

THE UNIVERSITY OF HULL

**THE CREATION OF THE EUROPEAN POLITICAL UNION: THE REFORM
OF THE COMMUNITY DURING THE 1991 IGC ON POLITICAL UNION**

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by

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SUMMARY

The 1991 IGC has reformed the European Community and the nature of the host of relations between its Member States. It has created the European Union through the Maastricht Treaty. The central hypothesis is that reform seems not to have resolved fully the deficiencies in form and substance of the Community's politico-legal foundation. The analysis proceeds through the comparison of three aspects: the reform of the constitutional foundation of the Community carried out by the IGC; the changes in the nature of the relations between Member States in these areas of competence that are inalienable from their sovereignty; and the introduction of the concept of citizenship of the Union in order to consolidate certain elements of citizenship that were present in the Community's framework. The conclusion reached is that the 1991 IGC has produced an entity of which the elements carry inherent contradictions; this tense nature appears to demand further reform.

We can forgive a man for making a useful thing as long as it does not admite it. The only excuse for making a useless thing is that one admites it intensely.

Oscar Wilde

I do not want to be a doctor and live by men's diseases; nor a minister to live by their sins; nor a lawyer and live by their quarrels. So I don't see that there is anything left for me but an author.

Nathaniel Hawthorne

ABBREVIATIONS

COREPER	Committee of Permanent Representatives
CFSP	Common Foreign and Security Policy
EAEC	European Atomic Energy Community
EC	European Community
ECJ	European Court of Justice
ECHR	European Convention on Human Rights
ECSC	European Coal and Steel Community
EDC	European Defence Community
EES	European Economic Space
EFTA	European Free Trade Area
EMU	Economic and Monetary Union
EP	European Parliament
EPC	European Political Cooperation
EPU	European Political Union
ESC	Economic and Social Committee
EUROPOL	European Central Criminal Investigation Office
EUT	European Union Treaty (1984 EP Draft)
FRG	Federal Republic of Germany (pre 1989)
HAJC	Home Affairs and Judicial Cooperation
IGC	Intergovernmental Conference
MEP	Member of the European Parliament
NATO	North Atlantic Treaty Organization
OCT	Overseas Countries and Territories
RRC	Rapid Reaction Corps (NATO)
SEA	Single European Act
TEU	Treaty on European Union (Maastricht Treaty)
TREVI	Terrorism, Radicalism, Extremism, Violence International
UK	United Kingdom
US	United States of America
WEU	Western European Union

Acknowledgements

When I started this Ph.D. two and a half years ago in the Autumn of 1990, Europe was caught up in a mood of optimism provoked by the quickening pace of history. European Union seemed, perhaps for the first time in forty years, to be an attainable possibility rather than a metaphorical idea. At the present, Spring 1993, the continent is shaken by an economic crisis that has resulted in increasing pessimism and the old recourse to national chauvinism that calls into question the very essence of the European project.

This thesis pays homage to all those who helped me to sail through this - historically and personally- turbulent period. The never-ending list must be opened (awkward as it may sound) by an institution: the Spanish Ministry of Education that through the Dirección General de Formación del Profesorado Universitario provided a generous scholarship to support my research. Professors Ramón Cotarelo and Lourdes López Nieto released me from my filial link with my home university, Universidad Complutense, and stimulated my search of new horizons. My commitment to them is, by no means, terminated with the completion of this thesis. No list of acknowledgements would be complete without including the name of my supervisor, Professor Juliet Lodge, European Woman of the Year in the very symbolic 1992. There is little that I can add to her huge reputation. Dr. Paul Furlong offered his kind support at a very delicate moment; *grazie tante e, come loro dicono, in bocca al luppo, crepi il luppo!* Of course, this acknowledgement extends to the other lecturers in the Department of Politics at the University of Hull, particularly Professor Noël O'Sullivan and Dr. Thomas Saalfeld who were occasionally understanding listeners. Becky, Sue and Pat are, by no means undeserving recipients of my appreciation given their tolerance of and patience with some of my more bizarre requests and inquiries. This acknowledgment extends to all the staff in the University, particularly those in the Brymor Jones Library and the Computer Centre.

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1 INTRODUCTION

- 1.1 Object
- 1.2 Methodology and analytical criteria
 - 1.2.1 Constitution
 - 1.2.2 Sovereignty
 - 1.2.3 Political subject or citizenship
- 1.3 Research sources
- 1.4 Hypothesis and plan of the thesis

1.1 OBJECT

The subject of this thesis is the reform of the European Community and, more precisely, the transition from the European Community and the host of relations between its Member States into a European Union.¹ Although reform might be considered to be an on-going process, it will be understood here as the sum of changes in the form, institutions and procedures that regulate relations among Member States. This thesis is concerned with formal changes marking further integration. Causality, (i.e., the reasons for reform) is a secondary concern. In the context of the Community, the normal procedure for reform is through an intergovernmental conference (IGC). The research examines the reform of the Community carried out during the 1991 IGC, focusing specifically on the legal foundation of the Union, the reform of the Community's constitutional foundation, the changes in the relations between Member States in areas of intergovernmental cooperation and the creation of a citizenship of the Union.

The position of this thesis within the context of integration theory and intellectual traditions in politics may be seen as follows: Since the creation of the European Coal and Steel Community in the 50s, the creation and development of the EC has been approached from two angles. One has been concerned with the dynamic aspect, trying to identify the causes, factors and actors that stimulate integration or, possibly, hinder it. The bulk of this mainly political-scientific approach, dominated by international relations scholars, is formed by integration theory and its critical revisions. A second line of enquiry has been more concerned with the description of formal aspects from a static perspective, analysing the characteristics and relations among the Community's component elements. This latter approach, shared by scholars in the field of comparative politics and government and disciplines of public law (international and constitutional), usually refers to ideal types, particularly the concept

¹ I have a dislike of using the first person in academic writing. Therefore, the following explanation is written in an impersonal style. This is not an attempt to avoid responsibility; indeed, sentences such as 'This thesis does' should be understood as 'I do'.

of federalism, as analytical tools. The examination of both traditions is developed in detail in Chapter 2, the following paragraph identifies their main traces.

Integration theorists define integration in terms such as policy integration or enlargement of the scope of policy (dealt with by the EC) and level of authority (of Community institutions). They, however, do not consider that consent by Member States was a prerequisite for integration. Therefore, they fail to see that integration is not an automatic process, but it requires an explicit endorsement by Member States. Given that the Community is governed by a fixed set of rules (the Treaty), further integration has to be carried out through agreement on an explicit reform of these rules. Integration theorists failed to see that an essential prerequisite to measure integration is to measure reform. A similar argument applies to the critics of integration who argue that the Community must not be interpreted as an entity on the process to integrate. However, this standpoint is only valid (and corroborated) as long as there is no reform of the set of rules and procedures that may reinforce the scope of policy and level of authority. Once reform occurs, the grounds to deny integration seem to be fundamentally weakened.

The second line of inquiry (i.e., the formal and static analysis) carries a main weakness derived from its reliance upon ideal types: the approach is prejudiced by normative connotations. Reform is interpreted in a pre-determined manner to adjust to a certain ideal type (for instance, the transition from confederation to federation). Given that the Community is a *sui generis* entity, reform does not necessarily reproduce the historical model of federal integration. The Community model of evolution through reform is *sui generis* and requires *ad hoc* analysis.

The proposal of this thesis is, therefore, to examine integration through the reform of the Community; that is, integration is assessed on the effective changes that Member States have agreed upon. Integration is evaluated in its formal dimension: the changes in the legal instruments and procedures regulating the Community and the relations among Member States. These changes are not examined on the model of an ideal type such as federations: the aim is to interpret the relationship among Member States avoiding misleading typologies.

This research examines the politico-legal nature of the new entity created by the 1991 IGC on Political Union² in order to assess which deficiencies of the former politico-legal construction have been addressed, and in what manner. The nature of the Union developed by the IGC will be assessed through comparison with the former Community framework provided by the Treaty of Rome and the SEA and the related forms of intergovernmental cooperation. The aim is to show that the Union has, from

² The entity created, the Union, has been designed by the 1991 IGC on political union. Certainly, EMU is an important component of the Union, but it is included within the politico-legal framework of the Union.

a formal point of view, been created with inherent unresolved contradictions in its construction due to a failure to compose systematically a politico-legal structure. The form of the Union resulted from assembling the different forms regulating the host of relations between Member States. As a result, further reform is already on the agenda. What factors will stimulate this reform, and when, are two different lines of enquiry that will not be addressed here.

What is the relevance of the findings from a theoretical point of view? Reform shows changes in the relationship between the EC and its Member States (and between themselves) according to the three criteria selected below. The evaluation of the reform allows a certain degree of measurement by comparisons.³ Furthermore, if measurement is possible, this surely implies the existence of an object to be measured, whether it be called integration or discontinual adaptation to new interdependence conditions. This thesis proposes to assess how the reform or transformation proceeds, instead of identifying its causes. The implicit assumption is that causes vary in each set of circumstances. Although integration and transformation or reform may be understood as simultaneous and even synonymous concepts, a theory of transformation seems to be a prerequisite for a theory of integration. However, it is not the intention of this thesis to advance a fully-fledged theory of reform, but to indicate the direction in which it might proceed and how.

1.2 METHODOLOGY AND CRITERIA FOR THE ANALYSIS

The research methodology adopted is comparative. The comparison is organised in a diachronic manner between two different configurations of the same entity: the comparison is between the politico-legal nature of the Community and the host of relations between its Member States *ex ante* the IGC, and the transformation of this nature effected by the IGC. The question is how to establish the second unit of the comparison. The IGC has created a Union, but the difficulties in defining the term 'European Union', (which has been used as *the ideological underpinning and justification for almost all the proposals designed to forward the process of European integration*⁴), have been conventionally accepted by the literature on European integration. European union has been equated with an idea, with a project and, partially, with a reality. The *idea* is the objective of reaching a *political union*;

³ Measurement does not mean numerical measure but qualitative formal change; for instance, the evolution from intergovernmental cooperation to the institutionalisation of common policy.

⁴ Bieber, R.; Jacqué, J.-P. and Weiler, J. (eds.) An ever closer union. A critical analysis of the Draft Treaty establishing the European Union (Luxembourg: Office for Official Publications of the European Communities, 1985) p. 7

the political project is developed through several instruments and the partial reality is the degree to which idea and project become reality.⁵

The solution seems to rule out a definition of the concept on the basis of two reasons. Firstly, the union is a permanent process. Secondly, the union is never to be consummated, be final, be achieved.⁶ The term 'Union', it is said,

is not susceptible to precise definition since it refers to a continuous process, to an evolving body of ideals, proposals and measures, rather than to an entity having a definitive legal, political or institutional structure,⁷

to the extent that *empirically, one might as well abandon any hope of arriving at a common meaning of the term.*⁸ The methodological proposal of this research is to induct the final outcome and its component parts through their genesis during the IGC. This research methodology can be termed *inductive exegesis*: induction indicates that the logical procedure apprehends the final concept from the particular forms given to it during the conference. For instance, the concept of "common policy" developed within CFSP is not examined in the final form presented by the Maastricht Treaty. "Common policy" is explained by examining its genesis in the first national contributions and institutional proposals, and its constant modifications during the negotiating process until the final version. Exegesis is a legal procedure of interpretation that focuses on the positive texts in order to induct the aims behind them. The aims of the actors involved are considered only as far as is reflected by their concrete proposals. For instance, "common policy" cannot be identified as an ideal model when the Commission proposes, the Council disposes and the EP is consulted. Although this was, in fact, the final aim of some actors; "common policy" stemmed from the Conference as a different procedure.

5 Aldecoa, Francisco La unión europea y la reforma de la Comunidad Europea (Madrid: Siglo XXI, 1985) p. 18

6 Bieber, R. et al. op. cit. p. 8

7 Toth, A. G. The Oxford Encyclopaedia of European Community Law (Oxford: Clarendon Press, 1991) p. 243

8 Bieber, R. et al op. cit. p. 7. In a rather clear way, Stanley Hoffman has said that *the enterprise can proceed as long as there is, if not a common purpose, at least sufficient ambiguity to accommodate a variety of national purposes* Hoffmann, Stanley 'The European Communities and 1992' Foreign Affairs Vol. 68 No. 4 1989 p. 41. The uncertainty of its aims and the tardiness in clarifying them led Arthur Shonfield to its famous title Europe: Journey to an unknown destination (BBC Reith Lectures London: Penguin, 1972). In his lecture to the EUI, the then Irish President, Patrick J. Hillery, argued that *we should not seek to define in advance the precise nature of our destination or the precise limit of our journey; not because we wish to travel blind but rather because we in the European Community have entered territory as yet unexplored in the history of the relations between free and democratic nations.* Hillery, Patrick J. Ar Scáth a chéile Jean Monnet lecture (Florence: EUI, 1988)

Since the comparison is not organised around ideal types, a main theoretical objection that might be raised is the generalisation value of the methodology (i.e., its applicability outside the EC studies' context) and, as a result, of the conclusions achieved (i.e., applicability outside the EC studies context). This legitimate concern, however, makes little sense within the context of EC studies where most authors have come to accept the *sui generis* nature of the Community, implying that specific methods and criteria are required for analysing it.

A comparative method requires the identification not only of the two units in the comparison but also the relevant dimensions of the comparison. Having established the two units (i.e., the same entity in two successive moments), meaningful dimensions will be those that express a relationship with the constant sub-elements (i.e., Member States). Therefore, it is necessary to identify certain criteria drawn from the political systems of Member States which can be applicable in explaining, in a politico-legal dimension, the relation between them and that entity. The utilisation of tightly defined criteria has the undoubted advantage of commensurability: they allow comparison of different configurations of the same object in very different moments. A second advantage derives from this: they allow a certain degree of measurability. The object measured is the politico-legal form adopted by the host of relations among Member States and the entity. Whether the changes in this relation might be conceptualised as integration or, simply, as adaptation to the new conditions of interdependence is a moot point. However, the comparative method permits the specification of how the reform has proceeded and this assessment seems to be a prerequisite for a new attempt at theorising. The objection that might be raised is that the method fails to provide a causality paradigm in that it does not identify the causes which provoke reform. However, literature on European integration has shown that causes depend on historical circumstances. Given the changing set of circumstances in each reform, the development of a comprehensive paradigm of causality puts forward doubts regarding its applicability.

The criteria to be used in this research are the ones explained below: constitution, sovereignty and citizenship. The selection of these three criteria is based on two reasons: firstly, they define the basic constitutive elements of each Member State.⁹ This methodological line is inspired by the approach of a French scholar, Quermonne. He proposed the creation of a European political model culled from the common elements of the political systems of the Twelve Member States, instead of resorting to the usual attempts at giving a political dimension to the Community system by referring it to the ideal types of federation and confederation.¹⁰ Secondly,

⁹ The three following sections mention a series of authoritative authors to substantiate this claim.

¹⁰ Quermonne, Jean-Louis 'Existe-t-il un modèle politique européenne?' *Revue Française de Science Politique* Vol. 40 No. 2 1990 pp. 192-211

these concepts have been recurrently used by integration theorists and their critics. The following subsections will address them in detail.

1.2.1 The constitutional element

The concept of constitution can be broadly understood as describing the foundation of the political relations within a community. However, it has traditionally been a disputed one and, therefore, the objective of this research requires a formal definition that avoids normative statements, considering the constitution as a framework for establishing political principles.¹¹ A constitution could be defined as **the supreme norm embodied in a written document which expresses the basic beliefs of a people**. This definition meets the exigencies of what Duchacek has identified as the legal view: the constitution is *the supreme law of the land, a fundamental normative fountain from which all the other secondary norms (...) are derived*.¹² But the definition embodies also the political view of a Constitution as defined by Duchacek: a political manifesto (a declaration of political or ideological commitment) and organisational chart.¹³ The concept of constitution has two dimensions: a legal one mainly referred to as supremacy, and a political dimension, which refers to political principles. This concept is problematic on two counts: its formal character and its reliance on a written document.

The applicability of the formal concept of constitution to a wide range of political systems has been identified as its main weakness. Along this line, Friedrich criticised the formal concept of constitution which he divided into a *legal* one (basic law) associated with the works of Hans Kelsen, and a *political* one (living constitution) linked to the doctrine of Carl Schmitt. These formal concepts, in his view, could not be accepted because of their applicability to non-democratic regimes. Since the notion of constitution in Friedrich is a substantial one related to *a kind of political order which contrasts sharply with non-constitutional systems, such as totalitarian dictatorship*,¹⁴ he proposes instead a functional (i.e., normative) conception; a constitution has the function of establishment and maintenance of

11 Cf. the classification proposed by Friedrich, Carl J. Constitutional government and democracy (New York: Blaisdell Publishing Co., 1965) pp. 121-122. Cf. the definition by Duchacek: *a constitution is a collection of written and unwritten principles and rules that identify the sources, purposes and restraints of public power*. Duchacek, Ivo 'Constitution/Constitutionalism', in Bogdanor, Vernon (ed.) The Blackwell encyclopaedia of political institutions (Oxford: Blackwell, 1987) p. 142

12 Ibid.

13 Ibid.

14 Friedrich, Carl J. 'Constitutions and Constitutionalism', in Encyclopaedia of Social Sciences p. 319

effective restraints upon political and, more specifically, upon governmental action.¹⁵ The distinctive element of a constitution, in Friedrich's view, is the realisation of certain political objectives. These are twofold: the protection of individuals against interference in their autonomy, implying, fundamentally, the protection of human rights. Along with it, the second principle is the functional and spatial division of powers.¹⁶ Therefore, Friedrich conceives constitutional government in a negative sense: *a constitutional government is one in which effective restraints divide political power, or, to put it negatively, prevent the concentration of such power.*¹⁷

This line of criticism, however, expresses a preference for the kind of political order of which the existence can be traced in Western constitutional texts and in the uncodified British constitution as being a result of historical constitutive processes. As such it does not invalidate the formal concept of constitution because, theoretically, any particular objectives and normative elements can be fitted into it. A constitution should not be considered to be a predetermined fixed set of values.

Any constitutional union is ultimately established by its constitution. Whether this result is expressed in a codified form or written text (or not) is due to historical constitutive experience. What is common to most of the European States is that their historical experience has shown the need for a written text which clearly establishes those elements regarded by Friedrich as characteristic of constitutional government and which are the common political principles of the EC Member States (the protection of human rights, democracy and division of political power). For some of those countries, the existence of a constitution in an absolute or "living" sense, following the British model, has not always implied those elements automatically. Italy and Germany recovered the elements of constitutional government through the Constitution of 1947 and the Bonn Basic Law of 1949. The constitutional texts of some occupied countries (such as France 1958) reinstated those elements alienated by the traumatic experience of the war.¹⁸ The Irish constitutional text of 1937 served to assert the existence of the Irish Republic as a different sovereign entity.¹⁹ The

15 Ibid. p. 123

16 Ibid. p. 319

17 Ibid.

18 These are denominated negative or reactive constitutions by Bogdanor, V. (ed.) Constitutions in democratic politics (Aldershot: Gower, 1988) p. 8

19 Article 1 of the Irish Constitution reads: *'The Irish nation hereby affirms its inalienable, indefeasible and sovereign right to choose its own form of Government, to determine its relations with other nations...'*. In commenting this article, Kelly recalls a dictum by the Irish Supreme Court which states: *'it is true that the Constitution is a legal document, but is a fundamental one which establishes the State and it expresses not only legal norms but basic doctrines of political and social theory'*. This dictum explicitly acknowledges the constitutional dualism (documentarian and absolute concept). As Kelly accurately emphasises, the importance lies not in the Republican form of Government, but in the Constitution as the instrument for the Irish people to choose such a concrete form. Kelly, J. H. The Irish Constitution (Dublin: Jurist Publishing Co. Ltd., 1980)

constitutional texts of Greece 1975, Portugal 1976 and Spain 1978 signalled an end to dictatorship through the establishment of those elements of constitutional government.²⁰ The common character developed by those constitutional experiences is an *editorial* (i.e., written) form which contains four essential elements:²¹

- a. A *Preamble*. It constitutes the declaratory, non-legal part of the constitution.
- b. An *organisational chart*. It establishes the hierarchical assignment of specialised roles and responsibilities and procedures to be followed.
- c. A *Bill of rights*.
- d. *Amending articles*.

In the context of the EC, the concept of constitution has usually been applied by legal writers (such as Mancini, Weiler or Pescatore), for whom it does not imply a normative option, in defining the Community politico-legal order. In the political literature on European integration, it has been vindicated anew by federalist writers, often from normative premises.²² Not surprisingly, constitution became a non value-free concept. Thus, Mitrany designed his functional model starting from the criticism of the model of a universal union based on a federal constitution.²³ A universal union based on a federal constitution was perceived as being undesirable for two reasons: firstly, federal constitutions are instruments not only to unite but also to divide. Secondly, the aim of organising a peaceful change in world society within a constitutional order seems to be unachievable.²⁴ Although Mitrany mentions occasionally that *the functional method as such is neither incompatible with a general framework nor precludes its coming into being*,²⁵ he is thinking of a kind of government of which the authority and scope for possible actions is determined more by technical requirements. This is not a constitutional government, but a 'functional'

20 Further to this argument, Guy Hermet considers that *the basic aim of the Spanish and Portuguese constitutional processes must be understood by reference to this cycle*. Hermet, Guy 'The role of the Constitution in Spain and Portugal', in Bogdanor, V. (ed.) Constitutions in democratic politics cit. p. 285

21 Duchacek, Ivo 'Constitution/Constitutionalism', in Bogdanor, V. (ed.) The Blackwell Encyclopaedia cit. pp. 142-4

22 See, for instance, Mackay, R.W.G. Federal Europe (London: Michael Joseph Ltd; 1940) 323 p.

23 See also the early criticism put forward by Forsyth: in an early work Forsyth rejected federalism as a constitutive or integrative technique on the grounds that it *does not lead beyond the nation state, but only creates a larger state with the same problems as before* Forsyth, Murray 'The political objectives of European integration' International Affairs Vol. 43 1967 p. 497

24 For Mitrany, peaceful change required *some system that would make possible automatic and continuous social action, continually adapted to changing needs and conditions, in the same sense and of the same general nature as any other system of government*. Mitrany, D. A working peace system: An argument for the functional development of international organization (London: RIIA, 1943) p. 14

25 *Ibid.* p. 28

government justified by technical needs and legitimated by its ability to perform its functions. His disregard for pacts and contractual links is based on the belief that they constrain the possibilities for change; constitutional pacts were adequate for the nineteenth century when the task was to restrain the powers of the authority. The trend of our century leads towards the organisation of government

*along the lines of specific ends and needs, and according to the conditions of their time and place, in lieu of the traditional organization on the basis of a set of constitutional division of jurisdiction of rights and powers.*²⁶

The main argument against the constitutional model is its inflexibility or inability to cope with change, as is evident even in federal states such as the USA. The alternative offered by Mitrany is functional organisation: *there are not 'federalizing' but 'functionalizing' actions, and they could never lead to any political union, let alone federation between the parties.*²⁷ The basic dictum of Mitrany's theory, as Taylor reminds us, is that the form should emanate from the function and, therefore, the form cannot be pre-established.²⁸ Functional organisation does not need a constitutional framework because political self-determination is translated into functional co-determination: *the range of tasks can be clearly defined and this, in turn, makes plain the powers and resources needed for its performance.*²⁹ The 'functional government' is justified by technical needs and legitimated by its ability to perform its functions. Undoubtedly, the world-wide emergence of functional agencies seems to justify functionalist expectations regarding the inadequacies of constitutional frameworks to organise international cooperation. However, the Community hardly can be described as a functional agency; and, without denying the insufficiencies of the constitutional model, it is, nevertheless, the one that best describes the EC framework.

Neofunctionalist theory did not deal with the question of the foundation of the political relation from a normative rejection of the concept of constitution. This approach was developed once the European Communities were established and, therefore, theory relied on empirical evidence to define the politico-legal form adopted by the integration process. Neofunctionalist authors created the concept of supranationality in explaining the new entity. As Haas writes, supranationality, in structural terms, means *the existence of governmental authorities closer to the*

26 Ibid. p. 28

27 Mitrany, D. 'The prospects of integration: federal or functional' Journal of Common Market Studies Vol. 4 1962 p. 143

28 Taylor, P. 'Functionalism: the approach of David Mitrany', in Groom, A.J.R. and Taylor, P. (eds.) Frameworks for international cooperation (London: Pinter, 1990) p. 126

29 Mitrany, D. 'The prospects' cit. p. 143

*archetype of federation than any past international organisation but not yet identical with it.*³⁰ Implicitly, the category of constitution used in this research reflects the legal and political dimension of supranationalism, as will be illustrated in Chapter 3.

To summarise, the concept of constitution will refer to a document containing both a legal dimension (legal supremacy) and a political one (political principles). The dual concept of constitution will be applied to the examination of the Community's legal foundation in establishing the eventual deficiencies of the construction (Chapter 3). The research will need to assess whether the reforms developed by the IGC have responded to these requirements and, by doing so, whether deficiencies in Community constitutional foundation have been definitively settled (Chapter 8).

1.2.2 Sovereignty

The second concept applied in organising the analysis and evaluating the process of reform is that of sovereignty. The definitions of 'sovereignty' are countless,³¹ a fact that has sometimes served to justify a convenient flexibility.³² Two applications at least are inappropriate. Firstly, the identification of the subject holder of sovereignty, the sovereign, whose powers are thus considered to constitute sovereignty. Sovereignty in this usage is *the condition of being sovereign or of being a sovereign*.³³ The important element in this conception is the determination of the subject; the sovereign is *that organ in a State which holds and exercises supreme authority, and may be either an individual person or a collective entity*.³⁴ This is the predominant British usage of the concept of sovereignty, which becomes sovereignty of the Parliament, the Queen-in-Parliament being the supreme authority.³⁵ Nevertheless, this is not a notion generally shared by most of the EC Member States

30 Haas, E. The Uniting of Europe (Stanford, Ca.: Stanford University Press, 1968) cit. p. 59.

There is an enormous bibliography dealing with the concept. A synthetic description of the term in Taylor, Paul 'Supranationalism: the power and authority of international institutions', in Groom, A.J.R. and Taylor, P. (eds.) Frameworks for international cooperation cit. pp. 109-121. In contrast with the political perspective of these two references, see the excellent legally-minded work by Weiler, J. 'Supranationalism revisited- a retrospective: The European Communities after 30 years', in Maihoffer, W. (ed.) Noi si mura (Florence: EUI, 1986) pp. 341-396.

31 A recent inquiry into the quagmire of the concept is that of James, Alan Sovereign statehood. The basis of international society (London: Allen & Unwin Publishers, 1986)

32 So, for instance, Howe argues '*sovereignty is (...) a flexible, adaptable, organic notion that evolves and adjusts with circumstances*'. Howe, G. 'Sovereignty and interdependence: Britain's place in the world' International Affairs Vol. 66 No. 4 1990 p. 676

33 MacCormick, N. 'Sovereignty', in Bogdanor, V. (ed.) The Blackwell Encyclopaedia cit. p. 583

34 *Ibid.* p. 583

35 Howe differentiates Parliamentary sovereignty from sovereign authority as their being two different ones. Howe, G. op. cit. p. 677

(which prefer to refer to the sovereignty of the people or nation) and, therefore, it is not appropriate for adoption as a universal concept.

A second meaning to be eliminated is the common use of the concept of sovereignty to mean purely and simply the power of the state. *It describes the extent to which a State has a power on effective or unfettered action.*³⁶ This is a highly political application that ignores the formal and legal requirements on which public international law is based (for instance, equality among sovereign states). The predominantly pragmatic conception reflects the fact that public international law may become an instrument in the relations of power among states.³⁷

Having rejected these particular usages, there is a basic consensus that sovereignty implies two dimensions already implicit in Bodin's classic definition: thus, internal sovereignty, asserted by a state in relation to its territory and population, *means the supremacy over all authorities within that territory and population.* Similarly, *external sovereignty is not supremacy, but independence of outside authorities.*³⁸ Both dimensions of sovereignty are expressed by the constitution which, as has been discussed above, is the supreme law in the land. Regarding the external dimension, the constitution establishes *constitutional separateness* of the state: *a sovereign state may have all sorts of links with other states and with international bodies, but the one sort of link which, by definition, it cannot have is a constitutional one.*³⁹ This definition of sovereignty as constitutional separateness indicates very precisely the worth of international treaties despite their eventual hierarchical superiority over constitutional law. In the words of James, a state inhibits its legal freedom by making a Treaty, but it does not derogate its own sovereignty.⁴⁰

36 House Of Lords Select Committee on the European Communities Economic and Monetary Union and Political Union 27th Report. Session 1989-90 (London: HMSO, 1990) p. 11. In this sense, see, for instance, Howe: 'sovereignty is the practical capacity of a nation to maximize its influence in the world' Howe, G. op. cit. p. 676. James rejects the hypothesis that sovereignty means the ability to take one's decisions on the basis solely of internal calculations and desires James, A. op. cit. p. 179. Cf. the definition by Wallace: national sovereignty concerns the formal ability of a nation to act on its own rather than under the instructions of another nation. He terms this *national autonomy* or the ability for a nation to attain its objectives through unilateral action. Wallace, W. 'What price independence? Sovereignty and interdependence in British politics' International Affairs 1986 p. 367

37 Even a realist author, Bull, points out this inescapable duality: sovereignty exists at both a normative and a factual level. Bull, Hedley The anarchical society (London: Macmillan, 1977) p. 8

38 Ibid. p. 7

39 James, A. op. cit. p. 24. The concept comprises the *legal powers which are necessary for a state to act independently on the international stage.* Ibid. p. 200. For some authors, sovereignty in this external dimension is the qualifying aspect of statehood. In MacCormick's terms, State sovereignty is *either legal or political freedom from external control, whether or not an internal sovereign is a condition of statehood* MacCormick, N. op. cit. p. 584.

40 Ibid. p. 200. On the same line, MacCormick states that *the undertaking by a State of Treaty obligations is an exercise of, not a limitation on, sovereignty* MacCormick, N. op. cit. p. 584

Traditionally, it has been considered that the main feature of the concept is its legal, absolute and unitary condition.⁴¹ Its unitary, non-divisible nature is particularly relevant; as Crick has submitted, *to admit divided sovereignty is to make the concept almost meaningless*.⁴² Indivisibility means that sovereignty does not amount to a sum of sovereign rights; sovereignty cannot be disintegrated into a cluster of competencies, some of which can be effectively transferred.⁴³ Indeed, constitutional frameworks contain all the powers for the political and legal exercise of sovereignty. However, the very constitutional derogations of this unitary and non-divisible nature have led to a questioning of the concept⁴⁴ as to its internal and external dimensions.⁴⁵ Regardless of these revocations, there are certain competencies which cannot be disposed of without giving up sovereignty itself: the powers to secure the final existence of the sovereign entity itself. Such is the concept proposed by Bernard Crick:

*sovereignty is relevant to emergency situations, as the potentiality of maintaining order in the face of clear and present danger, and the justification of emergency powers by which all regimes must find a capacity for decisive, centralized, and, for a time, unquestioned action if a State is to survive.*⁴⁶

The powers relevant to the concept of sovereignty are, thus, those which can secure the survival of the state; externally, the competencies on defence policy and internally, the defence of the constitutional order. Over these, the state needs to have

41 James, A. op. cit. p. 39

42 Crick, Bernard 'Sovereignty', in Encyclopaedia of Social Sciences cit. p. 78

43 See a discussion regarding this argument and the EC in Chapter 4. Against this argument, see the opinion of Howe based on a rather unfortunate analogy: *In exactly the same way as the property rights of an individual, sovereign may be seen as divisible*. Howe, G. op. cit. p. 679. Along similar lines, Wallace describes sovereignty as a *measurable* concept and explicitly declares that a government can yield a portion of its sovereignty Wallace, W. 'What price independence? Sovereignty and interdependence' cit.

44 For instance, *sovereignty over a certain area can be shared by, or divided between, more than one authority* Lapidot, Ruth 'Sovereignty in transition' Journal of international Affairs Vol. 45 No. 2 1992 p. 325

45 Soldatos, for instance, criticises the unitary concept of sovereignty which defines it as *la possession par une collectivité étatique, de la plénitude des compétences ou pouvoirs publics (legislatif, exécutif, judiciaire) et de leur exercice à l'intérieur d'un territoire donné (celui de l'état) de façon totale (c'est à dire sans restrictions de domaine et d'actes, sauf, certes, celles que l'état s'imposerait lui-même) et exclusive de toute intervention extérieure et supérieure à propos de ces mêmes compétences*. His criticism considers that the development of complex economic systems implies that economic decisions are taken away from the representatives of the people. On the other hand, the involvement of smaller units than the state in foreign policy (i.e., paradiplomacy) has led to segmentation of sovereignty or *functional sovereignty*. Soldatos, Panayotis Le système institutionnel et politique des communautés européennes (Bruxelles: Bruylant, 1989) pp. 18-20

46 Crick, B. op. cit. p. 81 Crick relates the concept to the classical theory of sovereignty elaborated by Hobbes, Bodin, Macchiavelli and Austin. Although the systematic reasoning of those authors is not coincident, Crick found, however, a common origin in the concern to avoid civil war.

legal supremacy in the sense of final absolute competence and decision-making powers. Such are the powers embodied by the sociological concept of state implying the right to exercise the monopoly of legitimate violence.⁴⁷

This characterisation of sovereignty has engendered passionate criticism. Marquand, for instance, argued that *as a juridical concept, sovereignty has nothing to do with war-waging capability*.⁴⁸ However, he concedes that *whatever may be true of the juridical concept of sovereignty, the capacity to wage war has in practice been one of the attributes of the sovereign nation states*.⁴⁹ Even Friedrich endorses legitimate exceptional powers exactly equivalent to the notion of sovereignty as the exercise of legitimate violence: constitutional dictatorship (i.e., temporary and exceptional concentration of powers of which the modern forms are martial rule, the state of siege and constitutional emergence powers) is justified for the defence of the constitutional order.⁵⁰

Sovereignty, as constitution, is a politico-legal concept embodying internal legal and political supremacy and external legal and political independence. In this research, the relevant aspect is the formal aspect, and, therefore, it will reflect some premises of realist authors such as Bull and Hoffmann. The concept of sovereignty featured prominently as an analytical criterion in integration theory before the creation of the Community. Once the new supranational entity was established, it seemed to render the concept irrelevant and most scholars concerned with European politics turned towards alternative concepts such as interdependence, which expresses rather the conditions for the exercise of sovereignty; the concept, however, becomes relevant again when the research transcends the constitutional foundation of the Community to include intergovernmental areas. The functionalist analysis of Mitrany provides, then, interesting clues. Although his definition of sovereignty is close to the realist paradigm,⁵¹ he re-elaborates the concept within functional considerations. Sovereignty becomes divisible and it may be transferred through a function:

*By entrusting an authority with certain tasks carrying with it command over the requisite powers and means, a slice of sovereignty is transferred from the old authority to the new one.*⁵²

47 See the criticism of this sociological concept made by Friedrich, C. Constitutional government cit. p. 17 ff.

48 Marquand, David Faltering Leviathan: National sovereignty, the regions and Europe (London: The Whyndam Place Trust, 1989) p. 27

49 Ibid.

50 Friedrich, C. Constitutional government cit. p. 573-583

51 Mitrany defines sovereignty as follows: *Sovereignty is a legal concept, a status; it cannot be surrendered unless the units which form the political community, whether individuals or groups, abdicate their political rights.* Mitrany, D. A working peace system cit. p. 9

52 Ibid. p. 9. Also Mitrany, D. 'The prospects of integration: federal or functional' cit. p. 145

This process, the transference of certain competencies, leads on the international level to a 'pooling of sovereignties'. Despite these considerations, the functional transference of sovereignty is constrained to the 'low politics' ambit. Mitrany recognises that there can be no real transfer of sovereignty until defence is entrusted to a common authority.⁵³ Moreover, *defence, justice, police, etc. are all instruments of some constituted authority; an international police force, to take the more extreme case, would be an impotent anachronism without an international authority.*⁵⁴ As he points out, the prevalence of negative functions in the exclusive domain of the nation state would always endanger the prospects of any functional world authority. Positive functions might work and develop more freely without constitutional constriction but when the object to be organised is political (i.e., diplomatic or military alliance) the task must remain a continuous variable reflecting changing situations. Yet if the parties

*should reach the point where they want to unify and make permanent both the process of decision making and that of execution in what by its nature must remain a variable political sphere, foreign policy and defence, that could only mean a common executive authority; that is a common government: (...) within possible constitutional variants, that is the essence of political union.*⁵⁵

This separation between the areas of high and low politics was one of the main objectives of the revision of Mitrany carried out by neofunctionalist authors. Although, according to Taylor, the separability thesis seems to be generally questioned, it highlights a relevant fact: relations among states adopt different politico-legal forms in these areas.⁵⁶

The research will render this criterion operational in the following way. Alternative forms to organise the relations among Member States in areas pertaining their sovereign competence are identified and described in the first part (Chapter 4). Then, the second part will focus on whether this relationship, that respect the ultimate sovereignty of member States, has been somehow altered by the creation of the two new Union areas on foreign and security policy, and on home affairs and judicial cooperation (Chapter 9).

⁵³ Mitrany, D. A working peace system cit. p. 8

⁵⁴ Ibid. p. 33

⁵⁵ Mitrany, D. 'The prospects' cit. p. 122

⁵⁶ Taylor, P. 'Functionalism: the approach of David Mitrany' cit. p. 134

1.2.3 The political subject: citizenship

The third criterion to complete a map of the relations between the Community and its Member States and between these themselves is the one that establishes the role of individuals. Exercise of sovereignty and constitutional regulation implies the existence of a political subject. This political subject is the human collectivity entitled to delegate the exercise of sovereignty, and, therefore, has the political rights so to do.⁵⁷ The delegation of (national or popular) sovereignty is a single act by the political subject: a group of individuals is not entitled, within a constitutional Union, to specific or partial sovereignty.

The political subject is usually identified in political theory through the concepts of people or nation. To both of these correspond the more legal concept of *citizen*. The concept of people is closely associated with the expression of the identity of the political subject.⁵⁸ The political concept of people is not necessarily related to characteristics such as language, race, etc. In the Western tradition, the people have always been identified in relation to the other, the alien.⁵⁹ Thus, Schmitt argued that the essence of the political existence of a people is its capacity and will to determine the distinction between friend and enemy.⁶⁰ The usefulness of this concept for the purposes of this research lies in the fact that, in Schmitt's words: *the distinction of friend and enemy denotes the utmost degree of intensity of a union or separation, of an association or disassociation.*⁶¹ Of course, the determination of the distinction in the extreme case is an exceptional situation that Schmitt himself recognises, despite its being identified in daily activity: *a concrete antagonism is still expressed in everyday language. All political concepts, images and terms have a polemical meaning.*⁶²

57 On this Evans, for instance, writes *within the conceptual framework of the modern state, sovereignty and nationality are inseparable. Only those whom the state can regard as belonging to it may participate, even indirectly, in the exercise of its sovereignty.* Evans, A. 'Nationality law and European integration' European Law Review 1991 vol. 16 No. 3 p. 190

58 As Murray Forsyth has put it, the people is *a single collectivity of individuals that has become conscious of its identity* and it is usually termed *the constituent power* Forsyth, Murray Union of states. The theory and practice of confederations (Leicester: LUP, 1981) p. 14

59 On the particular Western tendency towards dualism, see Harle, Vilho 'European roots of dualism and its alternatives in international relations', in Harle, V. (ed.) European values in international relations pp. 1-14

60 Schmitt, Carl The concept of the political Edition by George Schumb (Rutges University Press 1976) p. 49

61 *Ibid.* p. 24

62 *Ibid.* p. 30. Schmitt argues that the most salient feature of the political entity is its capacity to wage war: *'In the orientation toward the possible extreme case of an actual battle against a real enemy, the political entity is essential; and it is the decisive entity for the friend-or-enemy grouping; and in this (and not in any kind of absolute sense) it is sovereign'* Schmitt, C. op. cit. p. 39.

The concept or idea of 'nation', when referring to the political subject, is equivalent to that of 'people'. There are plenty of tentative definitions of 'nation'. The concept of nation was developed first in counterbalance to that of the absolute monarch in order to identify a new political subject. Later, the concept evolved to incorporate a transcendental dimension, asserting the continuity of a political community over the transitory changes in its political form.

Both political concepts, people and nation, are, however, indeterminate. They designate collectivities, but they do not distinguish the individuals composing the nation or people. Therefore, the Western constitutional tradition has developed, in parallel, their legal equivalent: the concept of citizenship and citizens. Citizens are the persons entitled to form the political subject, differently from those who enjoy protection and/or rights granted by the state (i.e., social rights as well as human rights). In the words of Evans,

*citizenship may be employed to distinguish rights available only to those having a special connection with the state concerned from fundamental rights more generally available within that state. The essence of citizenship remains the constitutional arrangements made for participation by a defined category of individuals in the life of the State.*⁶³

Therefore, the definitive and fundamental element of citizenship is the enjoyment of political rights.

The consideration of the role of individuals has been a central element in some integration approaches. The focus of interest has usually been the socio-psychological dimension expressed by the concept of political community that referred to the links of emotional attachment between an individual and an entity. Thus Etzioni defined political community *as the dominant focus of political identification for the large majority of politically aware citizens.*⁶⁴ The concept of political community is used also by federalist authors such as Friedrich, who defined it on socio-psychological, as well as cultural and emotional, bases:

A political community must be seen as a togetherness of persons who are united by having in common some of their values, interests, ideas (including ideology), myths, utopias and their symbols, religion and its rituals. Such uniting will be partly by emotional

63 Evans, A. op. cit. p. 118. In a classical study on federalism, William Schrenck has shown that the protection of fundamental rights, such as freedom of religion, are often not an incident of citizenship but constitutionally granted to all individuals within the jurisdiction of the federation. Schrenck, William 'Citizenship and immigration', in Bowie, R. and Friedrich, C., (ed.) Studies in federalism (Boston: Little, Brown & Co., 1954) p. 641

64 Etzioni, Amitai Political unification. A comparative study of leaders and forces (New York: Holt, Rinehart and Winston, Inc., 1965) p. 329

*attachment and partly by subjection to common rules, responding partly to organic need and partly to conscious purpose, expressing both what already exists and what is explicitly willed.*⁶⁵

The concept of political community had similar socio-psychological connotations for neofunctionalist authors such as Haas:

*Political Community is a condition in which specific groups and individuals show more loyalty to their central political authority than to any other political authority, in a specific period of time and in a definable geographic space.*⁶⁶

Political community is a comprehensive concept that embraces states as well as intergovernmental agencies: these might be included in the type of political Communities provided that the system of government engages in negotiation and compromise to reach consensus on binding common agreements of profound consequences.⁶⁷

However, the most prominent treatment of the link between individuals and integration was developed through Mitrany's functionalism. He envisaged the experience of successful integration as shifting loyalties away from national governments.⁶⁸ Individuals would gradually turn their loyalties towards those functional agencies that satisfy their welfare needs.⁶⁹ Integration (in Mitrany's meaning of the word) would be stimulated by the perceived needs of the citizens. Two assumptions support this view. Firstly, loyalties are conceived as being basically rational and instrumental. As Taylor has expressed it, citizens would learn to cooperate, from the experience that cooperation provides the greatest benefits.⁷⁰ The second assumption is more relevant: loyalties can be fractionated and, thus, partially transferred. This implies a translation of the true seat of authority, implying restraints upon national governments. Authority and sovereignty are based on the loyalties of citizens in functionalist theory. This idea informs still the modern debate on the integration process; loyalty has been subsumed under the more political concept of legitimacy. Loyalty in Mitrany's thinking is purely a socio-psychological category, whilst legitimacy also incorporates formal aspects.

65 Friedrich, Carl Europe: An emergent nation (New York: Harper and Row, 1969) p. 23. He perceives this nation as an amalgam of differentiated socio-functional communities: business, trade unions, etc.

66 Haas, E. The Uniting of Europe cit. p. 5

67 Ibid. p. 8

68 Taylor, Paul 'Functionalism and strategies for international integration', in Groom, A.J.R. and Taylor, Paul (eds.) Functionalism: theory and practice in international relations

69 Mitrany, D. A working peace system cit. p. 95

70 Taylor, P. 'The concept of community and the European integration process' Journal of Common Market Studies Vol. 7 No. 2 1968 p. 86

The criterion of citizenship is used in this research mainly in its formal dimension; the socio-psychological connotations attached to the status of individuals present an insuperable problem of operationalization. The comparison will proceed in the following way. Although there was no Community citizenship, certain rights attached to the concept were developed from the Rome Treaty and the SEA (Chapter 5). The second term of the comparison, the citizenship of the Union, is examined to determine whether it has implied an advance over the former situation. It will evaluate also whether this new citizenship has superseded the concept of nationality of Member States (Chapter 10).

1.3 RESEARCH SOURCES

Having identified these criteria, the question is how to operationalise the research; i.e., to identify the sources and materials to substantiate the discussion. Arguments for the first part of the research, that establishes the first unit of the comparison (i.e., the EC and the host of relations among Member States), will be drawn mainly from secondary sources. Literature provides evidence enough and, hence, primary sources will be used only when there is a lack of secondary material (as happens with the discussion on citizenship in Chapter 5). Primary source materials in this part comprise three types: EC legislation, informative and preparatory institutional documents, and ECJ rulings. The importance of the latter must be emphasised not only because of the politico-legal focus of the thesis, but because of the very important contribution that the Court has made to develop some central EC elements.

The second part of the research is, however, based almost exclusively on primary sources; literature is scarce or currently almost non-existent. These sources are basically of two types: institutional documents and national contributions to the IGC, plus conference drafts. Institutional documents were essentially those approved by the EP (Resolutions and Reports) and the Commission (Contributions). Whilst the importance of the first is more pioneering, Commission contributions became real cornerstones for IGC proceedings: they were soundly founded and reasoned, and they often provided the initial legal form to vague proposals. National contributions were generally unpublished; they differ in nature (some with a discussion character, some with a more legal and technical wording). Their importance, though, lies in the fact that they were the ground material from which the final result (the TEU) was created and, therefore, they embody the expression of the drafters' "Geist". The conference drafts, on the other hand, reflect how this "Geist" was adjusted at each moment according to negotiation and bargaining processes within the IGC.

1.4 HYPOTHESIS AND PLAN OF THE THESIS

The research will be based on the following hypothesis: the politico-legal form given by the reform of the Community and the host of relations between the Member States is inconclusive, and the reform itself establishes deficiencies and contradictions which themselves provide a new programme of reform. The identification of formal internal contradictions as a source of change has been convincingly argued by Forsyth in his work Union of States.⁷¹ Referring to confederations, he argues that their main characteristic is their evolutive nature. Although this research has drawn inspiration from his proposals on the inherently tense and evolutive nature of these entities, it rejects the validity of the ideal type 'confederation' with respect to its application either to the Community or to the Union.

The hypothesis will be tested in the following manner: the first part of the research will identify central aspects (procedures, rules, principles, etc.) of the Community and the related areas of intergovernmental cooperation among Member States that required reform. This is to establish the starting point in the evaluation of the process of reform. The second part will discuss the solutions elaborated by the IGC. Then, the conclusion will assess these solutions in order to reach a verdict on the initial hypothesis. The questions to be addressed are the following:

1. What are the reforms of the Community's constitutional foundation proposed by the IGC? Do they address the deficiencies and weaknesses identified? Have they eliminated contradictions and/or weaknesses?

The preparatory ground for these questions (to which responses will be elucidated in Chapter 8) is laid down in Chapter 3, which examines the constitutional foundation of the Community and the major deficiencies stimulating reform.

2. What are the innovations introduced by the creation of the two Union areas on CFSP and HAJC? What kind of constraints do these areas pose to Member States' sovereignty? What are the internal sources of contradiction in the construction?

The research for providing foundations for the responses is carried out in Chapter 9. The basis for formulating these questions is provided by Chapter 4, in an examination of how Member States have organised through an intergovernmental framework the areas linked to their sovereignty (foreign affairs, security, etc.). These are termed 'paraconstitutional', which means that they are not part of the Community's

71 Forsyth, M. Union of States cit.

constitutional foundation; however, they do rely strongly on its institutional and/or legal framework.

3. Does the creation of a Union citizenship amount to the creation of a political subject above the nationalities of the respective Member States? This examined in Chapter 10. The relationship of individuals with the Community's constitutional framework has established a catalogue of rights that do not substantially amount to a citizenship, as is established in Chapter 5.

The bases for proposing these research questions are established in the first part of the thesis. The second part (Chapters 7 to 10) examines the responses that can be drawn from the IGC. Primarily, Chapter 6 examines the dynamic aspects of the conference, assessing the roles of national and institutional actors. The evaluation of the formal nature of the Union created during the IGC is carried out in Chapter 7, that provides elements for answering the question: If the Union is not constructed as an extension of the Community constitutional framework, what form will it adopt then? The conclusion is that preservation of the sovereign separate existence of Member States under a European Union requires two conditions. Firstly, the competencies related to the exercise of sovereignty by Member States should not be brought under the Community's constitutional framework. Secondly, citizenship of the union should not supersede nationality of Member States.

The conclusion that this thesis tries to reach is that the reform carried out in the 1991 IGC has been inconclusive from a formal point of view. The different elements and parts carry inherent deficiencies or contradictions which will require further reform.

The following chapter examines the two relevant models of analysis dominating in the field of EC studies. As has been anticipated in the first sub-section, this thesis attempts to explore an intermediate way in which assessing changes in the formal structure may provide a solid basis for establishing whether integration may be conceptualised as an independent variable, i.e., a fact to be explained.

2 THEORETICAL TRADITIONS

2.1 Integration theory

2.1.1 The evolution of integration theory

2.1.2 Theorising on the re-launch of the process

2.2 Formal models: Federalism

2.2.1 The legal foundation of federations and confederations

2.2.2 Sovereignty in federations and confederations

2.2.3 The political subject in federations and confederations

The introduction has placed this thesis at the cross-roads of two different intellectual traditions. On the one hand, the process of theorising about European integration established, initially, a dependent variable (integration) that was questioned and rejected *a posteriori*. However, the new integration dynamics during the 1980s has called for a new revision. The argument to be developed in relation to this theoretical line of inquiry is that theorising on integration requires, at this stage, the concurrence of benchmarks, i.e., precise rounds of reform that sanction change (whether or not this is called integration).

On the other hand, evaluations of the formal aspects of the Community have tried to induce a model of dynamics (i.e., integration) through reference to the ideal type of federation. Against this argument, the second section of this chapter argues that the ideal type of federalism is not useful to explain reform, nor the concrete configuration of the entity at a moment.

2.1. INTEGRATION THEORY

2.1.1 The evolution of integration theory

The dialectic process of theorising on European integration has culminated in the exclusion of the definition of a dependent variable in formal terms. Political integration was the implicit or explicit dependent variable in the early theories. Thus, integration meant, for Mitrany, the development of an international community through functional cooperation¹ or, as Taylor has put it, a process of *changing attitudes and creating costs of disruption - the enmeshment process - which make war less likely*.² The final outcome, if any at all, would be a complex, interwoven network of crossnational organisations performing welfare functions. The possibility of detaching the performance of these welfare functions from traditional state sovereignty, a possibility which had been brought about by scientific and technological change, was believed to be the source of the process. This process was described by

1 Mitrany, D. 'The prospects of integration: federal or functional' cit. p. 136

2 Taylor, P. 'Functionalism: The approach of David Mitrany' cit. p. 130

Taylor as a learning process: citizens are *gradually drawn into the co-operative ethos created by functionally specific international institutions devoted to the satisfaction of real welfare needs.*³ Some of the concepts and assumptions of functionalism are revised below. Globally, however, functionalism seems to deserve the label of pre-theory applied by Haas: its set of propositions and concepts appear to be insufficient by themselves to explain the growth, in scope and level, of the Community formal framework.

Neofunctionalists, in turn, adhered *initially* to a necessary outcome, although they are careful enough not to define it in concrete terms; in the words of Haas,

*While a central government is essential institutionally and a collective national consciousness socially, the constitutional form which will qualify for the ideal type may be that of a unitary, a federal or even a confederate arrangement.*⁴

Neofunctionalist authors operated with an explicit dependent variable, political integration or the process of politicisation stimulated by the spillover logic. Spill-over meant for Haas the expansive logic of sector integration and it referred to mainly economic (welfare) areas.⁵ Spillover results from a shift in expectations of certain groups towards a new centre; this process is defined as political integration.⁶ Defining the dependent variable facilitates the determination of the independent ones: politicisation might be explained or *predicted* in terms of high scores on background conditions (size of units, pre-union rate of transactions, pluralism and elite complementarity); conditions at the time of union (governmental purposes, powers of union) and process conditions (decision-making style, rate of transactions after union and adaptability of governments).⁷

The theory suggested a degree of automaticity in the process of integration (once it was launched) provoked by the rationale of spillover; in words of Schmitter, automaticity indicates a *theoretically high probability that spill-over will occur; i.e., conflict between national actors is likely to be resolved by expanding the scope or level of central institutions.*⁸ Automaticity of spillover was a central tenet in early neofunctionalism and the focus of criticism; Caporaso, for instance, argued that *the level of functional specificity (and controversiality) of a sector is inversely related*

3 Taylor, P. 'The concept of community and the European integration process' cit. p. 86

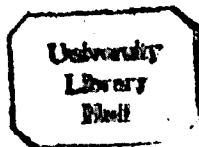
4 Haas, E. The Uniting of Europe cit. p. 8

5 Ibid. pp. 238-317

6 Ibid. p. 16

7 Haas, Ernst and Schmitter, Phillippe 'Economics and differential patterns of political integration: projections about Unity in Latin America' International Organization Vol. 18 No. 4 pp. 705-737

8 Schmitter, Phillippe 'Three neofunctionalist hypotheses about international integration' International Organizations Vol. 23 1969 p. 164



to its spill-over capacity, just the opposite of functionalism's (sic) assertion.⁹ Consequently, he hypothesised that the more differentiated the sector, the more structural independence from its own system it enjoys. Given the problems of validation that the proposition on automaticity presented, particularly in a comparative dimension, other neofunctionalist authors criticised and corrected the characterisation of integration as gradual politisation of actors and the consequent treatment of the relationship between economic union and political union as a continuum. Nye argued that *if an outside catalyst is necessary for the transition from economic to political union, this reduces the concept of "automatic politization" to mere words.*¹⁰

Together with automaticity, the reliance on the creative talents of political elites to contribute to the expansiveness of the spill-over effect¹¹ has been a second weakness of neofunctionalism. Although the later revisions included styles of leadership alternative to the incremental-economic (i.e., dramatic-political), Nau pointed out the main problem that inspired a departure towards a intergovernmental model: how to measure influence?¹²

Later neofunctionalists redesigned the model, assisted by Easton's systems theory. Thus, integration implied a system which can make authoritative decisions for the entire community, regardless of whether these are economic, military, or whatever.¹³ Such a general concept would, through precise re-conceptualisation, allow description of very different entities and, particularly, the EC, avoiding reference to the state model. In words of Lindberg,

*Systems analysis includes a wide variety of systems, including primitive, undifferentiated societies, political democracies, tightly organized totalitarian systems, and multinational or international systems. It is thus free of many of the kinds of assumptions involved when the nation-state is the sole empirical example from which a model of the political process in general or the integration process in particular is derived.*¹⁴

9 Caporaso, James Functionalism and regional integration: A logical empirical assessment (Beverly Hills: Sage, 1972) pp. 40, 42

10 Nye, Joseph 'Patterns and catalyst in regional integration' International Organization Vol. 19 1965 p. 882

11 Schmitter, P. op. cit. cit. p. 163

12 Nau, Henri 'From integration to interdependence: gains, losses and continuing gaps' International Organizations Vol. 33 No. 1 1979 p. 124

13 Lindberg, Leon and Scheingold, Stuart Europe's would-be polity: patterns of change in the European Community (Englewood Cliffs (NJ): Prentice Hall, 1970) p. 32

14 Lindberg, Leon N. 'The European Community as a political system: notes towards the construction of a model' Journal of Common Market Studies Vol. 5 No. 4 1967 p. 350

Integration is defined as a growth in the scope of the policy areas treated by common policy and the level of joint decision-making,¹⁵ and it becomes then a result of the system mechanisms (functional spillover, log-rolling and side payments, actor socialisation and feedback).¹⁶ Change would be an attribute of the system but this would not necessarily have a predefined direction; this new model does not establish an automatic and/or inevitable outcome for the process; rather, several different outcomes can be predicted: equilibrium, growth or spillback and renationalisation¹⁷ and, for some authors such as Nye, equilibrium (and not growth) seemed to be the most likely outcome.¹⁸

The introduction of the concept of system attempts to diffuse the fundamentally dynamic character of neofunctionalism; systems analysis is contingent upon static analysis. As stated by Lindberg: systems analysis *will be only tangentially relevant to the problem of projecting future structural states of the European system*.¹⁹ From this point of view, neofunctionalists accepted the criticism that their preoccupation with the process neglected to take into account systemic content.²⁰ The dynamic dimension was still retained theoretically as an internal function of the system. As will be discussed below, however, the source for dynamics must be found in the interaction between the units of the system rather than being an inherent property of the system itself.

The explanatory value that neofunctionalist authors postulated for their theory was brought into question, on the one hand, by the incapacity to establish a comparative model of analysis. But, more fundamentally, the real political dynamics of the Community and the process of stagnation during the seventies and eighties called into question its predictive value. As Taylor demonstrates, a detailed account of the events during these years shows that the majority of neofunctionalist expectations were unfulfilled.²¹ He listed three main limitations to the gradual integration model stemming from functionalism and neofunctionalism. Firstly, there were limits to the supranational capacity of the Community (i.e., the ability to receive, understand and act upon demands fed into the entity by its environment). This was exemplified by the

15 Nye, Joseph Peace in parts. Integration and conflict in regional organizations (London: University Press of America, 1987) p. 41.; Lindberg, L. and Scheingold, S. op. cit. p. 99

16 Lindberg, L. and Scheingold, S. op. cit. pp. 117-120. Nye adds rising transactions, deliberate linkages and coalition formation, regional group formation, ideological-identitive appeal and involvement of external actors in the process to elite socialisation and spillover. Nye, J. Peace in parts cit. pp. 64-74

17 Lindberg, L. and Scheingold, S. op. cit. p. 279

18 Nye, J. Peace in parts op. cit. pp. 96-98. He listed four likely outcomes: politization, redistribution, reduction of alternatives and externalisation.

19 Lindberg, L. 'The European Community as a political system' cit. p. 350

20 Kaiser, Ronn 'Toward the Copernican phase of regional integration theory' Journal of Common Market Studies Vol. 10 No. 3 p. 205

21 Taylor, Paul The limits of European integration (London: Croom Helm, 1983)

Commission's incapacity to formulate a common interest, the fiscal dependence upon Member States and the limits of majority voting. The second objection to gradualist theories is that the aspects of national decision-making expected by neofunctionalists to be modified by the integration process have not been so. Taylor underlines in particular that national groups have not re-focused their expectations and loyalties on the Community. Finally, the challenge to Member States' sovereignty (understood as exclusive competence) has been successfully resisted. In Taylor's view, this is so because the functionalist requirement of a socio-psychological Community as a pre-condition for the establishment of an eventual Community sovereignty remains unfulfilled.²²

The theoretical criticism of neofunctionalism stimulated by the verification of these limitations had been led by Haas himself who focused on the predictive value of the theory. Haas pointed out three reasons to account for its explicatory failure. Firstly, the change in the motives, perceptions and objectives of the actors involved questions both the incremental gradualist and the dramatic model of decision making. Secondly, the external influence has proved a far more important explicatory variable than neofunctionalists predicted. Finally, there has been a failure to predict institutional outcomes.²³ The central failure, though, was the lack of a clear dependent variable, since this had been constructed in an incorrect methodological sequence: ideal types were created for the terminal states starting from historical experiences at the national level. Then, the behaviour of the actors was interpreted in terms of their contribution (or failure to contribute) to the attainment of these types. The problem is that these types *are not independent variables since they cannot be observed or measured in nature*.²⁴ As a solution, Haas proposed a multiple dependent variable, defined in the form of three possible outcomes to the integration process (regional state, regional commune, asymmetrical regional overlap).²⁵ European integration was characterised as a multidimensional phenomenon requiring multivariate measurement.²⁶ In methodological terms, the revision of neofunctionalism implied the questioning of the automaticity of spillover and the role of "heroic" supranational actors.

The second group of contributions for the study of European integration comes from intergovernmental and interdependence approaches which shared the

22 Ibid. p. 300

23 Haas, Ernst The obsolescence of regional integration theory (Berkeley: University of California, Institute of International Studies, 1975) pp. 5-15

24 Haas, Ernst 'The study of regional integration: reflections on the joy and anguish of pretheorizing', in Lindberg, L. and Scheingold, S. (eds.) Regional Integration: theory and research p. 27

25 Ibid. p. 30

26 Lindberg, Leon 'Political integration as a multidimensional phenomenon requiring multivariate measurement' International Organizations Vol. 24 No. 4 1970 pp. 855-880

assumption that the Community had to be understood not in its specificity but through concepts applicable to other schemes of relations among states, such as regime or system, locating, thus, the EC in the mainstream of international politics. From an intergovernmentalist point of view, the criticism of the neofunctionalist interpretation of the Community has been addressed by Hoffmann against the assumption that the members (of the Community) are engaged in the formation of a new, supranational political entity superseding the old nation.²⁷ He argues that a theory able to explain the resilience and relative upturn of the nation-state should understand that, in any event, *politics of reciprocity and of zero-sum game reinforce the existing states*.²⁸ Hoffmann criticised the neofunctionalist dismissal of the ability of the major actors to stop or slow down the building of a new political system and advocated focusing on domestic priorities of Member States, their compatibility and the way they may be fostered by cooperation. Two other explanatory variables should be considered: the impact of the environment on the separate actors and the institutional interplay between the States and Community organs.²⁹

The immediate conclusion was an instrumentalist consideration of the Community; the acceptance of the Community should not be understood as a means of achieving a goal, but as means for Member States to pursue and obtain their separate interests.³⁰ In the words of Puchala, *realism at this juncture must portray policy processes in the EC as an instrument intermittently appropriate and intermittently used by national governments to seek and achieve essentially national goals*.³¹ Operational difficulties for the neofunctionalist model of policy-making were to be expected because of the failure of the supranational entity to articulate a sovereignty³² or the lack of a underlying community (*Gemeinschaft*).³³ In the view of Kaiser, the character of pretheory of neofunctionalism was due, precisely, to its failure to consider this socio-psychological factor.³⁴

This instrumentalist interpretation characteristic of intergovernmental approaches has been softened by the analytical tools of interdependence. Haas concluded that theorising about regional integration *per se* was no longer profitable as

27 Hoffmann, Stanley 'Reflections on the nation-state in Western Europe today' Journal of Common Market Studies Vol. 21 No. 4 p. 31

28 Ibid. p. 30

29 Ibid.

30 Taylor, Paul 'Interdependence and autonomy in the European Communities: The case of the European Monetary System' Journal of Common Market Studies Vol. 18 No. 4 1980 p. 372

31 Puchala, Donald 'Worm cans and worth taxes: fiscal harmonization and the European policy process', in Wallace, W. Wallace, H. and Webb, C (eds.) Policy-making in the European Community p. 261

32 Rosentiel, Francis 'Reflections on the notion of "supranationality"' Journal of Common Market Studies Vol. 2 No. 2 1963

33 Taylor, Paul 'The concept of community' cit.

34 Kaiser, R. op. cit. p. 224

a distinct intellectual pursuit. The logical conclusion drawn was that integration was not the most appropriate label for describing either the processes or the consequences of policy cooperation in a regional framework such as the EC.³⁵ Integration theory, in the view of Haas, ought to be subordinated to a general theory of interdependence. Integration, then, would refer to institutionalised procedures devised by governments to cope with the conditions of interdependence but this does not necessarily lead to progressive policy integration at all.³⁶ The establishment of this non-axiological dependent variable further provided the grounds for defining the independent ones. Webb argued that *blurring the outcome has the advantage that it deters the observer from distorting his analysis by unduly emphasising a preferred outcome (as federalists have done to their cost)*.³⁷ Similarly, Taylor concluded his study by suggesting that the *process of European integration was more likely to begin again if the goal of unification was consciously abandoned in the short term and if some of its supportive doctrines were discarded*.³⁸

Nau has summarised four main differences between integration and interdependence theories: voluntarism vs. complexity and constraints in the performance and growth of institutions; logic of competitive markets to establish substantive links among issues vs. new knowledge as rationale for particular or holistic association of substantive issues; hierarchy of issues vs. absence of hierarchy on issues, interests and institutions; and primacy of regional instead of global and national factors vs. equal weight for all factors.³⁹ Interdependence and intergovernmental analysis emphasise the role of national actors (as opposed to supranational ones). Indeed, the failure of the predicted model of decision-making (i.e., disjointed incrementalism) was at the root of Haas' revision. Disjointed incrementalism had been substituted by a new pattern (fragmented issue linkage) that predicts that the actors will learn merely to delay the exercise of "integrative" options in order to seek simultaneously internal and external solutions.⁴⁰ As a result, the progressive centralisation of efforts against the outside world is thrown into doubt and the eventual institutional outcome becomes far less predictable.⁴¹ The focus of the analysis switched towards policy-making on the assumption, summarised by

35 Webb, C. 'Theoretical perspectives and problems', in Wallace, Wallace and Webb (eds.) Policy making in the EC p. 8.

36 Haas, Ernst 'Turbulent fields and the theory of regional integration' International Organization Vol. 30 1976 p. 210

37 Webb, C. op. cit. p. 9

38 Taylor, P. The limits of European integration cit.

39 Nau, H. op. cit. pp. 140-141

40 Haas, Ernst 'Turbulent fields and the theory of regional integration' cit. p. 199

41 Ibid. p. 178

Bulmer, that the *policy-making process does not follow the logic of integration but rather integration follows the logic of decision-making processes*.⁴²

The main failure of interdependence approaches lies in their inability to satisfy the dictum that the Community should be understood through commensurable categories applicable to other international organisations, such as regimes. The concept of "regime", defined by Keohane and Nye as sets of governing arrangements (networks of rules, norms, and procedures that regulate behaviour and control its effects) that affect relationships of interdependence,⁴³ has been considered by Hoffmann to be the best conceptual scheme for analysing the Community.⁴⁴ More sophisticated reconceptualisations, such as Puchala's 'concordance system', have been provided. This is basically an international system of relations among states and separate systems *wherein actors find it possible consistently to harmonize their interests, compromise their differences and reap mutual rewards from their interactions*.⁴⁵ However, the category of regime has not been systematically applied because, even considering the Community as a static entity, the Community does not seem to be analytically comparable to any other international regime. Moreover, it is generally accepted, even among authors sympathetic to interdependence approaches, that the differences between the set of norms of behaviour, rules, policies and issues to facilitate agreement among Members in the Community and any other example of intergovernmental collaboration are wide enough to require a consideration of the point at which differences of degree become differences of kind.⁴⁶

2.1.2 Theorising on the re-launch of the process

Thus, by the mid-eighties, the theoretical sequence had reached a standpoint that refuted the necessity or interests of a preconceived and predefined dependent variable (much less a formal outcome). This, in turn, conveyed the questioning of the existence of a teleological process and gave grounds for the interpretation of the Community in instrumental terms for its Member States. This theoretical sequence, however, was based on the stagnation of the Community and the new dynamism of the second half of the 1980s put forward a new challenge: theoretical claims had to be

42 Bulmer, Simon 'Domestic politics and European Community policy-making' Journal of Common Market Studies Vol. 21 No. 4 1983 p. 353

43 Keohane, Robert and Nye, Joseph Power and interdependence (London: Scott, Foresman and Company, 1979) 2nd edition p. 19

44 Hoffmann, S. p. 33

45 Puchala, Donald J. 'Of blind men, elephants and international organization' Journal of Common Market Studies Vol. 10 1972 p. 277

46 Wallace, William 'Less than a federation, more than a regime: the Community as a political system', in Wallace, W. Wallace, H. and Webb, C (eds.) Policy-making in the European Community p. 405

re-validated against the new *corpus* of evidence. Broadly, five theoretical responses have been proposed. Firstly, authors such as Mutimer vindicate the neofunctionalist thesis in explaining the new reforms.⁴⁷

The second option, contained in the work of Pryce,⁴⁸ was the recovery of the teleological dimension by obviating the discontinuity of the process. The existence of several initiatives and proposals for reform, very different in substance and form, was given meaning by a successful one, the SEA. Pryce and Wessels identified three factors that would account for each of the individual attempts: first are the circumstances in which an initiative is taken, comprising the national environments (emphasising the appeal to and convergence of national interests), the international environment and the Community's own development. The second factor is the role of the actors promoting the initiative. Finally, the third and most important one is the goals, intentions and contents of a given initiative.⁴⁹ Without denying the descriptive and even explanatory power of this analysis, its main weakness lies in the structure of causality: there is no clear hierarchy of explanatory variables, nor correlation between them and each of the individual formal outcomes and, moreover, they fail to account for the discontinuities in the process.

The dynamic dimension has also been re-established by the "transnational elitism" of Sandholtz and Zysman, who share the emphasis placed by early neofunctionalists on the voluntaristic role of the actors. They propose *to analyze 1992 in term of elite bargains formulated in response to international structural change and the Commission's policy entrepreneurship*.⁵⁰ From a methodological point of view, there seems to be evidence of a certain inconsistency in the definition of the elite. When they indicate the primacy of the actors over structural variables, the elite is an aggregate comprising leadership in the Community institutions, in the business community and in segments of the executive branch of national governments.⁵¹ This definition brings parts of national governments into a transnational dimension, neutralising thus the claims of intergovernmentalism. However, they acknowledge that agreements on fundamental bargaining have been reached by political elites,⁵² i.e., national governments (which form a basic intergovernmentalist tenet), but the protagonism in stimulating the process remains with the transnational actors: *European business and the Commission may be said together to have by-passed*

47 Mutimer, David '1992 and the political integration of Europe: Neofunctionalism revisited' Journal of European Integration Vol. 13 No. 1 1990 pp. 75-101

48 Pryce, Roy (ed.) The dynamics of European Union (London: Routledge, 1987)

49 Pryce, R. & Wessels, W. 'The search for an ever closer union: a framework for analysis', in Pryce, R. (ed.) The dynamics of European Union pp. 1-34

50 Sandholtz, Wayne and Zysman, John '1992: recasting the European bargaining' World Politics Vol. 42 1989 pp. 95-128

51 Ibid. p. 108

52 Ibid. p. 106

*national governments processes and shaped an agenda that compelled attention and action.*⁵³ Contradictorily, this role of the business community is, in the opinion of Sandholtz and Zysman, difficult to prove or even accept: *It is hard, though, to judge whether the business community influenced Europe to pursue an internal market strategy, or was itself constituted as a political interest group by Community action.*⁵⁴

A second objection to the Sandholtz and Zysman approach is that their dependent variable (bargain) has been constructed in the most unsystematic manner; it comprises a formal outcome, the SEA, as well as informal intra-European (and not intra-Community) flows. They have, though, recovered a teleological dimension by concluding that 1992 implies a future set of bargains in at least four areas: monetary policy, redistributive and social bargaining, defence policy, and balance between Community and national decision-making. Any one of these could hardly be explained through recourse to the role that transnational elitism grants to the "transnational industry coalition", though.

The fourth theoretical account of the reform is the "intergovernmental institutionalism" represented by Moravcsik and Cameron. There are certain differences between them; whilst Cameron in the one hand argues that the 1992 initiative was the mixed product of the interaction between integrative actors and forces, and forces and actors reflecting intergovernmental politics and national interests,⁵⁵ Moravcsik seeks to refute the notion that institutional reform resulted from an elite alliance between Community officials and pan-European business interests groups.⁵⁶ In his view, the success of the SEA has to be explained, rather, by focusing purely on interstate bargains between heads of government in the three largest Member States. Intergovernmental institutionalism is based on three principles: firstly, intergovernmentalism, which implies that national governments are the main actors and the EC is considered the continuation of domestic politics by other means. The second principle is the lowest common denominator bargain that reflects the relative power positions of the Member States. This includes some compensatory mechanisms, such as side payments, for smaller Members. Finally, the third principle concerns the protection of sovereignty implying the unanimous consent of regime

53 Ibid. p. 116

54 Ibid. p. 117

55 Cameron David 'The 1992 initiative: causes and consequences', in Sbragia, Alberta (ed.) Euro-politics. Institutions and policymaking in the "new" European Community (Washington Dc: The Brookings Institution, 1992) p. 30

56 Moravcsik, Andrew 'Negotiating the Single European Act: national interests and conventional statecraft in the EC' International Organization Vol. 45 No. 1 1991 p. 20

members to reforms related to sovereignty and avoiding the granting of open-ended authority to central institutions.⁵⁷

The model proposed by Cameron is more comprehensive regarding the type and number of factors involved;⁵⁸ however, the powerful system of causality that is characteristic to the approach by Moravcsik becomes utterly diluted in Cameron's non-hierarchical ordination of these factors. On the other hand, the more restricted and precise model of Moravcsik has the advantage that it explains a concrete formal outcome, the SEA, through the same factors that might account for the stagnation of the process. The model eliminates any dynamic dimension and reform is explained on the basis of circumstantial coincidence of interests among the main actors. There are two major objections to this model. In the first place, the model has an undoubtedly explicatory value that is due to its construction in a regressive sequence: a certain formal outcome can be deconstructed to identify how it satisfies certain domestic requirements articulated in a determinate manner (bargaining between the three major actors). The question is: could this model be used in a projective manner to predict, for instance, the Maastricht Treaty? Chapter 6 will show that, further to the obvious intergovernmentalism, the patterns of negotiation and the outcome do not reflect exactly the Moravcsik claims.

Secondly, the applicability of institutional intergovernmentalism to a legal text (the SEA) is validated through a basic truism; by definition, the actors adopting the decisions to reform the Community are the governments of the Member States in an IGC. Moreover, they are the only exclusive negotiating actors and, therefore, the outcome could hardly be attributed to transnational or supranational actors. Without dismissing the formerly discussed problem of measurement (i.e., how to measure influence), the lack of decision power does not imply a lack of influence and motivation. The approach seems to be solidly based for explaining the single market, but its predictive value in foreseeing and explaining the reforms featured by the 1991 IGC remains yet to be proved.

The strength of institutional intergovernmentalism is that it is based on the analysis of the interests of the actors with the quasi-monopoly of decision. Whilst this may well suit a static description, the new changes precipitated after the SEA required a conceptual link with integration concepts, in order to understand the dynamic aspect. This link has, in general, been proposed as the understanding of institutional intergovernmentalism as the introduction of domestic politics into the policy-making of a supranational organisation.⁵⁹ Thus, two leading figures of the interdependence

⁵⁷ *Ibid.* pp. 24-26

⁵⁸ He proposed three type of factors (economic, political and institutional) amounting to ten explicatory elements. Cameron, D. *op. cit.* pp. 31-66

⁵⁹ Cameron David *op. cit.* p. 65

and intergovernmentalist schools, Keohane and Hoffman, have reinstated the neofunctionalist concept of supranationalism in describing the decision-making model; however, this pattern is firmly rooted in intergovernmental assumptions.⁶⁰ In their view, institutional change is explained by three variables: spillover, the influence of the world economic situation and the convergence of preferences among governments. Although their dependent variable, institutional change (i.e., reform) is not referred to as integration, they do consider a dynamic and teleological dimension: interstate bargains remain the necessary condition for European integration but successful programmatic agreements between governments may provide grounds for successful spillover.⁶¹

The last theoretical response to the new dynamism of the integration process has been proposed by William Wallace through redefinition (as opposed to questioning) of the two central objects of theory: integration and Europe.⁶² Wallace defines integration as *the creation and maintenance of intense and diversified patterns of interaction among previously autonomous units*.⁶³ His interest lies in investigating the centrality of the Community framework as an issue rather than as an *a priori* reality.⁶⁴ This is possible because the patterns of interaction define two different forms of integration: informal and formal. Informal integration

*consists of those intensive patterns of interaction which develop without the intervention of deliberate governmental decisions, following the dynamics of markets, technology, communications networks and social exchange or the influence of religious, social or political movements.*⁶⁵

Informal integration is, thus, not limited to the narrow formal framework of the EC. Indeed, this concept of informal integration may serve to map and describe the flows and interactions on a global scale, becoming then merely a new description of interdependence. This new scenario for the concept of integration is further sanctioned by the re-definition of the geographical space: Europe has to be defined by *measuring the intensity of communication among its different units*.⁶⁶ Along the lines of informal integration, the patterns of interaction define a core and periphery in

60 Keohane, R. and Hoffmann, S. 'Institutional change in Europe in the 1980s', in Keohane, R. and Hoffman, S. (eds.) The new European Community. Decision-making and institutional change 61 *Ibid.* pp. 17; 20

62 Wallace, William The transformation of Western Europe (London: RIIA and Pinter, 1990) 122p; Wallace, William (ed.) The dynamics of European integration (London: Pinter, 1990). The introduction of this volume contains a summary of the thesis advanced in the former.

63 Wallace, W. The dynamics of European integration cit. p. 9

64 *Ibid.* p. 3

65 Wallace, William The transformation of Western Europe cit. p. 54

66 *Ibid.* p. 22

contemporary Europe (which definition does not necessarily mirror the EC and its periphery).

Formal integration, on the other hand, is the host of deliberate political actions by authoritative policy-makers *to create and adjust rules, to establish common institutions and to work with and through these institutions, to regulate, channel, redirect, encourage or inhibit social and economic flows as well as to pursue common policies*.⁶⁷ The distinction between the two types is rooted in the Deutsch concept of community and echoes the concepts of *Gesellschaft* and *Gemeinschaft*. The problem with this proposal is the difficulty in establishing links of causality between informal and formal integration, as Wallace himself admits.⁶⁸

What are the conclusions drawn from this theoretical exploration to be applied in this research? Firstly, theory seems to have abandoned the aim to define a dependent variable in formal terms. On the other hand, the existence of a process of integration has been questioned. However, after two decades of stagnation, two successive waves of reform, SEA and the IGC on political union, have provided new bases on which to argue the existence of a dynamic and teleological process. Although this research shares the neofunctionalist belief that the Community has to be interpreted in a dynamic manner as an entity in a process of integration, it does not postulate an inherent automaticity in the process. As Wallace has indicated, formal integration (which can be equated with reform) is a discontinuous process that proceeds *decision by decision, bargaining by bargaining, treaty by treaty*.⁶⁹ Accepting the dynamic dimension, however diffuse and confuse, does not imply that the dynamic has to be interpreted as an internal function of the system (the Community) itself. Rather, discontinual integration that is brought about by concrete reforms has to be interpreted as a function of the interaction between the component units (Member States). Although the primacy of national interest postulated by intergovernmentalism is not under question, Member States are not completely autonomous within the process: increasing interdependence among Member States seems to be the explanation for further integration, but this should not hide the fact that further integration also seems automatically to increase interdependence. According to Keohane's and Hoffman's proposal, this thesis will examine how a successful programmatic agreement between governments reached during the 1991 IGC establishes the basis for further reform.

The second conclusion from the theoretical discussion is the difficulty of establishing valid independent variables; these seem to depend on changing historical

67 Ibid. p. 54

68 Wallace, W. The dynamics of European integration cit. p. 10

69 Wallace, William The transformation of Western Europe cit. p. 55

circumstances. (A commensurate attempt to determine the sequence of causality that led to the IGC and the Maastricht Treaty is provided in Chapter 6.) These explanatory variables determine a sequence of causality that identifies the actors and their motivations. Given the object of analysis (i.e., an IGC), the selection of actors involved is particularly obvious: national governments are the main and almost exclusive negotiating actors, while Commission and Parliament have a more rhetorical or programmatic role. The central tenet is that the outcomes are the untidy result of integrating different elements proposed or required by national delegations. The outcome reflects a process of bargaining and negotiation; therefore, a behaviourist assignation of causality between the motivations of the actors and the outcomes is not used as a main instrument for the analysis of the reform.

2.2 FORMAL MODELS: FEDERALISM

An alternative comparative method is to recourse to an ideal type applicable both to some States and some unions based on international public law (i.e., confederations). Some authors have used a concept, federalism, which is applicable to both constituted states and confederations, despite their differences regarding their respective politico-legal natures.⁷⁰ Federalism seems to be used to differentiate, on the one hand, between international organisations and confederations, and, on the other hand, between centralised states and federal states.

The categories used in this research can be applied either to federation or to confederation. This study conceives federal state, or federation, as a particular type of constitutional union and confederacies, confederations or confederal unions as a Union by means of a Treaty; that is, according to public international law. Confederation is merely a comprehensive and cohesive form of international administrative union, whereas a federal system is regarded as multiple government in a single state.⁷¹ The following analysis will adopt the definition of Forsyth: confederation is an organisational structure based on public international law to link together sovereign states creating a Union which provides the necessary conditions

70 For instance, Lenaerts, K. 'Constitutionalism and the many faces of federalism' American Journal of Comparative Law Vol. 38 No. 2 1990 p. 263. He says: *federalism is present whenever a divided sovereignty is guaranteed by the national or supranational constitution and umpired by the supreme court of the common legal order*. In order to integrate the two entities (state and supranational Organization) he uses two categories: "integrative federalism" which *refers to a constitutional order that strives at unity in diversity among previously independent or confederally related entities*. On the other hand, "devolutionary federalism" *refers to a constitutional order that redistributes the powers of a previously unitarian state among its component entities; these entities obtain an autonomous status within their fields of responsibility*. pp. 268-269

71 Macmahon, Arthur 'Federation', in Encyclopaedia of the Social sciences p. 173

for eventually constituting a new state.⁷² The thrust of the argument is that the concept of confederation may be relevant in establishing the politico-legal form of an entity, but the concept of federalism, which comprises both confederations and federal states by stressing their analogies, is not.

The precursor of the modern studies on federalism, Wheare, established a clear difference between federations and confederations: federation is a method of dividing powers so that *the general and regional governments are each, within a sphere, coordinate and independent*.⁷³ By contrast, the principle upon which a confederation is based is the subordination of the general government to regional government.⁷⁴ This distinction of principle has occasionally been blurred to become a *distinction based on a difference in the degree of decentralization of the latter as compared with the former*.⁷⁵ The degree of centralisation is a popular yardstick widely reflected by other authors; thus, confederation has been described as *a form of political organization of component states, less centralized than a federation but more centralized than a league, alliance, or international organization*.⁷⁶

The problem of measurement is to establish where a difference of degree becomes a difference of substance. For most authors, the problem is where to locate confederations: for instance, Friedrich emphasises the difficulties in distinguishing a federal government from a federation of governments.⁷⁷ In his early writing, Hughes characterised confederations as a political relationship placed between a mere Treaty Union and a full federation.⁷⁸ Analogously, Wright places them between unitary government and the international organisation.⁷⁹ Forsyth argues that confederations are one of the three possible types of relationship that *states adopt to guarantee or underwrite their continuous existence as states, the other two forms being hegemony and balance of powers*.⁸⁰

There are other criteria used to establish differences between both types whilst keeping them in the same general category (i.e., federation). The so-called *realistic distinction* refers to the extent to which, whether by direct or indirect methods, the

72 Forsyth, M Union of states cit. p. 208. The list of historical confederations normally accepted is as follows: Swiss Confederation (1291-1798; 1815-1848); United Provinces of the Netherlands (1579-1795); German Bund (1813-1866) and the Confederation of American States (1781-1789).

73 Wheare, K. C. Federal government (London: Oxford University Press, 1953) p. 11

74 *Ibid.* p. 5

75 *Ibid.* p. 291. Cf. the criticism of the validity of the criterion of the degree of centralisation by King, Preston Federalism and federation (London: Croom Helm, 1982) pp. 136-139

76 Wright, Quincy 'Confederation', in Encyclopaedia Americana (Grotier, 1986) p. 532

77 Friedrich establishes that federal government (based on a constitution) is substantially different of a league or federation (i.e., confederation) Friedrich, C. Constitutional government and democracy cit. pp. 39-48

78 Hughes, Ch. Confederacies (Leicester: University Press, 1963) p. 18-19

79 Wright, Q. op. cit. p. 532

80 Forsyth, M. op. cit. p. 204

decisions of the central authorities of a composite state within the field of their competence can secure certain orderly compliance.⁸¹ Another option has been to differentiate on the basis of the scope of central government action,⁸² for Wallace, that which makes the difference between a pure international regime and a federal union is *the presence or absence of authority and resources at the centre which effectively limit the behaviour of the Member States and which impose obligations on them which are generally accepted.*⁸³ The emphasis on the authority is characteristic, indeed, of those authors who do not establish a distinction between international and constitutional law. Therefore, they draw no differences between the politico-legal nature of the sources of such authority in each case. Wright admits thus that the authority may be derived either from the government of the whole, or from all the people, or from the constituent states.⁸⁴

The existence of an analytical distinction or objective differences between confederation and federal state is not agreed.⁸⁵ This is mainly due to the fact that confederations have historically been a previous step towards a federal state. Confederations have a evolutive character: *it is the process by which a number of separate states raise themselves by contract to the threshold of being one state.*⁸⁶ Confederations are predestined to evolve into states (albeit federal states) because they initiate the constitutive process of such a state. This transitional character is generally agreed as applying to political unions in the ambit of international law; thus, Crawford argues that *future political unions will be sui generis entities in transition towards more stable forms or organization.*⁸⁷

For the purpose of this study, the interest lies in establishing the substantive conceptual difference between the two types, through the application of the criteria proposed (constitution, sovereignty and citizenship).

81 Macmahon, A. op. cit. p. 173

82 Wright, Q. op. cit. p. 532

83 Wallace, W. 'Europe as a Confederation: (1982) the Community and the Nation-State' Journal of Common Market Studies Vol. 21 1986 p 61. Equally, Preston King argues that the federal/confederal difference is between one polyarchy whose decision procedures is ultimately majoritary as opposed to the other which operates basically on a unanimity principle. King, P. op. cit. p. 142

84 Wright, Q. op. cit. p. 532. The instrument defining the relations of the states with the central government *and among one another* is designated the constitution.

85 On this, see in general King, Preston op. cit.

86 Forsyth, M. Union of states cit. pp. 2-3

87 Crawford, James The creation of States in International Law (Oxford: Clarendon Press, 1979) p. 289

2.2.1 The legal foundation of federations and confederations

Wheare established that the essential character of federal government was the supremacy of the constitution.⁸⁸ Along with supremacy, the federal constitution should contain a principle regulating the distribution of powers, amending powers and judicial arbitration.⁸⁹ The constitutional nature of the federal states is substantially different to the contractual nature of confederations, which are based on a Treaty between states:

at the root of [confederations] is a pact between two wills by which they agree to treat one another as equal in status. At the root of the [federations] is a unilateral constitutive act by which the people, acting usually by way of a majority, establish a superior power capable of making and applying law. Mutual recognition establishes right on the one hand, popular constitution on the other.⁹⁰

The confederations are placed in the scope of what classic public international law has denominated *real unions*, states which are not only ruled by the same prince, but which are also united for international purposes by an express agreement.⁹¹ By contrast, *personal unions* exist when states which are wholly separate and distinct have the same ruling prince. In the view of Forsyth, this difference with personal unions is, historically, the fundamental element of the federal nature of confederations: *the Union established by a foedus or treaty is represented not simply by a single person, but by some form of assembly, congress, diet or council of the states that creates the union.⁹²*

The contractual nature is a basic characteristic of Treaties and, therefore, of the confederations, and this implies a substantial difference from constitutional unions. Friedrich, for instance, denies that constitutions can be considered contracts, even though he concedes an euphemistic usage; the specialised sense that a constitution implies an agreement by which the will of the majority of the people regarding the form and structure of the government is accepted by all as being final.⁹³ The presumption of the contractual nature of confederations is strongly criticised from a

88 Wheare, K.C. op. cit. p. 56

89 Ibid. p. 56-78

90 Forsyth, M. op. cit. p. 15

91 Crawford, J. op. cit. p. 290

92 Forsyth, M. Union of states cit. p. 1. The purpose of this methodological precision is his exclusion of the Commonwealth from the body of empirical evidence.

93 Friedrich, C. Constitutional government cit. p. 151. Cf. the opinion by Preston King who argues that *all political systems, including federations, can be viewed as characterised by a constitution, that is a basic controlling document or customary understanding and this holds equally for an hereditary monarchy, the federal government of India and the Arab League.* King, P. op. cit. p. 145 and 159

practical point of view by Hughes. Although he admits that the Union started with a contract, he opines that the initial treaty becomes a law, a status.⁹⁴ However, the contractual basis of confederations seems to be supported by the fact that the founding Treaty cannot be modified against the will of one of the participant states.⁹⁵ Friedrich specifies that the chapter or agreement in founding Leagues (his equivalent of confederations) must always include three organisational elements: an assembly of representatives of the constituent members making and maintaining the charter; an executive organ of some sort carrying out the decisions of the Assembly of representatives, and an arbitral or judicial body interpreting the charter.⁹⁶ Again, this institutional design is fundamentally different to the constitutional one: the Assembly represents the citizens (not the members) and it is legitimated to actualise the political principles of the constitution. As Crick has suggested, the existence of a Parliament allows the transformation of the exceptionality related to the exercise of sovereignty into the normality of the parliament legislative supremacy.⁹⁷

2.2.2 Sovereignty in federations and confederations

Adherents of the doctrine of federalism as a unitary concept always argue the existence of divided sovereignty, implying a certain distribution of decision-making powers and competence at different levels. For instance, Lenaerts refers to *multi-sovereign constitutional orders*.⁹⁸ Such an opinion cannot be easily maintained when considering decision-making powers over the areas related to the sovereign status.

The Treaty founding a confederation is intended to preserve the sovereignty of the members: *a confederation (Staatenbund) allows individual states, although bound together by Treaty or within the framework of an international organisation, to retain sovereign status under international law*.⁹⁹ The contractual nature of a confederation goes further than a traditional international treaty because the Treaty of Union

founds a body that possesses personality, but is more than merely the technical, 'legal' personality of the typical international organization. The 'personality'

94 Hughes, Ch. 'Confederacies' cit. p. 13

95 Cardis, François *Fédéralisme et intégration européenne* (Laussane: Université de Laussane, 1964) p. 62

96 Friedrich, C. *Constitutional government and democracy* cit. p. 191

97 Crick, Bernard 'Sovereignty', in *Encyclopaedia of Social Sciences* (London: Macmillan and Freepress, 1979) pp. 77-82

98 Lenaerts, K. 'Constitutionalism' cit. p. 213

99 House of Lords Select Committee on the European Communities *Political Union: Law-making powers and procedures* 17th Report Session 1990-1991 (London: HMSO Books, 1991) p. 8

*formed by the Union is an original capacity to act akin to that possessed by the States themselves.*¹⁰⁰

The main characteristic of the personality of confederations is its permanence; in words of Forsyth, it is *a profound locking together of states themselves as regards the exercise of fundamental powers*.¹⁰¹ A confederation is then a *qualified union*; a group of states which *share certain institutions of government by what is intended to be a permanent agreement. Thereby they acquire a secondary collective personality and a name*.¹⁰² The sovereignty of the members is affected in two aspects: their capacity to nullify and to secede, which are seriously questioned.¹⁰³ Indeed, authors such as Hughes have argued that *confederal government is a species of the genus 'state'; and not just a special case of the genus 'treaties' or 'contracts'*.¹⁰⁴ His opinion was supported by historical examples in which the *practical* performance was a continuous breach of the legal contractual nature reaching the extreme case in which the maintenance of the Union acted against attempts to exercise the recognised sovereignty of the states, through the right of self-determination, to secede.¹⁰⁵ The opposite opinion is held by Buchanan, who argues that the US Confederation was regulated by the right to secede. He considers that this right extends also to the current US constitution: in fact, the implicit acceptance of this right was a condition *sine qua non* of the constitutional settlement.¹⁰⁶ Regarding federal states, Wheare concludes that secession would require (on the text of the US constitution) a constitutional amendment. However, he does not formally take a position on this point: *I doubt whether it can be maintained that a right to secede unilaterally is inconsistent with the federal principle as a matter of logic*.¹⁰⁷

This questioning of the members' sovereignty is due to the inherent nature of confederations: the main historical objective of confederations, with very few

100 Forsyth, M. Union of States cit. p. 15

101 Ibid.

102 Hughes, Christopher J. 'Confederation', in Bogdanor, V. (ed.) The Blackwell Encyclopaedia of political institutions cit. p. 129

103 This opinion is sustained by Cardis, F. op. cit. p. 73. Also Preston King denies that the original pact entitles to secede and concludes that *secession is inconsistent with federations* (i.e. confederations or federal states) *exactly as it proves inconsistent for all other sovereign states*. King, P. op. cit. pp. 113-120.

104 Hughes, Ch. Confederacies cit. p. 6

105 Ibid. pp. 7-10. Not surprisingly, Hughes denominates the confederal government *late absolutism*.

106 Buchanan, J. 'Europe's constitutional opportunity', in Buchanan, J. et al. Europe's constitutional future pp. 4-5. It must be pointed out that the ratifying resolutions of the US Constitution of Virginia, Rhode Island and New York reserved the right to withdraw. The case law of the US supreme court after the secession war denied the right of secession by declaring that *the Constitution, in all its provisions, looks to an indestructible Union composed of indestructible states*. Friedrich, C. 'Admission of new states, territorial adjustments and secession', in Bowie, R. & Friedrich, C. (eds.) Studies in federalism cit. pp. 765-766

107 Wheare, K.C. op. cit. p. 91

exceptions, have been common defence and internal peace.¹⁰⁸ The consequence is that historical confederations acknowledged to the central government powers of securing representation and defence of the common interests *vis-à-vis* foreign countries, as expressed by the attribution to the confederation of the triple right of war, active and passive legation and the conduct of international treaties.¹⁰⁹ It has been said that the capacity to wage war is the element which differentiates a federal state from a confederation: federalism is the appropriate concept when a confederation passes the point of no return, namely when unanimity is no longer required for vital ultimate decisions.¹¹⁰

This enjoyment of the capacities for securing their own survival serves to approximate confederations to the federal state.¹¹¹ Wheare recorded the inherent tension between the pluralistic tendencies of federalism and the basically unitary, centralistic and regimented nature of the war power.¹¹² Federal states allot the responsibility for defence exclusively to the federal government. As has been pointed out, *to entrust defence to the member states would undermine the security and unity of the federation by subjecting its defence to the disaffection, improvidence or inability of each member.*¹¹³ This exclusivity consequently implies the control of the necessary aspects of foreign policy, including all alliances and other treaties related to defence, as well as control of the strength, composition, disposition and use of the armed forces. It poses a clear limit to the concept of perforated sovereignty in federal states: federal powers on foreign affairs extend to the powers constitutionally granted to the federations.¹¹⁴ Even though it is imprecise to refer to an *exclusive* federal competence on foreign relations, eventual claims of federated states to an international personality as sovereign entities fail entirely: they enjoy a limited international personality if the federal constitution grants them the right to deal separately with foreign states.¹¹⁵

108 Thus, Cardis defines confederations as *Une union contractuelle d'Etats, créée dans un but général de défense commune et de paix intérieure, et dotée à cette fin tant de la personnalité juridique que d'organes permanents.* Cardis, F. op. cit. p. 60

109 Ibid. p. 81

110 Hughes, C. 'Confederation', cit. p. 129

111 *A federation (or Bundestaat) allows substantial internal powers to remain in the hands of states or provinces. Foreign relations and defence are however conducted by the central government, and the federal state as a whole is sovereign under international law. A federation satisfies the criteria of a sovereign state defined as a subject of international law.* House of Lords Economic and Monetary Union and Political Union cit. p. 8

112 Wheare, K. C. op. cit. p. 157

113 Bowie, R. and Schrenck, W. 'Defense', in Bowie, R. and Friedrich, C. (eds.) Studies in federalism cit. 173

114 Sohn, and Shafer 'Foreign affairs', in Bowie, R. and Friedrich, C. Studies in federalism cit.

115 Bernier, Ivan International legal personality of federations (London: Longman, 1973) pp. 81-82. On the same, King notes that capacity to act in the international arena *derives from the federal constitution, or some construction thereof (...); it will not derive from the sovereignty of the member units.* King, P. op. cit. p. 113

Secondly, the entitlement to emergency action under circumstances of civil disorder or insurrection is universally recognised in modern constitutional states including federal ones. Although primary responsibility for the maintenance of public order may rest on the local (regional) government,

*final responsibility for the maintenance of public order is everywhere vested in the federal rather than in the local authorities. Through the operation of the state of siege and martial rule, federal executives are enabled, in times of emergency, to act in all essential respects as the executive of a unitary state.*¹¹⁶

2.2.3 The political subject

It is here, perhaps, where the differences between confederation and federation are more obvious; whereas in the case of federal states it is possible to speak of a nation, this concept is almost meaningless in the context of confederations. This is due to its juridical nature: confederations are not contractual aggregations of individuals (citizens), but between states.¹¹⁷ This has been occasionally regarded as the most reliable criterion in distinguishing confederations from federal states. Wheare argued that in the federal government both general and regional governments operate directly upon the people and each citizen is subject to two governments.¹¹⁸ Analogously, Wright proposes that

*when the central government acts only upon the component states, the organization is usually called a confederation. When the central government acts on individuals in regard to certain matters and the component states act upon them in other areas, the system is generally designated a federation.*¹¹⁹

The consequence normally accepted is that the central power cannot enforce a juridical effect directly *vis-à-vis* individuals and other private or public persons without the interposition of the member states between those subjects of national law and confederations.¹²⁰

116 Friedrich, C. and Sunderland, A. 'Defense of the constitutional order', in Bowie, R. and Friedrich, C. (eds.) Studies in federalism cit. p. 680

117 In the point of view of Preston King, this character is extended to *any* federation being this a confederation or a federal state

118 Wheare, K.C. op. cit. p. 2

119 Wright, Q. op. cit. p. 532

120 Cardis, F. op. cit. p. 77. Similarly, Forsyth argues that *A confederation manifests itself as a constituted unity capable of making laws for its members; however it is not the constituted unity of one people or nation, but a unity constituted by states* Forsyth, M. Union of states cit. p. 13

The distinctive characteristic of the federal states with respect to the unitary state is that the former implies the existence of territorial communities entitled to the exercise of specific forms of political determination regarding special particularities (such as culture, etc.). Schmitt too recognised this possibility: '*Within the community, however, subordinate groupings of a secondary political nature could exist with their own or transferred rights, even with a limited jus vitae ac necis over members of smaller groups.*¹²¹ This does not, however, entail the existence of sovereign peoples. As opposed to a confederation,

*the hall-mark of the state in this respect would seem to be that those organs or institutions are constituted to represent the will of one 'people' or 'nation'. They are not, in other words, the expression of a contract between different groups of people.*¹²²

Rather, the constitutional order creates specific politico-administrative forms of organising some competencies of the union, the federal state being the most relevant example. But even in this case, the federation exercises the power to determine who are to be the citizens, through regulation of both acquisition and loss of citizenship.¹²³ Federal systems do not allow any person to possess state citizenship without federal citizenship and, furthermore, there is a constitutional guarantee ensuring the prohibition of unreasonable discrimination.¹²⁴ The existence of peculiar accidents of state citizenship does not imply a different political subject from the federal one: those accidents reflect rather particular socio-economic situations.

Once a Constitution has been established for the whole, the territorial subdivisions can no longer secede.¹²⁵ Secession would imply a break in the constitutional order and, moreover, the breakdown of the union, the end of its existence as such. Generally, secession might be understood as the procedure to enforce the principle of self-determination, i.e., *the right of a specific territory (people) to choose its own form of government irrespective of the wishes of the rest of the state of which that territory is a part.*¹²⁶ The acceptance of such a definition as a general principle would not only conflict with the principle of unitary sovereignty,¹²⁷ but it would also erode the constitutional order. Accordingly, international law has traditionally recognised a second definition: self-determination is

121 Schmitt, C. op. cit. p. 58

122 Forsyth, M. Union of states cit. p. 14

123 Srenk, W. op. cit. p. 636

124 Ibid. pp. 644-645

125 Friedrich, C. Constitutional government, cit. p. 179

126 Crawford, J. op. cit. p. 91

127 Ibid. p. 85

the sovereign equality of existing states; particularly, their right to choose a form of government without intervention.¹²⁸ That is the endorsement of the constitution as the supreme law of a land and the acknowledgement of its constitutional separateness.

In a constitutional order, therefore, the smaller groupings or peoples are never entitled to the exercise of competencies related to sovereignty (i.e., defence and public order in situations of exception).¹²⁹ Further, it is inconceivable that those groupings could exercise the distinction 'friend' or 'foe' because this would imply the creation of a new sovereign entity.

To summarise, the model of the federal state fits into the constitutional model of union. Confederations, based on a public international law between members, are a different model of union. However, their main characteristic is their evolutive tendency to accommodate the inherent contradiction between the retention of sovereignty by members and their origins, as regards the necessity to centralise war-making powers. This characteristic of tension can be resolved either by dissolution or by evolution into a federal type state. The construction of a ideal type (federalism) which, by analogy, embraces both (confederation and federal state) fails entirely in providing a response to the politico-legal requirements: constitutional foundation, sovereignty and a political subject, different in each case.

The application of either ideal type to the European Community has been a hotly disputed option. The lack of consensus on the basic elements of both concepts and the particularities of the Community's politico-legal order have required a constant specification of both concepts. The Community has thus been considered a federation,¹³⁰ a partial federation, an incremental federation,¹³¹ a cooperative federation,¹³² a functional federation, a confederation,¹³³ a condominium of

128 Ibid. p. 91

129 See Friedrich: *the fact that constitutional charts declare the local units 'sovereign' does not need to disturb the political scientist; we have in such declarations simply a verbal concession to those who might oppose the establishment of the union. - a concession to which nothing real corresponds* Friedrich, C. Constitutional government cit. p. 197

130 Two interpretations of the European Community from a general "federalist" conception are Burgess, Michael Federalism and European Union. Political ideas, influences and strategies in the European Community 1972-1987 (London: Routledge, 1989) and Pinder, John The European Community. The building of a Union (Oxford: Oxford university Press, 1991)

131 Pinder, John 'European Community and the nation state: a case of neo-federalism?' International Affairs Vol. 62 1986 pp. 41-54

132 A pooling or mixing of national sovereignties with Community competencies to produce a new type of system in which both levels of authority (national and community) share the responsibility for problem solving. Neither by itself has either the material instruments or the legal competence to deal adequately with a range of problems: they each supplement the other. Pryce, R. and Wessels, W. 'The dynamics of European Union' cit. p. 13

133 Taylor considered that the Community had reached, by the mid-seventies, a confederal phase characterised by the simultaneous coexistence of interdependence and separateness, manifested, respectively, as a managed '*Gesellschaft*' and the defensive role of national governments. See Taylor, Paul 'Confederalism: the case of the European Communities', in Taylor, P. and Groom,

sovereign states,¹³⁴ an international organisation with federal features and an international organisation *sui generis*.¹³⁵ This constant incapacity to agree on a term to designate the Community damages the explanatory value of the ideal type of federalism. Therefore, it is an inappropriate category in describing the model of the union created by the IGC. Likewise, the utilisation of the vague concept of 'federalism' in referring to the final goal of European integration is only a meagre advance (at least the federal goal is specified either as a confederation or a federal state).

A.J.R. International organisation. A conceptual approach (London: Pinter, 1978) p. 317-325.

See also his article Taylor, Paul 'the politics of the European Communities: the confederal phase' World Politics Vol. 27 No. 3 1975 p. 336-360. See also Wallace, W. 'Europe as a Confederation: the Community and the Nation-State' cit.

134 Bassompierre, Guy Changing the guard in Brussels (Washington: CSIS, 1988) p. 121

135 Cf. House of Lords Economic and Monetary Union and Political Union cit. (The Community) *is unique, an association, or union, of independent states, with interlocking institutions set up for the purpose of forwarding the objectives of the Community* p. 14

3 THE CONSTITUTIONAL FOUNDATION OF THE EC

- 3.1 The legal concept of constitution applied to the Community politico-legal order
- 3.2 The concept of political constitution applied to the Community politico-legal order
 - 3.2.1 Preamble
 - 3.2.2 Bill of Rights
 - 3.2.3 Organisational chart
 - 3.2.4 Amendment procedures
- 3.3 Deficiencies in the constitutional foundation of the Community

The politico-legal foundation of the Community has often considered to be a *Constitution*, although the question whether the Community can strictly be said to have a Constitution (and even the question whether it ought to have one) is highly contentious one.¹ The concept of constitution itself when applied to the Community is not an agreed one; one line of thought tends to emphasise its documentary character. Thus, Hartley has stated that:

*the Constitution of the Community takes the form of a series of international treaties. There is no reason to believe that this form, in itself, disqualifies the constitutive treaties from being regarded as a Constitution.*²

More precisely, Louis describes the EEC Treaty as a 'constitutional framework' (*traite cadre*) because *it sets the aims, lays down the ground rules, and prescribes the procedures by which the institutions act to put them into effect*, whilst granting them wide discretion.³

The EC Constitution comprises:

- The ECSC, EEC and EAEC Treaties plus the amendments introduced by the Merger Treaty (Brussels, 8 April 1965); the Treaties on budgetary and financial matters (Luxembourg, 22 April 1970 and Brussels, 22 July 1975); the Treaty amending the Statute of the European Investment Bank (10 July 1975); the Treaty amending the Treaties with respect to Greenland (13 March 1984) and the Single European Act (Luxembourg and the Hague, respectively 17 and 28 February 1986).

1 Morgan, Roger 'The European Community: the Constitution of a would-be polity', in Bogdanor, V. (Ed.) *Constitutions in democratic politics* cit. p. 367

2 Hartley, Trevor C. 'Federalism, courts and legal systems: the emerging constitution of the EC' *American Journal of Company Law* Vol. 34 1986 p. 231. Along the same line, Mitchell refers to the constitutional nature of the Communities, Mitchell, J.D.B. 'The sovereignty of Parliament and Community law: the stumbling-block that isn't there' *International Affairs* Vol. 55 1979 p. 45

3 Louis, Jean-Victor *The Community legal order* 2nd Edition (Luxembourg: Office for Official Publications of the European Communities, 1990) p. 76

- The Treaties and Acts on the accession of Denmark, Ireland and the United Kingdom (22 January 1972); Greece (24 May 1979), and Portugal and Spain (12 June 1985).

Some authors prefer a broader definition that encompasses elements other than the Treaties themselves. Thus, Bernhardt considers that the Constitution of the Community is not constrained to the Treaties alone: the constitution of the Community consists of

those rules which are binding upon all the Community institutions and upon the Member States, which are beyond their reach and which, in the main, are written in the Community Treaties, and, exceptionally, those rules which are reflected in certain specified acts of the Community institutions or which may be binding as part of unwritten constitutional law.⁴

Certain institutional declarations are thus considered by Bernhardt quasi-constitutional instruments. Although this is reinforced by the fact that certain declarations have been referred to as having constitutional validity,⁵ the problem as regards a systematic construction is to determine which declarations have constitutional value, and why. Therefore, this study will refer to the first delimitation of the concept, which is much more precise.

A systematic analysis of the Community politico-legal framework has to consider two dimensions: the legal concept of constitution, based on the supremacy of EC law over national (and constitutional) law, with EC law being the supreme law in the territorial scope of the Community (as much as constitutional law within a state); on the other hand, the political concept of constitution refers to the set of values, institutions and procedures inspiring the organisation of the political life of the Community. Two similar systematic analyses have been proposed to explain the politico-legal nature of the Community; thus Weiler distinguishes between *normative supranationalism* (i.e., the relationship and hierarchy between the Community legal measures and policies and those of the Member States) and *decisional supranationalism* (which relates to the institutional framework and decision-making processes by which Community legal measures and policies are initiated, debated,

4 Bernhardt, Rudolf 'The sources of Community law: the "constitution" of the Community', in Thirty years of Community law p. 70. A similar notion of Community constitution understood also as constitutional convention is that of Craig, Paul 'Constitutional law', in Bogdanor, V. (Ed.) The Blackwell encyclopaedia cit. p. 151

5 The classical example is the Luxembourg Declaration, often invoked by certain countries as the basis for their membership. Cf. the opinion arguing that this Declaration has not constitutional validity, since it was neither in the wording of the Treaties nor in its spirit. Williams, Shirley 'Sovereignty and accountability in the European Community' Political Quarterly Vol. 61 No. 3 1990 p. 305

formulated then promulgated and finally executed). The main vice of this construction, from the point of view of the present inquiry, is in the second dimension; decisional supranationalism. For, although it is mainly concerned with processes and not with functions, it omits the conceptualisation the question of the political principles as a criterion in evaluating constitutional nature.⁶ A second construction is proposed by Bernhardt, who distinguishes between *formal constitution* (all the rules embodied in a written constitution, together with any unwritten rules that supplement them provide they have the same force) and *material constitution* (all the basic provisions of a Community legal order, regardless of their relative force).⁷

3.1 THE LEGAL CONCEPT OF CONSTITUTION APPLIED TO COMMUNITY POLITICO-LEGAL ORDER

The legal concept of constitution refers to its supremacy over any other law in the land. In the Community's ambit, the supremacy of EC law has been interpreted as evidence of its constitutional nature. The role of the ECJ has been decisive in constructing this interpretation.⁸ The interpretation, though, has been challenged by Mancini, a former judge of the ECJ. Although he concedes that *the case-law produced by the ECJ coincides with making a Constitution for Europe*,⁹ he establishes clearly that the instrument giving rise to the Community was a traditional multilateral Treaty.¹⁰ From the same stand-point, Rasmussen concludes that two main characteristics of Community law impede its being regarded it as Constitutional law. Firstly, the Community was created by a Covenant between fully sovereign States. Secondly, neither at the moment of creation nor at any subsequent point in time have the political circumstances normally believed to condition a successful federation of independent states being present.¹¹

6 Weiler, J. 'Supranationalism revisited' cit.

7 Bernhardt, R. op. cit.

8 For instance, the ECJ called the Treaty the basic constitutional charter of the Community in a capital case; Case 294/83 Parti Ecologiste 'Les Verts' v. European Parliament [1983] ECR 1339.

9 Mancini, G. Federico 'The making of a constitution for Europe' Common Market Law Review Vol. 26 1989 p. 545. Cf. the opinion by Bernhardt: the ECJ does not make constitutional law in the proper sense of the words. Bernhardt, R. op. cit. p. 73

10 Opinion further sustained by other authors: *The EEC Treaty is first and foremost an agreement governed by international law* Freestone, D. and Davidson, S. The institutional framework of the European Communities (London: Routledge. 1988) p. 11.

11 Rasmussen, Hjalte 'Between self-restraint and activism: a judicial policy for the European Court' European Law Review Vol. 13 No. 1 1988 p. 34. Similarly, Morgan sustains that the Treaty of Rome is quite distinctly an agreement between states, who agreed to pool their sovereignty in strictly limited spheres of public policy Morgan, R. op. cit. p. 368

Mancini concedes that the work of the ECJ has even recovered certain elements of a *political* Constitution. However, he refutes the fact that the EC Treaties are a Constitution by pointing out an essential difference between a Treaty and a Constitution:¹² Treaties do not enjoy the status of higher law in many countries. As is well known, Treaties have a different status in the respective constitutions of the EC Member States. Generally, constitutions are grouped in monist (those in which obligations of international law are equal to those derived from national law) and dualist (obligations posed by international law need to be transformed in national law).¹³ Other authors have criticised the simplicity of this classification, proposing instead a threefold distinction:¹⁴ constitutions in which a Treaty *automatically becomes part of the law of the State, without any separate act of "incorporation" or "transformation" being required*; constitutions in which *a Treaty has, of itself, no effect on the internal legal system and requires transformation by a legislative act in order to produce that effect*; and, finally, constitutions which *make the effect of a Treaty dependent upon the process of transformation: here the Treaty as such has no effect, and the effect is produced only by the national rules which purport to incorporate the Treaty*.¹⁵

Despite those conceptual differences, the general agreement seems to be that the EC Treaties enjoy, in their application by Courts, a Constitutional-like normative hierarchy. This is the belief which sustains the Hartley's opinion on the constitutional

12 The two other differences are the following. The interpretation of Treaties is subject to canons unlike all others; and, Treaties devise systems of checks and balances the main function of which is to keep under control the powers of the organisation they set up. Mancini, F.G. op. cit. p. 545

13 Freestone and Davidson propose a definition as follows: *a monist constitution accepts that international law obligations are of the same nature as, or are even superior to, national law obligations, so that a rule of customary international law established by an international treaty to which the state is a party becomes automatically part of national law*. They choose as examples the French Constitution, Article 55, and the Dutch Constitution, Articles 66 and 68. On the other hand, *a dualist constitution is one which gives only limited status to rules of international law unless and until they have been 'transformed' into national law by some acceptable method of national law-making -such as an Act of Parliament*. The obvious example is the United Kingdom. Freestone, D. and Davidson, S op. cit. p. 151

14 Jacobs, F. G. & Roberts, S. (eds.) *The effects of Treaties in domestic law* (London: Sweet & Maxwell, 1987) p. XXIV

15 Cf. the twofold classification proposed by Mancini regarding the incorporation of the EC constitutive treaties. On the one hand, those States who use the procedure of *constitutional revision* which sometimes prescribing a referendum (Denmark, Ireland, Luxembourg, Portugal). On the other hand, the remaining eight countries used an *ordinary law*. A particular case is that of the UK European Communities Act, which having 'ordinary form', amounts to constitutional content. Mancini, G. Federico 'L'incorporazione del diritto Comunitario nel diritto interno degli Stati Membri delle Comunità Europee' *Rivista di Diritto Europeo* Anno XXVIII No.2/3/4 1988 p.89-90

character of the Treaties.¹⁶ Indeed, considering the Constitution as the supreme norm (i.e., the legal concept of constitution) it could be argued that the normative hierarchy of the Community's legal system guarantees the Treaties a pre-eminence similar to that enjoyed by Constitutions within national legal systems. Therefore, it could be concluded that the Treaties, being the supreme norm, are a Constitution.

This interpretation is based on three principles progressively developed by the ECJ in its case law.¹⁷ Firstly is the acceptance of the principle of supremacy of Community law itself which implies that the law stemming from the Treaty cannot be challenged by judicial process on the basis of any provision, however framed, since this law has an independent source.¹⁸ From this stems what is called the *all or nothing* effect: Member States are largely unable to practise a selective derogation of certain Community obligations.¹⁹ The second principle supporting the supremacy of Community legal order is the doctrine of pre-emption which, in its extreme and purest form, means that in relation to fields over which the Community has competence, the Member States are pre-empted from taking any action at all.²⁰ Finally, the doctrine of direct applicability and direct effect of Community law²¹ establishes a difference from normal international treaties and, for some authors, it establishes the difference between nature of the Community and the international nature of confederations. By conferring rights and duties onto individuals who become subject to Community law, the Treaty has created a Community not only of States but also of peoples and persons. The most striking difference from a traditional constitutional framework is that the Community legal order has not created the political subject essential to any constitutional order: the political citizenship.

The application of the legal concept of constitution to the Community politico-legal order reveals three defects, which have provide grounds to the opinion

16 Other authors have been much more precise in their judgements, thus, Morgan considers that the *Constitution of the Community has become part of the Constitution of each of the Member States.* Morgan, R. op. cit. p. 368

17 Case 6/64: *Flaminio Costa v. ENEL* [1964] ECR 585; Case 106/77: *Ammistrazione delle Finanze dello Stato v. Simmenthal S.p.A.* [1978] ECR 629, and Case 26/62 N.V. *Algemeine Transport-en Expedite-Onderneming Van Gend en Loos v. Nederlandsche Administratie der Belastingen* [1963] ECR 1

18 Kovar, Robert 'The relationship between Community law and national law', in Thirty years of Community law cit. p. 113

19 Weiler, J. 'Supranationalism revisited' cit. p. 374

20 *Ibid.* p. 354. Cf. however the opinion of Louis: *as a rule it is not when jurisdiction is transferred, but only when it is exercised, that the Member States lose their authority to take action contrary to the centrally agreed rules.* Louis, J.-V. op. cit. p. 17

21 Both concepts have been defined on the following lines: *direct applicability should be reserved for the method of incorporation of secondary Community law into the municipal legal order. Direct effect best describes the question when a Community provision is susceptible to receiving judicial enforcement.* Winter, J. A. 'Direct applicability and direct effect. Two distinct and different concepts in Community law' Common Market Law Review Vol. 9 1972 p. 425

that in none of the Member States does Community law enjoy absolute supremacy over constitutional rules.²²

Firstly, with respect to the area of its competence, the legal system of the Treaties is superior to that of the Member States, but this area of competence is strictly limited. The Community possesses merely derived powers, termed *compétence d'attribution*. Powers are specifically conferred according to sectors, to a degree that varies depending on each case and with limitations as to their extent.²³ The opposite standpoint is sustained by Lenaerts, who argues the absence of a constitutionally protected nucleus of sovereignty for Member States:

*The residual powers of the Member States have not a reserved status. The Community may indeed exercise its specific, implied or non-specific powers in the fullest way possible, without running into any inherent limitation set to these powers as a result of the sovereignty that the Member States retain as subjects of international law. There simply is no nucleus of sovereignty that the Member States can invoke, as such, against the Community.*²⁴

The constitutional situation has been described, more accurately, as substantially different to the one of subordination to a higher constitution *in the sense in which the term constitution is used when it denotes the distribution and limitation of general governmental power within a particular territory.*²⁵

The strict scope covered by the legal supremacy of the Community's constitution may be expanded by recourse to Article 235.²⁶ According to certain interpretations, however, political and ethical objectives are excluded, and the utilisation of Article 235 is based on the assumption that the scope of powers transferred to the Community will not be broadened.²⁷ Although spillover processes open the practical possibility of bringing certain areas within the scope of Community legal constitution through Article 235, clearly the Community constitution does not provide the basis for those fields of competence indissolubly linked to the sovereign existence of the Member States. However, they have become involved in Community

22 Kovar, Robert op. cit. p. 130

23 Tizzano, Antonio 'The powers of the Community', in Thirty years of Community law p. 64.

24 Lenaerts, K. 'Constitutionalism and the many faces of federalism' cit. p. 220

25 James, A. Sovereign statehood cit. p. 249. Normally, this is quoted as a difference with federal systems; thus Louis states that *the Treaties establishing the Community do not, unlike many federal constitutions, assign jurisdiction over whole fields of activity to the Community institutions.* Louis, J.-V. op. cit. p. 17

26 On the conditions for the utilisation of Article 235, see in particular Tizzano, A. op. cit.

27 This was the *sine qua non* for the utilisation of Article 235 of the EEC Treaty posed by Denmark in order to keep the situation within the scope allowed by the terms of the Danish Bill of Accession. See Lanchmann, Per 'Some Danish reflections on the use of Article 235 of the Rome Treaty' Common Market Law Review Vol. 8 No. 4 1981 p. 447-461

development in a paraconstitutional fashion. The arrangements governing those areas are termed *paraconstitutional* since they are not subject to the binding legal commitments of the Treaties and/or they fall outside the Community's institutional design. They are the arrangements on foreign policy and security contained in Title III of the SEA and on areas of interior policy defined by the *Schengen Agreement on the Gradual Abolition of Controls at the Common Frontiers*. EPC is managed by the Council of Foreign Affairs Ministers' meeting in EPC, an institution legally and formally (albeit not practically) separated from the General Affairs Council. Interior matters are covered by several intergovernmental groups.

A second defect is the nature of the legislative acts. Although by analogy with national constitutional systems those acts are considered to be primary legislation,²⁸ they do not maintain a relation of hierarchy based on the relevance of the issues and the procedures for its application, as do national legislative acts. Regulations, directives and decisions differ, instead, over the recipients of the measures and their effect.

The third defect of the Community's legal constitution is that the hierarchical supremacy of the EC constitution might be challenged due to the deficiencies in the Community's *political* Constitution. That is, the absence of explicit acknowledgement of political principles inherent to any Western European constitutional order: democracy, division of powers and explicit guarantee of human rights.²⁹ Thus, the vacuum left by the absence of an explicit bill of rights opened the possibility of challenging the legal hierarchy of Community law and, therefore, the consideration of the Treaties as a *legal* constitution. This happened when some national constitutional courts tried to prevent the application of a Community rule if it was to infringe on a fundamental principle of peremptory norms (*jus cogens*), i.e., human rights.³⁰ Paradoxically, this challenge came from the institutions of the most monist systems: the constitutional courts of Italy and the FRG. In the case of the Italian Court, it held that the safeguard of the principles on the basis of the Constitution and, particularly, fundamental rights, comprised a limit to the transference of competencies to the Community. Therefore, the Court maintained its right to control the continuous correspondence of the derived law to constitutional values.³¹ Although the Italian

28 Weiler, J. 'Supranationalism revisited' cit. p. 392 fn. 94

29 Cf. the opinion of Bernhardt who considers that, despite the lack of formal codification, these principles are part of the Community constitution. Bernhardt, op. cit. Also, Weiler argues the emergence of an *unwritten* higher law based on the constitutional traditions of all Member States as well as international treaties as the ECHR. Weiler, J. 'Supranationalism revisited' cit. p. 375

30 Schermers, Henry G. 'The scales in balance: national constitutional court v. Court of Justice'. Common Market Law Review Vol. 27 1990 p. 102

31 Case 183 Frontini v. Ministero delle Finanze ECR [1974] 372

court revised its case law in 1984,³² it reiterated in 1989 that *the Court considers that a provision of Community law could be held to be inapplicable in Italy if it infringes fundamental human rights*,³³ indicating the willingness of the Italian Constitutional Court to review Community legislation. The German court, on the other hand, held that the case law of the ECJ did not counterbalance the lack of a 'bill of rights' elaborated with the participation of a Parliament elected by universal suffrage (the rulings were previous to 1979).³⁴ The change of circumstances also motivated a modification of the case law of the German court in 1986,³⁵ but this was conditional on the maintenance of the circumstances that induced the change.³⁶ The interpretative line in both cases stresses the tension between the supremacy of the Community's legal constitution and the principles that inform the political constitution of the member states and which are lacking in the Community.

3.2 THE POLITICAL CONCEPT OF CONSTITUTION APPLIED TO THE COMMUNITY POLITICO-LEGAL ORDER.

Even if it is considered that the supremacy of the Treaties establishes the grounds for a *legal* concept of constitution, they themselves do not incorporate a full *political* constitution. Indeed, it seems indisputable that development *has so far left the Community far short of anything that could be called a political entity with a Constitution in the accepted sense*.³⁷ The analysis of the political concept of constitution will be developed according to the 'editorial' form.

3.2.1 The Preamble

Since Preambles are declarative statements with the general purpose of helping the interpretation of the whole body of law, the Preamble of the Treaties can easily be considered a functional equivalent to a Constitutional preamble. The most striking substantial difference is the omission from the EEC and EAEC Treaties of certain

32 Sentenza No. 170 del 1984 *Granital*. See Gaja, Giorgio 'New developments in a continuing story: the relationship between EC law and Italian law' *Common Market Law Review* Vol. 27 1990

33 *Ibid.* p. 95. The case referred is Decision No. 232 of 21 Aprile 1989. 72 *Rivista di Diritto Internazionale* (1989) 103 ff.

34 Case 2 BvL 52/71 *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorrastelle für Getreide und futermittel* ECR [1974] 540. These principles have been named the *principle of structural convergence* and the *principle of proper respect for human rights*. Kovar, R. op. cit. p. 128.

35 Ruling 22 October 1986

36 See on both cases Mancini, F. 'L'incorporazione' cit. p. 693

37 Morgan, R. op. cit. p. 369

values contained in the constitutions' preambles of most Member States. However, such lack of commitment has been partially corrected by the SEA preamble when it refers to certain values such as democracy.

The provisions of the EC and EAEC treaties fulfil the conditions required for their consideration as the interpretative basis for legislation: they contain concrete aims that reach further than an enunciation of general principles in abstract terms.³⁸ The question as to whether the Preamble has additional force, i.e., it can be used as the basis for legislation, is disputed. Schepers has, using the analogy of the Constitutions of some of the Member States, adopted the view that some provisions could have legal effect and others do not.³⁹ The most salient case of the operational value of the Preamble is the invocation by the Commission of the SEA Preamble commitment to democracy to initiate the legislative process regarding voting rights in local elections.⁴⁰

3.2.2 A Bill of Rights (Human Rights)

One of the most obvious and consistently criticised defects of the Community's political constitution is its lack of a catalogue of human rights. For most of the Member States' constitutional traditions, human rights are an inalienable part of their constitutions. Human rights establish minimum guarantees, universally accepted, that are a limit to the discretionary action by the State and/or other individuals. This limit is particularly important given the experiences of dictatorship, civil war, etc. of some Community Member States.

Certain constitutional conventions and institutional documents have tried to bring human rights within the EC politico-legal framework. Thus a referential superstructure of rights is created by:

- the Preamble of the SEA, which draws attention to the European Convention of Human Rights and to the European Social Charter⁴¹
- the Joint Declaration by the EP, the Council and the Commission on Human Rights and Fundamental Freedoms⁴²
- the Joint Declaration Against Racism and Xenophobia⁴³
- the Declaration by the EP on Fundamental Rights and Freedoms⁴⁴

38 Schepers, Stephan. 'The legal force of the Preamble of the EEC Treaty' European Law Review 1981 No. 6 p. 356-361

39 Ibid. p. 360

40 See Chapter 5, Section 5.1.1 B

41 This positioning of fundamental rights in the preamble again contradicts the editorial tradition in European constitutionalism.

42 OJ No. C 103 27.4.1977 p. 1

43 OJ No. C 158 25.6.86

This loose formulation raises several objections. Although those declarations regard basic rights as a cornerstone for European integration, they do not grant them the status of law. As early as in 1979, the Commission proposed the Community's accession to the ECHR,⁴⁵ but the Council has never approved the proposal. More particularly, the rights explicitly granted by the EC (and from which human rights might be inferred) are not 'universal', whilst in the Community ambit individuals *derive their transnational rights from their constitutional position of being nationals of a Member State*.⁴⁶ As substantially different, human rights are universal and granted to anyone within the jurisdiction of the state regardless of nationality.⁴⁷

A second attempt at the incorporation of human rights has been through the case-law of the ECJ, in its adoption of the position of founding its judgements on fundamental rights inferred from the constitutional tradition of Member States. In the *Stauder* case,⁴⁸ the Court pointed out for the first time that respect for fundamental rights is enshrined in the general principles of Community law and protected by the Court. This judgement was further endorsed in the ruling of the *Nold* case⁴⁹ where the Court sustained that

in safeguarding those fundamental rights the Court is bound to draw inspiration from the constitutional tradition common to the Member States and cannot uphold measures that are incompatible with the fundamental rights established and guaranteed by the Constitutions of the Member States.

Nevertheless, one can query whether this performance of the ECJ amounts to a constitutionalizing of fundamental rights. Following this line of reasoning, Spencer argues two reasons:⁵⁰ firstly, constitutional traditions remain secondary to EC

44 OJ No. C 120 16.5.89 p. 51. Report PE Doc. A 2-3/89 A & B. The declaration is not systematically constructed, though. Article 25 (1) reads that the declaration shall protect every citizen and not every individual or person. The catalogue of rights includes classic human rights (life, freedom of expression, privacy, etc.), social rights (social security rights, the right to education and training) and administrative rights strictly connected to the Community process (non-retroactivity, access to court, etc.).

45 EC Commission *Memorandum on the accession to the ECHR*. EC Bull. Supp. 2/79. Clapham, for instance, favours this option over the development of a Community catalogue of human rights. Clapham, Andrew 'A human rights policy for the European Community' Yearbook of European Law Vol. 10 1990 p. 361-365

46 Mancini, F. 'The making of a constitution' cit. p. 606-607. See the examination of the failures to create an European citizenship in chapter 5.

47 Clapham, A. op. cit. p. 320

48 Case 29/69: Erich Stauder v. City of Ulm, Sozialamt. [1969] ECR 419

49 Case 4/73: J. Nold, Kohlen und Baustoffgrosshandlung v. Commission of the European Communities [1974] ECR 491

50 Spencer, Michael 1992 and all that. Civil liberties in the balance (London: The Civil Liberties Trust, 1990) p. 133

structure and objectives. In effect, the Court has held that *the validity of a Community measure of its effects within a Member State cannot be affected by allegations that it runs counter to fundamental rights as formulated by the constitutions*.⁵¹ The second reasoning of the argument, drawn from the ruling in the Nold case, is that human rights are interpretative guidelines rather than pure rights in EC law. On this point, for instance, van den Berghe opines that the provisions concerning fundamental rights *are scattered over the Treaties and often appear to be mainly an expression of an economic necessity to ensure free movement rather than having a real social or humanitarian goal*.⁵² Furthermore, the Court methodology of drawing such rights has not been systematic.⁵³

Although it has been correctly pointed out that, in practice, no Community institution would adopt acts in violation of fundamental rights, such a theoretical possibility exists and therefore opens up the possibility of challenging EC Constitution by national Constitutional courts,⁵⁴ as the discussion in the former section has demonstrated.

3.2.3 Organisational Chart

The existence of a set of institutions with some resemblance to those of certain constitutional orders allowed the consideration of the Community as a political system. However, the equivalence to constitutional systems is inaccurate in at least one aspect: a proper and clear basis on the principle of division of powers.⁵⁵ In the Community context, this concept is substituted by "institutional balance", i.e., with each institution required to act within the limits of the powers conferred upon it by the treaties; they are also requested to observe and respect the powers and prerogatives of other institutions.⁵⁶ The following paragraphs will examine, in turn, the institutions of the Community, starting with the ECJ.

51 Case 11/70: Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle fur Getreide und Futtermittel [1970] ECR 1125

52 van den Berghe, Guido Political rights for European citizens (Aldershot: Grower, 1982) p. 25

53 Clapham, A. op. cit. p. 331

54 On this opinion, Schermers, H. 'The scales in balance' cit. p. 102. Also, Clapham, A. op. cit. p. 324-325.

55 Cf. Lenaerts, K. 'Some reflections on the separation of powers in the European Communities' Common Market Law Review Vol. 28 No. 1 1991 p. 11-35, who proposes a *functional* understanding of the principle in opposition to the so-called organic one: the Community legal order defines an executive federalism in which the legislative *function* is performed almost entirely by the Community organs themselves, whereas the executive and judicial functions are performed to a greater extent by Member States on Community's behalf.

56 Toth, A.G. The Oxford encyclopaedia of European Community law (Oxford: Clarendon Press, 1991) p. 304

A. The European Court of Justice

The Court has three main functions, the first being the *judicial review* of acts of the EC institutions. In words of Louis, it can be likened to a 'constitutional court' when judging Council legislation and to an administrative court when ruling on Commission decisions addressed to individuals.⁵⁷ The second function is the *infringement procedure* in which the Court has to determine whether Member States have infringed Community law by failing to fulfil an obligation. Finally, the third function is the *preliminary ruling* procedure deciding on interpretation of Community law or the validity of acts referred to it by national courts, in which case the Court acts in the function of *supreme court*.

The relevant aspect here is that of a constitutional court, which needs to consider firstly its scope and secondly its role. Firstly, the constitutional role of the court, based on the supremacy of Community law, is, of course, reduced to the ambit of Community law. Settlement of disputes among Member States concerning other issues than those regulated by the Treaty must be referred to other international courts.

The second aspect concerns its role: in the performance of those functions, the ECJ has developed an activist role based on a teleological interpretation of the Treaties and resulting in the integration of some political elements. However, the ECJ judicial activism is a polemical issue⁵⁸ because this teleological experience, akin to that of the US Supreme Court, contradicts, nevertheless, European constitutional tradition.⁵⁹ the role of a 'constitutional' court can be exercised only in a full constitutional framework. In this case, the Court might act even as a negative legislator in interpreting principles, but the exercise of political discretion in incorporating principles is unsustainable, even though this exercise is inspired by the achievement of the Union. This has been strongly put forward by the EP regarding the case of human rights; *it is not the task of the Court to define what constitutes the very essence of a pluralist democracy, i.e. the fundamental rights which must be protected*.⁶⁰ Some authors have gone further, arguing that discrepancies between

⁵⁷ Louis, V.-J., op. cit. p. 46-48. The wording of this paragraph follows closely Louis' description.

⁵⁸ See the opposing arguments on ECJ activism developed by Rasmussen, Hjalte On law and policy in the European Court of Justice (Dordrecht/Boston/Lancaster: Martinus Nijhoff Publishers, 1986) and the subsequent critical review by Weiler, J. 'The Court of Justice on trial' Journal of Common Market Studies Vol. 24 1987 p. 555-589. Rasmussen's objections to activism are summarised by Weiler as follows: it is undemocratic; it severs the real world from the judicial world; it is ideologically otious, it brings the judiciary into disrepute and delegitimizes judges' position. Although this argument of the current research is sympathetic towards Rasmussen's formal argument, it does not subscribe his conclusions.

⁵⁹ The same opinion is sustained by Rasmussen, Hjalte 'Between self-restraint and activism' cit. p. 37

⁶⁰ PE Doc. A 2-3/89, Part B p. 7

judicial and societal values have been hardly avoided.⁶¹ The main problem, in Rasmussen's point of view, is the unavailability of some sort of consensus on the fundamental values of the integration process.⁶² The conclusion of Rasmussen is drawn with a view to clarifying the possibility of proposing a normative theory for the interpretation of Community law. His negative answer corroborates, indeed, the second difference that Mancini establishes between treaties and constitutions: different interpretative canons. While the formal aspects of the argument are impeccable, the conclusion, however, is misleading: the problem lies not in the lack of consensus,⁶³ but in the lack of proper mechanisms to make such a consensus explicit. That is, the problem is the lack of an institution explicitly entitled to elucidate values and principles (i.e., Parliament).

B. The European Parliament

The most distinctive feature of the EP⁶⁴ is its own nature; it has been qualified as a 'non sovereign' parliament because of its lack of legislative powers,⁶⁵ and the inadequacy of comparisons with the constitutional role of national parliaments has been underlined. Thus, the same authors argue that the main distinction with national Parliaments is that the EP is interested in the changing of the system (i.e., *modifying the nature of the relationships that exists between it and the other Community institutions*)⁶⁶ A very similar opinion is put by Lodge, who says that *the EP, unlike national parliaments in the EC, is an institution dedicated to increasing its powers.*⁶⁷ The opposite opinion was polemically sustained by van Schendelen some years ago when he argued that the inadequacies of the EP should not be an

61 Rasmussen, H. 'Between self-restraint and activism', cit. 32. Weiler has objected that this is a very particular opinion of Rasmussen based on ideological bias Weiler, J. 'The Court of Justice' cit. The EP has pointed out that there have been instances where the Court has declared to be a fundamental Community right a principle which, in the form defined by the Court of Justice, is to be found only in a single constitution. PE Doc. A 2-3/89 Part B p. 7. It alludes to the concept of misuse of powers in an old ECJ case; Case 5/55: *Assoziazione Industrie Siderurgiche Italiane (ASSIDER) v. High Authority of the European Coal and Steel Community [1954-1956]* ECR 135. Other authors have pointed out the possibility of the Court's not remaining free of political influences in the future. Finally, Bernhardt argues that Community law is not bound by the case-law of the ECJ, since the interpretation may evolve in the light of changing circumstances.

Bernhardt, R. op. cit. p. 173

62 Rasmussen, H. 'Between self-restraint and activism' cit. p. 34.

63 See, for instance, Lodge: *economic and political pluralism has been held to be the sine qua non of European integration*. Lodge, Juliet 'The EP -from Assembly to co-legislature: changing the institutional dynamics', in Lodge, J. (Ed.) The European community and the challenge of the future. (London: Pinter, 1989) p. 27

64 The Parliament was originally designated "Assembly". The name was officially changed by Article 3 (1) of the SEA

65 Jacobs, F. G. and Corbett, R. The European Parliament (London: Longman, 1990) p. 183

66 Ibid. p. 6

67 Lodge, J. 'The EP - from Assembly to co-legislature' cit. p. 58

obstacle to regarding it as a true Parliament since legal powers are not the only and valid measure of the parliament relevance.⁶⁸

An analysis of the politico-legal nature of the EP has to take into consideration the classical distribution established by the doctrine of the division of powers. Legislative powers, budget control and control of the executive are the three essential powers of any parliament.

LEGISLATIVE POWERS

Strictly speaking, the EP does not have the right to initiate legislation, with the exception of the right to propose a uniform electoral procedure as foreseen by Article 138. However, a minimalist strategy with a view to achieving European union has resulted in a *de facto* expansion of its constitutional role, basically through a successful exploitation of its right to set its own agenda.⁶⁹ The effects of such a strategy, however, cannot be over-valued: the EP only can expect that the Commission picks up one of the proposals contained in EP resolutions. As Lodge has reflected, *it is difficult to identify the extent to which EP resolutions have led to Commission acts.*⁷⁰ The EP has tried to engage the Commission in a constitutional convention that would formalise its channel to influence legislative initiatives.⁷¹ The Parliament endorsed, firstly, the follow-up procedure of the Commission's programme; it asked for an initial Commission consultation on any legislative initiative as well as for the consideration of EP opinions. Finally, the Parliament argued that its initiatives should be the basis of the Commission's work and, otherwise, the Commission should be obliged to justify its dismissal of them. As could be expected, EP proposals have not adopted.

Once legislation has been initiated, the EP is endowed with some procedural powers partly granted by the Treaties (i.e., constitutional powers) and partly developed through what can be considered constitutional convention, mainly Joint Declarations.

1. Consultation procedure.

The consultation procedure, which obliges the Council to consult the EP on certain Commission proposals, was set in the EEC Treaty concerning 22 articles. Successive declarations extended the scope to 'voluntary consultations' covering other

68 van Schendelen, Marinus P. C. M. 'The EP: political influence is more than legal powers' Journal of European Integration Vol. 8 No. 1 1984 p. 59-76

69 Lodge, J. 'The EP - from Assembly to co-legislature', cit. p. 64-68

70 Ibid. p. 66

71 Resolution on relations between the EP and the Commission in the institutional context of the Treaties. Doc. A 2-102/86 OJ No. C 283/31 10.11.86

issues although this did not imply the endorsement of a bargaining power for the Parliament since its opinions are not binding. The ECJ *Isoglucose* ruling,⁷² which annulled a Council decision taken without prior consultation with the Parliament, gave to consultation the character of unavoidably obligatory. In the ruling, the Court sustained that consultation was the way for EP to play a role in the Community legislative process and, moreover, it reflected, albeit primitively, the democratic principle. Consequently, the EP amended its own rules of procedure, transforming the obligation to consult into the possibility of blocking the issue and exercising a *de facto* veto.⁷³ Nevertheless, this delaying tactic is no substitute for real legislative power.⁷⁴

2. Conciliation procedure.

The conciliation procedure was not initially included in the Treaty but it was developed through a Joint Declaration.⁷⁵ The procedure is initiated at Parliament's request and it is exclusively addressed to the solution of budgetary disagreements on acts with appreciable financial implications, between the Council and the EP. Given the lack of bargaining capability of the EP, the procedure has little impact by itself.

3. Cooperation procedure.

The cooperation procedure was introduced by the SEA to be applied to 10 Articles of the EEC Treaty.⁷⁶ Basically, the cooperation procedure grants the Parliament the right to have two readings on legislative proposal forwarded by the Commission and, furthermore, it bestows the EP the possibility of incorporating amendments that only can be rejected by the Council unanimously or adopted by majority.⁷⁷

72 Cases 138/79 (Simmenthal) and Case 139/79: *Maizena GmgH v. Council of the European Communities* [1980] ECR 3393.

73 Jacobs, F. & Corbett, R. op. cit. p. 164-165

74 Lodge, J. 'The EP - from Assembly to co-legislature' cit. p. 64. See also the opinion by Celia Hampton who says that this delaying power is more useful as protest than as sanction. Hampton, Celia *Democracy in the European Community* New European Vol. 3 No. 1 p. 49

75 Joint Declaration of the European Parliament, the Council and the Commission. 4 March 1975 OJ No. C 89/1 22.4.75

76 Article 7 (elimination of discrimination on grounds of nationality); Article 49 (free movement of workers); Article 54 (2) (abolition of restrictions on freedom of establishment); Article 56 (2) second sentence (coordination of provisions on special treatment of foreigners on grounds of public policy, public security and public health); Article 57; Articles 100a & 100b (internal market); Article 118a (working environment); Article 130e (implementation of legislation on the ERDF) and Article 130q (2) (research and technological development). For a general account of the procedure and its perspectives and possibilities for interinstitutional bargaining, see Lodge, Juliet 'The Single European act and the new legislative procedure: a critical analysis' Journal of European Integration Vol. 11 No. 1 1987 p. 5-28

77 Detailed explanations of the procedure can be found in Jacobs, F. and Corbett, R. op. cit. p. 169-175 and Lodge, J. 'The SEA and the new legislative procedure' cit. p. 68-75

The procedure has certainly revalued the role of the EP, which has become a more productive participant in the legislative process thanks to its capacity to engineer majorities supporting amendments.⁷⁸ The amendment of its own Rules of Procedure to first examining the legal base of any proposal has been a critical factor in developing EP legislative involvement. The intention has been, of course, to frame as many proposals as possible on the legal basis foreseen for the application of the procedure.⁷⁹ Some authors have judged that the ritual of two readings gives the impression of a classical bicameral legislative procedure,⁸⁰ or, more cautiously, others have argued that *used skilfully, it could be a prelude to joint decision-making*.⁸¹ However, those opinions should not be misleading as regards the real EP powers; the shift of power has been insufficient to establish actual joint decision-making⁸² and the procedure has rather produced an illusion of two co-equal chambers: the EP does not have the same powers and instruments with which to affect the legislative outcome.⁸³ Furthermore, the main weakness of the cooperation procedure lays in its reliance upon the Commission's attitude towards EP amendments in the second reading.⁸⁴ If adopted, then the Council can pass them by qualified majority; if rejected, then they can be approved only by unanimity. Proposals rejected by the EP can become law, a fact which reinforces the idea that parliamentary democracy in the EC remains weak.⁸⁵

4. Assent procedure

The EP involvement in Community international agreements was developed through successive 'constitutional' conventions (Luns procedure, AETR Court ruling, Luns-Westerup procedure).⁸⁶ These provided the foundations for the application of the consultation and cooperation procedures to international agreements related to issues subject to the former procedures, as foreseen by the EEC Treaty and the SEA respectively. The Solemn Declaration of Stuttgart had, indeed, extended the obligation to consult the EP for the conclusion of 'all significant international

78 Ehlermann, Claus-Dieter 'The institutional development of the EC under the Single European Act' *Aussenpolitik* Vol. 41 No. 2 1990 p. 141

79 Lodge, J. 'The SEA and the new legislative procedure' cit. p. 72. See an example of this practice in Chapter 5 regarding political rights contained in the Commission's proposal on voting rights in local elections.

80 Jacobs, F. and Corbett, R. op. cit. p. 170

81 Louis, J.-V. op. cit. p. 27

82 Ibid. p. 26

83 Lodge, J. 'The SEA and the new legislative procedure' cit. p. 11

84 Lenaerts, K. 'Some reflections on the separation of powers' cit. p. 25. Data available showed that the Commission accepted 60% of the EP amendments in the first reading and 49% in the second reading. Wessels, W. 'The European Communities Council', p. 144-145

85 Lodge, J. 'The SEA and the new legislative procedure' cit. p. 76

86 Nicoll, W. 'Les procédures Luns/Westerterp pour l'information au Parlement Européenne' *Revue du Marché Commun* No. 300 Sept/Oct 1986 p. 475-476

agreements'. Since a procedure to determine the nature of an agreement has not been established, it is up to the institutions to agree on whether a determined agreement does or does not require EP consultation. This, of course, operates to the disadvantage of the EP.⁸⁷ Far more important are the provisions introduced by the SEA, requiring the assent of a majority of MEPs for association agreements or for the accession of new Member States to the Community (Articles 238 and 237).⁸⁸ Two aspects must be specified in this general entitlement: firstly, assent is required only for the acceptance of the *application* of membership and not for the conclusion of agreements; the latter is a prerogative of the Member States. Secondly, the EP can influence the negotiations on international agreements, since the power to choose when to decide whether to grant its assent equates to a *de facto* veto.⁸⁹ The Act did not extend this power to trade agreements negotiated and concluded by the Community without any parliamentary control whatsoever, either national or Community.⁹⁰

BUDGETARY POWERS

The budgetary powers of the EP, as consolidated by the Treaty revision of 1975, can be broadly summed up as follows. The EP has the right to increase Community non-compulsory expenditure, to redistribute certain sums across sectors within the budget, to reject (or approve) the whole budget, and it has also the exclusive right to grant discharge. Pinder considers that those powers were granted because of the perceived need for democratic control of Community expenditure, an opinion which led him to suggest that *The amending treaties made the Parliament and the Council a genuine two chamber legislature, with the Parliament having the final say and hence the stronger power over that part of the budget.*⁹¹ Effectively, through the allocation of sums, the EP has tried to influence legislation, whilst discharge is a supreme control instrument even though its effectiveness is limited.⁹²

POWERS OF SCRUTINY AND CONTROL

87 Bieber, Roland 'Democratic control of foreign policy' European Journal of International Law Vol. 1 1991 p. 163

88 Compare the opinion of the EP. Resolution of 17 June 1988 on the role of the European Parliament in external policy within the framework of the Single European Act. Doc. A 2-86/8 OJ No. C 187/233 18.7.88

89 Bieber, R. 'Democratic control of foreign policy' cit. p. 163

90 Lodge, J. 'EC policy-making: institutional considerations', in Lodge, J. (Ed.) The European Community and the challenge of the future cit. p. 36

91 Pinder, John The EC The building of a Union cit. p. 35

92 Jacobs, F. and Corbett, R. op. cit. p. 207

Since the development of those powers through the 1975 Treaty revision, the position of the EP has been regarded as *similar to the common (position) in national parliaments*⁹³ (access to information, right to debate in public, right to ask questions and even right to censure), although Parliament does not have entitlement to initiate proceedings before the ECJ.⁹⁴

1. The right to censure

The Treaty anticipates the EP's right to censure the Commission. If carried by a two-thirds majority, it would force the Commission to resign. Given the collective accountability of the Commission, this measure has been reinforced by two other instruments: resolutions criticising an individual Commissioner, and the 'reprimand motion' focused on a particular action by an individual Commissioner.

2. Appointment of the Commission

The Treaties reserve the appointment of the Commission as the prerogative of the governments of the Member States. EP involvement has been typically developed through constitutional convention. Consultations with the enlarged EP Bureau were developed after the Solemn Declaration on European Union. Also, since 1982 the Parliament has held a debate and ulterior vote of confidence on the incoming Commission, a practice enhanced by the Delors decision to delay its oath until receiving Parliamentary approval.

C. The Commission

The Commission is considered to be the 'Community executive', although it is widely accepted that it is weaker in its relation with the Council than are most governments in relation with their legislatures and, therefore, *it is far from filling the shoes of a European government in the process of Community legislation*.⁹⁵ The basic structure of the Commission is defined in Articles 9 to 18 of the Merger Treaty, although its internal structure has been considerably modified following the Spierenburg Report.⁹⁶ The Commission operates as a collegiate organ, appointed by

93 Ibid. p. 223

94 On the difficulties of the Parliament in securing the judicial defence of its prerogatives by bringing action for annulment via article 173, see Weiler, J. 'Pride and prejudice - Parliament v. Council' European Law Review Vol. 14 1989 p. 334-346.

95 Pinder, J. The Building of a Union cit. p. 22

96 Proposals for the reform of the European Communities and its services. Bull. EC 9-1979 p. 16. For a description of the internal structure and working of the Commission see Ludlow, Peter 'The European Commission', in Keohane, Robert O. and Hoffman, Stanley (eds.) The new European Community p. 85-132

unanimous agreement among the ministers in the Council.⁹⁷ Commission decisions are adopted by majority vote and responsibility is collective: all commissioners are responsible for all actions and the Commission President has no power of dismissal over them.⁹⁸

The sources of Commission functions are two-fold: statute, and custom; *statutes are for the most part the foundation treaties, whilst custom relates to working practices within the EC.*⁹⁹ The Commission functions basically number three. Firstly, the Commission has the sole right to initiate legislation,¹⁰⁰ with the exception of the elaboration of a uniform electoral procedure. In contrast with any other constitutional framework, the initiative right of the Commission is not a delegation by the legislature of a part of its universal entitlement to legislate: exclusive initiative right is legally guaranteed as one of the sources of the constitutional supremacy of Community law.

The second function is to act as guardian of the Treaties, as catered for by two main instruments: the initiative right already detailed above, and the entitlement to initiate judicial proceedings before the ECJ. The important aspect of this function of guardian of the constitutional orthodoxy is that it departs from the classical constitutional framework. The Commission must reflect the 'common good' or 'common interest', a reflection normally emanating from Parliament. As Henig has put it, *the Commission represents the EC whilst each Member State working in the Council represents itself*¹⁰¹ and even the very moderate proposals for reform contained in the Three Wise Men report considered it essential that the Commission retained its role in representing *the interest of Europe as a whole and not a compromise between different points of view.*¹⁰² Article 157 of the Treaty stipulates that, on taking their oath of office, Commissioners will act independently and accept no national instructions. As distinct from any national executive, the Commission does not represent a particular ideological line but a national political balance. Parliament, at the moment, falls short of producing ideological orientations and, furthermore, *the idea of the Commission representing a particular ideological lining (sic) is unacceptable to most governments.*¹⁰³

97 On its composition, organisation and appointment details, see an evaluation emphasising political aspects in Lodge, J. 'EC policy-making: institutional considerations' cit. p. 34-41

98 Henig, S. 'The European Community bicephalous political authority: Council of Ministers-Commission relations', Lodge, Juliet (Ed.) Institutions and policies of the European Community p. 10 ff.

99 Ibid. p. 12

100 Under this heading, Ludlow defines five subfunctions: strategic goal setting, policy formulation, drafting legislation, preparation of the budget and political management. Ludlow, P. op. cit. p. 97

101 Henig, S. op. cit. 12. Also Bassompierre; Guy Changing the guard in Brussels cit. p. 7

102 EC Bull. 11-1979 p. 27

103 Lodge, J. 'EC policy-making', cit. p. 36

Finally, the Commission has executive functions, although these are greatly reduced by the Council's reluctance to delegate powers of implementation¹⁰⁴ and the interposition of a myriad of committees (advisory or managerial).¹⁰⁵ Some authors argue reasonably that government, understood as execution of decisions (i. e., *assurer le mise en oeuvre des politiques arrêtés*) is incumbent on Member States' administrations rather than on Community institutions.¹⁰⁶ The legal argument emphasises, however, that the practical execution of Community policies by national administrations acting as "agents" cannot be seen as a weakening of the executive role of the Commission.¹⁰⁷

D. The Council of Ministers

The basic structure of the Council was established by Articles 1 to 8 of the Merger Treaty, although it has been pointed out that *constitutional lore owes even more to practice and established precedent*.¹⁰⁸ The membership of the Council is that of a conventional international organisation: a representative from each member government with rank of Minister. Certainly, this composition implies certain weakness summed up by Lodge in three points:¹⁰⁹ firstly, the ambiguity given by its composition and in government expectations of the roles and duties of individual members. Still, the General Affairs Council, made up of Foreign Affairs Ministers or European Affairs Ministers prevails because of the need, shared by the Commission, of a Council with a general sense of the integration process and also because of its involvement in the preparation of the European Council.¹¹⁰ Secondly, the Council is not a collegiate body and thirdly, electoral uncertainty and government crises can

104 Louis, J.-V. op. cit. p. 37. See also Ehlermann, C. op. cit. p. 140, who considers this Council reluctance one of the main weakness of the SEA regime.

105 The traditional influence assigned to the Committees has been diminished by Sidjanski. Although he concedes that the EC technical character stimulates the general Western tendency to share government with committees, he considers that they do not manage the Community. Sidjanski, Dusan 'Communauté Européenne 1992: gouvernement de comités? *Pouvoirs* Vol. 48 1989 p. 71-80.

106 Dubois, Louis 'Peut-on gouverner a douze?' *Pouvoirs* Vol. 48 1989 p. 107

107 Weiler, J. 'Supranationalism revisited' cit. p. 366. Ludlow has argued that in performing its implementing function *vis-à-vis* national administrations, *the Commission emerges more often than not as timid in its demands, unclear in its instructions and amateurish in its surveillance*. Ludlow, P. op. cit. p. 108

108 Henig, S. op. cit. p. 13. In contrast with the politico-legal analysis which follows, see, for instance, Wessels, W. 'The EC Council: The Community's decisionmaking centre' cit. He proposes to interpret the Council as the result of national reactions to a basic dilemma: how to cope with interdependence whilst ensuring economic performance and providing social services. Accordingly, he proposes three criteria of judgement: efficiency of decision-making, effectiveness and legitimacy (i.e., acceptance of the Council's decisions by EC citizens).

109 Lodge, J. 'EC policy-making, cit. p. 42

110 Bassompierre, G. op. cit. p. 22

seriously affect the Council. The Presidency is particularly important for the Council's organisation. The role of the Presidency combines several functions: representing the Community in the international arena, mediating in bargaining, and carrying out a general managerial function.¹¹¹

The Council executive powers are either direct 'in specific cases', as anticipated in Article 145, or indirect, through the managerial and regulatory committees. In performing this executive function the principle of separation of powers is at its lowest level.¹¹² Although the Council combines executive and diplomatic roles, its most important function is to be the final legislative authority in the Community. The criticisms addressed to the Council are concentrated on this function. Firstly, from the point of view of effectiveness in making decisions, it is said to be *a bottle-neck which slows down the whole process of decision-making*.¹¹³ Secondly, from the politico-legal point of view, the Council performs a contradictory role in the Community: on the one hand *it is a body that articulates and concerns itself with national interest*; in the other, it acts as the EC's legislature¹¹⁴ which implies that is involved in the definition of the Community's 'general interest'. Since the constitutional character of the Treaties implies that the determination of Community interest does not flow automatically from the Treaties,¹¹⁵ some decisions reduce Community interest to a compromise among national interests.¹¹⁶ As has been suggested, such combination of negotiating and legislative roles is *highly abnormal in terms of conventional democratic practice*.¹¹⁷ For some commentators, the contradiction lies not in the two roles but between the procedural requirements of each: confidentiality and diplomatic practice lead to a significant lack of transparency incompatible with the democratic standards which the legislative power should fulfil.¹¹⁸

The procedures for the Council in adopting decisions are laid down by Article 148. There are three methods: unanimity; a single majority which, in words of Lodge, *underlines the essential incongruity in the Council between its role as the EC's*

111 Helen Wallace noted five Presidency functions: management of the Council; promotion of political initiatives, package-broker, liaison with other Community institutions and spokesmanship. Wallace, H. 'The Presidency of the EC: Tasks and evolution', in O'Nuallain (Ed.) The Presidency of the European Council of Ministers (London: Croom Helm, 1985) p. 10-20.
See also the work by Bassompierre, G. op. cit.

112 Lenaerts, K. 'Some reflections on the separation of powers' cit. p. 31

113 Henig, S. op. cit. p. 19

114 Lodge, J. 'EC policy-making: institutional considerations' cit. p. 47

115 Louis, J-V., op. cit. p. 76

116 On this opinion see Dubois, L. op. cit. p. 109

117 Wallace, H. 'The Presidency of the EC' cit. p. 2

118 Wessels, W. 'The EC Council' cit. p. 150. Equally, Lenaerts opines that one of the main causes of the democratic deficit is the lack of transparency of the organic inputs (i.e., the contributions of each institution to the piece of legislation) which are constitutionally required and guaranteed. Lenaerts, K. 'Some reflections on the division of powers' cit. p. 20

*legislative and its members preoccupations.*¹¹⁹ The last procedure is a qualified majority, where voting rights are weighted according to the relative size of Member States.¹²⁰ If the decision is to be based on a Commission proposal, the majority must comprise at least 54 votes out of a possible 76. The relevance of voting has been debated by some authors, who argue that

*rules of the game are crucial in the operation of decision-taking machinery and not legalistic voting requirements, although there is an extent to which both approaches must reflect the realities of political power.*¹²¹

The Council is mainly assisted by two bodies: the *Secretariat* and the *COREPER*. The main function of the former tends to be that of collective memory rather than policy formulation.¹²² The status of the Committee of Permanent Representatives (COREPER), made up of ambassadors to the EC, is fixed in Article 4 of the Merger Treaty. The Committee has a mixed nature: the Permanent Representation are diplomatic missions created by an unilateral act of the government concerned¹²³ and its function is most clearly defined by an international instrument (Article 6 of the Vienna Convention of 14 March 1975). However, its internal role in the Community is subject to Community law.¹²⁴ The COREPER bears the responsibility of preparing the work of the Council and of carrying out tasks assigned by the latter. In an early work on the COREPER, Noël and Etienne concluded that the increment of its role and influence as the Community deepened and exceeded its strict Treaty powers did not impair the institutional balance designed in the Treaties.¹²⁵ The COREPER has no formal decision-making competence, yet although some authors have emphasised that COREPER can be said to hold, in reality, a decision power,¹²⁶ it must be pointed out that Commission control, indeed, has prevented COREPER from extending its decision-acts further than the mere implementation of decisions.¹²⁷ It has been said to suffer the same contradictions as

119 Lodge, J. 'EC policy-making: institutional considerations' cit. p. 47

120 UK, France, Germany and Italy, 10 votes each; Spain, 8 votes; Belgium, Greece, The Netherlands and Portugal, 5; Ireland and Denmark, 3; and Luxembourg, 2

121 Henig, S. op. cit. p. 18

122 Ibid. p. 13

123 Hayes-Renshaw, F. et al. 'The Permanent Representatives of the Member States to the European Communities', Journal of Common Market Studies Vol. 28 No. 2 1989 p. 122

124 Groux, J. and Manin, P. op. cit. p. 30-31

125 Noël, E. and Etienne, H. 'The Permanent Representatives Committee and the 'Deepening' of the Communities' Government and Opposition Vol. 6 1971 p. 445

126 Sidjanski, D. 'Communauté européenne: gouvernement de comites?' cit. p. 77

127 Noël, E. and Etienne, H. op. cit. p. 434

those of the Council: its members may represent the EC view to domestic officials and the national view to their counterparts and the Commission.¹²⁸

E. The European Council

The role of the European Council has been considered to be a *deus ex machina* for resolving a multitude of shortcomings within the EC's institutional structure.¹²⁹ Its status was informed and determined in a non-systematic way by three basic statements:¹³⁰ the Communiqué of the 1974 Paris Summit,¹³¹ which mentioned the participation of foreign ministers and provide for the creation of an administrative secretariat. The second one is the Statement released following the European Council in 1977¹³² (which stressed the importance of formal contacts). Finally, the Solemn declaration of Stuttgart on European Union¹³³ emphasised the 'strategic' role of the European Council. The European Council's existence was legally recognised by the SEA, although the Act did not transform it into a *de jure* Community institution.¹³⁴ Its paraconstitutional nature is underlined because a *full constitutional definition of the Council is avoided and it is expressly excluded from full judicial accountability to the Court of Justice*.¹³⁵ Its functions and powers were not formally described, which *de facto* reflects an intention of its authors *to emphasize the body's informal character and flexibility of operation*.¹³⁶ Bulmer and Wessels have distinguished nine intended or effectively executed functions. These are: defining guidelines for integration¹³⁷, policy orientation, scope enlargement (incorporation of new areas of activity), policy coordination, issuing declarations on foreign relations, decision-making (*de jure*), problem-solving as a 'court of appeal', and, finally, policy monitoring.¹³⁸ Decision-making is potentially the most irregular one in the constitutional framework, although it has not been used. The European Council has

128 Lodge, J. 'EC policy-making: institutional considerations' cit. p. 46. The same view is expressed by Hayes et al. op. cit.

129 Bulmer, S. and Wessels, W. The European Council. Decision-making in European politics. (London: Macmillan, 1987) p. 75.

130 Bonvicini, G. and Regelsberger, E. 'The decision making process in the European Council'. The International Spectator Vol. XXII No. 3 July-Sept. 1987 p. 133

131 EC Bull. 12-1974

132 EC Bull. 6-1977

133 EC Bull. 6-1983

134 The main value of the Act regarding the European Council was to give it legitimacy. The Act also returned the Council to its general strategic role Ehlermann, C. op. cit. p. 137

135 Bulmer, S. and Wessels, W. op. cit. p. 118

136 Louis, J-V op. cit. p. 24

137 See also Bonvicini, G. and Regelsberger, E. op. cit. p. 133. They opine that the basic objective of the European Council is that of directing from the top the political development of European integration.

138 Bulmer, S. and Wessels, W. op. cit. p. 75-102

the authority to take decisions that would become binding under EC law provided they are taken according to the Treaties and practices applicable.¹³⁹ The argument might, however, be challenged since the European Council remains outside the jurisdiction of the ECJ and therefore, the control of the legality of its acts is also supposed to be outside the judicial control of the Court.

3.2.4 Amendment procedures

The Treaties empower the institutions to amend specific provisions although this power is constrained to particular chapters. Equally, the Treaties provide procedures to remedy deficiencies or to fill gaps without amendment.¹⁴⁰ Those are however, reserve powers and they cannot be considered a general capacity for amendment.

Amendment power is external to Community institutions; they are not entitled to amend the Treaties on their own. In the amendment procedure,¹⁴¹ the Commission and the European Parliament have an advisory role whilst the Council is empowered to convene a conference of representatives of the Member governments. The Member States are, however, the subjects entitled to approve and ratify the reforms in accordance with their own constitutional requirements. The Community, thus, lacks a genuine constitutive power granting the right to revise the so-called EC constitution, despite the constituent role which the EP tried to assume with the EUT.¹⁴² The result, in the EP's view, is that the revision procedure is undemocratic, as it pointed out in the resolution on the Parliamentary position on the SEA: *it is undemocratic that an institutional reform of the Community should have been worked out without public debate and keeping at arms length the Assembly, legitimate representation of those citizens at European level.*¹⁴³

Protagonism for amending the Treaties remains, thus, with the Member States, who have the last word in the revision procedure. As Louis has commented, the most important feature of this procedure is the need for ratification by all Member States, which raises the question *whether constitutional developments of the Community can only proceed at the pace acceptable to the country or countries most reluctant to take part in qualitative leaps in integration.*¹⁴⁴ The theoretical implications of this

139 Ibid. p. 78

140 Article 235 EEC Treaty, Article 95 CSEC and Article 263 EURATOM

141 Article 236 EEC Treaty, Article 96 CSEC and Article 204 of the EURATOM Treaty

142 Lodge, J. 'European Union: A qualitative leap forward' *The World Today*. Nov. p. 204-207

143 Resolution on the position of the European Parliament on the Single Act approved by the intergovernmental conference on 16 and 17 December 1985. Doc. A 2-199/85 OJ No. C 36/144 17.2.86

144 Louis, J.-V. op. cit. p. 58.

legal requirement were discussed by Weiler¹⁴⁵ with a view to the eventual ratification of the EUT, which contained very different provisions for it. The conclusion is that a procedure departing from Article 236 (to avoid its requirement of unanimity) is legitimised neither under Community nor under international law. However, this is at odds with the democratic value that a majority of Member States and citizens should be allowed, certain some circumstances, *to determine their common fate unfettered by the unanimity requirement.*¹⁴⁶

The revision procedure weakens the constitutional nature of the Community. It also underlines its final reliance on international law, since new modifications have to be agreed through a new Treaty which, and this is a distinct possibility, might well evade the constitutional requirements of the Community's politico-legal framework.

3.3 DEFICIENCIES IN THE CONSTITUTIONAL FOUNDATION OF THE COMMUNITY

The application of the concept of legal constitution to the Community's politico-legal framework demonstrates, firstly, the limited scope of Community legal supremacy. Some policy areas have been organised on the sidelines of the Community in a paraconstitutional fashion; that is, using the Community's legal and/or institutional *acquis* without being placed under the full constitutional design. On the other hand, legal supremacy may be challenged on the basis of the lack of a proper constitutional foundation in political principles inherent in national constitutional orders.

The main deficiency of the Community's political constitution is the so-called 'democratic deficit'.¹⁴⁷ Since democracy is an essential principle of the Member States political systems, it has become, therefore, a principle of the Community constitution, too. This has been acknowledged in the case-law of the ECJ, for instance in the *Isoglucose* case¹⁴⁸ but also by the Council in its Copenhagen Declaration on Democracy¹⁴⁹ where the Heads of Government considered the EP's direct elections as a demonstration of the ideals of democracy and they also confirmed their will to

145 Weiler, J and Modrall, J. 'Institutional reform: Consensus or majority?' European Law Review Vol. 10 No. 5 1985 p. 316-333

146 Ibid. They put forward four requisites: a. creation of a real new legal order; b. the proposed change must not detract from the *acquis* of the Community; c. the proposed change must not be forced upon the minority (the Member States who opt out must have their substantive rights under the old Community respected); d. the interest of democratic government must be preserved. Weiler, J. and Modrall, J. op. cit. p. 329-331.

147 See Reich, C. 'Qu'est-ce que... le déficit démocratique?' Revue du Marché Commun et l'Union européenne No. 343 1991 p. 14-18

148 See page 62

149 EC Bull. 3-1978 p. 5-6

safeguard the principles of representative democracy. Finally, the democratic principle was codified in the preamble of the SEA.¹⁵⁰

Despite this fact, the Community's Constitution contains a democratic deficit which has been defined by the EP as the combination of two phenomena: a) the transfer of powers from the member States to the European Communities; b) the exercise of those powers, at Community level, by institutions other than the EP, even though national parliaments held powers to pass laws in the relevant area before the transfer.¹⁵¹ The effects of the democratic deficit are, therefore, felt by Parliaments both at national and Community level. National legislatures are prohibited from passing legislation (sole EC jurisdiction), or legislation is subject to a time limit period pending Community legislation (parallel jurisdiction), or Parliaments are required to implement Community legislation through secondary legislation. Finally, national Parliaments must even refrain from adopting any act which could jeopardise the smooth running of the Community (Article 5 of the Treaty).¹⁵²

Still, those limitations imposed upon national Parliaments could not be qualified as undemocratic if the process of law-making within the Community satisfied the same democratic requirements as national processes. It is in the relation between the Community institutions that the democratic deficit must be allocated, as it does in the EP resolution that followed the Toussaint Report.¹⁵³ Firstly, there is a breach of the principle of division of powers; the Council holds simultaneously legislative and executive powers and it has even the power to act on its own initiative (Article 152).¹⁵⁴ Also, active policy-making by the Court, albeit stimulating integration, is basically undemocratic. Secondly, being the legislative organ, the Council is not a directly-elected body. Thirdly, the Council is not collectively subject to any form of

150 See, however, the criticism labelled by the EP to the democratic shortcomings of the SEA.

Resolution on the position of the EP on the SEA, cit.

151 Report on the democratic deficit in the European Community. M. Toussaint rapporteur. PE Doc. A 2-276/87 1.2.1985. The democratic deficit has also been defined as *l'absence ou l'insuffisance de contrôle du Parlement national sur son exécutif dans l'élaboration de la norme communautaire* and *l'absence ou l'insuffisance du contrôle du Parlement européen sur l'exécutif communautaire (Conseil et Commission), et l'absence de co-décision législative*. Laprat, Gerard 'Réforme des traités: le risque du double déficit démocratique (les parlements nationales et l'élaboration de la norme communautaire)' Revue du Marché Commun et l'Union européenne No. 351 1991 p. 710-721

152 The involvement of national Parliaments in approving Community legislation is formally reduced to four cases: ratification, approval of the modification of the Community system of resources, approval of the accession of new members and approval of mixed international agreements (i.e., involving Community as well as national areas of competence). A fifth case is the approval of certain Community measures with constitutional repercussions, such as the uniform electoral procedure.

153 Resolution of 17 June 1988 on the democratic deficit in the European Community. Doc. A 2-276/87 OJ No. C 187/229 17.7.88

154 Even authors such as Celia Hampton, who warn of the application of the parallelism with national systems regarding the division of powers admit that *the key to the democratic deficit seems, however, to be in the peculiar position of the Council* Hampton, Celia op. cit. p. 53

democratic parliamentary control, whilst national parliamentary control cannot be extended to *all* Council members. Since the Council is not a collective organ, Ministers tend to be *accounting for his/her own government action or inaction in the Council, not accounting for the Council as such*, which would require a Community-wide process.¹⁵⁵ Fourthly, legislative deliberations within the Council are secret: a practice which owes much to diplomatic channels but which is incompatible with the democratic principle. Fifthly, the Commission President is not elected by universal suffrage or by the organ elected by universal suffrage; the appointment is not related to the ideological articulation and strength of political forces within the Parliament. Last but not least, the legislative powers accorded to the Parliament remain limited. Although the diminished role of Parliaments is a general trend among Western political systems, it does not occur without an *explicit constitutional delegation* by Parliament. As distinct from any national system, such a process has not implied a reinforcement of the executive and this poses problems of efficiency. The EP has tried, within the scope of the Treaties, to redress the deficiencies related to the institutional design by stimulating constitutional conventions.¹⁵⁶ Its failure shows the limit of constitutional conventions in regulating Community political life and further highlight the need for a positive political constitution.

The inadequacies of the political constitution related to the organisational charter are more easily perceived. Therefore, the advances towards a constitutional concept of union have been reduced to an institutional reform of which the basic content is to widen the legislative powers of the EP.¹⁵⁷ It is often forgotten that the organ of political representation needs first a political subject to represent; that is, a European people unified through the concept of citizenship. On the other hand, the requirements for a European Union in a constitutional sense should satisfy also the

155 *Ibid.* p. 49

156 The EP has called upon the Council to meet democratic requirements by: a) ensuring co-decision in the budgetary sphere (including compulsory expenditure); extending co-decision to international agreements; according the EP power to approve or reject such agreements and extend the cooperation procedure to spheres which have major repercussions for the EC evolution. The EP has tried to redesign also the relations with the Commission through a Draft joint declaration which formally set up the follow-up procedure on the Commission programme, asked for previous consultation and consideration of EP opinions to any legislative proposal, and, finally, considered that the EP initiatives should provide the guidelines for Commission work. Resolution on relations between the EP and the Commission in the institutional context of the Treaties. Doc. A 2-102/86 OJ No. C 283/39 10.11.86

157 See, for instance, the opinion of Pinder: a strengthened Community i.e., institutional reform plus security policy, would be called European Union. Pinder, J. *op. cit.* p. 18. Also the article by Padoa-Schioppa, Antonio 'From EEC to European union: a necessary institutional reform' The Federalist Vol. 31 No. 3 1989 p. 261-270. See also Henig, S. *op. cit.* p. 18-19 on the four possible scenarios for political reform.

legal requisite of supremacy on Member States' constitutions, which would imply the creation of a Community constitutional supremacy over those competencies inalienable to the exercise of sovereignty. Each of the following two chapters is devoted to the analysis of these aspects.

This chapter has shown that the politico-legal foundation of the Community may be considered a constitution in the legal sense, given its attributes of supremacy, direct effect and direct applicability. It has also been shown that this legal dimension carries, from a formal point of view, certain deficiencies (for instance, the limited scope of constitutional supremacy and the fact that it can be challenged due to the deficiencies in the political constitution). The chapter has shown also that the politico-legal foundation of the Community may also be considered a constitution in a political sense, since it contains principles and institutions modelled on a constitutional pattern. Finally, it has been argued that this political constitution is mixed with intergovernmental characteristics that dilute requirements normally expected from constitutional orders.

Next chapter examines the concept of sovereignty and how Member States have organised these areas strictly link to their constitutional status in a paraconstitutional manner. That is, these areas have been organised relying on the Community politico-legal framework but without being incorporated into it.

4 THE FORMAL INDEPENDENCE AND SUPREMACY OF MEMBER STATES

4.1 The external dimension: independence

4.1.1 Community attributes of independence: The international personality of the Community

4.1.2 Independence of Member States and the unsolved questions of withdrawal and dissolution

4.2 The internal dimension: supremacy and the inalienable competencies of Member States

4.2.1 Defence of the constitutional order

4.2.2 Internal order

4.2.3 Foreign policy

4.2.4 Security and defence

4.3 Member States Sovereignty of Member States and the definition of political union

The constitutional foundation in the sense discussed in the former chapter is not the only principle regulating the host of relations among Member States. Furthermore, they have been reluctant to extend it: a definitive enlargement of the legal supremacy over certain competencies would imply definitive derogation of the sovereignty of the Member States.

The interpretation of the concept of sovereignty as manifested in relations between Community and Member States needs to consider two dimensions: the external, as independence, and the internal, as supremacy. The criteria applied in evaluating the status of sovereignty in the external dimension is the degree of independence or autonomy of the Community from the Member States, as well as their own independence when acting in the international scene. The fact that the legal constitution of the Community is limited to very specific areas supports, of course, the assumption that Member States are independent in any other areas. Therefore, the test on the external independence of Community and Member States has to be constrained to those areas formally regulated by legal instruments.

The internal dimension coincides by and large with the concept of constitution discussed in the former chapter, i.e., supreme law implying exclusive competence and decision-making powers. The determination of the sovereign status needs to consider to what extent legal supremacy and political constitutionalization has been expanded to encompass to the areas inalienable to the sovereign condition of Member States: defence of the constitutional order, internal security, foreign policy and defence and security.

4.1 THE EXTERNAL DIMENSION: INDEPENDENCE

The question on whether Member States or Community are the sovereign entities has been expediently resolved by Bernier: *the Member States of the EC have refused so far to merge their international law sovereignties into a new and distinct entity.*¹ Evidence on this point is provided by the analysis of the international law personality of the EC; which proves the non-existence of a Community external sovereignty despite its endowment with certain attributes of an international personality. Furthermore, Member States retain the legal entitlement (i.e., constitutional separateness) to exercise self-determination on their own destinies. There are three relevant cases to consider in order to evaluate Member States' formal independence: reform of the Treaties (as discussed in the previous chapter); dissolution by mutual agreement, and unilateral withdrawal. Despite all of the practical problems, dissolution by mutual agreement seems to be compatible with the principles of international and constitutional law but, in any case, it appears to be a highly unlikely possibility. Withdrawal is, then, the most significant case in evaluating Member States' formal independence.

4.1.1 Community attributes of independence: The international personality of the Community

In the latter half of this century, public international law has advanced in the acknowledgement of capabilities of international organisations, including their right to conclude treaties, responsibility, and enjoyment of privileges and immunities.² The Community enjoys the legal personality attributed by Article 210 which has been generally interpreted also as attributing international legal personality, even though recognising that it is not possible automatically to infer specific powers in the foreign relations field from those provisions.³ The relevant attributes of international personality are three-fold:

a. *The right to enter into agreements.* This power has been extensively developed by the Community (trade, association). Although Bernier recorded that

1 Bernier, Ivan International legal personality of federations (London: Longman, 1973) p. 271

2 Groux, J and Manin, P. The European Communities in the international order European Perspectives Series (Luxembourg: Office for Official Publications of the European Communities, 1988) p. 9. On the same, see also Schemers, Henry G. 'The Community relations under public international law', in Thirty years of Community law p. 219

3 Louis, J-V. *op. cit.* p. 63

treaty-making and treaty-implementing powers are not absolute but strictly limited,⁴ Louis has replied that the possibility of implicit powers in areas other than tariff and trade agreements (covered by Articles 111-113) and association agreements (Article 238) has been recognised by legal precedent and established practice.⁵ The principle laid down by the ECJ in the AETR case is that any internal legal power is at least simultaneously matched by a parallel international legal power.⁶

This partial personality, however, does not grant a parallel entitlement to independent action. Community autonomy to negotiate, as provided by Treaty instruments, has been undermined by the interposition of devices to safeguard the autonomy of Member States: a special committee assists the Commission in negotiations with third parties to the point that the Commission is not an actor with exclusive competence but it is rather *a participant in a complex system of coordination with Member States*.⁷ Secondly, the conclusion of some agreements is made jointly by Member States and the Community, this being a way for the Member States to assert their sovereign status.⁸ The instrumentality of the Community's external relations for the member States has been underlined by case studies of negotiations covered by Article 113, being the conclusion that Community involvement in external policy, insofar as it derives from the Treaties, is mainly driven by economic concerns and its objective is to provide effective instruments for its Member States.⁹ For this reason, some authors have interpreted Community acts as a result of the 'balance of power' between Member States and Community institutions and a reflection of *the attempt to manage Community's internal development as they are to respond directly to external problems and opportunities*.¹⁰

4 Bernier, I. op. cit. p. 23. Equally, Schemers argues that these powers are granted not to conduct a foreign policy but to resolve specific problems. Schemers, H. 'The Community relations' cit. p. 228

5 Louis, J-V. op. cit. p. 64

6 In the *AETR ruling*; Case 22/70 EC Commission v. EC Council ECR [1971] 263, the Court restricted the autonomy for international agreements of the Member States to those areas or fields governed by a common policy. The principle of parallelism was established in the *Kramer case*; Joint Cases 3,4,6/76 ECR [1976] 1279 and a posterior ECJ opinion 1/76 ECR [1977] 791.

7 Taylor, Paul 'The European Communities as an actor in international society' *Journal of European Integration* Vol. 6 No. 1 1982 p. 41.

8 Lodge, J. 'European Political Cooperation: Towards the 1990s', in Lodge, J. (ed.) *The European Community and the challenge of the future* cit. p. 226

9 Ferrandis, Chris 'External relations: Textile politics and the multi-fibre arrangement', in Wallace, H; Wallace, W. and Webb, C. (eds.) *Policy making in the European Community* (Chichester: John Wiley & Sons, 1983) p. 313

10 Allen, D. and Smith, M. 'Western Europe's presence in the contemporary international arena'. *Review of International Studies* 1990 vol. 16 p. 34. For an eclectic interpretation of the common external trade policy as the result of state interest, regional interest and global needs, see Ginsberg, Roy 'European trade policy at Mid-Decade: coping with the internal menace and external challenge', in Rummel, Reinhardt (ed.) *The evolution of an international actor. Western Europe's new assertiveness* (Boulder/Oxford: Westview Press, 1990) p. 56-81

b. *The capability to enter into diplomatic relations.* Groux and Manin consider that the establishment of diplomatic relations with the Communities is equivalent to recognition, as well as being recognition of the international powers of the Community as defined by the Treaties¹¹ (although it should be born in mind that the Community was denied recognition by the Member States of COMECON without this fact having precluded the exercise of its treaty-making powers). These authors, however, locate the difference with State behaviour in the active capabilities:

*while practice for the establishment of 'diplomatic' relations shows marked similarities with the states procedure, the Communities have so far refrained from any formal decision to recognize a state or government.*¹²

Similarities with the state extend to the accreditation procedure: non-member states must first obtain the agreement of the Community on the actual principle of establishing a mission.¹³ Some 130 diplomatic representations are accredited to the EC; they more closely resemble national permanent missions (state legations) than they do representations in international organisms in two points. Firstly, they do not participate in the deliberations of the organs and, secondly, the main purpose of those delegations lays in negotiation with the Communities.¹⁴

Regarding Community missions, Bernier argued that the right to immunity in third states is an unresolved question.¹⁵ Analogously, Louis opines that

*the various forms of representation in non-EC countries are more a projection to the outside of the negotiating and executive responsibilities of the Commission than an expression of the international legal personality of the Community as a whole.*¹⁶

The Community as such cannot be said to have diplomatic representation abroad and even Commission delegations *are naturally restricted to matters within Community competence.*¹⁷ Furthermore, representation is shared between Commission missions and the missions of the country hosting the Presidency, with the

11 Groux, J and Manin, P. op. cit. p. 22

12 Ibid. p. 27. The exception was the explicit 'non recognition' of the Turkish Republic of North Cyprus.

13 Groux, J. and Manin, P. op. cit. p. 33

14 Ibid. p. 32

15 Bernier, I. op. cit. p. 229

16 Louis, J-V. op. cit. p.66

17 Groux, J. and Manin, P. op. cit. p. 35

raising of the possibility of conflict because of the ill-defined distribution of attributions between them.¹⁸

c. *International responsibility.* Bernier concluded that *the EC is responsible for their conduct in the same way as political subdivisions of federal states.*¹⁹ The general presumption is that the rules of customary international law regarding liability apply to the Commission.²⁰ Louis considers also that the Community can be held responsible for the consequences of their actions contractual as well as non-contractual ones.²¹ The possibility of invoking Article 228 (2) by third parties to demand responsibilities from Member States has been sustained as an option should action against the Community fail.²²

To summarise: the Community development of some elements of international personality has failed to imply the recognition of an parallel independent capability. Obviously, Member States retain full international personality as expressed through a general capability to enter into diplomatic relations and agreements (with the exceptions discussed), their separate membership of international organisations and their separate representation in the ONU. Moreover, relations among them in areas not covered by the Treaties are organised in public international law and on a diplomatic basis. Whatever their latitude for unfettered action, Member States seem to retain full sovereignty in the external dimension as actors on the international stage and the latest test is their ultimate possibility of withdrawing from the Community.

4.1.2 Independence of Member States and the unsolved questions of withdrawal and dissolution

Withdrawal provides the best criterion for evaluating the nature of the Community regarding sovereignty. As has been discussed in Chapter 2, withdrawal (or secession) is not a possibility normally associated with constitutional unions and it is a very unlikely option in unions based on international public law. From the realistic standpoint, Bull has argued that the crucial test to establish whether sovereignty lays with the Member States or the Community is the question as to *whether national governments within the Community had the right and, in terms of the forces and the human loyalties at their command, the capacity to secede.*²³ The force of this test is

18 Ibid. p. 35

19 Bernier, I. op. cit. p. 229

20 Groux, J. and Manin, P. op. cit. p. 142

21 Louis, J-V. op. cit. p. 67-68

22 Groux, J. and Manin, P. op. cit. p. 145

23 Bull, Hedley *The anarchical society* cit. p. 266

not such, though. It is self-evident that practical or economic reasons dwarf any other considerations: the survival of any of the Member States outside the framework of the Treaties is, at the least, doubtful. The arguments on the issue must take into account three different levels of analysis: public international law, Community law, and constitutional law.

The provisions of international public law relevant to this case are the following. Article 56 of the Vienna Convention on the Law of the Treaties regulates the possibility of withdrawal from a pact containing no provision for denunciation. The interpretation of a reputed specialist, Sinclair, sustains that, in theory at least and in accordance with the principle *pacta sunt servanda*, such possibility does not exist.²⁴ However, he emphasises the two possible exceptions; either the parties admit the possibility or the right to denunciation, or withdrawal may be implied by the nature of the Treaty. There are, thus, two possibilities which deserve systematic analysis: firstly, that the parties admit the possibility or right of denunciation. As is widely known, the EC Treaties do not contain any provision regarding this point and the most logical interpretation has concluded that the silence of the Treaties only means that Member States did not or were not in a position (because of lack of accord) to regulate this question by Treaty²⁵ which implies the freedom of the Member States to decide on this question for themselves.²⁶

A variant of this situation is contained in Article 62 of the Vienna Convention, which states that a party may withdraw from a Treaty in the event of a fundamental change of circumstances, when those circumstances constituted an essential basis for the consent of the other parties, and the change of circumstances may radically transform the extent of the withdrawing party's obligations under the treaty. This situation appeared on the occasion of the Irish ratification of the SEA. The case had been brought in front of the Irish Supreme Court, which ruled that the ratification would be unconstitutional because of the change of circumstances involved; i.e., the provisions regarding foreign policy and security in Title III. Given the declared neutrality of the Irish Republic, the new circumstances transformed effectively the consent and obligations of the Irish commitment. Facing the unreal option of

24 Sinclair, Ian The Vienna Convention on the law of the Treaties 2nd edition (Manchester: MUP, 1984) p. 186. On the same Akehurst concludes that *practice suggests that withdrawal from an international organization is illegal and void unless it has been authorized by the constituent treaty or unless there is clear evidence that the parties intended to permit a right of withdrawal.* Akehurst, Michael 'Withdrawal from international organisations' Current Legal Problems Vol. 32 1979 p. 149

25 Dagtoglou, P. D. 'How indissoluble is the Community?', in Dagtoglou, P. D.. (ed.) Basic problems of the European Community (Oxford: Basil Blackwell, 1975) p. 262

26 For instance, Pryce: *each of the signatories maintains absolute authority to take such a decision at any point in the future.* Pryce, Roy The politics of the European Community (London: Butterworths, 1973) p. 55

withdrawal, a referendum had to be held to amend the Irish constitution. The Irish Supreme Court held, however, that the Third Amendment to the Constitution, enabling Irish membership of the Communities, also allowed the amendments to the Treaties effected by the SEA. This decision and the respective Court interpretation underlines the commitment of the Irish state to a process of development.²⁷ The decision, however, has not definitively resolved the problem:

*while the Court held that the Communities are susceptible to permissible change, it did not define its extent and it is uncertain what changes can legitimately be consented to by the State*²⁸

and it, therefore, did not establish definitive parameters that could preclude an Irish decision on withdrawal.

The former possibilities move within the strict scope of international law. More relevant to the Community is the case whether withdrawal might be implied or not by the nature of the Treaty. Whether withdrawal from the EC is contradictory to the aim of the Treaties is contentious. The authors who deny such a possibility argue that the unlimited duration established by Article 240²⁹ is sign of an irrevocable commitment by its signatories and implies that unilateral denunciation is illegal and contradictory to the aim of the Treaties.³⁰ Opposed to this reasoning, Dagtoglou argues that *whether withdrawal is excluded or not depends not on the aim to integrate "in abstracto", but only on the stage of integration actually reached "in concreto"*.³¹

The arguments were developed on the occasion of Greenland's withdrawal from the EC. For purposes of Community membership, Greenland was treated as an integral part of Denmark.³² The change of status posed by the Home Rule Act opened the opportunity for withdrawal and the assumption of OTC status. However, the decision was not taken by Greenland as a sovereign state. The proposal had,

27 McCutcheon, J. Paul 'The Irish Supreme Court, European political Cooperation and the SEA' Legal Issues on European Integration No. 2 1988 p. 95

28 Ibid. p. 99

29 Article 97 of the ECSC foresee, however, a limited duration of 50 years. The Commission has proposed letting the Treaty expire in 2002 whilst incorporating certain provisions in the EEC Treaty. Europe Documents No. 1704 10.4.1991

30 Harhoff, Frederick 'Greenland's withdrawal from the European Communities' Common Market Law Review Vol. 20 1983 p. 28. Louis, J-V.; op. cit. p. 74. Akehurst, M. op. cit. p. 152. Louis, however, specifies that the Community is dissoluble only because it is meant to be a step in the gradual process towards union.

31 Dagtoglou, P. D. op. cit. p. 268. Other authors who similarly argue an implicit withdrawal possibility are Taylor, P. 'The European Community and the state' cit.; Pryce, R. The politics of the European Community cit. p. 55 and Weiler, J. Weiler, J. 'Supranationalism revisited' cit.

32 Weiss, Friedl 'Greenland's withdrawal from the European Communities' European Law Review Vol. 10 1985 p. 176

indeed, to be put forward by the Danish government³³ because competencies related to sovereignty (international affairs, constitutional matters and defence) belong to the Danish central authorities and they cannot be devolved.³⁴ Therefore, Greenland's withdrawal cannot be interpreted as an act of secession or the exercise of a right of self determination as reasserting its constitutional separateness. Since Greenland is not itself a sovereign state, its change of status-withdrawal will not possibly imply a precedent.³⁵ Indeed, the opinion issued by the EP legal affairs committee emphasised that there was no possibility of analogy of circumstances in reaching an eventual conclusion on the possibility of withdrawal of a Member State.

The Committee pointed out that the Treaty of Rome envisages no procedure whereby states (much less regions or administrative units of states) can withdraw from the EC. The Committee saw this omission as a *symbol of the solemn commitment to ever-closer integration between Member states which is inherent in the Treaty of Rome*.³⁶ The basic legal belief underlying this opinion is that the Treaties have established a new legal order as a constitution of a nascent European Federation.³⁷

The analysis needs, finally, to consider the issue from the point of view of constitutional law. Dualistic constitutions retain an explicit right of withdrawal. Within the Community, two cases are illustrative. Firstly, in the case of the UK, most authors seems to agree that since the British accession was through a Parliamentary act, the possibility of withdrawal could be opened by another one.³⁸

The second case is posed by the Danish constitution, of which Article 20 provides for the transference of powers to international organisations on the condition that withdrawal of such transferred powers is not excluded. This can be interpreted either as total withdrawal when claiming back all powers or as merely reclaiming

33 The proposal contained two points: firstly, the amendment of the provisions which define the geographical scope of the Treaties - Article 79 ECSC; Art. 227 EEC and Art. 198 EAEC. Secondly, it proposed the addition of Greenland to the list of OCT. See EC Commission *Opinion on the status of Greenland*. EC Bull. Supplement 1/83; followed by *Communication from the Commission to the Council. Status of Greenland*. EC Commission COM (83) 66 final Brussels 22 February 1983

34 Harhoff, F. op. cit. p. 18

35 This opinion is sustained by Harhoff, F. p. 31

36 PE Doc. 1-264/83 p. 9

37 Weiss, F. op. cit. p. 176. Cf. the arguments on the difference between Treaty and constitution regarding this point in Chapter 2.

38 Paul Taylor argues that *the Community is based upon a Treaty from which we could withdraw under international law*. Taylor, Paul 'British sovereignty and the European Community: what is at risk?' *Millennium: Journal of International Studies* Vol. 20 No. 1 1991 p. 74. This argument, regarding the EMU, has been endorsed by Ian Harden who opined that *it would remain 'constitutionally' possible for the Crown-in-Parliament to enact appropriate legislation withdrawing from monetary union and, presumably, from the EC*. Harden, Ian 'Sovereignty and the Eurofed' *Political Quarterly* Vol. 61 No. 4 1990 p. 410. The same opinion in Howe, G. op. cit. p. 684 although he specifies that *the act of withdrawal is becoming almost unthinkable*.

certain competencies. The case of total withdrawal is appropriate to the arguments given above and therefore appears to be undeniable in the final analysis. The important point is that this final right of withdrawal excludes, however, the constant right of nullification. This situation has been called by Weiler the *all or nothing effect*³⁹. It has been also the line consolidated by the case-law of the ECJ: in a 1971 ruling, the Court held that *Powers thus conferred cannot, therefore, be withdrawn from the Community and restored to the Member States except by virtue of an expressed provision of the Treaty.*⁴⁰

The idea of the possibility for Member States to exercise their respective sovereignty by reasserting their constitutional separateness through withdrawing from the Community seems to emerge from the theoretical discussion. Some, however, have contended that withdrawal is a good canon by which to judge the sovereignty of the Member States. Authors such as Louis have rejected the idea that the possibility of withdrawal from the EC proves that the Member States' sovereignty is preserved intact.⁴¹ If the constitutional separateness of each Member State is assured by the possibility of withdrawal, the practical (economical and political) possibility of determining their own destinies is nil. The existence of this gap between the existence of Member States' formal sovereignty in an external dimension and the practical limits to their international autonomy has led to the proposition of alternative concepts such as interdependence. The concept of interdependence, however, does not imply a derogation of the formal independence of each Member State: rather, it defines the conditions for the exercise of such independence. Interdependence cannot thus be considered a politico-legal element, but a relationship changing in each historical moment.

4.2 THE INTERNAL DIMENSION: SUPREMACY AND THE INALIENABLE COMPETENCIES OF MEMBER STATES

The former subsection implicitly concludes the independence or constitutional separateness of the Member States; that is, the existence of Twelve separate sovereignties. This hypothesis is, however, disputed. Criticising this argument, Hartley argues that *it would be a mistake to think that the circumstances in which the*

³⁹ *Whereas Member States retain the ultimate political option of withdrawing from the Community and thereby disengaging from their obligations of membership, they are largely unable to practice selective derogation of Community obligations.* Weiler, J. 'Supranationalism revisited—a retrospective cit. p. 374

⁴⁰ Case 7/71: Commission of the European Communities v. French Republic ECR [1971] 1003

⁴¹ Louis, J-V.; op. cit. p. 14

*Community constitution was adopted mean that sovereignty resides wholly with the Member States.*⁴² The wording of Hartley establishes the necessary connection between constitution and sovereignty, although some authors disagree. Thus, another view sustains that

*the existence under treaties of standing supra or transnational entities seems plainly to entail derogation from the sovereignty of the Member States without ascription of sovereignty to the confederation as a whole.*⁴³

In the EC framework, the concept of sovereignty is used to imply two different elements (decision-making powers, and competencies) although most careful authors are able to single and link them.⁴⁴ Firstly, a predominantly political usage interprets sovereignty as the power or capability of influencing the decision making process. For instance, Marshall says that *the law of the European Community appears to treat the legislatures of the Member States as subordinated bodies, subject to a new and superior legal order and, therefore, as being no longer sovereign.*⁴⁵ In this case, sovereignty is said to be 'pooled', i.e., *collectively held by an association of states which reaches decisions on specific matters by a qualified majority.*⁴⁶ In this line of reasoning, for instance, the existence of a *Community sovereignty*, albeit in emergent status, was sustained by an author writing under the pseudonym *Luxemburgensis*.⁴⁷ The concepts behind such opinion is that of divided sovereignty, that allows the establishment of a relationship between the loss of sovereignty of the Member States and the gain of sovereignty by the Community. Thus, the *loss of sovereignty* is identified when *the degree of integration achieved makes it impossible for the Member States to settle some problems among themselves which they were*

42 Hartley, T. 'Federalism, courts and legal systems' cit. p. 232.

43 MacCormick, N. 'Sovereignty', in Bogdanor, V. (ed.) The Blackwell Encyclopaedia of political institutions cit. p. 584

44 Thus, Louis says that the transfer of sovereignty which is the basis of the Community legal order is a *transfer of decision-making to common institutions and a corresponding limitation of the areas of decision-making remaining with the individual Member States* Louis, J-V. op. cit. p. 11-13

45 Marshall, Geoffrey 'Parliamentary sovereignty', in Bogdanor, V. (ed.) The Blackwell Encyclopaedia of political institutions cit. p. 408

46 Williams, Shirley 'Sovereignty and accountability in the European Community'. Political Quarterly Vol. 61 No. 3 1990 p. 294. Consistently with her own arguments, Williams concludes that sovereignty has been pooled rather than transferred, since governments do not sacrifice their powers absolutely.

47 A similar argumentative line can be traced in Howe who states that *the formal sharing of sovereign power within the Community(...) offers with it (...) the gradual assumption by all the nations concerned of (a) larger sovereignty* Howe, G. op. cit. p. 693

*free to settle formerly.*⁴⁸ Similarly, P. Soldatos refers to a 'souveraineté fonctionnelle' which consists in the *mise en commun des droits souverains* rather than a pure and simple narrowing of national sovereignties. In his point of view, this is not a zero-sum game, since the losses by the transfer are compensated by the *pool of sovereignties* and the right to become involved in (to influence) other Member States' affairs.⁴⁹

The decision-making process, from the point of view of the Member States, may seem a limitation of their sovereignty. However, the evaluation is different when the institutional design for the decision-making process is considered. Thus, Louis argues that

*far from entailing a loss of sovereignty from the state, participation in decision-making within the organization gives back to the state the power to influence events in areas that are only nominally within its control, given the interdependence between states.*⁵⁰

Regarding this pattern of decision-making, Keohane and Hoffman argue that the European Community *is an experiment in pooling sovereignty, not in transferring it from states to supranational institutions.*⁵¹ The concern that the issue raises has been put forward by Lodge as follows: *Anxiety over sovereignty legitimates a process of unfettered executive dominance and allows legislatures to wither on the vine by default.*⁵²

The Community politico-legal framework bears the contradiction that the legal supremacy which is an attribute of sovereignty does not respond to the mandate of a legislature elected by the universal suffrage of a political subject.⁵³ A non-sovereign

48 Luxemburgensis 'The emergence of a European sovereignty', in Ionescu, G. (ed.) Between sovereignty and integration (London: Croom Helm, 1974) p. 134. He establishes an identification between legitimacy and sovereignty in applying the latter concept to the EC: In the Community *sovereignty is largely the outcome of the effective functioning of the system and its achievements.* Ibid. p. 131. He identifies sovereignty with legitimacy (i.e., entitlement to act) and incorporates into the concept awkward ideas such as redistribution: *Redistribution, in different forms, which is the expression of the solidarity of the members, is a basic characteristic of sovereignty conceived in this sense.* Ibid. p. 122

49 Soldatos, Pannayotis Le système institutionnel et politique des communautés européennes. (Bruxelles: Bruylant, 1989) p. 17 and 26

50 Louis, J-V. op. cit. p. 14. Equally, Lenaerts argues that given the national source of legitimacy of the Council, *the exercise of Community powers appears as another mode for the Member States to assume their own sovereignty, not any longer through autonomous, but through common decision-making.* Lenaerts, K. 'Constitutionalism and the many faces of federalism' cit. p. 231

51 Keohane, R. and Hoffman, Stanley 'Conclusion: Community politics and institutional change', in Wallace, W. (ed.) The dynamics of European Integration (London: RIIA/Pinter, 1990) p. 227

52 Lodge, J. 'EC: policy making', in Lodge (ed.) The European Community and the challenge of the future cit. p. 31

53 The link between legal supremacy and a sovereign political subject is possible, of course, only in a full constitutional framework. On this line, for instance, Celia Hampton has argued that *Enhancing popular election would only be appropriate if a 'United States of Europe' is on the*

parliament (in the sense of its not being the supreme legislative authority); the predominance of national executives through the Council and COREPER, and the possibility of constraining the adoption of decisions through the practice of the veto which safeguards national interests combine to endorse the notion that decision-making in the EC must be considered a constant exercise of sovereignty by Member States, rather than the exercise of Community sovereignty.

In the second application of the concept in the context Community, sovereignty amounts to sovereign rights, i.e., exclusive competencies. Therefore, sovereignty is or might be transferred,⁵⁴ although some authors have suggested the convenience of speaking of powers' being 'conferred on' the Community rather than being transferred to it.⁵⁵ This predominantly legal interpretation has been endorsed by the statements of the case law of the ECJ; thus, in *Van Gend en Loos*, the Court sustained the widely-known opinion that the Member States have limited their sovereign rights, albeit within limited fields, and that the Community's institutions are endowed with sovereign rights.⁵⁶ The extent of this transfer was clarified by the Court with express reference to the British Act of Accession of 1972; the Court held that, being the transfer to the Community of powers in this field (fisheries) total and definitive, certain provisions contained in the Act could in no case restore to the Member States the power and freedom to act unilaterally in this field.⁵⁷

The expression 'sovereign rights' is a linguistic convention used with several meanings. Thus, in the case of human rights, it can be equated to 'inalienable rights', whilst in the case of the EC law it stands for exclusive competencies. The character of linguistic convention is further proved by the fact that the meaning in the human rights case is not appropriate to EC law: a State cannot give away an inalienable right (its right to self defence, for instance) without ceasing existence as an independent State. Sovereign rights can disappear but not be limited. Sovereignty cannot be disintegrated in a cluster of competencies, some of which may be limited and transferred. This concept is sustained by the presumption that sovereignty can be divided, something

agenda, otherwise, it could confer a spurious legitimacy Hampton, Celia 'Democracy in the European Community' *New European* Vol. 3 No. 1 p. 48.

54 Thus, Mitchell compares the Treaty of Rome with the ACT of Union of 1707 between England and Scotland as legal instrument transferring aspects of sovereignty Mitchell, J.D.B. 'The sovereignty of Parliament and Community law: the stumbling-block that isn't there' *International Affairs* Vol. 55 1979 pp. 33-46

55 Louis, J-V. op. cit. p. 12

56 Case 26/62: *N.V. Algemene Transport- en Expeditie onderneming Van Gend en Loos v. Nederlandsche administratie der belastingen* [1963] ECR 1

57 Case 804/79: *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland* [1981] ECR 1045

that contradicts its very nature. As Crick commented *to admit divided sovereignty is to make the concept almost meaningless*.⁵⁸

Although by using the former linguistic convention it could be accepted (on the wording of the ECJ) that the States have limited their autonomy of action by creating a Community, this does not imply the emergence of a new sovereignty. A Treaty establish a limitation to the autonomy of action of the governments, as does the Treaty of Rome, but this limitation does not extend to decision-making over those powers of which exclusive competence belongs to the Member States as guarantee and ultimate expression of its sovereignty. These cannot be reallocated under the Community constitutional framework as exclusive or concurrent competencies without bringing into question the existence of the constitutional supremacy and independence of the member States.⁵⁹ The extent to which the Community could be considered 'sovereign' or as having 'limited sovereignty' or 'pooled sovereignty' must be interpreted in the context of these areas essential to the expression of constitutional separateness: defence of the constitutional order, internal order, foreign affairs, and security and defence policies. All these areas are organised on the basis of intergovernmental arrangements parallel to the Community's politico-legal framework.

4.2.1 Defence of the Constitutional order

Although constitutional order is hardly a suitable expression for referring only to the legal order established by the Treaties (even in the case of considering them as a Constitution), it can be applied by analogy to examining the extent to which the maintenance of the Treaties is insured. Article 224 recognises explicitly the legitimacy of

measures which a Member State may be called upon to take in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security.

58 Crick, Bernard 'Sovereignty', in Encyclopaedia of Social Sciences (London: Macmillan and Freepress, 1979) p. 78

59 Cf. Howe, *certain important fields remain completely outside the Community relationship; most notably defence, arguably the most important component of sovereignty*. Howe, G. op. cit. p. 687. Some writers have emphasised the point that the Community is building a '*federalisme a l'inverse*': *Tandis que les Etats fédéraux interviennent principalement dans les domaines relevant des attributions régaliennes -défense, relations extérieures, monnaie- la Communauté européenne régit des matieres intéressant directement a la "société civile" (agriculture, transport, etc.)*. Quermonne, J.-L. op. cit.

In the Community framework, this ambit (basically the ambit of the eventual exercise of sovereignty) is preserved for the almost unlimited action of governments. Article 223 refers to the non-applicability of Treaty provisions to goods related to national security, and Article 36 fixes the scope subject to unilateral interdiction and restrictions on export/import: among them, everything related to public order and public security. Community powers are scarce in order to cope with those exceptional situations: Article 224 foresees the possibility of consultations between Member States *to prevent the functioning of the common market being affected* by those measures. Article 225 establishes the possibility of a ruling by the ECJ if the Commission or any Member State considers that another Member State is making improper use of the powers of Articles 223 and 224. Although 'improper use' is not a very lucid expression, it refers to the effect of distorting the conditions of competition within the EC. Whatever the interpretation, this article does not attempt to be a limit to the actions of government in exceptional situations, but only a protection for other Member States from an unfair and unclear definition of exceptionality and the application of subsequent measures.⁶⁰ The ECJ has held a restrictive view on those provisions arguing that they (the provisions of Articles 36, 224 and 226) *deal with exceptional cases which are clearly defined and which do not lend themselves to any wide interpretation*.⁶¹ Nevertheless, the governments, aware of the implicit acknowledgement of security as an almost unlimited scope for action, have shown their readiness to dispose of it. Through a lack of definition of the concept of security, Article 100A.3 & 4 of the SEA adds 'security' to the catalogue of Article 36. It has been pointed out, however, that

*ne s'agit pas ici de la sécurité "publique" - déjà mentionné à l'article 36 - mais de la "sécurité" tout court, ce qui élargit la portée du concept, par exemple à des notions comme celle de sécurité économique, de sécurité des approvisionnements, des normes de sécurité technique ..., dont les vertus protectionnistes sont bien connues.*⁶²

The Community lacks the competencies to secure its own existence independently from the will of the Member States in emergency situations through the granting of emergency powers in which it should find a capacity for decisive, centralised, and, for a time, unquestioned action. Some authors, however, consider that this does not nullify the hypothesis of a Community sovereignty. Louis thus argues the inability of the Community to prevent Member States' evading their

60 Bettatti, Mario 'Le "law-making power" de la Cour' *Pouvoirs* Vol. 48 1989 p. 48

61 Case 13/68 SpA Salgoil v. Italian Ministry for Foreign Trade [1968] ECR 453

62 Bettatti, M. op. cit.

obligations and/or withdrawing from the Community: that such actions would provoke the dissolution of the Community shows only that the Community lacks all the means possessed by States of asserting their will on their own territory, but does not show a fundamental deprivation of sovereignty.⁶³ Needless to say, defence of the constitutional order of the Member States is regulated by their own constitutions.

4.2.2 Internal order

The aspects traditionally covered by Home Affairs Ministries are not explicitly mentioned anywhere in the wording of the Treaties. Pure and simply *matters of criminal jurisdiction are within the reserved powers of the Member States and thus unaffected by the surrender of sovereignty which the EC Treaty has required in other areas.*⁶⁴ Thus, a detailed comparative study on the particular issue of terrorism concluded that *while countries might agree on a prospective unification in the long or medium term, they are unlikely to apply in an early stage of their organization any measure which puts at stake their own sovereignty.*⁶⁵ The exclusion applies to matters such as crime, and drug trafficking and other sensitive areas (immigration), despite progressive Commission involvement in some matters directly concerned with criminal jurisdiction, such as fraud.⁶⁶

The prospects of including those areas under the legal scope of the treaty seemed limited, despite the positive contribution of the Court. The ECJ has limited the freedom of the Member States to use the concept of internal security to limit freedom of movement and/or residence. The court has held that the reliance upon the concept of 'public policy' presupposes the existence of a genuine and sufficient serious threat affecting the fundamental interests of society. Furthermore, the conduct in question should be criminally punishable.⁶⁷

However, the theoretical case for using the Treaty as a legal basis for promoting legislation has been argued by some authors. Freestone concluded that it would have been possible to use certain Treaty articles to legislate on terrorism

63 Louis, J-V. *op. cit.* p. 14

64 Freestone, David 'The EEC Treaty and common action on terrorism' *Yearbook of European Law* Vol. 4 1984 p. 210.

65 Verder, Antonio *Terrorism in Europe: An international comparative legal analysis* (Oxford: Oxford Clarendon Press, 1992) p. 375

66 The Commission has established the Unit for the Co-ordination of Fraud Prevention UCLAF and it has issued a 45-point anti-fraud programme endorsed by the European Council of Madrid in June 1989. EC Bull. 6-1989 point 1.1.4; for the Commission program, see EC Bull. 5-1989. See also Sherlock, A. and Harding, C. 'Controlling fraud within the European Community' *European Law Review* Vol. 16 No. 1 1991

67 This has been established by the Court in the Cases 115, 116/81 *Rezguia Adoui v. Belgian State and City of Liège*; *Dominique Cornuaille v. Belgian State* [1982] ECR 1665

(Article 100, Article 235 and those related to free movement of persons and non-discrimination on nationality grounds) with the general condition that *national measures relating to the control or suppression of terrorism do themselves have an effect on the functioning of the common market*.⁶⁸ Member States have avoided, however, organising these areas on firm legal foundations, despite EP pressure of which the most salient proposal was the creation of a *European Common Judicial Area*.⁶⁹ This was not aimed at establishing a common jurisdiction, legal code or legal process, but at facilitating cooperation in legal matters (particularly, simplification of the extradition procedures and application of the principle *extradite or prosecute*). Attempts to create a European Judicial Space are constrained by two factors: firstly, the enormous gap between the continental countries with tradition of roman law and the British reliance on precedent and common law; secondly, for each Member State *the national penal code and legal apparatus constituted a formidable barrier of vested interest, tradition, and sheer complexity of any new institution building*.⁷⁰ Member States have developed distinctive traditions regarding the role of the state and the relation of the individual with the State as reflected in different policy instruments (for instance, identity cards).⁷¹

The option of creating an EC regime has been resisted and internal order has been reaffirmed in an area of exclusive competence of national governments. In fact, the Final Act of the Conference of the Representatives of the Governments which adopted the SEA confirmed this point in a declaration reading

*Nothing in those provisions affect the right of the Member States to take such action as they consider necessary for the purpose of controlling immigration from third countries, and to combat terrorism, crime, the traffic of drugs and illicit trading in works of art and antiques.*⁷²

The Final Act contains, however, a political commitment to cooperate and thus endorses the trend during the last two decades. Although the case law of the ECJ has established the difference between border controls and police controls⁷³ (which amounts to the distinction between Community competencies and state competencies) it is evident that the EC's competence on customs matters produces a particular grey

68 Freestone, D. op. cit. p. 219

69 Report on the European Judicial Area (Extradition). PE Doc. 1-318/82

70 Hill, Christopher 'European preoccupations with terrorism', in Pijpers et al. (eds.) EPC in the 1980s cit. p. 170

71 Butt Philip, Alan European border controls: Who needs them? p. 3

72 Declaration on articles 13 to 19 of the SEA.

73 Case 321/87: Commission of the European Communities vs. Kingdom of Belgium. ECR [1989] 947

area exemplified by Commission involvement with the customs management of frontiers and its parallel exclusion of frontier policing. In fact, those areas have been organised on a functional fashion in the sidelines of the Community through intergovernmental cooperation⁷⁴ under the EPC framework. The areas of cooperation are governed mainly by informal or paraconstitutional arrangements that have become more important on the eve of the removal of the internal frontiers.⁷⁵ The main frameworks for cooperation are the TREVI Group and the Schengen Agreement.⁷⁶

The TREVI Group⁷⁷ The Group was established in 1976 independently of EC and EPC and it was not incorporated into the SEA. Its aim is to facilitate co-operation at a practical, operational level against terrorism, drug trafficking and other serious and public order problems. Therefore, TREVI lacks any 'constitutional' instrument to organise its work although it approved a Programme of Action in Dublin in June 1990.⁷⁸ Its structure comprises of EC interior and justice ministers and seniors officials who meet regularly. The EC Presidency country becomes *ex officio* TREVI President. The staff is provided by a pentagonal management where the two preceding and the two succeeding presidencies join the current one. However, TREVI lacks a permanent secretariat and this creates problems of coordination. Several proposals have been forwarded for the creation of a permanent secretariat as a kind of EC police force. Although fears of bureaucratisation have

74 As it has been pointed out, the election of an intergovernmental method is an implicit recognition of the potential challenge to the sovereignty of the Member States that a communitarization of such policies would imply. Butt Philip, op. cit. p. 11

75 Within the EC framework, the two more important are the following:

Ad Hoc Working Group on Immigration It comprises Community ministers concerned with Immigration and the Commission is included.

Co-ordinators Group It is made up of senior officials from Member States ministers and deals with aspects no regarded in the Treaties but affected by the 1992 programme. It includes a member of the Commission.

In the view of Lodge, the most important problems are the lack of cooperation and a clear structure of authority between them. Lodge, Juliet 'Frontier problems and the single market' Conflict Studies No. 238 February 1991 p. 25

76 Three levels of cooperation can be distinguished: constitutional and legal matters; operational structures, practices and procedures; and, finally, prevention and detection of specific offences and crime problems. House of Commons Home Affairs Committee Practical police cooperation in the European Community Seventh Report. Session 1989-1990 363-I p. XVI. Evidence provided by the Leicester University Centre for the Study of Public Order.

77 Speculations about the origin of the name are among the favourite issues of the scholars who have dealt with the topic. Two are the explanations proposed: a. TREVI is a French acronym for Terrorism, Radicalism, Extremism and Violence International. b. The name comes from the Rome Trevi fountain next to which the first meeting was held and as a tribute to its first chairman Mr. Fountaine.

78 The evaluations on the lack of founding instrument are controversial. Hill argues that the benefits of TREVI have come through British taste for 'down-to-earth' incrementalism and pragmatism as opposed to grand designs. Hill, C. 'European preoccupations with terrorism. cit. p. 186 Cf. the opinion by Lodge, J. 'Frontier problems and the single market' cit.

impeded such a move, a compromise has been reached: a permanent team of high-level officials in charge of following up TREVI group work will be appointed.⁷⁹ TREVI is divided into four working groups made up of senior officials.⁸⁰

The main value of TREVI has been said to be *its role in developing personal contacts and trust between individual police and intelligence officers of Member countries since really sensitive information will never be thrown into a pool.*⁸¹ Its most salient result was the Dublin Agreement signed in 1979, described as an *unusual agreement whereby a group of states agree to apply among themselves the regime of a Treaty to which the majority are not parties.* Moreover, the agreement lapses when all the EC members accept that Treaty without reservation.⁸² TREVI, therefore, has been considered a very successful anti-terrorism agreement with two major strengths: it provides the machinery and the authority for the operations, and it carries out its work without media attention.⁸³ However, Freestone has considered two main advantages of eventual EC Treaty-based action against terrorism. Firstly, there would be the possibility of review by the ECJ and, secondly and more importantly, those actions would have greater democratic appeal if they *received the sort of exposure and public discussion which draft Community legislation receives rather than if they were considered in camera by the Ministers of Justice and Home Affairs.*⁸⁴ Although an EP resolution has criticised the lack of accountability of TREVI, the issue is settled in the following terms: *TREVI ministers are all responsible to their national parliaments and national states are responsible for the operation of criminal law.*⁸⁵

The Schengen Agreement⁸⁶ As opposed to TREVI, cooperation within the Schengen group is regulated by a legal instrument. The Schengen Agreement comprises 33 Articles in two titles. The first one *Measures Applicable in the Short Term*, include Articles 1 to 16 whilst Title II deals with *Measures Applicable in the Long Term*. In the fields of concern here, the agreement refers, firstly, to the cooperation between police authorities beginning with the exchange of information.

79 Ibid. p. 30

80 TREVI I on terrorism; TREVI II on public order issues; TREVI III on organised international crime; and TREVI 92 on police and security issues of the free movement of people.

81 Clutterbuck, Richard Terrorism, drugs and crime in Europe after 1992 (London: Routledge, 1990) p. 121

82 Freestone, D. op. cit. p. 215. The Treaty in question is the European Convention on the Suppression of Terrorism (ECST) signed in the framework of the Council of Europe.

83 Clutterbuck, R. op. cit. p. 197

84 Freestone, D. op. cit. p. 227-228

85 House of Commons Home Affairs Committee op. cit. p. XXII

86 *Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French republic on the gradual abolition of controls at the common frontiers.* The pertinent aspects dealing with immigration are also examined in Chapter 6.

This will be completed in the long term by discussions on drawing up arrangements for police cooperation (Article 18). The agreement also foresees the examination in the long term of any difficulties in applying agreements on international judicial assistance and extradition.

Although only eight Community Member States are currently parties to the agreement,⁸⁷ it has been thought of as a complement to EC law. The complementarity and reliance upon the Community politico-legal framework is emphasised by Article 40 which makes Community membership a condition of the possibility of becoming a party to the agreement. This does not conceal the fact that the agreement is mainly a traditional international Treaty,⁸⁸ the signatories have considered themselves parties to an international agreement working mainly through the implementation of national legislation in accordance with the respective constitutions. Decisions, adopted by unanimity, need to be transposed into domestic law by means of internal legislative or administrative instruments. The primacy of national law is recognised and, therefore, harmonisation is the main mechanism. Consequently, a very loose institutional structure governs the Agreement; Article 10 foresees meetings between the competent authorities of the parties held at regular intervals. The implementation of the agreement has been entrusted to a Committee of under-Secretaries of State meeting twice yearly. Those meetings are prepared by a central negotiating group that supervises four special working parties: a. security and police; b. movement of persons; c. transport, and d. movement of goods. Needless to say, the agreement is excluded from the jurisdiction of the ECJ and it has raised criticism from the EP because of its democratic shortcomings.

To summarise, cooperation in the areas of home affairs and judicial cooperation has been developed alongside the Community's politico-legal framework in a para-constitutional fashion.

4.2.3 Foreign affairs⁸⁹

⁸⁷ The five initial ones were joined by Italy on 27 November 1990, and Spain and Portugal who signed the Agreement on 25 June 1991. Greece has established contacts with a view to eventual membership.

⁸⁸ See, for instance, the following two opinions: *Although inspired by the principles of the Community, the negotiators did not want to put into question the sovereignty of the states, therefore the intergovernmental approach and the unanimity rule.* Blanc, Hubert 'Schengen: le chemin de la libre circulation in Europe Revue du marché commun et l'union européenne. Similarly, Butt Philip argues *The Schengen agreement is strictly intergovernmental and its detailed negotiations have been pursued in confidential discussions among the five governments.* Butt Philip, A. op. cit. p. 15

⁸⁹ This is not a generally agreed designation to express the external dimension of the Community. A brief exploration of alternative designations as well as their methodological and theoretical implications can be found in Soldatos, P. op. cit. p. 281

The limited international personality of the Community has attached to itself a certain capacity as regards Community foreign policy. However, most authors seem to agree that the Community has largely failed to produce an actor-behaviour and it cannot be strictly considered an actor in international society.⁹⁰ Although the competencies granted by the Treaty are instruments for foreign policy, policy formulation is developed by the Member States. Thus, Keohane and Hoffman argue that the Community can be regarded as an international actor only in the limited fields on which EC central institutions have full jurisdiction, i. e., external trade. In all the other fields, the Member States are usually the actors, because the community lacks Locke's federative powers: *the power to act for the State in international affairs or, to use the correct legal term, external sovereignty.*⁹¹ The creation of European Political Cooperation adds a new dimension to the analysis.⁹²

European Political Cooperation⁹³

The Twelve have achieved through Title III of the SEA a compromise to coordinate national foreign policies and a parallel commitment to achieve a common policy. This compromise is the result of previous commitments gradually developed since the Davignon report⁹⁴ which set down leading principles and institutional arrangements for EPC. The aims were a) to ensure a better mutual understanding of great international problems through the exchange of information and consultations, b) the promotion of the views of the Member States and c) when possible and desirable, the adoption of common actions. Three bodies were designed for its management: the Ministerial Council of Foreign Ministers formally separated from the

90 Taylor, Paul 'The European Communities as an actor in international society' cit. p. 41. In the point of view of Bull, "Europe" is not an actor in international affairs and it will not become one as long it does not provide for its own defence Bull, Hedley 'Civilian power Europe: a contradiction in terms' Journal of Common Market Studies Vol. 21 No. 2-3 1982. Other authors have considered the Community as a "partial" actor, close to the paradigm of "civilian power" Hill, Christopher 'European foreign policy: power bloc, civilian model- or flop?', in Rummel, Reinhardt (ed.) The evolution of an international actor p. 31-55. Finally, Allen and Smith have proposed an alternative categorisation to evaluate the impact on the international stage: presence and Western Europe instead of actor and Community. They conclude that *western Europe presents strong evidence for the politics of presence and of inclusion in the international arena*. Allen, D. and Smith, M. 'Western Europe's presence in the contemporary international arena' Review of International Studies Vol. 16 1990 p. 37

91 Keohane, R. and Hoffman, S. op. cit. p. 279

92 Although an analytical distinction has been made between internal affairs and foreign policy, both are included in EPC.

93 Political cooperation refers both to the attempt to formulate a common Community foreign policy and the host of relations among Member States outside the framework of the Treaties on intergovernmental basis.

94 This report is the result of the agreements of the 1969 The Hague Summit. It is better known as the 1970 Luxembourg report and it was published in the EC Bull. 11/70.

EC General Affairs Council; a Political Committee made up of national directors of political affairs in charge of preparing ministerial meetings, and a liaison officer in national Foreign Ministries.

The second report on EPC, the 1973 Copenhagen Report, set up the COREU network and codified the liaison officers under the name of the Correspondents Group. The Report also established arrangements for the coordination of embassies, but its most important contribution was the elaboration of the role of the Presidency. EPC aims were further extended by reciprocal commitments to consult each other on all important foreign policy questions, as well as refraining from taking final decisions without previous consultations.

The 1981 London Report⁹⁵ defined the EPC goal as 'joint action' and introduced several important organisational innovations: firstly, it noted the incorporation of the Commission into EPC. Secondly, it formalised the Troika system. Thirdly, it introduced the crisis management procedure, through which meetings could be convened in 48 hours. Although this is one of the central mechanisms of EPC, most authors agree in pointing out its general weakness.⁹⁶ Finally, the Solemn Declaration of Stuttgart reaffirmed the commitment to joint action, the principle of prior consultation and the centrality of common positions as reference points for national action.

This development process was explicitly adopted by the SEA. The Act, in its Article 1, established that the enclosed provisions on political cooperation confirmed and supplemented the procedures agreed and the practices established among Member States. The procedural improvements mentioned in Article 30 *are all based on the assumption that European political cooperation is cooperation among sovereign states.*⁹⁷ The reference that Title III makes to the High Contracting parties instead of to Member States has been rightly interpreted as implying *exclusive sovereignty for the signatories in the foreign policy field.*⁹⁸ The evaluation of EPC as established by the SEA and its impact on the Member States sovereignty can be examined along

⁹⁵ EC Bull. Supplement 3/81 p. 19 ff.

⁹⁶ As Bonvicini has put it, 'management' lacks traditional instruments of persuasion, both military and for direct intervention. Bonvicini, Gianni 'Mechanisms and procedures of EPC: More than traditional diplomacy'; in Pijpers, A.; Regelsberger, E.; and Wessels, W. (eds.) European Political Cooperation in the 1980s, A common foreign policy for western Europe? (London: Martinus Nijhoff, 1988) p. 61. Cf. the opinion by Rummel who considers the lack of communality of view and confidence among the Member States themselves the main obstacle to confront crisis. Rummel, Reinhart 'Speaking with one voice and beyond', in Pijpers, A. et al. (ed.) op. cit. p. 118-142.

⁹⁷ Pijpers, A.; Regelsberger, E.; Wessels, W. 'A Common policy for Western Europe', in Pijpers, A. et al.; op. cit. p. 261. More optimistically, Rummel considers that the technique and culture of working together as codified by the SEA represents a value by itself given the troubled history, relationships and heterogeneity of the Member States. Rummel, R. 'Speaking with one voice and beyond' cit. p. 119

⁹⁸ Lodge, J. 'European Political Cooperation: Towards the 1990s' cit. p. 234

three aspects: codification, institutionalisation and juridical articulation on the EC framework.⁹⁹

Codification. The Act has created a legal framework for cooperation on foreign policy between Member States. However, EPC is conceived as a particular set of rules derogating the legal and political characteristics of Community order. Whilst there is agreement that consultation *is henceforward not a political commitment, but a legal obligation*,¹⁰⁰ the discussion focuses on the quality of such obligation. In one extreme, some authors argue that the EPC system previous to the SEA might be regarded as equally legally binding (a 'soft law' construct) and that the SEA has not substantially changed these terms. The real problem stems from the absence of effective enforcement mechanisms.¹⁰¹ In the other extreme, it has been argued that the provisions of Title III, as duly ratified Treaties, *have unequivocal binding force under international law, and indeed, under Community law also*.¹⁰²

The latter is, perhaps, an excessively optimistic evaluation of Title III. In the wording of the article, those obligations include mutual information, consultation, *demarches* of convergence, concertation, search for conformity of national policies in the Twelve's common positions, and search for coherence with the EC external policies. Critics have pointed out that the wording is so general as to raise doubts on their binding character. More importantly, the burden posed is on the fulfilment of certain procedural requirements, but not on the Member States' right to act unilaterally.¹⁰³ For some legal writers, *the intrinsic nature of EPC provisions remains overwhelmingly political and its implementation a hostage to the political discretion of each of the Twelve Member States and the Commission*.¹⁰⁴

This view seems to be confirmed by the evaluation of the EPC performance after its codification by the SEA. It has been rightly pointed out that, after the SEA, the basic rules have been rarely taken very seriously because clashes between the *acquis politique* and areas of a genuine national interest are, without exception

99 This analytical scheme has been taken from Soldatos, P. op. cit. p. 291-297

100 Louis, J-V. op. cit. p. 71

101 Dehousse, Renaud and Weiler, Joseph 'EPC and the Single Act; from soft law to hard law?', in Holland, Martin (ed.) The future of European political Cooperation p. 123 and 131.

102 Freestone, D. and Davidson, S. 'Community competence and Part III of the SEA' Common Market Law Review Vol. 23 1986 p. 796. Cf. P. Soldatos who has argued that *de façon generale, en cas de violation des regles de cette cooperation, les effets juridiques serant ceux qui decoulent du droit internationale* Soldatos, P. op. cit. p. 296, But even the application of any international jurisdictional control on EPC is not a credible option.

103 Dehousse, R. and Weiler, J. op. cit. p. 130 and 137

104 Lak, Maarten W. J. 'Interaction between EPC and EC (external) - existing rules and challenges' Common Market Law Review Vol. 26 1989 p. 282

solved in favour of the latter.¹⁰⁵ Furthermore, one of the major reasons for the stability of the system is precisely the possibility of evading common policies.¹⁰⁶

Finally, the codification of EPC practices has not implied the development of a full set of new instruments. Already before the SEA, EPC counted on three specific tools: statements, which imply a political and unilateral stance towards third parties although without legal value;¹⁰⁷ informal agreements or understandings to organise relations between the Twelve and a third parties (dialogues);¹⁰⁸ finally, formal agreements dealing with both EPC and EC relations.

Institutionalisation. Some authors have regarded the creation of a Secretariat as the main contribution to EPC of the SEA, although conceding that the Twelve did not intend to - and did not create - a political organ but an administrative instance without power on its own;¹⁰⁹ a *light, flexible structure* with two main limitations: it has no budget of its own and operates with a minimal staff.¹¹⁰ Consistently, Title III failed to define precisely the tasks and procedures of the Secretariat, which were fixed in a non-codified way by a Foreign Ministers decision.¹¹¹ The concept behind the Secretariat prevents its growth as an institution able to initiate policy or to defend common principles or *acquis* on EPC before the Member States.¹¹² Keeping policy formulation in all its stages at the national level is the main device retaining EPC in the field of intergovernmental relations under Member States' discretionary use.

Articulation on the juridical framework of the Community. The link between EPC and EC was firstly acknowledged by the 1973 Copenhagen Report, although it asserted the distinction between them. The SEA established a formal link through three instruments. Firstly, the single Treaty covering both EPC and Community places on a legal footing the obligation on Members and applicants to accept both simultaneously.¹¹³

105 Pijpers, A. et al. op. cit. p. 264

106 Ibid. p. 264

107 On the value of the declarations, see Rummel, R. 'Speaking with one voice' cit. p. 120-121

108 On the value of the dialogues organised under article 30 (8) of the SEA, see Nuttall, Simon 'Interaction between European Political Cooperation and the European Community' Yearbook of European Law Vol. 7 1987 p. 244-248

109 Soldatos, P. op. cit. p. 293. Lodge considers that it has the potential to become a more political organ. Lodge, J. 'European Political Cooperation' cit. p. 223

110 Sánchez da Costa, P. op. cit. p. 86

111 Decision of 28 February 1986. EC Bull. 2/86

112 Cf. the opinion by Sánchez da Costa who considers that the Secretariat has a role as guardian of the orthodoxy which, of course, is not extended to the prohibition of particular actions. Sánchez da Costa, P. op. cit. p. 94

113 Nuttall, S. op. cit. p. 212

Secondly, Community organs, the Commission¹¹⁴ and the EP, have become officially involved in the process of political cooperation. Judicial control by the ECJ over EPC is, however, explicitly eliminated by Article 31, although it has been argued that any attempt wholly to exclude judicial scrutiny is condemned to failure since the questions concerning division of competence between EPC and the EC also concern to the ECJ.¹¹⁵ The exclusion of the ECJ is a device to prevent the progressive creation of an area of Community supremacy through judicial control over the Community instruments eventually used to implement EPC decisions and over the EPC procedural requirements.

The involvement of the EP in EPC is established by the formula 'closely associated'. The instruments of control are oral questions, written questions, the colloquy of the EPC presidency with the EP Political Affairs Committee and the report by the President of the European Council. These are weak control instruments which emphasise the fact that democratic control of foreign policy is a constitutional device difficult to accommodate in the intergovernmental structure of EPC.¹¹⁶

Parliament tends to see itself as the EC's international conscience,¹¹⁷ which is particularly important since the SEA does not contain political guidelines or programmes for EPC. Although some principles can be discerned in the EPC line, the complexity of any given conflict and a certain self-induced ambivalence reduce the scope for adjustment of Community foreign policy actions to principles.¹¹⁸

The third instrument is the obligation of consistency between EPC and Community external actions. Basically, this refers to the possibility of using Community instruments and policies to pursue EPC objectives. However, the Act did not provide any practical interaction rule for it. Special responsibility for insuring such consistency is entrusted to the Presidency and the Commission, although without juridical guarantee. This flexible and pragmatic approach has been endorsed by some authors; Lak argues that *at the present there is insufficient negative experience with the existing arrangements to conclude that political urgency exists for an unifying approach*.¹¹⁹ In the point of view of a very authoritative commentator, the acceptance of the use of Community instruments can rather be considered a result of political circumstances than of legal thinking.¹²⁰

114 On the Commission role in EPC, see the work by Nuttall, Simon 'Where the European Commission comes in', in Pijpers et al. (eds.) op. cit. p. 104-117

115 Dehousse, Renaud and Weiler, J. op. cit. p. 136

116 See Bieber, Roland 'Democratic control of foreign policy' European Journal of International Law Vol. 1 1990 p. 148-193

117 Lodge, J. 'European Political Cooperation' cit. p. 230

118 Rummel, R. 'Speaking with one voice' cit. p. 131

119 Lak, Maarten W. J. op. cit. Emphasis is ours.

120 Nuttall, S. op. cit. p. 187

4.2.4 Security and defence

Most of the above analysis of EPC applies also to security. More than anything else, the independent and supreme control of their security and defence assures the sovereignty of Member States. Security issues, after the failure of the EDC, were not included in the treaties. Further, Article 223 prevents the application of Treaty provisions to the armaments industry. Three aspects are addressed in the article: firstly, the right of every Member State not to disclose information; secondly, the principles regulating the free market will not be applied to armaments policy; thirdly, the scope of the article is based on a list drawn up by the Council, which was effectively elaborated in 1958 and was not subsequently been changed.

However, security issues have been progressively dealt with on the sidelines of the EPC framework.¹²¹ As early as 1975, the Commission Report on European Union¹²² called for the alignment of the Member States' defence policies and a common arms policy. The Council response, the Tindemans report,¹²³ proposed the *exchange of views on specific problems in defence matters and on European aspects of multilateral negotiations on security*. However, it was the London Report in 1981 which opened the way to the pragmatic inclusion of security within EPC, by stating that *the foreign ministers agreed to maintain the flexible and pragmatic approach which had made it possible to discuss in political cooperation certain important foreign policy questions bearing on political aspects of security*. Finally, the Solemn Declaration on European Union (Point 1.4.2) set the objective of *coordinating the positions of Member States on the political and economic aspects of security*.

These would also be the terms adopted by the SEA in determining the status of security issues in the EPC framework (Article 30 a, b and c). Whilst the political aspects of security are covered by the framework and instruments of EPC, economic aspects provide a new field for eventual Community action, mainly regarding the defence industry. On the other hand, the Act consolidated the exclusion of the military

121 See a theoretical discussion of the emergence of the so-called "security paradigm" in Tsakaloyannis, Panos 'The EC: from civilian power to military integration', in Lodge, J. (ed.) The EC and the challenge of the future cit. p. 241-254. The theoretical optimism of Tsakaloyannis is questioned by the opinions of realist authors arguing, for instance, *the absence of an autonomous common European defence with a correspondingly integrated military capability should be interpreted as a (specific) kind of security policy* and the emergence of an integrated European defence system would endanger the stability of the existing balance of power Pijpers, A. 'European Political Cooperation and the realist paradigm', in Holland, Martin (ed.) The future of European political Cooperation p. 22-23. Cf. the opinion by Bull fn. 23

122 EC Bull. Annex 7/75 p. 25

123 EC Bull. Annex 1/76

aspects of security (i.e., defence), despite the on-going pressure from the EP to include these.¹²⁴

Firstly, the parties committed themselves *to coordinate their positions more closely on the political and economic aspects of security*. Secondly, the parties are determined *to maintain the technological and industrial conditions necessary for their security*. Thirdly, there is an explicit acknowledgement of the symbiotic relationship with NATO and WEU:

Nothing in this Title shall impede closer co-operation in the field of security between certain of the High Contracting Parties within the framework of the Western European Union or the Atlantic Alliance.¹²⁵

The legal bases provided by Title III of the SEA are further amplified by Article 6.b which says that the Member States

are determined to maintain the technological and industrial conditions necessary for their security. They shall work to that end both at the national level and, where appropriate, within the framework of the competent institutions and bodies.

Some authors have stressed the point that a combination of the Preamble and dispositions in Titles II and III would provide what has been called a "back-door" for security policy.¹²⁶ the legal basis for the liberalisation and harmonisation of arms procurement.¹²⁷

The reference to the economic aspects of security can be interpreted as a codification of the Community propensity to deal with issues of defence industry.¹²⁸ Thus, the 1975 Commission Report on European Union had called for a common

124 Thus, the EP argued that *the political, economic and military aspects of security are interrelated and cannot be considered in isolation*. Resolution on the prospects for security policy cooperation following the entry into force of the SEA. PE Doc. B 2-960/88 OJ No. C 326/85.

125 The Dooge Committee had recommended the inclusion in the IGC of the following topics: arms control, equipment cooperation, arms technology, external threats and strategic doctrines.

126 Kirchner, Emil 'Has the Single European Act opened the door for a European security policy?' Journal of European Integration Vol. 13 No. 1 1989 p. 13

127 Grunert, Thomas 'Establishing security policy in the European Community', in Rummel, R. (ed.) The evolution of an international actor p. 110-111

128 This practice has been called *roundabout angle*; Bonvivini, Gianni 'The political and institutional aspects of European defence' The International Spectator Vol. 23 No. 2 1988 p. 113, or *indirect approach*; Story, Jonathan 'La Communauté Européenne et la défense de l'Europe' Studia Diplomatica Vol. 61 No. 3 1988 p. 271. On this see, in general, Collet, André 'Le développement des actions communautaires dans le domaine des matériels de guerre, des armes et des munitions' Revue Trimestrielle Droit Européenne Vol. 26 No. 1 1990 p. 75-84.

arms policy under a 'European Arms Agency'.¹²⁹ Less ambitious, the Tindemans Report proposed *the cooperation in the manufacture of armaments with a view to reducing defence costs, and increasing European independence and the competitiveness of its industry*.¹³⁰ The issue was picked up again by the Commission in the Davignon-Greenwood Report.¹³¹ The report argued in favour of the coordination of national arms production policies and, furthermore, denounced the special regimen of the arms industry (Article 223). In its view, the distinction between the armaments industry and civil industries was superficial. Therefore, the armaments industry should be under the same rules as the other sectors.

The impossibility of bringing defence industry policy under the Community legal framework is due to the fact that the principle orienting Community industrial policy (i.e., free competition) is not compatible with the particular requirements of the defence industry. On the principle of the free market, optimal economies of scale are so great in some areas of armaments production that competition would eventually lead to a situation of natural monopoly.¹³² This situation would be unwieldy, given the prevalence of divergent national priorities dictating what should be produced and under what conditions. Secondly, national public procurement in defence is excluded from Community scope, although the Commission has shown interest in including this in the framework of the EC Treaty and SEA.¹³³ Obviously, standardisation of procurement practices would require a prior agreement on the strategic use of the armaments and this, in turn, requires the acceptance of a common policy identifying threats and prescribing responses.

On the other hand, the impact that the broadened legal basis introduced by the SEA could have is limited and provisions of Article 223 still predominate.¹³⁴ Two

129 EC Bull. Annex 5/75. This view was also endorsed by the Gladwyn Report which abrogated the standardisation of defensive armaments within the EC through an Armaments Procurement Agency. Report on the effects of a European foreign policy on defence questions PE Doc. 429/74

130 EC Bull. Annex 1/76. p. 17-18

131 In the Klepsch report, the EP asked the establishment of contacts between the Commission and NATO's IEPG for developing programmes in the field of armaments. The Report called also for common military research and development, as well as arms standardisation. Report on European armaments procurement PE Doc. 1-83/78

132 Moravsick, Andrew 'The European armaments industry at the crossroads' Survival Vol. XXXII No. 1 Jan/Feb 1990 p.65-85

133 This was indicated by the Commission in its communication to the Council on a Community regimen on procurement in the excluded sector COM (88) 376 final par. 371-372 p. 88-89. Although the Commission proposed guide-lines for other sectors, it did not do so for defence procurement.

134 The Commission was called by the EP to clarify the interpretation of Article 223 and Title III of the SEA in order to develop a common arms market. Also, it was asked to draw up proposals for a common arms market and a common arms sales policy, to scrutinise Member States' arms exports and to publish a report annually. EPC is asked to develop a common arms sales policy and to issue a declaration setting out the principles of a common approach to arms sales. Resolution PE Doc. A 2-0348/88 OJ No. C 96/34 17.4.89. Ford Report The report proposed the following principles guiding arms sales policy at Community level:

cases illustrate this point. The Commission forwarded in 1988 a proposal on the suspension of import duties on certain military equipment, a proposal that did not reach a Council decision.¹³⁵ It intended the introduction of a Community scheme of tariff suspension to end divergent national practices prejudicing the Community's industrial policy and creating budgetary inequalities. The Commission pointed out that its proposal sought a reasonable balance between the requirements of the defence of the Community as a whole and the economic interests of Community producers of military equipment. Interpreting the provisions of Article 6.b, the Commission argued that *any measures taken to relieve imports of military equipment from import duties should not prejudice the development of strong defence industries within the Community*. The Commission saliently pointed out that the EC defence industries have not yet achieved the economies of scale essential to enable them to compete on even terms with major defence suppliers (i. g., the US). Pressure from defence ministers led to a postponement of the decision.

The second case is that of the precursors of chemical weapons. Following evidence that chemical weapons had been used in the Iran-Iraq war, the Commission put forward a proposal in 1984 on the basis of Article 113. Some coordinated national actions were adopted, but the Council failed to legislate on the topic. The reason alleged was that precursors of chemical weapons were too close in nature to weapons to be allowed to fall within Community jurisdiction.¹³⁶ The regulation was, however, finally adopted in 1989 because of German pressure and urgent political needs.¹³⁷

Security and defence policy remain fundamentally under the exclusive discretion of the Member States. The SEA has provided some basis for the treatment of certain technical aspects of the policy, leading to the illusion that *political union, with a strong central authority, is not a prerequisite for security policy*.¹³⁸ Once again, realistic thinking provides a more conclusive opinion: *a defence Community would require a leap toward a more powerful central institutions*.¹³⁹

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- The security needs of the Community.
 - The real need and likely purpose of the arms purchase.
 - The state of democracy and the respect of human rights in recipient countries.
 - The need to limit countertrade

135 Proposal for a Council regulation temporarily suspending duties on certain weapons and military equipment COM (88) 502 final 15.9.88

136 Nuttall, S. op. cit. p. 228

137 Nuttall, Simon 'Interaction between European Political Co-operation and the European Community' Yearbook of European Law Vol. 8 1988 p. 171-173

138 Kirchner, E. op. cit. p. 1

139 Hoffman, Stanley 'Reflections on the Nation-State in Western Europe today' cit. p. 37

4.3 SOVEREIGNTY OF MEMBER STATES AND THE DEFINITION OF POLITICAL UNION

The constitutional framework of the Community embraces only a reduced number of areas. Even in these areas, it is difficult to claim a final derogation of the ultimate sovereignty of the Member States. The Community has developed a limited international personality, but this in no case amounts to the recognition of a partial independence. On the other hand, the independence of the Member States seems latterly to be guaranteed by their formal capacity to withdraw from the Community. The exercise of exclusive supremacy and independence in decision-making over the inalienable areas of sovereignty is becoming increasingly constrained by factors such as interdependence, the expansive logic or *spillover* effect of the integration process and even cooperative tendencies among Member States. These factors might explain the emergence of arrangements on the sidelines of the Community constitutional framework aimed at organising those areas.

The problem, at this point, is the definition of the concept of union assuming on the one hand the Community constitutional foundation and, on the other, the mistrust of Member States in placing the competencies related to their sovereign status under such a framework and, therefore, ceasing to be sovereigns. From a politico-legal point of view, the question rests on the definition of a structure that could bring together the Community's constitutional framework and arrangements based on public international law. The principles for this are the keeping of informal commitments or else to base them on international law instruments rather than on the Community order. Since the defence and preservation of national sovereignty of the Member States is better served with an intergovernmental arrangement, the main threat to such a solution is the design of institutions or procedures that could formulate a common interest. The extension of this order to the areas of internal order, defence of the constitutional order, and defence and security policy would imply a definitive disappearance of the Member States as sovereign entities.

This chapter has shown that the Community cannot be considered a sovereign entity, despite that it has a limited international personality. It has been argued that Member States remain sovereigns and the retention of the formal capacity to withdraw is the best proof of it. The chapter has examined, then, how the exercise of competencies and/or the decision-making process within the Community has been related to the concept of sovereignty. In contrast with this proposal, it has been argued that these areas essential to Member States sovereign status (defence of the constitutional order, foreign affairs, defence) are outside the Community politico-legal

framework. They may be organised through intergovernmental cooperation in a paraconstitutional fashion.

Next chapter examines whether the prevalence of the link between individuals and Member States, which is the source of sovereignty, has been weakened through the development of some elements of citizenship within the Community's politico-legal framework.

5 ELEMENTS OF CITIZENSHIP IN THE EC¹

- 5.1 The internal dimension of citizenship.
 - 5.1.1 Political rights within the EC.
 - a. Citizenship and voting rights in EP elections.
 - b. Citizenship and voting rights in local elections.
 - c. Voting rights in national elections.
 - f. Referendum.
 - e. Right of Petition.
 - d. Right of access to public office.
- 5.2 The external dimension: citizenship *vis-à-vis* third parties
 - 5.2.1 Representation of citizens outside the Community
 - 5.2.2 The status of nationals from non-Member States.
- 5.3 Citizenship without a political subject

The introduction has examined how functionalism, neofunctionalism and communications theorists have focused on the attitudinal dimension of the role of the individuals around the question of the transference of loyalties.² These arguments are not going to be repeated here; in general, they accept implicitly Deutsch's concept of security community, which is based on the perception of the decreasing likelihood of the use of violence as a means of settling the conflicts between the peoples in the community. Without denying the importance of the attitudinal dimension, the concern of his research is the establishment of a criterion that might define the politico-legal link between individuals and the integration entity; a link which incorporates the formal procedures to transform attitudinal and behavioural expectations into a political input (for instance, legitimacy). Not surprisingly, authors who have attempted to re-create categories (such as nation or people) embodying both the attitudinal and formal dimension at a European level describe them as an indeterminate grouping of individuals.³ In a similar fashion, authors who start from the attitudinal and socio-psychological dimension conclude, logically, the impossibility of generating a political subject out of such an amalgam.⁴ In accord with the formal approach of this thesis, this chapter examines the quality of the political link created between individuals and Community.

The concept of citizenship is a relatively new one in the Community's area. As Mancini has accurately pointed out, the reference that the Treaty makes to several peoples (instead of a single one) implies that *the Rome Treaty does not recognize a*

1 Parts of this Chapter and of Chapter 10 have been published, in a different version. See Closa, Carlos 'The concept of citizenship in the Treaty on European Union' Common Market Law Review Vol. 29 No. 6 1992 pp. 1137-1169

2 See Chapter 1, Section 1.2.3

3 Friedrich, C. Europe. An emergent nation cit.

4 See, for instance, Smith, Anthony D. 'National identity and the idea of European unity' International Affairs Vol. 68 No. 1 1992 pp. 55-76

*constitutional right to European citizenship; citizenship remains the prerogative of the Member States.*⁵ Citizens of a Member State are still regarded as 'aliens' or 'foreigners' by other Member States and they may suffer discrimination in those fields of activity not protected by Community law (for instance, political rights). However, an incipient and partial form of Community citizenship has been developing due to two parallel facts: one concerns the rights that the process of progressive completion of the internal market have granted to individuals, regardless of their nationality; on the other hand lies the need to differentiate those individuals from citizens from non-Member States. The idea of citizenship, therefore, has been built simultaneously on internal and external dimensions.

5.1 THE INTERNAL DIMENSION OF CITIZENSHIP

Terms such as 'Community citizen', 'market citizen' or 'European citizen' are broadly used to describe individuals as being subject to Community law. On this line, for instance, Evans holds that 'national of a Member State' or the widely used synonym of 'Community national' *may be a Community concept, definable in accordance with the requirements of Community law and to which the benefits of European citizenship may suitably be attached.*⁶ This limited form of citizenship is restricted to the relations between the individual and the Community covered by directly applicable Community law. Some authors have even built a concept of European citizenship through analogy with the US federal model; Durand considered that the Community would be able to generate such citizenship on the basis of the principle of free movement of people since, in his opinion, the most important privilege of US citizenship is the right to pass freely between States.⁷

This interpretative line was opened by Plender contemporaneously with the appearance of the concept of citizenship in the Tindemans Report on European Union.⁸ Plender reasoned that an incipient form of citizenship (i.e., *a common European definition of a class of persons akin to citizens which bases are provided by the Treaties*)⁹ should develop three features:

⁵ Mancini, G. F. 'The making of a Constitution for Europe' cit. p. 596

⁶ Evans, A. C. 'European citizenship: a novel concept in EEC law' The American Journal of Comparative Law Vol. 32 1984 p. 688

⁷ Durand, Andrew 'European citizenship' European Law Review Vol. 4 1979 p. 6. Evans also regards this freedom as a particularly important feature of the EC citizenship, equivalent to that of the US. Evans, A. C. 'European citizenship' cit. p. 689

⁸ *Towards European citizenship*. EC Bull. Supplement 7/75. It reproduced the opinion of the Commission on the implementation of points 10 and 11 of the final communiqué of the Paris Summit, regarding, respectively, a passport union and the granting of special rights. The opinions were firstly issued in COM (75) 321 final and COM (75) 322 final.

⁹ Plender, R. 'An incipient form of European citizenship', in Jacobs, Francis (ed.) European law and the individual (Amsterdam, Oxford: North Holland Pub. Co., 1976) p. 41

- a. A class of persons defined by a common (European) criterion;
- b. The enjoyment of some consequential privileges by those persons (including the right of free movement through the common European territory);
- c. The abolition of discrimination between those persons on the grounds of nationality in cases in which they seek to assert their consequential privileges or rights.¹⁰

Despite these reputed opinions, a hypothetical European citizenship at this stage of development cannot be considered as being equal or equivalent to national citizenship.

Firstly, certain features of citizenship on the national level are lacking at the Community level. Evans, for instance, points out that the duty of military service cannot be an incident of European citizenship since the Community is not responsible for defence.¹¹

Second, and more importantly, the condition of European citizens is not an automatic and universal one. Indeed, the UK and Germany have made declarations defining the persons who qualify as their nationals for Community law purposes but, even so, awkward situations have not been avoided. Thus, Gibraltar citizens were also Community citizens in relation to all the effects of Community law, but they were deprived of voting rights in the election of British representatives in the EP.¹²

In the Community, individuals are bearers of rights *qua* nationals of a Member State and *qua* economic agents. This is particularly evident regarding such basic rights attached to citizenship as, for instance, the right of residence from which certain categories of EC individuals were excluded. Aware of this, the Commission firstly proposed a directive on the subject in 1979.¹³ The Council, however, failed to produce a decision, despite the recommendations of the Adonnino Committee when it sustained that *the right of a citizen of a Member State of the Community to reside in any other Member State of his free choice is an element of the right to freedom of movement*.¹⁴ The Commission withdrew its proposal in 1989 and introduced three new ones that made particular the benefiting groups (students and retired workers).¹⁵

10 *Ibid.* p. 41. Evans takes from Plender the first two features in his own concept of citizenship Evans, A. C. 'European citizenship' cit. p. 648. See also the more descriptive account by Blunnan, Claude 'L'Europe des citoyennes' Revue du Marché Commun et l'Union européenne No. 346 1991 pp. 283-292

11 Evans, A. C. 'European citizenship' cit. p. 685

12 See Motion for a Resolution on the denial of votes in the European elections to EEC citizens in Gibraltar. PE Doc. 2-396/84. Annex I to the Bocklet Report.

13 Commission proposal for a Directive on the Right of residence of nationals of the Member States on the territory of another member State. COM (79) 215 final.

14 A people's Europe Reports from the *ad hoc* committee. EC Bull. Supp. 7/85 p. 14

15 Commission proposal for Council Directives on the right of residence for students, on the right of residence for employees and self-employees who have ceased their occupational activity, and on the right of residence COM (89) 275 final

Although the Commission's aim was to achieve a general freedom of movement, the new proposals were still based on the position in the cycle of production of the individual. The EP argued that entry and residence are granted as a corollary to and necessary consequence of the exercise of economic activity.¹⁶ The view of the Parliament is that the right should be restricted only on grounds of public policy, public security or public health foreseen in Articles 48 (3) and 56 (1) of the EEC Treaty. Seeking the EP's support, the Commission used the cooperation procedure, which allowed the Parliament to change the legal basis of the proposal on residence (Article 7 for Article 100), since it considered that non-discrimination on grounds of nationality was a sufficient legal basis.¹⁷ Finally, the Council approved three Directives¹⁸ recognising the right of residence even though this was subject to the general condition that would-be residents have sufficient resources to avoid becoming a burden on the social security system of the host Member State. Therefore, the Community has been partially able to dissociate the right of residence from the exercise of economic activity, although this is not absolute: residents covered by the directives mentioned above must obtain a *Residence permit for a national of a Member State of the EEC*, the duration of which may be limited to five years yet on a renewable basis. As will be discussed below, the solution to the question of the right of residence is an *a priori* intrinsic to the universalisation of political rights.

Political rights are precisely the third incomplete feature in Community citizenship and, strictly, the one determining Community failure. As has been pointed out, in view of the nature of the Community's State-like work, *constitutional principle would seem to demand that the relationship between individuals in the Community and the Community itself should develop into one of citizenship*.¹⁹ In domestic law, the term 'citizen' applies only to persons in possession of full political rights.²⁰ Analogously, Evans has argued that the concept of Community citizenship implies, along with the full liberalisation of movement, political participation in the work of the Community.²¹ Political rights guarantee the possibility to influence state

16 Report on the proposal from the Commission to the Council for a Directive on the right of residence for students. PE Doc. A 3-77/89

17 See Report on the proposal from the Commission to the Commission to the Council for a Directive on the right of residence PE Doc. A 3-89/89. van Outriev Report

18 Council Directive of 28 of June 1990 on the right of residence (90/364/EEC) OJ No. L 180/26 13.7.90.

Council Directive of 28 of June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity (90/365/EEC) OJ No. L 180/28 13.7.90

Council Directive of 28 June 1990 on the right of residence for students (90/366/EEC) OJ No. L 180/30 13.7.90

19 Evans, A. 'Nationality law and European integration' *European Law Review* Vol. 16 No. 3 1991 p. 197

20 Van den Berghe, G. *Political rights for European citizens* (Aldershot: Grower, 1982) p. 165

21 Evans, A. 'Nationality law' cit. p. 199

policy, exclusively reserved to nationals.²² European citizenship, as formerly described, does not imply the existence of a political relationship between individual and Community akin to those existing between Member States and their nationals.²³ Regardless, some authors have argued that one of the constitutive elements of the Community political system is the existence of a political community composed of the groups and populations of the Member States.

Political rights are the essential element for the creation of a constituent power and the legitimate source for exercising political determination directing the integration process. Moreover, the principle of universal suffrage is one of the common pillars of the political systems of the Member states. In the EC framework, universality would imply that all residents, irrespective of nationality, are included in the electorate (provided they are nationals of any Member State).

5.1.1 Political rights within the EC

One of the first attempts to define citizenship within the EC framework established that *citizenship is basically a political concept which was substituted by the term national, which always is used in Community texts.*²⁴ This Report fixes two main elements for the development of the concept of European citizenship: a passport union and the granting of 'special rights', a euphemism covering the political rights to vote, to stand for election and to become a public official in the Member States.²⁵ The political character of these 'special rights' was further recognised by the Adonnino Report. In its view, the participation of the citizen in the political process within the Community should be two-fold: in the Community itself and within the Member States. The first dimension involved the introduction of a uniform election procedure and the reinforcement of the citizens' right of petition. The second dimension would eventually lead to the question of voting rights in local elections regardless of nationality.²⁶ On the other hand, the EP called for the adoption of a Charter of Citizens' Rights to sanction the new specific rights laid down in Community law together with human rights in the traditional sense.²⁷ Finally, the ESC also considered that the construction of a People's Europe demanded the solution of three main problems: the creation of a Community citizenship which is clearly defined and independent of nationality; the promotion of a standard procedure for EP elections

22 Evans, A. C. 'The political status of aliens in international law, municipal law and EC law' International and Comparative Law Quarterly Vol. 30 1981 p. 31

23 Van den Berghe, G. op. cit. p. 3

24 EC Commission Towards a European citizenship EC Bull. Supp. 7/75 p. 26

25 Ibid. p. 28

26 A people's Europe cit. pp. 19;20

27 Resolution on a People's Europe Doc. B 2-676/88 OJ No. C 262/40 10.10.88

based on voting rights in the Member State of residence, and, thirdly, the participation of EEC citizens in intermediary elections.²⁸

As has been rightly pointed out, the denomination 'special rights' attempts to emphasise that these rights are distinct from those already secured under the Treaties.²⁹ The underlying purpose was, ultimately, to reserve this ambit for the discretion of intergovernmental arrangements.³⁰ Nevertheless, the activist role of the Court has been again decisive in restricting the freedom enjoyed by the Member States under international law.³¹ Community law has begun to guarantee freedom for political activity of the kind already enjoyed by nationals of the host Member State for citizens from any Member State.

Community nationals can no longer be expelled from a Member State for failure to respect the obligation of political neutrality, although it is not established that restrictions on political activities which do not amount to a negation of the right of residence are prohibited.³²

More precisely, the limitations to political activity are related to the central political rights: voting rights mainly reserved for the nationals of Member States.

A. Citizenship and voting rights in EP elections.

The significance of European elections regarding the question of citizenship cannot be over-valued. Strictly speaking, there is no single European people to be represented in the Parliament elected through direct ballot, even though the European Parliament has occasionally made reference to the existence of a single people unified through the exercise of voting rights.³³ Since the EP is not an institution in charge of actualising a hypothetical European sovereignty in the daily legislative process, the constitutional link between citizens and sovereignty is missing. Differently from any other parliament, universal suffrage does not actualise sovereignty.

The legal instrument regulating the European parliament elections, the Council Act of 1976,³⁴ does not operate or provide for a concept of single citizenship. This

28 ESC Opinion OJ No. C 71/2 20.3.89

29 Evans, A. C. 'European citizenship' cit. p. 681

30 Cf. the critical opinion by Evans *the rights and freedoms entailed by European citizenship are best regarded more as a branch of the fundamental rights that form an integral part of Community law than as 'special rights'* Evans, A. C. 'European citizenship' cit. p. 683

31 Evans, A. C. 'The political status of aliens' cit. p. 34

32 Evans, A. 'Nationality law and European integration' cit. p. 206

33 See for instance, Resolution on the procedures for consulting European citizens on European political union PE Doc. A 2-106/88 OJ No. C 187/231 18.7.88

34 ACT concerning the election of the representatives of the Assembly by direct universal suffrage OJ L 278 8.10.1976

has inspired radical opinions which argue that Article 7 (1) of the Act may allow Member States to prohibit resident nationals of other Member States from participating in such elections held in their territories.³⁵ Voting rights are circumscribed to nationals or citizens of each state and only exceptionally are citizens from another Member States allowed to participate. The reservation of the political domain for the Member States' own nationals is based on the presumption that *the "foreigner", being a guest in the country, has to observe political neutrality and, therefore, cannot claim to be in the possession of a right which he is able to exercise.*³⁶ The same reasoning can be applied at Community level. Whereas the EP is involved in EC legislation and the Member State is bound to apply it, granting voting rights to aliens could be interpreted as giving them a possibility to influence state policy.³⁷

The practical result of these theoretical arguments has been that gaps in domestic legislations have provoked the exclusion of some groups of citizens from the EP elections,³⁸ despite the appeal issued by the Council *to fulfil the objective that all nationals of Member States should have the right to vote in the elections of MEPs, either in their country of origin or in their country of residence.*³⁹

The active right (i.e., right to vote) is granted to these residents who are citizens of another Member State only by Belgium, Ireland and the Netherlands. In this last country, the right is granted only provided that individuals could not vote in their respective Member State because of the very fact of their residence in the Netherlands. As has been put forward, residence is only a principle secondary to the nationality one,⁴⁰ in accordance with citizenship laws in the Member States. On the other hand, the passive right, i.e., the right to be elected and to stand for election, is, in most Member States reserved for their own nationals. The exceptions are Italy, and the UK (which grants the right to vote to Irish nationals only).

Although the initiative for the elaboration of a uniform procedure is granted by the Treaty to the EP,⁴¹ the EP's proposals have not gone much further. More

35 Evans, A. 'Nationality law' cit. p. 207. Evans continues to argue that *in laying down detailed rules to govern direct elections under Article 7 (10), Member States may be in violation of existing Community law obligations to the extent that they exclude resident nationals from other Member States. In a elegant theoretical exercise, he concludes that in the context of Community law, fundamental rights of nationals in their own State (i.e., voting rights) may become available, at least for Community nationals throughout the Community.*

36 van den Berghe, G. op. cit. p. 43

37 Evans, A. C. 'The political status of aliens' cit. p. 37

38 A most notable exception was for instance the whole population of Gibraltar. See note 12 *supra*

39 EC Bull. 5-1983 point 2.4.7

40 van den Berghe, G. op. cit. p. 137

41 Article 138 (3) EEC Treaty and Article 7 (1) of the Act of 20 September

concerned with the problem of a uniform representation system,⁴² the Parliament has relegated the development of a concept of citizenship that could dissociate nationality from the effective exercise of political rights, even though the EP has been conscious that the procedure has a constituent function, provides basis for legitimacy and is a method of attaining representation.⁴³ The EP Draft Act adopted in 1982⁴⁴ refers in its Article 1 to the 'people of the states' and it proposes granting voting rights on basis of nationality and not of residence. Article 5 stated that voting rights had to be granted by the Member State of which the individual was a national regardless of their residence. The passive right (to stand for election) was proposed to be extended, however, to any national from Member States residing in the host country for five years. Predictably, the Council failed to adopt the Act.

Similar arguments on eligibility were reproduced by the Proposal for a First Act on a uniform electoral procedure, passed in 1985.⁴⁵ The proposal attempted only to disallow the denial of voting rights retained by some Member States for those of their own nationals not residing in national territory (Articles 2 and 3). An attached opinion by the Legal Affairs Committee held that *the right to vote and to stand for election should depend on a given period of residence in a country rather than on nationality*.⁴⁶ Regardless of the desirability of such option, the Committee chose, however, to adopt a more realistic position in view of the existence of pre-established national quotas: the Committee conceived of the EP as composed of national delegations. Not surprisingly, given its cautious and minimalist approach, the EP has failed to separate citizenship from nationality, and it has also failed to base the principle of universality on residence.

Contemporary to the IGC, the EP approved another resolution that finally endorsed this principle. Along the lines of this text, any national of a Member State would be entitled to vote and to stand for election in the Member State in which they had maintained their main residence for at least the previous year.⁴⁷

42 See a brief account focused in the question of the representation system in Millar, D. 'A uniform electoral procedure for European elections' *Electoral Studies* Vol. 9 1990 p. 37-44

43 Report on a Draft uniform electoral procedure for the election of the Members of the European Parliament. Bocklet Report. PE Doc. A 2-1/85 22.3.85. Opinion attached by the Committee of Legal Affairs and Citizens' rights p. 22

44 Proposal for a decision on a Draft Act on a uniform electoral procedure. OJ No. C 87/61 5.4.82

45 Bocklet Report, cit.

46 Opinion by the Legal Affairs and citizens' rights Committee. Ibid. p. 27

47 Resolution of 10 October 1991 on the European Parliament's guidelines for the draft uniform electoral procedure. Doc. A 3-0152/91 OJ No. C 280/41 28.10.91

B. Citizenship and voting rights in local elections

The most important difference between local elections and EP elections is that the latter concern one of the Community institutions while the former are related to organs of the Member States. However, both types have become grouped together under the label of 'second class elections'.⁴⁸ This analytical distinction is reinforced by the belief that only in the first class elections do citizens exercise a real political determination.

The Commission has been conscious of this difference. Although the idea of granting voting rights in local elections was anticipated by the 1978 Community Action Programme for immigrant workers and their families,⁴⁹ the Commission started to monitor seriously the question only in a Report to the EP after the entry in force of the SEA.⁵⁰ The Commission opined that

*political elections (parliamentary and presidential elections, referenda) play a part in determining national sovereignty. The Community is not intended to impinge on national sovereignty, or to replace states or nations. That would come from a federalist process which is not provided for in the existing Treaties.*⁵¹

Consistently with this argument, the Commission proposal on voting rights in local elections⁵² sustained the view that it would be logical to exclude municipal councillors from other nationalities if they were to have a hand in nominating parliamentary assemblies (for instance, the Senate in France). The reason invoked is that a Parliamentary Assembly is involved in the exercise of national sovereignty, reserved to nationals.

The presumption that has supported successive attempts by the Commission to obtain a piece of legislation on the matter was the following: since local elections are not involved in the expression of national sovereignty, they fall within the scope of the Treaties. This opinion has been also shared by some other authors; Evans, for instance, argues that *the enactment of Community measures securing rights to*

48 Reif, K. and Schmitt, R. 'Nine second-order national elections. A conceptual framework' European Journal of Political Research Vol. 8 1980 p. 3-44. For an application of the same conceptual analysis to the second EP elections, Reif, K. H. (ed.) Ten European elections (Manheim: University of Manheim, 1985)

49 OJ No. C 34/ 14.1.76

50 Voting rights in local elections for Community nationals. Report from the Commission to the European Parliament transmitted for information to the Council in October 1986. COM (86) 487 final

51 Ibid. p. 9

52 Proposal for a Council Directive on voting rights for Community nationals in local elections in their Member States of residence COM (88) 371 final 11.7.1988

participate in domestic elections does fall within the scope of the Treaty in that it may be achieved under provisions such as Article 235.⁵³ Although voting rights in local elections were an early Council objective,⁵⁴ it initially held the view that there was nothing in the Treaties that could offer a power of action regarding political rights.⁵⁵ This view was, of course, challenged by the EP which considered that Articles 2, 3c and 235 could allow the right to vote to be deemed one of the objectives of the Treaty. Thus, in an earlier Resolution on voting rights for local elections, the EP had opined that although the EC Treaty had not provided the necessary powers, complete equality of treatment between citizens, whatever their nationality or residence, was an inherently essential objective of a Community whose ultimate aim is political integration.⁵⁶ A later EP resolution reiterated its opinion that all citizens of the Member States should be accorded equal voting rights in the territory of the European Community.⁵⁷ The question resurfaced in the Adonnino report when it recommended the pursuit of discussions on voting rights in local elections for citizens of any Member State on equal footing with nationals of the host country.⁵⁸

Against this background, the Commission produced a report on voting rights in local elections.⁵⁹ In it was proposed a response to a central question: *Allons-nous vers une nouvelle citoyenneté détaché de la nationalité?*⁶⁰ The central argument was that citizenship is dissociated from the national limits attached to a given nationality, since citizenship of a Member State confers rights also in the other Member States. The Commission's opinion sustained that (in the ambit of the Community), the right of residence is granted to anyone who wants to take advantage of it and, therefore, is no longer at the discretion of the state.⁶¹ On the other hand, the SEA had modified the terms in which the problem of the juridical foundation was posed by giving a *political* dimension to Community objectives.⁶² Although the IGC had discussed a Danish

53 Evans, A. C. 'European citizenship' cit. p. 709

54 Mabile, Xavier 'Droit de vote et nationalité' Courrière hebdomadaire du CRISP No. 1290 1990 p. 16

55 Towards a European citizenship cit.

56 Resolution on the right of citizens of a Member State residing in a Member State other than their own to stand for and vote in local elections. OJ No. C 184/28 11.7.83.

57 Resolution on the right of nationals of other Member States to vote and stand in local government and European parliament elections in their country of residence. Doc. B 2-1165/85 rev. OJ No. C 345/82 31.12.85

58 A people's Europe cit.

59 Voting rights in local elections for Community nationals COM (86) 487 final p. 7

60 Etienne, Bruno 'Le grand marché civique Européen' Environnement Européen No. 7 1989 p. 119

61 Evans opines that *the scope of the powers of exclusion or expulsion permitted by Community law is becoming so limited that these powers seem akin to those which national authorities possess under domestic law to restrict the movement of citizens of a State within the territory of that State* Evans, A. C. 'European citizenship' cit. p. 701

62 Mabile, X. op. cit. p. 18. On the same opinion, see Lobkowick, Wenceslaw de 'Un droit de vote municipal pour tous les Européennes' Revue du Marché Commun No. 322 1988 p. 608

proposal to introduce provisions under Article 66 tending to grant voting rights in local elections, the text of the Act did not adopt the proposal.⁶³ However, the commitment to democracy established in the Preamble of the Act allowed the Commission to conclude that Articles 235 and 236 of the Treaty provided enough legal basis for granting voting rights in local elections to any citizen of a Member State, regardless of residence. Democracy could be considered one of the objectives to be achieved through Article 235.

Before proceeding further, the Commission demanded a formal EP petition, dismissing earlier demands from the Parliament.⁶⁴ The EP delivered the petition, strongly critical of the Commission attitude⁶⁵ and the Commission then produced a proposal for a Directive.⁶⁶ The political foundation recognised that the integration process is indirectly eroding the democratic rights of some Community nationals. This runs counter to the objectives of a Community based on democracy as set out in the preamble of the SEA.⁶⁷ Given the number of individuals deprived of voting rights in local elections because of their residence (over four million),⁶⁸ residence appears to be a more appropriate criterion for determining the place of voting than does nationality. Thus, the proposal says (Article 2) that the Member States should grant to citizens from other Member States the right to be an elector in local elections in the municipality where they live.

The EP considered that the legal basis of the proposed directive [Articles 235; 3 (c); and 8 (a)] were suitable,⁶⁹ an opinion also shared by the ESC.⁷⁰ The EP proposed in its amendments a minimum residence period of not more than five years to qualify for voting rights, but the suggestion was not adopted in the Commission's

63 Lucchese, Anna 'Le droit de vote aux étrangers pour les élections locales en Europe' Revue du Marché Commun No. 309 1987 p. 474.

64 Thus, the Scelbe Report invited the Commission to make proposals regarding electoral rights in local elections. PE Doc. 346/77

65 Resolution on voting rights in local elections for Community nationals residing in a Member State other than their own. PE Doc. A 2-197/87 OJ No. C 13/33 18.1.88. See a report on the proceedings within the EP in Lobkowick, W. de op. cit.

66 Proposal for a Directive on voting rights for Community nationals in local elections in their Member State of residence COM (88) 371 final 11.7.88. OJ No. C 246/3 20.9.88. A highly detailed analysis of the directive can be found in the article by Lobkowick, W. de op. cit.

67 It has been said that this proposal is the only one directly related to the exercise of democracy since the Community exists. Mabile, X. op. cit. p. 22, quoting a declaration by the then Commissioner Ripa di Meana

68 In evaluating the Commission proposal, the EP opined that the right granted to any Member State's citizens to stand and vote in local elections in any Member State was a measure of fundamental importance in view of the migratory movements of the Community. Resolution on a People's Europe Doc. B 2-675/88 OJ No. C 262/39 10.10.88

69 Legislative Resolution embodying the opinion of the European Parliament on the proposal from the Commission to the Council for a directive on voting rights for Community nationals in local elections in their Member States of residence. PE Doc. A 2-392/88 OJ No. C 96/101 17.4.89

70 Opinion C 71/2

amended proposal.⁷¹ The definition of 'local elections' was entrusted to each Member State as the EP had proposed, and most of the separate Part treating the right to stand for elections was deleted, following EP suggestions. However, the amended proposal kept the discretionary reservation of the posts of Mayor or Deputy Mayor or equivalent for nationals of the Member State. Equally, eventual inscription in the register of electors may not be automatic: the resident may need first to apply.

The proposal raised important political questions. The British Home Office did not accept its legal bases. In its view, the purpose of the directive was to confer political rights and this was considered not to be a Community objective.⁷² A similar opinion was held by the Luxembourg government, although reflecting very different concerns.⁷³ The second question was a more fundamental one: the implementation of this right would require a constitutional revision in most of the Member States.⁷⁴ Thus, only three Member States grant voting rights to all nationals from Member States in local elections: Denmark, Ireland and the Netherlands. Portugal and the UK grant those rights to certain categories of non-nationals on bases that may not be extendible to Community level (respectively, nationals of Portuguese-speaking countries which grant reciprocal rights, and Irish and Commonwealth citizens). The Spanish constitution allows this right to be granted to foreigners on a reciprocal basis. But the constitutions of the remaining six Member States restrict voting rights, even in local elections, to their own nationals. This seems to challenge the basic belief behind the Commission proposal: local elections are not an expression of national sovereignty.

Some authors, however, have rejected the necessity of constitutional reform. Thus, Evans argues that

*if rights are recognized as attaching to European citizenship and deriving directly from Community law, constitutional amendment would be only necessary in so far as non-residents were positively prohibited from voting in local government elections.*⁷⁵

Clarifying any possible doubt on this point, the German constitutional court ruled that the right of foreigners (including nationals from EC countries) to vote in

71 Amended Proposal for a Council Directive on voting rights for Community nationals in local elections in their Member States of residence. COM (89) 524 final OJ No. C 290/4 18.11.89

72 House of Lords Select Committee on the European Communities Voting rights in local elections 6th Report. Session 1989-1990. (London: HMSO Books, 1990) p. 13

73 The migrant population from EC Member States comprises 27% of the Luxembourg population. The particular provisions that the proposal included regarding this particular problem were not enough to dissipate Luxembourg's fears of dilution of nationality.

74 This opinion is also endorsed by Mabilie, X. op. cit. pp. 24-25

75 Evans, A. C. 'European citizenship' cit. p. 710

municipal elections was contrary to the German Constitution.⁷⁶ In any case, the problem seems to be rather a political than a juridical one, i.e., the existence of majorities for constitutional reform.⁷⁷ The case has been authoritatively solved by the following reasoning: recourse to Article 235, which requires unanimity, implies that each Member State remains free to approve within the Council a norm that would eventually require modification of its own constitution for its implementation. Therefore, no State would be obliged to reform its Constitution if it had not previously accepted such requirement in the negotiations in the Council by giving its assent.⁷⁸

C. National elections

National elections are *the* mechanism for actualising national sovereignty. Not surprisingly, this area is strictly reserved by Member States for their own nationals. As has been commented, *a parliamentary assembly which represents the national sovereignty cannot admit the participation of non-nationals, even though they were citizens of EC Member States.*⁷⁹ It could be argued that participation at this level would be more important than at the local level to the development of the Community citizenship, since the institutional design of the Community implies that it is at national level where decisions of more direct relevance are taken.⁸⁰ Acquisition of nationality is an *a priori* requirement in all the Member States for participation in national elections and no specific facilities are granted to nationals from other Member States. They are required, in all Member States, to acquire nationality which, occasionally, may require surrendering the initial nationality. The only eventual advantage is that derived from the relative freedom of residence when this is a condition for naturalisation. Nationality is still prevalent over citizenship.

D. Referendum

There is, of course, no Treaty provision regulating such an institution at Community level. Moreover, the recourse to a Community-wide referenda has not been systematically considered by Community institutions. Only the EP referred to

⁷⁶ Ruling of 31 October 1990. AZ 2 BVF 3/89. The right had been introduced in 1989 by the Schleswig-Holstein and Hamburg *Länder*. I am grateful to Dr. Thomas Saalfeld for providing this reference.

⁷⁷ The Constitutional reform of the Netherlands in 1983, which entitled foreigners to vote in local elections, is normally quoted as an illustrative example.

⁷⁸ Lobkowitz, W. de op. cit. p. 608

⁷⁹ Lobkowitz, W. de op. cit. p. 611

⁸⁰ Evans, A. 'Nationality law' cit. p. 210

this option in relation to the achievement of European Union in a declaration on the holding of a plebiscite on political union.⁸¹ Later, the EP corroborated this opinion: a means of involving the people of Europe more closely in the constitution of European Union would be to hold a referendum at European level.⁸² Since constitutional practices and provisions are widely divergent,⁸³ the EP has not systematically insisted on its request. However, the EP has not renounced the referendum method: a parallel resolution⁸⁴ considered that specific consultation on legislative matters or in decisions of particular importance was an essential component of democracy. The EP therefore endorsed, albeit in very cautious terms, the principle of organising *national* popular consultations on the desirability of achieving political union.

Indeed, referenda have been an important instrument in the constitutive process of the EC. France used Article 11 of the Constitution - which foresees consultation in case of ratification of an international treaty which influences the working of the institutions even though it does not contradict the constitution - in authorising the enlargement of the Community in 1972. In the same year, a referendum was necessary in Denmark to decide membership on basis of Article 42 of the Constitution, since the *Folketing* failed to produce the five-sixths majority required by Article 20 for international engagements. The UK, whose parliamentary sovereignty seems by definition to be opposed to binding commitments from outside, held a referendum in 1975 to decide on British EC membership. The Republic of Ireland had to hold a referendum in 1972 to ratify the constitutional revision needed to allow membership of the Community, as prescribed by Articles 46 and 47 of the Irish Constitution. This procedure had to be repeated in 1986 to ratify the SEA. Finally, Italy is the only Member State to have used the referendum to entrust a constitutive mandate to the EP in accordance with the demand by the EP referred to

81 Written Declaration on the holding of a plebiscite on the political union of Europe and constituent powers for the EP. PE Doc. 4/88 OJ No. C 187/200 18.7.88

82 Resolution on the strategy for achieving European Union. Doc. A 2-332/88 OJ No. C 69/145 20.3.89

83 Thus, referenda are excluded from the Dutch constitutional tradition. In Greece (Article 49) and Luxembourg (Article 51) referenda are exceptional instruments and they have never been used. Similarly restrictive, the Belgian constitution allows consultative referenda of which only one was held in 1952 on the *royal question*. The German Fundamental Law of 1949 foresees referendum for territorial reorganisations (Article 29). Article 92 of the Spanish Constitution consents consultative referenda of which one was held in 1986 regarding Spain's NATO membership. Finally in Italy, referendum, as regulated by Article 75 of the Constitution, goes further than mere consultation and it is a widespread practice. See generally EP-Direction Generale for Research and Documentation Le référendum dans les Etats Membres de la Communauté Européenne (Luxembourg: Office for Official Publication of the EC, 1980)

84 Resolution on the procedure for consulting European citizens on European Political Union. PE Doc. A 2-106/88 OJ No. C 187/231 18.7.88

above.⁸⁵ The referendum, held parallel to the European elections on 18 June 1989, produced overwhelming support for the mandate.

E. Citizens' right to complain: petitions

The citizens' right to address petitions in the Community's institutional framework is not constitutionally regulated, but it is fixed by Rule 108 of the EP Rules of Procedure.⁸⁶ This right has been administered by the Parliament through its own Committee on the Rules of Procedure and Petitions. The tension with the alternative system - the ombudsman - has been a constant issue; an early resolution of 1979⁸⁷ considered desirable the existence of a 'Parliamentary commissioner', appointed by the EP, who would be in charge of examining citizens' complaints. The appointment of a Community ombudsman was dismissed because of the changes to the Treaty that its creation would entail.

Fears that the Adonnino report would eventually include among its recommendations the creation of a Community ombudsman stimulated a Report by the EP⁸⁸ on the issue. The report argued that respective ombudsman systems of the EC Member States do not have much in common and it would be difficult for the Community to adopt only one because it would have to be adapted to the tasks and powers of the Community institutions. The attached opinion of the citizens' rights committee considered that a hypothetical Community ombudsman would be limited by the legal framework of the Treaties and that he/she would be ineffective in relation to national administrations and their failures in implementing Community measures. The report argued, however, that the question was not a choice between a parliamentary petition committee or an ombudsman, but the strengthening of the citizens' right to lodge petitions. Regardless, the predilection for a parliamentary committee was reflected in the resolution that also demanded Community legislation on the issue.⁸⁹

85 See 'The meaning of the European referendum in Italy' The Federalist Vol. 31 1989 p. 3-6

86 Petition rights are constitutionally ensured in the Spanish constitution (Article 29); the Basic Law of Bonn in Article 17; the Belgian constitution in its Article 21, the Article 10 of the Greek constitution and Article 50 of the Italian constitution.

87 Resolution on the appointment of a Community ombudsman by the European Parliament. PE Doc. 29/79 OJ No. C 140/153 5.6.79

88 Interim report on strengthening the citizens' right to petition to the European Parliament. Chanterie Report. PE Doc. A 2-41/85 29.5.85

89 Resolution on strengthening the citizens' right to petition the European Parliament. OJ No. C 175/273 15.7.85

F. Right of access to public office

Public office is, in constitutional practice, generally reserved to nationals.⁹⁰ Accordingly, Article 48 (4) excludes public service from the ambit of the right of freedom of movement of workers and access to employment.⁹¹ Evans has argued that this limitation stems from a desire to limit the impact on national sovereignty of the provisions of Article 48.⁹² Also, despite a prudent degree of activism by the ECJ, these posts associated with the exercise of competencies related to the sovereign condition of the state remain largely untouched. Indeed, the Commission proposal on the issue covers both bodies selected on an institutional criterion (armed forces, police and forces for the maintenance of internal order, judiciary, tax authorities and diplomatic corps) and functional: the derogation from the right of free movement of workers also covers posts where the duties involve the exercise of state authority.⁹³

5.2 THE EXTERNAL DIMENSION: CITIZENSHIP *VIS-À-VIS* THIRD PARTIES

The external manifestation of European identity was an early Community objective, although it has not implied the development of the external dimension of European citizenship. The failure to create such an identity is closely related to the

90 Thus, Article 13 of the Spanish Constitution states that only Spanish nationals will be entitled to access to public office (as regulated by Article 23). Article 33 of the Bonn Fundamental Law says that all the Germans have equal access to any public office; a definition which implicitly excludes nationals from other Member States. Article 4.4 of the Greek Constitution prescribes that only Greek citizens shall be eligible for public services (except as otherwise provided by special law). The Belgian Constitution in its Article 86 refers only to the very top office post (ministers) saying that *No person may become a minister if he is not Belgian by birth or unless he has been granted full naturalisation*. Article 51 of the Italian Constitution says that all citizens can accede to public office. This, however, cannot be interpreted as an open formulation since the Italian text equates citizen with Italian national. This opinion is supported, furthermore, by the second paragraph of this Article which declares that a law can standardise this right for Italians not belonging to the Republic to the one of its citizens.

91 Handoll distinguishes two general criteria for the application of the exclusion: institutional (the institution is the one declared to be reserved to own nationals' employment because of its very nature) and functional (the relevant criterion is the function of the person within the organisation). Handoll, John 'Article 48 (4) EEC and non-national access to public employment' European Law Review Vol. 13 1988 p. 233-241

92 Evans, A. C. 'European citizenship' cit. p. 710

93 The areas proposed as being open to free employment of Community individuals are, in order of priority:

- Bodies responsible for administering commercial services (water, gas etc.)
- Public health care services
- Teaching in state educational establishment
- Research for non-military purposes in public establishments

Freedom of movement of workers and access to employment in public service of the Member States. Commission action in respect of the application of Article 48 (4) of the EEC Treaty OJ L No. C 72/2 18.3.88

lack of Community competence on those areas traditionally associated with the external exercise of sovereignty. The prevalence of the Member States' nationalities is an indisputable fact which is moreover enhanced by the behaviour of third states.

5.2.1 Representation of citizens outside the Community

As an initial step, the 1975 Commission report had proposed a Passport Union involving three measures: uniform passport, harmonisation of legislation affecting aliens and abolition of passport control within the Community.⁹⁴ The last measure, lifting border control of people, has the psychological objective of promoting among the citizens a sense of belonging to a single Community rather than their being strictly an economic necessity of the market.⁹⁵ The Commission report considered also that the suitable legal instrument would have to be a new Treaty, since there were no relevant provisions in the current treaties.⁹⁶

The unified document was initially achieved through the Resolution of 23 June of 1981⁹⁷ adopted by the representatives of the Member States' governments. The new document was a passport of uniform design, not a single or common passport. Issue and withdrawal conditions remain a national prerogative. Furthermore, the so-called passport union has not implied as essential features of citizenship as a single representation overseas or equal treatment for any EC individual by third countries, even though some extreme opinions have considered that

*only the Community might be able to invoke international legal rights where a Community national has been injured in breach of the terms of trade agreements between the Community and third countries.*⁹⁸

Clearly, the lack of a 'community nationality' impedes claims based on diplomatic protection, although some authors such as Croux and Manin have suggested that the theory of functional protection - personal damages suffered by an agent - could be extended in the case of EEC international agreements to cover any national from a Member State.⁹⁹ Aware of these imperfections, the Adonnino Report proposed that a Community individual in need of assistance during a temporary stay in

94 EC Bull. Supplement 7/75 p. 36

95 On this opinion see, for instance, House of Lords Select Committee on European Communities 1992, Border control of people Session 1988-89 2nd report (London: HMSO Books, 1989) p. 12

96 EC Bull. Supplement 7/75. p. 8

97 OJ No. C 241/1 19.9.81. On the technical aspects, see Denza, Eileen 'Le passeport européenne' Revue du Marché Commun 1982 pp. 489-493

98 Evans, A. 'Nationality law and European integration' cit. p. 196 fn 23

99 Groux, J. and Manin, P. The European Communities and the International order op. cit.

a third country where his own country was not represented should be able to obtain assistance from the local representation of another Member State.¹⁰⁰ However, this has happened only in very exceptional situations, such as in the seizure by Iraq of some Member States' embassies in Kuwait in 1990.

5.2.2 Defining citizenship *ab negatio*: the status of non-EC Member States' nationals

Together with granting political rights, the other way in which a state may sanction citizenship is through its capacity to discriminate against aliens. As has been pointed out above, within the Community the possibility for a State to discriminate against citizens from another Member State has been practically restrained to the deprivation of the political rights delineated above and certain limits to his/her freedom of residence. This privileged status, granted by Community law, is not available for non-Member States' nationals.¹⁰¹ Lacking a definitive concept of EC citizenship, the status of non-Member States' nationals within the Community has to be referred to national law and, indeed, the status of foreigners is determined in some constitutions¹⁰² and/or by a national law. The Treaty of Rome fails to give the institutions of the Community clear authority to deal with the issues determining the status of foreigners, such as immigration, visa policy, asylum for refugees and extradition.¹⁰³ Thus, the guidelines for a Community Policy on Migration, adopted in 1985,¹⁰⁴ recognised the jurisdiction of the Member States in matters relating to the entry, residence and employment of migrant workers from such countries. Paradoxically, as a result of the SEA, the Community does have powers to deal with the abolition of internal borders and, as the Commission has established in its report on the topic, lifting internal borders implies necessarily strengthening of external frontiers.¹⁰⁵ Already the Commission's White Paper had announced proposals regarding immigration, visa policy, asylum, etc.; but in view of the progress in intergovernmental cooperation parallel with the EC framework, the Commission

100 A People's Europe. Reports from the *ad hoc* Committee. EC Bull. Supplement 7/85 p. 24. The proposal was endorsed also by the EP in its resolution following the Adonnino Report. Resolution on a people's Europe, cit.

101 A very particular case is posed by the British concept of citizenship. Commonwealth citizens are subject to more stringent requirements regarding residence and employment in the UK than are nationals from Member States. However, once immigration requirements have been satisfied, Commonwealth citizens are entitled to enjoy all the rights of British citizenship, including political ones, whilst EC migrants are still treated as foreigners.

102 For instance, Article 10 of the Italian Constitution which refers to its regulation by law and Article 13 of the Spanish Constitution.

103 Butt Philip, A. European border controls: Who needs them? cit.

104 Council resolution of 16 July 1985 on guidelines for a Community policy on migration. OJ No. C 186/3 26.7.85

105 Communication from the Commission on the abolition of controls of persons at intra-Community borders COM (88) 640 final 7.12.1988 *passim*

restricted its warnings to an eventual proposal dealing with the coordination of the rules granting asylum and refugee status.¹⁰⁶

Two main features determine the status of foreigners: firstly, the privileges that the so-called EC citizenship enjoy in relation to them; secondly, the extent to which the status of foreigners is substantially the same within *any* EC Member State. This implies that any distinction between EC and non-EC nationals, regarding other rights than those secured by Community citizenship, takes place at Community external borders.

Ultimately, the main privilege of citizenship, as has been argued above, is the enjoyment of political rights. This point has found agreement even in some bodies defending immigrants:

*while it is acceptable to draw a distinction between Community citizens and non-Community (but 'settled') citizens as far as political rights are concerned, the distinction is harder to justify in respect of economic rights.*¹⁰⁷

Despite of this, the Commission has suggested the possibility of granting to residents from non-EC Member States voting rights in local elections, a suggestion which received a favourable opinion from the ESC who reported that *in the interest of consistency and to avoid alienation, rifts and tensions*, the measure should be considered.¹⁰⁸ As long as a decade ago, the EP had shown its predisposition to extend rights available to migrant Community workers, including not only free movement throughout Community territory but also the right to vote in local elections.¹⁰⁹ The issue is pending, however, on a previous definition of political rights for EC citizens.

Regarding the equality of treatment, the central question to be solved is that of the right of movement. Nationals from non-EC Member States do not enjoy the right of free movement within the Community. Under the Schengen Agreement, immigrants could move freely through the Community for periods under three months as happens among federated states. However, the federal analogy is inappropriate here; whereas in the USA control on immigration and the application of the refugee policy are exclusively federal competencies, in the EC ambit these remain national competencies.

106 Ibid.

107 Memorandum by the United Kingdom Immigrants Advisory Service (UKIAS), in House of Lords Select Committee on the European Communities 1992: Border control on people cit. Evidence p. 51

108 Opinion on the proposal for a Council Directive on voting rights for Community nationals in local elections in their Member State of residence CES (89) 73 25.1.89. OJ No. C 71/2 20.3.89

109 Resolution on migrant workers from third countries. OJ No. C 175/180 16.7.80

Moreover, the implementation of such a system allowing freedom of movement would meet considerable opposition from certain governments.¹¹⁰

The creation of a unified treatment for foreigners within the EC would also imply action in two areas pointed out in the Palma Document elaborated by the Coordinators Group: visa policy, and the determination of status of asylum seekers and refugees. On visa policy, the Group recommended the establishment of a common list of persons to be refused entry, the harmonisation of criteria and, finally, a European visa. On asylum policy, the most salient points were the acceptance of identical international commitments and an agreement on the determination of the State responsible for examining the application. The work was carried out by the Working Group on Immigrants, which adopted in May 1988 an initial agreement designed to prevent people from seeking asylum in more than one country.¹¹¹ In June 1990, eleven Member States¹¹² signed the '*Convention determining the State responsibility for examining applications for asylum lodged in one of the Member States of the European Community*'.¹¹³ The Convention foresees a 'one chance only' rule, akin to the provision in the Schengen Convention. Equally, the working party initiated the elaboration of a Draft Convention on the crossing of external borders of the Member States. The convention was designed to ensure uniform standards of control at Member States' external borders in relation to persons wishing to enter the Community for a short stay, and to increase cooperation between Member States in matters concerning visas.¹¹⁴

These policy lines were anticipated by the Schengen Agreement and the Convention on the Application of the Schengen Agreement. They envisaged a uniform visa to grant freedom of movement between the Member States signatories of the convention. Furthermore, a third state national whose stay becomes illegal could be expelled from the entire territory of the contracting states.

The evaluation of these policies has been very negative:

All this is clearly designed to encourage Member States to be zealous in guarding their frontiers and hunting down illegal entrants; it may well also discourage the granting of visas to people who seem likely to claim asylum, because they are then likely to

110 For instance, HM Government has expressed its rejection of any system allowing free movement of refugees. House of Lords Select Committee 1992: Border controls cit. p. 18. The Committee concluded that refugees should enjoy the right to move freely around Europe and to exercise the economic rights available to Community nationals. See also Spencer, Michael 1992 and all that. Civil liberties in the balance (London: The Civil Liberties Trust, 1990) pp. 37-38

111 Spencer, M. op. cit. p. 41

112 Denmark signed the convention in June 1991.

113 Bull. EC 6-1990 point 2.2.1 p. 154

114 Bull. EC 6-1990 point 2.2.1 p. 154. The signature of the convention is, however, pending the resolution of the dispute between Spain and the UK regarding Gibraltar.

*become the sole responsibility of the state granting the visa.*¹¹⁵

5.3 CITIZENSHIP WITHOUT A POLITICAL SUBJECT

Despite the reference in the Preamble of the Treaties to the 'peoples', the constitutive act of the Community has not been an act of a political subject in the exercise of its sovereignty, but a contract among sovereign parties (i.e., the Member States). The semi-constitutional nature of the Community's legal order has, however, progressively created a relationship with individuals in certain areas, one that partially amounts to a form of citizenship. The number of rights available as well as their quality can in no way be equated to the condition of citizen of a Member State. Moreover, it is difficult to consider the constituency formed by the individuals subject to EC law as anything remotely similar to a unified political subject who might eventually express a *volonté générale*. Political subjects are still constituted at the level of the Member States and they manifest themselves occasionally in a set of dichotomic antagonisms dominating the bargaining inside the decision-making process: north v. south, rich v. poor, centre v. periphery, large v. the rest. The persistence of these differentiated political subjects is always a ground on which to prevent a common interest from emerging and, lately, it is also a permanent excuse for justifying renationalization of the *acquis communautaire*.

The question to be elucidated by examining the concept of citizenship created during the IGC is whether this implies a substantial change with respect to the non-systematic catalogue of rights available within the framework of the Rome Treaty and the SEA.

¹¹⁵ Spencer, M. op. cit. p. 41

6 THE INTERGOVERNMENTAL CONFERENCE ON POLITICAL UNION

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6.3.2 Commission: a strategic actor with a reactive attitude

6.3.3 The European Parliament: a strategic actor with a marginal role

The preceding three chapters have assessed the politico-legal nature of the Community by applying the concepts which define the politico-legal nature of Member States. In the cases of the constitutional foundation and citizenship, the problems called for reform inspired on bringing the politico-legal nature of the Community closer to that of Member States. The areas linked to the Member States condition of being sovereigns remain at the discretionary disposition of the Member States, and, at best, they are regulated in a paraconstitutional fashion (i.e., using the politico-legal framework of the Community). Chapters 7 to 10 will assess the politico-legal nature of the Union developed during the IGC taking into account these three elements. Firstly, this chapter will provide an analysis on the dynamic aspects of the conference. The IGC is interpreted as the result of the interaction of two different dynamics, on which negotiating tactics have interacted to produce the final result.¹

The development and outcome of the IGC on political union has to consider, for its explanation, three orders of factors.² The first one is the environment and

¹ Rummel has argued that political union is one way of adapting to international change. In his opinion there were three separate driving forces, each of which inspired to elaborate specific elements. Firstly, the political flanking of economic and monetary integration requires an evolution of the Community political system. The second factor is to prepare for the prevention and resolution of conflict in Eastern Europe, which requires conceptual capability of and the resources for the development of a cooperative network in Europe (a strengthening of the Community as a civilian power). Finally, there was a requirement to prepare for reaction to security challenges beyond Europe, which necessitate the development of capabilities on common Western European threat assessment and the establishment of a common or coordinated arms export policy, as well as the creation of common or coordinated intervention and peace-keeping forces. Rummel, Reinhardt 'Regional integration in the global test', in Rummel, R. (ed.) *Toward political union* p. 22-23

² Examples of theoretical frameworks for explanation are the renamed article by Moravcsik, A. 'Negotiating the Single European Act', cit.; and Pryce, Roy (ed.) *The dynamics of European Union* cit. Regarding the 1991 IGC, Laursen has concluded that no single theory or model can explain the Maastricht Treaty and he identified five factors influencing the outcome: domestic politics, endogenous Community dynamics (spill-over), externalisation, wider systemic forces, and the leadership and bargaining dynamics of the conference itself. Laursen, Finn 'Explaining

circumstances which have stimulated the convening of a second IGC on political union and that could have influenced or prejudged the outcome. Once the negotiation process has been set in motion, however, the result depends mainly on national interests. Finally, the strategic role of the Community institutions cannot be forgotten because they are in the best position to formulate clear goals; as has been pointed out, the identification of goals of a practical nature has always been the essential problem for any strategy's success in gaining the support of a winning coalition of Member States.³

6.1 THE TWO DYNAMICS LEADING TO THE 1991 IGC

6.1.1 The Community's self-induced dynamic

The internal dynamic leading to the IGC on political union was shaped by the events and developments of the decade alongside the reiterated commitments to European Union; *the cumulative effects of repeated rhetorical commitments is to make some form of action eventually inescapable.*⁴ There were, however, formal requirements for reform; namely, the SEA had specified in Article 30 (1) that any revision of provisions governing EPC should be undertaken within five years, i. e., before 1992. This year was not only the date for the completion of the internal market but also the date at which the Community would exhaust its budgetary resources. A widespread belief in the unavoidable 'spillover' effects of the 1992 programme highlighted the fact that the single market would require for its real implementation a series of accompanying collateral policies designated the 'new agenda'; particularly EMU, social policy and social and economic cohesion and solidarity.⁵ Those internal Community developments brought up three aspects which needed to be addressed: firstly, the completion of the single market and the programme laid down by the White Paper assumed by the SEA required periodic reaffirmation and precise compensatory mechanisms to provide social consent. Secondly, there was a need to develop new

the Intergovernmental conference on political union', in Laursen, Finn and Vaanhoonacker, Sophie (eds.) The Intergovernmental Conference on political union p. 247

3 Pryce, R. and Wessels, W. cit. p. 3. They note three factors to be taken into account: the goals, content and methods of a given initiative; the actors promoting it, and the circumstances in which the initiative is taken

4 Pryce, Roy 'Past experience and the lessons for the future', in Pryce, Roy (ed.) op. cit. p. 276. He adds that the important role of rhetoric is *justifying the changes which have been made, underpinning current democratic and parliamentary regimes, and providing beacons for their future development.* p. 275

5 See, on this, Palmer, John 1992 and beyond (Luxembourg: Office for Official Publications of the European Communities, 1989) p. 45-59. See also the opinion by Wistrich, Ernest After 1992: The United States of Europe 1st ed. (London: Routledge, 1989) p. 10

policies both to complete the single market and to encourage its compliance. And, finally, there was a concomitant need to redress the institutional design.⁶ Therefore, some systemic development was needed in order to maintain stability and this seemed to justify the belief that progress within the Community was *due to an strategy of exploiting dynamic disequilibria within the system*.⁷ Despite the emphasis that the EP puts on the internal dynamic as an engine for change, reform, at this stage, did not seem to call for a grand design such as political union. The enlargement of the scope of Community competence could be considered a logical result of the spillover effect of the single market, particularly when taking into account that the new areas already fell *de facto* within Community action.

In parallel with the spillover effect, Community development also provoked externalities. The attractiveness of the single market and the Community's growing importance to neighbouring countries are the sources of external dynamics. These are manifested in the form of demands on the Community system.⁸ An early source of pressure came from the Mediterranean and Middle East, including the demands for membership from Malta, Cyprus and Turkey. Although the low-profile Community response reflects the nationally fragmented priorities for the region, there was widespread agreement on the necessity to reinforce at least certain Community policies; the response was the launching of the new Mediterranean policy in the summer of 1990. However, the character of some of the new issues confronted (e.g., immigration) called for an integral approach and the development of new policy areas instead of national strategies.⁹

But far more perturbing for the Community system were the demands for accession successively voiced by some EFTA countries. Whilst the academic debate confronted the alternative between widening and/or deepening,¹⁰ the Community,

6 Wallace, Helen Widening and deepening. The European Community and the new European agenda London: RIIA Discussion Paper No. 23 p. VIII

7 Emerson, Michael '1992 and after: the bicycle theory rides again' Political Quarterly Vol. 59 1988 No. 3 p. 289-299

8 An evaluation stressing the effect of the external conjunctural factors in shaping the union project is that of Sidjanski, Dusan 'Objectif 1993: Une communauté fédérale européenne' Revue du Marché Commun No. 342 December 1990 p. 687-695

9 Tsakaloyannis, Panos 'The European Community and wider Europe'. Paper presented to the TEPSA conference. 'The European Community in the 1990s. Major issues and priorities of the Dutch presidency. The Hague 21-22 March 1991

10 For an analytical summary of the four main schools of thought in this debate (deepening first; widening first; deepening for also widening and differentiated widening), see Wessels, Wolfgang 'Deepening and/or widening- Debate on the shape of EC-Europe in the nineties' Aussenwirtschaft Vol. 46 1991 p. 157-169. See also Wallace, Helen Widening and deepening cit.; also Wallace, Helen (ed.) The wider western Europe. Reshaping the EC-EFTA relationship (London: RIIA/Pinter, 1991). For the different attitudes within the Community on the issue, see in particular the contribution in this volume by Pedersen, Thomas 'Community attitudes and interests' p. 109-123. See also his work Pedersen, Thomas 'EC-EFTA Relations: neighbours in

through the Commission, designed a dilatory tactic. Firstly, it launched the EES initiative, with the hope of providing an alternative to membership for EFTA members. Secondly, it announced that the Community would not consider negotiations for accession prior to 1992, thus giving time to adjust to the effects of the single market programme. This option, however, linked further enlargement to future reforms, and as such was the line definitively made unavoidable by the EP in 1989 as part of its strategy for achieving European Union. The EP warned that

*it would be unable to approve any further accession treaty with a new Member State without the institutional reforms necessary to make the Community more effective and more democratic and unless significant progress towards European Union are made.*¹¹

Self-maintenance through institutional reinforcement became a cornerstone for the EC political development and, indeed, it was the doctrine governing the relationship with wider Europe.¹² Furthermore, any would-be Member would require, in terms of Delors, to be prepared to conform to two criteria: Primarily, acceptance of the *acquis communautaire* and secondarily of the level of the common ambitions deriving of the acknowledgement of the Community's international responsibilities and the awareness of the necessity to speak with a single voice, and to act in unison. Would-be Members should be prepared to accept the prevalence of common interests. Therefore, as a prerequisite, it is necessary to decide who shares the essential common interest. Those who want to hold to the maintenance of differentiated views or a stance of neutrality would prevent the emergence of the common interest.¹³

Against this background, the permanent disjunctive between *ad hoc* reform and a qualitative leap forward seemed not to call for a solution based on the creation of a Union according to the wording of the SEA preamble. Some consequent restructuring of Community bodies had been established through the report on the EMU, as a consequence of the new Treaty changes required. The report had also pointed out that regional and structural policies would have to be extended and made

search of a new partnership, in the volume by Edwards, Geoffrey and Regelsberger, Elfriedge (eds.) *Europe's global links*. (London: Pinter, 1990) p. 97-111

11 Resolution on the strategy of the European Parliament for achieving European Union. Doc. A 2-332/88 OJ No. C 69/145 20.3.89. The Parliament warned that it would have also to assent to an eventual EC-EFTA agreement

12 This principle was established by the Communication from the Commission to the Council. The Community and the EFTA countries. Implementation of the joint declaration issued in Luxembourg on 9 April 1984 COM (85) 206

13 Delors, Jacques 'Europe's ambitions' *Foreign Policy* No. 80 1990 p. 23-24

more effective as part of the EMU process.¹⁴ Should a revision of some provisions of Title III of the SEA be included, the process of reform could be accommodated in a single conference, the main result of which would have been a Treaty revision similar to the SEA: one that would include EMU and some revision on EPC and, perhaps, the institutional set-up. Not surprisingly, some scholars argued that the IGC could be better understood as part of the traditional Community aims and methods of governance and dealing with unfinished business from the past, but in a context where externalities were much more important.¹⁵ The landscape was drastically conditioned by two interlinked external events: German reunification, and the process of democratisation and political reform in Eastern Europe.

6.1.2 The redefinition of the fixed conditions of the integration process¹⁶

The decision to convene a second IGC on political union and, therefore, to provide a qualitative leap forward in the process of reform, was the political response of EC governments to the challenge of German reunification. German reunification was discussed 'in depth' and off the record in the Strasbourg European Council. Simultaneously to the Presidency's conclusions, the European Council released a declaration within the EPC framework that endorsed German reunification through self-determination in the perspective of European integration.¹⁷ Reunification having been endorsed at an interstate level in the Two-plus-Four talks, a decisive stand was adopted in favour of a very fast process of adaptation of the *acquis communautaire* to the former GDR.¹⁸ The counterpart was obvious: further progress in the integration process. Explicitly, the German government accepted (during the Community's

14 Committee for the study of Economic and Monetary Union Report on Economic and monetary union in the European Community p. 23-24. See the excellent discussion of the interrelation between economic and monetary union and the institutional aspects of political union in Van Themaat, Pieter Verloren 'Some preliminary observations on the intergovernmental conferences: the relations between the concepts of a common market, a monetary union, an economic union, a political union and sovereignty' Common Market Law Review Vol. 28 1991 p. 291-318

15 Wallace, Helen 'The Europe that came in from the cold' International Affairs Vol. 67 No. 4 1991 647-663. In Wallace's point of view, the redefinition of the EC as European Union omitted to respond to important questions; mainly whether the inclusion of all policy issues relevant to transnational collaboration implied also that the EC must encompass all European countries. See also, Wallace, Helen 'Unfinished business' Marxism Today Vol. 34 1990 p. 18-21

16 Panos Tsakaloyannis has graphically argued in a most interesting piece that the last round of reform of the Community was emboldened by an 'acceleration of history'. The title conveys the interesting suggestion that Community evolution is interlinked with the global historical process. Tsakaloyannis, Panos 'The acceleration of history and the reopening of the political debate in the European Community' Journal of European Integration Vol. 15 Nos. 2-3 1991 p. 88

17 Declaration on Central and Eastern Europe. Bull.. EC 12-1990 point 1.1.20 p. 14

18 Spence, David Enlargement without accession: the EC's response to German unification RIIA Discussion Paper No. 36 1991

negotiations in order to solve the questions raised by the forthcoming German reunification) that German unity had to be placed in the context of European unity which implied an acceleration of political union.¹⁹ The linking of both issues, German reunification and political union, became the backbone of the strategy of most of the institutional actors. Thus, the Commission considered that German reunification offered an opportunity for reinforcing and speeding up European integration.²⁰

The process of reform and democratisation in Eastern Europe reevaluated the Community's role. The EC was considered a basic factor in boosting the stability and economic recovery of the new democracies; and its role within the global Western approach was enhanced when the Commission was entrusted with the coordination of the PHARE programme. The Community adopted a piece-meal strategy to stabilise them and prepare the grounds for further relations. The main element of this strategy lay in the second generation of agreements, which entailed association without foreseen accession. The Community was regarded as an anchor and guarantor of political stability in Europe. While accepting this role, the main concern was the need to reinforce Community structure to cover a coherent policy approach towards Eastern Europe and the new problems raised, such as immigration. The conclusions after the Strasbourg Summit in December 1989 underlined that *it is in the interest of all European states that the Community should become stronger and accelerate its progress towards European Union.*²¹

On the other hand, events in the East were perceived by some Member States as a danger of dilution of the Community into a pan-European type of structure destined to organise simple forms of cooperation,²² particularly because of President

19 See a defence of this argument by Neuss, Beate 'Counterbalancing the Germans: Holding on' The European Journal of International Affairs Vol. 11 No. 1 1991 p. 82-99

20 The Community and German reunification. Communication from the Commission to the special session of the European Council in Dublin on 28 April 1990. Bull.. EC Supplement 4/90 p. 16. Similar arguments were put forward by the EP and some national governments. Spanish Prime Minister González argued that the dynamism of European construction would be increased if the German question were resolved satisfactorily *Agence Europa* No. 5224 29.3.90. Similarly, the Danish Government justified its change of attitude towards European integration (which led Denmark to present a memorandum for institutional reform in October) on the basis of the challenge posed by German reunification. *Agence Europa* No. 5351 17.10.90

21 EC Bull. 12-1989 point 1.1.2 p. 8. Similarly, the EP pointed out that in its relations with eastern Europe, the Community should endeavour towards guaranteeing its political cohesion and becoming a model of credible political democracy. Resolution of 23 November 1989 on the IGC decided at the European Council in Madrid. OJ No. C 323/111 27.12.89. Along the same lines, the conclusions of the April 1990 summit argued that *the continued dynamic development of the Community has become an imperative not only because it corresponds to the direct interests of the Member States but also because it has become a crucial element in the progress that is being made in establishing a reliable framework for peace and security in Europe.* Bull.. EC 4-1990 point I.4 p. 8

22 Declarations by the Belgian Prime Minister Martens. *Agence Europa* No. 5219 22.3.90 p. 3

Mitterrand's suggestion for an all-Europe confederation.²³ This was, indeed, the fear that inspired the Belgian government to react, forwarding to the Member States a *Memorandum* that included proposals aimed at *strengthening the effectiveness and democratic character of (the) institutional mechanisms, codifying the subsidiarity principle and increasing the impact of (the) external action.*²⁴ The memorandum pointed out two options: either to call a special IGC, or to extend the scope of the IGC on EMU. The idea was favourably received among the governments and President Mitterrand expressed publicly his hope that the forthcoming Dublin Summit would set a timetable for European political union, as well as a deadline.²⁵ The Italian government announced that it planned to propose the celebration of a conference on institutional reform outside the intergovernmental conference on EMU; the idea was endorsed by the Irish Presidency and the German chancellor²⁶ and, finally, the joint Mitterrand-Kohl letter activated the process of creating a political union.²⁷

6.1.3 External conditionants on the negotiations

Once the decision to create a political union was taken, arguments focused on which would be the components of the Union. Most of the issues seem to have emerged from tactical negotiation among Member governments. However, the central element of the Union, the development of a common foreign and security policy (CFSP) by the Union, would confront the negotiating partners with a teleological question: Is the Community (or Union) the appropriate framework for security and defence, given the new circumstances?²⁸ The question had to be answered bearing in

23 Mitterrand called for a European confederation in his 1990 New Year's Eve speech: *une confédération européenne, au vrai sens du terme, qui associera tous les Etats de notre continent dans une organisation commune et permanente d'échanges, de paix et de sécurité. Le Monde* 2 Janvier 1990

24 Declarations by the Belgian Prime Minister Martens. *Agence Europa* No. 5220 22.3.90 p. 3

25 *Agence Europa* No. 5222 26/27.3.90 p. 6

26 *Agence Europa* No. 5225 30.3.90

27 The letter had the effect of acting as the catalyst for other proposals, mainly concerned with institutional reform. Thus, the Belgian Prime Minister proposed that the Commission should become the government, the executive power in Europe responsible before the EP and, in order to avoid excessive bureaucracy, the technique or principle of subsidiarity should be introduced. More restrained, the Dutch endorsed the principle of organising two parallel conferences and focusing institutional reform on the following objectives: strengthening the decision-making capability of the Council by generalisation of decisions made on majority vote; strengthening the democratic control by the EP which will also increase its legislative powers; reinforcement of the Commission role and, finally, setting up a common external policy *Agence Europa* No. 5244 28.4.90 p. 3

28 Rummel opines that the central issue seems to be the rationale for a significant centralisation of foreign and security policy given the changes in the structure of international relations and specifically in Europe. Rummel, Reinhardt 'Beyond Maastricht: alternative futures for a political union', in Rummel, R. (ed.) *Towards political union* cit. p. 297

mind the reassessment being carried out by the Alliance as well as the effects of the two successive crises; the Gulf, and Yugoslavia.

1. The reform of the Alliance and the US attitude

During 1990-1991, NATO embarked on the definition of a new global strategy which would alter its structure and functions. The July 1990 London NATO summit approved the objective of formulating a Western European security identity, the central component of which would be a multinational corps made up of national units. The official NATO position was that *the Alliance is the essential forum for consultation among its members and the venue for agreement on policies bearing on security and defence commitments of allies under the Washington Treaty*.²⁹ NATO admitted the possibility of a European security *identity* and a defence role (instead of a common defence policy) which would reinforce the integrity and effectiveness of the Atlantic Alliance, also able to fulfil the requirements of transparency and complementarity in a satisfactory way.³⁰ This was the position voiced constantly by the UK and endorsed by other allies.

Concretely, the US opposed any structure in which the European Council directed the WEU, the main point of the Franco-German proposal.³¹ At the root of the US attitude lies an ambivalence that has been a constant in US policy. On the one hand, the US has sought the promotion of a European pillar or partner. On the other hand, the US fears that the development of a truly European identity might damage cooperation within NATO. Both aspects were reflected by the Transatlantic Declaration, which was conceived to provide new footing for the relationship.³²

29 Final communiqué. Ministerial meeting of the North Atlantic Council in Copenhagen 6-7 June 1991. NATO Review Vol. 39 No. 3 June 1991 p. 31-33

30 In his vital speech to the Institute of Strategic Studies, Delors identified three US demands to be confronted by the IGC: no internal bloc; continued globality of the Allied response, and no weakening of the command structures. Delors, Jacques 'European integration and security' Survival March/April Vol. 33 No. 2 1991 p. 108. In the eve of the speech, the US State Department sent a memorandum to the 11 members of NATO in which expressed three demands to preserve the integrity of the alliance. The new agreements should avoid creating a caucus of European states within NATO; they should not undermine NATO doctrine of common response, and they should not enfeeble its command structure. See also Moreau Defarges, Philippe 'Les États-Unis et le malentendu européen' Defense Nationale Vol. 47 1991 p. 87-94

31 See the Dobbins Demarché in spring 1991 as a reaction to the Franco-German February proposal. Some author opines that the US, of which the leadership was reinforced by its role on the Gulf crisis, has not played its traditional "*federateur*" role but it has used European disavowals to its own advantage. Remacle, Eric Les négociations sur la politique étrangère et de sécurité commune de la Communauté européenne Dossier "notes et documents" No. 156 Avril (Bruxelles: GRIP, 1991) However, the evidence available does not seem to support this claim.

32 A very good analysis of the issue is that of Krenzler, Horst and Kaiser, Wolfgang 'The Transatlantic Declaration: A new basis for relations between the EC and the USA' Aussenpolitik No. 4 1991 p. 363-372

A compromise had therefore to be based mainly on a reassurance towards the US. It was reached at the NATO Council meeting in Copenhagen in June 1991. A Statement endorsed the creation of a European identity in security and defence, one that would underline the preparedness of Europeans and would help to reinforced transatlantic solidarity. Moreover, NATO welcomed the

efforts further to strengthen the security dimension in the process of European integration and the progress made by the countries of the European Community towards the goal of political union, including the development of a CFSP.

In compensation, the French had agreed to the role of NATO in core security functions in Europe.³³

In November, the Rome NATO summit³⁴ reiterated the points of the Anglo-Italian proposal (European identity as a reinforcing process for the Alliance; complementarity, and confirmation of the central role for the Alliance), but it pointed out also that *it is for the European allies concerned to decide what arrangements are needed for the expression of a common European foreign and security policy and defence role.*³⁵

2. The Gulf and Yugoslavian crises and their effect on the negotiations.

The Gulf crisis evoked questions on whether there was convergence enough to create a common foreign and security policy.³⁶ Although this point was implicit in the conclusions of the European Council in June and was the underlying element for a reform of the SEA, the Gulf crisis placed the development of security and defence capabilities at the central point of the eventual Union. The Italian Presidency, and

33 In the opinion of Rummel, the French supported and partly engaged in the reform process of NATO in order to keep this framework as a strong multilateral structure for the integration and control of German military power. Rummel, R. 'Regional integration in the global test' cit. p. 21. In March 1991, the French government had decided to participate in the NATO strategic Review Group.

34 *Rome Declaration on peace and cooperation*. Issued by the Heads of State and Government participating in the meeting of the North Atlantic Alliance Council. Rome 7-8 November 1991 NATO Review Vol. 39 No. 6 Dec. 1991 p. 19-22

35 According to NATO's General-Secretary, the Rome NATO summit endorsed a reinforced role for the WEU in its double-edged function as the defence component of the process of European unification and as a means of strengthening the European pillar of the Alliance. Wörner, Manfred 'NATO transformed: the significance of the Rome Summit' NATO Review Vol. 39 No. 6 1991 p. 3-8

36 On the effects of the crisis on EPC, see Closa, Carlos 'The Gulf crisis: A case study on national constraints on Community action' Journal of European Integration Vol. 15 No. 1 1991 p. 47-67, and Salmon, Trevor C. 'Testing times for European political cooperation: the Gulf and Yugoslavia, 1990-1992' International Affairs Vol. 68 No. 2 p. 233-253

particularly the Italian Foreign Affairs Minister De Michelis, hold an interpretation of the crisis which, on the basis of the negative interpretation strongly argued by others (i.e., the UK), concluded precisely the opposite: far from nullifying the concept as not being feasible, the events called for a more effective Community action based on its capability of adopting common positions.

In the second part of the IGC, the Yugoslavian crisis acted as a reminder of the questions raised during the Gulf crisis. The incidence was aggravated by the fact that the Community assumed the main role by itself shouldering the burden of reaching a solution to a problem, for which it was not equipped with the appropriate means. Added to this, the basic split on policy line was between the two strategic partners (France and Germany).

The effect of both crises on the negotiations was to switch the emphasis from political and diplomatic aspects of security and towards defence policy. The crises provide arguments to justify the two strategic standpoints. On the one hand, some arguments stressed that divergent, different or even opposed and atomised national responses to crisis requirements prove that differences in substance between the Member States would not allow the creation of a single policy on foreign and security affairs, and, particularly, the implementation of a common policy on defence.³⁷ The contrary argument held that differences in substance were further stimulated by the lack of binding commitments and that the existence of procedures to formulate (and means to implement) common policies would greatly reduce these discrepancies. Crisis provided the arguments why a common security and defence policy was not attainable while supplying, too, the very reasons why it should be achieved.

Apart from this legitimating effect, and the intense French manoeuvres to use the Gulf crisis to substantiate their particular proposals,³⁸ the crises highlighted some areas for CFSP that had not been included in the European Council mandate. Thus, the consideration of the involvement in humanitarian intervention measures was precipitated by the situation in Iraqi Kurdistan after the war, as happened with UN peace-keeping missions following the Yugoslavian crisis.

37 For instance, Remacle: the war reinforced the logic of sovereignty of the nation-state and weakened the dynamic of integration, with the consequence of enhancing the national French and British stances. Remacle, E. op. cit.

38 On 12 March, France called for an emergency EC summit to consider the failure of the Twelve to show solidarity in the Gulf crisis and to debate plans for the future of CFSP. *The Independent* 12.3.1991. The April summit did not discuss political union and focused, instead on the aid to the Kurd population. In a manoeuvre designed to reinforce the French stance on the WEU as an implementing instrument of the European Council guidelines, the French Presidency in Office of the WEU called a meeting of the organisation to decide on the implementation of the summit decisions.

6.2 NATIONAL ACTORS: STRATEGIC AND TACTIC NEGOTIATION

Two dynamics have been identified above: spillover, and externalities. These, plus the redefinition of the fixed conditions in which the process of integration had developed, explain why political union was launched. The outcome of the negotiating process is, however, basically conditioned by national priorities. Their prominent role, and particularly those of the 'big three', in determining the outcome of process of reform has been theoretically elaborated by Moravcsik in relation to the SEA under the label of 'intergovernmental institutionalism',³⁹ which main assumption is that the sources for regime reform are located first and foremost in the changing interests of states and not only in the changing power distribution.⁴⁰ How national interests are designed and how the tactics for its defence operate depends on circumstances and change from time to time, but in any case *moves towards closer union have to be very carefully designed to appeal to national interests, and to provide a point for convergency for them so that may can be harnessed to the achievement of a common goal.*⁴¹

This is a statement of fact rather than a theoretical finding: the election of Article 236 as the procedure to follow implies that national governments are the negotiating actors. They are also the masters of the reform because it requires a double assent by the Member States; firstly, on Treaty amendments and, secondly, to fulfil constitutional requisites for ratification. The 1991 IGC has not been an exception and most of the delegations were primarily concerned with the inclusion or exclusion of particular policies on the basis of national interests.⁴²

Agreement on concrete outcomes is the result of a tactical negotiating process where each delegation proposes, seeks allies, bargains and exchanges, in a process that transcends the limits of the conference itself to become intricate on normal EC policies. The exceptionality of the 1991 IGC lies in the fact that, for the first time, the elusive goal of a Union would be defined as the final result. If the Union was to be an

39 Moravcsik, Andrew 'Negotiating the SEA' cit. One of the central assumptions of this approach is that the outcome largely reflects the convergence of domestic politics preferences of largest Members and the residual role of the remaining States.

40 Ibid. p. 27

41 Pryce, R. and Wessels, W. 'The search for an ever closer union' cit. p. 6. They continue to argue that these goals have to provide solutions to important and urgent problems perceived by the leaders of the Member States. p. 26

42 *Il semble bien que la plupart des états membres partenaient les préoccupations, à des degrés divers. Dans le suite de la négociation, la France at l'Allemagne ont mis l'accent sur la politique extérieure et de la sécurité, l'Espagne sur la citoyenneté et la cohésion; l'Italie et la Belgique sur les pouvoirs du Parlement et le vote majoritaire, le Danemark sur l'environnement.* De Schoutheete, Philippe in *L'Union européenne après Maastricht* journée d'études, 21 février 1992 Bruxelles, Institut d'études européennes. See the national contributions on new policy areas in Appendix III

strategic product further to the aggregation of tactical requirements (policy interests) of Member States on Community policies and procedures, a strategic negotiating dimension was necessitated. The strategic negotiation does not relate to Community areas of activity: the justification for the inclusion of strategic areas is not whether the Community rather than the Member States is better equipped to deal with a given policy. The justification rests on whether a policy area be organised on the framework of the Twelve EC Member States and not elsewhere. In the area of strategic negotiations, it is very difficult to articulate the compensatory mechanisms (roll on, linkage forward and side payments) which act in tactic negotiations. As has been indicated with reference to the SEA's IGC, the outcome, as well as the negotiating process, was determined by the reaction of the opposed states and the cohesion of the different priorities and motivations of the majority.⁴³

A. The Franco-German strategic partnership

The European Union developed during the IGC is based on the solution of the necessities of the Franco-German partnership. In the previous years, the French European policy had been focused on finding a formula that would allow the recovery, through the articulation of a Community instrument, of some degree of control over the monetary policy that had been dictated by the decisions of the German monetary authorities. Some argue that the Delors Committee Report was largely of French origin.⁴⁴ The French government, indeed, had tried to advance as far as possible preliminary negotiations on EMU during its own Presidency, with the underlying intention of establishing a German commitment to the phases of EMU in advance of the IGC. The German government, on the other hand, wanted to include as the minimum prerequisite to relinquishing control of monetary policy the institutional improvements required by the *Bundestag*.

German reunification provided the opportunity for altering the basis of this agreement which had not been so favourable for German aims. The German government quickly linked reunification to further integration, in a strategy with two goals.⁴⁵ For the German government, a second IGC on political union would provide a broad basis on which to accommodate the wide range of domestic requirements and would also provide a source of legitimacy for reunification. Moreover, it seems that there was a compelling need for the German government and the remaining Members

43 Corbett, R. op. cit. p. 238

44 Sutton, Michael 'France and the Maastricht design' *The World Today* Vol. 49 No. 1 1993 p. 5

45 See, in general, Kohl, Helmut *Our future in Europe* Speech on the occasion of the award of an Honorary Doctorate by the University of Edinburgh (Edinburgh: Europa Institute and Konrad Adenauer Foundation; 1991)

to reform the Treaty because of German reunification. Germany had, when negotiating the Treaty of Rome, entered a reservation for re-ratifying the Treaty in the event of reunification, although, surprisingly, there has been no mention of this reservation during 1990-91. On 28 February 1957, during the negotiations, the German ambassador, Carl Friederich Ophüls, made the following statement on behalf of the FRG:

The Federal Republic proceeds from the possibility that a revision of the Treaties on the Common Market will take place in the event of Germany being reunited. Dagtaglou argues that the binding character of the German statement on reunification has not been called into question by her partners on the Treaty. On the contrary, it was repeatedly confirmed.

He refers to a document of the French Parliament which contained the following statement: *The Treaty binds us permanently but is not binding for West Germany which retains its liberty to choose whether to stay or leave on the day of its reunification.*⁴⁶ Thus, the eventual ratification of the new Treaty by the German Parliament composed after reunification would amount to such confirmation and, moreover, would eliminate the possibility of this reserve being invoked as a justification for breaking away from the Community.

The link between the two issues (German reunification and political union) seemed to favour the German necessities, since it provided for a framework for the settlement of its tactical requirements regarding Community policies and procedures. Nonetheless, French priorities were served by the EMU terms and adherence to deeper reform did not respond to domestic requirements, as was so in the German case. The obvious counterpart for the French side was, therefore, the incorporation of the discussion of new arrangements on security within the scope of political union.⁴⁷

The expression of this agreement was the famous joint letter issued by Kohl and Mitterrand to the Irish President-in-Office of the Council. The joint letter established the precise timing until the start of the IGC; Foreign Ministers were due to prepare an initial report for the European Council summit in June and they were also charged with the submission of a final report in December. The IGC should run in parallel to the one on economic and monetary union; both treaties should come into

46 Dagtaglou quoted Hallstein saying that *a reunified Germany must have full political freedom of action regarding international treaties that have been concluded in the past in the name of one part of Germany*. Dagtaglou, P.D. 'How indissoluble is the Community?' cit. p. 266-267

47 Tiersky opined that *the trade amounted to German abandonment of monetary sovereignty for French abandonment of military sovereignty. This Franco-German understanding was the keystone of the entire Maastricht accord*. Tiersky, Ronald 'France in the new Europe' Foreign Affairs Vol. 71 No. 2 1992 p. 140

force on 1 January 1993.⁴⁸ The letter considered that *in the light of far reaching changes in Europe, the time had come to transform relations among the Member States into a European Union equipped with the necessary means of action.*⁴⁹ In the view of the French and German governments, the Dublin European Council should link German reunification to European union. Preparations for a conference on political union should therefore be initiated with the objectives of strengthening the democratic legitimacy of the Union; rendering its institutions more efficient; ensuring unity and coherence of the Union's economic, monetary, and political action and, finally, defining and implementing a common foreign and security policy. Even though the letter named the Union for the first time, it did not contain any definition of the concept but the identification of a competence area to be incorporated (CFSP) and three principles inspiring the reform: democratisation, effectiveness, and unity and coherence of action.⁵⁰

The terms of the strategic partnership appeared to be questioned by the unexpected announcement by the French President, in July 1990, of his intention to withdraw their troops from German territory. If this seemed to herald a solo French policy, the start of the British government's assertive strategy in coincidence with the Gulf crisis seems to have been a decisive factor in the reconstruction of the partnership. Franco-German orientations were renewed in October during the 56th bilateral summit. Both leaders reaffirmed that the reforms resulting from the Treaties should be ratified before the end of 1992 and they agreed also to harmonise their positions in order to open the way towards political union.⁵¹ Before the Rome summit, Kohl and Mitterrand addressed a second letter in which they listed a wide range of proposals to be discussed during the summit. These contained the main elements for the forthcoming IGC.⁵² This second joint letter had as its main purpose, the reestablishment of the centrality of the CFSP within the scope of the IGC: this had come under fierce attack from Mrs. Thatcher following the Gulf crisis.

The strategic partnership worked along these two axes: agreement on the inclusion of common foreign and security policy within the Union and, by effect, opposition to the UK who initially questioned the creation of the Union itself and afterwards fought the inclusion of CFSP. Already in the Asolo Council meeting, the Franco-German partnership presented the basic elements of the CFSP: the European

48 *Agence Europa* No. 5238 20.4.90 p. 3.

49 *Agence Europa* No. 5238 20.4.90 p. 3

50 In the opinion of Tsakaloyannis, the letter reflected the compromise reached in the Strasbourg summit between the French and German leaders but neither Mitterrand or Kohl could elaborate on the nature of the political union they had in mind. Tsakaloyannis, Panos 'The acceleration of history' cit. p. 89 fn. 12.

51 *Agence Europa* No. 5331 19.9.90 p. 4. In the Statement, it was noted that the German Chancellor insisted that French soldiers would continue to be welcome in Germany.

52 *Agence Europa* No. 5388 10/11.12.90 p. 4

Council should define the general guidelines on the common policies and the General Affairs Council would be in charge of its implementation. This was followed by the presentation to the IGC of a fully fledged proposal on CFSP in February, including a link with the WEU. In late March, stimulated by the lack of progress within the IGC, the French and German Foreign Ministers released a joint statement confirming the intention of the two countries to serve as an engine for European construction and reaffirming their determination to conclude the work of the IGCs by the end of the year.⁵³ Therefore, they conclude that it was vital to have completed the main part of the work before the summer of 1991. The pair was trying to influence the conclusions of the forthcoming Luxembourg April summit. Several guidelines for political union, mainly focused on CFSP, were included. They considered that the main issue was to define precisely the principles and procedures of a common foreign and security policy eventually leading to common defence policy. In an indeterminate fashion, they called for the best institutional formula for the implementation of common policy and for definition the organic relationship with the WEU without weakening the links with NATO. Finally, they also endorsed a common policy in the area of arms exports.

These terms collide with the Atlanticism of the UK and some other Member States but served well the objectives of French policy. Although the March declaration included reference to some German priorities (to take measures to strengthen the Union's democratic legitimacy and to laid down the EP powers; and to make progress in defining new sectors of cooperation and strengthening common policies on drugs and criminality, immigration, technology and the environment),⁵⁴ the German government was uneasy in a position that might be interpreted as an opposition to the US. At this moment, the partnership passed a critical moment and the pre-Luxembourg summit between Mitterrand and Kohl registered agreement for a low-key summit that would examine the balance sheet of the IGCs talks, would register areas of agreement and would fix goals for 'difficult issues'.⁵⁵

The consistency of the partnership was manifested in the last stage of the conference as a result of and response to the Italo-British proposal on CFSP. The intensity of the response proves the determination of the partners. Firstly, they invited these Member States sharing the Franco-German approach to discuss CFSP in a restricted meeting, thus effectively sabotaging the conference as the framework for discussions (only Spain responded to the invitation). This initiative was accompanied

53 *Agence Europa* No. 5456 23.3.91

54 *Agence Europa* No. 5456 23.3.91

55 This low profile agreement gave the impression to some commentators that *interest in exploring the possibility of establishing a West European defence entity with responsibilities distinct from these of the Atlantic Alliance seemed to have been postponed indefinitely while awaiting the emergence of more favourable circumstances, even though the idea remained in circulation.* Yost, David S. France and West European defence identity' *Survival* Vol. 33 No. 4 p. 344

by two political signs: a joint declaration on the Yugoslavian crisis which formed the basis of the EPC declaration; and the decision to upgrade the joint Franco-German brigade to the level of a corps which could thus become the nucleus of a European corps including forces from other WEU members.⁵⁶ Finally, they presented an alternative draft article and declaration on security policy that would become the basis of the texts finally agreed in Maastricht. Before the Maastricht summit, a Franco-German one was held (Bonn, 14 and 15 November). The summit recorded agreement on all major issues and the joint desire that the Council could achieve clear guidelines on CFSP; in strengthening the EP powers and in starting the path towards EMU. They endorsed the federal vocation, ruled out the possibility of failure in Maastricht and indirectly identified the UK as the main obstacle to success in Maastricht.⁵⁷ They also confirmed the use of the Franco-German military cooperation as the basis of the CFSP in the European Union.⁵⁸ Since the policy towards Yugoslavia was a point of disagreement between them, a tacit agreement to separate the issue from the negotiations on CFSP was forged.⁵⁹

The Franco-German partnership was decisive in setting the timing and scope of negotiations and establishing CFSP as the central element of a political union forcing British acquiescence. These were the bases of an strategic agreement which, however, were under strain during the negotiations on the two central issues. The realisation of the costs of German reunification implied a cooling of German enthusiasm towards EMU. At the same time, this provided fresh grounds for airing *Bundesbank* concerns. Whilst the Bundesbank argued in favour of a precedence of the convergence of economic indicators on inflation and budget deficit, Mitterrand argued that convergence should not be a precondition, but a goal.

56 The Franco-German plans for a European corps are regarded as a reaction to the British move earlier in the year to claim and obtain the command of the newly-established NATO reaction force. In the view of Paris and Bonn, the creation of this force itself was seen as a preemptive political strike of London. Rummel, R. 'Beyond Maastricht' cit. p. 308

57 However, they pointed out that no one wanted to isolate Britain and they hoped that after the debate in Parliament, the British Prime Minister would have his hands freer for negotiation. After the debate, however, there was a view that the British government had failed to secure a freer negotiating position and, therefore, some references to a two-speed union appeared. *The Independent* 27.11.91. The threat of excluding Britain was voiced by Mitterrand in an interview with the *Frankfurter Allgemeine Zeitung*.

58 Kohl and Mitterrand gave a mandate to their ministers that they prepare *the strengthening and extension of Franco-German military cooperation in an European perspective, as an extension of the initiative of 14 October dealing with CFSP*. The German and French ministers submitted a report proposing a timetable with a view to submitting in April 1992 detailed proposals on the missions and the nature of the ties with the competent collective security organisations in Europe, the WEU and NATO. *Agence Europa* No. 5610 16.11.91 p. 4

59 The question of the recognition of Croatia and Slovenia was deleted from the Maastricht summit agenda to avoid a split on the issue, mainly because the divergences between France (which preferred to maintain the integrity of the Yugoslavian Federation) and Germany (which pushed for immediate recognition of self-declared Slovenia and Croatian independence).

Regarding CFSP, the German government constantly attempted to allay any fear or reticence on the part of the US. After the first Franco-German submission to the IGC, the German Foreign Minister declared immediately that the joint proposals on CFSP (which were made with a view to giving the future union a responsibility on matters of defence) had to be placed in the historical context of a unified Germany confirming its intent to integrate to the greatest possible extent in the European Community.⁶⁰ Additionally, when the French government proposed to discuss CFSP outside the framework of the IGC, the German government (party to the initiative) voiced its determination not to implement a policy of bilateral hegemony.⁶¹ This dual attitude has been rightly interpreted: Franco-German proposals on CFSP stemmed primarily from French initiatives. The German support was somewhat ambiguous and based on a desire to maintain positive relations with France. Although Germany shares the long-term aspirations for European Union, it is concerned about the current risk of weakening NATO.⁶²

The Franco-German partnership was based also on a tacit agreement to respect the French general design whilst the German delegation was free to negotiate the institutional requirements demanded by its domestic politics. Regarding the nature of the union, Tsakaloyannis has written that the Franco-German agreement *was a tactic 'quid-pro-quo through which Paris lifted its reservations regarding the Germans right to decide on their own future in return for a German commitment to a federal Europe.*⁶³ However, there is general agreement that France did not favour the development of a federal Europe, since this would imply a loss of its leading role and, thus a further erosion of French sovereignty.⁶⁴ The basic element of the French design was the reinforcement of the European Council and, eventually, the introduction of an organ representing the national parliaments. The French delegation, however, opposed the idea of an unitary design modelled on the Community politico-legal framework and, indeed, the idea of the three-pillar structure was put forward by the French representative Pierre de Boisseau.⁶⁵ Although Germany favoured a unitary structure, it did not at any moment seriously challenge the leadership of the French design. Kohl used the summit of Christian-Democratic leaders to consolidate an

60 *Agence Europa* No. 5461 28.3.91 p. 3

61 *Agence Europa* No. 5585 10.10.91 p. 5

62 Yost, D. op. cit. p. 334

63 Tsakaloyannis, Panos 'The acceleration of history' cit. p. 88

64 Martial, Enrico 'France and European political union', in Laursen, F. and Vanhoonacker, S. (eds.) cit. p. 116. Martial argued that France tried to impose its national institutional system

65 Some have argued that if the TEU enters into force, it would have achieved the aim of the Fouchet proposals. Sutton, M. op. cit. p. 6

stance that would nurture rhetorically federalist aspirations whilst respecting the French design.⁶⁶

With the exception of the issues on the Union structure and CFSP, the German delegation was the leading negotiating partner with an assertive attitude that attempted to accommodate in the forthcoming Treaty its many domestic requirements. Enhancement of democratic legitimacy was a reform demanded by German institutions. Therefore, the German delegation championed the introduction of the codecision procedure for the EP, as well as other institutional reforms.⁶⁷ For this, the German delegation teamed up with Italy; Kohl and Andreotti had already agreed in Venice in 1990 on the necessity to introduce a codecision procedure for the EP and to create a representative body of "regions". Although they presented a Joint declaration on EP powers,⁶⁸ there was no attempt to forge a stable partnership further than the circumstantial coincidence (in fact, they presented two separate proposals on codecision).

The agenda of the German delegation was fixed in consultation with the *Länder*, which were also involved in the negotiations.⁶⁹ Their intention was to remove EC policy from the exclusive domain of foreign policy that in the past had allowed discretionary involvement by the Federal government in their reserved domain. They wanted also to be incorporated into the EC decision-making process. Most of their demands were satisfied by the conference: the inclusion of the principle of subsidiarity and its wording in a negative sense⁷⁰ as they had proposed; the

66 The summit, on 26 November, endorsed a strategy designed by Kohl in which the new Treaty would be revised at a fixed date *The Independent* 27.11.91. The UK would be offered the replacement of the expression *a federal goal* for another, more vague, expression. The instrument would be a statement Annexed to the Treaty with four parts: confirmation of the will to build a Union with a federal vocation; confirmation of the date of 1996 for revision; expression of the will of not using the opting out clause, and indication that would-be Members could only be accepted on the terms of the declaration. The agenda for 1996 included extension of the scope for co-decision, extension of competencies in social policy, foreign and security policy and judicial cooperation. *Agence Europa* No. 5619 29.11.91 p. 4. The Christian-Democratic leaders also established as a priority the inclusion in the Treaty of social policy, on which decision would be taken by majority voting and through to co-decision. *The Independent* 22.11.91.

67 Germany pressurised the Dutch Presidency to enlarge the EP's powers since the Bundestag confirmed its will not to ratify a treaty that was too timid on democratic legitimacy. *Agence Europa* No. 5613 21.10.91 p. 7

68 *Agence Europa* No. 5469 11.4.91 p.3.

69 See particularly Jeffery, C. and Yates, J. 'Unification and Maastricht: the response of the *Länder* governments' *German politics* Vol. 1 No. 3 1992 p. 58-81 and Leonardy, Uwe 'Federation and *Länder* in German foreign relations: power-sharing in Treaty-making and European affairs' *German politics* Vol. 1 No. 3 1992 p. 119-135

70 On the differences between the positive and negative wording of the principle of subsidiarity, see Chapter 8 Section 8.1.1 A. It has been noted that the reason for this controversy on the principle was rooted not in any hostility of the *Länder* towards the Union Treaty nor even the European Union as such (as it was mistakenly suggested by some British commentators). *On the contrary, the matter at stake was and remains a straightforward and even natural contest over power*

institutionalisation of the committee of the regions, and the rewording of Article 146 that opens up the possibility for ministerial level representation of the *Länder* in the Council. Their only unfulfilled demand concerned the distribution of competence on certain policy fields (the *Länder* had rejected the transference of competence on energy, trans-European networks, tourism and disaster prevention).

Finally, the development of a fully-fledged social policy was also a German requirement (shared by several other Member States) boosted by its domestic pressure. The German unions considered that the Single Market programme did not provide adequate safeguards for working conditions and worker's co-determination rights. Their main demand was the implementation of a legally binding social charter aimed at the protection of workers' rights.⁷¹ Therefore, a strong defence of the inclusion of the Community's Social Charter into the Treaty was to be expected from the German delegation.

B. An strategic actor *ab negotio*: The UK

The influence of the UK in shaping the Community development during the 1980s has been duly recognised and catalogued.⁷² A reiterated opposition towards further integration and the permanent questioning of concrete steps have made the UK a strategic actor to be taken into consideration in any negotiation, since it will normally provide the bottom line on the possible agreement. The adherents to institutional intergovernmentalism argue that, being one of the 'Big Three', the possibilities to bring into line its discordant positions are mainly limited to the threat of exclusion.⁷³ The limits of the large Member State veto and the accomplishment of a *de facto* exclusion were illustrated during both IGCs by the renouncing by the UK of signature of treaty provisions on social policy and the achievement of an opt-out clause on EMU.⁷⁴

sharing within a federal state which is itself growing into the fully accepted, new federal structure emerging above it. Leonardy, Uwe op. cit. p. 132

71 See on this Markovits, Andrei and Otto, Alexander 'German labour and Europe '92' Comparative Politics Vol. 24 No. 2 1992 p. 163-180. They pointed out that German unions had failed to develop a coherent strategy on social policy and that their attitude stemmed mainly from their ideological standpoint. This conclusion, however, has to be carefully assessed in relation to the period of the research (Summer 1989).

72 See in particular George, Stephen An awkward partner: Britain in the European Community (Oxford: OUP, 1990) 224 p.

73 Moravcsik, A. 'Negotiating the Single European Act' cit. p. 26

74 In the opinion of Noël, *the veto can no longer be used among the Twelve, even in an intergovernmental negotiation.* Noël, Emile 'Reflections on the Maastricht Treaty' Government and Opposition Vol. 27 No. 2 1992 p. 150

The UK's negotiating position was determined during the negotiations by two factors. Firstly, if the deal that led to the SEA reflected the convergence of domestic politics preferences among the 'Big Three' and not least Britain,⁷⁵ during the IGC on political union it was made clear that British domestic policy priorities did not appeal to most other Member States and as such insufficient to condition the agenda. Not surprisingly, then, Britain found herself in opposition to a majority on almost any relevant issue discussed during the conference, which fact thus reduced greatly its bargaining position.⁷⁶ Therefore, the UK needed to a larger extent than any other member constant bilateral contacts to forge occasional power coalitions on concrete issues or to try to diffuse the Franco-German pressure.

The second factor was the effect that the IGC itself had on British politics, unparalleled by any other Member State.⁷⁷ The split was established not only between Government and opposition but also within the party in government, too. During the preparatory stage, the intransigent attitude towards the process of reform fed the internal disarray in the Conservative Party, which was resolved with the substitution of the Prime Minister. The new government chose a more pragmatic approach based on the defence of certain points that could not be surrendered. This attitude, which implied certain counterparts, provoked in turn tensions that again threatened to split the Tory party.

The opposition of the UK government to the EMU was extended to the proposal of convening a conference on political union. As a response to the Franco-German initiative, the British government rejected any proposal in favour of greater centralisation and voiced, in turn, minor institutional improvements to strengthen Community's efficiency: a generalisation of the principle of subsidiarity in Community legislation; a greater role for the Community institutions in the execution of policies; the improvement of the Council's political responsibility to the national parliaments, and a review of the EP *status quo* in certain areas (financial control by the EP).⁷⁸ During the preparatory stage, the British government based their tactics on not making any contribution and reacting to ideas advanced by others whilst always coming back to a recurrent question: what is the meaning of political union? This was complemented by a dilatory attitude; thus, when the Presidency attempted to reach a

75 Moravcsik, A. 'Negotiating the Single European Act' cit. p. 25 and 49

76 *Personne ne peut préjuger de l'issue de cette réunion, à cause du problème posé par la position de la délégation britannique qui se trouve en opposition avec la majorité des autres Etats membres sur les enjeux importants de la négociation.* De Shoutteete, P. in Les conférences intergouvernementales avant le conseil de Maastricht cit. p. 16

77 In the words of Laursen, *domestic politics are particularly important for understanding the UK's position during the IGC (and) still made the UK the most minimalist of the Members.* Laursen, Finn 'Explaining the intergovernmental conference on political union', in Laursen, F. 'The Maastricht Treaty' cit. p. 235

78 *Agence Europa* No. 5242 26.4.90 p. 3

decision in the April 1990 summit, the UK's arguments were based on the necessity of a previous definition of the concept of union. The European Council commissioned a report on the topic to try to clarify the issue, and the decision was delayed. In the view of the Prime Minister, political union should be established by elimination; i.e., what should not be meant by European Union.⁷⁹

Proceeding with European union was not at all on the agenda of the British Prime Minister, who tried to design an alternative policy line for the UK based on reaffirming the Atlanticism and the partnership with the US in a new global role.⁸⁰ Her decided alignment with the US during the Gulf crisis and the slow and reluctant attitude of the other Community countries fed her arguments against the creation of CFSP. In her view, the response of the Member States to the crisis proved the existence of insoluble differences among them and, therefore, the non viability of any attempt to forge a CFSP. Therefore, the British government pointed out that it had not yet formed an opinion on the desirability of transferring to the Community certain competencies in the area of security. The British government considered, in turn, that it would be more suitable simply to strengthen political cooperation.⁸¹ This collide with the Franco-German partnership and determined the central axis of confrontation during the IGC.

The change in British leadership was felt between the two 1990 Rome summits; thus, the reservations that the UK had entered to the Conclusions of the Presidency after the October summit (regarding the EP role in the legislative sphere; European citizenship; and the objective of a common policy on security and foreign affairs)⁸² did not appear in the conclusions of the December summit which formed the basis for the IGC mandate. Some aspects of the new policy line were advanced in February. European Union, in the view of the Foreign Affairs Secretary, was a process and not a fixed state and, hence, cooperation between member states could fit more easily outside the institutional framework of the Treaty of Rome. In this scheme, the European Council would coordinate from above, giving guidance to policy.⁸³

79 Mrs. Thatcher attacked any notion that the initiative under way could be addressed to create an unitarian state or an end to the historic nation states in Europe. *Agencie Europa* No. 5245 30.4/1.5.90 p. 4. Alternative proposals were launched from several quarters. See for instance, the proposal of the Bruges Group; Sked, Alan A proposal for European Union Occasional Paper 9 (London: The Bruges Group, 1990) 34 p. See also the very interesting discussion in Institute of Directors European political union: a business leader's view (London: IoD, May 1990)

80 See an exposition of these ideas in Thatcher, Margaret Shaping a new global Community. Speech by the Prime Minister with occasion of receiving the Statement Award of the Aspen Institute, 5 August 1990 Verbatim service FCO VS039/90

81 This was voiced by British Foreign Secretary at the ministerial meeting in Asolo (which would produce the virtually definitive list of topics to be dealt within CFSP) *Agencie Europa* No. 5345 8/9.10.90 p. 3 Reservations were also registered by the Danish Folketing.

82 Bull. EC 10-1990 point I.4 p. 8

83 *Europe renewed* Churchill Memorial Lecture *Agencie Europa* No. 5436 21.2.91 p. 8

This signalled an acceptance by the UK of the strategic goal of establishing a union, provided that it would not be included in the Community's politico-legal framework. The negotiating position of the UK was established by the Prime Minister in the half-yearly review of Community developments.⁸⁴ After declaring that *it is in our national self-interest to help to build and shape the future of Europe*, he numbered the five principles for negotiation:

- Respect for national institutions and the principle of subsidiarity;
- Respect for individual freedom and opportunity vs. protectionist tendencies;
- Efficiency, meaning more control and powers of scrutiny for the EP;
- Democratic accountability, which implied the involvement of national parliaments;
- The enhancement of Europe's role in the world, taking into account national history, traditions and instincts.

The bottom line of the negotiating position was also contained in this paper; firstly, rejection of anything which could mean undermining NATO. Secondly, a Community social dimension was not acceptable if that meant extra cost and intrusive new rule that would stifle initiative and reduce the competitiveness of British firms. Finally, Britain would not accept the imposition of a single currency.

The strategic British position was very delicate. The new government believed that an anti-European stance would be counter-productive both at home and abroad. Therefore, it accepted the minimum requirement, i.e., the creation of a Union which was not modelled on the politico-legal framework of the Community. Since this was not a contentious issue within the conference, the focus switched to the attack on the objective of achieving a federal union and the CFSP. Given the lack of definition of the term 'federal' and the lack of an explicit agreement on it by the Franco-German partnership, it seemed to be rather a bargaining tool used by other negotiating partners (and not least the institutions) to trade more substantial British concessions. It was also useful for the British government to focus criticism on an easy-to-win target.

On CFSP, Britain was in direct opposition to the Franco-German partnership and her negotiating attitude was intended to divide it. Thus, Britain pushed the NATO May 1991 decision to establish a multinational Rapid Reaction Corps (RRC) which would be under British command. The move was politically valuable for Germany because it would make palatable a continued foreign military presence,⁸⁵ but it challenged the French design. This came in a moment of relative cooling of German faith in the process, particularly due to the Gulf war, the evidence of the economic

⁸⁴ *Developments in the European Community July-December 1990*. White Paper Command Paper EC No. 23 (1991) Cm 1457

⁸⁵ Yost, D. op. cit. p. 328

costs of reunification, and the unknown effects thrown up by the disintegration of the Soviet Union.

However, Britain was unable to articulate an alternative partnership with Germany or even a coalition because it could not offer substantial contributions, given the hostile domestic arena. The change of attitude of the Major government (who elected to announce during a visit to Germany that Britain wanted to bring its own ideas to the IGCs),⁸⁶ reopened the internal divisions within the Conservative Party. Although the irrelevance of the European issue in electoral prospects has been argued,⁸⁷ the government needed to avoid a potentially damaging split with a view to the forthcoming elections. The internal split reached a peak in June on the eve of the summit, with a strong attack against the Union project from Margaret Thatcher. The British government lobbied successfully on the French and German ones to ensure that no major initiative which could contribute to the isolation of the UK were presented to the Luxembourg June summit.⁸⁸

The anti-climax produced by the *Dutch Draft* as well as the low point in the Franco-German partnership due to the *Bundesbank* criticisms on EMU were viewed by the British government as the best chance to attack the central element of the partnership: their agreement on CFSP. The UK choose this opportunity to present the joint Italo-British proposal on common security and defence policy.⁸⁹ The Anglo-Italian paper mentioned the possibility of a long-term defence policy as result of a evolutionary process, but focusing for the present on European identity. The key element of this identity the special relationship with the USA and, in any case, any further development of the European identity should be constructed to reinforce the Atlantic Alliance. The central concept was the complementarity between the processes of development of CFSP and the revision of the Alliance tasks and strategy. This implied two elements: firstly, enhanced coordination among Europeans would respect the principle of openness in consultations; secondly, the decision-making process should be complementary, with the Alliance remaining the essential forum for agreement on policies reflecting the commitments of their members.⁹⁰

86 Major, John *The Evolution of Europe* Speech by the Prime Minister to the Konrad Adenauer Foundation. Bonn 11 March 1991.

87 Moravcsik argues: *Since Europe is a low-priority issue for the voters of the three largest Member states, it is implausible to posit a mechanism by which politicians launch political initiatives to seek direct electoral advantage, except perhaps immediately before European elections.* Moravcsik, A. op. cit. p. 52

88 See *The Independent* on Sunday 23.6.91. *The Independent* 26.6.91

89 The proposal was presented to the Haarzuilen session of the council. It is difficult to make a judgement on the reasons behind the timing of the presentation. De Michelis said that the British-Italo initiative was adopted on Easter Monday (in a meeting with Douglas Hurd in Rome), but it was delayed at British request because of internal political reasons.

90 *Anglo-Italian declaration on European security and defence in the context of the intergovernmental conference on political union.* Europe Documents No. 1735 5.10.91

The Franco-German reaction strongly reasserted the principal lines of CFSP. Confronting the possibility of a French solo policy, the British government accepted them. Before the Maastricht summit, the government designed its final negotiating tactic. Two different messages started to be used: one addressed the domestic audience and not least the Conservative party⁹¹ and a second one addressed the negotiation partners. As regards the latter, the British government underlined its willingness to sign a Treaty in Maastricht and, more importantly, it started to grant some concessions: institutional changes were already agreed at Noordwijk and later in November it pointed out that it could accept the formulation of the concept of joint action. Britain hoped that having offered flexibility on foreign policy and the EP powers, it could better defend its position in the more relevant area of social policy.⁹²

Regarding the domestic arena, the government needed overwhelming party support on a negotiating position that would not alienate the other Member States. It, therefore, presented a motion to the Parliament with the double objective of securing a negotiating mandate for Maastricht and of ensuring Cabinet unity to face the anti-federalist group. The motion repeated the basic presumption that *it is in Britain's interest to continue to be at the heart of the European Community*. It also endorsed the government's constructive approach and established the negotiation objectives for Maastricht. Firstly, the government was urged to work towards a settlement which avoided the development of a federal Europe. Secondly, the right of Parliament to decide in the future whether to adopt a single currency should be preserved. Thirdly, extension of Community competence should be based on the principle of subsidiarity and effectiveness avoiding, in particular, *intrusive Community measures in social areas which are matters for national decision*. Fourthly, CFSP should respect the basic national interests, and security policy should be compatible with NATO. Finally, the motion endorsed the improvement of *intergovernmental* cooperation on home and judicial affairs.⁹³

Unfortunately for the British government, most of its tactical requirements were diametrically opposed to these of the German delegation.⁹⁴ Political coincidence was rather accidental, as in the case of subsidiarity. Disagreement

91 Although the Conservative conference had endorsed a motion calling for maintaining the government's cautious but sensible attitude, the Bruges group was pressing for a referendum on Britain's participation in EMU and political union. *The Independent* 23 .9.91

92 *The Independent* 20.11.91. The Dutch Foreign Minister had pointed out that the British would need to make concessions on EP powers and CFSP. Interview in *The Independent* 18.10.91. Britain was ready to accept EP powers amounting to delay or veto on legislation. On the other hand, a deal was almost struck at the end of October on EMU which would allow Britain to opt out.

93 Commons. Parliamentary Debates. Vol. 199 1991-1992 20.11.91 p. 269

94 After a bilateral meeting, Major indicated that Britain differed with Germany in four key areas: communitarization of immigration policy, co-decision by the EP, social policy and the federal goal. *The Independent* 11.11.91

extended to the communitarization of immigration policy, with the British government calling for the abolition of Article 100c of the *Maastricht Draft* and reaffirming the British view that these questions should be settled through intergovernmental cooperation. Equally, they opposed any social policy agreement which may undermine Britain's comparative advantage on low wages and employment costs.⁹⁵ Differing from other delegations, who preferred to negotiate particular elements, Britain (which had not ratified the Social Chart) questioned the policy itself and its underlying principles.

6.3 THE ROLE OF THE INSTITUTIONS

The role of the institutions in the process of reform is particularly relevant in the preparatory stage when they can use their political discretion to advance proposals, thus shaping the agenda. On the other hand, their rhetorical capability allows them to harness events within a strategy fostering thus the debate. Thus, the EP and Commission were eager to underline that the Union was *the* coherent solution to the new historical requirements.⁹⁶

Once the negotiation process has started in accordance with Article 236, the Commission and EP are formally limited to emit their opinions. Although there is not a explicit provision excluding the institutions, their role depends on the willingness of the Member States, and their bargaining capability is limited.⁹⁷

95 Kohl finally proposed that social policy could be withdrawn from the body of the Treaty itself and placed in a Protocol. *The Independent* 11.12.91

96 The EP resolution on the constitutional basis of European Union mentioned the three main challenges to be met: the reform in eastern Europe; German reunification, and the Gulf crisis. Resolution on the constitutional basis of the European Union PE Doc. A 3-301/90 OJ No. C 19/65 28.1.91. The Commission opinion noted three factors behind the dynamic that had led to the IGC. They were, firstly, the acceptance by the Member States of the necessity of a higher international profile which would enable them to give collective responses in front of the new demands. Secondly, the success of the 1992 programme raised the question of how to met democratic legitimacy. Finally, the Community's overall progress had proven inadequate and it needed an improved decision-making process. Commission opinion of 21 October 1990 on the proposal for amendment of the Treaties establishing the E.E.C. with a view to political union COM (90) 600 final. Finally, the then President-in-Office, Andreotti, opined that *the great period of reforms opened as a result of two factors of different origins but convergent aims: the external factor represented by a general redefinition of European and international relations, and the internal factor, resulting from the SEA and based on the objective of completing the internal market by 1993*. Address to the EP. Debates of the EP. No. 3-398/104-126 23.1.91

97 Pierre Pescatore has pointed out that *La méthode négociative appliquée pour les gouvernements à ce projet vital pour notre avenir est contraire à toutes les règles de la démocratie*, in Les conférences avant le Conseil de Maastricht p. 8. On the procedure for reform, see Chapter 3 Section 3.2.4

6.3.1. Negotiations within European Council, Council and COREPER ⁹⁸

Preparatory stage

The development of negotiations within the conference was conditioned by the number and degree of elaboration of the issues discussed. Corbett has noted that the IGC on the SEA reversed the traditional trend of IGCs; whereas former Treaty revisions had been negotiated within the Council and the conferences had merely provided a mere assent, in 1985 the real negotiations took place in the IGC.⁹⁹ Reflecting on the parallel EMU conference, Noël remarked that the role of the European Council was limited to bringing political pressure, whilst political decisions were taken by Ministers and the main technical elements were the result of a long process of negotiation between officials.¹⁰⁰

The preparatory phase of any project of reform is of great importance for it is then that the goals are determined, together with the methods to be used to achieve them.¹⁰¹ In contrast to the 1985 and the EMU conferences, the IGC on political union was not preceded by a detailed report and, therefore, much of the previous preparatory work had to be carried out through normal Community channels by the COREPER and the political committee on the basis of documents from the Presidency. Crucially, the Council kept tight control over the shape of the initiative and it was not prepared to relinquish political control.¹⁰² The Foreign Ministers had been charged by the European Council with the preparation of the conference, which preliminary work was to be based on the report to the Council and the contributions from national governments and the Commission. The importance attached to the preparatory work was enhanced by the European Council's desire to start negotiations within the IGC on concrete bases provided by the preliminary work.¹⁰³

98 On the development and agenda of the negotiations, see Corbett, Richard 'The intergovernmental conference on political union' *Journal of Common Market Studies* Vol. 30 No. 3 1992 p. 271-98; Wessels, Wolfgang 'The institutional strategies toward political union', in Hurwitz, Leon and Lequesne, Christian *The state of the European community. Policies, institutions and debates in the transition years* (Boulder, Co.: Lynne Rienner & Longman, 1991) p. 9-18; Martial, Enrico 'I giochi dell'unione politica europea' *Il Mulino* Vol. 40 1991 p. 637-653; Constantinesco, Vlad 'Los doce trabajos de Hércules o la agenda de las conferencias intergubernamentales encargadas de revisar los tratados comunitarios' *Anuario CIDOB* Barcelona 1991 p. 89-96. See also the discussion of the procedure for reform (Article 236) in chapter 3.

99 Corbett, R. 'The intergovernmental conference on political union' cit. p. 239

100 Noël, E. 'Reflections on the Maastricht Treaty' cit. p. 149

101 Pryce, R. and Wessels, W. 'The search for an ever closer union' cit. p. 26

102 The Council dismissed the Presidency suggestion of creating a high level working group, proposed after the April summit. *Agence Europa* No. 5239 21.4.90 p. 3 The Council, instead, charged the COREPER and the political committee to establish an inventory of the questions to be discussed in a Gymnich type meeting on 19/20 May. *Agence Europa* 5249 7/8.5.90 p. 3

103 Conclusions of the Presidency Bull. EC 6-1990 point I.11

On the basis of the Belgian memorandum and the joint Franco-German letter, the Council was charged with examining and analysing the eventual Treaty changes and to prepare proposals to be discussed at the June summit,

*with a view to a decision on the holding of a second intergovernmental conference to work in parallel with the conference on EMU and with a view to ratification by the Member States in the same time-frame.*¹⁰⁴

Treaty changes should be based on three principles: strengthening the democratic legitimacy of the Union; enabling the Community and its institutions to respond efficiently and effectively to the demands of the new situation, and assuring unity and coherence in the Community's international action.¹⁰⁵

The Council called Member States to submit their proposals to the special meetings of the Permanent Representatives and political directors. These proposals were to concentrate on the three areas identified by the European Council: strengthening of democratic legitimacy, effectiveness and efficiency of Community institutions, and unity and coherence of Community action as well as subsidiarity.¹⁰⁶

The result was a report adopted by the Council and transmitted to the European Council.¹⁰⁷ Tsakaloyannis has judged the report in the following terms:

*evidently, it was drafted by junior officials, whose assigned job was to compile an inventory of the familiar problems which hinder political union rather than those to draft an imaginative document with new ideas on the subject.*¹⁰⁸

On the basis of this report (officially designated Results of the deliberations of the Ministers), the European Council decided the convening of a conference under Article 236 of the Treaty. The conclusions contained no definition of the concept of Union, but they referred to the transformation of the Community from an entity merely based on economic integration and political cooperation into a union of a political nature including a common foreign and security policy. The transformation would be implemented focusing on three aspects: scope (further transference of competence; inclusion of union citizenship, and inclusion of areas of intergovernmental cooperation); institutional aspects (institutional arrangements

104 Conclusions of the Presidency Bull. EC 4-1990 point I.8 p. 8

105 Bull.. EC 4-1990 point I.12 p. 9

106 After this meeting, each Minister appointed a Personal Representative as well as one from the President of the Commission; they would elaborate the text to be submitted to the European Council in June. Bull. EC 5-1990 point 1.1.1. p. 8

107 Council meeting on 18/19 June Bull. EC 6-1990 point 1.1.2 p. 26

108 Tsakaloyannis, P. 'The acceleration of history' cit. p. 90 fn. 15

necessary to ensure unity and coherence to the constituent elements of the union and the role of the European Council), and the general principles (negative delimitation of the concept of union and subsidiarity). The conclusions outlined a series of concrete measures under the three principles. On *democratic legitimacy*, the European Council referred to improved accountability and control. *Efficiency and effectiveness* was considered from two angles: how to meet the challenges the Community faces and how to improve the functioning of the institutions. Finally, *unity and coherence of the Community's external action* would imply the Community acting as a political entity on the international stage.¹⁰⁹

The Italian Presidency developed significant preparatory work. In October, the Council approved a Presidency document drawn up after the Personal Representatives' meetings, which was transmitted to the Rome European Council as the basis for deliberations.¹¹⁰ Because of British impediments and the priority to concentrate on EMU decisions, the summit merely took stock of the state of the discussions and confirmed the main principle leading the process: the transformation of the Community into a European Union by developing its political dimension, strengthening its capability for action and extending its powers.¹¹¹ There were no concrete instructions but a request for the Foreign Ministers to continue preparatory work and the Presidency to report, taking into account EP and Commission opinions.¹¹² The mandate of the European Council to the IGC, as approved by the Rome summit, contained a detailed list of subjects grouped in five headings:¹¹³

- * Democratic legitimacy (role of the EP and national parliaments, and regional institutions)
- * Common foreign and security policy
- * European citizenship
- * Extension and strengthening of Community action (enlargement of competence)
- * Effectiveness and efficiency of the Union (institutional improvements for the European Council, the Council and the Commission).

109 Bull.. EC 6-1990 point I.35 p. 15-17

110 Bull.. EC 10-1990 point 1.1.2 p. 16

111 Bull.. EC 10-1990 point I.4 p. 8

112 Allegedly, the Italian Presidency had taken its conclusions further than those of the Dublin summit and this fact provoked Dutch and British criticism. *Agence Europa* No. 12/13.11.90 p. 7.

113 Bull.. EC 12-1990 Conclusions of the Presidency. Points I.4 to I.9 p. 9-11

The proceedings of the Conference

A. Procedural aspects

The main procedural elements were decided by the European Council on June; the conference would open on 14 December 1990; it would adopt its own agenda and conclude its work, with the objective of ratification before the end of 1992. The General Affairs Council was charged with the responsibility of ensuring coherence between the two conferences.¹¹⁴ The composition of national delegations would be decided by the respective governments and the Commission would be invited to take part in the proceedings with its own representative. The European Council confirmed the mandate to the Foreign Ministers for them to ensure coherence between the two conferences and agreed also that the Personal Representatives who assisted the Foreign Ministers at the IGC on political union could also participate in the IGC on EMU.¹¹⁵ Despite those appeals, the conferences did not advance at the same pace and there was little interaction between them.¹¹⁶ The European Council decided also that the administrative aspects of the conference would be covered by the Council, since the Secretariat General of the Council was charged with taking the necessary steps to provide secretarial services for the two conferences.¹¹⁷ The Council decided also that the results of the two conferences would be submitted for ratification immediately with the objective of ratifying before the end of 1992.¹¹⁸

The opening session of the IGC at ministerial level on 15 December 1990 established the procedure for proceedings; the Conferences would meet at ministerial level once a month, coinciding with the General Affairs Council. Personal representatives would meet on a weekly basis.¹¹⁹

B. The Drafts of the Presidency

In comparison with the SEA IGC, in which the Draft was written during the first month and the details worked out by ministers in less than one-and-a-half months,¹²⁰ the IGC on political union produced four main drafts (constantly subject to a process of amendment). The first document to contain an exhaustive list of the issues under a formal design was the Luxembourg Presidency Non-Paper of 12 April

114 Conclusions of the Presidency Bull. EC 6-1990 point I.11

115 Bull.. EC 10-1990 Annex 1 point I.4 p. 11

116 Noël, Emile 'Reflections on the Maastricht Treaty' cit. p. 149

117 Ibid.

118 Bull.. EC 12-1990 point I.10 p. 11

119 Bull.. EC 12-1990 point 1.1.7 p. 22

120 Moravcsick, A. 'Negotiating the SEA' cit. p. 42

Project d'articles de Traité en vue de la mise en place d'une union politique.¹²¹ This was not, however, a finished document, since several relevant issues were not incorporated (for instance, the areas to which the codecision procedure would apply). On the basis of the Non-Paper and after the heavy criticism to which it was subjected, a certain compromise was reached in Dresden to emphasise the unitary character of the Union. The Luxembourg Presidency elaborated a consolidated draft, the *Draft Treaty on the Union*,¹²² submitted on 20 June 1991 to the conference. This document was confirmed by the European Council in Luxembourg as the basis for work within the IGC until the Maastricht summit. Recalling the Dresden compromise on an unitary approach, the Dutch presidency introduced a new text; the *Draft Treaty towards European Union*.¹²³ The eminently federalising proposals of this document provoked a backlash and the Ministers agreed, in their meeting at the end of October, to return to the *Consolidated Draft*, on which basis the Dutch Presidency elaborated a new draft presented to the conclave of ministers in Noordwijk on 12-13 November. This *Draft Union Treaty*¹²⁴ was the last global version and the structure of the treaty (and therefore the Union) ceased to be an issue. Regardless, the process of negotiation and re-wording of concrete articles continued until the Maastricht summit. The Presidency retained the right to propose replacement solutions in the light of the Maastricht discussions on certain topics (social policy, 'federal vocation', and cohesion).¹²⁵ Some modifications to the negotiating text tabled by the Presidency, the *Maastricht Draft*, were agreed during the summit. These were incorporated by final text approved, called *Treaty on European Union (TEU)*.

C. Proceedings under the Presidency of Luxembourg

The Luxembourg Presidency was mainly dedicated to creating the outline of the elements and policies that would compose the political union as well as its juridical structure. During the first meetings, it was evident that the work of the conference had to face a lack of progress due primarily to the 'round the table' procedure which prevented real negotiations or bargaining at this stage, since participants limited themselves to expressing divergent views. The lack of 'reference documents' was a second obstacle. Council reports and national contributions identified problems and the solutions proposed were either very vague or biased towards national concerns. The guidance role of the Council was particularly evident in the case of the most

121 Hereafter, the *Project of Articles*

122 Hereafter, the *Consolidated Draft*

123 Hereafter, the *Dutch Draft*

124 Hereafter, the *Noordwijk Draft*

125 Letter to the members of the European Council. *Agence Europa* No. 5625 7.11.91 p. 3

controversial issues of CFSP and EP powers, where progress was very slow. In January, the Presidency submitted a non-paper on CFSP and the conference agreed that the procedure to be followed on this topic was the elaboration of a questionnaire to be submitted to the Council for them to hold a debate and *to point the experts in the right direction, as well as caution them about ways not to be explored*.¹²⁶ The same procedure was applied to codecision and the Personal Representatives submitted a questionnaire to the Council. Given the differences between the respective governments, the ability of the Council to provide concrete operational elements was very limited and the reliance on the Commission work became evident, for instance, when an informal Council meeting to discuss CFSP was delayed awaiting the Commission's contribution.

The goal of the Luxembourg Presidency was to elaborate as soon as possible a reference document; it committed itself to having a complete text on all sections included in the Rome mandate on which basis true negotiations would begin.¹²⁷ For it, the Luxembourg Presidency adopted a brokerage attitude.¹²⁸ Thus, when the *Project of Articles* was presented, the President in Office insisted that the philosophy of the Presidency was to identify dominant trends.¹²⁹

The *Project of Articles* suffered heavy institutional criticism as well as that from national delegations. The Presidency tried to avoid the discussion of the Treaty structure within the conference of Representatives¹³⁰ but it was brought up by some delegations during the Council session on 13 May.¹³¹ Mounting pressure forced the discussion of the Treaty structure in the informal Dresden session. On the eve of the forthcoming summit, a deal had to be engineered considering the divergent positions. The reference to a federal goal included by the *Consolidated Draft* was the counterpart for the retention of the three pillar structure, as desired by the UK and France.¹³²

The Luxembourg Presidency, which considered the *Consolidated Draft* the result of the Dresden compromise, wanted the European Council to concentrate on the most polemic issues in order to register some agreement. However, the low point in the Franco-German partnership and the pressure from other Member States¹³³ forced a non-decisive, and therefore non-confrontational, summit. The Presidency

126 *Agence Europa* No. 5416 24.1.91 p. 6

127 *Agence Europa* No. 5444 4/5.3.91

128 *Agence Europa* No. 5420 30.1.91 p. 3

129 Address by Jacques Poos to the EP plenary session. Debates of the EP. No. 3-404. Sitting 17 April 1991

130 *Agence Europa* No. 5480 26.4.91 p. 3

131 Bull. EC 5-1991 point 1.1.2 p. 20

132 *The Independent* 18.6.91

133 During the preparatory conclave, UK and the Netherlands insisted that the European Council should instead elaborate a simple progress report. *Agence Europa* NO. 5519 24/25.6.91 p. 3

proposal was limited to the three issues on which progress should be endorsed at the summit: common foreign policy (without mentioning security or defence); EP powers, and recognition of the need for economic and social cohesion.¹³⁴ The conclusions were very modest; the European Council confirmed the timetable: final agreement should be reached at Maastricht and ratification should be completed during 1992 for the Treaty to enter into force on 1 January 1993. Examining the work of the IGC, the European Council agreed that *the presidency draft (the Consolidated Draft) forms the basis for the continuation of negotiations, both as regards ... the principal points contained in it and the state of play of the two conferences.*¹³⁵ This apparent endorsement of the Treaty structure was softened by the guidelines that the European Council provided regarding the principles to be followed in the forthcoming period of negotiation: a single institutional framework with procedures appropriate to the requirements of the various spheres of action and the evolving nature of the process of union.¹³⁶ On the other hand, the European Council examined policy areas, but it was able to record agreement only on a marginal point: the European Council agreed with the approach in the Presidency draft to improve the implementation of Community law. There was no endorsement of concrete points on CFSP: decision-making '*had to be reexamined*'; the defence identity would be decided at the final stage, and the role of the WEU needed to be clarified. The European Council noted that a consensus on co-decision would be an important part of the final agreement, emphasised the need to strengthen the Community's social dimension and considered that economic and social cohesion should be embodied in the treaty 'in an appropriate way'.¹³⁷

D. Proceedings under the Presidency of the Netherlands

The work under the Dutch Presidency proceeded along a very different path. Working methods and a schedule had been fixed in a communication from the Presidency on 29 July which already anticipated the necessity to held two-days conclaves to sort out the many outstanding issues. Initially, the Dutch Presidency had proposed a Conclave of the European Council to avoid that the final decisional meeting in Maastricht became confrontational. Other procedural aspects were the

134 Letter addressed by Jacques Santer to the European Council members. *The independent* 25 & 26.6.91. The EP had asked the European Council to renew the mandate for the IGC paying particular attention to controversial areas. Resolution of 14 June 1991 on the IGC on political Union. OJ No. C 183 15.7.91

135 Bull., EC 6-1991 point I.3 p. 8

136 Ibid. point I.5 p. 9

137 The EP criticised the postponement of a number of crucial questions to the Maastricht European Council. Resolution of 10 July of 1991 on the European Council meeting in Luxembourg on 28 and 29 June 1991. OJ No. C 240 16.9.91

increment in the number of ministerial meetings and the Ministers' personal involvement. Finally, the Dutch Presidency favoured abandoning the technique of writing articles on basis of majority tendencies favoured by the Luxembourg Presidency¹³⁸ and adopted a more assertive attitude.

The Dutch Presidency came under strain and criticism because of unfortunate timing and time tabling: the first two meetings of the Personal Representatives were cancelled allegedly due to an overload of work since most of the Representatives were also National Representatives. There was, however, a belief that the Dutch attempted to draft first its new proposals.¹³⁹ This was evident when the Presidency, unable to finish its negotiating proposal on time, had to call off a third scheduled meeting of the Personal Representatives on 14 September. The inactivity into which the conference was forced for three months came under heavy criticism since it left very little time for negotiation.

The Dutch Presidency created the biggest problems of the negotiations when it tabled a new proposal that redefined several issues which seemed broadly elucidated. The action was born out of a confusion between the negotiating position of the Dutch government and its role as President of the Council. The main Dutch objective for the IGC was to keep open the way for a step-by-step process of federal-communitarian integration.¹⁴⁰ Therefore, the Dutch government preferred a single legal order based on a supranational institutional framework including the communitarization of foreign and security policy. The consequent change in the structure of the Union introduced by the *Dutch Draft*, sharply rejected by the UK and France, was coupled with some other changes: initially, a preparatory Dutch document had attempted to introduce a reinforced cooperation procedure instead of a codecision procedure. This was unpalatable not only for the EP but for the German and Italian delegations as well. On the other hand, the Presidency suggested to the EMU conference a "two speed" Europe in the third phase, provoking criticism from some delegations. The new Draft could only have prospered with the support of a recomposed structure of alliances and partnerships more adequate to the Dutch interests but non-existent in the negotiations.

Some arguments raised the point that the Dutch tactic aimed to create a crisis to throw into focus that which could be agreeable to all Member States, a tactic successfully followed during EMU negotiations. However, this did not seem to be the

138 *Agence Europa* No. 5535 15/16.7.91 p. 3

139 *Agence Europa* No. 5562 7.9.91 p. 3

140 Most of this paragraph has been elaborated from the Dutch Foreign Affairs Minister, Dankert, Piet 'Nederland en de Europese Politieke Unie: op weg naar een democratische en federaal Europa' *Internationale Spectator* No. 2 1991 p. 78-85. This article was kindly translated by Mrs. Marijke van der Wolf. She does not bear responsibility for the interpretation and judgements expressed above, though.

case; as Dankert explained, the single structure of the *Dutch Draft* was a result of the conclusions of the June European Council which, in the opinion of the Dutch delegation, had clearly brought the fact that at least six members were in favour of a unitary structure.¹⁴¹ Most delegations, however, recalled the conclusions of the summit which had endorsed the consolidated draft as the basis for negotiation.¹⁴² Discussions between the Personal Representatives reached a deadlock and the issue was referred to the Council for it to decide which draft to use since the Dutch one was only backed by Germany, Belgium, Spain and the Commission.¹⁴³ The Dutch Presidency tried to restrict Council deliberations to cohesion, HAJC and EP powers, but the structure of the new entity came under ferocious attack at the meeting on 30 September at which it was decided to return to the Luxembourg *Consolidated Draft*.¹⁴⁴

After the rejection of its draft, the Dutch Presidency was forced to tighten the working schedule by establishing an item-by-item negotiation procedure: the Personal representatives would prepare the issues to be discussed immediately by the Council. Four topics were targeted: CFSP; EP powers, cohesion, and social policy whilst the remaining ones would have to be settled by the Personal Representatives.¹⁴⁵

The Dutch Presidency presented a new draft to the Noordwijk conclave with the task of identifying the problems to be submitted to the European Council for a final decision.¹⁴⁶ At this point, it was clear to all delegations that a final agreement could be reached only in the form of a total package.¹⁴⁷ Six unresolved issues still remained (the question of the federal vocation; decision-making on CFSP; defence entity; the scope and range of the new competencies; social policy, and cohesion).¹⁴⁸

6.3.2 The Commission: an strategic actor with a reactive attitude

The influence of the Commission and particularly its President Delors in shaping the EC developments in the late 1980s and early 1990s is undeniable and it

141 *Agence Europa* No. 5575 26.9.91 p. 3. On another occasion, Piert Dankert referred to the Dresden compromise as source of the new draft. *Agence Europa* No. 5580 3.10.91 p. 3

142 The British complained that they thought the structure of the Treaty had already been negotiated and agreed. *The Independent* 14.9.91

143 *The Independent* 27.9.91

144 Bull. EC 9-1991 point 1.1.4 p. 11

145 *Agence Europa* No. 5579 2.10.91 p. 3 Thus, the Representatives submitted four questions on CFSP for Council arbitration at the 5 October meeting.

146 *Agence Europa* No. 5603 6.11.91 p. 3

147 Address by Van den Broek to the EP. Debates of the EP. Annex OJ No. 3-411/121 20.11.91

148 *Agence Europa* No. 6622 4.12.91 p. 3. The process of negotiation at this stage was described as 'street fighting' by Belgian Foreign Minister Eyskens. *The Independent* 14.11.91

affected also the IGC.¹⁴⁹ The strategic objective had been during the whole period a federal solution. Writing in 1989, Delors argued that political union would help to keep up with the pace of change, particularly by solving the disjunctive between rapid progress and gradual disintegration.¹⁵⁰ In the words of Delors,

*the economic attraction of the single market could have an adverse effect for the commitment to transform relations among Member States into a European Union. Therefore, given the degree of commitment being asked of the Community, and the danger of the Community being diluted, we need an institutional structure that can withstand the strain.*¹⁵¹

However, the initiative for political union, in Delors' view, had come in a moment in which differences of opinion between countries and schools of thought remained still deep.¹⁵² After the first Dublin summit, Delors called for prudence because the Community's degree of maturity was not yet such that political union could be treated in the same way as monetary union. For him, it was a priority to know how the final stage of political union would be, rather than setting up a timetable with an unclear objective.¹⁵³ Some authors have argued that the Commission had judged that the 'hard' issue was EMU precisely because it implied a far-reaching re-cast of the relationship between the EC and its component members. Therefore, the adoption of further changes related to political union could be excessive.¹⁵⁴ Indeed, in his address to the EP in January 1990, Delors had proposed that the conference, under a single chairmanship, should conduct two parallel sets of discussions; one on EMU and the other on the remaining aspects (including political cooperation) with a view to drawing up a full blueprint for the Community in the future.¹⁵⁵

The Commission opted for institutional reform rather than ambitious political union, or accretion instead of transformation, in Pryce terminology,¹⁵⁶ because it was considered impossible to achieve a minimum consensus on the definition of the last stage of political union. The IGC was mainly an opportunity for broadening

149 Wester argues that the Commission's influence on the course and outcome of the negotiations does not seem as determinant a factor as in the case of the 1985 IGC for the elaboration of the SEA. Wester, Robert 'The European Commission and European political Union', in Laursen, F. and Vaanhoonacker, S. (eds.) The Intergovernmental Conference on political union cit. p. 214

150 Delors, Jacques 'Europe's ambitions' cit. p. 14-27

151 Commission's programme for 1990. Bull. EC Supplement 1/90 p. 11-12

152 Ibid.

153 Tsakaloyannis, P. 'The acceleration of history' p. 89

154 Wallace, Helen 'Political reform in the European Community' The world Today Vol. 47 No. 1 June 1991

155 Commission's programme for 1990. EC Bull. etin Supp. 1/90 p. 13

156 Pryce, R. and Wessels, W. 'The search for an ever closer union' cit. p. 25

Community powers and improving decision-making. The method chosen was to start from the weaknesses and gaps in the current institutional system and to evaluate how to achieve gradual progress. Delors numbered three principles to follow: a unitary approach; an institution which defends Community common interests, and the balance between institutions. When he presented the Commission's opinion, he reiterated that

*the time was not yet ripe for a treaty determining once and for all the form of political union, but for an intermediate step in the direction of a federal structure*¹⁵⁷. The opinion argued in favour of a prudent approach *which militates against defining the final shape of European union at this early stage in favour of keeping to the course charted by the Treaty of Rome, leading eventually to a federal type organization.*¹⁵⁸

Commission proposals

The Commission had abandoned the idea of proposing a fully-fledged concept of union and pointed out, instead, the four essential areas for strengthening the Community that should be examined by the IGC. These areas were: strengthening "political cooperation", broadening and strengthening of the Community competencies and extension of the cooperation procedure; strengthening democratisation and improvement of effectiveness which implied, in turn, extension of majority voting within the Council, and widening the delegation of powers to the Commission.¹⁵⁹ These lines were reflected in the Council report and the subsequent conclusions of the European Council.

The Commission's opinion was delivered at the end of October and presented by its President to the Council and the Interinstitutional conference.¹⁶⁰ It was divided in four sections: a single community; ensuring unity and coherence in the Community's international action; strengthening democratic legitimacy, and improving the effectiveness of the institutions. Plainly, the Commission did not determine the necessary elements that may constitute a Union, but it pointed out relevant treaty reforms to approximate the Community to an eventual union.

The Commission favoured a single Community¹⁶¹ which implied a single institutional structure open to evolution to take into account three facts: public

157 Bull.. EC 10-1990 point 1.1.6 p. 17

158 Commission opinion COM (90) 600 Bull.. EC Supp. 2/91

159 *Agence Europa* No. 5254 14/15.5.90 p. 3

160 On 22 and 23 October respectively. See Bull.. EC 10-1990 points 1.1.2 and 1.1.6 p. 16-17

161 In an early working paper for internal circulation, Commission officials speculated on the idea of a political union formed by two Communities; the first being an economic monetary and

opinions; the final commitment to a federal-type organisation; and the recognition of the necessity of institutional change to accommodate further enlargement. On CFSP, the Commission accepted a pragmatic and flexible approach even though it considered that *the Treaty should outline the procedures and methods for a common policy leading towards European union*. The Commission pointed out four questions in order to establish the way towards CFSP: who would prepare the decisions; who would take them; who would implement them and how could the EP be involved in this process? The creation of CFSP required the clarification of definition and implementation of policy.

Democratic legitimacy was considered in two dimensions: the involvement of institutions and citizens. Institutional reform reflected the normal claims, mentioning an improved cooperation procedure and the restriction of the involvement of national parliaments in information procedures. Finally, the improvement of the effectiveness of the institutions was designed with the aim *to maintain the current balance of the institutional triangle (...) since its dynamic power is already proven*. Four areas were considered: broadening Community's powers, on which the Commission favoured a selective approach; subsidiarity; effectiveness on which the Commission proposed a series of selected punctual measures, and the examination of the status of the Community's public finances. Commission contributions, already in the form of draft articles, were essential towards designing the precise amendments to the Treaty.¹⁶²

Negotiating tactic

The Commission's tactic during all the preparatory stage were characterised by caution and focused in the search for consensus; in Delors' opinion, the EP was the figurehead of European union, whilst the function of the Commission was to make progress by securing consensus: *The Commission has the task of proposing and, in addition, of gathering support*.¹⁶³ Moreover, Delors stressed that the Commission's

social community, and the second a foreign and security policy community. *Agence Europa* No. 5249 7/8.5.90

162 The Commission presented contributions on the following topics: Union citizenship; common external policy; democratic legitimacy (hierarchy of norms, executive powers; legislative process and codecision); the social dimension and development of human resources; economic and social cohesion; research and technological development; energy; environment; trans-European networks; culture and protection of the heritage; health; compliance with the judgements of the Court of Justice; ESC; human resources (vocational training and education); financial provisions; structure of the treaties and the consultative Committee of regional and Local Authorities. Contribution of the Commission to the Intergovernmental Conference. SEC (91) 500. These contributions are considered in the pertinent chapters.

163 Statement on the broad lines of Commission policy. Strasbourg 17/18 January 1989 EC Bull., Sup. 1/89 p. 24

role as guardian of the *acquis communautaire* should not be endangered by any unclear process. His opinion was that

*attention to distant objectives, which are admittedly vital, must not lead to neglect of closer objectives that represent the very basis of the Union: elimination of physical borders for persons, tax harmonization, etc.*¹⁶⁴

Delors, who confessed himself a little bit mistrustful, decided to adopt *an observer stance, waiting to counterattack*.¹⁶⁵

The Commission's role in the Treaty amendment process is formally reduced to emit its opinion. However, the Commission had been already involved in proceedings during the 1985 SEA conference and, similarly, the European Council decided that the Commission should participate in the IGC on political union.¹⁶⁶ The role of the Commission was further enhanced when the European Council accorded that consistency and parallel progress in proceedings would be ensured by means of regular contact between the President of the Commission and the Presidency of the two conferences.¹⁶⁷

With the exception of CFSP, the Commission's political involvement was kept to the minimum until the presentation of the first Presidency draft, the *Project of Articles*, which was qualified by Delors as a betrayal of the founding treaties and their spirit. From this moment onwards, Delors decided to work more closely with the Presidency. The Commission adopted a more offensive tactic which was mainly focused in guaranteeing the unity of the structure of the new entity. Delors argued that the limited Commission amendments were addressed to marking the will to move towards a Community gradually integrating all competencies recognised by the SEA; i.e., EPC.¹⁶⁸

The model of intergovernmentalism that the three-pillar structure of the Union introduced undermined the Commission's role in those new policy areas in which new institutional designs were introduced: this factor could affect particularly its role as guardian of the treaties. Delors defended particularly the Commission's right of initiative on grounds of continuity and efficiency and attacked the new legislative procedure which would allow the Council to modify Commission proposals by a qualified majority.¹⁶⁹ Noël has rightly observed that *the Commission found itself*

164 *Agence Europa*, 5384 5.12.90 p. 4

165 *Agence Europa* No. 5390 13.12.90 p. 7

166 Bull. EC 10-1990 Annex I point I.4 p. 11

167 Bull. EC 10-1990 Annex I point I.14 p. 11

168 *Agence Europa* No. 5502 31.5.91 p. 3

169 Address by Delors to the EP. Debates of the EP. Annex OJ No. 3-404 Sitting of 17 April 1991

sometimes on the defensive, having to fight (and successfully) to maintain its prerogatives.¹⁷⁰ The strategic role of the Commission merged the defence of its self-interests with the strategic construction of a unitary and Community model union. Indeed, it was Commission pressure, with the support of some Member States, that led to the Dresden compromise to reinforce the unitary character of the Treaty. Not surprisingly, the Commission was quite satisfied with the *Dutch Draft* which, in Delors' view, reflected the Dresden compromise.¹⁷¹ The final preservation of the three-pillar structure provoked strong criticism from the Commission who, in an unprecedented Declaration, reaffirmed its federal perspective for the present stage of construction of the Community as well as the concept leading the future developments. The main criticism of the Commission was the lack of a commitment to bring together into a single entity all of the powers which the Member States planned to exercise jointly in political and economic matters. Worse, the Union was not given a legal personality and this would pose problems regarding its representation and the coherence between foreign policy and external economic relations or development cooperation. The Commission proposed as a solution to spell out the fact that all activities provided for in the Treaties were part of a process leading progressively towards attaining Union or a political Community.¹⁷² The fear behind the Commission's argument was that if intergovernmental arrangements were to be kept in the Treaty, they would contaminate Community procedures because of the precedents and discrete dealings going on throughout bureaucracies behind the politicians.¹⁷³

6.3.3 The European Parliament

The European Parliament is the only Community institution which praises itself on having in place a fully-fledged strategy for achieving political union; its form, and main elements and characteristics are established by the 1984 Draft European Union Treaty (EUT). Still, the lack of powers and procedures converts the Parliament proposals into little more than rhetorical elements. The EP negotiating position was designed by a host of resolutions: a resolution approved after the Madrid summit (asking for the agenda of the IGC to be enlarged beyond EMU),¹⁷⁴ the three

170 Noël, E. 'Reflections on the Maastricht Treaty' cit. p. 153. The Commission's President tried to emphasise the tactical alliance with the Parliament in four issues: the appointment of the Commission, majority voting within the Council, the widening of the scope of the assent procedure, and European citizenship.

171 *Agence Europa* No. 5579 2.10.91 p. 4

172 Declaration of the Commission on the two intergovernmental conferences on political union and on economic and monetary union Bull. EC 11-1991 point 1.1.1. p. 11-12

173 Address by Delors to the EP. Sitting of 20 November 1991. EP Debates. Annex OJ No. 3-411

174 OJ No. C 323/111 23 November 1989

resolutions which followed the respective Martin reports¹⁷⁵ and the compulsory EP opinion which was delayed until the last moment.¹⁷⁶ Two aspects of the Parliament strategy for the IGC are examined below: the substantive Parliament proposals, and the tactics (i.e., procedures) utilised.

Objectives The Parliament's strategy was twofold: maximalist objectives were matched by more pragmatic proposals. The main objective of the EP is still the EUT to which it has unwaveringly adhered. Thus, with a view to the 1989 elections, Parliament announced its intention to draw up comprehensive proposals based on the EUT to give the European Union the necessary institutional basis.¹⁷⁷ When the principle to advance on Economic and monetary union was approved in 1989, the EP decided to go further by formulating the constitutional basis of the European Union on the base of the principles of the EUT (subsidiarity, effectiveness and democracy),¹⁷⁸ as redefined in the Colombo report on the Constitutional basis of European Union.¹⁷⁹

The explanatory statement endorsed the continuity of the EP strategy with the EUT but declaring that it preferred not to stress the means of implementing such a constitution. Constitutional nature is rooted in the idea of 'dual legitimacy': *a constitutional agreement creating the European Union involves contracting parties of two types and at two different levels: the States and the citizens*. The Report admitted, however, the idea of different levels of Union progressively developed but without damaging the constitutional character. Therefore, a mechanism should be provide which, whilst respecting the subsidiarity principle, allowed the assigning new competencies (not originally envisaged) to the Union. There were two areas where the clarification of these aspects was essential: external policy including security, and internal security. Without them, the Union could not be termed a political Union.¹⁸⁰ The resolution contained 70 points in 13 headings; these develop comprehensively all constitutional aspects including principles; citizenship; the supremacy of Union law;

175 Interim report on the IGC in the context of the Parliament's strategy for European Union. Doc. A 3-47/90. Resolution 14 March 1990 OJ No. C 96/114 17.4.90; Second interim report on the IGC in the context of Parliament's strategy for European Union Doc. A 3-116/90. Resolution 11 July 1990 OJ No. C 231/97 17.9.90; Third interim report on the Intergovernmental conference in the context of Parliament's strategy for European Union. Doc. A 3-270/90

176 Report on the convening of the IGCs on Economic and monetary Union and political Union. Doc. A 3-281/90

177 Resolution on the strategy of the EP for achieving European Union Doc. A 2-332/88 OJ No. C 69/145 20.3.89

178 Resolution of 23 November 1989 on the IGC decided on at the European Council in Madrid Doc. B 3-471/89 OJ No. C 323/111 27.12.89

179 Resolution of 12 December 1990 on the constitutional basis of the European Union PE Doc. A 3-301/90 OJ No. C 19/65 28.1.91. Report PE Doc. A 3-165/90/Part A & B

180 See points 60 to 65 of the Resolution on the Constitutional basis of European Union cit.

amending articles, and an institutional design based on the principle of the division of powers.

The EP was, nonetheless, conscious that its maximalist programme had no bargaining prospects and it only could be used as an instrument of rhetoric. Therefore, a more pragmatic design was undertaken, one that attempted to influence on concrete issues the outcome of the negotiation. Initially, the EP reaffirmed its preference for a single IGC with possibly two working groups,¹⁸¹ because it feared that two separate IGCs might result in two different treaties; such a dichotomy could allow Member States sign up for EMU yet reject political union.¹⁸²

The preparatory works included resolutions on subsidiarity, the procedure of assent and the powers of the Commission. As a first step, the EP approved a host of resolutions conceived to propose solutions for concrete aspects. The EP wished the resolutions to be used by the IGC. Thus, the second Martin report reflected the EP compromise, which was to submit appropriate proposals of Treaty articles and amendments as part of its opinion before the beginning of the conference.¹⁸³ The package of proposals was contained in the third Martin report.¹⁸⁴ In the view of the EP, the total sum of Treaty changes advocated by the Parliament would provide an answer to the question '*What is European union?* Political union, referring to the same aspirations as those which laid down behind the EUT, would consist of the following elements: EMU with a single currency and a central bank; a common foreign and security policy; a completed single market with common policies; elements of a common citizenship and protection of basic rights, and finally, an institutional system democratically structured.¹⁸⁵ These concrete proposals fitted more comfortably into the scope for reform foreseen by the Council, but its success depended upon the bargaining position of the EP which in turn was conditioned by the role of the Parliament in the IGC.

Negotiating role The legal involvement of the Parliament in the revision procedure of the treaties is limited by Article 236 to the obligation by the Council to

181 Resolution 11 July 1990 on the IGC in the context of Parliament's strategy for European Union Doc. A 3-116/90 OJ No. C 231/97 17.9.90 (Second Martin Report)

182 Personal letter from David Martin. See Appendix VI

183 Resolution 11 July 1990 cit.

184 Doc. A 3-270/90. The proposals were elaborated with the collaboration of the experts which had assisted the EP with the EUT (F. Capotorti, M. Hilf, J-P. Jacqué; and J. Weiler). On the views of David Martin, see Martin, D. *Europe: An ever closer Union* (Nottingham: Spokesman, 1991) 101 p. He defined federalism as *a form of government in which power is constitutionally divided between different authorities in such a way that each authority exercises responsibilities for a particular set of functions and maintains its own institutions to discharge these functions.*

185 Resolution 11 July 1990 cit. The EP criticised the emergence of some definitions of political union as being merely a reinforcement of the intergovernmental level of cooperation among Member States.

request its opinion.¹⁸⁶ Although the EP opinion would be a condition *sine qua non* to start the negotiations, the room for manoeuvre was kept by the Council within the strict legal limits foreseen by Article 236. Thus, the letter addressed by the Council requesting the EP's opinion¹⁸⁷ consulted only on the revision of the EEC Treaty. The Parliament tried to maximise the opportunities opened by the opinion mainly in terms of improving its procedural standing *vis-à-vis* the conference. Thus, the second Martin report had conditioned the issuing of a favourable opinion to the results of the preparatory interinstitutional conference and, particularly, to the consensus on the agenda and role of the EP.¹⁸⁸ A dilatory attitude in producing the opinion bore some fruit. Internal debates among the institutional affairs committee demonstrated that the EP was prepared to render a favourable opinion only if requests regarding EP involvement were satisfied.¹⁸⁹

Since the arrangements for an EP role provided by the conclusions of the October Rome summit were unsatisfactory, the Institutional Affairs Committee approved a resolution which gave a negative opinion on the convening of the conferences and requested, instead, the convening of a preparatory interinstitutional conference.¹⁹⁰ Alarmed by the negative vote from the committee, the Presidency of the Council called for a trilateral meeting with the presidencies of the Commission and the EP, trying to reassure them that the EP contributions would be brought in full to the attention of the conference.¹⁹¹ After those assurances, the EP was able to vote favourably on condition that the Council accepted three conditions: firstly, that the texts adopted by the EP would be used as the bases for the proceedings of the IGCs with the same status as those of the Commission.¹⁹² Secondly, that the interinstitutional conference would meet regularly following a timetable running strictly in parallel with the IGCs. Finally, that the results of the IGCs would be submitted to Parliament in order to seek an agreement between the IGC and the EP on the proposals to be submitted to national parliaments for ratification.¹⁹³ The European Council response was positive although short of Parliament demands: the European Council took note

186 For a comparison with the EP involvement in former IGCs, see the article by Silvestro, Massimo 'Les conférences intergouvernementales et l'évolution des pouvoirs du parlement européen' Revue du marché commun. No. 341 p. 644-66 Nov. 1990

187 Letter of 18 July 1990 Doc. C 3-228/90

188 Resolution 11 July 1990 cit.

189 *Agence Europa* No. 5352 18.10.90 p. 4

190 *Agence Europa* No. 5365 7.11.90 p. 3

191 *Agence Europa* No. 5369 14.11.90 p. 3

192 During the SEA IGC, it was agreed to take into account the draft EUT as well as further EP proposals. The conference had also agreed to provide information on the results of its works to the EP. Corbett, Richard 'The 1985 Intergovernmental Conference and the Single European Act', in Pryce, R. (ed.) The dynamics of European Union cit. p. 241

193 OJ No. C 324/ 24.12.90

of the contacts and decided to take the fullest account of the EP's views during the IGCs and at the time of their conclusion.¹⁹⁴

The compulsory EP opinion was its most effective pressure instrument, but its efficacy was limited to the pre-conference stage. The EP, lacking a formal seat through the IGC procedure, needed to press for agreement on procedures to influence the negotiation phase. During the 1985 IGC, the EP insisted that the new Treaties should be jointly approved by the conference and the by Parliament itself, with an appropriate conciliation procedure to settle differences.¹⁹⁵ These demands were renewed by the second Martin resolution: the Parliament demanded the right to examine the results of the IGC and also acknowledgement by the national governments of Parliament's right to amend them. In the event of disagreement between the IGC and Parliament's views, a procedure for agreement should be initiated.¹⁹⁶

Deeply dissatisfied with the efficacy of the procedures accorded for the negotiation of the SEA, the Parliament recorded that nothing in the Treaty (and specifically in Article 236) precluded the governments from including representatives from the EP in the IGC or from reaching agreement with such representatives. As an initial step, the EP proposed that a preliminary interinstitutional conference would be held during the preparatory stage. This would be in charge of drawing up specific proposals for the reform of the Treaty.¹⁹⁷ The resolution following the second Martin report contained a mandate for the EP President to convene an Interinstitutional Conference of which the aim was to prepare the mandate for the IGC and to establish the Parliament's participation in the IGC. The resolution contained precise measures to be defended by the twelve MEPs.¹⁹⁸ The principle of the Interinstitutional conference was agreed by the European Council decision when it launched the IGC in June 1990.¹⁹⁹

The EP search for a role led it to seek an increase in its 'negotiating legitimacy' through a "mandate" from national parliaments. The *Assizes* or Conference of Parliaments of the European Community (including the EP itself) become one of the elements in the EP tactic. National Parliaments were formally invited to discuss the next stages of EP Union. The EP aims were to define a procedure for reaching

194 Bull., EC 12-1990 point I.10 p. 11

195 OJ No. C 122/88 20.5.85

196 Resolution 14 March 1990 (First Martin report) cit.

197 Resolution of 23 November 1989 on the IGC decided on at the European Council in Madrid. OJ No. C 323/111 27.12.89

198 Resolution 14 March 1990 (First Martin Report). The Parliament invited also the ESC to send an observer to the pre-conference.

199 *close dialogue (would) be maintained with the European Parliament, both in the preparatory phase on political union as well as on economic and monetary union.* Bull. EC 6-1990 point L.1.1

consensus with national parliaments on the fundamental guidelines for drafting a constitution and to determine by common agreement the guidelines for European Union.²⁰⁰ The Declaration approved by the *Assizes*, held in Rome on 27-30 November 1990, endorsed in principle all EP claims and among them the need of remodelling the Community into a European union on a federal basis. The Declaration called also for a constitution to be drawn up that would confer the role of the executive to the Commission, giving EP joint legislative power and extending majority voting.²⁰¹

The EP conceived the *Assizes* as a a circumstantial method to reinforce a constitutive role²⁰² and, therefore, rejected another meeting to follow up the IGCs or the convening of future conferences, in particular with a view to new IGCs.²⁰³ National Parliaments, however, developed their own agenda, which included demands for the institutionalisation of their role in the future Union. This claim encountered strong opposition from the EP, which argued that such would undermine the democratic legitimacy of the Community and announced that the EP would use all legal means to oppose the reduction of its power to benefit a new body.²⁰⁴

The conference was closely monitored by the Institutional Affairs Committee²⁰⁵ and it was discussed five times in plenary session in the presence of the Commission and Council Presidents.²⁰⁶ Those appearances were, however, initiatives of the Presidency and not formal procedures.²⁰⁷ The presence of the Dutch President-in-Office in November was motivated by a question from the Institutional Affairs Committee in order to enable the EP to take a position.²⁰⁸ The EP approved

200 Resolution of 12 July 1990 on the preparation of the meeting with the national parliaments to discuss the future of the Community (the *Assizes*). (Second Interim Report. Duverger Report) Doc. A 3-162/90 22.6.90.

201 Bull. EC 11-1990 point 1.1.1 p. 10

202 Constantinesco argued that the SEA was born of the convergence between the constituent will of the EP and the reactivation desire express by the Commission in the White Paper, questioned the capability of the *Assizes* to produce a *constituent conscience* Constantinesco, Vlad 'Los doce trabajos de Hércules' cit. p. 90

203 Equally, the Commission argued that the way for national parliaments to exercise their sovereignty was through the ratification process of Treaty amendments and, therefore, they should not be included in the negotiations. Commission Opinion p. 78-79

204 Resolution of 21 November 1991 on the draft Treaty on Political Union and Economic and monetary Union. Doc. B3-1778/91/rev. OJ No. C 326/211 16.12.91

205 The Committee had monitored closely the SEA IGC and its comments on early drafts had been transmitted to the IGC by the EP President through a special procedure. Corbett, R. 'The 1985 IGC and the SEA' cit. p. 241

206 Sitings of 23 January; 17 April; 12 June; 9 July and 20 November. The SEA IGC was debated twice in plenary.

207 When Jacques Poos addressed the EP on 17 April to explain the *Project of Articles*, he emphasised that such communications were a personal initiative of the Luxembourg Presidency Address by Jacques Poos to the EP. Sitting 17 April 1991. Debates of the EP OJ Annex No. 3-404.

208 *Agence Europa* No. 5576 27.9.91 p. 4

during the IGC 21 resolutions directly or indirectly concerned with the IGC and the issues being discussed there.²⁰⁹

Any evaluation of the EP's influence on the IGC has to be made bearing in mind the procedures available: the European Council approved Interinstitutional meetings between the Chairman of the conference, the President of the Commission and the President of the EP. The EP President was allowed to address the conference before the start of some of its meetings at ministerial level,²¹⁰ as the EP had demanded in its March resolution.²¹¹ The effects of the Interinstitutional conference were greatly reduced: only five sessions were held ²¹² and they gave the impression of *whistling in the dark*.²¹³ The EP reiterated systematically its demands to the point that some commentators criticised this stubborn attitude; in the view of Noël, the EP could have achieved more of its goals if it had adopted the tactic of pressing for a greater number of small and precise demands during the last months of the IGC.²¹⁴

Although the final outcome reflects few of the EP demands in exact terms, some elements seem to be inspired by the proposals previously forwarded by the EP, particularly on institutional reform. Obviously, the EP lacks the power to influence negotiations, mainly because its bargaining power is virtually inexistent. The demands were backed by the EP's only available weapon: the denial of EP assent for agreements with third parties (enlargement and association) as foreseen by Article 237, and the threat of rejection.²¹⁵ The Parliament has no a legal right to rejection,

209 See in general, Martin, D. 'Progress towards European Union: EC institutional perspectives on the Intergovernmental conferences- the view of the Parliament' Aussenwirtschaft Vol. 46 No. 3/4 1991 p. 281-298

210 Bull. EC 10-1990 point I.19 p. 11

211 Resolution 14 March 1990 (First martin report) cit.

212 Brussels, 5 March; Strasbourg, 15 May; June; Brussels, 1 October and Brussels, 5 November.

The EP, through its delegation in the interinstitutional conference, sought to maintain bilateral contacts with the governments of each of the Member States.

213 Noël, E. 'Reflections on the Maastricht Treaty' cit. p. 153. The Presidency-in-Office pointed out, however, that the EP contributions had been taken into account. Address by Jacques Poos to the EP. Sitting 17 April 1991. Debates of the EP OJ Annex No. 3-404

214 Noël, E. 'Reflections on the Maastricht Treaty' cit. p. 154. Vanhoonacker has argued that there may be a causal link between the EP radical demands and its limited power. In the case of the IGC, the Parliament is said not to have an incentive to moderate its demands because it is not part of the negotiation. Therefore, it is not forced to make concessions with a view to reaching a compromise. Vanhoonacker, Sophie 'The European Parliament and European political Union', in Laursen, F. and Vaanhoonacker, S. (eds.) The Intergovernmental Conference on political union cit. p. 225. However, this conclusion seems to be the result of twisting the reasoning: a substantive negotiating role for the EP might modify its rhetoric but surely would increase its chances of including its priorities in the final outcome.

215 After the *Project of Articles* draft, the President-in-Office was threat in a meeting with the Committee on Institutional Affairs with an institutional crisis involving the rejection of the final outcome and the refusal to assent to the association agreements pending with Poland and Czechoslovakia. *Agence Europa* No. 5479 25.4.91 p. 4. The threat of not assenting to further enlargement was expressed also in the Resolution of 15 May 1991 on Community enlargement and relations with other European countries Doc A 3-77/91 OJ No. C 158 17.7.1991. The threat was again reiterated by Baron when he addressed the Noordwijk Conclave *Agence Europa* No.

but it considered itself under a political and moral responsibility that compelled it not to approve a Draft Treaty if this felt short of its own demands.²¹⁶ The negotiating efficacy of such moral power appears to be severely reduced. Therefore, the important role of the EP seems to be in its ability to influence the agenda before the process has been started.

5607 12/13.11.91 p. 3 and repeated on the occasion of the Maastricht summit, where he explained that the EP would be forced to reject the Draft. *Agence Europa* No. 5626 9/10.12.91 p. 5.

²¹⁶ Resolution of 10 October 1991 on the IGC on political Union OJ No. C 280 28.10.91. The EP had warned that *its acceptance of the results of the IGC would be subject to respect for its conditions regarding procedure and substance*. Resolution of 23 November 1989 on the IGC decided on at the European Council in Madrid. OJ No. C 323/111 27.12.89. Its approval had been made a prerequisite for some national parliaments' approval of the Treaty. Thus, before the IGC Prime Minister Andreotti had already announced that the Italian government would not submit to the Italian Parliament the law authorising ratification until the EP had delivered its opinion. Address to the EP. Debates of the EP OJ Annex No. 3-396/138-172 21.11.90. Equally, the Belgian Chamber of Representatives adopted on 27 June a Resolution on the IGC conditioning its approval to the EP assent in accordance with the Final Declaration of the Assizes. *Agence Europa* No. 5526 3.7.91 p. 5-6

7 THE NATURE OF THE UNION

7.1 The structure of the Union

7.1.1 The single structure

7.1.2 The three-pillar structure: Characteristics.

A. Reinforcement of the unitary element.

B. The evolutive character of the union.

C. Linkage between Union parts.

7.2 The institutions of the Union

7.3 The international personality of the Union and the question of representation

7.4 The Union and the Member States

The analysis of the politico-legal framework of the Community, the related areas of political cooperation and the elements of citizenship have revealed disfunctions to be addressed in a reform, particularly with a view to creating a Union. The next chapters examine how these disfunctions have been addressed during the IGC, but, first, an assessment on the nature of the Union created is required. Its most striking feature is that two areas of intergovernmental cooperation have been attached to the Community's politico-legal framework. The union is thus based on a triple structure regulated by different principles of law. Rather than an entity *per se*, the Union is an expression of relations among Member States.

7.1 THE STRUCTURE OF THE UNION

The main problem confronted by the conference was the lack of a definition of the concept of Union. During the preparatory stage, there was no debate on the central question raised by the project: what is a political union and what is its nature? The resort to the undefined concept of federalism was a partial solution as well as a preliminary source of confrontation.¹ On the other hand, national contributions were more concerned with concrete reform proposals focused mainly on institutional reform. The aim of the Belgian proposal was

¹ Among the theoretical proposals advanced around the concept of federalism, Heilbronner proposed a three-tier federalist structure in which viable entities in the level of *Länder*, *Comunidades Autónomas* and regions co-exist with strong legislative powers for the Member States in concurrent and skeleton legislation, and with a restricted Union. Heilbronner, Kay 'Legal institutional reform of the EEC: What can we learn from federalism theory and practice' *Aussenwirtschaft* Vol. 46 1991 p. 485-496. A second line, more concerned with the normative aspects of federalism, is that proposed by Sidjanski, Dusan 'Actualité et dynamique du fédéralisme européenne' *Revue du Marché Commun* No. 341 1990 p. 655-665, and Sidjanski, Dusan 'L'Europe sur la voie du fédéralisme' *Cadmos* Vol. 14 No. 55 p. 135-140. Finally, see also the work by Pinder, John 'Europe 2000: A federal Community in an interdependent world' *The International Spectator* Vol. 26 No. 1 1991 p. 154-168

to bring the Community nearer to political union by three means: strengthening the institutional machinery to make it more effective; increasing the democratic component and developing convergence between political cooperation and Community policy.²

The Greek Memorandum considered that *political union must result from a dynamically evolving process which will develop with increasing speed and widening scope towards its final goal.³*

The obvious starting point for the theoretical exercise was the commitment contained in the Preamble of the SEA to transform the host of relations among the Member States into an ever closer union. The European Council evaded the definition of the concept of union, concentrating instead on a method. The decision to convene an IGC in accordance with Article 236 determined the procedure: the union would be the result of the transformation of the Community from an entity based on economic integration and political cooperation into an entity of a political nature and including CFSP. Therefore, the Union would not be an entity created *ex novo*, independently from the Community. In terms of the European Council, Union would require strengthening the capability of the Community and its Member States in areas of their common interests; the unity and coherence of its actions would be secured by strong and democratic institutions.⁴ The same character of transformation was reiterated by the conclusions of the Rome extraordinary summit which described the union as the culmination of a progressive process agreed by common accord among the Member States. Two characteristics were attached to this definition of union: firstly, the union would evolve with due regard being paid to national identities and to the principle of subsidiarity.⁵ Secondly, the mandate to the IGC expressed the determination *to define the stages in the process of transforming the Community into a political union*. This new entity would be charged, additionally, with the mission to act as a focus of stability in Europe.⁶ Rather than defining a structure, the European Council concentrated on dictating the principles to be followed (efficiency and effectiveness; democratic legitimacy, etc.). The main problem of this procedure is that

2 *Contribution to a joint study of the prospects for political union*. Belgian Memorandum.

3 *Contribution to the discussions on progress towards political union*. Greek Memorandum. Cf. the Danish memorandum which did not refer to union but to strengthening of European cooperation on a broad front while maintaining the Community's role as an anchor point. *Danish Memorandum* Doc. 9046/1/90 REVTRAT 14 23.10.90. In the opinion of Laursen the Danish proposal for amendments of the EEC Treaty (*Proposal for amendment of the EC Treaties with regard political union*. (20.3.91) CONF-UP 1777/91) influenced substantially the Luxembourg Presidency *Project of Articles*. Laursen, Finn 'Denmark and European political union', in Laursen, F. and Vanhoonacker, S. (eds.) The intergovernmental conference on political union cit. p. 71

4 Bull. EC 6-1990 point I.35 p. 15

5 Bull. EC 10-1990 point I.4 p. 8

6 Bull. EC 12-1990 point I.3 p. 8

these principles made good sense in reforming the Community but they are not particularly suitable for building a new different politico-legal entity. Therefore, a strictly logical application of these principles to the new entity would bring its structure closer to the Community one.

Since there was no definition of but a commitment to create a union, the final product would be the result of the application of the method designed by the European Council on the elements singled out as eventual union components. The method (transformation according to principles)⁷ implied two options. The first was the transformation of the Community into a Union by enlarging its scope of competence to embrace new areas (particularly foreign policy) under its legal and institutional design, i.e., the inclusion of the host of relations within the Community's politico-legal constitutional framework.⁸ The second option was the qualitative upgrading of the host of relations among Member States (of which the Community was a particular example) through codification and institutionalisation. In this second case, the flanking policies and cooperations would not be brought under the Community's politico-legal framework but they would continue to be essentially based on international law (the EMU, not a separate entity despite its name, would be included under the legal and institutional framework of the EC).

The method of transformation should determine three aspects: first, the scope of the Union (comprising transference of new competence to the Community, the notion of Union citizenship and the eventual inclusion of areas of intergovernmental cooperation on home affairs). The second aspect was the institutional one regarding the role of the European Council and the institutional arrangements to ensure unity and coherence. Finally, the third aspect concerned the general principles of the Union, two of which were advanced: respect for national identities and subsidiarity.⁹ A basic issue to be solved then was the linkage between the different elements to be included and the institutional design of the Union. Two models arose during the IGC, popularly designed as the *temple* model and the *tree* model. The *temple* model gave equal status to the five component parts of the Union: the European Community; the ECSC; the EAEC; CFSP, and HAJC. The role of the Council and some other minor collateral provisions would guarantee the unity of the design. The element of transformation

⁷ The European Council mandate to the conference had singled out the following principles:

- * solidarity among its Member States
- * fullest realisation of its citizens' aspirations
- * economic and social cohesion
- * balance between Community and national areas of competence
- * balance between Community institutions
- * coherence of the overall external action of the Community. Bull. EC 12-1990 point I.4 p. 9

⁸ Toulemon, Robert 'Communauté, Union politique, confédération. Diplomatie ou démocratie plurinationale?' Revue du Marché Commun et de l'union européenne No. 348 1991 p. 428-432

⁹ Bull. EC 6-1990 point I.35 p. 6

was the evolution of the European Economic Community into a European Community. The *tree* model converted the Community itself into a new entity by including into its institutional and legal framework the other parts albeit with particular derogations. Eventually, the first model became the prevailing one but the final product was the result of combining with it features from the unitary structure.¹⁰

7.1.1 The single structure model.

The common element justifying the grouping together of different projects under the label of single structure is that they avoid creating a new subject over the existing Community and Member States. The single structure is, in reality, a binary structure of relations between Member States and another entity in which either the Community is enlarged to absorb new areas, or the Union abolishes the Community as a separate entity. The model for this structure is, of course, the EP's Draft EUT.¹¹ The EUT did not amend the previous treaties but created a new entity although assuming the Community *acquis*.¹² The conclusion is that Union and Community possibly could not co-exist and, therefore, the Community should disappear in order to be incorporated to the Union.¹³ As a result, there were only two subjects in the EUT: Union and Member States; two principles of law (union law and international commitments or international arrangements); and two methods for action: common action (which are acts attributable to the Union)¹⁴ and cooperation (which are international commitments undertaken by Member States which cannot become part of union law).¹⁵ The cooperation method would apply mainly to the international relations of the Union.

10 Some reputable participants in the IGC have rightly argued that the Union was built on a double logic; in the one hand a separating logic which emboldens the distinctions between pillars, the specificity of procedures and the different juridical nature of the acts. On the other hand, a unifying logic stressed the unity of the institutional design, the exigency of coherence, the bridges and the enlargement of Community competence. De Schoutheete, P., in Les conférences intergouvernementales avant le conseil européenne de Maastricht journée d'études 8 novembre 1991 (Bruxelles: Institut d'études européennes, 1991)

11 Among the huge bibliography on the EP's Draft EUT, see the commentaries by Capotorti, F. Hilf, Jacobs and Jacqué (eds.) The European Union Treaty (Oxford: Clarendon Press, 1986) 327 p.; Bieber, R. et al (eds.) An ever closer union cit., and the work edited by Lodge, Juliet (ed.) European Union. The European Community in search of a future (London: Macmillan; 1986) 239 p. See also Nickell, D. and Corbett, R. 'The Draft Treaty establishing the European Union' Yearbook of European Law Vol. 4 1984 p. 79-93.

12 Jacqué, J.-P. 'The Draft Treaty: an overview', in Bieber, R. et al. (eds.) op. cit. p. 17

13 Ibid. p. 18

14 Common actions are acts (normative, administrative, financial and judicial) issued by the Union itself and originating in its institutions. Article 10 (2).

15 Article 10 (3)

The single structure model had been systematically developed before the start of the IGC by the EP proposals. These were contained in the annex to its opinion,¹⁶ although the Parliament also proposed a full constitutional framework.¹⁷ The most relevant feature was the enlargement of the Community scope by introducing new policy areas, including foreign policy and security, under the Community legal and institutional framework. By contrast, there was no reference to policy in the areas of HAJC. Basically, the EP model was a systematic proposal for reform of the Community that proved not to be very influential.

The Commission contribution

The Commission reacted against the proposal of the Luxembourg Presidency's *Project of Articles* through its own contribution on the *Structure of the Draft Treaty on the Union*.¹⁸ The amendments to the structure of the Treaty proposed by the Luxembourg Presidency were based on two reasons: to keep an open option for the gradual achievement of a federal Europe, and to secure the coherence and efficiency among Community actions and those of the projected Union.¹⁹ The Commission considered that all progress towards integration in any field should be brought together in a single Community as the precursor of European Union. When the Commission forwarded its opinion, it had considered that the achievement of the Union required amendment of Articles 2 and 3 on the Treaty principles; the introduction of a title on EMU; the extension of certain powers and the strengthening of democratic legitimacy and efficiency, and, last but not least, the inclusion of a new title on CFSP which the Commission considered the primary driving force behind the new revitalisation.²⁰

In the Commission's view, the trend followed by the IGC and consolidated by the *Project of Articles* would no longer kept the Community in the focal point, but simply *as one entity among others in a political union with ill-defined objectives and a variety of institutional schemes*. The Union should absorb the Community and all

16 Resolution of 22 November 1990 on the Intergovernmental Conferences in the context of the European Parliament's strategy for European Union. OJ No. C 324/ 24.12.90 Doc. A3-270/90

17 Resolution of 12 December 1990 on the constitutional basis cit. An example of a federal proposal was the EPP Draft titled *For a Federal Constitution* which fixed the objective of achieving a federal constitution in the year 2000 according to the following principles: configuration of the Commission as a European government; bicameral Parliament and transformation of the ECJ in a supreme court.

18 Commission contribution SEC (91) 500 p. 173-177. For a comparison between the *Project of Articles* and the *Commission contribution*, see Lodge, J. 'The Luxembourg Non-Paper versus the Commission composite working paper', in Paterson, W. (ed.) Beyond the Intergovernmental Conferences: European Union in the 1990s (Edinburgh: Europa Institute, 1991) p. 39-57.

19 Address by Delors to the EP. Sitting of 12 June 1991 EP Debates Annex OJ No. 3-406.

20 Commission opinion COM (90) 600 p. 82

that it has achieved and this implied a radical change of the wording of the *Project of Articles: The Union shall take the place of the European Communities ... (which) constitute the original nucleus of the Community edifice and their federal vocation is thus confirmed.*²¹

The Commission, recalling the unitary nature endorsed by the 1990 December Rome European Council, criticised the three-pillar structure in which two new entities (common foreign and security policy, and home affairs and judicial cooperation) are artificially attached to the Community. As bases for its criticism, the Commission drew extensively on the principles forwarded by the European Council.

First and foremost, the consistency of the international actions of the Union could not be insured by simply adding foreign and security policy to existing policies. The consistency, coherence and efficiency of the Union should be insured through three aspects: the existence of an institutional machinery for the preparation and implementation of union decisions on CFSP; the strengthening of existing external policies, and finally, a clear establishment of the Union's international identity (not personality) in terms of its Treaty-making power. The Commission's primary concern lay in the obstacles that the nature of CFSP would set for the generalisation of the Community's design within the Union.

Two requirements would need to be met for the structure of the Union to reflect the unitary character of European construction. The first requirement was the inclusion of common articles defining the foundations and objectives for the Community, CFSP and EMU. The Commission proposed in its contribution three general principles applicable anywhere within the Union, the first being consistency and solidarity to organise relations among peoples and Member States.²² The second principle was the merging of three different sets of objectives (Community, CFSP and EMU).²³ The third was the principle of sufficient resources to attain objectives and to carry out policies.²⁴ Finally, the Commission proposed to include a principle of mutual assistance borrowed from Article V of the WEU Treaty: *The Member States of the Union shall provide assistance in all circumstances where the interests of any of them are threatened.*²⁵

The Commission's second requirement was to place the provisions on citizenship and institutions in the first part of the Treaty. That would make citizenship

21 Article B. Commission contribution. Along the same line, the Belgian delegation had submitted amendments to underline the transitional nature of the intergovernmental-type provisions. These included a new text for Article B which read *All the competencies of the Union will, in the long term, and in the most appropriate manner, be subjected to the Community mechanisms. Agencie Europa. No. 5531 10.7.91 p. 3*

22 Article C.1. Commission contribution SEC (91) 500

23 Article C.2. Ibid.

24 Article C.3. Ibid.

25 Article C.4. Ibid.

and institutions common elements to the three pillars, regulated by Treaty exceptions rather than being absent from some of the parts of the Treaty. Article 4 of the EEC treaty would thus become, in the Commission's contribution, an article of the Union treaty.²⁶

Finally, the Commission dismantled the three-pillar structure by placing CFSP and HAJC under the heading 'Union Policies' and within the same juridical framework as pre-existent Community policies. As had been anticipated in the Commission's opinion, CFSP would be only a title of the revised treaty, not a separate set of provisions.²⁷ Moreover, CFSP would be only one of the chapters of the 'External Policy of the Union' which would comprise also commercial policy and external economic policy (Chapter II); development cooperation policy (Chapter III) and multidimensional agreements, i.e., agreements simultaneously covered by CFSP and other Union policy areas (Chapter IV). Borrowing the wording of the conclusions of the Rome summit, the Commission proposed a common article to the four titles which read: *the purpose of the external policy is to ensure the coherence of the Community's external activities in the framework of its foreign, security, economic and development policies.*

The Dutch Draft

The proposal contained in the *Dutch Draft* was not the creation a Union, but the transformation of the European Economic Community into a European Community which would be a new stage in a process leading gradually to a European Union with a federal goal.²⁸ The *Dutch Draft* aimed to achieve union through a generalisation of the Community constitutional basis. The *Dutch Draft*, therefore, put forward only a general reform of the Rome Treaty inserting relevant provisions concerning new policy areas. The Draft simplified the system of evolutionary clauses and bridges of the *Consolidated Draft* through a series of dispensations from the unitary structure for cooperation on CFSP and HAJC.

The central characteristic was to establish a difference between objectives and instruments provided by Treaty which belonged either to the Member States or to the Community, or were jointly exercised. The final objective being the Community system and the *acquis communautaire* the starting point, the *Dutch Draft* defined two areas of competence in the new Treaty: community competence and joint competence. According to the Dutch President in Office, this wording would mean a *sui generis* cooperation between the Member States, with the Commission's having a

26 Article E

27 Commission opinion COM (90) 600 p. 82

28 Article 1

joint right of initiative, and with some EP involvement. This would also imply keeping the current competencies of the ECJ intact without extending them to the new areas involved in political union.²⁹

The unity of design in the *Dutch Draft* was emphasised by the creation of Part Four of the Treaty, which included under the heading "External relations of the Community" the traditional Community external policy (i.e., commercial policy) subject to the traditional constitutional requirements plus the provisions reinforcing the Community international personality needed to conduct this policy. Next to these was a new policy area, development cooperation, which had been the object of heated discussion as to whether it should be included within the Community' constitutional framework or under the intergovernmental model of cooperation provided by CFSP. CFSP was the fourth element of this part and its paraconstitutional character was emphasised by the subjects entitled to act: the Community and its Member States (instead of the Union, as in other drafts). Indeed, CFSP was defined by the Dutch Presidency as a concurrent competence to be jointly managed by the Community and national governments. On the other hand, home affairs and judicial cooperation were reduced to a single article.

7.1.2 The three-pillar structure³⁰

The three pillar structure was inspired by the proposals of the Tindemans report³¹ and the wording of the SEA.³² The model was adopted by the conference (with the exception of the above mentioned *Dutch Draft*). After the criticism to which the initial draft, the *Project of Articles*,³³ was subjected, the Presidency confirmed its intention to revise the structure of the Treaty following the amendments forwarded by the Commission. The deal achieved was to keep the three-pillar structure with more links between them and mentioning the final goal of a single Community.³⁴ The result

29 Letter forwarded by the Dutch President in Office to its counterparts accompanying the Dutch Draft. [No file reference]

30 Some commentators have referred to four pillars (considering EMU as a separate one) or even five (considering the link with the WEU and its own politico-legal design). On the former opinion, see Corbett, R. in Les conférences intergouvernementales avant le conseil européenne de Maastricht On the latter, see Laffant, Brigitte 'The governance of the Union' in Keatinge, Paul (ed.) Political Union

31 European Union Report to the European Council (Tindemans Report). EC Bull. Annex 1/76

32 Article 1 SEA. *The European Communities and European Political Co-operation shall have as their objective to contribute together to making concrete progress towards European unity.*

33 For a critical discussion of this conference draft, see L'union politique. État d'avancement de la conférence intergouvernementale journée d'études 27 avril 1991 (Bruxelles: Institut d'études européennes, 1991) 102 p.

34 Certain commentators judged the new draft as a balanced compromise between the "federal" deepening of the Community aspects and the confederal nature of the basically intergovernmental arrangements in the new areas (CFSP and HAJC). Reich, C. *Le développement*

was a second draft from the Luxembourg Presidency, the *Consolidated Draft*.³⁵ After the rejection of the unitary revision proposed by the *Dutch Draft*, the *Noordwijk Draft* restored the wording of the *Consolidated Draft* almost unaltered as regards the structure of the Union; the Common and Final provisions were identical. However, as a consequence of the unitary aspirations of the *Dutch Draft*, the *Noordwijk Draft* deepened the bridging of the Community with other parts of the Union. Further works did not alter substantially the structure of the Union.

The three-pillar structure finally adopted was already designed by the *Project of Articles* in seven parts.³⁶

- Common dispositions
- Dispositions for the modification of the EEC Treaty establishing the European Community.
 - . Principles
 - . Union citizenship
 - . Foundations of the Community
 - . Association of OCT
 - . Institutions of the Community
 - . General dispositions
- Dispositions for the modification of the EAEC Treaty
- Dispositions for the modification of the ECSC Treaty
- Dispositions related to foreign and security policy
- Dispositions regarding home affairs and judicial cooperation
- Dispositions general and final

The three-pillar structure is based on attaching areas of intergovernmental cooperation to the Community's politico-legal framework.³⁷ The three-pillar structure implied three separated areas of competence with three different institutional designs. Moreover, two of the parts were equipped with a set of objectives to orient

de l'union européenne dans le cadre des conférences intergouvernementales' *Revue du Marché commun et l'Union européenne* No. 351 1991 pp. 704-709

35 For a comparison between the *Project of Articles* and the *Consolidated Draft*, see Vignes, Daniel 'Le project de la présidence luxembourgeoise d'un "Traité sur l'Union" *Revue du Marché Commun et de l'Union Européenne* No. 349 1991 pp. 504 -577

36 Commenting on early stages of elaboration of the new political union, Vignes considered that the most important fact was the mutation from the economic to the political and particularly, the projection of a State profile given by the State-like features of the new entity: a territory, external frontiers; population with citizens' rights and a political power internationally recognised. Vignes, D. op. cit. p. 517

37 In a rather unconvincing manner, the Presidency argued that CFSP and HAJC had been not included in the EC Treaty to keep Community decision-making intact: Transferring all areas of policy to the Community would risk dilution of the *acquis communautaire*. Address by J. Poos to the EP. Sitting of 17 April 1991 Annex OJ No. 3-404

actions and policies, whilst the common objectives of the Union were reduced to coherence and solidarity in the organisation of relations among Member States and the progressive evolution towards a closer union, as well as provisions on the necessary means.³⁸ Dispositions on home affairs and judicial cooperation, however, were to be adopted for the purpose of achieving the objectives of the Union³⁹ and not for achieving particular autonomous objectives. The structure and legal foundation of the Union designed during the conference implied that

*Member States remain independent sovereign states - their union based ultimately in a Treaty. The constraints they accept under international law are compatible with the indefinite retention by the Member States of their separate sovereign status.*⁴⁰

Undoubtedly, the three-pillar structure guaranteed, within the Union, a greater margin for the Member States than did a unitary model. However, the unitary model influenced three of the features of the final shape: the centrality of the Community, the linkages between union parts and the evolutive character of the Union.⁴¹

A. Centrality of the Community

The initial creation of the union gave equal status to the Community and the other areas of intergovernmental cooperation: *the Union is founded on the European Communities, the dispositions on foreign and security policy, and cooperation on home and judicial affairs.*⁴² This was a perspective unacceptable to most of the parties involved and, therefore, the wording moved towards assigning a *supplementary* character for intergovernmental cooperation.⁴³ The auxiliary character became particularly evident in the areas of HAJC where attainment of Union objectives also allowed Community involvement.⁴⁴ Thus, the development of

38 Article C. Cf., however, the *Dutch Draft* (Article 3) which included among the list of Community actions CFSP. Equally, the EP proposal included CFSP among the list of Community objectives of Article 3. Resolution of 22 November 1990 on the intergovernmental conference cit.

39 Article A.1, B and D

40 House of Lords Select Committee on the European Communities Political Union: law making powers and procedures Session 1990-91. 17th Report (London: HMSO Books, 1991) p. 37

41 The Luxembourg European Council in June 1991 confirmed that the Union should be based on the following principles: full maintenance of the *acquis communautaire* and its development thereof, a single institutional framework with procedures appropriate to the requirements of the various spheres of action, the evolutionary nature of the process of integration or Union and the principles of subsidiarity and economic and social cohesion. Bull. EC 6-1991 point I.5 p. 9

42 Article B 1 and 2 *Project of Articles*.

43 *The Union shall be founded on the European Communities supplemented by the policies and cooperations established by this Treaty.* Article A *Consolidated Draft* and *Noordwijk Draft*; Article A §2 *Maastricht Draft*; Article A §3 TEU.

44 Article C.3

Community policy in sensitive areas affected by the objective of achieving free movement of persons (for instance, immigration) would be facilitated by provisions on HAJC.

The centrality of the Community was sanctioned by a guarantee of preservation of the *acquis communautaire* (which had been explicitly stated by the European Council in Luxembourg)⁴⁵ written in the intergovernmental areas. This gave way to a plethora of dispositions⁴⁶ which were finally reduced to a mention in the objectives of the union to maintain in full the *acquis*,⁴⁷ and a general disposition preserving the Community's politico-legal framework.⁴⁸ However, neither the final draft nor the TEU itself reflected the possibility of the ECJ's monitoring the safeguard of the powers of the Community as had been implicitly proposed at some stage during the conference.⁴⁹ Based on these dispositions, the ECJ could eventually decide that a determinate issue belonged to the Community's politico-legal framework. Therefore, it could eventually become the *de facto* deciding body for transferring certain powers to the Community framework. This prospect was not acceptable to national governments if the discretionality of intergovernmental agreements was to be preserved in these areas.

B. Distribution and consistency between areas of external policy

The structure of the Treaty determined the decision on which areas of external policy would be included under the Community framework and which under the CFSP provisions. In an ideal unitary structure, *all* external relations would be grouped together with derogations for foreign policy issues.⁵⁰ In fact, an integrated structure was implicit in the European Council's mandate, before the structure of the

45 Bull. EC 6-1991 point I.5 p. 9

46 Thus, on HAJC, Article A 1 and 2 *Project of Articles and Consolidated Draft*; Article J.1 *Project of Articles*; Article K.1 *Consolidated Draft*; Article J *Noordwijk Draft*. On CFSP; Article O.1 *Consolidated Draft* and Article M *Noordwijk Draft*

47 Article B *Maastricht Draft*

48 *Nothing in this Treaty shall affect the Treaties establishing the European Communities or any subsequent Treaties or Acts* (with the exception, of course, of the amendments introduced by the TEU itself). Article V [Final Provisions] *Maastricht Draft*.

49 Some provisions have established that the exclusion of the jurisdiction of the ECJ from the areas of HAJC and CFSP would not apply to the disposition regulating the perseverance of Community powers. On HAJC; Article K.1 and 2 *Consolidated Draft*, Article J and Article I *Noordwijk Draft*. On CFSP; Articles O.1 and 2 *Consolidated Draft*, Article M and Article L *Noordwijk Draft*.

50 Referring to the Draft EUT (Articles 63-68), Brückner comments that "international relations" is the notion encompassing external relations and foreign policy. External relations would be international relations conducted by common action (i.e., Community procedure) whilst foreign policy would refer to international relations conducted by intergovernmental cooperation. Brückner, Peter 'Foreign affairs powers and policy in the Draft Treaty establishing the European Union', in Bieber, R. et al. (eds.) cit. p. 127-140

Union Treaty started to emerge from the conference proceedings. Thus, the conclusions of the June Dublin summit had pointed out that the scope for the external policy should be determined with consideration of the integration of economic, political and security aspects of foreign policy; the definition of the security dimension; the strengthening of the Community's diplomatic action *vis-à-vis* third parties and the transference of competencies to the Union (particularly the definition of priority areas where transfers would take place from the initial stage).⁵¹ Later, in October, the European Council considered that no aspect of the Union's external relations would be excluded in principle from the common foreign policy and that there was consensus on going beyond the current limits regarding security.⁵² Having decided to establish CFSP as an intergovernmental regime parallel to the Community, the question to be addressed in order to fulfil the unifying mandate was the location in the Treaty of the other two policies related to external relations and their eventual link with the CFSP.

There was no serious case for removing the external commercial policy from the Community framework. This was an option only in the context of the unitary proposals to bring it together with the CFSP. Thus, the Commission proposed to include under the Title *Common External Policy* a Chapter (II) dealing with the external economic policy.⁵³ Similarly, the *Dutch Draft* also included a title on commercial policy comprising the former Rome Treaty Articles 110, 112 and 113 within the Part on External Relations of the Community.

The location of development policy was slightly more controversial. This being a new policy area which had been developed through Article 235, there was a general consensus for its inclusion in the Treaty. The instructions were, however, unclear. Firstly, the Council had pointed out that development policy, a fundamental component of the Union's external action, should be subject to a separate Treaty chapter.⁵⁴ Later, the Council specified that *the union's external policy should include a genuine development policy pursued within a Community framework*.⁵⁵ There were two options; the first, proposed by the Commission and the *Dutch Draft*, was to include development policy within CFSP. The second option was to include it as an autonomous chapter within the revised EC Treaty. Such was the option developed from a Dutch proposal which argued that development cooperation policy was different in origin and content from an eventual external policy. Therefore, it should be included in a separate EC Treaty chapter that would detail its objectives and

51 Bull. EC 6-1990 point I.35 p. 17

52 Bull. EC 10-1990 point I.4 p. 8

53 Articles Y 16 and Y 16a to Y 19

54 Report by the Italian Presidency on European political union (extract) *The Guardian*

55 Conclusions of the Ministers of Foreign affairs. Presidency's assessment. Europe Documents No. 1666 6.12.90

instruments.⁵⁶ Although this was the option finally adopted,⁵⁷ it did not pass uncontested because some delegations wanted to avoid development cooperation's becoming a tool for foreign policy outside intergovernmental channels.⁵⁸

Since it became clear that the external relations of the Union would be split into two parts (CFSP and external policies under Community procedure) there was a concomitant necessity to ensure consistency between the parts. The principle of consistency was included in the opening article of the Treaty.⁵⁹ Along the lines of the European Council's instructions to give coherence to the overall external action of the Community,⁶⁰ the guarantee of consistency was thought to be a particular responsibility and justification for the establishment of a single institutional framework. The principle of consistency was not, however, included as one of the objectives orienting each single external policy. Furthermore, no concrete institution was initially charged with this function of vigilance which had been diluted in vague wording.⁶¹ Such loose formulation was unsatisfactory, particularly to the Commission, who requested that the wording should explicitly reflect joint Council and Commission responsibility,⁶² as was reflected by the *Maastricht Draft*.⁶³

The principle of consistency has also been included within the provisions on CFSP, perhaps under Commission influence.⁶⁴ Consistency will be ensured by the Council,⁶⁵ but the *ad hoc* procedural mechanisms to ensure consistency proposed by the Commission, have not been included.⁶⁶

56 The Dutch proposal was, basically, a codification of the existing practices. CONF-UP 1703/91

57 Title XIV, Articles A to F of the *Project of Articles* ; Title XX, Articles A to E *Consolidated Draft*; Title XVII *Maastricht Draft*.

58 This option had indeed appeared in the form of an obligation to ensure consistency between development policy and the CFSP. Article B Title XX *Consolidated Draft*. Development policy would be oriented by a set of principles which were also the principles of the CFSP (development and consolidation of democracy and the role of law, and the respect for human rights and basic freedoms). Moreover, the Community *and* the Member States were obliged to comply with the commitments and objectives they approved in the context of the UN or any other international organisation.

59 Article A *Consolidated Draft*, *Noordwijk Draft*, *Maastricht Draft*

60 Bull. EC 12-1990 point I.4 p. 9

61 *The Union shall in particular ensure the consistency of its external actions as a whole in the implementation of its external relations, defence, economic and development policies.* Article C *Consolidated Draft* and *Noordwijk Draft*.

62 *Agence Europa* No. 5622 4.12.91 p. 4 bis

63 Article C 3 (2)

64 The Commission contribution had included the principle of consistency in the general title on common external policy and it had also designed an institutional procedure to control inconsistencies; through this procedure the Council could adopt a decision on a determined action by majority. Commission contribution SEC (91) 500.

65 Article H.2 *Noordwijk Draft* and *Maastricht Draft*.

66 The Commission had proposed that the Council might adopt an action to correct inconsistency by majority. Article B.2 [CFSP] of the *Project of Articles* had proposed that *Member States and Commission may address questions regarding this consistency to the Council.*

C. Internal linkages (bridge articles)

Consistency is a political principle to orient decision-making and actions taken in those areas of external policy regulated by different politico-legal frameworks. The legal instrument developed to permit consistency to have an operational meaning is to be found in the so-called "bridge articles". These are provisions to undertake eventual Community action following decisions adopted in the two areas of intergovernmental cooperation. Given the protection of Community *acquis*, "bridge articles" have been designed as one way traffic (i.e., Community decisions are not to be implemented through intergovernmental actions adopted in the framework of CFSP or HAJC). The exception, which in any case favours the Community, is that cooperation between diplomatic missions (established within CFSP provisions),⁶⁷ will aim to implement protection of union citizens provided by the new EC Treaty provisions.⁶⁸

The quality of each of these bridging dispositions is very dissimilar. There are provisions for the Community to provide operational backing to intergovernmental cooperation, including a formal reference to the applicability of the relevant EC institutional provisions to HAJC and CFSP.⁶⁹ Secondly, the Community budget will finance the administrative expenditure of the institution for intergovernmental cooperation and it may cover, eventually, the costs of actions decided in the framework of either CFSP or HAJC.⁷⁰

The "bridge dispositions" proper allow the Community to carry out particular actions in accordance with a joint decision. Although the utilisation of EC economic instruments to implement foreign policy acquires, in this way, a character of automaticism, this is not seen as its becoming a general and discretionary entitlement. Rather, the Community is limited to interrupting or reducing, in part or completely, economic relations with one or more countries.⁷¹ Proposals for more positive Community action were not accepted.⁷²

Regarding HAJC, the initial bridging provisions became a full fledged procedure for transferring competence from intergovernmental cooperation to the Community's politico-legal framework. Initially, the Community was entitled to

67 Article F *Noordwijk Draft* and *Maastricht Draft*.

68 See Chapter 10 Section 10.3.2

69 Article O.3 [CFSP] *Consolidated Draft* and Article K.1 [CFSP] and Article H.1 [HAJC] *Maastricht Draft* and TEU.

70 Article O.3 [CFSP] *Consolidated Draft*; Article 199 §2 and Articles K.2 [CFSP] and H.2 [HAJC] *Maastricht Draft* and TEU.

71 Article 228a *Consolidated Draft*, *Noordwijk Draft*, *Maastricht Draft* and TEU.

72 The Belgian delegation proposed that Article 235 will state that the EC supports the objectives of CFSP and the Council might take *necessary action* after a decision taken in the framework of CFSP. Vanhoonacker, Sophie 'Belgium and European Political Union', in Laursen, F. and Vanhoonacker, S. (eds.) *The Intergovernmental Conference on political union* cit. p. 45

support the objectives of HAJC and eventually to adopt necessary measures on the basis of decisions taken within HAJC.⁷³ The final creation of the new Article 100c substituted the technique of bridging for the principle of communitarisation of certain HAJC areas.⁷⁴

D. The evolutive character of the Union: revision

The initial draft had reflected the traditional Community objective *to make advance the host of relations among Member States towards an ever closer union*.⁷⁵ Semantically, it seems an inconsistency to establish a union which is in itself a mere step towards closer union. The inconsistency has been exposed in the following terms: *if the process is to go on for ever, there is an implicit affirmation of a never: the Union is never to be consummated, achieved, final*.⁷⁶ This is the context in which the problem created by the introduction of the idea of a "federal goal" must be understood. A federal goal will set a target because, however indeterminate, the concept of federalism could at least be defined *ab negatio*, i.e., which are the non-federal features within the Treaty to be corrected in the future in accordance with this goal. Therefore, any future revision would be teleologically oriented. The positions were thus defined around this implication.

The federal goal was introduced by the *Consolidated Draft* and confirmed by further drafts.⁷⁷ However, the reference to the federal objective, which was linked to the general drive towards a more unitary structure, seems to be motivated by tactical rather than strategic considerations. Indeed, the European Council had not endorsed explicitly the federal goal but it had referred to the more vague principle of the evolving nature of the process of integration or union.⁷⁸ The utilisation of the word "federal" provoked deep concern and criticism within the British government and public opinion.⁷⁹ Certain sources suggested that, already in June, the Dutch Presidency had agreed to eliminate the word from the definitive version in exchange for some British concessions.⁸⁰ Even Delors, who had repeatedly endorsed the

73 Article 235a and Article C.3 [HAJC] *Consolidated Draft*.

74 See Chapter 9 Section 9.2.2

75 Article C *Project of Articles*.

76 Bieber, R. et al. (eds.) *op. cit.* p. 8

77 Article A *Consolidated Draft* and *Noordwijk Draft*; Article 1 *Dutch Draft*.

78 Bull. EC 6-1991 point I.5 p. 9

79 *Agence Europa* No. 5518 22.6.91 p. 3

80 *The Independent* 13.11.91

federal goal,⁸¹ finally admitted that the affirmation of a federal goal would not have any precise meaning and, furthermore, would not be a guarantee in itself.⁸²

The reference to a federal goal still appeared in the negotiating text of the Dutch Presidency at the Maastricht summit, but was substituted afterwards by a milder terminology, doubtless to accommodate British objections:

*This Treaty marks a new stage in the process creating an ever closer union among the peoples of Europe, where decisions are taken as closely as possible to the citizens.*⁸³

As a counterbalance, the final draft included for the union a new objective not considered in any of the preliminary works: to build on the Community *acquis* with a view to considering, through the procedure of revision, *to what extent the policies and forms of cooperation introduced by this Treaty may need to be revised with the aim of ensuring the effectiveness of the mechanisms and institutions of the Community.*⁸⁴ In parallel with the general revision clause drawn on the wording of Article 236 of the EEC Treaty,⁸⁵ the conference drafts have since included a mandate for revision of fixed provisions by a set date. Initially, those provisions would be examined in 1996 in an IGC, with a view to strengthening the federal character of the Union.⁸⁶ Such a teleological orientation had to be referred, finally, to the confused objective mentioned above. The areas to be revised were those where the controversy was greater and, therefore, in which compromise solutions had been found: the scope for co-decision procedure,⁸⁷ the article on security with a view to the framing of defence⁸⁸ and the provisions on CFSP.⁸⁹

81 See, for instance, his address to the EP. Sitting 12.6.91. Debates of the EP OJ Annex No. 3-406 Session 1991-92. He argued that although the Twelve were not in agreement on a federal Europe, the option should be at least kept open.

82 Address to the EP. Sitting of 20 November 1991 EP Debates. OJ Annex No. 3-441/121

83 Article A 3 2 TEU

84 Article B *Maastricht Draft* and TEU

85 Article W.1 *Consolidated Draft*; *Noordwijk Draft* and *Maastricht Draft*; Article N.2 TEU

86 Article W.2 *Consolidated Draft* and *Maastricht Draft*.

87 Article 189.4 *Consolidated Draft*; Article 189b 8 *Maastricht Draft* and TEU. The co-decision procedure had not been considered for revision under the provisions of the *Dutch Draft* and *Noordwijk Draft*

88 Article L.3 *Project of Articles*; L.5 *Consolidated Draft*, N.5 *Noordwijk Draft*. The final version linked the revision to the expire of the WEU Treaty Article D.6 *Maastricht Draft* and TEU.

89 Article N *Consolidated Draft*, Article J *Noordwijk Draft* and *Maastricht Draft* Article J.10 TEU

7.2 INSTITUTIONS OF THE UNION

Lacking a fully-fledged definition of union, political union became synonymous with extensive Community institutional reform plus the addition of new policy areas. The institutional set-up of the Union then became a defining element but, as in other cases, the systematic application of the guidelines for extensive reform of the *Community* institutional system were contradictory with the aim of creating a Union that would finally allow the retention of the sovereignty of Member States.

The conclusions of the Dublin summit in June 1990 proposed to address two questions on the institutional structure of the Union: firstly, the extent to which new or modified institutional arrangements would be required to ensure the unity and coherence of all the constituent elements of the European Union. Secondly and more precisely, *how should the role of the European Council, as defined in the Solemn Declaration on European union and in the SEA, be developed in the construction of the Union?*⁹⁰ Once the three-pillar structure was endorsed, the European Council sanctioned as a Union principle a single institutional framework with procedures appropriate to the various spheres of action.⁹¹ This principle was not an entitlement for Community institutions to act, but merely an acknowledgement that the Union will not imply the creation of new institutions for its management.

The Role of the European Council

The mandate of the Rome December 1990 summit included the design of the role of the European Council under the heading 'Effectiveness and efficiency of the Union'. The European Council was considered to be an essentially political institution with a fundamental role in creating political momentum and, therefore, the conference was asked to clarify whether the Community's development towards Union necessitated an accentuation of this role.⁹²

Along the lines of this mandate, the functions of the European Council were determined by the conference as being to give impetus and to define general political

90 Bull. EC 6-1990 point I.35 p. 16

91 Bull. EC 6-1991 point I.5 p. 9

92 Bull. EC 12-1990 point I.9 p. 11

orientations for the Union.⁹³ The current working procedures (scheduled meetings) and composition⁹⁴ were codified on the current lines.

Agreement on the role of the European Council was relatively general; it would become the unifying institution above the three pillars of the Union. The Belgian delegation, however, criticised the primacy that the proposed draft would confer on the European Council,⁹⁵ and the Dutch delegation was fearful of its effects on the Community procedures and institutional equilibrium.⁹⁶ Indeed, the European Council was designed by the conference to be free of any control or responsibility, with the exception of a report to the EP after each meeting and a yearly report on the progress achieved.

The role of Community institutions in the Union

Despite the pre-conference references favouring a single institutional design, the initial draft provided no institutional setting for the Union with the exception of the European Council. As part of the general drive towards a more unitary structure, the successive drafts sanctioned, in the Common Union Provisions, a single institutional framework that would ensure consistency in and continuity of the actions.⁹⁷ Community institutions would not have a direct role in the Union, but each of its parts established different particular powers and procedures for involvement. They were confined to the role fixed by the regulations in the Treaty establishing the European Community and the provisions in the Union Treaty regarding CFSP and home affairs and legal cooperation.

The only exception to this indirect determination of the role of the institutions was contained in the provisions to amend the Union Treaty and to admit new members. The conference moved the pertinent articles of the Rome Treaty that implied recognising an equivalent role to Commission and EP in the Union to the

93 Article E.1 *Project of Articles*; Article D *Consolidated Draft*; Article 4a *Dutch Draft*; Article D *Noordwijk Draft*; Article D TEU. The Portuguese Memorandum proposed that the European Council should be responsible only for deciding the timing of new constitutional reforms and the basic general guidelines for CFSP. Portuguese Memorandum cit.

94 It shall meet at least twice yearly. It gathers the Heads of State and/or Government plus the President of the Commission assisted by the Foreign affairs Ministers and a Commissioner. A Declaration attached to the Final Act of the Conference provides for the European Council to decide to invite the economy and finance ministers to participate in meetings discussing EMU. *Declaration on Part Three, Title VI, of the Treaty establishing the European Community*. The *Project of Articles* attached in an annex to the Draft the relevant provisions of the Stuttgart Solemn Declaration on the role of the European Council which was not finally included.

95 *Agence Europa* No. 5483 1.5.91 p. 3

96 Not surprisingly, the *Dutch Draft* introduced a limitation: its functions should be exercised *whilst observing the institutional balance defined by this Treaty*. Article 4a. The amendment did not prosper.

97 Article C *Consolidated Draft*; *Noordwijk Draft* and TEU.

function they had previously held in the Community regarding these matters. The Commission obtained the very important right of submitting proposals for amending the Union Treaty.⁹⁸ It was also entitled to be consulted *where appropriate* before the Council could convene a IGC. Equally, the Commission had to be consulted before the Council could decide on the admission of new Members to the Union.⁹⁹ The EP had to be consulted before the Council could deliver its opinion on convening an IGC¹⁰⁰ and it had a right to assent to admitting new members to the Union.¹⁰¹

Only the ECJ escaped this indirect entitlement, but solely because it was explicitly excluded from specific areas of the Union. Although the provisions on CFSP and HAJC in the initial drafts had established the exclusion of the ECJ with certain exceptions, the last conference draft and the TEU itself included an article in the Final Provisions delimiting the areas for ECJ jurisdiction: the EC Treaty; certain conventions on issues of HAJC explicitly providing for ECJ involvement, and the final provisions.¹⁰² This change of location and the regrouping of provisions effected by the conference seems to have been conceived to underline that it is not the role of the ECJ to pass judgement over a Union which is substantially different to the Community's politico-legal nature and to Community law over which ECJ's jurisdiction extends. The explicit exclusion implies an implicit acknowledgement that the Union provisions might be judicable through conventional public law instruments.

The role of national parliaments

Since there were no previously established grounds on whether the Union would be the result of a generalisation of the Community structure or be a new entity, the definition of the role of the national parliaments gave rise to an initial problem: their new role in the Union could transform them also into Community institutions. The conclusions of the June 1990 Dublin summit had pointed out that *a greater involvement of the national parliaments in the democratic process within the Union, in particular in areas where new competencies will be transferred to the Union should be examined.*¹⁰³ This was reiterated by the conclusions of the October 1990 Rome special summit.¹⁰⁴

Apart from involvement in Community procedures (to be examined in the next chapter), the issue was to determine the role of national parliaments in new areas of

98 Article W.1 Consolidated Draft; Noordwijk Draft; Article N TEU

99 Article X Consolidated Draft; Noordwijk Draft; Maastricht Draft; Article O TEU

100 Article W.1 Consolidated Draft; Noordwijk Draft; Article N TEU

101 Article X Consolidated Draft; Noordwijk Draft; Maastricht Draft; Article O TEU.

102 Article U Maastricht Draft; Article L TEU

103 Bull. EC 6-1990 point I.35 p. 16

104 Bull. EC 10-1990 point I.4 p. 8

CFSP and HAJC in which the EP role was greatly reduced. The French delegation proposed the creation of a new institution, the "Congress", to bring together representatives from national parliaments. The new institution would, however, be restricted to Union policies not subject to the Community method, i.e., it would be consulted on the major orientations of the political Union regarding CFSP and home affairs and judicial cooperation.¹⁰⁵ The Portuguese Memorandum, for instance, justified the new institution through alleging that the new objectives would directly affect the substance of the sovereignty of the Member States.¹⁰⁶ Eventually, an article of the *Project of Articles* was reserved for a reference to the Conference of Parliaments which would thus become one of the institutions of the Union.¹⁰⁷ This was seriously criticised by Community institutions¹⁰⁸ and other delegations. The Belgian delegation then pointed out that this would bring back a double mandate and, moreover, would introduce nationalistic lobbies within Community mechanisms.¹⁰⁹ Although the subject seemed to have been settled, the French delegation later proposed that Parliaments would meet three times a year as a Conference of Parliaments and this would be consulted on major guidelines for political union. The Council might also consult the Conference on political principles concerned with the application of the principle of subsidiarity.¹¹⁰ However, this would not be a new institution but a role for national parliaments recognised through a declaration and, as such, it had more chance of success.¹¹¹ The Declaration, included by the Final Act of

105 This proposal was contained, for instance, in the first draft of the Franco-German proposal on CFSP, although it was eliminated afterwards.

106 Memorandum: *L'Union politique dans la perspective de la conférence intergouvernementale* (3.12.90) CONF-UP 10794/90 REVTRAT 27. The *Congress* would group representatives from the EP and national parliaments and the European Council would be its privileged interlocutor. The *Congress* would be entitled to deal only with few areas: foreign policy, major macro-economic orientations, realisation of citizens' Europe, enlargement of Community competencies and decisions on enlargement.

107 Article F *Project of Articles*

108 The criticism was particularly strong from the EP, which passed a resolution regretting such proposals and stating that the *Congress* had not been an objective endorsed by the *Assizes*. Resolution of 10 October 1991 on relations between the European Parliament and the national parliaments after the Conference of Parliaments of the European Community. Doc. A3-0220/91 OJ No. C 280/144 28.10.91

109 *Agence Europa* No. 5531 10.7.91 p. 3. See a theoretical defence of granting legislative and constituent powers on the grounds of double participation by electors and by analogy to a "federal" system in Sidjanski, Dusan 'Objectif 1993: une communauté fédérale européenne' *Revue du Marché Commun* No. 342 Dec. 1990 p. 643

110 *Agence Europa* No. 5612 20.11.91 p. 5-6. In fact, the Delegation of the French National Assembly for the European Communities had adopted a resolution in favour of organising a conference among the Community Parliaments to take an explicit stance on the overall guidelines of CFSP. *Agence Europa* No. 5547 2.8.91 p. 3

111 The Conclave on 2/3 December examined a draft statement on the role of national parliaments which provides for them to meet on regular basis in conference with the EP to discuss main guidelines for the Union and to assess its development. *Agence Europa* No. 5622 4.12.91 p. 4

the Conference,¹¹² amounts to a semi-institutionalizing of the Conference of national parliaments which were invited to meet as necessary.¹¹³ The Conference would be consulted on the main features of the European Union and the Presidents of the Commission and the Council will report to it.

7.3 THE INTERNATIONAL PERSONALITY OF THE UNION AND THE QUESTION OF REPRESENTATION

The main aim behind the creation of the new entity, the Union, was the reinforcement of the international dimension of the Twelve. Thus, the conclusions of the April Dublin summit called for an examination of the Treaty changes needed to ensure unity and coherence in the Community's international action.¹¹⁴ More precisely, the conclusions of the June Dublin summit stated that *the Community will act as a political entity on the international scene*.¹¹⁵ The issue that the conference had to address was whether to grant to the Union a general capacity to negotiate and enter into agreements as well as the entitlement to represent the union.

A. The international personality of the Union

The three-pillar structure posed the problem of defining the international personality of the new entity, the Union, and its articulation with the international personality of the Community and Member States. Successive drafts preserved the European Community's international personality in its current terms (capacity to enter into agreements and representation) with eventual improvements. In the new development cooperation policy, the Community has also been entitled to negotiate and conclude agreements under the terms of Article 228.¹¹⁶ However, this seems, as development policy itself, to be a complementary instrument to Member States' international capacities: the final wording explicitly states that this Community competence does not prejudice Member States' competence to negotiate in international bodies and to conclude international agreements.

In the areas covered by the common foreign and security policy, the subjects entitled to act will be the Union and the Member States.¹¹⁷ The opening article in the two first drafts stated that CFSP had the aim of *reinforcing the identity and role of*

112 *Declaration on the Conference of Parliaments*.

113 The French proposed a periodical schedule; the congress would meet thrice a year. *Agence Europa* No. 5514 17/18.6.90 p. 3

114 Bull. EC 4-1990 point I.12 p. 9

115 Bull. EC 6-1990 point I.35 p. 17

116 Title XVII Article E *Maastricht Draft*.

117 Article A *Project of Articles*

*the Union as a political entity on the international scene.*¹¹⁸ However, there was no explicit attribution of international personality to the Union, neither was there an explicit entitlement for the Union to enter into agreements or establish diplomatic relations, even though this possibility might be deduced from the wording of the articles on common action: through these articles, the Council is entitled to define the conditions, means and procedures applicable to putting into practice a common action.¹¹⁹

The only serious attempt to equip the Union with an international personality stems from the Commission's contribution, within its general strategy of transforming the Community into a new entity. Accordingly, the Union inherited the elements (improved) which gave the Community an international personality. In the Commission's proposal, the Union enjoys full status as subject of international law which main corollary is that *the Union is given the sole power to conclude international agreements in cases other than those expressly prohibited by the Treaty.*¹²⁰ The Commission foresaw three types of agreement into which the Union might enter with third countries and organisations: *Agreements within the area of common foreign and security policy;*¹²¹ *Agreements falling within other areas of Union powers;*¹²² and *Agreements in the field of foreign policy and other areas (multilateral agreements).*¹²³

The international personality of the Union was reinforced by two further aspects. Firstly, the Commission proposed to include explicitly the principle inspired by the AETR case:¹²⁴ for every power conferred on the Union internally there is a corollary external power and for any given area this power becomes exclusive once the Union exercises it internally.¹²⁵ Secondly, the Union was entitled to organise political dialogues with third countries and regional organisations whenever it considered such dialogue appropriate.¹²⁶

A stance similar to the Commission contribution was adopted by the *Dutch Draft*. Since there was no new entity, the complex juxtaposition of different juridical personalities of the other Drafts (Union and Community) was eliminated. The subjects

118 Article A *Project of Articles and Consolidated Draft*.

119 Article J.2 *Project of Articles*; Article J.3 1 *Maastricht Draft*. In the opinion of Delors, *the union has no legal personality and there is no provision for a bridge between it and the existing Communities, a situation which makes for organized schizophrenia on external relations.*

Address to the EP Sitting of 20 November 1991 EP Debates Annex OJ No. 3-411/121.

120 Commission contribution p. 114

121 Article Y 25

122 Articles Y 26 and Y 27

123 Article Y 28. The differences between those types were based on the entitlement and procedures to initiate negotiations, the conduct of negotiations and the procedures for their conclusion.

124 See Chapter 4, Section 4.1.1

125 Article Y 26.1

126 Article Y 9. This wording was essentially taken over from Article 30 (8) of the SEA

of the new treaty would be the same as those referred in the SEA formula: the Community and its Member States. The capacity to enter into and negotiate agreements was created through the improvement of the former Community's capabilities (Article 113) in those areas covered by Commercial policy¹²⁷ but extended to all the fields in which the new Community would acquire competence.¹²⁸

By contrast, the line chosen by the IGC has been not to grant a clear and defined personality to the Union but to let this emerge later from Union practice.

B. Representation of the Union

The differences between the single structure and the three-pillar structure did not imply strong differences in the representation of the Union. Even considering a single entity or juridical personality (that of the Union), representation accordingly reflected the different areas of competence and the institutions' legal entitlement in each of them. Thus, the Commission contribution provided that the Union would be represented in relations with third countries and international organisations by the Council Presidency and the Commission, assisted when appropriate through the *Troika* system (i.e., including the immediately previous and immediately subsequent Presidencies).¹²⁹ Secondly, the Union might be represented by one or more Member States in specific organisations of which not all Member States are members (e.g., the UN Security Council). Finally, representation in third countries would rely on strengthened cooperation between their diplomatic missions. Those measures concerned common foreign and security policy in general, but the Union would be represented by the Commission in relations under the external economic policy¹³⁰ as well as on development cooperation policy.¹³¹ The Commission attempted to reinforce its role in its contribution on the structure of the Treaty: the Commission would obtain the sole right of representing the Union in relations with third countries and international organisations in areas covered by Article 228. Moreover, joint action in international organisations and conferences will be based on Commission proposals to the Council containing the scope and implementation of such joint action.

The drafts presented to the conference granted the responsibility for the external representation of the Union to the Presidency, assisted when appropriate by

¹²⁷ Article C.3; Title II; Part Four of the *Dutch Draft*.

¹²⁸ Article C.1; Title II; Part Four. Analogously, the EP proposal contained in its opinion merely reflected the exiting provisions of the Rome Treaty although reforming some of the procedural requirements

¹²⁹ Article Y7. Commission contribution

¹³⁰ Article Y17. 6. Commission contribution.

¹³¹ Article Y23.2. Commission contribution.

the *Troika* system and with the participation of the Commission.¹³² Provisions on the coordination of national missions in third countries, which had already appeared in the SEA, were included with a view to implementing the provisions referred to in the articles establishing the citizenship of the Union.¹³³ Finally, Member States who are permanent members of the UN Security Council were entrusted with the defence of the position and interests of the Union:¹³⁴ the Member States sitting in the Security Council will be required to keep their partners informed and the Union voice would be expressed by the Member State assuming the Presidency. The two permanent Members will retain their prerogatives. Member States in those international organisations of which not all the Member States were members would keep the non-members informed.¹³⁵

There was no attribution of responsibilities for representation concerning the areas covered by HAJC. During the whole conference, there was a consistent view that the only form of representation envisaged as potentially viable was the defence of the joint positions by Member States in the international organisations and conferences in which they participate.¹³⁶

7.4 THE UNION AND THE MEMBER STATES

The Union was never meant to derogate the separate existence of the Member States. Although it provided no solution on the question of withdrawal, it reproduced the terms of duration already set in the Rome Treaty,¹³⁷ thus indicating an unwillingness to confront and settle the issue. On the other hand, the Union was not meant to be definitive in terms of membership. In response to the conclusions of the June 1990 summit, that had foreseen that the Union would remain open to membership to other European states accepting its final goals,¹³⁸ Article 237 of the Rome Treaty was moved to the final disposition of the Union Treaty.¹³⁹ This implied

132 Article F, *Project of Articles*; Article E.1 and E.3 of the *Noordwijk Draft*; Article J 5.1 and J 5.3 *Maastricht Draft*.

133 Article F *Noordwijk Draft*; Article J.6 *Maastricht Draft*

134 Article J 5.4 *Maastricht Draft*

135 Article I.2 *Project of Articles*; Article E.4 *Noordwijk Draft*

136 Article F *Project of Articles and Consolidated Draft*; Article E *Noordwijk Draft and Maastricht Draft*; Article K.5 TEU

137 *This Treaty is concluded for an unlimited period*. Article Y *Consolidated Draft, Noordwijk Draft and Maastricht Draft*. Article Q TEU.

138 Bull. EC 6-1990 point I.35 p. 15

139 Article X *Consolidated Draft, Noordwijk Draft and Maastricht Draft*. Article O TEU.

that enlargement in the future could not be merely confined to one of the parts, i.e., the EC but would comprise the whole Union.¹⁴⁰

The design of the Union was intended to preserve, to the greatest possible extent, the independence of the Member States. The Dublin summit formulated a negative delimitation of the Union: *in the context of ensuring respect for national identities and fundamental institutions, how best to reflect what is not implied by political union.*¹⁴¹ Several instruments were to embody this idea throughout the Treaty. First, there was a general duty for the Union to respect the national identity of Member States¹⁴² whose systems of government are founded on the principles of democracy. This wording and the reference to the democratic principle may be understood by reference to the terms of the Draft EUT. The EUT had designed a system of sanctions addressed against Member States in the event of serious and persistent violation of its provisions or democratic principles and/or fundamental rights.¹⁴³ In these cases, the Council (excluding the Member State concerned) could suspend the rights deriving from the application of the EUT for that Member State and its nationals. Moreover, participation in the institutions might be suspended. Expulsion was not contemplated although it appeared to be a possibility.

The 1991 conference clearly wanted to avoid granting to the Union any competence or attribution that could be understood as a capacity to control the constitutional order of Member States. This found proper expression in the dispositions on HAJC which reasserted, in authoritative wording, the exclusive competence of the Member States in the areas related to the exercise of sovereignty in the internal dimension.¹⁴⁴

Next to this general provision for the preservation of Member States' independence, there were several particular provisions scattered through the Treaty: derogation from joint actions on CFSP, respect for the specific character of the security and defence policy of certain Member States, and the allowance for closer cooperation between several of the Member States. However, the most important single instrument for the preservation of Member States' autonomy was the principle of subsidiarity.

140 The French Foreign Minister, Roland Dumas, had spoken previously of the possibility of considering differentiated membership in order to solve the problem of the neutral countries. *Agence Europa* No. 5515 19.6.91

141 Bull. EC 6-1990 point I.35 p. 15-17

142 Article D *Project of Articles*; Article G *Consolidated Draft and Noordwijk Draft*, Article F.1 *Maastricht Draft* and TEU.

143 Article 4 and 44 EUT.

144 *This Title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to maintaining law and order and the safeguarding of internal security.* Provisions on HAJC. Article E *Project of Articles* and *Consolidated Draft*; Article B.2 *Noordwijk Draft* and *Maastricht Draft*.

The principle of subsidiarity came to the debate due to several reasons.¹⁴⁵ Firstly, it was thought to be an instrument to prevent the erosion of sovereignty of Member States.¹⁴⁶ Secondly, it was used to calm the deep concern among the German *Länder* that the expansion of Community competence would be to their detriment.¹⁴⁷ Finally, there was a genuine concern, initially raised by the Padoa-Schioppa report,¹⁴⁸ about the Community's ability to deal efficiently with ever wider responsibilities. The principle of subsidiarity, therefore, was conceived as an instrument for addressing the defects within the *Community's* (and not Union's) scope of competencies. When the conference was launched, it became a principle on which to build the *Union*. The June 1990 Dublin summit had identified subsidiarity as one of the general principles to lead the discussions: it should be considered *how to define the principle of subsidiarity in such a way as to guarantee its operational effectiveness*.¹⁴⁹ In the conclusions of the Rome summit, subsidiarity became an operational principle allowing a distinction between Union jurisdiction and national jurisdiction.¹⁵⁰ Finally, the mandate for the IGC registered the European Council agreement on the importance of the principle of subsidiarity, not only when considering the extension of Union competence (sic), but also in the implementation of Union policies and decisions.¹⁵¹

These references to the principle of subsidiarity carried with them the implicit belief that the Union would mirror the Community's politico-legal framework and, therefore, provisions for a mechanism of control should be elaborated. This was the idea contained in the EP proposal; subsidiarity would determine the limits for the fair exercise of concurrent Union competencies and work as a constitutional guarantee against Union intrusion in the ambit of exclusive competencies of the Member States.¹⁵² This design draws heavily on the Draft EUT where the principle of

145 Laffant, B. op. cit. p. 32-33

146 The British Government considered subsidiarity a counterbalance to the inevitable tendency of organisations to gather power and activity at the centre, at the expense of the component parts. House of Lords Political Union: law making powers cit. p. 21

147 On the position of the German *Länder* on the question, see in particular Gretschnan, Klaus 'The subsidiarity principle: who is to do what in an integrated Europe?', in Subsidiarity. The challenge of change pp. 53-54.

148 Padoa-Schioppa, Tommaso Efficiency, stability and equity. A strategy for the evolution of the economic system of the European Community (Oxford: Oxford University Press, 1987) 187 p.

149 Bull. EC 6-1990 point I.35 pp. 15-17

150 Bull. EC 10-1990 point I.4 p. 8

151 Bull. EC 12-1990 point I.8 p. 10

152 The EP considered that the principle should be a guide in determining the extent of Community action in the field of concurrent competencies. Resolution of 12 July 1990 on the principle of subsidiarity. PE Doc. A 3-163/90 OJ N. C 231/163 17.9.90. Pescatore qualified the two EP reports on the principle of subsidiarity as *une apologie de la récupération, par les Etats membres, des compétences concédées à la Communauté*. Pescatore, P. in Les conférences intergouvernementales avant le conseil européenne de Maastricht cit.

subsidiarity justified Union action in areas of concurrent competence, whilst Union institutions would have the sole power to act in areas of exclusive competence.¹⁵³

The principle of subsidiarity appeared in the Common Union Provisions only in the later draft, in two different forms. The first was as a principle regulating the achievement of common union objectives: *the objectives of the Union shall be achieved as provided in this Treaty (...) while respecting the principle of subsidiarity as defined by Article 3b of the EC Treaty.*¹⁵⁴ It also appeared in form of a general declaration on the character of the union where *...decisions are taken as closely as possible to the citizens.*¹⁵⁵ This declaration reflects not only British concerns but also the interests of the German *Länder* and the Spanish *Comunidades Autónomas* in securing an implicit endorsement of their eventual role in the decision-making process.¹⁵⁶

The examination of the operation of the principle within the structure of the Union has to consider both Community and intergovernmental frameworks. The Community one is to be examined in the next chapter. Within the intergovernmental arrangements, two aspects pointed out by the European Council have to be weighted: transference and exercise of competencies.

The possibility of explicitly including the principle within the provisions regulating CFSP and HAJC had been considered at early stages.¹⁵⁷ Since these areas were to be governed mainly by provisions of public international law and intergovernmental type arrangements (that elude the discipline of the EC constitutional framework), competencies in these areas belonged, by definition, to the Member States, which are entitled to use their discretionary power to decide whether or not to transfer competence to the Union. Although it has been argued that a strict interpretation of the principle allows for a two-directional flow (whilst protecting national competencies, the principle might also be invoked as justification for the transfer of powers to the Union), Member States retain absolute formal entitlement individually to authorise further transferences.

153 Article 12 EUT. In the opinion of Jacqué, Member States conserved their sovereignty under this design and the Union enjoyed only limited transfer of competencies. These are distributed on basis of the principle of *subordination* (i.e., subsidiarity). Jacqué, J.-P. 'The Draft Treaty, an overview' cit. p. 20. On the other hand, Union action in the field of concurrent competencies is subject to the principle of subsidiarity. See the commentary by Constantinesco, Vlad 'Division of fields of competence between the Union and the Member States in the Draft Treaty establishing the European Union', in Bieber, R. et al. (eds.) cit. p. 41-56

154 Article B §2 *Maastricht Draft* and TEU.

155 Article A §2 *Maastricht Draft* and TEU.

156 In November 1991, the *Bundesrat* adopted a resolution stating that it would refuse to approve the Maastricht Treaty if it did not enshrine the principle of subsidiarity. See Wijnbergen, Christa van 'Germany and European Political Union', in Laursen, F. and Vanhoohacker, S. (eds.) *The Intergovernmental Conference on political union* cit. p. 54.

157 Provisions on CFSP. Article A *Project of Articles. La politique de l'Union a vocation a s'étendre à tous les domaines dans le respect du principe de subsidiarité.*

On the other hand, the principle seems to be unnecessary regulating the exercise of these competencies in intergovernmental areas. The adoption of joint actions will always require a previous unanimous vote. The principle justifying unanimity, and therefore, veto, i.e., the protection of national interest, is the presumption that each Member State enjoys the discretion to decide whether or not to exercise certain competencies. Therefore, the will of Member States would appear to render meaningless the criteria (i.e. effectiveness and/or necessity) applied through the principle of subsidiarity, although the inherent moral value of the principle and its criteria of application may be duly acknowledged.

The principle has some relevance within the areas of HAJC given the gradual process of communitarisation of certain aspects of the policies included under these provisions. The principle of subsidiarity would allow the Member States to decide the degree of communitarisation, since it regulated the adoption of joint actions mainly by posing a limit to the Commission right of initiative.¹⁵⁸ The irrelevance of the principle in areas of pure intergovernmental cooperation¹⁵⁹ explain why it was dropped from the provisions on CFSP and why the principle had to be defined as a **Community** (and not Union) principle to which other Union provisions would refer.

158 Article C.2 (a) *Project of Articles; Consolidated Draft; Noordwijk Draft*; Article K.3 2 (b) TEU

159 Cf. the opinion by Cardis who considers that the principle of subsidiarity regulates also intergovernmental relations: *La confédération d'Etats s'en tient au principe de subsidiarité pour régir la répartition des pouvoirs entre autorités fédérales et pouvoirs nationaux*. Cardis, F. Fédéralisme et intégration européenne cit. p. 78

8 THE REFORM OF THE CONSTITUTIONAL FOUNDATION OF THE COMMUNITY

- 8.1 Reform of the Community's legal constitution**
 - 8.1.1 Enlargement of the legal constitution**
 - 8.1.2 Hierarchy of legislative acts**
- 8.2 Reform of the Community's political constitution**
 - 8.2.1 The European Council**
 - 8.2.2 The Council**
 - 8.2.3 The Commission**
 - 8.2.4 The European Parliament**
 - 8.2.5 National Parliaments**

Chapter 3 concluded by pointing out that reform of the constitutional foundation of the Community required the addressing of institutional deficiencies. Additionally, new policy areas might be brought under the Community's legal constitution. Both aspects are an improvement on the constitutional foundation of the Community, without this feature's implying a substantial change in its nature. Some of the factors stimulating both institutional reform and extension of the Community's scope of competence have been discussed in Chapter 6. This chapter analyses how the reform of the Community's constitutional foundation was carried out during the IGC.

8.1 THE REFORM OF THE COMMUNITY LEGAL CONSTITUTION

The reform of the Community's legal constitution was based on the principle of balancing between Community and national areas of competence.¹ This implied a revision of the Community's scope of competence in two dimensions: the incorporation of new competencies and the establishment of a principle regulating the legal constitution. A third failed reform was the introduction of a new typology of Community legal acts.

8.1.1 The enlargement of the legal constitution

A The Principle of Subsidiarity

The reference to the principle of subsidiarity was a common feature in most of the pre-conference preparatory documents. Subsidiarity was confirmed by the European Council as the basic principle in regulating the balance of competencies.²

¹ Bull. EC 12-1990 point I.4 p. 9

² Bull. EC 6-1991 point I.5 p. 9

The conference had to develop the concept of subsidiarity considering three issues:³ definition, position in the Treaty, and canon for interpretation. The definition was not a controversial issue; as has been suggested, *consensus is possible because it hides differences in interpretation of the definition.*⁴ Subsidiarity, which already had a place in Community provisions,⁵ has been defined as:

*a normative recommendation, a rule for setting up institutional arrangements in such a way that decisions, affecting peoples' lives directly, should be taken as far down the chain of social organization as possible.*⁶

The normative definition certainly fixes a moral principle but it fails to offer any real progress as regards the problem of how to decide who is going to act. Within the context of the Treaty, this was discussed around two options: a positive formulation and a negative formulation. The positive wording implies that the Community might act when objectives could be achieved by the Community rather than by the Member States. This was the option of the Draft EUT⁷ and supported by the Belgian⁸ and Italian delegations. The initial drafts had introduced a positive formulation,⁹ but the negative formulation would prevail at the end.¹⁰ In this case, Community might act if objectives *cannot* be achieved by Member States. The negative formulation had been proposed by the UK delegation¹¹ and supported by German negotiators. The difference between the two formulations is substantial, because the negative formulation enhances further the residual competence of Member States in areas of concurrent competence.

A second problem linked to the definition concerns the criteria applied in determining which level will exercise the competence. The characteristic of the definition of subsidiarity is that it is not self-contained, but it needs to be referred to

3 Louis pointed out three issues: definition, localisation in the Treaty and jurisdictional control. See his contribution to the debate in L'union politique journée d'études. Bruxelles, 8 december 1990. (Bruxelles: Institut d'études européennes, 1990).

4 Santer, Jacques 'Some reflections on the principle of subsidiarity', in Subsidiarity. The challenge of change p. 39

5 The principle of subsidiarity was incorporated by Article 130 R s4 of the SEA on environment. *The Community shall take action relating to the environment to the extent to which the objectives referred to ... can be attained better at Community level than at the level of individual Member States.*

6 Gretschnan, Klaus 'The subsidiarity principle: who is to do what in an integrated Europe?', in Subsidiarity. The challenge of change cit. p. 47

7 Article 12.2 EUT

8 Belgian Memorandum on institutional relaunch cit. Doc. 5319/90

9 Article 3b *Project of Articles, Consolidated Draft and Noordwijk Draft.*

10 Article 3b *Maastricht Draft* and TEU.

11 Note on subsidiarity. CONF-UP 1721/91.

auxiliary interpretative criteria.¹² It has been argued that subsidiarity is a guiding principle to be applied in conjunction with other principles of social action.¹³ These other criteria were basically the same in the contributions presented to the IGC: efficiency, effectiveness, absolute necessity and the cross-boundaries test. Thus, the EP proposal combined the criterion of transcendence of frontiers as the basis for intervention with the most effective action.¹⁴ The question was how to combine them, and the final product has reflected the option of applying two different tests: the more effective attainment test combined with an absolute necessity test plus a combination of the better attainment with the cross-boundaries dimension.¹⁵ The final wording, thus, is as it follows:

Article 3b.

The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.

In the areas which do not fall within its exclusive jurisdiction, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or the effects of proposed action, be better achieved by the Community.

Any action by the Community shall not go beyond what is necessary to achieve the objectives of the Treaty.

The second issue to be clarified was the location of the principle within the Treaty. It could either be included in the preamble, in which case it would act mainly as a reinsurance and a guideline for legislation, or it could be written as a Treaty article, in which case it would provide a formalised procedure for handling subsequent disputes.¹⁶ The first option was supported by certain delegations (France, Italy and Spain) whilst the UK, Germany and the Commission itself preferred to incorporate it within the body of the Treaty.¹⁷ The discussion had not, however, considered the

12 Laffan, for instance, argues that subsidiarity is to be understood as meaning that policy competence and public authority should be exercised at the lowest *effective* level. Laffan, Brigitte 'The governance of the Union' in Keatinge, P. (ed.) Political Union cit. p. 34

13 Wilke, Marc and Wallace, Helen Subsidiarity: Approaches to power sharing in the European Community RIIA Discussion Paper No. 27 (London: RIIA, 1990) passim

14 Resolution of 12 July 1990 PE Doc. A 3-267/90

15 See Emiliou, Nicholas 'Subsidiarity: An effective barrier against the "Enterprises of Ambition"?' European Law Review Vol. 17 No. 5 1992 p. 399-401

16 Wilke, M. and Wallace, H. op. cit. p. 6

17 The Danish proposal was particularly incisive: the principle of subsidiarity should be stated as a basic principle in the preamble and should be applied in each specific area. *Danish memorandum*. Doc. 9046/1/90 REVTRAT 14

structure of the Treaty. If subsidiarity were to be defined by the Preamble or as a Union principle, its legal force for Community law would not be as strong as if it were established as a Community principle *strictu sensu*. The judicial guarantee provided by the ECJ extends only to EC jurisdiction; therefore, an article on subsidiarity in the common provisions of the Union Treaty would be less relevant for the ECJ. Indeed, the argument in favour of the inclusion of the principle in the Preamble highlighted that it should not be judicable, since interpretation (i.e., what is necessary or better) should be based on a political decision subject to changing circumstances.¹⁸ The solution finally adopted was to write subsidiarity as an EC Treaty article and to refer to it any relevant Union provisions.

The location, thus, seems to imply a basic decision of the third issue, i.e., the interpretative canon (political or juridical). There was broad support for ECJ jurisdictional control over the application of the principle. Thus, the EP was particularly supportive of the juridical guarantee of the principle: the ECJ should be given jurisdiction as a constitutional body to ensure the division of competencies between Member States and Community.¹⁹ Equally, the Belgian memorandum had proposed that a treaty provision should enable Member States to appeal to the ECJ if they consider that a Community decision exceeds Community's powers as defined by the principle.²⁰ Support for a form of *ex ante* control on the exercise of Community competence according to the subsidiarity principle has also been argued.²¹ The fact that subsidiarity has been placed together with other principles of Community law has been interpreted as a *strong indication that the drafters of the Treaty have invited the Court of Justice to adopt subsidiarity as another basic principle for judicial review*.²² The same author has listed four basic objections to the judicability of the principle, which led him to conclude that the proper role of subsidiarity, in the Community's legal order, *should be that of a guiding principle for the political institutions of the Community but not a general principle of law amenable to judicial review by the Court*.²³ Those favouring a political application of the principle argued

18 House of Lords Select Committee on the European Communities Political Union: law making powers and procedures cit. passim

19 Resolution of 12 July 1990 cit. The reaffirmation of this juridical guarantee was the main element in the second resolution on the issue. Report of the committee on institutional affairs on the principle of subsidiarity. PE Doc. A 3-267/90

20 Belgian *Memorandum* cit.

21 Jacqu , J.-P. 'Centralisation et d centralisation dans les projets d'union europ enne' Aussenwirtschaft Vol. 46 No. 3/4 1991 p. 474

22 Emiliou, N. op. cit. p. 402

23 *Ibid.* The objections are the following:

- It would give power to the Court to delineate the powers of the centre and periphery, which is a classical political decision inappropriate for a Court of law.
- Legal certainty of Community and national legislation would be eroded since both would be open to challenge on the basis that the principle of subsidiarity has been breached.
- The Court might have to intervene in disputes of political character between Member States.

that voting mechanisms within the Council, specifically unanimity or consensus, guarantee the observance of subsidiarity.²⁴

The principle of subsidiarity acts in a dual dimension: as a principle for the exercise of competencies and as a principle for the distribution of competencies.²⁵ Since the EC enjoys only *competencies d'attribution* (that is, competencies that have been expressly granted by the Treaty), the principle will be relevant within Community provisions, firstly, as a moral guideline for the institutions in areas of non-exclusive Community competence.²⁶ In these areas, the principle will secure a non-abusive or intrusive practice from European institutions and, particularly, from the Commission.²⁷ In the words of Constantinesco, *la subsidiarité devrait tempérer les conséquences de l'effet de "spill-over"*.²⁸

As a principle of attribution of competence, subsidiarity might have relevance with relation to Article 235.²⁹ At the beginning of the conference, it was expected that the article would be detached from its economic conditioning and re-addressed to the realisation of Community objectives in general. Indeed, Article 235 of the *Project of Articles* was explicitly linked to the policy areas mentioned by Article 3 and EP assent was required. The wording no longer deemed Community action to be

- The decision of the Court on its interpretation would become the main source of legitimacy of the principle.

- 24 Santer, J. op. cit., p. 20. The commentators of the Draft EUT went further by arguing *if qualified majority required for the legislative body to adopt an organic law is obtained, surely it must be presumed that the conditions of subsidiarity have been fully met*. Capotorti, F. et al op. cit. p. 79
- 25 Constantinesco, Vlad 'La subsidiarité comme principe constitutionnel de l'intégration européenne' *Aussenwirtschaft* Vol. 46 No. 3/4 1991 p. 445-452; Delors, J. Delors, Jacques 'The principle of subsidiarity: contribution to the debate', in *Subsidiarity. The challenge of change* p. 9. In the view of Wallace and Wilke, the principle of subsidiarity should help to clarify three aspects. Firstly, whether the powers and competence of the EC should be extended and thus shift some powers away from Member States. Secondly, how to share powers between the EC and Member States in cases of concurrent powers, where competence is not the issue, but the choice of the 'appropriate' level at which to act, is. Finally, they add a third dimension: the retention of the rights of the Member States themselves in relation to the collectively exercised powers of the Community as a whole. Wilke, M. and Wallace, H. op. cit. p. 4-5.
- 26 In the view of Delors, subsidiarity, which comes from a moral requirement, imposes a limit to interference by a higher authority vis-à-vis this person or this group in order to give it the means of achieving its end. Delors, J. 'The principle of subsidiarity' cit.
- 27 This was assertively exposed by the British contribution: *each institution shall act within the limits of the powers conferred upon it by this Treaty and, in exercising those powers, shall apply the principle of subsidiarity*. Note on subsidiarity CONF-UP 1721/91. Similarly, the Danish amendments had proposed that the Commission shall observe the principle of subsidiarity when drawing up its proposals for attaining the objectives of the Treaty. Article 155a Doc. 9046/1/90 REVTRAT 14
- 28 Constantinesco, V. 'La subsidiarité comme principe constitutionnel' cit. p. 440
- 29 Along this line, for instance, the Portuguese proposal argued that the principle of subsidiarity should not be an obstacle for the normal exercise of Community attributions. It should, rather, be the criterion for the rational and evolutive distribution of competencies between the Community and the Member States. Therefore, they propose to include the definition of the principle in the wording of Article 235. *Portuguese Memorandum* Doc. 10794/90 REVTRAT 27

necessary and, further, removed the requirement that action should be undertaken in the course of the operation of the common market. Rather, recourse to Article 235 should take into account the principle of subsidiarity in the attainment of union objectives. However, most of the delegations wanted to put specific limits onto Article 235 and establish a close list of objectives and means of action that could be invoked.³⁰ Therefore, the final version did not alter the text of the Rome Treaty, nor even the procedural requirements sought by the EP: the requirement of Parliamentary assent (proposed by the EP) was withdrawn and the reference to the principle of subsidiarity was not included.

The conference has also provided specific dispositions concerning the expansion of the Community's scope of competencies. These are the dispositions to expand the list of citizens' rights available under the Treaty³¹ and the provisions to transfer policy from the dispositions on HAJC to the Community framework. This latter event will occur because it has been provided that pure Community legal instruments (directives or measures adopted pursuant thereto),³² will be substituted in place of the content of intergovernmental conventions.

B New competencies

The extension of the Community's scope of competence to include new ones is a fixed item in any round of reform. The conclusions of the Dublin, June 1990 summit had called for an examination of the question: *to what extent does the union require further transfer of competence to the Community along with the provisions of the means necessary to achieve its objectives?*³³ The European Council listed the areas to be considered: social dimension; economic and social cohesion; environment; health sector; research; energy policy; trans-European networks; European heritage and the promotion of cultural exchanges, and education.³⁴ The widening of Community competencies had to provide a more solid basis for policies already being developed under Article 235. The conference had also to decide which other new policies would be written into the Treaty. If subsidiarity could be invoked as a moral principle, the promotion of particular national interests is the real basis for the inclusion of new policy areas and, not surprisingly, most of the national contributions were concerned with this aspect.³⁵

30 *Agence Europa* No. 5501 30.5.91 p. 3

31 Article 8e

32 Article 100c *Maastricht Draft*, TEU.

33 Bull. EC 6-1990 point I.35 p. 15

34 Bull. EC 12-1990 point I.8 p. 10

35 See Appendix III

Only the Commission displayed a full fledged tactic on the issue. The Commission's opinion adopted a selective approach towards the broadening of Community powers following the principle of *selecting the means of action the Community needs to ensure the balanced development of common policies*. The chosen option was to embody a limited number of competencies, instead of a wider scope with scarce means. Therefore, it recommended the inclusion of social affairs, major infrastructure networks and the free movement of persons.³⁶ In the Commission's view, the extension of competence should be led by three principles: competition, cooperation and subsidiarity.³⁷

This argument was directly addressed to the British pretension of generalising an extensive economic framework on the Thatcherite model at the single market scale and, specifically, to the exclusion of social policy on grounds of subsidiarity. Delors argued that *subsidiarity should not be used as a principle for demarcation between public and private in a liberal fashion*. Although the principle should preclude public regulatory intervention in the market, subsidiarity meant also the possibility of substituting legislation by agreements between the social partners at the European level.³⁸ Secondly, non-intervention in the market did not imply an inhibited attitude towards social policy. Quite the opposite: social policy should be included in the Treaty because it was *the balance between competitiveness, cooperation and solidarity within the Community that enables it to present itself before all European publics, all social strata, without shame*.³⁹

The opposite posture was held by the UK. For the British government, the extension of the Community's scope of competencies should be inspired by three principles. Firstly, there must be a refusal of any useless Community spending. The second principle was subsidiarity. Finally, respect for the market economy philosophy, which should have the effect of preventing any interventionist approach. As a consequence, those competencies that were inspired by an interventionist philosophy should be rejected: industry; energy and networks. Further, there was no reason to incorporate culture, consumer protection or tourism.⁴⁰ The most important conclusion for the British government was, however, that provisions on social policy

36 COM (90) 600 Bull. EC Supp. 2/91 p. 81

37 Declaration of the Commission on the two intergovernmental conferences on political union and economic and monetary union. Bull. EC 11-1991 point 1.1.1. p. 11

38 Delors, J. 'The principle of subsidiarity' cit. p. 18

39 *Agence Europa* No. 5624 6.12.91 p. 3. On the application of the principle of subsidiarity to social policy, see the article by Spicher, Paul 'The principle of subsidiarity and the social policy of the European Community' *Journal of European Social Policy* Vol. 1 No. 1 1991 p. 3-14. Referring to the moral foundation of the principle, he refutes its identification with the concept of sovereignty.

40 *Agence Europa* No. 5608 14.11.91 p. 4

were not required in the Treaty. Unable to impose its view, the conference finally adopted a Protocol signed by eleven Member States on social policy.

The number of new policy areas eventually included reflected an overall compromise on other issues (particularly, on majority voting)⁴¹ as well as a particular coalition of interests among Member States.⁴² The Dutch Presidency finally proposed deleting the titles on energy, tourism, consumer protection and civil protection. References to all of these policies were included in Article 3 (Objectives of the Community) which finally comprised 20 objectives.⁴³ Therefore, continuing Community action would be possible on basis of current Treaty provisions (Article 235 *inter alia*). Furthermore, they will be considered for their insertion as treaty articles in the next round of reform. The TEU has also included a title on consumer protection, incorporated at the final Maastricht summit.

In general, these articles dealing with the new areas have a very similar structure: a description of Community objectives; the obligation of Member States' coordination; allowances for international cooperation and the final possibility of Community action. The list of new Community policies was mainly a codification of the policy areas to which EC legislation had *de facto* been extended since the SEA.

8.1.2 The hierarchy of legal acts

The conclusions of the June Dublin summit had indicated that *consideration should be given to a review of the different types of legal instruments of the Community and the procedures leading to its adoption*.⁴⁴ The origins of the concept of law were in a desire, firstly expressed in an Italian contribution,⁴⁵ to substitute the classification of legal instruments based on form and effects by other based on politico-legal functions: constitutional, legislative, regulatory and administrative.

41 The same question is theoretically addressed by Moravcsik as the protection of national sovereignty as being one the elements of intergovernmental institutionalism. *Policymakers safeguard their countries against the future erosion of sovereignty by demanding the unanimous consent of regime members to sovereignty related reforms. They also avoid granting open ended authority to central institutions that may infringe on their sovereignty.* Moravcsik, A. 'Negotiating the Single European Act' cit. p. 27.

42 Laursen, for instance, mentions that Franco-Italian pressure led to the inclusion of industrial policy, but the UK and Germany succeeded in limiting its impact by requiring unanimous vote to adopt measures within this area. Laursen, Finn 'Explaining the Intergovernmental conference on political union', and European Political Union', in Laursen, F. and Vanhoohacker, S. (eds.) The Intergovernmental Conference on political union cit.

43 The Danish memorandum recommended the inclusion into Article 3 of the Treaty references to new Community functions: social policy, research and development, the environment, consumption, telecommunications, energy, common aid to the third world as well as development cooperation and joint programmes on health, education and culture. Danish amendments. CONF-UP 1777/91

44 Bull. EC 6-1990 point I.35 p. 16

45 Italian delegation note of 20 September 1990 on the typology of Community acts.

The Commission proposed, in its contribution, the introduction of a hierarchy of norms, pointing out that this already existed in the constitutional systems of the Member States. The Commission proposed to introduce the law as a new legal instrument that would be defined in accordance to two criteria: contents, and procedure. A law would *determine the fundamental principles, general guidelines and basic elements of the measures to be taken for their implementation*,⁴⁶ this being the sole purpose of the law. The criticism pointed out that there was no abstract criterion or definition which could reliably identify legislation that raises important principles and the decision on which matters would be subject to co-decision would be in reality a political choice.⁴⁷

Secondly, a law would be *an act of the Community legislature, i.e. Parliament and Council acting in accordance with the co-decision procedure*.⁴⁸ Finally, implementation would be brought about as a whole or in part by Member States. Since the law would be either directly implemented by national authorities or implemented through a Commission regulation for only those aspects which require an intervention and uniform rules, the principle of hierarchy of norms would help the development of the principle of subsidiarity.⁴⁹ In Delors' view, since the pure instrument of subsidiarity in Community legislation, the directive, increasingly resembled regulations; its substitution by the *law* would reinsure the principle of subsidiarity. The advantages of introducing this superior legal instrument, the *law*, were the following: to ensure a greater legislative role for the EP; to ensure the application of the principle of subsidiarity in the adoption of national implementing measures; to increase the effectiveness of the Community's decision-making process, and to simplify and clarify the system of Community acts.

The EP proposal on the typology of Community acts⁵⁰ had classified them as constitutional acts; budgetary acts; legislative acts and implementing measures. The proposal distinguished between legislative and implementing measures and, in the category of legislative acts, between those of which their implementation is charged to the Commission and those of which their implementation is left to Member States. Accordingly, two types of legislative instrument were designed, both of which should laid down the basic principles, general patterns and essential elements of the measures

46 Article 189. Commission contribution

47 House of Lords Select Committee on the European Communities Political Union: law making powers and procedures cit. p. 17

48 Bull. EC Supp. 2/91 p. 122

49 *By favouring implementation of the law by the national parliaments or by the regional authorities, the Commission wants to break with a centralism, which is often ineffective, in order for implementation to be taken as closely as possible to those to whom they are addressed.*

Delors, J. 'The principle of subsidiarity' cit. p. 16

50 Resolution of 18 April 1991 on the nature of Community acts. Doc. A 85/91 OJ No. C 129/.. 20.5.91

to be taken for their implementation. Laws and the implementing measures adopted for their application (regulatory acts and decisions) should be binding in their entirety and directly applicable in all Member States. On the other hand, the **framework law** would be binding in its entirety as to the results to be achieved over each Member State to which is addressed, but leaving to national authorities the choice of form and method. The acts proposed were:

- Legislative acts: subject to the co-decision procedure (Article 189)
 - . Framework laws (replacing directives)
 - . Laws (replacing provisions in regulations considered to be of a legislative nature)
- Regulatory acts: adopted by the Commission
 - . Framework regulatory acts (replace implementing directives)
 - . Regulatory acts (replacing the provisions in regulations considered not to be legislative in nature).

The main principles stemming from the Commission and the EP proposals were initially reflected by the conference. Thus, the law was initially defined as the supreme legal instrument under the Treaty (*La Loi a un valeur juridique supérieure à celle des autres actes communautaires*) defining the fundamental principles or the general rules applicable to certain matters.⁵¹ This precise definition subsequently disappeared and the law became defined only by its procedure of adoption (i.e., co-decision),⁵² and, finally, the concept of law itself as a different legal instrument in the Community framework was eliminated from the wording of the drafts which will contain only the traditional Community instruments. The Treaty re-addressed the settlement of the problem to the IGC to be convened in 1996 which *will examine to what extent it might be possible to review the classification of Community acts with a view to establishing an appropriate hierarchy between different categories of acts.*⁵³

8.2 REFORM OF THE COMMUNITY'S POLITICAL CONSTITUTION

The institutional reform has been linked to two principles anticipated by the June European Council: efficiency and effectiveness of the Community and its institutions, and enhancement of democratic legitimacy.⁵⁴ The first principle is linked

⁵¹ Article 189.1 *Project of Articles*

⁵² Article 189.1 and 2 *Consolidated Draft*

⁵³ Final Act of the Conference. *Declaration on the hierarchy of Community acts.*

⁵⁴ Bull. EC 6-1990 point I.35 p. 16. On the concept of legitimacy, see the excellent work by Weiler, J. 'Problems of legitimacy in post-1992 Europe' *Aussenwirtschaft* Vol. 46 No. 3/4 1991 p. 411-437. Cf. his very subtle distinction between formal (legal) legitimacy and social (empirical)

to the Council and the Commission, whilst the second concerns mainly the EP,⁵⁵ although the Parliament itself had proposed a general requisite of democracy.⁵⁶ The mandate to the IGC added a third principle: balance between Community institutions.⁵⁷

8.2.1 The European Council

The inclusion of the European Council in the Union institutional framework implied also a derived role in the Community. This brought the opposition of some delegations. The Netherlands considered that the European Council was not a Community body and its reinforcement would imply a limitation of the democratic control and an undermining of the functions of the Commission.⁵⁸

The conference granted to the European Council specific powers within the Community regarding EMU: it was empowered to decide the date for the beginning of the third stage, assessing the results of the integration of the markets and checking that the conditions of convergence on price stability, balance of the budget and interest rates were achieved.⁵⁹

8.2.2 The Council

Proposals for the reform of the Council of Ministers has been systematically focused on the extension of majority voting. The principle invoked for it, however, is

legitimacy with the more clumsy elaboration by Moxen-Browne for whom legitimacy in the context of the Community *refers to the degree of consent that the institutions of the Community are able to attract from its citizens. This consent rests, for the most part, on the effectiveness, accountability and visibility of the Community's decision-making process.* Moxen-Browne, Edward 'The legitimacy of the Union', in Keatinge, P. (ed.) *Political Union* p. 63.

55 Bieber, for instance, argues that Parliament is an object of Treaty reforms aiming at an increase of democracy. Bieber, R. 'Democratization of the European Community through the European Parliament' *Aussenwirtschaft* Vol. 46 No. 3/4 1991 p. 399

56 The principle of democracy was contained in Article 17 of the Declaration on Fundamental Rights and Freedoms attached to the EP opinion. There were three elements: firstly, all public authority emanates from the people and it must be exercised in accordance with the principles of the rule of law. Secondly, every public authority must be directly elected by or answerable to a directly elected parliament. Finally, the third element was free, direct and secret universal suffrage for Community citizens in EP elections. Resolution of 22 November 1990.

57 Bull. EC 12-1990 point I.4 p. 9

58 *Agence Europa* No. 5431 14.2.91 p. 5. Vignes has pointed out that the Dutch objections derive from Dutch constitutional law, since the Dutch constitution does not foresee special powers for the Prime Minister and, in the international order, they belong to the Foreign Minister. Vignes, D. 'Le projet de la présidence luxembourgeoise d'un "Traité sur l'Union" cit. p. 516

59 Article 109 F *Consolidated Draft*

the enhancement of efficiency and effectiveness⁶⁰ and the IGC has been no exception. Democracy, understood as majority rule, has not become a workable principle for the Council; in the words of Weiler, *there is still no legitimacy to the notion that boundaries within which a minority will accept as democratically legitimate a majority decision must now be European instead of national.*⁶¹ Not surprisingly, some reforms of Council procedures intended to enhance its democratic character have not been addressed, for instance, the question of openness and transparency.⁶²

Therefore, the only issue to be considered by the conference was the specification of unanimity as a voting procedure within the Council, to increase its efficiency. The EP proposed to establish majority as the general rule, whilst qualified majority only would apply in cases specifically provided for in the Treaty. Unanimous vote, on the other hand, would be restricted only to constitutional issues: Treaty amendments, Community enlargement and the extension of Community powers.⁶³ Following the suggestions of the Belgian Memorandum,⁶⁴ the conclusions of the Dublin summit had suggested the increase in the number of fields covered by qualified majority voting.⁶⁵ The mandate of the Rome summit to the IGC called for the examination of the possibility of extending majority voting with a view to making it the general rule with a limited number of exceptions.⁶⁶ The number of policy areas to which the procedure will apply has been reduced, since each change could have been blocked by Member States acting alone or in coalition. Majority voting has been provided in certain aspects of environmental policy, and for some of the new policies: development, health, consumer protection and trans-European networks.

60 In the words of Ehlermann, unanimous consent is no longer a workable principle for the EC and to retain it would mean condemning the EC to inactivity. Ehlermann, C. 'The institutional development of the EC under the Single European Act' cit. The same argument is exposed by Dubois, for whom effectiveness is hampered by the difficulty of reaching compromises within the Council through unanimity. Dubois, Louis 'Peut-on gouverner a douze? *Pouvoirs* Vol. 48 1989 p. 105-118

61 Weiler, J. 'Problems of legitimacy in post 1992 Europe' cit. p. 428-9

62 The EP had proposed that the negotiations on Community legislation within the Council should be open to the public and voting records should be published. Article 146a. Resolution 22 November 1990

63 Article 148 Resolution 22 November 1990

64 The Belgian Memorandum on institutional relaunch which had proposed to extend qualified majority voting to several sectors currently dealt with by unanimity: rules on the internal market [Article 10 a (2)]. Concerning fiscal provisions, the major decisions would be taken by majority but rules on methods and bases for assessment would be adopted by qualified majority. The memorandum also proposed free movement of persons and social rights, establishment of the framework programme on R & D and setting joint undertakings (Article 130 q) and environment (Article 130 s). Unanimity was reserved for the discretionary enlargement of Community competencies (Article 235) and constitutional provisions.

65 Bull. EC 6-1990 point I.35 p. 16

66 Bull. EC 12-1990 point I.9 p. 11

The June European Council had also called for central coordination through the General Affairs Council and concentration and rationalisation of the work of the Council in general.⁶⁷ This was supported by some delegations⁶⁸ but it was not reflected during the conference. Similarly, the possibility of allowing regional representatives to sit in the Council, considered in some proposals, was not solved in an explicit manner. Although this was a demand from the German *Länder*, it was strongly opposed by Spain.⁶⁹ Therefore, it will be up to the national governments whether to allow regional representatives to sit in the Council.

The conference has not carried out a reform of the COREPER.⁷⁰ As a result of the creation of the other two Union pillars (CFSP and HAJC), two bodies have been linked to the COREPER. The Political Committee, in charge of monitoring CFSP, is not statutory-linked, but the Co-ordinators Committee, in charge of HAJC, might be interpreted as collaborative organ in the preparation of proceedings under Article 100c.⁷¹

8.2.3 The Commission⁷²

The reform of the role of the Commission undertaken by the IGC has dismissed theoretical claims aimed at reinforcing its political character⁷³ focusing instead on reforms related to technical aspects. The conclusions of the June 1990 summit had indicated that the enhancement of the Commission's efficiency and effectiveness would require a redefinition of the number of its members and the strengthening of its executive role in the implementation of Community policies.⁷⁴

67 Bull. EC 6-1990 point I.35 p. 16

68 The Greek memorandum had proposed to reduce the number of Councils to four: Political Affairs, Economic Policy, International Integration and Agriculture. Hampton had suggested a permanent Council of deputy prime ministers: A Council in which members would not constantly changing according to the subject would be able to take greater responsibility for itself as a body at Community level than individual ministers at the present. Hampton, C. 'Democracy in the European Community' cit. p. 53

69 *El Pais* 4.10.1991

70 The Greek delegation had proposed to restructure the COREPER in three parts: COREPER I (political affairs-ambassadors); COREPER II (economic policy- first deputies); COREPER III (Internal integration- second deputies). *Contribution to the discussions on progress towards European union (15 May 1990)*

71 Article 100d *Maastricht Draft* and TEU

72 See, in general, Vahl, Remco 'The European Commission on the road to European Union: the consequences of the Treaty on European Union for the Commission's power base' *Acta Politica* Vol. 27 No. 3 1992

73 Thus, Ludlow opined that any reform of the Commission should consider, as well as its legitimacy, its capacity to perform its tasks. Ludlow, Peter 'The European Commission' cit. p. 123

74 Bull. EC 6-1990 point I.35 p. 16. Cf. Belgian Memorandum on institutional reform which had called for a restriction in the number of cases in which Commission powers are delegated to the Council. Belgian Memorandum. Doc. 5519/90

The reduction of the number of Commissioners has been constant in any proposal of reform of the Commission and, during the conference, it was enthusiastically supported by those Member States which have only one Commissioner.⁷⁵ While the trend of the IGC seemed to favour this reduction,⁷⁶ it has ultimately been unable to agree this point and the Treaty has finally included a declaration with a vague commitment: Member States would examine the questions related to the number of members of the Commission not later than the end of 1992.⁷⁷ The settlement of this question does not require an intergovernmental mechanism, since a modification of the number of Commissioners can be approved by the Council through a unanimous Council vote (Article 157 EC Treaty).

The mandate of the Rome summit asked the IGC to consider the necessity of strengthening the role of the Commission to match the extending responsibilities of the Union, thus implying an endorsement of Commission involvement in intergovernmental areas. The reinforcement should be based primarily on an increase of its powers of implementation.⁷⁸ The institutional proposals from the Commission and the EP emphasise the character of the Community executive of the Commission.

The Commission's contribution on executive powers⁷⁹ established that implementation would in principle be a matter for Community institutions (i.e., the Commission) in the absence of explicit reference to national measures. Accordingly, the functions of the Commission would be to ensure the application of Treaty provisions; to formulate recommendations and deliver opinions; to participate in the legislative process as provided for in the Treaty and, foremost, to adopt regulations and decisions (secondary legislation) to implement laws. The Commission would be assisted only by advisory or managerial committees, the latter in the case of regulations (Article 189B.2). The discretion of the Commission's action would be controlled through the so-called *substitution procedure* (Article 189) by way of which the legislature (Council and/or EP) could interrupt secondary legislation (regulations) if it is considered that the Commission was exceeding its powers in implementing a law. In this case, the co-decision procedure could have been invoked in order to pass this piece of secondary legislation.⁸⁰

⁷⁵ See, for instance, the references to the question in the Danish, Greek and Portuguese Memoranda.

⁷⁶ During the Noordwijk "Conclave", the Twelve seemed to have reached an agreement on Twelve Members for the Commission. The question whether five deputy Commissioners should be added was not solved. *Agence Europa* No. 5608 14.11.91 p. 4

⁷⁷ *Declaration on the number of Members of the Commission and the European Parliament.*

⁷⁸ Bull. EC 12-1990 point I.9 p. 11

⁷⁹ SEC (91) 500 EC Bull. Supp. 2/91 p. 117-125

⁸⁰ Cf. the opinion of the EP which would initiate the legislative procedure in the event of a negative opinion from a Consultative Committee or by a decision of the EP acting by majority of MEPs. Article 155 Resolution 22 November 1990

The EP believed that the Commission should be made the executive body of the Community in its own right and not because those powers were delegated.⁸¹ It could therefore be assisted only by advisory or managerial committees. In the context of the hierarchy of acts, the Commission would greatly increase its powers of implementation: guidelines for the Commission's implementation would be established by a law or a framework law. Therefore, regulatory committees, that in the EP view were unacceptable, also became unnecessary. There would be a judicial control of the Commission's power of implementation by the ECJ but also political control through the *removal procedure*. This could be activated either by the Council by qualified majority or the EP by majority, and a contested implementing measure could be converted into a simple Commission proposal subject to the ordinary legislative procedure.⁸² The EP also called for a reinforcement of the Commission's responsibilities for ensuring uniform application of Community legislation by Member States. In the implementation of the budget, only an advisory committee might assist the Commission. The Commission's executive powers on initiating and implementing international agreements were also enhanced.⁸³

Apart from the functions derived from its involvement in CFSP and HAJC, the conference has extended the Commission's traditional functions to the new policy areas. The exclusive right of initiative has been extended to all the new competencies, with the exception of visa policy on which the Commission will examine requests from Member States. On the other hand, the reporting function of the Commission has been enhanced, regarding certain fields such as social situation of the Union, economic and social cohesion, research and technology, etc. The task of reporting is particularly relevant since the agenda for further extension of the Community's scope of competence, in certain cases, will be stimulated by Commission reports.

The UK government was particularly keen on redefining a more administrative (as opposed to political) profile for the Commission. This was expressed in two British submissions oriented on tightening the financial control over the Commission and enhancing its role in ensuring compliance. Firstly, any Commission proposal should be accompanied by an estimate of its costs.⁸⁴ Although the British delegation had proposed an amendment to Article 155, the IGC finally agreed on a less stringent declaration.⁸⁵ Secondly, it was proposed that the examination of the budget would

81 Resolution of 13 December 1990 on the executive powers of the Commission (comitology) and the role of the Commission in the Community's external relations. Doc. A 3-310/90 OJ No. C 19/273 28.1.91. See also Article 155.4 resolution of 22 November 1990

82 Resolution of 18 April 1991 on the nature of Community acts. cit.

83 Resolution of 13 December 1990 on the executive powers of the Commission cit.

84 Proposal on improving the quality of EC legislation (13.3.91) CONF-UP 1765/91

85 Declaration on estimated costs under Commission proposals.

become the responsibility of a single Commissioner,⁸⁶ which proposal was not accepted. Finally, the UK proposed that the Commission could, under no circumstances, put forward a proposal that would result in altering the budgetary ceiling.⁸⁷ This was adopted by successive drafts and the TEU.⁸⁸

The UK further proposed to increase the powers of the Commission to control the compliance with ECJ judgements: in case of failure to comply with a ruling, the Commission could bring the matter before the Court again, specifying the amount of pecuniary sanction or periodic penalty payment it considered appropriate.⁸⁹ On the basis of this proposal, the TEU includes a Declaration on the implementation of Community law.

8.2.4 The European Parliament

The main rhetorical reference in the reform of the Community political constitution is the increment of democracy. To enhance democratic legitimacy, the conclusions of the June summit had proposed an increased involvement by the EP in the legislative process, possibly including forms of co-decision, the reinforcement of its control powers over the implementation of Community policies and its role in the field of external relations.⁹⁰ The conclusions of the extraordinary Rome summit pointed out that *the progress of the Community towards European Union must be accompanied by the development of the EP role in the legislative sphere.*⁹¹

In the mandate to the IGC, the European Council had asked for several measures towards strengthening the EP's role: extension and improvement of the cooperation procedure; extension of the assent procedure for international agreements requiring unanimous Council approval; involvement of the EP in the appointment of the Commission and its President; increased powers on budget control and financial accountability; closer monitoring of the implementation of Community policies and, finally, consolidation of the rights of petition and enquiry (restricted to Community matters). Furthermore, the European Council asked the conference to consider the development of co-decision procedures for acts of a legislative nature within the framework of the hierarchy of Community acts.⁹²

86 Draft Treaty amendments on financial management and accountability (20.2.91) CONF-UP 1737/91

87 Proposal on improving the quality of EC legislation cit.

88 Article 201a *Consolidated Draft, Noordwijk Draft, Maastricht Draft* and TEU.

89 Note on compliance, implementation and enforcement. CONF-UP 1721/91

90 Bull. EC 6-1990 point I.35 p. 16

91 Bull. EC 10-1990 point I.4 p. 8

92 Bull. EC 12-1990 point I.5 p. 9

The questionnaire of the Luxembourg Presidency addressed three areas: control of expenditure (discharge power), inquiry and petition seemed to be generally supported by all delegations. Secondly, the power to appoint the Commission on which there were proposed two options: either a single vote on the entire Commission or a two-stage procedure; confirming the President firstly and the whole Commission afterwards. Thirdly, legislative powers were considered along two options. One option was to keep the current co-operation procedure with new voting conditions and time periods in which Parliament involvement would be established, through a shuttle procedure with the Council. The second option was the introduction of a Conciliation Committee.⁹³

LEGISLATIVE POWERS

It has been argued that the IGC failed to provide clarity and transparency for the legislative procedures involving the EP.⁹⁴ The final result has been four different procedures, three of which include variations: co-decision and consultation, either of them with unanimity or qualified majority; and assent either with majority of MEPs or of votes cast. Although the *Project of Articles* mentioned specifically that the EP would exercise a legislative power, the rest of the Drafts expressed the more neutral final wording: the EP *shall exercise the powers conferred upon by this Treaty*.⁹⁵

A Right to initiate legislation

In common democratic practice, initiative right is a prerogative of the legislative power that can be *delegated* to the executive. A systematic transposition of this principle to the Community is a double-edged sword: on the one hand, granting initiative right to the EP would imply a definitive endorsement of its law-making character. On the other hand, however, the same democratic principle would require the extension of this right of initiative to the second branch of the legislature; i.e., the Council. Granting such power to the Council would imply the derogation of one of the foundations of the supranational character of the Community: the formulation of a common interest by a neutral body (the Commission) would be substituted by intergovernmental bargaining with the probable result of the collapse of the system.

93 Bull. EC 3-1991 point 1.1.2 p. 10

94 Corbett, Richard *The powers of the European Parliament in the Treaty of Maastricht 1992*
Mimeo

95 Article 137 *Consolidated Draft, Noordwijk Draft, Maastricht Draft* and TEU

Therefore, the best solution in order to improve the EP's legislative role is not to grant a initiative right, but to reinforce its participation in the legislative process.⁹⁶

The EP had proposed a very ambitious right of initiative in which the Parliament was not only entitled to forward a proposal: should the Commission reject it or fail to act, the EP proposal would automatically become, by majority vote of MEPs, the text forwarded to the Council. This text would take, then, the place of the first reading.⁹⁷ The line of agreement achieved during the conference was, however, a formalisation of the existing practice. Although the German-Italian memorandum had considered that the EP should enjoy the right of own initiative as is the case for all national parliaments,⁹⁸ and the German Draft articles on the EP legislative powers proposed to grant a joint right of initiative,⁹⁹ the final decision was that the EP could request (with the vote of a majority of the MEPs) that the Commission submitted a proposal.¹⁰⁰

B The new Co-decision procedure

To fulfil the mandate to enhance democratic legitimacy, the conference and its participants concentrated on upgrading the EP's legislative role in relation to the Council. The EP opinion had argued that *Parliament and the Council (would) jointly constitute the legislative body of the Community*¹⁰¹. This view was decisively supported by the German and Italian delegations in a joint declaration which argued that

the European parliament must be able to participate in the legislative process on equal terms with the Council so that the two institutions, which represent popular sovereignty and governmental legitimacy, may determine, together and on equal terms, the drawing up of Community acts of a legislative nature (co-decision). It is essential that in the co-decision procedure neither of the two institutions may approve an act without the other having consented. A

96 See, for instance, Lenaerts, K. 'Some reflections on the separation of powers in the European Communities' cit p. 28-29. He proposed to grant to the EP a right to submit amendments directly to the Council in the second reading.

97 Article 188 a. Resolution 22 November 1990

98 *Agence Europa* No. 5469 1.4.91 p. 3-3bis

99 Article 189 a *Agence Europa* No. 5433 16.2.91 p. 4

100 Article 137 a. *Noordwijk Draft, Maastricht Draft* and TEU. The Greek Memorandum had proposed an EP initiative right in these situations where the Commission had refused or failed to submit a proposal. Contribution to the discussions on progress towards European union (15 May 1990).

101 Article 188 a(a) Resolution 22 November 1990

*conciliation procedure with the Commission seems unavoidable.*¹⁰²

Negotiations on the issue of co-decision were, perhaps, the most intense and detailed. The procedure implied a reappraisal of the power relations between three institutions: Commission, Council and EP. The EP in particular concentrated its pressure on this issue. On the other hand, certain delegations (i.e., UK) were very suspicious of the concept of co-decision itself. The term 'co-decision' was finally substituted by the more aseptic expression 'procedure under Article 189'. The move was addressed to pleasing the UK, who then expressed its willingness to agree in principle to the mechanism provided under Article 189 b depending on its scope of application.¹⁰³

Co-decision was initially discussed according to three principles: respect for the balance between Community institutions; effectiveness of the decisional process, and areas of application.¹⁰⁴ Effectiveness was a central issue only in the Commission proposal,¹⁰⁵ since the argument of the Belgian Memorandum seemed to have been tacitly endorsed by the conference. Although it was accepted that the EP should become more efficient in its operation, this was a question for the EP itself to resolve through the internal reform of its rules. Increased efficiency would not correct democratic shortfalls that could be addressed only by increasing EP powers, mainly in the legislative sphere.¹⁰⁶ The argument on co-decision in the EP proposal and within the conference focused on the institutional balance; i.e., decision-making (which institution would take the final decision) and law making powers (which institution could propose the last round of amendments).

There were three models for co-decision considered initially. Firstly, the Tindemans-Delors procedure discussed during the SEA negotiations was proposed by the Commission's opinion.¹⁰⁷ In this form, the Commission proposal, incorporating eventual EP amendments after the second reading, would have to be adopted unless it was explicitly rejected by a simple majority in the Council. The second model was the modification of the cooperation procedure proposed by the Belgian Memorandum: the EP could refuse a decision from the Council by a majority of its members and, in

102 *Agence Europa* No. 5469 1.4.91 p. 3-3bis. The President of the EP asked the IGC to adopt the Genscher-De Michelis declaration on EP powers *Agence Europa* No. 5471 13.4.91 p. 3

103 Address by Van den Broek to the EP. Sitting of 20 November 1991 EP Debates Annex OJ No. 3-411. Obviously, this move met, in turn, strong criticism from the EP. *Agence Europa* No. 5603 6.11.91 p. 3.

104 *Agence Europa* No. 5431 14.2.91 p. 5

105 Cf. the House of Lords objected to the inclusion of the new procedure because within it the content of important legislation will become a trial of strength between the Council and the Parliament. House of Lords Political union: law making powers cit. p. 27

106 Belgian Memorandum. Doc. 5519/90

107 COM (90) 600 Bull. EC Supp. 2/91 p. 78

this case, the procedure would start again.¹⁰⁸ Finally, there was a group of proposals containing a conciliation committee, that would become the prevalent model. There were four of those proposals: EP's, Commission's, and two tabled by national delegations: Italian and German.¹⁰⁹

The EP proposal¹¹⁰ established the basic elements developed and modified afterwards by other contributions. In a procedure with two EP readings, the Conciliation Committee could be convened before the second reading if the Council rejected or did not act on the first EP reading. Otherwise, the second reading would be decisive, concluding with either EP approval or through convening the Committee. This might adopt a non-amendable version which should be approved by the EP and the Council.

The Commission proposal drew extensively on the cooperation procedure.¹¹¹ The proposal strengthened the Commission's own role: it could amend its proposal at any time and the Council would be entitled to amend a Commission proposal only by unanimity. The sources of discrepancies with the EP lay in this point, since the Commission would have a 'qualified veto' on EP amendments: if they were not considered by the Commission, they could be adopted only by the Council unanimously. Furthermore, the Commission would be represented at the conciliation stage where it could exercise its initiative right with a view to facilitating consensus. The Commission argued that the entire procedure was designed to facilitate agreement and avoid rejection, reducing the danger of deadlock and increasing effectiveness. As the Commission had advanced in its opinion, time limits were the main instrument for increasing efficiency even though the periods were very different at the various stages.¹¹² The aim of the Commission was to produce a procedure that would be shorter on average than the cooperation procedure.

The Commission's proposal allowed further scope for EP action; having produced its opinion, the lack of a common position would not serve to terminate the procedure but would immediately lead it to the Conciliation Committee. A tactical alliance between Commission and EP, together with the later semi-initiative right, implied that the Council could not block legislation through inaction. Indeed, the Council could close the procedure in only two cases after the failure of the

108 Belgian Memorandum. Doc. 5519/90

109 *Agence Europa* No. 5432 15.2.91 p. 6

110 Article 188b Resolution of 22 November 1990. See Appendix Va

111 Commission Contribution SEC (91) 500 See Appendix Vb

112 Four months for the initial EP opinion and for the Council to reach a common position; one month to convene the conciliation committee; two months to reach agreement within the conciliation committee; one month for the Council or EP to act after agreement in the conciliation committee and for the Commission to re-examine its proposal; two months for the EP to approve the re-examined proposal and for the Council to act and one month for the EP to reject finally the proposal

Conciliation Committee: by adapting the Commission's reexamination of the proposal by qualified majority or by rejecting through simple majority. In any other cases, provisions secured the fact that the EP would effectively have the last word. Finally, the Commission's proposal did not provide for voting within the Conciliation Committee; since the aim was *to promote the emergence of a consensus between the three institutions*, and alienate *any problems of representativeness of members*.¹¹³

The German text, elaborated in form of a draft article (Article 189 b), was basically a modified cooperation procedure where, in absence of EP backing after its second reading, a Conciliation Committee would be convoked. The Committee would be composed by the same number of MEPs as Ministers (i.e., twelve plus twelve). It would be charged with reaching an agreement within three months and the text so approved could not be amended. Final approval would require EP majority and qualified majority in the Council in order to become an act.¹¹⁴ The failure of the conciliation committee to reach a joint text would imply the end of the procedure. Time periods could be changed and an emergency procedure could be called at any moment by any institution. Finally, the Commission was entitled to modify the text presented to the Council and EP.

The Italian delegation tabled yet another proposal on co-decision that opened the possibility of convening the Conciliation Committee on two occasions during the procedure¹¹⁵. The first was in the event of initial Council disagreement with the EP opinion; the second, in the event that the EP amended the Council's common position and the Commission would present a re-elaborated proposal. The novelty of the Italian proposal was the option parallel to that of the Conciliation Committee; the Council could choose to amend the proposal revised by the EP but, in this case, the EP would always have the last option to introduce amendments. In the Italian proposal and to a greater extent than in any other, the EP was positive legislator and the Council was severely restricted, to an approval or rejection of the EP texts if it wish to end the procedure.

Against this background, the Luxembourg Presidency produced a text on co-decision on 12 April, favouring a system resembling the cooperation procedure, with the last word reserved for the EP -which could reject the text.¹¹⁶ The proposal included the creation of a Conciliation Committee to be charged with supplying bases for compromise. The fundamental objection raised to this proposal was that it eliminated the right of initiative of the Commission through the process.

113 Ibid. p. 124

114 *Agence Europa* No. 5433 16.2.91 p. 4 See Appendix VC

115 *Agence Europa* No. 5457 23.3.91 See Appendix VD

116 Article 189a *Project of Articles* See Appendix VE

Consequently, some delegations called for further discussion of the Commission's role in the procedure.¹¹⁷

The co-decision procedure would be started properly after the second EP reading on which there were four options. EP approval or failure to act would imply the approval of the original Council text and, therefore, the end of the procedure. In the event of initial approval, the EP was, however, deprived of the right to adopt the bill (a possibility considered in the first draft): the Council would be the organ adopting the law.

Apart from outright approval or inaction, the EP disposed of two other options after the second reading: to amend the text (i.e., positive legislation-making) or to reject it (i.e., negative legislation-making). Initially, an explicit rejection of the EP would imply an end to the procedure and the dropping of the proposal.¹¹⁸ This did not seem to be an acceptable option for national governments and, therefore, the EP was deprived of this possibility.¹¹⁹ It had to indicate, firstly, its intention to reject and the Council could, then, convene a non-decisional meeting of the Conciliation Committee (i.e., differences would be discussed but without taking a vote or decision). Only after this meeting might the EP proceed with the vote on rejection. Eventually, the EP could amend the proposal, coming thus to the fourth option available after the second reading.

Amendment would trigger the conciliation process. In the event that the Conciliation Committee reached an agreement on a text, a process of ratification in equal conditions for the EP and the Council was approved. This equality was mitigated afterwards: the EP could approve the joint text by majority, but rejection would require an absolute majority of the component members.¹²⁰ Finally, the conference endorsed a back-up procedure should the conciliation Committee fail to agree a text. In this case, the Council could confirm its former common position and the EP was confined to a reactive option: it could eventually reject the text by an absolute majority of component members.¹²¹

The trend during the conference has confirmed the intention to confine the EP to the role of negative legislator and to constrain its chances to exercise even this limited role. The EP needs to engage in previous consultation to the Council (with no procedural mechanism to reaching agreement). Even if it chooses to activate the

117 Bull. EC 4-1991 point 1.1.3 p. 10

118 Article 198a *Project of Articles, Consolidated Draft, Dutch Draft*

119 Article 189a *Noordwijk Draft, Maastricht Draft, TEU*

120 Article 189a *Maastricht Draft* and TEU

121 The German delegation proposed to modify Article 189 a (5) of the *Project of Articles*. The failure of the Conciliation Committee would imply that the bill would be deemed not adopted and the procedure would not be continued, as they had initially proposed. *Agence Europa* No. 5591 18.10.91 p. 4

Conciliation procedure, the Council keeps the final say in passing its version, with the EP always in a negative or passive role.

Scope of application

The negotiation on the scope of application of the new legislative procedure reveals the primacy of tactical package-building between different elements of the reform, to the detriment of a systematic process of reform of the Community's political constitution. Given that the lowest level of accountability of the Council to national parliaments lies in the case of decisions adopted by majority voting, it would seem a logical conclusion to link the cases of decisions by majority voting to the maximum level of participation of the EP in law-making to increase the legitimacy of legislation. Thus, co-decision would apply whenever qualified majority voting is applied by the Council.¹²²

In accordance with the Commission's contribution, the conference initially established co-decision as the procedure for the adoption of *laws*.¹²³ This did not cover all the areas on which a qualified majority vote applied, but only six of them.¹²⁴ This list varied during the conference¹²⁵ and additions, substitutions and eliminations reflected global negotiating packages¹²⁶ rather than a consistent application of the principle of balance between institutions. The list finally agreed comprised fourteen articles, with a commitment to extend it in the forthcoming 1996 IGC.¹²⁷

122 This is the view expressed by Delors in his Address to the EP. Sitting of 20 November 1991. EP Debates Annex OJ No. 3-411. Cf. the EP opinion had proposed the application of the procedure to 45 cases through the Treaty Resolution of 22 November 1990

123 Article 189.1 and 2 *Consolidated Draft*.

124 Adoption of the multiannual programme on R & D (Article 130 i.1); its adaptation or supplementation (Article 130 i.2); the multiannual framework programmes on the environment (Article 130 s.2); the approval of blueprints for trans-European networks (Title XIII C) and the general rules for financial and technical cooperation; food aid and humanitarian aid (Title XX C.3).

125 The *Dutch Draft* proposed co-decision in five cases, dropping the adoption of R & D programmes and networks blueprints, but it introduced, instead, the definition of the tasks, objectives and organisation of the structural funds (Article 130 d) and the multiannual programmes on development cooperation (Part Four, Title III Article C.2).

126 Bull. EC 10-1991 p. 11

127 These are:

- Free movement of workers (Article 49)
- Right of establishment (Article 54.2, Article 56.2, Article 57.1 and 2)
- Internal market (Article 100a.1)
- Incentive measures on culture (Article 128.5) (Co-decision with unanimity)
- Incentive measures on public health (Article 129.4)
- Measures on consumer protection (Article 129a.2)
- Guidelines for Trans-European networks (Article 129d \$1)
- Framework programmes on research (Article 130i.1)
- General action programmes on the environment (Article 130s. 3)

C Cooperation procedure

The redesign of the method and scope of the cooperation procedure was closely related to a settlement on the co-decision procedure. In an early resolution, the EP had complained that one of the defects of the cooperation procedure was the Council's tendency to reach decisions on the basis of political agreements without taking sufficient account of Parliament's opinion.¹²⁸ Consequently, the EP's opinion had called for its substitution by the co-decision procedure.¹²⁹ The opposite view was held by the Danish delegation, which considered that the current cooperation procedure with extended scope would be sufficient.¹³⁰ This option was considered only by the Dutch Presidency which had eliminated the co-decision procedure in some of its early working documents, introducing instead a reinforced cooperation procedure.

Having decided on its presence in the Treaty, the other issue pending a decision was its scope of application. The Belgian Memorandum and the Commission opinion¹³¹ argued in favour of the extension of the procedure to all new areas in which a qualified majority would apply.

The Dutch Presidency could reach agreement on applying the procedure to all policy areas decided by qualified majority, other than agriculture, trade policy, and the areas covered by co-decision.¹³² The procedure will be finally applicable to fourteen articles in the *Maastricht Draft*. On the other hand, the method of the procedure has remained unchanged. The Presidency argued that in 1996 a choice will need to be made between the two procedures.¹³³

D Consultation Procedure

The consultation procedure was considered by the conference with respect to measures where unanimity is still required and Member States did not wish introduce assent (voting rights in local and EP elections; industrial policy and supplementing action on social and economic cohesion); for one-off decisions on transition to Phase III of EMU, and for the nomination of individuals (Commission President, President and Board Members of the Central Bank, President of the Monetary Institute). Finally, the procedure was considered for certain secondary legislation: statute of the

128 Resolution of 10 October 1990 on relations between the European parliament and the Council.

OJ No. C 284/58 12.11.90

129 Article 149 Resolution of 22 November 1990

130 Danish Memorandum. Doc. 9046/1/90 REVTRAT 14

131 COM (90) 600 Bull. EC Supp. 2/91 p. 81

132 Bull. EC 10-1991 point 1.1.3 p. 12

133 *Agence Europa* No. 5575 26.9.91 p. 3

system of central banks, specific research programmes, regulations on state aid and visa policy (Article 100c).

E Assent procedure

The current assent procedure, in the view of the EP, did not allow full democratic control because of two facts: the confusion of executive attributions between the Commission and Council, and the vague and often arbitrary distinction between the types of agreement which might or might not be subject to assent.¹³⁴ At the same time, the Commission opined that the scope of application of the article should be clarified in the Treaty's revision. The procedure should apply to the most important agreements (in particular, association and cooperation) of which the purpose was to define the political, economical, financial and cultural dimensions of Community relations. The assent procedure should not, however, be applicable to ordinary trade agreements involving implementation in strict compliance with Treaty provisions on the broad principles of external economic policy (i.e., Article 113).¹³⁵

The EP proposed a clear definition of categories of agreement - significant and not significant -¹³⁶ to which different procedures would apply. The EP proposed also the establishment of a single procedure for significant agreements, comprising the participation of the EP in the elaboration of the negotiating mandate, exclusive negotiating rights for the Commission, submission of the agreement to the EP and the Council and, finally, assent by the Council and the EP. Previous assent would be required to initiate negotiations for significant agreements. The Parliament asked also for the extension of the assent procedure to constitutional matters, namely, the procedure to amend the Treaty (Article 236); procedures for making adjustments with respect to own resources (Article 201 EEC Treaty, Article 173 of EAEC Treaty) and the establishment of the procedures for a uniform electoral procedure. The Italo-German declaration supported the inclusion of the principle of full participation of the EP in the revision procedure of the Treaties (Article 236) by granting assent in parallel with Member States' ratification.¹³⁷

134 Resolution of 25 October 1990 on Parliamentary assent: practice, procedure and prospects for the future. Doc. A 3-235/90 OJ No. C 295 26.11.90. Cf. the improvements proposed by Bieber, Roland 'Democratic control of foreign policy' cit. p. 171

135 Commission opinion COM (90) 600

136 The distinction was established in the Resolution of 13 December 1990 on the executive powers of the Commission cit. Significant agreements are those involving amendment of Community legislation, or with significant financial implications or if such consideration is requested by Council or the EP.

137 *Agence Europa* No. 5469 1.4.91 p. 3-3bis. The Greek Memorandum proposed to apply the procedure to articles 113, 138, 201 (own resources), 235 and 236. Contribution to the discussions on progress towards European union (15 May 1990)

The changes in the assent procedure were related to two aspects: firstly, the quorum to obtain EP assent and, secondly, the scope of application. In October, the Dutch Presidency introduced a three-month deadline for EP assent, with the exception of constitutional matters. Assent was granted by a majority of voting members, with the exception of two cases; the uniform electoral procedure (Article 138) and the acceptance of new members.¹³⁸ In both cases, an absolute majority of component members was required. Double assent, i.e., *ex ante* and after legislation, was proposed for the procedure in order to strengthen or add new citizens' rights, but it did not feature in the final version.¹³⁹

The areas to which assent would be applied oscillated in the negotiations in parallel with other issues (i.e., co-decision). The Commission's contribution on the common external policy proposed seven types of agreements to which EP assent would apply¹⁴⁰. In the *Project of Articles*, there were three areas designed for assent,¹⁴¹ these increased to six cases in the *Consolidated Draft*¹⁴². The final *Maastricht Draft* included seven cases but, in the end, the Parliament failed to gain assent right on important constitutional provisions such as Article 235, although this possibility had been foreseen by the *Project of Articles*.

APPOINTMENT OF THE COMMISSION

The necessity to define the role of the EP in the nomination of the President and the Members of the Commission, in order to increase its democratic character, featured in preparatory documents.¹⁴³ There was basic agreement on the desirability of giving legal foundation to this constitutional convention. The conference discussed, at ministerial level, two alternatives.¹⁴⁴ The first one was a double investiture procedure and this option was favoured by the EP's and the Commission's opinions.

138 Article X.2 *Consolidated Draft*

139 Article F *Dutch Draft*

140 Agreements involving amendment of Union law; involving amendment of the financial perspective; establishing the basis for Community's external relations on trade or development cooperation; association agreements with a third country or organisation; agreements on basis principles of international law (human rights, natural resources etc.); agreements for the Union's accession to an international organisation and agreements providing for the participation of third countries in bodies set up by Community law. Article Y28 Commission contribution.

141 Uniform electoral procedure (Article 138); conclusion of determined agreements between the Community and third parties (Article 228.4) and enlargement of Community competencies (Article 235)

142 Implementation of the right of residence and movement (Article B); addition of new citizens' rights (Article F); creation of new structural funds (Article 130d); uniform electoral procedure; certain types of international agreement (Article 228.3) and action in new areas not covered by the Treaty (Article 235).

143 Belgian Memorandum and Conclusions of the June 1990 European Council Bull. EC 6-1990 point I.35 p. 16

144 Bull. EC 3-1991

The EP's opinion had called for the election of the Commission president by an EP majority vote on a Council proposal. The remaining members would be chosen by the Commission President in agreement with the Council. Secondly, the whole Commission would be subject to an EP vote of confidence by EP simple majority.¹⁴⁵

The Commission adopted this design but corrected the constitutional problem created by the EP's proposal: the government of Member States (and not the Council) would appoint the remaining commissioners and, then, the Commission as a whole would be confirmed by an EP vote on the basis of its programme.¹⁴⁶

Finally, the Italo-German Memorandum, also considering a double-stage procedure, added the requirement that the confirmation (by majority) of the Commission as a college should follow the presentation of the programme.¹⁴⁷

The second alternative considered was a single-stage procedure in which the EP would approve the Commission as a whole. The modality designed reflects a compromise between the two options.¹⁴⁸ The requirement of EP approval of the Commission's President has been dropped. Instead, the EP would be consulted, although some have argued that consultation in this case is tantamount to election.¹⁴⁹ The Commission will be then subject to a investiture vote.

This reform has not totally confirmed the political supremacy of the EP over the Commission. On the one hand, the Commission's Report to the EP has not been upgraded to the range of programme. Furthermore, there are no explicit legal provisions for this report to be the basis of the investiture vote. On the other hand, the terms in office of the EP and the Commission have been synchronised, but, again, without providing a legal footing for this link, which can be considered more of an intentional coincidence.

BUDGETARY POWERS

The EP's concern over budgetary matters was focused on the aspects of control.¹⁵⁰ The EP asked for continuous control during the course of the financial year; this control should embrace the management of policies with budgetary impact as well as several financial operations which, not being part of the general budget,

145 Article 158 Resolution of 22 November 1990

146 Commission opinion COM (90) 600 Bull.

147 *Agence Europa* No. 5469 1.4.91 p. 3-3bis

148 Article 158 *Project of Articles, Consolidated Draft, Noordwijk Draft, Maastricht Draft* and TEU. The Noordwijk conclave rejected an Italian proposal on a vote on each Commissioner. *Agence Europa* No. 5608 14.11.91 p. 4

149 Corbett, R. *The powers of the European Parliament in the Treaty of Maastricht'* cit.

150 Resolution of 22 November 1990 on strengthening Parliament's powers of budgetary control in the context of Parliament's strategy for European union. Doc. A 3-233/90 OJ No. C 324 24.12.90

evade financial control.¹⁵¹ In the view of the EP, the decision granting discharge commits the political responsibility of the Commission and, therefore, the Treaty should enshrine the principle that refusal to discharge is equivalent to a motion of non-confidence. Furthermore, EP observations in the decision regarding discharging should be backed by a power of enforcement over the institutions concerned and this would, in turn, require that the EP could obtain recourse to the ECJ and the Court would be entitled to impose sanctions. The first drafts granted the EP the right to demand any relevant information from the Commission, which could be also called to give evidence. The Commission should also take the necessary steps to execute EP observations.¹⁵²

Obviously, the conference did not consider any extension of the political control and the EP criticised this attitude in a second resolution passed at the end of the conference, when it asked specially for the recognition of the binding nature arising from the EP's budgetary control powers; the acknowledgement of the political equivalent between the decision to discharge and the motion of confidence; and the extension of the control powers to other Community and national institutions.¹⁵³

The Commission's opinion supported reinforcement of the EP's role in the budgetary procedure in order to increase its power, as well as its accountability before the electors, by awarding to it joint responsibility for Community revenue.¹⁵⁴

INQUIRY POWERS

The EP had explicitly requested the right to set up temporary committees of inquiry to investigate contraventions of Community law or instances of maladministration with respect to Community responsibilities.¹⁵⁵ This was reflected by successive drafts,¹⁵⁶ although the regulation of the detailed provisions to exercise the right of enquiry was left to a further interinstitutional agreement between the Council, the Commission and the EP.

151 Community borrowing and lending operations. Discharge of EDF operations which is provided on the basis of an internal Council agreement and not by Treaty provisions.
Financial statements and the ECSC operating budget

152 Article 206 B

153 Resolution of 24 November 1991 on strengthening the European Parliament powers of budgetary control in the context of its strategy for European Union Doc. A 3-253/91 OJ No. C 305
25.11.91

154 COM (90) 600 Bull. EC Sup. 2/91 p. 78

155 Article 143a. Resolution of 22 November 1990

156 Article 137 b

8.2.5 National parliaments

The insufficient control on the part of national parliaments over the Community decision-making process has traditionally been considered one of the sources of the democratic deficit in the Community.¹⁵⁷ The quest for the role of national parliaments within the Community's legislative process was based on the reinforcement of democratic legitimacy. The European Council's mandate had asked the conference to give consideration to arrangements that would allow national parliaments to play their full role in the Community development.¹⁵⁸

The issue was discussed from two opposing standpoints. On the one hand, proposals to institutionalise an organ of national parliaments, which had also surfaced in the Union context, had been mooted within the Community framework.¹⁵⁹ The theoretical foundation of such pretension was that the expansion of the field of application of Community law would require democratic legitimation through associating national parliaments to the process.¹⁶⁰

The opposite standpoint was maintained by certain national delegations,¹⁶¹ the Commission and the Parliament. The Commission had, in its opinion, opposed any institutionalisation and endorsed the view that national parliaments' role was to control national governments since these were the decision-makers in the Community system, through the Council. Therefore, the Commission argued that it was up to the EP to determine ways to improve relations and suggested an information procedure, whereby a delegation from national parliaments would be given an opportunity to hear

¹⁵⁷ It is worth quoting, on this point, the opinion of the Danish government: *It must be recognised that a considerable part of what is known as democratic shortfall is attributable to the fact that apparently not all national parliaments have an adequate say in the decisions at Community level. In this connection, the Danish government would point to the role played by the Folketing's Common Market Committee in Denmark.* Doc. 9046/1/90 REVTRAT 14

¹⁵⁸ Bull. EC 12-1990 point I.5 p. 9

¹⁵⁹ The EP had proposed a 'European Congress' composed of equal number of MEPs and members of national parliaments with the function of electing the President of the Commission from a list proposed by the European Council. See Resolution of 26 May 1989 on the Presidency of the European Community. Doc. A2-140/89 OJ No. C 158/368 26.6.89. See also the proposal by Michael Heseltine: In order to bring the democratic authority of national parliaments to bear upon the institutions of the Community, he proposed the creation of a Upper House (Senate) of the EP. The Senate would be made up from national parliaments' membership only and its healthy effect would be a shift of power from national governments to national parliaments. Heseltine, Michael *The challenge of Europe. Can Britain win?* (London: Weidenfeld and Nicholson; 1989) p. 33-35

¹⁶⁰ Jacqué, J.-P. op. cit. p. 474.

¹⁶¹ The Italian delegation, thus opposed the proposal of a Congress on the grounds that it would reduce the visibility, power and centrality of the EP and, moreover, it would imply a recognition of the European Council primacy. Martial, Enrico 'Italy and European Political Union', in Laursen, Finn and Vanhoohacker, Sophie (eds.) *The Intergovernmental Conference on political union* cit. p. 147-148

explanations from the Council and the Commission before decisions were taken.¹⁶² Along the same lines, the EP argued that the contribution of national parliaments to the decision-making process should be found in supervision over their executives through extended information during the stages of preparation and implementation. Accordingly, the EP opposed the creation of a new institution.¹⁶³

Decisively, this view was adopted by the submission of the British delegation.¹⁶⁴ In the view of the British government, the democratic legitimacy of Community institutions rests on two pillars: the EP, and the accountability of Ministers in the Council to their national parliaments. Legitimacy can be enhanced by closer links between the EP and national parliaments as well as by closer involvement of national parliaments in the Community process. The British note proposed three concrete operational steps: improved scrutiny of Community legislation by national parliaments; measures to transmit information from the Presidency and the Commission to national parliaments, and, finally, operational measures for improving cooperation between the EP and national parliaments.

The British view coincided with the opinion of the Commission's President, who reiterated that the concerns of national parliaments could not be resolved by creating a new institution.¹⁶⁵ Accordingly, institutionalisation was ruled out and the Declaration included in the Final Act reflected the British proposal: it would be up to the governments of the Member States to make sure that national parliaments received Commission proposals for legislation in good time for information or possible examination.¹⁶⁶

162 Commission opinion COM (90) 600. Cf. the opinion by the chief of division of the EP Laprat, Gerard 'Réforme des traités: le risque du double déficit démocratique (les parlements nationales et l'élaboration de la norme communautaire)' *Revue du Marché Commun et l'Union européenne* No. 351 p. 710-721. He suggested two alternative ways of correcting the democratic deficit: reinforcement of the influence of the national parliaments on their own governments in the national stages of preparation and application of Community legislation, as well as reinforcement of the EP control role during the proper Community stage.

163 Resolution of 10 October 1991 on relations between the European Parliament and the national parliaments cit.

164 Role of the national parliaments in the European community. 6.3.91 CONF-UP 1762/91 R/LIMITE. In the view of Laprat, other national delegations prefer to avoid the issue as a way to prevent further parliamentary control on national executives regarding Community matters. Laprat, Gérard op. cit.

165 *Agence Europa* No. 5624 6.12.91 p. 4

166 Declaration on the role of national parliaments in the European Union.

9 THE PARACONSTITUTIONAL AREAS OF THE UNION

- 9.1 The external dimension of the Union: Common foreign and security policy
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 - 9.2.2 Features for communitarisation of HAJC
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Chapter 4 has shown that Member States of the Community have avoided developing policy under Community politico-legal framework in those areas of competence related to their existence as independent and supreme entities. Their systematic engagement in intergovernmental cooperation has produced a paraconstitutional situation (i.e., reliance on the Community politico-legal framework). This chapter examines how the IGC responded to the question of developing Union policy in those areas (areas of external and internal exercise of sovereignty) without derogating the formal supremacy and independence of the Member States.

9.1 THE EXTERNAL DIMENSION OF THE UNION. COMMON FOREIGN AND SECURITY POLICY¹

The revision of Article 30 of the SEA was the central piece in the creation of the Union.² Immediately, the formulation of a new concept, common foreign and

¹ See a prospective of the outcome before the final version in Januzzi, Giovanni 'Scope and structure of the Community's future foreign policy', in Rummel, R. (ed.) Toward political union cit. p. 289-295. A commentary comprising the developments until the *Consolidated Draft* is that of Alonso Terme, Rosa María 'From the Draft Treaty of 1984 to the Intergovernmental conferences of 1991', in Rummel, R. (ed.) op. cit. p. 267-287. For a comparison of early proposals in this area, see Remacle, Eric Les négociations sur la politique étrangère et de sécurité commune de la Communauté européenne Dossier 'notes et documents'. No. 156 Avril (Bruxelles: GRIP, 1991). For a general overview (from a Spanish official), see Fernández de la Peña, Luis F. 'La política exterior y de seguridad común ante la cumbre de Maastricht' Política Exterior Vol. 5 No. 24 1992 pp. 67-77.

security policy (CFSP), emerged instead of the mere revision of EPC. The conclusions of the June Summit in Dublin established that CFSP would, institutionally speaking, advance beyond political cooperation and, accordingly, should clarify three aspects: the scope of the policy, decision-making, and implementation.³ Eventually, the new concept, CFSP, was consensually agreed at the October Rome summit, at least as an objective in order to strengthen the identity of the Community and the coherence of its action on the international scene.⁴ Despite this initial commitment, a basic problem of definition was posed for the IGC to solve: what exactly would CFSP be? The initial contributions created an evolutive concept; for the Italian Presidency, CFSP implied a dynamic and forward-looking development of political cooperation in order to achieve a new level of common positions and actions.⁵ The same evolutive approach was endorsed by Commission opinion, which considered that the establishment of a CFSP would require a flexible and pragmatic approach. This notwithstanding, the Treaty should outline the procedures and methods for a common policy leading towards European Union while taking into account two realistic facts: Member States have special relations and peculiar geopolitical situations. Secondly, the Twelve do not share an assessment of their responsibilities or of their general and specific commitments.⁶

The evolutive concept was also contained in a Spanish proposal⁷ which conceived CFSP as being mid-way between EPC and a single policy in a evolutive process. CFSP would imply integrated and common formulation and action; coherence between economic and political domains; compulsory character of the previous consultation principle, unanimous decisions, binding character, unified execution and, last but not least, the CFSP, would not require a new treaty but a modification of the existing one (i.e. SEA).

The Presidency was eventually able to record that the great majority of delegations was ready to engage in a CFSP that would be characterised by a well-defined competence of the Union and a formal decision-making procedure. The Presidency pointed out two basic models to follow: a) a global transformation of the wide area of foreign and security policy into a common policy from the outset, or b) the gradual introduction of the CFSP starting from areas which would be singled out

2 *Memorandum on institutional relaunch* cit. Doc. 5519/90. The Greek memorandum, on the other hand, called for the incorporation of EPC in the Community process. Greek memorandum.

3 Bull. EC 6-1990 point I.35 p. 17

4 Bull. EC 10-1990 point I.4 p. 8. The UK entered its reservations to this, though.

5 *Report by the Italian Presidency of the European Community on European Political Union* (extract). *The Guardian* 22 November 1990

6 Commission opinion COM (90) 600

7 *Politique étrangère et de sécurité commune* (PESC). Contribution espagnole. Madrid 26.11.90.

for priority attention by the European Council or the Council.⁸ The option chosen was, obviously, the second. The mandate for the IGC of the Rome summit laid down the conditions for the development of the CFSP: it should be a sustained evolutive process on the basis of the general objectives expressed in the Treaty. The list of the objectives for the CFSP comprised:

- maintaining peace and international stability
- developing friendly relations with all countries
- promoting democracy, the rule of law and respect for human rights.
- encouraging the economic development of all the nations.

The mandate asked the conference to address the definition of Union objectives, the scope of its policies and the means of fostering and ensuring their effective implementation within an institutional framework.

Needless to say, the negotiations on CFSP were the most complex and polemic of the issues incorporated in the IGC. The contributions were innumerable and the positions were polarised particularly regarding the question of security and defence. There was an obvious point of agreement: CFSP would not be incorporated into the Community's politico-legal framework.⁹ Some other minor agreements were possible through the brokerage effort of the Luxembourg Presidency. Early in February, the Presidency presented to the conference a questionnaire addressing three issues: the objectives of the CFSP; procedures for establishing common policies, and the operational arrangements to implement it.¹⁰ The Presidency proposed the following objectives: the defence of common values and general interests of the Union and of its independence and security; promotion of friendly relations with other states and international cooperation; maintaining international peace and cooperation. The Presidency also proposed that, in certain fields, no room would be left for national actions not based on a common position.¹¹ Agreement was possible on certain preliminary questions: common objectives should be defined; a step-by-step approach should be adopted; CFSP decisions should be binding, and a single and stronger institutional framework should be established.¹²

By early October, there were at least four topics requiring ministerial arbitration. The first of these was the article on security regarding the WEU's role and the eventual common defence; secondly, the role and value of the revision clause;

⁸ *Conclusions of the Ministers of Foreign Affairs*. Europe Documents No. 1666 6.12.90

⁹ Januzzi observed that the IGC would not produce a totally supranational structure absorbing individual countries and national sovereignties: *Rather, collective and individual action will have to coexist, albeit in a mix which will be different from the present one in the sense that the focus will be more often shifted to collaborative or common action*. Januzzi, G. op. cit. p. 293

¹⁰ *Agence Europa* No. 5423 p. 4 2.2.91

¹¹ *Agence Europa* No. 5424 4/5.2.91 p. 4-4 bis

¹² Bull. EC 1/2-1991 point 1.1.6 p. 11-12

thirdly, the implementation by qualified majority of common actions; finally, the list of subjects to come initially under joint action. Not surprisingly, final settlement had to await the Maastricht summit.

9.1.1 Characteristics of the CFSP

A The commitment entered into through CFSP

The major characteristic for the creation of a common foreign and security policy, substantially different from EPC whilst preserving its intergovernmental character, would be the upgrading of the commitment entered into by Member States through the SEA. The conference has succeeded in listing a set of concrete binding measures. The general commitments entered into by Member States would be active and unreserved support for the Union's foreign and security policy; the adaptation of national policies to the common positions, and refraining from actions opposed to the interests of the Union or likely to impair its effectiveness.¹³ However, the conference did not intend to reinforce this legal commitment through the creation of compliance procedures. The initial stages of the conference had already seen a rejection of certain measures addressed to discipline Member States' comportment. Thus, the obligation for preliminary consultation was queried by France, UK and Germany on the grounds that it would eventually lead to inaction. Equally, measures addressed to insure a minimum institutional control were not envisaged. The possibility that the Commission might request preliminary consultation and the possible reference (by the Commission or Member States) to the Council of compliance breaches caused by national governments was not accepted.¹⁴

B The specific methods for action of CFSP: joint action and cooperation

The second element in the creation CFSP was the definition of methods for action qualitatively different from either purely national actions or Community actions. Although the preparatory documents had discussed the institutional set-up and the eventual decision-making process, they did not provide a proper definition of the legal acts on which to base CFSP. The only theoretical reference available was the one provided by the Draft EUT which had defined two methods for action in the field of the Union international relations: common action, and cooperation. Common action comprised

¹³ Article H *Project of Articles and Consolidated Draft*, Article A.4 *Noordwijk Draft* and *Maastricht Draft*, Article J.1 4 TEU.

¹⁴ *Agence Europa* No. 5432 15.2.91 p. 5

*all normative, administrative, financial and judicial acts, internal or international, and the programmes and recommendations, issued by the Union itself, originating in its institutions and addressed to those institutions or to States or to individuals.*¹⁵

On the other hand, cooperation meant, purely and simply, all commitments which the member States undertook within the European Council.¹⁶

A systematic transposition of this model was excluded for two reasons. Firstly, common action applied, in the EUT, to areas not included by the 1991 IGC within CFSP (for instance, development aid and external commercial policy).¹⁷ Secondly, as opposed to the EUT, the IGC did not design specific legal instruments for the Union, i.e., there would not be union law. Therefore, normative, judicial or administrative acts would be either national or Community.

The practical challenge for the conference was the definition of a new method of action between cooperation and the common action, whilst retaining the concept of cooperation. The Commission contribution¹⁸ established the conceptual basis on which the conference operated and which was finally adopted. The Commission defined two different methods of action with a procedure that would allow the transfer of areas between the two methods.¹⁹ The drafts consolidated a difference between both methods: cooperation as a method for decision and joint action as a method for implementation. Thus, the Union would pursue CFSP objectives firstly, by establishing systematic cooperation between Member States and, secondly, by gradually, *implementing* joint action in areas of essential common interest.²⁰

Cooperation This method was initially named "joint actions" by the Commission contribution. This would apply on areas not considered by the European Council to be of vital interest. The principle for this action would be intergovernmental cooperation on the model of Article 30 of the SEA: obligation to coordinate

15 Article 10.2 EUT

16 Article 10.3 EUT

17 Article 64 Draft EUT.

18 Article Y 2 Commission contribution.

19 Commission opinion. At this stage, the Commission proposal of methods for action was related to two well-defined models: Community model and intergovernmental cooperation on the EPC model. Cf. the EP's conceptualisation which refers only to "common policies" in its Resolution of 22 November 1990.

20 Article A.3 *Noordwijk Draft* and *Maastricht Draft*. Article J.1 (3) TEU. On this point, the conference avoided the model of the EUT which empowered the European Council to restore fields transferred to common action either to cooperation or to the competence of a Member State. (Article 68 EUT).

(the Member States and the Commission shall coordinate their positions on any external policy issue of general interest within the Council) and obligation of consultation (Member States shall consult with each other and the Commission on all national foreign policy measures they intend to take).²¹

Intergovernmental cooperation was disciplined by three new elements: firstly, joint action would not be prevented through abstention. The legal formulation of this principle was much weaker, though *(the Member States shall refrain from hindering consensus and joint action that may flow from it).*²² Secondly, there was a guarantee of consistency: [Member States] *shall avoid any action that may impair the Union's effectiveness as a cohesive force.*²³ Finally, there was an obligation of previous consultation: *if a Member State deems (sic) necessary to adopt a determinate action, it shall, before taking action, refer the question to the Council which should decide whether action by the Union is called for.*²⁴

"Joint actions" were renamed cooperation in the conference drafts that retained the basic elements of the Commission design. Cooperation was to be based on the obligation to inform and consult between Member states with the possibility of the Council's defining a common position which would become the basis for Member States policies and actions.²⁵ The obligation to adjust national actions to the common position has been worded explicitly, but leaves it in the hands of national governments to insure compliance: *Member States shall ensure that their national policies conform to the common position.*²⁶ The conference, however, was cautious not to spell out punctual obligations, with the exception of coordination of action in international organisations and conferences and the compromise to uphold the common position in such fora.²⁷

There was no fundamental disagreement on this method of action, inspired by a reinforced EPC mechanism.²⁸

Joint action The second method of action designed by the Commission was the "common action" which the conference would rename "joint action". Joint actions were, however, not precisely defined. The Commission proposed that they should be adopted on such matters identified as being of 'vital common interest' for the Union by

21 Article Y 4.1. Commission contribution.

22 Article Y 4.3. Ibid.

23 Article Y 4.4. Ibid.

24 Article Y 4.5. Ibid.

25 Article G *Project of Articles and Consolidated Draft.*

26 Article B.1 *Noordwijk Draft and Maastricht Draft*, Article J.1 1 TEU.

27 Article B.3 *Noordwijk Draft and Maastricht Draft*, Article J.2 3 TEU.

28 Indeed, the *Dutch Draft* had expediently proposed that the provisions of Title III of the SEA would continue to apply to regulate cooperation. Article B.1 *Dutch Draft.*

the European Council.²⁹ Dispensations from the obligations entailed by common action might be granted by the European Council to a particular Member State(s) and those should refrain from taking any measures that might affect the implementation of Union decisions.

The consensus reached by the conference was to establish a difference between policy and implementation, linking each method of action to one of them. The problem lay in the fact that decisions on principle or policy formulation (cooperation) and "managerial" decisions or decisions on means (joint actions) may prove impossible to establish in practice.³⁰ "Joint action" would become a method of implementation rather than a method of policy formulation, which implied that each Member State should be bound by the joint line of action in the conduct of its international activity.³¹ This was completed by an obligation of previous consultation whenever there were any plans to adopt a national position,³² along with the information on measures adopted by Member States in accordance with the joint line of action in case of urgent need.³³ The conditions for dispensations were softened in relation with the Commission proposal: the Council would seek appropriate solutions if there were any major difficulties for a Member State in implementing a joint line of action although those solutions should not run counter to the objectives of the joint line of action.³⁴ The possibility of a generalised opt-out clause for CFSP was rejected by the majority of delegations.³⁵

The theoretical and legal distinction between coordination and joint action turn out not to be very clear. In the first place, joint action relies as much as cooperation on the Member States discretion, since the legal commitments in the case of joint actions are fundamentally weakened by the lack of instruments to force compliance other than Member States' good will or recourse to public exposure. The Council has been charged with the vigilance of compliance under a vague formula without means: the Council insures the compliance with the *principles*,³⁶ whilst the more detailed provisions of the Commission contribution have been dismissed. The Commission had foreseen that if a danger of inconsistency between Member States and Union policies arose, the Commission or any Member State might convene the

29 Article Y 3. Commission contribution.

30 This opinion is also shared by Keatinge, who argues that strategic decisions on ends (subject to consensus) may prove impossible to distinguish from decisions on means (subject to majority vote). Keatinge, Paul 'The foreign relations of the Union', in Keatinge, P. (ed.) op. cit. p. 127

31 Article K.1 *Project of articles and Consolidated Draft*.

32 Article K.2 *Project of Articles and Consolidated Draft*.

33 Article K.3 *Project of Articles and Consolidated Draft*.

34 Article K.4 *Project of Articles and Consolidated Draft*.

35 *Agence Europa*. No. 5622 4.12.91 p. 3-4

36 Article H, *Project of Articles and Consolidated Draft*; Article A.4 *Noordwijk Draft* and *Maastricht Draft*.

Council with a view to taking a decision by majority vote on the action to be adopted to correct the inconsistency.³⁷

The distinction between the two methods is also weakened because joint action has not advanced substantially the implementing powers of the Union over cooperation, with the exception of the implementing mandate assigned to the Presidency. The latter is mainly a representation mandate and any further incidence depends upon the instruments endowed by the Presidency at any moment. Lacking the Union instruments to act *per se*, joint actions as well as coordinated actions would be carried out by Member States.³⁸ An essential difference between them could be established only within a unitary structure, as happened with the *Dutch Draft*: joint action would be the means for the Community to pursue its common foreign and security objectives, whilst cooperation was more clearly a channel for the conduct of Member States policies.³⁹

The difference between both methods lay in two other aspects: the areas for application, and the decision-making procedure for joint action.

B.1 Areas of application of joint action

In the pre-conference stage, there was a growing belief that, to make the new CFSP operative, a previous initial definition of areas for joint action would be necessary. An initial preliminary list had been defined by the Ministers of Foreign Affairs (the Asolo list) which comprised mainly security topics. The Rome mandate established that this list would include the topics discussed in the international fora on

- arms control
- disarmament and related issues
- CSCE matters
- certain UN questions including peacekeeping operations
- economic and technological cooperation in the armaments field
- coordination of the armaments export policy
- non-proliferation.⁴⁰

When the conference developed the distinction between cooperation and joint action, it also established that any issue to be discussed could be treated by means of

37 Article Y 8 Commission contribution

38 The Commission argued that a common policy does not mean a single policy and that the essential point was that Member States fulfilled their obligation to act. Explanatory Memorandum Commission contribution p. 97

39 Article B.1 Title I Common foreign and security policy. Part Four

40 Bull. EC 12-1990 point 1.6 p. 9-10

the cooperation method.⁴¹ Therefore, a list of cooperation topics was superfluous; should a list be drawn, it would refer specifically to areas for joint action. The Commission, however, opposed to this pretension. Delors considered that it would be impossible to indicate in the Treaty which are *a priori* the common policy areas; therefore, it would be preferable that the European council define through unanimity the areas in which Member States have common essential interests, for the Council of Ministers later to adopt decisions by qualified majority.⁴² *A priori*, the Union would not have any exclusive field for joint action. This would be built up declaratively by the European Council. Therefore, Member States would have a general and absolute residuary competence.

This construction might very well be inspired by the EUT, which did not establish limitations on the aspects that might come under cooperation although these fall under the competence of the Member States.⁴³ Indeed, the exclusive competence of Member States seemed to be guaranteed by an explicit formulation of the principle of subsidiarity: Union action would be either in fields where Member States acting individually could not act as efficiently as the Union and/or fields where a Union policy was necessary in order to supplement national foreign policies.⁴⁴ The potential effect of the principle of subsidiarity, however, was an effective sanction of Union action *since it is hard to imagine any major issues of foreign policy in which the Union as a whole could not play a more effective role than an individual Member State*.⁴⁵ The Commission possibly had in mind the example of the list drawn in pursuance of Article 223 (security materials), not revised since its initial elaboration in the 1950s. Should a list not be drawn up, any eventual topic might become a *de facto* issue for CFSP.

The Commission's reasoning focused concretely on the loosely defined area (in terms of issues) of foreign policy. Regarding security issues (to be included in a different article although under the same methods), the Commission's contribution detailed as areas of vital common interest and, therefore, subject to joint action, those

41 Article C.3 *Project of Articles and Consolidated Draft*, Article B.1 *Noordwijk Draft and Maastricht Draft*. Article J.2 TEU. Cf. the British draft articles which listed areas for close cooperation, including control of arms exports, sensitive high-tech material, nuclear proliferation, UNO peace operations and the fight against terrorism. *UK Draft Treaty Provisions on common foreign and security policy* [No file reference]

42 *Agence Europa*. No. 5424 4/5.2.91

43 Brückner, P. op. cit. p. 139

44 Article 66 EUT.

45 Capotorti et al. op. cit. p. 260. The same reasoning was endorsed by the Greek memorandum (may 1990) which argued: *Application of the principle of subsidiarity leads to the conclusion that external policy is one of the areas where joint action is more effective than action by each individual Member State.*

numbered by the Rome mandate.⁴⁶ There was a tactical justification for listing security issues: certain areas might *de facto* be brought into the Community framework immediately since the Council would decide whether implementation in those areas would be carried out by the member States or the Union itself. Implementation by the Union would imply, in certain areas, a *de facto* development of a Community policy. Thus, the Commission argued that defence equipment production and trade should be brought fully under the discipline of the common market, which would imply the removal of Article 223.⁴⁷ This option was also defended by some national delegations and the Luxembourg Presidency proposed the abolition of Articles 223 and 224 of the EEC Treaty, to replace them the Commission proposal.⁴⁸

The areas finally agreed for joint action were reduced to four security topics:⁴⁹

- the CSCE process
- the policy of disarmament and arms control in Europe, including confidence building measures
- non-proliferation issues
- the economic aspects of security, in particular control of the transfer of military technology to third countries and control of arms exports.

The list was included by the drafts as an annex to the body of the Treaty until the *Maastricht Draft*,⁵⁰ but it did not appear in the TEU. Instead, the European Council asked the Council to prepare a report with a view to identifying areas open to joint action for the Lisbon summit, at which the report was approved.⁵¹

46 Article Y 13.1 Commission contribution p. 91. The Franco-German proposal later defined more precisely two groups of topics: the first one concerning foreign policy and the second, security policy.

47 Commission opinion. This was given legal form by Article Y13 of the Commission contribution.

48 The British delegation, however, refused this communitarisation of aspects of armaments policy pledging instead improved cooperation *Agence Europa* No. 5453 16.3.91

49 Thus, the Italian delegation proposed that security policy would apply to industrial and technological cooperation in armaments; transfer of military technology and participation and coordination of military initiatives *Agence Europa* No. 5426 7.2.91. The February Franco-German proposal pointed out the following areas: disarmament and control of armaments in Europe; security questions, including peace-keeping measures in the context of the United Nations; nuclear non-proliferation and economic aspects of security, namely cooperation in armaments and arms exports.

Most delegations were interested in the inclusion of domestic priorities; thus, for instance, Spain and France wanted to include the Mediterranean; the UK, transatlantic relations and Germany, the policy towards the USSR. In the Noordwijk conclave the Council was still unable to reach an agreement. On the other hand, the Franco-German proposal included two different lists of topics: areas for foreign policy and security items.

50 Declaration on the European Council on areas which could be the subject of joint action.

51 Report to the European Council in Lisbon on the likely development of the common foreign and security policy (CFSP) with a view to identifying areas open to joint action vis-à-vis particular countries or group of countries. EC-Bull. 6-1992 point I.31

B.2 Decision-making procedures for joint action.

In the June 1990 Dublin summit, the European Council had discussed different forms of decision which could include consensus, unanimity and qualified majority.⁵² The European Council's mandate pointed out that the decision-making process should take into consideration two procedures. First was the definition of general guidelines by consensus, which would not be prevented by non-participation or abstention. The second procedure was the recourse to qualified majority voting for the implementation of agreed policies.⁵³ In the early stages, the conference had not defined the difference between cooperation and joint action and, typically, the proposals for decision-making entailed combining both procedures in a single method. For instance, the proposal of the Italian delegation designed a single method with two procedures; the European Council would define gradually and progressively the priorities and sectors of application by consensus. The General Affairs Council would then formulate and enact those policies on the basis of these guidelines, eventually, by majority voting.⁵⁴

The distinction between the two different decision-making procedures as applied to the two methods of action appeared in the Commission contribution. Consensus would be the basis for the coordination of policies (with an obligation for the Member States to refrain from hindering consensus).⁵⁵ On the other hand, joint action would be regulated by a two-step procedure: firstly, the European Council would decide what matters were of common interest, although the Commission did not set out the procedure for this (i.e., voting requirements).⁵⁶ In a second step, the Council would determine the principles of the common policy, the action to be taken and whether implementation would be carried out by Member States or the Union itself. In doing so, the Council would proceed by enlarged qualified majority (i.e., 56 votes comprising at least eight Member States).

The drafts of the Luxembourg Presidency designed the procedure that would be more or less final. The European Council was charged with defining the principles and general orientations of CFSP.⁵⁷ The Council would also decide, through unanimity,⁵⁸ whether to proceed through a common position (cooperation)⁵⁹ or by a

⁵² Bull. EC 6-1990 point I.35 p. 17

⁵³ Bull. EC 12-1990 point 1.6 p. 9-10. This had been suggested in the Kohl-Mitterrand letter in December.

⁵⁴ *Agence Europa* No. 5426 7.2.91

⁵⁵ Article Y 4.3. Commission contribution

⁵⁶ Article Y 3.1. Commission contribution

⁵⁷ Article C.1. *Project of Articles and Consolidated Draft*

⁵⁸ Article C.3 *Project of Articles and Consolidated Draft*

⁵⁹ Article G *Project of Articles and Consolidated Draft*

joint action.⁶⁰ In this second case, the detailed arrangements for carrying out joint action *might* be adopted by qualified majority.⁶¹

The final version has not established an automatic correspondence between voting procedure and stage of policy formulation, i.e., between unanimity and formulation, and majority and implementation. The Council will first decide on the basis of the general guidelines from the European Council that a matter should be subject to joint action.⁶² However, the voting procedure has not been established and, indeed, the scope for unanimity is conditioned by a Council's discretionary capability of defining those matters on which decisions were to be taken by a qualified majority *when adopting the joint action and at any stage during its development*.⁶³ Unanimity has been further constrained by a Declaration attached to the Final Act of the conference⁶⁴ in which Member States agreed to avoid, as far as possible, preventing a unanimous decision where a qualified majority existed in favour of such a decision.

9.1.2. Institutional set-up

A Political framework: the role of the institutions

CFSP relies more on the Community institutional framework because of certain piecemeal adjustments. Thus, the improved procedure for the involvement of the Commission has been completed with the elimination of the artificial difference between Council and meetings of the Foreign Ministers under Political Cooperation.

There was widespread agreement from the beginning of the conference that the European Council would be the supreme institution for the management of CFSP. Its tasks would include the definition of areas for CFSP and eventually for joint action and the granting of dispensations.⁶⁵ This was enshrined by the subsequent drafts⁶⁶

60 Article J.1 *Project of Articles and Consolidated Draft*

61 Article J.2 *Project of Articles and Consolidated Draft*. The *Dutch Draft* did not grant any statutory role to the European Council in CFSP. Therefore, it was the Council who decided by unanimity to initiate joint action in an area previously considered to lay within the scope of CFSP (Article B.2) and to set up specific and general objectives. Secondly, the Council, acting either by unanimity or qualified majority, would set the conditions, means and procedures applicable to implementing a joint action (Article B.3). Hill argues that *the difficulties over majority voting just compound the fundamental problem, namely that not enough states are willing to relinquish ultimate control over policy in relation to the potentially dangerous external world*. Hill, Christopher 'The European Community: towards a common foreign and security policy?' *The World Today* No. 11 1991 p. 191.

62 Article C.1 *Maastricht Draft*

63 Article C.2 *Maastricht Draft*

64 *Declaration on voting in the field of common foreign and security policy*. TEU

65 Article Y 3 *Commission contribution*

66 Article C.1 *Project of Articles and Consolidated Draft*; Article H.1 *Noordwijk Draft*.

with the notable exception of the *Dutch Draft* which did not foresee any particular role for the European Council because of the reasons given previously.⁶⁷

The central role of the Council had been decided by the Rome mandate when it pointed out that there should be only one decision-making 'centre', namely, the Council.⁶⁸ Its attributions were, however, greatly reduced from the initial draft, which granted a general capability *to conduct the foreign and security policy on the basis of the orientations defined by the European Council*.⁶⁹ Although in the final version the Council is charged only with taking decisions towards defining and implementing CFSP,⁷⁰ the difficulties in differentiating between policy implementation and *de facto* policy formulation seem to have provided for the Council a most discretionary role .

The main contribution in the definition of the Commission role (and its strongest defence) came, not surprisingly, from the Commission itself.⁷¹ In its opinion, it had argued that the right of initiative should be shared by the Presidency, the Member States and the Commission ⁷². Shared initiative and consistency were the two main claims of the Commission.⁷³ Although a non-exclusive initiative right has been proposed by the European Council and it was guaranteed by the successive drafts,⁷⁴ the conference disregarded any implementing function. Thus, Commission entitlement to monitor consistency between the different Union policies and between these and the national policies was ignored by the conference. The Commission obtained, however, endorsement of its general role in CFSP in the exact terms it had demanded.⁷⁵

Clearly, the EP was the Community institution with the smallest chance of becoming involved in the management of CFSP.⁷⁶ Commission opinion had already declared that EP involvement should be less a matter of strict institutional rules than

67 See Chapter 8, section 8.2.1

68 Bull. EC 12-1990 point 1.6 pp. 9-10

69 Article C.2 *Project of Articles and Consolidated Draft*.

70 Article H.2 *Noordwijk Draft*.

71 The Commission envisaged even an autonomous ambit for action: *The Commission would maintain all appropriate forms of cooperation with international organizations. It shall, inter alia, contribute to the development of regional integration organizations.* Article Y 30. Commission contribution

72 Commission opinion. p. 77

73 Commission contribution Article Y 3.2 and Y 8

74 Article C.3 *Project of articles*; Article C.2 *Consolidated Draft*; Article J.8 3 TEU

75 The Commission proposed a general disposition which read *the Commission shall participate fully in the work carried out in the CFSP field*. Commission contribution on the structure of the Treaty. This wording was introduced by the Article I *Noordwijk Draft* and Article J.9 TEU.

76 The theoretical entitlement of the EP to deal with CFSP has been discussed by Mairret. Far from been a permanent legislator (since there is not a European people to be represented), the EP is depository of the federative powers in Locke sense (competence to make war and peace, conclude leagues and alliances and deal any affair with foreign powers and/or persons). Mairret, G. op. cit. p. 17

of general working practice which should include regular consultation and information.⁷⁷ Accordingly, the Commission had proposed scant powers: the close involvement of the EP in the formulation and implementation of CFSP would be guaranteed through information by the Commission and the Council, completed with an annual debate on the topic during which the Council and Commission would present statements.⁷⁸ The conference drafts, however, advanced a step further: the Presidency should consult the EP regarding the major aspects of CFSP and it should also insure that EP's views were taken into account. Likewise, the EP has been granted the right to put forward questions and make recommendations,⁷⁹ although this fell short of meeting EP demands.⁸⁰

Finally, the conference regularly confirmed an explicit exclusion of the Provision on CFSP from the jurisdiction of the ECJ. This was enshrined by the Final Provisions in the conference Drafts.⁸¹

B Auxiliary organs for formulation and implementation

The conclusions of the June 1990 Dublin summit stated that the Community method and/or *sui generis* methods should be considered. Supportive structures for the decision-making process should include a definition of the Commission's role and the bodies associated with the Council.⁸² The European Council acknowledged that there was a need for clear rules and modalities for implementation and that such should imply a definition of the roles of Presidency, Secretariat, Commission and national diplomatic services.⁸³ In its conclusions after the October 1990 Rome summit, it considered that a procedural review concerning preparation, adoption and

77 Commission opinion COM (90) 600

78 Article Y 5. Commission contribution

79 Article F *Project of Articles and Consolidate Draft*; Article G *Maastricht Draft*; Article J.7 TEU.

80 In a late resolution, the EP defined a reinforced role for itself *vis-à-vis* the other institutions involved in CFSP. Firstly, the common interests defined by the European Council would be submitted to the EP's approval. Secondly, the EP would be associated with the formulation of foreign policy (Council). Finally, it should monitor its implementation (Commission). Further-reaching, the EP would have the power to oppose by a majority of its members any resort to the use of force. Resolution of 10 October 1991 on the intergovernmental conference on political union. PE Doc. B 3-1639/91 OJ No. C 280/148 28.10.91. Later, the EP specified further this last point: Parliament's assent would be required on fundamental decisions on foreign and security policy (for instance, membership of military alliances, fundamental changes in military strategies and decisions on joint military action in the vent of conflict), as well as on any agreements or treaties affecting security. Report on the outlook for a European security policy. PE Doc. A 3-0107/91. Rapporteur Poettering, H. G. See also the opinion of the rapporteur in Poettering, H.G. 'The EC on the way towards a common security policy' *Aussenpolitik* No. 2 1991 p. 147-151

81 With the exception of Article L of the *Noordwijk Draft*

82 Bull. EC 6-1990 point I.35 p. 17

83 Bull. EC 6-1990 point I.35 p. 17

implementation was necessary to increase the coherence, speed and effectiveness of the Community's international action.⁸⁴ Finally, the mandate to the IGC pointed out that the working of the Council would be facilitated by the harmonisation and, eventually, unification of the preparatory work through a unified Secretariat. As implementing measures, the European Council asked for detailed procedures to be laid down to ensure that the Union can speak effectively with one voice on the international stage (in international organisations and *vis-à-vis* third countries).

Commission opinion⁸⁵ listed three questions to be addressed regarding definition and implementation of a common policy:

- who will prepare the decisions?
- who will take the decisions?
- who will implement the decisions?

The crux the preparation of decisions, in the Commission's opinion, should be sought in the existing Community system with an *ad hoc* institution acting simultaneously as a focus for Community action and as the guarantor of consistency between the CFSP and the other common policies. The preparatory body should incorporate the current Political Secretariat of EPC and representatives from the Commission, and it would be attached to the general secretariat of the Council. Contemporaneously, the COREPER would deal with foreign policy matters previously to Council decisions. Implementation should be a flexible arrangement giving the Council the option of choosing among several formulae, all of them with Commission involvement.

The design of the Commission reinforced its own comparative advantage as regards the provision of input and attempted to reduce the reliance upon national inputs at the stage of policy formulation. At the same time, the design would allow the strengthening of cohesion between Community policies and CFSP, leaving no role for the Political Committee. The COREPER, in turn, would prepare deliberations for the Council. The Council would be assisted by the General Secretariat of the Council in structured cooperation with the Commission⁸⁶ in taking decisions and implementing them.

The scheme of the Commission brought the procedure closer to the Community model. The option was not acceptable to national governments and, consequently, the intergovernmental mechanisms of the Council has been reinforced. The Political Committee (and not the COREPER) will be in charge of monitoring the

84 Bull. EC 10-1990 point I.4 p. 8

85 Commission Opinion COM (90) 600

86 Article Y6. Commission contribution

international situation and formulating opinions,⁸⁷ connecting directly national diplomatic services as input providers and reducing the guarantee of consistency between Union policies. The Commission, fearing its own marginalisation, requested that the Head of the Political department of the Commission be included within the Political Committee⁸⁸ and asked for the establishment of cooperation between the general Secretariat of the Council and the Commission in preparing and monitoring Council proceedings and decisions.⁸⁹ These requests were not met by the conference.

9.1.3 Security and the Union's role on defence

Although security was, at the end, dealt with in a single article, it was the most important issue to be negotiated during the IGC.⁹⁰ In contrast to any other issue, negotiations on security were also being carried out contemporaneously by NATO.

The mandate of the Rome European Council to the IGC bore in mind the necessity of considering also the Alliance's own change process. The conference was called to consider the prospects of a role for the Union in defence matters whilst maintaining and strengthening the ties within the Atlantic Alliance. Two other issues to be weighed were the idea of a commitment by Member States to provide mutual assistance, and the future of the WEU.⁹¹ The implicit question put forward was whether the Union should have a defence policy and, if so, defined in which terms.

On one side of the argument, the Commission contribution argued that the long-term objective of CFSP should be to establish a common European defence.⁹² Delors argued that

*a common defence policy will be meaningless unless it reflects two types of solidarity: unity of analysis and action in foreign policy and a reciprocal commitment to come to the aid of any Member State whose integrity is threatened.*⁹³

87 Article D.2 *Project of Articles and Consolidated Draft*, Article H.5 *Maastricht Draft* and Article J.8 TEU

88 Article D2. Commission contribution on the structure of the Treaty

89 Article D3. Commission contribution on the structure of the Treaty.

90 Nicole Gnesotto listed three main obstacles in the negotiation. Firstly, any eventual arrangement would need to take into consideration the already existing NATO structures and the US role. Secondly, the prospective of enlargement raised the question whether loose arrangements would be preferable in order to accommodate different attitudes. Finally, the main obstacle would be the association of the question of sovereignty to the notion of military power. Gnesotto, Nicole *Défense européenne: pourquoi pas les Douze? Politique Étrangère* Vol. 55 No. 4 p. 877-886

91 Bull. EC 12-1990 point 1.6 p. 9-10

92 Article Y 11. Commission contribution.

93 Delors, J. 'European integration and security' cit. p. 106

The Franco-German project proposed that *political union should implement a common security policy with the aim of setting up a common European defence system in due course without which the construction of European union would remain incomplete.*⁹⁴

The opposite standpoint was argued by the British delegation, even though their draft articles, that had excluded the 'defence' component, did acknowledge the acceptability of reaching a defence 'dimension'.⁹⁵ The document proposed instead that *whenever an issue relating to defence arises, any further European consultation or co-operative action shall take place within the framework of the WEU* (which would not be linked to the Union). Later, the Anglo-Italian proposal considered that political union implied *a stronger European defence identity with the long term perspective of a common defence policy compatible with the common defence policy already in place in NATO*. The development of this European identity would be an evolutionary process involving successive phases.⁹⁶

Beyond the apparent compatibility of terminology, there was a substantial disagreement on principles. European defence identity refers to the host of *ad hoc* arrangements and links between the Western European Allies. Common defence policy, on the other hand, would imply a minimum legal foundation and institutionalisation accordingly to which policy would be enacted. In the context of the IGC and the Franco-German proposal, this foundation would obviously be provided by the Union. The compromise established by the final drafts was to refer to security and to re-address the question of an eventual definition of defence policy to a future revision of the Treaty: *with a view to the eventual framing of a defence policy, the provisions of the article would be reviewed in 1996 on basis of a Council's report to the European Council.*⁹⁷ This evolutive perspective was endorsed by establishing it as one of the objectives of the Union; its identity on the international scene would be asserted in particular *through the implementation of a common and security policy which shall include the eventual framing of a common defence policy.*⁹⁸

There was a second terminological argument centring on the differences between a common defence policy and a common defence. Common defence policy, developed in the framework of the intergovernmental Treaty Provisions, would

94 *Security policy cooperation in the framework of the common foreign and security policy of political union*. Europe Documents No. 1690 bis

95 *UK Draft Treaty Provisions on common foreign and security policy* [No file reference]

96 *Anglo-Italian declaration on European security and defence in the context of the intergovernmental conference on political union*. Europe Documents No. 1735 5.10.91. De Michelis argued that the Anglo-Italian proposal was an asymmetric one in favour of the Community, since it implied the acceptance of the principle of common defence Europe Documents. No. 5390 16.10.91 p. 3

97 Article L.3 *Project of Articles*; Article L.5 *Consolidated Draft*.

98 Article B *Consolidated Draft* and following drafts

equate to coordination of national policies to different extents depending on the instruments made available for implement policy. The commitment to common defence, on the other hand, would imply a common system developed through common instruments, including operative capabilities on the model of the joint Franco-German brigade. This latter type would require a higher degree of institutionalising. The Maastricht Draft, after some arguments during the summit itself, has eventually linked both aspects in an evolutive perspective: *The CFSP shall include all the questions related to the security of the Union, including the eventual framing of a common defence policy, which might in time lead to a common defence.*⁹⁹ This wording avoided the characteristic automatism that could be deduced from the second Franco-German proposal: *a common foreign and security policy which, in the long term, would include a common defence.*¹⁰⁰

The development of a defence dimension in the framework of the Union could be based on two models. The first model was an organic relationship with the WEU that would add a practical dimension to implementing policy, although this would be conducted through a traditional military alliance based on the explicit prevalence of national sovereignties (regardless of the WEU commitment to Union). The second model implied the Union developing its own defence *acquis*. This would imply the establishment of a politico-legal foundation for it and a certain degree of institutionalisation. Neither option was mutually excluding; in fact, the eventual inclusion of the WEU within the Union would imply the adoption of the WEU *acquis*. Given the evolutive perspective adopted by the conference, this was the option chosen.

A. A non-considered option: elements of a Union's *acquis* on defence¹⁰¹

A.1 The commitment to mutual assistance

This commitment, more than anything else, would formally sanction, on legal basis, the practical situation of interdependence between the still formally independent Member States. This had been first proposed by the Italian Presidency which called for the incorporation in the Treaty a pledge to afford mutual assistance automatically

⁹⁹ Article J.4 *Maastricht Draft*

¹⁰⁰ *Franco-German initiative* cit.

¹⁰¹ The development of a Union's *acquis* on defence policy was considered, albeit in a not very systematic way, by the EP which requested the establishment of the components of a common and autonomous defence capability within the framework of CFSP. Resolution of 24 October 1991 on the intergovernmental conference on a Common Foreign and Security Policy. PE Doc. B 3-1703/91 OJ No. C 305/98 25.11.91

as provided for in Article 5 of the Brussels Treaty.¹⁰² Similar views were reiterated by the Commission opinion.¹⁰³ The Commission contribution repeated the mentioned article:

*if any of the Member States is the object of an armed attack in Europe, the other members shall, in accordance with article 51 of the United Nations Charter, afford it all the military and other aid and assistance in their power.*¹⁰⁴

It proved decisive that the Franco-German proposal was more cautious on this point: the pledge should be kept by the WEU Treaty if the Union itself did not adopt it¹⁰⁵ and they did not call the conference to do so. Although this was a relatively low-cost commitment that would only serve to articulate what is already implicit,¹⁰⁶ the asymmetry in membership, Irish neutrality and the particularly sensitive Greek relation with Turkey posed a burden that the Member States were unwilling to accept. Therefore, the conference did not include at any stage the commitment, despite Greek arguments in favour of including the principle of 'guarantee of territorial integrity'.¹⁰⁷

A. 2 The creation of a Defence and/or Security Council

The creation of this institution would allow the Union the development of an autonomous decision-making centre. Without a defence Council, the stage of policy formulation might conceivably still be developed within the Union framework, but eventual implementation of decisions with defence implications would have to be referred elsewhere, either to the WEU or directly to national governments. The participation of Defence Ministers was argued by some national contributions¹⁰⁸ and by the institutional contributions by the Commission¹⁰⁹ and the EP.¹¹⁰ The option

102 *Report by the Italian Presidency on European political union (extract). The Guardian* 21 November 1990

103 Commission opinion.

104 Article Y12. Delors argued that solidarity should be expressed by adopting Article 5 of the WEU. Delors, J. 'European integration and security', cit. p. 107

105 *Security policy cooperation in the framework of the common foreign and security policy of political union. Europe Documents* No. 1690 bis 21.2.91. It was also endorsed by the Italian proposal. *Agence Europa* No. 5426 7.2.91

106 Hill, C. 'The European Community: towards a common foreign and security policy?' cit. p. 191

107 *Agence Europa*. No. 5473 17.4.91 p. 3. The Greek memorandum had called for a definition of the concept and extent of Community frontiers. Greek Memorandum (May 1990)

108 Contribution spagnole cit.

109 Article Y 14. Commission contribution. It had proposed a twice-yearly meeting of foreign and defence ministers.

110 The EP opinion was silent on this point. However, by the end of the conference, the Parliament elaborated a report which advocated setting up a Council of Ministers responsible for security matters within the framework of the European Community (defence council) and joint meetings

did not appear in any of the conference drafts, which preferred an organic link with the WEU rather than the creation of a specific institutional set-up. Despite the apparent lack of intention to create this institution explicitly, the dispositions contained in the final version (for the Council to adopt the necessary practical arrangements in agreement with the WEU institutions) might imply a *de facto* justification for such a security Council.

B The organic relationship between the Union and the WEU, and the Union's relationship with NATO.

These two elements aimed at developing a Union *acquis* on defence policy are part of the WEU Treaty. Their non-consideration by the conference implied that the organic relationship between WEU and Union would, similarly, not be based on a take-over of the WEU's *acquis* by the Union. The Italian Presidency revived earlier proposals to merge the Community and the WEU and called for the gradual coordination between the Community and the WEU and, in the long term, their merging.¹¹¹ This being a distinctive possibility in the future, the question was the definition of the current links. Finally, the December Kohl-Mitterrand letter proposed the creation of an organic link which fell short of incorporation.

Although this would be the prevalent option, it was not unanimously accepted. The two opposing arguments already mentioned were present also on this issue. On the one side, the Commission contribution considered the WEU to be an organisation that would basically implement the Union defence dimension. Although the wording proposed to express the actual relationship did not explicitly sanction an organic relationship (CFSP shall rest on *cooperation* with the WEU),¹¹² the range of instruments foreseen was impressive. Firstly, implementation of Union decisions by the WEU was almost automatic since the Council retained the power decide whether to refer implementation to the WEU Council.¹¹³ Secondly, the Union would establish arrangements to enable the Union non-members and the Commission to attend WEU bodies.¹¹⁴ Finally, the WEU would be duly integrated into the Union by making use of the provisions of Article XII of the Treaty of Brussels.¹¹⁵

between these and the foreign ministers as Security Council to discuss and take decisions on matters of basic security policy. Report on the outlook for a European security policy, cit.

111 Report by the Italian Presidency on European Political Union. Less precisely, the Spanish text argued in favour of contacts between both organizations with a view to the progressive integration of the WEU. Spanish contribution, cit.

112 Article Y 11. Commission contribution

113 Article Y 15.1 Ibid.

114 Article Y 15.2 Ibid.

115 Article Y 15 Ibid.

Similar views had been exposed by the Franco-German proposal¹¹⁶ when it considered the WEU as the channel for cooperation between the Union and NATO. The paper had called for the establishment of organisational relations between the Union and the WEU. These would enable the WEU progressively to develop a common security policy on behalf of the Union. The proposal designed five elements to structure the links. Firstly, European Council guidelines on CFSP should serve as a guideline for cooperation in the framework of the Treaty of Brussels. Secondly, the terms of the Presidencies would be harmonised. Simultaneously, ministerial meetings would be synchronised. Fourthly, provisions would be concluded to insure mutual information between the Secretariats of the Council and WEU. Finally, links between the EP and the WEU Parliamentary Assembly should be established. The relations with the Members of the Union not belonging to WEU would be strengthened with a view to symmetric membership, and the possibility of specific forms of cooperation with other European members of the Atlantic Alliance was recognised.

The Atlantic Alliance was a complement to the Union in this respect, but this did not imply subordination of the Union or the WEU to NATO. The Commission thus argued that a common European defence would be *in full compliance with commitments entered into in the Atlantic Alliance*.¹¹⁷ WEU was not meant to be the Alliance pillar, but those Member States that were members of the Alliance were called to express the Union position when appropriate.¹¹⁸ Similarly, the first Franco-German proposal was reduced to a positive evaluation of the Alliance without designing any kind of link or role regarding the Union and/or WEU.¹¹⁹

The opposite line of argument supported a design making the Union a complementary organisation of the Atlantic Alliance, and the WEU the *bridge* between both of them. In its early proposals, the UK delegation had advanced specific measures to emphasise the bridge character of the WEU: the WEU bodies would be translated to Brussels; military counsellors acting as representatives with NATO would be attached to the WEU Council; the WEU Secretariat would establish contacts with the EPC Secretariat at the same time that the WEU Secretariat General was entitled to attend EPC meetings.¹²⁰

116 *Security policy cooperation in the framework of the common foreign and security policy of political union*. Europe Documents No. 1690 bis 21.2.91.

117 Article Y 11 Commission contribution

118 Article Y 15.3 Ibid.

119 The validity of the commitments that the partners have undertaken in the framework of the Atlantic Alliance and the objectives connected to them should not be questioned. The Atlantic Alliance, and notably a permanent US military presence in Europe, remains indispensable for European security and stability. *Security policy cooperation* cit.

120 *UK Draft Treaty Provisions on common foreign and security policy* February 1991

The proposals from this standpoint crystallised in early October in the joint Anglo-Italian declaration.¹²¹ The role of the WEU was not defined through an organic relation with the Union, but the declaration foresaw similar institutional links being forged between WEU and NATO, and WEU and the Union. The WEU was entrusted to develop the European dimension not only as a defence component of the Union but also as the means of strengthening the European pillar of the Alliance. Complementarity implied, in fact, a residual role for the WEU: it would be mainly concerned with out-of-area matters. For this task, the declaration designed an operational role: the WEU should develop a European reaction force to be deployed outside the NATO area.¹²² Such a force would be under the political control exercised by WEU ministers.¹²³ The UK government assented to final agreement¹²⁴ on condition that a previous WEU document defining its role in relation to both the Union and NATO be elaborated.¹²⁵ Finally, the political directors of the WEU met in Maastricht itself on 9 December to prepare the Declaration that borrowed extensively from the one included by the Franco-German proposal.¹²⁶

Early conference drafts, the *Project of Articles* and the *Consolidated Draft*, had been closer to the Franco-German proposals. However, the *Dutch Draft* reversed this trend, giving legal form to the British arguments.¹²⁷ The wording of this draft endorsed the principle of complementarity:

common security policy shall complement the security policy resulting from the obligations flowing for certain Member States from the Treaties establishing the North Atlantic Treaty Organization and the

121 *Anglo-Italian declaration on European security and defence in the context of the intergovernmental conference on political union.* Europe Documents No. 1735 5.10.91

122 In the Ministerial meeting held at the end of April, the British Foreign Secretary designed three geographical areas of competence: the NATO zone, where consultations among Europeans may take place but in line with Atlantic decisions; the outside-NATO zone, where an (no permanent) autonomous European intervention force could be conceived (although subject to NATO consultations); finally, the Eastern and Central European zone, where Europeans from the Alliance could be given a specific role to play in the event of strife *Agence Europa* No. 5482 29/30.4.91

123 In May, NATO had decided to set up a European Rapid Reaction Force under British command to be deployed outside the NATO area. The Franco-German proposal was regarded by the British as an attempt to check NATO's plans for a more political role across Europe.

124 The UK had accepted, for the first time, the perspective of a common defence policy in the ministerial meeting in Haarzuilen. *Agence Europa* No. 7/8.10.91 p. 4

125 The WEU Council decided on 18 November, at request of the UK and Portugal, to ask a special working group to present to the EC Conclave on 2 December a report on the future relationship between the WEU and political union *Agence Europa* No. 5611 18/19.11.91 p. 3

126 *Franco-German initiative on foreign, security and defence policy.* Europe Documents No. 1738 18.10.91

127 When the Commission contribution was discussed at the Sennigen ministerial meeting, the Netherlands delegation had argued that the role of *Europe in defence* should be defined not only as contributing to Community integration but also as maintaining American commitment to the security of Europe. *Agence Europa* No. 5461 28.3.91 p. 3

*Western European Union, which continue to contribute in a significant fashion to security and stability.*¹²⁸

Furthermore, there was no specific involvement with defence, but a provision for the Council to ensure cohesion between Community's policies and those policies followed by Member States in NATO and the WEU.¹²⁹

The combined effect of the *Dutch Draft* and the Anglo-Italian declaration was a firm response from the Franco-German pair who tried to reassert the main policy lines in a declaration that contained a draft article on security, a draft declaration on areas for CFSP and a draft WEU declaration.¹³⁰ The document confirmed the WEU both as an integral part of the process of European Union and as the organisation implementing certain Union decisions. The Council was charged with overseeing relations between WEU and the Union. Finally, the revision of the article provisions in 1996 would be done *in cooperation with the competent instruments of the WEU*.¹³¹

The three basic differences between the two proposals were as follows: firstly, the Franco-German text leaned towards European construction whilst the Anglo-Italian proposal was based on NATO. Secondly, the Franco-German text granted the European Council all aspects related to defence. Finally, the Franco-German proposal considered that the WEU should be managed from the perspective of merging it with the Community.¹³²

Given the firmness of the Franco-German attitude, agreement was possible only through a softening of UK government demands, which delineated three conditions to be fulfilled. Firstly, any common defence policy should be genuinely compatible with NATO. This implied that proposals for European forces should not question the exclusive responsibility of NATO for the defence of the NATO territory. Secondly, WEU would be the instrument of a European defence identity and linked, in different ways, to the Union and to the Alliance yet subordinate to neither. Finally, defence cooperation should not discriminate non-EC allies or present them with *faits*

128 Article C.2 *Dutch Draft*.

129 Article C.3 *Dutch Draft*.

130 *Joint letter Kohl-Mitterrand and Franco-German initiative on foreign, security, and defence policy*. Europe documents No. 1738 18.10.91. The Franco-German plan was criticised by the NATO General Secretary, Manfred Wörner. In his opinion, it would not make sense to create a separate European force to operate in defence of NATO territory which NATO already covered. *The Independent* 20.10.91. In the opinion of Rummel, the immediate aim of the Franco-German proposal was to prompt EC leaders to agree to plan for a European army based initially on a combined unit of German and French troops but politically guided by the European Council. Rummel, R. op. cit. p. 307

131 Cf. the Anglo-Italian declaration which stated that *the role of the WEU and its relationship with the Alliance and the Union should be reviewed by 1998 in the context of Article XII of the WEU Treaty*.

132 Declarations by Roland Dumas. *Agence Europa* No. 7/8.10.91 p. 4

accomplis.¹³³ The latter was more a question of manifest good political will and was easily accepted since it did not imply entering formal reserves. The first condition, compatibility with NATO, was negotiated on the wording of the article, of which the final version was closer to the British thesis than were earlier versions.¹³⁴ The real obstacle was, then, posed by the second condition: to define an organic relationship with the WEU (as the Franco-German position demanded) without implying subordination of the Union (as the British government required).

The ideal solution was to preserve the formal autonomous existence of the WEU in the transitory phase¹³⁵ while reinforcing the wording of the dispositions providing for implementation of Union decisions with defence implications as the Franco-German position demanded.¹³⁶

The dynamic integrative link between the Union and the WEU has been finally consolidated. This line had been considered by most of the contributions,¹³⁷ but it was not explicitly reflected by initial drafts since they did not set guidelines for reform. The final versions, reflecting the Franco-German pressure, linked the revision of the Union treaty to the expiry of the WEU Treaty,¹³⁸ with the implication that the Union would examine taking over the WEU *acquis*.

The role of the WEU has been established by the Declaration annexed to the Treaty.¹³⁹ The Declaration confirmed the asymmetric relationship in favour of the Union. Although it endorsed the concept of bridge, organic links were mainly developed with the Union:

133 Hurd, Douglas The European Community in a wider Europe Speech by the Foreign Secretary to the Atlantic Council in The Hague on 5 November 1991. Foreign & Commonwealth Office. Verbatim service VS026/91

134 Article D.4 *Maastricht Draft. the policy of the Union (...) shall respect the obligations of certain Member States under the North Atlantic Treaty and be compatible with the common security and defence policy established within that framework.*

135 This idea emerged for the discussions within the WEU. Its Secretary General had suggested that the WEU become in the future an instrument for the Union's defence policy. In his opinion, the WEU served well the 'variable geometry' of membership of different institutions which reflects differences in terms of strategic concepts and commitments. The crucial issue was *to define a security identity first and make potential new partners to subscribe to it rather than expand geographically and have to start the complex harmonization process all over again.* Van Eekelen, W.F. 'European security in a European union' *Studia Diplomatica* Vol. 44 1991 p. 50

136 Article D.2 *Maastricht Draft. The Union shall request the Western European Union, which is an integral part of development of the European Union, to elaborate and implement decisions and actions of the Union which have defence implications.*

137 The Italian Foreign Minister proposed an approach in phases: a) initially until 1998 (that he thought to be the expiry date of the WEU Treaty) the WEU would become a bridge between NATO and the Union b) Second phase. The WEU would become an EC body. c) Third phase. Development towards a federal state in which defence and security would be one of the areas of federal responsibility. *Agence Europa* No. 5482 29/30.4.91. See also the EP Resolution of 10 October 1991 on the Intergovernmental Conference on political union, cit.

138 Article D.6 *Maastricht Draft.* Article J.4 6 TEU

139 *Declaration on the role of the Western European Union and its relations with the European Union and the Atlantic Alliance.*

2. *WEU will be developed as the defence component of the European Union and as a means to strengthen the European pillar of the Atlantic Alliance. To this end, it will formulate common European defence policy and carry forward its concrete implementation through a further development of its own operational role.*

The relationship had to be settled also within the WEU.¹⁴⁰ The necessity of a WEU declaration incorporating political intention and the relevant practical arrangements had been foreseen since the *Project of Articles*, although its precise contents were not developed before the final stages of the IGC. The WEU declared itself prepared to *elaborate and implement decisions and actions of the Union which have defence implications*, at request of the European Union. To this end, the Declaration endorsed the procedural improvements expressed by the successive proposals.¹⁴¹ Regarding NATO, the WEU agreed that it would act in conformity with the positions agreed within the Atlantic Alliance, but with *the aim of introducing joint-positions agreed in WEU into the process for consultation in the Alliance*.

C The question of Irish neutrality

Irish neutrality seems to be an obstacle extant in any design wishing to include security and defence; however, the opinion of successive Irish governments has been that this principle is not irrenunciabile if European union is to be finally achieved.¹⁴² Accordingly, the appeal to neutrality has been used as a instrument of negotiation. Concessions to the Irish government had already been granted by the European Council's mandate to the IGC, according an explicit recognition of the Irish neutrality through the phrase *without prejudice of the traditional positions of other Member States*.¹⁴³

140 The WEU had held an extraordinary ministerial Council on 29 October when it debated the Franco-German proposal, the Anglo-Italian text and a bridging plan of the WEU's General Secretary, Van Eckelen. *Agence Europa* No. 5599 30.10.91 p. 4. *The Independent* 26.10.91

141 Synchronisation of dates and venues of meetings and harmonization of working methods; establishment of close cooperation between the secretariats; consideration of the harmonization of the sequence and duration of the respective presidencies; arranging modalities to keep the Commission informed; and encouragement of closer cooperation between the EP and the WEU Parliamentary Assembly.

142 On Irish neutrality and European integration, see Sharp, Paul *Irish foreign policy and the European Community* (Aldershot: Dartmouth, 1990) p. 199-235. For a evaluation of its incidence on the negotiations, see Wijnbergen, Christa van 'Ireland and European Political Union', in Laursen, F. and Vanhoohacker, S. (eds.) op. cit. p. 127-138 and Keatinge, Paul 'The foreign relations of the Union, cit.

143 The Irish Prime Minister pointed out that those conclusions went further than the SEA wording and, furthermore, they could be the basis for reconciling new neutral members with a political union, including a common foreign and security policy. *Agence Europa* No. 5398 22.12.90 p. 4

Irish neutrality found protection in the conference drafts in the dispensation clauses and the elusive wording that regulate the article on security arrangements; it was stated that decisions should not affect the situation of each Member State in connection with NATO and WEU.¹⁴⁴ Although the Irish government had voiced its reservations regarding the establishment of institutional links between the Community and organisations such as the WEU and NATO,¹⁴⁵ it finally accepted that *if the Community were to develop its own defence arrangements for its security, then Ireland, as a committed member, would consider participating.*¹⁴⁶ Finally, the Prime Minister declared to the Dáil, before the Maastricht summit, that this aspect of Irish policy would not preclude the possibility of a relationship between the EC and the WEU.¹⁴⁷ This cleared the path for the final wording, restoring the conclusions of the Rome mandate and providing an explicit endorsement of the principle of differentiation: *the policy of the Union shall not prejudice the specific character of the security and defence policy of certain Member States.*¹⁴⁸

9.2 HOME AFFAIRS AND JUDICIAL COOPERATION

Home affairs and judicial cooperation (HAJC) was the last element designated as being part of the Union. The inclusion of this area of competence within the scope of the IGC was mentioned by the December 1990 joint Kohl-Mitterrand letter.¹⁴⁹ The Rome mandate pointed out that

*it should be considered whether and how activities currently conducted in an intergovernmental framework could be brought into the ambit of the Union, such a certain key areas of home affairs and justice, namely immigration, visas, asylum and the fight against drugs and organized crime.*¹⁵⁰

The relative lack of preparatory work in the area proved no obstacle for smooth negotiation, in contrast with other sectors. The main disagreement was on

144 Article C.2 *Project of Articles and Consolidated Draft*

145 *Agence Europa* No. 5431 14.2.91 p. 5

146 Address to the Dáil by the Irish Prime Minister after the Luxembourg summit. *Agence Europa* No. 5536 17.7.91 p. 5

147 *The Guardian* 27.11.91. Already after the Haarzuilen meeting, Ireland had accepted that its neutral attitude could be modified if a truly European identity was to emerge *Agence Europa* No. 5583 7/8.10.91 p. 5

148 Article D.4 *Maastricht Draft*, Article J.4.4 TEU

149 *Agence Europa* 10/11.12.90

150 Bull. EC 12-1990 point 1.8 p. 10

whether or not certain policies could be brought under the Community framework. There were only two major fully-fledged national contributions and, surprisingly, neither the Commission¹⁵¹ or the EP¹⁵² presented any. The first contribution was presented by the UK delegation¹⁵³ and determined the main features of the final design. The aim of the British proposal was to formalise (within the framework of the Union) activities carried out on an intergovernmental basis. The principle for codifying this area was to keep it outside the framework of the Community Treaty. The second contribution was a Memorandum presented by the German government to the Luxembourg European Council.¹⁵⁴ Although it cannot precisely be considered a contribution to the IGC, the European Council agreed on the objectives underlying the set of proposals and instructed the conference to examine them further with a view to the revision of the Union Treaty.

The Memorandum contained two different points: a negotiation guideline for the IGC, and immediate and preparatory measures to be developed simultaneously with the conference. The IGC should lay down a Treaty commitment to harmonise the policies on asylum, immigration and aliens, of which the details would be laid down by unanimous Council decision and implementation measures could eventually be decided by majority. The proposal contemplated a joint initiative right for the Commission and Member States. The second policy area to be negotiated concerned the fight against international drug trafficking and organised crime; the memorandum

151 However, the Commission elaborated during this period two very important reports: A report on immigration SEC (91) 1855 of which the main points were the consideration of immigration policy as an integral part of the EC external policy and the control of existing immigration. The second report was a Communication on the right of asylum SEC (91) 1857 calling for a unified approach and to fight the abuse of asylum rules. On both documents and the broader context of the problem, see Lodge, Juliet Internal security and judicial cooperation beyond Maastricht ECRU Research Paper No. 1/91 (Hull: University of Hull, 1992).

152 In the Draft EUT, the EP had proposed a general clause regulating an *homogeneous judicial area* (Article 46 EUT) which included the objective to fight international forms of crime, including terrorism. Eventually, this would require the coordination of penal and police laws. Capotorti, F et al. p. 192. Explaining the EP attitude during the 1991 IGC, David Martin argues that the EP did not see this area as one of its main priorities, although he regret *a posteriori* this attitude. Personal letter. See Annex VI. Later, the EP called for the inclusion of a Community system of criminal law to protect the Community's financial interests. In its view, the Treaties did not provide power to legislate in penal matters with adequate guarantees of democratic legality, since these should be requested from the democratically elected body as in any constitutional state. Therefore, the main requirement of this system would be a co-decision power for the EP and the jurisdictional control by the ECJ. Resolution of 24 October 1991 on the legal protection of the European Community's financial interests. Doc. A3-0250/91 OJ No. C 305/106 25.11.91

153 *Cooperation on interior and justice matters*. CONF-UP 1783/91. Articles 1-7.

154 *Future common actions on home affairs and judicial cooperation*. Bull. EC 6-1991 point I.11 p. 10. On the German domestic circumstances surrounding the presentation of this document, see Goybet, Catherine 'Le manque d'une politique européenne de l'immigration' Revue du Marché commun et l'Union européenne No. 351 Oct. 1991 p. 685-687. She describes the document as a '*Coup de force du Chancelier Kohl*'.

suggested a Treaty commitment to the creation of a European Central Criminal Investigation Office (EUROPOL), to be developed gradually from an initial exchange of information. A shared right of initiative for the Commission was also envisaged.

The programme of immediate measures created, indeed, a process parallel to the IGC. Preparatory work was undertaken by the Secretary-General of the Council with a view to reporting to the pertinent Ministers during the Maastricht summit. Three issues were put forward: the definition and planning of harmonisation of asylum and immigration policies; proposals for transitional measures until the entry into force of the new Treaty, and proposals for setting up EUROPOL. The Interior and Justice Ministers discussed the model for EUROPOL, concluding that it might be a unit for cooperation between the services of the Twelve Member States with the initial task of operating in the intelligence field. They also concluded a report on immigration policy containing three basic points: the fight against illegal immigration; the preservation of human rights, and the integration and recognition of the rights of nationals from third States legally established in one of the Twelve EC countries.¹⁵⁵ This Council operated as a *de facto* parallel body to the IGC. Indeed, in his letter to the Heads of State and Government, Ruud Lubbers considered that those reports would be basic elements for the discussions on political union.¹⁵⁶ The results of both reports were incorporated into the final conference draft in the form of two declarations.¹⁵⁷

9.2.1 Intergovernmental nature of HAJC.

Generally, the considerations applied to CFSP can also profitably be translated to HAJC. There are, however, several features that lend to this area a hybrid character between the mostly international public law regime of CFSP and the Community law framework. Very early during the conference (10 January), the Luxembourg presidency put forward four different models for the development of HAJC. The first was to continue to develop cooperation in the uncodified fashion on the sidelines of the Union/Community. The second option was to include a reference in the Treaty to the principle of cooperation but leaving it to the Council to work out the details later. Thirdly, there was the option to elaborate a full set of Treaty provisions defining areas and decision-making procedures. Finally, the last option was a full communitarisation developing this policy within the Community politico-legal framework. From the

¹⁵⁵ *Agence Europa* No. 5624 6.12.91 p. 8

¹⁵⁶ *Agence Europa* No. 5625 7.12.91 p. 4

¹⁵⁷ *Declaration on asylum* and *Declaration on police cooperation*. The latter refers specifically to the German Memorandum and confirmed the establishment of practical measures in certain areas.

discussions, it emerged that France and Germany preferred the third option with a transitional provision towards communitarisation and this proved, finally, to be the prevalent option.¹⁵⁸

The assertion of a conventional international law regime was firstly and foremost elucidated through the definition of the subject acting on HAJC. Initially, the Union was entitled to act; thus, *the matters of common interest may be the object of action by the Union*.¹⁵⁹ Equally, explicit entitlement for the Community to act was envisaged only in an early stage;¹⁶⁰ the disappearance of references either to Community or to Union action in later drafts consolidates the Member States as the only subjects empowered to act in this area, as the UK proposal had argued.¹⁶¹

The primacy of the Member States was further consolidated by the wording of a clause safeguarding exclusive national control over internal security: initially, it read *The Union shall allow for the responsibilities incumbent upon national authorities*.¹⁶² The implicit role that this wording would give to the Union was also eliminated and the final wording said *This Title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintaining of law and order and the safeguarding of internal security*.¹⁶³ This guarantee was addressed to the threat of communitarisation which stemmed from the other provision on HAJC.

9.2.2 Features for communitarisation of HAJC

The communitarisation of parts of HAJC was open through three forms: firstly, a non-definitive and open distribution of policy areas between the Community framework and the HAJC provisions; secondly, a range of policy instruments that would allow Community involvement; finally, the involvement of Community institutions and procedures in HAJC was also considered.

A Areas for HAJC

In contrast to CFSP, the areas defined for Home Affairs and Judicial Cooperation are proper policy areas, each of which will require its own precise and distinctive instruments. The initial list of areas was virtually established from the

158 Corbett, Richard 'The intergovernmental conference on political union' Journal of Common Market Studies Vol. 30 No. 3 1992 p. 284

159 Article A.2 *Project of Articles and Consolidated Draft*.

160 Article C.3 *Project of Articles and Consolidated Draft*

161 *Cooperation on interior and justice matters*, cit.

162 Article E *Project of Articles and Consolidated Draft*

163 Article B.2 *Noordwijk Draft and Maastricht Draft*; Article K.2.2 TEU

beginning of the conference; after the German Memorandum, asylum policy and an explicit mention of police cooperation were included in the scope of these provisions,¹⁶⁴ making a definitive list of nine policy areas incorporated by the Treaty: asylum policy, rules on the crossing of external borders; immigration policy and policy on third countries' nationals; combating drug addiction; combating international fraud; judicial cooperation on civil matters; judicial cooperation on criminal matters; customs cooperation and police cooperation).¹⁶⁵ One of the characteristics attributed to this list by the IGC was its closed character, since a procedure for further additions was not included. Initially, the conference had considered the possibility of enlarging the list of policy areas following the procedure established for CFSP. On the basis of general guidelines from the European Council, the Council would decide, unanimously, to extend the scope of Article A to other areas of activity related to the objectives of the Union.¹⁶⁶ This option did not appear in any of the drafts of the Dutch presidency.

Although there was basic agreement on the policy areas to be included, the agreement did not extend to the respective positions of these policies in the Treaty. The German government was deeply interested in the communitarisation of the asylum and immigration policy, since its very open laws on asylum allowed a flow of immigrants. Constitutional change was not supported by the Social Democrat opposition and, therefore, a harmonised European legal instrument, stricter than the German one, appeared to be the best solution in forcing constitutional change.¹⁶⁷

The step towards communitarisation was possible through a theoretical distinction proposed by the Belgian delegation: the areas directly linked to the free circulation of persons may remain in the Community framework, whilst those areas on which there is a common interest but are not linked to the free movements of persons would remain intergovernmental.¹⁶⁸ On this basis, the Dutch presidency distinguished between 'strengthened cooperation' and 'communitarisation'. Cooperation would be described in an annex to the Treaty and it would include asylum policy; policy on immigration and concerning natives from third States; fight against drugs; fight against international fraud; legal cooperation in civil matters; customs cooperation; police cooperation on terrorism and international criminality.

A second group of areas would be incorporated in a Treaty article and policy would be decided by a Council qualified majority. This would include rules regulating the crossing of external borders; general rules for entry and movement for third

164 Article 220a *Dutch Draft*

165 Article K.1 TEU

166 Article D.1 *Project of Articles and Consolidated Draft*

167 On the particular German interests, see Gaybet, C. op. cit.

168 De Schoutheete, in Les conférences intergouvernementales avant le conseil européenne de Maastricht cit. p. 13

countries' nationals, and visa policy. The role of the Commission was discussed around two options; a shared initiative right with Member States, or a formula based on Article 32 of the EURATOM Treaty stipulating that the Commission inspects the requests formulated by Member States.¹⁶⁹

After the Noordwijk Conclave, it was agreed that this later formula would apply to the free movement of persons (crossing of external borders, visa policy). The result was the creation through the latest drafts of the Dutch Presidency of a new Article 100c within the EC Treaty Provisions which included initially rules governing the crossing of external borders; entry and movement of third countries' nationals during short stays, and some concrete aspects of visa policy.¹⁷⁰ Although the first two areas were closely related to the implementation of the internal market, they were incorporated finally into the Provisions on HAJC, which also included customs cooperation.¹⁷¹ Asylum policy, a particularly sensitive issue for the German government, remained in the scope of intergovernmental arrangements. However, an annexed declaration provided that Member States will consider priority questions concerning their asylum policies with the aim of adopting by the beginning of 1993 common action to harmonise certain of their aspects. More importantly, the Council will consider by the end of 1993 the possibility of transferring asylum policy to the scope of Article 100c.¹⁷²

The semi-communitarisation of HAJC was not restricted to the inclusion of some areas within the Community framework. More importantly, the conference designed a mechanism to transfer certain or all policy areas to the EC Treaty Provisions. At the outset, the Council may decide, unanimously, on a proposal from the Commission or a Member State, that a Community action would be necessary in order to achieve the objectives of the Union. In that case, Article 235 of the EC Treaty would apply.¹⁷³ The philosophy inspiring this transfer was changed with the introduction of Article 100c. Although the procedural requirements did not change (the Council would decide through unanimity on the initiative of the Commission or a Member State), the meaning of this new provision is that the Community could creatively extend its competence and the ambit covered by Community law to areas initially reserved for intergovernmental cooperation. However, the potentially far-reaching implications of this provision were reduced by the explicit exclusion of the

169 *Agence Europa* No. 5602 4/5.11.91 p. 4

170 Article 100c 1 and 2 *Noordwijk Draft*

171 Article A.2 *Maastricht Draft*; Article ...TEU

172 *Declaration on asylum*

173 Article C.3 *Consolidated Draft*. The *Project of Articles* only mentioned that the Council would adopt the appropriate dispositions but without reference to the Community. Article C.3

three most sensitive areas: judicial cooperation in criminal matters; customs cooperation and police cooperation.¹⁷⁴

B Methods of action¹⁷⁵

The initial conference drafts distinguished two methods; the first one would be applied to the sensitive areas of judicial cooperation in criminal matters, customs cooperation and police cooperation. In these areas, the procedure would be mutual information and consultation between Member States.¹⁷⁶ Later versions improved this wording by institutionalising through the Council coordination that had not been mentioned in early drafts.¹⁷⁷

The second type of action would apply to the remaining areas on which a gradual procedure would apply;¹⁷⁸ firstly, information and consultation within the Council with a view to coordinate their actions. Then, if it were considered necessary, they might adopt a common position. In these areas, the Council has two policy instruments which could be adopted by unanimous vote: the undefined joint action, and conventions.

The boundaries between the areas assigned to each method were not intended to be definitive because the Council could decide, by unanimous vote, to transfer an area of activity from coordination to eventual joint action.¹⁷⁹ The final option of the conference, developed from the *Noordwijk Draft* onwards, was to include the two methods of action under the same article and, more important, affecting all the areas of HAJC. The only distinctive feature between them would be initiative right, which would be exclusive of Member States in the areas of judicial cooperation in criminal matters, customs cooperation and police cooperation. In the other areas, initiative right is to be shared with the Commission.¹⁸⁰ Furthermore, policy instruments might be applied to any of the policies listed.

B.1 Policy instruments

174 Article K *Noordwijk Draft*; Article K.9 TEU

175 The instruments foreseen by the EP Draft EUT was the co-ordination by the method of cooperation, either through the conclusion of legally binding agreements between Member States within the European Council or through the adoption of political understandings or joint resolutions. Capotorti et al. op. cit. p. 191

176 Article B *Project of Articles and Consolidated Draft*

177 Article C.1 *Noordwijk Draft*; Article K.3 TEU

178 Article C.1 7 C.2 *Project of Articles and Consolidated Draft*

179 Article D.2 *Project of Articles and Consolidated Draft*

180 Article C.2 *Noordwijk Draft* and *Maastricht Draft*; Article K.3.2 TEU

The main instrument designed to develop policy on HAJC on the areas on which a common position was reached were conventions. Conventions are an instrument of public international law, traditionally used by Member States for HAJC topics within the EPC framework. Its intergovernmental character prescribes that they must be adopted unanimously and that the Council needs to recommend them to the Member States for their approval in accordance with their respective constitutional requirements.¹⁸¹ However, conventions, as contemplated within the Provisions on HAJC, have been communitarised to a certain extent: firstly, the Commission is entitled to an non-exclusive and non-general right of initiative. Secondly, a Community organ (the Council), and not the Governments of the Member States, is the organ entitled to adopt the drafts and it is therefore the negotiating body. Finally, the ECJ is charged with the interpretation of the provisions and with ruling on any disputes regarding their application. This, initially a general entitlement giving further room for an eventual communitarisation through a teleological interpretation,¹⁸² was restricted afterwards to those conventions that explicitly stated such authorisation.¹⁸³ Implementing measures could be decided through unanimity by the Council.

The second policy instrument was the joint action which presents features mid-way between pure cooperation and the convention. Joint actions are national measures adopted simultaneously and in a coordinated manner by the Member States. They allow also the involvement of Community institutions through the initiative right of the Commission. The introduction of the principle of subsidiarity in the wording regulating joint action was probably addressed in order to check an expansionist line by the Commission, one that could lead to the progressive communitarisation of instruments in areas of HAJC.¹⁸⁴ Joint actions would be adopted by the Council by unanimity although it could also decide that implementing measures would be adopted by a qualified majority.¹⁸⁵ However, jurisdictional control by the ECJ over joint actions and in particular their implementing measures was not considered at any stage. How to enforce compliance with the majority decisions by any Member States included in the eventual discordant minority is a unsolved issue.

9.2.3 Institutional framework

181 This wording stems from the British proposal, Article 3 (c)

182 Article C.2 (b) *Project of Articles and Consolidated Draft*. *The Court of Justice ensures the respect of the rights in the interpretation (and application) of the mentioned conventions.*

183 Article C.2 (c) *Noordwijk Draft*; Article K.3 2 (c) TEU. This was a point on which the UK had insisted. See House of Lords Political Union: law making powers and procedures cit.

184 The Council might adopt joint action in so far as the objectives of the Union can be attained better by joint action than by Member States' acting individually, on account of the scale of the effects of the action envisaged. Article K.3 2 (b) TEU.

185 Article C.2 (a) *Project of Articles and Consolidated Draft*; Article C.2 (b) *Noordwijk Draft* and *Maastricht Draft*; Article .3 2 (b) TEU

HAJC will be operated, basically, by the Community institutions subject to a particular regime. The initial drafts provided scope for institutional involvement on a non-specific basis: the provisions of institutional and financial nature in the EC Treaty would apply to HAJC provisions to the extent to which they were not expressly derogated.¹⁸⁶ However, this broad option was dismissed and the provisions subsequently referred to the explicit EC Treaty articles that would apply to HAJC and the financial procedure was also explicitly fixed.¹⁸⁷

The British document had proposed, following the wording of the December 1990 Kohl-Mitterrand letter, the creation of an 'Interior and Justice Ministers Council' to be directly responsible to the European Council.¹⁸⁸ This measure was intended to enhance the separate identity of HAJC from the Community framework, thus strengthening the unifying role of the European Council. The conference drafts, however, adopted the classical Community organ, the Council, the composition of which has to be thus decided on an *ad hoc* basis. On the other hand, a specific role for the European Council was envisaged only in early drafts giving it the power to enlarge the number of areas included in the provisions on HAJC.¹⁸⁹

The entitlement of the EC Council would allow, of course, for potential institutional spill-over given, specially, the practical difficulties of maintaining a functional distinction between a Council acting as an EC Council or under HAJC. The Council voting procedures were not explicitly established in the initial draft; the principle of unanimous voting and the regulation of the reinforced qualified majority, similar to the one operating in CFSP,¹⁹⁰ were introduced subsequently.¹⁹¹

The design of the role of the Council auxiliary bodies reflects a loss of influence of these that are associated with Community practices. Thus, the Secretariat General of the Council was not granted the auxiliary role initially attributed.¹⁹² Similarly, the COREPER was initially entrusted with the preparation of the Council works and the implementation of the tasks assigned,¹⁹³ but its role disappeared from the final versions.

The option finally accepted by the IGC was the institutionalisation of the Coordinators' Group. The British document had proposed that this group should prepare the business of HAJC, *give the necessary impetus and to maintain the*

186 Article J.3 *Project of Articles* and Article K.3 *Consolidated Draft*

187 These EC Treaty Articles are 137, 138 to 142, 146, 147, 150 to 153, 157 to 163 and 217. Article H *Noordwijk Draft* and *Maastricht Draft*; Article K.8 TEU

188 Article 3 (a) *Cooperation on interior and justice matters* cit.

189 Article D.1 *Project of Articles* and *Consolidated Draft*.

190 Article 148 (2) EC Treaty. 54 votes cast by at least eight Member States

191 Article D.3 *Noordwijk Draft* and *Maastricht Draft*. Article K.4 3 TEU

192 Article H.3 *Project of Articles* and *Consolidated Draft*

193 Article H.1 *Project of Articles* and *Consolidated Draft*

*continuity of activities under the Title.*¹⁹⁴ The Coordinating Committee was charged with providing opinions and preparing Council discussions even on areas covered by Article 100c of the EC Treaty.¹⁹⁵

The determination of the role of the Commission depended on the location of policy areas in the Treaty. The issue to be clarified was its initiative right, on which positions ranged from the silence of the British document¹⁹⁶ to the exclusive right to table proposal in certain areas eventually proposed.¹⁹⁷ In the final drafts, the Commission obtained a non-exclusive initiative right over HAJC with the exception of the three sensitive ones (judicial cooperation in criminal matters; customs cooperation and police cooperation). In an effort to allay its fears of marginalisation, the conference included an explicit endorsement of the Commission role: the Commission shall be fully associated with the work in the areas referred to in this Title.¹⁹⁸ However, the most significant aspect is its potentially constitutional role: the Commission has been granted initiative right to propose the application of Article 100c to areas of HAJC.¹⁹⁹

Finally, the EP obtained a right to being regularly informed by the Presidency and the Commission, the right to being consulted on the main aspects of HAJC and the right to tabling questions or to making recommendations.²⁰⁰ The EP reacted late in attempting to become involved in the new area; only in relation to citizenship did the EP formulate a general democracy principle (*no law may be imposed on citizens by Community institutions without the consent of the appropriate elected representatives*)²⁰¹ reflecting its desire to put police and judicial cooperation under EP's scrutiny.

194 *Cooperation on interior and justice matters*. Article 5. The British document proposed also that implementation would be carried out by four standing working groups, similar to the ones operating under TREVI:

- Working Group on immigration
- Working Group on police matters
- Working Group on drugs
- Working Group on judicial cooperation

195 Article D.1 *Noordwijk Draft* and *Maastricht Draft*; Article K.4 1 TEU

196 *Cooperation on interior and justice matters*. Article 3.b granted initiative right to the Presidency.

197 Some information disclosed a German proposal on immigration and asylum policies giving the Commission the exclusive right to table proposals. *The Independent* 4.11.91

198 Article D.2 *Noordwijk Draft* and *Maastricht Draft*. Article K.4 2 TEU

199 Article K *Noordwijk Draft* and *Maastricht Draft*; Article K.4 TEU.

200 Article g *Project of Articles* and *Consolidated Draft*; Article F *Noordwijk Draft* and *Maastricht Draft*. Article K.6 TEU

201 Interim report on Union citizenship, cit.

10 THE CREATION OF THE CONCEPT OF UNION CITIZENSHIP

10.1 Juridical value: position in the Treaty and procedure for its development

10.2 Definition and characteristics

10.2.1 Definition

10.2.2 Characteristics

10.3 Catalogue of rights

10.3.1 The question of human rights

10.3.2 Citizenship rights

During the IGC, citizenship became one of the elements for the definition the concept of Union. As has been seen in Chapter 5, certain elements of citizenship had already been developed within the limited framework of the Rome Treaty and the SEA. The task of the conference, therefore, was the creation of a concept providing a systematic basis for these elements without implying the creation of a political subject that might eventually legitimate an Union's interest autonomously from those of the respective Member States.

In the preliminary stage of the IGC, citizenship was not considered in the scope of reform; indeed, the concept of citizenship was initially subsumed under the broader and more vague proposals on democratic legitimacy. Thus, the Belgian memorandum on institutional relaunch,¹ which can be considered as the first informal contribution to the IGC process, did not specifically mention the concept of citizenship, although it referred to the old notion of 'People's Europe', to be considered as inextricably linked to basic human rights. Therefore, the Belgian government proposed that provisions on human rights should be written into the Treaties and the accession of the Community to the Strasbourg Convention on Human Rights. Both were regarded as devices to strengthen the democratic nature of the institutions of the Community. Two other measures proposed were a uniform electoral procedure for European Parliament elections allowing *all* Community citizens to take part wherever they reside within the Community, and measures to advance towards granting voting rights in local elections, along the lines of former Commission proposals.

The first reported reference to the concept of citizenship in the framework of the discussions on political union was contained in a letter from the Spanish Prime Minister to the President in Office of the Council.² Citizenship was defined as one of the three pillars of European political union, the other two being EMU and a common

¹ *Memorandum on institutional relaunch* cit.

² Letter of 14 May 1990 from Prime Minister González to the Irish President-in-Office of the Council Charles Haughey.

foreign and security policy. The basic elements would be the unlimited freedom of movement, establishment and access to employment, and the right to vote and stand for election irrespective of the country of residence. Although the idea was backed by the Italian and the Danish delegations, it was regarded as a rather vague notion by some other Member States. Thus, the Belgian delegation argued that citizenship should be seen rather as an objective to be achieved and the UK believed that it was premature to consider citizenship a constitutive element of political union.³ The underlying belief of the Spanish proposal was that the creation of a new instance of political power, i.e., the Union, would require the definition of rights and duties of the affected individuals, as occurs in national states.⁴

Eventually, the question of citizenship was incorporated in the preparatory work of the COREPER and, finally, the June 1990 Dublin European Council included citizenship in the framework of the 'overall objective of political Union'.⁵ The guidelines provided by the European Council endorsed the development of the concept from the limited form of citizenship already existing within the EC, and not one which was created *ex novo*. The Council was asked to examine:

How will the Union include and extend the notion of Community citizenship carrying with it specific rights (human, political, social, the right of complete free movement and residence, etc.) for the citizens of the Member States by virtue of these States belonging to the Union?

The first systematic contribution to the elaboration of the concept was the *Spanish Memorandum on European citizenship*.⁶ This text dismissed the insufficient concept of "citizen of the Community" developed around the Rome Treaty, because the measures and initiatives taken to develop it did not allow the overcoming of the notion of 'privileged foreigners' applied to citizens from other Member States. From this limited notion, the Spanish proposal called for a further step to eliminate the negative effects currently accompanying the condition of foreigner for a citizen of a Member State living in another Member State.

The emphasis laid by the Spanish text on the autonomous character of citizenship as one of the bases of the Union was diminished by two other contributions referring to the concept of citizenship before the opening of the IGC. The Commission's opinion made it clear that the development of the concept of

3 *Agence Europa* No. 5255 16.5.90 p. 3 and No. 5258 19.5.90 p. 3

4 See the article by the Spanish Secretary of State for the European Communities, Pedro Solbes Mira

'La citoyenneté européenne' *Revue du marché commun et l'union européenne* 1991 pp. 168-170

5 Bull. EC 6-1990 Annex I point I.35 p. 15

6 *Towards a European citizenship*. 25.9.90 SN 3940/90

citizenship was central to its objective of strengthening democratic legitimacy,⁷ explicitly pointing out the exclusion of the 'people of Europe' by the neofunctionalist dynamic based on the 1992 program. In its view, the involvement of citizens in Community activities should be at every stage of the definition of policies in fields directly affecting them. The second document was the *Danish Memorandum on the IGC on political union*⁸ which proposed the inclusion of some political rights (voting rights in local elections and ombudsman) in the section under the heading 'Strengthening the democratic basis for Community cooperation'.

Finally, the mandate to the IGC from the Rome European Council established that citizenship would be considered one of the autonomous elements in creating the Union (together with democratic legitimacy, common foreign and security policy, extension and strengthening of Community action, and effectiveness and efficiency of the Union). The conclusions⁹ recorded the consensus between Member States on the necessity of examining the concept of European citizenship. The Heads of State and Government proposed the study of a catalogue of rights to be included in the Treaty as elements of citizenship, although they indicated that the implementation of such provisions should give appropriate consideration to particular problems in some Member States, a clear concession to Luxembourg's problems regarding voting rights in local elections.

The substance of the concept of citizenship was, in the view of the Council, to be built around three groups of rights.¹⁰ The first group was 'civic rights', a euphemistic designation for political rights *strictu sensu*. The Council specified participation in elections to the European Parliament in the country of residence and possible participation in municipal elections. The second group of rights, social and economic rights, was mainly an enlarged version of rights under the EEC Treaty, i.e., freedom of movement and equality of opportunities and treatment for all Community citizens. Thirdly, the Council included the joint protection of Community citizens outside Community borders. The Council opined also that the IGC should consider a mechanism for the defence of citizens' rights regarding Community matters (ombudsman).

7 Commission opinion

8 *Memorandum on political union cit.*

9 Bull. EC 12-1990 point 1.7 p. 10

10 The Spanish Memorandum had proposed three basic elements for the concept of citizenship.

Firstly, the already mentioned dynamic dimension (or progressive acquisition of rights). Far more important is the second element denominated 'Special basic rights of European citizens' which comprised three rights partially developed within the Rome Treaties: full and complete freedom of movement, free choice of the place of residence and free participation in political life in the place of residence. Finally, the third element was composed of what could be denominated 'New rights' (external representation, petition). *Towards a European citizenship. cit.*

In comparison with any of the other major issues discussed during the conference, citizenship was a less controversial topic. Discussion proceeded on the basis of two documents elaborated in the form of draft articles. These were a text by the Spanish delegation,¹¹ which developed in ten articles the ideas advanced in the memorandum, and the Contribution of the Commission,¹² containing twelve articles. Basic agreement was already possible on the first draft text of the Luxembourg Presidency and the final shape of the citizenship of the union was almost entirely established by the *Consolidated Draft* in June. The EP, however, criticised the achievements of the conference¹³ whose drafts were considered not to institute a Union citizenship but instead to list a number of special rights of a partial nature whose exercise was subject to intergovernmental agreement.

10.1 THE LEGAL STATUS OF CITIZENSHIP IN THE CONTEXT OF THE TREATIES

Prior to the IGC, the concept of citizenship had been built on a body of heterogeneous provisions dispersed throughout the Rome Treaty. The lack of an explicit legal acknowledgement of citizenship allowed for this area to be reserved for the discretion of intergovernmental arrangements. The introduction of citizenship of the union has implied the generalisation of the rights of residence and movement, the constitutionalising of the right of petition and the establishment of a clear legal foundation for regulating voting rights in local and EP elections regardless of residence.

Citizenship of the Union is included in Part Two of the *'Provisions Amending the Treaty establishing the European Economic Community with a view to establishing the European Community'* and developed through six articles which contain a definition,¹⁴ the catalogue of rights attached to the condition of citizen¹⁵ and a procedure for further development of this Part.¹⁶ Significantly, the Treaty has overcome opinions arguing in favour of the inclusion of the principles in the Treaty, leaving their application to be effected through derived law. The link between citizenship of the Union, as developed through the Dispositions of the EC Treaty, and the Union itself is created by recognising citizenship as one of the objectives of the Union. This is enshrined by the Common Provisions of the Treaty, as had been

11 *Citoyenneté européenne* (20.2.91) CONF-UP 1731/91

12 Union citizenship. Contributions by the Commission to the Intergovernmental Conference SEC (91) 500.

13 Interim report on Union citizenship. PE Doc. A 3-0139/91 23.5.91. Rapporteur: Bindi, R.

14 Article 8 TEU

15 Articles 8a to 8d TEU

16 Article 8e TEU

anticipated by the final text of the Luxembourg Presidency.¹⁷ In this respect, the Treaty follows the ideas forwarded by the contribution of the Commission. By including the articles regulating the citizenship of the Union in Title I of Part Two (Foundations of the Union) rather than in the Preamble or in the introductory articles setting out the objectives of the Union, the Commission's intention was to stress that these were measures of implementation and not merely declaratory clauses.¹⁸

The inclusion of citizenship of the Union in the provisions on the Community implies that some citizenship rights will be governed mainly by Community law and through the involvement of Community institutions. Furthermore, legislation may be directly applicable and the jurisdiction of the ECJ will cover it. This offers the possibility for any individual, citizen of an EC Member State, to recourse to national courts to make these rights prevail. Not surprisingly, opposition to the principle of direct applicability, as it would stem from the initial draft, was voiced by Denmark. The British government also objected to the possible direct applicability of the right of movement throughout the Community without time limits.¹⁹

The primacy of Community law in the development of citizenship of the Union enshrined by the Treaty is made uncertain in two aspects. Firstly, during the conference there was no in-depth discussion on the problems and implications of establishing a Union citizenship which would be affected by Union policies (e.g., legal or police cooperation), but which could only be protected in the framework and with the means of the EC. Secondly, the provisions regulating citizenship are a blend of two different origins, as the Commission pointed out in its contribution.²⁰ Firstly, there is a group of articles, conferring rights for citizens, deriving directly from the Treaty (non-discrimination, freedom of movement, the granting of union citizenship) which need only a juridical guarantee and/or the improvement on existing provisions for its exercise. Not surprisingly, this list coincides with the rights already available under the Rome Treaties. The second group is composed of rights, the effective development of which will require *ad hoc* legislation to be brought into effect together with the necessary detailed rules and conditions. Voting rights and diplomatic protection are included in this category of rights for which the Treaty has as yet failed to establish a proper Community procedure. They might be implemented

17 *Consolidated Draft*. Article B Common Provisions. The wording determined that one of the aims of the Union would be *to reinforce the protection of the rights and interests of the Member States nationals, through the introduction of the citizenship of the union*

18 A similar opinion was voiced by the Parliament, which argued that confining citizenship to a single Title would allow it to be interpreted as one of the component elements of the Union rather than as a sub-element. *Interim Report on Union citizenship cit.*

19 *Agence Europa* No. 5491 15.5.91 p. 3

20 Commission contribution, *Explanatory Memorandum cit.* p. 89

through multilateral agreements between Member States rather than through Community legal instruments.

10.2 DEFINITION AND CHARACTERISTICS

10.2.1 Definition

The only exhaustive definition of the concept of citizenship was contained in the Spanish proposal. Citizenship was defined as

the personal and inalienable status of citizens of Member States, which by virtue of their membership of the Union, have special rights and tasks, inherent in the framework of the Union, which are exercised and protected specifically within the borders of the Community, without this prejudicing the possibility of taking advantage of this same quality of European citizenship outside the said borders.

The Commission contribution delimited the concept of citizenship of the Union in the following terms: *citizen of the Union is every person holding the nationality of a Member State.*²¹ As in the Spanish contribution, the distinctive element is the enjoyment of the rights granted and the subjection to the obligations set down by the Treaty.²² The European Parliament preferred not to define citizenship: the concept *should stem later from all Community legislation applied to citizens.*²³ The EP was proposing a detachment of citizenship from nationality with a view to the generalisation of social and human rights as a basic component of the former. In the point of view of the rapporteur, citizenship (understood as a concept to express the exclusivity applying to the citizens of the same state) had been superseded and was unacceptable. Three factors have contributed to this breakdown: the freedom of movement within the Community; the internationalisation of economic and cultural activities, and, finally, mass emigration.²⁴

21 Article X1. Commission contribution.

22 Article X1. Commission contribution

23 Interim report on Union citizenship. cit. p. 11. An earlier EP attempt to define the concept was included in the Resolution on the constitutional basis of the European Union PE Doc. A 3-301/90 OJ No. C 19/65 28.1.91. Article 20 linked the condition of union citizenship to that of the Member States, established a prohibition of discrimination on the grounds of nationality and established also the right to the full freedom of movement and activity. See also the proposed new Articles 8f (citizenship) and 51a (right of movement and establishment) of the EP opinion. Resolution of 22 November 1990 on the intergovernmental conference in the context of the European Parliament's strategy for European Union cit.

24 Ibid. p. 9. To its credit, the EP proposal was the only one which distinguished citizens from resident aliens (i.e., nationals from non-Member States). The EP proposal listed a series of rights to be granted to this group: fundamental human rights, freedoms and guarantees, and the rights required in order to carry on a lawful economic occupation or social activity. These ideas had been forwarded by the constitutional basis which established that non-citizens (i.e., foreigners) could eventually enjoy comparable rights and, in any case, they were guaranteed the rights

In the end, the conference preferred not to define citizenship explicitly. As the Commission had proposed, the definition was realised through delimiting the recipients. The final wording was already established by the first draft of the Luxembourg presidency: citizen is every person holding the nationality of a Member State which enjoys the rights and is subject to the duties laid down by the Treaty.²⁵

10.2.2 Characteristics

The concept of citizenship was to be defined through two characteristics: additionality, and dynamic or evolutive character.

a. Additionality

The Spanish proposal had differentiated the definition of the concept of citizenship (which was regarded *per se* as the basis of democratic legitimacy), from the *status civitatis* which is defined as a set of rights, freedoms and obligations of citizens of the European Union. The *status civitatis* is based on a set of rights additionally to a further two: national rights and responsibilities stemming from national citizenship at the level of Member States which will subsist in any case, and the set of Community rights and responsibilities stemming from the Rome Treaties for citizens of a Community Member State.²⁶ The Commission's opinion endorsed this additional character and its contribution argued also that this notion was supplementary to rights and obligations attached to every national as a citizen of his/her own Member State.²⁷ A subsequent characteristic stems from additionality: citizenship will be an indirect relationship between the individual and the union since the link which entitles individuals to the enjoyment of rights is the link with a Member State (i.e., nationality).

Lacking a strict definition on what a citizen of the Union is, nationality of any of the Member States became the requisite *sine qua non* for the enjoyment of citizenship. Union citizenship will not in any case supersede nationality and, therefore, the determination of the nationality of each of the Member States in accordance with

derived from their economic activity in the same conditions as Union nationals. PE Doc. A 3-301/90 OJ No. C 19/65 28.1.91

²⁵ Article A. *Project of Articles*. Only the *Dutch Draft* changed the notion of Union citizen by that of Community citizen because of the general alteration of the Treaty structure.

²⁶ *Towards a European citizenship* cit.

²⁷ Commission contribution, p. 85

its constitutional requirements is the prerequisite.²⁸ As the Commission had suggested, the Final Act of the Conference annexed to the Treaty included a Declaration on nationality.²⁹ This declaration establishes that settlements on the possession of the nationality of a Member State will be made by reference to the domestic law of the Member State concerned. Member States will decide also who are to be considered their nationals for Community purposes and may amend this whenever they consider it necessary. Differences in naturalisation systems did not pose an insuperable problem to the conference, since there was widespread agreement on preventing any form of 'passport dumping'.³⁰

b. Evolutive character

The second characteristic of the Spanish proposal was the progressive acquisition of rights stemming from the dynamic development of the Union, that is, the gradual acquisition by the European citizen of specific rights in new policy-areas transferred to the Union. Lastly, a 'real Union' would require a European citizenship of great content, entailing that a 'real union' should aim to overcome the inequalities which subsist between community citizens through the promotion of economic and social cohesion, this being a constant claim of the Spanish government. Specific provisions for the progressive acquisition of new rights were accordingly attached.

The Commission endorsed also this dynamic character (i. e., citizenship would be progressively developed) in its opinion.³¹ Indeed, the Commission included as one element of Union citizenship the establishment of targets for the definition of the civic, economic and social rights of the individuals to be properly defined at a later stage. When it presented its contribution to the IGC, the Commission explained that the dynamic character was one of the principles on which Union citizenship was based: it *reflects the aims of the Union, involving as it does an indivisible body of rights and obligations stemming from the gradual and coherent development of the Union's political, economic and social dimension*.³² The Commission wanted to avoid the concept of citizenship being restricted to economic rights in the framework of the

28 This was also the option chosen by the EP Draft EUT: Citizenship of the Union would be dependent upon citizenship of a Member State; it could not be independently acquired or forfeited. Article 3 EUT.

29 Declaration on nationality of a Member State

30 During the discussions of the EP report on union citizenship, there was an amendment to introduce the principle of dual nationality (Sarlis, Gr., CD). A Community national married to another Community national should be able to acquire the nationality of his/her spouse while keeping his or her own, and the children should be able to have both nationalities. See *Agence Europa* No. 5592 19.10.91 p. 5

31 Commission opinion p. 79

32 Commission contribution p. 87

Rome treaties and, at the same time, it sought to provide bases for its future updating as the union developed. Therefore, the proposed provisions laid down objectives for the granting of rights in the future and for defining obligations, especially in the social field.³³ Eventually, the catalogue of citizens's rights might be enlarged by a unanimous Council vote on a Commission proposal.³⁴ The wording of the initial drafts was not definitive on this point; the Council would be allowed to modify the catalogue of rights, which might be understood as a provision to complete, or eventually *restrict*, the foreseen rights through a majority voting.³⁵ Such an option was not satisfactory and was accordingly modified. Firstly, the Commission was requested to report before 31 December 1993 and every three years, on the implementation of the provisions of Part Two.³⁶ Thus, the Commission was charged with guiding the dynamic evolution of citizenship and its parallel development alongside the Union itself. This Commission report would become a basis for Council decisions acting through unanimity on a Commission proposal after consulting the EP. Secondly, the Council could not reduce or restrict the catalogue of rights: Article F reads, *the Council may adopt provisions to strengthen or to add to the rights laid down in this Part*. In any case, future provisions were not to be automatically binding, since the Council is merely entitled to *recommend* (them) *to the Member States for adoption in accordance with their respective constitutional rules*. Therefore, the future development of Union citizenship is left to the discretion of the Member States.³⁷

10.3 CATALOGUE OF RIGHTS³⁸

10.3.1 The question of human rights

The Spanish proposal established very clearly the independent nature of human rights from the condition of citizenship. In the terms of the Spanish text, human rights and basic freedoms are a distinct and independent part of the quality of

33 Ibid.

34 Article X12 Commission contribution

35 Article G *Project of Articles*.

36 Article F. *Consolidated Draft, Noordwijk Draft and Maastricht Draft*. Article 8 e TEU.

37 The *Dutch Draft* proposed the introduction of a procedure of double assent for the addition or strengthening of citizens rights. Firstly, the assent of the EP was required for a Council act on a Commission proposal. Secondly, the proposal needed to obtain again Parliament assent to be recommended to Member States. The attempt, which was related to the Dutch intention to enhance the EP powers, was not successful and Article F was restored in its former and final terms by the *Noordwijk Draft*.

38 The EUT did not foresee an explicit and systematic catalogue of rights; citizens of the union would *enjoy the rights granted to them by the legal system of the Union and be subject to its laws*. (Article 3)

European citizens and the Conference should examine uniform guarantees for residents of the Community, irrespective of their nationalities.³⁹ This vague wording could imply indeed a political will to universalise the guarantee of human rights even to nationals from non-Member States. The Commission had, however, considered that basic human rights were an essential element of citizenship and it therefore proposed a reference to the Strasbourg Convention.⁴⁰ Consistently, the Commission proposal⁴¹ entitled Union citizens to invoke the rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms. Although the wording establishes that the Union accepts the Convention, the Commission did not call for accession and refers to the proposal, already lodged before the Council, for the Community (and not the Union) to accede. This opinion was also shared by the EP which in its Resolution on Union citizenship⁴² considered that such citizenship must imply the guarantee of basic human and fundamental rights. From the Rapporteur's point of view, *it is inconceivable to base citizenship on anything other than the expansion of fundamental rights and freedoms in addition to their recognition and protection.*⁴³ In any case, human rights were not regarded in any of the drafts of Part Two.

10.3.2 Citizenship rights

The Spanish Memorandum had proposed three groups of rights to be incorporated by the concept of citizenship. The first is the dynamic dimension (or progressive acquisition of rights) already mentioned. Far more important is the second element denominated 'Special basic rights of European citizens' which comprised three rights partially developed within the Rome Treaties: full and complete freedom of movement, free choice of the place of residence and free participation in the political life in the place of residence. Finally, the third element was composed of what could be denominated 'New rights' (external representation, petition).

During the conference, there were other specific rights suggested for incorporation in the Treaty. The Spanish document proposed the recognition and validity of obligations such as military service or alternative service that were in effect in any country of the Union. On the other hand, the Commission proposed the right to

39 *Towards a European citizenship*. cit.

40 European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (ECHR). Commission opinion p. 79

41 Article X2. Commission contribution. SEC (91) 500 p. 85

42 Resolution of 21 November 1991 on Union citizenship. PE Doc. A 3-0300/91 OJ No. C 326/205 16.12.91

43 Interim report on union citizenship, cit. p. 12

cultural expression (and the obligation to respect cultural expression by others),⁴⁴ and the right of every citizen to enjoy a healthy environment with the concomitant obligation of contributing to its protection.⁴⁵ The most important innovation of this later provision was related not to its substance but to procedure: it foresaw the possibility of consulting the citizens in fulfilment of that objective. None of these rights reached the Presidency drafts which regulated only movement and residence, local and EP elections, petition and ombudsman, and diplomatic protection.⁴⁶

1. Movement and residence

The Spanish proposal argued that freedom of residence and movement are rights, stemming from the Treaties, that should be extended and applied to all European citizens. On this point, the Union would imply a universalisation of precedent Community rights. Along the same lines, the Commission proposal included the prohibition of any discrimination on the basis of nationality and the explicit recognition of the freedom of movement and residence regardless of economic activity.⁴⁷ The principle of non-discrimination was dropped from the following drafts, although these enshrined the freedom of movement and residence. Every Union citizen will enjoy the right to circulate, and to reside freely and without limitation of duration, in the territory of the Member States of the Union. Initially, however, the exercise would not be automatic; it would have to be developed by secondary legislation with a view to assuring an equitable distribution of charges particularly regarding social protection. This reflected the fears of eventual pressures on the more generous social systems.⁴⁸ This condition presented an eventual threat to the Community *acquis* and, therefore, the article was already corrected by the Luxembourg Presidency: the reference to *equal distribution of charges* was eliminated and a looser formulation was introduced instead: *under the conditions laid down in the Treaty*. Moreover, implementing legislation would be subject to strong

44 Article X6 Commission contribution.

45 Commission contribution. SEC (91) 500 Article X7

46 This catalogue compares unfavourably with the more ambitious one proposed by the "European Movement"; the *European Charter of Citizens' Rights* which included also a general voting entitlement including national elections and the right of access to public office. Parry, John *European citizenship* (London: European Movement, 1991) 36 p. In the opinion of Reich, however, the proposal contained in the successive drafts would allow the constitution of a truly federal citizenship. Reich, C. 'Le développement de l'union européenne dans le cadre des conférences intergouvernementales' *Revue du Marché commun et l'Union européenne* No. 351 1991 pp. 704-709

47 Articles X3 and X4 Commission contribution

48 Article B *Project of Articles*.

Community guarantee: the European Parliament's assent would be required, unless the Treaty stipulated otherwise.⁴⁹

2. Political rights⁵⁰

In some of the initial contributions, the entitlement to exercise political rights was a general one rather than being summarised by concrete and specific ones. Thus, the Spanish memorandum spoke of the explicit recognition of the freedom of expression, association and assembly,⁵¹ which the EP report formulated more generally as the right to complete freedom for any citizen to take part in the political life of any Member State.⁵² The Spanish memorandum argued that *participation of European citizens must be progressively extended to electoral consultations organised in the country of residence*. The emphasis on residence does not hide the underlying reading which seems to favour voting rights in any election, including in national ones. This possibility has not been developed, since the Spanish memorandum had singled out two cases: proportional representation and voting rights in the place of residence in the EP elections, as well as voting rights of the place of residence in local elections.

The conference drafts considered only the two electoral rights already under discussion within the Community framework. Local and EP elections were regulated by the same article. The initial conference option was to determine the general conditions for qualification; as the Commission had proposed, a minimum qualifying period would be established and the first draft conditioned the exercise of this right to not being deprived of the right in the country of origin and to its not being able to exercise the right there. The conditions for qualification (non-deprivation and single vote in municipal elections) were later deleted. Instead, a general principle of equality was introduced: *Every Union citizen shall have the right (...) under the same conditions as nationals of that State*. Finally, derogatory dispositions due to particular

49 Article B *Consolidated Draft* To guarantee any eventual dissolution of Community *acquis*, the *Dutch Draft* introduced a double assent procedure. Firstly, the Council was obliged to consult the EP before acting by unanimity. But, secondly, EP gained the right to assent to the proposal by absolute majority. Article B.2 *Dutch Draft*

50 The EUT granted to the citizens of the union a general right to take part in the political life of the Union, a vague expression of which the most important application was the election of the EP. The implicit reading, however, would allow extension of this right to any other political activity including national elections or referendum. Article 3 EUT

51 *Towards a European citizenship*, cit. Equally, the Commission contribution proposed the right of being member of political association. Article X5 Commission contribution.

52 In the view of the EP, the essential element of citizenship is the citizens' political relationship with the Union. Those rights were roughly designed in the constitutional basis Article 21 including first and foremost a general right to participate in the political life of the Union. Resolution on union citizenship, cit.

problems in a Member State (i.e., Luxembourg) were provided, although with a temporary character only.⁵³

Taking into account the recent problems when trying to legislate on local elections, the general attitude during the conference was to leave the regulation of the particular electoral conditions to future legislation. Provisions for implementing secondary legislation required the unanimity of the Council on a Commission proposal, but they also granted a consulting role to the EP.⁵⁴

3. Petition and ombudsman

The right of petition is not new within the Community framework,⁵⁵ but its inclusion in the Drafts signalled a desire for its effective constitutionalisation. This is not, however, a right exclusively attached to the condition of citizen of the Union. Rather, it can be regarded as a general right: Article 8d explicitly acknowledges for only the citizens a right that Article 138d of the TEU grants to any natural or legal person residing or having statutory seat in a Member State of the Community. The ambit of petitions is constrained, however, by Article 138d, to matters within the field of activity of the Community, implying that the global ambit of the Union is not, strictly speaking, subject to petition. This provision might allow the avoidance of Parliamentary scrutiny in such sensitive areas as home affairs and judicial cooperation.

Similar arguments can be extended to the right to apply to the ombudsman. This is a new institution in the Community's legal order regulated by Article 138e of the Treaty. As with the right to petition, the ombudsman is not conceived of as an institution exclusive to the citizens of the Union: any natural or legal person is entitled to lodge a complaint concerning maladministration by Community institutions.

The contributions to the conference, however, had designed an institution directly attached to the condition of citizen. Thus, the function of the ombudsman would, along the lines of the Spanish proposal, be *to provide the protection of the specific rights of the European citizens*. The ombudsman could act directly or through national ombudsmen or equivalent institutions existing in the Member

53 Luxembourg, indeed, opposed the extension of voting rights to EC citizens. *Agence Europa* No. 5491 p. 3 15.5.91. An alternative proposal had been presented also by Denmark: Nationals of a Member State and their families who reside permanently in another Member State will be able to take part in local elections at the end of a three-year period of residence. The Commission would be charged to draft a proposal and the Council would decide by qualified majority. *Agence Europa* No. 5456 21.3.91 p. 5

54 Similarly to the rights of movement and residence, the *Dutch Draft* attempted to introduce a previous consultation before an unanimous Council decision, but the proposal did not succeed. Article C 1 and 2 *Dutch Draft*.

55 Petition had appeared already in the EP's EUT. EUT Article 16 (5) and Article 18

States.⁵⁶ The idea was adopted by the Commission contribution,⁵⁷ which considered the ombudsman-type function an implementing provision to develop the catalogue of rights. The functions of this institution comprise the advice to citizens on rights and courses of action open to them under the Union treaty; assistance in dealing with the administrative authorities of the Union and, thirdly, the defence of those rights before courts and tribunals on behalf of citizens. The most important point is that the proposal created this new institution within the ambit of each Member State (twelve ombudsmen, in fact): *each Member State should establish at least one national authority, possibly in the form of an office of ombudsman to which Union citizens may have recourse*. From this wording, it is not clear whether the Commission intention was to use existing national ombudsmen or to create them *ex novo* with the specific task of the defence of Union law. The most important difference with the institution finally created by the Treaty is that the former was legally entitled to intervene in cases of alleged maladministration carried out by national administrations in implementing Community law.

The joint enshrining of both rights was hotly contested by the EP, which considered that the existence of a powerful ombudsman is incompatible with a petitions committee.⁵⁸ The EP argued that the creation of an ombudsman could reduce by 60% the number of petitions and, furthermore, it would progressively lead to the disappearance of the EP committee on petitions.⁵⁹

4. External representation.

The Spanish document had proposed a higher degree of assistance, and diplomatic and consular protection, from Member States to other Community citizens.⁶⁰ This would have effects on the international personality of the Community. Therefore, the text foresaw that protection and assistance regardless of nationality would require the negotiation of agreements with third countries, since the Vienna Conventions and the different bilateral conventions cover only the protection of nationals of each Member State.

The Commission proposed that every Union citizen in the territory of a non-Member State would be entitled to Union protection (depending on the diplomatic instruments of the Union) and to protection by *any* Member State on the same conditions as its nationals, reproducing thus the principle of equality of treatment in

⁵⁶ *Towards a European citizenship*, cit.

⁵⁷ Article X9 Commission contribution.

⁵⁸ Oral opinion of the Committee of Petitions. EP Debates No. 3-406/303 13.6.91

⁵⁹ Report on European citizenship. cit.

⁶⁰ *Towards a European citizenship*, cit.

the external dimension of citizenship that might become directly enforceable by the ECJ.⁶¹ This principle of general protection was stated only in the first Presidency's draft, which read that every citizen of the Union enjoys the protection of *all* the Member States under the same conditions as their own nationals in the territory of third countries.⁶² To this end, the provisional date of 31 December 1993 was set to establish between Member States the necessary measures and to initiate international legislation with third parties. Successive drafts however, introduced a principle of subsidiary representation: protection would not be automatic in any third country but citizens would be entitled to such protection in the territory of a third country *in which the Member State of which he (or she) is national is not represented*.⁶³ The precarious equilibrium between Union citizenship and Member State nationality is resolved in this case to the advantage of the latter.

61 Article X8. Commission contribution

62 Article D. *Project of Articles*

63 Article D *Consolidated Draft*

CONCLUSIONS

The main aim of this research has been to compare the EC and the host of relations between Member States with the reform of this carried out by the IGC. The first part (Chapters 3 to 5) has evaluated the constitutionalisation of the Community's politico-legal foundation within the framework of the Treaty of Rome and the SEA. It has also identified deficiencies in this constitutional foundation and has established that Member States have not expanded this constitutional foundation to the areas considered to be vital for their continued separate existence (foreign policy, security, defence, defence of the constitutional order, etc.). Finally, it has shown that the development in the Community framework of certain rights for individuals had fallen short of the creation a citizenship.

The introduction detailed a series of questions in order to compare, along the three criteria distinguished, the pre-1991 status with the reform introduced by the IGC. The first question to be addressed is: what form has the Union adopted? The Union, the nature of which has been thoroughly examined in Chapter 7, has not been conceived from the outset as a coherent and cohesive entity systematically constructed. It has been constructed to accommodate different and often competing demands. As a codified expression of the host of relations between Member States, the Union is compatible with their separate sovereign existences. The IGC, by rejecting a unitary model, has consciously avoided the creation of a Union by enlarging the scope of the Community's constitution to include the areas previously organised as intergovernmental cooperation. The inspiration provided by the model of the SEA is undeniable. The nature of the Union corresponds to a hybrid that results from the combination of principles of public international law or intergovernmentalism, with the supranationalism of the politico-legal framework of the Community. Three different types of law will inform the Union: areas based on international law, Community law and the linkage or transitional area. This last principle is mainly embodied in the provisions on HAJC, but it exists also in the form of bridge dispositions in the common provisions and CFSP provisions.

Some of the problems posed by the nature of the Community, such as the right to withdraw and the development of a fully and properly defined international personality, remain unsolved. If this, on the one hand, is a guarantee for the maintenance of the separate international personalities of the Member States, on the other hand, it questions the capability of the Union to perform as an actor on the international scene, which was one of the main aims of the IGC reform. This can be

advanced at this stage as a theoretical problem that will need to be taken into account in further reforms.

Despite the acknowledgement of the constitutional independence of the Member States, sanctioned through public international law instead of Community law, the IGC has designed a method for eroding the legal foundation of such independence in certain areas and in a progressive manner: the recourse to the Community's politico-legal framework to develop policies in these areas. This is the principle sanctioned by the bridge articles and the provisions contained in Article 100c. The problem is that the entity that more satisfactorily fulfils the requirements of the Member States is a semi-constitutional entity that threatens their separate existence. The progressive adaptation of the Union to the Community model seems to be inherent in the nature of the new entity. Although the federal goal has been eliminated, a tendency towards the progressive communitarisation of intergovernmental areas seems to be inherent to the construction.

The second question to be responded to is what are the reforms of the Community constitutional framework carried out by the IGC? These were examined in Chapter 8 and amount, basically, to two: enlargement of the Community scope of competence and introduction of the principle of subsidiarity, and reform of the institutional framework. The inclusion of new policy areas within the Community legal constitution has been undoubtedly induced by a spill-over effect, where Member States have tried to harness particular national priorities, as illustrated in Chapter 6. The reform of the Community legal constitution was carried out with the objective of providing solutions to some of the deficiencies identified (such as the fear of saturation of the Community capacity), but there is no evidence that reform proceeds from the application of clear principles entangled in the constitutional framework. For instance, the introduction of a hierarchy of laws, which would be based on the combination of the constitutional principle of legislative hierarchy and division of powers, has not been endorsed. Although this would bring the institutional role and the quality of law-making closer to the constitutional requirements, it would also imply the bringing of national constitutional orders strictly under this hierarchy.

Instead, the IGC proceeded on the basis of the principle of balance of competence between Member States and Community. The result has been the creation of the new principle of subsidiarity that has been conceived as the constitutional principle to regulate the distribution of the legal constitution (i.e., competencies and their exercise) between the Community and its Member States. The principle, which in constitutional orders inspires the whole of the competencies, has been constructed,

within the Community, to reassure Member States of their residuary competencies. The problem is that this principle did not appear to be required by the Community's constitutional foundation, which already contains a principle to regulate these issues: Member States have already agreed by Treaty which competencies can be exercised, and these can only be exercised with the unanimous or majority consent of the Member States. On the other hand, new competencies can only be exercised, via Article 235, through a unanimous vote.

The main deficiency of this design is that subsidiarity has been intended as a safeguard against the eventual invasion by the Community into the competencies Member States. Since unanimity is a more effective principle for the protection of the residuary competencies of the Member States than subsidiarity, recourse to the principle seems meaningful to prevent the exercise of competence in policy areas regulated by majority voting. However, the recourse to the principle of subsidiarity seems to be untenable in opposing the principle of majority, inherent to democracy. The question raised is: Can subsidiarity become a political principle to nullify the principle of majority? The defence of the minority is ensured by juridical guarantees and, therefore, the validity of the principle will have to be judicially established. The judiciability of subsidiarity implies a previous acceptance of a political (as opposed to judicial) discretion of the ECJ to decide on the allocation of competencies. As a consequence, new competencies could be brought under the Community scope, against the political interpretation of some Member States. Two unintended effects of the principle seem to emerge: Firstly, it could, theoretically at least, be used both as a principle to restrict or to enlarge the Community's scope of competencies. Secondly, it grants a certain discretionary political power to the Court.

Having discussed the reforms proposed for the Community's constitutional framework, the conclusion must now focus on the next question: have the reforms eliminated contradictions and/or deficiencies in the Community's constitutional foundation? The immediate response is that they have not. Regarding the Community's legal constitution, the process of transferring new competencies to the Community's ambit has not been closed. The principle of subsidiarity has been thought partially to justify, direct, or clarify this process, but it has been revealed as an essentially problematic principle: as with any other moral principle, subsidiarity will depend mainly on its interpretation. The important point is that it has raised a new question: the establishment of a general principle to be applied to *any* given competence for its allocation might be used to sanction the growth of the Community scope regardless of or despite the wishes of Member States. The principle of subsidiarity, indeed, seems to open a dialogue on a federal model of distribution of competence. Moreover, subsidiarity seems to require also the establishment of a

hierarchy of laws that, in accordance with that principle, reflects the involvement of several legislative bodies at different levels. Although the 1991 IGC has not finally incorporated the principle of hierarchy of laws into Community law, the debate is, by no means, closed.

The institutional reforms have been substantial in number: the creation of a new codecision procedure, the establishment of a procedure for the approval of the Commission by the EP, and an increase in the number of areas for majority voting. These reforms have to be evaluated in the light of another question put forward in the introduction: have the deficiencies identified in the Community's constitutional framework been addressed? In this respect, the evaluation of the reforms results in a mixed judgement. Institutional reform proceeded in a relatively consistent fashion in addressing the deficiencies identified in Chapter 3 around the issues of democratic deficit and legitimacy. Community procedures, from the point of view of the constitutional principles of division of powers and democracy, have been improved. However, institutional reforms have been inconclusive. Issues such as the generalisation of the principle of majority voting, the reinforcement of the executive role of the Commission, and a more active EP role in the legislation-making process featured already as eventual reforms before the 1991 IGC and, therefore, they will resurface again.

Some constitutional provisions, such as the Preamble (where the principles for a teleological development are included), and the provisions on amendment and enlargement have been expelled from the Community scope. The removal of these elements could be seen as depriving the institutions of the broad objectives for the performance of their tasks. These changes are not likely to have an impact in the operation of the Community, though. They have been reallocated in the Union, and, therefore, it could be expected that the institutions reinterpret Community action in expansive terms, to *inform* the Union.

The second group of questions put forward in the introduction concerned the organisation of policy in areas essential to the formal sovereignty of Member States. An evaluation of the situation prior to the IGC was provided in Chapter 4. The initial question was: What are the innovations introduced through creating Union policy in these areas? The most important one is the codification or systematic definition through a legal instrument of fairly precise obligations and commitments on certain policy areas, as well as providing some instruments to execute them. Codification is particularly significant for the area of HAJC, which had operated in a very informal fashion (cooperation sometimes lacked even a legal foundation). The methods defined

are similar in CFSP and HAJC: the starting point is coordination, from which joint action may be attained. This reflects the will of Member States to retain the maximum degree of control over policy in these areas. Regarding the instruments, specific ones have been provided in the area of HAJC (conventions and, eventually, Community legal acts). Regarding procedures, the introduction of the principle of voting in CFSP is, by itself, a major innovation that will establish the starting point for a further step: the definition of voting modalities. Although majority voting has been provided for, it requires the paradoxical previous unanimous backing from Member States, which may virtually equate it to a unanimous vote.

The second question was: What kind of constraint do these areas place on the sovereignty of Member States? Both areas have been essentially organised through intergovernmental arrangements and, from this point of view, they are rather an articulation and consolidation of relations between Member States than a politico-legal element required in such form by the Union. In these areas, the existence of the Union will pose a limitation to the unfettered action of Member States, but it will not abolish their legitimate right to assert their separate policy if they so wish. Member States have avoided any derogation of their formal independence and supremacy on foreign affairs and security policy by designing a politico-legal framework that avoids establishing binding legal commitments and relies on a political commitment to cooperate: this commitment is not guaranteed by procedures for compliance or institutional control. Member States have instituted an instrument to improve the effectiveness of refined cooperation between them but this does not imply *automatically* one foreign and security policy or even joint Member States' policies.

The extreme case is defence policy. The absence of any provision developing a specific Union's politico-legal framework (i.e., legal binding procedures and methods plus institutions) is consequence of the unwillingness of Member States to sacrifice this area, which is essential for their sovereignty, although they do accept mechanisms to improve intergovernmental cooperation. The function of implementing policy entrusted to the WEU would improve marginally the effectiveness of Member States' military actions by linking them to the rest of the foreign policy of the Union. However, this vertical consistency does not imply a horizontal consistency, since the WEU is mainly a consultation forum based on consensus and respects the discretionary commitment of individual governments (with the exception of the case of automatic response in the event of attack).

The constraints on the formal sovereignty of Member States seem to be of a different nature in each area. On CFSP, the establishment of the Union creates a legal basis that gives priority to the organisation of policy among Member States rather than between any of them and a third party. The second constraint is the reliance on

the Community's constitutional framework, which has intensified their character as paraconstitutional areas. Institutionalisation has formally and legally established the Council as the institution in charge of policy (instead of the Ministers of the Member States) and has granted the Commission a shared initiative right.

At this stage, there is adequate evidence to respond to the third question put forward in the introduction and relating to these areas: What are the internal sources of contradiction in the construction? Regarding CFSP, it has been argued that divergence of views was a previous obstacle to achieving a common policy. Clearly, the CFSP (as well as HAJC) attempts to accommodate two different aims: to provide the basis for acting as one actor, while respecting the possibility of having twelve actors. From this point of view, it does not remove the obstacle mentioned but implies a set of methods and procedures through which the search for a common policy will be preferred to the expression of divergent views. The implications of this are twofold: on the one hand, the failure to reach a common view may lead to inaction. But inactivity, again, may stimulate the improvement of methods and/or procedures to produce active policy. On the other hand, the central elements of CFSP have not been properly constructed; for instance, the difference between joint action and cooperation in terms of substance as well as its contradictory nature (i.e., efficiency of the action and tolerance of national veto) seem to be a preliminary source of tension.

Regarding HAJC, its contradictory nature is due to the fact that it has not been conceived as purely intergovernmental; its most important element is the procedure for communitarisation of policy. Intergovernmentalism will still be the main method and Community action is conceived as a second option, but given the latter's potential to produce effective results, it may easily displace intergovernmental cooperation as the policy method. This seems to allow a gradual evolution towards the Community framework, starting from cooperation and progressing to common action, then transferring to a Community method with derogations, finally to achieve a fully fledged Community procedure.

For both areas, CFSP and HAJC, the contradiction seems to lie on a pragmatic or operational level: the principles that inspire politico-legal construction (for instance, efficiency and effectiveness) seem to be at odds with the prevalence of the separate Member States' legal and political supremacy that might justify actions or policies that may call into question Union policy. Member States find themselves in a situation in which their requirement for efficiency and effectiveness drags them towards the Community framework whilst they want to retain the looser arrangements under intergovernmentalism.

Finally, the question placed in the introduction regarding citizenship was: Does the creation of a Union citizenship imply the creation of a political subject above the nationalities of Member States? The concept of union citizenship created during the IGC, examined in Chapter 10, amounts to a catalogue of rights that can be creatively enlarged. These rights, however, are superimposed on the condition of national of a Member State. The Treaty on European Union has formalised or constitutionalised certain rights already existing within the Community ambit; it has introduced certain new rights and, above all, it has provided a solid basis for further expansion of the catalogue of rights attached to citizenship. From this point of view, it represents an advance on the situation as it was under the Rome Treaty and the SEA. The institutional role for the development of the dynamic character of citizenship will be the determinant factor in producing a qualitative leap forward.

However, citizenship of the Union has not superseded nationality of the Member States, in much the same way as the European Union has not abolished the sovereign existence of the Member States. The preponderance of nationality is preserved by the lack of references to particular conditions for naturalisation of citizens from other Member States. On the other hand, among the rights excluded from the systematic construction of the IGC are those which might be considered to be related to the transmission of an entitlement to the exercise of legislative supremacy: National elections, the mechanism to actualise sovereignty and, moreover, the source of any State policy on the Union itself, are the exclusive domain of *nationals*. The same applies to referendum: without its being a procedure common to all twelve Member States, referenda have played a decisive role in Community developments. Thus, the decisive entitlement for decisions by individuals on the Union is not citizenship but nationality. The Union has provided itself with a functional category, the citizen, which still gives priority to one of the qualitative sources of legitimacy: the representation of any nationals of Member States will still remain a sufficient entitlement to challenge the legitimacy granted by the citizenship of the Union. It remains to be seen whether the basis of citizenship of the Union provided by the Treaty can evolve in the future to develop into a political subject for the Union.

Whether the outcome of the reform is approached as a legal package (the TEU) or as a political entity (the Union), it undoubtedly seems to have increased integration among Member States. Defined through interdependence concepts, institutional procedures devised by governments have increased in number, scope, detail and instruments. It is clear, though, that integration adopts different forms and stages. The essential integrative step has been the *formalisation* of the (previously informal) host of relations among Member States in a single legal instrument.

Relations in certain areas have been *codified* and *regulated* (making explicit the implicit ties among Member States) and an entity has been created instead of an elusive network of formal and informal relations. The Union seems to be an entity destined for further integration: firstly, a closer union is postulated as its main objective; secondly, there is an explicit legal commitment to reform at a fixed date, and, finally, the direction towards further integration is indicated by Treaty provisions.

This research has shown that the process of reform has not definitively solved deficiencies and contradictions. The unaddressed issues of the 1991 IGC has already implicitly established a new catalogue of possible reforms. By identifying them, actors may influence the agenda of the forthcoming reform. Whether these deficiencies, contradictions and/or weaknesses are effectively addressed is another question, as the 1991 IGC itself illustrates. As discussed in Chapter 6, the IGC has been an exercise of political determinism in creating the model of Union. This does not imply that the final design is the result of a preconceived plan; with the exception of the EP (which has no decisional role), no actor put forward a fully fledged model of Union. National delegations and institutions put forward proposals that simultaneously suited their particular interest and could be fitted into the undefined concept of union. Bargaining and negotiation between national actors were concentrated mainly on distributive and redistributive policies. This can be called sectional or particularist determinism. On the other hand, Member States have never considered reforms that would have threatened to abolish their separate existence. Therefore, they have exercised political determinism in a negative sense: they resisted the inclusion of those aspects that clash with their constitutional supremacy and independence, sovereignty and, eventually, nationality.

The final result of crossed tactics and strategic goals is a situation where there is a legal commitment to reform the Treaty; a mandate for further amendments that contains indications on what parts, elements and aspects of the Union should be revised for reform has been incorporated into the Treaty itself. Although the decision rests with national governments, the scope for the institutions to propose changes has not only been amplified but also legitimised. Therefore, it seems that the new situation offers greater possibilities to the institutions, particularly the EP, to influence future reform. More importantly, the process of reform will not *exclusively* depend on Member States' priorities. However, Member States remain the decisional masters of any further reform, and it would be foolish to suggest otherwise. Most likely, further IGCs will again become hostages to the tactical priorities of Member States, as well as wider the environmental conditions.

APPENDIX I

COUNCIL MEETINGS DURING THE PREPARATORY STAGE

Irish Presidency

Place	Date	Type	Main Issues
Dublin	28 April 1990	Extraordinary European Council	
Brussels	7 May	Ordinary	Implementation of the mandate of the Dublin summit
Parknasilla	19/20 May	Gymnich	Mandate to personal representatives.
Luxembourg	18/19 June	Ordinary	Report from the Personal Representatives. Council report to the European Council.
Dublin	25/26 June	European Council	

Italian Presidency

Brussels	16/17 July	Ordinary	Establishment of Schedule and Procedure
Asolo	6/7 October	Ordinary	Discussions on two documents from Personal Representatives. Franco-German initiative on cfsp. "Asolo list" on areas for common action on cfsp.
Rome	22/23.10.90	Ordinary	Discussions on a document from the Personal Representatives. Agreement on the Presidency Document to the European Council.
Rome	27/28 October	Extraordinary European Council	EMU Stages
Brussels	4 December	Ordinary	Discussion of an Italian Presidency document.
Rome	14/15 December	European Council	Mandate to the IGC

COUNCIL MEETINGS DURING THE IGC

Luxembourg Presidency

Place	Date	Type	Main Issues
Rome	14 Dec 90	Ordinary	Procedure of the IGC
Brussels	4 Feb. 91	Ordinary	Cfsp; Democratic legitimacy
Brussels	4 March	Ordinary; Institutional reform	
Senningen	26 March	Gymnich	Cfsp
Luxembourg	15 April	Ordinary	Cfsp; Co-decision
Luxembourg	27/28 April	Gymnich	Cfsp
Brussels	13/14 May	Ordinary	Treaty Structure; Social policy; Citizenship; Economic and social cohesion
Dresden	3 June	Gymnich	Treaty structure
Luxembourg	17 June	Ordinary	Common Provisions; Institutions and new competences.
Luxembourg	23 June	"Conclave"	Discussion of the <i>Consolidated Draft</i>
Luxembourg	2 June	European Council	

Dutch Presidency

Brussels	30 Sept.	Ordinary	Cfsp; Hajc; Economic and social cohesion; Co-decision and Social policy
Haarzuilen	5/6 Oct.	Gymnich	Cfsp
Brussels	28 Oct.	Ordinary	Co-decision; Economic and social cohesion
Brussels	4 Novem.	Ordinary	Social Policy; Hajc
Noordwijk	12/13 Nov.	"Conclave"	Discussion of the Noordwijk Draft
Brussels	2/3 Dec.	"Conclave"	Issues to be submitted to the European Council for final decision
Maastricht	10/11 Dec.	European Council	

Source: Own elaboration.

APPENDIX II

CONFERENCE SCHEDULE

Luxembourg Presidency

Date	Main issues	Preparatory Documents
8 January	Subsidiarity	Presidency Non-Paper Belgian proposal
	Enlargement of Community competences	Commission proposal; Presidency Non-Paper
16 January	Enlargement of Community competence; Debate on hacj	
22 January	Democratic legitimacy Cfsp	Presidency Non-Paper
31 January 5/6 February	Enlargement of Community competences	Belgian proposal on industrial policy Dutch proposal on development cooperation policy
	Cfsp Codecision Cfsp	Franco-German proposal Presidency Questionnaire Franco-German proposal; Italian proposal
12 February	Codecision Enlargement of Community competence	German proposal Irish contribution on economic and social cohesion Italian proposal on civil protection
20 February 26 February 28 February	Budgetary control Enlargement of Community competence Taxation	UK proposal Greece proposal on tourism policy
6 March	Codecision Citizenship	Commission contribution Spanish proposal Commission contribution
	Hierarchy of norms and transparency of Community acts Enlargement of competences	Dutch proposal on development cooperation Commission contribution British proposal
13 March	Cfsp	
20 March	Citizenship Role ESC Transparency of legislation Enlargement of Community competences	Commission contribution Luxembourg document on road safety
25/26 March 16 April	Draft Treaty	<i>Project of Articles</i>

24 April	Social policy Economic and social cohesion Citizenship	
30 April	Enlargement of Community competences - Research - Environment - Energy - Health - Trans-European networks	
21/22 May		
28 May	Structure of the Treaty	<i>Project of Articles; Commission contribution</i>
31 May	Decision-making	Presidency table on national positions on majority voting <i>Consolidated Draft</i>
17 June	Common provisions; Institutional aspects	
20 June	Enlargement of Community competences	
Dutch Presidency		
12 July	Working methods and schedule	
18 July		
25 July	Economic and social cohesion; Judicial cooperation	
19 September	<CANCELLED>	
26 September	Discussion of the Draft Treaty	<i>Dutch Draft</i>
1/2 October	Cfsp	Presidency Non-Paper, Italo-British proposal " <i>Statement on European security and defence</i> "
10/11 October	EP powers; Hajc; Enlargement of Community competences (Social policy; industrial policy; Energy)	
17/18 October	EP powers	
21 October	Economic and social cohesion	
29 October	Economic and social cohesion; Institutional reform	
6/7 November	Cfsp; Enlargement of Community competences (Social policy; Environment; Trans-European networks) Institutional reform (Role of the Regional Committee)	

SOURCE: OWN ELABORATION

APPENDIX III

NATIONAL PROPOSALS TO THE IGC ON NEW COMPETENCES

	B.	Dk	G	Gr.	S	F.	I	L.	N.	Ir.	P.	UK	Comission
Trans-European networks			X		X								X
Transport safety			X					X					
Public health		X	X		X		X		X	X	X		X
Development policy		X							X				
Education		X	X		X		X			X			X
Culture		X	X		X	X			X				X
Energy	X	X								X			X
Consumer protection		X			X								
Industrial policy	X												
Tourism				X			X						
Civil protection							X						
Youth					X		X						
Animal Protection			X										

NATIONAL CONTRIBUTIONS ON EXISTING COMPETENCES

Economic and social cohesion				X	X					X			X
Environmental policy		X	X	X					X			X	X
Research	X	X	X	X	X								X
Social policy	X	X				X							X

Source: Own elaboration

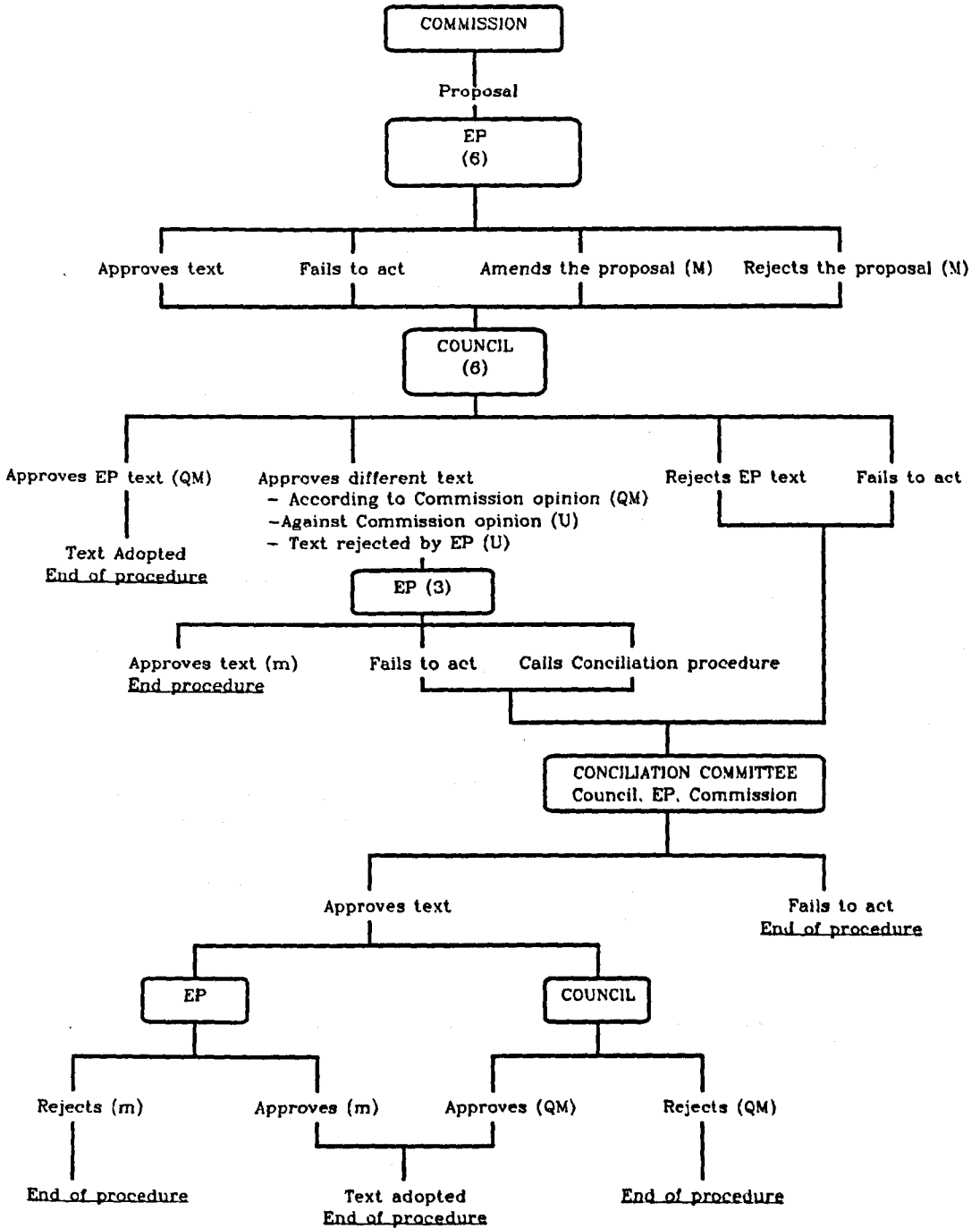
APPENDIX IV
COMPARATIVE TABLE ON THE STRUCTURE OF THE DRAFTS

EP OPINION	DUTCH DRAFT	COMMISSION CONTRIBUTION	PROJECT OF ARTICLES
Part I: Principles	Part I: Principles	- Principles	- Common dispositions
Part II: Foundations of the Community	Part II: Community citizenship	- Union citizenship	- Dispositions for the modification of the EEC Treaty establishing the European Community.
Protection of fundamental rights and freedoms	Part III: Policies of the Community [Titles I to XVI]	- Union policies	. Principles
Racism and xenophobia	Part IV: External relations of the Community	External policies	. Union citizenship
European citizenship	Title I: Common foreign and security policy	Union policy on home affairs and judicial cooperation	. Foundations of the Community
Title I.	Title II: Commercial policy	- Institutions of the Union	. Association of OCT
Title II: Agriculture	Title III: Development Cooperation	- General and final provisions	. Institutions of the Community
Title III: Free movement of persons, services and capital.	Title IV: Representation of the Community in external relations	<i>Provisions amending the ECSC Treaty</i>	. General dispositions
Title IV: Transport	Part V: Association of overseas countries and territories	<i>Provisions amending the EAEC Treaty</i>	- Dispositions for the modification of the EAEC Treaty
Part III: Policy of the Community	Part VI: Institutions		- Dispositions for the modification of the ECSC Treaty
Title I: Common rules	Part VII: General provisions		- Dispositions related to foreign and security policy
Title II: Economic and monetary policy,			- Dispositions regarding home affairs and judicial cooperation
Title III: Social and employment policy			- Dispositions general and final
Title III A; Cultural policy			
Title V: Economic and social cohesion			
Title VI: Research and technological development			
Title VII: Environment			
Title VIII: Foreign polic and security			
Part V: Intstitutions of the Community			
Part VI: General and Final Provisions			

Source: Own elaboration

APPENDIX V A

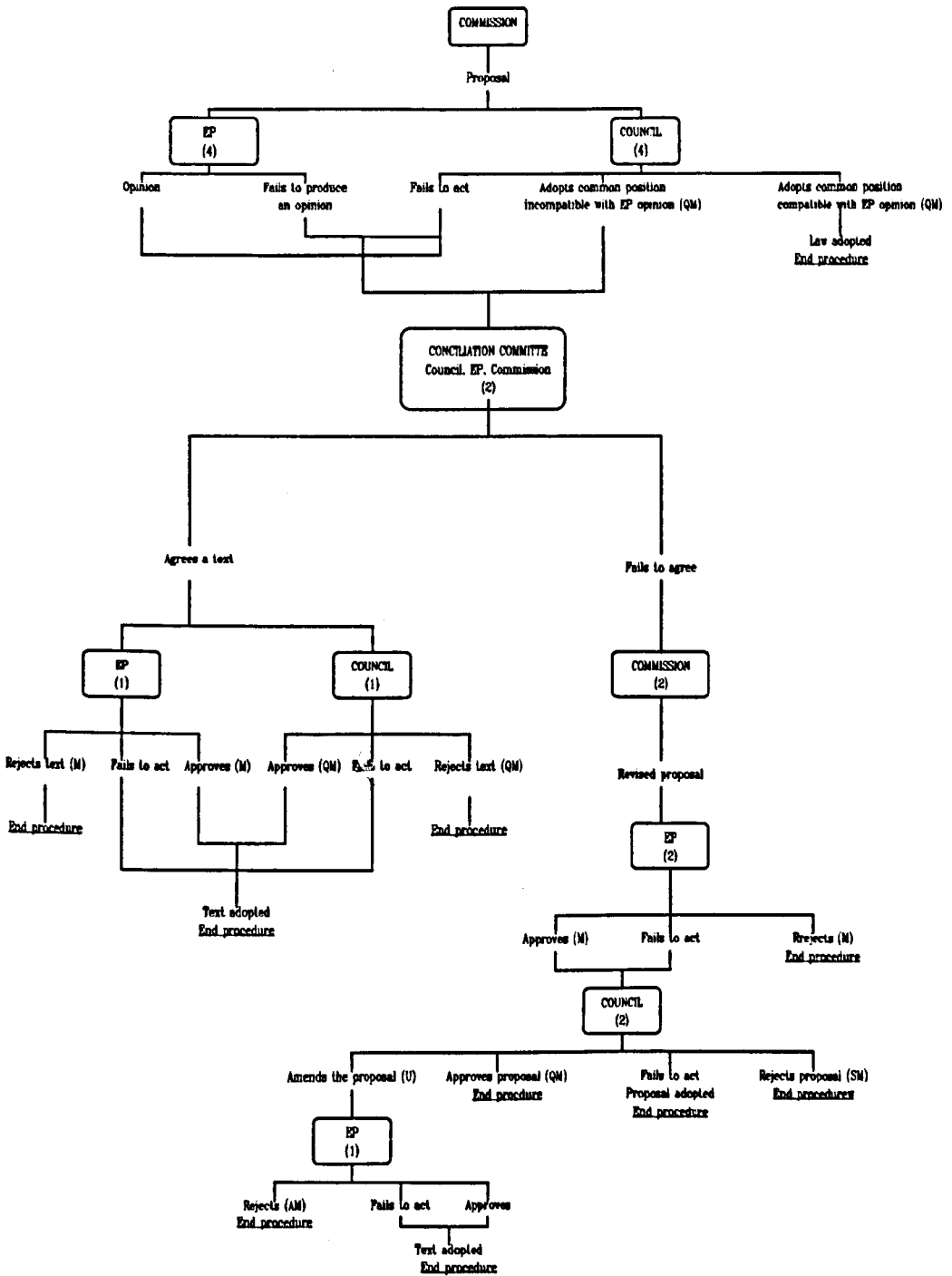
CODECISION PROCEDURE EP Proposal



Source: Article 189 b. Resolution of 22 November 1990

APPENDIX V B

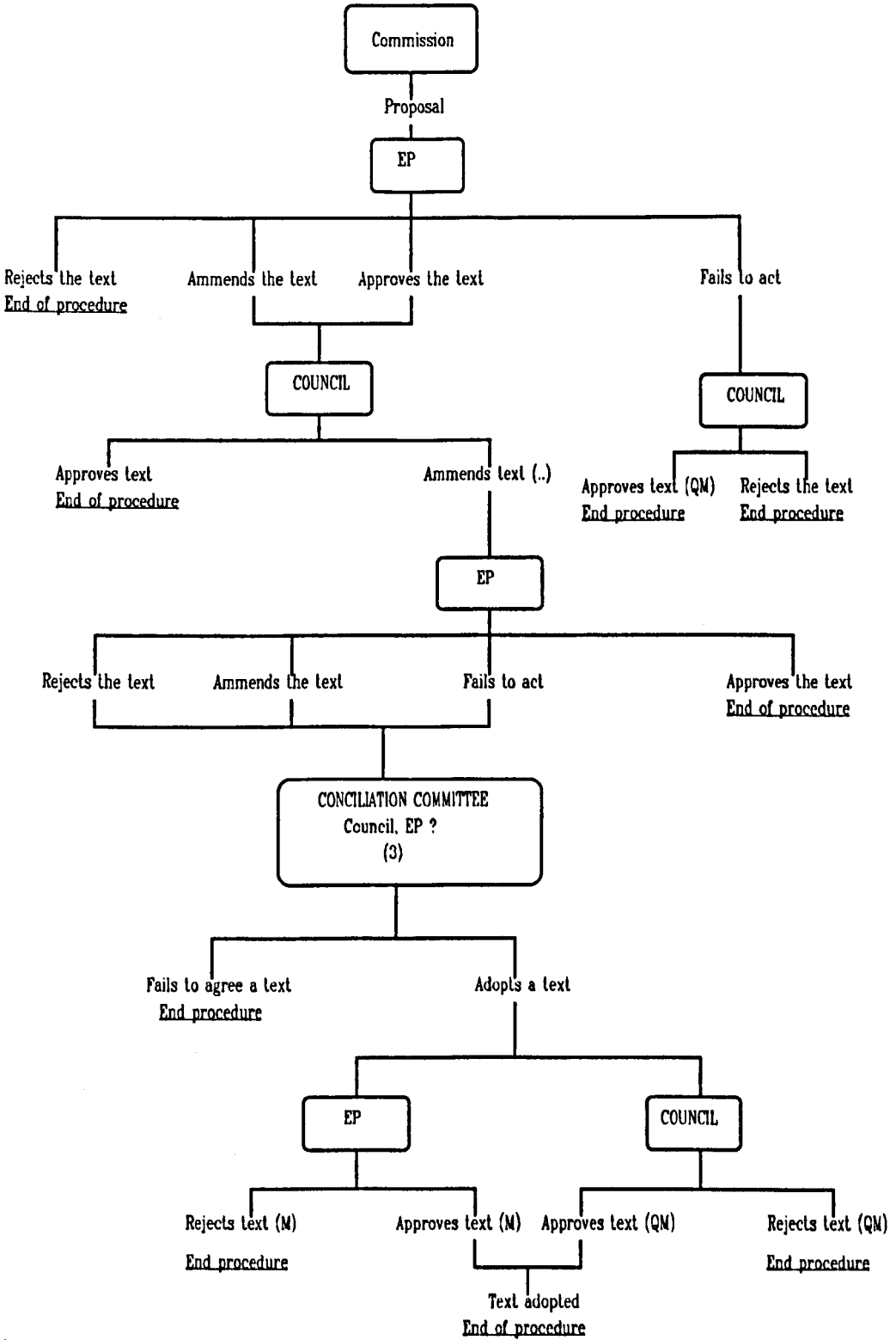
CODECISION PROCEDURE Commission contribution



Source: Own elaboration from Commission contribution COM (91) 500

APPENDIX V C

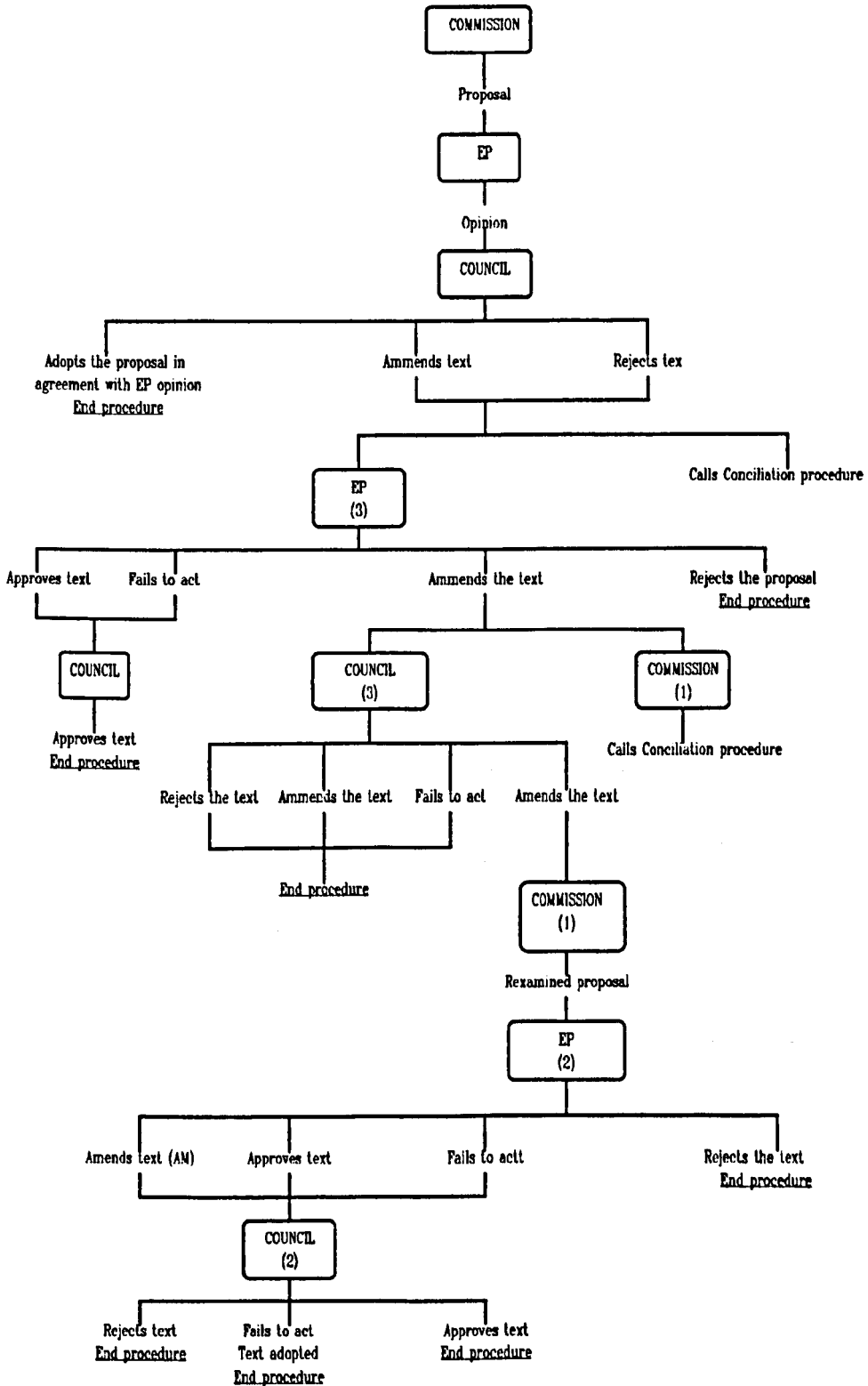
CODECISION PROCEDURE German delegation proposal



Source: own elaboration

APPENDIX V D

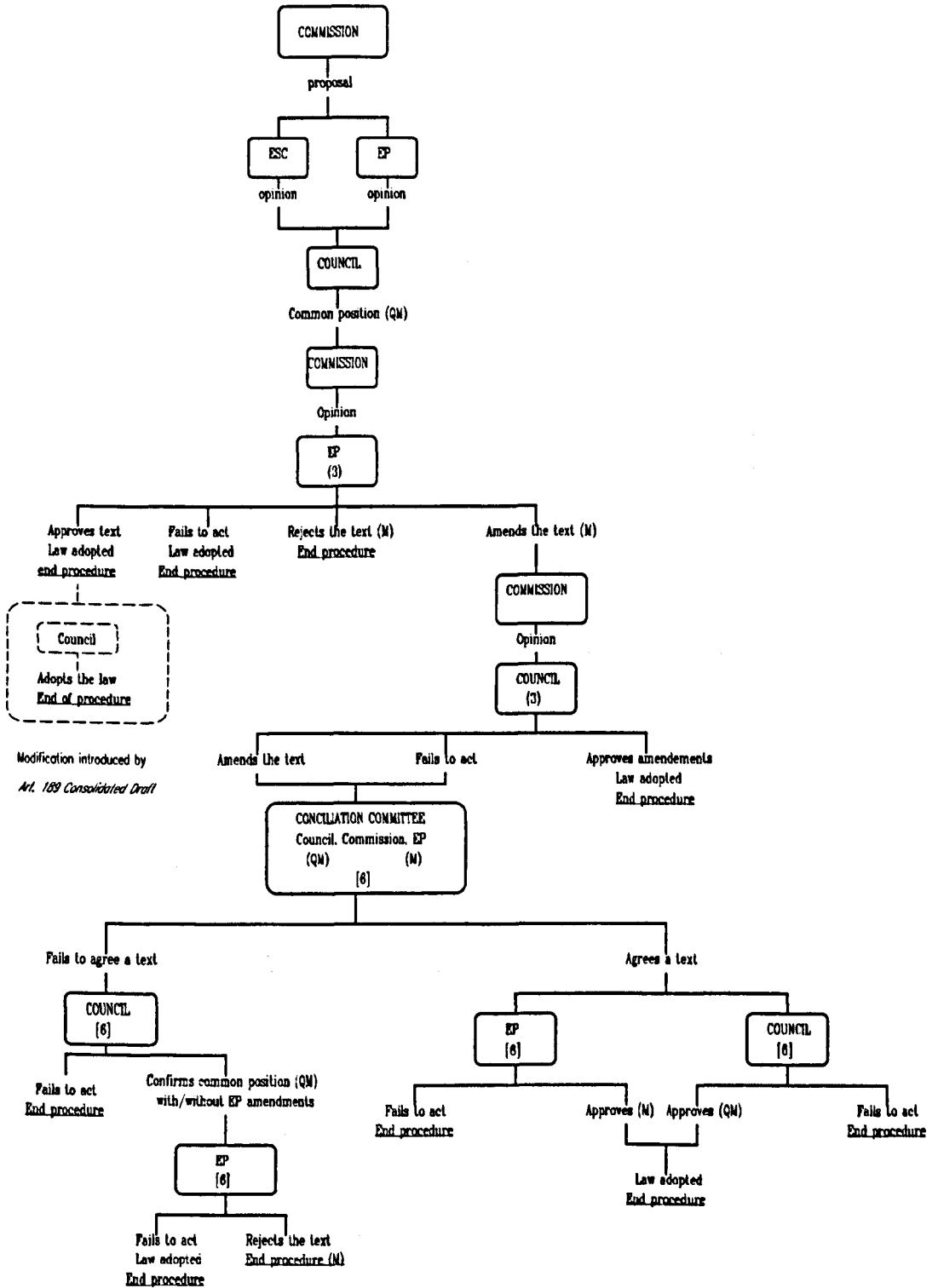
CODECISION PROCEDURE Italian delegation proposal



Source: Own elaboration

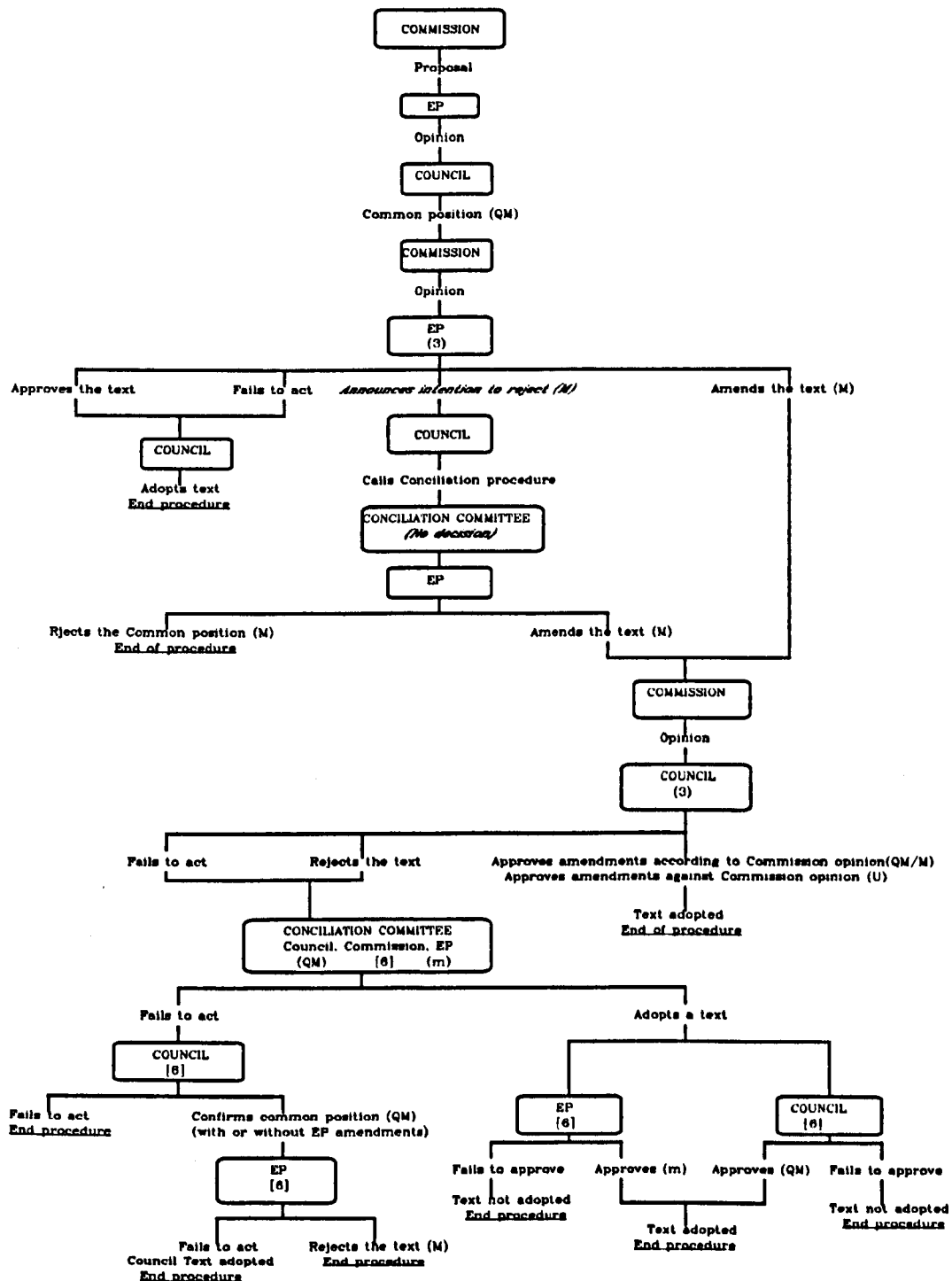
APPENDIX V E

CODECISION PROCEDURE Article 189A Project of Articles



APPENDIX V F

CODECISION PROCEDURE Article 189b *Maastricht Draft* and TEU



Appendix VI

Personal letter from David Martin, MEP in response to a questionnaire

Which are the reasons to explain the EP's preference for a single IGC?

The main reason for European Parliament's preference for a single IGC was that we were concerned that there should be one Treaty which would contain our demands in the political, social and environmental areas. We were concerned that if there were two IGCs there might be two Treaties one for economic and monetary union and one for European political union. It would then have been possible for the Member States to accept the Treaty on economic and monetary union and reject the one on political union. As it turned out our worries were not well founded as there was only one Treaty. However, I still believe that there is a tendency towards economic determinism: to believe that European Union should be economically led; a belief that if you bring in a single currency and monetary union then a political superstructure will form. I believe this has now become outdated and dangerously complacent thinking. If we want to create true European Union, a peoples' Europe, it must be politically led. The economics should follow, or be part of the politics, not the driving force. The ratification process has shown that if we fail to lead politically we will not take the citizens of Europe with us.

Was there any value in the bilateral meetings between the EP delegation and the Heads of State and/or government during the IGC?

I believe there was great value in the bilateral meetings between the EP delegation and the Heads of State and/or Government during the IGC. It gave us the opportunity face to face to put the European Parliament's view to the constituent members of the Council who would do the final negotiations. It was well worth while meeting as politicians so that the Heads of Government were hearing from the 'horses mouth' so to speak and not from officials what the EP's view was. I wish there had been more contact and bilateral meetings between members of the EP and Members of the national parliaments.

Why did not the EP present any extensive proposal on home affairs and judicial cooperation? Were there any difficulties to monitor the negotiations of this topic?

The reason why the EP did not present any extensive proposals on home affairs and judicial cooperation is that we did not, at the time, see it as one of our main priorities. In retrospect, we should perhaps have paid more attention to this area. I certainly was not happy with the pillar structure with judicial cooperation being outside the Community process.

Which would you say were the substantial differences between the Commission and the EP regarding objectives and negotiating tactics?

The substantial differences between the Commission and the European Parliament were over the balance of power between the institutions. The Commission gave top priority to economic and monetary union (EMU) and were less interested in improving Parliament's position. The Commission also opposed Parliament's demand for the right to initiate legislation. In terms of negotiating tactics, the Commission was less radical to deal with the democratic deficit and other matters which the Parliament saw as critical in dealing with the democratic deficit. Commission's tactics were partly defined by the fact that they have a formal role in that they have to make proposals. They saw themselves as being more pragmatic and the Parliament as somewhat idealistic. However, the Parliament also took wide soundings amongst their electorate and believed themselves to be putting forward an equally pragmatic position. We were convinced that unless more was done to democratise the Community the people would tend to be highly sceptical. I believe events have proved Parliament to be the better judge. Unless the Community becomes more democratic and open European Union will not go ahead.

Why the Commission opposed granting initiative rights to the EP?

Yes, the Commission did oppose the granting of initiative rights to the EP. I can only think it was because they saw this as their sphere of influence which they were not prepared to give up. I think they were wrong. If we are to truly democratise the EC the representatives of the people must be able to initiate legislation. My constituents cannot understand when they come to me with a grievance or a proposal that I cannot initiate legislation, on their behalf, in that area at the European level. They rightly ask "what did we elect you for if you cannot carry out our will?". The present system of how EC legislation emerges appears too secret and mysterious to the general public.

25 September 1992

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