"THE DRAFT TREATY ESTABLISHING THE EUROPEAN UNION"
EUI/University of Strasbourg/Trans-European Policy Studies Association
Firenze, 29-31/X/1984

(1) programma e lista dei partecipanti
(2) abstracts
(3) Bieber,R.: "The institutions and the process of decision-making in the draft treaty establishing teh European Union: commentary"
(4) Br ckner,P.: "The foreign relations powers and policy in the draft treaty establishing the European Union"
(5) Constantinesco,V.: "La repartition des competences entre l'Union et les etats membres dans le projet de traite instituant l'union europeenne"
(6) De Meyer,J.: "The draft treaty establishing the European Union: report on Belgium"
(7) Edward,D./Mcallister,R./Lane,R.: "The draft treaty establishing the European Union: report on the United Kingdom"
(8) Koopmans,T.: "The judicial system envisaged in the draft treaty establishing the European Union"
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(11) Lenz,C.O.: "The draft treaty establishing the European Union: report on the Federal Republic of Germany"
(12) Moller,J.Ostrom: "The finance provisions (articles 70-81) of the draft treaty establishing the European Union"
(13) Pasquino,G./Bardi,L.: "The institutions and process of decision-making in the draft treaty establishing the European Union"
(14) Pinder,J.: "The division of economic and social powers between union and states; subordinate or coordinate relationship?"
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(18) Weiler,J.H.H./Modrall,J.: "An outline of the transition from the treaties establishing the European Communities to the treaty establishing the European Union: comparative international and constitutional reflections"
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The Draft Treaty Establishing the European Union

The European Policy Unit at the European University Institute

The University of Strasbourg

The Trans-European Policy Studies Association

PROGRAMME

DOC. IUE .282/84 (EPU 20)

Conference at the Badia Fiesolana, 29,30,31 October 1984

The European Policy Unit at the European University Institute

together with

The University of Strasbourg

The Trans-European Policy Studies Association

Conference on

THE DRAFT TREATY ESTABLISHING THE EUROPEAN UNION

Badia Fiesolana, Firenze,
29, 30, 31 October 1984

PROGRAMME

The official languages of the conference will be English and French.

6887

Monday, 29 October 1984

In the theatre of the Badia Fiesolana

16.00 p.m. Workshop; The Historical Evolution of the Idea of European Union within the European Communities

Papers presented by Dr. Roy **PRYCE** (Director, Federal Trust for Education and Research, London), Professor Jacques **VANDAMME** (Professor of Law, University of Leuven, President, Trans-European Policy Studies Association - TEPSA), and Mr. Robert **TOULEMON**, (President, Association Francais d'Etude pour l'Union Européenne, and an Honorary Director-General of the European Commission).

Tuesday, 30 October 1984

In the old refectory of the Badia Fiesolana

09.00 a.m. Welcoming Addresses: Professor Werner **MAIHOFER** (Principal, the European University Institute); Professor Jean-Paul **JACQUE** (President, the University of Strasbourg); Professor Jacques **VANDAMME** (President, Trans-European Policy Studies Association - TEPSA).

Introduction to the conference by Professor Joseph **WEILER** (Director, the European Policy Unit at the European University Institute)

THE CONTENT OF THE DRAFT TREATY ESTABLISHING THE EUROPEAN UNION.

Special commentators:

Professor Francesco **CAPOTORTI**
Professor Meinhard **HILF**
Professor Francis **JACOBS**
Professor Jean-Paul **JACQUE**
(The four draftsmen)
Dr. Hans-J. **GLAESNER**
(Director General, Legal Service, Council of Ministers.)

The conference organisers have great pleasure in announcing that On. Altiero **SPINELLI**, Member of the European Parliament and President of the Parliament's Committee on Institutional Affairs, will assist proceedings throughout the conference.

09.30 a.m. Report: The Institutions and the Process of Decision-Making in the Draft Treaty

Paper presented by Professor Gianfranco **PASQUINO** (Professor of Political Science, University of Bologna, Senator of the Italian Republic) and Dott. Luciano **BARDI** (European University Institute Study of the European Parliament).

Commentary by Dr. Roland **BIEBER** (Visiting Professor of Law, European University Institute, former Legal Adviser to the outgoing President of the European Parliament).

Discussion.

10.30 a.m. Report: The Judicial System Envisaged in the Draft Treaty

Paper presented by Judge Thijmen **KOOPMANS** (European Court of Justice).

Commentary by Judge Dimitrios **EVRIGENIS** (European Court of Human Rights).

11.30 a.m. Coffee break.

12.00 p.m. Report: The Division of Competences between the Union and the Member States in the Draft Treaty.

Paper presented by Professor Vlad **CONSTANTINESCO** (Professor of Law, University of Strasbourg).

Commentary by Professor Giorgio **GAJA** (Professor of Law, University of Florence, Visiting Professor of Law, European University Institute).

Discussion.

13.00 p.m. Lunch in the Sala Rossa of the Badia Fiesolana

14.30 p.m. Report: The Finance Provisions in the Draft Treaty.

Paper presented by Dr. Jørgen **ØRSTRØM MØLLER** (Under-Secretary for European Market Relations, Royal Danish Ministry of Foreign Affairs, Copenhagen).

Commentary by Dr. Claus-Dieter **EHLERMANN** (Director-General, Legal Services, European Commission).

Discussion.

15.30 p.m. Report: The Foreign Relations Powers and Policy in the Draft Treaty.

Paper presented by Ambassador Peter **BRUCKNER** (Royal Danish Ministry of Foreign Affairs).

Commentary by Dr. Wolfgang **HAGER** (Senior Research Fellow, European University Institute).

Discussion

16.30 p.m. Coffee break.

17.00 p.m. Report: The Economic Powers and Policy of the Union.

Paper presented by Mr. John **PINDER** (Director, Policy Studies Institute, London).

Commentary by Professor Jacques **PELKMANS** (Institute of Public Administration, Maastricht).

Discussion.

End of day's proceedings.

Transportation to hotels.

20.00 p.m. Reception by the President of the European University Institute, in honour of On. Altiero **SPINELLI**, MEP, President of the European Parliament Committee on Institutional Affairs.

Wednesday, 31 October 1984

In the old refectory of the Badia Fiesolana

THE DRAFT TREATY, THE EUROPEAN COMMUNITIES, AND THE MEMBER STATES: CONSTITUTIONAL AND POLITICAL DIMENSIONS.

09.00 a.m.

Report: The Creation of the Union and its Relation to the EC Treaties

Paper presented by Professor Joseph **WEILER** (Director, European Policy Unit, Professor of Law, European University Institute), and James **MODRALL** (European Policy Unit).

Commentary by Professor Jean **CHARPENTIER** (Professor of Law, University of Nancy).

Discussion.

The Draft Treaty Establishing the European Union and the Member States.

10.00 to 11.30 a.m. — Panel Discussion

Moderator of Discussion:
Dr. Claus-Dieter **EHLERMANN**

Panel Members:

Belgium: Professor Jan **DE MEYER** (Professor of Constitutional Law, University of Louvain).

Denmark: Professor Per **LACHMAN** (University of Copenhagen).

Greece: Professor Georgios **MAVROS** (University of Athens, Member of the European Parliament).

Ireland: Dr. John **TEMPLE LANG** (Commission of the European Communities).

Italy: Professor Gustavo **ZAGREBELSKI** (University of Turin).

	Luxembourg:	Ambassador Jean **DONDELINGER** (Ministry of Foreign Affairs, Luxembourg).
	Netherlands:	Professor E.M.H. Hirsch **BALLIN** (University of Tilburg).
	Federal Republic of Germany:	Advocate-General Carl-Otto **LENZ** (European Court of Justice).
	France:	Senator Jacques **GENTON** (Senator of the French Republic, President of Senatorial Delegation for the European Communities).
	United Kingdom:	Professor David **EDWARD** (University of Edinburgh, Director, Centre of Governmental Studies), Dr. Richard **McALLISTER** (Lecturer in Politics, University of Edinburgh), Dr. Robert **LANE** (Lecturer in Law, University of Edinburgh).
11.30 a.m.		Coffee break.
12.00 p.m.		Round Table Discussion.
13.00 p.m.		Lunch, Sala Rossa of the Badia Fiesolana
14.30 to 16.30 p.m.		Continuation of Panel and Round Table Discussion Panel Members as for morning session
16.30 p.m.		Coffee break.

17.00 p.m. Report: Alternative Strategies for Institutional Reform.

Paper presented by Dr. Wolfgang **WESSELS** (Director, Institute for European Policy, Bonn).

Discussion.

18.00 p.m. Conclusion of conference.

Conference Participants

Mr. Timothy **BAINBRIDGE**	(European Parliament.)
Dott. Luciano **BARDI**	(European University Institute Study of the European Parliament).
Professor Roland **BIEBER**	(Visiting Professor of Law, European University Institute, former Legal Adviser to the outgoing President of the European Parliament.
Dr. Gianni **BONVICINI**	(Secretary General, Istituto Affari Internazionale, Rome, and Visiting Professor, the Johns Hopkins University School of Advanced International Studies, Bologna Center.)
Dott. Piergiorgio **BRANZI**	(Director, RAI, Firenze.)
Ambassador Peter **BRUCKNER**	(Royal Danish Ministry of Foreign Affairs.)
Dott. Vittorio **BRUNELLI**	(Corrispondente, Corriere della Sera.)
Professor Francesco **CAPOTORTI**	(Professor of Law, University of Rome, and one of the draftsmen of the Draft Treaty.)
Professor Jean **CHARPENTIER**	(Professor of Law, University of Nancy.)
Professor Vlad **CONSTANTINESCO**	(Professor of Law, University of Strasbourg.)
Dott. Virgilio **DASTOLI**	(Editor, The Crocodile.)
Professor Jan **DE MEYER**	(Professor of Constitutional Law, University of Louvain.)
Ambassador Jean **DONDELINGER**	(Ministry of Foreign Affairs, Luxembourg.)

Professor Francois-Georges **DREYFUS**	(Director, Institut des Hautes Etudes Européennes, University of Strasbourg.)
Professor David **EDWARD**	(Director, Centre of Governmental Studies, University of Edinburgh.)
Dr. Claus-Dieter **EHLERMANN**	(Director-General, Legal Services, European Commission.)
Judge Dimitrios **EVRIGENIS**	(European Court of Human Rights and Member of the European Parliament.)
Professor Giorgio **GAJA**	(Professor of Law, University of Florence, Visiting Professor of Law, European University Institute.)
Senator Jacques **GENTON**	(Senator of the French Republic, President of Senatorial Delegation for the European Communities.)
Mr. Jean-Guy **GIRAUD**	(Counsellor to the President of the Commission.)
Dr. Hans-J. **GLAESNER**	(Director-General, Legal Services, Council of Ministers.)
Professor Georges **GORIELY**	(Free University of Brussels.)
Dr. Wolfgang **HAGER**	(Senior Research Fellow, Department of Economics, European University Institute.)

Professor Meinhard **HILF**	(Professor of European and International Public Law at the University of Bielefeld, and one of the draftsmen of the Draft Treaty.)
Professor E.M.H. **HIRSCH BALLIN**	(Professor of Law, University of Tilburg.)
Professor Francis **JACOBS**	(Professor of European Law and Director, Centre of European Law, King's College, London, and one of the draftsmen of the Draft Treaty.)
Professor Jean-Paul **JACQUE**	(Professor of Law and President, University of Strasbourg, and one of the draftsmen of the Draft Treaty.)
Judge Thijmen **KOOPMANS**	(European Court of Justice.)
Professor Per **LACHMANN**	(Legal Adviser on EC Law, Royal Danish Ministry of Foreign Affairs, Faculty of Law, University of Copenhagen.)
Dr. Robert **LANE**	(Lecturer in Law, University of Edinburgh.)
Advocate-General Carl-Otto **LENZ**	(European Court of Justice.)
Professor Werner **MAIHOFER**	President of the European University Institute.)
Advocate-General Giuseppe Federico **MANCINI**	(European Court of Justice.)
Professor Georgios **MAVROS**	(University of Athens, Member of the European Parliament.)
Dr. Richard **McALLISTER**	(Lecturer in Politics, University of Edinburgh.)
Mr. James **MODRALL**	(European Policy Unit at the European University Institute.)

Mr. Jacques **MOREAU**	(Former Member of the European Parliament, former rapporteur, European Parliament Committee on Institutional Affairs.)
Professor Guglielmo **NEGRI**	(Segretario General Vicario, Camera dei deputati, and University of Rome.)
Dr. Dietmar **NICKEL**	(European Parliament.)
Dr. Jørgen **ØRSTRØM MØLLER**	(Under-Secretary for European Market Relations, Royal Danish Ministry of Foreign Affairs, Copenhagen.)
On. Marco **PANELLA**	(Member of the European Parliament.)
Professor Gianfranco **PASQUINO**	(Professor of Political Science, University of Bologna, Senator of the Italian Republic.)
Professor Jacques **PELKMANS**	(Professor of Economics, the European Institute of Public Administration, Maastricht.)
Dott. Andrea **PIERUCI**	(European Parliament.)
Mr. John **PINDER**	(Director, the Policy Studies Institute, London.)
Dr. Roy **PRYCE**	(Director, Fedral Trust for Education and Research, London.)
Mr. Raymond **RIFFLET**	(Special Advisor to the President of the European Commission.)
Mr. Otto **SCHMUCK**	(Research Fellow, Institute for European Policy, Bonn.)
Mr. Volkmar **SCHWARZ**	Editor, Nomos-Verlag.)
Professor Jurgen **SCHWARZE**	(University of Hamburg.)

Professor Denys **SIMON**	(Faculties of Law and Political Science, University of Strasbourg.)
On. Altiero **SPINELLI**	(Member of the European Parliament and President, European Parliament Committee on Institutional Affairs.)
Professor Eric **STEIN**	Institute for Advanced Study, Berlin.)
Dr. John **TEMPLE LANG**	(European Commission.)
Mr. Robert **TOULEMON**	(Honorary Director-General, the European Commission, President, Association Francaise d'Etude pour l'Union Europeenne.)
Professor Jacques **VANDAMME**	(Professor of Law, University of Leuven, President, Trans-European Policy Studies Association - TEPSA.)
Professor Joseph **WEILER**	(Professor of Law, European University Institute and University of Michigan, Director, European Policy Unit at the European University Institute.)
Dr. Wolfgang **WESSELS**	(Director, Institute for European Policy, Bonn.)
Mr. Martin **WESTLAKE**	(The European Policy Unit at the European University Institute.)
Professor Rudolf **WILDENMANN**	(Professor of Political Science, University of Mannheim.)
Professor Gustavo **ZAGREBELSKI**	(Faculty of Law, Istituto Giuridico, University of Turin.)

(2)

The Draft Treaty Establishing the European Union

The European Policy Unit at the European University Institute

The University of Strasbourg

The Trans-European Policy Studies Association

ABSTRACTS

DOC. IUE 281/84 (EPU 19)

Conference at the Badia Fiesolana, 29,30,31 October 1984

October 1984

ABSTRACTS

Of Papers Presented at the Conference on
The Draft Treaty Establishing the European Union
Badia Fiesolana, Florence
29, 30, 31 October 1984

organised by

The European Policy Unit at the European University Institute
The University of Strasbourg
The Trans-European Policy Studies Association

ABSTRACTS

A number of authors furnished the conference organisers with abstracts of their papers. These have been collected together here. They are;

The Finance Provisions in the Draft Treaty Establishing the European Union, by J. Ørtstrøm Møller,

The Division of Economic and Social Powers Between Union and Member States: Subordinate or Coordinate Relationship?, by J. Pinder,

An Outline of the Transition from the Treaties Establishing the European Communities to the Treaty Establishing the European Union; Comparative International and Constitutional Reflections, by J.H.H. Weiler and J.R. Modrall,

Alternative Strategies for Institutional Reform, by W. Wessels,

Report on France, by J. Genton,

Report on Denmark, by P. Lachmann,

Report on the United Kingdom, by D. Edward, R. Lane and R. McAllister.

October 1984

The Finance Provisions in the Draft Treaty Establishing the European Union.

J. Ørstrøm Møller

Abstract

Of Paper Presented at the Conference on
The Draft Treaty Establishing the European Union
Badia Fiesolana, Florence
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organised by

The European Policy Unit at the European University Institute
The University of Strasbourg
The Trans-European Policy Studies Association

3 September 1984

ABSTRACT

Conference version of report on the finance provisions of the draft treaty establishing the European union

1. The report starts with an analysis and discussion of the present budgetary and financial system as well as the budgetary problems facing the Community.

   Compared with national budgets and gross domestic product the Community budget is of very limited size and its impact on the economic development and the European integration process is of modest nature.

   The own-resources system contains several elements which were new and unproven on the international scene when introduced in the mid-70s. Member states are legally committed to finance common activities approved in the Council. The financing system is linked to the contents of the Community system and not to the economic clout of member states.

2. The budgetary powers of the three institutions reflect the powers invested in those institutions with regard to the legislative process.

   Council approves the legal acts and has the final word with regard to obligatory spending. The composition and total amount of non-obligatory spending are fixed in an institutional interplay between Council and Parliament with the Commission as the initiator.

   The Community system is thus far more coherent and logic than it seems at first glance.

3. In recent years different approaches to the integration process have been brought to the forefront.

   Until approximately 1980 there was only one approach. Council approved the contents of the common policies and financing was provided automatically by the own-resources system. The financial flows between member states were not given much attention. It was taken for granted that grosso modo all member states benefitted from their membership of the Community.

For the last four years this approach has been contested by some member states and those member states have focused on the budget as the primary instrument in the Community system. By way of budgetary discipline expenditure should be reduced to a certain well-defined framework with a specific ceiling for agricultural spending. The budget must produce an equitable financial result for all member states.

The negotiations concerning the future financing of the Community are, therefore, not so much a question of specific financial amounts, but a question of which Community structure and which approach to the Community member states wish for the rest of this century.

4. Parliament has for a long time been a protagonist and defender of the approach which served the Community well until contested a few years ago.

Parliament has supported the strengthening of the integration process and the deepening of the Community structure by way of new and other common policies to supplement the common agricultural policy.

This general philosophy is the main building brick. Not only in the finance provisions but also in the draft treaty as a whole. Parliament thus rejects the approach to give priority to budgetary considerations instead of the contents of the Community system.

5. Parliament proposes that a better and more well-defined distribution of responsibility between national policies and common policies are brought about. This will provide a better background to take up new common policies as it will alleviate national budgets to the same extent as the Community budget grows.

6. The revenue system proposed in the draft treaty is grosso modo in conformity with the present own-resources system. However, the VAT ceiling is rejected which will make it possible for the union to call up the amount necessary to finance common policies without any upper limit.

7. On the expenditure side the most important proposal is the doing away with the distinction of obligatory versus non-obligatory spending. This is in conformity with the proposal to do away with the Council's existing exclusive legislative powers and confer that power to the union as such.

The annual increase for total expenditure is determined in the framework of multiannual financial programmes.

8. A system of financial equalization is proposed without being very specific on how it would work in practice.

9. The present budgetary procedure is replaced by a complicated new procedure which, however, can be summarized in the way that it confers on Parliament nearly all powers in the budgetary field.

10. The report contains a short chapter on the implication for economic integration.

11. The general assessment of the possibilities for gaining support in member states for Parliament's proposals concerning the finance provisions is not very optimistic. On the basis of recent experience it does not seem likely that member states will agree to such sweeping changes as proposed by Parliament.

3 September 1984

October 1984

The Division of Economic and Social Powers Between Union and Member States: Subordinate or Coordinate Relationship?

J. Pinder

Abstract

Of Paper Presented at the Conference on
The Draft Treaty Establishing the European Union
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The Division of Economic and Social Powers between Union and States: Subordinate or Coordinate Relationship ?

Summary of comments on the Draft Treaty Establishing the European Union

by

John Pinder

1. The economic significance of the Draft Treaty is that it offers a way to create the economic union which is a vital necessity for the management and development of the Member States' interdependent economies.

2. This is to be done by a radical reform of the Community's institutions and instruments. Codecision with majority votes and time limits in both Council and Parliament, for legislation as well as budget, would remove the veto that has hamstrung Community policy-making. In addition to inheriting the patrimony of Community instruments, the Union is to acquire by stages the instruments of monetary policy and dispose of a budget adequate to finance its activities. Thus the Draft Treaty gives the Union the institutions and powers for its essential economic tasks.

3. The problem is to define the proper border between the powers of the European Union and those of the Member States. The Draft Treaty leaves this problem to be solved in action by allocating the greater part of competence for economic and social policy concurrently to both Union and States. Since, however, the States are precluded from legislating where the Union has already legislated, there is no constitutional barrier to the Union eventually acquiring exclusive competence over almost the whole field of economic and social policy.

4. The complex interdependence among the different branches of modern economic and social policy makes it hard to define

a dividing line between Union's and States' powers. But the diversity of European peoples and the reaction in modern political culture against centralising trends make it particularly important to guard against the danger that the European Union might become excessively centralised.

5. The Draft Treaty adopts the principle of subsidiarity as a safeguard against this: "the Union shall only ask to carry out those tasks which may be undertaken more effectively in common than by the Member States acting separately" (art. 12). But doubts have been cast on the juridical application of the concept (see Jacqué, op. cit. on p. 8 of main paper); the principle would not prevent centralisation where the Union adopts a task with inherently centralising aims (e.g. unification of all taxes); and the experience of the FRG and the US raises questions about the effectiveness of such safeguards.

6. The Draft Treaty also requires the Union as far as possible to determine "the fundamental principles" for common action while entrusting the Member States to implement the principles in detail (art. 34), but there is doubt about the latitude that this would in practice leave the States.

7. Finally the Draft Treaty requires the procedure for organic laws to be used where Union legislation would make inroads into the competence of the States (art. 12). But although the European Parliament must pass organic laws by a qualified (two-thirds) majority, if the law has been amended by the Commission it will be passed provided that it is supported by only one-third plus one of the weighted votes in the Council.

8. Consideration might be given to sharpening the definition of subsidiarity and giving more weight in the Treaty to the value of diversity. The voting procedure could be altered to require an absolute or a two-thirds majority in the Council to pass organic laws or reduce the competence of the Member States. But we should also consider whether closer limits should not be set to the aims, areas or instruments of Union action in the economic and social fields.

9. The Draft Treaty gives the Union exclusive competence "in the field of commerical policy" (art. 64.2) and "to complete, safeguard and develop the free movement of persons, services, goods and capital within its territory" as well as "for trade between Member States" (art. 47.1). While the Union needs exclusive competence to regulate both its external trade and trade among the States, it is questionable whether the Draft Treaty needs to add to this by specifying the timetables within which free movement is to be attained and in particular whether the timetable for the free movement of capital should be fixed (art. 47.3) independently of the programme for accomplishing monetary union (art. 52).

10. Article 48 gives the Union exclusive competence to "complete and develop competition policy at the level of the Union". The Union inherits articles 85 and 86 from the EEC Treaty and the Draft Treaty provides that a system for the control over mergers be established on the lines laid down in article 66 of the ECSC Treaty. There is a case for confining Union competence explicitly to such control of mergers and to competition policy as defined in the EEC Treaty, in cases "likely to affect trade between the Member States" (EEC Treaty, art. 85).

11. Article 49 provides for the approximation of laws relating to undertakings (in particular companies) and taxation. The approximation of company laws might better be confined, as in the EEC Treaty (art. 100), to those having "a direct incidence on the establishment or functioning of the Common Market", rather than to those having "a direct effect on a common action of the Union" (Draft Treaty, art. 49), which appears to set no limit to the Union's scope. The approximation of tax laws "in so far as necessary for economic integration" (art. 49) likewise sets no limit, if unification of taxes can be regarded as an aspect of economic integration. A better criterion might be "in so far as Member States' taxes substantially distort economic transactions among the Member States"; and it might be thought suitable that Union competence should stop short of personal income tax.

12. The Draft Treaty gives the Union "concurrent competence in respect of conjunctural policy, with a particular view to facilitating the coordination of economic policies within the Union" (art. 50). While thus stressing the coordination of

Member States' policies, article 50 also provides for the use of "the budgetary and financial mechanisms of the Union for conjunctural ends".

13. Article 50 appears to set no limit to the control by the Union, for the purpose of its general economic policy, not only of the Member States' monetary instruments, but also of the budgets of States and local authorities. But Union control of States' budgets is a concept that is alien to federal systems and the Union Treaty could well explicitly exclude it. Union control of the States' monetary instruments should be subject to the programme for accomplishing monetary union.

14. The Union is given concurrent competence for "monetary and credit policies" (art. 51) and for "the progressive achievement of full monetary union" (art. 52). Monetary integration is the crucial lacuna in the economic scope of the existing EC Treaties, and full monetary union should be here defined as an exclusive Union currency or the permanent locking of the parities of the Member States. The Draft Treaty provides, as steps towards it, for "the progressive conversion of the ECU into a reserve currency and a means of payment, and its wider use", for the "transfer to the European Monetary Fund of part of the reserves of the Member States", and for the Union to pass an organic law regarding "the procedures and the stages for attaining monetary union" (art. 52.3). While the European Council may "suspend the entry into force" of these monetary laws for five years after the Treaty enters into force (art. 52.4), it must be recognised that some Member States, in particular the FRG, might require that transition beyond the point of no return in progress to full monetary union be "conditional on a confirmatory statement to the effect that the essence of the objectives laid down in the Treaty ... has in fact been achieved", to use the words providing for transition to the record stage of the European Economic Community (EEC Treaty, art. 8.3) - the objective in this case being a non-inflationary equilibrium among the economies of the Member States.

15. The scope for microeconomic policies provided for by the EC Treaties includes the creation of the common market, the commercial policy, the competition policy, control of state

aids, regimes for coal, steel and atomic energy, and a number of budgetary and financial instruments. The Draft Treaty provides the Union in addition with "concurrent competence with the Member States to pursue central policies at the level of the Union" (art. 53).

16. Thus the Union may "draw up common strategies with a view to coordinating and guiding national activieies" of research and development (art. 53.d); and similar words are used with respect 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" (art. 53.e). It is proposed that, rather than opening up the possibility of Union control of all research and development activities within its territory, Union competence be confined to the provision of financial support for joint research, the undertaking of research in its own establishments, and the encouragement of cooperation among the States. For its industrial policy, the Union could rest mainly on the Community patrimony (see preceding paragraph), the use of its own financial and budgetary resources (for which the Draft Treaty makes ample provision) and perhaps some very limited further powers.

17. The Draft Treaty empowers the Union to "create a transport network commensurate with European needs" (art. 53.b) and "establish a telecommunications network" (art. 53.c). Whereas the Draft includes some other detailed matter, it could with advantage be confined to those basic powers and to the removal of distortions that affect economic transactions among the Member States (avoiding the more open-ended wording of the Draft Treaty which, similarly to its wording with respect to tax harmonisation, requires the Union to pursue a transport policy "designed to contribute to the economic integration of the Member States").

18. For agriculture, the Draft Treaty (art. 53.a) rests solely on the Community patrimony and on the objectives laid down in article 39 of the EEC Treaty. For energy, article 53.f of the Draft Treaty enjoins the Union to take action "designed to secure security of supplies, stability on the market of the Union" and to introduce common standards for safety and for

"the protection of the environment and of the population". Article 53.f also introduces some other aims; but the Draft Treaty would be none the worse for omitting these and confining Union action, beyond what is already allowed by the Community patrimony, to action in pursuit of the aims specified in the previous sentence.

19. "The Union shall have concurrent competence in the field of social, health, consumer protection, regional, environmental, education and research, cultural and information policies" (Draft Treaty, art. 55). Articles 56-62 spell out some particular aims and areas for Union action in this extremely wide field. Since, if the Union exercised the competence indicated by article 55 to the full, virtually no competence would be left for the Member States (certainly much less than for the Cantons, Länder, Provinces or States of any democratic federation), a minimum constitutional safeguard of a due sphere of autonomy for the Member States would be an explicit limitation of Union competence to the aims and areas specified in articles 56-62. If the scope for Union constraint of States' legislation is still, as it may well be, considered excessive, the Union could be confined to the expenditure of its own financial and budgetary resources within the scope of the aims and areas defined in articles 56-62 (or perhaps, more widely, in article 55), beyond which only the method of cocperation, i.e. of unanimous agreement, would apply. A more rigorous view of the proper scope for Union activity might exclude concurrent competence altogether from such fields as education and health.

20. It is suggested, then, that the economic and social aspects of the Draft Treaty could be improved in many detailed ways. Some of these improvements are of minor importance: the Treaty might be the better for the changes, but without them the Union would not be much the worse. It may be thought more important, however, to limit more closely the scope for the Union action so as to ensure an adequate field of autonomy for the States.

21. Both general and specific means are suggested for limiting the reach of Union competence. The general means could include (1) the requirement for a qualified majority in the

Council for the passage of laws that encroach on the States' competence, and (2) a sharper definition of the principle of subsidiarity with greater stress on the value of diversity. The specific means could define more tightly the scope for Union action in particular fields, for example precluding Union legislation on income tax or on States' or local budgets or confining it to matters that substantially affect economic transactions among the Member States.

22. A careful consideration of the Draft Treaty along these lines by the European Parliament, in dialogue with the States' Parliaments and other political forces, could contribute not only to a substantial improvement of the Treaty but also to the process of persuading the Member States of the need to accept its basic principles of codecision between Council and Parliament, majority voting and endowment of the Union with adequate monetary and budgetary instruments. Such a process could in particular channel national reactions away from resistance to those basic principles and into a constructive search for safeguards to States' autonomy in fields that properly belong to them within a system where States are, as in democratic federations, not subordinate to the Union but coordinate with it, each being autonomous within its constitutionally defined field of action.

October 1984

An Outline of the Transition from the Treaties Establishing the European Communities to the Treaty Establishing the European Union; Comparative International and Institutional Reflections.

J.H.H. Weiler

J.R. Modrall

Abstract

Of Paper Presented at the Conference on
The Draft Treaty Establishing the European Union
Badia Fiesolana, Florence
29, 30, 31 October 1984

organised by

The European Policy Unit at the European University Institute
The University of Strasbourg
The Trans-European Policy Studies Association

ABSTRACT

AN OUTLINE OF THE TRANSITION FROM THE TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES TO THE TREATY ESTABLISHING THE EUROPEAN UNION ; COMPARATIVE INTERNATIONAL AND CONSTITUTIONAL REFLECTIONS

J.H.H. Weiler J.R. Modrall

The Draft Treaty on European Union, in Article 82, stipulates that ratification by a majority of the Member States representing two-thirds of the population of the European Communities will suffice to bring the European Union into being. This procedure seems to contradict Article 236 of the Treaty of Rome, which requires unanimity for amendment.

Does this inconsistency imply that ratification of the Draft Treaty in accordance with its own terms would constitute a violation of Community law? We examine a variety of legal constructs that seek to justify the Draft Treaty procedure under international and Community law theories. Article 82(DT), however, must also be seen in its politico-legal context; to insist on unanimity would permit a tiny minority of Community citizens to block a Community-wide movement toward unification. Under some circumstances, therefore, our concept of legality must be flexible enough to justify some "illegal" activities. On the other hand, to allow a majority of the Member States to deviate

from Article 236(EEC) at any time would jeopardize the constitutional Community edifice.

To deal with these choices, we propose some guidelines to distinguish permissable and impermissable departures from the established procedure for amending the Treaties of Rome. To be justified, a proposed revision must be fundamental, a change instituting a "new legal order." It must preserve the Community acquis; a further step in European integration is consistent with the goals of the Treaty of Rome, and so does less violence to the Community legal order. The revision must not be forced on the minority and must advance the principles of democracy. These two elements are essential to the legitimacy of the proposed amendment. These four factors are all rather vague. Together, however, they block out a framework for identifying amendments whose consistency with Community goals and inherent legitimacy outweigh the vice of technical illegality.

Why is this issue important? If the Draft Treaty is politically popular enough to be ratified in accordance with Article 82(DT), perhaps no-one will raise the issue of legality. Conversely, if the Treaty is not ratified, whether or not ratification would be legal is academic. Any future attempt at major institutional revision of the Treaty of Rome, however, will raise the same issues, so the debate is of lasting importance. More immediately, full discussion of the issues involved may prevent them from becoming political footballs in the debate over ratification, excuses advanced by anti-Comunautaireans for not proceeding with the process of European integration.

October 1984

Alternative Strategies for Institutional Reform.

W. Wessels

Abstract

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Outline

Die Strategie entnimmt die zu untersuchenden Mittel und Zwecke nur aus der Erfahrung.

(Carl von Clausewitz, Vom Kriege, 19. Auflage, Bonn 1980, S. 294)

"Tactics is fighting and strategy is planning where and how to fight"

("Strategy", in: International Encyclopedia of the Social Sciences, 1967, Vol. 15, p. 281)

Die Politik bedeutet ein starkes langsames Bohren von harten Brettern mit Leidenschaft und Augenmaß zugleich... Alle geschichtliche Erfahrung bestätigt, ... daß man das Mögliche nicht erreichte, wenn nicht immer wieder in der Welt nach dem Unmöglichen gegriffen worden wäre, aber der, der das tun kann, muß ein Führer sein und nicht nur das, sondern... auch ein Held... Welche beides nicht sind, müssen sich wappnen mit jener Festigkeit des Herzens, die auch dem Scheitern aller Hoffnungen gewachsen ist, jetzt schon, sonst werden sie nicht im Stande sein, auch nur durchzusetzen, was möglich ist. Nur wer sicher ist, daß er nicht daran zerbricht, wenn die Welt, von seinem Standpunkt aus gesehen, zu dumm oder zu gemein ist für das, was er ihr bieten will..., nur der hat den "Beruf" zur Politik.

(Max Weber, Politik als Beruf, München/Leipzig, 2. Auflage 1926, S. 67).

Some conclusions

To assess to utility and feasibility of various strategies for an institutional reform is a risky business.

The aim where the strategy should lead to is not clearly defined; even more, there are diverging and controversial interpretations of how the institutional set-up of a European Union (whatever this means) should look like. For the sake of orientation, four institutional models are been identified categorizing numerous variations on that theme, but a "simple" cost-benefit analysis of different strategies is not possible.

The very concept of "strategy" is not clearly defined, the academic debate about it is in a rather early stage and inconclusive; the paper thus suggests certain conceptual ingredients for "strategy" and identifies nine different strategiees pursued or being in debate; those are however not clear-cut alternatives but might be used in different periods.

Methodological traps are all around: In analysing the relative feasibility and utility of each strategy, we have to draw lessons from unresearched history - being endangered of sticking to too simple analogies - and to rely on political science analysis - also known for its imperfect state of the art. Here the dangers are deterministic fallacies. This paper presents some theses by which preliminary conclusions for different strategies can be drawn. The perception of the political top about political value of overall package deal is considered as of major importance to achieve institutional progress against the resistance of the national welfare system. In a system of "cooperative federalism" where the major actors are involved with both national and European responsibilities the political support for "radical" strategies (saut qualitatif in terms of transfering competences

to a new European level) is small. Challenges from the world outside Europe are not necessarily a mobilizing force.

Conclusions from these analysis are not encouraging. Major internal or external crises excluded, the strategy which would have the highest degree of feasibility is to build up a new core area, though its utility of really getting new, different, more efficient and more democratic institutional set-up is - at best open to debate and the costs - in terms of destroying the existing Community framework high. Resignation about the futility of new attempts can only be muted by the hope that perceptions and interest constellations are subject to possible change.

October 1984

The Draft Treaty Establishing the European Union: Report on France.

J. Genton

Abstract

Of Paper Presented at the Conference on
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SÉNAT *République Française*

Colloque sur le projet de Traité d'Union européenne, à Florence, les 30 et 31 octobre 1984

Le 9 octobre 1984

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Schéma de la communication de M. Jacques GENTON, Sénateur, Président de la Délégation du Sénat pour les Communautés européennes, sur le thème :

"PROBLEMES CONSTITUTIONNELS ET POLITIQUES POSES EN FRANCE PAR UNE EVENTUELLE RATIFICATION ET MISE EN OEUVRE DU PROJET DE TRAITE D'UNION EUROPEENNE"

Le réalisme conduit à déclarer d'emblée que l'exercice auquel nous avons été appelés à nous livrer relève, quelque peu, en France, de la politique-fiction. En effet, le projet de Traité d'Union européenne n'inspire pas, malgré les immenses espoirs qu'il porte, l'attention qu'il mériterait.

Le combat d'un homme politique, toutefois, ne permet pas de céder au pessimisme, et il convient plutôt d'envisager le sujet sous l'angle de la prospective.

Les sources écrites de réflexion utilisées pour présenter cette communication auront été peu nombreuses. Elles proviennent principalement des conclusions des Délégations du Sénat et de l'Assemblée Nationale pour les Communautés européennes (l'auteur a l'honneur de présider la première), de certaines réponses publiées au Journal Officiel, du gouvernement français, des débats devant le Parlement européen, de la campagne pour les élections européennes du 17 juin 1984 en France, et de trop rares

.../...

articles dans des revues spécialisées, dont les remarquables travaux du Professeur Jean-Paul JACQUE, Président de l'Université de Strasbourg III.

I - LES ASPECTS CONSTITUTIONNELS D'UNE EVENTUELLE RATIFICATION ET MISE EN OEUVRE DU PROJET DE TRAITE D'UNION EUROPEENNE EN FRANCE

Le projet de traité à l'égard des règles constitutionnelles soulève plusieurs interrogations, dont certaines, en l'état, ne peuvent recevoir de réponse tranchée.

A - LE POUVOIR DE NEGOCIER

L'article 52 de la Constitution française, confie au Président de la République le pouvoir de négocier (et de ratifier) les traités internationaux. Or, le Parlement européen a précisément voulu échapper à la procédure de négociation intergouvernementale en prévoyant, à l'article 82 du projet, un mécanisme original d'entrée en vigueur.

La question se pose dès lors de savoir si la procédure retenue par le Parlement européen est compatible avec les dispositions constitutionnelles françaises relatives aux traités et accords internationaux ? A cet égard, quatre observations peuvent être faites :

- les conventions de l'organisation internationale du travail (O.I.T.) ne sont pas élaborées au sein d'un organe intergouvernemental mais dans le cadre de la compétence tripartite de l'O.I.T. Elles sont ensuite soumises aux organes nationaux pour ratification ;

- l'existence, en général, des procédures d'adhésion destinées à permettre à des tiers de devenir membre d'un accord à l'élaboration duquel il n'a pas participé démontre que négociation et ratification ne sont pas indissolublement liées

.../...

- la "Conférence" dont le Président de la République française a annoncé la convocation ultérieure à la suite du Sommet européen de Bruxelles à la fin mars 1984 pourrait constituer, si elle se saisit du projet de traité, cette instance intergouvernementale de négociation. On peut même imaginer que la Conférence se saisisse d'un projet de traité déjà amendé par le Parlement européen en fonction des premières réactions des Parlements nationaux, selon la procédure voulue par lui ; ces amendements pourraient également être inspirés des prises de position des gouvernements nationaux ;

- depuis le Conseil de Fontainebleau (juin 1984), le "Comité institutionnel" ("Dooge", ou "Spaak n° 2") pourrait être cette instance intergouvernementale de négociation.

B - L'AVIS DU PARLEMENT FRANCAIS

Par le second paragraphe de la résolution, votée également le 14 février 1984, relative au projet de traité instituant l'Union européenne, le Parlement devra recueillir auprès des Parlements nationaux les "positions et observations" que le projet aura suscitées de leur part.

Mais depuis que la procédure de motion de résolution a disparu du droit parlementaire de la Vè République, il n'existe pas de procédure qui permette de dégager, devant l'Assemblée Nationale et le Sénat, une majorité sur le projet de traité. La question qui se pose dès lors est de savoir comment des prises de positions - qui, de toute façon, ne pourront pas être considérées comme réflétant celles du Parlement français dans son ensemble - pourraient être formulées

Plusieurs procédures sont envisageables :

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- les conclusions des Délégations parlementaires pour les Communautés européennes. Celle du Sénat a déposé les siennes le 5 avril 1984 (n° 120/84, rapporteur : M. Noël BERRIER) ; celle de l'Assemblée Nationale le 5 juin 1984 (n° 11/84, rapporteur : M. Charles JOSSELIN, Président de la Délégation)

- des questions orales avec débat ;

- une "mission d'information", à la demande d'une commission (Affaires étrangères ou Lois).

Mais, en tout état de cause, ces procédures ne pourront pas être conclues par un scrutin en séance publique.

C - LE CONTROLE DE LA CONSTITUTIONNALITE

Le droit commun est que le Conseil constitutionnel ne peut être saisi que d'une loi, avant promulgation, et non d'un projet de loi (article 61 de la Constitution). Mais il en va différemment des projets de loi de ratification, qui peuvent, dès ce stade, faire l'objet d'un contrôle de constitutionnalité s'ils concernent un engagement international pouvant comporter une clause contraire à la Constitution (article 54 de la Constitution).

Dans ces conditions :

- si la procédure parlementaire classique d'autorisation de ratification est utilisée (article 53 de la Constitution), le contrôle de la compatibilité du projet de traité avec la Constitution présente le risque que le Conseil constitutionnel impose la voie difficile de la révision constitutionnelle ;

- si la procédure référendaire est choisie pour autoriser la ratification (article 11 de la Constitution ; voir infra), rien ne semble empêcher le Conseil constitutionnel de statuer sur la conformité du projet de traité à la Constitution, à condition que le contrôle intervienne avant la consultation populaire.

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D - LA RATIFICATION PAR REFERENDUM

L'autorisation de ratifier le projet de traité d'Union européenne par la voie référendaire entre manifestement dans le champ d'application de l'article 11 de la Constitution.

D'un point de vue politique, et non plus juridique, cette procédure serait assurément le meilleur moyen de vérifier s'il existe, en France, ce "peuple européen" prêt à répondre à ce qui ressemble fort à l'appel d'une Assemblée constituante. Le dernier en date des référendums organisés en France avait d'ailleurs un enjeu européen (l'élargissement de la Communauté au Royaume-Uni, en 1973).

Mais, outre la difficulté mentionnée ci-dessus sur le contrôle a priori de constitutionnalité du projet de traité, le choix de cette procédure nécessiterait une décision politiquement difficile et courageuse après les "péripéties référendaires" de l'été 1984 en France.

E - LES TRANSFERTS DE SOUVERAINETE

La question des transferts de souveraineté de l'Etat à l'Union ne se pose qu'en cas de mise en oeuvre - encore très hypothétique - du projet de traité d'Union européenne.

Il semble que, dans les premiers temps qui suivront la ratification, des transferts de souveraineté ne devraient pas se produire puisque la philosophie générale du projet de traité est que l'Union sera, à terme, ce que les Etats membres voudront progressivement qu'elle soit.

A la vérité, des transferts de souveraineté se sont déjà produits dans le cadre des traités constitutifs : ainsi notamment du secteur agricole, du secteur commercial et du secteur des transports, qui doivent faire l'objet, d'après l'article 3 du traité de Rome (25 mars 1957), de politiques communes.

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Et, de fait, c'est au moment de la décision de transfert que se poserait alors la question de la souveraineté, et non au moment de la ratification du traité d'Union.

Trois observations doivent ici être présentées :

- d'une façon générale, l'inclusion d'une nouvelle matière dans la compétence exclusive de l'Union est le fait (article 11 du projet de traité) des organes législatifs de l'Union. Fait sur l'initiative du Conseil européen, c'est-à-dire des représentants des gouvernements nationaux, ce transfert échappera aux Parlements nationaux ;

- concernant le pouvoir fiscal de l'Union, la création de nouvelles ressources propres serait également le fait des organes de l'Union. Les parlements nationaux, dont les compétences fiscales sont historiquement les plus anciennes, seraient là aussi dépossédés. Le transfert de souveraineté serait alors patent ;

- si la politique extérieure, et, partant, la politique de défense, devaient être confiées à l'Union, que resterait-il aux autorités nationales d'un domaine caractéristique de l'exercice de la souveraineté ?

Ces observations doivent être examinées à la lumière de la décision rendue le 30 décembre 1976 par le Conseil constitutionnel au sujet de l'élection du Parlement européen au suffrage universel direct. Le Conseil y donne une vision restrictive des progrès de l'intégration européenne et laisse entendre qu'une constitution européenne conférant à l'Union des pouvoirs nouveaux, notamment en matière de politique étrangère ou de défense, se heurterait aux exigences constitutionnelles françaises.

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L'article 86 du projet de traité interdit aux Etats membres d'assortir leur ratification de réserves. Cette disposition contraignante n'en favorisera pas l'acceptation.

II - LES ASPECTS POLITIQUES D'UNE EVENTUELLE RATIFICATION ET MISE EN OEUVRE DU PROJET DE TRAITE D'UNION EUROPEENNE EN FRANCE

Le moins que l'on puisse dire, en toute objectivité, est que la ratification du projet de traité d'Union européenne suppose une singulière évolution des esprits, tant dans l'opinion publique que parmi les formations politiques. Ces dernières ont, en effet, conservé une étonnante discrétion à l'égard du projet, comme s'il les embarrassait ou comme s'il intervenait prématurément.

Quatre indicateurs peuvent être utilisés pour illustrer cette impression générale d'indifférence à l'égard du projet du Parlement européen.

A - LE VOTE ET LES EXPLICATIONS DE VOTE DES MEMBRES FRANCAIS DU PARLEMENT EUROPEEN, LE 14 FEVRIER 1984

Le scrutin au cours duquel fut adopté le projet de traité révéla les prises de positions suivantes de la part des représentants français. Les libéraux et les P.P.E., plus un socialiste et un D.E.P., ont approuvé le projet ; les communist ont voté contre et les socialistes, sauf un, se sont abstenus. Les représentants D.E.P. français n'ont pas pris part au vote, sauf l'un d'entre eux.

Les explications de vote et les prises de positions antérieures donnèrent, quant à elles, les indications suivantes

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1°) L'U.D.F., correspondant pour partie aux membres des groupes P.P.E. et Libéral, se prononça en faveur du projet de Traité en apportant certaines observations sur l'édifice institutionnel qu'il préconise.

Ainsi de Mme Simone VEIL, qui vit dans le projet une entreprise ambitieuse et réaliste. Ses critiques de détail portèrent notamment sur le mécanisme par lequel la Commission statue souverainement, pendant la période transitoire de dix ans, sur l'exercice du droit de veto au sein du Conseil par les différents Etats membres.

Ainsi également du Président Edgar FAURE qui, dans une brillante improvisation, déplora que le projet n'aille pas assez loin et réclama la création sans attendre d'une présidence élue de l'Union...

2°) Le R.P.R., c'est-à-dire les membres du groupe D.E.P., affirma sa fidélité à l'idée de l'Union européenne mais contesta la voie institutionnelle choisie pour la mettre en oeuvre. Dénonçant le caractère inadapté, irréaliste et inopportun du projet, le président du groupe D.E.P. contesta en outre la légitimité de la vocation constituante que le Parlement européen avait cru se trouver.

3°) Les socialistes français rappelèrent leur attachement à la construction européenne mais dénonçèrent le projet de traité comme un texte hors du temps et étranger à une réalité politique qui appellerait au contraire une attitude d'efficacité. Craignant que la démarche institutionnelle constitue un alibi, et préférant les réalisations concrètes aux idées, même généreuses, le porte-parole des socialistes français demanda que la priorité soit donnée à "l'Europe du quotidien", ou à "l'Europe du possible". Le volet institutionnel sera alors le complément, ou l'achèvement, d'une démarche pragmatique menée avec patience et ténacité.

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4°) Les communistes français exprimèrent le point de vue que les traités actuels offraient des potentialités inexploitées et qu'il convenait de se défier d'une affirmation volontariste sans lendemain. Préférant un pragmatisme efficace à un idéalisme respectable, ils déclarèrent opter pour un changement de politique plutôt que d'institutions.

B - LA CAMPAGNE DES ELECTIONS EUROPEENNES DU 17 JUIN 1984

Tous les observateurs de la vie politique française s'accordent à dire que le projet de traité d'Union européenne a été très rarement évoqué par les candidats aux élections européennes du 17 juin 1984.

Seule la liste E.R.E. (Entente Radicale Ecologiste), conduite par MM. DOUBIN, STIRN et LALONDE, avait mis le projet au centre de son argumentaire de campagne ; la médiocrité de son score (3,3% des suffrages exprimés) incline à penser que le thème de l'Union européenne n'était guère "porteur".

En réalité, les thèmes proprement européens ont été notoirement absents de la campagne pour les élections européennes à l'exception de certaines "petites" listes. Tout s'est passé comme si les "grandes" listes étaient d'abord préoccupées par des enjeux de politique interne.

C - LE DISCOURS DE M. FRANCOIS MITTERRAND, EN SA QUALITE DE PRESIDENT EN EXERCICE DU CONSEIL EUROPEEN, DEVANT LE PARLEMENT EUROPEEN A STRASBOURG LE 24 MAI 1984

Le discours prononcé à Strasbourg le 24 mai 1984 par le Président de la République française fut interprété par nombre d'observateurs comme une approbation spectaculaire du projet de traité.

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Les commentaires qui suivirent un discours considéré à bon droit comme important doivent cependant être singulièrement nuancés, sans aucun esprit polémique.

Tout d'abord, le Président français a cité, pour expliquer comment il entendait relancer la construction européenne, la "déclaration solennelle" de Stuttgart (juin 1983) tout autant que le "projet SPINELLI". Or, on se souvient que les objectifs de la déclaration de Stuttgart sont incomparablement moins ambitieux que ceux du projet de traité, et il existe dès lors une ambiguïté sur le moyen exact qui serait retenu pour favoriser l'émergence d'une Europe politique.

Ensuite, les références aux traités existants, et aux possibilités inexploitées qu'ils offrent, ont été nombreuses elles retirent en toute logique, sa justification au recours à un système institutionnel nouveau. Le Président français concluait l'une de ses périodes oratoires sur les questions institutionnelles par la phrase suivante : "C'est pourquoi il est indispensable de consolider le principal Traité qui lie les pays européens entre eux et constitue leur loi fondamentale, le Traité de Rome".

Enfin, si M. François MITTERRAND a évoqué le projet de traité dans des termes élogieux, il n'a pas déclaré qu'il l'approuvait en l'état, ni dans l'immédiat. Affirmant que, "à situation nouvelle doit correspondre un traité nouveau", le Président français a rappelé qu'un "Traité nouveau ne saurait se substituer aux traités existants, mais les prolongerait dans les domaines qui leur échappent". Or, une étude approfondie du "projet SPINELLI" démontre qu'il n'est guère de coexistence possible entre les institutions issues des traités actuels et celles qui figurent dans le projet de traité. En outre, c'est l'inspiration du projet de traité, et non le projet lui-même, qui, dans le discours du Président de la République, convient à la France. Celle-ci est disponible

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pour entreprendre la construction de l'Europe politique, mais pas nécessairement par les voies et moyens inscrits dans le projet du Parlement européen.

D - LA VIE POLITIQUE DEPUIS 1945

Des constantes existent dans la vie politique française depuis 1945 à l'égard des projets tendant à faire progresser l'intégration européenne.

Traditionnellement, les courants issus du gaullisme leur sont hostiles, ou, dans certains cas, sont simplement réservés à leur égard. Les formations d'extrême gauche leur sont ouvertement opposées. A l'inverse, les familles de pensée appartenant à la démocratie chrétienne et à la social-démocratie leur sont favorables, et ont constamment démontré leur attachement à l'idée de la construction européenne.

C'est dire que, paradoxalement, l'attitude vis-à-vis de l'Europe ne correspond pas au clivage gauche-droite de la société politique française. Cette observation vaut pour les formations politiques les unes vis-à-vis des autres, mais également pour les composantes internes à chaque formation. Car des divergences d'appréciation existent au sein de chaque formation politique à l'égard de l'idée européenne.

Dans l'opinion, la faible participation électorale aux scrutins intéressant l'Europe (référendum de 1972, élections européennes de 1979 et 1984) démontre le peu de cas que les électeurs français font des affaires de la Communauté. Les partis politiques portent une grande part de responsabilité dans ce phénomène.

Quant à savoir si la mise en oeuvre du projet de traité d'Union européenne ferait apparaître de nouvelles formations ou susciterait des alliances politiques inédites, il serait bien vain et hasardeux de faire sur ce point des "scénarios du futur

a cf. Communauté européenne de Défense .../...
(-1954)

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Le faible écho trouvé en France auprès de l'opinion publique et des formations politiques par le projet de traité d'Union européenne, les incertitudes qu'il présente à l'égard du droit constitutionnel, et les lenteurs, au niveau communautaire, manifestées par le "Comité Dooge" ne permettent pas de s'interroger sur les délais qui s'écouleront avant l'achèvement des procédures de ratification. Car s'il faut refuser de céder au pessimisme, il convient également de faire preuve de réalism

Dans l'immédiat, une attitude constructive consiste à réfléchir sur le contenu même du projet et de rechercher commen les mécanismes institutionnels qu'il comporte pourraient être améliorés. A cet égard, plusieurs suggestions pourraient être faites, comme une meilleure délimitation des secteurs de compétence attribués à l'Union, ou l'attribution au Conseil européen du droit de dissoudre le Parlement européen. Les deux Délégations du Parlement français pour les Communautés européennes ont d'ailleurs l'une et l'autre souligné ces points particulier

Mais tel n'était pas l'objet de la présente communication.

October 1984

The Draft Treaty Establishing the European Union: Report on Denmark.

P. Lachmann

Abstract

Of Paper Presented at the Conference on
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The European Parliament Draft Treaty establishing a European Union. Constutional and Political inplications in Denmark

SUMMARY AND CONCLUSIONS

By Per Lachmann

I. The Draft Treaty and the Danish Constitution

1. An approval by Denmark 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 5/6 majority in the "Folketing" or a simple majority coupled with a referendum.

2. The Draft Treaty uses a sometimes very broad language open to differing interpretations. The findings of this report is therefore subject to a number of reservations regarding the interpretations of the Draft.

3. 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 is taken by unanimity.

4. The enlargened competence of the Union "ratione materiae" is in principle compatible with section 2o 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 pursuant to Section 20. Pending such clarifications it might be that at least one substantive provision of the constitution which reserves certain jobs in the public administration to Danish nationals would have to be amended by the procedure for constitutional amendmends.

5. The explicit provisions regarding the supremacy of Union law would most likely not give rise to 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.

6. The composition and voting rules for the Parliament and the Union Council gives Denmark a representation which is less than in a full-fled-

ged federal State, and which could become even smaller if an organic law redistributed the seats in Parliament. It is open for discussion whether this is compatible with section 20 of the Constitution, which requires a "fair" representation.

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 increased powers of the court could in any case be accomplished in accordance with section 20 of the Constitution.

7. 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 amendmend rather than a bill pursuant to section 20 would be considered the most correct solution, but such an interpretation is not necessary from a legal point of view.

II. The Draft Treaty and the Danish political parties.

1. All leading Danish Parties have in a Folketing motion rejected the Draft Treaty proposed by the European Parliament.

2. This rejection is an expression of a broad concesus on the approach to the European Union. The steady but slow progress is preferred to great leaps which cannot be implemented for want of popular support.

3. The center of gravity in discussions on the future development of the Community towards a European Union should in the view of all Danish parties be the new policies to be made in the fields of industry, tecnology, research and development, energy and the protection of the environment. General institutional reforms are rejected by all the parties, and the right of veto is considered a necessity also in the future.

4. Within this general concensus there is a clear difference among the parties with respect to smaller institutional amendments. This difference is often not clearly expressed due to the necessary alliance among the major parties regarding foreign policy including European policy.The Liberals and - to a lesser degree the Conservatives - are more open to such smaller reforms while the Social-democrats and the Radicals are taking a more defensive attitude in this respect. The Social-democrats have after their poor results in the European elections set up a committee to study their position with respect to Europe's role in the world. The outcome of this committee work is difficult to forecast, yet important for the party and thereby for Denmark.

October 1984

The Draft Treaty Establishing the European Union: Report on the United Kingdom.

D. Edward

R. Lane

R. McAllister

Abstract

Of Paper Presented at the Conference on
The Draft Treaty Establishing the European Union
Badia Fiesolana, Florence
29, 30, 31 October 1984

organised by

The European Policy Unit at the European University Institute
The University of Strasbourg
The Trans-European Policy Studies Association

ABSTRACT PAGE

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The Draft Treaty Establishing the European Union

The European Policy Unit at the European University Institute

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The Trans-European Policy Studies Association

THE INSTITUTIONS AND THE PROCESS OF DECISION-MAKING IN THE DRAFT TREATY ESTABLISHING THE EUROPEAN UNION: COMMENTARY.

R. BIEBER

DOC. IUE 280/84 (EPU 18)

Conference at the Badia Fiesolana, 29,30,31 October 1984

The Institutions and the process of decision making in the draft treaty establishing the European Union*

Comments by Roland Bieber

2 Preliminary remarks:

1. - Institutions, according to the wording of article 4 EEC-treaty (and art. 8 of the draft), comprise the Court of Justice as well, but since it was dealt with in detail by Judge Koopmans, and in the discussion, I shall not continue the discussion in the context of my contribution.

2. - Decision-making in practice includes the budgetary procedure as well, that is the procedure to be followed for the adoption of the budget. The draft treaty in article 76 has - like the existing treaties (203 EEC) - completely separated the legislative procedure from the budgetary procedure. We follow that separation in our colloquy and I therefore will not discuss here what is dealt with by Mr. Orstrøm Møller and Professor Ehlermann. But I do think that it is an error of the draft treaty to maintain the separation of 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 technique of creating conflicts among the institutions - and even within the institutions - (budgetary Council v. Foreign Ministers; budgetary committee v. agricultural committee), and for those conflicts no solution is provided.
I should like to give an example which may help to illustrate the objection: According to art. 38, para.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 Art. 76 f). If Parliament, against

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*Transcript from the oral statement

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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 necessary money for the implementations of legislation, which it has decided by itself. This result appears somewhat strange to me and I do not know whether it was intended by Parliament. So much for the inter-connection between budgetary and legislative procedure which, to my mind, could be improved in the draft.

3. Court of Justice and budget left aside, I should like to raise three points with regard to institutions and decision-making procedure:

   a) the assumptions which Parliament has made before the text had been drafted,

   b) the major changes which are envisaged and their implication for democracy and efficiency in the institutional system and

   c) the question (which Mr. Spinelli certainly does not like) whether some of the proposals could be achieved separately from the rest, in other words, whether they could be inserted inthe existing treaties without having to adopt the entire draft.

a) The assumptions made by Parliament

4. The articles on institutions and on decision-making cover 1/3 of the entire draft treaty. Institutions and decision-making in fact, in the eyes of the draftsmen of the EP's text, merit greater attention than in any other proposal for European Union before. Furthermore, European Union in this context seems to be seen as an instrument to repair present misgivings rather than an opportunity to offer a fresh approach to given problems. It might be worth while discussing whether this approach is justified.

5. One is, in fact, surprised, how little the institutional structure differs from the existing treaties. In fact, article 8 of the draft in substance is distinguished from article 4, para.1 of the EEC-treaty only insofar as the European Council is added to the institutions of the future Union. One might have expected more radical changes and inventions. Parliament, in fact, expressly decided already 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".

6. Continuity is of course the safest way of avoiding major errors and of reassuring the political opponents. I find it, however, regrettable that apparently no analysis about the requirements of an institutional system for the Union has been made. Such an analysis 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, repartition of seats and electoral period of Parliament not have to be reconsidered?

7. The main aim of Parliament's draft obviously was 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). I should therefore suggest for discussion whether Parliament's approach towards the institutional system of the future Union is the most appropriate one.

b) the major changes which are envisaged and their implication for democracy and efficiency

8. From an institutional point of view, the establishment of the 'European Council' as an institution of the Union is the major innovation of the draft. Although the heads of state and government already meet as 'European Council', this body would receive specific powers only through the draft. Until now the legal powers of the European Council do not differ from those of the Council. The draft, on the other hand, assigns to it the power to decide new areas of Community competences (art. 54, 68). This innovation creates in fact a treaty-amendment procedure which one might locate between art. 235 and 236 of the EEC treaty. The draft avoids elaborating on the voting procedure within the European Council, but it is obvious, considering arts. 235 and 236, that those decisions will in most cases have to be unanimous.

9. 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 creation 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 additional obstacle for ratification of the draft. This, in my opinion, would provide a further argument for creating a "Senat" within the institutional system of the Union in which national Parliaments were represented. (I indicated already that this had in fact been proposed in 1953).

10. With respect to the Commission, it should be noted that the draft provides for an awkward procedure for its appointment (art. 25, 16). Its president is appointed by the European Council (this appointment meaning at the same time cooptation to the European Council), and the president shall then select the other members of the Commission. This sounds somewhat naive. Either Parliament is able to appoint the Commission (as it is envisaged for half of the members of the Court, Art. 30, 2) or this power will necessarily remain with

national governments. National governments will not accept that no political and national control is exercised over the selection process. They therefore will not appoint somebody president of the Commission before he has committed himself to a certain team.

A very important change is envisaged with respect to the term of office of the Commission. This will, in fact, be quite rightly linked to the electoral period of Parliament.

11. With respect to the Court and to the Court of Auditors, it should be noted, that the draft provides for an appointment of a part of its members by Parliament and by Council (art. 30, 33) This technique is likely to create conflicts among the appointing institutions. E.g. on the methods how to provide for a representation of all member states in those institutions. It would, in my opinion, be safer to provide for a mechanism which guarantees that decisions on appointments are taken in due course before the end of term of the outgoing member.

12. It is surprising to note with regard to the rules of procedure of the Court of Auditors that the draft contains the same omission as the EEC-treaty and does not clearly lay down the autonomy of the Court in this respect. For ECOSOC, in contrast to the EEC-treaty, this autonomy has been created (and been re-enforced by formally establishing a right of initiative).

13. I now move to the major changes in the decision making procedure and their possible impact on efficiency and democracy. The most important articles in this respect are articles 36 and 38 which establish Parliament and Council as the joint legislative authority. The idea of co-decision is already achieved in the budgetary field and it was proposed for legislation in the "Vedel-report" of 1972.
The Parliament suggests now, that legislation generally is initiated by the Commission. But both Parliament and Council may, if the Commission refuses, introduce legislation by themselves. The procedure (art. 37) is not quite clear. It seems as if only the institution which 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 Commission implicitly reject?

14. In any event, once the legislative procedure has started, a bill may be enacted after Council and Parliament had the possibility 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:
- a participation of Parliament in legislation and
- a way around the notorious lack of capability of Council to gather a "positive" majority for the adoption of a text.

15. 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, 3). It is not quite clear whether a government should be allowed to block a vote in Council even beyond the time-limit in art. 38 or whether this right can be exercised only within this limit.

16. 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 provide for safeguards of 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

taking into account the time constraints put on each institution (which for certain legislative projects might be too short but could be prolonged on actual agreement).
In comparison to the present system the procedure proposed in article 38 might well be the keystone of the proposed Union since it would enable the Union to overcome the present inertia.

17. But I should like to draw your attention - and to suggest a discussion of this topic - to the delicate proposal contained in art. 38, paragraph 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 large in comparison to the gain in efficiency of the decision-making procedure. It is not compensated by the fact that, in any event, the two other institutions have to approve a text. I personally find it unacceptable that the consent of directly elected Parliament is reputed by the absence of a vote within a given time.

c) The question, whether the proposals could be integrated into the present treaties without adoption of the entire project

18. I do think that the decision-making procedure as it is proposed namely in article 38 could indeed become part of the present treaties even without the rest of the draft text for a European Union. 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 - and it would establish a substantial improvement! Therefore, it might be worth while to consider the alternative of a reform in the decision-making process without having to "swallow" the entire package of a European Union.
Less important, although possible as well, would be changes of the treaties adopting the institutional reforms for which the draft provides. In practice, most of them are already used, except the somewhat doubtful transfer of competences from national Parliaments to the European Council.

19. I criticized earlier that the Draft in some respects did not have enough distance from the present treaties. This close relationship provides on the other hand 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 my opinion, be exploited by Parliament and should be considered as a major advantage of the draft. But this is, of course, an observation more of political nature and it should not replace the impetus for the achievement of the entire project.

30 October 1984

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The Draft Treaty Establishing the European Union

The European Policy Unit at the European University Institute

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

P. BRÜCKNER

DOC. IUE 267/84 (EPU 5)

Conference at the Badia Fiesolana, 29,30,31 October 1984

September 1984

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

Comments by Ambassador Peter Brückner,
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Introductory remarks

The purpose of the present paper is merely to contribute a basis for discussion at the Conference on the Draft Treaty establishing the European Union at Florence on 30-31 October 1984. In this sense it is still a non-paper. Time has not permitted a sufficiently profound analysis of the subject. Moreover, it would neither be correct nor sensible to present a fully structured chapter of the proposed book at this stage. Its final contents would depend on the further thoughts and constructive contributions which hopefully will emerge during and after the exchange of views at the Conference.

In this present first draft I shall, therefore, attempt to define the main issues and leave open certain questions rather than draw too many hasty conclusions which might narrow the scope of the debate.

The subject I have been asked to address is entitled "The Foreign Relations Powers and Policy in the Draft Treaty establishing the European Union". In the present context "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 of the scope of my text seems to be in harmony with the general approach reflected in the Draft Treaty i.e. an institutional rather than a functional approach.

For similar reasons the present study will mainly focus on the foreign relations machinery in the broad sense of the term. Will the machinery set up by the Draft work according

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

My attempted analysis will be that of a practician. The use of footnotes and other academic attributes will be limited to a minimum - at least at this stage of the exercise.

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

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

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

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

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

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

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

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

Both under the 1/76-doctrine and art 235 the problem arises whether "necessary" is a political concept leaving a nearly unlimited discretion to the competent institutions, in particular the Council, or whether it is rather a legal principle leaving a right of censorship to the Court.

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

These opinions constitute, together with the ERTA-judgement, the leading cases in regard to the exclusive character of

Community competence. The severe peremptory approach in Opinion 1/75 was somewhat mitigated in Opinion 1/78 (The Rubber Agreement) demonstrating the conflict between legal orthodoxy and political reality.

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

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

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

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

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

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

Conversely, in other situations practice has shown that third countries tend increasingly to regard the Member States and the Community as a unity, often more than the Member States do themselves, and expect the Ten/EC to act as an entity on international issues. The difficulties to respond to such expectations have manifested themselves in two related respects:

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

petence. In such cases resort has been made to "mixed agreements".

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

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

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

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

In fact, it has become increasingly difficult to distinguish between the Ten acting in Political Cooperation and the Community. The picture becomes even more blurred when

account is taken of fields of cooperation among the Ten which progressively have moved away from EPC proper and established their own framework such as Trevi and "espace judiciaire". Both areas deal with relations among the Ten rather than with relations between the Ten and third countries.

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

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

The present negotiation regime has evolved through practice, inspired largely by art. 113 procedures and by international

state practice. The legal principles defended in particular by the Commission have been in constant clash with socalled political realities.

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

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

The nature of the decision of the Council authorizing negotiations has also been questioned. The present doctrine regards it as an act sui generis, an internal preparatory step in a long process which - as distinct from the process of internal law making - involves one or more third parties. Hence, it has been generally felt that a certain number of special factors should be taken into account when applying the system of the Treaty in practice to the process of international law-making.

Agreements on protection of the environment and fisheries agreements are concluded on the basis of art 235 and art 43 respectively. Both provisions require consultation of the European Parliament. At what stage of the process should consultations take place? In practice Parliament is consulted when the agreement has been signed. Certain informal

procedures serve to ensure that Parliament is kept informed during the negotiation process. Recently, a parliamentary request has been made for information already from the stage where draft directives are being elaborated by the Commission. The question is how such requests can be reconciled with the vital need for confidentiality in international negotiations.

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

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

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

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

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

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

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

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

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

II. <u>International Relations of the Union</u>.

1. General observations.

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

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

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

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

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

- Article 6 on the legal personality of the Union;

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

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

The provisions of Title III, of course, have to be read in conjunction with the general rules of the Draft Treaty, in

particular Part Two on the objectives, methods and competences of the Union, Part Three on the institutional Provisions and Part Four concerning Policies of the Union.

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

Finally, a word on the terminology used in this part of the Draft. The term "international relations" has been chosen as the principal notion. "External relations" is the label for international relations conducted by "common action", typically actions covered by present Community powers. "Foreign policy" is the term frequently applied to international relations conducted by "cooperation", as a general rule relations dealt with under EPC.

2. Objectives and the Treaty system of international relations.

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

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

The methods (common action or cooperation) are only mentioned in para 2; it is not clear whether these methods also apply to attain the objectives of para 1.

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

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

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

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

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

In resume, the system may be described as follows:

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

- The European Council is responsible for cooperation.

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

3. Analysis of the operative provisions on international relations.

Article 64 para 1 confirms the principle of total parallelism between internal and external community powers.

Thus, in its internatinal relations, the Union shall act by common action in the fields referred to in this Treaty where it has exclusive or concurrent competence. These areas 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 Community they may give rise to some difficulties of

interpretation when applied to international action. Indeed, it may create difficulties when a particular policy is applicable "within the Union", see Article 50 para 1.

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

Furthermore, and similar to the other provisions of Title II but contrary to the provisions of Title I of Part Four, article 59 does not specify the method of action (common action or cooperation). Thus, it seems that the Draft has failed to some extent to create a clear legal basis for Union action in a field where the Community in practice has felt a need for a more appropriate legal basis than article 235.

Of course, a solution may be sought through recourse to the general provision of para 4 of Article 64, which seems to encompass external policies under exclusive Community competence established as well on the basis of article 235. This, however, would hardly be a legally secure solution.

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

Mr. Derek Prag's working document (Doc. 1-575/83/C p. 113) gives certain indications as to the intentions of the

authors, but otherwise the text of the Draft is not very helpful. The present formula may, after all, be preferable in order to allow for a dynamic interpretation of "commercial policy" based inter alia on the Community patrimony. A question in this connexion is to what extent Article 51 on credit policy would apply in the external field.

Development aid policy (DAP) referred to in para 3 of art. 64 is not defined f.inst. in relation to commercial policy. The provision prescribes that DAP progressively is to become subject of common action. The last part of the paragraph presupposes the continued existence of independent DAP programmes by Member States. However, it is not clear to what extent Member States may preserve their own DAP. 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. It would seem appropriate to introduce more flexibility and allow expressly either for cooperation (the term coordination is not clealy defined) or for concurrent competence.

The residual clause in para 4 of Article 64 seems likely to give rise to particular difficulties of interpretation. The term "exclusive competence" used here cannot mean the same as "exclusive competence" as defined in Article 12, which presupposes a positive indication of the extent to which national authorities may legislate. Furthermore, the Article 64-concept is based on an understanding of the term "exclusive competence" under the present Treaty system which is not generally shared, namely that a competence is exclusive as well in areas where it has not been exercised by the Community.

This leads to an intricate question relating to the continued co-existence of art 235 of the Treaty of Rome and

the provisions of the present Union Treaty which does not contain a similar provision (and perhaps does not need it).[3] How would art 235 operate in particular in relation to para 4 of art 64.2.

The new feature regarding the conduct of common action is the increased role of the EP, as reflected in article 65.

In the absence of particular provisions in Title III it may be assumed that the general rules of the Draft Treaty, such as Articles 37 and Article 40, apply in conjunction with Art 65. This seems clear with regard to approval of international agreements, see para 4.[4]

Conversely, EP has not been given any role with regard to the issuing of guidelines for the conduct of international actions. Moreover, it is not apparent by what kind of act the Council issues such guidelines and it is, therefore, difficult to determine which procedures apply.

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

Apart from these specific questions the procedure laid down in art 65 gives rise to the following general comments:

The EP has a co-decision power on all international agreements to be concluded by the Union. No Member State Parliament has such extensive powers. The Union is not based on a parliamentary system; the Council is not politically responsible to EP. Consequently, it does not seem justified to grant such co-decision power to the EP. If the provisions of art 37 apply the procedure may apparently lead to a situation where EP approves an agreement without the express consent of the Council.

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

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

Conversely, para 4 refers only to international agreements but not to other international acts (unilateral legal or political acts), see para 2, which seems to cover only acts entailing legal obligations. It is not specified which institution approves such acts.

It might also be argued that some international actions do not even merit submission to the Council. There should be a subsidiary organ (where is COREPER?) for handling current affairs.

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

In summary, the procedures laid down in art 65 seem very far from an acceptable solution to the problems which face the Community as an international actor. On the contrary, art 65 has added further unjustifiable obstacles to the present cumbersome machinery.

Finally, it is not clear how the Union should tackle "mixed" international subjects for negotiation. Para 5 of Art 67

authorizing the European Council to call on the President of the Council to act as spokesman may together with para 1, 3 and 4 of article 67 contain a basis for a solution to the conduct of mixed negotiations.

Art. 66 defines the scope of cooperation. The subsidiarity-principle is clearly reflected, but the areas of cooperation are very poorly defined. The Union is not - apparently - to have a foreign policy; it is rather to constitute a frame-work or forum for mandatory cooperation based on unanimity. The terminology is, however, so wide and vague that it may embrace any foreign policy issue which concerns more than one Member State. Qualifying the matters subject to the method of cooperation seems necessary in the light of the introductory words: "The Union shall conduct etc.".

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

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

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

Paras 2 and 3 use the term "the Union" without specifying the competent institution. Otherwise, these provisions seem to contain a suficient degree of flexibility. The crux of the matter remains: What are the more precise parameters for cooperation and which is to be the decision-making rule? (See below).

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

Article 68 concerns extension of the field of cooperation and transfer from cooperation to common action. Para 1 mentions specifically as some of the new areas of cooperation, armaments, sales of arms to non-member states, defence policy and disarmament. Depending on the definition of "disarmament" it should be noted that disarmament-related issues are already subject to political cooperation among the Ten within the UN and CSCE. The objective "disarmament" is also mentioned in Article 9. Suffice it to say that the other matters 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 rag in some capitals.

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

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

Para 3 contains a revolutionary provision of a heretical nature in a Community context. It allows for a reversal by empowering the European Council to decide to restore fields transferred to common action either to cooperation or to the competence of the Member States. Taking account of the very delicate fields found in the foreign policy arena the rule as such seems very useful; it allows for flexibility and balances to some extent the daring perspectives of para 1. The sentence "and in accordance with paragraph 2" does not seem to make any sense as presently worded, in particular because para 2 refers to the whole of Article 11. The use of the veto-power in this situation does not make any sense either, unless para 3 is based on the philosoply that is important to make sure that there is permanent unanimity to maintain a certain field within common action and that lack of unanimity at a later stage should lead to restoring the field to cooperation.

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

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

4. Open issues

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

Since it cannot be ascertained by what kind of act international agreements are approved it is not possible to state whether the term "law" in Art. 39 on publication could be interpreted to the effect that international agreements of the Union are to be published. Nor is there any provision concerning the registration of the Union's agreements with the United Nations Secretary General. This obligation may be said to flow from international law. However, since a special system of registration has been established with regard to agreements concluded by entities like the European Community, it might be useful to insert a provision to this effect.

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

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

Other problems which the Community has faced in practice relate to the right of representation of the Union in organs set up 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 member of its Member States or only one vote. Legal and political arguments may be advanced for one or the other solution.

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

IV. Conclusion.

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

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

In the classical area of common action the Draft Treaty has built rather faithfully on the Community patrimony. However,

the rules concerning the conduct of common action are so defective that a revision is warranted. The negotiation system creates 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, the role of the EP in this context could not by any arguments be justified to the extent foreseen by the Draft.

Finally, seen from the point of view of international relations it is hardly possible to conceive of a Union of less than all Member States. Indeed, the system of Art. 82 allowing for a progressive creation of the Union could not be reconciled with the regime on international relations of the Draft Treaty. Suffice it to imagine the reaction of third countries to a Union of such a hybrid nature.

Foot-notes

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.

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

3) This situation is foreseen in Doc. 1-575/83/B p. 5 para 12 Explanatory Statement.

4) Derek Prag seems to take this view in his report, see p. 114 in Doc. 1-575/83/C.

(5)

The Draft Treaty Establishing the European Union

The European Policy Unit at the European University Institute

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LA REPARTITION DES COMPETENCES ENTRE L'UNION ET LES ETATS MEMBRES DANS LE PROJET DE TRAITE INSTITUANT L'UNION EUROPEENNE

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LA REPARTITION DES COMPETENCES ENTRE L'UNION ET LES ETATS MEMBRES DANS LE PROJET DE TRAITE INSTITUANT L'UNION EUROPEENNE

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SOMMAIRE

Le projet de traité instituant l'Union européenne (ci-après dénommé "Le Projet"), renoue , d'une certaine façon, avec la stratégie constituante que l'on a pu opposer à la stratégie de l'intégration fonctionnelle. Comme le Projet de traité portant statut de la Communauté européenne, adopté par l'Assemblée ad hoc le 10 mars 1953 à Strasbourg, le Projet actuel est, en effet, issu des travaux d'une assemblée parlementaire (1). A la différence du Projet de 1953, le texte de 1984 procède de la volonté d'une seule assemblée, élue au suffrage universel direct.

Si cette origine parlementaire donne du Projet du Parlement une incontestable légitimité démocratique, elle peut, en revanche, malgré les précautions prises (2), expliquer certaines notions floues, certaines absences, qui parfois conduisent à un manque de clarté du Projet. Et ceci se vérifiera particulièrement pour ce qui est de la répartition des compétences qu'il institue.

Celle-ci peut être plus originale par les notions qu'elle utilise que par les résultats auxquels elle devrait conduire. On peut noter d'emblée, que sur le plan de la substance des compétences de l'Union projetée, l'originalité du Projet est moindre -par rapport aux Communautés- que sur le plan institutionnel (3).

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(1) On ne discutera pas ici de la question de savoir si, en 1984, le Parlement avait compétence pour arrêter un tel projet. L'Assemblée ad hoc constituée par la réunion de l'Assemblée de la CECA et par la révision de l'Assemblée de la CECA et de l'Assemblée consultative du Conseil de l'Europe, décidée par les Ministres des affaires étrangères de la République Fédérale d'Allemagne, de la Belgique, de la France, de l'Italie et du Luxembourg le 10 septembre 1952. Elle avait reçu mandat d'élaborer un projet de traité pour l'institution d'une Communauté politique européenne.

(2) On sait que la commission institutionnelle s'est entourée d'un comité de juristes formé de MM. CAPOTORTI, HILF et JACQUÉ.

(3) Cf. les remarques de M. C.D. EHLERMANN, Vergleich des Verfassungsprojekts des Europäischen Parlaments mit früheren Verfassungs- und Reform Projekten, in J. SCHWARZE/R.BIEBER (Ed), Eine Verfassung für Europa. Von der Europäischen Gemeinschaft zur Europäischen Union, Nomos Verlag, Baden, 1984, p. 276.

En effet, même si l'influence des systèmes fédéraux de répartition des compétences s'y fait sentir, notamment en ce qui concerne la distinction entre compétences exclusives et compétences concurrentes, la prise en considération de la répartition communautaire des compétences (1) est patente. De plus, on y reconnaît également le souci de ne pas heurter de front les gouvernements des Etats membres, mais, au contraire, de les associer aux actions et aux institutions de l'Union.

Enfin, il est probable que les clivages idéologiques entre groupes politiques ont dû également conduire à des solutions de compromis, qui parfois, et du point de vue juridique, se révèleront équivoques.

L'examen du Projet de traité,(2) sous l'angle de la répartition des compétences, oblige d'abord à présenter la délimitation des compétences de l'Union (I) avant d'en étudier la gestion (II).

I.- LA DELIMITATION DES COMPÉTENCES DE L'UNION

La lecture du Projet de traité conduit à s'interroger, en premier lieu, sur la nature des compétences de l'Union (A). Les compétences ne sont pas immuables dans leur consistance : aussi conviendra-t-il d'en examiner, ensuite, leurs possibilités d'évolution (B).

A) La nature des compétences de l'Union

Les dispositions pertinentes figurent dans la seconde partie du Projet, aux articles 9 à 13. A l'article 9 sont énumérés les buts de l'Union, en termes généraux. Pour délimiter les compétences de l'Union, le Projet procède d'une façon différente de celle qui existait dans le cadre des traités communautaires, différente aussi de celles que l'on rencontre habituellement dans les constitutions fédérales. On peut, en effet, dire que les

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(1) Pour un examen du système communautaire, v. notre ouvrage "Compétences et pouvoirs dans les Communautés européennes", Paris, LGDJ, 1974.

(2) Nous n'avons utilisé que la version en langue française, sans nous livrer à une confrontation entre les versions linguistiques.

compétences de l'Union se définissent selon un processus de double détente. S'agissant de déterminer les moyens de réaliser les buts de l'Union, le Projet indique deux méthodes : la coopération et l'action commune (art. 10 al. 1er). S'agissant de préciser les formes de l'action commune, le Projet, en application du principe de subsidiarité et conformément aux modèles fédéraux, évoque la distinction entre compétences exclusives et concurrentes (art. 12).

1) Une délimitation fonctionnelle, non exempte d'ambiguïté, caractérise la délimitation globale de ce qui relève de l'Union. Les auteurs du Projet ont certainement voulu placer dans le champ de l'Union, outre l'"acquis communautaire", qui correspond à l'action commune, la coopération politique (1) développée en dehors des traités communautaires proprement dits et qui correspond à la coopération.

En quoi les zones de l'action commune et de la coopération sont-elles distinctes ? L'article 10 al. 2 et 3 met l'accent sur le fait qu'à ces deux méthodes d'action de l'Union, doivent correspondre des instruments juridiques différents.

Ainsi, l'action commune sera constituée par

> "(...) l'ensemble des actes -internes ou internationaux- normatifs, administratifs, financiers et judiciaires ainsi que des programmes et recommandations propres à l'Union, émanant de ses institutions et s'adressant soit à celles-ci, soit aux Etats, soit aux individus".

Cette rédaction énumérative, cet inventaire qui utilise plusieurs critères : champ d'application des actes, domaines d'intervention de ceux-ci, actes de caractère obligatoire et actes dénués semble-t-il, de cet effet, auteur de l'acte, destinataires de l'acte, semble complexe et peut résulter confus. N'était-il pas possible de se tenir à un critère plus général, plus simple (du type : "Par action commune on entend l'ensemble des actes juridiques unilatéraux et contractuels émanant des institutions de l'Union

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(1) Par la coopération politique et ses relations avec les traités communautaires, on consultera J. CHARPENTIER,
(2) La coopération politique entre Etats membres des Communautés européennes, A.F.D.I. 1979, p. 753 s.

et qui lui sont imputables") ? La méthode énumérative (Enumerationsprinzip), par sa volonté d'exhaustivité aboutit à une rédaction inutilement contournée et à des précisions superfétatoires : quelle est, par exemple, l'utilité de savoir que les programmes et les recommandations propres à l'Union font partie de l'action commune ?

En revanche, la coopération est définie de façon apparemment plus simple, bien que là aussi, les rédacteurs du Projet n'aient pas échappé à l'équivoque. L'article 10 al. 3 indique :

> "Par coopération, on entend les engagements que prennent les Etats membres dans le cadre du Conseil européen. Les résultats de la coopération sont mis en oeuvre par les Etats membres ou par les institutions de l'Union selon les modalités définies par le Conseil européen".

Le domaine de la coopération -qui relève maintenant de l'Union- se matérialise juridiquement par les "engagements" (1) pris par les Etats au sein du Conseil européen - institution de l'Union. Mais l'équivoque procède du second alinéa : si les institutions de l'Union peuvent mettre en oeuvre les engagements souscrits au titre de la coopération, c'est avec leur propre registre d'instruments :or, c'est ainsi que se définit l'action commune ! Comment distinguer alors les deux zones ? (2).

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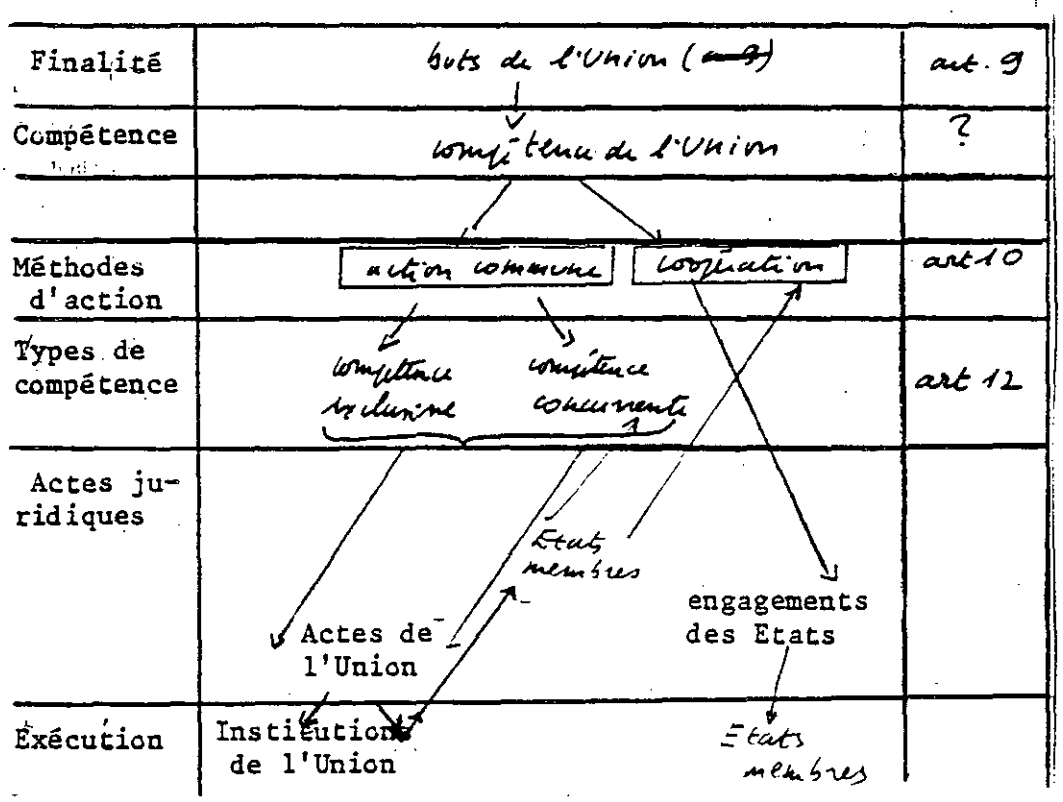
(1) Aura-t-on l'occasion de retrouver les débats qui ont eu lieu en France à propos de la notion d'"engagement" que contient l'article 54 de la Constitution ? V. sur ce point l'attitude du Conseil Constitutionnel telle qu'elle est présentée dans le Rapport J.P. JACQUÉ et V. CONSTANTINESCO, le Conseil Constitutionnel et le droit international et communautaire, Colloque de Strasbourg 1982 (sous presse)

(2) Un autre problème peut se poser, qui révèle une autre équivoque : dans le cas où les Etats membres mettent en oeuvre un engagement souscrit au titre de la coopération, est-on dans le même ordre d'agencement que celui qui existe en matière de compétences concurrentes ?

Les méthodes de l'action commune et de la coopération ne concernent pas seulement le fonctionnement "interne" de l'Union : les compétences extérieures de l'Union connaissent également cette dualité. Le titre III du Projet consacré aux relations internationales de l'Union comporte des dispositions qui évoquent ces deux modalités de l'action externe de l'Union (1). Les articles 64 et 65 sont relatifs à l'action commune tandis que les articles 66 et 67 régissent la coopération. Les relations de ces dispositions avec l'article 10 ne sont pas toujours claires notamment, la formulation de l'article 64 al. 1 est ambiguë :

> "Dans les relations internationales, l'Union emploie la méthode de l'action commune dans les domaines de compétences exclusives ou concurrentes mentionnés dans le présent traité"

car elle laisse penser qu'a contrario l'Union pourrait employer une autre méthode dans les domaines des compétences exclusives ou concurrentes. Ceci entraîne une autre observation : les relations entre les compétences de l'Union (et non leurs modalités) et ses méthodes d'action souffrent d'une certaine indétermination : le tableau suivant est-il correct ?



(1) A noter la formule très ouverte de l'article 68. A la lettre l'Union a-t-elle la maîtrise de sa propre compétence, la compétence de la compétence ?

2) Le domaine de l'action commune peut, à son tour, être susceptible d'être organisé de deux façons distinctes, en application du principe de subsidiarité. D'une part, la compétence de l'Union peut être exclusive (art. 12 al. 1) et, d'autre part, cette compétence peut être concurrente (art. 12 al. 2). Cette distinction est empruntée au droit de l'Etat fédéral, de même que le principe qui la sous-tend (mais qui dans le Projet ne s'applique toutefois qu'aux compétences concurrentes, alors que la logique du principe de subsidiarité voudrait qu'il permette également de fonder les compétences exclusives : pourquoi certaines compétences seront-elles exclusives si ce n'est précisément parce qu'elles correspondent à des "tâches qui peuvent être entreprises en commun d'une manière plus efficace que par les Etats membres oeuvrant séparément" comme le dit l'alinéa 2 de l'article 12 ?).

La compétence exclusive de l'Union, comme dans la théorie juridique du fédéralisme, écarte toute intervention des Etats membres. Deux précisions utiles sont apportées par l'alinéa 1er de l'article 12. D'abord, les Etats peuvent être invités à agir au titre d'une compétence exclusive de l'Union si la loi de l'Union le prévoit expressément. Les Etats, dans ce cas, exerceront nationalement une compétence de l'Union. Ensuite, dans un domaine de compétence exclusive, les règles nationales restent en vigueur tant que l'Union n'a pas légiféré. "Restent en vigueur" : la formule de l'article 12 al. 1 peut être comprise de deux façons : soit la compétence nationale demeure totale et les Etats sont libres d'arrêter toutes mesures qu'ils estiment utiles, soit cette compétence doit demeurer en l'état sans que les autorités nationales puissent l'exprimer par des actes juridiques (clause "standstill"). Le Projet ne choisit pas, semble-t-il, entre ces deux interprétations qui coexistent au sein d'une nouvelle équivoque.

La compétence concurrente de l'Union autorise l'action des Etats "là où l'Union n'est pas intervenue" (art. 12 al. 2) (On aurait pu préférer une rédaction qui tienne davantage compte de la dimension temporelle de la compétence concurrente : ainsi par exemple "(...) l'action des Etats s'exerce là où, et tant que, l'Union n'est pas intervenue", sans se dissimuler l'inélégance de cette formulation...). Mais ne peut-on pas se demander ce qui

distingue la situation des Etats dans chacun de ces types de compétences ? Lorsque l'Union n'intervient pas -que ce soit dans le domaine de la compétence exclusive ou dans celui de la compétence concurrente-, les Etats peuvent agir, peut-être pas de la même façon, mais cela n'apparaît guère dans le libellé du texte (cf. les observations précédentes).
Lorsque l'Union intervient au titre de sa compétence exclusive, les autorités nationales sont déssaisies : elles sont frappées d'incompétence "ratione materiae" dans le secteur en cause.
Lorsque l'Union intervient au titre de sa compétence concurrente, les Etats ne peuvent agir que là où l'Union n'est pas intervenue ; a contrario elles ne peuvent agir là où l'Union est intervenue, comme lorsque celle-ci exerce une compétence exclusive. L'expression "là où" désigne-t-elle un domaine en quelque sorte "géographique" d'intervention où un degré dans la hiérarchie normative ? La frontière entre les deux types de compétences ne semble pas dessinée avec suffisamment de précision.

Le principe de subsidiarité, sous-jacent à cette décision des compétences, est explicité à l'alinéa 2 de l'article 12. On peut regretter qu'il ne figure pas en tête de la disposition qui s'intéresse aux compétences car son application justifie aussi bien les dompétences exclusives que les compétences concurrentes de l'Union. En outre, le critère de l'efficacité qui justifie la compétence de l'Union peut être source de difficultés d'interprétation.

B) L'évolution des compétences de l'Union

Les compétences dont on vient d'examiner la nature ne sont pas immuables et les frontières qui les séparent ne sont

pas étanches. Aussi convient-il d'étudier successivement comment s'effectue le passage de la coopération à l'action commune -1- et comment les compétences concurrentes peuvent devenir exclusives -2-, avant d'envisager la procédure de révision -3-

1) Le passage de la coopération à l'action commune

L'article 11 est une disposition de procédure qui indique quelles sont les conditions auxquelles le passage d'une méthode à l'autre peut s'effectuer. Mais l'article 11 indique aussi, dans son alinéa 2, que ce passage est irréversible : on ne saurait revenir de l'action commune à la coopération.

- La procédure qui permet de passer d'une zone à l'autre n'est pas d'application générale : l'article 11 al. 1 dispose qu'elle ne peut s'appliquer que lorsque le Projet l'a explicitement prévu. C'est le cas de la coopération industrielle (art. 54 § 1) et de l'aide au développement (art. 64 § 3). Ces domaines sont donc potentiellement de l'action commune : faut-il pour autant les considérer comme des compétences "potentielles" ? Nous ne le pensons pas car, comme il a été indiqué ci-dessus, la coopération relève déjà de la compétence de l'Union. L'expression compétence "potentielle" introduirait alors une équivoque, puisque l'on pourrait penser qu'elle recouvrirait une situation où l'on passe de la compétence nationale à la compétence de l'Union, ce qui n'est pas le cas.

En dehors de ces hypothèses, il ne saurait donc y avoir de passage entre le domaine de la coopération et celui de l'action commune. Mais, en revanche, le domaine de la

coopération peut être élargi par le Conseil européen. L'article 68 § 1 indique que cet élargissement peut avoir lieu :

> "(...) notamment en matière d'amendements, de ventes d'armes à des pays tiers, de politique de défense, de désarmement" (1).

La procédure est alors la suivante :

> "sur proposition soit de la Commission, soit du Conseil de l'Union, soit du Parlement, soit d'un ou plusieurs Etats membres, le Conseil européen décide, après consultation de la Commission et avec l'accord du Parlement de soumettre ces matières à la compétence exclusive ou concurrente de l'Union"

- L'irréversibilité du passage de la coopération à l'action commune n'est pas totale. Posée en termes pourtant absolus par l'article 11 al. 2, elle connaît deux ordres de dérogations. D'une part, selon l'article 68, al. 2 :

> "(...) le Conseil de l'Union peut, à titre exceptionnel et par un vote unanime, autoriser un ou plusieurs Etats membres à déroger à certaines mesures prises dans le cadre de l'action commune"

D'autre part, l'alinéa 3 du même article 68 dispose :

> "Par dérogation à l'article 11, paragraphe 2 du présent Traité, le Conseil européen peut décider de soumettre à nouveau les domaines transférés à l'action commune conformément au paragraphe 2 du présent article, soit à la coopération, soit à la compétence des Etats membres".

La première hypothèse de dérogation vise vraisemblablement une hypothèse analogue à celles que régissent les clauses de sauvegarde dans les traités communautaires : cependant aucune allusion à une limitation dans le temps de la dérogation n'est faite.

La seconde hypothèse instaure un mécanisme de rétrocession des compétences qui appelle plusieurs précisions. La première donnée par confrontation entre le § 2 et le § 1 de l'article 68 est que seul un domaine de coopération qui est

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(1) N'est-ce pas dire que le domaine de la coopération est illimité ?

déjà passé à l'action commune peut la quitter et revenir à la coopération. La reversibilité dérogatoire ne concernerait pas les secteurs soumis "ab initio" à l'action commune : il s'agirait en quelque sorte d'une rétrocession à l'intérieur du champ de l'Union. Mais l'article 68 § 2 permet aussi une rétrocession de la compétence de l'Union à la compétence des Etats membres. N'est-ce pas là introduire un mécanisme subreptice de révision ? D'autant qu'il déroge à la procédure de révision instituée par par l'article 84.

Si l'on comprend les préoccupations politiques qui ont poussé les rédacteurs du Projet et la majorité du Parlement à adopter ce système, il faut convenir que sur le plan juridique, un tel système soulève des réserves. D'abord, il est peu clair et complexe : les dispositions pertinentes sont dispersées dans le Projet alors que leur importance et leur fonction commune auraient mérité qu'on les regroupe. Ensuite, s'agissant d'une compétence étatique placée initialement sous l'emprise de la coopération, faisant ensuite l'objet d'un passage sous l'égide de l'action commune, rétrocédée enfin aux Etats,les dispositions du Projet ne remettent-elles pas au Conseil européen seul en réalité une possibilité de diminuer l'assise des compétences de l'Union ?

3) La procédure de révision du traité d'Union prévue à l'article 84 du Projet est conforme, dans ses lignes générales, au modèle qu'a pu constituer l'article 236 du Traité CEE. Comme lui, elle comporte deux phases. Elle donne l'initiative aux Etats ("une représentation au sein du Conseil de l'Union"),au Parlement (un tiers des membres du Parlement") (1) et à la Commission.

(1) Pratiquement l'initiative de révision appartiendra aux groupes politiques et non à chacun des parlementaires. Le Parlement n'a d'ailleurs qu'une initiative législative indirecte régie par l'article 37 al. 2.

Ces institutions peuvent

> "(...) soumettre à l'autorité législative leur projet de loi motivé portant amendement à une ou plusieurs dispositions du présent traité. Ce projet est ensuite soumis à l'approbation des deux branches du pouvoir législatif statuant selon la procédure applicable à la loi organique".

c'est-à-dire selon les conditions posées par l'article 38 du Projet. La seconde phase s'ouvre lorsque le projet approuvé est soumis à la ratification des Etats membres ce qui en autorise l'entrée en vigueur.

x x x
x x

Deux remarques concluront cette brève présentation de la délimitation des compétences de l'Union. En premier lieu, on notera que le Projet ne reprend pas, sous une forme ou sous une autre, le mécanisme inscrit à l'article 235 du traité CEE qui a permis de fonder les politiques dites dérivées. Ce mécanisme introduisait un élément de souplesse dans la répartition des compétences et aurait peut-être mérité d'être conservé. En second lieu, la délimitation des compétences de l'Union répond à une juxtaposition de critères qui n'en rendent pas toujours la compréhension facile.

II.- LA GESTION DES COMPETENCES DE L'UNION

Deux problèmes seront successivement examinés : quel est le contenu des compétences de l'Union ? (A). Comment s'effectuera la mise en oeuvre des compétences de l'Union ? (B).

A) Le contenu des compétences de l'Union

Sans vouloir empiéter sur la matière d'autres rapports, on se limitera à s'interroger sur quelques aspects particuliers des compétences de l'Union.

1) L'acquis communautaire fait l'objet des dispositions de l'article 7 du Projet. Après l'habile formule de principe du premier alinéa "L'Union fait sien l'acquis communautaire", les quatre alinéas suivants organisent le sort de cet acquis dans la nouvelle Union. Un traitement différencié est prévu pour les diverses catégories de normes qui ont été considérées comme faisant partie de l'acquis communautaire (1), selon leur autorité.

- L'alinéa 2 de l'article 7 indique que certaines des dispositions des traités instituant les Communautés (et des conventions et protocoles qui y sont annexés), celles :

> (...) qui concernent les buts de celles-ci et leur champ d'application et qui ne sont pas modifiées de façon expresse ou implicite par le présent traité font partie du droit de l'Union. Elles ne peuvent être modifiées que selon la procédure de révision prévue à l'article 84 du présent traité"

Ce sont là les normes communautaires qui bénéficient de la protection maximale : elles auront le même rang que le traité d'Union. Plusieurs incertitudes doivent être soulignées. A-t-on, au cours de la rédaction du Projet, recensé quelles dispositions communautaires précises étaient concernées ? Que signifie l'expression "champ d'application" des Communautés ? A-t-on songé à la

(1) Pour une tentative de définir l'acquis communautaire cf. P. PESCATORE. R.T.D.E. 1981, p. 617 et s.

compétence territoriale ?

Qu'est-ce qu'une modification "implicite" des traités communautaires ? Et enfin qui l'appréciera ?

- L'alinéa 3 de l'article 7 indique :

"les autres dispositions des susdits traités, conventions et protocoles font également partie du droit de l'Union pour autant qu'elles ne soient pas incompatibles avec le présent traité.Elles ne peuvent être modifiées que par la procédure de la loi organique visée à l'article 38 du présent traité"

Les dispositions communautaires dont il s'agit bénéficieront d'une protection moins forte : elles s'incorporent au droit de l'Union, sous réserve qu'elles ne soient pas icompatibles avec le traité et auront rang de loi organique puisqu'elles ne pourront être modifiées que selon cette procédure. Une question : qui constate l'incompatibilité ?

- L'alinéa 4 de l'article 7 se lit ainsi :

"Les actes des Communautés européennes ainsi que les mesures prises dans le cadre du système monétaire européen et de la coopération politique continuent à produire leurs effets, pour autant qu'ils ne sont pas incompatibles avec le présent traité, tant qu'ils n'auront pas été remplacés par des actes ou mesures pris par les institutions de l'Union, conformément à leurs compétences respectives"

Le droit communautaire dérivé, les mesures de mise en oeuvre du système monétaire européen, comme celles de la coopération politique se voient assigner au sein du droit de l'Union un rang inférieur aux deux catégories précédentes : ils demeurent en vigueur, sauf incompatibilité avec le traité d'Union (qui va constater ?) jusqu'à leur remplacement par des actes ou mesures de l'Union dont le Projet ne précise pas la place dans la hiérarchie des normes.

- Enfin l'alinéa 5 de l'article 7 précise :

"L'Union respecte tous les engagements des Communautés européennes, en particulier les accords ou conventions passés avec un ou plusieurs Etats tiers ou une organisation internationale"

Cette disposition vise un problème important et complexe, le sort des engagements internationaux souscrits par les Communautés à l'égard de l'Union. La formulation choisie est habile sans lever toutes les difficultés que présenterait la situation. L'activité conventionnelle des Communautés sera "respectée" par l'Union. C'est-à-dire ? L'Union succèdera-t-elle aux engagements des Communautés ? Si elle comprend les mêmes Etats membres, la solution se comprend. Quid si elle n'en comporte que quelques uns ? En quelle qualité l'Union respectera-t-elle les engagements antérieurs des Communautés ? Quelle est la signification exacte du terme "respecter" ? L'Union est-elle liée par les engagements communautaires ? Ceux-ci lui sont-ils opposables ? Quelles sont les relations entre l'Union et les Communautés (au cas où celles-ci subsisteraient) dans ce domaine ?

2) La question des droits fondamentaux

Le Projet réaffirme dès son Préambule, l'importance que les Etats qui constituent l'Union attachent aux droits de l'homme. ("Se fondant sur leur adhésion aux principes de la démocratie pluraliste, du respect des droits de l'homme et de la prééminence du droit"). A la différence des traités communautaires -qui n'abordent qu'indirectement, et par le biais économique, certains droits fondamentaux- le Projet comporte une disposition spécifique, l'article 4 qui leur est consacré. Ainsi se manifeste, une fois de plus, le caractère matériellement constitutionnel du Projet. L'on sait que dans les Communautés, la Cour de Justice a oeuvré au fil de sa jurisprudence pour que les institutions communautaires respectent, dans la confection de leurs actes, les droits fondamentaux issus des constitutions des Etats membres, ou de certains instruments internationaux qu'ils ont ratifié. L'article 4 § 11 "constitutionnalise" en quelque sorte les efforts de cette jurisprudence :

> "L'Union protège la dignité de l'individu et reconnaît à toute personne relevant de sa juridiction les droits et libertés fondamentaux tels qu'ils résultent notamment des principes communs des constitutions des Etats membres, ainsi que de la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales"

Mais le Projet va au-delà en abordant la question des droits économiques, sociaux et culturels qu'on distingue souvent des droits civils et politiques. Ces droits -dont certains figurent d'ailleurs dans les constitutions nationales, dans la Convention européenne et dans les protocoles additionnels- font l'objet d'un engagement de l'Union inscrit à l'article 4 al. 2 :

> "L'Union s'engage à maintenir et à développer, dans les limites de ses compétences, les droits économiques, sociaux et culturels qui résultent des constitutions des Etats membres ainsi que de la Charte sociale européenne".

Ainsi la "constitution" de l'Union s'enrichit-elle de nouvelles normes protectrices des droits fondamentaux, selon la technique du renvoi que l'on rencontre, par exemple, dans le Préambule de la Constitution française du 4 octobre 1958.

- Pour assurer au sein des Communautés le respect des droits fondamentaux, la Commission avait suggéré dans un mémorandum du 4 avril 1979, l'adhésion de la Communauté en tant que telle à la Convention européenne des droits de l'homme. Le Projet s'inspire de cette idée puisque l'article 4 al. 3 dispose :

> "Dans un délai de cinq ans, l'Union délibère sur son adhésion aux instruments internationaux sus-mentionnés ainsi qu'au Pacte des Nations Unies relatifs aux droits civils et politiques et aux droits économiques, sociaux et culturels (...)"

La rédaction présente une petite équivoque : le verbe <u>délibérer</u> est-il entendu en son sens de <u>décider</u> ou en son sens de "<u>discuter avec d'autres personnes en vue d'une décision à prendre</u>" (Dict. Robert) ? Selon le cas, on est en présence d'une obligation de résultat ou d'une obligation de comportement.

- Enfin, dans le cadre des Communautés, le Parlement avait revendiqué l'élaboration d'une charte des droits fondamentaux qui devait compléter les traités. Selon lui, seule une Assemblée élue pouvait procéder à une telle oeuvre, dans la tradition de l'Assemblée constituante en 1791. Mais, en 1984, lorsqu'une

occasion lui fut donner de réaliser cette ambition, le Parlement a préféré, pour des motifs que l'on peut comprendre, renvoyer à plus tard l'élaboration d'un catalogue des droits fondamentaux. L'article 4 al. 3 in fine se borne à indiquer :

> "(...) Dans le même délai (5 ans) l'Union adopte sa propre déclaration des droits fondamentaux selon la procédure de révision prévue à l'article 84 du présent traité"

L'engagement semble ici plus fort mais quid en cas de non-adoption de la déclaration dans le délai produit ? Ce recours de l'article 175 CEE pourrait-il être intenté ? Ainsi, on peut constater que le Projet rassemble et cumule les actions en faveur d'une protection des droits fondamentaux qu'avaient menées séparément la Cour, la Commission et le Parlement auxquelles le Conseil avait accpeté de se rallier en signant la déclaration commune de 1977.

- L'insertion des droits fondamentaux au niveau normatif le plus élevé de l'Union doit en principe avoir pour effet de ne lier que ses institutions. C'est ce qui apparaît dans la formulation des § 1 et 2 de l'article 4 :

> "L'Union reconnaît à toute personne relevant de sa juridiction (...)"
> "L'Union s'engage à maintenir et à développer, dans la limite de ses compétences (...)"

Mais le § 4 de l'article 4 fait de l'observance des droits fondamentaux par les Etats membres une condition de leur appartenance à l'Union. En effet :

> "En cas de violation grave et persistante par un Etat membre des principes démocratiques ou des droits fondamentaux, des sanctions pourront être prises suivant les dispositions de l'article 44 du présent traité"

L'ensemble des compétences nationales et leur exercice est ainsi placé sous la vigilance de l'Union. Du point de vue de la répartition des compétences on peut dire que si ces

compétences nationales ne subissent là pas d'atteinte dans leur substance, en revanche, leur exercice se trouve assujetti au respect de principes communs : cette situation peut être décrite comme une limitation de l'exercice des compétences nationales, ou comme un encadrement par l'Union des compétences nationales qui sont désormais liées par une finalité commune. La situation n'est pas sans rappeler celle qui régit les relations entre la Communauté et les Etats membres dans le domaine de la libre-circulation des personnes.

3) Action commune et coopération

a) Sur le fond, les deux méthodes retenues par le Projet présentent l'avantage de lier davantage qu'aujourd'hui les compétences communautaires et la coopération politique (1). Ces domaines qui sont aujourd'hui distincts -la coopération politique se déroulant en dehors des traités- mais qui sont fonctionnellement et institutionnellement liés, seraient désormais partie intégrante des compétences de l'Union. Ainsi "l'acquis communautaire" serait préservé par son inclusion dans l'action commune tandis que la coopération politique serait expressément rattachée à la compétence de l'Union, même si elle serait conduite par les Etats agissant dans le cadre du Conseil européen. Alors que pour l'action commune ce sont toutes les institutions de l'Union qui sont appelées à intervenir, la coopération se déroule,en effet, exclusivement au sein du Conseil européen (2), qui dispose, on l'a vu plus haut, du pouvoir de faire entrer dans la sphère de l'action commune un domaine de coopération (3). Cependant, la coopération dans l'Union dépasse le domaine de la seule coopération politique et inclut également la :

> "(...) coordination des législations nationales en vue de former un espace juridique homogène" (art. 46 du Projet).

La réalisation de cet espace -qui n'exclut pas les mesures devant être prises dans le cadre de l'action commune- pourra s'orienter

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(1) Cf. C.D. EHLERMANN, Verglich des Verfassungsprojekts des Europäischen Parlaments mit früheren Verfassungs- und Reformprojekten, loc. cit. p. 274.
(2) Le Conseil des Ministres détenant une compétence d'exécution.
(3) Et d'élargir le domaine de la coopération.

selon l'article 46, dans deux voies :

> "(...) prendre des mesures propres à renforcer le sentiment d'appartenance des citoyens à l'Union.
> (...) lutter contre les formes internationales de criminalité, y compris le terrorisme"

b) Le domaine de l'action commune correspond, on l'a vu, aux compétences communautaires. Il se divise en deux types de compétences qu'il s'agit d'examiner successivement.

- Les compétences exclusives sont évidemment les moins nombreuses. Elles concernent la libre circulation des personnes, des biens et des capitaux (art. 47), la politique de concurrence (art. 48) et la politique commerciale (ainsi que les aspects externes des compétences exclusives (1) (art. 64).

- Les compétences concurrentes recouvrent les secteurs suivants : politique de conjoncture (art. 50), politique monétaire et de crédit (art. 51), réalisation progressive de l'Union monétaire (art. 52) (2), les différentes politiques dites "sectorielles" : agriculture, transports, télécommunications, recherche et développement, industrie, énergie (art. 53) ainsi que les actions qui relèvent de la politique dite "de la société" (3) : politique sociale, de la santé, protection des consommateurs, politique régionale, politique de l'environnement, politique d'éducation et de la recherche, politique culturelle et politique de l'information (art. 55 et suiv.).

On remarquera que figurent au nombre des compétences concurrentes les politiques communes de la Communauté autres que la politique commerciale ou les règles de concurrence ainsi que les politiques dérivées créées sur la base de l'article 235 CEE.

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(1) La "doctrine" de la Cour de Justice des Communautés apparue pour la première fois en 1971 dans l'arrêt A.E.T.R., se voit ainsi "constitutionnalisée" par le Projet.

(2) Ces secteurs relèvent, selon l'art. 2 CEE, du "rapprochement des politiques économiques des Etats membres"

(3) L'expression provient de l'allemand "Gesellschaftspolitik" : la traduction française a une tonalité inhabituelle. N'aurait-il pas fallu risquer le néologisme proposé jadis par Alexandre MARC pour distinguer le "social majeur" du "social mineur" et parler de politique "sociétale" ? Il est vrai que si le projet de traité d'Union est à certains égards un banc d'essai, ce n'est pas pour autant qu'il devait aller jusqu'à l'innovation sémantique...

- A côté de ces deux types de compétences, l'article 49 prévoit aussi une action de l'Union en matière de

> "rapprochement des dispositions législatives, réglementaires et administratives relatives aux entreprises et en particulier aux sociétés, dès lors que ces dispositions ont une incidence directe sur une action commune de l'Union"

Il en va de même en ce qui concerne les législations fiscales des Etats membres.

C'est ici la reprise de l'article 100 du traité CEE qui visait le rapprochement des dispositions législatives, réglementaires et administratives des Etats membres "ayant une incidence directe sur l'établissement et le fonctionnement du marché commun". L'action de rapprochement prévue par le Projet relève sans doute des compétences concurrentes encore que cela ne soit pas explicitement indiqué.

B) La mise en oeuvre des compétences de l'Union

Il convient ici d'examiner comment le Projet organise la mise en oeuvre des compétences de l'Union qui peut s'apprécier à deux points de vue. Il faut d'abord recenser les actes juridiques dont l'Union disposera -1- et ensuite décrire la façon dont les actes seront appliqués et exécutés -2-

1) Les actes juridiques : droit de l'Union (1)

La nature des actes juridiques que l'Union est habilitée à adopter est clairement décrite par le Projet pour ce qui est du domaine de l'action commune (a) alors que l'on ne peut faire la même constatation pour la coopération (b). Le projet

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(1) L'expression "droit de l'Union" employée par le Projet lui-même, à plusieurs reprises, recouvre-t-elle seulement les actes arrêtés par l'Union dans le cadre de l'action commune ou bien comprend-elle aussi les engagements que l'Union adopte dans le cadre de la coopération ? Selon nous, la conception large devrait logiquement l'emporter, mais comme on le verra ci-dessous, cette conception risque de contredire dans son application la volonté exprimée des auteurs du Projet.

définit aussi les caractères du droit de l'Union (c).

a) Les actes juridiques de l'Union, arrêtés dans le cadre de l'action commune se rangent dans une typologie qui évoque la hiérarchie des normes du droit interne.

Au sommet se trouve la loi issue de la volonté du législateur de l'Union, dont la vocation est d'arrêter les principes fondamentaux de la matière qu'elle régit dans le cadre de l'action commune (art. 34) (1). L'article 35 introduit la notion d'application différée de la loi :

> "La loi peut subordonner à des délais, ou accompagner des mesures de transition différenciées selon le destinataire, la mise en oeuvre de ses dispositions lorsque l'uniformité d'application de celles-ci se heurte à des difficultés particulières dues à la situation spécifique de certains de ses destinataires. Ces délais et mesures doivent néanmoins viser à faciliter l'application ultérieure de l'ensemble des dispositions de la loi à tous ses destinataires"

Ainsi est expressément prévue une dérogation à l'effet général et uniforme de la loi (2) dont on pouvait penser qu'elle aurait été retenue par le Projet en même temps que la dénomination de loi. Plutôt que de prévoir des mécanismes du type de ceux qui organisent le fonctionnement des clauses de sauvegarde et qui consistent à relever temporairement un Etat de ses obligations qu'un traité lui impartit pour lui permettre de les appliquer au plus vite, le Projet a préféré consacrer l'idée que l'on présente familièrement comme celle de l'"Europe à plusieurs vitesses". Peut-être est-ce dû à ce qu'exprime cette phrase dont la paternité est disputée :

> "Puisque nous ne pouvons nous opposer à ces évènements, feignons de les organiser"

Il faut signaler deux types particuliers de lois : la loi organique qui règle l'organisation et le fonctionnement des institutions (art. 34 al. 2 et art. 38) et la loi budgétaire

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(1) Il est piquant de relever que c'est aussi l'art. 34 qui définit la loi dans la Constitution française du 4 octobre 1958.

(2) On notera l'absence explicite du principe de non-discrimination dans la rédaction du Projet.

qui arrête le budget de l'Union (art. 34 al. 3 et art. 76). Chacun de ces types particuliers se caractérise par une procédure plus contraignante que celle qui régit l'adoption de la simple loi.

Subordonné à la loi, le règlement et les décisions constituent les mesures par lesquelles la Commission édicte les normes générales et individuelles nécessaires à l'application de la loi. Ce pouvoir appartient exclusivement à la Commission (1).

La typologie des actes de l'Union rompt ainsi avec celle du droit communautaire dérivé : on peut toutefois regretter la disparition de la directive, qui s'est révélée un instrument normatif utile : il est vrai que la loi peut être une loi-cadre en se contentant de déterminer les principes fondamentaux de la matière.

b) Lorsque l'Union agit par la méthode de la coopération, le Projet ne lui confère pas un arsenal d'instruments juridiques aussi complet et aussi varié que lorsqu'elle agit par la méthode de l'action commune. Le Projet est, à cet égard, très laconique : il se borne à indiquer à l'article 16 al. 3 que :

> "Par coopération, on entend les engagements que prennent les Etats membres dans le cadre du Conseil européen"

Ce sont donc les engagements (terme dont on a déjà relevé plus haut l'imprécision) qui matérialiseront juridiquement cette modalité de la compétence de l'Union que réalise la coopération. Ces engagements pourront recouvrir une large gamme d'actes : communiqués, déclarations d'intention, résolutions accords etc... dont tous n'auront pas nécessairement et immédiatement un caractère juridique et donc une force obligatoire. Ce n'est pas l'un des moindres paradoxes du Projet que de faire de compétences

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(1) Le Projet répond ainsi aux souhaits du Parlement comme de la Commission de voir disparaître la mainmise par les Etats exerçant sur les compétences d'exécution conférées à la Commission par les diverses procédures inventées depuis celle des comités de gestion. Cf. C.D. EHLERMANN, art. cit. loc. cit. p. 279.

exercées en commun par les Etats, au sein d'une instance interétatique, des compétences de l'Union !

c) Les caractères du droit de l'Union sont énoncés à l'article 42 du Projet. Y figurent l'applicabilité directe et non l'effet direct dont, selon la jurisprudence de la Cour, l'applicabilité directe ne serait qu'une modalité, la primauté et l'obligation faite aux juridictions nationales d'appliquer le droit de l'Union, ce qui peut sembler redondant dès lors que la primauté du droit de l'Union figure "expressis verbis" dans le Projet.

Ainsi se trouvent, ici aussi, consolidées et érigées en normes de caractère "constitutionnel" des principes essentiels et fondamentaux du droit communautaire que la Cour avait dégagés et explicités mais qui ne figuraient pas expressément ni avec la même intensité dans le texte des traités.

On posera à nouveau la question de savoir si les caractères que le Projet reconnaît au droit de l'Union s'appliquent aux zones de l'action commune et de la coopération : peut-on penser que les rédacteurs du Projet aient voulu accorder l'applicabilité directe et la primauté aux "engagements des Etats membres" ?

2) L'application et l'exécution du droit de l'Union (lato sensu)

L'analyse des dispositions du Projet relatives aux modalités de l'exécution des actes juridiques imputables à l'Union arrêtés dans le champ de ses comptétences révèle un système différencié. Pour en rendre compte on est conduit à nouveau à distinguer selon que l'acte qu'il s'agit d'exécuter relève de l'action commune ou de la coopération avant d'envisager l'obligation générale qui pèse sur la mise en oeuvre du droit de l'Union.

a) L'exécution des décisions relevant de l'action commune

Outre les précisions apportées par l'article 42 du Projet quant aux caractères du droit de l'Union examinées ci-dessus la même disposition indique que :

"(...) sans préjudice des compétences attribuées à la Commission l'application de ce droit (i.e. le droit de l'Union) est assurée par les autorités des Etats membres"

Ainsi, les Etats sont-ils titulaires d'une compétence d'exécution de principe tandis que la Commission doit se voir investie d'une compétence spéciale d'exécution. Cette disposition est conforme à la pratique communautaire dans laquelle les Etats constituaient les relais ultimes -sur le plan matériel- de l'exécution du droit communautaire à l'exception des compétences dévolues à la Commission.

Il est également indiqué dans la disposition pertinente qu' :

"(...) une loi organique détermine les modalités selon lesquelles la Commission veille à cette application".

On rencontre l'idée communautaire selon laquelle la Commission est la "gardienne du traité". La Cour pourra d'ailleurs, parallèlement au recours de l'article 169 CEE, intervenir -à l'initiative de la Commission comme cela figurera probablement dans la loi organique prévue à l'article 64 qui étendra la compétence de la Cour à la "sanction des manquements des Etats membres aux obligations découlant du droit de l'Union" (1). Un cas particulier et important de ce mécanisme de surveillance de l'observation du Traité de l'Union par les Etats membres figure à l'article 44 du Projet qui aménage la procédure applicable en cas de violation grave et persistante par un Etat des principes démocratiques ou des droits fondamentaux et en tout autre cas de violation grave et persistante des dispositions du Traité d'Union. L'article 44 permet donc de sanctionner à la fois le non-accomplissement par un Etat membre d'obligations issues du traité ou la non-observation par un Etat de ses propres normes internes établissant des principes démocratiques ou des droits fondamentaux. Le mécanisme de l'article 44 pourra donc être utilisé pour deux

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(1) Cette loi organique pourrait-elle conférer à la Cour la compétence d'annuler une norme nationale contraire au droit de l'Union ? Ce serait garantir l'effectivité du principe posé à l'article 42 du Projet selon lequel "(...) les juridictions nationales sont tenues d'appliquer le droit de l'Union".

contrôles distincts de portée bien différente. Dans le premier cas, il paraît normal qu'un instrument comme le traité d'Union organise une procédure qui permette de sanctionner les infractions d'une certaine importance et d'une certaine durée à ses propres dispositions. Dans le second cas, c'est un véritable droit de regard de l'Union sur ce qui relève de la compétence des Etats membres qui est aménagé : ne peut-on pas estimer alors que toute compétence nationale devrait être désormais exercée selon cette finalité réaffirmée par le traité d'Union, perdant ainsi son caractère discrétionnaire pour devenir une compétence liée ? Ceci respecte-t-il la souveraineté des Etats que, par ailleurs, le traité d'Union ne met pas en cause d'une façon déterminante ?

Cet article 44 du Projet est encore intéressant à deux titres par la procédure qu'il établit et par les sanctions qu'il prévoit.

- Quant à la procédure, on notera que l'initiative en appartient à la Commission ou au Parlement, sans doute parce que ce sont les deux institutions qui incarnent l'intérêt propre de la collectivité composée qu'est l'Union. Ces deux institutions peuvent, en effet, demander à la Cour de constater l'une ou l'autre de ces violations graves et persistantes. Si on comprend le souci des rédacteurs du Projet de garantir un examen impartial de l'attitude des Etats on ne peut s'empêcher de penser que le rôle de la Cour sera bien délicat : le critère de gravité -plus que celui de persistance- sera parfois difficile à évaluer, comme tout critère qualitatif. De plus, s'il s'agit pour la Cour d'apprécier une situation interne, quels seront les moyens de son contrôle ? La procédure autorise ensuite le Conseil européen à statuer après <u>avis conforme</u> du Parlement et après avoir entendu l'Etat concerné. L'exigence de <u>l'avis conforme</u> n'est-elle pas excessive ? A quelle majorité devra-t-il être rendu ?

- Le Conseil européen peut prendre deux degrés de mesures : - soit une suspension des "droits qui résultent de l'application d'une partie ou de la totalité des dispositions du présent traité à l'Etat considéré et à ses ressortissants sans

préjudice des droits acquis à ce dernier"

- soit la suspension de "(...) la participation de l'Etat considéré au Conseil européen et au Conseil de l'Union, ainsi qu'à tout autre organe où l'Etat est représenté comme tel".

Le Projet ne va pas jusqu'à prévoir l'exclusion mais il est clair que si la suspension pouvait être d'une durée variable, elle ne saurait toutefois être permanente car alors ce ne serait plus une suspension... On notera aussi que l'Etat en cause perd un élément essentiel de sa représentation au sein de l'Union avant même d'être suspendu puisqu'il ne participe pas au vote relatif aux sanctions, sans doute en vertu du principe "nemo judex in causa sua.".

b) L'exécution des décisions relevant de la coopération

L'article 10 du Projet indique, in fine, que :

"Les résultats de la coopération sont mis en oeuvre par les Etats membres ou par les institutions de l'Union selon les modalités définies par le Conseil européen"

On rencontre ici également cette dualité Etats membres/institutions de l'Union; toutefois toutes les institutions de l'Union seraient susceptibles d'assurer la mise en oeuvre de la coopération sans que le "monopole" de la Commission soit ici conservé.

Dans le domaine des relations extérieures, l'article 67 al. 1 du Projet précise cependant que :

"Le Conseil européen a la responsabilité de la coopération. Le Conseil de l'Union assure la conduite de celle-ci. La Commission peut proposer des politiques et des actions qui sont mises en oeuvre, à la demande du Conseil européen ou du Conseil de l'Union, soit par la Commission, soit par les Etats membres".

c) L'article 13 du Projet indique :

"L'Union et les Etats membres coopèrent dans la confiance mutuelle à l'application du droit de l'Union, les Etats membres prennent toutes mesures générales particulièrement propres à assurer l'exécution des obligations découlant du présent traité ou résultant des actes des institutions de l'Union. Ils facilitent à celle-ci l'accomplissement de sa mission. Ils s'abstiennent de toute mesure susceptible de mettre en péril la réalisation des buts de l'Union".

On aura reconnu l'article 5 du traité CEE auquel l'on a rajouté une première phrase évoquant la coopération et la confiance mutuelle qui devront régir les relations entre l'Union et ses Etats membres. Ceci témoigne de la volonté des rédacteurs du projet d'aller au-delà de l'inscription du principe de bonne foi, telle qu'elle figure à l'article 5 CEE en tenant compte de l'interprétation qu'en a donnée la jurisprudence de la Cour de Justice. Ce faisant, les rédacteurs ne sont pas allés jusqu'à formuler un principe comparable à la "loyauté fédérale" (Bundestreue).

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En conclusion, on peut estimer que la répartition des compétences inscrites dans le Projet souffre d'une certaine ambiguïté quant à sa délimitation. Les notions utilisées (méthodes d'action de l'Union) sont susceptibles de deux interprétations contradictoires, toutes deux d'ailleurs insatisfaisantes : soit la coopération demeure à l'extérieur des compétences de l'Union -mais on comprendrait mal alors la raison de l'intervention des institutions de l'Union-, soit la coopération rentre bien dans le champ de compétences de l'Union, mais alors comment comprendre que l'on puisse augmenter le domaine de la coopération et augmenter par là le champ de compétences de l'Union sans passer par la procédure de révision?

A l'intérieur de l'action commune la distinction entre les compétences exclusives et concurrentes devrait être davantage précisée en ce qui concerne notamment la situation juridique des Etats membres avant l'intervention de l'Union.

En ce qui concerne le contenu des compétences de l'Union, on a pu noter que le sort fait à l'acquis communautaire et aux droits fondamentaux manquait parfois de précision. Quant aux compétences exclusives et concurrentes, le changement par rapport aux Communautés n'est pas substantiel. Ainsi que

l'indiquait M. EHLERMANN (1) :

> "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".

Enfin, pour ce qui est de la mise en oeuvre du droit de l'Union, les solutions retenues, inspirées de la pratique communautaire et fédérale, devraient être efficaces. Par rapport aux Communautés européennes, le rapporteur partage l'idée de M. EHLERMANN (1) selon laquelle le Projet de traité instituant l'Union européenne a été davantage inspiré par le souci de modifier les procédures de décision que par la volonté d'attribuer des compétences nouvelles ou plus importantes. L'amalgame relatif entre l'action commune et la coopération exprime d'ailleurs aussi plus le statu quo qu'une vision nouvelle des relations entre l'Union et les Etats. Peut-être est-ce là le tribut que le Projet paie au réalisme politique : on voudrait que ce soit aussi un gage de son entrée en vigueur effective.

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(1) Art. cit. loc. cit.

(6)

The Draft Treaty Establishing the European Union

The European Policy Unit at the European University Institute

The University of Strasbourg

The Trans-European Policy Studies Association

THE DRAFT TREATY ESTABLISHING THE EUROPEAN UNION

REPORT ON BELGIUM

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THE DRAFT TREATY ESTABLISHING THE EUROPEAN UNION
REPORT ON BELGIUM

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I.

Constitutional Aspects.

A.
Compatibility of the Draft Treaty with the Belgian Constitution.

I.

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).

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(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".

The existing European Community Treaties were concluded by the King's Government and approved by Parliament according to that Article.

2.

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 then stood and that Belgium could not enter into such organizations without first amending its Constitution (1).

The Belgian Council of State (2) and also four of the six professors then in charge of Constitutional

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(1) See, for a good summary of that controversy : W.J. GANSHOF VAN DER MEERSCH, "La constitution belge et l'évolution de l'ordre juridique international", in Annales de droit et de sciences politiques, vol. XII, N° 49 (1952). See also the extended relation of the consideration by the Belgian Parliament of each of both treaties, in P.F. SMETS, Les traités internationaux devant le parlement (1945-1955), Brussels 1978, pp. 285-489.

(2) See Doc. Ch., 1952-1953, N° 163.

Law at the Belgian Universities (1) appeared to be of that opinion, which was, however, strongly opposed (2).

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" (3), 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 inconstitutional 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

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(1) See Doc. Ch., 1952-1953, N° 696.

(2) See, inter alia, my article "La constitution belge et l'Europe", in Synthèses, N° 69 (February 1952), and J. DABIN's "Note complémentaire sur le problème de l'intégration des souverainetés", in Annales de droit et de sciences politiques, vol. XIII, N° 51 (1953).

(3) Full French text of Article 25 : "Tous les pouvoirs émanent de la nation. Ils sont exercés de la manière établie par la constitution".

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.

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 upon national independence, since Belgium thereby integrated itself into a larger Community and dit not subject itself to a foreign power (1).

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(1) J. DABIN, op.cit..

I, for my part, stressed at that time the relativity of state constitutions and state sovereignties and the superiority of 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 just be relevant 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 creating themselves Constitutional Law for that higher legal order (1).

Other arguments, for or against, and more or less convincing, were expounded as well.

Nothwithstanding 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.

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(1) See my article in Synthèses referred to above.

3.

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" (1).

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 (2). It was however delayed by internal political difficulties (3), and also by the Congo problem (4),

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(1) Full French text of Article 25bis : "L'exercice de pouvoirs déterminés peut être attribué par un traité ou par une loi à des institutions de droit international public".

(2) The procedure to amend the Constitution on that subject was initiated by the Government on October 6, 1953, i.e. before the approval of the EDC Treaty by the House of Representatives, on November 26, 1953, and by the Senate on March 12, 1954.

(3) 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 Socislists blocked it in 1959, as a protest against the economic and social policy of the then ruling Coalition of Christian Democrats and Liberals.

(4) Invoking that problem, the Government, at the beginning of 1960, asked Parliament to suspend further consideration of the matter.

then forgotten for some time (1), and later taken up again, together with the internal institutional reforms which were considered since 1965 (2).

Article 25bis might, of course, have been better phrased than it actually is. It contains wordings which might be interpreted narrowly (3). 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 transfers of power (4).

4.

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

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(1) The procedure to amend the Constitution which was initiated in 1953, was prolongated in 1958. It was not continued in 1961.

(2) 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.

(3) This was already feared when the idea of such an Article was put forward. DABIN pointedly observed, in his "Note complémentaire" referred to above : "le danger est que les précisions ne soient par trop limitatives et qu'elles n'apportent trop d'entraves aux processus d'intégration nécessaire".

(4) 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 meaningless in practice.

proposed in the Draft Treaty, certainly has the character of an "institution of public international law", within the meaning of Article 25bis (1), 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.

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

5.

If however any incompatibility might be deemed to exist between Article 25bis, or any other provision, of the Belgian Constitution , and the Draft Treaty

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(1) Whatever they may exactly mean, the terms "institutions of public international law" were definitely not intended to exclude supranational organizations (see P. WIGNY, La troisième révision de la Constitution, Brussels 1972, p. 349).

establishing the European Union, I would personnally 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" (1) and which cannot be denied to the people of Europe, "anything in the constitution or laws of any state to the contrary notwithstanding" (2).

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(1) See 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.

(2) See Article VI, Section 2, of the Constitution of the United States of America.

B.

Procedure to be followed for Belgium to be a Party to the Draft Treaty.

1.

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 (1), 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.

2.

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.

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(1) See p. 1 above.

The wording thus used in Article 68 may seem to be rather narrow, but it has always been understood so as 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 (1).

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.

3.

Also in so far as it requires the consent of Parliament for certain categories of treaties, Article 68 does not clearly cover treaties establishing international or supranational organizations.

It may however certainly be held that, if perhaps not as to its explicit wording, it does, as to its spirit, require such consent for such treaties.

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(1) See also the Decree of November 22, 1830, on the Form of Government and Articles 63 and 64 of the Belgian Constitution.

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 now 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 (1), the ECSC (2), the EEC and Euratom (3), and also the European Convention on Human Rights (4) were all submitted to the approval of Parliament. So were also the treaties and protocols additional to, or modifying them.

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(1) The Statute of the Council of Europe was approved by an Act of February 11, 1950.

(2) The ECSC Treaty was approved by an Act of June 25, 1952.

(3) The EEC Treaty and the Euratom Treaty were approved by an Act of December 2, 1957.

(4) The European Convention on Human Rights was approved by an Act of May 13, 1955.

Likewise, the approval of Parliament was sought, inter alia, for the Charter of the United Nations (1) and for the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights (2).

In practice, it uses to be 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 proposed by the European Parliament would thus need, as far as Belgium is concerned, the consent of Parliament.

4.

The consent of Parliament to a treaty has to be obtained from both Houses : the House of Representatives and the Senate. It uses to be given in the form of an Act of Parliament, according to the procedure followed for domestic legislation (3).

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(1) The Charter of the United Nations was approved by an Act of December 14, 1945.

(2) The International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights were approved by an Act of May 15, 1981.

(3) 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 it is, also, in practice, always given in the form of an Act of Parliament.

In general, an Act of Parliament approving a treaty only contains one Article, according to which the treaty concerned shall "have full effect" (1). It may however also contain other provisions.

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 (2).

5.

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 whether to ratify, or not to ratify, the treaty, 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. They would not need the approval of Parliament for such a denunciation or withdrawal.

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(1) In French : "Le traité... sortira son plein et entier effet".

(2) 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.

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.

6.

Complications might arise from certain provisions of the Special Act of August 8, 1980, concerning the institutions of the Flemish Community, the Flemish Region, the French Community and the Walloon Region, and of the Act of December 31, 1983, concerning the institutions of the German-speaking Community.

(a)

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 August 8, 1980 (1) and Article 5 of the Act of December 31, 1983 (2) require the consent of the Community Councils concerned.

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(1) 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 sont présentés au conseil compétent par l'exécutif de la communauté".

(2) French text of that Article : "Les articles 5, § 2 et 8 à 16 de la loi spéciale sont applicables à la communauté germanophone".

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 other bodies 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 French Community and to the approval of the Flemish Council, as well as to the approval of both Houses of Parliament (1).

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(1) 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 May 15, 1981, as already mentioned above, was also approved separately by a Decree of the Council of the French Community on June 6, 1982, and by a Decree of the Flemish Council on January 25, 1983. It was not submitted to the approval of the Council of the German-speaking Community, since Article 5 of the Act of December 31, 1983 concerning that Community did not yet exist at that time.

(b)

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 August 8, 1980 (1) and Article 51 of the Act of December 31, 1983 (2) 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 draffed 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.

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(1) 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".

(2) 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".

7.

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, or any of them, may be concerned, the already mentioned Article 16 of the Special Act of December 31, 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.

8.

Private Member's Bills to the effect of approving international treaties were hardly conceivable until recently.

Such Bills were however already 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 (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 Internatinal 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 (2). 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 (3).

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.

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(1) See Doc. Sénat, 724 (1980-1981) - N° 1.

(2) Doc. Conseil culturel de la Communauté culturelle francaise, 33 (1979-1980) - N° 1.

(3) See pp. 15-16 above.

That difficulty should however not be taken too seriously, since, even if passed and sanctioned, such a Bill would not have the effect to oblige the Government to ratify the treaty concerned (1).

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.

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(1) See pp. 14-15 above.

II

Political Aspects.

A.

General Remarks.

The European Union, in particular as proposed in the Draft Treaty adopted by the European Parliament on February 14, 1984, seems not to be a major issue in Belgium.

There is neither serious opposition against, nor much enthousiasm for the Draft Treaty, which even appears not to be known very much outside a rather narrow circle of people interested in European affairs. The Draft Treaty has hardly, or not at all, 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.

1.

In the European Parliament all Belgian Members (1) present at the final vote on the Draft Treaty on February 14, 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 (2) : the two Members belonging to that Party (3) and also one Flemish Liberal (4) and one Francophone Socialist (5) were not present at the vote (6).

2.

On May 24, 1984 the Belgian House of Representa-

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(1) 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).

(2) Chanterie, Croux, Marck, Phlix, Van Rompuy, Vandewiele and Verroken, of the CVP; Deschamps, Herman and Vankerkhoven, 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.

(3) Beyer de Ryke and Damseaux.

(4) Pauweleyn, of the PVV.

(5) Dury, of the PS.

(6) Those four Members had however signed the presence list for the sitting of February 14, 1984.

tives (1) 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" (2).

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 March 22, 1984 by Mr Dierickx, a leader of the Belgian Greens (3). The other one was moved, also on March 22, 1984, by a Christian Democrat, Mrs Demeester- De Meyer (4); it was also signed by the floor leaders of the four Majority Parties (5) and by those of two of the Opposition Parties as well (6).

Of the 212 Members of the House, 176, including Members of all but one of the Parties represented in the

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(1) 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.

(2) Doc. Ch.,893 (1983-1984) - N° 2, p. 6, and Ann. Ch. 1983-1984, pp. 2975-2976.

(3) Doc. Ch.,892 (1983-1984) - N° 1.

(4) Doc. Ch.,893 (1983-1984) - N° 1.

(5) Blanckaert, of the CVP, De Winter, of the PVV, Henrion, of the PRL, and Wauthy, of the PSC.

(6) Baert, of the VU, and Van der Biest, of the PS.

House (1), and also the two independent Members, took part in the vote on the Resolution. They adopted it unanimously (2).

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 May 23, was rather short. Only Mr Dierickx, Mrs Demeester-De Meyer, the rapporteur (Mr Grootjans, a Liberal), the Minister of 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 showed however some skepticism.

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 Amendements to the Draft, which was already a compromise, should not be dealt with by diplomats but by the European Parliament itself.

On the other hand, the Minister of 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

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(1) The one Member representing the Vlaams Blok did not participate.

(2) Ann. Ch., 1983-1984, pp. 2975-2976.

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 May 24, 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 antidemocratic action of the existing European Institutions and their policy of industrial dismantlement, growing unemployment, impoverishment of the working people and social regression.

3.

A Motion concerning the Draft Treaty was also introduced in the Belgian Senate (1) on March 20, 1984 by Mrs De Backer-Van Ocken, a Christian Democrat and former Minister (2); it was also signed by the floor leaders of the four Majority Parties (3) and by those of the three principal

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(1) 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.

(2) Doc. Sén., 658 (1983-1984) - N° 1.

(3) André, of the PSC, Gijs, of the CVP, Herman-Michielsens, of the PVV, and Wathelet, of the PRL.

Opposition Parties (1).

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.

4.

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 so appears that in 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 February 5, 1952 and by the Belgian House of Representatives on June 12, 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 November 26, 1953 and by the Belgian Senate on March 12, 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.

The EEC Treaty and the Euratom Treaty were approved by the Belgian House of Representatives on November 19, 1957 and by the Belgian Senate on November 28, 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.

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(1) Delmotte, of the PS, Wyninckx, of the SP, and Van der Elst, of the VU.

The votes on the ECSC and on the EDC were held under a Christian Democrat Government (1), the vote on the EEC and Euratom under a Coalition Government of Socialists and Liberals (2).

The voting behaviour of each of the Parties then represented in Parliament is shown in the Table on page 29 . 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.

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(1) 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.

(2) 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.

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 abstained.

"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.

Votes in the Belgian Parliament on the Community Treaties.

House of Representatives

		For			Against			Abstaining		
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

		For			Against			Abstaining		
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 1950-1954.

(2) Including one Independent Catholic.

5.

It appears from the voting behaviour of their representatives in the European Parliament (1) and in the Belgian Parliament (2) 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 explicitly 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 (3).

In their Programmes for the European Election of June 1984, both Belgian Socialist Parties, the Francophone PS (3) and the Flemish SP (4), 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

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(1) See p. 22 above.

(2) See pp. 22-25 above.

(3) 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, dit not reply.

(4) See : Le programme européen du parti socialiste pour les élections du 17 juin 1984, pp. 4-5 and 18-21.

(5) See : SP - programma voor de Europese verkiezingen van 17 juni 1984, Chapter VII.

European Parliament to be strenghtened 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 of 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 the Francophone Liberals (the PRL) for the European Election of June 1984 (1), 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

(1) See : Une même foi : l'Europe, la liberté, pp. 10-11, 13, 16-17, 19-20.

be given to the Commission to conduct sectorial 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 (1), have welcommed the Draft Union Treaty as a first step towards a democratic Europe, but they have found it to meet 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 for a possible European centralism and they have required more attention for their own ecologist and pacifist views.

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(1) See : Agalev 8, Europees licht op groen, programma voor de Europese verkiezingen van 17 juni 1984, pp. 28-29; L'Europe des écologistes, programme Ecolo pour les élections européennes du 17 juin 1984, p. 18; and a Press Communiqué of Ecolo of February 3, 1984, Ecolo, priorité à l'Europe des régions et des citoyens.

The Francophone Christian Democrats (the PSC), when campagning 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 (1).

The VU (Flemish Nationalists) are not very enthousiastic 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 the Draft Treaty to be founded on the existing states and not on the regions and they would like to have the Council replaced by a 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 (2).

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 (3).

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(1) See : Temps nouveaux, N° 44, June 1, 1984, p. 2.

(2) Information provided by Mr Anciaux, President of the VU.

(3) Information provided by Mr Humblet, Senator for the RPW.

Both other francophone Parties, the FDF (1) and the RW (2), 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 as to its spirit. 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 (3).

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 (4).

C.

The Belgian Social and Economic Organizations and the Draft Treaty (5).

1.

In a joint plenary session on June 7, 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.

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(1) Information provided by Mrs Spaak, MP for the FDF.

(2) Information provided by Mr Massart, President of the RW.

(3) Information provided by Mr Hendrick, President of the UDRT-RAD.

(4) See pp. 22-26 above.

(5) 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 concering 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.

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 also 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.

2.

In particular, the Federation of Belgian Enterprises (VBO-FBE), which have already for a certain time supported the idea of strengthening the European Institutions, in the line of the Tindemans Report of 1976, now also appear 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, they now appear 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 their views, lift the obstacle which Article 235 of the EEC Treaty seems to have been so far for the development of new policies.

3.

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 (1).

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 an 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)"?

24 % of the respondents did not have an opinion on the question. 14 % 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 (2).

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.

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(1) See Euro-Barometre N° 21, May 1984.

(2) See ibid., Table 4.

(7)

The Draft Treaty Establishing the European Union

The European Policy Unit at the European University Institute

The University of Strasbourg

The Trans-European Policy Studies Association

THE DRAFT TREATY ESTABLISHING THE EUROPEAN UNION

REPORT ON THE UNITED KINGDOM

D. EDWARD R. MCALLISTER R. LANE

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September 1984

THE DRAFT TREATY ESTABLISHING THE EUROPEAN UNION
REPORT ON THE UNITED KINGDOM

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ABSTRACT PAGE

PART I: LEGAL & CONSTITUTIONAL IMPLICATIONS

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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.

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 Britain is that, whatever they say, they are liable to be called "euro-fanatics" at home or "anti-communautaire" elsewhere in Europe. If our Report seems negative in tone, it is because we feel it more important to state the problems frankly and realistically than to refrain from criticism as a kind of personal pledge of loyalty to the Community.

PART I: 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.

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 recognise 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.

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, 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 recognises 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 entrenchment of 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 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.

PART II: SOCIO-POLITICAL ASSESSMENT

This part of the report is divided into five 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 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 3 sketches the views, insofar as they have been formulated, of leading interest groups, as reflected through the organisations representing employers and trades unions. Section 4 comments briefly on the attitudes of the media. Section 5, also brief, deals with public opinion as a whole.

Section 1: The Government

(a) Public Attitudes:

The United Kingdom government has not yet 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, who will be the U.K. representative on the ad hocq 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 EUT (September 1983), Mr Rifkind gave a yet more general view of the government's approach :

> The European Parliament has focussed 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 co-operation 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'.

(b) Informal indications:

The public pronouncements quoted above show that the United Kingdom government is likely to be opposed in principle to two of 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 politicise 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 U.K. 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 reference 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 competence. 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.

Section 2: The Political Parties:

As mentioned in the Introduction, we have been unable to identify 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.

(a) 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" (underlining 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, 18 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 ... [16]

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 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. [17]

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 as they are told by the party managers - reflecting the Ministerial views already quoted. A few would break ranks; rather more might abstain.

(b) 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. [18]

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.

(c) 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 'crossbench' sympathisers. 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 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 emphasising "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 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.

Equally significant was the absence of debate on the Draft Treaty at the Party's Assembly in the late summer of 1984. Attention was focussed instead on the Party's unhappy relations with the ELD, and its delicate relations with the British SDP, to which we now turn.

(d) 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. First, 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. Second, 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 a article by Mr Jenkins in The Guardian in 1982.

Section 3: Interest Groups

(a) 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. Proposals for a Community policy which would divide the Member States into two...are inconsistent with this objective and must be opposed.

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 liberalisation 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 indicates 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.

(b) The Trades Union Congress ("T.U.C.")

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 those of TUC's 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 co-operation, 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.

Section 4: 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. Here are a few 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.[20]

> 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.[21]

> Federal union likely to remain just a vision.[22]

> [I]ts chances of being implemented in the foreseeable future are remote in the extreme. The Parliament recognised 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.[23]

The Economist was the most positive. Its headline (18/2/84) read

> "The EEC speeds up from a snail's pace to a crawl."

If British attitudes are hard to understand, it should not be forgotten that this is the diet on which 'informed' opinion has been fed.

Section 5: Public Opinion

In the light of the foregoing, it might be expected that public opinion in the UK would be universally hostile to the 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 Euro-barometer 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.

In contrast, one can point to the dismal but perhaps equally inconclusive level of turnout in the 1984 EP elections. Again, 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.

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 the evidence, the Alliance parties were to make sweeping gains, might this happen. It is fair to point out that an rextra 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.

PART III: 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.

First, membership of the Community was "sold" to the British public as an economic benefit. The political advantages of European integration were - perhaps wisely at the time - underplayed. 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 greater political integration is not seen as the natural development of the existing Communities.

Second, 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.

Third, 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 attention of the U.K. 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 importance of finding a way to make the Communities work better, and of the benefits that greater European integration can bring. The attitude of the CBI reported in Part II is particularly significant in this respect.

In many respects, 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 first applied the Commerce Clause. In the Community we have, as it were, started with the Commerce Clause. It is perhaps right that we should now embark on drafting the Constitution. But that was a long job, even in 1787. It should not divert us from the immediate task of making the Commerce Clause work - a task which, on the evidence in Part II of this Report, many opinion-formers in Britain are likely to find more congenial.

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.

THE COURT OF JUSTICE

The Court of Justice (like the Supreme Court of 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 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" (EUT Art.7(2)). 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 EUT 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 EUT 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 EUT. 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 EUT, 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 Jacqué has pointed out in his General Report to the recent FIDE Congress on "The Principle of Equality in Economic Law" (page 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.

THE PARLIAMENT

The Parliament envisaged in the Draft Treaty is a unicameral Parliament. It has been suggested that a "bicameral legislature" is achieved by sharing the legislative function between the Parliament and the Council. We suggest that this is not a sound analogy for two reasons: first, because the Council is, by its

nature, representative of government - of executive power; and second, because the Council is representative of central government which may be, but frequently is not, sensitive to the divergent interests of regions.

The interests of the executive organs of government are not necessarily, and certainly not always, identical with the interests of the legislator. We do not think this becomes any the less true if the executive is transposed into a larger context. Moreover, it is at least arguable that part of the purpose of the European Union is to diminish the influence of the nation state. We are not satisfied that this aim is likely to be promoted by the entrenchment, within the legislative organs of the Union, of the rights of Luxembourg with no provision at all for, say, Scotland, Bavaria or Catalonia. We do not say this out of disrespect for Luxembourg, but because, in the context of a meaningful European Union, the Scots, the Bavarians and the Catalans are unlikely to find such a situation, if perpetuated, acceptable.

Even if that is not so, it is characteristic of nearly all bicameral legislatures that the composition of one Chamber is determined by the numerical weight of population, while the composition of the other is "regional". The reason, as we understand it, is that legislative power should not depend wholly on the will of the densely populated urban areas. Even in the curious case of the British House of Lords, regional interests are frequently taken more into account there than in the House of Commons.

The Member States differ considerably in the constitution of their central governments. Some are highly "centralist"; others are not. Precisely because their constitutions differ, it cannot be assumed that, in the context of the Union, a Council composed of representatives of the governments of Member States would or could perform the same function vis-à-vis a Parliament elected on the basis of population as does, in a national context, a Second Chamber elected on the basis of regions vis-à-vis a First Chamber elected on the basis of population.

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.

DROITS ACQUIS

The provisional view of British government sources (see Part II, Section 1) is that 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. Whether or not this argument is correct as stated, it seems clear that a majority of the parties to an existing treaty cannot, by entering into a new treaty, deprive the minority of droits acquis under the existing treaty. In the case of the Community treaties, the Court in Van Gend en Loos has emphasised that their beneficiaries are "peoples" and not just states. There are therefore moral as well as legal objections to a situation in which the majority (the population of Member States ratifying the EUT) can deprive the minority of droits acquis under the existing Community treaties.

It may be suggested that the EUT seeks to preserve the acquis communautaire; therefore the population of non-ratifying Member States will be deprived of nothing. But is it not equally arguable that the EUT 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 an adherence to 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.

NOTES

1. See, for example, Rustomjee v. the Queen, (1876) 2 Q.B.D. 69, per Lord Coleridge, C.J., at 74 (CA). On the treaty making power and the Community treaties in particular, see Blackburn v. A-G, [1971] 1 W.L.R. 1037; 2 All E.R. 1380; C.M.L.R. 784 (CA), and McWhirter v. A-G, [1972] C.M.L.R. 882 (CA).

2. Trendtex Trading Corp v. Central Bank of Nigeria, [1977] Q.B. 529; 1 All E.R. 881 (CA). cf. the earlier doctrine as enunciated by Lord Atkin in Chung Chi Cheung v. The King [1939] A.C. 160 at 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] A.C. 326 at 347-8 (PC).

4. A.V.Dicey, The Law of the Constitution (10th ed.), 1965. pp. 88-91.

5. 20 & 21 Eliz. II, c. 68.

6. English Law - The New Dimension, 1974. p. 15.

7. See, for example, H.W.R. Wade, Constitutional Fundamentals, 1980. pp. 22-40; Frank Stacey, A New Bill of Rights for Britain 1973.

8. Macarthys Ltd. v. Smith [1979] 3 All E.R. 325 at 329; 3 C.M.L.R. 44 at 47 (CA).

9. Garland v. British Rail Engineering Ltd., [1983] 2 A.C. 751 at 771.

10. See A-G New South Wales v. Trethowan, [1932] A.C. 526 (PC); Harris v. Minister of the Interior, [1952] 2 S.A.L.R. 428 (SC); Bribery Commissioner v. Ranasinghe, [1965] A.C. 192 (PC); but cf. Kashavananda v. State of Kerala, [1973] 1 S.C.R. 231 (Indian SC).

11. See, for example, Dicey, op. cit., pp. 64-70; Wade, "The Basis of Legal Sovereignty", 1955 Camb.L.J. 172.

12. Answer to Mr Proctor, Hansard 27/6/84, col.988

13. Answer to Mr Body, Hansard 14/5/84, col. 1.

14. Answer to Mr Lofthouse, Hansard 21/3/84, col. 452.

15. Speech by Mr Rifkind to Scottish CBI members, Dundee, 23/9/83.

16. Letter to The Times 12/6/84.

17. EP Debates, No. 1-309/32; 14/2/84.

18. Labour Manifesto, 9/3/84, pp. 31-32.

19. Alliance Manifesto, 'Let's Get Europe Working Together', 1984, pp. 24-26.

20. P. Clough, 'European Union: an Impossible Dream?', The Times, 12/9/83.

21. The Guardian, 14/9/83.

22. Headline, The Guardian, 15/9/83.

23. The Times, 15/2/84.

(8)

The Draft Treaty Establishing the European Union

The European Policy Unit at the European University Institute

The University of Strasbourg

The Trans-European Policy Studies Association

THE JUDICIAL SYSTEM ENVISAGED IN
THE DRAFT TREATY ESTABLISHING THE EUROPEAN UNION

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Comments by Judge Thijmen Koopmans,
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The draft Treaty establishing the European Union

2: The judicial system

by T. Koopmans

I - 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 the European Political Cooperation. Among these three forms of organization, only the European Communities are relevant, it seems, as far as the judicial system is concerned. In so far, 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 which tend to characterize the Communities' decision making practice; 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. Signore 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 on 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 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, nonetheless. Jurisdiction of the Court is extended (Article 43); a system of sanctions is devised (Article 44); and the prospect of an "homogeneous judicial area" is hold out (Article 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, or 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 Communities, 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, 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 so far, 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; but it is a well-known problem in many legal systems how to combine 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 (Article 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" (Article 9).

More immediate consequences, for the scope of judicial action, may flow from the inclusion of the protection of fundamental rights. It is a trite observation that comparative legal studies abundantly show how much the powers of judicial review are strengthened by the courts' willingness to consider themselves as 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 forties[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 having taken the courage of interpreting the 1958 Constitution in such a way that its preamble embodies 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 a rapid journey through the forests of jurisdiction and then steer our course to problems of substance, hoping to be thus finally able to give an overall assessment of the position of the judiciary under the draft Treaty.

II - Problems of jurisdiction

a. General

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 by 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 sheer 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 to 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 (Article 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 addressee 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 had recommended this extension in the opinions on the European Union which they gave 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 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 function under judicial control. The Court of Justice would thus have 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].

Second item in the "technical" category: equal treatment for all the institutions before the Court (Article 43-2). This seems to imply two things. First, Parliament cannot, under the existing rules, bring an action for annulment under Article 173 EEC-treaty, 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 way[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. Actually, 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, vid. 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 act 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 recommandation 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 in so far as it regards preliminary rulings on "the validity ... of acts of the institutions"[15]. The

implications of the Commission's idea are not very clear. It may first 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 judgments even roused the indignation of well-known French legal scholars[17]. The Commission's proposal may, however, secondly 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 judgment 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 held already 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; and the Court went out of its way to stress that national courts remained, of course, free to reintroduce 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 a 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, with different consequences, in pending litigation, 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 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 (Article 43-7). These

objectives being framed in wide terms, almost any litigation between Member States will belong in this category. The proposal thus broadens and widens the provision of Article 182 EEC-treaty. 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 and 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 for interpreting these agreements[23]. This declaration - 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 negociating practice of the Member States' diplomats does not show an excessive zeal in that direction. 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 legislations normally attach to patents[24].

Second declaration of principle: the clause on jurisdiction of the Court to impose sanctions on a Member State failing to fulfill its obligations under the law of the Union (Article 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 fulfill 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 fulfill 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. First, although actually the judgment that finds that a Member State failed to fulfill 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 (Article 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 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 had 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 in a correct way. With some exaggeration, one might summarize the situation as one in which a citizen first fights his way through local court, appeal 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 susceptibilities 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 loose 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 in-

compatibility 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 compatibility 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 proceed to levying 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, can therefore not be excluded. To make matters worse, there may even be a treble protection, as the European Convention of 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 of Human Rights would not be admissible before the Court of Justice would have rendered its judgement 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 how to reconcile the two great systems of legal integration in Europe, that of the Communities and that based on the European Convention of 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 your reporter is among them - will have great difficulty in accepting these two basic premisses. 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, 3rd par., EEC-treaty, 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 automatically recourse 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-treaty 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 appreciation 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 hierarchy 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. First, it is not at all clear whether the system of preliminary rulings will effectively work better after such a change. Secondly, we may make tacitly a choice on the organisation 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 to have a "Union judiciary", alongside of national hierarchies of courts, for the European Union, just as the United States have 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 so far, the draft Treaty is a lost opportunity.

III - Matters of substance

a. The objectives of the Union

We saw earlier that the objectives of the Union are couched in wide terms: the preanble 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.

There is one easy answer to this: the Union takes over the Community patrimony, the famous "acquis communautaire" (Article 7), and encompasses thereby the aims of the EEC-treaty; hence, courts can continue to base their interpretations on these aims like 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 legislative process. This is a very important point. Everyday experience shows that in many fields of Community action, harmonization of national legislation is long overdue. And the question is more and more urgent 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. 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 not any more 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 taking over of 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 charaterized as "grundrechtähnlich", as not-so-dissimilar[39]. It may be true that the classical human rights as, 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.

A first thing one discovers when thinking about this problem is that most of the time the rights of these two categories strengthen each other rather than showing a contrast. Non-discrimination in the common market fortifies equal protection before the laws, and the free development of the individual is helped by the freedom to move without being subjected to arbitrary interference of 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 dominant positions on 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' unfettered discretion to expel aliens that previously existed[41].

The remaining difficulty is what to do when there should be a clash, and when no efforts to reconcile the effects of different freedoms succeed. I would personally prefer not to take the general view that rights belonging to the human rights catalogue should always

and automatically override social and economic freedoms. Much depends on the persons who claim protection of their rights and freedoms, human rights being primarily concerned with protecting the weak against the mighty; 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; 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 specific powers of 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 fishermen's feeling that they are citizens 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 practices can, as the Bask 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 program that can do justice to the ambitious wording of Article 46. Why not start a real effort for unifying commercial law? Lawyers have had guilt feelings ever since Pascal's jeering observations on the "trois degrés d'élévation du pôle" 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 to it: 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 Article 100 EEC-treaty, 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 consideration: "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 U.S. 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 of Human Rights. To push the matter somewhat further: for a moment it looked as if capital punishment in the U.S. would be abolished by the Court on account of its being contrary to the American Bill of Rights; and a similar fate menaced 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; and this wave of activism culminated about 180 years after the coming 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 the change of 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 will be inevitably reinforced. First, 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 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 fishery and to transport. The technicians of economic law will, for the moment, hold their ground.

Some further thinking gives, however, 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 Luxemburg sister institution is more liable to respond to problems regarding discrimination, or division of powers among 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, like 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 will take shape in the way indicated by the draft Treaty, judicial relations between these two areas will be strengthened. The Union may, therefore, more and more become 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, be all but a nominal member of the Council of Europe. What remains then, is 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. Actually, 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.

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 to invoke 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 England 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 its 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 Union law and to take their share in its implementation? There is, of course, the mecanism 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 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 actions 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, that triggered off the integration process, sought exactly to displace movement of troops by more peaceful ways of coming to grips with each other.

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 violates persistently 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.

IV - 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: the increase of its powers goes primarily at the expense of the powers of the other Union institutions. Is that an advantage? Personnaly, 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 program 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 did its work well. The general lay-out of European law owes more to the Court's patient needlework 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 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 to form gradually 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 (Article 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 ten or twelve 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 U.S. 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 could get more involved in aspects of the integration process, like 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 here lies not the real problem: 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.

Notes

1. Report on behalf of the Committee on Institutional Affairs on the preliminary draft Treaty establishing the European Union, part B, Explanatory Statement (doc. E.P. 1-1200/83/B), no. 1.
2. Altiero Spinelli, Das Verfassungsprojekt des Europäischen Parlaments, in: Schwarze-Bieber (ed.), Eine Verfassung für Europa, Von der Europäischen Gemeinschaft zur Europäischen Union (Baden-Baden 1984) p. 231.
3. Example: Ingolf Pernice, Verfassungsentwurf für eine Europäische Union, EuR 1984/2 p. 126.
4. O.J. 1977, C 103/1. The Court's case law is summarized in case 44/79, Hauer [1979] E.C.R. 3727.
5. See case 191/82, FEDIOL [1983] E.C.R. ...
6. See J. Mégret, Le contrôle par le juge administratif de l'intervention économique dans les Etats membres de la C.E.E., in: Miscellanea Ganshof van der Meersch, II (Brussels 1972) p. 579.
7. See case 24/75, Petroni [1975] E.C.R. 1149.
8. Examples: Shelley v. Kramer, 334 U.S. 1 (1948); Mapp v. Ohio, 367 U.S. 643 (1961).
9. See Cappelletti and Cohen, Comparative constitutional law (Indianapolis 1979) ch. 3-C (particularly p. 50-72).
10. See, generally, Claus Dieter Ehlermann, Vergleich des Verfassungsprojekts des Europäischen Parlaments mit früheren Verfassungs- und Reformprojekten, in: Schwarze-Bieber, Eine Verfassung für Europa (as quoted note 2), p. 269, at p. 281-282.
11. Report of the Commission on European Union, Bulletin of the European Communities, Supplement 5/75, no. 129; Suggestions of the Court of Justice on European Union, Bulletin of the European Communities, Supplement 7/75, p. 18.
12. Suggestions of the Court (as quoted note 11), p. 18.
13. See case 230/81, Grand-Duchy of Luxemburg v. European Parliament [1983] E.C.R. 255.
14. Article 20 Statute of the Court of Justice of the E.E.C.
15. Report of the Commission (as quoted note 11), no. 128.
16. Example: case 4/79, Providence agricole de la Champagne [1980] E.C.R. 2823.
17. See Jean Boulouis, Dalloz 1982 p. 10-13.
18. See Henry Schermers, Judicial protection in the European Communities (2nd ed., Deventer 1979), par. 379 a and 379 b; J. Mertens de Wilmars, Annulation et appréciation de validité dans le traité CEE: convergence ou divergence? in: Grewe-Rupp-Schneider (ed.), Europäische Gerichtsbarkeit und nationale Verfassungsgerichtsbarkeit (Festschrift-Kutscher, Baden-Baden 1981) p. 283.

19. Case 66/80, International Chemical Corporation [1981] E.C.R. 1191.

20. See T.P.J.N. van Rijn, Exceptie van onwettigheid en prejudiciële procedure inzake geldigheid van gemeenschapshandelingen (Deventer 1978) no. 249-252.

21. Case 92/78, Simmenthal [1979] E.C.R. 777.

22. This might in fact seem a logical consequence of the I.C.C.-judgment, as quoted note 19.

23. Solemn Declaration on the European Union of 20 June 1983 (Stuttgart Declaration), Bulletin of the European Communities no. 6/1983, point 2.5.

24. In particular: case 119/75, Terrapin Overseas [1976] E.C.R. 1039.

25. Case 88/77, Schonenberg [1978] E.C.R. 473.

26. Example: Report to the European Council on the European Union of 29 December 1975 (Tindemans report), Bulletin of the European Communities, Supplement 1/76, chapter IV-A-1; also in Working document 481/75 of European Parliament, p. 39-40.

27. Report of the Commission (as quoted note 11), no. 124 and no. 84.

28. Art. 93 Grundgesetz; Art. 90 Bundesverfassungsgerichtsgesetz.

29. BVerfGE 37 no. 18, Solange Beschluss, 1974.

30. Article 26 European Convention for the protection of human rights and fundamental freedoms.

31. Example: G. Pfennig, Möglichkeiten der materiellen Weiterentwicklung des Gemeinschaftsrechts, in: Carstens and others, Der Beitrag des Rechts zum europäischen Einigungsprozess (Melle 1984) p. 73, at p. 77.

32. Case 283/81, CILFIT [1982] E.C.R. 3415.

33. Art. III section II(1) U.S. Constitution.

34. Paul de Saint-Mihiel, Le projet de traité instituant l'Union Européenne, RMC no. 276 (1984) p. 149.

35. President Hans Kutscher said as much in his farewell speech to the Court: see the Court's publication on its ceremonial sittings in 1980-1981 (Luxemburg 1982, p. 25).

36. See T. Koopmans, De polsstok van de rechter, in: Regel en praktijk (Opstellen-Van Wijnbergen, Zwolle 1979) p. 101.

37. See Peter Gilsdorf, Die Rolle der Kommission bei der gemeinschaftlichen Rechtssetzung, in: Der Beitrag des Rechts (as quoted note 31) p. 91.

38. See, for a list of these freedoms, Eberhard Grabitz, Implementation of human rights in Community law, in: In Memoriam J.D.B. Mitchell (London 1983) p. 194.

39. Albert Bleckmann, Die Freiheiten des gemeinsamen Marktes als Grundrechte, in: Bieber and others (ed.), Das Europa der zweiten Generation, Gedächtnisschrift für Christoph Sasse, II (Kehl 1981) p. 665.

40. See also M. Waelbroeck, La constitution européenne et les interventions des Etats membres en matière économique, in: In orde (Liber amicorum VerLoren van Themaat, Deventer 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 (O.J. no. 56 p. 850, English special edition 1963-1964, 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).

43. Pascal, Pensées, éd. Brunschvicg (Paris 1950) no. 294.

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. E.P. 1 - 575/83/c), working document on the law of the Union (K. de Gucht reporting) no. 71.

45. Furman v. Georgia, 408 U.S. 288 (1972); Roe v. Wade, 410 U.S. 113 (1973).

46. Conseil constitutionnel 16-7-1971, loi d'associations, Rec. 29.

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] E.C.R. 329; case 104/81, Kupferberg [1982] E.C.R. 3641.

49. Suggestions of the Court (as quoted note 11), p. 17.

50. See, in particular: case 2/74, Reyners [1974] E.C.R. 631; case 8/81, Ursula Becker [1982] E.C.R. 53.

51. See Pernice, Verfassungsentwurf (as quoted note 3).

52. Art. 59 French Constitution.

53. Art. 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: Mauro Cappelletti (ed.), New perspectives for a common law of Europe (Leyden-London 1978) p. 309.

55. Mauro Cappelletti, Giudici legislatori? (Milan 1984) p. 19-59.

56. Case 8/55, Fédéchar [1954-1956] E.C.R. 299 is an example (principle of proportionality).

57. Report quoted note 44, part B, Explanatory Statement, p. 33 (O. Zecchino reporting).

58. Art. 5 Bundesverfassungsgerichtsgesetz.

59. Art. II section II(2) U.S. Constitution.

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The Draft Treaty Establishing the European Union

The European Policy Unit at the European University Institute

The University of Strasbourg

The Trans-European Policy Studies Association

THE DRAFT TREATY ESTABLISHING THE EUROPEAN UNION

REPORT ON DENMARK

P. LACHMAN

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THE DRAFT TREATY ESTABLISHING THE EUROPEAN UNION
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The European Parliament Draft Treaty establishing a European Union. Constutional and Political inplications in Denmark

SUMMARY AND CONCLUSIONS

By Per Lachmann

I. The Draft Treaty and the Danish Constitution

1. An approval by Denmark 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 5/6 majority in the "Folketing" or a simple majority coupled with a referendum.

2. The Draft Treaty uses a sometimes very broad language open to differing interpretations. The findings of this report is therefore subject to a number of reservations regarding the interpretations of the Draft.

3. 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 is taken by unanimity.

4. The enlargened competence of the Union "ratione materiae" is in principle compatible with section 2o 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 pursuant to Section 20. Pending such clarifications it might be that at least one substantive provision of the constitution which reserves certain jobs in the public administration to Danish nationals would have to be amended by the procedure for constitutional amendmends.

5. The explicit provisions regarding the supremacy of Union law would most likely not give rise to 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.

6. The composition and voting rules for the Parliament and the Union Council gives Denmark a representation which is less than in a full-fled-

ged federal State, and which could become even smaller if an organic law redistributed the seats in Parliament. It is open for discussion whether this is compatible with section 20 of the Constitution, which requires a "fair" representation.

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 increased powers of the court could in any case be accomplished in accordance with section 20 of the Constitution.

7. 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 amendmend rather than a bill pursuant to section 20 would be considered the most correct solution, but such an interpretation is not necessary from a legal point of view.

II. The Draft Treaty and the Danish political parties.

1. All leading Danish Parties have in a Folketing motion rejected the Draft Treaty proposed by the European Parliament.

2. This rejection is an expression of a broad concesus on the approach to the European Union. The steady but slow progress is preferred to great leaps which cannot be implemented for want of popular support.

3. The center of gravity in discussions on the future development of the Community towards a European Union should in the view of all Danish parties be the new policies to be made in the fields of industry, tecnology, research and development, energy and the protection of the environment. General institutional reforms are rejected by all the parties, and the right of veto is considered a necessity also in the future.

4. Within this general concensus there is a clear difference among the parties with respect to smaller institutional amendments. This difference is often not clearly expressed due to the necessary alliance among the major parties regarding foreign policy including European policy.The Liberals and - to a lesser degree the Conservatives - are more open to such smaller reforms while the Social-democrats and the Radicals are taking a more defensive attitude in this respect. The Social-democrats have after their poor results in the European elections set up a committee to study their position with respect to Europe's role in the world. The outcome of this committee work is difficult to forecast, yet important for the party and thereby for Denmark.

PART ONE: The Draft Treaty establishing the European Union and the Danish Constitution.

I. The Draft Treaty establishing of the European Union.

1. The purpose of this section is not to give 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.

2. 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.

a. While the Draft is based on the "acquis communitaire", the future position of the basic Community Treaties is only defined in the broadest terms. The treaty provisions relating to the objectives and scope of the Treaties are part of the law of the Union, though not of the new Treaty. They may be amended only by the procedure governing treaty amendmends.

All other provisions of the Treaties which are not incompatible with the new Treaty are also laws of the Union, but subject to amendmends through the procedure for organic laws.

We would suggest that the determinations as to which provisions of the basic Treaties concerns 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 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:

- Does article 235 of the Rome-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 Art. 2 of the Rome-Treaty 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?

- Do Article 30-36 and Article 48 paragraph 4 (which makes an exception for the free movement of workers with respect to the public administration) of the Rome-
Treaty concern the "objectives and Scope" of the Rome-

Treaty, and in the affirmative have these provisions been implicitly 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.

b. It seems however certain that the new Draft does involve fundamental amendmends of the basic Treaties without however respecting the procedures laid down in Article 236 of the Rome-Treaty and the equivalent provisions of the other basic Treaties. This of course raises delicate problems which are dealt with below under chapter VII.

c. 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 fields of cooperation. Are such commitments part of the law of the Union which is directly applicable in the Member States pursuing to Art. 42.? And to what extent is the Court competent to interprete and ajudicate with respect to such commitments.

Art. 10 paragraph 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 Art. 46 the Commission and the Parliament may adopt recommendations with a respect to cooperation undertakings regarding "espace judiciaire" and other enumerated matters. The European Council may adopt recommendation regarding all matters of

cooperation pursuant to Article 32. It would, however, not be logical to imagine that such recommendations 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 intergovernmental cooperation. To the extent that this assumption may be erroneous the subsequent evaluation of the constitutional implications in Denmark has to be reconsidered.

II. The Danish Constitution.

1. 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 of the Constitution. 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 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 politic-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.

2. 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 Belgium 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 the procedure for adoption of such bill was however dramatically amended. A majority of 5/6 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 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 Denmarks accession to the European Communities. The bill for accession did not obtain the required 5/6 and was consequently submitted for a referendum where it received the consent of almost 2/3 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 5/6 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 quantitavely. Also the substantive provisions regarding transfer of sovereignty seem somewhat more strict in Denmark than in other Member States. The text of section 20 paragraph 1 reads as follows:

> "Powers vested in the authorities of the Realm under this Constitution Act may to an extent to be determined 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-a-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", 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 authorities 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."

III. Section 20 and the substantive provisions of the Draft.

1. It is possible to read Art. 45 in such a way that this article which refers to Art. 9 concerning the objectives of the Union gives the general delimi-

tation 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 Art. 9. The competence of the court would obviously cover the same fields.

Given the fact that the aims of the Union in Art. 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, may only be transferred "to an extent to be defined". In his textbook on constitutional law Max Sørensen states that:

> "this condition imply that there must be acertain 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 Art. 3.

It is obvious that under the above given interpretation of Art. 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 chapter 1 - 3 of part 4 and part 5 regarding the finances of the Union. If this assumption is correct and Art. 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.

2. Compared to the competence of the present communities the Union's competence seems to be enlargened in different ways:

- new areas of activities such as education, culture and health are added.

- The union competence in areas where the Community has only a very limited competence such as taxation and social affairs is greatly increased.

- 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 chapter I it is very unclear to the present reporter to what extent this may happen.

- The competence to impose taxes and collect the revenue as "own income" is without limits in the Draft.

- the objectives of the Union provided for in Art. 9 of the Draft is considerably wider than the objectives in Art. 2 and 3 of the Rome-treaty.
Given the impact which these objectives have for 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 is quoted above from 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 sufficient-

ly clear 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 of course not 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:

- A clarification of Article 7 as discusssed under chapter I.

- Does Article 55, which gives the Union concurrent competence in the field of social, consumer protection, regional, environmental, education and research, 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?

- In Articles 57-59 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 chose to comply with?

- Pursuant to Article 56 the Union may take action with respect to social an 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?

- Article 4 paragraph 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 no violate the 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 paragraph 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 Art. 4 and from Art. 44 that if Member States in their own rights 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.

3. 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 all jobs in the public administration, i.e. if Article 48 paragraph 4 of the Rome-treaty 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.

4. Article 11 on the Draft Treaty authorises 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 Article 2o.

However, Section 2o of the constitution does not allow a transfer of the powers contained in that section. In other words, the institutions of the Union may not by their own action decide to transfer matters from national competence to Union competence. The powers to be transferred therefore must be defined at the time of the adoption of the bill.

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 Denmarks accession to the EC with respect to Article 235 of the Rome-Treaty. 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.

IV. Section 20 and the supremacy of Union law over the fundamental rights guarantied by the Constitution.

The transfer of competence pursuant to Art. 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-a-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 cataloques 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 practise developed by the ECJ 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 therefore seem that no 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.

V. Section 20 and the Institutional set up of the Union.

1. 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 Member States' governments or parliaments. 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."

2. The Draft contains no provisions with respect to the number of seats in Parliament or their distribution among the Member States. It must therefore be assumed that the provisions presently in force will continue to apply. It would however seem that the Union may by way of an organic law amend these provisions pursuant to Article 7 paragraph 3 of the Draft.

   The voting weight of each Member State in the Union is on the other hand fixed by reference in the Draft to Article 148 of the Rome-treaty. It may therefore only be amended in accordance with the procedure laid down in Article 84 of the Draft.

   In a full-fledged federal structure the seats in Parliament would be distributed solely on the basis of the number of inhabitants in each Member State. The Union Council would consist of representatives of the Member States each having one vote.

   Given the fact that the Union - whatever it is - is not a full-fledged federal State, one would have assumed that the element of equality of States would be more

preponderant than in a federal State. However the Danish vote in the Union Council is only 5% of the total votes compared to 10% on the basis of state equality. In the Parliament the Danish representation is 3,4% compared to 1,8% based on total equality of the electorate.

If one adds to this picture the possibility that a new organic law could revise the distribution of seats in the Parliament in the direction of total equality of the electorate and thereby diminish the share of Danish Seats, there seems to be some basis for discussing "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.

3. The legal instruments available to the Union are mostly clear and represent a continuation of the Community's legal instruments.

The commitments and recommendations of the European Council with respect to matters of cooperation may however give rise to doubts as mentioned in chapter 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.

4. The European Court of Justice will continue within its present functions. However an organic law shall give some further functions to the Court. One of these merit some further examinations with respect to the Danish Constitution.

A right of appeal to the ECJ against national courts of last instance shall be instituted where a reference to the ECJ for a preliminary ruling is refused or where a preliminary ruling of the Court has been disregarded.

The English text differs from the Danish and French Text which only proposes a "Pourvoi en Cassation". The latter versions do respect the basic nature of Article 177 of the Rome-Treaty which leaves the right to decide the cases to the national Courts. We shall therefore assume that the French and Danish texts are the correct ones.

The evaluation of a procedure for "cassation" with respect to section 20 of the constitution raises some doubts. In his memorandum to the Danish Government on the relation between the EC Treaties and the Danish Constitution Max Sørensen discusses if the preliminary procedure contained in Article 177 of the Rome-Treaty involves any transfer of powers.

In this point of view:

> "the answer would seem to be negative. It is clear that the national court maintains its competence in the main litigation without restrictions."

Max Sørensen points out that:

> "it is a normal part of arrengements under international law that a national court which is to apply international law must apply thos interpretations which are rendered by the competent international instance."

It would be tempting to view the supplementary right of "cassation" to be given to the Court as nothing more than a practical tool which can not affect the basic function of the system of preliminary rulings. In practice the national Court will still maintain its competence with respect to the final decision in the main litigation.

It is on the other hans also possible to consider the proprosed new procedure, as implying the creation of a "cour de cassation" within a limited field under the Union. Viewed as such, the right to annul national court decisions of last instance (under the conditions laid down in Article 43 alinea 5) and order a new trial could be considered as exercising competence which otherwise belongs to national courts. Transfer of powers pursuant to Section 20 would in that case be required.

VI. 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 the Draft would be 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 vide

Union Competence "ratione materiae", the limited Danish influence in th 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 favor of this viewit 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 2o does not use the term "international Organization" but international authority thus clearly accepting that also entities which are so sovereign, that they would not be classified as international organizations may be adhered to pursuant to Article 20.

We - for our part - would,however, not find it unreasonable if adherence to a full-fledged federal State would be considered as being beyond what may be accomplished pursuant to section 20 of the Constitution. However the Union is clearly not a full-fledged federal State.

To go beyond this, and assume that adherence to a highly integrated Union which is not a full-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.

VII. Procedures for adoption in Denmark.

1. The Danish constitution and legal tradition with respect to international law is the so called dualism. Pursuant to section 19 of the constitution the King (Government) negociates 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 casu first of all a bill pursuant to section 20 of the constitution.

   A bill containing the "Folketing" consent to ratification pursuant to section 19 of the Constitution and

provisions for transfer of powers pursuant to section 2o would be introduced by the Government.

2. The Draft Treaty on the European Union is obviously amending to 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 of the Rome - Treaty (and the equivalent Articles in the other treaties). Only after completion of such procedures a bill could properly be introduced nationally.

3. 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.

VIII. Summary and Conclusions

1. An approval by Denmark 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 5/6 majority in the "Folketing" or a simple majority coupled with a referendum.

2. The Draft Treaty uses a sometimes very broad language open to differing interpretations. The findings of this report is therefore subject to a number of reservations regarding the interpretations of the Draft.

3. 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 is taken by unanimity.

4. The enlargened competence of the Union "ratione materiae" is in principle compatible with section 2o 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 pursuant to Section 20. Pending such clarifications it might be that at least one substantive provision of the constitution which reserves certain jobs in the public administration to Danish nationals would have to be amended by the procedure for constitutional amendmends.

5. The explicit provisions regarding the supremacy of Union law would most likely not give rise to 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.

6. The composition and voting rules for the Parliament and the Union Council gives Denmark a representation which is less than in a full-fled-

ged federal State, and which could become even smaller if an organic law redistributed the seats in Parliament. It is open for discussion whether this is compatible with section 20 of the Constitution, which requires a "fair" representation.

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 increased powers of the court could in any case be accomplished in accordance with section 20 of the Constitution.

7. 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 amendmend rather than a bill pursuant to section 20 would be considered the most correct solution, but such an interpretation is not necessary from a legal point of view.

PART TWO: The Draft Treaty establishing a European Union and the political parties.

I. The Danish political parties.

The following parties are represented in the "folketing" using the traditional yet sometimes erroneus left/right order:

Venstresocialisterne (Leftist Socialists)	5
Socialistisk Folkeparti (Peoples Socialists Party)	21
Socialdemokratiet (Social-democratic Party)	57
(S) Det radikale Venstre (the Radical Party)	10
(G) Kristeligt Folkeparti (Christian Peoples Party)	5
(G) Centrumsdemokraterne (the Center-democrats)	8
(G) Venstre (The Liberal Party)	23
(G) Det konservative Folkeparti (the Conservative Party)	42
(S) De frie Demokrater (the Free Democrats)	1
Fremskridtspartiet (the Progress Party)	5
Outside the parties (the Faroe Islands and Greenland)	2
Total	179

The four parties with a (G) added are forming the government. The two parties with an (S) added are in general supporting the Government in domestic economic issues.This block has a practical majority as the two members outside the parties will not both vote against the Government in 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.

II. The "Folketing" debate on EC-questions in May 1984.

1. In May 1984 the two leftwing Socialist Parties in the "Folketing" requested a Folketing debate on the following question 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 incorporation new areas, such as security and culture under the EC cooperation, the relation between the institutions and the safeguarding of the right of veto."

The questin was part of the campaign prior to the elections to the European Parliament, and its formulation gives an indication of the issues that the anti EC parties wanted to be central in the campaign.

The thrust of the answer by the Foreign Minister may be illustrated by the following excerps:

> "If we should evaluate the EC- cooperation solely on the basis of the picture presented by the mass medias no one could be blamed for getting a false impression of the status and importance to Denmark of the cooperation. I say this not to blame the medias, but as a reminder that they are quite naturally more interested in conflicts and quick fixes than in quiet and steady progress. 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 funcioning in a way which is satisfactory and which is beneficial to Denmark."

The answer of the Foreign Minister was centered around the budgetary problems and the need to develop new common policies for industry, tecnology, research and development and energy. To the Minister common actions in these fields:

"should be the center 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 Euripean Union proposed by the European Parliament."

This approach indicates similarly how the four govenrmental 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 presented 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 competence between the Council of Ministers, the Commission and the European Parliament is the basis for Denmarks membership of the EC.

The Folketing consequestly rejects the Draft Treaty establishing a European Union as proposed by the European Parliament." (The motion included a second 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. Only two Center-democrats of the Government coalition abstained and spoke out against the motion.The two parties to the extreme left and the two parties to the extreme right voted against 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.

2. The most fundamental issue related to the European Union is no doubt the question of the approach. With the possible exception of the Center-democrats all 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 strenthening the existing ones. Such endevours are supported by all the major parties. We would suggest, that in this respect Danish political parties are as integrationists as parties in most other Member States. Increases in the "own resources" of the Community to this end is also favoured by the major parties.

This is not to suggest that proposals to this end would always be blindly supported. Special national as well as party interests may of course call for special positions. The fundamental point, however , remains that there is a general concensus among the major parties that new policies in the central areas are both necessary and desirable, and that Denmark as a small country is vitally dependant of the succesful outcome of such policies.

As regards the institutional set up a broad agreement likewise exists among Danish parties that the existing Treaties must remain the center and basis for a Union to come.

It is obvious that the Draft Treaty presented by the European Parliament with its heavy emphasis on revising the institutions , dropping the right of veto and fundamentally disregarding the content of the future policies must be felt as problematic and counterproductive by all the major 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 Center-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 of 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 af the Union was undoubtedly a way to appeal to that part of their electorates to whom the EC membership is disagreable.

The only two parties whose spokesmen dealt in substance with the Union were the two anti EC left-wing Socialist parties. This clearly indicates that in fact all parties shared the evaluation that the Draft would favour the anti EC parties in the elections to the European Parliament.

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 favor of the motion. Certain features of the Danish political scene which we shall examine below may explain why.

III. The fundamentals of Danish politics in EC matters.

It is the rule and not the exception that Danish Governments are minority Governments. Danish domestic politics are therefore as a rule 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 political 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 - exploittheir lack of responsibility to recapture votes lost due to foreign policy decisions.

Over the last year 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 the rift itself. 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 Folketing motions under the circumstances prevailing in the Danish political life. This is particularly 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 as their Social-democratic predecessors.

2. <u>The vulnerable position of the Social-democratic and Radical Parties</u>.

The problems facing the 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 %
Peoples Socialist Party	11.5 %	9.2 %
Other small anti EC parties without seats in the Folketing	2.o %	not running
The Popular movement against EC	not running	2o.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 referendum in 1972 on Danish membership of the EC.

The discrepancy between the elctorate and the Folketing in EC matters is , however, not evenly distributed among the parties. It is on the contraray concentrated in the two parties that moved the motion adopted by the Folketing in May this year, i.e. the Social-democrats and the Radicals.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 electorates.

IV. The differences among the major political parties

While Folketing debates tend to focus on points of agreements in order to continue the big foreign policy alliance the elections to the European Parliament necessarily involves a certain focussing on the party differences. The various election manifestos adopted prior to the European elections bear witness to this.

1. The liberal Party.

The Liberal Party manifesto to the European elections adheres to the general Danish concensus by stressing that the Party is basing its policy on the Rome-Treaty. 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 blocking for the Community interests. The manifesto suggests to strengthen the role of the Commission to counteract this development.

The right of veto is in this way maintained though the manifesto explicitly proposes to abolish the widespread misuse of this right.

The Liberals favors an increased influence to the European Parliament. This should be achieved on the basis of the existing Treaties by way of interinstitutional agreements. It is suggested that the European Parliament in this way should be given a right af veto against proposals from the Commission.

The Liberals are also in favor of a closer coordination between the EPC and the Treaty cooperation. In particular the Parliament should be more actively integrated with the EPS. Such closer coordination between the Treaty cooperation and the EPS should give the Community a possibility to speak and act on behalf of the Member States in order to increase the EC influence on the international peace and security.

While defence matters should be left to the NATO European security arrangements should be dealt with in the EPS.

The Liberal manifesto also speaks out in favor of a generally stronger involvement of the EC ineducation 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 is however important and are - in contrast to the manifestos of the other major parties - put in the beginning of the manifesto. It may easly be seen that the Liberal manifesto in form, and to a certain extent also in substance, differs from the tone and content of the Folketing motion of May, though it remains within its broad concensus as far as the Draft Treaty is concerned.

2. The Conservative Party.

The Conservative approach to the institutional questions is more prudent than the Liberal. The Draft Treaty is firmly, but diplomatically rejected by repudiating "artificial new modes of cooperation which do not enjoy any popular support and which is therefore endangering the steady but slow progress of the Community". In the Conservative view the existing Treaties are a sufficient basis for the cooperation, though it is emphazised that they should be used in a more complete way.

Also the Conservative favors a strenthening of the role of the Parliament, but they do in fact only envisage a larger controlling function for the Parliament.

While the Conservatives also favors an increased cooperation with respect to education, they note that the subject falls

outside the Treaty, and they do not call explicitly for the cooperation to take place within the Community institutions. The Conservatives differs from the Liberals as to the security policy, which in the Conservative view should be dealt with in the NATO.

3. The Radical Party.

Compared to the two foregoing manifestos the Radical manifesto is quite defensive in its approach. All institutional developments and increases in the EC competence are rejected and the importance of separating the Treaty cooperation from the 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 controle of the Community must lie with the national Parliaments according to that party.

4. The social-democratic Party.

The Social-democratic manifesto outlines the policies which the Party will support in the EC. In a second part of the manifesto the Social-democrats undertake to oppose inter alia:

- changes in the competences of the institutions,
- any erosion in the right of veto,
- any granting of rights to the European Parliament in matters of security and defence,
- the inclusion of education and culture under the Treaty cooperation.

It is it obvious that the Social-democratic manifesto - like the Radical-is designed to appease the important fraction of their electorates which is critical of the EC - to use the term often used in the Social-democratic Party. Another way of achieving this was the preponderance of candidates on the Social-democratic list, who were known to have voted against the Danish membership of the EC in 1972.

The rather poor showing of the Social-democrats 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 the right of the Social-democratic Party may concentrate on either being in favor or against further integration.Be that as it may, the Social-democratic Party itself has felt a need to clarify their policies with respect to the EC. Following the elections

The anti EC wing of the Party demanded that a committee be set up to study the pros and cons of belonging to the EC. The leadership of the Party counteracted by proposing that the committee should study the role of Europe in the world ,and the Social-democratic position in this respect. It will no doubt be of vital importance both to the Party and to the Danish policy with respect to the EC what this committee may achieve.

V. Summary and conclusions.

1. All leading Danish Parties have in a Folketing motion rejected the Draft Treaty proposed by the European Parliament.

2. This rejection is an expression of a broad concesus on the approach to the European Union. The steady but slow progress is preferred to great leaps which cannot be implemented for want of popular support.

3. The center of gravity in discussions on the future development of the Community towards a European Union should in the view of all Danish parties be the new policies to be made in the fields of industry, tecnology, research and development, energy and the protection of the environment. General institutional reforms are rejected by all the parties, and the right of veto is considered a necessity also in the future.

4. Within this general concensus there is a clear difference among the parties with respect to smaller institutional amendments. This difference is often not clearly expressed due to the necessary alliance among the major parties regarding foreign policy including European policy.The Liberals and - to a lesser degree the Conservatives - are more open to such smaller reforms while the Social-democrats and the Radicals are taking a more defensive attitude in this respect. The Social-democrats have after their poor results in the European elections set up a committee to study their position with respect to Europe's role in the world. The outcome of this committee work is difficult to forecast, yet important for the party and thereby for Denmark.

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The Draft Treaty Establishing the European Union

The European Policy Unit at the European University Institute

The University of Strasbourg

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THE DRAFT TREATY ESTABLISHING THE EUROPEAN UNION

REPORT ON IRELAND

J.TEMPLE LANG

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Introduction

This paper begins by summarising 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 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 briefly assesses the elements likely to influence public opinion in Ireland at the various stages of these procedures.

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.( )

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 be administered ~~xxxxxxxx~~ 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 by the Government, which was to be responsible to the Dáil (the lower house).

To make it possible for the Republic of Ireland to ratify the Treaties, therefore, an 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 a referendum in 1972. The amendment, in the form of an addition to ~~xxx~~ 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. First, 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. ( )

Second, 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 ( ) and fisheries ( ) and in the expanding areas dealt with by Community legislation which come within Community competence under the principle stated in the AETR Judgment, ( ) 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 constitutional 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 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 Treaty. 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 authorises 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 ( ) 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 ( ) 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 Treaty, rather than to a particular interpretation of the amendment to the Constitution. Clearly, the question whether Member States have a 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 [redacted] widely( ) 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, in some sense, under Community auspices is obligatory for Member States under Community law : the European Monetary System agreement is proof that some very important arrangements are "optional".

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 ~~Constitution of Ireland~~ 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 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 (Article 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 (Article 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 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 the 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 insofar 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 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.

One question that did not previously arise should be mentioned. The Constitution of Ireland classifies governmental powers as "legislative, executive and judicial". 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 authorised by either the existing provision dealing with the European Community or the future provision dealing with the European Union. However, if it is accepted that monetary powers are "executive" powers within the (broad) meaning of that word in the Constitution, no express mention of monetary powers would be needed in the new provision dealing with the European Union.

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 ~~xxkxx~~ 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.

Some other comments may be useful.

First, 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, information (Arts. 56-62,passim). It is more explicit about inter--national relations than the existing Treaties (Arts. 63-69). It is true that much of this is little more than the existing Communities are already doing, but the express provisions must inevitably result in wider and increased powers. More directly relevant to the subject of this paper, Art. 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 seems likely that, 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 not 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 would 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 whether the clauses of the new Treaty dealing with the"organs"of the Union might come into conflict with the Constitution, in the future. The only immediate problem concerns the European Monetary Fund which, under Art. 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, in the absence of some definition of the future powers of the Fund, it does not seem useful to discuss how far the powers of a monetary authority not under the control of the Irish legislature would be consistent with the Irish Constitution.

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 it. 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 trademark measure, for example, is to be a Regulation and not a convention), but the problem should be dealt with.

Even if the amendment is substantially similar to the 1972 amendment ("The State may become a member of the European Union. No provision of this Constitution invalidates .."), 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. ( ) First, legally Ireland's sovereignty would be reduced 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 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.

Second, 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 visualised by the new Treaty had been 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 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 usefulness 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 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. Art.64.2, for example, merely declares the existing law. ( ) Article 32, however, which contemplates the enlargement of the competences of the Union, does not (as Article 235 EEC Treaty now does) make that enlargement conditional on a finding that it is necessary to 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 Art. 23, a modified version of the "Luxembourg compromise", under which, during a trans--itional period of ten years, a Member State may invoke a "vital national interest" and, if the Commission recognises 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, for 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 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 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, if it still exists, would be very limited indeed. The Treaty contemplates the transfer, to the Union, of some at least of ~~all of the~~ each kind of powers which is 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.

The fact is that 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 ~~degree of sovereignty~~ extent of the powers of members of a federation may vary widely, the key question 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 clearly no longer have any 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" and "independence" are formal and political concepts, not primarily legal ones. 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 <u>better</u> protected by the safeguards for members 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 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.

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 Dail (Article 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 Dail.

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 would take place 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 but 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. The most important clause of that Act 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 (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.

So that Ireland can ratify the new Treaty setting up the European Union, an Act essentially similar to the European Communities Act 1972 would therefore be necessary and appropriate. (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. ( )

The Irish constitutional rules just stated appear to deal with the question, ~~of how to deal with the argument that~~ this 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 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. This situation, of course, would not necessarily be the case if the legislation, or the constitutional provision itself, were differently drafted from the present provisions. But there is no reason to believe that they would be. 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.

Neutrality - not a legal question

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, 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 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, it is improbable that any movement to have such a provision added to the Constitution would make significant progress.

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 were 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 referenda 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 the main reason why the idea has been suggested in recent years is that it has been felt that extensive changes might 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.

PART II Political aspects

This Part of this paper assesses some of the elements which are likely to influence public opinion in 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. National independence is therefore not taken for granted as much as in other countries. Ireland is also the only Member State ~~xhixkxxxxxxixxxxxxxxxx~~ 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 influence which it would be reluctant to see merged into a European group of states. 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 U.K. 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 influenced by the argument that it 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 fifteen 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 achievements 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 realised in Ireland.

Irish attitudes towards the Community have been primarily concerned with economics. Initially it 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 criticise the Community, somewhat unfairly, for its inability to prevent or surmount the 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 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 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.

The significance of Northern Ireland

As already mentioned, the problems of Northern Ireland, and of Ireland's relations with the U.K. in the light of the N.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 N.Ireland. Many people in N. Ireland realise 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 N. Ireland and the Republic wither away.

. So far, progress towards European integration is not regarded as a way (certainly not an adequate ~~xxxxxxxxxxxxxx~~ way) of solving N. Ireland's difficulties. One of the papers written for the New Ireland Forum ( )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 co-operation 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 paper ( )pointed out that the use made by the South of Community loan instruments, mainly 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 ( ) pointed out that Community law is likely to be a significant harmonising factor in legal development in both jurisdictions. However, the main Report of the Forum says very little about the Community, merely mentioning ( )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 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 U.K. more than one thousand million pounds sterling each year, and though the corr sponding cost to the Republic is less in absolute terms, it is greater in relation to the size of the country's budget.

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 ~~xikkixxxkxx~~ 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.

Irish attitudes to increased Community powers

The attitudes of Irish politicians and of public opinion do not display ~~xxxxxx~~ the automatic objection to any increase of Community powers, or even to the 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 ( ) 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 U.K. joined, Irish people have never felt any of the ambivalence, to put it no more strongly, which is felt in the U.K. 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.

Irish Neutrality

Irish neutrality has never been defined. It is not mentioned in the Constitution. It is not the subject of any treaty. It is an attitude. It is therefore not easy to describe, although it has been the subject of a valuable book by my colleague in Trinity College, Dublin, Patrick Keatinge. ( )

The idea of Irish neutrality has been associated with independence from Britain. 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". ( ) After Ireland joined the U.N. in 1955, and in the 1960s, the Irish government worked for disarmament measures and progressive withdrawal of armed forces in Europe. These were regarded with approval in Ireland as demonstrating an independent and constructive foreign policy, although Ireland's voting record in other respects in the U.N. was not very different from that of other western European countries, or those of the other European neutrals, Austria, Finland, and ~~Switzerland~~ 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 U.N. peacekeeping forces, and by the view of Irish people that peacekeeping, neutrality, and aid to developing countries are related.

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 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 recognised European neutral States, Austria, Finland, Sweden and Switzerland. Keatinge identifies two points of view. The first is a "pragmatic" view of what national prosperity, security and independence make appropriate. This is the view of at least a majority of the two 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 (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 recognised national interest or made necessary any significant economic sacrifices, it is impossible to be certain which of these two views would be closer to ~~the~~ 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 spokesmen suggested in 1980 that neutrality should be written into the Constitution, there is no ~~one~~ ever 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.

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 attractive, but neither can usefully be discussed.

Irish public opinion would obviously be more favourable to the European Union if the Community proves itself successful economically in the ~~xxxx~~ coming years. ~~xxxxxxx~~ It is impossible to isolate the effect of the Community on the Irish economy in 1973-1984 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 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 FEOGA and the Social and Regional Funds. Ireland could have benefited more if its problems of farm structure and land use policy, and 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 very strong.

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) would probably 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 the present Irish Presidency ~~xxxxxxxxxx~~ brings the third Lomé negotiations to a successful conclusion or pushes through a useful package of measures on intra-Community barriers, thorough coverage by the 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.

The attitudes of the main political parties

It has been convenient to refer 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.

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 of neutrality identified by Keatinge, and Dr FitzGerald is the most Community-minded politician in Ireland.

The attitude of the much smaller Labour Party is less easy to summarise. 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. ( ) 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 institution policies and programmes of the Community, and to its overall progress."

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 Fail nor Labour has repudiated the commitment to eventual European union, implying involvement in collective defence, their real position, as distinct from their rhetoric, may be essentially similar to Fine Gael's.

Trade unions and Employer organisations

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, first, the economic advantages of joining the Union, compared with the economic results of not joining, and second, 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 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 U.K. 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 comes, 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 organisations 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 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.

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 summarised 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, although State-run, is not significantly government influenced on issues relevant to the European Union (measures have been in operation for years to prevent television from giving publicity (directly) to the I.R.A.). 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 material for the media. 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.

The Catholic Church

For completeness, a 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 "recognised" 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 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. 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 legalising 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 the Community.

Irish opinion in a referendum on accession to European Union : conclusio

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 politicians and civil servants who are now obstructing the operation of the Community. Or it might result 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 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 refendum would almost certainly approve accession. If one of the two large parties opposed accession, the outcome would 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. Fianna Fáil, however, would find it more difficult to oppose joining if the Social Democratic and Labour Party in Northern Ireland, now led by John Hume, was in favour. 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 <u>not</u> be as opposed to the incipient federalism of the European Union as the United Kingdom and Denmark would probably be. Irish opinion is not opposed to 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 Fail have never been in power when Ireland held the Presidency, and so have never had occasion to see its political potential.

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The Draft Treaty Establishing the European Union

The European Policy Unit at the European University Institute

The University of Strasbourg

The Trans-European Policy Studies Association

THE DRAFT TREATY ESTABLISHING THE EUROPEAN UNION:
REPORT ON THE FEDERAL REPUBLIC OF GERMANY.

C.O. LENZ

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The Draft Treaty Establishing the European Union: Report on the Federal Republic of Germany.

C. O. Lenz

Abstract

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Dr. jur. Carl Otto Lenz

The Draft Treaty Establishing the European Union

Country Report for Federal Republic of Germany

A. Constitutional Questions

I. 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. (Article 59(1)). To be valid, the relevant act of the Federal President requires counter signature by the Federal Chancellor or the appropriate Federal Minister (Article 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 committees; 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 Europe policy. According to the procedure found for this, the relevant report of the Europe Committee would go not to the full House, but to the Foreign Affairs Committee, which is competent, and to certain other committees for joint consultation, with the proviso that the full House be presented only with a report on the result of the consultations on this report of the Europe Committee. The Europe Committee would thus be not 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 the details here would

exceed the bounds of this paper. If the act of acceptance is passed accoridng 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.

II. Is amendment of the Basic Law necessary in order to implement the Treaty in the Federal Republic of Germany?
a) Preliminary remark: 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 intergovernmental 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 of 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, State responsibility 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 (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.

b) 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 5 of the Germany Treaty, 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 (see e.g. the final communiqué of the 16th session of the North Atlantic Council in Paris, 9-11 May 1955, when the Federal Republic of Germany took part for the first time; Europa-Archiv 1955/p. 7927, and finally, the Washington Declaration of the North Atlantic Council of 31 May 1984, point 7; Federal Government Bulletin 1984 No. 65, p. 579).

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.

c) Article 24 empowers the Federation to transfer 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 in the limits provided therein and according to the procedures provided for. That this would end the members' 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 (integration 1/84 p.12-23, esp. p. 15), Hilf and Schwarze (Eine Verfassung für Europa p. 265 and 32f). Moreover, the draft Treaty allows the Member States as such far-reaching cooperative powers over the European Council and over 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 a maintenance of 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 (Article 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 Basic Law, 3rd indent of Preamble and Article 4 of draft Treaty). Likewise, the precept of democracy is further realised than the extent hitherto achieved in the European Communities (see Article 20(1) and (2) of Basic Law, Article 14-19 of draft Treaty). The same is true for the principle of the social State (Article 20(1) of Basic Law). Again, the principle of constitutionality, or better the rule of law (Article 20(1) and (3) of 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 judicature 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 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" (Tomuschat, Commentary on the Bonn Basic Law, Article 24, No. 68a). 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 Article 30, 83 ff of the Basic Law, largely a matter for the Bundesländer.

III. 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.

There are, however, fears that the extensive powers to be transferred to the European Union might lead to serious intervention in the economic and social structure of the Federal Republic. In particular, the right given the Union to increase

its own revenues even against the opposition of the Federal Republic (Article 71(2) of the Draft Treaty) will certainly be treated critically in the Federal Government, Bundestag and Bundesrat. Possible resistance can be overcome only by sufficiently strong political resolve towards European integration. We shall therefore turn in the next part to the attitude of politically important groups towards the draft Treaty.

B. 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:

I. Parliaments and Parties

a) The German members of the European Parliament have taken the following positions on the draft Treaty:

	Number of seats	Vote	Took part	aye	no	abstained	did not take part
Federal Republic of Germany	81	1	69	67	0	2	12
of which		2	64	59	0	5	17
C D U / 34)	42	1	35 (28 + 7)	35	0	0	7
C S U 8		2	37 (30 + 7)	37	0	0	5
S P D	35	1	30	28	0	2	5
		2	25	20	0	5	10
F.D.P.	4	1	4	4	0	0	0
		2	2	2	0	0	2

C D U Christian Democratic Union

C S U Christian Social Union

F.D.P. Free Democratic Party

S P D Social Democratic Party of Germany

This means that the German delegation, like those of Italy, Belgium and the Netherlands, 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.

b) The Association of Former POWs and the Europe Union approached the CDU/CSU, SPD and FDP in connection with the adoption of the draft Treaty by the European Parliament. Additionally, the Bundestag has had two debates on the draft Treaty. The following picture can be drawn from this:

1) All groups in the German Bundestag, including the Greens, referred the draft Treaty 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. On the other hand, it cannot be deduced from this motion for a resolution that the German Bundestag is unconditionally prepared to go it alone. If the procedure in other Member States should take very much more time, it is to be feared that the Bundestag too will not deliver its opinion by April next year.

2) 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 Europe 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 countermodel to the present European Community" (Mr. Vogt, Bundestag member for Kaiserslautern, at the 68th Session of the German Bundestag, Friday 13 April, p. 4788 and 4790). Similar statements were made in the Bundestag debate on 7 July 1984.

Minister of 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" (68th Session, 13 April 1984, p. 4791). Similar positive indications were given by the parliamentary groups to the President of the European Union, former Federal President Walter Scheel, and to the President of the Association of Former POWs, Werner Kiesling, who on behalf of his Association had striven to secure rapid treatment of the draft. In view of this basically positive attitude by 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 Bundesrat, 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.

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 (Schwarze/Bieber, Eine Verfassung für Europa, 1984). 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" (op cit. p.98).

Such statements did of course not go unchallenged, as the report of the ensuing discussion shows (op cit. . 110-113, esp. 111, 112). 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" (p. 37).

III. 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 organs, for increased recourse to majority decisions and for greater power for the 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 however helped towards improving 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. 52% of men are in favour of more powers for the Parliament. 46% 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).

As against this, environment protection in Europe should where necessary be imposed compulsorily. 94% are in favour of this, with only 5% against. There are no significant differences between men and women here.

As far as German reunification is concerned, some $^{2}/3$ 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, $^{2}/3$ of Germans 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, $^{2}/3$ 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 2000 and in March

1984 on 3082 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 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.

Dr. jur. Carl Otto Lenz

Der Entwurf eines Vertrages zur Gründung der Europäischen Union

Länderbericht Bundesrepublik Deutschland

A Verfassungsrechtliche Fragen

I Zum Ratifizierungsverfahren

Der Entwurf eines Vertrages zur Gründung der Europäischen Union ist in der Terminologie des Grundgesetzes ein Vertrag "mit auswärtigen Staaten" Er wird deshalb vom Bundespräsidenten geschlossen. (Artikel 59 Absatz 1). Der entsprechende Akt des Bundespräsidenten bedarf zu seiner Gültigkeit der Gegenzeichnung durch den Bundeskanzler oder den zuständigen Bundesminister (Artikel 58 Absatz 1). Aus diesen Vorschriften sowie aus ihrer Stellung in Abschnitt 5 des Grundgesetzes, das die Überschrift trägt "Der Bundespräsident",wird geschlossen, dass nicht nur die Vertragsschliessungskompetenz, sondern auch die Vorbereitung des Vertragsschlusses eine Angelegenheit der Exekutive,d.h. der parlamentarisch verantwortlichen Bundesregierung,ist.

Da der Entwurf die politischen Beziehungen des Bundes regelt und sich ausserdem auf Gegenstände der Bundesgesetzgebung bezieht, bedarf er der Zustimmung oder Mitwirkung der für die Bundesgesetzgebung zuständigen Körperschaften in der Form eines Bundesgesetzes,d.h., dass die Bundesregierung den Entwurf in dem üblichen Verfahren zunächst dem Bundesrat zuzuleiten hat. Selbstverständlich können Bundestag und Bundesrat die Regierung auffordern, ihr den Vertragsentwurf zur Beratung vorzulegen, aber diese Aufforderung ersetzt die Vorlage durch die Bundesregierung nicht. Der Entwurf geht mit der Stellungnahme des Bundesrates an die Bundesregierung zurück, die Gelegenheit hat, sich zur Stellungnahme des Bundesrates zu äussern. Er geht dann an den Bundestag in die soge-

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nannte Erste Lesung, in der die Bundesregierung und die Sprecher der Fraktionen ihre grundsätzliche Haltung zu dem Vertrag darlegen würden. Er wird dann an die Ausschüsse überwiesen, wobei davon ausgegangen werden kann, dass der Auswärtige Ausschuss den entscheidenden Bericht für den Bundestag ausarbeiten wird, während etwa ein Dutzend weitere Ausschüsse zu Stellungnahmen an den Auswärtigen Ausschuss aufgefordert werden (sogenannte Mitberatung). Ein besonderes Problem stellt die Beteiligung der vom Bundestag gebildeten Europakommission dar. Diese Kommission, die zur Hälfte aus Mitgliedern des Deutschen Bundestages und zur anderen Hälfte aus deutschen Mitgliedern des Europäischen Parlaments besteht, ist 1983 geschaffen worden, um den Deutschen Bundestag in grundsätzlichen Fragen der Europapolitik zu beraten. Nach dem hierfür gefundenen Verfahren würde der entsprechende Bericht der Europakommission nicht dem Plenum, sondern dem federführenden Auswärtigen Ausschuss und einigen anderen Ausschüssen zur Mitberatung mit der Massgabe überwiesen, im Plenum lediglich ein Bericht über das Ergebnis der Beratungen über diesen Bericht der Europakommission vorzulegen. Damit ist die Europakommission mit den klassischen Ausschüssen des Deutschen Bundestages nicht gleich-, sondern nachgeordnet, dennoch besteht über sie die Möglichkeit die Auffassungen der im Europäischen Parlament tätigen deutschen Abgeordneten in die Beratungen einfliessen zu lassen.

Aufgrund des Berichts des Auswärtigen Ausschusses, der die Stellungnahmen der übrigen beratenden Ausschüsse und das Ergebnis der Beratungen über die Vorstellungen der Europakommission enthält, findet dann die zweite (und letzte) Beratung im Deutschen Bundestag über das Zustimmungsgesetz zum Vertragsentwurf statt. Zum Vertragsentwurf sind Änderungsanträge nicht zulässig. Der Vertragsentwurf kann nur in toto angenommen oder abgelehnt werden. Wird das Zustimmungs-

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gesetz angenommen, so wird es dem Bundesrat zugeleitet. Das Zustimmungsgesetz kommt zustande, wenn der Bundesrat ihm zustimmt oder eine andere der in Artikel 78 Grundgessetz genannten Voraussetzungen erfüllt wird. Es kommt nicht zustande, wenn ein Einspruch des Bundesrates nicht vom Bundestag überstimmt wird oder eine erforderliche Zustimmung nicht erteilt wird. Auf die Einzelheiten hier einzugehen würde den Rahmen des Vortrages sprengen. Kommt das Zustimmungsgesetz nach diesen Vorschriften zustande, so wird es nach Gegenzeichnung durch die zuständigen Mitglieder der Bundesregierung vom Bundespräsidenten ausgefertigt und im Bundesgesetzblatt verkündet.

Zusammenfassend kann gesagt werden, dass das Zusammenwirken von Bundesregierung, Bundestag, Bundesrat und Bundespräsident erforderlich ist, um ein Zustimmungsgesetz zum Entwurf eines Vertrages zur Gründung der Europäischen Union zustande zu bringen.

II Bedarf es einer Änderung des Grundgesetzes, um den Vertrag in der Bundesrepublik Deutschland in Kraft zusetzen?

a) Vorbemerkung: Das Grundgesetz für die Bundesrepublik Deutschland ist eine ausserordentlich integrationsfreundliche Verfassung. Schon in der Präambel heisst es "Das deutsche Volk" sei "von dem Willen beseelt ... als gleichberechtigtes Glied in einem vereinten Europa dem Frieden der Welt zu dienen." Ausserdem heisst es in Artikel 24,der Bund könne durch Gesetz Hoheitsrechte auf zwischenstaatliche Einrichtungen übertragen, er könne sich zur Wahrung des Friedens einem System gegenseitiger kollektiver Sicherheit einordnen und werde hierbei in Beschränkungen seiner Hoheitsrechte einwilligen.

Der Text der Präambel, der die gleichberechtigte Mitgliedschaft der Bundesrepublik Deutschland in einem vereinten Europa als die angemessene Form des von der Bundesrepublik geforderten Friedensdienstes bezeichnet , stellt nicht nur eine Ermutigung, sondern auch eine Ermächtigung für Bundesregierung, Bundestag und Bundesrat dar,auf dem Weg zur Einigung Europas voranzuschreiten, sofern die Zielsetzungen des Vertragsentwurfs denen des Grundgesetzes nicht widersprechen. Bei der Lektüre der entsprechenden Artikel des Grundgesetzes, insbesondere der Präambel ("dem Frieden der Welt zu dienen"),Artikel 1 Satz 2 (Menschenrechte als Grundlage des Friedens),Artikel 9 Absatz 2(Verbot von Vereinigungen, die sich gegen den Gedanken der Völkerverständigung richten), Artikel 24 Absatz 2 (Wahrung des Friedens

.../...

durch Einordnung in ein System gegenseitiger kollektiver Sicherheit),Absatz 3 (friedliche Regelung zwischenstaatlicher Streitigkeiten), Artikel 26 (Verbot von Handlungen, die sich gegen das friedliche Zusammenleben der Völker richten, staatliche Verantwortung für die Kriegswaffenproduktion), Artikel 87a (Streitkräfte nur "zur Verteidigung") und der entsprechenden Bestimmung des Vertragsentwurfs (Präambel"In dem Willen durch einen noch engeren Zusammenschluss, Frieden und Freiheit zu wahren und zu festigen") , Artikel 9,3. und 4.Anstrich, Artikel 63, Abs.1 und 2, fallen die gleichgerichtete Zielsetzung und die ähnliche Sprache auf. Unter dem Gesichtspunkt des Friedensdienstes entsprechen sich also Grundgesetz und Vertragsentwurf.

b) Der Vertragsentwurf widerspricht auch nicht der Verpflichtung der Verfassungsorgane der Bundesrepublik Deutschland, die nationale und staatliche Einheit des deutschen Volkes zu wahren und in freier Selbstbestimmung die Einheit und Freiheit Deutschlands zu vollenden, noch nimmt sie ihnen diese Verpflichtung ab. Es bleibt insoweit bei der bestehenden Rechtslage, insbesondere bei Artikel 5 des Deutschlandsvertrages,in dem sich die drei westlichen Besatzungsmächte verpflichten, die Wiedervereinigung der Deutschen in einen demokratischen Staat zu unterstützen. Grossbritannien und Frankreich sind Mitunterzeichner dieses Vertrages und gleichzeitig Mitgliedstaaten der Europäischen Gemeinschaft. Die übrigen Mitgliedstaaten haben, soweit sie der

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Nordatlantischen Allianz angehören, diese Verpflichtungen mit übernommen (siehe z.B. Schlusskommuniqué der 16. Tagung des Nordatlantikrates in Paris vom 9.-11.Mai 1955, an der die Bundesrepublik Deutschland zum ersten Mal teilnahm; Europa-Archiv 1955/S. 7927 und zuletzt Washingtoner Erklärung des Nordatlantikrates v. 31. Mai 1984, Ziffer 7; Bulletin der Bundesregierung 1984 Nr. 65, S. 579)

An dieser Rechtslage würde sich durch die Ratifizierung des Vertragsentwurfs wohl nichts ändern. Es gibt jedoch Stimmen in der Bundesrepublik Deutschland, die fordern, dass dieser Aspekt noch Eingang in den Vertragsentwurf finden muss.

C) Artikel 24 ermächtigt den Bund zur Übertragung einzelner Hoheitsrechte durch einfaches Bundesgesetz, erlaubt jedoch nicht ein Aufgeben der Staatlichkeit der Bundesrepublik Deutschland zugunsten eines europäischen Staates. Zwar sieht der Vertragsentwurf die Übertragung von weitgehenden Befugnissen auf wichtigen Gebieten des staatlichen Lebens auf die Europäische Union in den dort vorgesehenen Grenzen und nach den dort vorgesehenen Verfahren vor. Dass dadurch die Staatlichkeit der Glieder beseitigt werden sollte, ist aber weder dem Text des Entwurfes zu entnehmen noch die erklärte Absicht seiner Verfasser. Eine weitgehende Übertragung von Befugnissen dürfte jedoch angesichts der Haltung des Grundgesetzes zur europäischen Einigung, das die Bundesrepublik als ein gleichberechtigtes Glied eines vereinten Europa ansieht, durch Artikel 24 gedeckt, der, sieht man davon ab, dass der Kern der Staatsgewalt nicht übertragen werden darf, seinem Wortlaut nach keine weiteren Grenzen enthält.
Zum selben Ergebnis kommen Everling (Integration 1/84 S.12-23,hier 15) Hilf und Schwarze (Eine Verfassung für Europa S.265 u. 32f)

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Ausserdem räumt der Vertragsentwurf den Mitgliedstaaten als solchen weitgehende Mitwirkungsbefugnisse über den Europäischen Rat und über den Rat der Union im Rahmen der Europäischen Union ein. Diese gehen z.B. bei der Bildung der Kommission noch über die Rechte hinaus , die dem Bundesrat in der Verfassung der Bundesrepublik Deutschland zugestanden werden. Ausserdem scheint der Bereich der Direktverwaltung der Europäischen Union nicht über den Stand hinauszugehen, der bereits heute in den Europäischen Gemeinschaften erreicht ist die Europäische Union wird konkrete Verwaltungsbefugnisse auf den Sektoren Kohle und Stahl, Landwirtschaft und Wettbewerb haben, während die gesamte übrige Verwaltung nach wie vor in den Händen der Mitgliedstaaten liegen wird.

Insgesamt kann also die im Vertragsentwurf vorgesehene Fortschreitung und Intensivierung der europäischen Integration als eine Aufrechterhaltung der Staatlichkeit der Mitgliedstaaten, also auch der Bundesrepublik Deutschland, angesehen werden. Ausserdem dürfen die Grundstrukturen der Bundesrepublik Deutschland nicht beeinträchtigt werden, denn solches ist nicht einmal durch ein verfassungsänderndes Gesetz möglich (Artikel 79 Absatz 3). Hier muss jedoch festgestellt werden, dass die Strukturen der Europäischen Union denen des Grundgesetzes nicht nur nicht widersprechen, sondern weitgehend entsprechen. Das gilt für das Friedensgebot ebenso wie für die Wahrung der Menschenrechte (Präambel Artikel 1 GG, 3. Anstrich der Präambel und Artikel 4 des Vertragsentwurfs). Ebenso wird

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das Demokratiegebot über das bislang in den Europäischen Gemeinschaften erreichte Mass hinaus verwirklicht (siehe Artikel 20 Absatz 1 und 2 GG, Artikel 14 bis 19 Vertragsentwurf). Das gleiche gilt für Sozialstaatsgebot (Artikel 20 Absatz 1 GG), auch der Grundsatz der Rechtsstaatlichkeit, besser der Herrschaft des Rechts, (Artikel 20 Absatz 1 und 3 GG), hat im Vertragsentwurf (Präambel 3. Anstrich sowie die Artikel 41 bis 44) seine Entsprechung gefunden. Auch der Gedanke der Gewaltenteilung sowohl zwischen Legislative, Exekutive und Judikative als auch zwischen Union und Mitgliedstaaten hat im Vertragsentwurf einen Niederschlag gefunden (siehe insbesondere den 3. Teil: Institutionelle Bestimmungen, sowie den 2. Teil: Ziel, Aktionen und Zuständigkeiten der Union Artikel 9 bis 13 , die sich insbesondere mit der Abgrenzung der Zuständigkeiten der Union und denen der Mitgliedstaaten beschäftigen). Das Prinzip der Bundesstaatlichkeit wird ebenfalls gewahrt. Zwar ist es nicht auszuschliessen, dass einzelne Befugnisse der Union zu Lasten der Länder gehen, aber von einer "Entleerung der Länderstaatlichkeit" (Tomuschat, Kommentar zum Bonner Grundgesetz, Art. 24, Rdnr. 68a) wird man in dem Zusammenhang schwerlich sprechen können. Es wurde schon darauf hingewiesen, dass die Anwendung des Rechts der Union vorwiegend Angelegenheit der Mitgliedstaaten und damit entsprechend der Kompetenzverteilung nach Artikel 30, 83 ff GG weitgehend Sache der Bundesländer bleibt.

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III Ergebnis

Vom Standpunkt des Grundgesetzes her lassen sich gegen die Gesamtkonzeption des Vertragsentwurfs und die Grundzüge ihrer Ausgestaltung keine verfassungsrechtlichen Einwände erheben.

Es gibt jedoch Befürchtungen, die umfangreichen Befugnisse,die der Europäischen Union übertragen werden sollen, könnten zu schwerwiegenden Eingriffen in die Wirtschafts- und Sozialstruktur der Bundesrepublik führen. Insbesondere das der Union zugesprochene Recht, auch gegen den Widerspruch der Bundesrepublik die eigenen Einnahmen der Union erhöhen zu können (Art. 71 Absatz 2 Vertragsentwurf), wird sicherlich in der Bundesregierung, im Bundestag und im Bundesrat einer kritischen Betrachtung unterzogen werden. Mögliche Widerstände können nur durch einen entsprechenden politischen Willen zur europäischen Einigung überwunden werden.
Wenden wir uns deshalb im nächsten Teil der Haltung politisch wichtiger Gruppen zu dem Vertragsentwurf zu.

B Die Aussichten des Vertragsentwurfs

Die Aussichten des Vertragsentwurfs, geltendes Recht zu werden, hängen naturgemäss von der Haltung wichtiger politischer und gesellschaftlicher Gruppen ab.
Diese lässt sich im Augenblick wie folgt beschreiben:

I Parlamente und Parteien

a) Die deutschen Abgeordneten des Europäischen Parlaments haben zu dem Vertragsentwurf wie folgt Stellung genommen:

	Sitzzahl	Abstimmung	teilgenommen	ja	nein	enthalten	nicht teilgenommen
BR DEUTSCHLAND	81	1	69	67	0	2	12
davon		2	64	59	0	5	17
C D U / 34		1	35 (28+ 7)	35	0	0	7
C S U 8)	42	2	37 (30+ 7)	37	0	0	5
S P D	35	1	30	28	0	2	5
		2	25	20	0	5	10
F.D.P.	4	1	4	4	0	0	0
		2	2	2	0	0	2

C D U Christlich Demokratische Union
C S U Christlich-Soziale Union
F.D.P. Freie Demokratische Partei
S P D Sozialdemokratische Partei Deutschland

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D.h., die deutsche Delegation hat ähnlich wie die Delegationen Italiens, Belgiens und der Niederlande dem Vertragsentwurf mit grosser Mehrheit ihre Zustimmung gegeben. Allerdings nahm auch in der deutschen Delegation die Zustimmung von der ersten zur zweiten Abstimmung ab. Zwar konnte die CDU/CSU die Zahl der Ja-Stimmen um zwei erhöhen, so dass 37 von 42 CDU/CSU-Mitgliedern für den Entwurf stimmten; aber bei der SPD stimmten in der zweiten Abstimmung 20 mit ja (-8), keiner mit nein, 5 enthielten sich der Stimme (+3). Auch in der FDP ging die Zahl der Ja-Stimmen von 4 in der ersten auf 2 in der zweiten Abstimmung zurück.

b) Der Verband der Heimkehrer und die Europa-Union haben sich aus Anlass der Verabschiedung des Vertragsentwurfs durch das Europäische Parlament an CDU/CSU, SPD und FDP gewandt. Ausserdem hat der Bundestag zwei Aussprachen zu dem Vertragsentwurf durchgeführt. Daraus lässt sich folgendes Bild gewinnen:

1) Alle Fraktionen des Deutschen Bundestages, auch die Grünen, haben den Vertragsentwurf an die Ausschüsse überwiesen mit dem Auftrag, die vom Europäischen Parlament erbetene Stellungnahme binnen eines Jahres abzugeben, d.h., der Deutsche Bundestag ist bereit, in die Debatte über den Vertragsentwurf einzutreten und die Sache nicht auf die lange Bank zu schieben. Andererseits wird man aus diesem Entschliessungsantrag nicht entnehmen können, dass der Deutsche Bundestag unbedingt zu einem Alleingang bereit ist. Sollte das Verfahren in anderen Mitgliedstaaten sehr viel

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mehr Zeit in Anspruch nehmen, so steht zu befürchten, dass auch der Bundestag nicht bis zum April nächsten Jahres seine Stellungnahme abgeben wird.

2) Der Deutsche Bundestag hat zu dem Vertragsentwurf zwei Aussprachen abgehalten, ausserdem haben sich die Fraktionsvorsitzenden auf Anfragen des Verbandes der Heimkehrer und der Europa-Union mit diesem Thema beschäftigt. Die sich aus diesen Unterlagen ergebene Haltung der Fraktion lässt sich wie folgt zusammenfassen:
CDU/CSU, SPD und FDP haben die Initiative des Europäischen Parlaments begrüsst,ohne sich in Einzelheiten auf den Vertragsentwurf festzulegen. Auch die Vertreter der Grünen haben die Debatte über den Vertragsentwurf gutgeheissen, "weil sie Gelegenheit gibt, öffentlich Alarm zu schlagen". Sie wollen sich "in die Verfassungsdiskussion erst einschalten, wenn die Zeit reif ist, das Gegenbild zu der jetzigen Europäischen Gemeinschaft einzubringen "(Abgeordneter Vogt, Kaiserslautern in der 68. Sitzung des Deutschen Bundestages,am Freitag, den 13. April, S. 4788 und 4790). Ähnlich lauteten die Äusserungen in der Bundestagsdebatte vom 7. Juli 1984.

Staatsminister Mertes hat für die Bundesregierung erklärt, ohne einer späteren genaueren Stellungnahme vorzugreifen, dass er "in dem Vertragsentwurf des Europäischen Parlaments einige wichtige Grundsätze unserer Europa-Politik wiederfinde" (68. Sitzung am 13. April 1984, S. 4791).Ähnlich positiv haben sich die Fraktionen auch gegenüber dem Präsidenten der Europa-Union, Bundes-

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präsidenten a.D. Walter Scheel und dem Präsidenten des Verbandes der Heimkehrer Werner Kiesling geäussert, der sich im Namen seines Verbandes für eine rasche Behandlung des Entwurfs eingesetzt hatte. Angesichts dieser grundsätzlich positiven Einstellung der Fraktionen, die Regierungserfahrung haben, ist damit zu rechnen, dass etwaige Schwierigkeiten bei der parlamentarischen Beratung, deren Auftreten nie auszuschliessen ist, im Sinne einer positiven Stellungnahme des Bundestages überwunden werden. Ähnliches darf auch vom Bundesrat angenommen werden, denn das deutsche Volk würde eine unterschiedliche Stellungnahme beider Häuser des Bundesparlaments, die aus Repräsentanten derselben Parteien zusammengesetzt sind, nicht verstehen.

Dieser Bericht wäre jedoch unvollständig, wenn nicht noch einige kritische Stimmen zitiert würden. Der Vertragsentwurf hat im Europa-Wahlkampf nicht die von seinen Urhebern gewünschte Rolle gespielt. Gelegentlich ist auch die Auffassung vertreten worden, die Probleme Europas könnten nicht "durch grosse politische Entwürfe gelöst werden". In der Presse hat es im Vorfeld der Europa-Wahlen kritische Stimmen zum Europäischen Parlament gegeben. Statt vieler will ich nur zwei Beispiele zitieren: "Stellen Sie sich vor, es ist Wahl und keiner geht hin" (Stern, 14.06.84) und "Ich gehe heute nicht zur Wahl" (Welt am Sonntag, 17.06.84). Es wäre schon überraschend, wenn die für diese Artikel Verantwortlichen dem Vertragsentwurf des Europäischen Parlaments mehr Sympathie entgegenbringen würden als der zweiten Direktwahl dieses Parlaments.

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Kritische Stimmen hat es auch in der Wissenschaft gegeben. Ich verweise hier insbesondere auf die Referate und Diskussionsbeiträge der internationalen Tagung des Instituts für Integrationsforschung der Stiftung Europa-Kolleg in Hamburg vom 3. - 5. November 1983, (Schwarze/Bieber, Eine Verfassung für Europa, 1984). Statt vieler möchte ich hier Professor Dr. Werner von Simson, Freiburg zitieren. Dieser zitiert zustimmend den früheren Bundeskanzler Helmut Schmidt. "Nun sollen wir uns also mit Europa identifizieren ... Ich glaube daran nicht" (aaO S.98).

Natürlich sind solche Äusserungen nicht unwidersprochen geblieben, wie der beigefügte Diskussionsbericht beweist (aaO S.110 - 113, hier 111,112). Aber die Skepsis gegenüber den Ambitionen des Entwurfs und seinen Realisierungschancen zieht sich doch, so scheint mir, wie ein roter Faden durch das ganze Buch.

Ähnliches gilt auch für die Beiträge, die in der Zeitschrift "Integration" (1/84) zum Vertragsentwurf des Europäischen Parlaments veröffentlicht worden sind. Auch wieder hier ein Beispiel: Unter der Überschrift "Europäische Verfassung für Visionäre?" schreibt Werner Weidenfeld, Professor an der Universität Mainz: "Die grundsätzlich wichtige und gute Idee, eine Europäische Verfassung zu erarbeiten, wurde vom Europäischen Parlament in einer Weise konkretisiert, die inhaltlich und prozedural mit Fragezeichen zu versehen ist" (S.37).

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III Die Haltung der Öffentlichen Meinung im allgemeinen

Die Haltung der öffentlichen Meinung im allgemeinen zu dem Entwurf des Europäischen Parlaments für eine Europäische Union ist schwer zu ergründen, weil diese Frage im Wahlkampf keine Rolle gespielt hat. Man muss sich deshalb diesem Problem auf Umwegen nähern. Der Entwurf des Parlaments sieht, grob gesprochen, die Einbeziehung neuer Tätigkeitsfelder in den Aufgabenbereich der Europäischen Organe, eine verstärkte Hinwendung zu Mehrheitsentscheidungen und einen grösseren Einfluss des Parlaments vor. Zu diesen Themenbereichen liegen durchaus Umfragen vor.

Zunächst zum Europäischen Parlament:
Ende 1983 wussten 83% aller Befragten von der Existenz des Europäischen Parlaments, gegenüber 76% im Jahre 1979, wobei die Männer mit 93% um fast 20% vor den Frauen mit 75% liegen. Ähnliche Zahlen wie die Frauen, weisen die Personen mit Volksschulbildung und die Arbeiter auf, während Personen mit Abitur, Beamte und Selbständige noch über den Werten für die Männer liegen.

Die Zunahme im Bekanntheitsgrad hat jedoch nicht zur Verbesserung des Ansehens beigetragen. Die Zahl der Personen, die einen guten Eindruck von der Arbeit des Europäischen Parlaments hatten, haben sich von 1979 bis 1983 fast halbiert (42 zu 23%) Die Zahl der Personen, die einen schlechten Eindruck hatten, hat sich nahezu verdreifacht (von 10 auf 29%). Die Zahl derjenigen ohne Urteil ist nahezu konstant geblieben (48 zu 46%).

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Vor diesem Hintergrund ist es nicht erstaunlich, dass mehr als die Hälfte der Befragten der Ansicht sind, die letzte Entscheidung soll nicht beim Europäischen Parlament, sondern bei den Regierungen der Mitgliedsländer liegen. Immerhin sind 44% der Auffassung, das Europäische Parlament solle in einigen wichtigen Bereichen verbindlich für alle Mitgliedsländer entscheiden. Der Unterschied zwischen Männern und Frauen ist erheblich. Die Männer sprechen sich mit 52% für mehr Kompetenzen des Parlaments aus. 46% wollen die Entscheidungsgewalt bei den Regierungen belassen. Bei den Frauen wollen dies 60%. Nur 36% sind für mehr Entscheidungsbefugnisse des Parlaments. Vor diesem Hintergrund ist es nicht verwunderlich, dass die Mehrheit aller Befragten eine gesamteuropäische Regierung ablehnt (56%), während nur ein gutes Viertel, nämlich 27 %, dafür ist. Bei den Männern beträgt das Verhältnis 35% dafür,50% dagegen. Bei den Frauen ist die Ablehnung mehr als dreimal so stark wie die Zustimmung (61% zu 19%).

Dem entspricht, dass mehr als die Hälfte der Befragten nicht bereit ist, wirtschaftliche Nachteile für die Unterstützung ärmerer Länder der Europäischen Gemeinschaft in Kauf zu nehmen, während 46% dazu bereit sind. Bei den Männern ist das Verhältnis ausgeglichen (49 zu 49). Bei den Frauen ist die Opferbereitschaft geringer (44 ja, 53 nein)

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Umgekehrt soll der Umweltschutz in Europa notfalls mit Zwang durchgesetzt werden. Dafür sprechen sich 94% aus, nur 5% sind dagegen. Zwischen Männern und Frauen gibt es keine signifikanten Unterschiede.

Was die Wiedervereinigung Deutschlands angeht, so sind etwa 2/3 der Auffassung, dass die westeuropäische Einigung darauf keinen Einfluss hat, d.h.,dass sie diesen Prozess weder erschwert (das glauben zwischen 16 und 19%) noch erleichtert, (das glauben nur 15%).Es passt in dieses Gesamtbild, dass nur 53% der Bevölkerung die Europa-Wahlen für sich sehr wichtig gehalten haben und nur 62% sich beteiligen wollten. Die wirkliche Wahlbeteiligung lag zwischen diesen beiden Zahlen,nämlich bei 56,8%.

Es gibt aber auch Zahlen , die ein anderes Bild vermitteln. So fühlen sich 2/3 der Deutschen "als Europäer" angesprochen, wobei das Europabewusstsein bei den mittleren Jahrgängen 30 bis 59 Jahre besonders ausgeprägt ist. Es steigt mit dem Bildungsgrad und der beruflichen Qualifikation. Personen mit Abitur oder Hochschulausbildung, Beamte, Selbständige und freie Berufe fühlen sich am meisten als Europäer angesprochen. Dementsprechend halten 2/3 der Deutschen die Zugehörigkeit zur Europäischen Gemeinschaft für eine gute Sache. Nur 6%, nicht einmal ein Zentel, hält sie für eine schlechte Sache. Dementsprechend würde eine Auflösung der Europäischen Gemeinschaft von 72% der Befragten ausdrücklich bedauert, nur 6% würden sie begrüssen, der Rest würde ihr gleich-

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gültig gegenüberstehen.

Diese Zahlen beruhen auf zwei Repräsentativumfragen, die das Sozialwissenschaftliche Forschungsinstitut der Konrad-Adenauer-Stiftung im Oktober 1983 bei 2000 und im März 1984 bei 3082 wahlberechtigten Bundesbürgern durchgeführt hat. Die Ergebnisse sind, wie die Konrad-Adenauer-Stiftung selbst zugibt, widersprüchlich. Sie schreibt:"Vor dem Hintergrund vielfältiger schlechter Meldungen über die Europäische Gemeinschaft ... ist das Europabild der bundesdeutschen Bevölkerung im März 1984 gespalten. Einerseits hat sich die allgemeine Zustimmung zur Europäischen Gemeinschaft, die Identifikation mit der Europaidee verstärkt, andererseits bestimmen auch in Deutschland Enttäuschung und Verärgerung ... die Einschätzung". Der Berichterstatter fährt dann fort: "Aber beide Tendenzen stehen nur in einem scheinbaren Widerspruch zueinander.Tatsächlich scheinen Verärgerung und Enttäuschung über die wirtschaftlichen Entwicklungen auf der einen Seite zu einer verstärkten Zustimmung zum europäischen Integrationsprozess auf der anderen Seite zu führen. Es scheint eine Stimmung vorzuherrschen, die man vielleicht unter das Motto stellen könnte : Jetzt erst recht ! "

In einer solchen durch Widersprüche gekennzeichneten Lage wird die Zukunft des Projekts von der Entschlossenheit der politischen Führung abhängen, die Europäische Union zu verwirklichen. Die Bundesregierung und die grosse Mehrheit des Bundestages haben nie einen Zweifel daran gelassen, dass sie entschlossen sind, auf diesem Wege voranzugehen.

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The Draft Treaty Establishing the European Union

The European Policy Unit at the European University Institute

The University of Strasbourg

The Trans-European Policy Studies Association

THE FINANCE PROVISIONS (ARTICLES 70 - 81) OF THE DRAFT TREATY ESTABLISHING THE EUROPEAN UNION

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THE FINANCE PROVISIONS (ARTICLES 70 - 81) OF THE DRAFT TREATY ESTABLISHING THE EUROPEAN UNION

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ABSTRACT

Conference version of report on the finance provisions of the draft treaty establishing the European union

1. The report starts with an analysis and discussion of the present budgetary and financial system as well as the budgetary problems facing the Community.

   Compared with national budgets and gross domestic product the Community budget is of very limited size and its impact on the economic development and the European integration process is of modest nature.

   The own-resources system contains several elements which were new and unproven on the international scene when introduced in the mid-70s. Member states are legally committed to finance common activities approved in the Council. The financing system is linked to the contents of the Community system and not to the economic clout of member states.

2. The budgetary powers of the three institutions reflect the powers invested in those institutions with regard to the legislative process.

   Council approves the legal acts and has the final word with regard to obligatory spending. The composition and total amount of non-obligatory spending are fixed in an institutional interplay between Council and Parliament with the Commission as the initiator.

   The Community system is thus far more coherent and logic than it seems at first glance.

3. In recent years different approaches to the integration process have been brought to the forefront.

   Until approximately 1980 there was only one approach. Council approved the contents of the common policies and financing was provided automatically by the own-resources system. The financial flows between member states were not given much attention. It was taken for granted that grosso modo all member states benefitted from their membership of the Community.

For the last four years this approach has been contested by some member states and those member states have focused on the budget as the primary instrument in the Community system. By way of budgetary discipline expenditure should be reduced to a certain well-defined framework with a specific ceiling for agricultural spending. The budget must produce an equitable financial result for all member states.

The negotiations concerning the future financing of the Community are, therefore, not so much a question of specific financial amounts, but a question of which Community structure and which approach to the Community member states wish for the rest of this century.

4. Parliament has for a long time been a protagonist and defender of the approach which served the Community well until contested a few years ago.

Parliament has supported the strengthening of the integration process and the deepening of the Community structure by way of new and other common policies to supplement the common agricultural policy.

This general philosophy is the main building brick. Not only in the finance provisions but also in the draft treaty as a whole. Parliament thus rejects the approach to give priority to budgetary considerations instead of the contents of the Community system.

5. Parliament proposes that a better and more well-defined distribution of responsibility between national policies and common policies are brought about. This will provide a better background to take up new common policies as it will alleviate national budgets to the same extent as the Community budget grows.

6. The revenue system proposed in the draft treaty is grosso modo in conformity with the present own-resources system. However, the VAT ceiling is rejected which will make it possible for the union to call up the amount necessary to finance common policies without any upper limit.

7. On the expenditure side the most important proposal is the doing away with the distinction of obligatory versus non-obligatory spending. This is in conformity with the proposal to do away with the Council's existing exclusive legislative powers and confer that power to the union as such.

The annual increase for total expenditure is determined in the framework of multiannual financial programmes.

8. A system of financial equalization is proposed without being very specific on how it would work in practice.

9. The present budgetary procedure is replaced by a complicated new procedure which, however, can be summarized in the way that it confers on Parliament nearly all powers in the budgetary field.

10. The report contains a short chapter on the implication for economic integration.

11. The general assessment of the possibilities for gaining support in member states for Parliament's proposals concerning the finance provisions is not very optimistic. On the basis of recent experience it does not seem likely that member states will agree to such sweeping changes as proposed by Parliament.

3 September 1984

I. 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 for the life span of the European Communities, but also the evolution of nation states, has given ample proof of the budget as a ninge in the historical process.

The American rebellion against British colonial rule was based upon a small fiscal question, but the politica 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 of 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 medieval 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 room of manoeuvre of the king 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 agreement 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 state 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 ten years ago, but Parliament now takes the view that these increased powers are insignificant, indeed totally unsatisfactory.

Pending the possibilities for 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 as 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.

II. The present Community budget

1. 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.

2. 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 criticised for its high expenditure level. This criticism does not seem to be corroborated by the figures in the annual Community budget. Measured in per cent 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 the 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 UA 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 illustrates the development of the co-operation on the expenditure side of the Community budget from 1973 to 1984.

3. Receipts

The Community is financed by customs duties, agricultural import levies and up to one percentage point 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 Britain 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 one percentage point 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 presents the total financial resources at the disposal of the Community in the period 1973 to 1984 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.

4. 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 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 ten member states and not a loose international cooperation encompassing ten national states.

III. The Community's budgetary procedure

1. 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 FEOGA 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 which 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 Community either to change the legal acts or to face a situation where the Community could not fulfil its legal commitments.

This is a case in point that the Community system with regard to distribution of powers among institutions 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 which was signed June 30 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 Britain.

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.

2. Existing powers of the three institutions

According to the treaty there is a clear-cut distribution of powers among the three institutions which 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 legal nature.

It does not preclude that the institutions circumvent the treaty and fix 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 that way. 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 Britain. 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 ago.

3. Conclusion

The danger of the present budgetary procedure is not that there are certain gaps where different inter-

pretations 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. It 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 maintain its prerogatives as laid down in the treaty or giving in to Parliament and accept a fundamental change in the distribution of powers concerning the budgetary procedure.

IV. The Community's present budgetary problems

1. 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 percentage point puts approximately 1,000 million ECU at the disposal of the Community. This is peanuts compared to 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 per cent 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 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 October 1 1985 which will make it possible to operate with a call-up per cent 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 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 per cent 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 per cent 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 six years from now see 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 five-ten 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 1.5 and 2%. Most member states were quite happy that the VAT increase was limited to 1.4%. Among them were Britain 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.

2. 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 198 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 Britain, supported by the Netherland 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 runs contradictory to the treaty.

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 the last paragraph of Article 203, 9, 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, 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 all other areas no common policies worthy of this word have 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, indeed, strange 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 cooperation it may even be cheaper for everybody concerned to let the Community do the job

instead of having ten 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 new and other common policies.

3. Budgetary imbalance

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

British calculations at that time pointed towards a financial burden for Britain, but it was rightly stressed by the other member states that the calculations were based upon the assumption of a static Community. If Britain 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 British 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 British Government took the view that as Britain's share of imports from non-member countries was above the Community average Britain 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 British Government evoked once more the budgetary problem but now it was presented in the sense that the so-called British net contribution was grossly out of line with Britain's relative standard of living.

In conceptual terms, this change of approach signified that from focusing on the receipts side only the British 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 British 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 Britain. This goes without saying that the whole basis of calculation of the 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.

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 ten 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 the case, at least partly and in softer terms, for nearly all other member states except Great Britain.

In the second half of 1983 and the beginning of 1984 an attempt was made to solve the British budget problem by focusing exclusively on the payment side of the Community budget.

The philosophy behind this approach was that the British 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 per cent of their GDP shows that Britain receives a share far below the Community average. (For 1982 total expenditure amounted to 0.75% of Community GDP while payments to Britain amounted to 0.49% of the British GDP). If the imbalance were corrected it would mean that the British

share would approach the Community average and there would be no British budget problem. In the meantime the Community should take upon itself to alleviate the British problem by partly compensating the expenditure shortfall[7)].

At the European Council meeting at Fontainebleau a mechanism was approved which 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 bugetary discipline will mean that in four or five years' time the present imbalance between common policies will still exist and the British budget problem will return to the negotiating table.

The weak chain in the armour is that the Community did not decide to establish new common policies and to regard the mechanism to solve the British 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.

4. 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 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 manoeuvring 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 some 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 straitjacket 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 - is looking 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 is far better as the

Community is producing a surplus but is, however, not used). 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 on the one hand have talked about a better balance between common policies and those who have used the term a better budgetary balance. This may sound as 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 logic 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 five - ten 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 realise 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 it accommodates 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 ceasefire 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.

5. 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 obtain 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 British 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 one per cent 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 British 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.

V. 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. VAT is to be the main revenue source while at the same time a special role is assigned to loans.

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 multi-

annual 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 borrowin

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.

VI. The main features of Parliament's proposal

1. General philosophy

The starting point for the analysis of the provisions concerning the finances of the Union (Articles 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 which developed in the period 1958-1980.

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 the 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 which was 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.

2. 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 the 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 a case in point on how this could be done in a way which 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 ten 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 ten 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 USA and Japan.

These are only a few examples of what can and should be done at 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.

3. Revenue

It is explicitly said in Article 71 that the revenue of the Union shall be of the same kind as that of the European Communities.

The revenue sources 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 per cent 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, subparagraph 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 per cent 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 neither for the annual increase in expenditure, nor 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 per cent above 1.4% were rejected with near-unanimity by the Council.

There has been no development for the last 6 - 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 cornerstone in the building 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.

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 - 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 work in the way that member states should 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, 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 longer 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.

The draft treaty maintains the present system where the member states collect the revenue. It is, however, foreseen that the Union may set up 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.

4. 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.

5. 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 it 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 determin 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 ones but at the same time open up 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.

6. 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 were not the property of the Community from the moment of collection because they 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.

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.

7. Budgetary procedure

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

- The Commission proposes.
- 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.
- 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.

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 forwarde 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 is 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 twelve 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 may 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 to oppose 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.

After having done so the Council forwards once more 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.

It is interesting to note that to do so the Council needs a qualified majority while simple majority is sufficient to make amendments in the first place.

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 fine-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 place 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.

VII. 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 how to facilitate and promote the 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[9] 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 standard 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 and then place a European federation on an equal footing with 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 pre-determined 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 interregional 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 USA is federal expenditure amounting to between 2% or 3% of GDP to reduce interregional 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 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 and reaches for example between 3% and 5% of GDP and the possibility for influencing the business cycle will grow as expenditure rises in per cent 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[10].

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 and 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 has not really been taken into account when the finance provisions were drawn up.

VIII. Conclusion

Our general appreciation of the finance provisions in the draft treaty is that it is primarily the institutional aspect which has 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 removal of the distinction between obligatory and non-obligatory spending is a case in point.

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 determines 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.

Judging by recent experience member states do not seem willing to accept the proposed finance provisions, primarily because they do not want to transfer the necessary powers to the European Parliament and to give up revenue sources of the size foreseen in the draft treaty.

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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 April 1970 (see Official Journal of the European Communities, No. L 2 of 2 January 1971).

2) Budget Treaty 2, signed on 22 July 1975, was published in the Official Journal of the European Communities, Brussels, No. L 359 of 31 December 1977.

3) Decision of 21 April 1970 on the replacement of financial contributions from member states by the Communities' own resources. OJ L 94 of 28th April 1970.

4) Council Regulation (EEC) No. 1172/76 of 17th May 1976 setting up a financial mechanism. OJ L 131 of 20th May 1976.

5) See "Member States and the Community Budget", by J. Ørstrøm Møller, Copenhagen 1982.

6) "Financing the European Economic Community" by J. Ørstrøm Møller. National Westminster Bank Quarterly Review, November 1983.

7) Proposal submitted by the Danish Government in August 1983.

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 May 1983.

9) MacDougall Report: The Role of Public Finance in the European Communities, EC Commission, Brussels, 1977.

10) Allen, P.R. and Kenen, P.B.: "Asset markets, Exchange Rates and Economic Integration: A Synthesis", Cambridge University Press, New York, London 1980.

3 September 1984

Table 1

Distribution of payments appropriations 1973-1984

	1973		1974		1975		1976		1977		1978		1979		1980		1981		1982		1983		1984	
	UA	Pct of total	UA	Pct of total	UA	Pct of total	UA	Pct of total	UA	Pct of total	ECU	Pct of total	ECU	Pct of total	ECU	Pct of total	ECU	Pct of total	ECU	Pct of total	ECU	Pct of total	ECU	Pct of t
1. Administration	240	6.0	337	7.5	335	5.8	420	5.8	497	5.7	676	5.7	771	5.4	820	5.0	1,038	5.6	1,106	5.0	1,160	4.6	1,209	
2. Research, technology, energy	72	1.8	78	1.7	116	1.8	118	1.6	143	1.6	192	1.6	254	1.8	290	1.8	292	1.6	410	1.9	591	2.4	644	
3. Reimbursement and support to member states	236	5.9	284	6.3	354	5.5	472	6.5	665	7.6	662	5.5	727	5.1	791	4.9	926	5.0	1,121	5.1	1,089	4.3	1,104	
4. Regional Fund	-	-	-	-	91	1.4	277	3.8	372	4.3	255	2.1	513	3.6	727	4.5	819	4.4	1,200	5.5	1,495	6.0	1,454	
5. Special arrangements to Britain	-	-	-	-	-	-	-	-	-	-	-	-	-	-	174	1.0	1,396	7.6	1,654	7.5	1,672	6.7	1,202	
6. Social Fund	50	1.2	239	5.3	138	2.1	256	3.5	317	3.6	285	2.4	596	4.1	735	4.5	620	3.4	1,022	4.6	1,431	5.7	1,369	
7. FEOGA guarantee	3,174	79.3	3,278	72.6	4,822	75.2	5,365	73.6	6,167	70.9	9,279	77.5	10,435	72.6	11,307	69.4	11,813	63.0	13,217	60.1	15,811	63.1	16,500	
8. FEOGA structure	124	3.1	128	2.8	184	2.9	218	3.0	297	3.4	324	2.7	403	2.8	601	3.7	529	2.9	772	3.5	719	2.9	757	
9. Third countries	105	2.6	169	3.7	324	5.1	137	1.9	216	2.5	265	2.2	405	2.8	509	3.1	798	4.3	803	3.7	981	3.9	893	
10. Miscellaneous	4	0.1	5	0.1	9	0.2	24	0.3	31	0.4	35	0.3	271	1.8	335	2.1	407	2.2	678	3.1	106	0.4	558	
Total	4,005	100	4,516	100	6,411	100	7,287	100	8,705	100	11,973	100	14,367	100	16,289	100	18,434	100	21,984	100	25,060	100	25,341	1

Source: The annual budget published in the Official Journal of the European Communities.

1) Account is not taken of the Commission proposal for supplementary financial resources of 2,071 mio ECU.

Table 2

Development of the Community's own resources 1973-1984. 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
- Pct. 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
- Pct. 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
- Pct. 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	-
- Pct. of own resources	-	-	-	-	-	-	-	-	-	-	-	-
VAT												
- 1 pct. of assessment basis	-	-	-	-	-	-	9,047	9,910	11,680	12,974	13,719	14,608
- Pct. of own resources	-	-	-	-	-	-	55.2	55.6	58.9	58.9	59.6	58.0
- Call-up pct. (VAT pct.)	-	-	-	-	-	-	-	0.73	0.78	0.92	0.99	0.99

Source: Preliminary draft budget for 1985, Volume 7, page 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.

(13)

The Draft Treaty Establishing the European Union

The European Policy Unit at the European University Institute

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THE INSTITUTIONS AND PROCESS OF DECISION-MAKING IN THE DRAFT TREATY ESTABLISHING THE EUROPEAN UNION

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1) INTRODUCTION

The Draft Treaty establishing the European Union constitutes so far the most tangible piece of evidence 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 Europeanist as Spinelli should devote so much of his effort to a proposal largely centered on institutional reform. Whether such an effort will eventually produce adequate results is thus a question which first and foremost requires an assessment of the institutional provisions included in the Draft Treaty.

Any assessment of institutional architecture, especially if still only on paper, is a task that requires a high degree of speculation. Institutional blueprints 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, is envisaging 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). If greater supranationalism should provide the solution to most EC problems, such a broad statement does not allow an assessment of the internal consistency of the set of institutional provisions contained in the Draft Treaty. Besides problems stemming from 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.

Very little can be done to fill out the gaps and to clarify the gray areas in the Draft Treaty. To the extent to which such a task remains unsuccessful, the assessment of the Draft Treaty's institutional provisions will have to rely on a high degree of speculation. But the other two sets of problems mentioned above can hopefully be circumvented more satisfactorily.

If the subjective motives and aims of the initiator of the Draft Treaty remain vague and undetermined, they may be assumed to be based on what could be considered an objective 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. As a matter of fact, institutionalization presents another, internal, aspect; that is the development in an organization of those characters that will permit it to become externally institutionalized vis-à-vis the 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).

An evaluation of the present institutional balance of the EC should provide us both with an idea of the shortcomings the Draft Treaty should presumably eliminate and with a measure of the degree of institutionalization reached by each relevant EC body under the present Treaties. Such findings could be projected 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 what institutions should prove to have the greatest potential for more 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.

Institutionalization theory has been conceived having in mind the political development of the nation-state. Considering that the proposed Union in many ways resembles a federal state, it can be studied with the instruments provided by the theory. The peculiar nature of the incipient European Political system,however, suggests a distinction between two different sets of the criteria proposed by Huntington and Polsby. A highly institutionalized body in the European political system should score highly on all four, but while two of the criteria, complexity and adaptability, can be seen as indicators of an institution's potential capability to perform 'tasks of authoritative resource allocation, problem solving, conflict settlement and so on', the other two criteria, autonomy and differentiation from environment, could also indicate an institution's propensity to act as a truly European, that is,supranational, rather than as an intergovernmental decision-making body (5).

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 imputable to defects of 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 is necessary for the continuation of 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'(7). Such a rigidity is in open contrast with the need for flexibility implicit in the functional and neofunctional principles animating the Communities.

Individual theories of integration have surely shown 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. The original intention to protect the Commission by insulating it from the national governments, 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 (8).

Moreover, whatever 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' paralyzing 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 re-introduction of majority vote would create a 'democratic deficit' which could hardly be filled under the present institutional arrangements (9).

The trend in favour of intergovernmental decision-making was also reinforced by 'protective' reactions of governments to the monetary, energy and generally economic crises of the seventies, 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 (10).

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'(11). Such an administrative inefficiency, probably originated by 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 taken by the 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 could be attempted. In order to do so, we shall examine in closer detail the Commission, the Council of Ministers with its spinoff and ancillary bodies, and the European Parliament, trying also to assess the degree of institutionalization of each institution. As for the other major EC institution, the Court of Justice, the only problem seems to be, according to the Three Wise Men, the preservation of its perfect independence. The Court therefore deserves the distinction of not being specifically considered, at least in this first part of the analysis, especially considering that another paper in this conference will be centered on the subject.

b) The Commission

In the Treaty of Rome, the Commission was conceived as a genuine supranational body, designed to be the 'motor' of the Community. According to the Treaty, the Commission was meant to be

the initiator of Community policy and guardian of the Treaties, as well as to act as a mediator among the member states and as an administrator of the affairs of the Community.

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). Applying to the Commission the Huntington-Polsby model, which measures adaptability on the basis of an institution's age, seen mostly as acquired ability to attract new functions, one must attribute the Commission a very low score on this criterion (12).

The Commission was sufficiently well equipped to perform the tasks neatly outlined in the Rome Treaty. But as soon as challenges (of an economic, technological, and even social and environmental nature) arose from sectors outside the official blueprint of the Treaty, the Commission was unable to respond. The lack of autonomy the Commission has in disposing of its own resources can certainly be considered to be a very severe handicap which has progressively 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, such a 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 director generals the member states are entitled to, they do not respond to its actual task performing needs. 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 lack of legitimacy of the Commission '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' (13). As pointed out by

Ernst B. Haas, the concept of legitimacy hinges on participation/representation and performance (14). Through the early years of the Community the Commission drew its legitimacy from the representativeness of the member governments, signatories of the Treaty. There is enough evidence that, with the possible exception of the honeymoon period that followed the Treaty of Rome, the investiture given the Commission by the member governments was conditional on the preservation of some means of national control. The national quota system with which Commission officials are selected, even if considered to be non-influential in terms of the behavior of individual Commissioners, certainly has an impact on the institutional integrity of the Commission. At least one-third of the very important A1 positions (mostly director generals) is filled by 'parachuting' outsiders, generally national civil servants, directly into the position, while the number of director generals who work their way up from starting positions below A3 is very small. The reasons and some of the implications of this situation are clearly stated by Stanley Henig:

> It has always been considered undesirable for any one nationality to gain a stranglehold over a particular sector of policy making. there is a general rule that a Commissioner and his director general will be of different nationalities and also a broad understanding that normally directors and directors general to whom they work will be from different countries. This also applies to heads of division and directors. Since each country wishes to preserve its share of these senior posts, procedures for the filling of vacancies may be cumbersome. Unless there is to be a redistribution between nationalities involving

> potential upheaval in a number of DGs, vacancies at A3 level and above have to be filled by somebody from the country to whom the post 'belongs'. This frequently necessitates outside recruitment at the behest of that country even if suitable internal candidates of other nationalities are available. Where posts are filled by internal promotion, merit will only be one factor to be taken into account. The career pattern of an A7 entrant may well be limited to a rise to A4 unless he or she is lucky enough to win what amounts to political patronage (15).

According to another student of EC bureaucracy the co-optation of national officials into the decision-making process presents 'a major challenge to the 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 sub-committees involving representatives of the member countries, never develop a sense of belonging to a European civil service (16). 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 (17).

c) The European Council, the Council of Ministers and COREPER

In the opinion of at least one attentive student of EC institutions and decision-making, 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 (18).

The Council, in its various ministerial manifestations has been expanding its policy making and even policy initiating powers chiefly at 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 intergovernmental 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, but maybe because of, this seldom acknowledged importance of working parties, they are often staffed with home-based experts with very little familiarity with EC methods and

propensity for compromise. Some working-parties' members desire to preserve unchanged the national position can considerably delay or even prevent the reaching of decisions (19).

The cumbersome decison-making processes, now almost exclusively centered on the Council in its various forms (Council(s) hereinafter), being based on lengthy preparatory stages in ad hoc or standing committees at various levels, and involving long bargaining sessions amongst its own members and always requiring the mediation of the Commission, are a reflection of 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 Council(s) and their activities are directly controlled by the member states' 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 also 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 albeit discrete functional complexity (20).

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.

Manca una analisi sul ruolo del Comm. Ecc.

d) The European Parliament

The European Parliament has been termed as 'not much of a parliament' and is much more often mentioned for the powers it lacks than for the powers it does have (21). Formally the EP has budgetary powers, control over the executive, a legitimizing

function and some legislative powers. But in practice, however, despite direct elections, such powers remain rather limited.

Parliament's budgetary powers are formally the most important of the lot, 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 budget) until the new budget is approved (22). Parliament can also amend non-compulsory expenses, that is expenses pertaining to policies not explicitly provided for in the Treaties. These expenses do not amount to more than twenty per cent of the whole budget, and Parliament alone can increase them only through a very complicated procedure and not by very much. 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. As a matter of fact, 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 (23). MEPs also lament the non-existence 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 do not favour the autonomy and the coherence/boundary definition of Parliament, despite the relatively small number of dual mandates left after direct elections(24). An evaluation of the importance of the other powers of Parliament, 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, especially considering that the new Commission would still be appointed by the 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 faculty to express opinions on Commission proposals with very little or no impact on the legislative output. Such a situation has even deteriorated for the EP, since the emergence as prime policy making body of the European Council, with which the EP has no organic relationship. Given the paucity and scarce salience of Parliament's powers and functions not very much 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 activities of the EP seems to have also 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 is the testimony of the EP's attempt to give itself the powers and functions of a constituent assembly.

c) EC decision-making. Institutional explanation.

The main thrust of Spinelli's argument is that the Community has to give itself a new Treaty not only to fulfill 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. Spinelli's main motive is well grounded, but if an effective cure has to be sought for the Community's malaise one has to go beyond the lack of political will explanation, barring which no solution can be found. 'Political will' is a very fuzzy term, and a very difficult variable to operationalize. It can be considered as a dichotomous variable (either negative or positive), but, probably more accurately, as a continuous one, measurable on a scale. Although the motives of the national 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' might be neutral or even moderately positive with respect to European integration. It does not seem to be farfetched to put forth the hypothesis, comforted by several federal and consociational experiences, that the presence of adequate institutional structures might actually help shape the 'political will' of the various would be members of the Union (245

A solution to the present problems of the EC can therefore possibly be found by trying to see what is wrong with its institutions. But in order to avoid the pitfalls of inane tautologies, one has to accept the view that EC institutions' 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. What can be more disturbing for the 'European' cause is the trend towards a lower level of institutionalization characterizing the evolution of the Commission, while the Council(s) seem to have at least the adaptability to fill the vacuum (26). The combination of these two trends is at the basis of the decreasing dynamism, efficiency and ultimately 'Europeanism' of EC decision-making.

NO

All policies not decisions taken by the Council are multi-state in character

Unfortunately, as mentioned in an earlier footnote, the Huntington/Polsby model gives us criteria to measure institutionalization but does not explain it. 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 (27). This is certainly not the place to attempt a revision of institutionalization theory, and it might be enough to say that the legitimacy and accountability of an organization must be important pre-requisites 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 can be explained with the gradual exhaustion of the tasks provided for in the Treaty or with their declining importance vis-à-vis the emerging environmental challenges (economic crisis, technological gap, defense 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 on the Commission an 'unfair'advantage, allowing them to escape the strait-jacket represented by the Treaty and stemming from their position between the European political system and the set of the national ones. 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 picture looks very different. 'The agreement to agree' existing in the Council might be more than adequate to give it the needed coherence.

The individual components of the Council, receive their legitimacy from the national Parliaments to pursue the national interest (albeit disguised as a European one). And as branches of the 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 interest'. 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. Hence the 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 is 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 negatively affected their internal and external institutionalization in the European Political system. The development of both institutions has been hindered by their being subject to 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 adapt to the performance of 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 the very limited external powers afforded it by the Treaties have discouraged any sort of internal institutionalization (28).

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 intergovernmental 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 looks like external institutionalization might be favoring 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 induced the Council to elicit the cooperation of the Commission even for those policy areas outside its competence. It is possible that the structures the Commission is giving itself to accommodate the requests of the Council(s) will give it again 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 the diagnosis is correct, those bodies having weaker supranational inclinations have shown greater ability to face the difficulties of the Community. The Council(s) have displayed adequate adaptability and have been able to rely on member state resources in order to maintain an acceptable level of autonomy and complexity. On the contrary, among those bodies having greater supranational potential, the Commission has been unable to go beyond certain structural and juridical limits. 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 together effectively the two more supranational bodies.

Appropriately, the first institution presented and discussed in the Draft Treaty is the European Parliament. Art. 16 identifies the most important functions of the European Parliament in a very modern way. No modern Parliament exercises by itself legislative functions, nor does it create in its own ranks the executive. Well functioning Parliaments (and political systems) are based on the sharing of powers with the executive in some issues and on their ability to act as stimuli for the activities of the executive and as checks on their behaviour. Indeed, the European Parliament, as portrayed in art. 16, occupies a central position in the European political system. It participates in the three main areas of activities of other bodies: legislation, budgetary processes, international agreements. Therefore, it comes into contact and enters into a dialectical relationship with the Council of the Union which is involved, according to art. 21, in the legislative and budgetary procedures and enjoys powers 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: over the political programme of the Commission, over the activities of the Commission (political

supervision), over the Commission as such. Indeed, once the President of the Commission has been appointed by the European Council, the fundamental relationship and its working and very survivability are in the hands of the European Parliament. From formal investiture through political supervision to a motion of censure, the relationship between the European Parliament and the Commission comes very close to the ones established in the forms of pure parliamentary governments, though with some significant differences. These will be better appreciated following an analysis of the Commission itself.

There is no doubt that the Commission is meant to represent the executive in the European political system (29). 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 (that is, by the Heads of State or Government of Member States who, 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 intepreted, this clause entails a shift of power away from the European Council towards the European Parliament. In

practice, away from an intergovernmental 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 art. 28, that is:

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 thee 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,
- exercise the other powers attributed to it by this Treaty.

The role of the Commission as the engine of action is therefore specifically recognized and codified. The Draft Treaty has correctly identified in the Commission a supranational body capable of dynamic initiatives and it has attributed to it the relevant powers. Moreover, the Commission seems to combine in its structure and functions the two criteria of authority and legitimacy essential according to Haas for the production of positive institutional outcomes. Of particular relevance is the fact that the European Council, an intergovernmental body, practically loses control over the Commission following the designation of its President and its participation in an appointment of the various members of the Commission. Hence, the Commission acquires a considerable amount of discretionality in the carrying out of its tasks - important as they are. Having become responsible to another supranational body, the European Parliament, a major opportunity is created for the launching of a virtuous circle. In the process, the Commission and the Parliament would act to enlarge supranational functions and powers. The lack of provisions 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 possible to detect the means through which the European Council might be able to prevent the President and the Commission from undertaking actions not to its liking. It is only possible to envisage some informal means of pressure to be utilized, such as the formulation of recommendations and the undertaking of commitments in the field of cooperation, the information of Parliament about the activities of the Union in the fields in which it is competent to act, and, above all, the exercise of other powers attributed to it by the Draft Treaty. It is conceivable that through recommendations, the underlining of previous or future commitments, informations, 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 which is in the intention of the draftees.

Only theoretically could the European Council resort to mustering support from the Council of 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 are limited however. 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, its inputs can be easily overruled. Of course, the case may be extreme but if it is so, it will exactly be because of its relevance.

Apparently, the Council of the Union retains a major weapon. When it comes to the drafting of the budget - initiated and submitted, in accordance with the Treaty, by the Commission - the Council of the Union may make its approval very difficult. This can be done either on the sheer merit of the proposals or as a form of blackmail or bargaining when the conflict of interests and policies between the Commission and the Council of the Union itself (or the European Council, since one must take for granted that the Council of the Union or some of its members might act abiding by some preference or desire expressed by the European Council or, again some of the latter's members) is very sharp. However, in such an occurrence it will be up to the European Parliament to decide the issue. It will not be easy, due to the predictable ample series of 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 represents the promise of a shift of authority into a supranational direction. No doubt, this would represent a major achievement. However, before giving a positive evaluation to the virtuous linkage between the Commission and Parliament, one must further inquire into the way powers can be effectively exercised and, more precisely, which areas can be affected by these powers and which areas can, on the contrary, be insulated. More powers in fewer and irrelevant areas will, of course, represent not much of an achievement.

b) Issue areas

It is a well known contention of the functionalist school that efficient performance in one issue area is likely to produce spill-over effects. While it is difficult to assess the validity of this principle in the concrete experience of the EEC, it appears rather clearly that the Draft Treaty is not inspired by this principle. Indeed, it is well spelled out that common institutions will be entrusted 'only with those powers required to complete successfully the tasks they may carry out more satisfactorily than the States acting independently'; (preamble) that to attain the specified objectives, 'the Union shall act either by Common action or by cooperation between the Member States' (art.10) - even though, what is important, 'the fields within which each method applies shall be determined by this Treaty' (art.10); and, finally, '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. 12.2).

The balance between exclusive and concurrent competence is then not pre-established, rigidly fixed. This would alow not simply some discretionality in terms of interpretation and action, but as it is pointed out in several instances, the conversion from forms of cooperation into common action of the Union. However, there is a clause of safeguard in this process: art. 68.3 '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'. Even though the exceptionality of this derogation is explicitly stressed, it appears that subject to a 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'. On the other hand, the restoration of some field to cooperation or to the competence of the Member States as decided by the European Council is a powerful weapon against the supranational inclinations of the Commission. It is not possible to speculate on the likelihood of these developments nor on the manner they might produce themselves because Art. 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. It is in the (potentially shifting) balance between exclusive and concurrent competence concerning economic policies that the Union, particularly through the ability and the intiative of the Commission, might move from cooperation to common action. Indeed, writing some time ago in an anticipatory vein, Haas suggested that if institutional evolution were to occur along the lines of a 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' (30).

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 (31). Not much different could probably be done in the light of previous commitments and actions. 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 center and the member units: both share in the management of crucial fields of social and economic action',

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 art. 53 might not mean much, even though necessary. The important step will be taken by the Commission which is entitled, in s'everal instances, to define the guidelines and objectives to which the action of the Member Sates 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 analyzing and assessing the overall distribution of power among different institutions. It has been in the past (32), 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. However, the sorest issues in the past have concerned on the one hand the transfer of resources (revenues) from Member States to the EEC and their allocation. The Draft Treaty contains some innovative propositions. In particular art. 71.3 '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' and art. 74.2 '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'. 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 funds to carry out the activities and the policies of the Union are, of course, very important and their amount and the way they are collected will tell us a lot about the availability of the Member States to contribute to the process of unification and to strengthen it. Indeed, the financial autonomy of the Union is a clear indicator, together with its new juridical status, of its growing potential for institutionalization. Since the Draft Treaty contains many provisions 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, one would surmise that in those instances, the Union will acquire more differentiation from the environment (albeit with a note of warning: some bodies can and must become more differentiated, such as the European Parliament and the Commission; 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 potentialities for both types of differentiation. Both have to be assessed and specified.

Financial and juridical autonomy leads to external differentiation from the environment. This is further strengthened when there emerges substantial 'consensus on the functional boundaries of the group and on the procedures for resolving disputes which come up within those boundaries (33)'. While we have seen that, appropriately, the functional boundaries have been left somewhat flexible, the procedures for resolving disputes may be analyzed from two points of view. The first one is the existence of a specific body, the Court of Justice. The second one is the provision of a Conciliation Committee (art. 38.4), which shall consist of a delegation from the Council of the Union and a delegation from the Parliament and with the participation of the Commission, empowered with the resolution of conflicts deriving from divergent views on draft laws.

In itself, the EEC has shown to possess enough adaptability, that is the ability to face environmental challenges and to survive and change in its environment. The formulation of the Draft Treaty itself is evidence of this, at least potential, adaptability. Finally, the European political system has always been characterized by complexity, that is the existence of organizational subunits, hierarchically and functionally, and differentiation of separate types of organizational subunits (34).

In the light of the Draft Treaty which institutions present the greatest potential for institutionalization within the European political system? There is little doubt that the European Council has already reached the upper limits in terms of its potential for institutionalization. It cannot exceed certain boundaries in its autonomy from the Members states as it cannot acquire more adaptability. Indeed, its very strength, apart from its potential for more or less supranationality, is dependent 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 differentiation or any increase in complexity. While, of course, 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 most probable and best equipped candidate for a strategy against the development of supranational patterns of EC decision-making appears to be the Council of the Union. Because of its nature, being made up of representations of the Member States appointed by their respective governments and led by a Minister who is permanently and specifically responsible for Union affairs, the potential institutionalization of the Council of the Union enjoys some favorable conditions. 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 art. 21 not only specifies that the Council will participate in the legislative and budgetary procedures and in the conclusion of international agreements, but that it will also exercise powers in the field of international relations besides the other powers attributed to it by the Draft Treaty, it is likely that the Member States will be willing to provide their representations with all those resources needed to confront the Commission and Parliament effectively. Therefore, the adaptability, the differentiation, and the complexity of the Council of the Union are likely to grow. That is, the Member States will have to decide how many personal and physical resources they are willing to devote to a body which is the most likely to protect their interests and to promote their preferences in the face of the choices made by the Commission and Parliament. 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 representation will not simply be a sign of the interests each individual State has in European affairs, but a deterrent against 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 preempt 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 (35).

In order to evaluate the potential for institutionalization of the two more supranational institutions, one must engage in some speculation. This speculation, though, has to be founded on the one hand on the past experiences of the Commission and of Parliament, on the other on the indications emerging from the Draft Treaty. The choice of the President of the Commission by the European Council assumes particular importance in this light. Presumably his designation, because of the utmost importance of his role, will have to be unanimous. It is therefore possible that a man lacking a prominent personality will be selected (36). It is also possible that the subsequent constitution of the Commission by the President will be strongly influenced by his consultation of the European Council. However, as we have already stressed, Parliament might then exercise some of its powers. 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 much on the vigilance of public opinion).

Much more, in the light of past experiences and grievances, will be the product of an appropriate organization and structure

of the Commission. It is easy to foresee a major confrontation of opinions, interests, and strategies when art. 26 will have to produce its effects: 'The structure and operation of the Commission and the Statute of its members shall be determined by an organic law'. Until then only some speculations may be put forward and related to the outcomes desired by those who want to relaunch the process of unification.

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 that of viable cabinets, but it should not be fixed the organic law in order to allow for that flexibility that the Draftees of the Treaty have strenuously sought to preserve throughout the institutional design. It is easy to foresee than an important choice will be made concerning 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 could appropriately be 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 programs.

In the past, the Commission has alternatively played a very dynamic role and a rather subordinate one. Its limited internal institutionalization has negatively affected its performance,

hence its external institutionalization. If the President and the members of the Commission are capable of pushing their autonomy to the extreme limits, are willing to devote their resources to a strengthening of 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 very propulsive position in the overall institutional design. We believe that the most favorable conditions are created by the formulations of the Draft Treaty. Moreover, since an institutional arrangement takes shape through a dialectical confrontation among the different institutions which comprise it, it should not be forgotten for a moment that the Commission has plenty of opportunities to enlarge its role vis à vis the other institutions. Most important, by mustering the support of the European Parliament it may be able to strengthen the Parliament, while legitimizing itself. By facilitating the institutionalization of the Parliament, the Commission also creates the premises for a mutually advantageous relationship. In fact, the 'engine of action) is located in the circuit of this specific relationship. It will be the flow of legitimacy and support from Parliament to the Commission and of the ideas and initiatives from the Commission to Parliament which will give birth and sustain most, if not all, the supranational potentialities.

The European Parliament ought now to enjoy several preconditions for a successful institutionalization. The first

elective term might be considered a sort of apprenticeship period. The awareness of the drawbacks and the hindrances to its action has already been translated into the Draft Treaty. Other organizational and structural inconvenients have been discovered. Above all, however, the European Parliament enters into a phase in which either it succeeds in creating a sort of self-propelling institutionalization or it will be doomed to survive as a rubberstamp or merely a representative assembly. In the latter case, the risk being of further delegitimization in the eyes of too many voters.

Theoretically, the European Parliament may enlarge its scope of support through the activities undertaken by the various parliamentary groups. The role of transnational parties becomes particularly important. The risk is, as several instances of Presidential governments show, that the executive (that is the Commission) will represent general, probably progressive, in all likelihood supranational, interests, while Parliament might become the repository of particularistic, probably defensive, in some cases purely national, interests. There is no guarantee that this syndrome will not manifest itself, especially if the institutional circuit were to encounter unforeseen initial obstacles. These obstacles 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). Insofar as they are utilized by their holders as an instrument through which they can represent 'European issues', in their respective national Parliaments they constitute a useful component in a complex linkage process, which admittedly could also go the other way around. It would as a consequence also make unlikely the evolution of a process of growing internal complexity. In view of the several important and technically significant tasks the European Parliament will have to fulfill, the creation of appropriate expertise will become an urgent need. Moreover, through an increasing differentiation and a growing complexity and 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 of becoming institutionalized 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 opportunities for a positive outcome, even though many variables are not in control of the 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 structural 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 elections of the Parliament might offer the deus ex machina for the integration process' (37). It is appropriate, then, that after a brief analysis of the, mostly unexploited, potentialities of a directly elected Parliament and the indication of the positive changes the Draft Treaty introduces for its role, one might turn to the issue of voting.

While it might be true that in many cases, the voting procedures and the need for unanimity have hindered, delayed or prevented some important decisions, it is also true that all Member States have been unwilling to abandon that safeguard of their interests represented by unanimous voting, that is by individual veto powers. Morevoer, the persistence of the clause of unanimity in the workings of the Council of Ministers is less a cause and more a reflection of the difficulties of the integration process. All this said, however, it remains that the overcoming of

unanimous voting would represent a real achievement, or at least would oblige all Member States to look for effective conciliation procedures. The introduction of new rules of the game would automatically impinge upon the behaviour of the players, their expectations an their inclinations.

In a very pragmatic and cautious way the Draft Treaty creates a series of situations in which qualified majorities are necessary and required. 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 will not simply allow for some time to ponder the matter but also to proceed to the necessary conciliation of interests and opinions. However, in all cases a majority, though qualified, must emerge. 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, a powerful brake may come into being if the Member States so decide. Only exceptionally will the Council of the Union be required to resort to the unanimity of representations (abstentions not counted); that is only when expressly specified by the Treaty. A major loophole, however, remains open for the European Council. Art. 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 represent at the same time a sort of mortgage the Member States might want to put on the process of European unification and the 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 provided in the Draft Treaty and which can be activated by the dissenting Member States. Obviously, there is no easy solution to this real stumbling block, but the fixation of 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 incorporates, utilizes, gives coherence and clarity to many proposals for change and improvement formulated by different committees in the past (38). 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 (38). It does so in a way which can be defined at the same time as pragmatic and gradualist, and ambitious (39).

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 particular, it gives a greater role to the European Parliament legitimized by its direct election and attempting 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 strategy is very weary in reducing ipso facto the powers and trimming the prerogatives of the Member States. No clear cut break is envisaged with the recent past, which might be counterproductive. Indeed, the draftees 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' (40). Behind this simple sentence, a wide field of interpretation and initiative and action for common institutions opens up. 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 draftees are aware of the impossibility to start from scratch and they have taken into account the assets as

well as the liabilities of the existing institutional arrangement. Morevoer, they have tried to preserve whatever institutional dynamism the existing arrangements still possess and to exploit it in the desirable direction. At the same time they have squarely tackled the critical problem, that of the balance, or better imbalance of powers and functions between intergovernmental bodies and supranational institutions. Their ambition is most evident in the well designed efforts to create an overall situation in which functions and powers will be gradually, but irresistibly shifted away from intergovernmental bodies to supranational institutions, specifically from the Council(s) to the institutional circuit created by the mutually advantageous relationship between the Commission and Parliament.

The hope and the promise of the arrangement so devised are that the streamlining of the decision-making process, which, however, does not entail any deliberate or manipulatory exclusion, will prove to be successful because capable of combining elements both of participation/representation and performance. Moreover, this arrangement does not contemplate the concentration of power in one single body, which would lead to a decision-making paralysis were that body become and prove unable to exercise power. Nor does it excessively diffuse power among too many competing institutions, which would lead to fragmentation. While some complexity is to be found in the web of relationship 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 produce positive outcomes. 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' (41).

4) CONCLUSIONS

All this said, it is time to come to a global assessment of the institutional provisions of the Draft Treaty. A fair amount of speculation is needed. We will keep it on the grounds of some well-established criteria. In the first place, there exists in the Treaty a profound awareness of the past difficulties and the failure of more or less encompassing blueprints for change. The difference with similar past attempts is that the Draft Treaty is the product of an elaboration by the popularly elected and representative body of the European political system. It cannot be shelved or put aside without entailing 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.

However, this does not automatically mean that a shift of powers and functions from the intergovernmental bodies to the

supranational institutions will necessarily follow. The Treaty indicates with all clarity the steps to be taken, the safeguards, and the intentions. It is at the same time flexible, for instance in making room for intervention by the intergovernmental bodies at practically all stages in the decision-making process, and vague, for instance in the vital field of voting procedures. The manner in which some of the several unspecified clauses will be filled and clarified; the manner in which other clauses will be interpreted, allowing quite a fluctuation between intergovernmentalism and supranationalism, more than anything else, the manner in which the Commission and Parliament will be willing and able to acquire, assert, and exercise their functions and powers, all will make a major difference in the implementation of the Treaty. 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 a show of capability in performing accurately their functions of decision-making and implementation (42) and participation/representation, respectively, plus the effective institutionalization of the Council of the Union, which will testify of the will of the Member States to accept a greater amount of supranationality, might create the premises for a quasi-federalist arrangement. It is not farfetched to anticipate in the long run a withering away of the European Council insofar as the various Member States will feel

confidently represented and protected by the Council of the Union. This body, acquiring some of the already rather limited functions of the European Council, might transform itself in a sort of Second Chamber representing the States and with some specific voting procedures.

It is not simply that requirements of functionality will push into 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 in such a away as 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 will develop among the permanent representatives of the Member States.

Perhaps, the weakest element in the overall architectural construction is constituted by 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 constraints against non-integrative behavior ought to be foreseen and some disincentives envisaged. Another weak point or at least an element which might create problems is the openness of the Treaty to accession by new Member States. In the light of past experiences, new Members will probably slow 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 create 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 is that it 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 lot in terms of achievements and performance will depend on the way the issues of the voting procedures, especially in the European Council, are solved. Much is also dependent upon the way the Commission and the Council of the Union will structure their bodies, will recruit their staff, will provide incentives, will be willing to test the limits of their influence, authority,

political imagination. Finally, and probably most significantly, many unpredictable developments may result from the complex web of interrelationships which are established on paper and will come into being in practice, particularly in the frequent triangular relationship among the Council of the Union, the Commission, the European Parliament. It is our contention that, given the need for a prestigious designation by the European Council and enjoying the prerequisites of a potentially powerful and influential office, the President of the Commission will feel under pressure to exploit all his potentialities. This ought to compel him (or her) to look for support from the European Parliament and to establish that virtuous path whose treading will lead to further integration. It seems to us that the institutional circuit contains several relevant potentialities to be exploited. It is a quasi-federalist structure in the making and capable of overcoming the foreseeable obstacles. If ratified, the Treaty will have to be implemented and fulfilled through many political maneuverings, political initiatives, and innovative behavior. As it stands, on the whole, it already contains the necessary ingredients to 'continue and revive the democratic unification of Europe': institutional wisdom and political will could produce positive outcomes.

NOTES

1) Altiero 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 delegates to an organic law the determination of 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: Douglas W. Rae, The Political Consequences of Electoral Laws, New Haven, Yale University Press, 1967; Richard S. Katz, A Theory of Parties and Electoral Systems, Baltimore, Johns Hopkins University Press, 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, cit.; Our observation on the vagueness of Spinelli's motives is only meant to underline the ensuing methodological problems. Spinelli's exposition of his motives and final aims is made less than crystal clear by a number of political constraints and practical considerations. These, however, must perforce be ignored here. We are also aware that by implicitly

defining the Council of Ministers as an intergovernmental institution we are not doing full justice to its supranational attributes (see Joseph Weiler, Supranationalism Revisited - Retrospective and Prospective European University Institute Working Paper, Florence, 1981.) But for all practical purposes, and for our analysis, the erosion of the supranational features of the Council, as pointed out by Weiler himself (Supranationalism, cit., pp. 36-40), authorizes the more reductive definition.

4) The four categories will be termed respectively as: adaptability, autonomy, coherence/boundary definition, and complexity. See: Samuel P. Huntington, Political Development and Political Democracy in World Politics, 1965, 17: 386-430; Samuel P. Huntington, Political Order in Changing Societies, New Haven, Yale University Press, 1968; Nelson W. Polsby, The Institutionalization of the U. S. House of Representatives, American Political Science review, 1968, 62: 144-168. On internal and external institutionalization see: Maurizio Cotta, Classe Politica e Parlamento in Italia. 1946-1976, Bologna, Il Mulino, 1979, p. 285 et passim.

5) An institution scoring highly on the first two criteria and low on the remaining two, would paradoxically be more detrimental to the European political system than an institution presenting low scores on all four accounts. In fact a situation would be created where an institution would

be performing the vital functions of a system (the EC) while pursuing the goals of different ones (the member states). For this reason, of the four criteria, the latter two will be privileged in the course of our analysis in order to assess the potential 'European' institutionalization of EC decision-making bodies. The quotation is from Polsby, cit., p. 144.

6) See Carole Webb, Theoretical Perspectives and Problems in Helen Wallace, William Wallace and Carole Webb eds., Policy-Making in the European Community, 2nd ed., Chichister and New York, Wiley & sons, 1983, pp. 1-42.

7) See Samuel Krislov, Claus-Dieter Ehlermann and Joseph Weiler, The Political Organs and the Decision-Making Process in the United States and the European Community, forthcoming.

8) Stanley Henig, Power and Decision in Europe,, London Europotentials Press, 1980, pp. 4-5. On the attempts to insulate the Commission see Krislov et al., cit.

9) This analysis is by David Marquand, Parliament for Europe, London, Cape pub., 1979. See also Weiler, Supranationalism, cit. pp. 32-34.

10) Paul Taylor, The Limits of European Integration, New York, Columbia University Press, 1983, p. 32-36.

11) Council of the EC, Three Wise Men's Report on European Institutions, 1980, p.11

12) 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, cit., p. 13-17). This shortcoming of the model, however, does not detract from its usefulness to assess the level of development of one institution at a given point in time, and to provide diachronic measures of its institutionalization. On the need for a dynamic theory of institutionalization and more powerful explanatory criteria see: Richard Sisson, Comparative Legislative Institutionalization: A Theoretical Explanation in Allan Kornberg, ed., Legislatures in Comparative Perspective, New York, David McKay & Co., 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.

13) Three Wise Men Report, p. 50.

14) Ernst B. Haas, The Obsolence of Regional Integration Theory, Berkeley, University of California Press, 1975, p. 65.

15) Henig, Power and Decision, cit., p. 46.

16) David Coombes, Politics and Bureaucracy in the European Communities, Beverly Hills, Sage, 1970, p. 242 et passim.

17) According to this criterion, an institution must have clearly defined boundaries, its members must have a sense of belonging and not be loyal to other organizations. Leadership positions must be filled by individuals recruited within the organization on the basis of universally shared, impartial and impersonal criteria. See Polsby, cit., p.

18) Stanley Henig, The European Community's Bicephalous Political Authority, in Juliet Lodge ed., Institutions and Policies of the European Community, New York St. Martin's Press, 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 p. 14 and note 16.

19) Christopher Sasse, Edouard Poullet, David Coombes, Gérard Duprat, Decision-Making in the European Community, New York, Praeger, 1977, p. 96.

20) Admittedly, if the Council(s) are to maintain the present crucial role in EC policy-making, they have to give themselves

a permanent structure or at least develop an organic relationship with the Commission.

21) Valentine Herman and Juliet Lodge, The European Parliament and the European Community, New York, St. Martin's, 1978, pp. 64-69.

22) Henig, Power and Decision, cit., p. 70. On the frustration that such provision can cause for MEPs see Spinelli, cit., pp. 10-11.

23) Henig, Power and Decision, cit., pp. 82-83.

24) About 25% during the first legislature. We must, however not overlook the fact that a number of dual mandates is considered by many necessary for the preservation of a link between the EP and its national counterparts.

25) 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 respect to the effects of the Treaty of Rome on

respectively the Commission and the Council(s), institutional schemes could affect individual institutions very differently.

26) 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.

27) See Bardi, cit.

28) An EP with more powers would witness a dramatic increase in the salience and in 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 value than in National Parliaments and party group or committee sessions where close contact allows groups of MEPs to communicate through common languages, have even more practical importance.

29) For an excellent analysis of the prevailing situation see E. Poullet and G. Déprez, The Place of the Commission within the Institutional System, in C. Sasse, et al., op.cit. pp. 129-240, and S. Henig, Power and Decision, cit., pp. 40-63.

30) E.B. Haas, op.cit., p. 85.

31) E.B. Haas. op.cit., p. 84.

32) S.P. Huntington, Political Order, cit., p. 22.

33) Ibidem, p. 18.

34) And since it has been intimated that a bicameral evolution is desirable, the transformation of the Council of the Union in this direction makes it both likely and useful. See Ch. 10 of V. Herman and J. Lodge's book, The European Parliament and the European Community, cit.

35) A different assessment is provided by D. Coombes,' The problem of Legitimacy and the Role of Parliament', in Decision-Making in the European Community, cit., specifically when (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 least desirable under certain conditions.

36) S. Henig, Power and Decision, cit., p. 105.

37) Both C. Sasse et al. and S. Henig contain useful and stimulating discussions and criticisms of the various proposals.

38) As explicitly stated in the preamble.

39) On these aspects see P. Taylor's sensible analysis, The Limits of European Integration, cit., p.. 26-59.

40) Again in the preamble.

41) E.B. Haas., op.cit., p. 64. Of course, incrementalist strategies have also been criticized for allowing too much space to intergovernmentalism and delaying the process of integration.

42) For an assessment, cfr. Wallace, Wallace and Webb (eds.), op.cit. For an identification of fields where the challenge cannot be postponed, and ought to be and can be faced, see M. Albert, Una sfida per l'Europa, Bologna, Il Mulino, 1984.

(14)

The Draft Treaty Establishing the European Union

The European Policy Unit at the European University Institute

The University of Strasbourg

The Trans-European Policy Studies Association

THE DIVISION OF ECONOMIC AND SOCIAL POWERS BETWEEN UNION AND STATES; SUBORDINATE OR COORDINATE RELATIONSHIP?

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THE DIVISION OF ECONOMIC AND SOCIAL POWERS BETWEEN UNION AND STATES: SUBORDINATE OR COORDINATE RELATIONSHIP?

Comments on the Draft Treaty establishing the European Union

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 quite 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 voting system for enacting laws by codecision 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. 66-8). But it is fair to suppose that, under the procedures proposed in the Draft Treaty, economic policy would not be obstructed by individual member governments.

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(1) *Europe Documents* No. 1312, 20 May 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 R. Hrbek, J. Jamar, W. Wessels (eds), *The European Parliament on the Eve of the Second Direct Election: Balance Sheet and Prospects*, Bruges, De Tempel for the College of Europe, 1984, p.93. But see also the possibility under the Draft Treaty of enacting Union laws with a minority vote in the Council (p. 9 below).

The Draft Treaty gives the Union the right to legislate over a vast field of economic and social policy, including the essential powers implied by the norms itemised 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. 47-8, 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.

Concurrent competence: a risk of over-centralisation?

"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."(3) 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"(4); and Biehl observes that concurrent competence

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(3) K. 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 July 1983, p.11, para. 32.

(4) K. C. Wheare, *Federal Government*, London, Oxford University Press for the Royal Institute of International Affairs, 1951 (first edition 1946), p.79.

has been the most important basis for centralisation in the relations between Bund and Länder in the Federal Republic of Germany.(5)

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 would never do such things, it is necessary to examine very carefully any aspect of its constitutions that could be more centralising than those of the existing democratic federations such as Australia, Canada, the German Federal Republic, Switzerland or the U S.

One reason why the European Union needs to be less centralised 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 over-centralised economic policy would 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.

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(5) Dieter Biehl, *Die Ausgestaltung des Finanzausgleichssystems in der Bundesrepublik im einzelnen*, unpublished paper, 1983, p.62ff.

More fundamentally, the danger of over-centralisation has been sensed by contemporary Europeans and they do not like it, at any level of government. The people 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.

The Draft Treaty's attempts to limit centralisation

The principal architect of the Draft Treaty, Altiero Spinelli, was aware of the danger of over-centralisation. 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".(6)

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).(7) 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

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(6) A. Spinelli, "Note on some problems of terminology", in *Report of the Committee on Institutional Affairs, Part C*, op. cit., p.160.

(7) 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".

industrial and commercial life of the country".(8) There has been further pressure to interpret "the phrase ... 'inter-state commerce' ... so generously that 'intra-state' disappears altogether".(9) 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."(10) 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 such effect is what at some earlier time might have been defined as 'direct' or 'indirect'."(11) Confining Union legislation to tasks whose "effects extend beyond national frontiers" may not, then, 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.

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(8) A. L. Goodhart, "The Constitution of the United States", in Patrick Ransome (ed.), *Studies in Federal Planning*, London, Macmillan, 1943, p.256.

(9) Wheare, op. cit., p.143.

(10) Justices Cardozo and Stone, in the case Schechter Poultry Corporation v. United States (1935) 295 U.S. 495, p.554, cited in Wheare, loc. cit.

(11) Supreme Court in the case Wickard v. Filburn (1942) 317 U.S.111, p.125; U.S. v. Darby (1941) 312 U.S. 100, p.119; cited in Wheare, loc. cit.

The Basic Law for 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".(12) 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 centralising consequences for economic policy, squeezing the autonomy of both Länder and local authorities.(13) 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.(14)

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,(15) the suspicion that the principle of subsidiarity may not be a strong enough guarantee against

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(12) English translation from Arthur W. Macmahon, in his *Federalism Mature and Emergent*, New York, Russell & Russell, 1962, (first edition Doubleday, 1955), p.16.

(13) Biehl, op. cit., p.63ff.

(14) 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 ...".

(15) See for example Ioan Bowen Rees, *Government by Community*, London, Charles Knight, 1971, especially ch. 2.

over-centralisation can only be reinforced; and Jacqué adds confirmation to this from a juridical perspective, in observing that the principle of subsidiarity "ne possède, à nos yeux, qu'une valeur méthodologique et non juridique. Elle devrait servir de guide au Parlement lorsqu'il définie les compétences communautaires, mais ne saurait figurer dans le Traité même comme limite juridique à l'intervention de l'Union, en raison de son caractère mouvant et de l'appréciation subjective qui peut en être faite".(16)

In addition to the principle of subsidiarity, the Draft Treaty contains two devices intended as checks to over-centralisation. 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 directives, which are supposed to bind member states "as to the result to be achieved, while leaving to domestic agencies a competence as to form and means", are frequently more detailed than regulations, which are to be "binding in every respect and directly applicable in each Member State" (Treaty establishing the EEC, art. 189). The other 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 Communities 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

(16) Op. cit., p.89.

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.

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 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 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.

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(17) Altiero 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 codecision", but believes that "it is surrounded by sufficient safeguards, and at the end of a long enough procedure, to be regarded as exceptional" (Richard Corbett, "Reform of the Council: The Bundesrat Model", *The Federalist*, July 1984, Pavia, 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.

(18) This point was already made in the mid-1950s by John Fischer, "Prerequisites of Balance", in Arthur W. Macmahon (ed.), *Federalism Mature and Emergent*, p.62, where Fischer also cited Max Beloff, "The Federal Solution in its Application to Europe, Asia and Africa", *Political Studies*, June 1953, regarding the centralising tendency in federations that has followed on the expansion of governments' economic and social responsibilities.

Stronger safeguards

If it is accepted that there is a case for stronger safeguards against over-centralisation, the European Parliament may wish to consider what changes in the Draft Treaty could help to meet that case, without undermining its central features of codecision, 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.

Although Jacqué doubts the "juridical value" of the principle of subsidiarity, the American cases cited earlier (on p.6) 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 worth while for jurists

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(19) Biehl (op. cit., p.64) cites some comments by Eberhard Grabitz (1979) on this point.

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 rôle of the Court in defending the principle of diversity".(20)

Scepticism as to the effectiveness of sharper wording of general principles may, however, well be justified. We will therefore consider, in analysing article by article the Draft Treaty's sections on economic and social policy, how far the Union's competences could usefully be limited by closer definition of particular aims or fields among its competences, the instruments it may use in relation to them or the conditions under which they may apply.(21) 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 that can satisfy the essential needs of its citizens.

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(20) Roy Pryce, *Towards European Union*, (Report of a Federal Trust Study Group on the European Parliament's draft proposals for a new Treaty), New Europe Papers 8, London, 1983, p.12.

(21) The possibility of defining exclusive competences for the Member States is not considered in this paper. One reason is the view of an eminent jurist, citing the experience of courts in interpreting the Canadian constitution, that "a second exclusive list is a very great nuisance" (Wheare, op. cit., p.82). Yet Wheare also shows that concurrent jurisdiction too "adds yet another dispute about jurisdiction to the already formidable list" (loc. cit.), which suggests that it may be the nature of modern economic and social policy itself that makes such disputes inevitable, rather than the choice among particular combinations of exclusive and current lists. The clinching reason for not considering exclusive lists of Member States is this layman's view that an exclusive States' competence for direct personal taxation cannot be very different from confining the Union's competence to taxes other than direct personal taxation.

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 realised. 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 (47-9 and 64) relate, rather, to a certain excess of detail and a potential for excessive harmonisation.

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 would deal with external monetary relations. But it is not so clear that the Union would have power to make policy an 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" 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[22] 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.

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(22) "The Community shall be based on a customs union covering the exchange of all goods" (Rome Treaty art. 9.1); "restrictions on the free supply of services within the Community shall be progressively abolished" (art.59).

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 harmonisation 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,[23] the free movement of persons is not a matter of economic policy so will not be considered here. The Draft Treaty requires the free movement of capital to be completed "within a period of ten 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 p. 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 "likely to affect trade between the Member States and which have as their object or result the prevention, restriction or distortion of competition within the Common

(23) "The free movement of workers shall be ensured within the Community not later than the end of the transitional period" (art.48.1).

Market", five main types of such agreement being specified in particular (art.85). This definition has stood the test of a quarter of a century fairly well. The main objection has been that the Rome Treaty omits any safeguard against the creation of dominant positions as distinct from their abuse; and the Draft Treaty is surely right to generalise to the economy as a whole the system for authorising 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.(24) 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".

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(24) "... any aid, granted by a Member State or granted by means of State resources, in any manner whatsoever, which distorts or threatens to distort competition by favouring certain enterprises or certain productions shall, to the extent which it adversely affects trade between Member States, be deemed to be incompatible with the Common Market" (Rome Treaty, art. 92).

It has been argued, including by the present author, that the Commission should have authorised a joint programme of capacity reduction by the man-made fibre manufacturers so that they could better meet international competition; and that the Community should have encouraged such programmes in a number of troubled sectors. Article 85 does allow the Commission to permit agreements "which contribute to the improvement of the production or distribution of goods or to the promotion of technical or economic progress while reserving to users an equitable share in the profit resulting therefrom, and which (a) neither impose on the enterprises concerned any restrictions not indispensable to the attainment of the above objectives, (b) nor enable such enterprises to eliminate competition in respect of a substantial proportion of the goods concerned". If words such as "equitable share", "not indispensable" and "eliminate 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 legislative and administrative provisions of the Member States as have a direct incidence on 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 "laws, regulations and administrative" provisions may have their justification in the social and cultural diversity among European countries; and it seems desirable to preserve such variation where it does not have a substantial and "direct influence on 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 that stand in the way? If so, it might be better to return to the Rome Treaty's "direct incidence on the establishment or functioning of the Common Market".

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, even if the Commission found a justification for proposing a European Company Statute under article 101, which requires distortions due to differences between Member States' laws to be eliminated. 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 is 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".(25) 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 (art. 71 of the Draft Treaty provides for this) and divergences between Member States'

(25) Bela Balassa, *The Theory of Economic Integration*, London, Allen & Unwin, 1962, p.2.

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, following 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 measure of harmonisation 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.

General economic policy

The Member States have reached a stage of inter-dependence 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 the policies are called conjunctural or economic, we have entered a field which is harder to define than trade policy, competition policy or the approximation of tax 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 utilise 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 (arts.71,72), although the potential use of the Union budget for conjunctural purposes is limited by the Draft's stipulation that "the adopted budget must be in balance" (art. 75). 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,[26] a limit of say 5 per cent of the Union's GDP, which could be raised only by Treaty amendment.[27]

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".[28] Thus the Union is to establish the aims of Member States' economic policies and control the means, i.e. the policy instruments, by which the aims are to be achieved.

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(26) *The Role of Public Finance in the European Communities*, 2 vols, Brussels, Commission of the EC, April 1977.

(27) There would be less risk of a Treaty limit stunting the development of the Union sometime in the future if Treaty amendment were to require a large majority, rather than unanimity of the Member States as proposed in article 84.

(28) 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.

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 judgement, not of objective fact; and such judgements have become very hazardous in these turbulent times. They offer only a shaky basis for a massive incursion into the polities 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, politicians who believe in them and 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 attract the votes of, say 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), the Commission, and 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. The Members of the last European Parliament must have thought this feasible, or they would not have voted in favour of article 56, which provides that "the 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 horrendous unemployment is incomes policy - even if the incomes policy takes the non-statutory form of nation-wide or industry-wide (as in West Germany) collective agreements between trade unions and employers' associations. But to impose this view on a country where the government is bitterly opposed to incomes policy 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 (c.f. 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 Britain, Denmark and Germany (or Britain, 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 really quite plausible, since budgetary control was wanted by the officials and central bankers on the widely-acclaimed Werner Committee, who proposed that "quantitative guidelines will be given on the principal elements on 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".(29) Nor are bankers,

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(29) *Report to the Council and the Commission on the realisation by stages of economic and monetary union in the Community* (the Werner Report), Supplement to Bulletin 11-1970 of the European Communities, Luxembourg, 8 October 1970, p.19.

officials and politicians lacking today who are convinced that budgetary control is the key to a healthy economy. Yet the control of the budget balance, let alone the size of receipts, expenditure, consumption and investment, is a concept that is alien to federal systems; and even in the highly centralised 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 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' polities. 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 to subject article 50 paragraphs 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.

Monetary union

Article 52 deals with monetary union. Before that, however, comes article 51, which gives the Union "concurrent competence as regards European[30] 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 for monetary union in article 52; and if there is enough difference between monetary and credit policies to justify specifying the latter 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 appears a logical measure, although specially constituted authorities and committees are not the means employed for the purpose in at least some member countries. But the "particular objective of coordinating the use of capital market resources"

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(30) Another semantic quibble: 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, without the adjective European?

seems to imply a planning of investment that is not practised in the majority of member states and is hard to reconcile with the neoliberal philosophy that underlies article 33.4, which affirms that "the European Monetary Fund shall have the autonomy required to guarantee monetary stability". Neither the neoliberal 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[31] 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.[32]

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(31) *Report of the Committee on Institutional Affairs, Part A : Motion for a Resolution*, European Parliament Document 1-575/83/A, 15 July 1983.

(32) Semantics again. 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.

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".(33) 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 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.

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

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(33) J. Moreau, "The Economic Union", in *Report of the Committee on Institutional Affairs, Part C*, op. cit., p.57, para. 129.

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 authorised if Union laws would cause "specific difficulties" for particular States) and provides for an organic law[34] 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

(34) Requiring a qualified majority in the Parliament, together with an absolute majority in the Council,or with the Commission and one-third plus one of the weighted votes in the Council (see p.9 above; a two-thirds majority in the Council is suggested on p.11).

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. Even transactions in ECUs are not allowed within the German monetary system, because indexation is prohibited for fear it could lead to inflation, and a currency unit linked to other Member States' currencies is regarded as indexed. The German government could over-rule the Bundesbank if the grounds for doing so appeared politically secure. But the fear of inflation may be 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, appears to find 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).(35)

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 seek some form of accommodation with the German government. This might be analogous with the formula for transition from the first to the second stage when establishing the EEC, which was "conditional on a confirmatory statement to the effect that the essence of the objectives laid down in the Treaty for the first stage has in fact been achieved" (Rome Treaty, article 8.3).

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(35) Wolfgang Wessels, "Der Vertragsentwurf des Europäischen Parlaments für eine Europäische Union", *Europa-Archiv*, 25 April 1984, p.242.

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".(36) This condition 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 and p.15 above) as well as with the permanent locking of parities or the replacement of national currencies by a European currency.

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 specialisation 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 Rome Treaty 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

(36) *Werner Report*, p.10.

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 showssigns of abandoning policies to promote technological development and to facilitate adjustment; and except on the utterly unrealistic 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 recognise 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 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 as well as a stick. Money from the Social Fund, the Regional Fund, the European Investment Bank, the New Community Instrument and ECSC funds have been used to support industrial adjustment. The ECSC Treaty, in addition to authorising the Community to raise loans and to levy a turnover tax of up to 1 per cent 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 the particular sectors of 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 there 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 can use 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".(37) While these terms are entirely appropriate as regards 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.

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(37) Once 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 have a bearing on inter-State trade"?

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 organisation, 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 somewhat dirigiste and bureaucratic 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 have a bearing on 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 emphasise 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 cooperation 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.(38) 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 centralisation 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, shutting down a programme of research on developing a microcomputer or even on a cure for influenza, for that matter.(39) Nor, as we have seen, is

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(38) 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 undertakingsto act together to adjust their organisation 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".

(39) Question for jurists: would the term "national activities" give the Union control only over Member States' policies or also over research activities that are independent of public policy?

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 the public authorities in the Member States, and 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 to sponsor Union 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 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 various 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 may be argued that the Rome Treaty, whose patrimony the Union is to take over (art.7), 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, it would seem desirable that paragraph e on industry should 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 rationalisation 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 centralisation 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.(40) Additional instruments, that could be useful for Union policy in industry as well as other fields, would be the "specialised European agencies" which article 54 authorises the Union to establish.

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(40) 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 and 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 if these two sentences were dropped.

Transport, telecommunications

The main concern of articles 74-84 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 by their size or nature cannot be entirely financed by the various means available in each of the 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 Community 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".(41) 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 intra-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, harmonise the basic terms of competition between the various modes of transport, eliminate obstacles to trans-frontier traffic" (Draft Treaty, art. 53b). Nor, following our earlier argument about subsidiarity (p.6ff above; see also pp. 18, 19), 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 p.18). It might be better to replace this reference to economic integration

(41) Nigel S. Despicht, *Policies for Transport in the Common Market*, Sidcup, Lambarde Press, 1964, p.34.

by a formulation similar to that suggested on p.18 for tax harmonisation, e.g. "in the field of transport, the Union shall remove distortions that 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 harmonised tariffs. The common standards are doubtless desirable but it might be advisable to confine the requirement to harmonise 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 paragraph a). Article 39 of the Rome Treaty lists five objectives: "to increase agricultural productivity"; "to ensure thereby a fair standard of living for the agricultural population..."; "to ensure reasonable prices in supplies to consumers"; "to stabilise markets"; "to guarantee regular supplies". Stabilisation 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 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 for 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 harmonised 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 harmonised 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 "disparity existing between the legislative or administrative provisions of the Member States (which) distorts 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.

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".(42) We have already encountered, in our examination of the part of the Draft Treaty concerning economic 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 p.3 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.

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(42) G. Pfennig, "The European Union's powers in the area of policy for society", in *Report of the Committee on Institutional Affairs, Part C*, op. cit., p.65 para 2, p.66 para 5.

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 p.5 above). Proposals for federal systems usually envisage leaving the great bulk of social policy with the States.(43) 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 56-62. Yet even this would leave some provisions with highly centralising 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 by-pass 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

(43) See for example Francesco Rossolillo, *Citta territorio istituzioni*, Napoli, Guida Editori, 1983, p.62ff.

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 56-62, or even in the very wide fields listed in article 55, but not to interfere in legislation expenditure by Member States, except where the Rome Treaty already provides for this (eg with respect to equal pay and to the size of subsidies to investments in the various regions). Harmonisation of Member States' legislation could also be subject to the method of cooperation, based on unanimous agreement among the Member States. If the European Parliament is not fully 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 55-62, the list of subjects specified in these articles should be carefully scrutinised 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.

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 over-centralisation. One possibility is to define the principle more sharply, particularly in order to forestall any attempts to circumvent it by adopting

inherently centralising objectives. Another possibility would be to give more weight to the values of diversity and decentralisation in the general objectives of the Union.

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.(44) The interpretation of the equivalent elements of the Canadian Constitution seems, 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".(45) But there has in both cases been "much uncertainty about the respective powers of general and state governments, because of the conflicting and ambiguous language adopted".(46) 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 Freedoms (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 system existing in Member States in respect of property" (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

(44) Wheare, op. cit., p.145.

(45) Ibid., p.137.

(46) Ibid., p.149.

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 system existing in Member States in respect of property" is 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 centralisation.

Another general safeguard would lie in requiring a qualified, or even an absolute, 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 instruments 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 have a "direct incidence on 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 harmonisation, transport and telecommunications.

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 in the whole field of agricultural policy. There is a strong 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 it 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 concern 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 harmonisation (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 centralisation 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. 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 Rome Treaty 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, however, viewed more tolerantly. Apart from this, 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 relation to 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;(47) and it is to be among the documents to be considered by the Ad Hoc Committee 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.(48)

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(47) Op. cit.

(48) Op. cit., p.243.

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 categorisation of the type of constitution to which we are accustomed in the West as "a system of effective, regularised restraints upon the exercise of governmental power",(49) this is certainly a most important aspect of the European Union Treaty. In reacting to such an approach, however, the European Parliament should be determined to defend the hard core of its Draft: co-decision by Council and Parliament with no time limits and majority votes; and basic economic powers in the fields of the internal market, monetary union and the Union's financial and budgetary resources.

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(49) Carl J. Friedrich, "Federal Constitutional Theory and Emergent Proposals", in Arthur W. Macmahon (ed.), op. cit., p.516; Fridrich refers here to his *Constitutional Government and Democracy* (revised edition), Barton, Ginn, 1950.

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EUROPEAN UNION: SOME HISTORICAL DIMENSIONS

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EUROPEAN UNION: SOME HISTORICAL DIMENSIONS

Roy Pryce

I. INTRODUCTION

The aim of this paper is to put the current discussion of European Union in a broader historical framework in order to give perspective to the issues which are now being discussed. (1) These issues - about the future development of relations between the members of the Community, their future common goals and the strategies to achieve them - have been the object of discussion and argument through the whole history of the Community. One question to be examined is to what extent the nature and substance of these discussions have changed over time. Another question, with more immediate practical implications, is what we have learned about the relative effectiveness of the various different strategies and methods that have been tried as ways of moving towards that 'ever closer union among the European peoples' to which the original signatories of the Rome Treaties (as well as those who have subsequently become members of the Community) committed themselves. And we can also ask, in the light of past experience, how close current discussions about European Union are to fulfilling the conditions for moving towards this grander, but still amorphous, goal to which the members of the Community have been formally committed since 1972; a commitment they have regularly reaffirmed, most recently in the 'Solemn Declaration on European Union' agreed at the European Council meeting in Stuttgart in June 1983.

The answers to these questions necessarily involve a view of the nature of the process in which the members of the Community are involved, and of its dynamics. Today students of these issues are far less certain than they used to be both about how to categorise the process and also how to explain its development. Their uncertainty is a reflection of the evident differences between the member states about the range of functions which the Community and its various appendages should fulfill and how - if at all - they should be further developed. These differences are a central and very obvious feature of all the discussions that have so far taken place between the member governments on European union. They are reflected,

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(1) This paper is a contribution to a TEPSA project, supported by the European Cultural Foundation, entitled "From Community to union? A critical appraisal of past attempts and current prospects".

too, in the proliferation of different models for the future - contrary to the expectations of some of the early theorists, the search for closer unity has not proved to be a unilinear and cumulative process. In some respects, indeed, it has generated forces which have strengthened the obstacles in the way of its original members' goal of an ever closer union. Over the same period other obstacles have remained, sustained by factors quite outside the control of the countries of western Europe. In assessing current prospects of attempts to move towards European Union it is important to remind ourselves of these and other aspects of the legacy of the past forty years of struggle in western Europe to achieve closer unity and its relevance to the present.

II. PROTAGONISTS AND OBSTACLES

The protagonists of unity

Progress towards the goal of closer unity has always depended essentially on the attitudes, policies and initiatives of the political elite in each country. The general public has, for the most part, played only a passive role. In the immediate aftermath of the second world war the emotional thrust behind the cause of European unity was so strong that substantial numbers could be mobilised for meetings and demonstrations. Such occasions are now rarely attempted. The attitudes of the general public have played a significant part in individual countries in either encouraging leaders to take initiatives or to set parameters to their policies. The referenda held on enlargement have been important political occasions to approve, or disapprove, of elite initiatives, and now direct elections provide an opportunity for the public to intervene in the election of MEPs each five years. But there is no evidence currently of any general public concern with the state of the Community that could either erupt into pressure for more forward movement, or be mobilised to do so.

Like the general public, the political elites in western Europe have been strongly in favour, over the whole of the postwar period, of closer unity. But this support for a generalised proposition has been accompanied by major differences on what this should consist of and how it should be achieved. It was only with the emergence of the six-member Community that a sufficient homogeneity of purpose was achieved to enable significant progress to be made towards ambitious goals. Even then, there were still major disagreements. And with the successive enlargements of

the Community, these have multiplied. At the same time the original generation of leaders, so strongly imbued with a determination to overcome Franco-German hostility and prevent another war, has given way to a younger generation with a less certain motivation.

It was originally hoped that the progressive extension of a process of economic integration would both mobilise more elite groups in favour of further developments of the process, and at the same time reinforce the role of non-national elites. Neither has happened on any significant scale. It is true that the steadily increasing scope of common action has involved more and more elite groups in society. But it has not bred any substantive new pressure for future advance. Community-level associations with broad horizontal functions - such as UNICE and the ETUC - are more concerned with maximising their influence within the system as it is than worrying about how it might or should develop. If pressed such bodies will respond, but experience shows that they only rarely develop of their own volition pressures for significant change in the system as a whole.

The process has also failed to develop significant alternative sources of leadership to those provided by those in positions of national authority. There is no-one today playing a role comparable to those played by Monnet and Hallstein. It has become increasingly difficult for the Commission or its President to play such a role, and although the European Parliament may aspire to do so, its nature as an assembly is bound to inhibit its capacity to carry it out. The nearest equivalent that operates today is the presidency of the Council, but not all national leaders are willing or able to set aside their specific national interests when they are in the chair.

Taken together, these various factors suggest that the strength of the thrust towards closer unity has diminished rather than increased over the years: can the same be said of the obstacles in the way of its achievement?

The search for unity? a divisive goal, a divisive process

One of the ironies of post-war western Europe is that the search for unity has itself been a persistent source of friction and division in the relations between the countries of the area. This is due partly to continuing differences between them about how far and how fast they are prepared to go, and corresponding differences about organisation and the

location and exercise of power within the bodies set up to promote unity. But it is also due to the inherent complexity of such a process, which involves not only trying to reach agreement about common action in specific policy areas, but also managing the process and deciding on priorities at each stage. This is made all the more complicated because the process is certainly not unilinear: it involves several different dimensions - such as the number of countries involved, the scope of their common action, its intensity, and the rules for taking decisions together. There can be - and in the west European experience there has been - substantial tension between them. There have been, for instance, not only conflicts of interest about the desirability of a small, tightly-knit group as opposed to a wider and more loosely-organised group, but also about the relative priority to be given to widening the scope of common action or making it more effective. As well as generating a new degree of interdependence, the search for closer unity has also therefore generated its own internal tensions.

This has been true of each of the three distinct phases of this search since 1945. During the first of these, from 1945 to 1950, the major cleavage was between those favouring a wide but loose set of arrangements based on intergovernmental cooperation and those who sought a more radical approach. At that time the British were effectively able to call the tune, but at the price of building up a considerable body of discontent on the continent.

The strength of this was revealed in the successive phase which opened with a successful challenge to British leadership through the creation of the first Community built around a new Franco-German understanding. But it was several years before the Six were able to establish themselves - not least because of British hostility. And when the British admitted defeat and in 1961 sought to join they discovered that the Six were divided about whether the door should be opened, and also - when it had been firmly shut by de Gaulle - about the future development of the Community itself. It was that conflict which precipitated the 1965 crisis and a period of stagnation from which the Community only recovered after de Gaulle's resignation in 1969. By then it had become apparent that the Six could not continue to refuse those who asked to join and said they were willing to abide by the rules of the club. But what was in one way the moment of their greatest triumph, the first enlargement in 1973, also posed a serious threat. For in admitting new

members the gates were opened to further geographical enlargement over time - and in admitting Britain and Denmark in particular the founding members ran the risk of a challenge to their model of Community-building.

The consequences of their decision have become abundantly clear in the latest phase of the process, since 1973. The degree of consensus achieved by the Six has now been compromised - perhaps irretrievably; and alternative models are now being advocated for the future of the Community, which is now being debated in terms reminiscent in some ways of the pre-1950 period. Even after many years of working together, efforts towards closer unity are still a source of significant friction between the members of the Community.

The consequences of a divided Europe

Another set of obstacles derives from the same circumstances which have also provided a major incentive for the initiation of the process - namely, the division of historic Europe. These obstacles are of two main kinds. In the first place there are those created by the hope that the post-war division is only a transitory experience, and that nothing should be done by the countries of western Europe to prejudice such an outcome. For the country which is most directly affected by the division, West Germany, this also means keeping alive the hope of eventual reunification. This concern was a major reason for the original opposition of the SPD to the Schuman Plan. It led subsequently to the insertion in the EEC treaty of the special provisions relating to 'internal' German trade. This defused opposition to the programme of economic integration - but there has always been in the Federal Republic a debate about how consistent the development of the Community is with a policy of eventual national reunification. Today there are signs of renewed concern with this issue - and any moves designed to promote closer union, particularly involving defence and closer political integration, are bound to be scrutinised from this point of view.

If this issue is of particular concern to the Federal Republic, there is another - also deriving from the division of Europe - which affects all the member states. This is their strategic dependence on the United States. This has persisted throughout the period, unlike western Europe's original economic and financial dependence which has been greatly reduced though by no means wholly eliminated. The continuing dependence in so crucial an area has greatly inhibited the development of the Community into a Union in the classic sense of the term - eg., with a common defence and foreign policy and a corresponding military capability and organisation.

The Atlantic framework which pre-dated the Community-building process is still considered by the great majority of the EC's member governments as the best and most secure way to ensure their defence.

They have hesitated, therefore, to include defence in the scope of their Community-building efforts. The project for a European Defence Community was only undertaken because of the threat represented by the United States' decision to re-arm west Germany. And, contrary to the fears expressed at the time, it is significant that the failure of the EDC did not seriously retard the Community-building process.

All subsequent attempts to develop a defence policy and military capability specific to the members of the EC have been constrained by fears that this might offend the US and hasten the day when the latter would no longer guarantee the security of western Europe. Such fears have even impeded the building up of a 'European pillar' within the Alliance, although such efforts have from time to time been encouraged by the Americans themselves. The current discussion about whether or not Western European Union might be the most appropriate organisation to develop for such a purpose reflects the continued differences on this issue.

Similar worries in western Europe have also been a major factor in the low-profile, pragmatic and hesitant approach to the development, alongside the Community, of political cooperation. As the discussions in the early 'sixties of de Gaulle's proposal for a Political Union showed, divergences of policy towards the United States, and a concern about the impact on the Atlantic Alliance of too formal a union among the Six, were major reasons why his proposals proved unacceptable. The same reasons also go a long way to explain the preference for the Davignon approach eventually adopted in 1970, which has been well-characterised as "procedure as a substitute for policy".(1)

With regard to economic integration the effects of the trans-Atlantic relationship have been much more complex. Support by successive

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(1) By William Wallace and David Allen in Wallace, Wallace and Webb, Policy-making in the European Communities, 1st ed., Wiley, London, 1977, chp. 9.

US administrations was undoubtedly of great help in the early years. But it is noticeable that as US interests have been affected adversely, that initial enthusiasm has been replaced by a much tougher stance. The members of the Community have responded in a similar vein - but several still hesitate to develop the European Monetary System in a way that could provide them with a more effective counterweight to the dollar. In short, the degree of west European dependence on its protector continues to set limits to the extent and strength of the union which the governments of the region are willing to contemplate and able to achieve.

The continued strength of the nation state

Another barrier to closer union has been the way in which, contrary to some earlier expectations, the experience of working together has not either sapped the foundations of the participating nation states or stimulated overwhelming pressures for closer union.

Where national structures have come under pressure - as in the case of Belgium - it has been for reasons unconnected with the existence of the European Community. Membership, on the other hand, has strengthened national structures and the sense of national identity and national interest. In some cases there has been a formal linkage. For the Federal Republic, for instance, taking part in the Community was part of the process of rebuilding the authority of the state. Similarly, the entry of Greece meant recognition and support for a new national democratic regime. The smaller member countries have acquired prestige through their exercise of the presidency. And, paradoxically, membership has also meant the definition and defence of a more comprehensive set of 'national interests' - for the purposes of bargaining around the Council table - than would otherwise have been the case.

The strengthening of the national elements in the institutions of the Community, the creation of the European Council, and the emergence of a distinct preference for cooperation as the mode of working together in new policy areas, are all reflections of a corresponding reassertion of the strength and will of the member states. There was still enough support in the early 'seventies to implement the commitment to direct elections to the European Parliament - but the governments have subsequently shown a marked resistance to giving it more power. Their leaders, together with their supporting political and bureaucratic elites, have a natural preference for forms of cooperation which leave

them with maximum autonomy - and not too much parliamentary interference.

The political system of the Community having been adjusted in these ways to meet the new mood, there is strong resistance from most of the new members to change it back, and bring it closer to the original Community model. At the same time, as far as the economic aspects of working together are concerned, the gains from the current level of integration, though certainly sub-optimal, are nevertheless still substantial. So while there is support for improving the operation of the common market - from which the corresponding gains would be quite tangible - there is much less agreement about the desirability of pushing the process much further. This means that in spite of repeated calls to action the members are slow, and frequently unable, to respond.

Conclusions

This brief survey of some of the main factors that have operated over the post-war period underlines the persistence of a number of powerful constraints, and the emergence of others, which have made the search for unity so difficult and set parameters to its achievements. These constraints have so far prevented the emergence of a specifically European framework in the defence field and have dictated a very cautious approach towards a common foreign policy. They have also imposed limits to the programme of economic integration, though this has so far been by far the most successful area of common action.

But even in this area progress has been jerky and uneven. At each stage it has been necessary to identify areas of a potential convergence of national interest and mobilise support for a specific project. The question now to be examined is whether some common features can be detected to account for the success of particular projects and strategies - and the failure of others - and if so, what lessons can be learned of relevance to the current situation.

III THE EXPERIENCE OF THE SIX

The emergence of the core group formed by the Six in 1950 proved to be a decisive development which has conditioned all subsequent developments. The years between 1950 and 1972 also witnessed the successful development of this group's programme of economic integration. This was however punctuated by moments of serious failure - dramatic failure in the case of the rejection of the European Defence Community (and its associated project for a European Political Community) in 1954, and a serious setback in the early 'sixties with failure to agree on a proposed Treaty of Political Union.

The development of economic integration itself was also far from smooth. There were serious difficulties at every stage from the negotiation of the original Treaty of Paris, through the conception, negotiation and ratification of the Rome treaties, and their subsequent implementation in the 'sixties - a period which saw a major crisis in 1965 followed by a period of stagnation only ended by de Gaulle's withdrawal from power. Of the total period of 22 years substantial forward progress was achieved in about half - though even this rough guide to relative success or failure requires significant qualification.

Within this period it is the negotiation of the basic treaties which stand out as the two most successful episodes, achieved respectively between 1950-52 and 1955-57. The two most notable failures on the other hand were those of the EDC and the Fouchet negotiations. Between the two, at a more modest level of success in pushing forward the frontiers of common action, can be counted two developments at the end of the period: the agreement to initiate Political Cooperation in 1970, and the first attempt - agreed the following year - to move towards Economic and Monetary Union. It can, however, be misleading to ascribe marks for 'success' or 'failure' purely in terms of agreements reached or rejected. Our judgement about relative success or failure of particular initiatives and strategies also has to take into account such additional dimensions as the subsequent implementation of agreements formally reached (particularly important in the case of the Rome treaties themselves) and the longer term effects of negotiations which (like the Fouchet talks) failed at the time but which helped to prepare the way for a later positive outcome.

To these reservations we also need to add two other considerations that must also make us wary of generalisations based on an analysis of

particular moments in the overall process. The first is that circumstances change, and that history does not repeat itself. A strategy that may have been successful at a given moment may not be at all appropriate in a different context. One important factor that needs to be taken into account is the international context - in particular the extent to which this may or may not have provided resources for the protagonists of change or created obstacles in their way. For much of the period when the Six were alone in constituting the core group, for instance, both the general economic environment and the policies of the successive United States administrations operated as positive elements - sometimes in very specific and direct ways, sometimes in a more indirect and diffuse manner. Any attempt to derive lessons from this period of Community-building has to take account of these factors, and how they have been modified or changed subsequently.

Similarly, the role of accident and chance has also to be borne in mind. It is sufficient to recall the importance of the outbreak of the Korean war in 1950 in changing the agenda of the protagonists of the Community approach, or the impact of Suez and the Hungarian rising in 1956 in the context of the negotiations leading up to the Rome treaty, to be reminded of the crucial influence such events exercised, suddenly changing the context in which particular strategies were being deployed and altering the balance of forces arrayed for and against them. Western Europe has never been fully in control of its own agenda and it continues to be an area of the world highly susceptible - and vulnerable - to changes both in relations between its presiding Super powers and the international economic environment.

Such reflections do not however invalidate, even if they warn us to be cautious about, the search for lessons from past experience. The period of the six-member Community was rich in initiatives to extend the area of common action - and in a variety of different outcomes. It is to these we now turn.

If we begin with the major successes represented by the basic treaties, we are immediately struck by the dissimilarities in the strategies and tactics employed to achieve them. The Schuman Plan took a narrow, sectoral approach, while the Spaak Committee combined this with a general common market. The Schuman Plan was the fruit of private reflection among Monnet and his advisers, communicated in a conspiratorial fashion to selected members of the French government, adopted by it with

little discussion, and launched suddenly on the world as a unilateral French initiative without any prior consultation with other interested governments. The early stages leading to the Rome treaties were in almost total contrast. They took the form of a very prolonged and public process, involving a plethora of national proposals, several meetings of Foreign Ministers, and the Spaak Committee. The outcome of the two processes, though similar in form, was also very different in substance. For whereas the Treaty of Paris laid down a short timetable for the achievement of the common market for coal and steel and precise rules about how it was to be run, the EEC Treaty only sketched in general terms how the common market was to be achieved, and left major issues - including the construction of a common agricultural policy - to subsequent negotiation.

There were nevertheless some significant similarities between the two in terms of basic strategy (eg., a political goal through an economic route, with a common market as the initial objective); the care taken in the initial drafting of the project to appeal to as broad a spread of national political and economic interests as possible; and the critical role in both cases played by determined leaders. Without Schuman and Adenauer in particular the Community would never have even been formed. But Franco-German agreement, while a necessary element, was not by itself sufficient. A purely bilateral partnership would have been regarded as divisive and menacing, and the two countries were not in a position - even had they wished - to impose terms on their neighbours. The formation and development a group of a sufficient size to lay claim to be a 'European' Community needed more willing and determined partners: and the leaders of the Benelux countries and Italy were as important as those of France and Germany in these initial stages. But alongside national leadership there was also that provided by Monnet and Spaak when he assumed the chairmanship of the committee that was to bear his name. Their contribution was to identify, articulate, and even to some degree to personify, the common interest. They also played a major part in both cases in negotiating the agreements which enabled this common interest to be translated into very detailed terms. Through his Action Committee Monnet also created a very effective network to plan and promote the future development of the Community.

It is the availability of such leadership across the member countries, the choice of an economic route to closer unity; the capacity to devise

projects to maximise the common interest while appeasing specific sectoral concerns; and the determination to drive the process along that emerge as the most fundamental reasons for the successful initiation and early development of the Community. The specific form and content of individual initiatives were less critical factors - though still important to the extent that these were able to identify an area of convergence of interests sufficiently wide to attract the support necessary to have them placed on the governments' agenda, and subsequently to ensure their successful negotiation, ratification and implementation.

In contrast, both the EDC and the Fouchet episodes show the difficulties of reaching a successful conclusion in non-economic fields. In the first case the success of the initial negotiation was due to the factors that had ensured the creation of the ECSC: above all, imaginative and determined leadership operating at both national and Community levels. But now the stakes were much higher, the issues far more sensitive, and the benefits far more debatable. In France the supportive coalition was unable to withstand the pressures from both right and left - and without France the project was not a practical proposition.

The later Fouchet negotiations, though arousing far less passion, demonstrated the sensitivity of the issues raised by de Gaulle in his search for a way to assert control over the Community-building process - and particularly those involving relations with the United States. Other issues were also involved - particularly after the British application to join the Community when the Dutch in particular were anxious not to create any additional difficulties for them: a clear example of the frequently repeated conflict between the processes of widening and deepening the Community. On this occasion, too, the support of the Federal Republic was less than whole-hearted in spite of the personal commitment of Adenauer himself. In short, many of the conditions for a successful initiative were lacking.

These were not fully restored until after de Gaulle's departure from power. For a time this did not prevent progress in the implementation of the existing treaties, though after the crisis of 1965 even this was seriously impaired. The relaunching of Community-building at The Hague summit in December 1969 is of particular interest for several reasons. The triptych of completing, deepening and widening the Community which provided the basis for it was a very explicit package incorporating the

most salient national interests of the time, backed by a new Franco-German understanding between Pompidou and Brandt. Its central thrust was a resumption of progress in the field of economic integration. But this meant going beyond what had been agreed and stipulated in the treaties - and although the mood was one of renewed ambition it was nevertheless imbued with a certain caution. So while there was general agreement that the next target should be Economic and Monetary Union, to be sought over a period of ten years, the agreement reached in March 1971 was limited to an initial first phase of three years and was taken in such a way - as a 'Resolution of the Council and the representatives of the Summits of the Member States' - as to avoid the need at that stage for a new treaty, or any process of national ratification. It is also significant that political cooperation was initiated in a similar and even more low-key manner without recourse to anything more formal than the agreement reached between the Foreign Ministers and adopted in its final form at their meeting in Luxembourg on 27 October 1970.

Both decisions seemed to suggest that as the member states ventured more closely towards the most sensitive areas of national sovereignty they were tempering ambition with a more pragmatic and flexible approach. The great strains to which the new exchange arrangements (agreed as part of the first moves towards EMU) were very quickly subjected in the summer of 1971 as a result of American monetary policy were a reminder, too, of the difficulties which now had to be faced. The successful conclusion of negotiations for enlargement nevertheless produced a mood of temporary euphoria at the Paris Summit of October 1972 when the leaders of those countries about to join met with the leaders of the Six to plan for the future. It is perhaps this mood, and the need felt for a dramatic gesture suitable to the occasion, that explains the agreement then reached on a new set of goals and the grand objective of 'transforming the whole complex of the relations between the member states' into a European Union by the end of the decade.

IV. THE ENLARGED COMMUNITY

In proposing the new goal of European Union, the French deliberately chose a very vague expression. They were mindful of the doctrinal arguments that had previously divided France from her partners when de Gaulle had opposed a Europe des patries to the Community Europe envisaged in the treaties, itself inspired to no small degree by a federalist model of a United States of Europe. The new concept was not only vague: it was completely devoid of content. It was a totally blank blueprint. The only clue to possible substance lay in the word 'transform'. In the context of a statement which stressed the determination of the leaders of the enlarged Community to extend and deepen the process of integration, and to strengthen their solidarity, it appeared to mean a desire to transform in the sense of drawing even closer together. But this was not explicitly stated. It was left to the various institutions, who were asked to report by the end of 1975, to try and fill in the void.

This, then, was not an exercise in goal definition in the same category as the Schuman Plan or the Spaak Committee Report. It proposed neither a specific objective nor the means to achieve it. For a while this suited everyone rather well. The trouble started when attempts began to give the concept substance. Even now, in spite of reiterated and even solemn declarations to the contrary, no consensus has emerged between the governments on the issue, other than of a purely rhetorical nature. Indeed, it has become increasingly evident that several governments, whatever their formal commitment, are strongly opposed to any significant 'transformation' of relations within the group which would make them tighter and more binding. Moreover, there is more and more discussion of alternative models for the development of those relations, all of which start from

the hypothesis of the unsuitability - some would say, undesirability - of a uniform advance towards closer forms of union for a group which now consists of ten members and is shortly to be expanded to include two more, with the entry of Spain and Portugal.(1)

The basic problem is that since 1973 the enlarged Community has lacked that degree of consensus about common goals, backed by a uniformly high level of public support, which was the dominant characteristic of the six-member Community - and the essential prerequisite of its capacity to generate successful strategies and projects for its development. And although there are some superficial parallels with the conflict between de Gaulle and his partners about the organisation and development of the Community, there are also fundamental differences between the situation then and now. One is the fact that the Gaullist strategy was always contested within France itself. It did not reflect a national consensus, and proved to be an interlude in that country's European policy rather than a permanent feature of it. The same may well be true of Greece today. But it is not the case for Denmark and the United Kingdom. In both countries majority opinion, reflected in the policy of successive governments of different political composition, is hostile to closer forms of union implying more binding forms and methods of common action. And, while both - like Gaullists - assert the primacy of national authority in the decision-making process, the Danes also oppose the development of a political union implying a common defence and foreign policy.

Another major difference has been the way in which changes in the external economic environment since 1973 - and their domestic

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(1) See paper by Wolfgang Wessels , 'Alternative strategies for institutional reform'.

repercussions - have impinged on the group. The member states, both individually and collectively, have been struggling with a succession of urgent and intractable problems: inflation, unemployment, crises in both traditional and modern sectors of industry, security of supply and costs of energy, threats to public order and so on. These agendas have necessarily absorbed a great deal of their energy and resources. And, as far as the Community agenda itself is concerned, enlargement has also generated its own problems. One major impact, which was felt immediately in the wake of the first enlargement and which has persisted subsequently, is the amount of time and effort that now has to be devoted to the group's relations with the rest of the world - both in respect of those policy issues coming within the ambit of the Community, and also those dealt with within the framework of political cooperation. There have also been the succession of negotiations directly related to enlargement itself, including the 'renegotiation' of the British terms of entry. Even more time-consuming and divisive has been the need forced on the members by the convergence of a cluster of fundamental issues, to undertake what has in effect been a readjustment of the basic compact between them - involving the cap, the overall budget, the British contribution to it, and the development of new policy areas. And although the deal struck at Fontainebleau in June 1984 initially appeared to have at last found a way through these issues, what has happened subsequently suggests that they may well to continue to dominate the Community's agenda, and to generate tension between its members.

In these circumstances, it is surprising that the Community has been capable of any forward movement during the past eleven years. There has not in fact been very much. The single substantial exception has been the creation of the European Monetary System.(1) This achievement, much

(1) For a detailed account, see Peter Ludlow, The making of the European Monetary System, Butterworths, London 1982

against the general trend, briefly saw the reappearance of a pattern familiar in the Six: imaginative and determined leadership, involving both a Community element(the role played by Roy Jenkins in first making the proposal) and - essentially - a strong Franco-German drive supplied by the close agreement between Helmut Schmidt and Valery Giscard d'Estaing. But it was characteristic of the changed times that the initial and most critical negotiations were conducted on an intergovernmental basis outside the formal Community machinery - and that the scheme was launched with the British half in and half out. This was a case where the predominant role of their respective currencies enabled the French and the Germans to seize the initiative and push through a decision - once they were assured that the British were not actively going to oppose the scheme. The same thrust has not, however, yet developed to take the EMS further.

As far as the pursuit of European Union itself is concerned, this has been given only low priority by most of the member governments. Those who favour progress towards it have succeeded in keeping it on the agenda, and in extracting regular and repeated commitments to it, but they have singularly failed to make any significant progress towards their goal. The difficulties they have had to face were clearly demonstrated in the mid 'seventies in the course of the elaboration and subsequent discussion of the Tindemans report. There were a sufficient number of governments in favour of making a serious attempt to advance the matter to persuade the others to accept a change in the procedure originally agreed. In addition to the reports from the individual institutions - the deadline for which was brought forward to mid 1975 - the Belgian Prime Minister was asked to submit a comprehensive report based both on them and his own consultations

not only with governments but also "a wide range of public opinion" in the member states. This was clearly intended to put more prestige and authority behind the exercise. But, as Mr Tindemans made quite clear in the letter accompanying his report, he rapidly ran into difficulties. "Some people", he wrote," believed that it was particularly inappropriate to draw up a report on European Union at a time when the European concept was passing through a crisis and the incompleted European structure was swaying". And while, on the other hand, Mr Tindemans said that he had been struck by the strength of popular support for a strengthened Community, he nevertheless came to the conclusion, in spite of his own personal federalist convictions, that the time was not ripe to draw up a Constitution for the future European Union. Instead, he concentrated on making a series of proposals on how the Community could overcome its immediate crisis, defining a number of different dimensions of the future Union, and indicating the practical steps that should be taken to "set in motion the dynamic process of attaining the Union".(1)

It was also notable that in his discussion of economic and social policies he suggested a new approach. "It is impossible at the present time", he wrote,"to submit a credible programme of action if it is deemed absolutely necessary that in every case all stages should be reached by all the States at the same time. The divergence of their economic and financial situations is such that, were we to insist on this, no progress would be possible and Europe would continue to crumble away".(2)

(1) European Union. Report by Mr Leo Tindemans to the European Council. Bulletin of the European Communities, Supplement 1/76. For an extensive discussion of the Report see Heinrich Schneider and Wolfgang Wessels (eds), Auf dem Weg zur Europäischen Union ? Diskussionsbeiträge zum Tindemans-Bericht. Europa Union Verlag, Bonn, 1977.
(2) Ibid, p.20.

The Report set out careful parameters and conditions for such a differential development, and firmly rejected the idea of Europe à la Carte. Nevertheless, it was highly significant that the new degree of heterogeneity in the Community had led even Mr Tindemans to the conclusion that some greater degree of flexibility would be required in the future.

The Report greatly disappointed those who had hoped that it would provide the occasion for a relance , and its immediate results were meagre. The European Council first shunted it off to the Foreign Ministers and then, a year later, quietly buried it. And while it was not without some positive consequences - for instance, in putting an end to some of the more absurd formal distinctions between Community business and political cooperation - the episode showed very plainly the absence of a consensus on anything other than very modest and pragmatic steps forward.

In the next major report which, though not centrally concerned with European Union, nevertheless had some significant comments to make about it, the tone was noticeably more negative. The Committee of Three in their Report on European Institutions of October 1979 declared that "An excess of ambition, particularly when it begins and ends with mere words, breeds confusion, frustration, and finally indifference". In their concluding paragraph they also added: "The present time seems to us ill-suited to futuristic visions which presuppose a profound and rapid transformation of attitudes within the Community. The chance of such a transformation in the next few years seems to us exceedingly slight". So while the authors stressed that the Community should have a clear view of its priorities at each stage of its development, they also underlined that these could not be fixed once and for all. It followed

from this that "When we speak of European Union, therefore, we are speaking not so much of a definite goal as of a direction of movement".(1)

This was a very convenient redefinition of European Union as far as the more reluctant governments were concerned, for it meant that they could then claim that virtually everything they did - at the limit even meeting and talking together - could be construed as valuable progress in the right direction.

On the other hand, this view did not deter the German Foreign Minister, Hans-Dietrich Genscher, from proposing in January 1981 that "a clear step forward towards European Union" should be taken in the form of a new treaty. This, he suggested, should provide for the development of a common foreign policy, the extension of existing Community policies, coordination of security policy, and closer cooperation in cultural and legal matters. In the course of discussing his ideas with his colleagues, he found firm support from the Italian Foreign Minister, Emilio Colombo, who then added a shopping list of his own, consisting of proposals to strengthen and extend the economic and social tasks of the Community. Thus was born the Genscher-Colombo initiative which, given a generic blessing by the European Council in November 1981, was then subjected to detailed scrutiny by a special Ad Hoc Committee. Two and half years later it emerged from this process severely emasculated, no longer in the form of a proposed treaty nor even as a 'European Act'(the name by which it was known for some time), but as a 'Solemn Declaration on European Union' formally adopted by the European Council at its meeting in Stuttgart in June 1983.(2)

(1) For a discussion of this and other reform proposals, see Werner Weidenfeld(ed), Nur verpaste Chancen ? Europa Union Verlag, Bonn,1983.
(2) See Pauline Neville-Jones, 'The Genscher-Colombo proposals', Common Market Law Review,December 1983, and Joseph H.H.Weiler, 'The Genscher-Colombo Draft European Act: the politics of indecision', Journal of European Integration, Winter-Spring 1983.

As with the Tindemans Report, the Solemn Declaration ranges widely. It underlines the concern of the member governments to pursue the work begun by the treaties and to reinvigorate the Communities, and reaffirms - yet again and in precisely the same familiar terms, "their will to transform the whole complex of relations between their states into a European Union". Common objectives are set out, the role of the institutions defined, and separate sections are devoted to foreign policy, cultural cooperation and the approximation of laws. But the text consists for the most part either of statements of current practice or the expression of pious hopes for the future. Disputes on crucial issues had either voided specific proposals of real content, or had led to an impasse. On a number of issues the Danish and Greek governments insisted that their dissent should be displayed in footnotes to the published document, contrary to the usual and more discreet practice of having them recorded separately and out of public view. But the minutes also recorded a series of reservations and explanatory statements made by the other signatories, for the most part related to voting practices in the Council. The attempt to achieve more majority voting and to moderate the use of the veto had failed. All that finally agreed was a reference to 'the possibility' of abstention in cases where unanimity was required. There was also sharp disagreement about even modest gestures towards increasing the role of the European Parliament.

The signatories nevertheless decked out their meagre wares with much Euro-bunting. They not only reaffirmed their will to achieve European Union but asserted that such a Union was in fact being achieved. They added, however, that they would only consider whether sufficient progress had been made to justify a formal treaty as part of a general review of progress towards European unification to be undertaken in not later than five years' time. This was a hard-won but modest concession

made by the sceptics - at little cost to themselves - to those who, like the authors of the original project, still hoped that something positive would eventually come out of the exercise.

For the reasons discussed above, this had few points in common with the processes which enabled the Six to advance on the path to a wider and closer union. The basic difference was that there was no agreement between the parties even on the desirability of a closer union. The rhetoric was maintained because some believed in it and those who did not incurred no penalties by passively accepting it. The rituals of regularly going over the same ground were also maintained. The latter have even begun to perform a certain modest function: the Genscher-Colombo discussions were used, for instance, to record and codify established practice. In a curious way, what was originally intended to lead to a new blueprint for the Community has been converted into a series of occasions for legitimizing pragmatism.

But at the same time what began, in the minds of some of the newer member states at least, as a rather futile exercise of a purely rhetorical kind has now developed a momentum of its own. Governments cannot continue to reaffirm their commitment to an objective without others beginning to take them seriously - or at any rate using the commitment for their own ends. This is what the European Parliament has now done in working out its Draft Treaty establishing the European Union. The details of this do not concern us here - they are amply considered elsewhere. But it is relevant to note that a new actor has now become involved in the game; that it has set out a coherent view of what European Union should look like quite sharply different from the uncertain approach of the governments; and that in the process it has also made an important bid to increase its own powers.

This initiative contributed in turn to the decision at the Fontainebleau meeting of the European Council to set up an Ad Hoc Committee "on the lines of the Spaak Committee" with the task of "making suggestions for the improvement of the operation of European cooperation in both the Community field and that of political, or any other, cooperation".(1)

In spite of its very wide terms of reference it is not wholly clear to what extent the new Committee will also consider European Union as such. There is little doubt that President Mitterand, the author of the proposal, intended that it should - including the Parliament's Draft Treaty.(2) The explicit reference to the Spaak Committee and the requirement that its members should be the personal representatives of the leaders of the member states also clearly signalled his hopes that the Committee would be able to initiate a new relance. The early difficulties over its composition and chairman are, however, a reflection of a very different set of political realities - and a foretaste of the problems it will face in its work. There is little evidence to suggest that the attitudes and policies of the member governments have changed in any significant way since the Genscher-Colombo exercise. The Committee seems condemned to go round the same circuit once again, with the prospect of a very similar outcome.

Future prospects

In the past, lack of agreement about the ultimate objective has not proved an absolute barrier to forward movement, on condition that intermediate goals could be identified capable of appealing to a convergence of national interests, and that these were promoted by determined leadership. Currently these conditions are not fulfilled - though there are signs of new pressures developing which could restore momentum and a clearer sense of purpose. The major source of such pressures is the realisation that

(1) European Council Meeting at Fontainebleau: Conclusions of the Presidency, section 7.
(2) See Mitterand's speech to the European Parliament, May 28,1984.

the Community would be much more useful if it worked better. The increasing irritation at the persistence of barriers within the common market is one illustration of this. Another is the inability of the member countries to compete effectively with the United States and Japan in the application and exploitation of advanced technologies. At the same time there is also increasing irritation with the United States over a whole range of issues - voiced even by Mrs Thatcher.(1) All point to the need to strengthen the Community. Similarly, there are good reasons for the European members of the Atlantic Alliance to work more closely together within it, to define their common interests and to find ways of expressing these more effectively.

At the moment, however, there is no consensus about how to proceed on either front. At the height of the budgetary argument with Mrs Thatcher there was so much pent-up frustration that some began to argue that the only way forward would be to revert to the core group of the Six. This idea is also implicit in the Parliament's Draft Treaty. But though the thought has great nostalgic appeal, it is difficult to see how it would work in practice. And although the current equation of deadlock does not inspite great optimism, it is still the case that the pursuit of economic integration offers the most promising way forward. Much depends on the policy pursued by the United Kingdom. So far Mrs Thatcher has resisted the rising tide of pressure to take a full part in the European Monetary System: there are signs, however, that resistance is waning. A positive decision could open the way towards a new thrust in the directionof economic and Monetary Union and a more promising future for the Community.

As far as the foreign policy and defence sectors are concerned, it is

(1) See, for instance, the remarks in 'Europe - The Future' about unilateral American action (para 16), and the strictures about the need for the US to pay 'more attention to the international consequences of its domestic economic policies' (para 18)

much more difficult to see all the member states moving forward together - even in a flexible fashion. The policies pursued by the present Greek government have created great difficulties for political cooperation; the Danes still choke over the notion of a common foreign policy; and the Irish remain wedded to neutrality. So it is hardly surprising that WEU has been wheeled out again as the most promising framework for closer cooperation in defence matters. If progress in this area is possible it will be made by those countries which are members of it.

As a group the Ten are therefore still a long way from any prospect of an all-embracing Union of a classic type. It is becoming less and less likely that there will be any significant new developments before the entry of Spain and Portugal. Even though this will bring to an end the main phase of the Community's geographical expansion, it is unlikely to facilitate the quest for closer union. But many things could change in the medium term. For if the past shows how difficult the struggle to achieve closer unity has been, it also reminds us how constantly the situation has changed - and how leaders of vision have been able to make good use of even the most unpromising circumstances.

(16)

The Draft Treaty Establishing the European Union

The European Policy Unit at the European University Institute

The University of Strasbourg

The Trans-European Policy Studies Association

DE LA COMMUNAUTE A L'UNION
(POUR UNE EUROPE A DEUX CERCLES)

R. TOULEMON

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DE LA COMMUNAUTE A L'UNION
(POUR UNE EUROPE A DEUX CERCLES)

Mr. Robert Toulemon, Chairman,
A.F.E.U.R., Honorary Director General
of the Commission of the European Communities.

A Paper Presented at the Conference on

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DE LA COMMUNAUTE A L'UNION
(POUR UNE EUROPE A DEUX CERCLES)

R. TOULEMON

L'objectif suprême de la construction européenne n'a cessé depuis l'origine d'être éminamment politique. Les réalisations économiques et techniques de la Communauté charbon acier, du marché commun et de l'Euratom étaient, dans la pensée de leurs auteurs, des substituts, des palliatifs à l'Europe politique, momentanément paralysée par le demi échec du Conseil de l'Europe en 1949-1950 puis par l'abandon du projet de Communauté de défense en 1954.

Le lien entre intégration économique et solidarité politique est apparu clairement lors du premier élargissement. La mise en place de procédures dites de coopération politique n'a été possible qu'à partir du moment où le conflit à propos de l'adhésion britannique a été résolu. Le Royaume-Uni, avant même son adhésion, avait d'ailleurs manifesté son intérêt pour les aspects politiques de la construction européenne. Lors des débats in ternes relatifs à l'adhésion cet argument a été largement utilisé.

En dépit ou peut-être à cause des difficultés rencontrées par l'intégration économique, par suite des divergences d'intérêts nationaux à court terme accentuées par la crise, la nécessité d'une étape nouvelle vers l'Europe politique s'impose aujourd'hui.

La force de l'idée européenne provient de la permanence et de l'urgence des motifs qui militent en faveur de l'union des nations et des peuples de l'Europe restés ou redevenus libres.

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Qu'il s'agisse de la défense d'intérêts économiques essentiels au seuil d'une phase nouvelle et sans précédent d'évolution technique et dans un monde profondément perturbé par l'anarchie monétaire et les déséquilibres nord-sud avec leurs conséquences sur les institutions de crédit, ou d'intérêts stratégiques alors que des centaines de fusées à tête nucléaire sont braquées sur l'Europe occidentale et que, sous cette menace, une partie de l'opinion européenne, notamment allemande, semble tentée par la finlandisation, l'union européenne apparait plus que jamais aux yeux des plus lucides l'alternative au déclin.

Après l'échec de tentatives répétées - rapport des Sages, mission Tindemans, projet Gensher-Colombo, le dernier Parlement européen, sous l' impulsion d'une personnalité exceptionnelle, a eu le mérite d'élaborer un projet d'union, à la fois ambitieux par son caractère englobant et les objectifs à long terme qu'il définit, et réaliste par la modestie relative des transferts de compétence ou des transformations institutionnelles qu'il propose dans l'immédiat.

En annonçant que ce projet "lui convenait" et qu' "il en approuvait l'inspiration", le président Mitterrand a créé la surprise - les socialistes français n'avaient pas voté le projet - et contribué grandement à la crédibilité de l'entreprise.

Certes la création d'un comité ad hoc de représentants des chefs d'Etat et de Gouvernement lors du Sommet de Fontainebleau n'a pas été accompagnée, comme il eut été souhaitable, d'une prise en considération privilégiée du projet du Parlement, mais celui-ci a été expressément mentionné comme l'une des bases de la discussion.

Il n'est donc pas sans intérêt de procéder à une analyse d'une des difficultés principales que soulève tout projet d'union européenne et des solutions esquissées dans le texte du Parlement, et à mon avis, insuffisamment approfondies.

Cette difficulté n'est pas ou n'est plus celle de la supranationalité, ou si l'on préfère un terme moins barbare, celle du transfert ou de la conjonction des souverainetés nationales. En effet, personne aujourd'hui ne propose, au moins en première étape, la mise en place d'un gouvernement européen et personne ou presque ne nie la nécessité d'institutions plus fortes et plus efficaces.

L'obstacle désormais provient davantage des profondes différences d'attitude des Etats membres de la Communauté des Dix, et bientôt des Douze, après l'adhésion des deux Etats ibériques, à l'égard des objectifs politiques de l'Union européenne.

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De toute évidence, l'Irlande, qui est hors du pacte atlantique, le Danemark dont l'opinion est en majorité hostile à l'Europe politique, la Grèce dont la solidarité face à la menace soviétique est quasi-inexistante, ne sont pas en état, du moins dans le proche avenir, de participer utilement à une entreprise visant à renforcer les liens de solidarité politique et stratégique entre Européens.

Faut-il en conclure que rien n'est aujourd'hui possible dans le cadre communautaire ? La tentation est grande en effet de concevoir un nouveau système, plus restreint, par exemple dans le cadre de l'Union de l'Europe Occidentale, et d'accepter la transformation progressive de la Communauté en une sorte de nouvelle O.E.C.E ouverte à tous les pays européens démocratiques, y compris les neutres, et désormais dépourvue d'objectifs proprement politiques.

Bien des raisons permettent d'affirmer qu'accepter une telle évolution serait une erreur.

Au sein d'une Communauté dont l'élargissement progressif ne pourrait désormais en aucune manière être compensé par un renforcement des structures, toute véritable politique commune deviendrait sinon impossible, tout au moins précaire et peu efficace. La politique agricole, déjà menacée, ne résisterait pas à une telle évolution.

Mais surtout l'acquis de trente ans de vie communautaire, depuis la fondation de la Communauté charbon-acier, serait plus ou moins dissipé. En dépit de leurs imperfections, les institutions communautaires ont secrété des traditions et des solidarités. Les fonctionnaires, les experts, les hommes d'affaires des pays membres ont appris à travailler ensemble. D'innombrables organismes professionnels ont été créés. Les lobbies eux-mêmes, à commencer par celui des agriculteurs, font partie du terreau à partir duquel on peut espérer faire éclore l'Europe politique.

Il convient dès lors de rechercher une formule qui concilie ces deux exigences apparamment contradictoires :

- ne pas soumettre tout progrès de l'Europe politique au veto des Européens les plus timorés ;

- ne pas séparer l'Europe politique du substrat vivant et fertile de la Communauté économique.

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Les auteurs du projet du Parlement n'ont pas ignoré cette difficulté. Aussi bien ont-ils prévu que le nouveau traité établissant l'Union européenne entrerait en vigueur dès lors qu'il aurait été ratifié par "une majorité d'Etats membres de la Communauté dont la population forme les deux tiers de la population globale des Communautés" (article 82). Le même article prévoit que "les Gouvernements des Etats membres ayant ratifié se réuniront immédiatement pour décider d'un commun accord des procédures et de la date d'entrée en vigueur du Traité ainsi que des relations avec les Etats membres qui n'ont pas encore ratifié".

Il peut paraitre judicieux de réserver pour l'avenir cette question délicate. En fait il est douteux que les gouvernements puissent accepter de s'engager dans la voie d'une union européenne plus restreinte que les Communautés actuelles sans avoir une idée assez précise des rapports qui pourraient s'établir entre la nouvelle Union et les anciennes Communautés. Or le projet du Parlement est muet sur ce point. Il n'est donc pas inutile d'examiner la question, de formuler des hypothèses et d'esquisser des solutions conformes à la double exigence rappelée ci-dessus.

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L'acquis communautaire
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Le Parlement a été sensible à la nécessité de préserver l'acquis communautaire en assurant une continuité aussi parfaite que possible entre les Communautés actuelles et la nouvelle Union.

Un article figurant dans la première partie du projet de Traité intitulé l'Union (article 7) a pour titre "Acquis communautaire".

Il est ainsi rédigé :

" 1. L'Union fait sien l'acquis communautaire ;

" 2. Les dispositions des traités instituant les "Communautés européennes ainsi que des conventions et proto- "coles relatifs auxdites Communautés, qui concernent les

" buts de celle-ci et leur champ d'application et qui ne " sont pas modifiées de façon expresse ou implicite par " le présent traité font partie du droit de l'Union. Elles " ne peuvent être modifiées que selon la procédure de révi- " sion prévue à l'article 84 du présent traité.

" 3. Les autres dispositions des susdits traités, " conventions et protocoles font également partie du droit " de l'Union pour autant qu'elles ne soient pas incompati- " bles avec le présent traité. Elles ne peuvent être modifiées " que par la procédure de la loi organique visée à l'article " 38 du présent traité.

" 4. Les actes des Communautés européennes ainsi " que les mesures prises dans le cadre du système monétaire " européen et de la coopération politique continuent à pro- " duire leurs effets, pour autant qu'ils ne sont pas incom- " patibles avec le présent traité, tant qu'ils n'auront pas " été remplacés par des actes ou mesures pris par les ins- " titutions de l'Union, conformément à leurs compétences " respectives.

" 5. L'Union respecte tous les engagements des " Communautés européennes, en particulier les accords ou " conventions passés avec un ou plusieurs Etats tiers ou " une organisation internationale".

Dans la troisième partie intitulée "Dispositions institutionnelles", le projet de traité reprend l'architecture générale des institutions communautaires avec leurs quatre piliers : Parlement, Conseil, Commission, Cour de Justice, auquel vient s'ajouter le Conseil Européen dont le rôle éminent dans le domaine de la coopération et dans celui de l'élargissement ultérieur des compétences de l'Union, est ainsi juridiquement sanctionné.

Rien toutefois, dans ces dispositions relatives à l'acquis communautaire ou aux institutions ne nous éclaire sur la situation relative de l'ancien système communautaire et du nouveau système de l'Union.

Dès lors deux hypothèses peuvent être envisagées.

Première hypothèse : désormais deux systèmes coexistent. Les institutions communautaires subsistent à côté des nouvelles institutions de l'Union. L'Europe a désormais deux Parlements, deux Conseils, deux Commissions, deux Cours de Justice (non compris celles de la Haye et de Strasbourg ...), voire deux Conseils Européens.

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Formuler cette hypothèse, c'est en faire apparaitre l'absurdité. Il est évidemment plus réaliste d'envisager un seul système institutionnel fonctionnant avec un nombre de participants différents suivant que l'on se situe dans le cadre des Communautés anciennes ou dans celui de la nouvelle Union.

De même il n'est pas réaliste d'envisager que les Communautés et l'Union puissent mener dans les domaines économique, monétaire, agricole, industriel, technologique, scientifique, social des politiques différentes et moins encore divergentes. En revanche, il n'est pas impossible de prévoir des obligations plus contraignantes et des objectifs plus ambitieux dans le cadre plus restreint de l'Union. L'ensemble des membres des Communautés ne souscrivant que des obligations plus limitées mais les uns et les autres agissant dans la même direction générale. C'est en fait la situation qui prévaut dès à présent dans le domaine monétaire.

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L'Europe à deux cercles
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On est donc conduit à envisager un certain recouvrement des institutions et des objectifs généraux de la nouvelle Union et des anciennes Communautés.

Pour ce qui est des institutions, on peut envisager deux solutions juridiquement différentes mais pratiquement très proches. Ou bien l'on prévoit des institutions distinctes siégeant dans les mêmes lieux, sinon dans les mêmes locaux, ou l'on accepte des institutions communes mais à participation variable.

La première solution suppose, pour être pratique, que les mêmes personnes siègent dans les institutions des Communautés et dans leurs homologues de la nouvelle Union. Ainsi les mêmes Commissaires siégeraient dans la Commission des Communautés et pour les Etats membres de l'Union dans la Commission de l'Union. Bien évidemment les mêmes ministres et Chefs d'Etat ou de Gouvernement siègeraient dans les Conseils des Communautés et dans ceux de l'Union.

La deuxième solution, consisterait, suivant l'ordre du jour, à admettre ou à écarter la participation des représentants (Conseils) ou ressortissants (Commissions) des Etats non membres de l'Union, rien n'interdisant, d'un commun accord, d'admettre dans des cas intermédiaires leur présence comme observateurs ayant ou non droit à prendre part aux délibérations.

Il en serait de même en tout état de cause pour le Parlement et la Cour de Justice. Les ressortissants des Etats non membres de l'Union seraient tenus de s'absenter ou de s'abstenir des débats et des votes ou décisions concernant l'Union.

On ne manquera pas d'objecter que cette Europe à deux cercles, séduisante en théorie, se heurtera dans la pratique à bien des difficultés.

Telle mesure de politique commerciale prise par exemple dans un esprit de sanction à la suite d'agressions ou de violations des droits de l'homme (Afghanistan, Pologne) sera décidée par l'Union mais ne pourra l'être par les Communautés. Dès lors l'unité du marché commun serait mise en cause.

Le risque existe en effet que la dualité des cercles ne conduise à une certaine dualité des politiques. Il ne faut cependant pas s'exagérer la difficulté. Les exemples sont nombreux, dans le cadre communautaire actuel, supposé homogène, d'applications différenciées des décisions. Pour nous en tenir à la politique commerciale, il suffira d'évoquer les relations entre les deux Allemagne (non application du tarif douanier commun par la R.F.A. aux importations de R.D.A.) et les nombreux cas d'application de l'article 115, rendus nécessaires par certaines divergences de politique commerciale contingentaire.

Un système préservant un noyau central d'Etats ayant en commun des objectifs non seulement économiques mais politiques, est certainement préférable à une Communauté paralysée par son élargissement ou à une Union politique coupée de l'infrastructure économique que constitue l'union douanière et les amorces déjà acquises d'union économique et monétaire.

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Quels Etats figureront dans le cercle restreint de l'Union ? Ce sera à chacun d'en décider. On peut cependant formuler dès à présent une quasi certitude et deux interrogations.

Il est à peu près certain, pour les raisons évoquées plus haut, que dans l'avenir proche, ni le Danemark, ni l'Irlande, ni la Grèce ne seront disposées à rejoindre une Union européenne ayant des objectifs proprement politiques, ce qui ne signifie pas que certaines formes de coopération politique à la carte ne pourraient être envisagées entre l'Union et ces pays dans tel ou tel domaine (1).

Il est plus difficile, à l'heure actuelle, de prévoir l'attitude qu'adopteront l'Espagne et le Portugal à l'égard du projet d'Union européenne. Le souci de s'unir au bloc des démocraties européennes l'emportera-t-il sur les réticences à accepter des engagements politiques contraignants avant une étape d'adaptation et d'intégration au sein des Communautés économiques ?

Enfin, le Royaume-Uni ne manquera pas d'être embarrassé ou tout au moins divisé face à l'Europe politique. Une fois de plus s'affronteront outre-Manche le souci de participer aux affaires politiques du continent et la réticence à s'engager dans des innovations institutionnelles jugées insuffisamment "pragmatiques". Une fois de plus sans doute, les Anglais s'efforceront de freiner le mouvement quitte à le rejoindre si d'aventure il menace d'avancer sans eux.

C'est du moins ce que nous disent quelques Britanniques "pro-européens". N'hésitez pas à aller de l'avant, même sans nous. Si vous réussissez, nous vous rejoindrons. Voilà qui est de nature à éviter le renouvellement des querelles outre continentaux sur l'attitude à tenir à l'égard de la Grande-Bretagne qui a tant contribué dans les années cinquante et soixante à faire échouer les tentatives d'union politique européenne.

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(1) Le développement de la coopération politique européenne devrait normalement se situer dans le cadre de l'Union, même si, dans une première période, aucun élargissement de la compétence exclusive ou concurrente de l'Union n'est envisagé (cf. article 11 du projet de traité).

Une objection demeure. Qu'adviendrait-il si un ou plusieurs des Etats qui refuseraient d'adhérer à l'Union, refusaient également les aménagements nécessaires pour permettre une coexistence harmonieuse entre l'Union et les Communautés actuelles ?

La réponse est assez simple dans le principe même si les difficultés pratiques à prévoir ne sont pas négligeables. Dans le cas d'une obstruction ne pouvant être surmontée, il appartiendrait à l'Union de reprendre et de développer en son sein les actions et les politiques qui se trouveraient paralysées. On peut espérer que la menace de voir les Communautés se vider de leur substance au profit de l'Union conduirait les pays minoritaires à adopter une attitude de coopération. Il est également permis de penser qu'une situation leur donnant une position d'observation et d'influence tout en ménageant leur liberté d'action ou l'originalité de leur position, correspondrait assez bien à leurs souhaits.

(17)

The Draft Treaty Establishing the European Union

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LES PROJETS D'UNION EUROPEENNE
DU RAPPORT TINDEMANS AUX PROGRAMMES DE 1984

J. VANDAMMES

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LES PROJETS D'UNION EUROPEENNE DU RAPPORT TINDEMANS AUX PROGRAMMES DE 1984.

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Introduction. L'origine du concept d'Union européenne

L'expression d'"union européenne" a été utilisée pour la première fois au sommet de Paris d'octobre 1972 où, dans le dernier point du communiqué, les Chefs d'Etat et de Gouvernement déclarent que l'objectif final des Etats dans l'entreprise communautaire est "la transformation de l'ensemble de leurs relations en une Union européenne".

On ne trouve dans cette déclaration aucune définition du concept. Mais le contexte général de la relance européenne amorcée dès le sommet de La Haye en décembre 1969 permet de dégager une certaine explication.

(1) Ce texte est une version légèrement adaptée d'un exposé préparé pour le Colloque de mai 1984 organisé par l'Institut de Politique internationale et européenne de l'Université de Paris X Nanterre et consacré au thème : "La démocratie chrétienne, force internationale".

Une des principales décisions de La Haye est de compléter l'union douanière et commerciale qui constitue la Communauté par une union économique et monétaire dont les premiers éléments sont d'ailleurs adoptés dès mars 1971.

En 1972, à Paris, ce sont les politiques d'accompagnement qui se trouvent à l'ordre du jour : politique industrielle, politique régionale et politique sociale.

Après le projet d'union économique et monétaire on parle du projet d'union sociale. (1)

En évoquant l'idée d'"Union européenne" on vise une globalité de matières et d'engagements par opposition aux approches partielles développées dans la logique de l'intégration fonctionnelle.

Nous ne partageons dès lors pas tout à fait l'opinion de notre collègue Zorgbibe qui semble ramener l'essentiel du débat sur l'Union européenne à la querelle institutionnelle sur la supranationalité. (2)

Certes l'Union européenne implique des progrès institutionnels importants et s'oppose certainement à la pratique du vote à l'unanimité qui ressort du pur intergouvernementalisme.

Mais l'essentiel ne nous paraît pas se situer à ce niveau.

Nous pensons que le chancelier W. Brandt est plus près de la réalité lorsque s'exprimant devant le Parlement européen le 13 novembre 1973, il déclare :

> " La République Fédérale a fait de l'Union européenne sa mère patrie. L'Etat national classique est la forme de vie d'hier. L'Union européenne ne naîtra pas d'une révolution supranationale ni du renverseemnt des poteaux frontières, mais d'une accélération de l'effort fragmentaire fonctionnel pour l'Union économique et monétaire, l'union sociale, l'union politique. "

On retrouve dans ces propos l'idée de globalité des progrès.

C'est une des composantes essentielles de l'Union européenne.

Mais il manque encore quelque chose d'essentiel : la transformation qualitative de cet ensemble. Car il ne s'agit pas de n'importe quels progrès.

Ce sera l'élément nouveau du rapport Tindemans.

I. Le rapport Tindemans (1974-1976)

Le sommet de Paris de décembre 1974 se situe à un nouveau tournant de l'histoire européenne. En France M. Giscard d'Estaing vient d'être élu à la Présidence de la République tandis qu'en Allemagne Fédérale le chancelier Schmidt succède à Willy Brandt. C'est l'occasion d'une nouvelle tentative de relance après l'échec de l'union économique et monétaire. Ce programme de relance décidé à Paris comporte notamment la décision de procéder à l'élection du Parlement Européen au suffrage direct et la définition du mandat confié au Premier Ministre de Belgique, Leo Tindemans, concernant l'Union européenne.

Celui-ci établira un rapport à ce sujet après consultation des institutions européennes, des gouvernements et des forces économiques et sociales de la Communauté.

M. Tindemans se met au travail dès janvier 1975 et prend son bâton de pèlerin.

Au cours de visites dans toutes les capitales, et parfois en dehors, il rencontre les représentants de ces groupes politiques et des forces vives (3). Il s'agit d'une sorte de "consultation populaire" qui nous éloigne pour un temps de l'Europe bureaucratique et technocratique.

Finalement quelle sera la conception de M. Tindemans sur l'Union européenne ?

Le rapport présenté début janvier 1976 comporte cinq chapitres.

Le premier développe la nécessité d'une vision commune de l'Europe autour du concept d'union européenne dont M. Tindemans énonce les composantes :

1. se présenter unis au monde extérieur;
2. tirer les conséquences de la dépendance réciproque de nos Etats en organisant un certain nombre de politiques communes notamment en matière économique et monétaire;
3. rendre la solidarité effective par les politiques régionales et sociales;
4. développer la prise de conscience au niveau des individus;
5. renforcer l'autorité des institutions de manière à accroître l'efficacité de leur action.

Le second chapitre traite de l'Europe dans le monde et développe les mécanismes d'une attitude commune dans certaines matières de politique extérieure.

Le troisième parle de l'Europe économique et sociale et y propose notamment l'idée des progrès différenciés dans le domaine économique et financier.

Le quatrième traite de l'Europe des citoyens en évoquant les problèmes des droits fondamentaux de la protection de l'environnement, des droits du consommateur et en proposant l'idée de la Fondation Européenne.

Enfin le cinquième chapitre expose les modifications institutionnelles qui devraient rendre la Communauté plus efficace dans son action : rôle du Conseil Européen, du Conseil, de la Commission et du Parlement européen.

De l'ensemble de ce rapport il résulte que l'Union européenne est selon L. Tindemans, une nouvelle phase de l'intégration européenne, qui s'amorce par une décision des Chefs de Gouvernement de prendre, dans différents domaines (politique extérieure et intérieure, conscientisation populaire et institutions) des mesures constituant dans leur ensemble un progrès qualitatif, celui-ci pouvant déboucher, dans une phase ultérieure, sur un Traité nouveau confirmant ces progrès dans des textes contraignants et apportant aux mécanismes institutionnels, les adaptations requises.

On retrouve donc ici l'idée de globalité que nous exprimions au début, en citant le chancelier Brandt.

Mais il y a dans le rapport Tindemans un élément nouveau : celui de la qualité des progrès.

On ne pourrait donc pas dire qu'il y a Union Européenne si par exemple on réalisait l'idée des progrès monétaires différenciés (que l'on a d'ailleurs réalisé en 1979 en instituant le système monétaire européen).

On ne pourrait pas le dire non plus si le Conseil fonctionnait correctement dans le sens indiqué par M. Tindemans et par beaucoup d'autres avant lui et après lui.

Il faut un ensemble de mesure qui globalement constituent un progrès qualitatif.

Ce n'est donc pas un critère juridique qui déterminera si l'on entre en Union Européenne; les juristes le regretteront.

On sait quelles suites ou plus exactement quelle absence de suites a été réservée au rapport Tindemans.

Après un an de discussions, le Conseil Européen n'a pu, en novembre 1976 à La Haye, qu'exprimer des voeux pieux et décider que l'on ferait un rapport annuel sur les progrès de l'Union.

Le Conseil et la Commission se sont attelés à cette tâche et ont publié chaque année un rapport annuel sur l'Union européenne(4)

Ce faisant, comme le remarque le Conseil par exemple dans son rapport de 1981,(5) les Ministres des Affaires Etrangères "ne cherchent pas à établir un bilan exhaustif de l'importante activité communautaire au cours de l'année achevée, mais entendent souligner les progrès réalisés dans les différents domaines de l'Union et traduisant dans la réalité la conception commune de l'Union européenne."

Certes des progrès ont été observés chaque année et quelques-uns d'entre eux sont d'une grande importance. Mais c'est un abus d'affirmer qu'ils "traduisent la conception commune de l'Union européenne." Précisément c'est l'absence de conception commune sur l'Union européenne, c'est-à-dire sur les finalités ultérieures de l'intégration européenne qui fut la cause majeure de l'échec du rapport Tindemans.

Et cette situation subsiste toujours aujourd'hui.

Il n'y a pas de consensus entre les dix Etats de la Communauté sur le sens des progrès à accomplir, voire de certaines des composantes actuelles.

Certes il y a consensus sur l'idée du Marché Commun, d'une politique agricole et commerciale commune.

Il n'est cependant pas certain que tous les Etats acceptent le sens de la coopération politique.

Quelques Etats n'acceptent pas la finalité politique de l'intégration économique.

Quelques autres voudraient modifier les règles de la solidarité et du financement.

Comment, dans ces conditions, espérer qu'au niveau des gouvernements on puisse véritablement avancer vers l'Union européenne, sans une clarification de la définition des objectifs à poursuivre, par qui et comment ?

Les exercices ultérieurs de 1977 à 1983, vont, confirmer l'impasse dans laquelle on se trouve tant que cette question centrale n'est pas réglée.

II. Les exercices intérimaires (1979-1981)

C'est dans la perspective décrite ci-dessous qu'il faut situer et apprécier les initiatives ultérieures visant à apporter des améliorations partielles au fonctionnement de la Communauté. Nous songeons en particulier au rapport de 1979 sur les institutions européennes, aux initiatives du Parlement Européen et au memorandu du gouvernement français.

1.- Rapport sur les Institutions Européennes (dit "des trois sages")

A/ Origine: A l'initiative du Président de la République Française Valery Giscard d'Estaing, le Conseil Européen du 5 décembre 1978 donna mandat à trois personnalités -MM. Biesheuvel, Dell et Marjolin - pour rechercher de nouvelles propositions concrètes destinées à assurer le fonctionnement harmonieux des Communautés et à progresser dans la voie de l'Union Européenne (dans le respect des Traités).

Conformement à ce mandat, les "Trois Sages" purent émettre en octobre 1979 une série de propositions, souvent techniques, relatives à l'organisation de chacune des Institutions, y compris le Parlement Européen. Une partie de ce rapport concerne "le mouvement vers l'Union Européenne".

B/ Contenu de la partie intitulée "mouvement vers l'Union Européenne"

Pour les auteurs, parler d'Union Européenne revient en fait à décrire "un mouvement vers une Communauté qui se comporterait d'une façon de plus en plus solidaire, dans ses efforts pour résoudre les multiples difficultées auxquelles la Communauté et les Etats membres" (6) doivent faire face à présent et dans l'avenir. Il ne s'agit pas tant de définir un "objectif déterminé" mais plutôt de préciser les principaux obstacles qui devront être franchis, ensemble et solidairement par les pays de l'Europe.

Rappelant tout d'abord que les priorités d'action communautaires ne peuvent être établies une fois pour toute dans un monde en pleine évolution, les "Trois Sages" soulignent l'importance primordiale de deux des principes qui sont à la base du mouvement d'unification européenne: la "Solidarité active" et la "Solidarité passive".

La première peut être définie comme le devoir et l'intérêt bien compris par les pays de la Communauté de porter assistance à un des leurs confronté à une situation de grande difficulté, et ce quelques soient les raisons de ces difficultés.
La Solidarité passive se conçoit comme le souci partagé par les pays de la Communauté de "s'abstenir, dans la mesure du possible, de tout acte qui pourrait rendre plus difficile la vie d'autres Etats et de la Communauté dans son ensemble".(7)
Cette double solidarité devrait permettre de palier au fait que la Communauté ne dispose souvent que d'attributions et de pouvoirs limités. Cela est vrai dans les domaines économiques, financiers et monétaires dont l'éssentiel des "décisions sont restées et resteront très probablement des décisions nationales"(8) dans les prochaines années.
L'Europe se trouve confrontée à une crise caractérisé par des tendances inflationnistes durables, des tensions liées aux problèmes énergétiques, de faibles taux de croisaance, un durcissement des concurrences internationales, la désagrégation du système monétaire international.
Dès lors, et dans ce contexte, "la première des priorité est le maintient de la cohésion de la Communauté et des pays membres en vue de préserver l'acquis communautaire".(9) De mêmê, "il est vital que dans ses différentes relations (avec ses partenaires économiques et commerciaux) la Communauté et les Neuf se comportent comme une unité".(10) Ce qui implique qu'il faut s'attacher à développer la coopération politique et assurer un maximum de compatibilité entre les politiques nationales. En raison de son importance mais aussi de sa fragilité, le secteur énergétique pourrait constituer l'exemple d'une réelle coopération et solidarité communautaire.
Mais cela suppose, le rapport des "trois Sages" est très clair à cet égard , que l'on choisisse des actions concrètes limitées et

appréciables selon leurs mérites propres, plutôt que "des projets vastes ou mal définis qui ne correspondraient pas à l'état de développement actuel de la Communauté". (11)

C/ Signification

Comme on peut aisément le constater, les auteurs de ce rapport dit "des Trois Sages" ont délibérément opté pour une vision pragmatique du processus d'unification européenne au détriment de ce qu'ils qualifient eux-mêmes de "grandes fresques futurologiques qui selon eux supposent presque toujours une transformation profonde et rapide des esprits", transformation du reste peu probable à courte échéance.

Ce rapport ne semble pas avoir eu de suites identifiables en ce qui concerne l'Union Européenne. Mais s'attendait-on vraiment à ce qu'il en ait ? Privilégiant les expériences concrètes limitées et le renforcement des pratiques de solidarité (actives et passives), le rapport correspond effectivement au niveau de développement des capacités et de l'esprit communautaire.

En rupture vis-à-vis des projets antérieurs beaucoup plus ambitieux, le rapport des "Trois Sages" confirme la crise de finalité des institutions européennes et n'apporte rien d'essentiel au concept d'Union Européenne.

2. Les résolutions du Parlement sur la réforme des institutions

L'approche pragmatique du Parlement Européen consiste à mettre l'accent sur l'amélioration des institutions européennes.

Au cours des années 1980, 1981 et 1982, le Parlement Européen adopte d'initiative une série de résolutions visant à améliorer le fonctionnement institutionnel des Communautés et à réaménager ses relations (en tant qu'organe directement élu) avec les autres institutions en insistant sur l'accroissement de son propre rôle dans le processus législatif et dans la ratification des Traités.

A. Contenu des propositions

a) Résolutions du 17 avril 1980 concernant relations Parlement/ Commission (rapport Rey)

Dans la perspective du renouvellement de la Commission (1981), le Parlement insiste sur la fonction politique de celle-ci dans son rôle d'"organe exécutif naturel de la Communauté" (12) et sa nécessaire autonomie de gestion. Le Parlement réaffirme son droit à être consulté et à donner son avis annuellement sur la politique suivie par la Commission comme d'ailleurs lors de la désignation de son Président. Désignation qui devra donner lieu à un débat suivi d'un vote d'investiture du Parlement.

b) Résolution du 9 juillet 1981, sur les relations Parlement/ Conseil (rapport Haensch)

Estimant que les pratiques développées au cours des 20 dernières années ont conduit à une réduction de "la capacité d'action et de la volonté de décision du Conseil et de la Commission" (13), le Parlement invite le Conseil à prendre des mesures concrètes par le biais de déclarations communes visant à améliorer l'information réciproque, développer la consultation préalable du Parlement, accroître et perfectionner les procédures de concertation Parlement/Conseil, respecter "l'égalité fondamentale" (14) des deux institutions en matière budgétaire. Enfin, le Parlement invite le Conseil à revoir son fonctionnement particulièrement en ce qui concerne ses procédures de vote (retour à la règle majoritaire) et les délégations de ocmpétences à la Commission.

c) Résolution du 9 juillet 1981 sur les relations Parlement/ Parlements nationaux (rapport Diligent)

Le Parlement estime "que des rapports réguliers et organiques doivent s'instaurer" (15) entre lui et les Parlements nationaux. Aussi, entre autres moyens, le Parlement propose une concertation accrue en vue d'accomplir certains actes communautaires (législation communautaire) ainsi que l'établissement de contacts étroits entre les présidents et les rapporteurs des commissions parlementaires européennes et nationales.

d) Résolution du 9 juillet 1981 sur les relations Parlement/ Comité Economique et Social (rapport Beduel-Glorioso)

Vu la composition et le rôle croissant du Comité Economique et Social, le Parlement propose différentes mesures destinées à améliorer son information sur les travaux du C.E.S. et à accentuer leur collaboration réciproque.

e) Résolution du 9 juillet 1981 sur le Parlement et le processus législatif communautaire (rapport Van Miert)

Considérant que "le Conseil et la Commission devraient s'engager à accorder aux avis adoptés par le Parlement... sur les propositions législatives de la Commission l'importance qu'elles méritent" (16), le Parlement invite la Commission et le Conseil à accepter son droit d'initiative législative et à tenir compte de ces initiatives. Ce qui implique un renforcement des procédures de consultation/concertation entre le Conseil et le Parlement.

f) Résolution du 9 juillet 1981 sur les Parlement et Coopération politique (rapport Lady Elles)

Le Parlement, outre un renforcement des procédures de la Coopération politique entre les Etats membres, souhaite pouvoir "exercer une plus grande influence" (17) (contrôle démocratique) sur ces problèmes. Dès lors, il conviendrait de prendre des mesures visant à améliorer l'information du Parlement.

g) Résolution du 12 décembre 1981 sur les relations Parlement/ Conseil européen (rapport Antoniozzi)

Le Parlement demande instamment au Conseil - quand celui-ci agit comme tel au sens des Traités - de respecter les procédures de consultation et de concertation nécessaires, et de participer, par la présence de son Président, au débat annuel du Parlement sur "l'état de l'intégration européenne et le rôle de la Communauté dans la politique internationale".

h) Résolution du 17 février 1982 sur le Parlement et traités internationaux (rapport Blumenfeld)

Constatant les pratiques constitutionnelles nationales en la matière, le Parlement invite "le Conseil et la Commission à déclarer qu'ils associeront le Parlement européen à la conclusion de tous les accords conclus sur la base des traités instituant la Communauté (18) et à l'informer pour les autres accords internationaux. L'objectif étant d'instaurer l'assentiment nécessaire du Parlement pour la conclusion des traités et leur mise en oeuvre.

B. Suites et signification

Les résolutions du Parlement Européen ont incontestablement contribué à alimenter le débat institutionnel à l'intérieur de la Communauté.

En octobre 1981 la Commission adopte, dans le cadre du mandat du 30 mai 1981, le rapport Andriessen sur les relations inter-institutionnelles. Ce rapport rencontre différentes suggestions du Parlement notamment en ce qui concerne la procédure de concertation en matière législative et budgétaire. Au cours du même mois les Ministres des affaires étrangères adoptent à Londres le rapport sur la coopération politique. Il contient un passage sur l'amélioration des relations avec le Parlement, tant sur le plan des contacts informels que formels.

Les Ministres y décident de reprendre plus souvent les résolutions adoptées par le Parlement.

Ils notent qu'à l'issue d'une réunion du Conseil européen, le Président du Conseil fera une déclaration au Parlement.

Enfin en novembre 1981 une rencontre a lieu entre le Bureau élargi du Parlement et le Conseil Affaires étrangères sur les questions institutionnelles.

Comme on peut le constater l'ensemble des résolutions du Parlement se situent dans la ligne des réalisations possibles sans modification des Traités. Elles sont inspirées principalement du souci de voir augmenter le rôle politique du Parlement afin d'assurer un meilleur équilibre institutionnel à l'intérieur de la Communauté. C'est donc un aspect important mais seulement partiel de l'Union européenne.

Globalement les résultats sont restés très en deça de ce qui avait été escompté. Néanmoins ils ont permis d'entretenir le débat et d'empêcher son enlisement.

3. Le mémorandum du Gouvernement français du 9 octobre 1981

A. Origine

Il ne s'agit pas à proprement parler d'un document sur l'Union européenne mais étant donné l'approche globale exprimée, on peut considérer ce memorandum comme une contribution au progrès du concept étudié.

Le nouveau Gouvernement français, issu des élections de mai et juin 1981, adresse aux différentes institutions européennes un memorandum visant à promouvoir et guider une relance de l'action communautaire.

B. Contenu

Le document présente une série de propositions assez précises relatives à tous les secteurs de l'activité communautaire.

Partant de la constatation suivant laquelle, dans la difficile bataille économique actuelle, "il n'y a pas de puissance politique sans puissance économique; (ni)... de puissance économique sans un projet politique et culturel" (19), il s'avère donc nécessaire de viser des objectifs ambitieux en matière d'emploi, d'autonomie énergétique, d'indépendance industrielle et de justice. Pour ce faire, il n'apparaît pas urgent d'envisager une réforme des Institutions. Par contre, "il convient d'approfondir la concertation avec les partenaires sociaux" (20).

Sur ces bases, le Gouvernement français propose au plan économique un recours accru à l'emprunt, le passage à une nouvelle phase du S.M.E., et la définition d'une politique économique extérieure commune. Mais ces actions économiques doivent s'accompagner de l'élaboration d'un "espace social européen" caractérisé par une intensification du dialogue social, une coordination des dépenses sociales nationales et d'une ré-orientation du Fonds social. De même, la P.A.C. doit être ré-aménagée afin de tirer mieux parti des richesses agricoles de la Communauté et de maîtriser l'évolution des dépenses. En matière énergétique, le souci d'indépendance et de solidarité européenne doit s'allier au développement d'une coopération avec les PVD. Energies nouvelles, agronomie, connaissances et produits adaptés aux PVD, tels sont les domaines prioritaires d'une action commune dans le domaine de la recherche irrigué par la constitution d'un "espace scientifique et technologique européen"; Espace qui ne peut oublier de se pencher sur les réactions et les besoins des travailleurs et des consommateurs. Enfin, le mémorandum français prévoye le renforcement des politiques communes en matière industrielle, commerciale et régionale avant de définir les axes d'un approfondissement des relations Europe/Sud (aide au recyclage des capitaux, extension du Stabex, politique pour les réfugiés).

Le texte se termine par des propositions sur le fonctionnement des institutions dont l'essentiel vise à assurer une meilleure application des Traités en matière de vote permettant au Conseil de prendre ses décisions plus rapidement.

Le gouvernement français propose que la Présidence ait normalement recours au vote lorsque le Traité le prévoit, étant admis que le vote pourrait être différé si un ou plusieurs Etats membres le demandent au nom de la défense d'un intérêt national essentiel.

C/ Signification: Deux ans après le Rapport dit des "trois Sages", et alors que le Parlement cherche à accroître son rôle et à clarifier la répartition des compétences communautaires, l'initiative française semble inspirée par le souci de dynamiser l'action commune dans une série de domaines nouveaux où des réalisations concrètes se font attendre. Ce choix peut être rattaché aux principes définis par les "Sages" dans la mesure où il vise à rencontrer des problèmes concrets que l'ensemble des Etats membres s'éfforcent de surmonter. On retrouve ici l'idée que l'Union pourrait se faire "dans la crise" plutôt que "dans ses institutions. Cependant des concepts comme celui "d'espace social européen" devraient permettre aux institutions européennes d'investir de nouveaux champs d'action et par là d'enrichir le contenu de la notion d'Union. Il faut noter enfin l'important "retournement" de la position française en ce qui concerne le recours du vote...

III. La tentative de relance au niveau des gouvernements
Le projet d'Acte Européen présenté par la RFA et l'Italie (projet Genscher-Colombo)

A. Origine : la proposition soumise au Conseil Européen des 26-27/11/81

Les échecs des approches partielles décrites ci-dessus allaient susciter un courant nouveau en faveur d'un retour à une conception plus globale.

La première à mentionner est le projet d'Acte Européen présenté, à l'initiative des Ministres des Affaires étrangères et des Gouvernements allemand et italien, au Conseil Européen des 26-27 novembre 1981.

Conçu comme ün "Acte" auquel devraient adhérer tous les pays membres, le projet Genscher-Colombo consiste en une tentative de redéfinition des objectifs fondamentaux de l'unification européenne et des compétences attribuées aux différentes institutions des Communautés.

La première partie, concernant les "principes", réaffirme la volonté unanime de réaliser progressivement "l'Union Européenne" par un renforcement des Communautés Européennes (et notamment dans les domaines culturel, juridique, "espace judiciaire", sécurité) et de la Coopération politique.

La seconde partie, concernant les "institutions", propose une série de modifications structurelles dont "le regroupement des structures de décision des Communautés et de la Coopération politique sous l'autorité du Conseil Européen" (21). Il est également prévu d'élargir les pouvoirs du Parlement (rapport annuel du CE au Parlement, développement de la consultation et de la concertation). Mais aussi d'attribuer au Conseil des Ministres des affaires étrangères la pleine compétence pour la Coopération politique.

Enfin, il est demandé aux Etats membres de faciliter la prise de décision au Conseil en recourant à l'abstention plutôt qu'au vote négatif qui ne doit servir que lorsque des "intérêts vitaux" sont menacés.

Une fois accepté, "l'Acte Européen" devrait servir de base à la réalisation de l'Union et serait révisé après cinq ans dans le but de rassembler les progrès réalisés.

B. Déroulement et conclusions

Les discussions du projet de rapport Genscher-Colombo se développèrent pendant plüs de 18 mois tant au niveau des Ministres que d'un Comité d'experts gouvernementaux.

Finalement le Conseil Européen de Stuttgart de juin 1983 adopte une "déclaration solennelle" très en deça de ce que les promoteurs avaient espéré et assortie au surplus de réserves grecque et danoise sur certains points déjà fort atténués. (22)

La déclaration réaffirme dans le préambule la volonté des Dix de transformer l'ensemble des relations entre leurs Etats en une Union européenne.

Cette Union européenne implique le renforcement et le développement des Communautés qui sont le "noyau" de l'Union, par "l'approfondissement des politiques existantes et l'élaboration de politiques nouvelles dans le cadre des traités".

Mais elle implique aussi un renforcement de la coopération politique par l'adoption de positions communes dans le domaine de la politique étrangère, "y compris la coordination des positions des Etats membres sur les aspects politiques et économiques de la sécurité".

Enfin les objectifs nouveaux consistent à promouvoir :

a) une coopération plus étroite en matière culturelle (notamment au niveau universitaire)

b) un rapprochement de certains domaines de la législation des Etats membres dans le but de faciliter les rapports mutuels entre leurs ressortissants (protection commerciale et industrielle, protection des consommateurs, etc..)

c) des actions concertées pour faire face aux problèmes internationaux de l'ordre public, aux manifestations de violence grave, à la criminalité internationale organisée et d'une façon générale, à la délinquance internationale.

Vient ensuite l'explicitation des mesures envisagées dans la ligne de ces objectifs, en commençant par les institutions.

On y souligne notamment, la nécessité, déjà fréquemment affirmée dans le passé, d'une étroite cohérence et coordination entre les structures des Communautés et de la coopération politique afin de permettre une action globale et cohérente de l'Union.

Le Conseil européen présentera au Parlement européen un rapport à la suite de chacune de ses réunions et un rapport annuel sur les progrès réalisés sur la voie de l'Union européenne.

Rien n'est dit d'important en ce qui concerne le vote au Conseil si ce n'est que "toute possibilité susceptible de favoriser la prise de décision sera utilisée, y compris, dans le cas où l'unanimité est requise, le recours à l'abstention".

La déclaration rencontra quelques-unes des revendications exprimées par le Parlement comme la présentation d'un rapport sur la présidence, une communication annuelle sur les progrès de la coopération politique, la consultation du Bureau élargi avant la désignation du Président de la Commission, la présentation du programme de la nouvelle Commission, la consultation du Parlement sur les accords internationaux d'importance significative.

Tout ceci n'est pas révolutionnaire mais confirme une pratique déjà amorcée depuis quelque temps dans l'activité de la Communauté.

La déclaration s'étend alors sur les champs d'action de l'Union, la stratégie économique globale, la coordination des politiques économiques nationales, le système monétaire européen, le renforcement de la politique commerciale, la réalisation complète du marché intérieur, la poursuite de la politique agricole commune en harmonie avec les autres politiques, le développement d'une stratégie industrielle au niveau communautaire, le développement des politiques régionale et sociale.

Rien de très nouveau non plus dans la description des actions à entreprendre dans ces domaines.

En ce qui concerne la politique étrangère, la déclaration acte les pratiques introduites depuis quelques années et déjà confirmées dans la déclaration de Londres d'octobre 1981.

L'élément nouveau est celui qui a trait à la coordination des positions des Etats membres sur les aspects politiques et économiques de la sécurité et la description d'actions dans le domaine culturel et en ce qui concerne le rapprochement des législations dans le domaine commercial et industriel.

Enfin les dispositions finales comprennent quelques précisions sur la manière de réaliser l'Union européenne. Celle-ci se réalise "par l'approfondissement et l'extension du champ d'action des activités européennes pour couvrir d'une manière cohérente, bien que sur des bases juridiques différentes, une part croissante des rapports entre les Etats membres et de leurs relations extérieures".

Dans un délai de cinq ans, les chefs d'Etat et de gouvernement réexamineront les progrès réalisés et décideront s'il y a lieu d'incorporer ces progrès dans un traité sur l'Union européenne.

"L'avis du Parlement sera sollicité à ce sujet".

C. Appréciation

La déclaration sur l'Union européenne de juin 1983 est incontestablement un document important à différents titres.

D'abord il reflète le compromis actuel possible entre les Etats membres sur le sens de l'action communautaire et sur les objectifs à poursuivre à court terme.

Même si la déclaration, pour certaines matières, ne fait qu'entériner des pratiques en cours depuis quelques années, elle n'en constitue pas moins un "status questionis" assez complet.

D'autre part la déclaration accrédite en quelque sorte la conception de l'Union européenne développée dans le rapport Tindemans.

L'Union européenne est une démarche globale, par laquelle des matières de plus en plus nombreuses, intéressant les relations entre les Etats sont inclues dans le processus de concertation ou de décision communautaire. L'action communautaire va donc maintenant bien au-delà de l'économique pour englober le culturel, la sécurité intérieure et même un peu de sécurité extérieure (à l'exclusion toutefois des aspects militaires).

Il paraît désormais acquis que l'Union européenne est beaucoup plus qu'une question institutionnelle.

Enfin l'idée d'un Traité sur l'Union européenne est envisagée ce qui donne une perspective aux engagements souscrits.

Ceci dit, il reste évidemment de nombreux points obscurs. Le premier est la nature de la déclaration. De quels engagements s'agit-il ? Les nouvelles matières seront-elles traitées dans le cadre de procédures communautaires ou inter-gouvernementales ?

La coopération politique reste largement une affaire de bonne volonté, sur la base d'une structure très fragile.

Enfin les réserves exprimées par certains pays montrent à quel point de divergences importantes subsistent entre les Dix au sujet du développement de la Communauté et de sa finalité.

Cette question fondamentale reste toujours ouverte après la déclaration de Stuttgart.

On comprend, dans ces conditions, que le Parlement n'ait pu s'en tenir à une aussi mince perspective à la veille de l'élection de juin 1984.

IV. Le projet de Traité sur l'Union européenne

Si le projet de Traité sur l'Union Européenne a finalement été adopté le 14 février 1984 par 238 voix pour, 31 voix contre et 43 abstentions, il n'en a pas moins connu une naissance laborieuse et certainement problématique jusqu'au milieu de l'année 1983.

Pour quelles raisons ?

D'abord parce que précisément les Ministres préparaient depuis 1981 un projet d'Acte sur l'Union Européenne : il fallut attendre les derniers mois avant Stuttgart (juin 1983) pour savoir que la montagne accoucherait d'une souris.

En second lieu parce que l'initiative du dynamique Altiero Spinelli reste longtemps limitée à quelques amis fidèles du club du "Crocodile" en raison, principalement, de l'opposition des démocrates chrétiens qui, se considérant comme les plus européens, n'appréciaient pas de voir une initiative aussi importante leur échapper.

Mais, comme le dit M. Spinelli lui-même, une fois qu'ils décidèrent de s'engager, ils furent aussi ses alliés les plus sûrs et c'est au sein de ce groupe que l'unanimité fut la plus grande lors du vote final. (23)

A. Contenu du projet

Le projet de Traité couvre l'ensemble des matières communautaires actuelles et en inclut de nouvelles. Il a pour but de poursuivre et de relancer l'oeuvre d'unification démocratique de l'Europe en faisant sien l'acquis communautaire. Les objectifs sont plus ambitieux que ceux des Traités de Rome puisqu'ils comportent aussi la promotion, dans les relations internationales, de la sécurité, la paix, la coopération, la détente, le désarmement et la libre circulation des personnes et des idées.

Pour atteindre ces buts, l'Union agit selon les méthodes de l'action commune ou de la coopération. L'action commune comporte les actes normatifs, administratifs, financiers et judiciaires ainsi que les programmes et recommandations propres à l'Union, émanant de ses institutions et s'adressant soit à celles-ci, soit aux Etats, soit aux individus.

La coopération comporte les engagements que prennent les Etats dans le cadre du Conseil européen.

Des matières de coopération peuvent devenir l'objet d'actions communes.

Les compétences de l'Union sont soit exclusives (comme par exemple l'achèvement du marché intérieur, la concurrence, etc.) soit concurrentes à celles des Etats (par exemple la politique de conjoncture, la politique monétaire, les politiques sectorielles, etc.)

Lorsqu'elle est concurrente, l'action des Etats s'exerce là où l'Union n'est pas intervenue.

C'est la loi organique qui déclenche l'action commune.

Les institutions de l'Union sont les mêmes que dans les traités existants mais les pouvoirs sont différents.

Le Parlement européen participe à la procédure législative et donne l'investiture à la Commission. Comme maintenant, il dispose évidemment de la motion de censure.

Le Conseil reste co-législateur et vote soit à la majorité simple, soit à la majorité qualifiée, soit à l'unanimité.

Une procédure de concertation est prévue lorsque le Conseil et le Parlement n'arrivent pas à s'entendre. En fin de compte le Conseil peut rejeter à la majorité qualifiée le texte adopté par le Parlement. Mais à ce moment final aucun amendement n'est recevable.

La Commission garde le droit d'initiative législative mais le Parlement et le Conseil peuvent adresser une demande motivée à la Commission pour l'inviter à présenter un projet. La Commission soumet son programme à l'approbation du Parlement. Elle est responsable devant le Parlement.

Le Conseil européen, composé comme il l'est maintenant, formule des recommandations et prend des engagements dans le domaine de la coopération. Il désigne le Président de la Commission au début de chaque législature. Ce Président forme la Commission après consultation du Conseil européen.

La Cour de Justice assure le respect du droit dans l'interprétation du traité.

Les matières de compétence de l'Union sont d'abord toutes celles des traités actuels, y compris un fonds monétaire européen, dans le domaine économique et de perfectionement du marché intérieur.

Elles sont ensuite les domaines de la politique de la société, c'est-à-dire la politique sociale, la politique de protection des consommateurs, la politique régionale, la politique de l'environnement, la politique de l'éducation et de la recherche, la politique culturelle et la politique de l'information.

Dans les relations internationales, la politique commerciale est de compétence exclusive, tandis qu'après dix ans l'ensemble de la politique d'aide au développement fait l'objet d'une action commune.

Lorsque les actions extérieures ne sont pas des actions communes, elles sont menées dans le cadre de la coopération : c'est le cas notamment pour les aspects politiques et économiques de la sécurité.

Mais à tout moment le Conseil européen peut décider de transférer à l'action commune de politique extérieure un domaine spécifique de coopération.

Pour la mise en vigueur du traité, il est prévu que dès que celui-ci aura été ratifié par une majorité d'Etats membres des Communautés dont la population forme les 2/3 de la population globale des Communautés, les gouvernements des Etats ayant ratifié se réuniront immédiatement pour décider d'un commun accord des procédures et de la date de mise en vigueur ainsi que des relations avec les Etats n'ayant pas ratifié.

B. Appréciation

Il est incontestable qu'à première vue, en s'en tenant aux aspects formels, le projet de traité a les caractéristiques d'une constitution d'un Etat fédéral. Il définit à l'article 3 la citoyenneté de l'Union, à l'article 4 les droits fondamentaux de ses citoyens, à l'article 5 le territoire de l'Union et aux articles suivants le système de pouvoir dans l'Union et les relations entre l'Union et les Etats membres.

Tous les éléments d'un système fédéral paraissent réunis.

Cependant le texte approuvé se présente plutôt comme une perspective que comme une réalité pratique et dès lors il semble plus correct de dire que l'Union est à définir comme une unité politique et juridique en évolution vers l'Etat fédéral (24).

Pour parler de la création de la Fédération européenne il faudrait une sorte de constitution fédérale, ce qui ne résulte ni du préambule, ni de la résolution ni des travaux préparatoires.

L'Union ne se présente cependant pas comme la continuation des anciennes Communautés. Certes il est dit à l'article 7 que "l'Union fait sien l'acquis communautaire".

L'ensemble du projet constitue cependant une rupture par rapport au passé : il s'agit d'un départ nouveau avec en partie de nouvelles institutions et en tout cas de nouvelles relations d'autorité et de pouvoir.

A cet égard le projet de Traité est fondamentalement différent de la conception de l'Union européenne dans le rapport Tindemans. Celui-ci se situait nettement dans la prolongation des traités existant et n'envisageait qu'à une phase ultérieure, la discussion d'un nouveau Traité qui acterait les progrès qualitatifs réalisés et notamment ceux nécessitant une modification des traités.

Le point d'interrogation majeur, dans le projet de traité du Parlement est celui du sort des Communautés existantes.

L'article 82 dit en effet que "dès que le présent traité aura été ratifié par une majorité d'Etats membres des Communautés dont la population forme les 2/3 de la population globale des Communautés, les gouvernements des Etats ayant ratifié se réuniront immédiatement pour décider d'un commun accord des procédures et de la date d'entrée en vigueur du présent traité ainsi que des relations avec les Etats membres qui n'ont pas encore ratifié".

Cette expression finale des Etats "qui n'ont pas encore ratifié" semble indiquer qu'il ne s'agit que d'une période de transition de quelques mois en attendant que les derniers ne rejoignent le groupe majoritaire des "ratificateurs".

Or la situation pourrait être très différente : dans l'état actuel des choses, il paraît impossible, au moins pour trois Etats, d'entrer dans un processus de ratification d'un Traité d'une telle inspiration.

A ce moment se posera évidemment le problème de la coexistence de deux ordres juridiques très différents dont le contenu matériel est certes en partie assez semblable (marché commun et quelques politiques communes) - quoique les textes régissant la matière ne soient pas identiques - mais en tout cas dont le système décisionnel diffère fondamentalement.

Certes cette situation existe déjà en partie pour les traités C.E.E. et C.E.C.A. dont les dispositions matérielles sont différentes par exemple pour la concurrence ou le régime des prix des produits concernés.

Mais il s'agit là de questions relativement faciles à résoudre par le système de la hiérarchie des normes et la relation entre une "lex généralis" et une "lex spécialis".

Tout autre est la question de traités globalement différents en ce qui concerne les Etats concernés et les matières visées.

On est donc encore loin d'une solution satisfaisante même dans l'hypothèse où le processus de ratification se mettrait en route.

Conclusions générales

De ce qui précède découlent les caractéristiques communes du concept d'Union européenne

a) d'abord l'idée que les progrès doivent viser la globalité des matières : l'Union européenne recouvre l'ensemble du processus d'intégration, en matière économique, sociale et politique. On retrouve cette idée à travers tous les textes qui en traitent.

b) la seconde idée est que l'Union européenne implique un meilleur fonctionnement des institutions notamment dans le sens du renforcement de l'Exécutif et du rôle du Parlement Européen. Cette idée se retrouve même dans le document le plus minimaliste, à savoir la déclaration de Stuttgart de juin 1983.

Les divergences portent principalement sur l'importance des progrès à réaliser et leur nature.

Selon une première thèse, ces progrès se situent dans la ligne des Communautés existantes.

L'Union européenne est la prolongation du système actuel que l'on veut améliorer. C'est l'esprit de la déclaration de Stuttgart. C'est aussi l'idée du rapport Tindemans. Celui-ci ajoute cependant que les progrès doivent amorcer une transformation qualitative de la Communauté.

Selon une seconde thèse l'Union européenne ne peut réaliser de réels progrès substantiels qu'à partir d'un nouveau traité fixant les objectifs développant les compétences et améliorant les structures décisionnelles.

C'est la conception du Parlement européen dans le projet de Traité.

Enfin selon une troisième thèse l'Union européenne s'identifie à la Fédération européenne.

C'était la conception sous-jacente à la proposition Jonker et du groupe du Parti Populaire Européen, présentée le 12 février 1982, comme "alternative" à l'initiative Spinelli.

Le préambule s'exprimait ainsi : "désireux de créer, comme stade définitif, une Union européenne dotée d'une constitution approuvée par les peuples de l'Union, cette constitution devra fixer l'organisation fédérale des relations des Etats membres avec l'Union et entre eux".

Et l'article 1 disait : "Par le présent traité, les Hautes Parties contractantes instituent entre elles la première étape de l'Union européenne, ci-après appelée l'Union.

L'Union a pour mission de définir les affaires communes des Etats membres et de les promouvoir de façon à rendre possible son développement et son achèvement".

Selon ce texte, l'Union européenne est donc le but, le stade final de l'intégration.

Encore que dans certains documents issus notamment de la démocratie chrétienne, on parle de l'Union comme une étape vers la Fédération européenne.

Le programme du Parti Populaire Européen de 1978 dit que "Pour nous, l'Union européenne, objectif décidé solennellement par les chefs d'Etat et de gouvernement au sein du Conseil européen et telle qu'elle a été définie dans le rapport Tindemans, est une étape importante de la construction européenne.

Nous continuons à assigner comme objectif final au processus d'unification la transformation de l'Union européenne et une Fédération européenne "sui generis", telle que l'avait déjà proposé Robert Schuman, le 9 mai 1950. Cette Europe disposera d'une pleine capacité d'agir de manière vigoureuse et convaincante le jour où elle se sera donné les institutions nécessaires :

- un Parlement qui exprime la libre volonté des peuples,
- une Chambre des Etats qui représente les intérêts légitimes des Etats membres,
- un Gouvernement qui peut et doit gouverner au sens propre du terme."

Il n'est donc pas clair si c'est l'Union ou la Fédération qui est le but final. Mais il est bien évident que dans la phase finale c'est une constitution qui est à la base de l'Union ou de la Fédération.

En fin de compte si le concept de l'Union européenne s'est clarifié depuis son lancement en 1972, il n'en subsiste pas moins de nombreuses divergences d'interprétation. Les prochaines années nous diront si un consensus est possible autour d'un concept marquant un réel progrès dans le processus d'intégration.

NOTES

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(2) ZORGBIBE ,La construction politique de l'Europe,Paris, P.U.F., 1978.

(3) L'Union Européenne.Rapport de Monsieur Léo Tindemans, Premier Ministre de Belgique, au Conseil Européen,Serie "Textes et Documents" ,n.306 ,1976, Ministère des Affaires Etrangaire.

(4) Supplément 7/82 au Bulletin des Communautés Européennes.

(5) Supplément 3/81 au Bulletin des Communautés Européennes.

(6) Receuil des documents institutionnels de la Communauté de 1950 à 1982,Rapport sur les Institutions Européennes, p. 383.

(6) o. c.,p. 385.

(8) o. c.,p. 385.

(9) o. c.,p. 389.

(10) o. c.,p. 389.

(11) o. c.,p. 389 bis.

(12) o. c.,p. 389 ter.

(13) Receuil des documents institutionnel de la Communauté de 1950 à 1982,Résolutions du Parlement sur la réforme des institutions,p. 419.

(14) o. c.,p. 423.

(15) o. c.,p. 425.

(16) o. c.,p. 429.

(17) o. c.,p. 431.

(18) o. c.,p. 436.

(19) o. c.,p. 453.

(20) Receuil des documents institutionnels de la Communauté de 1950 à 1982,Mémorandum présenté par le Gouvernement Français,p.454.

(21) Receuil de documents institutionnel de la Communauté de 1950 à 1982, Projet d'acte Européen présenté par les Gouvernements de la R.F.A. et de l'Italie (projet Genscher-Colombo) ,p. 441.

(22) Le texte de la déclaration a été publié dans le Bulletin mensuel 6/83 de la Commission de la Communauté Européenne.

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(24) SCHNEIDER,H.,Der Vertragsentwurf und der Föderalismus, Integration 1/84 ,januar'84.

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(18)

The Draft Treaty Establishing the European Union

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The Trans-European Policy Studies Association

AN OUTLINE OF THE TRANSITION FROM THE TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES TO THE TREATY ESTABLISHING THE EUROPEAN UNION: COMPARATIVE INTERNATIONAL AND CONSTITUTIONAL REFLECTIONS

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Outline: The Transition from the Treaties Establishing the European Communities to the Treaty Establishing the European Union: International, Constitutional and Comparative Reflexions

Joseph H.H. Weiler & Jay 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 in 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 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 -- co-existing 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.

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 Art. 236(EEC). The terms of Art. 82(DT) somewhat blur the issue by leaving unresolved the final steps that will bring the Treaty into force. Art. 82(DT) does not provide, as many treaties do, for automatic entry into force upon deposit of a preestablished 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 manouver as they seek to complete the transition from European Community to European Union.(4) In spite of this ambiguity, Art. 82(DT) clearly foresees the Draft Treaty entering into force pursuant to a procedure which deviates from Art. 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.

The Relevance of the Issue

The legality of the adoption procedure is an issue that 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 ex Art. 236(EEC). By contrast, should the "political will" not emerge, 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 thirty 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 Art. 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 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

> 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 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 Art. 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 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 favor 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 solemnised 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 theDraft 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 Art. 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. 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 favor 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.

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 thereof. In the second, not all of the Member States decide to adhere. This latter 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, at least in the context of the conference, attempt to "adjudicate" any of these constructs. They are presented merely as a basis for discussion.

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; the principal concern is actually the procedure itself.

Legal Construct No. 1: The Member States pursue the formal procedures provided in Art. 236(EEC). Legally, of course, this would be the neatest avenue for obviating the juridical issues. The problem is political: Art. 236(EEC) envisages a pathetic role for the European Parliament -- it is to be consulted only on the possibility of convening an intergovernmental conference. Parliament does not play a substantive role. Moreover, we have proof in the recent dismembering of the Genscher-Colombo Draft European Act that intergovernmental negotiations 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 Art. 236(EEC). Indeed, there are signs that the early Crocodile strategy of bypassing the governments of the Member States has been abandoned by even the most ardent promoters of the Draft Treaty.

Legal Construct No. 2: The Member States reach accord and proceed to ratification without respect for Art. 236(EEC). As already indicated, political accord would take the urgency out of the legal argument. Nonetheless, 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 Art. 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 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.(9) Indeed, there are well-known precedents in the history of the Community itself.(10) The force of these precedents depends on their status under international and Community law. No-one, to our knowledge, has suggested that such cases have given rise to a new rule of customary international law. They may be classed, instead, as exemplars of the principle that the subsequent practice of the parties to a treaty constitute a valid source of authority for treaty interpretation. In this light, unanimous agreementto adopt

the Draft Treaty is not essential, but it is essential that no Member State actively object. The question, therefore, is whether the Member States' practice has established the rule that Art. 236(EEC) may be dispensed with by unanimous agreement. The two instances cited above favor such a rule, but some commentators(11) and the Court of Justice, in at least one case, seem to deny it.

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 Art. 236(EEC).(12) 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. Art. 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 may still be violated. Because Art. 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 Art. 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 Art. 236(EEC) nor Art. 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.

In conclusion, within the framework of Community law, even unanimity might not suffice to legitimate a procedural deviation from Art. 236(EEC). Under the case law of the Court of Justice, violation of the Commission's procedural rights could well constitute a violation of an "essential procedural requirement." In practice, as we have noted above, such objections maybe irrelevant if no Member State dissents.

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 Art. 82(DT). The arguments used above to explain a unanimous disregard of Art. 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.(13) 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.

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.

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.

First 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 Art. 240 declares that"/t/his Treaty is concluded for an unlimited period."(14) Some writers maintain that this article necessarily precludes unilateral withdrawal(15); others note that the failed European Political Community treaty was defined as "indissoluble," a much stronger term than "unlimited period."(16) Under this reading, therefore, Art. 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."(17) The Court of Justice has hinted that it favors 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 conirm or amend them within the time specified in Art. 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.(18)

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 comes into play.(19) Article 56(1) returns to the fundamental principle of treaty interpretation, the intention of the parties.(20) 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.(21) 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 right of withdrawal will be inferred. With respect to the Treaty of Rome, the different interpretations of Art. 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. In a sense, of course, that objection is politically irrelevant, as the British referendum on withdrawal from the EEC demonstrates. We are concerned, however, with the 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 thefifth and sixth constructs, let us consider the possible consequences of a rigid application of Art. 236 (EEC). Imagine that all the Member States, except Luxembourg, wish to adhere to the Draft Treaty.(22) Indeed, imagine that only a bare majority in the Luxembourg legislator opposes the move. Art. 236 would, it appears, permit the representatives of no more than,say, 150000 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 nonapplication of Art. 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.(23) 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 of Rome, we run square into another problem: that a group of Member States have no power, under Community law, to enter into "private arrangements" in relation to subject matters which come within the jurisdiction of the Community.(24)

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 Art. 236(EEC)? With no more, the idea of a new

legal order seems plausible in a situation of unanimity (construct number two) but problematic in a divided Community.

The situations outlined above, in which a tiny minority wants to block the will of a majority or a majority wants to circumvent Art. 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(25) 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 Art. 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 Art. 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 organisations. Nonetheless, 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 favored a strong central government and radicals who wanted to keep the central government as weak as possible.(26) 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 Council of Ministers, was composed of members appointed by the state legislatures,who acted on the states' instructions and could be recalled at will (Article 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 (Article 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.(27)

The stage was set for a major reorganisation when Virginia and Maryland entered into a commercial agreement, even though such agreements were forbidden by Article 6 of the Articles of Confederation.(28) 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.(29)

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.(30)

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 (Article 7). 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. Nonetheless, a concerted effort to amend the Pact was made in 1832. In the 1840's, a series of religious conflicts led to the formation of the Sonderbund, a defensive league of seven predominantly Catholic cantons. Although such leagues were in principle permitted under the Federal Pact (Article 6), the federal 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 ratified by a majority of the cantons within a year.

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.(31) This view is borne out by the repeated attempts at revision and even by the objections of Switzerland's neighbors. 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.(32) He did not claim, significantly, that the Pact could not be modified at all, even though it contained no provision for amendment. Thus, the 1848 Constitution, like the American Constitution, broke from past requirements - although unwritten ones - that amendments receive unanimous consent from the federal units under the earlier Constitution.

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 exmples, 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 could be justified. While each one of these principles is necessarily somewhat ambiguous, cumulatively they may provide a framework for analyzing 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 Art. 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. Treaties 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 amendment that furthers that ideal, even though it deviates from Art. 236(EEC), constitutes less of a rupture to the Community legal order.

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.

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 Art. 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 1/60 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."(33)

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,(34) either because they are believed to be particularly local in character or because they are most efficiently managed at that level.

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.(35) The"democratic unit"(36) in the Community, 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 system. The right to make such a choice is fundamental to democratic values, and should not be subject to "negative minority rule."

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 "a 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. 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 the 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.(37) Of course, the parallel institutions of the Union and the Community could not function together as readily as did the institutions of the three Communities before 1965, because their composition would not be the same. Still, it should be possible to coordinate their operations to a large extent.

The other solution that has been suggested,(38) 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 who 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.

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.

Footnotes

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 (Detroit 1984).

2. For the sake of simplicity I shall deal only with the EEC; most issues are similar in the ECSC and Euratom. Cf. 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, in 5 Italian Yearbook of Int'l. L. 110 (1980-81).

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 cf. Art. 169(EEC).

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.

7. Ilké, How Nations Negotiate 202 (1964).

8. Weiler, The Community System: The Dual Character of Supranationalism, 1 Yearbook of European Law 267 (1981).

9. For example, the OECD supplanted the OEEC without following the organic amendment procedures contained in the OEEC. See, Jacqué The European Union Treaty and Community Treaties, Crocodile, no. 11, 6, 7 (June 1983).

10. The Convention on Common Institutions was signed with the Treaties of Rome. Although it modified portions of the ECSC Treaty, no-one objected that Art. 96 ECSC had been breached. Catalano, The European Union Treaty: Legal and Institutional

Legitimacy, Crocodile, no. 11, 1, 2 (June 1983). The "acceleration decisions" of the 1960's furnish another parallel. In Commission v. Italian Republic, Case 38/69 (1970) E.C.R. 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 67 (Leiden 1974).

11. See, Schwarze, Ungeschriebene Geschäftsführungsbefugisse für die Kommissien bei Untätigkeit des Rates? Zum Fischerei-Urteil des EuGH v.5.5.1981., 17 Europarecht 133 (1982).

12. Roquette Frères v. Council, Case 138/79 (1980) E.C.R. 3360.

13. The Draft Treaty's concern for continuity manifests itself especially in Article 7, entitled "The Community Patrimony."

14. Cf. Article 208 of the Euratom Treaty. Article 97 of the ECSC limits that treaty to a term of 50 years.

15. See, e.g., Akehurst, Withdrawal from International Organisations, in Current Legal Problems 1979 143, 151 (London 1979).

16. Dagtoglou, How Indissoluble is the Community?, in Basic Problems of the European Community 258 (Oxford 1975).

17. Id. at 259-260.

18. Case 7/71 (1971) E.C.R. 1003, 1018.

19. 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.

20. 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.

21. E.g. Akehurst, supra.

22. 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.

23. Nickel, Le projet de traité instituant l'Union européenne élaboré par le Parlement européen forthcoming in Cahiers de Droit Européen (1984); Catalano, supra, at 2; Jacqué, supra, at 7.

24. Insofar as the envisaged jurisdiction of the Union comprises subject matters that fall within the exclusive competence of the Community, the principle of preemption 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 Art. 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.

25. The sort of principle that we are referring to clearly straddles the domains of law, philosophy and political science. Such principles are nonetheless "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 (London rev'd ed. 1978).

26. The controversies leading to the final version of the Articles is recounted in detail by Jensen, The Articles of Confederation (Madison 1948).

27. The classic picture of a nation paralyzed by the weakness of its central government, painted by Fiske, The Critical Period of American History 1783-1789 (Boston and New York 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 (New York 1950); Morgan, The Birth of the Republic 1763-1789 (Chicago rev'd 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.

28. The two states were, apparently, well aware that their agreement was illegal. Farrand, The Fathers of the Constitution 100-101 (New Haven 1921).

29. 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 101-103.

30. 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.

31. Gilliard, A History of Switzerland 91 (Westport Conn. 1978).

32. Calgari and Agliati, 2 Storia della Svizzera 216-18 (Bellinzona 1969).

33. Lijphart, Democracy in Plural Societies 36 (New Haven 1977).

34. See, Cappelletti, Seccombe, and Weiler, Introduction, Integration Through Law: Europe and the American Federal Experience, vol. 1, book 1. (Forthcoming).

35. Dahl, Federalism and the Democratic Process, in Liberal Democracy, NOMOS XXV 95 (Pennock and Chapman eds. 1983).

36. Id.

37. In any case, these precedents show that coexistence cannot be dismissed as "inconceivable." See, Nickel, supra, at 30.

38. Jacqué, supra, at 8.

(1P)

The Draft Treaty Establishing the European Union

The European Policy Unit at the European University Institute

The University of Strasbourg

The Trans-European Policy Studies Association

ALTERNATIVE STRATEGIES FOR INSTITUTIONAL REFORMS

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Outline

Die Strategie entnimmt die zu untersuchenden Mittel und Zwecke nur aus der Erfahrung.

(Carl von Clausewitz, Vom Kriege, 19. Auflage, Bonn 1980, S. 294)

"Tactics is fighting and strategy is planning where and how to fight"

("Strategy", in: International Encyclopedia of the Social Sciences, 1967, Vol. 15, p. 281)

Die Politik bedeutet ein starkes langsames Bohren von harten Brettern mit Leidenschaft und Augenmaß zugleich... Alle geschichtliche Erfahrung bestätigt, ... daß man das Mögliche nicht erreichte, wenn nicht immer wieder in der Welt nach dem Unmöglichen gegriffen worden wäre, aber der, der das tun kann, muß ein Führer sein und nicht nur das, sondern... auch ein Held... Welche beides nicht sind, müssen sich wappnen mit jener Festigkeit des Herzens, die auch dem Scheitern aller Hoffnungen gewachsen ist, jetzt schon, sonst werden sie nicht im Stande sein, auch nur durchzusetzen, was möglich ist. Nur wer sicher ist, daß er nicht daran zerbricht, wenn die Welt, von seinem Standpunkt aus gesehen, zu dumm oder zu gemein ist für das, was er ihr bieten will..., nur der hat den "Beruf" zur Politik.

(Max Weber, Politik als Beruf, München/Leipzig, 2. Auflage 1926, S. 67).

Some conclusions

To assess to utility and feasibility of various strategies for an institutional reform is a risky business.

The aim where the strategy should lead to is not clearly defined; even more, there are diverging and controversial interpretations of how the institutional set-up of a European Union (whatever this means) should look like. For the sake of orientation, four institutional models are been identified categorizing numerous variations on that theme, but a "simple" cost-benefit analysis of different strategies is not possible.

The very concept of "strategy" is not clearly defined, the academic debate about it is in a rather early stage and inconclusive; the paper thus suggests certain conceptual ingredients for "strategy" and identifies nine different strategiees pursued or being in debate; those are however not clear cut alternatives but might be used in different periods.

Methodological traps are all around: In analysing the relative feasibility and utility of each strategy, we have to draw lessons from unresearched history - being endangered of sticking to too simple analogies - and to rely on political science analysis - also known for its imperfect state of the art. Here the dangers are deterministic fallacies. This paper presents some theses by which preliminary conclusions for different strategies can be drawn. The perception of the political top about political value of overall package deal is considered as of major importance to achieve institutional progress against the resistance of the national welfare system. In a system of "cooperative federalism" where the major actors are involved with both national and European responsibilities the political support for "radical" strategies (saut qualitatif in terms of transfering competences

to a new European level) is small. Challenges from the world outside Europe are not necessarily a mobilizing force.

Conclusions from these analysis are not encouraging. Major internal or external crises excluded, the strategy which would have the highest degree of feasibility is to build up a new core area, though its utility of really getting new, different, more efficient and more democratic institutional set-up is - at best open to debate and the costs - in terms of destroying the existing Community framework high. Resignation about the futility of new attempts can only be muted by the hope that perceptions and interest constellations are subject to possible change.

I. THE DEBATE ON INSTITUTIONAL STRATEGIES

1. A neglected field of integration studes

The academic and political debate on integration strategies was and is - compared with the discussion about the institutional legal forms and the policy substance of a European Union - underdeveloped. Though it is generally accepted that initiatives for a "relance européenne" need to be pursued and implemented by some kind of political strategies, there are few academic works which assess the relative utility or disutility of different options to combine and to mix actors/forces, (taking and pursuing the initiative) procedures (of preparing, pursuing and implementing projects) as well as legal forms (of adaptation), scope and specificity of European initiatives.[1]

In the political discussions, the proposals for integration strategies are quite often reduced to formulas like
- "it's time to mobilize the political will",
- or it is the "intergovernmental" charakter which led to the failures[2]
- or fall back on familiar patterns to get time-tables (e.g. the Werner plan, EMS resolution, the final clause of the Solemn Declaration) or to create new committees (Vedel, three wise men, Genscher/Colombo follow up, Spaak II).

A major problem for these debates on strategies is the lack of no commonly defined or generally accepted goals of a European Union or its institutional structure; the concept of a European Union is kept on purpose vague; thus it is not possible to analyse a goal-instrument relationship in which the alternative ways to one specific clearly set goal could be assessed with some form of academic cost/benefit analysis.[3] The selection among different strategies is thus directly linked

with different interpretations of a European Union and its institutional reforms.

The debates both from academic as from political circles have been intensified due to both the Genscher/Colombo as to the crocodile club initiative. Spinelli's (at least early) "radical" shift away from (or even against) the government bureaucracy complex as major actors to a "coalition" of parliaments have induced a new wave of conceptual reflections about bits and pieces of strategies, many already floating around partly since the beginning of the integration process. The major part of this paper proposes to revisit basic assumptions of different strategies for institutional reforms. Theses on the integration process are based on the methodological assumption that an assessment of integration strategies cannot be limited to a narrow view on Community institutions as they work or break down,[4] but need to include the environment in which Community strategies have to operate.

2. Methodological fallacies - cliffs ahead in a stormy sea or how to minimalize the danger of falling in a methodological trap

a) The risks

Considerations about integration strategies cannot be separated from their inherent methodological problems. Indeed, given the imperfect state of our art some methodological assumptions need to be set anyhow. Some sources of fallacies quite common for discussion on European strategies should be however mentioned as a "caveat" for too fast a conclusion. They include the fallacies of historical analogies as consequence of the unreflected use of earlier "lessons", the deterministic fixation as consequence of too rigid feasibility approaches and the voluntaristic activism from a political "necessity approach".

Fallacies deriving from historical "lessons"

Successes like the Spaak Committee and failures like Spinelli's Congress of the European People are quite often transposed into the present: "When it worked then it will work again ..." Or: Because the head of governments failed always we need alternative strategies.

In taking up Hegel's view that history is always right, the successes are given a higher "moral" weight than the failures; thus, what has succeeded in the history of European integration becomes sacrosanct and petrifies into a doctrine. The Monnet or Spaak method of integration and strategies are thus sometimes turned - contrary to what those persons perhaps considered themselves - from a useful strategy for a certain political constellation into a general rule which is taken out of its historical context.

Historical progresses and persons turn into myths which are constrated to the rather miserable reality and should, by referring to them full of "awe", stimulate political actors to imitate their predecessors. The "great fathers" of the European Integration history, the Messina conference (which was apparently rather inconclusive[5]) and the Spaak committee (see the Fontainebleau Communiqué) are used to put some kind of moral pressure on present day politicians to act with the same courage and in the same direction. As long as these myths are just used for motivating politicians to become more active for integration, they are not necessarily harmful; as soon however as they become master-plans or models from which a deviation is considered as sin, they might block constructive policies. Linked with the mystification of historical successes as a "force mobilitratrice" and master plan is the doctrinazation of an once accepted principle for institutional reforms, e.g. the formula of returning to the "original equilibrium of the treaties" or of retaining the national veto for "vital interests". Without analyzing the conditions for developing these principles and their respective usefulness in different situations, the claim to use them again (or to stick to them) becomes an obstacle to look at the

present and prepare actions for the future. Even if it would be proved that the deviation from such a principle was dysfunctional at a given time (in the terms of the respective historical tasks) a return to paradise might be as dysfunctional as the paradise might meanwhile have changed its character. Without analyzing the major factors for success and failures in the past and compare them with the constellation at the present, historical analogies are thus dangerous to work with as they will be misleading.

Strategies for the European Union in the second half of the eighties aer thus endangered to be based on superficial assessments of strategies, which were developed of the immediate post war period. Myths are also inviting "revisionistic" critics[6] destroying not only overrated successes but they tend to underestimate the influence of the once overestimated factors.[7]

Another trap of historical lessons for strategies is to interpret the history only from today's need and pointing at lost opportunities, e.g. the claim that if we would have only followed the Fouchet Plan, even in its most intergovernmental form, we would be much better off today, is again - not reflecting the constellation of the that time and might lead to an activism of using each possible step forwards devoid of any assessment of different strategies open and disregarding the utility to fight for a better solution than those which seem politically feasible.

Another methodological problem of today's discussion on strategies is to present a classification of historical periods of the Community which lookl obvious at first sight, but at a closer view you wonder how meaningful this periodization really is for present day strategies. For example, how useful is it for different kinds of strategies to refer to a "Europe of the second generation" as long as you do not make clear for what purpose and along which line you distinguish among "generations". Using different events and categories, you could

easily establish a classification with at least two, three, four "generations of Europeans[8] Even with more sophistication it might be difficult to use these classifications as different "generations" are working together in one ball game at the same time (from Spinelli to Fabius).

Dahrendorf's classification of a First, Second and Third Europe[9] is more elaborated but it has clear shortcomings in explaining present day developments in which the policies of several periods intermingle or collide. Thus Weiler,[10] has pointed at the "parallelism" of intergovernmentalization in the decision making with increasing supranationalism in the decision implementation.

Traps of a feasibility approach

The (useful and necessary) approach to analyse the political constellation of today referring to basic factors and structures (e.g. to the perseverance of the "nation state" or to the tensions of economic divergences) quite often leads explicitly or implicitly to explain the status quo as the only possible product of the historical developments.

As in other fields of society, "historical trends" are quite often extrapolated into the present and future and also made "sacrosanct": For example as we witness over the last decades, an increased involvement and weight of national governments and bureaucracies, some quite often assume implicitly that this intergovernmentalization is a "natural" (!) and "logical" (!) development, which can and should not be counteracted. Without looking at the basic factors of these trend, e. g. the welfare state dimension (see below) and analyze its persistence, such extrapolations of a "visible" flow of events into a certain direction leave us unprepared for possible basic structural changes.

The future is equally "determined" by these factors leaving no real space for political manoeuvres by political actors. Their activities can just hasten or slow down the inbuild dynamic of an historical process. The inherent dangers of certain feasibility studies is thus political resignation.

Again: we are inclined to base our considerations on strategies for the European Union and its institutional on past instead on future constellations.

Problems of the "political necessity" approach

The methodical trap the political necessity approach can fall into is caused by starting the debate on strategies by analyzing the world we live in. A most preferable program setting the maximum goal is then sketched.[11] The implementation is then left to the politicians who are supposed to reach those goals if they only manage to mobilize the "political will" which must be present as the program reflects the most rational way to solve the problems ahead and will thus be supported by all men of "good will". The intellectual quality is supposed to be the driving force. The way to reach this paradise can thus be paved e.g. by clear landmarks by binding timetables. Needed is just the political leader to convince citizens of the usefulness of their program. This approach was the inherent danger to lead to political activism turning around few personalities without a more systematic look into the policy.

b) The plea for "educated guesses"

The risks of falling into such methodological fallacies (which were exaggerated as paradise) are often seen and reflected, Nevertheless, the debate on integration strategies runs too often into such traps, thus reducing the potential for better based advice and actions. Given the risk, should we then refrain from all use of history and systemic

analysis and develop "pragmatic" concepts which fit much better into present days' realities by avoiding any political and intellectual deviations caused by historical doctrines, oversimplified extrapolations or paradise oriented time tables? The argumentation against this quite often preached pragmatism is based on several grounds.

The political decision makers as well as academic observers draw explicitly (as was referred to above) or even more often implicitly from their personal experiences or at least from their personal interpretation of the Community history. "Pragmatism" means then quite often unreflected conclusions from limited experiences and a distorted set of facts consolidating into an "ideology" about what should be done and how it should be done. As Keynes pointed out, those who claim to be pragmatic base their actions on "outmoded theories". Thus: History is part of political life. What we need is not to exclude it (what is in any case impossible) but to exploit it more thoroughly for our strategies.

An exploitation of history should be based on sound social science methods. Since Popper, we know that a verification of causal theories in a complex social world is impossible; however, falsifications are highly useful to refute theses and theories not explaining sufficiently the reality. From academic research works we know how difficult it is to identify relevant variables (factors) and, in particular, to isolate them from additional factors, the "ceteris paribus clause" is difficult to keep,[12] so we are always running the risk of overestimating the influence of one factor (e. g. the personality of decision makers or the perennial national interests) and of underestimating other factors like the compatibility of economic and political structures (or vice versa). At the same time, to include all possible and potential factors into the debate on strategies is practically impossible and/or too costly in terms of time, money and energy.

For the debate on strategies, we should therefore highlight the possible impact of certain factors. In a more extended research, those theses could be tested in case studies. For our conference, the theses should serve to stimulate discussions "representative" (as far as this is possible) for different constellations of factors. Given the limitations, our debate will and can certainly not find the one and only "truth" about how and why strategies to make progress on the way to European Union fail or succeed, but hopefully we put doubts forward vis-à-vis oversimplifications and work out "probabilities". A success of such a debate would be to come to more "educated guesses" superior in insights to at least some of the presently propagated views.

By finding factors which can help to understand certain successful or unsuccessful ways to European Union, they could be identified as crucial elements for strategies to pursue. Thus, if we find out that package deals among member governments, are the most crucial factors for steps ahead (see below), then we would recommend not to spend only time on identifying the best integration forms along rational and functional lines but to combine useful integration steps with the interests of member governments. Second best options (= political optimum) in terms of a purely technical problem solution from a Community point of view should than be considered preferable to maximum solutions which are outside the political interests.

This paper thus starts from the methodological approach that "feasibility" (political potential and restraints) and "goal-achievement" are two criteria which need to be examined for a development of the strategy.

In accepting both criteria, it would be a mistake to <u>first</u> describe the ideal world, the paradise, and only <u>then</u> try to find ways to implement them. Quite often, the train is then already on a completely wrong track, from which it cannot be moved away. Right from the begin-

ning, both the feasibility and the goal achievement aspect must be discussed together.

By using this methodological device, it is assumed that within a set-up of historical and economic factors political action can change reality.[13]

II. THE EUROPEAN UNION - A VAGUE AND AMBIGUOUS AIM

1. Of bits and pieces floating around

When referring to institutional reforms, it is now usual to refer to some concepts of a European Union as the goal to which changes and adaptations of the Community's political system should lead to. Also in term of intellectual charity it is helpful to reflect about the "finalité" of actions.

The term European Union is - on political purpose - kept vague.[14] As with the term "integration", it implies different meanings to different political forces.[15] The meaning of "Union" already refers to various concepts in different languages.[16] The "unionist" wing represented in the early integration history were strong defenders of intergovernmental cooperation stressing national sovereignty against federalists demanding transfer of sovereignties.[17] In the Community history itself, the term European Union is only one among others for "more efficient and democratic European institutions" for achieving more "unity", more "common" policies", a new "federal" constitution etc. The Rome Treaty refers in its preamble to an "ever closer union among European peoples", the Fouchet discussions turned around a "political Union".

The Paris Communiqué of 1972 is more comprehensive but does not provide a clear goal either. The formula "converting, ... in absolut

conformity with the signed Treaties, all the relationships between Member States into a European Union" is vague about the institutional forms and policy contents as well as ambiguous and even contradictory. Later definitions by Tindemans and the three wise man stressed essential principles (like that of solidarity), new tasks and detailed institutional and procedural proposals. The European Council "welcomed" those reports by underlining different lines of further work (like "consolidating" and "developing" of the "acquis communautaires" and "best use" of possibilities for cooperation methods).[18] The latest attempt to define the European Union by the European Council in the Solemn Declaration and by the EP in the draft treaty on the European Union demonstrate few signs for a significant convergency on the meaning of European Union and its institutional set-up as a central part of the new political system, though certain extremes on both sides were excluded.

For a debate on strategies, this ambiguity reduces the "value-free" or "neutral" character of advice academics can give. The definition of the goal is already part of the strategy and must therefore take "strategical" consideration into account.

2. Four models as possible goals of a European Union

Though we do not dispose of any politically legitimized and/or generally agreed definition of an institutional set-up which could serve as the goal of a strategy, four models could be identified[19] in the discussion.

(1) In a "presidency" model, the European Council disposes the "supreme powerr" acting above and outside the Community system. The intergovernmental character might be reinforced by a political secretariat for the heads of governments reducing the role of the Commission and the Council Secretariat. The Council would turn de

facto into a Coreper on a higher level which would at least guarantee the legality of discussion. The European Parliament might have a teaching function with some kind of moral persuasion. The European Union follows the concept of a l'Europe des patriès'.

(2) In the reinforced Community model, the relations between Community bodies are made more efficient:

* the European Council turns also de jure into the Council on the level of the head of governments;
* the Council decides by majority voting;
* the Commission exercises its initiative and implementation function more forcefully, its position being reinforced by majority voting in the Council;
* the European Parliament increases its power of control (with sanctions), but does not get more deeply involved in the decision-making process.

The European Union concept returns to the "original" equilibrium of the Treaty.

(3) The dual model is characterized by the co-decision making power of Council and Parliament of the Union, both of which have to agree - with different forms of majority - to legislative and budgetary acts, to treaties and to the installations of the Commission.

The institutional concept of this dual model is based on two legitimacies: the national and the direct European.

(4) The parliamentary federation set-up is conned by the supremacy of the European Parliament which elects the government and disposes over the final say in legislative and budgetary acts. The Council becomes a second chamber with some more rights in special "domaines reservées" like foreign affairs.

Those institutional models of the European Union do not necessarily deterine the strategy with which this set-up is to be achieved, i.e. one concept might be pursued with different strategies; or one strategy might serve different models; nevertheless, we could expect certain affinities between the institutions are to play a principal role in the final set-up on one side and the actors who are the dominant political force in a strategy on the other side. Furthermore, as some models - at least the dual and the federal - would need a legal implementation in form of a treaty or a constitution, the "strategical requirements" are by far higher: For a "saut qualitatif" the strategy must be capable of inducing a more radical change than progress "â petits pas".

III. INSTITUTIONAL STRATEGIES

1. Conceptual ingredients

Besides the ambiguity and diverging interpretations of the goal it is also the vagueness of what is called "strategy" which contributes to the difficulties in the academic and political debate. Quite often strategy is used synonymously for "program" policies or goals. For our purpose, it is useful to draw a distinction between the following elements:

a) The actors in different stages

* Who is are pushing for an initiative? A respective personality like Monnet, a group of influential advisers, a circle of the "elite" like the European Movement, the representatives of the European people, i.e. in the European Parliament?

* Who is the "catalysator" to take an accepted decision on the procedure for a follow-up (heads of government in the European Council, national parliaments)?

* Who are the political actors/forces who are the object of the initiative, i.e. who are supposed to implement national Governments in the European Council (national parliaments or just Community institutions)?

* Who are the actors who need to be engaged for political support (e. g. parties, pressure groups, national parliamentarians)?

b) Procedures and legal mechanism

* What kind of procedures are used for undertaking the initiative - e.g. informal, even secretive channels or formal, open treaty provisions (Art. 236)?

* What kind of legal/procedural form is aimed at as result of the initiative e.g. legally unbinding declaration like the Stuttgart Solemn declaration or the reports on EPC, a treaty, or even a constitution.

c) The modalities

* What is the content of the initiative? Is it of broad overall nature including both several sectors of activities and an overall institutional change (e.g. the draft for a European Political Community, Draft Treaty of the European Parliaments), does it enumerate several areas of activities without any specific institutional changes like the Werner report and the Paris 1972 summit; does it concentrated on few policy sectors like coal and steel,

monetary integration or on few key institutional sectors creating the European Council, the European Political Cooperation reports? Does the initiative thus lay the stress on institutional reforms, or on problem solving?

* How detailed is the initiative? Is it a carefully draft and detailed document (like the draft treaty on the European Union); more a general statement of major points where details are open (e.g. the 1972 summit) or the outline of few central topics to which others can be added (like the Monnet plan or the Giscard/Schmidt initiative on the EMW)?

* How careful are the explanations drafted and presented to different forces - just a reference to the gloomy situation of Europe as raisonnement or more explicit in terms of the specific interest of the actors who are to implement the initiative?

* From what kind of dynamic mechanisms is the strategy supposed to draw its strength, e.g. economic inbuild rationals of large markets, the economic self interest of involved circles of the society, package deals among interests of different countries/nations, the democratic will of the European people, external threats the forces which are considered to set and to keep the train in motion.

A debate of this vital part of an integration strategy needs to be based on some kind of "positive theory" explaining why and how the process of integration develops. Thus the validity of different integration theories plays a crucial role for the success of an integration strategies. The lamentable situation of general integration theories[20] increases the problems of advising a successful strategy.

2. Some types of strategies

These elements of strategies can be mixed in numerous combinations. However from pursued attempts so far and from the debate, our considerations should concentrate on some types of strategies:

(1) The type of "statesmen" strategy stresses the role of the political top[21] which needs to be convinced in informal, secretive, high level contacts. The modalities should be drafted to fit the personal characteristics and political style of the leading personalities. The character of the final product should be unbinding or - at least - the national parliaments should enter the scene only at the end. The probability is high that this strategy will mainly be used for a presidency model. The process should also exclude as far as possible "interdependent outsiders" like the Commission, the EP, etc.; if not possible otherwise, they should play only a secondary role as "experts". The "political will" of the real "European statesmen" is considered as the basic dynamic of this strategy.

(2) In the "conference" strategy[22] national governments are following formal procedures either according to Art. 236 of the Rome treaty or by supernational conferences of governments aside from treaty provisions. Community bodies would be officially consulted in the first version. Expert committees and national bureaucracies play an eminent role. The final product consists of a treaty to be ratified by national parliaments. Such a strategy, should mainly serve basic changes towards a dual or federal model. As the inherent "dynamics" are considered the constitutinal procedures involving all formal actors.

(3) The "coalition of parliaments" strategy identifies as major actors the parliaments with the European parliament in the conceptual and political lead.[23] As the dynamics of the strategy are located with

democratic/parliamentary "revolt" against the bureaucratic network, procedures are to be based on parliamentarians besides the usual and formal negotiation machinery of governments. The final product will be a treaty reinforcing the role of the EP in a dual or federal model.

(4) The "revolutionary" strategy[24] sees all "existing" political actors (also parties and national parliaments) as defending their own status quo within the existing political system; this strategy looks for a mobilization of the "mass" by an "avant-garde" leading to a European "constituante" really representative of the European people. The final product will be a federal constitution.

(5) In a "directoire" strategy[25] only the statesmen of major (= larger = more powerful) countries agree on steps forward because only those are feeling the "historical responsibilities" in a world-wide context and develop the energy (lacking to other governments) for taking bold decisions. In personal summits of those head of governments, the major decision will be taken. Other countries will be pure "decision takers" which are confronted with "submission" to the agreement by the "principal nations"[26] or exlusion from the "internal circle". The final product will probably give the personal engagement of the political top a dominant role.

(6) A "core area" strategy[27] propagates more integration for all those countries prepared to join - the assumption is that this circle will consist of the original member countries (= core area); the others will either follow the lead into a more integrated system or exclude themselves. The dynamic is based on the higher degree of interests among those countries. The final product is open to debate as this concept is proposed by actors with different institutional concepts.

(7) The multi-tier or "abgestufte" integration strategy[28] tries to combine a flexible implementation of generally agreed policies by some countries with a stability of the overall institutional framework and help for those countries which have difficulties to follow. As for institutional reforms, this strategy needs more considerations.

(8) The "problem solving or scope enlargement first strategy"[29] reduces the importance of the institutional reforms. Some of this school esteem the present formal decision-making and decision implementation structure as in general terms sufficient for solving problems ahead of Europe; some want to exclude the more controversial institutional issues from the agenda as they might be a nuisance for going ahead with solving problems; some hope that by broadening the scope of activities treated by the Community will finally induce or "spill over"[30] to an institutional reform. In all three variations of this school it is assumed that problem solving irrespective of the institutional form is the major drive for more integration. Institutional reforms are at best a by-product if not even a tactical nuisance. The flexibility of procedures within the established framework is given highest priority. The product in institutional terms is the status quo with adaptations and supplement leading towards a model of a reinforced Community system or to a presidency model.

(9) The "l'Europe à la carte" strategy[31], stresses the problem solving priority irrespective of or even detrimental institutional consequences for the existing Community.[32] Institutional engineering is at best the task at the end of a period rid of institutional and legal strait jackets.

Those strategeis are not mutually exclusive; most of those are even quite often pursued at the same time or at least consecutively in a "trial and error process". However, strategies cannot be switched

arbitrarily. According to relative utility of different ingridients, plans of initiatives have to be made, priorities to whom to address and to which procedures should be employed have to be set, coherence between dynamic forces and procedures and actors have to be established.

For assessing the relative utility of these strategies, some "lessons" from the Community history - still rather unresearched as we know -, some political science considerations on the "dynamics" of "system" also known for its imperfect "date of the art" will be developed in form of theses. From those analyses of the factors influencing the degree of utility of certain strategies, we hope to reach an "educated guess" about the probabilities if those certain strategies will work.

IV. THE RELATIVE IMPORTANCE

1. The role of different groups of actors

a) **First theses:**

**********1**********

Progress towards more institutional integration was so far part of package deals among national interests as perceived by the political leadership in power, mainly heads of governments (who were strong enough to convince or overcome national political obstacles,[33] or date the arguement the other way round with Spinelli: initiatives failed because the national governments (in the last decade: the European Council) were unable to reach an agreement).

****

This thesis implies and is based on:

(a) Steps towards a European Union with an institutional set-up were not following a master-plan conceived from an "idealistic" European point of view which needed "only" technical and legal implementation. Peace meal engineering with at most medium term perspectives was dominant. Schneider pointed at the concrete political interests dominating in the fifties.[34] Milward even states that his findings about the period till 1951 "flatly contradict" the prominent role of European "idealism" based on the war-time experiences[35] as they are elaborated by the work of Lipgens.[36]

There is also no inherent historical deterministic force of the European society to move into a European federation, "the process of integration is (not a) thread woven into the fabric of Europe's political destiny".[37]

There is also no automatic implementation or at least no push strong enough by the functional necessities to solve problem together beyond national frontiers.

Successes in integration attempts are thus not caused by the absence of national interests and/or the orientation of political actors towards an optimal European model,[38] but by a congruence or at least compatibility of national interests.

(b) Institutional reforms were parts of an overall package in which the scope enlargment to deal with certain concrete problems were the dynamic engine to set the train in motion. Pure institutional engineering did not attract throng support.

On the other hand, progress towards European Union was not based on a "pure" package deal among "national" interests at a given moment. For a lasting progress, structures, procedures and forms had to be included which lasted longer than the original package. Scope enlargement as such is not a sufficient guarantee for success.

Necessary conditions for successes were thus twofold: The serving of political needs and the creation of lasting structures and procedures. The structures as thus were quite often also the

result of compromises or package deals but they had an inbuild potential to start a process going beyond the original package deal. It was Monnet's chef d'oeuvre to combine exactly those elements in his CSCE plan. Indeed, the mastery of his plan is that it can be perceived as well as a master plan for European Unification as for French or German national political recovery.[39]

The structures which were created did only in exceptional cases replace the nation state as major political agency by a new European system but it mainly established rules and procedures for accommodation or co-existence of different even diverging national economic policies inside an outside the groups. Form and character of the "institutionalization of interdependence"[40] is a major factor for failure or success (see also Thesis 17 and 20).

(c) National interests are not a "fixed" quasi unchangeable datum dictated by history and geography. To a large degree the perception of national leaders about the policies in one sector and in the overall framework defines the national interest in a given moment.[41] These perceptions of national interests are not necessarily based on a "narrow self-interest",[42] but might also derive from some enlightened self interest disregarding tangible short term costs for the sake of more indirect however less certain medium term benefits.

The perception of national interests was not only a function of actual political needs but also of the "vision" of political leaders (coming from a national environment) about the role of their respective countries in Europe and the world; thus for a debate on the perception of heads of governments it is necessary to analyse in which medium-term direction they want to move their country that includes also the alternatives open to them in comparison with more binding European solutions. It depends on that vision about the future role in how far costly compromises are accepted for the sake of establishing a reliable framework.

The more the Community policy is however reduced to a management

of the status quo[43] instead of creating potential future benefit, the more the short term view of national interests are dominant, coming the attempts of nation states to control the distribution of the costs and benefits of the package deals.

This theses also implies that the perception of national interests in steps towards European Union from the head of governments does not necessarily derive from "good" or "bad" integration attitudes of the responsible heads of governments but on how European strategies serve different goals of their policies at the same time:

- e.g. foreign policy goals like: gaining some kind of equal status (like for the FRG in the Monnet plan, like Ireland in the EMS etc.) or gaining influence on other partners and helping internal external economic policies (like for France in the Monnet Plan[44] or gaining or reserving a large status in international affairs (like for the FRG and the UK in the EPC creation[45];
- e.g. winning general points vis-à-vis the electorate by selling specific policies with a European label;
- e.g. by putting internal opposition forces in difficult positions etc.

Thus referring to the perception of national leaders does not imply that the achievement of progress was necessarily conditioned by having only "good Europeans" at the top of each national government. Strong pro-integration attitudes were not a necessary prerequisite for successes. Again: Decisive was the overall political concept which the European initiatives served and the compatibility (not necessarily the identity or convergence) of this strategy with those of major partners.

It is not the political will as such which was present or absent; this formula is dangerously often used to "explain" successes or failures without making a more profound analysis. The formula of the "political will" develops into an empty category which - when present - is seen as a deux ex machina to implement initiatives, and - when absent - explains "easily" the lack of

progress. Thus the reference to the political will becomes a truism which quite often prevents a closer look into reality.

(c) The perception of national leaders is vital, it is a necessary but not sufficient precondition for success. The political leaders must also be able to implement the ideas and enable the compromises in the national setting. Steps forward were always accompanied by battles in the national environment about the usefulness of the Community for given interest. The "power" of leaders is of high importance. Thus it is not sufficient to analyze only the perception of political leaders but the national political context, the power relationships among political and societal forces.[46] The political leadership is part of a political system in and by which the head of government has to operate. Especially for institutional reforms strong resistances have to be included in the analysis. The "national interest" is then the outcome of the national decision-making process - the battle in the capitals[47] with the head of governments in a dominant position when European initiatives are the object of negotiations.

(d) This concentration on the role of political leadership does not imply that major statesmen have to create and initiate all plans and initiatives by themselves; those acts might and or quite often are prepared by the bureaucracy[48] or by single personalities like Monnet or groups of experts. It is perhaps quite indicative for this thesis that plans might "float" around and for some time then being picked up by the political leadership who perceive them as useful in a given moment. Compared with the early fifties, the political leadership needs however to be involved more extensively in the seventies and eighties.

**********2**********

A necessary but not sufficient precondition for a successful package deal was a primary French/German agreement on the major ingredients of the package. The understanding between the French and the German leadership was the prerequisite for any major success.

****

This thesis implies or is based on following assumptions and lessons:

(a) An initiative by one of those countries without an early understanding with the other country did not work (see the Erhard Initiative from 1964, see Genscher/Colombo Initiative, see the French memoranda on the "especiale sociale et industrielle").

(b) A common French/German initiative proved quite often successful in the Community because the positions of the other countries were in the middle between the two so that a French/German agreement would not be detrimetal to their proper interests.

(c) The rest of the original members recognized the crucial importance of a German/French understanding. Though perhaps complaining about a certain style of policy making - they did therefore not object to a special relationship as furthermore the initiatives of those two countries normally were brought at an early stage into the Community framework. The inherent tendency towards a bilateral hegemony or directoire was counterbalanced by an appropriate use of Community channels.

(d) Other countries could veto the French/German package, but not substitute it. Thus they have the power to prevent French/German plans buts the impact of their initiatives is significantly smaller than a French/German understanding. The entry of new countries like the U.K. has increased the frequencies and strenght of vetos but not lead to new constellations of driving forces.

(e) There was not necessarily a close identity or growing covergence of interests between France and the Federal Republic. To achieve a consensus between Germany and France force was always difficult. Failure of quite a lot of initiatives can be explained more by French/ German désaccord than by the "nuisance" power of other members. This finding supports a core area or multitier strategy.

**********3**********

As a driving force the will of the European people was of a secondary importance.[49]

****

No initiative was successful because the "people" forced their leaders to pursue certain pro integration initiatives. Those initiatives which relied too much on "la volonté générale" as instrument "against" governments failed. This thesis assumes:

(a) A general pro European attitudes of citizens is not unimportant. It may serve as a "permissive consensus"[50] which gives political leaders a certain freedom of manoeuvre which makes it difficult for opposition forces to attack them; a general pro-European attitude is a positive factor for them to "sell" their initiative and establish themselves as "statesman of historical and European rank". Thus, if this pro-European attitude in a country is not existing or disappearing, the freedom of maneouvre and the incentives to take and support initiatives are reduced as they do not serve any more for an overall political strategy (see Thesis 1).

(b) Positive results of the Eurobarometer should not be deceiving: the potential for stronger European actions can be discerned,[51] however if those actions are not taken, no government leader will fall. Looking at studies about how voters decide about the party of their preference in elections, European initiatives were seldom

playing a decisive role, especially institutional technicalities do not find any popular reaction and to a certain degree the parliamentary coalition strategy is founded on a weak basis, as the last election campaign for the European Parliament has demonstrated. This implies that European initiatives were not crucial for political survival, maintenance of political power or the winning of political power.

**********4**********

Political Parties inside and outside the Parliaments have played no major role of driving their leaders to strong actions, especially not in the field of institutional reforms, not even since the cooperation of parties in the European wide party groupings has intensified.

****

(a) One reason might be that gaining elections is the crucial function for each party: As elections were not decided on the ground of taking or leaving European initiatives (see thesis 3), parties did not "fight" for a European program. This argumentation does not exclude that parties were concerned with European questions, but they perceived them in "normal" times as of limited utility for winning elections. As with other topics, catch-all parties do not like to be on the negative side of a wide-spread attitude, thus they preferred in most member countries to pronounce themselves as pro-European without making this a basic crucial issue of e.g. the party leadership and program.

(b) A second more speculative reason of a certain passivity of major parties refers to a perhaps instinctive drive of parties to conserve power in their hands. Initiative to <u>transfer</u> powers to a European level might have been viewed as a reduction of their own influence - irrespective of European party groupings in or outside the European Parliament.

If this thesis is valid, the parliamentary strategy will lack a crucial part of its dynamic.

**********5**********

National Parliament as unities of their own have so far played no major role beyond what the party groups inside the Parliaments have.

****

Non partisan initiatives e. g. for the direct election of the European Parliament have been of a limited value. Reasons might be:

(a) The often quoted loss of competences of national parliaments[52] have not induced a revolt against national governments and bureaucracies. Rare outcries about insufficient information and participation[53] are muted (except for Denmark) by the "normal" interplay between the (majority) party(/ies) with the government and quite often by informal consultation procedures with the other parties.

(b) As with parties, Parliaments might be reluctant to give up powers even if there are existing only "on paper" to some other body and even if this is democratically elected.

Thus, the assumption of the parliamentary strategy that there is a natural "alliance" of parliaments against national governments and bureaucracies seems less valid than the thesis that national parliamentarians might prefer the existing kind of perhaps mainly informal influence on at least their government (which they can vote out of office) and bureaucracy to a perhaps formally more democratic control of Community policies by a European Parliament where their influence is comparatively marginal.

**********6**********

Interests groups (including trade unions) limited their sometimes strong engagement on specific points, their general pro- and anti-European attitude is - similar to the public opinion - of a limited help or obstacle to initiatives for the institutional set-up of a European Union.

****

**********7**********

The national bureaucracies are not showing a persistent pattern. Though tending to power conservation in their hands and to a certain distrust of initiatives , there were in most member countries pro-integration coalitions in the bureaucracies of a considerable strength.[54]

****

The often quoted blame that "national bureaucracies although they have to take their place as major political actors in the process and were indeed much more important to it than theory suggests, are deplorably ill-equipped for such a task (of long term calculations about gains and losses) trained as they are to destil with the greatest possible accuracy forecasts about calculable short term consequences"[55] does not seem to be confirmed by historical evidence. Furthermore, the political leadership could - it wanted - make their plans implemented by their bureaucracies. Thus, bureaucracies are not necessarily the foes of any integration strategies.

**********8**********

The European leadership (High Authority, Commission, European Parliament) were instrumental in raising topics, in including enduring procedural elements into the package deals and in providing conceptions. However, their part in getting an initiative off the ground and in implementing it were limited (see the Jenkins initiative for the EMS, the Thorn contribution to the Stuttgart and the Fontainebleau package).

****

Thus, the power of reforming the institutional set-up by forces from within the system is limited.[56]

**********9**********

Independent personalities (like Monnet or presidents of the European movement) could play a vital part in inducing heads of government to take up an initiative and to suggest - out of their insights and personal contacts - constructive package deals. Beyond that, their influence was marginal unless they could serve as a personal representative to the head of government. Due to the increasing bilateral and multilateral têta-â-tête's of the political these utility of such a role decreased.

****

We should be careful not to compartementalize political actors too much into single groups e.g. parties, we must be aware that there are "clusters" or networks of actors of different groups:[57] Those clusters of, e.g., certain political leaders, parliamentarians, parties (or wings of parties), interest groups and civil servants are of considerable importance and stability.

If we assume for a moment that theses 1-9 are valid for starting our research, we can deduce additional theses concerning the modalities

and procedures which - at least at the first look - do not seem to be contradicted by the experiences which we have.

**********10**********

Successful initiatives for the European Union should at their inception clearly indicating the major aims without fixing the details too early.

****

The central package deal behind the initiatives should be clear to the national political leadership, the program should leave enough field for manoeuvre and supplementary ideas. It was vital that a locomotive of interest was put on the rail. Thus the draft treaty might already be too far reaching.

**********11**********

In the next phase, that of concertation, it was necessary that the political leadership were taking a strong engagement not necessarily a strong personal involvement by a mixture of complementary steps

* being involved directly in the crucial points,
* by entrusting personal representatives in close contact with political leadership with drawing up to detailed plans,
* to give the bureaucratic responsibles large bindings with clear political aims.

****

Successes were based on an intensive interplay of political leadership and the administrative apparatus. If one part lacks, failure is rather likely.

Not successful at least for the implementation were the attempts to install high level independent expert groups or wise men. Their power

is not sufficient to generate the political wish forwards. Thus, the original concept of the Spaak II committee was based on exeriences.

**********12**********
In the finalization of the written agreement intensive involvement of the political leadership in the central details is indispensable.
****

"Technical" details cannot only be left to the "experts" because in the controversies on details the basic political differences are being reflected. The often used distinction between political decision "in principle" and the "technical " implementation by civil servants has proved to be quite often artificial and increased only the problems of finalization.

**********13**********
For ratification or implementation again the political leadership needed to get involved in the lobbying. No initiative worked as such.
****

**********14**********
Agreements without the need of ratification are being preferred as involving less engagement of the political leadership inside their countries.
****

The internal sensibility is less high and the political costs are lower. At the same time, the obligations stemming from agreements of a legal kind are higher, the control of the follow-up by the national political leadership is smaller.

**********15**********
Ambiguity in the texts can be a help to argue the case to different circles.
****

For example, the controversy about the "liberal" (used as an argument in the ratification in Bonn), the "social" character of the Rome treaties (used as an argument in the Assemblée Nationale) helped to make the treaty pass, but might create controversies later on (which might be still preferable to having no steps forward at all). Water-proof solutions with no ambiguities did mean standstill. It is however necessary to include procedures (legal or otherwise) for overcoming different interpretations.

2. The dynamics of integration

a) The national environment: The withering away of original integration functions

Theses 1-15 tried to draw lessons from previous attempts to achieve institutional progress - thus being an easy object of falling into the trap of historical analogies. The following theses try to explain the observed behavioural patters of political actors by looking at the "system" or the "environment" in which the actors operate, and by presenting some extrapolation thus appraoching possible traps of the feasibility approach.

**********16**********
Major original functions of the integration process for member states have been either fulfilled or lost in importance.
****

In the post-war period the the six original EC members used "integration" as means of pursuing at the same time

* national emancipation from war-time defeat and post-war restrictions,
* a new "regime"[58] of rules and code of conducts to manage the growing interdependence[59]
* to establish a "working" peace-system in a larger sense then just the absence of war, including forms of peaceful, democratic and legal settlings of conflicts, guaranteeing human and civil rights etc.,
* to regain a say in international affairs in formal as well as in power terms,
* to support their own economic growth after war time devastation.

Those partly overlapping functions of the Community - identical, though not necessarily compatible in the original member countries - have been largely been materialized - partly due to factors outside direct Community policies - partly due to different forms of integration.[60] The emancipation function has passed for most countries into a historical reminiscence; the establishment of a working peace system has been largely achieved; to keep it is still important, though from national points of view, no dramatic improvement is needed.

For supporting economic growth - in the middle of the eighties you will say competitiveness and reduction of unemployment -, for keeping or reestablishing a regime for managing interdependence (partly with new issues like ecology) and a say in international affairs. European policies are still of major importance, though in pursuing those goals through Community channels, the urge for major institutional initiatives might be less strong. For the "newcomers" most original function - at least with different world war II experiences - were of no major importance. Thus the passing of time and new members led indeed to a new "generation" of politicians, for which steps towards a European

Union did and do not play a major role for the future development of their country, as was the case for some of the founding "fathers".

This downgrading in importance of the original functions are not only due to progress in integration; where steps towards some kind of European Union failed like with the EDC or the Fouchet plans other solutions like NATO or EPC have been found fulfilling at least some the original functions for the member countries. Failures to achieve more steps forward reinforced the tendencies of the economically and politically "successful" West European States to reestablish and reascertain themselves as major actors and perceive concrete Community policies in narrower utilitarian terms of concrete cost and benefits.[61] This reduced the propensity to make larger investment into projects of the European Union as such and increased the propensity for package deals of an ever increasing complexity and "technality" (see also Thesis 1). The reluctance of new members for bolder initiative and the withering away of certain functions for the original members have led to the result that institutional initiatives get a rather low priority; piece meal engineering around the status quo is the dominating pattern.

**********17**********

The role national political systems play in modern welfare states is strongly established and resists attempts to be replaced or downgraded by an independent European system.

****

Since the post war period, the EC member countries developed into fully fledged welfare system with party competition and increasing "neo corporatisme" in which approximately half of the GNP is spent through governments (on different levels) and through public agencies (like social security etc.) National governments have become the central object of intensive lobbying for distribution and redistribu-

tion. They are made responsible for the "pursuit of happiness". Thus the whole national structure of policy making has been oriented on the national capital. It is no more so much the national sovereignty in security and legal terms as such which gives the national political system its legitimacy, but the different "service functions" for its citizens. Though the national government does not dispose of all the instruments necessary to fulfill these service functions in the most efficient way (and thus need to cooperate and integrate), the citizens address their expectations and give their support primarily to the national system which he or she is familiar with.

The dilemma between the most efficient level of problem solving on one side (which is for many political topic the Community) and the established national political system - being also able to evoke some traditional loyalities - is not likely to be solved in favour of pure problem rationality. The disposition of political forces in major Community countries to replace the role of the national system in these service functions to a large extent by a different, new and unfamiliar (European) system is low. The resistance of the whole political system against a large political change of functions is thus considerable.[62] Though the welfare state has and is suffering through different crises, none of them has stirred up a broad political move towards more European integration.

The European Community and related policies were more a help for nation states to keep and strengthen their salience than a cause of the nation state "to wither away".[63] Unless major crises would undermine the legitimacy of national system due to "overload" and incapacity, given a certain stability of the national political system any European progress towards "European Union" is not excluded, but those steps will mainly be possible as an <u>extension</u> of the nation state - not downgrading the national system. Thus, those institutional systems are preferred which give political representatives of the welfare state a decisive say.

**********18**********

Divergences in the economic performance and the heterogenity of economic policies have grown (or have at least not been considerably reduced), thus keeping the potential costs for giving up national control high.

****

With the help of the EC, the economic performances of the original member countries have all improved, however, the distance among them in some crucial terms like international competitiveness, inflation rates, external balance, regional equilibrium have not been really bridged. With increasing membership, the economic performance will further diverge in a Community of Twelve, there will be a general interest in having a common market and common internal and external economic policies, but there was and will be more controversies about the substance of these policies.

Beside divergencies in interests - due to different economic positions in the international "division of labour"[64] - the "philosophies" and instruments used for economic policies are still quite different so perhaps less in their real impact.

Looking at this situation, it can be assumed that institutional setups of towards a European Union replacing or downgrading national instruments are not likely as most member governments expect that new common policies run by independent bodies of the European Union will not be as adequate to their problems and philosophies as their national ones. To loose formal control over these instruments vital for national economies and crucial for gaining national elections will not be easily accepted. Furthermore, as the CAP demonstrates when loosing one instrument others are likely to be created to fine-tune economic policies according to the needs perceived at national level.

This thesis does not exclude that all member countries have a vital interest in pursuing Community policies, but this strong potential

interest is restrained by the "uncalculable" risks to give up the ultimate responsibility - even if national instruments have less impact than a genuine European policy.

In such kind of situations, economic booms can facilitate the implementation of plans like it happened with the ECSC and the Rome Treaties. If all economies grow, divergencies are less embarrassing and the available budget is larger to make side payments also for institutional steps. In times of economic crises, the costs of integration are more obvious and are hurting directly also reducing the propensity to institutional reforms. If necessary to strengthen the institutional set-up again those (intergovernmental) forms are preferred which leave the major influence to national governments.

b) The Community environment - restraints of a "cooperative federalism"

**********19**********

By a constant evolution of the institutional structure (though in clear limits) as well as by enlarging the scope of policies pursued by the Community, the Community institutions and related bodies have created an "acquis" which at the same time reduces on one side the options open and creates on the other side opportunities and pressures for further developments.

****

With the institutions created by the Paris and Rome Treaties, with some reforms of the original division of powers (especially establishing the budgetary powers of the EP), with institutional adaptations and ammendents like Coreper, the European Council, with parallel developments like the EPC and EMS , the structure of policy making has gone through different evolutionary phases; historical plans are thus often outdated as experiences gained over the last three decades are

building up their own "acquis";the potential for institutional engineering is reduced.

The scope of policies pursued in the Community and in related frameworks like the EPC and the EMS have also increased considerably over the years. Most areas vital to national policies are in some way or other touched by Community deliberations, legislation and action; in this sense, national policies have been "Europeanized". For steps towards a European Union, these different forms of the "acquis" have to be taken into account as the basis of action.

The felt "disequilibria" of these policies and dynamic spill-overs (not necessarily an "automatischer Sachzwang" à la Hallstein) are "pushing" for more democratic and more efficient institutional set-up. The growing imperfections of the political system of the EC have increased the claim for institutional reforms. The imperfections of the institutions and the insufficiencies policies are thus a constant source for new initiatives towards a European Union.

**********20**********

Steps and strategies towards a European Union are not only influenced by the growing number of activities and the increased variety of institutional machinery but by the development of the Community into a system of "cooperative federalism".[65] Increasing the "double role" of national decision makers and reducing the field for manoeuvre for the EP.

****

By this term we want to describe the "pooling" and "mixing" of national sovereignties with Community competences. In a system of cooperative federalism two levels (in our case the Community and the national) are not clearly separated in terms of their competences (implying that each level is operating on its own without taking into account

the other level); but both levels "share" the responsibility: A cooperation of both is necessary to solve an increasing number of problems as none has enough competences and capacity to tackle the challenges aheand; a strong tendency to overstep a clear vertical separation of powers (in federal states and in the Community) is caused by the tasks of modern welfare states in an interdependent world.

The term "cooperative federalism" is used to mark - more clearly than other terms like "intergovernmentalization" or "regime" used to describe at least part of the same phenomena - the close links between several governmental levels and to put the analysis of the Community development into some comparative perspective. Strategies for a European Union thus do not only need to take into account the increased activities and the higher density of the institutional network but also this specific character of the Community actively.

A major consequence of this process is a gain of power by the government[66] in all fields of governmental functions: policy determination, policy execution and policy control. Looser at least in formal terms are parliaments: The political leadership in government and bureaucracies are in a permanent process of negotiation, the result of which cannot normally be overruled by the national or the European Parliaments, as not to endanger the whole compromise.[67] The strengthening of administrative actors by the necessity to work together on a permanent basis does not lead a "technocratic rule".[68] The administrative and political representatives of the member states and increasingly of the Commission are part of "policy clusters" - policy network which are formed by the close interaction of interested members of parliaments, the political leadership in government, the interest groups, academics and the civil servants. The positions being negotiated in Brussels are thus normally not just "bureaucratic" inventions by civil servants - "out of touch with the political reality" - but reflect in most cases the consensus among the concerned national elites on certain topis (this analysis would explain Theses 4 and 5).

In such a system, the major national actors are not only having but are also realizing to have responsibilities for both levels. Not only in situations like holding the Presidency do national decision makers perceive the need to keep also the Community system as such going; an output failure on the Community is clearly seen as having direct repercussions for the national service function.

The institutional system of the Community as developed over the seventies and early eighties has gained in stability and strength by the involvement of nearly all major national actor. The institutional build-up since the fifties is assembling nowadays nearly all decision makers in regular intervals; the late-comers were the heads of government in the European Council. Deficits are however existing in the parliamentary circles, except for the European party associations which are neither complete nor very relevant, parliamentary leaders and experts outside the governments do not dispose about a regular European-wide network - this deficit has been reinforced by the nearly total reduction of dual mandate. This loss of channel influence has - strange enough - not led to a stronger revolt as many had expected.

The intensive involvement of national decision makers - caused by and reinforcing at the same time the interdependence of the national and the Community level - reduce the play ground "below" or beside the close attentin of the "national system". One major consequence is the trade-off between the gain in stability and the loss of field for manoeuvre.

In terms of institutional strategies for a European Union we can conclude from those characteristics of the Community system that we are faced with a dilemma for our strategies: if we want to pursue a strategy which is viable and acceptable in member countries, we need to base those steps on a majority of forces in parliament, bureaucracies and interest groups who are basically supporting the present system of shared responsibilities and are, in institutional terms,

mainly status quo oriented. Those forces are generally not interested in a structural reform which would reduce their influence and control over Community policies. On the other side, if we want to achieve a step forward beyond the status quo which seems necessary to solve the problems ahead we are lacking the political forces to give those steps enough weight.

c) The international environment - unity by external coercion

**********21**********

The simple hypothesis "the stronger the external challenges, the easier are steps towards a European Union are taken" can be regarded as refuted.

****

The history of the Community demonstrates that in all steps and projects towards more institutional integration the international environment played and plays a major though not persistent role[69] - not always leading towards faster agreement and more rapid implementation of initiatives. In times of crises, quite often "coalitions" with countries outside the Community are searched for and/or strengthened or induced by a "divide-et-impera" policy of third countries (like the Arab countries after the 4th Middle East war). For major institutional pushes the external challenges were not (yet?) strong enough. Furthermore, in terms of crisis a reflex to fall back on known national systems can be discovered. lead quite often to internal clashes.

**********22**********

In the history of the Community, the international "power game" has offered most of the time a premium for a "European coalition". This premium was and is quite often off-set by the fear of loosing national freedom of manoeuvre and by some successes in a rather loose system of European cooperation.

****

The result is a double strategy of member countries leading towards "parallel Community activities"[70] in many sectors of international affairs. The member countries have common and coordinated forms of foreign economic (e.g. Lomé) and diplomatic (EPC) policies as well as at the same time keeping their own national policies. Institutionally national instruments were not replaced but diversified.

**********23**********

The economic interdependence of the European welfare systems have made a cooperation in and outside the Community circle imperative.

****

Thus neither the diplomatic/security position of Europe nor the economic interdependence are - at least at present - not a strong incentive for institutional reforms.

V. CONCLUSIONS - A CORE AREA STRATEGY AS SOLUTION OR RESIGNATION?

After the look into the past and the present, we would need a look into the future in how far the conditions responsible for the utility of a certain strategy will persist or change. We would need to analyze in how far new or reinforced challenges will lead to constructive packages breaking up the present institutional "impasse" in the "cooperative federalism". Beside looking into the crystal ball, we could

work with "scenarios" in which alternative evolutions and changes in the national, Community and international environment are put together.[71] Thus, if we expect a long term economic recession, the propensity of the Community of Twelve either to collapse or wither away is high. Then different institutional models and different strategies should be pursued than in times of economic boom.

For the sake of our discussion, however, we assume that the theses presented have a certain degree of validity for a medium term evolution of the status quo. From these analyses and assessments some suggestions for institutional strategies can be drawn.

*** (1) *** Package deals with scope enlargening and institutional reforms should not be planned in a medium term on only one "voie royale", e.g. certain institutional reforms or on one crucial area of activities like the EMS or the "espace industrielle". Perceptions of the political leadership caused by political pressures might change in a short time. Various "locomotives" for integration strategies should be tested in a trial and error process. However, at a given moment, a rather simple "give and take relationship" with elements of institutional reforms should be presented.

*** (2) ***Package deals which would enlarge scope and the institution framework among member governments are difficult to discover in the present status quo. In a Community of Ten or even Twelve some form of constructive compromises among countries of a different position in the international division of labour of different degrees of European awareness and diverging conceptions for institutional reforms will make constructive package deals with scope enlargement and strengthening of the institutional structure difficult. Given this analysis of certain preconditions for institutional reforms, new forms of integration have been proposed in which the numbers of participants are limited. The mentioned strategies of l'Europe à la Carte,[72] differenzierte Integration,[73] "abgestufte Integration" (où l'Europe à plu-

sieurs vitesse) à la Brandt and with variations à la Tindemans,[74] l'Europe à géométrie variable,[75] the abgestufte Integration à la Grabitz[76] or a new "core group" being "threatened" as well by Mitterrand and Kohl as by the draft treaty of the European Parliament (Art. 82) and apparently partly tried with the "revival" of the WEU, all start from the assumption that the smaller circles of member countries will agree faster on more ambitious steps forward to solve problems in common. They differ about the forms by which the rest of the countries should "participate" of the common project or to be led back into the "club" of advanced European circles. Stressing mainly the "scope enlarging" dimension, most concepts do not treat implication for the institutions and for a European Union.

*** **(3)** *** As a strategy for reforming the existing institutions, in terms of higher efficiency and stability those concepts could serve:

* as tactical device to pressure reluctant countries: Follow our ideas or we create a new club of our own;

* as a means of keeping a status quo by allowing institutional mechanisms which - like the "multiple bilateralism" of Community countries (i.e. the regular bilateral meetings of some heads of governments) - might be outside the institutional orthodoxy but perhaps necessary to keep the institutional framework working;[77]

* to enlarge the scope outside the Community in a strict sense - like the EMS -, thus reducing some pressure on Community institutions;

* to offer some kind of Community oriented fall - back position in case the overload on the Community institutions lead to a break down.

*** **(4)** *** To use these concepts as a central element for a strategy towards a new institutional set-up, we should again distinguish be-

tween the utility as a "tactical" device and as basic alternative to a Community of Ten/Twelve.

The "tactical device" is based on some kind of "bluff" that reluctant countries will not want to stay outside an inner, more dynamic circle to which they might have to join later under less favourable terms - Britain's experiences after not entering the EEC club early enough. For not being called a "buff", an inner core area must be prepared to really go ahead.

*** **(5)** *** The utility of those concepts to achieve some kind of different institutional model to a Community of Ten/Twelve should be considered:

(a) The slightly varying concepts of a multi-tier community as a "non-permanent exception but unlimited in time"[78] in which all countries agree on a common concept, some however delay the implementation out of "objective" reasons (see e.g. also the Art. 35 of the draft treaty on the European Union) and are especially supported by the Community to reach the Common standard, will not serve as a strategy for a major institutional device forward to a European Union. They might be useful for scope enlargening in new areas like it happened with the EMS (though at that case the third element - that of special aid - was not given to the non-implementing countries) a more principal change of institutional reforms would need an agreement by all; secondly it difficult to conceive institutions in which some members would - at least not actively - participate. The utility of "abgestufte Integration" as a strategy for institutional reforms in the direction of a European Union is therefore limited to an early stage of drawing new areas of activities into some kind of common (though imperfect) integration framework.

(b) The strategy "l'Europe à la carte" - "that is common policies where there are common interests without any constraint on those who

cannot join them"[79] - opens the possibility for a multiplicity of parallel approaches which are - at least implicitly - defying any kind of coherent institutional framework. Scope enlarging wihtout at least some kind of rules will not help institutional steps forward, there are more a danger to existing institutions without offering institutionally sound alternatives.[80]

(c) More promising looks a strategy based on new (= old?) core areas. Institutional reforms and scope enlargement could be pursued in a coherent way. In a smaller circle of those willing to go ahead with integration and having more similarities, the subjective and objective preconditions are met to a higher degree than in other constellations. Before jumping on this train, several warnings have however to be given:

If Theses 15 is also the core area and especially the Federal Republic does not necessarily need a new institutional set-up of the Community for emancipation or for finding a new identity. From theses 16 and 17 it can be followed that also for a core area a permanent engagement and a decisive say of the political top are necessary. Both theses imply that the propensity to radical basic reforms is small.

To create a package deal for a core area (see Thesis 1) implies that there are enough interests which can be combined in a constructive way. As crucial for these packages were seen the French/German understanding (see Thesis 2). An analysis of interest constellation are however not too promising. Strong French interests for "new policies" in the middle of the eighties (espace industrielle et sociale, mercantilistic trade policies, more use of the ECU, espace sociale, prevention of German "neutralism")[81] are met with reluctance from the German side whereas their major interests in an open world trade sytem more common security and foreign environmental protection (acid rain)[82] might not meet the prioritys of the French side.[83] In some areas, German interests are more converging with British interests. Also on

the institutional questions, few constructive elements for a French/ German package appear to be existing. Some agreements for improving the efficiency of the existing Community might be possible. Although package deals are regularly put together by different priority sectors, some common starting points have to exist. The draft treaty of the European Parliament includes some offers to both sides but in the debate, so far, no "locomotive" of interests has been set in motion. In many areas there are French/German controversies which make decisions difficult.

From this analysis of interest constellation can be tentatively deduced that core area strategies will not be easily implemented if only the original members get rid of the "nuisance countries".

Even when deciding for a core area strategies (though with the expectations that other will jump on the band waggon), relations with the rest of the Community countries must be put in a framework - as this is in the interest of all countries involved; thus, the freedom of manoeuvre for a core area European Union in terms of exclusive areas of activities and institutional autonomy is limited.

Conclusion: The feasibility of this strategy might be relatively high, the probability to achieve one of the more democratic and more efficient models low, the costs however high as the existing framework will already suffer from attempts in that direction. The strategy to reach an institutional progress towards European Union by a core area approach should be seen as an attempt of the last "ressort" which has clear internal French/German divergencies and external limitations (to arrange workable relations with the rest).

At the end of this exercise to compare different strategies in terms of their utility for reading (different) institutional models, the results lead us to a certain resignation. The resistances to institutional change by the involved welfare systems are considered to be

only surmoun table by package deals which serve important aiming the political top of the member states. These package deal cannot be easily identified even in a core area. Also for a smaller circle, forces to achieve progress in the institutional field are difficult to discover. Predictions about changes in this constellations are difficult to make. The hope that perceptions of the political top in different countries about the necessity of institutional reforms (to deal effectively with the problems ahead) will converge should not be buried.

Given the analyzed status quo, we should however expect that the institutional muddling through with at the same time scope enlargement will continue to be the permanent pattern.

NOTES

1 See as few examples: Hans-Peter Schwarz, Europa föderieren - aber wie: Eine Methodenkritik der Europäischen Integration, in: Lehmbruch u. a., Demokratisches System und politische Praxis der Bundesrepublik Deutschland, München 1971; Ralf Dahrendorf, Plädoyer für eine Europäische Union, München 1973, especially pp. 75-85, in which he criticizes the "functional logic" (Sachlogik) à la Hallstein and the "procedural logic" (Verfahrenslogik) à la Spinelli and proposes his third Europe; see also Ralf Dahrendorf, A Third Europe? Third Jean Monnet Lecture, Florence, 26 November 1979; Wolfgang Wessels, Die Integrationsstrategie des Tindemans Berichts, in: Heinrich Schneider, Wolfgang Wessels (eds.), Auf dem Weg zur Europäischen Union, Bonn 1977, pp. 219-238; Heinrich Schneider, Rudolf Hrbek, Die Europäische Union im Werden, in: Hans von der Groeben, Hans Möller (Hrsg), Möglichkeiten und Grenzen einer Europäischen Union, vol. 1, Die Europäische Union als Prozeß, pp. 227-334. The authors analyze different forms of a "saut qualitatif" and of integration incentives. Their conclusion (p. 344). From within the political/institutional system (endogenous factors) few chances for integration steps can be expected but the system would be able to react constructively to "exogenous" challenges. A comparison with "strategical" elements of different European initiatives is presented by Alterio Spinelli in: European Parliament, Committee on Institutional Affairs: Selection of texts concerning institutional matters of the Community from 1950 to 1982 (quoted from now on: Committee on Institutional Affairs, Selection of texts) no assessment of different appraoches is however given as is appropriate for such a compilation. See also national strategies for European integration (e.g. Commissariat Gênêral du Plan, Quelle strategie Européenne pour la France, Paris 1983, in which the French/German axis was accentuated) and strategies of the European Parliament (e.g. the contributions by Jacquê and Hänsch, in: R. Hrbek, J. Jamar and W. Wessels, Parliament Européen, Bilan et perspecitves 1979-1984, Bruges 1984, and Jean Paul Jaquê, Roland Bieber, Vlad Constantinesco and Dietmar Nickel, Le Parlement Européen, Paris 1984; in both works the parliamentary strategies of "petits pas" and "saut qualitatif" are debated).

2 See e.g. Mauro Ferri, Foreword, Committee on Institutional Affairs, Selection of texts.

3 See for a debate on these questions Hans Möller, Untersuchungswege, Methodenfragen, Ergebnisse, in: Groeben und Möller (Hrsg.), Die Europäische Union als Prozeß, op. cit., pp. 159-189.

4 See also Schneider/Hrbek, Die Europäische Union im Werden, op. cit., p. 435.

5 See the work by Hans Jürgen Küsters, Die Gründung der Europäischen Wirtschaftsgemeinschaft, Baden-Baden 1982, pp. 128-135.

6 For these "revisionistic" dangers inherent in academic work, Hans Peter Schwarz, Europäische Integration als Zeitgeschichtsforschung, in: Vierteljahreshefte für Zeitgeschichte, 31. Jahrgang 1983, 4. Heft/Oktober, p. 569.

7 I see this danger in the highly interesting conclusions by Alan S. Milward, The Reconstruction of Western Europe 1945-51, London 1984, in

particular pp. 491-502; his contributions are however quite useful to underline some of the theses presented below.
8 See for an attempt to look closer, Stephan F. Szabo (ed.), The Successor Generation: International Perspectives of Postwar Europeans, London 1983.
9 See his Jean Monnet Lecture, op. cit.
10 Joseph H.H. Weiler, Legal structure and the political process in the European Community, manuscript 1982, pp. 54-55.
11 See e.g. the draft proposal by Pfennig und Luster for a European Union.
12 See as one of the recent elaborations on these methodological problems Renate Mayntz, Die Entwicklung des analytischen Paradigmas der Implementationsforschung, in: Renate Mayntz (ed.), Implementation politischer Programme, Königstein 1980, p. 14.
13 This assumption is based on works like that of Grainski and Popper demonstrating possible impacts of political strategies.
14 When "rediscovered" by Pompidou at the Paris Summit 1972, the French President himself did not give any precise definition when asked explicitly by the then German Foreign Minister, Walter Scheel, so Scheel in an interview with the author of this article.
15 See Heinrich Schneider, Leitbilder der Europapolitik, Der Weg zur Integration, Bonn 1977, pp. 234/235.
16 See Möller, Untersuchungswege, Methodenfragen, Ergebnisse, op. cit., p. 162.
17 See Pierre Gerbet, La construction de l'Europe, Paris 1983, p. 60, et Schneider, Leitbilder der Europapolitik, op. cit., pp. 193-216; the controversy was characterized by the slogan "union - not unity".
18 See Resolution of the European Council on the Tindemans Report, EC Bulletin 11, 1976, p. 93-94.
19 To present models numerous variations are possible: See here Wolfgang Wessels, Zur Strategie des direktgewählten Parlaments auf der Suche nach einer Rolle für das Europäische Parliament, in: Integration 3/79, pp. 113-114.
20 12 Carol Webb, Theoretical Perspectives and Problems, in: Helen Wallace, William Wallace, Carol Webb, Policy Making in the European Community, 2nd edition, London 1983, pp. 1-39.
21 See for the elements of this strategies among others the British memorandum on European policies and its proposals for confidential meetings of the head of governments and the French philosophy behind the European Council.
22 Proposals for this strategy are coming from orthodox circles.
23 See the original Spinelli proposals.
24 These ideas are especially presented by the Italian branch of the Union of European Federalists, see for example Andrea Chiti-Batelli, Le problême de l'Union politique Européenne vue par un fédéraliste "a part entière", XXIXême Table Ronde des problèmes de l'Europe, Bonn, 2./3. April 1976, p. 17.
25 See returning remarks from French presidents.
26 See for this term report on behalf of the four research instituts on Western Security, London 1980.
27 See article 82 of the draft treaty.

28 Scharrer, Abgestufte Integration, op. cit., pp. 6-12.
29 See for this debates in the European Parliament.
30 See for the expectations the neofunctinalist school.
31 See especially Ralf Dahrendorf, A Third Europe, in: Third Jean Monnet Lecture, op. cit.
32 Dahrendorf, op. cit., is here ambiguous.
33 Compare for the package of the different interests and purposes linked to the creation and implementation of the Rome Treaties, Hans von der Groeben, Aufbaujahre der Europäischen Gemeinschaft: Das Ringen um den Gemeinsamen Markt und die Politische Union (1958-1966), Baden-Baden 1982, pp. 37; 56; Küsters, Die Gründung der Europäischen Wirtschaftsgemeinschaft, op. cit., pp. 449-470; see for a similar assessment Helen Wallace, Negotiation, Conflict and Compromise, in: Wallace, Wallace, Webb, Policy Making, op. cit., p. 48.
34 H. Schneider, Leitbilder der Europapolitik, op. cit., p. 299.
35 See Milward, The reconstruction of Europe, op. cit., p. 492.
36 See Walter Lipgens, A history of European Integration, op. cit., vol. 1: 1945-1947.
37 Milward, The reconstruction of Europe, op. cit., p. 493.
38 See also Rudolf Hrbek/Wolfgang Wessels, Die Interessen der Bundesrepublik Deutschland in EG und EPZ, in: Rudolf Hrbek/Wolfgang Wessels (eds.), Die Interessen der Bundesrepublik Deutschland an EG und EPZ, Bonn 1984 (forthcoming), p. 13.
39 Milward, The reconstruction of Western Europe (p. 494), reduces the ambiguity between "European" and "national" functions to a one sided relationship "the validity of ECSC ... did not be so much in their vaunted supra-nationality as in their extranationality - that they were created as an arm of the nation states to do things which could not otherwise be achieved".
40 Milward, The reconstruction of Western Europe, op. cit., p. 474.
41 E.g. the monetary establishment of the Federal Republic was against the creation of the EMS; it perceived its regulations as against the monetary stability (one of the "highest" national interests in the FRG). Chancellor Schmidt perceived the EMS from a different atlantic and European perspective.
42 This is suggested by Milward, op. cit., p. 492.
43 See for this notion Wolfgang Wessels, Der Europäische Rat: Stabilisierung statt Integration, Bonn 1980, p. 341.
44 See for an analysis of how far the Schuman/Monnet Plan served French economic and foreign policy interests Schneider, Leitbilder der Europapolitik, op. cit., p. 364, and Milward, The Reconstruction of Western Europe 1945-1951, pp. 362-421, and in summarizing the major arguments p. 474 and 475: "The Schuman Plan was called into existence to save the Monnet Plan" (for French economic recovery).
45 See as an example for an analysis of how some political leaders assessed the EC as part of an overall strategy, von der Groeben's description of de Gaulle's policy in the early sixties, op. cit., p. 193-196.
46 See for this especially Rudolf Hrbek, Heinrich Schneider ..., Politische Union im Werden, op. cit.

47 See Wallace, Negotiation, Conflict and Compromise, op. cit., p. 69.
48 Milward, The reconstruction of Western Europe, op. cit., p. 492.
49 See for the ECSC, Milward, The reconstruction of Western Europe, op. cit., p.495, for the EEC see Küsters, op. cit., pp. 441-443.
50 See for this notion Ronald Inglehart, in: Leon N. Lindberg, Stuart A. Scheingold (eds.), Regional Integration, Theory and Research, Cambridge (Mass.) 1971, p. 16.
51 See Elisabeth Noelle-Neumann/Herdegen, Die öffentliche Meinung, in: Werner Weidenfeld, Wolfgang Wessels, Jahrbuch der Europäischen Integration 1982, Bonn 1983, p. 299, and Eurobarometer, No. 17, June 1982, pp. 46-65.
52 See European Parliament Secretariat General, Directorate General for Research and Documentation, Research and Document Papers, Political Series, Transfer of responsibilities and democratic deficit, Luxemburg, January 1984.
53 See Carl Christop Schweitzer, Die nationalen Parlamente in der Gemeinschaft: Ihr schwindender Einfluß auf die Europagesetzgebung, Bonn 1978; Antonio Cassesse (ed.), Control of Foreign Policy in Western Democracies, New York 1982; David Marquand, Parliamentary accountability and the European Community, in: JCMS, vol. 19, No. 3, March 1981, pp. 221-236.
54 See for the active role of pro-European bureaucratic the works by the neofunctinalists inspired by Ernst B. Haas who saw the dynamic process of integration namely based on civil servants and experts from interest groups until de Gaulle demonstrated in the view of Haas the impact of the "politicians of the market-place". See for personal experiences, Hans von der Groeben, op. cit., p. 46-47.
55 Milward, The Reconstruction of Western Europe, op. cit., p. 500.
56 See Schneider/Hrbek, Die Europäische Union im Werden, op. cit., p. 344.
57 See Helen Wallace, Negotiation, Conflict and Compromise, op. cit., p. 47.
58 See for a discussion of the "fashionable" term William Wallace, Less than a federation, more than a regime: The Community as a Political System, in: Wallace, Wallace, Webb (eds.), Policy making in the European Community, op. cit., p. 403.
59 See Milward, The Reconstruction of Western Europe, op. cit., p. 500.
60 See Milward, op. cit., The Reconstruction of Western Europe, p. 493, who stated as historical evidence" that when specific and well defined economic and political problems were resolved, there would be no further momentum from the national interest towards any further stage of economic or political integration".
61 See e.g. von der Groeben, Aufbaujahre, op. cit., pp. 337-362.
62 Milward (The Reconstruction of Western Europe, op. cit., p. 493) even states in a theatrical way "the process of integration is (not) a thread woven into the destiny of all highly developed capitalist nation states".

63 See especially the analysis by Stanley Hoffmann, Reflections on the Nation State in Wester Europe Today, in: Journal of Common Market Studies, vol. 21, no. 1 and 2, September/December 1982, p. 21.
64 See the works of the "politik-ökonomische Schule of integration", here also Frieder Schlupp, The Federal Republic of Germany in the world political economy, in: E. Krippendorff/F. Rittberger (eds.), The Foreign Policy of West Germany, Formation and Contents, London Beverly Hills 1980, pp. 33-100.
65 The origins and the different connotations of the history of this term is described in: Max Frenkel, Föderalismus und Bundesstaat, Band 1, Föderalisms, Schriften des Forschungsinstituts für Föderalismus und Regionalstrukturen, Nr. 14, Bern 1984, pp. 123-128.
66 Heinrich Schneider (Europäische Union durch das Europäische Parlament: Zur Initiative des institutionellen Ausschusses, in: Integration 4/1982, p. 1533, and: Der Vertragsentwurf und der Föderalismus, 1/84, (Anmerkung 9) employs the use of "gubernative" and Karl Löwenstein functions of the political system for this kind of consideration.
67 This kind of phenomenon in the case of the Federal Republic has been studied by Fritz W. Scharpf, Fritz Schnabel und Bernd Reissert, Politikverflechtung: Theorie und Empirie des kooperativen Föderalismus, Kronenberg 1976. Their findings are useful to develop some kind of analogous theses for the Community.
68 See the respective delcarations by De Gaulle and the work by Scharpf, op. cit.
69 See e.g. for the acceptance of the Rome Treaties, Küsters, Die Gründung der Europäischen Wirtschaftsgemeinschaft, op. cit., p. 420.
70 The term was developed by John Pinder.
71 See e.g. Rudolf Hrbek, Wolfgang Wessels, Introductiory Report: A satisfying balance-sheet? In: Hrbek, Jamar, Wessels (eds.), Parlement Européen, op. cit., p. 38-43.
72 Dahrendorf, A Third Europe, op. cit.
73 Hans Eckart Scharrer, Differenzierte Integration im Zeichen der Schlange, in: Schneider/Wessels, Auf dem Weg zur Europäischen Union, op. cit., pp. 153-154.
74 Scharrer, Abgestufte Integration, op. cit., p. 6-12.
75 Commissariat Général du Plan, L'Europe les vingt prochaines années, Paris 1980, pp. 211-212.
76 See Eberhard Grabitz, Constantin Iliopoulos, Typologie der Differenzierungen und Ausnahmen im Gemeinschaftsrecht, in: Grabitz (ed.), Abgestufte Integration, op. cit., p. 43.
77 See for such kind of general "raisonnement" for abgestufte Integration Ulrich Weinstock, Abstufung als Realität und Chance, in: Grabitz (ed.), Abgestufte Integration, op. cit., pp. 366-379.
78 See for this definition Weinstock, Abstufung als Realität und Chance, op. cit., p. 381.
79 Dahrendorf, A third Europe? Op. cit., pp. 20-21.
80 This assessment might not be fair to Dahrendorf as he himself proposes institutional changes especially the election of the Commission by the Parliament, but I see inconsistencies between his conception of l'Europe à la carte and his institutional proposals.

81 See Commissariat Général du Plan, Quelle stratégie européenne pour la France, op. cit.
82 See Rudolf Hrbek, Wolfgang Wessels (ed.), Das Interesse der Bundesrepublik Deutschland an EG und EPZ, Bonn 1984 (forthcoming).
83 See Chancen und Grenzen eines deutsch-französischen Tandems, report on a French/German conference on that subject in: Integration 2/84, pp. 117-120.