. The Union shall have its own finances, administered by its institutions, on the basis of the budget adopted by the budgetary authority which shall consist of the European Parliament and the Council of the Union.

2. The revenue of the Union shall be utilized to guarantee the implementation of common actions undertaken by the Union. Any implementation by the Union of a new action assumes that the allocation to the Union of the financial means required shall be subject to the procedure laid down in Article 71(2) of this Treaty.

## Article 71 – Revenue

1. When this Treaty enters into force, the revenue of the Union shall be of the same kind as that of the European Communities. However, the Union shall receive a fixed percentage of the basis for assessing value-added tax established by the budget within the framework of the programme set out in Article 74 of this Treaty.

2. The Union may, by an organic law, amend the nature or the basis of assessment of existing sources of revenue or create new ones. It may by a law authorize the Commission to issue loans, without prejudice to Article 75(2) of this Treaty.

3. In principle, the authorities of the Member States shall collect the revenue of the Union. Such revenue shall be paid to the Union as soon as it has been collected. A law shall lay down the implementing procedures for this paragraph and may set up the Union's own revenue-collecting authorities.

## Article 72 – Expenditure

1. The expenditure of the Union shall be determined annually on the basis of an assessment of the cost of each common action within the framework of the financial programme set out in Article 74 of this Treaty.

2. At least once a year, the Commission shall submit a report to the budgetary authority on the effectiveness of the actions undertaken, account being taken of their cost.

3. All expenditure by the Union shall be subject to the same budgetary procedure.

## Article 73 – Financial equalization

A system of financial equalization shall be introduced in order to alleviate excessive economic imbalances between the regions. An organic law shall lay down the procedures for the application of this system.

## Article 74 – Financial programmes

1. At the beginning of each parliamentary term, the Commission, after receiving its investiture, shall submit to the European Parliament and the Council of the Union a report on the division between the Union and the Member States of the responsibilities for implementing common actions and the financial burdens resulting therefrom.

2. On a proposal from the Commission, a multiannual financial programme, adopted according to the procedure for adopting laws, shall lay down the projected development in the revenue and expenditure of the Union. These forecasts shall be revised annually and be used as the basis for the preparation of the budget.

## Article 75 – Budget

1. The budget shall lay down and authorize all the revenue and expenditure of the Union in respect of each calendar year. The adopted budget must be in balance. Supplementary and amending budgets shall be adopted under the same conditions as the general budget. The revenue of the Union shall not be earmarked for specific purposes.

2. The budget shall lay down the maximum amounts for borrowing and lending during the financial year. Save in exceptional cases expressly laid down in the budget, borrowed funds may only be used for finance investment.

3. Appropriations shall be entered in specific chapters grouping expenditure according to its nature or destination and subdivided in compliance with the provisions of the Financial Regulation. The expenditure of the institutions other than the Commission shall be the subject of separate sections of the budget; they shall be drawn up and managed by those institutions and may only include operating expenditure.

4. The Financial Regulation of the Union shall be established by an organic law.

## Article 76 – Budgetary procedure

1. The Commission shall prepare the draft budget and forward it to the budgetary authority.

2. Within the time-limits laid down by the Financial Regulation:

(a) on first reading, the Council of the Union may approve amendments by a simple majority. The draft budget, with or without amendment, shall be forwarded to the Parliament;

(b) on first reading, the Parliament may amend by an absolute majority the amendments of the Council and approve other amendments by a simple majority;

(c) if, within a period of 15 days, the Commission opposes the amendments approved by the Council or by the Parliament on first reading, the relevant arm of the budgetary authority must take a fresh decision by a qualified majority on second reading;

(d) if the budget has not been amended, or if the amendments adopted by the Parliament and the Council are identical, and if the Commission has not exercised its right to oppose the amendments, the budget shall be deemed to have been finally adopted;

(e) on second reading, the Council may amend by a qualified majority the amendments approved by the Parliament. It may by a qualified majority refer the whole draft budget as amended by the Parliament back to the Commission and request it to submit a new draft; where not so referred back, the draft budget shall at all events be forwarded to the Parliament;

(f) on second reading, the Parliament may reject amendments adopted by the Council only by a qualified majority. It shall adopt the budget by an absolute majority.

3. Where one of the arms of the budgetary authority has not taken a decision within the time-limit laid down by the Financial Regulation, it shall be deemed to have adopted the draft referred to it.

4. When the procedure laid down in this article has been completed, the President of the Parliament shall declare that the budget stands adopted and shall cause it to be published without delay in the Official Journal of the Union.

## Article 77 – Provisional twelfths

Where the budget has not been adopted by the beginning of the financial year, expenditure may be effected on a monthly basis, under the conditions laid down in the Financial Regulation, up to a maximum of one-twelfth of the appropriations entered in the budget of the preceding financial year, account being taken of any supplementary and amending budgets.

At the end of the sixth month following the beginning of the financial year, the Commission may only effect expenditure to enable the Union to comply with its existing obligations.

## Article 78 – Implementation of the budget

The budget shall be implemented by the Commission on its own responsibility under the conditions laid down by the Financial Regulation.

## Article 79 – Audit of the accounts

The Court of Auditors shall verify the implementation of the budget. It shall fulfil its task independently and, to this end, enjoy powers of investigation with regard to the institutions and organs of the Union and to the national authorities concerned.

## Article 80 – Revenue and expenditure account

At the end of the financial year, the Commission shall submit to the budgetary authority, in the form laid down by the Financial Regulation, the revenue and expenditure account which shall set out all the operations of the financial year and be accompanied by the report of the Court of Auditors.

## Article 81 – Discharge

The Parliament shall decide to grant, postpone or refuse a discharge; the decision on the discharge may be accompanied by observations which the Commission shall be obliged to take into account.

# PART SIX: General and final provisions

## Article 82 – Entry into force

This Treaty shall be open for ratification by all the Member States of the European Communities.

Once this Treaty has been ratified by a majority of the Member States of the Communities whose population represents two-thirds of the total population of the Communities, the governments of the Member States which have ratified shall meet at once to decide by common accord on the procedures by and the date on which this Treaty shall enter into force.

## Article 83 – Deposit of the instruments of ratification

The instruments of ratification shall be deposited with the government of the first State to have completed the ratification procedure.

## Article 84 – Revision of the Treaty

One representation within the Council of the Union, or one-third of the Members of the Parliament, or the Commission may submit to the legislative authority a reasoned draft law amending one or more provisions of this Treaty. The draft shall be submitted for approval to the two arms of the legislative authority which shall act in accordance with the procedure applicable to organic laws.

The draft, thus approved, shall be submitted for ratification by the Member States and shall enter into force when they have all ratified it.

## Article 85 – The seat

The European Council shall determine the seat of the institutions. Should the European Council not have taken a decision on the seat within two years of the entry into force of this Treaty, the legislative authority shall take a final decision in accordance with the procedure applicable to organic laws.

## Article 86 – Reservations

The provisions of this Treaty may not be subject to any reservations. This article does not preclude the Member States from maintaining, in relation to the Union, the declarations they have made with regard to the Treaties and conventions which form part of the Community patrimony.

## Article 87 – Duration

This Treaty is concluded for an unlimited period.

ANNEX II

# Ad Hoc Committee for Institutional Affairs Report to the European Council (March 1985)

*Contents*

# Preface[1, 2]

After the Second World War Europe made a very promising start by setting up, firstly with the European Coal and Steel Community (ECSC) and then with the European Economic Community (EEC), an unprecedented construction which could not be compared with any existing legal entity. The Community — based on the principles of pluralist democracy and the respect for human rights which constitute essential elements for membership and is one of the constant objectives of its activities throughout the world — answered the complex and deeply felt needs of all our citizens.

Although the Community decided to complete this construction as from the Summit in the Hague in 1969 and Paris in 1972, it is now in a state of crisis and suffers from serious deficiencies.

In addition, however, the Member States have become caught up in differences which have obscured the considerable economic and financial advantages which would be obtained from the realization of the Common Market and from economic and monetary union.

Furthermore, after 10 years of crisis, Europe, unlike Japan and the United States, has not achieved a growth rate sufficient to reduce the disturbing figure of alomst 14 million unemployed.

In this state of affairs Europe is faced with ever more important challenges both in the field of increasing industrial and technological competition from outside and in the struggle to maintain the position of political independence which historically it has held in the world.

Faced with these challenges, Europe must recover faith in itself and launch itself on a new common venture — the establishment of a political entity based on clearly defined priority objectives coupled with the means of achieving them.

The Community has not lost sight of the fact that it represents only a part of Europe. Resolved to advance together, the Member States remain aware of the civilization which they share with the other countries of the continent, in the firm belief that any progress in building the Community is in keeping with the interests of Europe as a whole.

*
* *

The Committee has placed itself firmly on the political level, and without purporting to draft a new Treaty in legal form, proposes to set out the objectives, policies and institutional reforms which are necessary to restore to Europe the vigour and ambition of its inception.[3]

# I – A genuine political entity[4, 5]

It is not enough to draw up a simple catalogue of measures to be taken — even if they are precise and concrete — since such exercises have often been attempted in the past without achieving results. We must now make a qualitative leap and present the various proposals in a global manner, thus demonstrating the common political will of the Member States. At the end of the day that will must be expressed by the formulation of a *genuine political entity*[4] among European States: i.e. a European Union:

(i) with the power to take decisions in the name of all citizens, by a democratic process according to their common interest in political and social development, economic progress and security,[6] and according to procedures which could vary depending on whether the framework is that of inter-governmental cooperation, the Community Treaties, or new instruments yet to be agreed;

(ii) in keeping with the personality of each of the constituent States.

---

[1] See Mr Moller's comments in Annex A.
[2] See Mr Papantoniou's comments in Annex B.
[3] Mr Moller felt that the difficulties facing the construction of Europe resulted from a failure to implement the existing Treaties fully and could be remedied by the strict application of the Treaties. He considered that the achievement of European Union, as already foreseen in existing statements, was the objective.
[4] Reservation entered by Mr Papantoniou who suggested replacing 'a genuine political entity' by 'a genuine economic and political entity'.
[5] Mr Moller considered that the expression 'a genuine political entity' should be replaced by the expression 'European Union'.
[6] Mr Moller considered that the point security should be limited to the political and economic aspects of security.

# II – Priority objectives

## *A. A homogeneous internal economic area*

The aim is to create a homogeneous internal economic area, by bringing about the fully integrated internal market envisaged in the Treaty of Rome as an essential step towards the objective of economic and monetary union called for since 1972, thus allowing Europeans to benefit from the dynamic effects of a single market with immense purchasing power. This would mean more jobs, more prosperity and faster growth and would thus make the Community a reality for its citizens.

### *(a) Through the completion of the Treaty*

1. By creating a genuine internal market by the end of the decade on the basis of a precise timetable.

   This involves:

   (i) the effective free movement of European citizens;*

   (ii) a favourable climate for investment and innovation through stable and coherent economic, financial and monetary policies in the Member States and the Community;

   (iii) pending the adoption of European standards, the immediate mutual recognition of national standards by establishing the simple principle that all goods lawfully produced and marketed in a Member State must be able to circulate without hindrance throughout the Community;

   (iv) more rapid and coordinated customs procedures, including the introduction as planned of a single administrative document by 1987;

   (v) the early introduction of a common transport policy;

   (vi) the creation at an early date of a genuine common market in financial services, including insurance;[7]

   (vii) the opening up of access to public contracts;[7]

   (viii) the creation of conditions which will favour cooperation between European undertakings and in particular the elimination of taxation differences that impede the achievement of the Community's objectives;

   (ix) the strengthening of European financial integration, *inter alia* through the free movement of capital and the creation of a European financial market, hand in hand with the strengthening of the European monetary system.[7]

2. Through the increased competitiveness of the European economy.[8]

   European economic life must be made fully competitive through a return to the fundamental principle embodied in the Treaties of promoting efficient producers, involving in particular:

   (i) the removal of all measures distorting competition in the Common Market, notably through an application of national and Community competition rules, adapted to the new industrial situation, and through strict control of national State aids in compliance with the rules of the Treaties;[9]

   (ii) introduction of the necessary transparency in nationalized industries in order to safeguard the principles laid down in the Treaties.

3. Through the promotion of economic convergence [10,11]

   (i) the promotion of solidarity amongst the Member States aimed at reducing structural imbalances

---

* dealt with by the Committee for a Peoples' Europe.

[7] Reservation entered by Mr Papantoniou who considered that the introduction of these policies should take account of the particular situation of national economies.

[8] In addition Mr Moller stressed that all the measures in the agricultural area which have in recent years been introduced with the intention of renationalizing the common agricultural policy should be dismantled.

[9] Reservation entered by Mr Papantoniou who considered that the application of competition rules of the Treaties should take account of the particular situation of the less developed economies.

[10] Reservation by Mr Papantoniou who argued that the text should stress more explicitly the need to reinforce the policies aiming at economic convergence, and should give a more comprehensive definition of their scope.

[11] Mr Ruhfus entered a reservation. He argues that economic convergence by its very nature is a convergence of economic policies aiming at the objectives set out in Article 104 of the Treaty establishing the European Economic Community. It will thus help to improve living conditions in the individual Member States. On this basis, positive action is required to counter tendencies to inequality and to reduce structural imbalances in the Community.
Mr Van Eekelen concurs with the argument of Mr Ruhfus.

which prevent the convergence of living standards, through the strengthening of specific Community instruments and a judicious definition of Community policies;

(ii) the effective pursuit of integration and the strengthening of Community institutions that underlies it, require positive action to counter the tendencies to inequality and promote the convergence of living standards.[12]

### *(b) Through the creation of a technological community*

The growth capacity of Europe, backed up by this genuine internal market, will have to be based, *inter alia,* on wholehearted participation in technological innovation, and must result in the creation of a technological community through, among other things, the introduction of faster decision-making procedures. This process must enable European industry to become a powerful competitor internationally in the field of production and application of the advanced technologies.

This means in particular:

(i) that industrial enterprises in the Community must have at their disposal common European standards and suitable procedures for advanced technology products;

(ii) that international cooperation during the development phase must be strengthened;

(iii) that public and semi-public contract procedures in the Community, concerning *inter alia,* the supply and use of electronic and communications equipment, must be liberalized;[13]

(iv) that the exchange of services connected to the use of advanced technology must be liberalized;[13]

(v) that a successful techno-industrial development in the technological community depends upon and must increasingly allow for wider scope for individual creativity and performance;

and, in addition the following specific activities:

(vi) the development of vocational education and training;

(vii) the encouragement of universities and research institutes to orient their activities more towards the commercial sector and to ensure the transfer of the results of their work;

(viii)the coordination of research and development at national and Community level;

(ix) the promotion and support of greater industrial cooperation between European companies including the launching of transnational projects in key sectors;

(x) the furthering of undistorted international exchange of technology and advanced technological products through an active common commercial policy in conformity with GATT obligations.

### *(c) By the strengthening of the European Monetary System (EMS)*

The European monetary system, which was created and set up pending restoration of the conditions for the gradual achievement of economic and monetary union, is one of the achievements of the Community during the last decade. It has enabled the unity of the Common Market to be preserved, reasonable exchange rates to be maintained and the foundations for the Community's monetary identity to be laid.

The time has come however, to forge ahead towards monetary integration through:

(i) the closer coordination of economic, budgetary and monetary policies with the aim of true convergence of economic performance;

(ii) the liberalization of capital movements and the removal of exchange controls;[14]

(iii) the strengthening of the European monetary and financial market to make it attractive and capable of supporting the growth and investment effort;

(iv) the participation of all the Member States both in the EMS and in the exchange rate mechanism, provided that the necessary economic and monetary conditions are met;

---

[12] Reservation by Mr Herman who wishes to see the text of the second paragraph replaced by a call for greater coherence between the economic policies of the Member States which is a better guarantee of a reduction in the differences in living standards.

[13] Reservation entered by Mr Papantoniou who considered that the introduction of these policies should take account of the particular situation of national economies.

[14] Reservation entered by Mr Papantoniou who considered that the introduction of these policies should take account of the particular situation of national economies.

(v) the increased but non-inflationary use of the ECU in transactions between central banks whether they are members of the system or not;

(vi) the elimination consistent with monetary stability of obstacles to the use of the ECU in private transactions;

(vii) the promotion of the ECU as an international reserve currency; the coordination of exchange policies with regard to third currencies and in particular the dollar and the strengthening of the role of the European Monetary Cooperation Fund (EMCF) by stages depending on the progress made in the use of the ECU.[15]

Through these measures as a whole it will be possible for the EMS to progress towards the second institutional phase envisaged in the decision of the European Council in Bremen in 1978.

### *(d) Through mobilizing of the necessary resources*[16]

Intensifying the efforts already undertaken, framing new policies and delegating new tasks to the Community will often, but not always, entail additional expenditure which will necessitate transfers of resources. Such resources should be made available in the context of a clearly identifiable Community financing system firmly based on the own resource principle. This system, that would come under review at reasonable intervals, should endow the Community with a stable revenue base for a sufficiently long period.

Actual transfers of resources will only be feasible if they are subject to strict budgetary control and if in most cases this is reflected in savings in the Member States.

## *B. Promotion of the common values of civilization*

The contemplated European Union will not rest on an economic community alone. The logic of integration has already led Member States to cooperate in fields other than economic ones and will continue to lead them still further along that path. The accentuation of this essential process will give a European dimension to all aspects of collective life in our countries.

To that end a number of measures must be undertaken, whenever possible in close cooperation with European countries which are not members of the Community and with the Council of Europe, which makes a valuable contribution especially with regard to the promotion of human rights and the common cultural identity.

These measures are:

### *1. Measures to protect the environment*

Pollution, in most of its forms does not recognize frontiers and poses an increasing danger to the environment and the health of people both within the Community and outside. High priority must be given to the protection of the environment and the improvement of working conditions and safety at work.

### *2. Gradual achievement of a European social area*

An integrated internal economic area must be based not only on industrial, economic and monetary policies, but also on social policy. In this field, the Union will have to remain true to the objectives which the Community set itself from its inception and will have to have the necessary powers and means to act whenever social policy measures are required at European level.

---

[15] Reservation entered by Mr Ruhfus. He emphasized that, for the ECU to become an international reserve currency, some major requisites are still lacking at present. A strengthening of the role of the EMCF is primarily dependent on further progress in the convergence of economic policies and on its consolidation through institutional development.

[16] Mr Moller considered that the increase in the VAT ceiling agreed by the European Council at Fontainebleau would scarcely be sufficient for the promotion of new policies.
The size of additional resources must be determined by the need to continue existing common policies and to develop new ones, in particular with regard to research and technology.

Progressive introduction of a European social area, as the logical follow-on from an economically integrated, dynamic and competitive Community with the will to achieve full and better employment entails:

(i) definition of frameworks for action, particularly in the basic fields listed in Article 118 of the Treaty, either by harmonization, by the adoption of joint decisions or by any other appropriate measures;

(ii) pursuance of a social policy that reflects the medium-term social action programme and the changing economic and social needs of the Community;

(iii) development of the dialogue between employers and employees at European level, which could result, where they judge it desirable, in contractual relations between them.

### *3. Gradual establishment of a homogeneous judicial area*

This means:

(i) increasing protection of fundamental freedoms and rights as they derive from common basic principles and the European Convention on Human Rights. The Court of Justice has played an essential role in this context and will do so even more in the future;

(ii) increased harmonization or approximation of national laws in all the fields covered by the European Union, in so far as these are consistent with the objectives of the Union;

(iii) envisaging, in certain areas of inter-governmental cooperation, agreements between Member States which would, in cases where unanimous agreement could not be reached, apply among those States having ratified them if the latter constitute a strong majority;

(iv) a campaign against large-scale crime and terrorism by increasing cooperation between Member States;

(v) further codification of Community law.

### *4. The promotion of common cultural values*

European culture is one of the strongest links between the States and peoples of Europe. It is part of the European identity. The promotion of the European cultural identity should be a comprehensive expression of the cultural variety and each nation's individual values which form an integral part of it.

The promotion of common cultural values and the European cultural identity requires:

(i) the safeguarding of the European cultural heritage,

(ii) support for cultural creation,

(iii) measures to overcome language barriers,

(iv) the development of new media in a European-wide context,

(v) the elimination of obstacles to the free circulation of cultural goods and communication,

(vi) an improvement in the level of knowledge about all the peoples of the Community in all their diversity and their different contributions to European culture,[17]

(vii) the intensification of exchange programmes.

The European Foundation and the European University Institute should be associated with these actions. Cooperation with third countries and in the wider international context should also be encouraged. The practical realization of cultural cooperation requires a coherent organizational framework.

## *C. The search for an external identity*[18]

Europe's external identity can be achieved only gradually within the framework of common action and European political cooperation (EPC) in accordance with the rules applicable to each of these. It is increasingly evident that interaction between these two frameworks is both necessary and useful. They must therefore be more closely

[17] Mr Ferri feels that minority cultures should be expressly mentioned here, as their protection is an achievement of democratic pluralism in its modern form.

[18] Mr Møller entered a general reserve on all of this section. He considered that, instead of structural changes, it is necessary to have a new pragmatic development of European political cooperation on the existing base, which has already shown itself to be effective to further this development. Particularly in relation to security, it should be confined to political and economic aspects.

aligned. The objective of European political cooperation must remain the systematic formulation and implementation of a common external policy.[19]

Similarly in the case of security, although a fundamental aim of European Union is indeed the cohesiveness and solidarity of the countries of Europe within the larger European and western framework, it will only be possible to achieve that aim by paying special attention to the existing Alliances on the one hand, and the differing individual situations on the other, including the situations of the two nuclear powers which are members and of certain Member States facing specific problems in this field.

*(a) External policy*

It should first of all be noted that common policies, which have an external dimension, are provided for in the Treaties and already exist, along with external policies such as the development policy and the commercial policy.

In particular, Community development policy must be intensified, without prejudice to the traditional actions of the Member States.

On the diplomatic front several measures could be considered initially which might allow progress to be made towards finding a common voice.[20]

1. the strengthening of political cooperation structures by:
   (i) the creation of a permanent political cooperation secretariat to enable successive Presidencies to ensure greater continuity and cohesiveness of action; the secretariat would to a large extent use the back-up facilities of the Council and should help to strengthen the cohesion between political cooperation and the external policies of the Community;
   (ii) the regular organization of EPC working meetings at the Community's places of work, while meetings of Ministers should also be arranged in the Member States' capitals.
2. The improvement of political cooperation through:
   (i) an explicit undertaking by the Member States to promote EPC by agreeing to a formalization of the commitments to a prior consultation procedure;
   (ii) seeking a consensus in keeping with the majority opinion with a view to the prompt adoption of common positions and to facilitating joint measures;
   (iii) adopting common positions in multilateral and inter-regional relations, particularly at the United Nations.
3. Member States and the Community should examine on a case-by-case basis the desirability of common representation at international institutions, especially in the UN framework and in the countries where only a few Member States are represented.
4. Codification of EPC rules and practices.

*(b) Security and defence*[21]

The aim is to encourage greater awareness on the part of the Member States of the common interests of the future European Union in matters of security. The relevant Member States will make the fullest contribution both to the maintenance of adequate defences and political solidarity, and to the pursuit of security at the lowest possible level of forces through the negotiation of balanced and verifiable measures of arms control and disarmament.

In any event, this question will have to take account of:

(1) the frameworks which already exist (and of which not all partners in the European Community are members)

[19] Reservation entered by Mr Papantoniou who suggested replacing the last sentence by:
'The objective of European political cooperation must remain the systematic search for common positions in external affairs.'

[20] Reservation entered by Mr Papantoniou on points 1, 2, 3 and 4 of the section on external policy. He argued in favour of preserving the informal character of present EPC arrangements and stressed the importance of consensus in the search for common positions.

[21] Mr Dooge did not agree to the inclusion of the section on security and defence.

such as the Atlantic Alliance, the framework for and basis of our security, and Western European Union, the strengthening of which, now under way, would enrich the Alliance with its own contribution;[22]

(2) the differing capabilities and responsibilities and the distinctive situations of the Community Member States;

(3) the existence of interests and objectives which Member States, while respecting their individual situations as regards defence and security, recognize as common, in particular the need for the Atlantic Alliance to maintain adequate military strength in Europe for effective deterrence and defence, in order to preserve peace and protect democratic values.[23]

Accordingly, the following measures are proposed:

(i) Developing and strengthening consultation on security problems as part of political cooperation. Such consultation could involve in particular:

(a) discussion of the nature of external threats to the security of the Union;

(b) discussion of the way in which Member States' security interests may be affected by the international context, in particular by developments in weapons technology and strategic doctrines, changes in relations between the great powers and the progress of negotiations on disarmament and arms control;

(c) an effort to harmonize, whenever, possible, the stances to be taken by Member States on the major problems posed by the preservation of peace in Europe.

(ii) The stepping-up of efforts to draw up and adopt common standards for weapons systems and equipment, taking account of the work being done in the relevant bodies.

Particular attention is to be paid by Member States to:

(a) rationalizing their military equipment research and development;

(b) support for production capacity for high-technology equipment which can strengthen Europe's defensive capabilities.

(iii) A commitment by Member States to design, develop and produce such systems and equipment jointly.

(iv) The will on the part of the Member States to create the technological and industrial conditions necessary for their security.

# III – The means: efficient and democratic institutions[24]

European Union — like the Community today — needs institutions which are entirely at the service of the common interest. Their functioning and behaviour must clearly reflect the original nature of their purpose, within the framework of their specific powers. It is of primary importance that the institutions should comply with and apply the rules of the Treaties.

The trend towards the European Council's becoming simply another body dealing with the day-to-day business of the Community must be reversed. Heads of State and of Government should play a strategic role and give direction and political impetus of the Community. For this purpose two European Council meetings a year should suffice.

## *A. Easier decision-making in the Council,*

which means primarily changes in practice and certain adjustments to existing rules:

(i) less bureaucracy within the institutions, as national authorities have, through their experts, gained too much ground over the last 10 years; in particular, the authority of the Permanent Representatives over the various

[22] Reservation entered by Mr Papantoniou who suggested replacing point 1 by 'the frameworks which already exist (and of which not all partners in the European Community are members) such as the Atlantic Alliance and the Western European Union'.

[23] Reservation entered by Mr Papantoniou who proposed the deletion of 'for the Atlantic Alliance'.

[24] Reservation entered by Mr Møller on this chapter. Mr Møller considers that the problems faced by the Community are not due to the failure or imperfections of the institutions of the Community system. On the contrary, it may be said that the gradual deviation and derogations from these fundamental principles together with a lack of political will to take decisions are the root of many of the problems of today. The balance between the institutions should accordingly be re-established by respecting the distribution of competences between them as laid down in the Treaties.

working parties must be strengthened in order to improve the preparation of the Council's decisions and to focus its discussions on the most important matters;

(ii) the growing number of areas of Community activity has led over the years to the Council meeting in a multiplicity of special compositions. The Council must remain a single institution in which a pre-eminent role of coordination and guidance must be preserved for the ministers with general responsibilities (the 'General Affairs' Council);

(iii) the rules and procedures governing the Council should be rigorously applied in the interests of its own efficiency and internal cohesion;

(iv) concerning principles of voting:

(a) The majority of the committee favour the adoption of the new general principle that decisions must be taken by a qualified or simple majority. Unanimity will still be required in certain exceptional cases, which will have to be distinctly fewer in number in relation to the present Treaties, the list of such cases being restrictive.

In a spirit of a return to the Treaties, the Presidency must call a vote if the Commission or three Member States so request. The vote must be taken within 30 days.[25, 26, 27]

(b) The minority of the committee considered that more use will need to be made, especially in the context of the enlarged Community, of the majority voting provisons laid down in the Treaties. Once a reasonable time has been devoted to the search for consensus, the Presidency should call for a vote.

Where the Treaties require decisions to be taken by unanimity Member States should also make greater use of the possibility of abstention in accordance with Articles 148 (3) (EEC), 118 (EAEC) and 28 (ECSC).

When a Member State considers that its very important interests are at stake, the discussion should continue until unanimous agreement is reached.[28]

(v) in order to ensure the implementation of certain decisions, the use in exceptional circumstances of the method of differentiated Community rules, provided such differentiation is limited in time, is based solely on economic and social considerations and respects the principle of budget unity.[29]

## *B. A strengthened Commission*

The Commission guarantees autonomous representation of the common interest. Wedded to the general interest whose guarantor it is, the Commission cannot be identified with individual national interests.

If it is to carry out fully the tasks entrusted to it, which make it the lynchpin of the Community, its powers must be increased, in particular through greater delegation of executive responsibility in the context of Community policies.

In the first place, its autonomy must be confirmed so that it can be completely independent in the performance of its duties in accordance with the obligation specifically imposed upon it and on each of its members individually.

To this end it is proposed that the President of the Commission be designated by the European Council.

The other members of the college shall be appointed by common accord of the Governments of the Member States, acting on a proposal from the President-designate.[30]

---

[25] This proposal is supported by Mr Faure, Mr Ferri, Mr Herman, Mr Ripa Di Meana, Mr Ruhfus and Mr Van Eeke'en. Mr Dondelinger accepted this because he considered that this text distanced itself least from the present situation.

[26] Mr Dooge, though in agreement with the principle underlying this text, felt unable to support the text because, though not excluding the pleading in exceptional circumstances of a vital interest, it did not include any explicit reference to the protection of vital national interests in exceptional circumstances.

[27] Mr Herman underlines the considerable progress which distinguishes these proposals from the solutions envisaged in the Interim Report of the Committee in the matter of voting and the veto.

[28] This proposal is supported by Mr Moller, Mr Papantoniou and Mr Rifkind. Mr Rifkind also considers that, in order to prevent abuse, a member of the Council insisting that discussion should continue in this way should, through a special procedure of the Council, explain fully and formally why his government considers that a very important interest is at stake.

[29] Reserve entered by Mr Moller.

[30] Mr Rifkind considers that the other members of the college should be nominated by Member States, after consultation with the President-designate, and appointed by common accord of the governments of the Member States.

The Commission must not include more than one national from any Member State.[31]

At the beginning of its term of office the Commission should receive a vote of investiture on the basis of its programme.[32]

Similarly, the Commission must now be acknowledged as an organ with full powers of initiative, implementation and administration.

## *C. The European Parliament as a guarantor of democracy in the European system*[33]

A parliament elected by universal suffrage cannot, if the principles of democracy are logically applied, continue to be restricted to a consultative role or to having cognizance of only a minor part of Community expenditure. That dooms it to oblivion or over-statement, and more often than not to both.

An enhanced role will be sought for it in three areas:

(a) by effective participation in legislative power, the scope of which will be specifically defined, in the form of joint decision-making with the Council; to this end the Commission proposal will be discussed first of all by the European Parliament; the Council will deliberate on the text adopted by the European Parliament; in the event of disagreement, a conciliation procedure will be initiated on the basis of a proposal of the Commission; the Commission will retain its power of initiative throughout the legislative procedure;[34]

(b) by increasing its supervision of the various policies of the Union and its political control over the Commission and over cooperation in the external policy field; the association and accession agreements negotiated by the Union will also be submitted to the European Parliament for approval;[35]

(c) by giving it responsibility in decisions on revenue as the coping-stone of the establishment of a new basic institutional balance;

(d) conciliation between Parliament and the Council would take place at the moment when the frame of reference on the basis of multiannual planning is defined;

(e) decisions governing the development of own resources will be taken jointly by the Council and Parliament so that the latter may be able to have a hand in the balancing of expenditure by revenue.

These developments should go hand in hand with increased representativeness of Parliament itself through the standardization of voting procedures to elect its members.

## *D. Court of Justice*

The binding nature of the law of the Union gives the Court of Justice of the European Communities an essential role to play in progress towards European Union. The Court ensures compliance with the rights, obligations and powers laid down in the Treaties. The Court must be consolidated in its role of supreme arbiter in all matters

---

[31] Mr Ruhfus entered a reservation on this point. He argued that such a change would not improve the supranational character of the Commission and would considerably change the internal balance, which has proved its worth ever since the establishment of the Community.

[32] Reservation by Mr Papantoniou who suggested replacing the text of the four preceding paragraphs by the following text:
'To this end it is proposed that the President of the Commission be designated unanimously by the European Council, and be consulted by the governments of the Member States prior to the nomination of the Commissioners. The Commission should be composed of one member per Member State.'

[33] Mr Rifkind entered a reservation on this section. He considers that the European Parliament should be encouraged, within its Treaty powers, to make a more effective contribution to Community decision-making. The Parliament should make more use of its right to put forward proposals for Community action. The Council should follow up resolutions with the Parliament, or explain its reasons for not doing so. There should be improvement and extension of the conciliation procedure, in particular by more effective consultation between the Council and the Parliament at earlier stages of the consideration of proposals.

[34] Reservation of Mr Papantoniou. He did not agree with joint decision-making between Parliament and Council in the legislative area and argued in favour of improving the conciliation procedure and extending its field of application.

[35] Reservation entered by Mr Papantoniou who suggested deleting the last sentence of (b).

coming under the Treaties, including the protection of the basic rights of individuals guaranteed under the Community legal order. To this end, the Court:

(i) must be relieved in an appropriate manner of responsibilities incumbent upon it as regards disputes between officials and the institutions;

(ii) must be given jurisdiction for the interpretation of agreements concluded within the ambit of the Treaties as far as possible by means of a standard clause.

## IV – The method[36]

The committee proposes that a Conference of the Representatives of the Governments of the Member States should be convened in the near future to negotiate a draft European Union Treaty based on the *acquis communautaire*, the present document and the Stuttgart Solemn Declaration on European Union and guided by the spirit and method of the Draft Treaty voted by the European Parliament:

(i) the parties to the conference will be the Member States;

(ii) Spain and Portugal will be invited to attend as full members on the assumption that the Treaties of Accession have been signed prior to the opening of the conference;

(iii) the European Commission will participate in the negotiations;

(iv) the European Parliament will be closely associated with the Conference. Its outcome will be submitted to the European Parliament.

The very decision of the Heads of State or of Government to convene such a conference would have great symbolic value and would represent the initial act of European Union.

[36] Mr Papantoniou and Mr Rifkind consider that the recommendations in this report should be the subject of consultations between the governments before the June European Council, so that decisions can be taken by the Heads of Government at that meeting.
Mr Moller shared their view, but pointed out that according to the committee's terms of reference it was not its task to put forward recommendations on the conclusions which the European Council might draw from the report.

*Annex A*

## Comments by Mr Møller

I am not convinced that the overall approach in the report is the right one. I agree that the Community needs a new impetus, but, in my opinion, the following is required.

The decision-making process should be more efficient. The distribution of powers between the institutions, as laid down in the Treaties, must be respected. The blurring of the powers should stop and be replaced by the clear logic of the Treaties.

The fundamental aim of the Treaty, the bringing about of an efficient production structure, must be re-established, and distorting factors which prevent the attainment of this aim must be rejected. The gradual introduction of quota systems, production thresholds, etc., pose a danger to this principle.

New common policies should be developed to supplement the common agricultural policy. The Community must have further financial means at its disposal for these policies.

Our consultations within the framework of European political cooperation must be intensified and strengthened so that areas of common interest can be identified and agreement can be reached on an increasing number of common positions.

New activities must be developed at European level, and participation in these should not be limited to the present members of the Community.

*Annex B*

## Comments by Mr Papantoniou

The report rightly identifies the main challenges facing Europe at present. However, the approach followed, while containing many useful elements, does not pay sufficient attention to some important points. The overall gains from economic integration are not only unevenly distributed, but may also disguise losses for the less prosperous regions. The creation, therefore, of an integrated market and a technological community needs to be supplemented by a very substantial effort to strengthen the Community's cohesion by promoting regional development and the convergence of living standards.

In the external field, the improvement of political cooperation and the promotion of solidarity in security matters should take fully into account the particular situation and problems of each Member State, and the need for consensus in the search for common positions.

Finally, institutional reform should reflect the existence of significant possibilities for improved decision-making within the framework of the Treaties, and recognize the necessity of protecting vital national interests when invoked by Member States.

## List of Members of the *ad hoc* Committee on Institutional Affairs

Mr James DOOGE (Chair)
Representative of Mr Garret FitzGerald, Prime Minister of Ireland

Mr Jean DONDELINGER
Representative of Mr Jacques Santer, President of the Government of Luxembourg

Mr Maurice FAURE
Representative of Mr François Mitterrand, President of the French Republic

Mr Mauro FERRI
Representative of Mr Bettino Craxi, President of the Italian Council

Mr Fernand HERMAN
Representative of Mr Wilfried Martens, Prime Minister of Belgium

Mr Otto Møller
Representative of Mr Poul Schluter, Prime Minister of Denmark

Mr Ioannis PAPANTONIOU
Representative of Mr Andreas Papandreou, Prime Minister of Greece

Mr Malcolm RIFKIND
Representative of Mrs Margaret Thatcher, Prime Minister of the United Kingdom

Mr Carlo RIPA DI MEANA
Representative of Mr Jacques Delors, President of the Commission

Mr Jürgen RUHFUS
Representative of Mr Helmut Kohl, Federal Chancellor of the Federal Republic of Germany

Mr Wilhelm VAN EEKELEN
Representative of Mr Ruud Lubbers, Prime Minister of the Netherlands

Secretariat of the Committee: Katherine MEENAN
Yvon QUINTIN
Alain Van SOLINGE

# Contributors to this volume

**Ernst M. H. HIRSCH BALLIN,** Dr jur., has been professor of constitutional and administrative law at the Catholic University of Tilburg, the Netherlands, since 1981. Until 1981 he was a civil servant in the Department of Justice, section of public law legislation. He is a member of several governmental advisory committees on legal affairs.

**Luciano BARDI** is a research associate (political science) at the European University Institute in Florence.

**Roland BIEBER,** Dr jur., is visiting professor of law at the European University Institute in Florence, lecturer at the University of Saarbrücken and Head of Division for Institutional Affairs (adviser) to the European Parliament.

**Peter BRÜCKNER** has been censor at the Universities of Copenhagen and Odense since 1981. In 1981 he was the Head of the Law of the Sea division at the Royal Danish Foreign Ministry, Head of the Danish delegation to the United Nations Conference on the Law of the Sea, and subsequently of the delegation to the UN Preparatory Commission. He was legal adviser to the Legal Service of the Council of the European Communities from 1973-78. From 1978 to 1981 he was the European correspondent for the Ministry of Foreign Affairs.

**Vlad CONSTANTINESCO,** *agrégé* in public law and political science, is professor of law in the Department of Law and Political Science at the University of Strasbourg and at the College of Europe in Bruges.

**Jan DE MEYER** is professor of constitutional law at the University of Louvain, Belgium. He was assessor at the Council of State from 1962 to 1980 and senator in the Belgian Parliament from 1980 to 1981.

**David A. O. EDWARD,** CMG, OC, MA (Oxford), LL B (Edin.), has been Salvesen Professor of European Institutions at the Centre of Governmental Studies at the University of Edinburgh since 1 January 1985. He has been a member of the Law Advisory Committee of the British Council since 1974, and is director of Adam and Company PLC and Chairman of the Medical Appeal Tribunals.

**Dimitrios EVRIGENIS** was professor of law at the University of Thessaloniki, Greece, from 1961 until 1984. He is a judge at the European Court of Human Rights, a Member of the European Parliament, and an associate of the Institut de Droit International.

**Giorgio GAJA** is professor of international law at the University of Florence and visiting professor of law at the European University Institute for 1984-85.

**Jacques GENTON** has been a senator in the French Parliament and mayor of Sancerre (Cher) since 1971. He has been a member of the Commission des Affaires Etrangeres, de la Défense et des Forces armées since 1974, President of the Senate delegation for the European Communities since 1979, and vice-president of the Conseil Général of Cher since 1982. From 1958 to 1971 he was Secretary-General of the Economic and Social Committee of the European Communities.

**Jean-Marc HOSCHEIT** has been lecturer in law at the European Institute of Public Administration in Maastricht, the Netherlands, since 1982.

**Jean Paul JACQUÉ**, *agrégé* in public law and political science, is a professor of law at the Department of Law and Political Science at the University of Strasbourg and at the College of Europe in Bruges. He is president and honorary rector of the University of Political, Social, and Legal Sciences and Technology of Strasbourg.

**Thijmen KOOPMANS** was a professor of law at the University of Leyden from 1965 to 1978. Since 1979, he has been a judge of the European Court of Justice. He is a corresponding member of the Netherlands Academy of Arts and Science and is a fellow commoner of Trinity College, Cambridge.

**Per LACHMANN** is legal adviser on EEC law to the Royal Danish Ministry of Foreign Affairs and is presently associated with the University of Copenhagen.

**Robert C. LANE**, PhD (Exeter), is lecturer in law at the Centre of European Governmental Studies at the University of Edinburgh.

**Carl Otto LENZ** is an Advocate General at the European Court of Justice. He is a former member of the German Parliament, and Chairman of the Committees for legal and European affairs of the Bundestag.

**Richard A. McALLISTER**, MA (Cambridge) is a lecturer in the Department of Politics at the University of Edinburgh.

**James MODRALL** is a research associate (law) at the European University Institute in Florence and executive coordinator of the European Policy Unit.

**J. Ørstrom MØLLER** graduated from the University of Copenhagen in 1968 with a degree in economics (cand. polit.). Since February 1968 he has been on the staff of the Royal Danish Foreign Ministry. He has been Under-Secretary for European Community relations since 1 September 1984.

**Gianfranco PASQUINO** is professor of political science at the University of Bologna and visiting professor of political science at the Bologna Center of the Johns Hopkins University. In 1978-79 he was a fellow of the Woodrow Wilson International Center for Scholars. In 1983 he was elected senator of the Italian Republic.

**John PINDER** was the director of the Policy Studies Institute in London from 1964 to 1985. He is now a senior fellow of the PSI, a professor at the College of Europe in Bruges and a visiting fellow at the London School of Economics.

**John TEMPLE LANG** is legal adviser to the Legal Service of the Commission of the European Communities. He is a visiting lecturer at Trinity College, Dublin, and a solicitor in the Republic of Ireland. He is a former special professional adviser to the Department of Finance, Dublin, and a research attorney of the American Bar Foundation.

**Cécile J.M. VERKLEIJ** has been assistant lecturer of constitutional law at the Catholic University of Tilburg, the Netherlands, since 1984.

**Joseph H.H. WEILER** is professor of law at the European University Institute in Florence and the University of Michigan in Ann Arbor. He is the director of the European Policy Unit at the European University Institute.

European Communities — Commission

**An ever closer Union — A critical analysis of the Draft Treaty establishing the European Union**

*edited by R. Bieber, J.-P. Jacqué, J. H. H. Weiler*

*Preface by A. Spinelli*

Luxembourg: Office for Offical Publications of the European Communities

1985 — 345 pp. — 17.6 x 25.0 cm

The European Perspective series

DE, EN, FR, IT

ISBN 92-825-5220-9

Catalogue number: CB-43-85-345-EN-C

Price (excluding VAT) in Luxembourg

ECU 10.01 BFR 450 IRL 7.20 UKL 5.90 USD 7.50

## Salg og abonnement · Verkauf und Abonnement · Πωλήσεις και συνδρομές · Sales and subscriptions Vente et abonnements · Vendita e abbonamenti · Verkoop en abonnementen


BELGIQUE / BELGIË

**Moniteur belge / Belgisch Staatsblad**
Rue de Louvain 40-42 / Leuvensestraat 40-42
1000 Bruxelles / 1000 Brussel
Tél. 512 00 26
CCP/Postrekening 000-2005502-27

Sous-dépôts / Agentschappen:

**Librairie européenne / Europese Boekhandel**
Rue de la Loi 244 / Wetstraat 244
1040 Bruxelles / 1040 Brussel

**CREDOC**
Rue de la Montagne 34 / Bergstraat 34
Bte 11 / Bus 11
1000 Bruxelles / 1000 Brussel

DANMARK

**Schultz Forlag**
Møntergade 21
1116 København K
Tlf: (01) 12 11 95
Girokonto 200 11 95

BR DEUTSCHLAND

**Verlag Bundesanzeiger**
Breite Straße
Postfach 10 80 06
5000 Köln 1
Tel. (02 21) 20 29-0
Fernschreiber:
ANZEIGER BONN 8 882 595

GREECE

**G.C. Eleftheroudakis SA**
International Bookstore
4 Nikis Street
Athens (126)
Tel. 322 63 23
Telex 219410 ELEF

Sub-agent for Northern Greece:

**Molho's Bookstore**
The Business Bookshop
10 Tsimiski Street
Thessaloniki
Tel. 275 271
Telex 412885 LIMO

FRANCE

**Service de vente en France des publications des Communautés européennes**

**Journal officiel**
26, rue Desaix
75732 Paris Cedex 15
Tél. (1) 578 61 39

IRELAND

**Government Publications Sales Office**
Sun Alliance House
Molesworth Street
Dublin 2
Tel. 71 03 09

or by post

**Stationery Office**
St Martin's House
Waterloo Road
Dublin 4
Tel. 68 90 66

ITALIA

**Licosa Spa**
Via Lamarmora, 45
Casella postale 552
50 121 Firenze
Tel. 57 97 51
Telex 570466 LICOSA I
CCP 343 509

Subagente:

**Libreria scientifica Lucio de Biasio - AEIOU**
Via Meravigli, 16
20 123 Milano
Tel. 80 76 79

GRAND-DUCHÉ DE LUXEMBOURG

**Office des publications officielles des Communautés européennes**
5, rue du Commerce
L-2985 Luxembourg
Tél. 49 00 81 - 49 01 91
Télex PUBOF - Lu 1322
CCP 19190-81
CC bancaire BIL 8-109/6003/200

**Messageries Paul Kraus**
11, rue Christophe Plantin
L-2339 Luxembourg
Tél. 48 21 31
Télex 2515
CCP 49242-63

NEDERLAND

**Staatsdrukkerij- en uitgeverijbedrijf**
Christoffel Plantijnstraat
Postbus 20014
2500 EA 's-Gravenhage
Tel. (070) 78 99 11

UNITED KINGDOM

**HM Stationery Office**
HMSO Publications Centre
51 Nine Elms Lane
London SW8 5DR
Tel. 01-211 3935

Sub-agent:

**Alan Armstrong & Associates Ltd**
72 Park Road
London NW1 4SH
Tel. 01-723 3902
Telex 297635 AAALTD G

ESPAÑA

**Mundi-Prensa Libros, S.A.**
Castello 37
E-28001 Madrid
Tel. (91) 276 02 53 - 275 46 55
Telex 49370-MPLI-E

PORTUGAL

**Livraria Bertrand, s.a.r.l.**
Rua João de Deus
Venda Nova
Amadora
Tél. 97 45 71
Telex 12709-LITRAN-P

SCHWEIZ / SUISSE / SVIZZERA

**Librairie Payot**
6, rue Grenus
1211 Genève
Tél. 31 89 50
CCP 12-236

UNITED STATES OF AMERICA

**European Community Information Service**
2100 M Street, NW
Suite 707
Washington, DC 20037
Tel. (202) 862 9500

CANADA

**Renouf Publishing Co., Ltd**
61 Sparks Street (Mall)
Ottawa
Ontario K1P 5A6
Tel. Toll Free 1 (800) 267 4164
Ottawa Region (613) 238 8985-6

JAPAN

**Kinokuniya Company Ltd**
17-7 Shinjuku 3-Chome
Shiniuku-ku
Tokyo 160-91
Tel. (03) 354 0131

The Draft Treaty establishing the European Union is the most ambitious effort so far to achieve sweeping institutional reform in the European Communities, and the clearest proof of the new independence of the directly elected European Parliament. Apart from its immediate political significance, it has re-opened the debate on institutional and substantive reform of the European Communities at both the governmental and the public levels. This book offers a comprehensive political, economic and legal analysis of the Draft Treaty, and a realistic assessment of the political and constitutional hurdles it faces in the Member States. The usefulness of this book, however, is not limited to its analysis of the Draft Treaty itself. The papers collected in this volume incisively examine the state of the current Communities in many of their aspects, and the observations and recommendations made by the authors bear careful reflection by all those engaged in the ongoing discussion of the fate of the European Communities.

The first part of this book includes studies of Community reform on the institutional, judicial, economic and foreign relations dimensions seen through the perspective of the Draft Treaty. The second part deals with the constitutional and political problems of trying to amend or replace the Treaty of Rome. This issue includes the legal status of the procedure established for ratification and the position of the Draft Treaty in the Member States.

Price (excluding VAT) in Luxembourg
ECU 10.01 BFR 450 IRL 7.20 UKL 5.90 USD 7.50

OFFICE FOR OFFICIAL PUBLICATIONS
OF THE EUROPEAN COMMUNITIES
L-2985 Luxembourg

ISBN 92-825-5220-9

9 789282 552209