

# The Law of the EUROPEAN UNION

Teaching Material



EUROPEAN COMMUNITY SYSTEM:  
THE POLITICAL INSTITUTIONS

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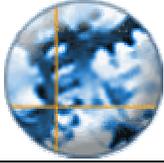
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# 1. THE COMMUNITY, ITS MEMBER STATES AND INSTITUTIONS



## NOTE AND QUESTIONS

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*The principal reading will be the excerpt from Shaw's Law of the European Union.*

*Read the following Note and Questions quickly before you go to the principal reading. Then return to the Note and Questions and address the issues they raise.*

*In any system of governance it is important to examine how power is allocated among various political institutions and how these allocations play out in the reality of political life and change over time. In a non-unitary system such as the EC, one has to examine the political process in both its vertical (Member State - Community) and horizontal (Community institutions inter se) manifestations. Decision making and the legislative process in the Community have undergone substantial change over the years. An understanding of the historical mutations is essential to an understanding of the current situation and future developments.*

*The principal Institutions in the Community system are the European Commission, the Council of Ministers, the European Council and the European Parliament (and of course the Court which also plays a hugely important political role.)*

*For purely didactic reasons readings and discussion will focus first on the Commission and Council and the interaction between them. Then the European Parliament will be added to the picture.*

## QUESTIONS

I. *Read in the excerpt from Shaw (Ch. 3) and the Commission. You need not yet read the sections dealing with the European Parliament. The sections on the minor institutions (Court of Auditors, Social and Economic Committee etc.), which are included for the sake of completeness only and will not be discussed in class, should be skimmed through.*

*Pay attention to the relevant Articles in the Treaty cited by Shaw, (but always note that the text you are reading does not reflect the amendments introduced by the Treaty of Nice, which entered into force on February 1 2003, nor the renumbering of the ToA – see Primary Sources for the table of numbering pre and post Amsterdam). Read in particular Articles 250, 251 and 252.*

*This material is largely descriptive treating the principal political organs of the Community. In this part of the course you are called to exercise as much your synthetic powers as your analytical ones: The task is to construct a systematic view of EC decision making which transcends a mere understanding of the functions and powers of each institution.*

*The following propositions and questions are designed to give direction to your reading and assist you in understanding the interaction of institutional structure and decisional process.*

A. *Note that although we speak of "the" Commission and "the" Council, these are more complex bodies. The Commission means both the College of 20 Commissioners and also the whole bureaucracy attendant to them. The Council of Ministers is assisted by the COREPER*

(Committee of Permanent Representatives) and is distinct from the European Council (of Heads of Government and State).

B. In relation to each of these bodies you should satisfy yourself that you know (as of Nice Treaty):

1. Their composition and mode of appointment.

What is the political significance of the mode of appointment?

What is the political significance of the composition of the Commission? Why is it important that there be Commissioners of all Member States? Is this "representation" in conflict or at least in tension with Article 213?

See especially the articles of the TEC on the President of the European Commission as modified by Nice and the new rotation system of the Members of the Commission.

See also the Protocol annexed to the Treaty of Nice which modify considerably the composition of the European Institutions.

2. Their functions (What are they supposed to do).

3. Their powers (how are they supposed to fulfil their functions).

4. How does all of the above change in the Constitutional treaty?

Note that it is often difficult to separate function from powers: We derive undesignated functions from powers granted and vice versa.

Consider Article 211 EC Treaty, which supposedly lists the principal functions of the Commission. Is it exhaustive? What would you consider the principal functions and powers of the Commission? Is Article I-26 of the Constitution exhaustive?

Distinguish clearly the respective roles of the Council of Ministers, the European Council, COREPER. What is the formal status of the COREPER? Why do some define it as the Community's Trojan horse within the national governments?

II. Once you are familiar with the above you must start thinking about the interaction of the institutions and the overall features of the system of governance conditioned by this particular institutional set-up.

1. Given the objectives of the EC (cf. Preamble; Articles 2, 3 EC) what criteria would be relevant for an evaluation of decision making? Are efficiency and democracy at odds with each other? The literature frequently speaks of "supranationalism"; what meaning can be given this term in the context of decision making?

2. The Treaty of Rome assigns a central legislative function to the Council of Ministers. It is sometimes said that the Framers of the Treaty opted for a confederal rather than federal decisional structure. Do you agree with this proposition? What are the implications inherent in the choice of federal or confederal systems of decision making?

3. Despite the above-mentioned basic choice the Treaty seeks to attenuate some of the consequences of a central confederal legislative organ. This it does by the functions assigned to, and powers vested in, other institutions (especially the Commission) and the voting and other decision making rules it imposes on the Council. Try and pinpoint these institutional and procedural mechanisms.

4. It is alleged that a veto power given to any one Member State with the consequent

*ability of one to frustrate the collective will of all Member States is the single most damaging feature of collective interstate decision making. The Treaty itself gives the Member States a veto power - on what occasions? Is this always damaging to the decisional process and the Community interest? How does it change in the Constitutional treaty?*

III. *In the Community there is no separation of powers between government coalition and opposition as it exists at the national level. Nor there is a confidence relationship between the Council and the Parliament. Can you identify any checks and balances that characterize the Community system? Are they sufficient from the perspective of democratic control of institutions? How could they be improved?*

IV. *Shaw is of the opinion that Commissioners are independent. However, some claim that de facto they depend too much on the national governments of their respective countries. How could the Commissioners' independence be enhanced? Has that been achieved in the Constitutional Treaty and to what extent?*

V. *Some diplomats working in Brussels claim that the accessibility of the Council documents by the public will diminish the efficiency of the decision making process. Should such a risk stop the "politique des portes ouvertes" started by the Council a few years ago?*

*See also Article I-50 (3) of the Constitutional Treaty. A large number of members of the Convention argued for a more ambitious approach to the issue of transparency, including specifically the automatic presumption of public right of access to all documents. The proposed Constitution imposes an obligation on the institutions to adopt rules on transparency.*

VI. *On the Treaty establishing a Constitution for Europe:*

*1. The Commission and the smaller Member States have joined their voices in criticising the composition of the Commission as presented in the Constitutional Treaty (see Article I-26), according to which the Commission will consist of a number of Members, including its President and the Union Minister for Foreign Affairs, corresponding to two thirds of the number of Member States (unless the European Council, acting unanimously, decides to alter this figure). Members will be selected among the nationals of the Member States on the basis of a system of equal rotation between the Member States.*

*They insist that each EU Member State must be represented by a European Commissioner. They are also determined to keep the rotating presidency of the Council.*

*In your opinion, are such demands legitimate and viable? Is such representation really necessary considering the roles which the Commission and the Council play in the institutional matrix?*

*2. See also Article I-45 on the principle of democratic equality and Article I-46 on the principle of representative democracy. From your reading, are these principles reflected throughout the Constitution?*

## 1.1 Excerpt from J. Shaw: *The Institutions of the European Union*

### Introduction

Building upon the outline presentation in 1.2 and the historical framework which has emerged through Chapters 2 and 3 in which the role of the institutions has been constantly alluded to, this chapter examines the composition, and basic powers, functions and organisation of the institutions of the EU. It is a largely static presentation, and there will be more detailed discussion of the institutions at work in Part III, which examines law and policy-making in the EU. Proposed and likely reforms of the institutions in the context of the IGC 2000 were discussed in 3.15. Internal reforms, in particular of the Commission, are dealt with in this Chapter, although the discussion below needs to be viewed in the light of the more detailed exposition of how the Commission works in conjunction with the other institutions in order to fulfil policy-making, guardianship and executive functions under the Treaties in Part III.

The institutional structure of the European Community was, from the beginning, *sui generis*. The same institutional structure as was to be found in the original Article 4 EEC is now embedded into the European Union (Article 3 TEU), and the same institutions operate across the three pillars, albeit with differing powers and functions. This is the single institutional structure for the EU (Article 3 TEU). The institutional structure resembles neither the typical governing structure of an international organisation, in that its institutions exercise sovereign powers transferred by the Member States, nor (yet) the institutional framework of a modern parliamentary democracy. It is, for example, not possible to identify a clear separation of powers between the legislative and the executive functions (Lenaerts, 1991a). The legislative function is presently divided between the Council and the Parliament, with inputs from the Commission and from a number of subsidiary bodies. The executive function is largely held by the Commission, but often under delegated powers from the Council which retains control through a committee structure, and such powers can only properly be exercised with the active cooperation of the Member States. There is no single legislative or executive procedure which can be described in simple terms. Reference must always be made to specific provisions within the Treaties to ensure that the institutions are acting within their powers as required by Article 4 EC. Within these limits, however, the institutions have broad autonomy of action, and may establish their own Rules of Procedure, which once created must be observed. The Court of Justice exercises a supervisory control over the division of powers between the institutions, as it does over the division of powers between the EU and the Member States.

The four cornered structure – Commission, Council of Ministers (now renamed Council of the European Union and termed ‘Council’ in this book), European Parliament and Court of Justice, assisted by the Economic and Social Committee – envisaged by the original Treaties of Paris and Rome was described briefly in Chapter 1. The institutions of the three founding Treaties have been merged since 1967, although the powers conferred by each Treaty upon the various institutions continue to differ. The discussion of the powers of the institutions in this chapter is focused primarily on the powers granted by the EC Treaty, with limited discussion of the power structure under the intergovernmental second and third pillars, established under the TEU. The institutional framework has gradually evolved through the Treaties, and also in the light of changed institutional practices and the interventions of the Court of Justice. For example, under the Treaty of Maastricht the Court of Auditors, which ensures financial discipline and prudence within the EU, was given the status of an institution, and a Committee of the Regions was established to make an additional advisory input into the legislative process (Article 4 EC).

The essential institutional structure for EMU was also established. The TEU formalised the existence and role of the European Council (Article 4 TEU).

Since the inception of the European Community, although the basic outline of the political institutions has remained largely the same, the details of the structure have altered considerably. Changes have been the product both of the enlargement of the EU which has necessitated the enlargement of the institutions and changes in their working patterns, and of the evolution of the functions

and activities of what is now the EU. The pattern of development has frequently been one of the *de facto* development of new activities and interinstitutional relationships, followed by subsequent *de jure* recognition of the changes in an amendment to the constitutive Treaties. At no point does a study of the Treaties alone give a complete picture of the institutions at work.

The new bodies which have emerged inside and outside the existing framework, while making the pattern of policy-making at the EU level ever more complex, have not always brought improvements in the efficiency, transparency or accountability of the activities of the EU. Despite the frequent reference in the Treaties and documents such as the Commission's *Strategic Objectives for 2000-2005* (Commission, 2000a) to making the EU and its institutions more accessible to citizens, this seems a forlorn hope given the nature of the system. Moreover, the balance of power between the institutions has altered in significant ways. For example, the intergovernmental element in the decision-making process, represented by the Council of the European Union, has exercised a more dominant role than envisaged in the founding Treaties, and has tended to prevail over the supranational element, represented by the Commission and the Parliament. This is not just because the Council has largely retained the core legislative power, but because its influence has been strengthened by the following key developments:

- the evolution of the European Council;
- the emergence of the distinctive role of the Presidency;
- the establishment of the intergovernmental structures of political cooperation, and cooperation in home affairs matters where the Council and its Secretariat take a leading role;
- the work of the Committee of Permanent Representatives (COREPER); and
- the evolution of a structure of committees of national representatives which advise, assist and sometimes control the Commission ('comitology').

In sum, the Council has expanded 'upstream' in such a way as to influence the initiation of policy, and 'downstream' so as to exercise more control over the implementation of policy. The expansion of its roles has been largely at the expense of the Commission.

The European Parliament, while unable to overcome the dominance of the Council, has gradually emerged as a more significant political actor. It has worked to maximise its most important powers through:

- its increasing input into the legislative and budgetary processes, which ensures an element of democratic legitimacy for the EU;
- its powers of supervision and control over the other political institutions which promote executive accountability.

In formal terms, at least, the Commission appears to have changed the least during the existence of the EC and the EU, as there has been no complete overhaul of it or its role under the Treaties or in terms of internal administration. In practice, it is called upon to carry out many more tasks than in the early years, and up to one half of the Commission's staff are now occupied on the management of various EU funded programmes and activities. On the other hand, despite the evolution of the other institutions and the proliferation of other bodies (including in very recent years a number of regulatory and executive agencies, which may in the future come to assist and even compete with the Commission in relation to the management of EU policies), however, the Commission still retains a pivotal role within the institutional structure. Consequently, a discussion of the political institutions needs to begin by considering the composition, duties and tasks of the Commission.

### **The European Commission: Composition and Basic Character**

The European Commission was originally intended as the 'bonding element' within the supranational institutional structure of the EU (Urwin, 1995: 81). It would drive forward the motor of integration, recommending policies for action, administering the Treaties and acting as a guardian and watchdog of the 'Community' interest. It was intended to be a technocratic and elite body, rather than a political entity. It grew out of the High Authority, created by the ECSC Treaty, which has greater powers of decision under the more detailed provisions of that Treaty. The Commission is based in Brussels, although it has an important outpost in Luxembourg.

In legal terms, the Commission is a college of twenty Commissioners – at least one and no more than two from each Member State – chaired by a President, under whose ‘political guidance’ it shall work (Article 219 EC). By convention, two Commissioners are drawn from each of the five larger Member States (France, Germany, Italy, Spain and the UK), and one from each of the ten smaller states. By convention also, the UK’s two Commissioners come from the two largest political parties – Conservative and Labour. Article 214(2) EC lays down the appointment procedure, which has been altered by both the Treaties of Maastricht and Amsterdam. It has weighted the system to create both a more strongly ‘presidential’ system, and to lend greater democratic legitimacy to the Commission as a whole by subjecting the process to parliamentary scrutiny and approval. It also politicises the Commission to a greater extent, carrying it further away from its essentially technocratic origins. It may be seen increasingly as a prototype European government. The governments of the Member States are responsible for nominating ‘by common accord’ the person they intend to appoint as President of the Commission. That nomination must be approved by the European Parliament. The other persons who are then to be appointed as Commissioners are nominated by common accord with the nominee for President. Finally, all of the nominees are subject to a vote of approval by the European Parliament, and then are appointed by common accord of the governments of the Member States. The Santer Commission of 1994 and the Prodi Commission of 1999 were both subjected to reasonably rigorous hearings before a European Parliament Committee, and approved by a vote. In the case of Santer, the vote of approval was quite close, a political handicap which continued to dog Santer and his Commission throughout its period of office.

The term of office of the Commission was extended from four to five years by the Treaty of Maastricht, and synchronised in terms of inception and departure with the European Parliament. Accordingly, the newly elected Parliament of 2004 will be responsible over that summer for scrutinising the next Commission. Commissioners may be renewed for a further five years. Since the possibility of extensive eastwards enlargement of the EU has been on the agenda, it has been equally obvious that the composition of the Commission needs to be closely scrutinized.

If the number of Commissioners carries on growing as the EU enlarges, it will become unwieldy and ineffective. It is already the case that the functions of the Commission barely allow meaningful portfolios to be allocated to all Commissioners. The 1996-97 IGC leading to the Treaty of Amsterdam was supposed to consider these issues, but ducked the question in the end, leaving it to a further IGC. It came under consideration again from February 2000, with the calling of the IGC envisaged in the Enlargement Protocol to the Treaty of Amsterdam (3.15).

According to the Treaty, the qualities of the Commissioners are their general competence and an independence which is beyond doubt (Article 213(1) EC). Although appointed by the Member States, the Commissioners are not national representatives. Their independence is guaranteed by Article 213(2) which prohibits them from taking instructions from any government or other body, from taking any action incompatible with their duties, and from engaging in other occupations, and which enjoins them to act during and after their term of office with integrity and discretion. This includes not accepting, after ceasing to hold office, certain appointments or benefits. They give a solemn undertaking at the beginning of their term to respect the obligations of office. In return, they are protected from dismissal except for failure to fulfil the conditions required for the performance of their duties or serious misconduct, in which case the Court of Justice may compulsorily retire an errant Commissioner (Article 216 EC). The Court may also deprive a Commissioner, or retired Commissioner, of his or her benefits or pension for breach of Article 213(2). In practice, the controls upon Commissioners have normally been greater than these formalities might indicate, since the possibility of non-renewal in post at the expiry of a term of office may be sufficient occasionally to remind a Commissioner that ultimately he or she owes the appointment to the exercise of national discretion. Margaret Thatcher’s well publicised refusal to renominate Lord Cockfield, the architect of the Commission’s White Paper on the completion of the internal market, for the second Commission presided over by Jacques Delors was a good example of the use of the renewal of the mandate as an instrument of discipline.

However, such sanctions may be of little assistance in controlling the actions of a Commissioner who is about to leave the Commission in any event. Such was the case of the German Internal Market Commissioner Martin Bangemann, who came to public attention in July 1999 when it emerged that after

ten years as a Commissioner he was moving directly from political responsibility for regulating the telecommunications industry to an extremely well paid executive post with the large Spanish telecommunications company Telefónica. Bangemann received almost universal condemnation for his action, with the Commission as a college expressing 'surprise' and individual Commissioners such as Neil Kinnock being publicly critical; there were calls for him to reverse his decision to join Telefónica from bodies such as the European Parliament (see Bulletin EU 7/8-1999, points 1.9.7 and 1.9.11) and from his own political party, the German Free Democrats, who also asked him to resign from the party. All of this was despite his commitment not to represent Telefónica in its future dealings with the Commission. Many observers were surprised, none the less, when the Council took the decision – in accordance with the terms of Article 213(2) – to ask the Court of Justice to rule upon whether Bangemann was in breach of his obligations and if necessary to deprive him of his pension rights (worth in excess of £50,000 p.a.) (Council Decision 1999/494, OJ 1999 L192; Case C-290/99). Bangemann promptly counterclaimed against the Council by bringing an action for annulment of its decision before the Court of First Instance (Case T-208/99). The matter was settled by a further decision of the Council in December 1999 (Council Decision 2000/44, OJ 2000 L16/73) in which the Council agreed to withdraw its case provided Bangemann simultaneously withdrew his. The principal concession made by Bangemann, apart from a confirmation that he would remain subject to his ongoing duty of confidentiality (Article 287 EC), was that he would not take up employment with Telefónica or any other telecommunications operator until July 1 2000, and that he would not represent any telecommunications operator in its dealings with the EU institutions until after January 1 2002. In return, he keeps his pension.

At the beginning of the term of office, the President allocates policy portfolios to the other Commissioners. The President's nominally free hand in this task has historically been fettered by the need to balance national interests, which jealously demand the allocation of important and prestigious portfolios to their Commissioner(s), and by the general competence and reputation of the nominees. Hence the Member States appended a Declaration to the EC Treaty at the Amsterdam IGC noting that 'the President of the Commission must enjoy broad discretion in the allocation of tasks within the College, as well as in any reshuffling of those tasks during a Commission's term of office.' In his allocation of functions, President Prodi was able almost entirely to eliminate the so-called 'Frankenstein portfolios', with the exception of one of the Spanish Commissioners, Lolo de Palacio, who was allowed to keep sectoral responsibilities for energy and transport in addition to her duties as Vice President of the Commission in charge of relations with the European Parliament. Not all the policy portfolios carry the same workload, or degree of policy coherence. Each Commissioner is assisted by a *cabinet* or private office, composed of officials who have been traditionally personally appointed by the Commissioner. The *cabinets* operate outside the formal bureaucracy of the Commission. The cabinets are headed by the *Chefs de cabinet*, who meet on a regular basis to prepare the work of the Commission itself. These meetings fulfil something of the same role in relation to the Commission as the Committee of Permanent Representatives (COREPER) in relation to the Council (4.11).

Concerns regarding these private offices, along with the ethical questions raised by the Bangemann affair, were some of the immediate questions about the integrity and probity of the Commission as a political institution which Romano Prodi was able to deal with at the very beginning of his term of office in late 1999. Codes of Conduct for Commissioners (covering the declaration of interests, missions (i.e. travelling on Commission business) and the composition and functioning of private offices) and on Commissioners and Departments (especially the relations between them) had already been adopted even before the March 1999 resignation of the Santer Commission (van Gerven, 2000: 95), and under Prodi they were updated and revised and made available on the internet. The Rules of Procedure of the Commission have also been revised (OJ 1999 L252/41) to reflect these principles. Private offices had become small fiefdoms within the Commission, and also were the sight of some of the abuses which attracted the criticisms of the Committee of Independent Experts appointed by the Parliament (3.11). They were 'europeanized' by rules requiring the maximum of six advisors per Commissioner to feature at least three nationalities, and requiring either the *chef de cabinet* or his/her deputy to be of a different nationality to the Commissioner. The Commissioners and their private offices were moved out of the Commission's main building into the buildings where the Directorates-General or Services which they effectively head are based. Appointments to the private offices are now formally a task of the President.

Each of the Commissioners gave an undertaking to President Prodi on entering office that he or she would resign if asked to because of failure to live up to high standards of conduct in public life.

These Directorates-General or Services constitute the Commission as bureaucracy or civil service, rather than political institution within the Treaty framework. Most of the day to day work of the Commission is done by a body of European civil servants who are employees of the institution. Those 'Eurocrats' concerned with policy and executive functions number around 10,000, assisted by a similar number in technical and support posts. Contrary to popular demonology about 'Brussels', this represents a small bureaucracy both in relation to the tasks which it is required to undertake and in comparison to the size of the national civil services. Eurocrats are normally appointed on the basis of entry examinations or, increasingly, come on secondment from national administrations. The Commission is divided into thirty-six Directorates-General ('DGs') or specialised Services, such as the Secretariat General, the Legal Service, the Statistical Office and the Translation and Interpretation Services (around one fifth of Commission staff work in translation and interpretation, across the EU's eleven official languages).

The size of the DGs and the Services varies, as does their degree of influence and input into the policy-making process. They are each headed by a Director General. Having long been known by their numbers as often as their names, the DGs are now known solely by their names (or sometimes acronyms). Thus DGIV is the Competition DG, DG XV is the Internal Market DG (DG MARKET) and DGV is the Employment and Social Affairs DG (DG EMP). Recent 1999 reorganisations have created a more streamlined structure for issues such as industry, the distributive trades, and aspects of enterprise and competitiveness, with a single Enterprise DG. The field of external relations has also been reorganised with separate DGs for development, enlargement and trade, but a Common Service for External Relations, and two Commissioners – one for Enlargement and the other for External Relations. Even so, there are still difficulties with matching up all the DGs and the Commissioners, who have responsibility for one or more DGs. Improvements in relation to coordination should be brought about with increased cross-Commission groups of Commissioners on issues such as equal opportunities and 'growth, competitiveness, employment and sustainable development'. These changes should overcome at least some of the difficulties associated with the rigid organisational structure and the lack of overall policy oversight within the Commission, which have often meant that policy-making is fragmented and lacking in coherence, at least until the more thoroughgoing reforms being pursued by Romano Prodi with the assistance of Neil Kinnock can come into effect (4.7). Within the DGs and Services, Prodi's short term changes have also had an effect. He has insisted, once again, on Commissioners and Directors-General *not* having the same nationality, and 'flags' on specific posts such as the Director General of the Agriculture DG who was always French have gone, appointments now being based on 'merit and experience'. Overall, of course, these are beneficial developments in a modern transnational civil service, although some of the short term changes have been dubbed 'sub-optimal' in terms of their effects, with talented and experienced officials with no obvious national allegiance being moved for no other reason than their formal nationality (Peterson, 2000).

As a college, decisions must be taken collectively by the Commissioners, who meet every week in private session. The Commission takes decisions by a simple majority vote, but members are bound by a principle of collective or collegial political responsibility, even if they opposed a particular decision. To facilitate the decision-making process, and prevent administrative overload, the Commission's own internal Rules of Procedures allow for a 'written procedure', whereby copies of draft decisions are circulated in advance to the Commissioners, and are adopted without discussion if there is no opposition. The Commission may also delegate the power to take 'clearly defined measures of management and administration' to individual Commissioners (Article 13 of the Rules of Procedure); sub-delegation of certain decision-making functions to senior members of the Commission staff is also permissible if expressly provided for in the delegation decision. However, some decisions cannot be delegated such as the decision to issue a reasoned opinion and to commence enforcement proceedings against a Member State alleged to be in breach of its obligations under EU law in accordance with Article 226 EC (Chapter 8). Following the *BASF* case (Case C-137/92 P *Commission v. BASF* [1994] ECR I-2555), where the Commission has found that undertakings have infringed the competition rules and imposes fines upon them, the undertakings in question must be confident that the operative part of the decision in question

and the statement of reasons had actually been adopted by the College of Commissioners, the Court found in *Germany v. Commission* (Case C-191/95 [1998] ECR I-5449) that the decision to issue a reasoned opinion was not a measure of administration or management and could not be delegated. The formal requirements on the College of Commissioners are, however, limited as the issue of a reasoned opinion is merely a preliminary step which does not have any binding legal effect on the addressee (and so is not in itself challengeable), so it is not necessary for the College itself formally to decide on the wording of the acts which give effect to those decisions and put them in final form.

The Court found that it was sufficient that the decisions had been the subject of collective deliberation in the College, and the information on which they were based was available to the members of the Commission.

The observance of both the Rules of Procedure, and general principles of administrative fairness and consistency, mean that the Commission must always comply carefully with the limitations set down by these procedures. This is well illustrated by the *BASF* case. In December 1988 the Commission adopted a decision finding a violation of Article 85(1) by a number of chemical firms alleged to be members of a cartel in the PVC sector. Heavy fines were imposed. The firms successfully challenged the decision before the Court of First Instance in Cases T-79/89, etc. *BASF v. Commission* ([1992] ECR II-315), which held that the decision was so vitiated by defects of form and procedure as to be 'non-existent' (15.2). It found that the measure had been altered in a way which went beyond the correction of grammatical, orthographical or typographical errors after it had been adopted by the Commission; this was a breach of the principle of the inalterability of administrative measures (Case 131/86 *United Kingdom v. Council (Battery Hens)* [1988] ECR 905). The Commission itself had considered only the French, German and English versions of the draft decision; it had left the Commissioner for competition policy matters to adopt text of the decision in the other languages of the case (Dutch and Italian). Finally, the Court of First Instance established that there was a problem over the timing of the taking of the decision, since some versions appeared to have been authenticated by Peter Sutherland – whose mandate expired on January 5 1989 – at a time when there was no text ready for notification or publication. The most controversial finding of the Court of First Instance was that concerned with 'non-existence'; this could have meant that all previous decisions of the Commission could be challenged, since no time limit applies to the challenge of non-existent acts. This aspect of the case was overturned by the Court of Justice when the Commission appealed the judgment (Case C-137/92 P) which found that there was no case for applying this extreme sanction, recalling that:

'acts of the Community institutions are in principle presumed to be lawful and accordingly produce legal effects, even if they are tainted by irregularities, until such time as they are annulled or withdrawn' (p.2647).

However, the Court of Justice agreed with the first instance finding of irregularities, stressing the vital importance of the collegial responsibility of the Commissioners:

'Compliance with that principle, and especially the need for decisions to be deliberated upon by the Commissioners together, must be of concern to the individuals affected by the legal consequences of such decisions, in the sense that they must be sure that those decisions were actually taken by the college of Commissioners and correspond exactly to its intention' (p.2650).

It rejected the Commission's view that it need only make clear its intention to take certain action without needing to be involved in the drafting and finalisation process:

'Since the intellectual component and the formal component form an inseparable whole, reducing the act to writing is the necessary expression of the intention of the adopting authority' (p.2651).

The Court confirmed the primacy of the principle of inalterability, and the paramount necessity for authentication of acts in the form provided for in the Rules of Procedure (signatures of President and Executive Secretary), as a guarantee of legal certainty (9.3). Consequently, the Court annulled the decision.

The independence of the Commission makes it uniquely qualified to give a 'European

perspective' upon the progress of European integration, although in practice it is of course never entirely separated from national or sectoral pressures and lobbies. It has developed a role as the mediator and conciliator between disparate and conflicting interests, in particular within the Council, and has operated as the broker in the resolution of numerous intractable disputes such as those over budgetary contributions and financial discipline within the EU.

The powers and tasks of the Commission are set out in Article 211 EC:

'In order to ensure the proper functioning and development of the common market, the Commission shall:

- ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied;
- formulate recommendations or deliver opinions on matters dealt with in this Treaty, if it expressly so provides or if the Commission considers it necessary;
- have its own power of decision and participate in the shaping of measures taken by the Council and by the European Parliament in the manner provided for in this Treaty;
- exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter.'

In practice, the role of the Commission is best described by dividing it into the four basic functions examined in the following paragraphs:

- the formulation of policy;
- the execution and administration of policy;
- the representation of the interests of the EU;
- the guardianship of the Treaties.

It does not, of course, have such extensive powers in relation to CFSP and JHA, or indeed in relation the post-Amsterdam Title IV of the EC Treaty on aspects of the free movement of persons, where it will share the power of initiative discussed below until 2004 with the Member States. Thus what follows should be seen best as a general summary of the powers of the Commission, and not a comprehensive statement valid in every respect for every area of policy making.

### **The Policy-Making Function**

There are three main mechanisms whereby the Commission develops the policy of the EU. It makes proposals for action; it drafts the budget which determines the allocation of resources; and it takes policy decisions within the limited powers it is granted by the Treaties.

Proposals for action take either a 'small' or a 'large' form. 'Small' initiatives are draft legislative acts prepared by the Commission for adoption by the Council (acting, where, appropriate with the European Parliament) under the law-making powers of the Treaties. Almost all the provisions of the Treaty which grant a law-making power to the Council begin 'on a proposal from the Commission...'. The Commission has a broad discretion in putting forward policy proposals, although some limits are imposed by the Treaty itself. For example, when making proposals for the adoption of measures in relation to the completion of the internal market, the Commission has been required by Article 15 EC to take into account the difficulties faced by weaker economies as they prepared for the internal market. Article 95(3) EC further requires all proposals made for measures concerned with the completion of the internal market under that provision which concern health, safety, environmental protection and consumer protection to take as a base a high level of protection.

'Large' initiatives are Commission proposals for EU action within a broad field. Perhaps the best known is the Commission's White Paper Completing the Internal Market, but others include the Social Action Programme issued as the basis for action to implement the 1989 Community Social Charter and the 1995 White Paper on Education and Training. Teaching and Learning: towards the Learning Society. Not all such projects necessarily envisage that all the measures to be taken will involve binding legislative action. Good examples are the 1997 Action Plan for the Single Market and the 1999 Strategy for the Internal Market, where legislative measures might be coupled with the publication of handbooks, for instance, to provide better information for citizens and those who might seek to rely upon EU law (e.g. economic operators in the field of public procurement).

In Title IV of Part III of the EC Treaty, concerned with the free movement of persons, the Commission shares the power of legislative initiative with the Member States for a period of five years. Under the third pillar, Article 36(2) TEU refers to the Commission being 'fully associated' with work in this area. More significantly, it has a joint right of initiative in relation to secondary measures to be taken by the Council under Article 34(2) TEU, reflecting its practice just prior to the Treaty of Amsterdam when it began to make third pillar initiatives, at least informally. However, its capacity to drive policy still remains relatively weak.

The Commission has a limited power of decision under the Treaty. Some powers are granted explicitly by the Treaty, others are implicit in its system. One example is the old Article 118 EC which gave the Commission the task of encouraging cooperation between the Member States and facilitating the coordination of their action in various fields of social policy including employment, labour relations, working conditions, vocational training and social security, and which is now in large measure replicated in Article 140 EC. In Cases 281, etc./85 *Germany et al. v. Commission (Migration Policy)* ([1987] ECR 3203) the Court of Justice held that where the Commission is granted a specific task under the Treaty, it must be regarded, implicitly, as having the power to take steps to achieve this task, including the power to adopt binding measures such as decisions. The Commission is also responsible for developing the competition policy of the EU, which involves not only the enforcement of the prohibitions in Articles 81 and 82 EC on anti-competitive and monopolistic conduct against individual undertakings (a function better characterised as enforcement rather than policy implementation), but also the development of general policy initiatives aimed at dismantling rigidities in public sector markets such as telecommunications.

To this end it has an important power of decision under Article 86(3) EC. Use of this power to issue directives has been upheld by the Court of Justice on several occasions (Cases C-271, etc./90 *Spain et al v. Commission* [1992] ECR I-5833). Other original legislative powers include Article 39(3) EC giving the Commission the power (which it has exercised) to lay down regulations establishing the principles on which retired migrant workers may continue to reside in the host state. However, the majority of the Commission's legislative or regulatory powers are not original, but are delegated to it by the Council. This has occurred extensively in the field of agriculture under Article 37 EC, in relation to customs law, and to a more limited extent in the field of competition law. The discussion of these belongs essentially under the Commission's executive and administrative function.

In the development of policy, the Commission's internal bureaucracy is assisted by internal working groups and Advisory Committees composed of national experts, or civil servants representing national interests, by networks of experts, and by 'Euroquangos' such as CEDEFOP, the EU's centre for the promotion of vocational training. Closely linked to the Commission is an ever-growing network of agencies and other similar bodies which exercise quasi-regulatory and advisory functions (4.17). The Commission – like the other political institutions – is also subject to intense lobbying by national and EU-based interest groups.

### **The Executive and Administrative Function**

Since the bureaucracy of the EU is extremely small, and largely centrally-based, it relies for the most part for the implementation of policies upon the administrations of the Member States, and, where appropriate, the network of agencies referred to in 4.3. The examples of 'direct implementation' of EU policies by the

Commission are few, and can more accurately be characterised as activities of the Commission aimed at protecting the legal fabric of the EU such as the enforcement of the competition rules and the rules on state aids (see 4.6). The Commission's role in the 'indirect implementation' of the major policy areas such as external trade, customs, agriculture and social security for migrant workers is likewise supervisory, and consists in large part in the making of rules which the national administrations must observe, and then ensuring that they are observed. The duty of loyalty to the European Community contained in Article 10 EC requires national administrations to cooperate in the implementation of EU policies. The Commission owes a duty of 'due diligence' to the Member States in its working managing the implementation of policy or procedures under the Treaties (Case C-319/97 *Kortas*, judgment of June 1 1999).

In laying down the rules for national administrations to follow, the Commission is commonly exercising a power delegated by the Council under Article 202 EC. The Council 'may impose certain requirements in respect of the exercise of these powers'. In practice, this involves the structure known as 'comitology', under which the Commission acts in conjunction with one of a number of types of committees comprising national representatives which it chairs, which will exercise a lesser or greater degree of control over it. This is one mechanism whereby the Member States have extended their input into EU activities beyond the legislative role of the Council itself (6.7; 7.13).

In its executive role, the Commission manages the finances of the EU, and supervises both revenue collection and expenditure. More than half of the funds go to the European Agricultural Guidance and Guarantee Fund, the Guarantee Section of which is charged with implementing the agricultural price support system established under the Common Agricultural Policy. The Commission also administers the structural funds of the EU aimed at ensuring economic and social cohesion, namely the European Social Fund, the European Regional Development Fund and, more recently, the Cohesion Fund. It also manages the disbursement of funding to support research, especially the RTD framework programmes (current Framework Five). The management of smaller incentive funds, such as, for example, the programme of grants available under the SOCRATES scheme to encourage higher education student and staff mobility, is now frequently contracted out to outside bodies which are responsible to the Commission for the proper management of the funds.

In scrutinizing the implementation of policy – often with a view to developing new policies – the Commission is under an obligation to prepare a number of reports. These include the General Annual Report submitted to the European Parliament (Article 212 EC), which must contain, for example, a separate chapter on social developments (Article 145 EC) and specific annual reports on matters such as competition policy, the achievement of social policy objectives, employment policy, and equal opportunities for men and women (not all of which are required by the Treaty). It is also required to draw up reports on the application of provisions such as Citizenship of the Union (Article 22 EC) every three years and was required to report on progress towards monetary union during the second stage (Article 121 EC) under transitional provisions.

### **The Representative Function**

The supranational composition and role of the Commission make it uniquely qualified to fulfil the function of representing the interests of the European Union on the wider global stage. The Commission President is recognised as an important international figure, attending international conferences, acting within international organisations and speaking on behalf of the EU, often in conjunction with the leader or foreign minister of the Member State which holds the Presidency of the Council, who tends to focus on the political representation of matters falling within the Second and Third Pillars of European Union and, since the Treaty of Amsterdam, the High Representative for the CFSP who assists the Presidency. As third countries increasingly choose to deal with the EU rather than individual Member States, the Commission's role in establishing diplomatic missions in third countries and accrediting diplomatic missions from those countries is becoming more important (MacLoed *et al.*, 1996).

The Commission also has the task of recommending the opening of negotiations with third states and of conducting negotiations leading to the conclusion of international agreements on behalf of the EC

under the procedures in Article 300 EC.

### **Guardian of the Treaties**

The Commission is the guardian of the legal framework of the Treaties, a role explicitly conferred by Article 211 EC. Its significance is such that it will be discussed fully in a separate chapter (Chapter 8). The Commission has a general power under Article 226 EC to refer to the Court of Justice alleged violations by the Member States of the Treaties and of the rules adopted thereunder. It has additional specific enforcement powers, for example in relation to state aids (Article 88 EC) and the control of the anti-competitive activities of public undertakings and undertakings entrusted with the performance of public services (Article 86 EC). It may in some circumstances authorise Member States to depart from the strict rules of Treaty; for example, it may authorise the Member States to restrict imports of third country products in free circulation in other Member States under Article 134 EC. It also supervises the right of the Member States to apply national measures to protect environmental and health and safety policies under Article 95(4)-(7), (9) EC, even where the EU has adopted harmonising measures. Under Council Regulation 17 adopted in 1962, the Commission was granted numerous enforcement powers in relation to Articles 81 and 82 EC, which proscribe anti-competitive and monopolistic conduct on the part of undertakings within the EU.

In exercising these powers, the Commission is subject to the control of the Court of Justice over the legality of its procedures. A 'softer' form of enforcement against the Member States is envisaged in the new post-Amsterdam title on Employment Policy, which it exercises in conjunction with the Council (Article 128 EC).

In its 'guardianship' function, the Commission is assisted by Article 284 EC, which allows it 'within the limits and under conditions laid down by the Council' to 'collect any information and carry out any checks required for the performance of the tasks entrusted to it.' A more specific investigative function is that given to the European Anti-Fraud Office, established in 1999 to succeed UCLAF, the Commission's own anti-fraud unit, which had been in operation since 1987, after a negative report by the Court of Auditors. OLAF remains within the Commission, but it has an independent investigatory function. Its work is scrutinised by a Supervisory Committee of five persons who are independent of the EU institutions. It carries out internal investigations in all of the EU institutions and bodies, and coordinates with the anti-fraud authorities of the Member States. The cross-institutional framework for investigations on a common basis and with the cooperation of the staff of each EU institution or body is an Interinstitutional Agreement of May 25 1999 between the Council, the Commission and the European Parliament. The Commission is at pains to point out on its website that OLAF is neither a 'secret service' nor a police force, but a legal instrument of administrative investigation.

### **Reform and review**

There has been no major overhaul of the Commission as either a political institution or a bureaucracy managing policy initiation, development and implementation since its inception in the 1950s. At the same time, with the development of Community and Union competences, the Council and the European Parliament have regularly given the Commission new and additional activities to pursue, without always transferring adequate additional resources to get these done. There has always been in addition an inbuilt inclination in each incoming Commission – in the political sense of the College and especially the President – to be seen to be pursuing a big idea and therefore to be seen as successful in the terms of that big idea. Successive Commissions would seek to develop new areas of competence, but at the expense of developing adequate systems of internal administration and management. Because the Commission adopts its own Rules of Procedure, it has been in large measure self-regulating. The bare rules of the Treaties provide, it can be argued, an inadequate legal and constitutional framework for the operation of a supranational public service. Jacques Santer, with his 'do less, better' proposal was in truth the first President to begin to take a long hard look at what the Commission actually is and does.

When referring to 'reforming the Commission', however, a variety of different dimensions are implicated. The first is the area in which there is high level paralysis, namely the composition of the College. The formula of at least one and no more than two for each Member State might have worked well for a European Community of Six, is already under considerable strain in a Union of Fifteen and will be an unworkable proposition for a much enlarged Union of anything up to twenty eight Member States. This issue was not resolved in the Treaty of Amsterdam and was placed squarely before the Member States in the context of the IGC 2000 (3.15). Yet the unwillingness of the Member States to let go of vested interests inherent in having one or two guaranteed members of the Commission has not assisted other aspects of the reform process. Second, reform of the Commission can be taken to refer to improving the network of accountability within which the Commission exists, to reduce the possibilities for mismanagement and nepotism as occurred in the context of the Santer Commission (and doubtless many of the earlier Commissions). This is 'reform' in the sense of dealing with any whiff of corruption associated with the Commission, the Commissioners and especially their *cabinets*.

These are issues which President Prodi has begun to address at the very inception of 'his' Commission with tighter rules on private office appointments, Codes of Conduct and other measures.

The third question concerns the web of control which increasingly permeates the Commission, and the absence of a management system or management paradigm oriented towards the achievement of objectives. There has historically been no effective system for prioritisation and coordination, and up to half of Commission staff are engaged with managing various programmes established by the institutions rather than the core activities of policy initiation and development and the guardianship of EU law. However, within that framework of activity, there has remarkably been evidence to indicate that no one – least of the Commission itself – actually really knows what the Commission does. This is a longer term project, one which picks up on earlier initiatives started by Santer which carry the acronyms SEM, MAP and DECODE, and on which a White Paper was issued in early 2000 under the aegis of Vice President Neil Kinnock, who is responsible for the reform programme, but under the signature of every Commissioner (Commission 2000b). This White Paper follows a number of earlier strategy and policy papers, putting forward options, and is nested within an ongoing process of consulting the Commission's own staff who could easily be a powerful force against change in this context.

The White Paper makes the following proposals, and enshrines the concrete ideas within an Action Plan incorporating a detailed timetable:

- The White Paper is predicated upon the strategic decision for the Commission to focus more on 'core functions' such as policy conception, political initiative and enforcing EU law. This means ceasing to take as much responsibility for managing programmes; this aspect of the work will be 'externalised', that is passed to bodies appropriately specialised in such tasks, under the supervision of the Commission as necessary.
- It puts in the foreground five principles which are central to a 'culture based on public service', namely independence, responsibility, accountability, efficiency and transparency, which are principles applying to the institution as a whole, the politicians who make up the College and each individual Commission staff member. These principles will allow, for example, whistle blowing by staff members concerned about improper activities, and will involve a revamped disciplinary procedure.
- The Commission is making an overall assessment of its activities and resources, building upon the earlier assessments of the Santer initiatives. It will make a hard headed assessment as to whether the resources are sufficient for the activities, and will discontinue tasks or ask for additional resources as necessary. All institutions (and, of course, the Member States as payers) must face up to these facts.
- The internal organisation of the Commission will be restructured for optimal effectiveness, including reform of the way political priorities are set and resources allocated, changes to the policies on human resources within the Commission in order to improve the working environment, and a review of the system of financial management.

- Most specifically it develops a management tool for delivering the reforms in terms of priority setting, namely 'activity-based management' (ABM). According to the White Paper, 'this system aims at taking decisions about policy priorities and the corresponding measures together, at every level of the organisation. This allows the resources to be allocated to policy priorities and, conversely, decisions about policy priorities to be fully informed by the related resources requirements' (Commission, 2000b: 9). Effectively, the Commission is entering twenty first century 'new public management' with a bang. ABM requires much greater strategic planning as well as prioritisation.

The timetable carries the programme through until 2002. The jury is out on the chances of its success, as the reform agenda remains remarkably similar to that which has failed to achieve sufficient political support from the Member States for more than twenty five years to make it a reality (Spence, 2000).

### **The Council of the European Union: Composition and Basic Character**

The Council is composed of representatives of the Member States, at ministerial level 'authorised to commit' their government (Article 203 EC). The Council represents the intergovernmental element within the institutional structure of the EU. Indeed, it is, in many respects, the main institution of the 'Union' in the strict sense of the second and third pillars, and the general treaty framework of the TEU. It meets, generally, in Brussels, where its Secretariat is based (in the recently built Justus Lipsius building). The Presidency of the Council circulates on a six monthly rotation between all of the Member States – a long established practice which is coming under challenge as the EU grows larger. The representative of the Presidency country sits in the chair at Council meetings (see also 4.12). The Council meets when convened by the President, or at the request of one of its members or the Commission. As this implies, a member of the Commission with appropriate responsibilities normally attends Council meetings, although without a vote.

The membership of the Council is not static. Although there is a body conventionally designated the 'General Affairs Council' composed of the Foreign Ministers of the Member States, which discusses issues of general concern to the EC and especially the EU, much of the practical work of the EU is undertaken by the 'technical' Councils, that is sectoral and specialised Councils. These include the 'Internal Market Council', composed of trade and industry ministers with special responsibility for the completion and management of the internal market and the 'Agriculture Council', composed of Agriculture ministers who oversee the development and implementation of the CAP. In the context of EMU, ECOFIN, the meeting of finance and economics ministers, has become increasingly important. There is a special meeting of the ministers of those Member States involved in EMU, termed 'Euro-11'. It acts as a political counterweight to the ECB (4.20). Exceptionally, the Treaties can provide for the Council to meet 'in the composition of the Heads of State or Government' (i.e. the European Council). This is the case in relation to decisions about whether Member States have met the convergence criteria which are the economic qualifications for joining the single currency (Articles 121 and 122 EC) and determinations that there have been a serious and persistent breach by a Member State of the principles contained in Article 6(1) TEU, namely liberty, democracy, respect for fundamental rights and the rule of law (Article 7 TEU). The different formations of the Council meet more or less often, as required. On average, the Agriculture Ministers meet most often (around monthly), although at different times there have been very regular meetings of the General Affairs Council, ECOFIN and the Internal Market Council.

The fragmentation of the Council weakens its effectiveness, as there is insufficient general policy coherence within the legislative activities of the EU, although this function is fulfilled in part by the Commission, the European Council, the Presidency and even the Council's own bureaucracy or Secretariat which, while smaller than the Commission's, is increasingly influential (Article 207 EC; see Hayes-Renshaw, 1999 who describes this body as having a 'shadowy existence' until the 1990s). The Council is also assisted by its own Legal Service, which is likewise influential given, for example, that it drafted 90 per cent of the articles which formed the basis of negotiations in the 1996-97 IGC (Stubb, 2000: 165). The Treaty of Amsterdam inaugurated a post of Deputy Secretary-General responsible for administration and internal coordination (Article 207(2) EC). The Secretary General is, of course, 'Mr or

Ms CFSP', the High Representative for the CFSP (3.12).

The tasks of the Council are set out in Article 202 EC. They are to ensure the coordination of the general economic policies of the Member States, to take decisions and to delegate implementing powers to the Commission. There is a tension between the first two tasks, in that they illustrate the sometimes irreconcilable dual role of the Council: to act as the forum for the representatives of the Member States, and to act as the principal decision-making body for both the European Community and the European Union. The Council also has the power under Article 208 EC to request the Commission to undertake any studies the Council considers desirable for the attainment of the objectives of the Community, and to submit to it any appropriate proposals. Used extensively this power could significantly limit the policy-making function of the Commission.

It is not possible to know exactly what happens within the Council. Indeed, the Council remains the least known of the EU institutions (cf. Westlake, 1995; Hayes-Renshaw and Wallace, 1997; Hayes-Renshaw, 1999). It has always deliberated in secret and no full record of its business is published. As it does not have a permanent political presence in the same way as the Commission, it has not established informational channels to the same degree. Press Releases and briefings by national ministers have often been the only sources of information, apart from the published record in the Official Journal of legislative acts which the Council passes, or resolutions which it adopts. Like the other institutions, it now has a website, but this is not in truth as informative as the other institutions, and rarely carries materials in all official languages. Many documents appear only in French or English, and the coverage, especially under the second and third pillar, can be patchy. In the aftermath of the Treaty of Maastricht, as openness and transparency moved onto the political agenda, the Council introduced reforms to allow for limited public and/or televised sittings, publication of voting records (concretised by the Treaty of Amsterdam in Article 207(3) EC), and a policy of limited access to its internal documents. Access to documents is now subject to the general principle in Article 255 EC, and Article 207(3) requires the Council to elaborate the rules on access to documents in its Rules of Procedures, although in fact the rules are little changed since 1993 when they were first introduced. It was unsurprising that the Council should be first institution to be the subject of an appeal before the Court of First Instance on access to documents (Case T-194/94 *Carvel and Guardian Newspapers v. Council* [1995] ECR II-2765), challenging the general practice of blanket refusals of documents. *Carvel* established the very important principle of the need for an individual case-by-case assessment of requests made by the public (10.8).

The members of the Council – as members of national governments – are not politically accountable to any EU institution for their acts. The Parliament can and does ask questions of the Council, but the answers given are not always full or helpful. However, a convention is developing that the Presidency presents its programme of action for the next six months for debate in the Parliament. The level of accountability at the national level varies between the Member States. The Danish Parliament – the *Folketing* – exercises the tightest control, with the Danish representatives on the Council being frequently required to delay EU decision-making processes in order to consult at a parliamentary level. Scrutiny within the UK Parliament is not as strict. This unsatisfactory situation persists although a number of governments, that of the UK included, insist that the democratic legitimacy of the EU is anchored through the role of national Parliaments; the position of national parliaments has been strengthened by a Protocol attached by the Treaty of Amsterdam to the TEU and the EC Treaty on their role, entrenching the duty on the Commission to pass significant policy papers and proposals to national parliaments and enforcing a six week waiting period for the national parliament to exercise its scrutiny function and institutionalising the Conference of the European Affairs Committees of the national parliaments which has been in existence since 1989.

The Council is subject, like all the institutions, to the rule of law. This largely leaves its legislative discretion unfettered, although there are a number of overriding principles which legislative acts may not violate (6.8). This can lead to the annulment of legislative acts adopted by the Council, or to actions for damages (see Part VI). Within narrow limits the Council is also responsible for a failure to act in the legislative field. In Case 13/83 *Parliament v. Council* ([1985] ECR 1513) the Parliament successfully challenged the failure of the Council to create a common transport policy using Article 232 EC. Although the Court of Justice would not substitute itself for the legislature and lay down what form such a policy

should take, the case was widely interpreted as a rap on the knuckles for the Council for dilatory exercise of its legislative function.

Article 205 EC provides for simple majority voting, unless the Treaty provides otherwise. A simple majority is constituted by the votes of 8 countries out of 15. An example where no majority is specified is Article 207(3) which provides for the adoption of the Council's Rules of Procedure, and includes provision for the Council to lay down the conditions for public access to its documents. In practice, the Treaty almost always provides for unanimity or a so-called qualified majority, the latter becoming increasingly the norm. Qualified majority voting (QMV) means that under Article 205(2) EC, the votes of the Member States are weighted as in Table 4.1.

**Table 4.1** Qualified Majority Voting

Austria	4
Belgium	5
Denmark	3
Finland	3
Germany	10
Greece	5
Spain	8
France	10
Ireland	3
Italy	10
Luxembourg	2
Netherlands	5
Portugal	5
Sweden	4
United Kingdom	10
Total	87

A qualified majority requires there to be at least 62 votes cast in favour of a measure out of 87, where the Council's deliberation is based on a proposal from the Commission. In other cases (e.g. under CFSP and CJHA where there is limited usage of QMV), the 62 votes must include the votes of at least 10 Member States (so-called double qualified majority). The weighting of votes in QMV departs in part from the theory of the equality of all states in international law, although the weighting does not fully reflect population differentials – the less so, the larger the number of Member States belong to the EU. The voting power of Germany was not strengthened after unification although it is now much the biggest Member State. Before the 1995 enlargement, the weighting of the voting and the minimum requirement had the effect of allowing what would normally be at least three dissenting Member States to block a measure. In view of that enlargement, rather than remake the whole structure, the European Council adopted the so-called Ioanninou Compromise whereby a minority of Member States with a total number of votes between 23 and 25 may temporarily block a decision due to be taken by QMV. In such a case, the Council then tries to reach a solution which can be adopted by a least 65 votes. The reluctance of the Council (and the Member States) to commit themselves fully to QMV has been one of the consistent themes of institutional development in the EC and now the EU. It has returned to the agenda – as has the weighting of votes in the Council under QMV – with the 2000 IGC (3.15).

### **The Council Acting as an Intergovernmental Body**

On certain occasions, in particular where the subject-matter of the meeting falls outside the scope of Community competence and outwith the bounds of the Union's activities under the second and third pillars, the representatives of the Member States will meet on an intergovernmental basis. The best

known instance of this was foreign policy cooperation, which has gradually been institutionalised and rendered a more hybrid intergovernmental/supranational type of policy with limited QMV and a slightly increased role for the Commission under the second pillar, and a clear autonomous role for the Council as an institution in that context of the European Union. Only in the external sphere has this formula needed to be used under CFSP, bearing in mind that the EU was not endowed by either the Treaty of Maastricht or the Treaty of Amsterdam with the clear capacity to conclude international agreements with third parties. So insofar as the EU required consensual as opposed to unilateral action in the foreign and security policy field, the formula 'the Member States of the European Union acting within the framework of the Union' was adopted, for example, for the Memorandum of Understanding on the EU Administration of Mostar, in Bosnia (Dashwood, 1999: 218). Intergovernmental cooperation between the Member States also grew up to coordinate policies on immigration, asylum, police cooperation and other home affairs matters. The Trevi Group and the Ad Hoc Group on Immigration in which the Member States met to discuss these matters were replaced by the more formalised arrangements of Justice and Home Affairs in Title VI TEU (the third pillar), by virtue of the Treaty on European Union, which were then partially communitarised by the Treaty of Amsterdam (Title IV, Part III, EC Treaty).

The institutional structures have also provided a framework for intergovernmental cooperation in certain areas which once lay at the margins of Community competence such as policy on culture, education and health. Measures adopted in this field were commonly designated 'Decision of the Representatives of the Governments of the Member States, meeting in the Council'. An example is the Resolution of the Ministers for Culture Meeting within the Council of June 7 1991, on the development of the theatre in Europe (OJ 1991 C188/3). Since the Treaty of Maastricht, such a resolution can now be adopted within the context of the EC's own limited new competence in relation to culture (Article 151 EC). Even as the competence of the Community expands, and certain areas are brought within the second and third pillars of the Union (e.g. measures on racism and xenophobia), still there are areas of cooperation and collaboration which prove themselves apt for the 'Decision of the representatives...' formulation. One good example is the Resolution of the Council of the European Union and of the representatives of the Governments of the Member States, meeting within the Council of June 1995 on the employment of older workers (OJ 1995 C228/1). However, after the Treaty of Amsterdam, this would probably fall under Article 129 EC. Thus increasingly the purely 'intergovernmental' role of the Council will become a historical anachronism. Measures of this nature should be characterised as 'soft law' which is not binding, but largely exhortatory in content and nature (6.15).

### **The European Council**

The most prominent and most powerful form of intergovernmental cooperation within the EU is the European Council. The practice of summit meetings between the leaders of the Member States has long existed. Regular meetings have occurred since 1974, and the European Council was finally formalised in Article 2 of the SEA, now superseded by Article 4 TEU. This provides that the European Council should meet at least twice a year and that it should be attended not only by the Heads of State or Government, assisted by their Foreign Ministers, but also by the President of the Commission and one other Commissioner. It is given the task of providing the EU with 'the necessary impetus for its development' and of defining 'the general political guidelines thereof'. It is required to submit a report after each meeting to the European Parliament, and make a yearly written report on the progress achieved by the EU.

The European Council has remained formally outside the structures of the European Community (i.e. the supranational pillar), not subject to the control of the Court of Justice. Conversely it has no legal power to act in pursuance of the Community's objectives or power of decision (Case T-584/93 *Roujansky v. European Council* [1994] ECR II-585). Of course, there would be nothing to prevent the Heads of State or Government meeting as the Council of the European Union, and in limited circumstances the Council *must* meet in that composition (4.8); however, one of the strengths of the European Council, which has increasingly come to fulfil a troubleshooting role in pushing forward the process of European integration and resolving the conflicts between the Member States at the highest level, lies precisely in its informality. Indeed, it was originally intended as a relatively low key meeting, and is somewhat undermined in its effectiveness by the high levels of expectation and media interest which now generally accompany its meetings. It has also been gradually co-opted in parts of the legislative process in the EC Treaty, notably

in relation to the determination of the broad guidelines of economy policies under Article 99 EC and, since the Treaty of Amsterdam, the formalised consideration of the employment situation in every Member State under Article 128 EC. Many of its 'decisions', embodied in the Presidency Conclusions have longstanding consequences for the shape and direction of the EU. Perhaps the best example are the so-called 'Copenhagen Criteria' of 1993, establishing the basis for accession to the EU and now enshrined in Article 6(1) TEU as the very liberal constitutional cornerstone of the Union itself as well as appearing in Article 49, which governs accession.

During the crisis over the ratification of the Treaty of Maastricht, the European Council probably gained an even higher status than before, with a number of skilful compromises being worked out which eventually put the ratification process back on course. Indeed, European integration processes without the European Council have now become unimaginable, although such a crucial role for the Member States in policy formulation was not envisaged by the founders of the Treaties. In practice, the European Council is not simply an opportunity, as it is sometimes portrayed in the British media, for the leaders of Member States reluctant to press further with European integration to halt the entire process. For example, Margaret Thatcher found the regular meetings of the European Council to be occasions when she could not always resist pressure for conformity, as with the agreement over the British budget rebate at the Fontainebleau summit in June 1984 (see 2.10). Furthermore, a skilful Commission President such as Jacques Delors was able to exploit alliances with pro-integrationist leaders such as President Mitterrand of France in order to carry forward the objectives of the Community. Example of this are the budgetary discipline settlement agreed at the special meeting in Brussels in 1988, or the launch of initiatives on Employment (Luxembourg in 1997), Justice and Home Affairs (Tampere in 1999) and eEurope (Lisbon in 2000) at special European Council meetings. The essence of the European Council's function, more than any other EU body, is compromise. Leaders, whose domestic fate in elections will be judged largely according to their economic success, need to find a balance between promoting the 'good' elements of integration, whilst hindering the 'bad' ones. That means choosing between those EU proposals which are perceived, from the perspective of the domestic agenda, as excessively intrusive or insufficiently beneficial, and those which are not.

### **The Committee of Permanent Representatives (COREPER)**

In addition to the help it gets from 'above' in the form of the resolution of serious conflicts at the level of the European Council, the Council also receives assistance from 'below' in the form of the preparatory work of the Committee of Permanent Representatives (COREPER), which is provided for in Article 207 EC. The Permanent Representatives are in effect the Ambassadors of the Member States to the Community, who are based in Brussels and who provide a continuity of presence which political representatives cannot. COREPER meets at two levels: COREPER I (deputy Permanent Representatives) whose remit covers more technical matters and COREPER II (Permanent Representatives themselves) who discuss the more controversial political matters, identifying the differences of view which the Council itself must settle at a political level. The workings of COREPER and the Council are further facilitated by working groups and committees which meet on a regular or ad hoc basis to discuss policy proposals at an early stage.

Formally, COREPER facilitates Council deliberations by permitting the division of the Council agenda into two parts. Part A contains items on which a unanimous view has been obtained within COREPER. These points can be agreed without discussion. Part B contains the points on which a decision cannot be reached without further discussion and probably compromise within the Council itself. These matters are regulated by the Council's own Rules of Procedure, which themselves represent, however, a fetter on the extent to which the Council can delegate effective authority to COREPER (see Case 68/86 *United Kingdom v. Council (Agricultural Hormones)* ([1988] ECR 855) where the Court declared a Directive to be void, as the Council was in breach of its own Rules of Procedure in adopting a Directive by a written vote when two Member States (the UK and Denmark) were known to be against it). The Court has also confirmed that COREPER, despite its increasingly significant contribution to the institutional life of the EU, is not an institution in the formal sense of the word, as its role is limited by the

terms of Article 151 EC, and cannot therefore take 'decisions' in a legal sense (Case C-25/94 *Commission v. Council (FAO)* [1996] ECR I-1469).

Operating parallel to COREPER under the second and third pillars of European Union are two further committees which assist the Council in its work in relation to CFSP and JHA respectively. These are:

- the Political Committee (Article 25 TEU) which monitors the international situation, contributes to the definition of policies by delivering opinions to the Council, and monitors the implementation of policies in the field of foreign and security policy generally; and
- the Coordinating Committee (Article 36 TEU – known 'pre-Amsterdam' as the Article K.4 Committee) which has a role in coordinating policy on Police and Judicial Cooperation in Criminal Matters (PJC) under the third pillar, giving opinions to the Council and preparing of the Council's discussions.

There are a number of other 'senior' committees, especially the Special Committee on Agriculture created in 1960 and the Employment Committee established by Article 130 EC, after the Treaty of Amsterdam. Beneath COREPER and these various Committees there are a huge number of Working Groups and High Level Groups which contribute variously to the formulation and agreement of policy. They are the base of the Council hierarchy and their exact dimension is 'one of the EU's great unsolved mysteries' (Hayes-Renshaw and Wallace, 1997: 97), since hardly anyone knows exactly how many Working Groups there are at any one time. Some are temporary and *ad hoc*; others are permanent. Their general task is to reduce the number of problem areas to be dealt with by COREPER and the Council. They are not forums for voting, but disagreements are noted by means of minutes and the placing of reserves.

## The Presidency

The Presidency of the Council of the European Union circulates at six monthly intervals between the Member States, originally according to an alphabetical arrangement based on the title of the country in the national language (Belgique, Danmark, Deutschland, Ellas (Greece), etc.). To avoid countries always following each other, and to allow for alternation between the first half-year and second half-year slot, the Member States have resorted to various arrangements, such as reversing the names in pairs (so that Belgium follows Denmark, etc.). Historically, in the first half of the year, the everyday work of the EU used to be dominated by the CAP; in the second half of the year, it was the budget which normally dominates the agenda. Adjustments consequent upon the fourth enlargement altered the earlier arrangements to give the Presidency for the first time to Austria in the second half of 1998, to Finland in the second half of 1999, and to Sweden in the first half of 2001. During 2000 the Presidency was held by Portugal and then France, with the 2000 IGC scheduled for completion at a European Council meeting in Nice in December. The future of the Presidency in its present form has been in question for some time, as further enlargement will make the rotation principle unwieldy, reduce the influence of the larger and most internationally respected Member States, and raise the possibility of several small (or indeed exceedingly small states) succeeding each other over a period of years. However, reform has not so far been achieved and was not placed on the agenda of the 2000 IGC.

On paper the task of the Presidency of the Council is a modest one. It is to convene and chair meetings of the Council, and to sign, on behalf of the Council, legislative and other acts adopted by the Council, or by the representatives of the Member States meeting within the Council. The Presidency acts as the Chair within all the fora convened within the EU structures, in the largest sense. This includes not only the General Council, the Sectoral Councils, the European Council and COREPER I and II, and the Committees and Working Groups, but also other fora of intergovernmental cooperation such as CFSP and PJC. In practice, however, the Presidency has become a great deal more significant, usurping in part many of the policy-making and mediation functions of the Commission. The country holding the Presidency usually sees it as an opportunity to leave a distinctive mark upon the EU scene, and to be seen by the outside world as synonymous with the EU itself. It prepares and presents a programme of action for the Presidency and prioritises particular measures which it would like to see passed in the

Council. This it can achieve by controlling the agenda of the Council, in conjunction with the Council's own Secretariat. It creates a certain symbolic separateness by hosting its own website away from the main Europa website. The state holding the Presidency tends to work closely with the Member States immediately succeeding it (a point expressly confirmed for the conduct of the CFSP in Article 18(4) TEU) and the one preceding it.

The key role of the Presidency can be illustrated through some examples. The Dutch Presidency of the second half of 1991 was given the onerous responsibility of brokering the outcome of the intergovernmental conferences on Economic and Monetary Union and Political Union, and the agreement within the European Council on the text of the Treaty of Maastricht. Its management of this matter was not positively evaluated by many observers, and it was felt to have achieved a much better outcome when it again managed the final stage of the 1996-97 IGC leading to the Treaty of Amsterdam. The uneven progress of the ratification process in late 1992 was influenced by the somewhat ambivalent attitude of the UK Presidency, although ultimately the Edinburgh European Council in December 1992 proved to be a triumph of diplomacy. Not all Presidencies contain such important events in the calendar of integration, but Member States do vie with each other to have the most 'productive' term of office, although not all share the same idea of what this means. It is not clear to what extent the EU has benefited from the tendency of the Presidency to match the Commission's functions as mediator and broker of compromise deals, as initiator of policies, and as representative of the EU towards the outside world (although the Presidency does have a particular role in relation to the EU second and third pillars).

### **The European Parliament: Composition, Basic Character and Powers**

The European Parliament is composed of 626 directly elected representatives of the peoples of the Member States. The number of Members of the European Parliament (MEPs) elected in each Member State is set out in Table 4.2 (Article 190(2) EC). The total number of MEPs may not exceed seven hundred (Article 189 EC), raising significant problems if the current proposed enlargements take place, as the application of the current formula for allocating MEPs would carry the number very quickly over seven hundred. They have traditionally been paid variable salaries, with rates differing between the Member States, and both the disparities and the levels of pay themselves in some Member States (e.g. Italy) have caused widespread concern. After the elections in 2004 all MEPS will be paid the same rate from the EU budget. There has also been public disapproval in some quarters about the rates of allowances for MEPs and their assistants, including travel allowances and daily *per diem* rates for attendance.

**Table 4.2** Membership of the European Parliament

Belgium	25
Denmark	16
Finland	16
Germany	99
Greece	25
Spain	64
France	87
Ireland	15
Italy	87
Luxembourg	6
Netherlands	31
Portugal	25
United Kingdom	87
Total	626

The Members of the European Parliament are elected in a five yearly cycle, with the first direct elections having been held in 1979. In June 1999 the first elections for the EU of fifteen were held. Since 1989, there had been a centre-left majority in the Parliament, with the Socialists as the largest single grouping with around 220 seats, followed by the European People's Party (Christian Democrats) with around 170 seats. A significant change took place in 1999; not only were a very large number of new MEPs elected for the first time giving a significant input of 'new blood' into the institution, but there was also a clear shift towards the right of the spectrum, with Party of European Socialists securing just 180 seats, and the European People's Party (which does not include the UK Conservative Party) more than 220. However, given the powers of the Parliament and the general institutional organisation of the EU, there is no governing party political coalition in the conventional sense, although the MEPs are grouped together in eight political groupings, covering nearly one hundred parties.

There is at present no uniform electoral procedure, and for many years the UK is out of step with the other Member States in so far as it continues to elect the representatives for mainland Britain (Scotland, Wales and England) on the basis of single-member constituencies with a first-past-the-post system. Proportional representation had always been used in Northern Ireland. However, for the first time in 1999 the MEPs in England, Wales and Scotland were elected by proportional representation, with multi-member constituencies and party lists, although the turn out at 23.1% was the lowest on record for a national election in the UK. There was a considerable swing towards the Conservative Party from the Labour Party (the previous elections of 1994 having been a particular low water mark in any event for John Major's Conservative Government), with the Conservative Party making opposition to the single currency a hallmark of its campaign. It is the task of the European Parliament to draw up proposals for a uniform electoral procedure or a procedure based on principles common to the Member States, and, since the Treaty of Maastricht, to give its assent to any provisions adopted for this purpose by the Council, which must act unanimously. However, any changes to the existing system will need to be ratified by the Member States according to the national constitutional requirements (Article 190(4) EC). At the Treaty of Amsterdam Article 190 EC was modified to allow for the Parliament to seek an electoral system based on the principles common to the Member States, a watering down of the 'uniformity' injunction.

The origins of the European Parliament were extremely modest. Designated the 'Assembly' in the original Treaties (a term for which Margaret Thatcher retained a great fondness), the Parliament was composed simply of delegates nominated by the national Parliaments and endowed with a narrow range of consultative and supervisory powers. Until the changes introduced by the Single European Act, the only input into the legislative process which was given to the Parliament (a name which it gave itself from 1962 onwards, and which was formally recognised in the Single European Act), was to be consulted by the Council on proposals made by the Commission. It is also responsible for ensuring the accountability of the Commission (4.14). It has always had at the very least mild supervisory powers over the Commission, including the right to put written and oral questions to the Commission (Article 197 EC) and the right to discuss the annual general report submitted by the Commission (Article 200 EC). It has also held from the beginning a draconian power of censure over the Commission, namely the power, by a two-thirds majority vote, to require the Commission to resign as a body. However, although threatened, this power has never been used, and in any event there would be nothing to prevent the Member States reappointing the same Commissioners.

Since its inception, the Parliament has grown in size as consequence of enlargement, changed its character through direct elections, and acquired an important range of new powers. Clearly, there has always been a strong case for developing the role of the Parliament within the system of the EU, both in terms of its input into the decision-making process, and in terms of its control and supervisory power over the other institutions.

One aspect of the 'democratic deficit' which the EU is generally held to suffer from relates to the way it exercises sovereign powers transferred by the Member States, but without the same degree of legislative input by an assembly of representatives elected by universal suffrage, and without the full executive accountability of the Commission or the Council to such a body. Ironically, so long as the Parliament remained a non-elected body with 'dual mandate' members (national Parliament and European

Parliament), the case for more powers could be defeated, by pointing to the low calibre and the low level of commitment of its members, who were generally more committed to their role as members of national Parliaments. Even now, some critics point to the absence of a coherent transnational party structure, the relatively low level of popular interest in the Parliament, and its alleged tendency to adopt positions on European integration which are out of step with popular feeling as reasons for continuing to limit the powers of the Parliament. The real reason may have more to do with the jealous protection of national sovereignty. The institution of a proper, effective European Parliament endowed with the full range of legislative and supervisory powers associated with parliaments in liberal democracies would mean acknowledging that the EU had in truth reached the stage of something approaching a federal association. At present, however, democracy is suffering, since power has been effectively taken out of the hands of national Parliaments, and given to Ministers who are not collectively responsible to any representative body. A step towards the enhancement of a 'European' party system was introduced in Article 191 EC which asserts the importance of political parties at the European level as a factor promoting integration, since they contribute to forming a European awareness and to expressing the political will of the citizens of the Union.

The Parliament has the power to organise its own work by adopting Rules of Procedure (Article 142 EC). It has regularly amended these Rules in order to give maximum effect to its role in the institutional structure (Nicoll, 1994); in 1999 they were in their fourteenth edition (OJ 1999 L202/1). For example, it was through amendments to the Rules of Procedure that 'congressional-style' hearings for individual Commissioners prior to the vote of approval were established. In relation to its input into the legislative process, it has maximised the effectiveness by creating a committee structure in which the range of political views within the Parliament are represented, with 20 individual Committees responsible for preparing draft amendments to legislative proposals which are placed before the plenary session. Furthermore, to facilitate its work and in order to enable it to manage its workload, the Parliament has since 1988 been able to agree an annual legislative programme with the Commission. The Parliament also acts on its own initiative in certain policy areas. One of the best known examples is the setting up of an (internal) Committee concerned with institutional reform after the first elections in 1979 which drew up the DTEU (2.10). In January 1999 it put together an (external) Committee of Independent Experts which effectively brought about the downfall of the Santer Commission (4.14).

The business of the Parliament is managed by its President and Vice-Presidents (now 14 in number), who are elected for two and a half years from amongst the MEPs (Article 197 EC), and by the Conference of Presidents, in which the President and Vice-Presidents are joined by the Chairs of the Committees. The final say is held by the Plenary session of the Parliament, which meets eleven times a year. The current work of the Parliament is hampered by its geographical fragmentation: in accordance with established agreements between the Member States, plenary sessions are held in Strasbourg and occasionally in Luxembourg, but most of the Parliament's bureaucracy and support staff are located in Luxembourg, and Committee meetings are held in Brussels. There is longstanding conflict between the Parliament and certain Member States, since the Parliament would prefer to be relocated in a single city, but that desire was again frustrated by the European Council meeting in Edinburgh in December 1992 which largely preserved the status quo, as did the Protocol on the Seats of the Institutions appended to the TEU and the EC Treaty by the Treaty of Amsterdam.

The Parliament's lack of autonomy in this matter was reinforced by the judgment of the Court of Justice in *France v. European Parliament* (Case C-345/95 [1997] ECR I-5215) in which France contested the decision of the European Parliament to hold a smaller number of sessions in Strasbourg. The Court held that it was for the Member States to determine how many sessions were held in which cities, even if this might affect the organisation of its work by the European Parliament.

At present the European Parliament holds the following powers under the EC Treaty, in addition to those with which it was endowed under the original Treaties and described above. By Articles 272-273 EC, which were amended principally by the Budgetary Treaties of 1970 and 1975, the Parliament was given the status as co-budgetary authority with the Council, although its power, in practice, to affect how the resources of the EC are spent remains limited (7.15). In practice, the provisions of Articles 272 and 273 give 'only an approximate and rather formal guide to what actually happens [in terms of budgetary

decision-making]. It provides a framework which has been fleshed out and adapted over time in response to pressures, necessities, and convenience' (Nugent, 1999: 347). The Commission is responsible to the Parliament in respect of accounting for expenditure. The Single European Act significantly increased the powers of the Parliament by giving it the power of assent (and therefore of veto) over the accession of new members (now Article 49 TEU) and the conclusion of certain types of external agreements with third states or international organisations (now Article 300(3) EC). The Single European Act also introduced the cooperation procedure which allows the Parliament to give a second reading, and to propose further amendments, to certain legislative acts (7.4). Finally, the Single European Act extended the range of provisions where an opinion of the Parliament is required.

The Treaty of Maastricht took Parliamentary involvement in the legislative procedure one step further. The assent provisions were expanded to include the adoption of a uniform electoral procedure (Article 190 EC), reorganisation of the structural funds (Article 161 EC), certain aspects of the supervision of the ECB (Article 105(6) EC) and the amendment of the Statute of the ECB (Article 107(5) EC). It gave the Parliament a power which parallels that given to the Council by Article 208 EC to request the Commission to submit proposals to it on matters which it considers EU legislation to be necessary (Article 192 EC). In addition to widening the instances in which the cooperation procedure is to be applied (e.g. environment, vocational training), the Treaty also introduced what is termed 'Council-Parliament' co-decision as a new legislative procedure (7.5). Many (but not all) provisions where the cooperation procedure previously applied were 'upgraded' to co-decision. The Treaty of Amsterdam made limited changes to the co-decision procedure (Article 251 EC) to make it a more genuine partnership of equals, and apart from the area of EMU which was untouchable in the context of the 1996-97 IGC, made considerable progress towards consolidating the co-decision procedure as the leading basis for QMV voting on legislative proposals in the Council, coupled with intensified involvement of the Parliament. The extent to which the European Parliament is now a genuine co-legislator will be discussed further in Chapter 7.5. The default position for votes in the European Parliament is that unless otherwise provided it acts by an absolute majority of its members (i.e. 50% of MEPs, plus one) (Article 198 EC).

The Treaty of Maastricht also significantly enhanced the position of the European Parliament as the guardian of the interests of citizens of the Union. Article 193 EC empowered the Parliament to set up temporary Committees of Inquiry to investigate alleged instances of maladministration on the part of the other institutions or bodies established under the Treaties; the first such Committee was established in December 1995 to look at alleged contraventions or maladministration under the Community transit system and only one other Committee of Inquiry has been established, to monitor measures taken in relation to BSE (Shackleton, 1998).

Article 194 EC formalised a longstanding informal right on the part of all persons resident in the Union to petition the Parliament, individually or collectively, on any matters coming within the Community's field of activity which affect them directly, a right repeated for EU citizens in Article 21 EC. That provision also refers to the citizen's right to apply to the Ombudsman, appointed under Article 195 EC (4.14), whose task it to receive and investigate complaints of maladministration by the EU institutions. Delays meant that the first Ombudsman (Jacob Magnus Söderman) was not inaugurated until September 1995; he was reappointed for a second term of four years in October 1999 notwithstanding his consistently critical stance regarding standards of administration in the institutions.

The range of powers held by the Parliament in relation to the intergovernmental activities of the EU in the sphere of foreign policy has always been very limited (Bieber, 1990). Article 30(4) Single European Act merely required the Parliament to be kept informed concerning European Political Cooperation, although in practice there was a greater level of contact, channelled through the Presidency, which has reported to the Parliament regularly and held meetings with the Committee on Political Affairs. The level of involvement was little changed by the introduction of the more formalised second pillar (CFSP) and the third pillar (JHA and then PJC) by the Treaty of Maastricht and the Treaty of Amsterdam. The European Parliament is consulted by the Presidency on the main aspects and basic choices of CFSP (Article 21 TEU), and it is to be kept regularly informed by the Presidency and the Commission of the development of CFSP. It may ask questions of the Council and make recommendations, and it holds an annual debate on progress in implementing this field of policy. Under the third pillar the Council *consults*

the European Parliament before adopting certain types of measures such as framework decisions, other decisions and conventions (a significant innovation: Article 39(1) TEU), but for the rest the pattern of information, questions and debates is the same as for the second pillar (Article 39(2) and (3) TEU).

It is still not possible, even after Maastricht and Amsterdam, to characterise the Parliament as a fully operational democratic legislature. Indeed, it may well be inappropriate to take as its primary comparator national parliaments, which themselves have problems of legislative input and popular disaffection. It is, however, important to stress its symbolic role within the EU political system. It has become the platform on which statesmen and women from inside and outside the EU (e.g. President Clinton of the US or President Havel of the Czech Republic) choose to address their thoughts on European integration. The address given by Queen Elizabeth II to the European Parliament in May 1992 constituted an historic event from the perspective of both the UK and the Parliament itself in its search for greater international recognition.

Two areas of the Parliament's activities are worthy of more extensive comment in this context. First, the relationships between the European Parliament and the Commission and the extent of the latter's control over the former, in view of the momentous events of 1999; second, the evolving role of the European Ombudsman as a quasi institution in his/her own right in the EU.

### **The European Parliament and the Commission**

The resignation of the European Commission in March 1999 was undoubtedly brought about by the activities of the European Parliament in seeking to reinforce real executive accountability. Interestingly enough, however, it occurred not because the European Parliament directly used its powers to bring the European Commission to account such as the motion of censure or the rejection of a new Commission, but because of its use of its budgetary weapon (van Gerven, 2000). In this case, it was the withholding of its discharge in relation to expenditure under the 1996 budget (Article 276 EC). A motion of censure was contemplated, but eventually the lesser – and arguably more effective – choice of convening a Committee of Independent Experts (CIE) was taken in January 1999. Even before the events of 1999, Craig and de Búrca had presciently noted the significance of the budgetary powers:

'The budgetary process cannot...be separated from more general issues of institutional power within the Community. History is replete with examples of legislative bodies at national level which have used their power over the purse as a lever to improve their position in the overall constitutional hierarchy. The European Parliament is no different in this respect' (Craig and de Búrca, 1998: 102).

In its work, the CIE was influenced strongly by codes of conduct and standards elaborated for example of the UK's Committee on Standards in Public Life. In regard to relationships between the Parliament and the Commission, one of the main points of initial tension was the failure of the Commission to supply the Parliament with information it deemed necessary and which it considered that it had a right to receive under Article 276(2) EC. In other words, transparency and honesty would need to characterise future relations between the two institutions. These are just two key aspects of a broader constitutional relationship of accountability between the Commission – as the head of the EU's executive structure – and the Parliament as part of the EU's legislator and the repository of representative democratic legitimacy as a consequence of being directly elected by universal suffrage. The need for individuals as well as the collective to be held to account reinforces the argument that amendments should be made to the Treaties to enable the Parliament to require the resignation of an individual Commissioner. In the event, the effective holding to account of individual Commissioners occurred because they were specifically identified by the CIE's first report. Although the internal politics of the Commission as a College resulted in a *collective* resignation in March 1999, there was an effective *individualisation* of blame onto those individuals personally responsible for mismanagement and nepotism as well as onto the President as primarily politically responsible for the whole institution. For the future, there should be a positive synergy between the reform of the Commission and its political accountability to the Parliament.

## The European Ombudsman

The office of the Ombudsman was established in 1994 by a decision of the European Parliament. There were some delays in the initial appointment of the first European Ombudsman, Jacob Magnus Söderman, in 1995. In the brief time since the inception of this office, however, it has had a significant effect on approaches to administration and administrative law within the EU. Södermann has been reappointed for a further term of four years. The Ombudsman has not only responded with inquiries, decisions and recommendations to specific individual complaints about maladministration within the EU institutions, but he has also undertaken 'own initiative' inquiries in sensitive issues which have often highlighted areas of resistance within the institutions (note: the male gender is adopted here when discussing the Ombudsman's work, as there has so far only been one *male* Ombudsman). Such inquiries tend to result from a consistent pattern of complaints. Areas of particular concern have been the following:

- access to documents and the general issue of transparency;
- the role of the Commission *vis-à-vis* complainants in relation to Article 226 EC enforcement proceedings which may be brought against Member States;
- the need for a preventative Code of Good Administrative Behaviour for all of the institutions and bodies of the EU, especially in relation to dealings with the public;
- the problem of late payment of its creditors by the Commission.

In relation to the latter point, the Ombudsman has highlighted the hypocrisy of the Commission in proposing harmonising national laws on late payments by undertakings and public authorities in the Commission, without learning the lessons which it points out in the proposed directive about the effects of late payment in terms of damage to the reputation of the bodies concerned and the causing of unnecessary insolvencies amongst creditors.

A Statute and Regulations govern the performance of the Ombudsman's duties. To be investigated, all complaints must be within the 'mandate'. That is, they have been submitted by a person or body entitled to submit a complain (any natural or legal person established in the EU), they must be against an institution or body of the EU, they cannot be against the Court of Justice or Court of First Instance acting in their judicial capacity, and they have to concern maladministration. According to the Ombudsman's Annual Report for 1997, 'maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it'. The office of the Ombudsman was from its inception in the Treaties linked with Union citizenship, although in fact its origins lie outwith the Spanish proposals which led to what are now Articles 17-22 EC and are linked to a desire to replicate one of the most successful national Ombudsmen, the Danish one. Many of the rights laid down for 'citizens of the Union' in the Treaty are directly concerned with freedom of movement. Unsurprisingly, therefore, the Ombudsman receives a large number of complaints about free movement issues which are inevitably found to be outside the mandate. This is because they concern obstacles – mainly based in national law or resulting from the actions of national, regional or local administrations – to freedom of movement for citizens. There are also criteria of admissibility which the complaint must satisfy before it can be investigated: it must identify the author and subject matter of the complaint, it must be submitted within two years of the events complained of, and it must be preceded by prior administrative approaches to the institution complained of.

The Ombudsman mounts an inquiry if he finds grounds. Once the investigation begins, the institution may settle, or the citizen may drop the complaint. If no maladministration is found after enquiry the case is closed by the Ombudsman. If maladministration is found, the Ombudsman attempts to bring about a friendly settlement between the parties. In cases where a friendly settlement is not possible, or the basis for any settlement is not acceptable to the Ombudsman, he can close the file with a critical remark to the institution or body concerned, or make a formal finding of maladministration with draft recommendations. A critical remark is considered appropriate for cases where the instance of maladministration appears to have no general implications and no followup action by the Ombudsman seems necessary. In cases where followup action by the Ombudsman does appear necessary (that is, more serious cases of maladministration, or cases that have general implications), the Ombudsman

makes a decision with draft recommendations to the institution or body concerned. The institution or body must then send a detailed opinion to the Ombudsman within three months; this could consist of acceptance of the Ombudsman's decision and a description of the measures taken to implement the recommendations. If an institution or body fails to respond satisfactorily to a draft recommendation, the Ombudsman can send a report to the European Parliament and to the institution or body concerned which may contain recommendations, a mechanism which he does not invoke very often. Important Special Reports have been made on access to documents and the adoption of Codes of Good Administrative Behaviour. Even where the Ombudsman finds no maladministration, the process of complaining and the response of the institution which is forced to explain itself can be salutary for the complainant.

A number of interesting facts are revealed by the statistical analysis of complaints contained in the most recent Annual Report to be published (1998). 1360 complaints were sent directly to the Ombudsman, of which over 1200 were from individual citizens as opposed to companies or associations. A high proportion of complaints are outside the mandate and need to be transferred to the national Ombudsmen or to the European Parliament as a petition. Even within the mandate, there were only just over 200 admissible complaints. Within that category some 40 revealed no grounds for enquiry, so since the Ombudsman closed 185 files with reasoned decisions in 1998, it is clear that he and his office are keeping on top of the workload. Amongst the larger Member States, it is only from Spain where the number of complaints as a percentage of the total exceeds Spain's population as a percentage of the total EU population. This is a more common phenomenon amongst the smaller Member States as the number of complaints from Belgium, Portugal, Finland and Ireland as a percentage of the total significantly exceeds the population of these Member States as a percentage of the total population.

The Ombudsman has made a significant contribution to good administrative practice in relation to access to documents, although this is clearly an area where his role is subsidiary to that of the Court of Justice. He rapidly pushed through an own initiative inquiry which pushed the generalised adoption of codes of practice and rules on access to documents for all EU institutions (except the Court of Justice), and other bodies established under the Treaties and decentralised agencies (on the scope of access to documents, as opposed to the good practice of having codes, see further 10.8) (Södermann, 1998).

In April 2000, the Ombudsman adopted a further Special Report to the Parliament on the adoption by the institutions and bodies of Codes of Conduct on Good Administrative Behaviour (European Ombudsman, 2000). The Special Report arose because of his dissatisfaction with progress being made on a piecemeal basis, and led to his recommendation that a general administrative law in the form of a Regulation should be adopted by the EU legislature to give effect to this principle. According to the Ombudsman,

'A Code which contains the basic principles of good administrative behaviour for officials when dealing with the public is needed both in order to bring the administration closer to the citizens and to guarantee a better quality of administration, thus helping to prevent instances of maladministration from arising. Such a Code is useful for both the Community officials, as it informs them in a detailed manner of the rules they have to follow when dealing with the public, and the citizens, as it can provide them with information on which principles apply in the Community administration and on the standard of conduct which they are entitled to expect in dealings with the Community administration.'

This in a sense sums up the function of the Ombudsman to take preventative action in relation to maladministration, as well as to offer recourse for citizens and others. He has been able to make a significant contribution to development of administrative law and practice in the EU (see generally Harlow, 1999a), as well as to support the evolution of fundamental rights and general principles of law, albeit that the resolution of cases which he offers remains essentially 'soft' in comparison to a judicial resolution (Bonnor, 2000). On the other hand, because of the flexibility of his responses, and his capacity to focus on all of the institutions and bodies of the EU, the Ombudsman appears to have the capacity to make change occur more quickly than might otherwise happen.

## **The Economic and Social Committee (ECOSOC) and the Committee of the Regions (CoR)**

The idea of the ECOSOC, and, since the Treaty of Maastricht, the Committee of the Regions, is to provide for the formal representation, within the institutional structure, of disparate economic, social, and regional interests. The ECOSOC originated in a similar body – the Consultative Committee of the European Coal and Steel Community (Article 18 ECSC). Under Article 257 EC the ECOSOC is given advisory status, and this in practice means being consulted by the Council and Commission where the Treaty so provides (e.g. Article 95), or where those institutions consider it appropriate (Article 262 EC). The European Parliament can consult the ECOSOC, although in practice the two bodies are more likely to be in competition for status within the system. It also issues ‘own initiative’ opinions (Article 262 EC). The instances of consultation in relation to legislative proposals have evolved over the years, and most recently it was given consultative status by the Treaty of Amsterdam in relation to employment policy, social policy and public health.

The 222 members of the ECOSOC are allocated between the Member States on a basis which is broadly proportionate to size and population. They are appointed by the Council, on the nomination of the Member States, for four years, with appointments renewable. The members are appointed in their personal capacity and must not be bound by any mandatory instructions. This is strengthened by Article 258 EC which insists that the members of the ECOSOC must be ‘completely independent in the performance of their duties, in the general interest of the Community’.

The interests to be represented are listed, on a non-exhaustive basis, in Article 257 EC. They include representatives of producers, farmers, carriers, workers, dealers, craftsmen and professional occupations and representatives of the general public. In practice, members are divided into three categories: I – employers; II – workers; III – others, including agricultural interests, professional associations and consumers. The ECOSOC is organised in specialised sections (e.g. agriculture, transport, etc.) which prepare draft reports on legislation for consideration in plenary session.

The Treaty of Maastricht established a Committee of the Regions, composed of representatives of regional and local bodies (Articles 263-265 EC). Like the ECOSOC, the CoR has 222 members, divided on the same basis amongst the Member States. The provisions on the appointment of members by the Council and the organisation of the work of the Committee largely parallel those governing the ECOSOC. The Treaty of Amsterdam protected the CoR against infiltration by MEPs, forbidding a dual mandate (Article 263 EC). Like the ECOSOC, the CoR undertakes much of its work in commissions and subcommissions. It is to be consulted where the Treaty so provides, and where the Council and Commission so decide, especially in relation to matters of cross-border cooperation. It may be consulted by the European Parliament. It may also issue own initiative opinions, and is to be advised of instances where the ECOSOC is to be consulted, but it is not, with the possibility that it might then decide to submit an opinion, believing there to be significant regional interests affected (Article 265 EC). The provisions on EU policy in the field of culture introduced by the Treaty of Maastricht (Article 151 EC), as well as the revised provisions on economic and social cohesion (regional policy) (Articles 158-162 EC) provided for the consultation of the Committee of the Regions but the amended provisions on environmental policy did not, despite the obvious links with regional policy. This point was changed by the Treaty of Amsterdam (Article 175(1) EC). Amsterdam also extended the CoR’s remit to consultation in areas such as employment, social policy, public health and transport. The provisions on the CoR are thus a mixture of the original mandate etched out by the Treaty of Maastricht, plus ‘a significant if undramatic enhancement of the status of the Committee’ by the provisions of the Treaty of Amsterdam (Duff, 1997: 172).

The ECOSOC and the CoR encounter a good deal of criticism as being irrelevant wastes of time and money (e.g. Weatherill and Beaumont, 1999: 169). There is already fierce direct lobbying of the political institutions by interest groups (7.9), and the institutions are regarded as relatively open to influence. In areas of particular importance, the Treaties bypass the ECOSOC by establishing bodies such as the Employment Committee (Article 130 EC), or by constitutionalising the status of the social dialogue in the area of social policy law-making (Articles 138-139 EC). Certainly, in many analyses of democracy within the EU they are frequently largely ignored (e.g. Lord, 1998; Laffan, 1999). On the other hand, within the EU viewed as a multi-level system of governance with diffuse *loci* and processes for the

representation of interests as well as allowing for the citizen to have multiple avenues to express his or her identity, the CoR and ECOSOC can be viewed as part of the overall framework for the representation of the interests of citizens (Lenaerts and de Smijter, 1996).

### **Agencies and Other Bodies Established under the EU Treaties**

Since 1990 there has been a proliferation of independent agencies endowed with specific functions or limited delegated powers under the EU Treaties. They vary greatly in composition, nature and scope of powers (although almost all have separate legal personality) (Kreher, 1997). Long disputes between the Member States over the location of some of the most important agencies have caused delays. Some however are longstanding such as CEDEFOP (European Centre for Development of Vocational Training, 1975) which has recently relocated from Berlin to Thessaloniki in Northern Greece, and the Foundation for the Improvement of Living and Working Conditions (1975), located in Dublin in Ireland. The most important of the new bodies are the following:

- European Environment Agency: Copenhagen, Denmark (largely informational in its role, in describing the present and future state of the environment);
- European Agency for Health and Safety at Work: Bilbao, Spain (provision of information of a technical and scientific nature for the EU, Member States and others);
- European Monitoring Centre on Racism and Xenophobia: Vienna, Austria (provision of objective, reliable and comparable data at European level on the phenomena of racism, xenophobia and anti-Semitism for the EU institutions and the Member States).
- European Drugs and Drug Addiction Monitoring Centre: Lisbon, Portugal (provision of objective, reliable and comparable information at European level concerning drugs, drug addiction and their consequences)
- European Training Foundation: Turin, Italy (responsible for the delivery of training aid to the countries of Central and Eastern Europe);
- European Agency for Reconstruction: initially located in Pristina in Kosovo, and using services in Thessalonika in Greece (responsible for implementing the EU's reconstruction programmes in Kosovo);
- European Agency for the Evaluation of Medicinal Products: London, UK (responsible for the coordination of an existing network of experts for the valuation and supervision of medicinal products, and to provide scientific advice);
- Office for Harmonisation in the Internal Market (Trade Marks and Designs): Alicante, Spain (this is the Community Trade Mark Office, by another name, and it is responsible for the registration and administration of applications under the EU Trade Mark Regulation and in future a Regulation on design and models);
- Community Plant Variety Rights Office: Angers, France (responsible for the implementation of the Community Plant Variety Rights regime);
- Europol (succeeding and subsuming the Europol Drugs Unit): The Hague, The Netherlands;

The work of many of these bodies is supported by a single Translation Centre for bodies of the European Union based in Luxembourg.

The agencies listed above are grouped according to broad types of function and approach. The first group of four join the longer established CEDEFOP and the Foundation for the Improvement of Living and Working Conditions in have largely informational tasks. The European Training Foundation is partly responsible for the delivery of EU programmes (and in that respect its work is not that dissimilar to certain private or public bodies to which the Commission in particular has already contracted out the management of programmes). It is joined by the most recently created Agency (1999), which has the

time-limited objective of delivering effectively EU reconstruction aid in Kosovo. It will be wound up when the task is completed. Of the third group of three agencies, the first is essentially assisting the Commission in undertaking certain authorisation tasks delegated to it under EU legislation in relation to medicine approval, while the latter two have certain regulatory and discretionary tasks delegated to them under EU legislation. They will raise at least some of their own revenue from fees. Equally their decisions may be subject to internal appeal and, eventually, judicial review by the Court of First Instance, an imminent increase in workload which represents a serious threat to the functioning of the Community judicature (4.21). Future cases brought by rightsholders in respect of alleged infringements will come within the jurisdiction of the national courts, so the question will arise as to which Court within the Community judicature will hear references for preliminary rulings. As it stands, this will be the Court of Justice.

Finally, Europol and the Europol Drugs Unit (EDU) which is superceded on July 1 1999 are rather different types of bodies to the others discussed in this paragraph. Europol derives its authority, and its work, from the competence of the EU under the third pillar, which now formally recognises Europol (Article 30 TEU). Europol is based on a convention adopted under the old Article K.3 TEU, and duly ratified by the Member States. Its work is in the fields of organized crime, transnational money-laundering, drug trafficking, terrorism and similar matters. It does not as yet have an operational role, but rather its work lies in the field of liaison between national police forces, and the exchange of information. In that context, it is important that Article 286 formally extends EU acts on data protection for individuals to the institutions and bodies set up by the Treaty.

The arrival of these new bodies marks a significant shift in the pattern of regulation in the EU, as a departure from reliance upon the current structures based on the unwieldy and opaque 'comitology' which is sometimes unable to integrate the necessary technical expertise, and upon soft instruments such as mutual recognition. However, regulatory agencies themselves give rise to difficulties such as problems of control, accountability and independence, as well as the extent to which the powers of the EC and EU may validly be delegated in this way (Everson, 1995; Lenaerts, 1993). The validity of such delegations to 'bodies established under private law, having a distinct legal personality and possessing powers of their own' has been long recognised by the Court of Justice (Case 9/56 *Meroni v. High Authority* [1957-58] ECR 133 at p. 151), but equally the Court has made clear that delegations to such bodies may not grant the same wide discretionary powers which may be handed to the Commission:

'To delegate a discretionary power, by entrusting it to bodies other than those which the Treaty has established to effect and supervise the exercise of such power each within the limits of its own authority, would render ... ineffective' the 'fundamental guarantee' of 'the balance of powers which is characteristic of the institutional structure of the Community' ([1957-58] ECR 133 at p. 152).

Hence, the general limitation on agencies and other similar bodies is that their work should be limited to preparatory work, gathering and monitoring of information, research and coordination. Ultimately, they should improve the effectiveness of the Commission's own work, but at this stage of their existence, their genuine autonomy is limited by the impact of the *Meroni* judgment and the concept of interinstitutional balance and they are perhaps best seen as part of wider networks, delivering better governance within the EU (Dehousse, 1997).

### **The Court of Auditors**

Under the Treaty of Maastricht, the Court of Auditors acquired the status of an institution. Accordingly, the provisions (Articles 246-248 EC) which govern its establishment, composition, tasks and duties were shifted into the Chapter on the institutions, having previously been linked solely to the budgetary provisions. It has been in existence since 1977, and consists of fifteen members – one from each Member State – who are persons qualified to serve on a body which has the task of carrying out the audit of EU finances, and whose independence is beyond doubt. They are appointed for six year terms by the Council. The European Parliament, which has particular budgetary responsibilities, is consulted on the appointments. The protected legal status of the members of the Court of Auditors during their term of

office resembles that of the members of the Court of Justice, although they can be deprived of their office by the Court of Justice (Article 247(7) EC). At the supranational level, the Court of Auditors is a rather novel institution (Laffan, 1999).

The Court of Auditors has an auditing and supervisory task, and not, despite its name, a judicial role (see Laffan, 1997: 192-204). It is the 'financial conscience' of the EU. It extends not only to the revenue and expenditure of the EU itself, but also to all bodies set up by the EU, unless other arrangements have been made. By providing a statement of assurance regarding the reliability of the accounts and the underlying financial transactions conducted by the EU, the Court of Auditors assists the Parliament in giving the Commission a discharge in respect of the implementation of the budget. It has the important right to request and receive any document or information necessary to carry out its tasks from the institutions, any bodies managing revenue or expenditure on behalf of the EU and any natural or legal person in receipt of payments from the budget (Article 248(3) EC). Previously somewhat of a Cinderella institution within the EU structures, the role of the Court of Auditors have come increasingly to the fore as the EU budget has grown and diversified into new areas, as the fight against waste and fraud within the EU has intensified, and as the academic study of the practice of audit has evolved (Harden *et al.*, 1995).

### **The European Investment Bank (EIB)**

The European Investment Bank has separate legal personality, although it is governed by the provisions of the EC Treaty (Articles 9 and 266-267 EC). It was established by the original Treaty of Rome, and it has a particular function to provide investment loans to assist the funding of projects aimed at promoting regional development within the EU, and projects of particular interest to two or more Member States. Its revenue is derived from money subscribed by the Member States and money which it raises on the international capital markets. The management of the Bank is entrusted to a Board of Governors, a Board of Directors and a Committee of Management.

### **The Institutions of Economic and Monetary Union**

The institutions of Economic and Monetary Union (EMU), established by Article 8 and Title VII of Part III of the EC Treaty replaced the earlier institutions such as the European Monetary Cooperation Fund. They are based in Frankfurt in Germany. Now that the third stage of monetary union has begun, the most important bodies will be the European System of Central Banks (ESCB), composed of the European Central Bank (ECB), which will have separate legal personality, and the national central banks (Article 107 EC). Details are contained in the Treaty and in the associated Protocols and Declarations. During a transitional period, preparation for the work of the ESCB and the ECB was undertaken by the European Monetary Institute (EMI) established under the transitional provisions of Article 117 EC, which took over from the existing Committee of Governors of Central Banks. The transition to monetary union, and the associated coordination of national policies, was also assisted by a temporary Monetary Committee with advisory status (Article 114(1) EC) which was dissolved and replaced on transition to the third stage of monetary union by an Economic and Financial Committee (Article 114(2) EC).

The ECB has legal personality, and it is run by its Executive Board, composed of a President, Vice-President and four other members, and a Governing Council, consisting of the Executive Board and the Governors of the national central banks (Article 112 EC). The President of the Council of Ministers and a member of the European Commission may participate in meetings of the Governing Council, but they do not have a right to vote. Thus, the institutions of monetary union under the Treaty of Maastricht are built on a model of central bank independence (Article 108 EC), but one which will not necessarily ensure adequate accountability and legitimacy for these institutions. It might, on the contrary, exacerbate the EU democratic deficit (Gormley and de Haan, 1996). The Treaty of Maastricht fitted the ECB into the system of judicial review of the EU, so that the validity and interpretation of acts of the ECB may be referred to the Court of Justice by national courts under Article 234 EC, and direct challenges can be brought against acts and failures to act on the part of the ECB under Articles 230 and 232 EC (Craig,

1999).

The tasks of the ESCB, to be carried out by the ECB, are to define and implement the monetary policy of the EU, to conduct foreign exchange operations, to hold and manage the foreign currency reserves of the Member States, and to promote the smooth operation of payment systems (Article 105 EC). Its overall objective is price stability and the creation and maintenance of a strong currency. Most obviously, to the outside observer, the ECB sets interest rates. The ECB has the right to be consulted on certain matters related to its tasks. It will acquire the exclusive right to authorise the issue of banknotes through 'Euroland'. It has a limited capacity to make regulations, take decisions, make recommendations and deliver opinions in order to carry out its tasks (Article 110 EC). It has certain external powers in addition (Article 111 EC). In relation to economic policy, the Council retains certain powers.

[...]

## **1.2 Institutions in the Treaty establishing a Constitution for Europe**

Sources:

- Summary of the Constitution adopted by the European Council in Brussels on 17/18 June 2004 (This note, prepared by the Secretariat of the European Parliament Delegation to the Convention, is for information only and aims to provide as concise a summary as possible of the Constitution finally adopted by the European Council on 17 and 18 June at the close of the IGC process.)
- A Constitution for Europe: Fact sheets ([http://europa.eu.int/scadplus/constitution/institutions\\_en.htm](http://europa.eu.int/scadplus/constitution/institutions_en.htm))

The Constitution amends the basic institutional structure of the European Union (EU), which currently consists of six institutions (European Parliament, Council of Ministers, Commission, Court of Justice, Court of Auditors, European Central Bank), and three other important bodies (European Economic and Social Committee, Committee of the Regions, European Investment Bank).

Article I-19 of the Constitutional Treaty now states that "the institutional framework comprises: the European Parliament, the European Council, the Council of Ministers (referred to as the "Council"), the European Commission and the Court of Justice of the European Union".

The European Council is therefore recognised as a fully-fledged institution, but the Court of Auditors has not been included in the basic institutional framework. It is mentioned separately in Chapter II of Title IV, the latter being entitled "Other institutions and advisory bodies", as is the European Central Bank (ECB), which is formally given the status of an institution. This new presentation, in two separate chapters, suggests that alongside the five main institutions (European Parliament, European Council, Council of Ministers, European Commission and Court of Justice) there are two secondary institutions (Court of Auditors and European Central Bank) which are completely independent of the other institutions in the performance of their duties.

Thus, there are seven bodies that have been classified as institutions. Of these seven, four of the main institutions (Parliament, European Council, Council of Ministers and Commission) have undergone substantial changes, whereas the only real changes concerning the Court of Justice relate to just some of its provisions.

As regards the other EU institutions and bodies, amendments are almost non-existent, with only the length of the term of office of members of the Committee of the Regions (COR) and of the European Economic and Social Committee (EESC) being changed.

The Constitution does not make any changes to the seats of the institutions, incorporating the existing protocol hitherto appended to the EC Treaty.

Finally, the Constitutional Treaty incorporates without change the concepts of consultation and cooperation among the institutions, which must practise mutual sincere cooperation (Articles I-19 and II-397).

**SUMMARY TABLE:**

<b>Articles</b>	<b>Subject</b>	<b>Comments</b>
I-19	The institutional framework	Major changes
I-30 and III-382 - III-383	The European Central Bank	-
I-31 and III-384 - III-385	The Court of Auditors	
I-29 and III-353 to III-381	The Court of Justice	
I-29	The Court of Justice (name)	
III-355 and III-357	The Court of Justice (selection of Judges and Advocates-General)	Major changes
III-359	The Court of Justice (specialised courts)	
III-365	The Court of Justice (actions brought by citizens)	
I-32	The Union's advisory bodies	
III-386 to III-388	The Committee of the Regions	-
III-389 to III-392	The European Economic and Social Committee	
Protocol on the location of the seats of the institutions and of certain bodies, offices, agencies and departments of the European Union	The seats of the institutions	-
Protocol on the Statute of the European System of Central Banks and of the European Central Bank	The European System of Central Banks and the European Central Bank	-
Protocol on the Statute of the Court of Justice of the European Union	The Court of Justice	-

### **1.2.1 The European Parliament**

The European Parliament will, jointly with the Council of Ministers, enact legislation and exercise the budgetary function, as well as functions of political control and consultation. It will elect the President of the European Commission on a proposal from the European Council (adopted by qualified majority), which will have to take into account the results of the elections; the EP will also approve the Commission as a whole. The number of MEPs will be limited to 750. The Constitution does not make provision for the allocation of seats by Member State as is currently the case, but Article I-19 contains a legal basis giving the European Council, on a proposal from Parliament and with its consent, the responsibility to determine the allocation of seats before the elections scheduled for 2009, on the basis of the principle of 'degressively proportional' representation of citizens, with a minimum threshold of six seats and a maximum of 96 per Member State (the Convention proposed a minimum threshold of four and no upper limit).

#### **SUMMARY TABLE**

<b>Articles</b>	<b>Subject</b>	<b>Comments</b>
I-20	The European Parliament	Major changes
I-34	The legislative acts	Major changes
III-330 to III-340	The European Parliament - specific rules	-
III-396	The ordinary legislative procedure	Major changes
III-403 to III-409	The Union's annual budget	Major changes
Protocol on the transitional provisions relating to the institutions and bodies of the Union	Seats in the European Parliament 2004-2009	Transitional rules

### **1.2.2 The European Council**

The European Council is to become a full institution. The revolving presidency will be abolished and replaced by a permanent presidency with limited powers, elected by a qualified majority of its members for a renewable term of two and a half years. The general rule regarding the adoption of decisions will be consensus.

The European Council will provide impetus and define political priorities but will not exercise a legislative function. Respect for this principle was ensured during the negotiations in the IGC, despite an extremely difficult debate on the role of the European Council in the field of judicial cooperation in criminal matters (cf. the description of the compromise found on the definition of the 'emergency brake' mechanism given below).

**SUMMARY TABLE:**

Articles	Subject	Comments
I-19	The Union's institutions	Major changes
I-21	The European Council	New rules
I-22	The President of the European Council	New rules
I-27	The President of the Commission	-
I-28	The Minister of Foreign Affairs	New rules
III-341	Provisions governing the institutions - The European Council	New rules

**1.2.3 The Council of Ministers of the EU**

The Constitution provides for the creation of a Foreign Affairs Council chaired by the EU Minister for Foreign Affairs (see below), separate from the General Affairs Council. The latter will continue to ensure the coherence of the Council's deliberations with the aid of COREPER. The meetings of special formations of the Council will be split into two parts, one devoted to legislative - public - deliberations, the other to non-legislative deliberations, in order to meet the requirement of transparency.

The organisation of the Council's work was fiercely debated in the IGC until an advanced stage, with a majority of the Member States in favour of maintaining the rotation of the Council presidency (except for the Foreign Affairs Council). Finally, the Constitution states the principle of equal rotation in the context of a system of 'team' presidency defined by a European Council decision.

**SUMMARY TABLE**

Articles	Subject	Comments
I-23	The Council of Ministers	Major changes
I-24	Configurations of the Council of Ministers	Major changes
I-25	Definition of qualified majority	Major changes
I-50	Transparency of the proceedings of the institutions	New rules
III-342 to III-346	Institutional provisions - the Council of Ministers	-
Protocol on the transitional provisions relating to the institutions and bodies of the Union	Weighting of votes in the European Council and the Council of Ministers until 2009	Transitional rules

Articles	Subject	Comments
Declaration concerning the European Council decision on the exercise of the Presidency of the Council	Council Presidency rotation system	New rules

### 1.2.4 Qualified majority

This was the key issue throughout the debates in the Convention and the IGC, as regards both its definition and its sphere of application.

As regards its definition, the formula finally adopted by the IGC is still based on the double majority principle devised by the Convention. The thresholds have however been raised: 55% of the Member States (the Convention proposed a majority of the Member States) including at least 15 Member States (a requirement which in itself has no independent significance once there are 27 or more Member States); 65% of the population (the Convention proposed 60%). Nevertheless, the IGC added an extra clause specifying that a blocking minority (*a priori* 35% of the population) should include at least 4 Member States, failing which a decision is in any case considered to have been adopted<sup>1</sup>. This system will apply as of 1 November 2009. In order to overcome the remaining reluctance of certain Member States, the Conference also adopted a decision containing a sort of revised 'Ioannina' compromise<sup>2</sup>.

When a Commission proposal is not required or when a decision is not adopted on the initiative of the Minister for Foreign Affairs, the qualified majority required will be enhanced: 72% of the Member States (2/3 according to the Convention) representing at least 65% of the population (60% according to the Convention).

Qualified majority will become the general rule for the adoption of decisions within the Council of Ministers. Unanimity remains the rule for taxation and partly in the fields of foreign and common security policy and social policy. Furthermore, it will also apply to the system of own resources and the multiannual financial framework. Finally, for cases in which the Convention has not achieved consensus on changing over to qualified majority voting, a general measure (known in French as a 'passerelle') is planned, whereby the European Council will have the opportunity to decide unanimously that the Council will in future act by qualified majority and, if necessary, according to the ordinary legislative procedure, without the need to amend the Constitution, which would in turn require ratification by each Member State. However, the formal opposition of a single national parliament is enough to block the application of the 'passerelle'.

### 1.2.5 The European Minister for Foreign Affairs

A great institutional innovation proposed by the Convention, the Minister for Foreign Affairs, appointed by the European Council by qualified majority with the agreement of the President of the Commission, will

<sup>1</sup> This may have the effect of lowering the population threshold and allow, for example, the adoption of a law by 22 Member States representing only around 55.5%.

<sup>2</sup> If Council members representing at least 3/4 of the Member States or the percentage of the population required to block a decision indicate their opposition to the Council's adoption of an act by qualified majority, the Council will continue to debate the subject in order to achieve broader agreement within a reasonable period of time.

conduct the Union's common foreign and security policy, chair the Foreign Affairs Council and will also serve as Vice-President of the Commission (as such he or she is subject to a collective vote of approval by the European Parliament and, possibly, a vote of censure). In this 'two-hatted' role (Commission-Council), he or she will be responsible for carrying out the Union's external policy *as a whole*. He or she will have the power of proposal, represent the Union alone or with the Commission, and will be aided by a European External Action Service<sup>3</sup>.

#### SUMMARY TABLE:

Articles	Subject	Comments
I-28	Appointment, role and responsibilities of the Minister for Foreign Affairs.	New rules
I-22	Role of the European Council President	New rules
III-292 to III-328 (Title V)	The Union's external action	Major changes
III-296	Creation of a European External Action Service	-
Declaration on the creation of a European External Action Service	European External Action Service	New rules

### 1.2.6 The European Commission

The Constitution confirms the functions of the Commission and supplements the existing rules concerning the number and origin of its members. The composition of the Commission, which was one of the thorniest issues examined by the Convention and the Intergovernmental Conference (ICG), is based on the model suggested by the Treaty of Nice, with improvements. Otherwise there are no major changes, except of course for the creation of the post of Minister for Foreign Affairs, who will be one of the Commission Vice-Presidents.

The constitutional Treaty reaffirms (Article I-26) the essential functions of the Commission, namely the right of initiative (which becomes the general rule for the adoption of legislative acts, any exceptions, which are fewer in number than at present, requiring to be explicitly stipulated), the executive function, overseeing the application of Community law, execution of the budget and management of programmes. It also clarifies that the Commission represents the Union externally, except in the case of the common foreign and security policy, and that it initiates the Union's annual and multiannual programming. The Constitution also reaffirms the principle of collective accountability and of responsibility to the Parliament. Finally, Article I-26 stipulates that the Commission is always appointed for a five-year term of office and must be completely independent in carrying out its responsibilities.

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<sup>3</sup> The Service will consist of officials from the relevant departments of the Council's Secretariat and the Commission, as well as staff seconded from national diplomatic services. Its organisation and operation will be determined by a Council decision after obtaining the opinion of the EP and the approval of the Commission.

Articles I-26, I-27 and I-28 contain the main innovations introduced by the Constitution as regards the composition of the Commission (Article I-26), the selection and role of the President (Art. I-27) and the functions assigned to the future Minister for Foreign Affairs (Article I-28).

The appointment, replacement and resignation procedures, as well as other provisions on the internal organisation of the College which remain the same as in corresponding articles of the EC Treaty, are contained in Articles III-347 to III-352 (Part III, Title VI on the functioning of the Union).

### **Composition**

The Constitution has abandoned the original formula proposed by the Convention members, which consisted of appointing Commissioners with voting rights and Commissioners without voting rights.

The constitutional Treaty has adopted a solution similar to the Nice solution, namely the maintenance of one Commissioner per Member State up to a certain size, and subsequent capping of the size of the College, with equal rotation between Member States

The text of the Constitution stipulates that the first Commission appointed under the provisions of the Constitution, i.e. the 2009 Commission, shall consist of one national of each Member State, including its President and the Union Minister for Foreign Affairs.

As from 2014 the Commission will be reduced in size and consist of a number of members corresponding to two-thirds of the number of Member States. The European Council, acting unanimously, may nevertheless decide to alter this number.

In the reduced-size Commission, the Commissioners will be selected according to a system of equal rotation between Member States. This system will be established by a European decision adopted unanimously by the European Council, and will be based on the following principles:

Member States shall be treated on a strictly equal footing as regards determination of the sequence of, and the time spent by, their nationals as members of the Commission.

Each successive Commission shall be so composed as to reflect satisfactorily the demographic and geographical range of all the Member States.

For the present Commission, the provisions that apply are those of the EC Treaty as amended by the Treaty of Nice and by the Treaty of Accession of the ten new Member States, i.e. one Commissioner per Member State. Apart from the new provisions adopted concerning the representation of Member States in an enlarged Commission, the Constitution introduces a major innovation with the creation of a post of Minister of Foreign Affairs.

This latter will be required to carry out the tasks currently performed by the High Representative for the Common Foreign and Security Policy, "Mr CFSP", and by the Commissioner responsible for external relations. He or she will also take over some of the functions performed by the Council Presidency in the field of external relations. The Minister for Foreign Affairs will therefore be answerable both to the Commission and to the Council.

Appointed by the European Council, acting by qualified majority with the agreement of the President of the Commission, the Minister will conduct the common foreign and security policy (CFSP) together with the European security and defence policy (ESDP), as mandated by the Council. In this capacity, he or

she will chair the "foreign affairs" formation at the Council of Ministers. He or she will also be responsible for external representation of the Union in the field of foreign and security policy.

### **Commission President**

The Constitution does not propose any substantial changes to the way the President is appointed but clearly states that when the European Council proposes a candidate for the Presidency for election by the European Parliament the latter must take account of the results of the European elections. This change indirectly increases the influence of the Parliament and gives greater political significance to the European elections.

The remaining provisions concerning the Commission President are virtually identical to those contained in the EC Treaty.

The Council, by common accord with the President-elect, adopts the list of the other people whom it proposes for appointment as members of the Commission. They are selected on the basis of the suggestions made by Member States. The members of the Commission are chosen on the ground of their general competence, their independence and their European commitment (this latter criterion is new).

Finally, the President decides on the internal organisation of the Commission and may re-allocate the portfolios during the term of office. He or she appoints the Vice-Presidents, other than the Union Minister for Foreign Affairs, from among the members of the Commission. The President may ask a member of the Commission to resign, although, unlike today, the College is not obliged to approve such a request.

#### **SUMMARY TABLE:**

<b>Articles</b>	<b>Subject</b>	<b>Comments</b>
I-26	Role, composition, collective accountability and responsibility to the Parliament	Significant changes
I-27	President's role and powers of appointment	-
I-28	Role of the Minister for Foreign Affairs	New provisions
III-347 to III-352	Procedure for appointing Commissioners, replacement procedure, rules of procedure and other provisions	-

### **1.2.7 The Court of Justice**

Following the major changes made to the judicial system by the Treaty of Nice , including a better distribution of competences between the two bodies and the possibility of setting up of judicial panels attached to the Court of First Instance, the Constitution proposes some additional changes.

The Constitution changes the name of the Court of Justice. In the future, the term "Court of Justice of the European Union" will officially designate the two levels of jurisdiction taken together. The supreme body is now called the "Court of Justice" while the Court of First Instance of the European Communities is renamed "General Court". Article I-29 states that the Court of Justice of the European Union includes "the European Court of Justice, the General Court and specialised courts".

Article III-359 of the Constitution states that specialised courts may be attached to the General Court by means of European laws, adopted under the ordinary legislative procedure . These laws, adopted on a proposal from the Court of Justice or the Commission, will lay down the rules on the organisation of the General court and the extent of the jurisdiction conferred on it.

Article III-357 of the Constitution provides for the setting up of a panel to give an opinion on candidates' suitability to perform the duties of Judge and Advocate-General, before the governments of the Member States take the decisions regarding their appointment.

The Constitutional Treaty does not make any changes to the Court's tasks. However, it stipulates that "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law" (Article I-29).

However, private individuals' access to the Court of Justice will be facilitated by the provision that any natural or legal person may institute proceedings against "a regulatory act which is of direct concern to him or her and does not entail implementing measures" (Article III-365). In this way, the Constitution should make it easier for citizens to challenge the Union's regulatory acts under which penalties are imposed, even if these acts do not affect them individually (unlike what is required under the existing treaties).

The Court of Justice's competence will be broadened, particularly in the area of freedom, security and justice and certain aspects of foreign policy. There is also provision for a degree of individual access to the Court<sup>4</sup>.

### ***1.2.8 Competences and how the institutions will exercise them***

The Constitution first of all defines essential principles regarding:

- the principle governing the allocation of the Union's powers;
- lawmaking in accordance with the principles of subsidiarity and the proportionality of the exercise of competences;
- the primacy of Union law, which is stated unambiguously;
- the obligation of Member States to implement Union law.

Distinctions are drawn between three categories of Union powers: areas of exclusive competence, of shared competence and areas where the Union may take supporting action, provided this conforms with the provisions of Part III relative to the area where action is to be taken. Particular cases that do not fit into the general classification are dealt with separately: for example the coordination of economic and employment policies (Article 14) and common foreign and security policy (Article 15).

The flexibility the system requires is guaranteed by a clause allowing the adoption of measures necessary to attain any of the objectives laid down by the Constitution where there is no provision for powers of

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<sup>4</sup> The Constitution will give any natural or legal person the opportunity to institute proceedings against regulatory acts that are of direct concern to him or her and that do not entail implementing measures.

action to that effect in the Constitution. Its scope is therefore wider than that of the current Article 308 of the EC Treaty, which is confined to the internal market, but the conditions for its implementation are stricter in that, as well as requiring unanimity in the Council, Parliament's approval will also be needed.

This provision is complemented by the Protocol on the application of the principles of subsidiarity and proportionality, which provides for an 'early-warning system' involving national parliaments in monitoring how the principle of subsidiarity<sup>5</sup> is applied.

### **1.2.9 Instruments and their adoption procedure**

#### **Legislative and regulatory measures**

The Constitution will work on the basis of a hierarchy of acts, clarifying the legal acts used by the institutions to put the Union's powers into practice and how they are adopted.

It makes two successive distinctions:

- between legally binding acts (laws, framework laws, regulations and decisions) and non-binding acts (opinions and recommendations);
- in terms of legally binding acts, it distinguishes between legislative acts (laws and framework laws) and non-legislative acts (regulations and decisions<sup>6</sup>).

#### **Legislative acts:**

The power of legislative initiative lies with the Commission, although this is shared with at least a quarter of Member States as regards certain aspects of the area of freedom, security and justice.

The Constitution states that, as a general rule, laws and framework laws are to be adopted by codecision of the EP and the Council, the latter with a qualified majority, a procedure to be known as the 'ordinary legislative procedure'<sup>7</sup>, which is practically a carbon copy of the current codecision procedure.

#### **Non-legislative acts:**

As far as implementing acts in the strict sense of the term are concerned, the Constitution states from the outset that it is the responsibility of Member States to implement legally binding acts of the European institutions. Where uniform conditions for implementing acts are required, the Constitution gives the Commission the power to take the necessary implementing measures, or, exceptionally, gives this power

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<sup>5</sup> They will be informed of all new legislative initiatives and if at least one third of them consider that a proposal infringes the principle of subsidiarity, the Commission will have to reconsider its proposal.

<sup>6</sup> It must also be pointed out that the term 'decision' covers both decisions in the sense of administrative acts and decisions of a political nature, a meaning also used in the draft Constitution: e.g. Council decision regarding the suspension of the rights of a Member State related to membership of the Union.

<sup>7</sup> In exceptional cases provided for by the Constitution, laws and framework laws can be adopted either by the Council (e.g., law on own resources, law on the multiannual financial framework, law on elections to the EP, etc.) or by Parliament (three cases: law on the status of its members, law on the status of the Ombudsman and law on provisions governing the exercise of the right of inquiry), but always with the participation of the other branch, which can range from simple consultation to approval (currently assent).

to the Council (in cases involving implementing acts based directly on the Constitution, apart from the CFSP). As regards ‘comitology’, a European law will lay down in advance the rules and general principles for the mechanisms for control by Member States of these implementing acts. The EP will therefore have a decisive role in this area in future.

The Constitution will also create *delegated regulations*, delegated to the Commission (NB: there are to be no delegated Council regulations) by the legislative authority: that is, the EP and the Council. These delegated regulations, which can amend or supplement certain aspects of laws or framework laws without changing their essential elements, will therefore require specific authorisation in the text on which they are based and will be subject to a specific system of control exercised by the legislators: each of the two branches can revoke the delegation, and the delegated regulation can only enter into force if neither branch of the legislative authority raises an objection within a period set by the law or framework law.

#### SUMMARY TABLE:

Articles	Subject	Comments
I-33	The legal acts of the Union (new typology)	New provisions
I-34	The legislative acts	Significant changes
I-35	The non-legislative acts	
I-36	Delegated European regulations	Significant changes
I-37	Implementing acts	
I-40	Particular rules concerning CFSP	Significant changes
I-41	Particular rules concerning ESDP	
I-42	Particular rules concerning JHA	

### **1.3 *The Decision-Making and its Procedures: Excerpt from J. Shaw: The European Union and its Institutions at Work (Chapter 7)***

#### **Introduction**

This Chapter examines the various processes of decision-making provided by and under the Treaties. The EC Treaty in particular lays down an extraordinary number of different instances where a decision can or must be taken, primarily but not solely by the Council. These decisions are to be taken according to the processes set out in the Treaties, and again there is an extraordinary variety. Nor is there a single legislative process for the adoption of legislative acts under the EU Treaties, which the Commission has recently defined as 'rules of general scope, based directly on the Treaty and which determine the fundamental principles or general guidelines for any Community action' (Commission, 2000d: 26). Indeed, nowhere in the Treaties is the legislative power as such strictly separated from other aspects of decision-making, although in Article 207(3) EC the Council is required, for purposes of transparency, to determine those cases in which it is acting in a legislative capacity. The Commission's Report to the Reflection Group for the 1996-97 IGC identified 22 different decision-making processes, highlighting a situation of excessive complexity which has not been reduced since that time. A complete picture of decision-making processes can only be derived from a detailed study of the Treaties. This Chapter concentrates on legislative, certain executive rule-making and budgetary procedures.

#### **Varieties of legislative and decision-making process**

There are three basic patterns to which the majority of provisions in the EC Treaty which grant a decision-making power to the Council of Ministers conform, and each of these is relevant to the adoption of legislation. The simplest procedure involves the Council acting, either by a qualified majority, or unanimously, on a proposal from the Commission, and after consulting, where required, the Parliament and/or the Economic and Social Committee (ECOSOC). This model dates from the original Treaty of Rome, but is still used for certain provisions, and has been introduced in new areas of competence where the Member States have sought to minimise parliamentary input or maintain maximum national control. It is termed here the 'old procedure', and is discussed in 7.3. It could also be termed the single reading procedure, although there are variants in which the Parliament is not consulted at all. The Single European Act introduced the cooperation procedure and this is examined in 7.4. It is largely of historical interest outside the field of EMU. It was retained for EMU by the Treaty of Amsterdam because those provisions were treated as politically untouchable and so could not be 'modernised' with the much of the rest of the Treaty. It will presumably disappear in due course, most probably after the 2000 IGC. Most recently, the Treaty of Maastricht introduced what is popularly termed 'Council-Parliament co-decision', a form of joint legislative action by the Council and the Parliament. This is discussed in 7.5. In 7.6 the small number of cases where the assent of the Parliament is required will be discussed. Finally, in 7.7, a fourth form of legislative process is discussed, namely the use of the social dialogue between management and labour for the purpose of elaborating framework agreements which are subsequently turned into hence binding legislation by the Council. The section of the Chapter on legislative processes moves to a conclusion with a review of the processes and of 'post-Maastricht' approaches to legislating.

Both the cooperation and co-decision models, as with most cases under the 'old' procedure, require the Commission to initiate legislation. The right of proposal is important. The Commission maintains considerable control over the proposal until its adoption or rejection by the Council.

This is confirmed by Article 250 EC. The Commission may amend its proposal at any point during the law-making process, and the Council requires unanimity in order to amend a Commission proposal, except in certain limited circumstances under the co-decision procedure, where the matter is before the Conciliation Committee (7.5). In Case 355/87 Commission v. Council (Italo-Algerian Maritime Transport) ([1989] ECR 1517) the Commission objected to what it saw as the abuse of the Council's right of amendment. It argued that the Council had reversed the effect of its proposal. The Court found for the Council by holding on the facts that both the measure adopted and the proposal were designed to achieve the same objective, without ruling on the greatly differing submissions made by the two institutions on the scope of the right of amendment. The Commission can, of course, prevent the Council from adopting an amended version of its proposal to which it objects by withdrawing it from consideration, although under the revised co-decision procedure, the Commission does to a much greater extent lose control of its proposal. There are some provisions requiring the Council to act on a recommendation from the Commission, especially in the area of EMU (e.g. Article 99 EC regarding the broad guidelines of economic policy). This technique has clearly been adopted to give the Commission input into the legislative process, but no 'ownership' of a proposal.

Away from the legislative process, there are a minority of decision-making powers under the Treaties which differ significantly from these patterns; these are generally, but not solely, concerned with the institutional configuration of the Union, and with arrangements relating to Economic and Monetary Union. For example, Council has some powers to adopt legal measures without the need, apparently, for the participation of any of the other institutions in the decision-making process. Two examples are Articles 284 EC, which requires the Council to lay down the conditions under which the Commission may collect any information and carry out checks required for the performance of the tasks with which it has been entrusted, and Article 290 EC, under which the Council shall determine by unanimity the rules governing the languages of the institutions.

Alternatively, a provision may give an institution other than the Commission the right of initiative. For example, Article 225(2) EC makes provision for the transfer of additional categories of cases to the Court of First Instance. It requires the Council to act, on the request of the Court of Justice, and after consulting the European Parliament and the Commission. Here the Commission's role is merely consultative. Likewise, it is the European Parliament which is responsible for drawing up initial proposals for parliamentary elections according to a uniform election procedure in all Member States or according to principles common to all the Member States, to be decided upon by the Council acting unanimously after obtaining the assent of the Parliament itself, although any such decision would require ratification by the Member States according to their constitutional requirements (Article 190(4) EC).

In an important innovation, under the new Title IV of the EC Treaty on visas, asylum, immigration and other matters related to the free movement of persons, a special transitional period of five years is instituted during which the right of initiative is shared between the Member States and the Commission (Article 67 EC). This is because of the origins of this Title in the old JHA third pillar and hence within the domain of intergovernmentalism. It has been criticised for watering down the supranational dimension of the decision-making procedures under the EC Treaty. Exceptions are provided in relation to measures on visas which were within the former Article 100c EC, not the JHA third pillar (Article 67(3) and (4)). After five years, the right of initiative reverts to the Commission alone, although it must continue to 'examine any request made by a Member State that it submit a proposal to the Council', and the Council – presumably on its own initiative – can decide unanimously to move all the decision-making processes under that Title to the co-decision procedure under Article 251. It must consult the European Parliament. It may also use the same procedure without initiative from the Commission to decide to adjust the controversial provisions relating to the Court of Justice under this Title (4.21).

Paralleling an earlier 'bridge' between the third and first pillars instituted by the Treaty of Maastricht, Article 42 TEU now provides for the Council acting unanimously on an initiative of either the Commission or a Member State to move matters from the PJC third pillar into Title IV, and to decide upon

the voting conditions after transfer. It must consult the Parliament. Such a decision has to be ratified by the Member States according to their constitutional requirements. It is, in effect, a simplified Treaty amendment procedure.

The procedures relating to closer cooperation (especially Article 11 EC) are likewise a special case with regard to their provisions on decision-making (5.19).

[...]

## **1.4 Description of the main legislative procedures**

### **1.4.1 Introduction**

*This section describes the three main legislative procedures which Shaw refers to in the preceding section. They are: the Old Procedure, the Cooperation Procedure and the Co-decision Procedure.*

*At the outset it should be underlined that the distinction between unanimity and majority voting and the distinction between the three different procedures (Old Procedure, Cooperation and Co-decision) must be kept separate, although there are certain combinations (for ex. the dyad unanimity and Old Procedure) that come up often.*

*The three different procedures and their introduction in different stages of the integration process testify to the growth of the Parliament's involvement in the decision-making process. Under the Old Procedure, present in the Treaty since its original version of 1957, the participation by the Parliament is the lowest, whereas under the Co-decision Procedure, introduced by the Maastricht Treaty, the involvement of the Parliament is the highest.*

### **1.4.2 The Old Procedure**

Of the three procedures, the Old Procedure is the simplest. The essence of this procedure is that the Commission makes a proposal and the Council decides. However, it comes in two basic alternatives:

- a) the consultation of one or more of the other institutions is not required;
- b) such consultation is required.

An example of alternative a) is that provided by Art. 57 (ex Art. 73) TEC regarding free movement of capital between Member States. Two important examples of alternative b) are provided by Art. 94 (ex Art. 100) TEC and Art. 308 (ex Art. 235) TEC, which represent the general law-making powers of the Community. The former requires the consultation of the Parliament, the latter the consultation of both the Parliament and the Economic and Social Committee. (On the extent of the duty to consult the Parliament please see the decision C 138/79 Roquette Frères v. Council *infra* as well as C-408/95 Eurotunnel in Unit 2-4)

### **1.4.3 The Cooperation Procedure**

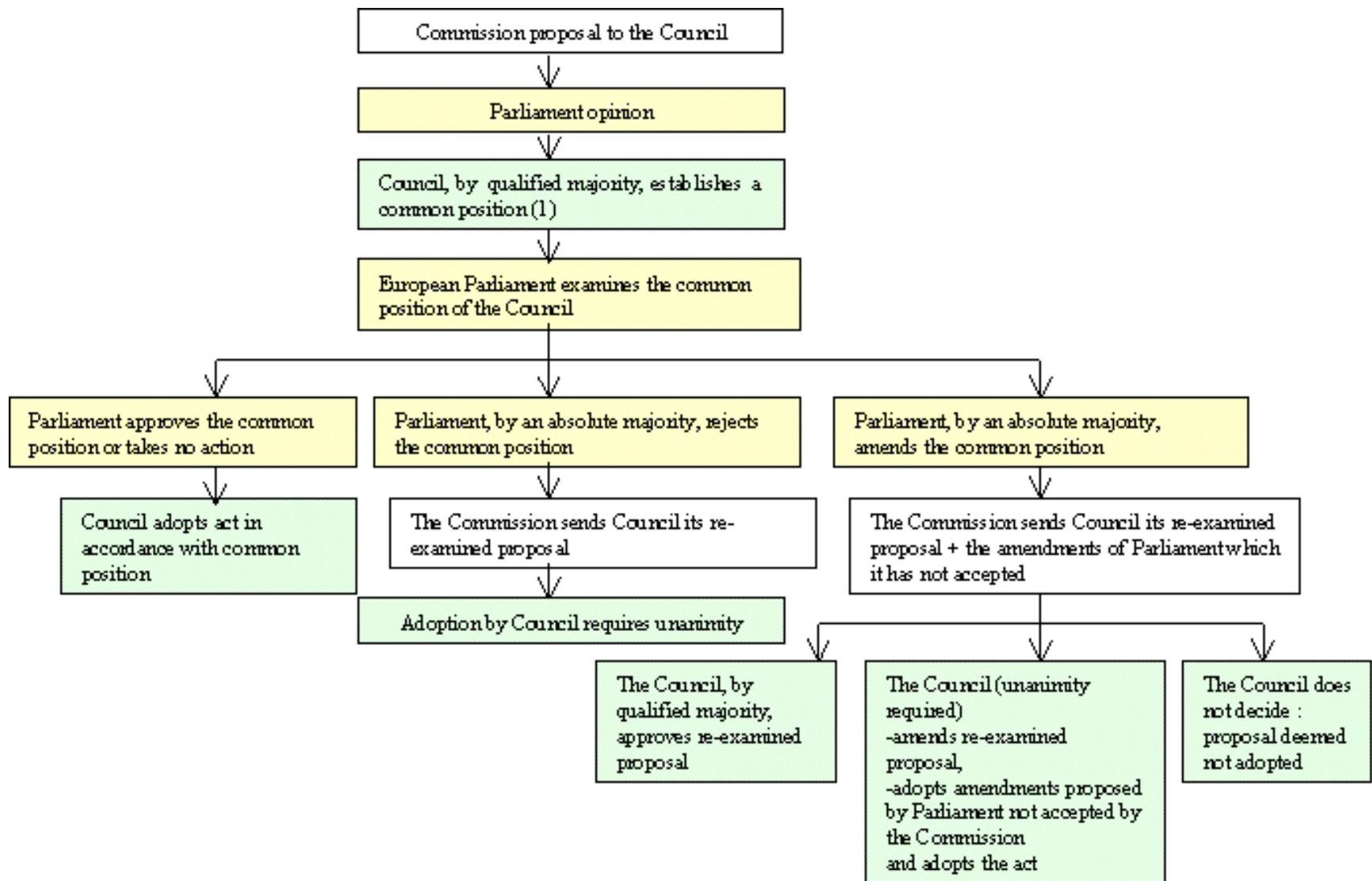
The cooperation procedure (Article 252 of the EC Treaty) was introduced by virtue of the Single European Act. It gave the Parliament greater influence in the legislative process by allowing it two readings of Commission proposals. The cooperation procedure was used extensively in the implementation of the single market. The Maastricht Treaty further widened its application, although the Amsterdam Treaty subsequently reduced its scope in favour of the codecision procedure. Since the entry into force of the Amsterdam Treaty, this procedure has in practice been relevant only in relation to economic and monetary union (Articles 99(5) and 106(2) EC); in all other scenarios in which it used to be used, it has now been replaced by the co-decision procedure.

The initial phase in the Cooperation Procedure is the same as in the Old Procedure: the Commission makes a proposal to the Council which then has to consult another institution (in this case the Parliament). However, three important features characterize the further phases of the Cooperation Procedure: a second reading in the Parliament, a second reading in the Council and a partial veto right of the Parliament.

The details of the Cooperation Procedure can be summarized as follows:

1. The Council's common position:  
The Council, on a proposal of the Commission and after obtaining the opinion of the Parliament, adopts a common position and transmits it to the Parliament together with the reasons which led it to adopt it.
2. The Parliament's reaction:  
The Parliament has 3 months to react to the Council's common position. It has three options:
  - I) to accept the common position or not to react to it: this leads to the adoption of the measure
  - II) to propose amendments by an absolute majority: this leads to a re-examination of the proposal first by the Commission and then by the Council
  - III) to reject the common position by an absolute majority: this obliges the Council to act unanimously if it still wants to adopt the proposed measure
3. The second reading by the Commission and the Council (under option II):  
If the Parliament proposes amendments, the Commission has 1 month to re-examine the proposal by taking into account the amendments of the Parliament. The Council has then 3 months to act. It has two options:
  - A) to accept, by qualified majority, the proposal as re-examined by the Commission; therefore, the Parliament's amendments that are accepted by the Commission require qualified majority within the Council to be adopted;
  - B) to amend, acting unanimously, the proposal as re-examined by the Commission; therefore, the Parliament's amendments that are rejected by the Commission require unanimity within the Council to be adopted

If no decision is taken, the proposed act shall be deemed not to have been adopted.



(1) The Council acts unanimously if it amends the proposal made by the Commission

#### **1.4.4 The Codecision Procedure**

The codecision procedure was introduced by the Treaty on European Union (Maastricht Treaty, 1992) and is governed by Article 251 of the Treaty establishing the European Community. The procedure gives Parliament the power to adopt instruments jointly with the Council.

The Treaty of Amsterdam (1997) further widened the scope of application of the codecision procedure, while also making it simpler and more comprehensible by placing the Council and Parliament on an equal footing. The Nice Treaty permits the use of the codecision procedure in the majority of cases.

This procedure is called codecision because it lays down the basics of a bicameral decision system. From its initial stage, the codecision Procedure differs from the other two procedures in significant ways. First of all, the Parliament has an absolute veto right in the first reading. Moreover and maybe more importantly, after the adoption of a joint text by the Conciliation Committee (a mixed organ composed of representatives of the Parliament and member of the Council), the act is enacted only if the Parliament approves it.

The details of the Codecision Procedure can be described as follows:

1. The Commission's proposal and the Parliament's opinion:

The Commission's proposal is submitted both to the Parliament and the Council; the Parliament shall issue an opinion on it

2. The Council's action:

The Council, after obtaining the opinion of the Parliament, has three options:

- I) to approve the amendments of the Parliament: the act is thus approved
- II) to adopt the measure as it is, if the Parliament has not proposed any amendments: the act is thus approved
- III) to adopt a common position, if it does not accept all the amendments of the Parliament: the Council has to communicate its reasons for doing so

3. The Parliament's reaction (under option III):

If the Council adopts a common position, the Parliament has 3 months to react to it. The Parliament has three options:

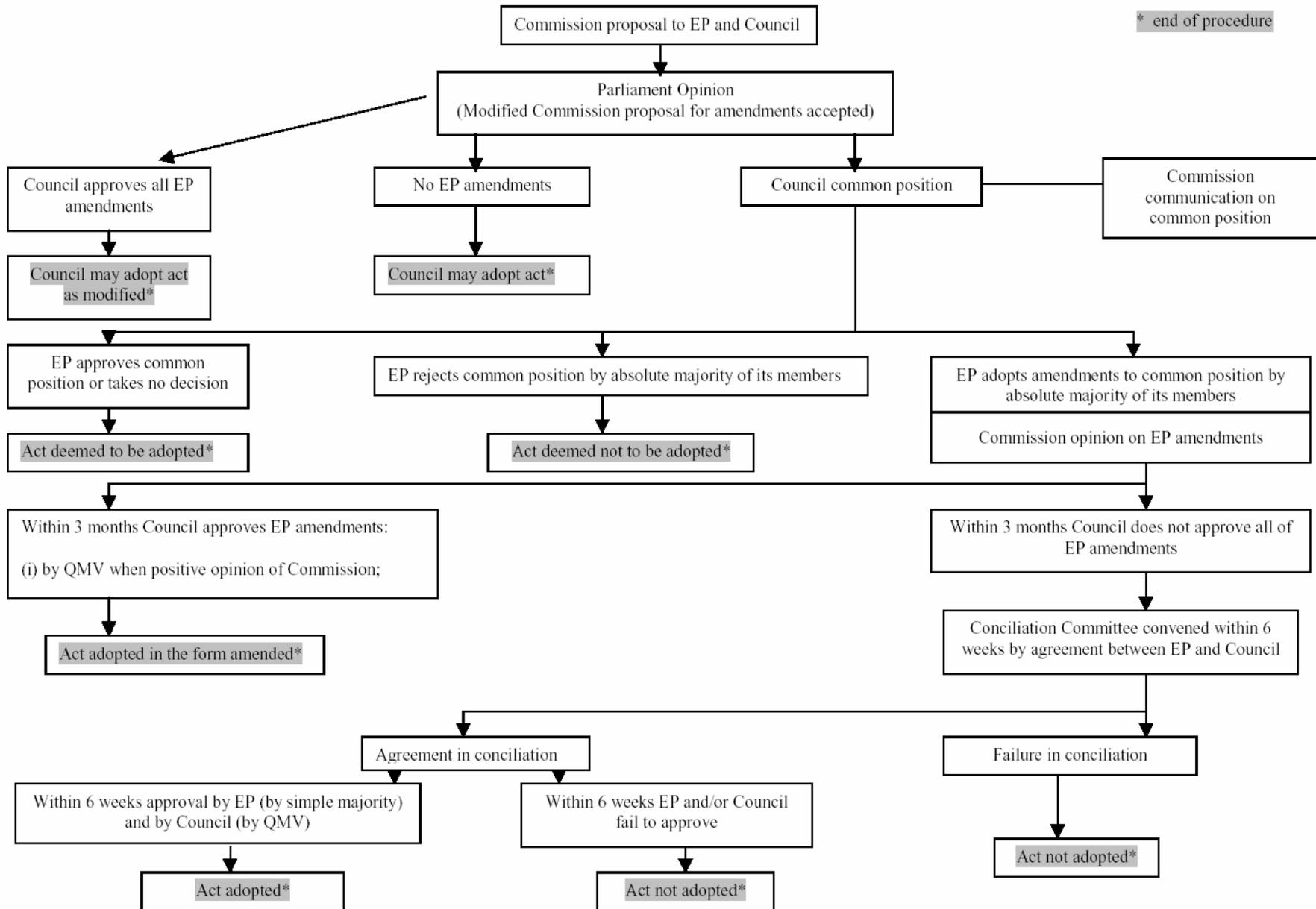
- A) to approve the common position or fail to act: the proposed measure is thus adopted
- B) to reject the common position by absolute majority: the proposed measure is thus deemed not to have been adopted
- C) to propose amendments to the common position: the amended text is thus communicated to the Council and the Commission, which shall deliver an opinion

4. The Council's reaction (under option C):

If the Parliament proposes amendments, the Council has two options:

- a) to approve the amendments of the Parliament: to do so it acts in principle by qualified majority, but by unanimity in regard to those amendments on which the Commission has delivered a negative opinion
- b) not to approve all the amendments of the Parliament: the President of the Council shall within six weeks convene, in agreement with the President of the Parliament, a conciliation Committee

5. The Conciliation Committee (under option b):  
If the Council does not approve all the amendments of the Parliament, a Conciliation Committee is convened. Half of the Conciliation Committee is composed of members of the Council or their representatives and half by representatives of the Parliament. The Commission takes part in the work of the Conciliation Committee. The Conciliation Committee, on the basis of the amendments proposed by the Parliament, has the task of elaborating a joint text. It has two options:
  - i) it fails to approve a joint text: the proposed act shall be deemed not to have been approved
  - ii) it approves a joint text by a qualified majority of the members of the Council (or their representatives) and by a majority of the representatives of the Parliament
6. Final vote within the Parliament and the Council (under option ii):  
If the Conciliation Committee approves a joint text, the act is approved if both the Council, by qualified majority, and the Parliament, by an absolute majority, approve it within 6 weeks. If this is not the case, the act is deemed not to have been adopted.



## **1.5 Protocol annexed to the EU and EC Treaties by the Treaty of Nice**

*See primary sources:*

*Consolidated versions of the Treaty on European Union and of the Treaty establishing the European Community.*

## 1.6 Bargaining Under the Shadow of the Veto



### NOTE AND QUESTIONS

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*The principal reading of this section is a judgement of the ECJ in case 804/79: Commission v United Kingdom (Sea Fisheries). Read the following Note and Questions quickly before you go to the case. Then return to the Note and Questions and address the issues they raise.*

*Shaw has described in detail the various institutional permutations in the legislative process. For the most part, as we shall see in subsequent sections of Unit I, the differences relate to the manner in which the European Parliament may, or may not, impact the decision making process.*

*Despite this "unholy mess" two basic modes of decision making remain: Those matters over which Member States retain a power of veto and those in relation to which one of the forms of Majority Voting prevail.*

*In both instances the overriding tension is between Community and Member States and the manoeuvring of the different Institutions within that tension.*

*The following readings are designed to highlight some of the issues where legal norms and legal analysis impact the decision making process and help a better understanding of the decision making process. Since this is also one of the first European Community Cases which you will be reading, you should also pay attention to the nuances of legal discourse and try and begin to develop a sensibility to the peculiarities of this discourse: assumptions about interpretation and the like.*

*The case is a good illustration of the Community decision making game in practice. In order to help you in reading the case there is a series of comments and questions.*

*Relevant Treaty articles: 3.d;5;7; 38;43(2);43(3) of the old EEC Treaty; Annex 2 to the Treaty of Rome; Act of Accession 102. UK accession. Because of its time, you should be looking at EEC Articles and not Maastricht. Article 102 -- the principle provision with which the case deals -- is reproduced at the beginning of the case).*

*The text of the case contains: The facts and submissions of the parties and intervening parties as summarised by the Reporting Judge and the actual decision of the Court. Excluded is the Opinion of the Advocate General of the Court which is usually printed after the text of the decision (later in the course you shall see the role of the Advocate General. For your reference see especially Unit 2-1).*

*The case brings out in striking fashion most elements of decision making discussed earlier in abstract. One finds a conflict among the various Member States, a blocked Council by*

virtue of a Member State veto, a Commission fulfilling several of its functions: "honest broker", initiator of legislation, guardian of the Treaty and Community "Attorney General".

For its part the Court utilizes in its reasoning concepts such as "essential balance" of the Community or "structural principles". It has to deal directly with the triangle Commission-Council-Member States and in this instance comes out with a subtle solution to an apparently intractable problem.

You will probably find the style of Judgment far more terse and dry in comparison to, say, the style of the US Supreme Court. Your Common Law analytical experience should however enable you to read the Judgment with attention to detail and nuance.

The following are some guiding questions which may help you in digesting the case.

### **Facts and Submissions of the Parties:**

1. What is the precise nature of the Commission charge against Britain?
2. What are the conflicting interests in the blocked situation (Conservation interests, Community political equilibrium etc.)?

The specific legal issue in the case is rooted in an interpretation of Article 102 (Act of Accession).

### **Interpretation of Art. 102 AA:**

3. "From the sixth year after Accession..." Jan 1979 or December 1979?
4. "The Council, acting on a proposal from the Commission..." By Majority or by unanimity? "shall determine conditions for fishing..."

This of course is the key issue. What happens if the Council fails to adopt a measure determining conditions for fishing?

Before analysing the decision of the Court you should look at the **British, Commission, French and Irish positions** respectively.

5. Each of these gives a different reply to the problem of Council inaction (resulting from the British veto). What are the respective positions and what consequences for Community decision making would follow from each.
6. Read carefully the submissions of the Commission. Classify the type of legal argument used by the Commission in their brief (textual, contextual etc.) The Court eventually finds for the Commission. Which arguments carried most weight for the Court?

### **The decision of the Court**

- 1. In Recitals 17 - 18 the Court defines a "position of principle". What is this position? Do you detect a leap from 17 to 18? Is this leap justified? Why, for example, should a bestowal of power on the Community ex Article 102 AA preclude the Member States from exercising "any power of their own in the matter of conservation measures..." (Recital 18)? What are the policy reasons behind this? Is there legal justification for such a position?*
- 2. The Court now faces the "Real world": Despite Article 102 the Council has failed to adopt conservation measures. (Recital 19). Examine critically the Court's handling of the various options open to it in the face of this failure. Is Recital 22 an invitation to unilateralism?*
- 3. In order to provide a solution to the dilemma the Court refers in Recital 23 to "[...] the structural principles on which the Community is founded [...]" and to the necessity of observing "[...] essential balances intended by the Treaty [...]". Search in the subsequent 10 Recitals for the Court's elaboration of these two elements and explain how they allow the Court to arrive at a solution.*

### **Final Questions**

- 1. The Commission argued that absent a Council decision its approval was necessary before a unilateral measure could be adopted by a Member State. Does the Court give a conclusive reply to this question? What would the situation have been if the U.K. had allowed the Commission sufficient time to examine its unilateral proposals?*
- 2. Proposition: In areas where the Community enjoys exclusive competence it may be better for the Community should the Council fail to adopt measures. What is your view?*
- 3. In the absence of a Council decision it seems clear that powers do not revert back to the Member States. Could the Council adopt a resolution which -- in the interest of avoiding strife in the Community -- simply allowed all Member States to adopt unilateral measures in the field of Fisheries conservation?*
- 4. How is the scenario of decision making affected by the restoration of Majority voting? (Reread Article 95 TEC).*

## 1.6.1 Case 804/79: Commission v United Kingdom

**Commission v. UK**

**Case 804/79**

5 May 1981

Court of Justice

[1981] ECR 1045, [1982] C.M.L.R. 543

<http://www.curia.eu.int/en/content/juris/index.htm>

### **FACTS:**

The facts of the case, the course of the procedure and the submissions and arguments of the parties may be summarized as follows:

#### **I - Facts**

On 20 October 1970 the Council of the European Communities adopted, pursuant in particular to Articles 42 and 43 of the EEC Treaty, Regulation (EEC) No. 2141/70 laying down a common structural policy for the fishing industry [citation omitted] and Regulation (EEC) No. 2142/70 on the common organization of the market in fishery products [citation omitted].

Articles 98 to 103 of the Act concerning the Conditions of Accession and the Adjustments to the Treaties, annexed to the Treaty of 22 January 1972, known as "the Accession Treaty", contain provisions relating to fisheries. In particular, Article 102 provides that the Council, acting on a proposal from the Commission, shall determine, from the sixth year after accession at the latest, conditions for fishing with a view to ensuring protection of the fishing grounds and conservation of the biological resources of the sea.

[emphasis added]

On 19 January 1976, the Council adopted Regulation (EEC) No. 100/76 on the common organization of the market in fishery products [citation omitted] and Regulation (EEC) No. 101/76 laying down a common structural policy for the fishing industry [citation omitted]. The first of those regulations repeals Regulation (EEC) No. 2142/70 and the second regulation repeals Regulation (EEC) No. 2141/70.

Article 1 of Regulation (EEC) No. 101/76 provides as follows:

"Common rules shall be laid down for fishing in maritime waters and specific measures shall be adopted for appropriate action and the co-ordination of structural policies of Member States for the fishing industry to promote harmonious and balanced development of this industry within the general economy and to encourage rational use of the biological resources of the sea and of inland waters".

Under Article 2 (1):

"Rules applied by each Member State in respect of fishing in the maritime waters coming under its sovereignty or within its jurisdiction shall not lead to differences in treatment of other Member States.

Member States shall ensure in particular equal conditions of access to and use of the fishing grounds situated in the waters referred to in the preceding subparagraph for all fishing vessels flying the flag of a Member State and registered in Community territory".

Article 2 (2) of Regulation (EEC) No. 101/76 provides that Member States must notify other Member States and the Commission of the existing laws and administrative rules and regulations in respect of fishing in their maritime waters and those rules arising out of the duty to ensure equal conditions of access to and use of the fishing grounds; under Article 3, Member States must notify other Member States and the Commission of any alterations they intend to make to their fishery rules.

Article 4 of Regulation No. 101/76 provides that:

"Where there is a risk of over-fishing of certain stocks in the maritime waters referred to in Article 2, of one or other Member State, the Council, acting in accordance with the procedure provided for in Article 43 (2) of the Treaty on a proposal from the Commission may adopt the necessary conservation measures.

In particular, these measures may include restrictions relating to the catching of certain species, to areas, to fishing seasons, to methods of fishing and to fishing gear".

At its meeting on 30 October 1979 in The Hague the Council drew up and formally adopted on 3 November 1976 a resolution that the Member States would by concerted action extend as from 1 January 1977 their fisheries jurisdiction to 200 miles off their North Sea and North Atlantic coasts.

On the same occasion, the Council agreed (Annex VI to the Resolution) to a Commission declaration (hereinafter referred to as "the Hague Resolution") worded as follows:

"Pending the implementation of the Community measures at present in preparation relating to the conservation of resources, the Member States will not take any unilateral measures in respect of the conservation of resources.

However, if no agreement is reached for 1977 within the international fisheries Commissions and if subsequently no autonomous Community measures could be adopted immediately, the Member States could then adopt, as an interim measure and in a form which avoids discrimination, appropriate measures to ensure the protection of resources situated in the fishing zones off their coasts.

Before adopting such measures, the Member State concerned will seek the approval of the Commission, which must be consulted at all stages of the procedures.

Any such measures shall not prejudice the guidelines to be adopted for the implementation of Community provisions on the conservation of resources."

On 18 February 1977, the Council adopted Regulation (EEC) No. 35/77 laying down certain interim measures for the conservation and management of fishery resources [citation omitted].

At its meeting on 30 and 31 January 1978, the Council reached agreement on the following declaration [citation omitted]:

"The Council failed to reach agreement at this meeting on the definition of a new common fisheries policy but agreed to resume examination of these matters at a later date. Pending the introduction of a common system for the conservation and management of fishery resources, all the delegations undertook to apply national measures only where they were strictly necessary, to seek the approval of the Commission for them and to ensure that they were non-discriminatory and in conformity with the Treaty".

On 19 December 1978, the Council adopted a decision "under the Treaties, concerning fishery activities in waters under the sovereignty or jurisdiction of Member States, taken on a temporary basis pending the adoption of permanent Community measures".

By that decision, the Council, pending the conclusion of an agreement on Community measures for the conservation and management of fishery resources and related matters and in view both of Article 102 of the Act of Accession and of the need to protect the biological resources and to maintain suitable relations with third countries in fisheries matters, adopted interim measures applicable until a definitive agreement had been reached or until the end of March 1979 at the latest.

Those interim measures were as follows: the Member States were to conduct their fisheries in such a way that the catches of their vessels during the interim period took into account total allowable catches (TACs) submitted by the Commission to the Council and the part of the TACs made available to third countries under agreements or arrangements made with them by the Community. The catches taken in the interim period were to be offset against the allocations eventually decided upon by the Council for 1979.

As regards technical measures for the conservation and surveillance of fishery resources, Member States were to apply the same measures as they applied on 3 November 1976, and other measures taken in accordance with the procedures and criteria of Annex VI of the Council Resolution of 3 November 1976 (the Hague Resolution).

Identical interim measures were once more adopted by the Council by Decision No. 79/383 of 9 April 1979 [citation omitted], then by Decision No. 79/590 of 25 June 1979 (Official Journal No. L 161, p. 46); the interim measures which form the subject-matter of the latter decision were applicable until 31 October 1979 at the latest.

Before this, by a letter of 21 March 1979, the Government of the United Kingdom had informed the Commission that in the absence of Community agreement beforehand, the United Kingdom intended to adopt several national measures relating to sea fisheries with effect from 1 June, and sought approval of those measures under the Hague Resolution. Those measures concerned more particularly the increase in certain fishing areas of the mesh size for whitefish and nephrops fishing, the fixing of a minimum landing size for certain species of fish, including whiting, the laying down of a permitted percentage of by-catches in nephrops fishing and the fixing of a minimum landing size for nephrops.

After a voluminous exchange of correspondence and several consultations, the Commission received official notification from the Government of the United Kingdom on 19 June 1979 of five draft statutory instruments, and on 29 June 1979 of a sixth draft statutory instrument, replacing one of the first five, relating to the sea fisheries sector, which were to come into force on 1 July 1979, in spite of the Commission's objections. The Commission was also notified at the same time of certain problems raised by the application of the licensing system for herring fishing and the scheme for the management of herring resources in the waters of the Isle of Man and Northern Irish Sea.

The statutory instruments contested by the Commission, as regards both national powers to adopt them and as regards several of their provisions and the detailed rules for their adoption were as follows: the Fishing Nets (North-East Atlantic) (Variation) Order 1979, Statutory Instrument No. 744, the Immature Sea Fish Order 1979, Statutory Instrument No. 741, the Immature Nephrops Order 1979, Statutory Instrument No. 742, the Nephrops Tails (Restrictions on Landing) Order 1979, Statutory Instrument No. 743, the Sea Fish (Minimum Size) Order (Northern Ireland) 1979, replaced, on 29 June 1979, by the Sea Fish (Minimum Size) (Amendment) Order (Northern Ireland) 1979, Statutory Rules of Northern Ireland No. 235.

(a) The Fishing Nets (North East Atlantic) (Variation) Order 1979 imposes, as regards fishing for protected species of whitefish in Region 2 of the North-East Atlantic Fisheries Commission, except the Irish Sea, a minimum mesh size of 75 mm for trawl nets made of single twine and 80 mm for such nets made of double twine, whilst the existing North-East Atlantic Fisheries Commission regulations provide for a mesh size of 70 and 75 mm respectively.

The same order increases the minimum mesh size for nephrops fishing from 55/60 to 75 mm for trawl nets made of double twine and 70 mm for trawl nets made of single twine in the whole of the North-East Atlantic Fisheries Commission Region 2. It fixes the maximum by-catch of protected whitefish species at 50% and also contains certain technical measures relating to the restructure of the nets.

(b) The Immature Sea Fish Order 1979 fixes a minimum landing size for various species of fish. The provisions of that order are applicable to all fishing boats operating within United Kingdom fishery limits; an exemption is provided for as regards by-catches in industrial fishery.

(c) The Immature Nephrops Order 1979 fixes a minimum landing size of 25 mm, measured by the length of the carapace, which corresponds to a total length of 86 mm, for nephrops landed in the United Kingdom, and lays down detailed rules for that measurement; it prohibits foreign fishing boats from carrying on board in United Kingdom waters nephrops of less than the size laid down in that order.

(d) The Nephrops Tails (Restrictions on Landing) Order 1979 prohibits the landing of nephrops tails except where the quantity consists of not more than 290 tails per kilogram of the landed weight.

(e) The Sea Fish (Minimum Size) (Amendment) Order (Northern Ireland) 1979 fixes, in Irish waters, the minimum landing size for whiting at 27 cm and for nephrops at 25 mm carapace length.

The agreements envisaged in 1979 between the Governments of the United Kingdom and of the Isle of Man concerning the conditions for herring fishing in the Northern Irish Sea within the context of the Herring (Irish Sea) Licensing Order 1977, Statutory Instrument No. 1388, and the Herring (Isle of Man) Licensing Order 1977, Statutory Instrument No. 1389, discriminated, according to the Commission's information, against Irish fishermen, in particular in the licensing system authorizing fishing within the 12 mile zone around the Isle of Man and the landing of fish on that island, and contained quantitative restrictions in the form of quotas per fisherman and per fishing day.

After a further exchange of correspondence and further consultations, the Commission, by a letter of 6 July 1979, initiated against the United Kingdom the procedure laid down in Article 169 of the EEC Treaty. In that letter it complained that the United Kingdom had failed to fulfil its obligations under Community law by adopting the contested national fisheries measures; consequently, the Government of the United Kingdom was requested to submit its observations before 20 July 1979.

By a letter of 31 July 1979, the Government of the United Kingdom submitted its observations on its alleged failure to fulfil its obligations under the Treaty.

Since these observations did not satisfy the Commission, it issued on 3 August 1979 the reasoned opinion provided for in Article 169 of the EEC Treaty. In that opinion it requested the Government of the United Kingdom to take, within 45 days, the necessary steps to bring to an end the infringements of Community law consisting, in its view, in the application of the statutory instruments relating to sea fisheries brought into force on 1 July 1979; the Commission reserved to itself the right to take a final position shortly on the arrangements for herring fishing in the waters of the Isle of Man and Northern Irish Sea.

After further consultations, the Commission issued on 2 October 1979 a second reasoned opinion in which the Government of the United Kingdom was requested to bring to an end the infringements of Community law consisting in the application of certain measures affecting herring fishing in the waters of the Isle of Man and Northern Irish Sea.

## **II - Written procedure**

By application lodged on 13 November 1979, the Commission, pursuant to the second paragraph of Article 169 of the EEC Treaty, brought before the Court of Justice the alleged failure of the United Kingdom to fulfil its obligations in the sea fisheries sector.

By orders of 12 December 1979 and 26 March 1980, the Court permitted the French Republic and Ireland to intervene in support of the Commission's submissions.

The written procedure followed the normal course.

The Court, after hearing the report of the Judge-Rapporteur and the views of the Advocate General, decided to open the oral procedure without any preparatory inquiry. However, it requested the Commission on 10 July 1980 to specify with regard to each of the measures forming the subject-matter of its application the submissions on which it requires the Court to rule and, on 7 October 1980, requested the Commission and the Government of the United Kingdom to reply in writing to several questions. Those requests were complied with within the prescribed periods.

## **III - Conclusions of the parties**

The Commission, in the last state of its conclusions, which were made specific at the request of the Court, concludes that the Court should:

Declare that the United Kingdom has failed to fulfil its obligations under the EEC Treaty and the Hague Resolution by adopting and applying, in 1979, the Fishing Nets (North-East Atlantic) (Variation) Order, the Immature Sea Fish Order, the Immature Nephrops Order, the Nephrops Tails (Restrictions on Landing) Order, the Sea Fish (Minimum Size) (Amendment) Order (Northern Ireland) and a licensing system or management scheme for herring fishing in the waters of the Isle of Man and the Irish Sea;

Order the United Kingdom to pay the costs.

The Government of the French Republic, intervener, claims that the Court should rule that the United Kingdom, by unilaterally enacting the fishery measures of 1 July 1979, has failed to fulfil its obligations under Community law.

The Government of Ireland, intervenor, claims that the Court should rule that, in introducing and applying the measures for 1979 which are the subject-matter of the Commission's application, the United Kingdom has failed to fulfil its obligations under the Treaty.

The Government of the United Kingdom contends that the Court should rule that it has not failed to fulfil its obligations under the EEC Treaty in the matters which form the subject-matter of the Commission's application.

#### **IV - Submissions and arguments of the parties in the course of the written procedure**

The Commission puts forward objections to the measures in question from two points of view: on the one hand, generally, as regards the competence of Member States to adopt after 31 December 1978 autonomous measures in the fisheries sector, and on the other, as regards the various measures specifically, in relation to the procedure and to several of the substantive provisions of those measures.

The Government of the French Republic contests the United Kingdom's power to take the unilateral measures complained of and considers that the decision relating to the mesh size of the nets for nephrops fishing is premature, unnecessary, excessive and discriminatory.

The Government of Ireland considers that the United Kingdom has not, in respect of any of the measures in question, complied with its obligations under the Hague Resolution and that the measures applied to fishing in the waters of the Isle of Man and the Northern Irish Sea are discriminatory.

The Government of the United Kingdom, for its part, is of the opinion that the Member States have retained the power to adopt in 1979 national measures in the sea fisheries sector, that those measures were not subject to the authorization of the Commission, that the measures in question were adopted according to the applicable procedural rules and that they are not contrary to substantive Community law.

#### **A - The problem of competence**

The Commission maintains that since the expiry of the transitional period referred to in Article 102 of the Act of Accession, the Member States no longer have power to take conservation measures in the fisheries sector and that such measures may only validly be adopted by the Member States if they have previously been authorized by the Community.

(a) The Community has, under the EEC Treaty itself, competence in fisheries matters; its powers in that sector do not derive from Article 102, which has some other purpose. Since Article 102 cannot be without legal effect, its effect must be to bring to an end the powers of Member States to adopt measures "with a view to ensuring protection of the fishing grounds and conservation of the biological resources of the sea", in so far as those powers had not ended at an earlier date as a result of the adoption of Community fishery measures.

(b) This opinion is based on the case-law of the Court of Justice, in particular the judgments of 14 July 1976 (Joined Cases 3, 4 and 6/76, Kramer and Others [1976] ECR 1279), 16 February 1978 (Case 61/77, Commission v Ireland [1978] ECR 417) and 3 July 1979 (Joined Cases 185 to 204/78, Van Dam and Others [1979] ECR 2345). It follows in particular from those judgments that the competence of the

Member States in relation to conservation measures is only of a transitional nature and that they were only permitted to take such measures at national level as long as the transitional period laid down by Article 102 of the Act of Accession continued to run and as long as the Community had not yet fully exercised its powers in the matter. The words used by the Court show clearly that it paid particular attention to the date marking the end of the competence of the Member States. The rule about the temporary competence of Member States is additional to and separate from the rule that national measures enacted under Member States' powers have to comply with Community law; it is also separate from the normal rule that when the Community has legislated comprehensively on a particular topic, Member States no longer have power to legislate on the same topic.

(c) The statement of the Court that Member States have, at the latest within the period laid down by Article 102 of the Act of Accession, a duty to use all political and legal means to ensure the participation of the Community in the international fisheries conventions implies that after that date Member States no longer have the necessary power to participate themselves.

(d) The fact that the Hague Resolution of 1976 prohibits, for a short period, Member States from adopting unilateral measures for the conservation of resources, which is at first sight surprising, seems natural when Article 102 is interpreted as depriving Member States of their entire legislative powers in fisheries matters from a date only just over two years later.

Apart from the question of the date on which the period laid down in Article 102 expires, which has in the meantime been decided by the Court, the wording of that provision is unambiguous: after the date laid down therein, the Council, and only the Council, has power to lay down the conditions for fishing for protection of the fishing grounds and conservation of the biological resources of the sea.

(e) The substantial arguments for treating the fisheries sector in this way are to be found in the real nature of this activity: in the sector of the conservation of the biological resources of the sea, worthwhile results can only be attained thanks to the co-operation of all the Member States and through a system of rules binding on all the States concerned, including non-member countries.

The links between the internal and external powers of the Community are particularly close in the fisheries sector. The great proportion of Community fishery resources has come within Community jurisdiction because of the Community decision to extend fishing limits to 200 miles. In no other area of law is the jurisdiction of Member States based so completely on a Community measure; in no other area have measures adopted by the Community such an immediate and direct impact on the rights of citizens of non-member countries and on the relations of the Community with those countries.

(f) The Court has ruled that the Council's power to adopt conservation measures derives from the EEC Treaty, in particular from Article 43. Article 102 of the Act of Accession was not intended to be the basis of the Council's power in this sector; it was intended to be an invitation to the Council to adopt a common fisheries policy within a certain period. Since such a provision cannot have no legal effects, it means that the action for which it makes provision may only be taken by the Council and not by Member States.

Since the Member States no longer have competence to adopt national fisheries measures they may adopt them only if they are authorized by the Community to do so. The Council, unable to agree on a Community measure, might be able to agree to authorize national measures; if a particular measure has not been so authorized, the Commission must necessarily have the power under Article 155 in these exceptional circumstances to authorize a Member State to adopt national conservation measures. The Commission's power thus to authorize certain national conservation measures has been recognized by the decisions of the Council of 19 December 1978, 9 April and 25 June 1979.

(g) As regards the criteria and other procedures applicable, the Commission agrees with the United Kingdom that the Hague Resolution applies and is legally binding. The Commission must be consulted by the Member States concerned at all stages of the procedures; as to the criteria applicable, it follows from the Hague Resolution that the Member States may adopt "as an interim measure and in a form which avoids discrimination, appropriate measures to ensure the protection of resources..." and from the Council declaration of 31 January 1978 that national measures may only be taken in as far as they are strictly necessary for the conservation and management of fishery resources, are non-discriminatory and in conformity with the Treaty and if the approval of the Commission has been sought beforehand.

The Hague Resolution remains applicable but in a situation substantially changed by the expiration of the period contemplated by Article 102. The legal regime applicable since 1 January 1979 is based on Article 102 and not on a new strict interpretation of the Hague Resolution. In these circumstances, neither the Hague Resolution nor Regulation No. 101/76 could have given back to Member States the competence which Article 102 brought to an end.

(h) In the alternative, it is necessary to state that if Member States still have powers in fisheries matters after the date by which the Council should have acted, they have a strict duty to co-operate and they may exercise those powers only with the approval of either the Council or the Commission. This view is based on Article 5 of the EEC Treaty but does not depend on the interpretation of Article 102 which the United Kingdom is unwilling to accept.

Article 102 shows that Member States unanimously agreed that the Council should adopt comprehensive fisheries measures by the end of the period referred to in that article. Since the Council has failed to adopt Community measures, Member States have a duty to co-operate so as to remedy as far as possible the failure of the Council. They have two duties: a duty to take measures on the problems with which the Council should have dealt, in particular urgent conservation problems, and a duty to do so only with the consent of a Community institution.

If the Council had acted in accordance with Article 102, Member States would incontestably already have lost their powers in fisheries matters; if they now have such powers, they have them only because of the default of the Council, and any national measures are merely a substitute for those measures which should have now been adopted by the Council. Those national powers cannot be greater than those which the Council would now have; the Member States may therefore in any case only adopt measures proposed or approved by the Commission, just as the Council can adopt only such measures (subject to an exception). If the Member States still have powers in fisheries matters, they may exercise them, because of Article 102, only with the consent of the Commission.

It would be incompatible with Article 5 of the EEC Treaty for Member States to take advantage of the default of the Council to adopt national measures which they would not be able to adopt if the Council had acted in accordance with Article 102 and which *ex hypothesi* are not measures which the Council had agreed to adopt. This reasoning assimilates the need for Commission approval in fisheries matters to the need for Commission approval, by way of a Commission proposal, for most decisions of the Council. In the sector of protection of fishery resources, the measures which the Commission *ex hypothesi* must approve are measures of the same kind which the Commission is and should be proposing to the Council and which the Council should seek to adopt.

(i) Member States have certain possibilities *de jure* and *de facto* to prevent the adoption of Community measures. It would be wrong if a Member State which had unjustifiably obstructed the adoption of Community measures were free, without the consent of the Community institutions, to use powers which, if the Council had acted, it would clearly no longer be able to exercise.

(j) The Council decision of 25 June 1979 which was in force on the date on which the national measures in question came into operation refers explicitly to Article 102 and supports the Commission's interpretation of that article. Its wording indicates that the Hague Resolution is no longer in force in so far as it recognizes the power of Member States to adopt national conservation measures; that resolution is in force only in so far as it relates to procedures and criteria. The reference by the decision of 25 June 1979 only to the procedures and criteria of the Hague Resolution does not make sense except on the Commission's interpretation of Article 102, since it would have been absurd to give Member States greater freedom to adopt national measures than they had previously had under that resolution as a whole.

The Government of the French Republic recalls that the fisheries sector, and more precisely that of the conservation of marine species, indisputably falls within the powers expressly devolved to the Community by the Treaties.

(a) As regards the circumstances in which the Council was obliged to exercise and has exercised Community powers in regard to the conservation of the resources of the sea, a fundamental distinction must be drawn between the transitional period laid down in Article 102 of the Act of Accession and the following period.

(b) As far as the first period is concerned, it follows clearly from the case-law of the Court that where the Council has refrained from acting, the Member States could until 31 December 1978 take certain national measures for the conservation of species, but that on any view that power came to an end on 1 January 1979. This principle was moreover recognized by the Council itself in the Hague Resolution.

(c) As far as the second period is concerned, the case-law of the Court has established that all national powers in this field came to an end on 31 December 1978. Thereafter the Council alone has power to take measures for the conservation of marine products; moreover, the Council could not restore to the Member States powers which the latter permanently lost at the expiry of the transitional period without infringing the provisions of Article 102.

The Hague Resolution was itself adopted from the same perspective. That resolution was drawn up "pending the implementation of the Community measures at present in preparation relating to the conservation of resources" and it was never envisaged that its application would be prolonged beyond 31 December 1978, the end of the transitional period.

All national powers in the field of the protection of the fishing grounds and the conservation of the biological resources of the sea therefore came to an end totally and irreversibly on 31 December 1978.

(d) The interim measures adopted by the Council on 19 December 1978, 9 April, 25 June (and 29 October) 1979 cannot, since all national powers came to an end on 31 December 1978 pursuant to Article 102 and since the Hague Resolution ceased to apply at that date, be interpreted as having the aim not of authorizing Member States to take measures after 31 December 1978 but of crystallizing the measures previously taken by the States; the Member States are obliged to apply after 1 January only those measures in force on 3 November 1976, the date of the adoption of the Hague Resolution, and those duly taken in accordance with that resolution between 3 November 1976 and 31 December 1978, the date upon which all national powers came to an end. This is the only interpretation compatible with Article 102 as construed by the Court. The interim decisions taken by the Council must, in accordance with the texts of the Treaties, the case-law of the Court and their actual wording be interpreted as crystallizing decisions and not as decisions delegating or transferring power.

(e) No new technical protective measures may now be taken by the Member States. By adopting the disputed measures the United Kingdom has therefore failed to fulfil its obligations.

The Government of Ireland, as regards the competence of a Member State to take conservation measures in 1979, considers that the position is governed by the Council decisions of 19 December 1978, 9 April, 25 June (and 29 October) 1979. The interpretation of the powers of the Council in the sphere of fisheries conservation placed upon Article 102 of the Act of Accession by the French Republic is too restrictive and cannot be accepted. Certain circumstances may make it necessary for the Council, even after 31 December 1978, to lay down rules, procedures and criteria for action by individual Member States instead of action by the Council itself. There is no reason why the Council should not authorize Member States, if and in so far as the authorization of the Council to this end may be necessary, to introduce measures of fisheries conservation if the Council considers such a course to be in the best interests of the Community.

In this case, the Court is required to decide whether the United Kingdom's measures for 1979 complied with the interim decisions taken by the Council in 1978 and 1979, including the Hague Resolution, which has not been altered, and other relevant rules of Community law, in particular Article 7 of the EEC Treaty, Article 2 of Regulation No. 101/76 and Article 4 of Protocol No. 3 to the Act of Accession concerning the Channel Islands and the Isle of Man, Article 3 of Regulation No. 101/76 and the provisions of the London Convention of 1964 on the rights of Ireland and Irish fishermen.

The Government of the United Kingdom is of the opinion that the Member States have an inherent power and right to take conservation measures, except in so far as they have limited that right by treaty. These limitations are that the measures must comply with the positive requirements of Community law, notably Regulation No. 101/76 and the Hague Resolution, and must not conflict with Community measures taken in that field. Member States are under an obligation to seek the approval of such measures from the Commission, not to obtain the Commission's authorization.

(a) The passing on 31 December 1978 of the date by which at the latest the Council is required by Article 102 of the Act of Accession to take Community conservation measures did not of itself affect the power of Member States to take such measures. The power of Member States is only limited to the extent that the Council actually takes such measures.

The matter was in any case at all material times regulated by the express terms of the successive Council decisions of 19 December 1978, 9 April and 25 June 1979, which expressly authorize such measures.

(b) Article 102 cannot be construed as conferring an exclusive power or competence on the Council to enact conservation measures. It quite clearly requires the Council to exercise its powers by a certain date. Since the Council can only proceed by agreement there is no way of compelling it to comply; Article 102 cannot intend that in default of punctual performance of this obligation by the Council the fish stocks should remain indefinitely without protection.

(c) The Council has not however been completely inactive; without having adopted comprehensive Community conservation measures in accordance with its obligation under Article 102, it has however made a series of decisions declaring its intention of reaching an agreement as early as possible on Community measures for the conservation and management of fishery resources and related matters and meanwhile providing for interim measures until a definitive agreement has been reached.

(d) The legality of the measures taken by the United Kingdom during the validity of the interim measure taken by the Council on 25 June 1979 must be judged by the requirements of that decision, which has exactly the same status and binding force as the Hague Resolution itself; the question

therefore is whether the United Kingdom measures were taken "in accordance with the procedures and criteria" of that Hague Resolution.

(e) The Council in no way intended to grant the Commission a power of veto over national conservation measures; it chose to rely on the requirement of the Hague Resolution that Member States must "seek the approval" of the Commission.

(f) The Commission's argument that Article 102 has the effect of bringing to an end the powers of Member States in so far as they had not ended at an earlier date is unsupported. It is not supported by the case-law of the Court of Justice; the Court has not hitherto had to decide what would be the position if the time-limit set by Article 102 should pass without the Council having complied fully with its duty to take conservation measures.

(g) To state that only the Council has competence does not enable it to be argued that national measures may nevertheless be authorized by the Commission.

In this respect it is necessary first of all to state that in fact the Council has authorized national measures by its decision of 25 June 1979; moreover, Article 155 of the EEC Treaty cannot be interpreted as empowering the Commission to authorize a Member State to take a measure which ex hypothesi it had no power to take. In fact the Commission claims a power not to authorize a measure which is not authorized by the Council but to veto a measure which is authorized by the Council.

(h) The reference in the "interim" decisions of 19 December 1978, 9 April and 25 June 1979 to the procedures and criteria of the Hague Resolution must not be understood as requiring Member States to obtain the authorization rather than to seek the approval of the Commission.

(i) The argument of the French Government that all national powers came to an end on 31 December 1978 is not supported either by the case-law of the Court or by Article 102 of the Act of Accession; it is refuted by the wording of the "interim" decisions and by practice: during 1979, the Member States made at least 25 applications to the Commission for approval of national conservation measures including one such application by the French Government itself.

(j) The Commission's alternative argument is as fallacious as its original argument: the powers of the Member States have so far been limited only by the terms of the Hague Resolution which only requires them to "seek the approval" of the Commission, not to obtain its consent. The Commission has in no way acquired a power of veto over national conservation measures.

(k) It is quite wrong to express an opinion on the conduct of Member States in the performance of their legislative functions; in any case, such an examination cannot constitute a ground for conferring a power of veto on the Commission.

## **B - Procedural rules**

The Commission complains, only in the alternative, that the measures in question were adopted in breach of several procedural rules.

(a) Although the Commission asked in April 1979, it did not receive the texts of the five statutory instruments adopted by the United Kingdom until 19 June, three months after first notification and after the date on which they had originally been intended to come into force.

A further measure, which was due to come into force and in fact came into force on 1 July 1979, was only notified to the Commission on 29 June 1979. The Government of the United Kingdom did not give any explanation or justification for this; it therefore clearly failed to fulfil its obligations under the Hague Resolution, according to which it must consult the Commission "at all stages of the procedures".

The complaint that the Commission itself was responsible for the lack of discussion is refuted by the facts.

There is no justification for attempting to make a distinction between "changes in fishing rules" within the meaning of Regulation No. 101/76 which must merely be notified and the measures to which the Hague Resolution applies. Although the wording of the resolution and Article 3 of Regulation No. 101/76 is not the same, they do not apply to different categories of measure. The Hague Resolution, according to the case-law of the Court, must be interpreted as referring to all conservation measures.

In any case, less than 48 hours' notice of a change which the United Kingdom intended to make to existing rules is not sufficient to comply with Article 3 of Regulation No. 101/76.

(b) The statutory instruments submitted to the Commission in June 1979 contained provisions which were different from those of which it was notified on 21 March.

(c) The Government of the United Kingdom objected at the Council meeting on 25 June 1979 to Community measures qua Community measures although it had no objection to a series of national measures having identical effects. The fact that it refused to adopt as Community measures certain measures to which it agreed fully as a matter of substance is incompatible with the obligations of a Member State under the Treaty, in particular Article 5 thereof.

(d) With one exception, the Government of the United Kingdom refused to modify the measures in question in the light of the Commission's objections. This refusal cannot in this case be objectively justified by the alleged lateness of the request.

(e) The United Kingdom was in breach of its obligations under the Hague Resolution by adopting the measures which it notified in accordance with Article 3 of Regulation No. 101/76 but for which it did not seek the Commission's approval.

(f) as a whole, the Government of the United Kingdom failed properly to inform and consult the Commission and to give it adequate time to reach a decision, contrary to Article 5 of the Treaty and the Hague Resolution.

The Government of the French Republic claims that the United Kingdom has failed in this case to fulfil its obligations under Article 5 of the Treaty and the Council decisions. On the same assumption, it has also infringed Articles 2 and 3 of Regulation No. 101/76 by not notifying the proposed measures to the other Member States in due time.

The Government of Ireland also complains that the United Kingdom was in breach in particular of the Hague Resolution by failing to give information and to co-operate.

(a) The Government of the United Kingdom initially supplied the Commission only with incomplete information, particularly in the case of the Isle of Man measures; reasonable requests by the Commission for further information were only answered after long delays, in some instances even after the measures in question had been implemented. The general tendency of the United Kingdom's conduct was to regard the procedural obligations imposed by the Council decisions of 1979 and by the more general rules of the Treaty as a series of mere formalities rather than as substantive obligations to co-operate by giving

adequate notice and adequate information concerning measures proposed, and by making a genuine effort to reach agreement in advance on such measures which seriously affected the interests of fishermen of other Member States.

(b) The argument that some of these measures were merely "changes in fishing rules" rather than measures of fisheries conservation and were not therefore subject to the requirements of the Council decisions and the Hague Resolution cannot be accepted. The measures in question were all taken in connexion with the objective of conservation of fish stocks; the fact that no new legislation or statutory instrument may have been adopted in 1979 for the Isle of Man fishery is irrelevant. The administrative measures taken in 1979 by the United Kingdom and Isle of Man authorities under pre-existing statutory powers were as much subject to the procedures of the Hague Resolution and Article 3 of Regulation No. 101/76 as the adoption of new legislation or of new statutory instruments to control fishing in the sea area in question would have been.

(c) In any case, Ireland was not notified in advance by the United Kingdom or Isle of Man authorities of the measures proposed by those authorities for fishing by Irish boats in the "low season" in the waters within 12 miles of the Isle of Man coast, either pursuant to Article 3 of Regulation No. 101/76 or otherwise.

The Government of the United Kingdom contests the procedural infringements complained of.

(a) The lack of consultation is attributable to the Commission which, instead of accepting the invitation to discuss the proposed measures, asked to see the draft statutory instruments, thus postponing discussion of the proposals until their final form had been decided upon.

In any case, the Commission has no right to see the draft instruments as such; it is entitled to know in sufficient time and in sufficient detail what is proposed and to be consulted at all stages of the procedures. The United Kingdom has fulfilled this requirement fully.

The Commission is setting up two standards: several measures adopted by the other Member States were not notified to the Commission until some time after they came into force. Moreover, no minimum period of notice has been laid down by Community law.

The Hague Resolution refers to unilateral measures in respect of the conservation of resources.

(b) The differences between the statutory instruments notified to the Commission on 21 March 1979 and those notified in June were very minor.

(c) The reasons why a Member State takes action within the Council, the legislative organ of the Community, do not come within the jurisdiction of the Court.

(d) To air a political grievance before the Court amounts to inviting the Court to interfere with the internal functioning of another Community institution in defiance of the requirements of Article 4 (1) of the EEC Treaty.

In fact, the request to modify its proposals was not made to the Government of the United Kingdom until 27 June 1979, three days before they came into force; that request was belated.

(e) Since the measures in question were changes in fishing rules, not conservation measures, the question of seeking the Commission's approval under the Hague Resolution did not arise.

### **C - Certain substantive provisions of the measures in question**

The Commission considers that the United Kingdom measures involve certain substantive infringements of Community law.

(a) The early introduction of an increased minimum mesh size for trawl nets and of a minimum landing size for nephrops was unnecessary and unfair to fishermen. The measures in themselves are not contested; the complaint relates to their premature introduction.

The United Kingdom should have provided for a period of grace of several weeks, giving fishermen a reasonable time to write off and replace nets previously used; the fishermen had legitimate expectations that the existing rules would be maintained. Protection of that legitimate expectation required the grant of a period of grace. By refusing this, the United Kingdom failed in its duty only to take conservation measures which are strictly necessary and to avoid, as it is obliged to do under Article 5 of the EEC Treaty, causing unnecessary and unreasonable inconvenience and loss to fishermen of other Member States, or at least to minimize such inconvenience or loss.

The measures in question gave rise to various incidents: the boarding of several French fishing boats and the institution of criminal proceedings against and conviction of their skippers.

(b) The agreements reached between the Governments of the United Kingdom and of the Isle of Man with regard to the conditions laid down for herring fishing in the Northern Irish Sea made it necessary for fishermen to possess a licence in order to be able to fish within the 12 mile zone around the Isle of Man; they involved quantitative restrictions in the form of quotas per fisherman and per fishing day; it was possible to limit the number of licences and the landing of fish was reserved to fishermen holding a landing licence which was issued only to holders of a fishing licence.

Irish fishermen were subject to many forms of discrimination compared with United Kingdom and Isle of Man fishermen: they were not informed in good time of the duty to hold a licence; they were not enabled to satisfy that requirement by normal and reasonable means; criteria of "historic interests" were applied to them, obliging them to acknowledge that they had fished without licences in 1977 and 1978 or to reduce their individual claims to an "historic interest" in the fisheries concerned. As a whole, they were victims of very subtle administrative obstructionism.

Even if the Community fishery rules did not apply to the Isle of Man, Article 4 of Protocol No. 3 to the Treaty of Accession unequivocally prohibits all discrimination.

The Government of the French Republic considers that the measure increasing the minimum mesh size for nephrops fishing nets is incompatible with Community law.

(a) The unilateral introduction by the United Kingdom on 1 July 1979 of a 70 mm mesh size is premature having regard to the conservation needs of the species.

The initial proposals of the Commission envisaged the implementation of such a measure on 1 September 1979; the adoption of the date of 1 July 1979 runs counter to the Council declaration at its meeting on 4 April 1979, is not based on any scientific justification and is in breach of an agreement reached in the Council.

(b) The measures in question create unjustified discrimination between the Member States and between types of fishing.

The abrupt change to a mesh size of 70 mm is such as to accelerate the movement towards progressive substitution of British nephrops fishermen for French fishermen. Since the stock of nephrops is not threatened, the only possible reason for a change to a mesh size of 70 mm is the desire to reduce the by-catches of bottom species; such a reason may be criticized at a scientific level, at a political level and at a legal level.

(c) The unilateral British decision on the mesh size for nephrops fishing is of such a nature as adversely to affect and to jeopardize the formulation of a common fisheries policy.

(d) The measure in question causes serious financial loss to French fishermen, the magnitude of which is such as to encourage fishermen no longer to visit the waters in which they have traditionally carried on their activities in accordance with their historic rights and with Community law. This loss consists of the boarding of boats, the fining of their skippers, the confiscation of gear and the deterrent effect, the consequences of which are far heavier, on French fishermen who traditionally fish those waters.

The Government of Ireland complains that the measures concerning herring fishing in the waters of the Isle of Man and Northern Irish Sea are discriminatory to Irish fishermen.

The Community rules, including the prohibition on discrimination, apply to the waters within the 12 mile zone off the Isle of Man, if not outside three miles then at least outside six miles from that coast. Moreover, the traditional rights of Ireland and her fishermen under the London Convention of 1964 to fish within a defined area between six and 12 miles off the west side of the Isle of Man have the force of law under the Community Treaties, in particular Article 100 (2) of the Act of Accession. The exercise of the special fishing rights of Ireland is also covered by the "equal treatment" rule in Article 4 of Protocol No. 3 to the Act of Accession concerning the Channel Islands and the Isle of Man.

Irish fishermen or their representatives received application forms for fishing in the Isle of Man and Northern Irish Sea fishery, including the zone between six and 12 miles off the Isle of Man coast, only very belatedly, as regards both the low and the high seasons; they were moreover placed in an unfavourable position to establish their "historical interest".

The whole of the licensing system for fishing within the waters adjacent to the Isle of Man in 1979, including the "historic interest" criterion, as that system was operated by the Isle of Man and United Kingdom authorities, was discriminatory against Irish fishermen.

The Government of the United Kingdom considers the substantive infringements complained of to be unfounded.

(a) The increase in the mesh size of the nets for nephrops fishing, of the minimum landing size of nephrops and of the mesh size for fishing for whitefish were justified for good scientific reasons, in particular the recommendations of the International Council for the Exploration of the Sea; the United Kingdom's refusal to agree to the proposed Community regulation which would have delayed the introduction of those measures was amply justified.

Conservation measures decided upon with the aim of increasing yields of fish to all concerned in the long term may in the short term involve temporary losses for fishermen.

To delay the introduction of the measures beyond 1 July 1979 would have caused damage to the stocks and hence to the livelihoods of fishermen; the measures in question were therefore both appropriate and necessary.

The introduction of an interim measure relating to nephrops fishing was not contrary to the Council declaration of 4 April 1979.

The criticisms of the French Government are based on social and economic grounds, whereas the measures in question are based in essence on the scientific recommendations of the International Council for the Exploration of the Sea.

(b) The complaints concerning the issue of licences to Irish boats for herring fishing can only relate to the waters situated between six and 12 miles off the base-lines of the Isle of Man during the 1979 season; the rules of Community law governing fish conservation measures do not apply to those waters, pursuant in particular to the new Article 227 (5)(c) of the EEC Treaty and to Protocol No. 3 to the Act of Accession.

No discrimination against Irish fishermen has been shown in this case. The small number of licences granted to Irish fishermen is due to the fact that a small proportion was permissible in accordance with historical criteria.

#### **V - Oral Procedure**

The Commission, represented by its Agents, Donald W. Allen and John Temple Lang, the French Republic, represented by its Agent, Gilbert Guillaume, Ireland, represented by Declan N.C. Budd, B.L., and the United Kingdom, represented by the Lord Advocate, Lord Mackay of Clashfern, Q.C., assisted by Peter G. Langdon-Davies and by Mr Cushing as an expert witness, presented oral argument and answered questions put by the Court at the sitting on 9 December 1980.

## Judgement:

1. By application lodged at the Court Registry on 13 November 1979 the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that, by applying in the matter of sea fisheries unilateral measures comprising on the one hand five Statutory Instruments relating to the mesh of nets and the minimum landing size for certain species and on the other hand a licensing system for fishing in the Irish Sea and the waters round the Isle of Man, the United Kingdom has failed to fulfil its obligations under the Treaty.
2. The measures belonging to the first group comprise the following Statutory Instruments, which were brought into force on 1 July 1979:

[...]

## History of the dispute

4. It is common ground that at the beginning of 1979 the Council, to which the Commission, in pursuance of Article 102 of the Act of Accession, had proposed the adoption of a series of measures for the conservation of fishery resources in the waters under the jurisdiction of the Member States, failed to adopt the necessary provisions. In the circumstances the Council adopted interim measures which, applied for limited periods, were extended from time to time. These decisions, the wording of which is similar, are dated 19 December 1978 (not published), 9 April 1979, No. 79/383 (Official Journal No. L 93, p. 40) and 25 June 1979, No. 79/590 (Official Journal No. L 161, p. 46). The latter decision, which was applicable at the time of the bringing into force of the five Statutory Instruments of the first group, is worded as follows:

"COUNCIL DECISION of 25 June 1979

under the Treaties, concerning fishery activities in waters under the sovereignty or jurisdiction of Member States, taken on a temporary basis pending the adoption of permanent Community measures.

The Council intends to reach an agreement as early as possible in 1979 on Community measures for the conservation and management of fishery resources and related matters. Pending its decision in the matter and in view both of Article 102 of the Act of Accession and of the need to protect the biological resources and to maintain suitable relations with third countries in fisheries matters, the Council, on 19 December 1978 and 9 April 1979, adopted interim measures which were in force from 1 January to 31 March 1979 and from 1 April to 30 June 1979 respectively. Following on from these measures, the Council had decided on the following interim measures which will apply from 1 July 1979 until the Council has reached a definitive agreement or until 31 October 1979, whichever is the earlier.

1. Member States shall conduct their fishery in such a way that the catches of their vessels during the interim period shall take into account TACs submitted by the Commission to the Council in their communications of 23 November 1978 and 16 February 1979 and the part of the TACs made available to third countries under agreements or arrangements made with them by the Community. The catches taken in the interim period will be offset against the allocations eventually decided upon by the Council for 1979.

2. As regards technical measures for the conservation and surveillance of fishery resources, Member States shall apply the same measures as they applied on 3 November 1976, and other measures taken in accordance with the procedures and criteria of Annex VI to the Council resolution of 3 November 1976."

5. By a letter of 21 March 1979 the Government of the United Kingdom informed the Commission of its intention to bring into force on 1 June 1979 a series of measures for the conservation of fishery

resources concerning the mesh of nets, minimum landing sizes and by-catches and sought the approval of the Commission in this matter in accordance with Annex VI to The Hague Resolution (the text of which, hereinafter referred to as "The Hague Resolution", which was not published in the Official Journal, was quoted in the Court's judgment of 16 February 1978, *Commission v Ireland*, Case 61/77, [1978] ECR 417, at paragraph 37). Subsequently the Government informed the Commission that the proposed measures would not come into force until 1 July.

6. The Commission reserved its position until it had obtained the complete text of the proposed measures and the Government of the United Kingdom sent to it on 19 June 1979 five draft Statutory Instruments and on 29 June 1979 a sixth replacing one of the first five. In the correspondence exchanged on this subject with the Government of the United Kingdom the Commission repeatedly stressed that the proposed measures could not come into force without having received its approval in view of the fact that the subject-matter was within the powers of the Community.
7. The measures in question were brought into force on 1 July 1979.
8. On 6 July 1979 the Commission sent to the Government of the United Kingdom a letter notifying it that it was taking action under Article 169 of the Treaty. The Commission received the Government's observations by a letter dated 31 July 1979 and delivered its reasoned opinion on the above-mentioned Statutory Instruments on 3 August 1979 and on the dispute concerning fishing in the Irish Sea and the waters round the Isle of Man on 2 October 1979.
9. The parties do not dispute the fact that the Statutory Instruments brought into force on 1 July 1979 by the United Kingdom are genuine conservation measures and that they correspond, at least in principle, to the measures proposed at the same time by the Commission to the Council as regards the whole of the sea areas in question. The criticisms made by the Commission are based on the consideration that measures of this type cannot be effectively adopted except for the whole of the Community, that the Council would have been in a position to adopt them in the form intended by the Treaty if the United Kingdom had not itself blocked the decision-making process in the Council and that by unilaterally adopting the measures in question the United Kingdom has encroached upon the powers which belong in their entirety, as from 1 January 1979, to the Community. According to the Commission, in the circumstances the disputed measures could therefore be adopted only with its authorization.
10. It is only in the alternative that the Commission has considered the substance of the various measures adopted in order to show that, even though they are genuine measures of conservation, their adoption has breached the principle of the equality of treatment of all Community fishermen, either as regards the time at which they came into force or as regards the detailed methods of their application.
11. The Government of the French Republic and the Government of Ireland have expressed their support for the Commission's case.
12. The French Government recalls that fisheries and more precisely the conservation of marine species are covered by the powers expressly transferred to the Community and stresses that on 31 December 1978 all national powers in the matter of conservation measures disappeared totally and irreversibly. A fundamental distinction must therefore be made, in accordance with the existing case-law of the Court, between the period which expired on 31 December 1978 and the ensuing period. Henceforth the power to adopt measures for the protection of the biological resources of the sea comes within the competence of the Community alone and more precisely of the Council. The Council cannot, without disregarding the provisions of Article 102, restore to the

Member States a power which they have definitively lost. Having regard to these legal facts, the decisions adopted by the Council must be understood as decisions "crystallizing" and fixing the conservation measures as they existed at the expiration of the transitional period and not as decisions delegating or transferring power.

13. The Government of Ireland, whilst supporting the Commission's action, does not however accepted the French Government's position with regard to the question of powers. It takes the view that the situation is governed by the successive decisions of the Council, as referred to above, but it would not wish to exclude the possibility that the Council might, even after the expiration of the period laid down in Article 102 of the Act of Accession, adopt rules, procedures and criteria for action by individual Member States instead of action by the Council itself if circumstances make urgent conservation measures necessary.
14. The Government of the United Kingdom claims that as long as the Council has not exercised the powers conferred upon it by Article 102 of the Act of Accession, even after the expiration of the period laid down in that article, the Member States retain residual powers and duties until the Community has fully exercised its powers. It does not dispute that the measures adopted in these circumstances by the Member States must be compatible with all relevant provisions of Community law; in this case the real question therefore is whether the measures are in conflict with the Community legislation in force and whether, in adopting them, the United Kingdom has disregarded any one of its obligations in pursuance of Community law.
15. The Government of the United Kingdom takes the view that at the time when it introduced the five Statutory Instruments at issue there was no Community legislation in force on the same matter just as there was no Community legislation affecting herring fishing in the Irish Sea and the waters round the Isle of Man. The Government feels that it has satisfied the obligations resulting from the Council's decisions and The Hague Resolution in view of the fact that it consulted the Commission at all stages of the preparation of the disputed measures and sought its approval. On the other hand it does not agree that that resolution and the decisions extending its application may be interpreted as requiring the prior authorization of the Commission for any action by the Member States.
16. Having regard to the uncertainties characterizing the legal situation in the field in question it is appropriate in the first place to establish what the state of Community law was as regards conservation measures at the relevant period. Once the bases of the legal situation have been established it will then be necessary to consider separately on the one hand the question of the compatibility with Community law of the adoption of the five Statutory Instruments disputed by the Commission and on the other the fisheries situation in the Irish Sea and the waters round the Isle of Man, which raises special legal problems.

#### **The state of the law at the time in question**

17. The Court has had occasion to recall in former judgments and most recently in its judgment of 10 July 1980, to which reference has already been made, the elements of Community law which are applicable in this matter. The situation described in those judgments has in the meantime undergone a substantial change by reason of the fact that since the expiration on 1 January 1979 of the transitional period laid down by Article 102 of the Act of Accession, power to adopt, as part of the common fisheries policy, measures relating to the conservation of the resources of the sea has belonged fully and definitively to the Community.
18. Member States are therefore no longer entitled to exercise any power of their own in the matter of conservation measures in the waters under their jurisdiction. The adoption of such measures,

with the restrictions which they imply as regards fishing activities, is a matter, as from that date, of Community law. As the Commission has rightly pointed out, the resources to which the fishermen of the Member States have an equal right of access must henceforth be subject to the rules of Community law.

19. It is in the light of this position of principle that the legal situation must be assessed. It is characterized by the fact that, in a matter in which the powers are in the hands of the Community, the Council has not adopted, within the required periods, the conservation measures referred to by Article 102 of the Act of Accession.
20. On this subject it is appropriate to stress, first of all, that the transfer to the Community of powers in this matter being total and definitive, such a failure to act could not in any case restore to the Member States the power and freedom to act unilaterally in this field.
21. It follows, as has been stated by the French Government, that in the absence of provisions adopted by the Council in accordance with the forms and procedures prescribed by the Treaty, the conservation measures as they existed at the end of the period referred to in Article 102 of the Act of Accession are maintained in the state in which they were at the time of the expiration of the transitional period laid down by that provision.
22. However, it is not possible to extend that idea to the point of making it entirely impossible for the Member States to amend the existing conservation measures in case of need owing to the development of the relevant biological and technological facts in this sphere. Such amendments would be of a limited scope only and could not involve a new conservation policy on the part of a Member State, since the power to lay down such a policy belongs henceforth to the Community institutions.
23. Having regard to the situation created by the inaction of the Council, the conditions in which such measures may be adopted must be defined by means of all the available elements of law, even though fragmentary, and by having regard, for the remainder, to the structural principles on which the Community is founded. These principles require the Community to retain in all circumstances its capacity to comply with its responsibilities, subject to the observance of the essential balances intended by the Treaty.
24. In this respect it should be recorded first of all that at the time of the events giving rise to the dispute, the Commission had presented the proposals required by Article 102 of the Act of Accession so that the Council had before it a draft relating to the whole of the conservation measures to be adopted. Although it is true that the Council did not follow those proposals, it did at least lay down certain guide-lines, expressed in the decisions referred to above and, in particular, in that of 25 June 1979, which was applicable at the time of the events in question.
25. These decisions, which were essentially of an interim nature, adopt the Commission's proposals as regards total allowable catches (TAC) as a limit to the aggregate of fishing activities during the period in question. They moreover consolidate the technical measures for conservation and control of fishery resources in force at the relevant time. They thus reflect, on the one hand, the Council's intention to reinforce the authority of the Commission's proposals and, on the other hand, its intention to prevent the conservation measures in force from being amended by the Member States without any acknowledged need.
26. As regards any amendments which may be necessary to the existing conservation measures, the decisions which have been mentioned refer to the "procedures and criteria" of The Hague Resolution. It may be recalled that that resolution excludes in principle unilateral measures by the

Member States and that in the absence of Community measures it admits only of measures adopted to ensure the protection of resources and in a form which avoids discrimination. Furthermore it emphasizes that such measures shall not prejudice the guide-lines to be adopted for Community policy on the conservation of resources.

27. Before adopting such measures the Member State concerned is required to seek the approval of the Commission, which must be consulted at all stages of the procedure. It should be noted that these requirements, which were originally defined during the transitional period laid down by Article 102 of the Act of Accession, must be considered henceforth in a new setting, characterized by the exclusive powers of the Community on this subject and by the full effect of the relevant rules of Community law, without prejudice to the transitional provisions of Articles 100, 101 and 103 of the Act of Accession, the application of which is however not at issue in this case.
28. According to Article 5 of the Treaty Member States are required to take all appropriate measures to facilitate the achievement of the Community's task and to abstain from any measure which might jeopardize the attainment of the objectives of the Treaty. This provision imposes on Member States special duties of action and abstention in a situation in which the Commission, in order to meet urgent needs of conservation, has submitted to the Council proposals which, although they have not been adopted by the Council, represent the point of departure for concerted Community action.
29. Furthermore it should be remembered that in pursuance of Article 7 of the Treaty, Community fishermen must have, subject to the exceptions mentioned above, equal access to the fish stocks coming within the jurisdiction of the Member States. The Council alone has the power to determine the detailed conditions of such access in accordance with the procedures laid down by Articles 43 (2) and (3) of the Treaty and Article 102 of the Act of Accession. This legal situation cannot be modified by measures adopted unilaterally by the Member States.
30. As this is a field reserved to the powers of the Community, within which Member States may henceforth act only as trustees of the common interest, a Member State cannot therefore, in the absence of appropriate action on the part of the Council, bring into force any interim conservation measures which may be required by the situation except as part of a process of collaboration with the Commission and with due regard to the general task of supervision which Article 155, in conjunction, in this case, with the decision of 25 June 1979 and the parallel decisions, gives to the Commission.
31. Thus, in a situation characterized by the inaction of the Council and by the maintenance, in principle, of the conservation measures in force at the expiration of the period laid down in Article 102 of the Act of Accession, the decision of 25 June 1979 and the parallel decisions, as well as the requirements inherent in the safeguard by the Community of the common interest and the integrity of its own powers, imposed upon Member States not only an obligation to undertake detailed consultations with the Commission and to seek its approval in good faith, but also a duty not to lay down national conservation measures in spite of objections, reservations or conditions which might be formulated by the Commission.
32. It may be noted that this process of co-operation between Member States and the Commission has been confirmed by a practice which has been widely followed inasmuch as the Commission has given its views on a large number of national conservation measures notified to it by the various Member States concerned and has put forward, where appropriate, reservations or conditions (cf. for the period in question, the Communications published in Official Journals No. C 154 of 1978, p. 5, No. C 119 of 1979, p. 5, and Nos. C 133 and C 237 of 1980, p. 2 in each case).

33. It is in the light of the state of law as thus defined that the two groups of measures which are the subject of the dispute must be considered.

#### **The Statutory Instruments contested by the Commission**

34. The Government of the United Kingdom claims that the five Statutory Instruments contested by the Commission were the subject of prior consultation on its part in accordance with the decisions of the Council and the procedure laid down by The Hague Resolution. There can be no question of its having brought them into force before obtaining the Commission's views, the more so as it may be seen from the information supplied by the Commission itself that the majority of the measures adopted by the Member States at the time in question had been notified only after they entered into force and that the cases of prior approval were exceptional.
35. In this respect it must be stated that the consultation carried out by the Government of the United Kingdom was unsatisfactory and cannot be considered as being in accordance with the requirements of the Council decisions. Although it is true that the Commission was informed on 21 March 1979 of the Government's intentions it was only on 19 June that it was able to acquaint itself with the text of the proposed measures. Having regard to the technical complexity of the matter it is clear that this way of handling the matter did not allow the Commission to weigh up all the implications of the provisions proposed and to exercise properly the duty of supervision devolving upon it in pursuance of Article 155 of the Treaty.
36. It may be noted that the Commission put forward its reservations at the very beginning of the consultation procedure and that it renewed them expressly on 22 and 27 June after taking note of the wording of the measures and making known its intention not to approve them until a more thorough examination had made it possible to find an area of agreement. The Government of the United Kingdom did not take any action in consequence of those observations and the measures were brought into force on 1 July 1979 with the result that the Commission immediately initiated the procedure under Article 169 of the Treaty by a letter of 6 July 1979.
37. The United Kingdom Government's argument to the effect that in other cases the Commission gave retroactive approval to measures already brought into force by the Member States cannot affect this view of the position. In fact it is established that in all the cases referred to the measures in question were in the end approved, where necessary after acceptance by the State concerned of the conditions laid down by the Commission. Although the procedure adopted in this matter by certain Member States may appear unsatisfactory from the point of view of the duty to co-operate laid down in Article 5 of the Treaty, the cases referred to are not comparable with the disputed measures of the United Kingdom, in respect of which the Commission made known its reservations from the beginning of the consultation procedure and against which it formally maintained its objections.
38. It therefore appears that the United Kingdom has failed to fulfil its obligations under the Treaty both by having prevented the Commission, by the consultation procedure adopted, from giving adequate consideration to the proposed measures and by having brought them into force in spite of the Commission's objections.

#### **The measures applicable to the Irish Sea and the waters round the Isle of Man**

39. The Government of Ireland, which attaches special importance to this aspect of the dispute, has asked the Court to clarify the legal situation as regards the application of the relevant rules of Community law in the territorial waters around the Isle of Man.

40. As the Court has already declared in its judgment of 10 July 1980, it is not necessary in this connexion to consider the constitutional position of the Isle of Man or the relationship of that territory to the Community as it is clear from the very wording of the order in question, namely the Herring (Isle of Man) Licensing Order, SI No. 1389, that that measure was adopted under the legislation of the United Kingdom by the British Government so that the United Kingdom must take full responsibility for that measure vis-a-vis the Community.
41. It is sufficient to state that the legal bases of the fishery regime disputed by the Commission remained in 1979 the same as those which the Court had to consider in its judgment of 10 July 1980 for the years 1977 and 1978. Even though it appears from the file that the regime seems to have been slightly liberalized in favour of Irish fishermen, the Court can only maintain the assessment which it made in the judgment referred to, to the effect that the system of fishing licences applied in the Irish Sea and the waters round the Isle of Man did not form the subject-matter of any consultation of consequently of any authorization on the part of the Commission, that the detailed rules for its implementation were reserved wholly to the discretion of the United Kingdom authorities without its being possible for the Community authorities, the other Member States and those concerned to be legally certain how the system would actually be applied.
42. This system, as such, has infringed one of the fundamental rules in this matter, referred to above, in the sense that it has prevented the fishermen of other Member States and particularly those of Ireland from having access to fishery zones which ought to be open to them on an equal footing with the fishermen of the United Kingdom.
43. It is therefore necessary to repeat for the year 1979 the finding already laid down by the judgment of 10 July 1980 of a failure by the United Kingdom to fulfil its obligations. Moreover the fact must be recorded that the system applied in the maritime zone referred to calls in question one of the essential principles in this matter.

[...]

## 1.7 *Bargaining under the Shadow of the Vote*



### **NOTE AND QUESTIONS**

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#### ***The Shift to Majority Voting***

*The Single European Act (SEA) (1986 -- came into force in July 1987) represents a break with the "Veto Environment" of the past. How big a break and its implications are a matter for analysis.*

*The principal legal instruments "enshrining" the break are the following:*

- *The old version of Article 100a (now 95) TEEC as amended by SEA:*

1. BY WAY OF DEROGATION FROM ARTICLE 100 AND SAVE WHERE OTHERWISE PROVIDED IN THIS TREATY, THE FOLLOWING PROVISIONS SHALL APPLY FOR THE ACHIEVEMENT OF THE OBJECTIVES SET OUT IN ARTICLE 8A. THE COUNCIL SHALL, ACTING BY A QUALIFIED MAJORITY ON A PROPOSAL FROM THE COMMISSION IN COOPERATION WITH THE EUROPEAN PARLIAMENT AND AFTER CONSULTING THE ECONOMIC AND SOCIAL COMMITTEE, ADOPT THE MEASURES FOR THE APPROXIMATION OF THE PROVISIONS LAID DOWN BY LAW, REGULATION OR ADMINISTRATIVE ACTION IN MEMBER STATES WHICH HAVE AS THEIR OBJECT THE ESTABLISHMENT AND FUNCTIONING OF THE INTERNAL MARKET.

2. PARAGRAPH 1 SHALL NOT APPLY TO FISCAL PROVISIONS, TO THOSE RELATING TO THE FREE MOVEMENT OF PERSONS NOR TO THOSE RELATING TO THE RIGHTS AND INTERESTS OF EMPLOYED PERSONS.

3. THE COMMISSION, IN ITS PROPOSALS ENVISAGED IN PARAGRAPH 1 CONCERNING HEALTH, SAFETY, ENVIRONMENTAL PROTECTION AND CONSUMER PROTECTION, WILL TAKE AS A BASE A HIGH LEVEL OF PROTECTION.

4. IF, AFTER THE ADOPTION OF A HARMONIZATION MEASURE BY THE COUNCIL ACTING BY A QUALIFIED MAJORITY, A MEMBER STATE DEEMS IT NECESSARY TO APPLY NATIONAL PROVISIONS ON GROUNDS OF MAJOR NEEDS REFERRED TO IN ARTICLE 36, OR RELATING TO PROTECTION OF THE ENVIRONMENT OR THE WORKING ENVIRONMENT, IT SHALL NOTIFY THE COMMISSION OF THESE PROVISIONS.

THE COMMISSION SHALL CONFIRM THE PROVISIONS INVOLVED AFTER HAVING VERIFIED THAT THEY ARE NOT A MEANS OF ARBITRARY DISCRIMINATION OR A DISGUISED RESTRICTION ON TRADE BETWEEN MEMBER STATES.

BY WAY OF DEROGATION FROM THE PROCEDURE LAID DOWN IN ARTICLES 169 AND 170, THE COMMISSION OR ANY MEMBER STATE MAY BRING THE MATTER DIRECTLY BEFORE THE COURT OF JUSTICE IF IT CONSIDERS THAT ANOTHER MEMBER STATE IS MAKING IMPROPER USE OF THE POWERS PROVIDED FOR IN THIS ARTICLE.

5. THE HARMONIZATION MEASURES REFERRED TO ABOVE SHALL, IN APPROPRIATE CASES, INCLUDE A SAFEGUARD CLAUSE AUTHORIZING THE MEMBER STATES TO TAKE, FOR ONE OR MORE OF THE NON-ECONOMIC REASONS REFERRED TO IN ARTICLE 36, PROVISIONAL MEASURES SUBJECT TO A COMMUNITY CONTROL PROCEDURE.

Consider also:

- The old version of Article 8a (now Art. 14) TEEC as amended by the SEA

THE COMMUNITY SHALL ADOPT MEASURES WITH THE AIM OF PROGRESSIVELY ESTABLISHING THE INTERNAL MARKET OVER A PERIOD EXPIRING ON 31 DECEMBER 1992, IN ACCORDANCE WITH THE PROVISIONS OF THIS ARTICLE AND OF ARTICLES 8B, 8C, 28, 57(2), 59, 70(1), 84, 99, 100A AND 100B AND WITHOUT PREJUDICE TO THE OTHER PROVISIONS OF THIS TREATY.

THE INTERNAL MARKET SHALL COMPRISE AN AREA WITHOUT INTERNAL FRONTIERS IN WHICH THE FREE MOVEMENT OF GOODS, PERSONS, SERVICES AND CAPITAL IS ENSURED IN ACCORDANCE WITH THE PROVISIONS OF THIS TREATY.

***Does Article 100a in conjunction with Article 8a truly represent a return to Majority Voting?***

Consider the following:

- *During the SEA negotiations, a proposal formally to repeal the Luxembourg Compromise was rejected and in presenting the Single European Act to the House of Commons (The principal chamber of Parliament) the British Foreign Minister stated that*

"... as a last resort, the Luxembourg compromise remains in place untouched and unaffected" (96 Parl. Deb., H.C. 5th Ser. 320 (1986)).

- *Likewise, his French counterpart, in the Assemblée Nationale made a similar statement:*

"en toute hypothèse, même dans les domaines où s'applique la règle de la majorité qualifiée, l'arrangement de Luxembourg de janvier 1966 demeure et conserve toute sa valeur." (O.J. No. 109 [1] A.N., Séance 81 6611 (nov. 20, 1986)).

[In any event, even in those areas where the rule of qualified majority voting applies, the Luxembourg Compromise of January 1966 remains and maintains all its value]

But consider the following too:

- ARTICLE 11 OF COUNCIL'S RULES OF PROCEDURE ADOPTED BY THE COUNCIL ON 28 AUGUST 2002, OJ L 230 [Voting arrangements and quorum]

1. THE COUNCIL SHALL VOTE ON THE INITIATIVE OF ITS PRESIDENT. THE PRESIDENT SHALL, FURTHERMORE, BE REQUIRED TO OPEN VOTING PROCEEDINGS ON THE INVITATION OF A MEMBER OF THE COUNCIL OR OF THE COMMISSION, PROVIDED THAT A MAJORITY OF THE COUNCIL'S MEMBERS SO DECIDES. [...]

***What then is the state of majority voting in the face of these seemingly conflicting texts?***

*Please read the following Council decision of March 29, 1994 (known as “the Ioannina Compromise”). Assuming that the Luxembourg Accords were still in force in 1994, has the Ioannina Compromise implicitly repealed them? Why?*

**COUNCIL DECISION  
of 29 March 1994  
concerning the taking of Decision by qualified majority by the Council**

(94/C 105/01)

THE COUNCIL OF THE EUROPEAN UNION,

DECIDES

***Article 1***

If Member States representing a total of 23 to 26 votes indicate their intention to oppose the adoption by the Council of a Decision by qualified majority, the Council will do all in its power to reach, within a reasonable time and without prejudicing obligatory time limits laid down by the Treaties and by secondary law, such as in Articles 189 B and 189 C of the Treaty establishing the European Community, a satisfactory solution that could be adopted by at least 68 votes. During this period, and always respecting the Rules of Procedure of the Council, the President undertakes, with the assistance of the Commission, any initiative necessary to facilitate a wider basis of agreement in the Council. The Members of the Council lend him their assistance.

[...]

### **1.7.1 Excerpt from J. Shaw: Consequences of the Shift to Majority Voting**

#### **The Legal Acts of the Institutions**

The essential differences between the 'methods' employed under the 'Community' pillar and the intergovernmental pillars of the European Union have already been highlighted in this book. This paragraph discusses the essential prerequisites for legal acts adopted by the institutions under the Community pillar, which are subject, of course, to the binding jurisdiction of the Court of Justice. There are certain basic conditions which a valid legal act of the institutions must satisfy. These are in part contained in the Treaty, and can in part be derived from the case law of the Court of Justice. The principle of judicial control is made clear in Article 173 EC which declares:

'The Court of Justice shall review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the ECB, other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects vis-à-vis third parties... on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule relating to its application, or misuse of powers.'

The basic requirements can be reduced here to four core principles. The first requirement is that the institution adopting an act must have competence or the legal power to act. This principle is easily derived from the two principles of 'limited' powers binding both the EU as a whole (Article 3B EC), and the institutions specifically (Article 4 EC) (see 3.5 and 3.7). It is evidenced, on a case-by-case basis, by showing that a legal act has a valid legal basis, and reference must normally be made in the recitals (or preamble) of the act to the concrete enabling power. This is generally to be found in the Treaty itself, or, in the case of delegated legislation, located in an enabling legislative act. However, legal basis not only shows that the EU and a specific institution or institutions have competence. In addition, under the Treaty system, because of the way in which the powers of the institutions are organised, it may be that the choice of legal basis affects the degree of input of a particular institution. Consequently, the choice of legal basis is an important element in the legislative process.

According to the Court of Justice legal basis is a matter of law:

'the choice of the legal basis for a measure may not depend simply on an institution's conviction as to the objective pursued but must be based on objective factors which are amenable to judicial review' (Case 45/86 Commission v. Council (Generalised Tariff Preferences) [1987] ECR1493 at p. 1520).

An incorrect reference or a general reference to the Treaty as a whole is insufficient. Although an explicit reference is not absolutely necessary, the absence of such a reference will render a measure capable of challenge if the parties concerned and the Court of Justice are left uncertain as to the precise legal basis in fact used (Case 45/86 Commission v. Council (Generalised Tariff Preferences)). Problems continue to abound in relation to the identification of the 'correct' legal basis, problems which the Treaty itself often causes, as the Court has acknowledged:

'Under the system governing Community powers, the powers of the institutions and the conditions on their exercise derive from various specific provisions of the Treaty, and the differences between those provisions, particularly as regards the involvement of the European Parliament, are not always based on consistent criteria' (Case 242/87 Commission v. Council (ERASMUS) [1989] ECR 1425 at p.1452).

A number of specific interinstitutional questions raised by the problem of legal basis are discussed in 5.17. Challenges to the legal basis of measures are, of course, not the sole prerogative of

interinstitutional litigation: the question of legal basis is also frequently raised both Member States in actions brought against the EU institutions (where such arguments are often closely linked to arguments about the scope of Community competence: e.g. Case 281, etc./85 Germany et al v. Commission (Migration Policy) [1987] ECR 3203 and Case C-426/93 Germany v. Council (Statistical Registers) [1995] ECR I-3723 discussed at 3.9). Litigation opposing the Member States and the institutions has also frequently raised the crucial question of the relationship between general and specific legal bases (5.14), that is, between provisions of the Treaty offering powers in relation to specific fields (e.g. agriculture), and those offering general legislative powers.

The legal basis of measures may also be challenged by individual litigants in cases brought against the EU institutions, or against other individuals or public authorities in actions begun in the national courts where EU measures are at issue (e.g. Case C-405/92 Etablissements A. Mondiet v. Armament Islais [1993] ECR I-6133), concerning the correct legal basis for an EU measure banning the use of driftnets of more than 2.5km in length).

Second, every legal act must contain an adequate statement of reasons. The duty to give reasons is a principle of 'transparency', and to use the language of Article 173 EC, it is an 'essential procedural requirement'. Article 190 EC requires Regulations, Directives and Decisions adopted by the Council, by the Commission or by the Council and Parliament jointly to refer to any proposals and opinions required to be obtained under the Treaty, and to contain a statement of reasons. A statement of reasons facilitates the process of judicial review, allowing any interested parties, and the Court where appropriate, to discover at a glance the circumstances which enjoined the adopting institution to act (see Case 24/62 Commission v. Germany (Brennwein) [1963] ECR 63). The intensity of the duty to give reasons depends upon the type of act adopted (a general legislative act requires less specific reasons than an individual act, such as one which imposes a pecuniary sanction on an undertaking for breach of the competition rules) and the circumstances in which an act is adopted.

Where the institution must act urgently, a cursory statement of reasons may be sufficient (Case 16/65 Firma Schwarze v. Einfuhr- und Vorratstelle für Getreide und Futtermittel [1965] ECR 877). Similarly in complex areas like agriculture where there is frequently a highly fragmented and much amended body of legislation, the duty to give reasons has arguably been emptied of its 'substantive value' (Barents, 1994: 112). In such a field, even the objective of transparency may no longer be achieved. Closely linked to the giving reasons requirement is Article 191 EC which makes provision for the entry into force of binding acts of the institutions, and for their publication in the Official Journal and notification to addressees as appropriate. These principles can be similarly construed as means of facilitating review of measures.

Suggestions have been made that the giving reasons requirement might be extended beyond to transparency to encompass a right of participation (Shapiro, 1992; discussed in Craig and de Búrca, 1995: 107-112). Particularly as regards the executive and administrative work of the Commission, it could be argued that there is a close link between the duties which are frequently incumbent upon the Commission to hear the arguments put by those who are affected by its measures (especially, but not only in the field of competition law) (the principle of *audi alteram partem*), and the reasons then given for any measure which ensues. It is also linked to principles of participatory democracy referred to in Chapter 3. Recent case law of the Court of First Instance may indicate that it is moving in the direction of pushing the Commission into greater dialogue with those concerned by its administrative actions. In Case T-95/94 *Chambre Syndicale Nationale des Entreprises de Transport de Fonds et Valeurs and Brink's France Sarl v. Commission* (28.9.95), in the context of a complaint made by the applicants regarding Commission approval for certain state aids paid by France, the Court of First Instance held that the obligation to state reasons may in certain circumstances require an exchange of views with the complainant, which obligation had not been discharged in the present case. However, the status of the dialogue principle is not yet fully enshrined in EC law.

The third precondition for EU legal acts involves respect for the principles of subsidiarity and proportionality set out in Article 3B EC. There is as yet little evidence, as was shown in 3.10, of how the principle of subsidiarity might be applied as a condition of a valid legal act. In contrast, the principle of proportionality, although only relatively recently formally constitutionalised, is a well-established general principle of EC law which the Court applies in a number of fields to control actions by both the EU and the Member States (de Búrca, 1993a). It means, essentially, that the means adopted should be appropriate to the end sought, such that 'a public authority may not impose obligations on a citizen except to the extent to which they are strictly necessary in the public interest to attain the purpose of the measure' (Hartley, 1994: 155). Proportionality is discussed further in 6.5. In the same paragraph, other so-called 'general principles' of EC law are discussed. Valid EU acts must not infringe these principles. Fourth and finally, therefore, even an act satisfying the first three core principles identified here may still infringe against a range of additional principles which bind the lawmakers of the EU - as the text of Article 173 EC makes clear ('...any other rule of law...').

[...]

### **Litigation between the institutions**

The most drastic, public and formal way of bringing about the resolution of an interinstitutional dispute is to submit it to the Court of Justice. The legalisation of interinstitutional relationships in this manner is illustrative of the key role which the Court of Justice has played in the policy-making process. The involvement of the Court will normally take the form of an action brought under Article 173 EC for the annulment of an act taken by one or more institution (measures adopted by co-decision are signed jointly by the Presidents of the Council and the Parliament, and are seen as joint acts). Exceptionally, however, circumstances may arise where one institution takes action against another for failure to act, where there is a duty on the latter to act (Article 175 EC) (e.g. Case 13/83 Parliament v. Council (Transport Policy) [1985] ECR 1513). Much of the litigation between the institutions is concerned with the legal basis of EU measures (5.2), but some cases have raised other principles of EC law such as the duty of cooperation between the institutions (5.13), and the requirements of 'consultation' in the context of the legislative process (5.4).

One important obstacle to the involvement of the Parliament in interinstitutional litigation was that it was not cited as a potential plaintiff or defendant in the original version of Article 173, although it was, from the beginning, given standing under Article 175. In order to extend the scope of judicial protection, the Court of Justice was required to recognise the standing of the Parliament to bring an annulment action based on Article 173 (12.3). Although this point is now of largely academic interest following the alteration of this Article by the Treaty of Maastricht to extend locus standi to the Parliament, it is worth reconsidering briefly the two contradictory cases in which the Court first denied and then accepted the principle that the Parliament had the right to pursue an action before the Court, at least in order to protect its prerogatives - notwithstanding the strict wording of the Treaties. It should be noted that neither the Court, through its judicial legislation, nor the Member States in their amendments to the Treaty, have recognised a generalised right of action on the part of the Parliament in order to protect the general interest such as is accorded by Article 173(1) to the Council, the Commission and the Member States.

In Case 302/87 Parliament v. Council (Comitology) (5.11) the Court dismissed the Parliament's action as inadmissible, refusing to draw parallels between Article 173 and Article 175, or between the right of others to bring the Parliament before the Court in respect of allegedly unlawful acts (which it had already recognised in Case 294/83 Parti Ecologiste 'Les Verts' v. Parliament [1986] ECR 1339) and the right of the Parliament itself to bring an action. It suggested that the interests of the Parliament could be adequately protected by the Commission's ability - in the general interest - to take action in respect of any measure. The Court's decision was heavily criticised by commentators (Weiler, 1989; Bradley, 1988). Just

over a year later the Court reversed its position (Case C-70/88 Parliament v. Council (Chernobyl) [1990] ECR I-2041), allowing the Parliament to bring an action, this time to challenge the legal basis used by the Council to adopt a measure regarding the marketing of foodstuffs affected by radiation. The Parliament successfully argued here that the measure should have been adopted on the basis of Article 100A EC rather than Article 31 Euratom.

The Court acknowledged its right to bring an action in order to protect its prerogatives (e.g. involvement in the cooperation procedure, or the right to be consulted). In Chernobyl it was the right to be involved in the cooperation procedure which was at issue (Article 31 Euratom requires merely consultation of the Parliament) and it must have been significant for the Court's judgment that in this case the Commission did not support the Parliament's views and therefore had no incentive to protect the rights of the Parliament, as the Court had suggested in Comitology was the appropriate course of action. The Court held:

'The absence in the Treaties of any provision giving the Parliament the right to bring an action for annulment may constitute a procedural gap, but it cannot prevail over the fundamental interest in the maintenance and observance of the institutional balance laid down in the Treaties establishing the European Communities' ([1990] ECR 2041 at p.2073).

The effect of the Chernobyl judgment was to recognise more fully the specific identity of each of the institutions, and to acknowledge the need for a legal mechanism to be available to each institution in order to ensure that its prerogatives are not harmed in the dynamic process of integration. It is the logical conclusion to the process of recognition of the Parliament in the institutional structure of the EU begun in the Isoglucose cases, which concerned the issue of consultation (5.4). However, it should not be thought that even now the Parliament has an unlimited right of standing. In Case C-156/93 Parliament v. Commission (Micro-organisms) ([1995] ECR I-2019) the Court held that the Parliament has no right of standing under Article 173 to attack the reasons on which the Commission is based, unless it can show that these in some way affect its prerogatives.

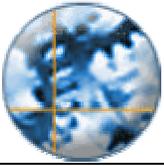
The phenomenon of interinstitutional litigation also illustrates how the intensely political issue of the choice of a legal basis can be reduced in large measure to the scenario of a legal dispute between institutions, where procedural rules rather than substantive political choices appear to predominate. The most dramatic example of this scenario is offered by the Court's shifting approach to the interrelationship between Articles 100A and 130S as legal bases for measures in the field of environment. In Case C-300/89 Commission v. Council (Titanium Dioxide) ([1991] ECR I-2867) the Commission (with the support of the Parliament) challenged the decision of the Council to use Article 130S EC as the legal basis for Directive 89/428/EEC approximating national programmes for the reduction and eventual elimination of pollution caused by waste in the production of titanium dioxide. The Directive had an admittedly dual function, namely to protect the environment (Article 130S) and to harmonise national measures which had an impact upon the completion of the internal market. From the latter perspective the measure would fall within the remit of Article 100A, thus requiring only a qualified majority vote in the Council and the use of the cooperation procedure (at that time). In contrast, Article 130S was an 'old style' legislative power, requiring unanimity in the Council and involving only the consultation of the Parliament. The Court ruled out a dual reference to both articles, since this would in practice defeat the very purpose of the cooperation procedure, which is to expand the influence of the Parliament, and held that such a measure must be based on Article 100A alone.

The effect of this decision appeared very significantly to limit the scope of application of Article 130S, and to assert the dominance of the procedural imperatives of the cooperation procedure over the substantive resolution of the appropriate content of an environmental protection measure.

In Case C-155/91 Commission v. Council (Waste Directive) ([1993] ECR I-939), however, the Court took a different view of the precise focus of Directive 91/156 on waste disposal. Again the legal

basis chosen by the Council was Article 130S, but this time the Court held that the chief purpose of the Directive was to safeguard the management of the environment through the safe disposal of waste throughout the EU. Questions of free movement (and hence the issue of the internal market for waste) were merely ancillary to the central focus of this Directive. The Court reached a very similar conclusion in a subsequent case brought by the Parliament to challenge the use of Article 130S as the legal basis for Council Regulation 259/93 on the supervision and control of shipments of waste within, into, and out of the EU (Case C-187/93 Parliament v. Council (Transport of Waste) [1994] ECR I-2857). Since these cases were decided, of course, the relationship between Articles 100A and 130S has changed somewhat: both provisions now provide for QMV, although Article 100A is a co-decision provision and Article 130S involves the cooperation procedure. These changes, coupled with the modification of the Court's approach in the two Waste cases indicates that in future decisions involving Article 100A may be less motivated by procedural factors (see Case C-271/94 Parliament v Council (Edicom) discussed in 5.14), and that the main arguments used will be whether the 'internal market question' is merely ancillary to the measure, and whether there exists a *lex specialis* which should be used as the legal basis.

However, it remains unlikely that the unanimity requirement in Article 235 will, or indeed should, ever be altered. As the Court repeated its arguments on the protection of the cooperation procedure, when discussing the relationship between Article 6(2) EC and Article 235 EC in Case C-295/90 Parliament v. Council (Students' Rights) it seems that the argument of institutional balance will always retain some relevance to the question of legal basis.



## NOTE AND QUESTIONS

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1. Amsterdam has transferred some areas from unanimity rule to qualified majority voting (for example implementing decisions in the 2nd (CSFP) and 3rd pillar, social policy issues, research and development. But there are also new cases - which may be qualified as quasi-constitutional - where unanimity is again chosen. (e.g. the implementation of the Schengen acquis, measures against racial etc. discrimination, extension of the competence in the common commercial policy to services and intellectual property).

\* the 'constructive abstention' rule in the CFSP: in case a member state is against the decision which is about to be taken, it may abstain from the vote and thus not hinder the decision to be taken; the state is, however not bound by the decision, and does not have to participate in its financing.

\* the 'extra-qualified majority': for a series of decisions taken under the third pillar regarding Justice and Police Cooperation an extra-qualified majority (at least ten members have to be in favour of the measure) will replace unanimity.

\* the 'Amsterdam compromise': in three cases [authorisation to closer cooperation in the areas covered by the TEC and in the third pillar (JCP), implementing measures in the CFSP] the following formula will be introduced:

*"If a member of the Council declares that, for important and stated reasons of national policy, it intends to oppose the granting of an authorisation by qualified majority, a vote shall not be taken. The Council may, acting by a qualified majority, request that the matter be referred to the European Council for decision by unanimity"*

Questions: Compare this formula - you may call it the 'Amsterdam compromise' - to the Luxembourg compromise. Will this have legal consequences for the Luxembourg compromise?

2. Consider also the formula proposed by the draft Constitution of Europe:

*"If a member of the Council of Ministers declares that, for vital and stated reasons of national policy, it intends to oppose the adoption of a European decision to be adopted by qualified majority, a vote shall not be taken. The Union Minister for Foreign Affairs will, in close consultation with the Member State involved, search for a solution acceptable to it. If he or she does not succeed, the Council of Ministers may, acting by a qualified majority, request that the matter be referred to the European Council for decision by unanimity."*

## 2. THE EUROPEAN PARLIAMENT, DEMOCRACY AND LEGITIMACY IN THE EUROPEAN COMMUNITIES

### 2.1 European Parliament: The Evolving Function and Powers



#### NOTE AND QUESTIONS

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*The powers of Parliament were fairly minimal at the inception of the Community giving rise to charges of a persistent Democracy Deficit in the polity. As the Community grew in breadth and depth so did the demands for increased parliamentary powers.*

*There are two parts to the material and discussion of the European Parliament. The first part -- more formal and descriptive -- is designed to introduce its evolving function/powers in the system of Community governance. This second part of the reading is designed as a background for a broader discussion on the issue of democracy and legitimacy in the European Communities.*

*Re-read first the parts in Shaw (supra) dealing with the European Parliament. Then consider the Note, Questions and the case-law below. **In particular pay attention to the five basic modes of parliamentary involvement in the decision-making process, which are set out below under title 2.2.***

*Parliament -- Commission*

- *How real is the Power to dismiss the Commission?*
- *How do you assess the impact of Article 214 (ex Art. 158) TEC in its Maastricht version? The Amsterdam version?*
- *What are the other control powers of the European Parliament? Does the proposed Constitution continue the tendency of increasing the powers of the Parliament? How does it provide for its participation?*

## **2.2 The so-called control powers of the European Parliament**

The power of the European Parliament in the legislative process may be divided into the following categories:

### **2.2.1 Adoption of measures without formal requirement to consult the European Parliament**

The Commission transmits its proposal to the Council, which adopts the act by qualified or unanimous majority, depending on the legal basis.

See e.g. Article 133 (ex Art. 113) EC in relation to non-conventional (not involving an agreement with a third party) measures such as tariff rates, export policy, anti-dumping and the like. The Community may adopt legislation in these areas by a process which does not involve the European Parliament.



### **NOTE AND QUESTIONS**

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*How could the European Parliament seek to influence such legislation absent any formal requirement of its involvement in the legislative procedure? Are there alternative "political" means? Budgetary means?*

### **2.2.2 The Duty to Consult the European Parliament**

Many Treaty articles have the following formula: "The Council shall, acting [unanimously] or [by a qualified majority] on a proposal of the Commission and after consulting the European Parliament..." (see e.g. Article 83)



### **NOTE AND QUESTIONS**

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*The contours of the consultation procedure were explored in the Roquette Freres I and Case C-65/93: European Parliament v Council of the European Union case (bellow). Read the cases and consider the questions following them.*

### **2.2.3 Legislating according to the Cooperation Procedure**

The Cooperation Procedure was introduced by the 1986 Single European Act (Article 149 EEC as amended). Since Maastricht it can be found in Article 252.



#### **NOTE AND QUESTIONS**

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*Consider the increase, if any, in the power of the European Parliament under the Cooperation Procedure. What are the principal weaknesses of the procedure? What impact might it have on the political map of the Parliament?*

*N.B. Almost all cases of cooperation were replaced by the co-decision procedure by the Amsterdam Treaty.*

### **2.2.4 The New Co-Decision Procedure**

Article 251 lays down the procedure commonly referred to as Co-Decision.



#### **NOTE AND QUESTIONS**

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*Is this procedure veritable co-decision? How does it improve on Cooperation, if at all? What are its main weaknesses? What advice would you give the EP in order to maximize the potential of Co-Decision?*

*Read Article III-203 of the proposed Constitution. How does the normal legislative procedure differ from the Co-decision Procedure?*

### **2.2.5 The Assent Procedure**

The Single European Act introduced the Assent Procedure in Articles 237 (EEC) (Enlargement) and Article 238 (Association Agreements) of the EEC Treaty in its pre-Maastricht version.



#### **NOTE AND QUESTIONS**

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*What is the legal and political significance of the Assent procedure under the Single European Act? Note that Maastricht introduced slight changes to Assent in some of the new procedures and amended some of the old ones. What are the differences, why do you think they were amended, and what will be the impact of such amendment?*

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## 2.3 The role of the European Parliament through the case-law of the Court of Justice



### NOTE AND QUESTIONS

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*As stated in the introduction, in the earlier days of the Community the Parliament played only a small role in the legislative process, since the power was concentrated in the hands of the Commission and the Council. The ECJ managed to improve the position of the European Parliament by its decision in the Roquette Frères case (Case 138/79 Roquette Frères SA v Council [1980] ECR 3333). On that occasion the Council adopted a piece of legislation without consulting the European Parliament. As you will be able to see from the following excerpt from the Roquette Frères case the ECJ annulled the measure in question.*

*But the ECJ's jurisprudence is not a one way street. Consultation does not merely represent a Parliament's right (to be consulted), but also its duty (to express its opinion). Case C-65/93: European Parliament v Council is an example of the Parliament failing to fulfil this so called duty of "sincere cooperation" with the Council. As a consequence the ECJ found against the Parliament. (See also Case C-417/93: European Parliament v Council, [1995] ECR I-1185, where the ECJ found that the Council is entitled to take a preliminary decision on the measure in question before obtaining the Parliament's opinion, provided that such decision is not definitive.)*

### 2.3.1 Case 138/79 Roquette Frères SA v Council

#### SA Roquette Frères v Council

Case 138/79

Court of Justice

20 October 1980

[1980] ECR 3333

<http://www.curia.eu.int/en/content/juris/index.htm>

#### Judgment:

1 BY APPLICATION REGISTERED AT THE COURT REGISTRY ON 31 AUGUST 1971 THE APPLICANT FRENCH COMPANY MANUFACTURING INTER ALIA ISOGLUCOSE ASKED THE COURT TO DECLARE THE FIXING OF THE PRODUCTION QUOTA RESULTING FOR THE APPLICANT FROM ANNEX II TO COUNCIL REGULATION NO 1293/79 OF 25 JUNE 1979 AMENDING REGULATION NO 1111/77 LAYING DOWN COMMON PROVISIONS FOR ISOGLUCOSE (OFFICIAL JOURNAL L 162, P. 10 WITH CORRIGENDUM IN OFFICIAL JOURNAL L 176, P. 37) TO BE INVALID. IT IS APPARENT FROM CONSIDERATION OF THE APPLICATION THAT IT IS AN APPLICATION FOR A DECLARATION THAT REGULATION NO 1293/79 IS VOID IN SO FAR AS IT FIXES A PRODUCTION QUOTA FOR ISOGLUCOSE IN RESPECT OF THE APPLICANT.

2 IN SUPPORT OF ITS APPLICATION, THE APPLICANT, APART FROM VARIOUS SUBSTANTIVE SUBMISSIONS, MAKES A FORMAL SUBMISSION THAT ITS PRODUCTION QUOTA FIXED BY THE SAID REGULATION BE DECLARED VOID ON THE GROUND THAT THE COUNCIL ADOPTED THAT REGULATION WITHOUT HAVING RECEIVED THE OPINION OF THE EUROPEAN PARLIAMENT AS REQUIRED BY ARTICLE 43 (2) OF THE EEC TREATY WHICH ACTION CONSTITUTES AN INFRINGEMENT OF AN ESSENTIAL PROCEDURAL REQUIREMENT WITHIN THE MEANING OF ARTICLE 173 OF THE SAID TREATY.

[...]

5 BEFORE CONSIDERING THE QUESTIONS OF ADMISSIBILITY RAISED BY THE COUNCIL AND THE CLAIMS MADE BY THE APPLICANT IT IS WELL TO RECALL BRIEFLY THE HISTORY OF THE ADOPTION OF THE CONTESTED REGULATION AND THE PROVISIONS THEREOF.

6 BY JUDGMENT OF 25 OCTOBER 1978 IN JOINED CASES 103 AND 145/77 ROYAL SCHOLTEN HONIG (HOLDINGS) LTD V INTERVENTION BOARD FOR AGRICULTURAL PRODUCE ; TUNNEL REFINERIES LTD V INTERVENTION BOARD FOR AGRICULTURAL PRODUCE ( 1978 ) ECR 2037 THE COURT HELD THAT COUNCIL REGULATION NO 1111/77 OF 17 MAY 1977 LAYING DOWN COMMON PROVISIONS FOR ISOGLUCOSE (OFFICIAL JOURNAL L 134, P. 4) WAS INVALID TO THE EXTENT TO WHICH ARTICLES 8 AND 9 THEREOF IMPOSED A PRODUCTION LEVY ON ISOGLUCOSE OF 5 UNITS OF ACCOUNT PER 100 KILOGRAMS OF DRY MATTER FOR THE PERIOD CORRESPONDING TO THE

SUGAR MARKETING YEAR 1977/78. THE COURT FOUND THAT THE SYSTEM ESTABLISHED BY THE ABOVE-MENTIONED ARTICLES OFFENDED AGAINST THE GENERAL PRINCIPLE OF EQUALITY (IN THOSE CASES BETWEEN SUGAR AND ISOGLUCOSE MANUFACTURERS) OF WHICH THE PROHIBITION ON DISCRIMINATION AS SET OUT IN ARTICLE 40 (3) OF THE TREATY WAS A SPECIFIC EXPRESSION. THE COURT HOWEVER ADDED THAT ITS JUDGMENT LEFT THE COUNCIL FREE TO TAKE ANY NECESSARY MEASURES COMPATIBLE WITH COMMUNITY LAW FOR ENSURING THE PROPER FUNCTIONING OF THE MARKET IN SWEETENERS.

- 7 ON 7 MARCH 1979 FOLLOWING THAT JUDGMENT THE COMMISSION SUBMITTED A PROPOSAL FOR AN AMENDMENT OF REGULATION NO 1111/77 TO THE COUNCIL. BY LETTER OF 19 MARCH 1979 RECEIVED BY THE PARLIAMENT ON 22 MARCH THE COUNCIL ASKED THE PARLIAMENT FOR ITS OPINION PURSUANT TO THE THIRD SUBPARAGRAPH OF ARTICLE 43 (2) OF THE TREATY. IN ITS LETTER SEEKING AN OPINION IT WROTE THAT:

"THIS PROPOSAL TAKES ACCOUNT OF THE POSITION AFTER THE JUDGMENT OF THE COURT OF 25 OCTOBER 1978 IN ANTICIPATION OF NEW ARRANGEMENTS FOR SWEETENERS WHICH SHOULD ENTER INTO FORCE ON 1 JULY 1980. ... SINCE THE REGULATION IS INTENDED TO APPLY AS FROM 1 JULY 1979, THE COUNCIL WOULD WELCOME IT IF THE EUROPEAN PARLIAMENT COULD GIVE AN OPINION ON THE PROPOSAL AT ITS APRIL SESSION."

- 8 THE URGENCY OF THE CONSULTATION REQUESTED IN THE COUNCIL ' S LETTER RELATED TO THE FACT THAT IN ORDER TO AVOID INEQUALITY OF TREATMENT BETWEEN SUGAR MANUFACTURERS AND ISOGLUCOSE MANUFACTURERS THE PROPOSED REGULATION WAS BASICALLY INTENDED TO SUBJECT ISOGLUCOSE PRODUCTION TO RULES SIMILAR TO THOSE APPLYING TO SUGAR MANUFACTURE UNTIL 30 JUNE 1980 PURSUANT TO THE COMMON ORGANIZATION OF THE MARKET IN SUGAR ESTABLISHED BY COUNCIL REGULATION NO 3330/74 OF 19 DECEMBER 1974 ( OFFICIAL JOURNAL L 369, P. 1 ). IN PARTICULAR IT WAS A QUESTION OF MAKING TRANSITIONAL ARRANGEMENTS UNTIL THEN FOR PRODUCTION QUOTAS FOR ISOGLUCOSE WHICH WERE TO APPLY FROM 1 JULY 1979 WHICH WAS THE BEGINNING OF THE NEW SUGAR MARKETING YEAR.

- 9 THE PRESIDENT OF THE PARLIAMENT IMMEDIATELY REFERRED THE MATTER TO THE COMMITTEE ON AGRICULTURE FOR FURTHER CONSIDERATION AND TO THE COMMITTEE ON BUDGETS FOR ITS OPINION. THE COMMITTEE ON BUDGETS FORWARDED ITS OPINION TO THE COMMITTEE ON AGRICULTURE ON 10 APRIL 1979. ON 9 MAY 1979 THE COMMITTEE ON AGRICULTURE ADOPTED THE MOTION FOR A RESOLUTION OF ITS RAPPORTEUR. THE REPORT AND DRAFT RESOLUTION ADOPTED BY THE COMMITTEE ON AGRICULTURE WERE DEBATED BY THE PARLIAMENT AT ITS SESSION ON 10 MAY 1979. AT ITS SESSION ON 11 MAY THE PARLIAMENT REJECTED THE MOTION FOR A RESOLUTION AND REFERRED IT BACK TO THE COMMITTEE ON AGRICULTURE FOR RECONSIDERATION.

- 10 THE PARLIAMENTARY SESSION FROM 7 TO 11 MAY 1979 WAS TO BE THE LAST BEFORE THE SITTING OF THE PARLIAMENT ELECTED BY DIRECT UNIVERSAL SUFFRAGE AS PROVIDED FOR BY THE ACT CONCERNING THE ELECTION OF THE REPRESENTATIVES OF THE ASSEMBLY BY DIRECT UNIVERSAL SUFFRAGE AND FIXED FOR 17 JULY 1979. AT ITS MEETING ON 1 MARCH 1979 THE BUREAU OF THE PARLIAMENT HAD DECIDED NOT TO PROVIDE FOR AN ADDITIONAL SESSION BETWEEN THOSE OF MAY AND JULY. IT HAD HOWEVER STATED:

" THE ENLARGED BUREAU IS NEVERTHELESS OF THE VIEW THAT IN SO FAR AS THE COUNCIL OR COMMISSION CONSIDER IT NECESSARY TO PROVIDE FOR AN ADDITIONAL SESSION THEY MAY, PURSUANT TO ARTICLE 1 (4) OF THE RULES OF PROCEDURE, CALL FOR AN EXTRAORDINARY SESSION OF THE PARLIAMENT; ANY SUCH SESSION WOULD BE FOR THE PURPOSE ONLY OF CONSIDERING REPORTS WHICH HAD BEEN ADOPTED FOLLOWING URGENT CONSULTATION."

AT ITS MEETING ON 10 MAY 1979 THE BUREAU WAS TO CONFIRM ITS POSITION IN THE FOLLOWING WORDS:

- "CONFIRMS THE POSITION ADOPTED AT THE ABOVE-MENTIONED MEETING WHEN IT WAS DECIDED NOT TO PROVIDE FOR AN ADDITIONAL SESSION BETWEEN THE LAST SESSION OF THE PRESENT PARLIAMENT AND THE SESSION OF THE PARLIAMENT ELECTED BY DIRECT UNIVERSAL SUFFRAGE, PROVIDED ALWAYS THAT WHERE THE MAJORITY OF THE EFFECTIVE MEMBERS OF THE PARLIAMENT, THE COUNCIL OR THE COMMISSION DESIRE THE HOLDING OF AN ADDITIONAL SESSION THEY MAY, PURSUANT TO THE PROVISIONS OF ARTICLE 1 (4) OF THE RULES OF PROCEDURE, ASK FOR THE PARLIAMENT TO BE SUMMONED;

- DECIDES FURTHER HAVING REGARD TO THE PROVISIONS OF ARTICLE 139 OF THE EEC TREATY THAT WHERE THE PRESIDENT HAS SUCH AN APPLICATION BEFORE HIM THE ENLARGED BUREAU WILL MEET TO CONSIDER HOW IT SHOULD BE DEALT WITH.'

- 11 ON 25 JUNE 1979 THE COUNCIL WITHOUT OBTAINING THE OPINION REQUESTED ADOPTED THE REGULATION PROPOSED BY THE COMMISSION WHICH THUS BECAME REGULATION NO 1293/79 AMENDING REGULATION NO 1111/77. THE THIRD REFERENCE IN THE PREAMBLE TO REGULATION NO 1293/79 REFERS TO CONSULTATION OF THE PARLIAMENT. THE COUNCIL NEVERTHELESS TOOK ACCOUNT OF THE ABSENCE OF AN OPINION FROM THE PARLIAMENT BY OBSERVING IN THE THIRD RECITAL IN THE PREAMBLE TO THE REGULATION THAT " THE EUROPEAN PARLIAMENT WHICH WAS CONSULTED ON 19 MARCH 1979 ON THE COMMISSION PROPOSAL DID NOT DELIVER ITS OPINION AT ITS MAY PART-SESSION; WHEREAS IT HAD REFERRED THE MATTER TO THE ASSEMBLY FOR ITS OPINION".
- 12 THE COURT IS ASKED TO DECLARE REGULATION NO 1293/79 VOID IN SO FAR AS IT AMENDS REGULATION NO 1111/77.

[...]

#### INFRINGEMENT OF ESSENTIAL PROCEDURAL REQUIREMENTS

- 32 THE APPLICANT AND THE PARLIAMENT IN ITS INTERVENTION MAINTAIN THAT SINCE REGULATION NO 1111/77 AS AMENDED WAS ADOPTED BY THE COUNCIL WITHOUT REGARD TO THE CONSULTATION PROCEDURE PROVIDED FOR IN THE SECOND PARAGRAPH OF ARTICLE 43 OF THE TREATY IT MUST BE TREATED AS VOID FOR INFRINGEMENT OF ESSENTIAL PROCEDURAL REQUIREMENTS.
- 33 THE CONSULTATION PROVIDED FOR IN THE THIRD SUBPARAGRAPH OF ARTICLE 43 ( 2 ), AS IN OTHER SIMILAR PROVISIONS OF THE TREATY, IS THE MEANS WHICH ALLOWS THE PARLIAMENT TO PLAY AN ACTUAL PART IN THE LEGISLATIVE PROCESS OF THE COMMUNITY, SUCH POWER REPRESENTS AN ESSENTIAL FACTOR IN THE INSTITUTIONAL BALANCE INTENDED BY THE TREATY. ALTHOUGH LIMITED, IT

REFLECTS AT COMMUNITY LEVEL THE FUNDAMENTAL DEMOCRATIC PRINCIPLE THAT THE PEOPLES SHOULD TAKE PART IN THE EXERCISE OF POWER THROUGH THE INTERMEDIARY OF A REPRESENTATIVE ASSEMBLY. DUE CONSULTATION OF THE PARLIAMENT IN THE CASES PROVIDED FOR BY THE TREATY THEREFORE CONSTITUTES AN ESSENTIAL FORMALITY DISREGARD OF WHICH MEANS THAT THE MEASURE CONCERNED IS VOID.

- 34 IN THAT RESPECT IT IS PERTINENT TO POINT OUT THAT OBSERVANCE OF THAT REQUIREMENT IMPLIES THAT THE PARLIAMENT HAS EXPRESSED ITS OPINION. IT IS IMPOSSIBLE TO TAKE THE VIEW THAT THE REQUIREMENT IS SATISFIED BY THE COUNCIL ' S SIMPLY ASKING FOR THE OPINION. THE COUNCIL IS; THEREFORE, WRONG TO INCLUDE IN THE REFERENCES IN THE PREAMBLE TO REGULATION NO 1293/79 A STATEMENT TO THE EFFECT THAT THE PARLIAMENT HAS BEEN CONSULTED.
- 35 THE COUNCIL HAS NOT DENIED THAT CONSULTATION OF THE PARLIAMENT WAS IN THE NATURE OF AN ESSENTIAL PROCEDURAL REQUIREMENT. IT MAINTAINS HOWEVER THAT IN THE CIRCUMSTANCES OF THE PRESENT CASE THE PARLIAMENT, BY ITS OWN CONDUCT, MADE OBSERVANCE OF THAT REQUIREMENT IMPOSSIBLE AND THAT IT IS THEREFORE NOT PROPER TO RELY ON THE INFRINGEMENT THEREOF.
- 36 WITHOUT PREJUDICE TO THE QUESTIONS OF PRINCIPLE RAISED BY THAT ARGUMENT OF THE COUNCIL IT SUFFICES TO OBSERVE THAT IN THE PRESENT CASE ON 25 JUNE 1979 WHEN THE COUNCIL ADOPTED REGULATION NO 1293/79 AMENDING REGULATION NO 1111/77 WITHOUT THE OPINION OF THE ASSEMBLY THE COUNCIL HAD NOT EXHAUSTED ALL THE POSSIBILITIES OF OBTAINING THE PRELIMINARY OPINION OF THE PARLIAMENT. IN THE FIRST PLACE THE COUNCIL DID NOT REQUEST THE APPLICATION OF THE EMERGENCY PROCEDURE PROVIDED FOR BY THE INTERNAL REGULATION OF THE PARLIAMENT ALTHOUGH IN OTHER SECTORS AND AS REGARDS OTHER DRAFT REGULATIONS IT AVAILED ITSELF OF THAT POWER AT THE SAME TIME. FURTHER THE COUNCIL COULD HAVE MADE USE OF THE POSSIBILITY IT HAD UNDER ARTICLE 139 OF THE TREATY TO ASK FOR AN EXTRAORDINARY SESSION OF THE ASSEMBLY ESPECIALLY AS THE BUREAU OF THE PARLIAMENT ON 1 MARCH AND 10 MAY 1979 DREW ITS ATTENTION TO THAT POSSIBILITY.
- 37 IT FOLLOWS THAT IN THE ABSENCE OF THE OPINION OF THE PARLIAMENT REQUIRED BY ARTICLE 43 OF THE TREATY REGULATION NO 1293/79 AMENDING COUNCIL REGULATION NO 1111/77 MUST BE DECLARED VOID WITHOUT PREJUDICE TO THE COUNCIL ' S POWER FOLLOWING THE PRESENT JUDGMENT TO TAKE ALL APPROPRIATE MEASURES PURSUANT TO THE FIRST PARAGRAPH OF ARTICLE 176 OF THE TREATY.

[...]

### 2.3.2 Case C-65/93: *European Parliament v Council*

#### European Parliament v. Council of the European Union

##### Case C-65/93

Court of Justice

30 March 1995

[1995] ECR I-2691

<http://www.curia.eu.int/en/content/juris/index.htm>

#### Judgment:

- 1 By application lodged at the Court Registry on 12 March 1993, the European Parliament brought an action under Article 173 of the EEC Treaty for the annulment of Council Regulation (EEC) No 3917/92 of 21 December 1992 [...] on the ground that the Council had disregarded the Parliament's prerogatives.
- 2 The regulation is based on a proposal submitted by the Commission to the Council on 15 October 1992. The main objective of that proposal, based on Articles 43 and 113 of the EEC Treaty, was to extend into 1993 the system of generalized preferences then in force. It went on to include new countries in the list of beneficiaries, partly to take account of the collapse of the former Soviet Union (by including Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Uzbekistan, Russia, Tajikistan, Turkmenistan and Ukraine), and partly in order to align the Community list of the least developed countries with that of the United Nations (by adding Cambodia, Liberia, Madagascar, the Solomon Islands, Vanuatu, Zaïre and Zambia). Finally, with a view to the introduction of the single market on 1 January 1993, the Commission suggested replacing the tariff quotas divided among the Member States by fixed duty-free amounts for the whole Community.
- 3 By letter of 22 October 1992, the General Secretariat of the Council informed the President of the Parliament that the Council had decided that day to consult the Parliament on the proposal in question. To enable it to make a decision before 1 January 1993, when the regulation was due to enter into force, the Council also requested the Parliament to apply the procedure in cases of urgency under Article 75 of its Rules of Procedure, which provided as follows:  
  
"1. A request that a debate on a proposal on which Parliament has been consulted (...) be treated as urgent may be made to Parliament (...) by the Commission or by the Council. This request shall be made in writing and supported by reasons.  
  
2. As soon as the President has received a request for urgent debate, he shall inform Parliament thereof; the vote on that request shall be taken at the beginning of the sitting following that during which notification was given of the request (...)"
- 4 At the Parliament's sitting of 30 October 1992, the proposal was referred to the Committee on Development for detailed consideration and to four other committees for their opinion (OJ 1992 C 305, p. 565).

- 5 On 17 November 1992 the Parliament decided in plenary session to debate the proposal as a matter of urgency on 20 November 1992 (OJ 1992 C 337, pp. 25, 26).
- 6 At the plenary session on 20 November the Chairman of the Committee on Development requested referral back to committee pursuant to Rule 103(1) of the Rules of Procedure (OJ 1992 C 337, p. 261) for the following reasons:

"We consider that this is merely a renewal, but one with important consequences because it affects East European countries, which are not particularly underdeveloped, and other products. Consequently, we would like to have the matter referred back to committee and we could review the situation after the Committee Development and Cooperation has examined it, during the December session".
- 7 The report by the Committee on Development was placed on the agenda for the sitting on Friday 18 December, the last day of the last session of the European Parliament for 1992. On that day, when the matter was about to be debated in plenary session shortly before 1.00 p.m., the President of the session received a request by 14 Members for the sitting to be adjourned pursuant to Rule 106 of the Rules of Procedure, which provided as follows:

"The sitting may be suspended or closed during a debate or a vote if Parliament so decides (...) at the request of (...) at least 13 Members".
- 8 Parliament agreed to the request and the sitting was adjourned, with the result that the remaining matters on the agenda, including the resolution proposed in the report by the Committee on Development and Cooperation, could not be debated, notwithstanding a proposal by the President of the session that the report be debated first. The debate was postponed to 18 January 1993.
- 9 There followed immediate telephone consultations between the offices of the General Secretary of the Council and the President of the Parliament, in the course of which it was agreed that it would no longer be possible for practical reasons to convene an extraordinary session of the Parliament before the end of 1992.
- 10 The Council adopted the contested regulation on 21 December 1992 without having obtained the Parliament's opinion, although the latter was notified by letter of the same date. The failure to consult the Parliament is justified in the recitals in the preamble to the regulation as follows:

"Whereas it is imperative to avoid a legal vacuum that could seriously harm the Community' s relations with the developing countries as well as the interests of economic operators; whereas, therefore, the regulation on the application in 1993 of the Community' s regime of generalized tariff preferences must be adopted sufficiently early to enable it to enter into force on 1 January 1993;

Whereas it appears, after consultation of the President of the European Parliament, that it would be impossible to hold an extraordinary session at the European Parliament to enable it to adopt its opinion in good time to allow the adoption and publication of the regulation before the end of 1992;

Whereas, in these exceptional circumstances, the regulation should be adopted in the absence of an opinion of the European Parliament."

- 11 The regulation was published in the Official Journal of the European Communities of 31 December 1992. The relevant copy of the journal was issued by the Publications Office of the European Communities on 28 January 1993.
- 12 In the meantime, on 18 January 1993, the parliament examined the proposal which had been submitted to it (OJ 1993 C 42, p. 11). The following day, it adopted 17 amendments (OJ 1993 C 42, p. 25) and approved the remainder of the text as a whole. However, it requested the Council to notify it should it intend to depart from the text, and to consult the Parliament again in the event of substantial modifications (OJ 1993 C 42, p. 28).
- 13 In its application, the Parliament maintains that, since the Council adopted the contested regulation without complying with the consultation procedure provided for in Article 43 of the Treaty which, in conjunction with Article 113 of the Treaty, forms the legal basis of the regulation, the latter must be annulled for breach of an essential procedural requirement.
- 14 The Council begins by pointing out that the introduction of a Community system of generalized preferences is the result of an agreement reached within the United Nations Conference on Trade and Development. Even if, as a matter of law, the measures adopted may be withdrawn at any time, the Community cannot alter its practice unilaterally, for political reasons.
- 15 Secondly, the Council argues that an overriding public interest required the regulation to be adopted before the end of 1992. It had to enter into force on 1 January 1993 in order to protect the legitimate expectations both of the developing countries which were beneficiaries of the system and of economic operators.
- 16 Thirdly, the Council argues that it exhausted all the possibilities for obtaining the Parliament's opinion in time, by requesting that the procedure in cases of urgency be used and by proposing, unsuccessfully, to the President of the Parliament that an extraordinary session be held in accordance with Article 139 of the EEC Treaty. In view of those exceptional circumstances, the Council considers that it was entitled to adopt the contested act without the Parliament's opinion.
- 17 Finally, in its rejoinder, the Council points out that consultation of the Parliament on the proposal for the regulation became obligatory only because Article 43 of the Treaty was included in the legal basis for its adoption. However, as the Court held in Case 45/86 Commission v Council [1987] ECR 1493, generalized preferences fall in principle solely within the common commercial policy, and thus within Article 113. Accordingly, the reference to Article 43 could have been avoided, and, since Article 113 was the only legal basis lawfully required, the Parliament might not have had to be consulted at all.

[...]

- 21 The first point to note is that due consultation of the Parliament in the cases provided for by the Treaty constitutes an essential procedural requirement, disregard of which renders the measure concerned void. The effective participation of the Parliament in the legislative process of the Community, in accordance with the procedures laid down by the Treaty, represents an essential factor in the institutional balance intended by the Treaty. Such power reflects the fundamental democratic principle that the people should take part in the exercise of power through the intermediary of a representative assembly (see the "Isoglucose" judgments, Case 138/79 Roquette Frères v Council [1980] ECR 3333, paragraph 33, and Case 139/79 Maizena v Council [1980] ECR 3393, paragraph 34).

- 22 Furthermore, observance of the consultation requirement implies that the Parliament has expressed its opinion and the requirement cannot be satisfied by the Council's simply asking for the opinion ("Isoglucose" judgments, paragraphs 34 and 35 respectively). In an emergency, it is for the Council to use all the possibilities available under the Treaty and the Parliament's Rules of Procedure in order to obtain the preliminary opinion of the Parliament ("Isoglucose" judgments, paragraphs 36 and 37 respectively).
- 23 However, the Court has held that inter-institutional dialogue, on which the consultation procedure in particular is based, is subject to the same mutual duties of sincere cooperation as those which govern relations between Member States and the Community institutions (see Case 204/86 Greece v Council [1988] ECR 5323, paragraph 16).
- 24 In this case, it is undisputed that the Council informed the President of the Parliament in its letter of 22 October 1992 of the need to adopt the contested regulation before the end of 1992, so as to enable it to enter into force on 1 January 1993. It is also undisputed that, having regard to the special relations between the Community and the developing countries and to the difficulties, both political and technical, which would result from an abrupt interruption in the application of generalized tariff preferences, that request was justified.
- 25 The Parliament took those considerations fully into account, since, after referring the proposal for the regulation to the Committee on Development, it decided to deal with the matter under its procedure in cases of urgency. By placing the report of the Committee on Development on the agenda for the sitting on Friday 18 December, during its last session of 1992, the Parliament clearly intended to give its opinion in time to enable the Council to adopt the regulation before 1 January 1993.
- 26 However, the documents before the Court show that, notwithstanding the assurances thereby given to the Council, the Parliament decided, pursuant to Article 106 of its Rules of Procedure, to adjourn the plenary session of 18 December 1992 at the request of 14 Members, without having debated the proposal for the regulation. It appears, moreover, that that decision was based on reasons wholly unconnected with the contested regulation and did not take into account the urgency of the procedure and the need to adopt the regulation before 1 January 1993.
- 27 By adopting that course of action, the Parliament failed to discharge its obligation to cooperate sincerely with the Council. That is so especially since the Council was unable to avail itself of the possibility open to it under Article 139 of the Treaty, the information obtained by the Council from the President of the Parliament having made it clear that it was impossible for practical reasons to convene an extraordinary session of the Parliament before the end of 1992.
- 28 In those circumstances, the Parliament is not entitled to complain of the Council's failure to await its opinion before adopting the contested regulation of 21 December 1992. The essential procedural requirement of Parliamentary consultation was not complied with because of the Parliament's failure to discharge its obligation to cooperate sincerely with the Council.
- 29 The fact that the Official Journal of the European Communities of 31 December 1992, in which the regulation was published, was not issued until 28 January 1993 cannot affect the assessment of the legality of the regulation on the date of its adoption.

[...]

## 2.4 The European Parliament, Democracy and Legitimacy



### NOTE AND QUESTIONS

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*The following reading is intended as background for general discussion on democracy and legitimacy in the European Union.*

#### 2.4.1 Excerpt from J.H.H. Weiler: The Transformation of Europe

100 Yale Law Journal 2403 (1991)

[Numbering of footnotes changed.]

[...]

#### B. Challenges of "Democracy" and "Legitimacy".<sup>8</sup>

1992 also puts a new hue on the question of the Democracy Deficit of the Community. A useful starting point could indeed be by focusing on the European Parliament and its role.

It is traditional to start an analysis of the place of the European Parliament in the governance structure of the Community by a recapitulation of the existing democracy deficit in EEC decision making. It is this deficit which has informed, animated and mobilized the drive for change in the powers of the European Parliament. And to the extent that the governments of the Member States have responded, weakly and grudgingly, to this drive, it is surely because even they have recognized the compelling power of the Democracy Deficit argument.

The typical argument views the European Parliament as the only (or at least principal) repository of legitimacy and democracy in the Community Structure: The phrase most typically used in this context is Democratic legitimacy.<sup>9</sup> The Commission, it is usually said is an appointed body of international civil servants and the Council, by definition, represents the Executive branch of government which is given through Community structures legislative powers which it lacks in the national scene.

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<sup>8</sup> I am drawing here on my *Parlement européen intégration européenne, démocratie et légitimité*, in JV Louis & D. Waelbroeck, *Le Parlement Européen* (1988) at 325. I have been considerably helped by, and have drawn in particular on, the following works: Dahl, *Federalism and the Democratic Process*, in Pennock & Chapman, *Liberal Democracy*, XXV *Nomos* (1983) at 95; L. Henkin, *Constitutionalism, Democracy and Foreign Affairs* (1990); Th. M. Franck, *The Power of Legitimacy among Nations* (1990); L. Brilmayer, *Justifying International Acts* (1989); J. Habermas,

*Legitimation Crisis* (1975). My own synoptic presentation cannot do justice to the richness of the works cited.

<sup>9</sup> Thus, typically, the Dublin Summit (note ... *supra*) addresses the problem of democratic structures as "3. Democratic Legitimacy" (p. 8).

Thus, the Council -- a collectivity of Ministers -- on a proposal of the Commission -- a collectivity of non-elected civil servants -- could, and in some instances has to, pass legislation which is binding and enforceable even in the face of conflicting legislation passed by national parliaments without, however, the corresponding parliamentary scrutiny and approval. Indeed, it could pass the legislation in the face of European parliamentary disapproval. This happens with sufficient regularity to render the point not simply theoretical. What is more, it can legislate in areas many of which were hitherto subject to parliamentary control at the national level. We have already seen how the constitutionalization process in the Foundational Period, and the erosion of enumerated powers in the second period have accentuated this problem.

According to this view the Powers of the European Parliament are both weak and misdirected. They are weak in that the legislative power (even post SEA) is ultimately consultative in the face of a determined Council; the budgetary powers, though more concrete, do not affect the crucial areas of budgetary policy: revenue raising and expenditure on compulsory items.<sup>10</sup> The power to reject the budget in toto is a boomerang which has not always proved effective -- though in 1984 ultimately the budget was amended in a direction which took account of some of Parliament's concerns. The possibility of denying a discharge on past expenditure lacks any real sanction.

Those powers which are real -- the power to dismiss the Commission, to ask questions of the Commission and receive answers -- are illusory at best and misdirected at worst. Illusory because the power to dismiss is collective and does not have the accompanying power to appoint. Misdirected, because the Council is the Villain of the Piece in most Parliamentary battles.

It is all these factors taken together -- surely well known and trite -- which constitute the elements of the Democracy Deficit and create the crisis of legitimacy from which the Community allegedly suffers.

Although the Democracy Deficit is prominent in Parliamentary rhetoric, the day to day complaint of Parliament especially in the pre-SEA days was not of an over vigorous Community legislator (the Council) which violates democratic principles but rather of a Community legislator (the Council) which failed to act vigorously enough; which had incapacitated itself and the entire Community by abandoning Treaty rules for majoritarian decision making by giving a de facto veto to each Member State government which asserts a "national vital interest".

The veto power arrogated by the Member States produced another facet of the Democracy Deficit: The ability of a small number of Community citizens represented by their Minister in the Council to block the collective wishes of the rest of the Community.

Parliamentarians almost from wall to wall have claimed that both facets of the malaise could be corrected by institutional changes which on the one hand would de-block the Council by restoring majority voting but which would also significantly increase the legislative and control powers of Parliament.

Increased powers to the Parliament, directly elected by universal suffrage, would, so it is claimed, ipso facto substantially reduce the democratic deficit and restore legitimacy to the Community decision making process. The point seems to be so obvious that, strangely, it receives little critical analysis.

As regards the decisional malaise, Parliament has -- so the Progressive view claims -- over the years boasted a Communautaire spirit which would, if given effective outlet, transcend nationalistic squabbles and introduce a dynamism far more consonant with the declared objectives of the Treaties. The large

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<sup>10</sup> Parliament has a final say (within limits set by the Commission) only on expenditure items which are not mandated by the Treaty itself. For the best explanation of Parliamentary powers in this field see Jacque, Bieber, constantinesco, Nickel, *Le Palement Europeen* (1984) at 178. See also Case 34/86 Re: the 1986 Budget [1986] ECR 2155 esp Opinion of A.G. Mancini.

majority accorded to the Draft Treaty Establishing the European Union is often cited as a typical example of this dynamism.

The absence of a critical approach derives in part from a loose usage of the notions of democracy and legitimacy. Very frequently in discourse about Parliament and the Community the concepts of democracy and legitimacy have been presented interchangeably though in fact they do not necessarily coincide.<sup>11</sup>

Today it would be difficult in the West for a non-democratic government or political system to attain or maintain legitimacy, but it is still possible for a democratic structure not to enjoy legitimacy -- either in toto or over certain aspects of its operation. With all the conceptual difficulties of dealing with "legitimacy"<sup>12</sup> even in this brief excursus it may at least be useful to draw one classical distinction between Formal (Legal) Legitimacy and Social (Empirical) Legitimacy.

Formal legitimacy as regards institutions or systems connotes that in the creation of the institution or system all requirements of the law are observed. (It is a concept akin to the juridical concept of formal validity). Clearly in Europe of today (and generally in the West) any notion of legitimacy must rest on some democratic foundation loosely stated as the People's consent to power structures and process. But even so we can still speak of formal legitimacy if we can show that the power structure was created following democratic processes.<sup>13</sup> Thus, in our context I would simply point out that the Treaties establishing the EC which gave such a limited role to the European Parliament were approved by all national parliaments of the founding Member States and subsequently by the parliaments of six acceding Member States. Proposals for change which would give more power to the European Parliament have failed, for a variety of reasons, to complete the democratic process in the Member States.<sup>14</sup>

This definition of formal legitimacy distinguishes itself therefore from simple "legality": It is legality understood in the sense that law on which it is based (in our case the Treaties) was created by democratic institutions and processes.

Thus, in this formal sense, the existing structure and process could be said to rest on a formal approval by the democratically elected parliaments of the Member States; and yet, undeniably the Community process suffers from a clear democracy deficit in the classical sense outlined above.

Social legitimacy connotes a broad societal (empirically determined) acceptance of the system. Social legitimacy may have an additional substantive component: Legitimacy is achieved when the government process displays a commitment to and actively guarantees values which are part of the general political culture such as justice, freedom and general welfare.

An institution or system or polity will in most (but not all) cases have to enjoy formal legitimacy in order to enjoy social legitimacy. This is most likely the case in Western Democratic traditions. But, a system which enjoys formal legitimacy may not necessarily enjoy social legitimacy. Most popular revolutions (from the French revolution onwards) took place in polities where government and the system were formally legitimate but which lost social legitimacy.

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<sup>11</sup> A stark example may drive the point home better than an abstract explication: Germany during Weimer was democratic but the government enjoyed little legitimacy. Germany during National Socialism ceased to be democratic once A.H. rose to power but government continued to enjoy widespread legitimacy well into the early 40s. Cf. G.A. Craig, Germany 1866 - 1945 (1981) Ch.s 15 & 18).

<sup>12</sup> Hyde, The Concept of legitimation in the Sociology of Law 1983 Wisconsin Law Review 379

<sup>13</sup> Frank's synthesis of "legitimacy" as it applies to the rules applicable to states is close to this: "Legitimacy is a property of a rule or rule making institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operated in accordance with generally accepted principles of right process" (id. at 24 emphasis in original).

<sup>14</sup> The Single European Act, which does not remove the so-called Democracy Deficit, was ratified by all Parliaments of the Member States. Likewise, with each enlargement of the Community, in 1973, 1981 and 1986 national parliaments were given the opportunity to protest the non-democratic character of the Community, but notwithstanding, reconfirmed the governance system of the Community.

The relevance of these admittedly primitive distinctions will become relevant to our discussion, but we need one further excursus into the notions of Integration and Democracy.<sup>15</sup>

It is trite that no complex modern polity aspiring to democracy can govern itself today like the Greek Polis or the New England town. Representative (parliamentary) democracy has replaced direct participation. Nonetheless, one yardstick of democracy will be the closeness and responsiveness and representativeness and accountability of the governors to the governed. Although this formula is vague it is sufficient for present purposes.

Let us now assume three polities each of which is independent from each other each enjoying a democratic representative form of government. To simplify matters let us further assume that each government in these polities enjoys legislative and regulatory power in the following fields: Education, taxation, foreign trade and defense. This means that in relation to each of these four functions the electors can directly influence their representatives (through elections etc.) as to the polity's education policy, the level of taxation, the type of foreign trade ( eg protectionist or free) and the nature of the defence forces and policy. Let us now assume that for a variety of reasons the three polities decide to integrate and to "share their sovereignty" in the fields of taxation, foreign trade and defense.

If within each of the three polities this decision was democratically reached the integrated polity will certainly enjoy formal legitimacy. But by definition there will initially be a diminution of "responsiveness" in the new integrated polity in respect of the old three polities. Why is this so? Because prior to the integration the majority of electors in polity A would have a controlling influence over their level of taxation, the nature of their foreign trade policy and the size of their army and its posture. Under the integrated polity the electors of polity A (even a huge majority) may be outvoted by the electors of polities B and C.<sup>16</sup> This will even be the case if the new integrated polity has a perfectly democratically elected "federal" legislator. The integrated polity will not be undemocratic but it will be, in terms of the ability of citizens to influence policies affecting them, less democratic.<sup>17</sup>

We see this idea, in reverse form, when a centralized state devolves power to regions as in the case of Italy, Spain and in recent years, to some extent to France. Regionalism, "the division of sovereignty" and its bestowal on more or less autonomous regions is in some respects the opposite of integration. One of the prime motivations for regionalism is to enhance democracy in the sense of giving people more direct control of areas of public policy which affect their life.

To suggest, as I have, that in the process of integration there is a loss, at least in one sense, of democracy, does not, as such, condemn the process of integration. There usually will have been formidable reasons which will have prompted the electors in polities A, B and C to choose to integrate despite this loss of some direct control in the larger polity. Typically the main reason will be size. By aggregating their resources, especially in the field of defence, their total welfare may be enhanced despite the loss of the more immediate influence of their governments policies. Similar advantages may accrue in the field of foreign trade and there may be phenomena like multinational corporations which manage to escape the control of any particular polity and only an integrated polity will be able, say, to tax them effectively. In other words the independence and sovereignty of the single polities may be illusory in the real inter-dependent world. Nonetheless, the ability of the citizens of Polity A, B or C directly to control and influence these areas will have diminished.

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<sup>15</sup> See generally Dahl, note ... *supra*

<sup>16</sup> The dilution in voice operates on two levels: the diminution of the specific gravity of each voters weight in the process, and the diminution of the gravity of each voter's state.

<sup>17</sup> Different federal options will of course also have consequences allocation choices of voters and substantive policy outcomes. For a sustained discussion of this issue see Rose-Ackerman, Does Federalism Matter? Political Choice in a Federal Republic, 89 Journal of Political Economy 152 (1981).

It is true that even within each polity the minority had to accept majority decisions. So why am I claiming that in the enlarged integrated polity, where an equally valid majoritarian rule applies there is a loss of democracy? This is among the toughest aspect of all democratic theory.

What defines the boundary of the polity within which the majority principle should apply? There is no theoretical answer to this question. It is determined by long term, very long term, factors such as political continuity, social, cultural and linguistic affinity and a shared history. No one factor determines this but the interplay of some or all. People accept the majoritarian principle of democracy within a polity to which they see themselves as belonging.<sup>18</sup>

The process of integration -- even if decided upon democratically -- brings about then, initially at least, a loss of direct democracy in its actual process of governance. What becomes crucial for the success of the integration process is the social legitimacy of the new integrated polity despite this loss of total control over the integrated areas by each polity.

How will such legitimacy emerge? Two answers are possible.

a. The first must be the visible and tangible demonstration that the total welfare of the citizenry is enhanced as a result of integration.

b. The second answer to this is to ensure that the new integrated polity itself within its new boundaries will have democratic structures. But more important still is to give, for a time at least, an enhanced voice to the separate polities. It is not an accident that some of the most successful federations which emerged from hitherto separate polities -- the United States, Switzerland, Germany -- enjoyed prior to unification in some form of a federal state a period as a confederation. This does not mean that one has to have a confederation prior to a federation. It simply suggests that in a federation created by integration, rather than by devolution, there will have to be a period of adjustment when the political boundaries of the new polity becomes socially accepted as appropriate for the larger democratic rules whereby the minority will accept a new majority.<sup>19</sup>

>From the political point of view (though not in its legal architecture) the EC is in fact a confederation. The big debate is therefore whether the time is ripe for a radical change towards a more federal structure, or whether the process must allow itself to continue in a more evolutionary fashion.

These two answers can be at odds with each other: Giving an enhanced voice to each polity may impede the successful attainment of the goals of integration. Denying sufficient voice of the constituent polities (allowing the minority to be overridden by the majority) may bring about a decline in the social legitimacy of the polity with consequent dysfunctions and even disintegration. In terms of democratic theory the final objective of a unifying polity is to recuperate the loss of democracy initiated by the process of integration. This "loss" is recuperated when the social fabric and discourse is such that the electorate accepts the new boundary as defining the polity and then accepts totally the legitimacy of being subjected to majority rule in a much larger system comprising the integrated polities.

Obviously there is no risk today that the Member States of the Community would resort to armed force to solve any problems they have among themselves. The single biggest success of the Communities in a long term historical perspective has been, indeed, making war not only impossible but

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<sup>18</sup> "Thus it does not seem possible to arrive at a defensible conclusion about the proper unit of democracy by strictly theoretical reasoning: we are in the domain not of theoretical reason but of practical judgment" Dahl, id. at 106. On this issue see discussion in Brilmeyer, note ....<sup>supra</sup> esp Chs. 1 and 3;

<sup>19</sup> And we do not have to take the formal transfer to federation as necessarily the actual transfer. Arguably, the US became truly federal only after the Civil War.

unthinkable. But it is not unthinkable that radical political changes would lead to secession of at least some Member States.

We can now see how these notions play themselves out in a reconstructed analysis of the democracy issue in the Community.

As stated above it is a premise of the traditional analysis that the Community suffers from a crisis of legitimacy. Is the absence of legitimacy formal? Surely not. The Community -- including its weak Parliament -- appointed Commission and unaccountable Council -- enjoys perfect formal legitimacy. The Treaties have all been approved by the Community electorate through their national parliaments in accordance with the constitutional requirement in each Member State and reapproved several times with the accession of each new Member State and most recently with the adoption of the Single European Act.

If there is a crisis of legitimacy it must therefore be a crisis of Social (empirical) legitimacy. What is the nature of this crisis of social legitimacy if indeed it exists?

The traditional view is that the absence of legitimacy is rooted in the Democracy Deficit. As stated above, the implication is that any increase in the legislative and control powers of the European Parliament at the expense of Council will contribute to an elimination of this legitimacy crisis. I challenge the premise and the conclusion. I do believe that Parliament should be given enhanced powers because I acknowledge the Democracy Deficit in that formal sense explained above. But I think that it is at least questionable whether this will necessarily solve the legitimacy problems of the Community. It may even enhance it.

The legitimacy problem is generated by several reasons which should be discussed separately. The primary reason is, at least arguably, because the European electorate (in most Member States) only grudgingly accepts the notion that crucial areas of public life should be governed by a decisional process in which their national voice becomes a minority which may be overridden by a majority of representatives from other European countries. In theoretical terms there is, arguably, still no legitimacy to the notion that the boundaries within which a minority will accept as democratically legitimate a majority decision must now be European instead of national. It is interesting, and significant, that for the first time national parliaments are taking a keen interest in the structural process of European integration and are far from enamored with the idea of solving the democracy deficit by simply enhancing the powers of the European Parliament.<sup>20</sup>

At its starkest this view would claim that in terms of social legitimacy there is no difference between a decision taken in the council of ministers and a decision taken in the European Parliament. To the electorate both present themselves as legislative chambers with representatives of the Member States. In both cases, until this dimension of legitimacy is resolved by time and other factors the electorate of a minority Member State might find it hard to swallow and will consider it socially illegitimate that they have to abide by a majority decision of a redefined polity.

On this view, in the current state of Community life the single most legitimating element (from a social point of view) was the Luxembourg accord and the veto power. To be sure, one pays a huge cost in terms of efficient decision making and progress. But it was this device which enabled the Community to legitimate its programme and its legislation for it provided both an ex-ante "insurance policy" to the national electorates that nothing could get through without their voice having a controlling say and it presents a post legitimation as well: Everything that the Community does, even those things that are not popular were passed with the assent of national ministers. To the extent that the output of the Community

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<sup>20</sup> See, eg. Select Committee of House of Lords Report on Economic and Monetary Union and on Political Union (note ... *supra*) at paras 157, 158, 210.

decisional process is legitimate, it is so at least partially because of the knowledge that it is controllable in this way.

The turn to majority voting might exacerbate legitimacy problems and that even a beefed up European Parliament (which also operates on a majority principle) will not necessarily solve that legitimacy problem since on this view the legitimacy crisis does not derive principally from the accountability issue at the European level but from the very redefinition of the European polity.

If we try to pull all threads together the conclusion of the above is at least food for thought:

In a formal sense, the turn to majority voting exacerbates the democracy deficit, by weakening national parliamentary control of the Council without a corresponding increase in the powers of the European Parliament. But even an increase in the power of the European Parliament -- to full co-decision on the most ambitious plan, does not wholly solve the problem. For it brings to the fore the intractable problem of redefining the political boundaries of the Community within which the operation of the principle of majority votes is to take place. It is at least an open question whether there has been the necessary shift in public loyalty to such a redefined boundary even we accept the formalistic notion of state parliamentary democracy.

[...]