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# The European Union's Constitutional Order? Between Community Method and *Ad Hoc* Compromise

By  
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## I. INTRODUCTION

According to the European Court of Justice, “the EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the Constitutional Charter of the Community based on the rule of law.”<sup>1</sup> The Court has consistently held that the European Union (“EU”)<sup>2</sup> treaties have established

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1. Case 294/83, *Les Verts v. Parliament*, 1986 E.C.R. 1339, 1365.

2. The founding treaties of the European Communities are:

- the Treaty of Paris establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140 [hereinafter ECSC TREATY];

- the Treaty of Rome establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC TREATY]; and

- another Treaty of Rome establishing the European Atomic Energy Community, Mar. 25, 1957, 298 U.N.T.S. 140 [hereinafter EURATOM TREATY].

European integration was reinvigorated in the 1980s through the Single European Act, Feb. 17 & 28, 1986, O.J. (L 169) 1; 25 I.L.M. 503 (1986) [hereinafter SEA]. The EU was established by the Treaty on European Union, Feb. 7, 1992, O.J. (C 224) 1; 31 I.L.M. 247 (1992) [hereinafter TEU or Treaty of Maastricht]. The TEU changed the name of the EEC Treaty in Treaty establishing the European Community [hereinafter EC Treaty]. The treaties were amended by the Treaty of Amsterdam Amending the Treaty on European Union, the Treaties establishing the European Communities and Certain Related Acts, Oct. 2, 1997, O.J. (C 340) 1 [hereinafter Treaty of Amsterdam]. For the consolidated version of the TEU, see O.J. (C 340) 145 [hereinafter Consolidated TEU]. For the consolidated version of the EC Treaty, see O.J. (C 340) 173 [hereinafter Consolidated EC Treaty]. For an introduction to the Consolidated TEU and Consolidated EC Treaty, see Youri Devuyst, *Introductory Note*, 37 I.L.M. 56 (1998).

The EU serves as the common roof spanning three pillars. This pillar structure was maintained by the Treaty of Amsterdam.

- Pillar I is based on the provisions of the three European Communities. The EC Treaty includes Titles on such topics as the free movement of goods; agriculture; the free movement of persons, services and capital; visas, asylum, immigration and other policies related to free movement of persons; transport; common rules on competition, taxation and approximation of laws; economic and monetary policy; employment; common commercial policy; customs cooperation; social policy, education, vocational training and youth; culture; public health; consumer protection; trans-European networks; industry; economic and social cohesion; research and technological development; environment; and development cooperation. It also contains a Title describing the composition and functions of the EC's institutions (European Parliament, Council, Commission, Court of Justice and Court of Auditors).

- Pillar II deals with the Common Foreign and Security Policy (CFSP).

a new legal order with its own institutions, decision-making mechanisms and enforcement powers “for the benefit of which the [Member] States have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only the Member States but also their nationals.”<sup>3</sup> Still, in the EU’s institutional reality, Constitutionalization remains a controversial topic.<sup>4</sup> When launching a new round of Treaty reform in December 1999, the Helsinki European Council refused to add the Constitutionalization of the EU Treaty framework to the agenda.<sup>5</sup> This is not entirely surprising. A genuine Constitutional debate, implying clear choices on the goals, character and institutional conception of European integration is precisely what most Member States have been trying to avoid since the disruptive and inconclusive discussion on the Union’s “federal” nature during the Maastricht negotiations.<sup>6</sup>

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- Pillar III contains provisions on police and judicial cooperation in criminal matters.

Pillar I functions on the basis of the traditional “Community method”: the exclusive right of legislative initiative for the Commission; Council voting on legislative matters by either qualified majority or unanimity; co-decision for the European Parliament in a significant number of legislative fields; jurisdiction for the Court of Justice to interpret and verify the legality of Community acts; and primacy of Community law over Member State law. Pillars II and III, while governed by the same institutions, function according to more traditional intergovernmental practices. For an introduction to the EU’s structure, see Bruno de Witte, *The Pillar Structure and the Nature of the European Union: Greek Temple or French Gothic Cathedral?*, in *THE EUROPEAN UNION AFTER AMSTERDAM: A LEGAL ANALYSIS* 51 (Ton Heukels, Niels Blokker & Marcel Brus eds., 1998); Joseph H. H. Weiler, *Neither Unity nor Three Pillars - The Trinity Structure of the Treaty on European Union*, in *THE MAASTRICHT TREATY ON EUROPEAN UNION: LEGAL COMPLEXITY AND POLITICAL DYNAMIC* 49 (Jörg Monar, Werner Ungerer & Wolfgang Wessels eds., 1993). For a general introduction to the legal aspects of European integration, see PAUL CRAIG & GRAINNE DE BURCA, *EU LAW: TEXTS, CASES AND MATERIALS* (1998); P. J. G. KAPTEYN & P. VERLOREN VAN THEMAAT, *INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITIES: FROM MAASTRICHT TO AMSTERDAM* (Lawrence W. Gormley ed., 1998).

3. Opinion 1/91, 1991 E.C.R. 6102.

4. For the academic debate regarding the Constitutional nature of the EU’s Treaty framework, see JORG GERKRATH, *L’EMERGENCE D’UN DROIT CONSTITUTIONNEL POUR L’EUROPE: MODES DE FORMATION ET SOURCES D’INSPIRATION DE LA CONSTITUTION DES COMMUNAUTES ET DE L’UNION EUROPEENNE* (1997); J. H. H. WEILER, *THE CONSTITUTION OF EUROPE: “DO THE NEW CLOTHES HAVE AN EMPEROR?”* (1999); *CONSTITUTION-BUILDING IN THE EUROPEAN UNION* (Birgit Lafflan ed., 1996); Philip Allcott, *The Crisis of European Constitutionalism: Reflections on the Revolution in Europe*, 34 *COMMON MKT. L. REV.* 439 (1997); Grainne de Burca, *The Institutional Development of the EU: A Constitutional Analysis*, in *THE EVOLUTION OF EU LAW* 55 (Paul Craig & Grainne de Burca eds., 1999); Ingolf Pernice, *Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?*, 36 *COMMON MKT. L. REV.* 703 (1999); Jean-Claude Piris, *Does the European Union have a Constitution? Does it Need One?*, 24 *EUR. L. REV.* 557 (1999).

5. Treaty reform takes place in an Intergovernmental Conference [hereinafter IGC]. The IGC 2000 - formally opened on Feb. 14, 2000 - should “examine the size and composition of the Commission, the weighting of votes in the Council and the possible extension of qualified majority voting in the Council, as well as other necessary amendments to the Treaties arising as regards the European institutions in connection with the above issues and in implementing the Treaty of Amsterdam. The incoming Presidency will report to the European Council on progress made in the Conference and may propose additional issues to be taken on the agenda of the Conference.” Helsinki European Council, Presidency Conclusions, Dec. 10-11, 1999 in *BULL. EUR. UNION* at para. I.1 (12-1999). In June 2000, the European Council added the issue of “closer cooperation” to the agenda of the IGC-2000. Santa Maria da Feira European Council, Presidency Conclusion, Jun. 19-20, 2000 in *BULL. EUR. UNION* at Para. I. (6-2000).

6. For an interesting attempt to reinvigorate the debate on the EU’s constitutional nature, see German Foreign Minister Joschka Fischer’s speech of May 12, 2000 at Humboldt Univ. in Berlin entitled “From Confederacy to Federation—Thoughts on the Finality of European Integration.” On

Instead, the Member States have opted to move forward one day at a time, through a series of *ad hoc* compromises that have tended to reinforce the EU's intergovernmental dimension rather than the supranational dynamic underlying the Community method of the 1950s.<sup>7</sup> The resulting institutional framework hangs somewhere between the strong foundations of the Community's original integration method and the complex *ad hoc* solutions of the past decade. It constitutes an institutional patchwork<sup>8</sup> in permanent tension:<sup>9</sup>

- between an expansive and a restrictive definition of the EU's powers;
- between coherence and flexibility;
- between solidarity and the promotion of narrow self-interest;
- between a functional and a thematic division of powers between the institutions;
- between a supranational integration engine and a Commission under Member State control;
- between decision-making efficiency and the unanimity trap in the Council;
- between non-hegemonic decision-making and grand power politics;
- between parliamentary control and parliamentary governance;
- between legislative harmonization, policy coordination and resource allocation;
- between a coherent and a fragmented law enforcement;
- between directly applicable rights for EU citizens and intergovernmental law; and
- between an EU of Member States and an EU of the Regions.

The EU's institutional structure is of major importance, for Member States and third countries alike. The Community method of the 1950s proved an effective instrument for reconciliation and lasting peace among the countries of Western Europe. In addition, it served as a strong framework for democracy, enabling the development of stable parliamentary regimes in Greece, Portugal

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the Maastricht debate regarding the EU's federal nature, see RICHARD CORBETT, *THE TREATY OF MAASTRICHT* 38 (1993); JIM CLOOS, GASTON REINESCH, DANIEL VIGNES & JOSEPH WEYLAND, *LE TRAITE DE MAASTRICHT: GENESE, ANALYSE, COMMENTAIRES* 115 (1994). On the absence of a similar debate during the Amsterdam negotiations, see BOBBY MCDONAGH, *ORIGINAL SIN IN A BRAVE NEW WORLD: AN ACCOUNT OF THE NEGOTIATION OF THE TREATY OF AMSTERDAM* at 10 (1998); Youri Devuyt, *Treaty Reform in the European Union: the Amsterdam Process*, 5 J. EUR. PUB. POL'Y 615 (1998); Andrew Moravcsik & Kalypso Nicolaides, *Federal Ideals and Constitutional Realities in the Treaty of Amsterdam*, J. COMMON MKT. STUD. 13 (European Union Annual Review 1997); Andrew Moravcsik & Kalypso Nicolaides, *Explaining the Treaty of Amsterdam: Interests, Influence, Institutions*, 37 J. COMMON MKT. STUD. 59 (1999); Jean-Claude Piris & Giorgio Maganza, *The Amsterdam Treaty: Overview and Institutional Aspects*, 22 FORDHAM INT'L L.J. 532 (1999).

7. On the Community method, see PHILIPPE DE SCHOUTHEETE, *UNE EUROPE POUR TOUS: DIX ESSAIS SUR LA CONSTRUCTION EUROPEENNE* (1997); J. H. H. Weiler, *The Transformation of Europe*, 100 YALE L. J. 2403 (1991); Youri Devuyt, *The Community-Method after Amsterdam*, 37 J. COMMON MKT. STUD. 109 (1999).

8. Deirdre Curtin correctly referred to this patchwork as "a Europe of bits and pieces." See Deirdre Curtin, *The Constitutional Structure of the Union: A Europe of Bits and Pieces* 30 COMMON MKT. L. REV. 17 (1993).

9. To a certain degree, the tension between the territorial Member State dimension and the non-territorial supranational dimension is itself a major characteristic of the Community method. See Alberta Sbragia, *The European Community: A Balancing Act* 23 PUBLIUS 23 (1993).

and Spain. Furthermore, where it functions according to the Community method, the EU has been able to act as an important global player, in particular in the field of external economic relations.<sup>10</sup> The more intergovernmental approach governing the EU's common foreign and security policy (CFSP) and cooperation in justice and home affairs (JHA) has proved much less successful.<sup>11</sup> There is a general recognition that the intergovernmental working methods have been an important factor in holding back developments in those areas.<sup>12</sup> A more general erosion of the Community method in favor of the intergovernmental approach would therefore be likely to decrease the EU's effectiveness as a whole. As former Commission President Jacques Delors recalled: "Experience shows that when we stray from this method, Europe goes nowhere."<sup>13</sup>

Examining the nature and method underlying European integration is topical in at least two respects. First, the EU is pursuing its historical mission of embracing the countries of Central and Eastern Europe in an enlargement process which now also includes Cyprus, Malta and Turkey. According to the Helsinki European Council, "the Union should be in a position to welcome new Member States from the end of 2002."<sup>14</sup> The prospect of enlargement automatically leads to questions regarding the EU's institutional adaptation and the nature of the integration process. For the European Parliament, the new pace of the enlargement process agreed upon in Helsinki required "a reform of the treaties capable of ensuring institutional stability, of creating democratic methods for constitutional reform, of safeguarding and increasing the effectiveness of the decision-making process and of strengthening democracy in order to make further progress in European integration."<sup>15</sup> The Commission too has long favored

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10. See CHRISTOPHER PIENING, *GLOBAL EUROPE: THE EUROPEAN UNION IN WORLD AFFAIRS* 13 (1997).

11. The CFSP has grown out of European Political Cooperation (EPC), a framework established in 1970 as a way to coordinate the foreign policies of the EC Member States. It was for the first time incorporated in a legal structure in the Single European Act. For the development of EPC and CFSP, see SIMON J. NUTTALL, *EUROPEAN POLITICAL COOPERATION* (1992); A COMMON FOREIGN POLICY FOR EUROPE? (John Peterson & Helene Sjursen eds., 1998); EUROPEAN POLITICAL COOPERATION IN THE 1980S: A COMMON FOREIGN POLICY FOR WESTERN EUROPE? (Alfred Pijpers, Elfriede Regelsberger & Wolfgang Wessels eds., 1988); FOREIGN AND SECURITY POLICY IN THE EUROPEAN UNION (Kjell A. Eliassen ed., 1998); FOREIGN POLICY OF THE EUROPEAN UNION: FROM EPC TO CFSP AND BEYOND (Elfriede Regelsberger, Philippe de Schoutheete & Wolfgang Wessels eds., 1997). JHA too started in the mid-1970s as a cooperation effort between the Ministries of Justice and Home Affairs, known as the Trevi framework. On the institutional evolution of JHA, see STEVE PEERS, *EU JUSTICE AND HOME AFFAIRS LAW* (1999); JUSTICE AND HOME AFFAIRS IN THE EUROPEAN UNION: DEVELOPMENT OF THE THIRD PILLAR (Roland Bieber & Jörg Monar eds., 1995); THE THIRD PILLAR OF THE EUROPEAN UNION: COOPERATION IN THE FIELDS OF JUSTICE AND HOME AFFAIRS (Jörg Monar & Roger Morgan eds., 1994).

12. Particularly interesting in this respect is the analysis by the Reflection Group that was asked to draft an annotated agenda for the 1996 Amsterdam Treaty negotiations, see Reflection Group Report and Other References for Documentary Purposes: 1996 Intergovernmental Conference (Gen. Sec. Council EU) 49, 75 (Dec. 1995).

13. Jacques Delors, *Reuniting Europe: Our Historic Mission*, AGENCE EUROPE, Jan. 3-4, 2000, at 3.

14. Helsinki European Council, *supra* note 5.

15. European Parliament, Resolution on the Convening of the Intergovernmental Conference, para. B (Feb. 3, 2000).

the deepening of the integration process as a precondition to enlargement to "ensure that 'more' does not lead to 'less'."<sup>16</sup>

The second challenge concerns the need for transparency and clarity regarding the values underlying the EU's political community-in-the-making.<sup>17</sup> This issue was catapulted onto the EU's political agenda following the formation of the coalition government between the Austrian People's Party (ÖVP) and the Austrian Freedom Party (FPÖ) in February 2000. The FPÖ is notorious for its extreme right-wing program and for "the insulting, xenophobic and racist statements" by its leader Jörg Haider.<sup>18</sup> The fourteen heads of state and government of the EU's other Member States immediately "informed the Austrian authorities that there would be no business as usual in the bilateral relations with a Government integrating the FPÖ."<sup>19</sup> For the European Parliament, this expression of concern was fully justified by "the emergence and achievement of the political project of the European Union."<sup>20</sup> In the words of Belgian Minister of Foreign Affairs Louis Michel,

the European Union is not a banal international organization. It is a community of States that places at the heart of its undertaking liberty, democracy, respect for human rights and fundamental freedoms . . . . When a Member State takes a course in contradiction with these humanistic principles and values, telling it so is not interfering in its internal affairs because these questions today no longer fall purely within European countries' internal affairs.<sup>21</sup>

Never before had the EU's governments been so outspoken about the nature of the EU's political community and "the values and principles of humanism and democratic tolerance underlying the European project."<sup>22</sup> The Austrian affair has drawn the public's attention to the fact that the EU is in the process of

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16. Commission of the European Communities, *Europe and the Challenge of Enlargement: Report to the Lisbon European Council*, June 26-27, 1992, at para. 19 (June 24, 1992). For the Commission's updated viewpoint, see Commission of the European Communities, *Adapting the Institutions to Make a Success of Enlargement: Commission Opinion in Accordance with Article 48 of the Treaty on European Union on the Calling of a Conference of Representatives of the Governments of the Member States to Amend the Treaties*, COM(00) 34 final.

17. See DEIRDRE CURTIN, *POSTNATIONAL DEMOCRACY: THE EUROPEAN UNION IN SEARCH OF A POLITICAL PHILOSOPHY* (1997); Ian Ward, *The European Constitution, the Treaty of Amsterdam, and the Search for Community*, 27 GA. J. INT'L & COMP. L. 519 (1999).

18. This is how the European Parliament characterizes the statements by Jörg Haider. See European Parliament, *Resolution on the Legislative Elections in Austria and the Proposal to Form a Coalition Government between the ÖVP (Austrian People's Party) and the FPÖ (Austrian Freedom Party)*, para. 1 (Feb. 3, 2000).

19. Statement from the Portuguese Presidency of the European Union on Behalf of XIV Member States (Jan. 31, 2000) (on file with author). The statement includes the following sanctions against the Austrian government:

- "Governments of XIV Member States will not promote or accept any bilateral official contacts at political level with an Austrian Government integrating the FPÖ;
- There will be no support in favor of Austrian candidates seeking positions in international organizations;
- Austrian Ambassadors in EU capitals will only be received at a technical level."

20. European Parliament, *Resolution on the Result of the Legislative Elections in Austria*, *supra* note 18, at para. A.

21. AGENCE EUROPE, Feb. 14, 2000, at 7.

22. Press Release by the Portuguese Prime Minister's Office on the Constitution of the New Austrian Cabinet (Feb. 3, 2000) (on file with author). In the Treaty of Amsterdam, the Member States had felt the need to make clear that "[t]he Union is founded on the principles of liberty,

forming a political community. While implying that such notions as interference in internal affairs must be interpreted in a different context, the controversy did not eliminate the complexity and “anomalies” that make the European integration process difficult for non-specialists to grasp.<sup>23</sup> In the Commission’s blunt wording, today’s EU still “is not understandable to the European citizens.”<sup>24</sup>

Experts have recommended the Constitutionalization of the EU treaties as a means to make the powers of the Union more comprehensible to EU citizens. In what became known as the “Wise Men” report, former Belgian Prime Minister Jean-Luc Dehaene, former German President Richard von Weizsäcker and former UK Minister David Simon suggested a division of the EU Treaties into two separate parts:

The Basic Treaty would only include the aims, principles and general policy orientations, citizen’s rights and the institutional framework. These clauses . . . could only be modified unanimously, through an IGC [Intergovernmental Conference], with ratification by each Member State. Presumably such modifications would be infrequent.

A separate text (or texts) would include the other clauses of the present treaties, including those which concern specific policies. These could be modified by a decision of the Council . . . and the assent of the European Parliament.<sup>25</sup>

Parliament gave its enthusiastic support to the Constitutionalization proposal.<sup>26</sup> The European Commission too saw considerable merit in the Wise Men’s proposal and asked the European University Institute in Florence to study it.<sup>27</sup> During the Helsinki European Council of December 1999, however, the heads of state and government decided to launch an IGC with an agenda largely restricted to the so-called Amsterdam leftovers: the possible extension of qualified majority voting, the weighting of the votes, and the number of Commissioners.<sup>28</sup> The Constitutionalization of the Treaty framework was not even mentioned in the European Council’s conclusions.

To clarify the EU’s current Constitutional debate, Part II reviews the circumstances that have permitted the creation of the Community method which still constitutes the EU’s institutional foundation. It also introduces the suprana-

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democracy, respect of human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States” (CONSOLIDATED TEU, *supra* note 2, art. 6).

23. See Commission, *Adapting the Institutions to Make a Success of Enlargement*, *supra* note 16, at 3.

24. See *id.*

25. Jean-Luc Dehaene, Richard von Weizsäcker & David Simon, *The Institutional Implications of Enlargement: Report to the European Commission*, at 12 (Oct. 18, 1999).

26. See European Parliament, *Resolution on the Preparation of the Reform of the Treaties and the next Intergovernmental Conference*, para. 57 (Nov. 26, 1999). See also Giorgios Dimitrakopoulos & Jo Leinen, *Report on the Preparation of the Reform of the Treaties and the Next Intergovernmental Conference*, EUR. PARL. DOC. (SEC A5) 0058 (1999).

27. See Commission, *Adapting the Institutions to Make a Success of Enlargement*, *supra* note 16, at 5. The European University Institute (EUI) presented its study on the reorganization of the Treaties to the Commission on May 15, 2000. The EUI report presented a better structured and easy-to-read text, without proposing any changes to the substance of the present legal situation. See <<http://europa.eu.int/igc2000>>.

28. See Helsinki European Council, *supra* note 5.

tional dynamic that the Community method engendered and its effect on the Member States. While the Masters of the Treaties, governments no longer exercise full control over their creation in the areas covered by the Community method. This has given rise to a desire on the part of some Member States to pursue the European integration process through a more intergovernmental approach. Through an analysis of the twelve dimensions of institutional tension listed above, Part III examines the degree to which the Community method has been eroded by the desire of some Member States to keep their creation under more direct control. In view of the complexity and inefficiency of the EU's current patchwork of legal texts, Part IV refers to the proposal for a reinvigoration of the European integration process through the creation of a Federation of Nation States based on a coherent Constitutional system among those European countries willing to leave behind ancient notions of sovereignty.

## II.

### THE MASTERS OF THE TREATIES AND THE COMMUNITY METHOD

#### A. *The Creation of the Community Method*

Before examining the EU's current institutional framework, it is useful to set the stage by introducing the circumstances that have allowed for the creation of the Community method. The basics of the method were developed in the 1950s, largely as a reaction to the inefficiency of the Council of Europe's intergovernmental decision-making techniques.<sup>29</sup> The Council of Europe, based in Strasbourg, was established in 1949 to promote European unity after World War II.<sup>30</sup> All Western and Northern European countries became members.<sup>31</sup> Attempts to give the Council of Europe an effective decision-making capacity were rejected by the United Kingdom (UK) and the Scandinavian countries, which insisted on traditional diplomatic working methods through the unanimous adoption of international conventions.<sup>32</sup> The Organization for European Economic Cooperation ("OEEC"), created in 1948 in response to the Marshall Plan, suffered from the same intergovernmental paralysis.<sup>33</sup> The need to depart from such intergovernmental working methods was most eloquently formulated by a disillusioned Paul-Henri Spaak following his resignation as President of the Council of Europe's Consultative Assembly:

Do you really want to build Europe without creating a supranational European authority and do you really want to build Europe while maintaining your national sovereignty? If that is your goal, we are no longer in agreement, because I believe

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29. On the creation of the Council of Europe and its institutional system, see A. H. ROBERTSON, *THE COUNCIL OF EUROPE* (1956); PETER M. R. STIRK, *A HISTORY OF EUROPEAN INTEGRATION SINCE 1914* 103 (1996); DEREK W. URWIN, *A POLITICAL HISTORY OF WESTERN EUROPE SINCE 1945* 77 (5th ed. 1987).

30. See *id.*

31. See *id.*

32. See *id.*

33. On the creation of the OEEC and its institutional system, see ROBERT MARJOLIN, *MEMOIRS, 1911-1986: ARCHITECT OF EUROPEAN UNITY* 191 (1989); ALAN S. MILWARD, *THE RECONSTRUCTION OF WESTERN EUROPE 1945-51* 168 (1984); STIRK, *supra* note 29, at 83; URWIN, *supra* note 29, at 79; *EXPLORATIONS IN OEEC HISTORY* (Richard T. Griffiths ed., 1997).



you will be blocked by an insurmountable obstacle; wanting to create a new Europe while keeping national sovereignty intact is like trying to square the circle.<sup>34</sup>

The European Coal and Steel Community ("ECSC") project met the demand for a change of method.<sup>35</sup> Only those countries that accepted the supranational principle of bringing their coal and steel industry under the governance of an independent High Authority were asked to participate in its elaboration. In the words of French Foreign Minister Robert Schuman, "the participating nations will *in advance* accept the notion of submission to the Authority . . . . They are convinced that . . . the moment has come for us to attempt for the first time the experiment of a supranational authority which shall not be simply a combination or conciliation of national powers."<sup>36</sup> For Schuman and his principal instigator, Jean Monnet, achieving the proper institutional framework was crucial. The cumulative sagacity of institutions was essential to Monnet, who was fond of quoting Swiss philosopher Henri Frédéric Amiel: "Each man begins the world afresh. Only institutions grow wiser; they store up their collective experience; and, from this experience and wisdom, men subject to the same laws will gradually find, not that their natures change but that their behavior does."<sup>37</sup> In view of his strong belief in the power of institutions, it is not surprising that, as Chairman of the Intergovernmental Conference convened in 1950 to negotiate the Treaty of Paris establishing the ECSC, Monnet urged the delegates not to saddle the embryonic Community with the shortcomings of traditional intergovernmental institutions.<sup>38</sup>

Although the EU's founders succeeded in creating a Community method that went beyond the unwieldy set-up of traditional intergovernmental organizations, states' acceptance of this method was never based on purely idealistic motives. From the beginning, the EU's development has resulted from Member States' acceptance of institutional formulae that advance their substantive political and economic preferences.<sup>39</sup> This has gone hand in hand with tough inter-

34. Paul-Henri Spaak, *Document 54: Il n'y a qu'un seul partenaire concevable pour les Etats-Unis d'Amérique: ce sont les Etats-Unis d'Europe* (7 février 1952) in *LA PENSÉE EUROPEENNE ET ATLANTIQUE DE PAUL-HENRI SPAAK* at 297 (Paul-F. Smets ed., 1980). Translated by the author. On Spaak's disappointment with the functioning of the Council of Europe and the OEEC, see PAUL-HENRI SPAAK, *COMBATS INACHEVÉS II: DE L'ESPOIR AUX DECEPTIONS* 46 (1969); MICHEL DUMOULIN, SPAAK 433 (1999).

35. See WILLIAM DIEBOLD, *THE SCHUMAN PLAN* (1959); ERNEST B. HAAS, *THE UNITING OF EUROPE: POLITICAL, SOCIAL AND ECONOMIC FORCES 1950-1957* (1968); ROGER BULLEN & M.E. PELLY, *THE SCHUMAN PLAN, THE COUNCIL OF EUROPE AND WESTERN EUROPEAN INTEGRATION* (1986).

36. *THE POLITICS OF EUROPEAN INTEGRATION: A READER* 36 (Michael O'Neill ed., 1996). (Robert Schuman before the Consultative Assembly of the Council of Europe, Records of the Fourth Sitting, Aug. 10, 1950). On Schuman's viewpoint regarding European integration, see RAYMOND POIDEVIN, ROBERT SCHUMAN, *HOMME D'ÉTAT*, 1886-1963 (1986).

37. FRANCOIS DUCHENE, *JEAN MONNET: THE FIRST STATESMAN OF INTERDEPENDENCE* 401 (1994).

38. See JEAN MONNET, *MEMOIRS* 323 (1978). See also DUCHENE, *supra* note 37, at 205 (1994).

39. On the Schuman Plan and the negotiation of the Treaty of Paris establishing the ECSC, see JOHN GILLINGHAM, *COAL, STEEL AND THE REBIRTH OF EUROPE, 1945-1955: THE GERMANS AND FRENCH FROM RUHR CONFLICT TO ECONOMIC COMMUNITY* (1991); MILWARD, *THE RECONSTRUCTION OF WESTERN EUROPE*, *supra* note 33; *THE BEGINNINGS OF THE SCHUMAN-PLAN 1950/51* (Klaus Schwabe ed., 1988); Pierre Gerbet, *Les Origines du Plan Schuman: le Choix de la Méthode Com-*

state and intra-governmental<sup>40</sup> bargaining regarding the nature and instruments of the European integration process.

*B. The Levels of Change in the EU: Supranational Dynamic and Member State Control*

From the start, European integration has been characterized by a desire for gradual evolution or change. The Treaties of Paris and Rome merely constituted a point of departure for the step-by-step integration process.<sup>41</sup> At the most fundamental level, the power to bring about change in the EU is still largely in the hands of the heads of state and government. This level of change concerns broad political decisions with wide-ranging effects on the EU's functioning. Treaty reform<sup>42</sup> and enlargement with new Member States<sup>43</sup> are obvious examples.<sup>44</sup> The EU's discussions at this level are position games in which the gov-

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*munautaire par le Gouvernement Français, in HISTOIRE DES DEBUTS DE LA CONSTRUCTION EUROPEENNE (MARS 1948-MAI 1950) 199 (Raymond Poidevin ed., 1986); William I. Hitchcock, France, the Western Alliance, and the Origins of the Schuman Plan, 1948-1950, 21 DIPLOMATIC HIST. 603 (1997). On the negotiation of the Treaty of Rome establishing the EEC, see HANNS JÜRGEN KÜSTERS, FONDEMENTS DE LA COMMUNAUTE ECONOMIQUE EUROPEENNE (1990); ALAN S. MILWARD, THE EUROPEAN RESCUE OF THE NATION-STATE (1992); ANDREW MORAVCSIK, THE CHOICE FOR EUROPE: SOCIAL PURPOSE AND STATE POWER FROM MESSINA TO MAASTRICHT (1998); Hanns Jürgen Küsters, *The Origins of the EEC Treaty*, in THE RELAUNCHING OF EUROPE AND THE TREATIES OF ROME 211 (Enrico Serra ed., 1989).*

40. For an insight into the disagreements within the French and German governments during the negotiation of the Rome Treaties, see GERARD BOSSUAT, L'EUROPE DES FRANCAIS 1943-1959: LA IV<sup>E</sup> REPUBLIQUE AUX SOURCES DE L'EUROPE COMMUNAUTAIRE; Hanns Jürgen Küsters, *The Federal Republic of Germany and the EEC-Treaty*, in THE RELAUNCHING, *supra* note 39, at 495.

41. Already in his famous Declaration of May 9, 1950, Schuman had underlined that "Europe w[ould] not be made all at once or according to a single plan. It will be built through concrete achievements." Robert Schuman, *Declaration of 9 May 1950*, in THE ORIGINS AND DEVELOPMENT OF EUROPEAN INTEGRATION: A READER AND COMMENTARY 76 (Peter M. R. Stirk & David Weigall eds., 1999). For the original French version of the Schuman Declaration, see POIDEVIN, ROBERT SCHUMAN, *supra* note 36, at 261.

42. The Treaty reform procedure can be found in CONSOLIDATED TEU, *supra* note 2, art. 48: The government of any Member State or the Commission may submit to the Council proposals for the amendment of the Treaties on which the Union is founded. If the Council, after consulting the European Parliament and, where appropriate, the Commission, delivers an opinion in favor of calling a conference of representatives of the governments of the Member States, the conference shall be convened by the President of the Council for the purpose of determining by common accord the amendments to be made to those Treaties. The European Central Bank shall also be consulted in the case of institutional changes in the monetary area. The amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements.

43. The accession procedure can be found in CONSOLIDATED TEU, *supra* note 2, art. 49: Any European State which respects the principles set out in Art. 6(1) may apply to become a member of the Union. It shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the assent of the European Parliament, which shall act by an absolute majority of its component members. The conditions of admission and the adjustments to the Treaties on which the Union is founded which such admission entails shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements.

44. For an alternative use of the level of analysis technique to EU decision-making and an excellent general introduction to the EU's political process, see JOHN PETERSON & ELIZABETH BOMBERG, DECISION-MAKING IN THE EUROPEAN UNION 10 (1999). On the EU's political process, see also DESMOND DINAN, EVER CLOSER UNION: AN INTRODUCTION TO EUROPEAN INTEGRATION (1999);

ernments attempt to create a congenial institutional framework, favorable to their substantive policy preferences. As the formalization of agreements at this level usually requires a consensus by the heads of state and government in the framework of the European Council as well as ratification by each Member State, the key to success is finding a compromise among the preferences of the participating Member State governments.<sup>45</sup> In this sense, the Member States have always remained the Masters of the Treaties.<sup>46</sup>

At the same time, however, the Member States as early as the 1950s set in motion a supranational dynamic, establishing a European polity with its own powers and institutions. This supranational dynamic partly escapes direct control by the governments of the Member States. Furthermore, attempts by individual Member States to resist the outcome of the supranational decision-making process, such as the Community's secondary legislation, Commission decisions or Court rulings, are not always successful. This explains why the heads of state and government have frequently complained that the EC's adaptation process has not gone in a direction favorable to them.<sup>47</sup>

The creation of secondary law in the form of EC regulations and directives is a level of change characterized by the interplay between the Community institutions: the Commission has the exclusive right to take the legislative initiative, the Council of Ministers adopts the legislative texts either by unanimity or by qualified majority voting,<sup>48</sup> and the European Parliament is increasingly involved via the co-decision procedure.<sup>49</sup> Council voting by qualified majority implies that Member States in the minority are nevertheless obliged to implement the legislative texts adopted by the majority. This has, at times, given rise to high-level protests. In the case of the working time directive of 1993,<sup>50</sup> British Prime Minister John Major claimed that this issue should have been dealt with under the Maastricht Treaty's Social Protocol, thus excluding the UK from

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SIMON HIX, *THE POLITICAL SYSTEM OF THE EUROPEAN UNION* (1999); NEILL NUGENT, *THE GOVERNMENT AND POLITICS OF THE EUROPEAN UNION* (1999).

45. This does not imply that the influence of the European Parliament and the European Commission can be completely neglected in the decision-making process at this level. The European Parliament, for instance, must give its assent before an enlargement can take place. Commission opinions on both enlargement and Treaty reform have often helped to set the tone for European Council debates.

46. For the expression that the Member States are the "Masters of the Treaties," see *Entscheidungen des Bundesverfassungsgerichts [BVerfGE]* (German federal constitutional court), Oct. 12, 1993, 1 C.M.L.R. 57 (1994), at para. 55.

47. Reference is made here to the EC — as the framework functioning according to the Community method — and not to the EU, which also includes more intergovernmental pillars where the Member States did maintain greater direct control. For a recent collection of critical comments by heads of state and government regarding the EC's evolution, see AGENCE EUROPE, July 1, 1998, at 4.

48. Qualified majority voting is defined in CONSOLIDATED EC TREATY, *supra* note 2, art. 205 (ex art. 148). Where the Council is required to act by a qualified majority, the votes of the Member States are weighted. *See id.* For their adoption under qualified majority, acts of the Council require at least 62 votes out of a total of 87. *See id.*

49. The co-decision procedure is defined in CONSOLIDATED EC TREATY, *supra* note 2, art. 251 (ex art. 189b). It is a legislative procedure that requires that Commission proposals must be approved by both the European Parliament and the Council. *See id.* If either of these two institutions fails to approve the proposed act, it is not adopted. *See id.*

50. *See* Council Directive 93/104/EC, 1993 O.J. (L 307) 18.

any implementation obligation.<sup>51</sup> However, as the European Court of Justice ruled that the working time directive had been correctly adopted by qualified majority voting under then Article 118a EC, it entered into force as planned, even in the UK.<sup>52</sup>

The application of EC policies forms another level of change. Its impact should not be underestimated. In 1999, the Commission on its own enacted 842 regulations, fifty-five directives and 516 decisions in application of the Treaties or of the EU's secondary legislation.<sup>53</sup> For example, the Commission has effectively used its regulatory powers in competition policy by adapting existing treaties to meet current needs. The expanded application of antitrust policy by the Commission in such sectors as multimedia or sports, while not requiring any change in Treaty law or secondary legislation, has caused major friction with some of the large Member States. In 1998, for instance, the Commission banned a merger between German multimedia giants Kirch and Bertelsmann<sup>54</sup> and brought an antitrust case against ticket sales at the World Cup in France,<sup>55</sup> causing great irritation to German Chancellor Helmut Kohl and French President Jacques Chirac. Similarly, the Commission's measures against the export of UK beef in the BSE crisis or of Belgian food products in the dioxin crisis were attacked by both governments as excessive and unfair.<sup>56</sup> Nevertheless, they had to comply.<sup>57</sup>

The judicial interpretation of existing primary and secondary law, including the settlement of conflicts on both procedural and substantive matters, constitutes yet another level of change. The European Court of Justice makes final decisions at this level.<sup>58</sup> The Court's ruling in the working time directive case constitutes a good example of supranational decision-making. While the UK protested vigorously that the Court's interpretation of laws "sometimes seem[s] to go beyond what the participating governments intended in framing" them, the Major government had to live with the Court's interpretation.<sup>59</sup> Through its rul-

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51. See John Major, Statement on the Working Time Directive, Nov. 12, 1996 (on file with author). See also Margaret Gray, *A Recalcitrant Partner: the UK Reaction to the Working Time Directive*, 17 Y.B. EUR. L. 323 (1997).

52. See Case 84/94, United Kingdom v. Council, 1996 E.C.R. I-5793; GEN. REP. EU 1996 at para. 1126 (1997).

53. See GEN. REP. EU 1999 at 417 (2000).

54. See COMP. REP. 1998 at para. 155 (1999).

55. See GEN. REP. EU 1999 at para. 192 (2000).

56. On the Commission measures in the BSE crisis, see GEN. REP. EU 1996 at para. 501. On the Commission measures in the Belgian dioxin crisis, see GEN. REP. EU 1999 at para. 577 (2000).

57. The role of Comitology — the Committees of Member State representatives designed to supervise the Commission's implementing acts — will be examined in section III.E of this article.

58. The European Court of Justice "shall ensure that in the interpretation and application of this Treaty the law is observed" (CONSOLIDATED EC TREATY, *supra* note 2, art. 220, ex art. 164). The Court consists of 15 judges and is assisted by 8 advocates-general (CONSOLIDATED EC TREATY, *supra* note 2, art. 221-222, ex art. 165-166). They are appointed by common accord of the governments of the Member States for a renewable term of 6 years (CONSOLIDATED EC TREATY, *supra* note 2, art. 223, ex art. 167). Since 1988, the Court of First Instance hears and determines in first instance, subject to a right of appeal to the Court of Justice, certain classes of action (CONSOLIDATED EC TREATY, *supra* note 2, art. 225, ex art. 168a).

59. A PARTNERSHIP OF NATIONS: THE BRITISH APPROACH TO THE EUROPEAN UNION INTER-GOVERNMENTAL CONFERENCE 16 (1996).

ings, the Court has gradually defined the boundaries of Community and Member State powers. During the early 1960s, the Court promulgated such fundamental principles as the direct effect and primacy of Community law.<sup>60</sup> This was certainly not what the governments of the Member States had envisioned. During the famous *Van Gend & Loos* case of 1963, the Dutch, Belgian and German governments all submitted statements to the Court arguing against the direct effect of EEC Treaty provisions.<sup>61</sup> Similarly, during the *Costa v. ENEL* pleadings, the Italian government argued unsuccessfully against the primacy of EEC law over national law.<sup>62</sup>

That supranational decision-making processes can bring about institutional and societal change in the EU, even if some governments object, implies that the Member States have lost direct control over their creation.<sup>63</sup> It also explains why certain governments have been less than eager to continue with the European integration process through the Community method since it implies giving up direct control and veto powers. Their attempt to redirect the EU in the intergovernmental direction will be examined in Part III.

### III.

#### THE EU'S INSTITUTIONAL FRAMEWORK: BETWEEN THE COMMUNITY METHOD AND AD HOC REFORM

##### A. *Between an Expansive and a Restrictive Definition of EU Powers*

In its Preamble, the EEC Treaty announced that its signatories intended to "lay the foundations of an ever closer union among the peoples of Europe."<sup>64</sup> EEC Treaty Article 235<sup>65</sup> was designed by the Community's founders as the legal mechanism that would allow the integration process to gradually adapt to new societal needs without Treaty revision.<sup>66</sup> It allowed the Council to take "the appropriate measures (by unanimity) . . . if action by the Community should prove necessary to attain . . . one of the objectives of the Community [while the] Treaty has not provided the necessary powers."<sup>67</sup> Between 1958 and 1972 it was used infrequently and under rather restrictive constructions.<sup>68</sup> It was not until the October 1972 Paris Summit that the heads of state and government

60. For a more detailed treatment of the principles of direct effect and primacy see sections III.J & III.K of this article.

61. See Case 26/62, *Van Gend & Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1.

62. See Case 6/64, *Costa v. ENEL*, 1964 E.C.R. 585.

63. That the Court has ruled against the opinion of the Member States on such fundamental principles as the direct effect and primacy of EEC law contradicts Alan S. Milward's claim that the Member States always retained firm control over their creation. See MILWARD, *THE EUROPEAN RESCUE OF THE NATION STATE*, *supra* note 39, at 12.

64. CONSOLIDATED EC TREATY, *supra* note 2, preamble.

65. Currently CONSOLIDATED EC TREATY, *supra* note 2, art. 308.

66. See Joseph Van Tichelen, *Souvenirs de la Négotiation du Traité de Rome*, 34 *STUDIA DIPLOMATICA* 342 (1981); Pierre Pescatore, *Les Travaux du Groupe Juridique dans la Négotiation des Traités de Rome*, 34 *STUDIA DIPLOMATICA* 172 (1981).

67. CONSOLIDATED EC TREATY, *supra* note 2, art. 308 (ex art. 235).

68. See Guigliano Marengo, *Les Conditions d'Application de l'Art. 235 du Traité CEE* 12 *REVUE DU MARCHÉ COMMUN* 147 (1970).

decided to start making full and expansive use of Article 235 for the development of regional, social, science, environmental and energy policies as well as economic and monetary integration.<sup>69</sup> In the succeeding years, it served as a basis for action in such areas as consumer and environmental protection, before these subjects were explicitly listed in the Treaty as Community competences.<sup>70</sup>

Similarly, the European Court of Justice developed an implied powers doctrine to expand Community competence in the external relations field. The doctrine took the form of a parallelism between internal and external Community competences. It strongly affected the Member States' powers to act on their own in the international field.<sup>71</sup> The two main principles governing the Community's implied external powers can be summarized as follows:

- whenever Community law has conferred upon the Community institutions internal powers for the purpose of attaining a specific objective, the Community is authorized to enter into the international commitments necessary for the attainment of that objective (this is the so-called Opinion 1/76 doctrine);<sup>72</sup>

- where Community rules have been promulgated, the member states cannot outside the framework of the Community institutions assume obligations which might affect those rules or alter their scope (this is the so-called ERTA doctrine).<sup>73</sup>

While the Member States regularly reaffirmed that they were "[r]esolved to continue the process of creating an ever closer union,"<sup>74</sup> during the 1990s the emphasis shifted towards the protection of Member State powers. Through the subsidiarity principle in the Treaty of Maastricht, the Member States underlined the need for respect of their national (and regional) identities.<sup>75</sup> Federal Mem-

69. See BULL. EUR. COMMUNITY 24 (1972). See also WEILER, THE CONSTITUTION, *supra* note 4, at 53; Mark A. Pollack, *Creeping Competence: The Expanding Agenda of the European Community*, 14 J. PUB. POL'Y 95 (1994); John A. Usher, *The Gradual Widening of European Community Policy on the Basis of Art. 100 and 235 of the EEC Treaty*, in STRUCTURE AND DIMENSIONS OF EUROPEAN COMMUNITY POLICY 30 (Jürgen Schwarze & Henry G. Schermers eds., 1988).

70. The need to rely on EC Treaty Article 235 decreased following the explicit inclusion of new fields of EC competence in the SEA and the Treaty of Maastricht.

71. For the case-law of the 1970s, see Jean Groux, *Le Parallélisme des Compétences Internes et Externes de la Communauté Economique Européenne* 14 CAHIERS DE DROIT EUROPEEN 3 (1978); Pierre Pescatore, *External Relations in the Case-Law of the Court of Justice of the European Communities*, 16 COMMON MKT. L. REV. 615 (1979). For the evolution of the case-law since the 1970s, see David O'Keeffe, *Community and Member State Competence in External Relations Agreements of the EU*, 4 EUR. FOREIGN AFF. REV. 7 (1999); Takis Tridimas & Piet Eeckhout, *The External Competence of the Community in the Case-Law of the Court of Justice: Principle versus Pragmatism* 14 Y.B. EUR. L. 143 (1994).

72. See Opinion 1/76, 1977 E.C.R. 741.

73. See Case 22/70, *Commission v. Council (ERTA)*, 1971 E.C.R. 263. Since the beginning of the 1990s, the Court has significantly restricted the implied powers in ERTA terms by making clear that the Member States maintain a competence where the internal EC provisions determine only minimum standards as is often the case with harmonization directives. See Opinion 2/91, 1993 E.C.R. I-1061.

74. TEU, *supra* note 2, preamble.

75. On the subsidiarity principle, see George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331; Koen Lenaerts & Patrick van Ypersele, *Le Principe de Subsidiarité et son Contexte: Etude de l'Art. 3b du Traité CE*, CAHIERS DE DROIT EUROPEEN 3 (1994); David Millar, John Peterson & Andrew Scott, *Subsidiarity: A "Europe of the Regions" v. the British Constitution*, 32 J. COMMON MKT. L. REV. 47

ber States such as Germany and Belgium favored the subsidiarity principle because their regional entities refused to see their sometimes newly regionalized competences escape to the European level.<sup>76</sup> The UK's Conservative government also pushed for the adoption of a subsidiarity principle, for very different reasons. In line with its successful resistance to the explicitly "federal" aspirations of the draft Treaty on European Union, the UK saw subsidiarity as a means to limit the EU's scope of action, particularly in the field of legislative harmonization of social, consumer and environmental protection. For the governments of Prime Ministers Margaret Thatcher and John Major, the EU's legislative approximation proposals indicated the federalists' desire to create a "European Superstate" that would drive up the cost of doing business, thus decreasing the UK's competitiveness.<sup>77</sup>

As clarified by the Edinburgh European Council of December 1992, the subsidiarity principle—incorporated in Consolidated EC Treaty Article (formerly EC Treaty Article 3b)—covers three distinct legal concepts with strong historical antecedents in the treaties and the case law of the Court of Justice.<sup>78</sup> First, the principle of attribution of powers means that the EU can only act where given the power to do so, implying that national powers are the rule and EU powers the exception. Second, the principle of subsidiarity in the strict legal sense stipulates that, in areas that do not fall within its exclusive competences, the EU shall take action only if and in so far as the objectives of the proposed action can by reason of scale or effect not be sufficiently achieved by the Member States. Third, the principle of proportionality means that action by the EU shall not go beyond what is necessary to achieve the objectives of the Treaty.<sup>79</sup> Commission President Jacques Santer interpreted the introduction of the subsidiarity principle as a signal that his institution needed to stop the activism that had characterized the term in office of his predecessor Jacques Delors.<sup>80</sup> At the

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(1994); John Peterson, *Subsidiarity: A Definition to Suit Any Vision?*, 47 PARLIAMENTARY AFF. 116 (1994).

76. See Juliane Kokott, *Federal States in Federal Europe: German Länder and Problems of European Integration*, in NATIONAL CONSTITUTIONS IN THE ERA OF INTEGRATION 175 (Antero Jyränki ed., 1999).

77. See United Kingdom, *Growth, Competitiveness and Employment in the European Community*, in COMMISSION OF THE EUROPEAN COMMUNITIES, GROWTH, COMPETITIVENESS, EMPLOYMENT: THE CHALLENGES AND WAYS INTO THE 21ST CENTURY, PART C 271 (1993).

78. See Edinburgh European Council, Presidency Conclusions, Dec. 11-12, 1992, in 12 BULL. EUR. COMMUNITIES at para. I.4 & I.15 (1992).

79. The Amsterdam Treaty Protocol on the application of the principles of subsidiarity and proportionality includes broad guidelines that further clarify the use of both principles. See CHRISTIAN CALLIÈS, SUBSIDIARITÄT — UND SOLIDARITÄTSPRINZIP IN DER EUROPÄISCHEN UNION: VORGABEN FÜR DIE ANWENDUNG VON ART. 5 (EX-ART. 3B) EGV NACH DEM VERTRAG VON AMSTERDAM (1999); Grainne de Burca, *Reappraising Subsidiarity's Significance after Amsterdam*, Jean Monnet Chair Working Paper Series, Harvard Law School (1999/07) <<http://www.law.harvard.edu/Programs/JeanMonnet/papers/99/990701.html>>. Compliance with the subsidiarity principle may be subject to scrutiny by the Court of Justice. But this is after-the-event scrutiny. See Grainne de Burca, *The Principle of Subsidiarity and the Court of Justice as an Institutional Actor*, 36 J. COMMON MKT. STUD. 217 (1998); A. G. Toth, *Is Subsidiarity Justiciable?*, 19 EUR. L. REV. 268 (1994).

80. See John Peterson, *The Sonter Era: the European Commission in Normative, Historical and Theoretical Perspective*, 6 J. EUR. PUB. POL'Y 46 (1999).

informal meeting of heads of state and government at Pörschach in October 1998, Santer—whose Commission worked under the slogan “legislate less to act better”—proudly presented the result of his strict application of the subsidiarity principle: the number of Commission proposals had dropped from 787 in 1990 to 491 in 1998; the number of consultations with both Member States and interested parties before launching new initiatives had drastically increased; and in 1998 alone the Commission withdrew 70 unnecessary legislative proposals.<sup>81</sup>

In preparation for the Amsterdam Treaty negotiations, the German Bundesrat and the major political parties in Denmark tried to go much further by limiting the evolutive nature of the integration project.<sup>82</sup> They pushed a proposal for a better demarcation between EU and national competences through the inclusion of a limitative list of EU powers in the Treaty.<sup>83</sup> The idea was quickly abandoned. For most Member States, a detailed list of EU powers seemed contrary to the changing, ongoing nature of European integration. Not surprisingly, those proposing a limitative list of EU powers also attempted to repeal Article 235 EC. The issue was not pursued.<sup>84</sup> Already in the preparatory phase of the IGC, the Reflection Group had stated it was “not in favor of incorporating a catalogue of the Union’s powers in the Treaty and would prefer to maintain the present system, which establishes the legal basis for the Union’s actions and policies in each individual case.”<sup>85</sup> At the same time, the Reflection Group that had been asked to draft the annotated agenda for the Amsterdam IGC showed itself “in favor of maintaining Article 235 as the instrument for dealing with the changing nature of interpretation of the Union’s objectives.”<sup>86</sup>

One year after the conclusion of the Amsterdam Treaty, under the heavy influence of the German electoral climate of September 1998, Chancellor Helmut Kohl insisted on putting the competence and subsidiarity debate back on the agenda.<sup>87</sup> In their joint letter for the Cardiff European Council in June 1998, Kohl and French President Jacques Chirac emphasized that their objective had “never been . . . to build a central European State” and urged their colleagues “to clarify the limits of the competences of the [EU].”<sup>88</sup> With Kohl and his Austrian colleague Victor Klima arguing that “[t]he restitution by Brussels of certain powers in the area of national or regional responsibilities should not be a taboo subject,”<sup>89</sup> some Member States appeared to be retreating from their commitment to the “ever closer union.” A few months later, on January 1, 1999, the exchange rates of the currencies participating in the final phase of Economic and

81. See Commission of the European Communities, Note for the Press: President Santer’s Brief for the Informal Meeting of Heads of State and Government at Pörschach (Oct. 24-25, 1998) (on file with author).

82. See European Parliament Intergovernmental Conference Task Force, Briefings on the 1996 Intergovernmental Conference, Volume III, 335-362 (1996).

83. See *id.*

84. See *id.*

85. Reflection Group, *supra* note 12, at para. 125.

86. *Id.*

87. See Devuyst, *The Community-Method*, *supra* note 7, at 111.

88. AGENCE EUROPE, June 9, 1998, at 5.

89. AGENCE EUROPE, July 1, 1998, at 4.



Monetary Union (EMU) were irrevocably linked, marking a fundamental new step in the European integration process.<sup>90</sup> While accepting a major transfer of sovereignty in the traditionally sensitive monetary field, the Member States simultaneously indicated that they were determined to remain the Masters of the integration process.

### B. Between Coherence and Flexibility

EU membership involves rights, but also entails obligations. Maintaining a certain equilibrium between the Member States' rights and obligations — in the sense that they should respect the Community's coherence — has often been regarded as essential to keeping the integration project sustainable.<sup>91</sup> From the start, one of the Community's characteristics, was that it incorporated a degree of positive integration going beyond the free trade alternative offered by the UK.<sup>92</sup> The Spaak report of 1956, which formed the starting point for the negotiations leading to the Rome Treaties, underscored this point, notably on France's demand.<sup>93</sup> While the report emphasized the free movement of the factors of production as a way to revitalize Europe's economy, it also contained an important chapter on the correction of market distortions and the harmonization of the laws of the Member States.<sup>94</sup> This last element was seen as essential to prevent the Common Market from being undermined from within. The Spaak report even touched upon the correction of distortions due to divergent tax and social security systems, and the harmonization of labor laws, all topics which remain on the agenda today.<sup>95</sup>

During the subsequent Treaty of Rome negotiations, France aimed at making a successful harmonization of social regulations a prerequisite to the final stage of the common market.<sup>96</sup> In the final version of the Treaty, France's idea was watered down significantly.<sup>97</sup> The Treaty of Rome, while containing a concrete liberalization plan for the creation of the customs union, only provided for the possibility of harmonization of social and fiscal legislation, and this by a unanimous vote of the Council.<sup>98</sup> Still, the Treaty went much further in the

90. See GEN. REP. EU 1999 at para. 30.

91. See, e.g., Commission of the European Communities, Opinion to the Intergovernmental Conference 1996: Reinforcing Political Union and Preparing for Enlargement, at 21-22 (1996).

92. See Ugo La Malfa, *The Case for European Integration: Economic Considerations*, in EUROPEAN INTEGRATION 64 (C. Grove Haines ed., 1957).

93. See Comité Intergouvernemental Créé par la Conférence de Messine, Rapport des Chefs de Délégation aux Ministres des Affaires Etrangères 60 (1956). On the drafting of this report, see SPAAK, *supra* note 34, at 84; DUMOULIN, SPAAK *supra* note 34, at 510; Michel Dumoulin, *Les Travaux du Comité Spaak (juillet 1955-avril 1956)*, in THE RELAUNCHING, *supra*, note 39, at 195.

94. See Comité Intergouvernemental, Rapport des Chefs de Délégation aux Ministres des Affaires Etrangères, *supra* note 93, at 60.

95. See *id.* at 64.

96. On the limited success of French harmonization demands, see in particular MILWARD, THE EUROPEAN RESCUE OF THE NATION-STATE, *supra* note 39, at 211-217.

97. See *id.*

98. Several authors have pointed out that the imbalance between the EU's successful drive for liberalization ("negative integration") and the slow and difficult road towards harmonization ("positive integration") is therefore a direct consequence of the Treaty of Rome's original set up. See FRITZ SCHARPF, GOVERNING IN EUROPE: EFFECTIVE AND DEMOCRATIC? 43 (1999); Mark A. Pollack, *Ne-*

direction of positive integration than any other European agreement of the immediate post-World War II era. As such, it provided the basis for a remarkable integration *acquis* in all fields of economic and social life.<sup>99</sup> To underline their intention of maintaining some balance between the common market freedoms and positive integration, the founders decided to add Article 101 to the EEC Treaty.<sup>100</sup> It provides for the adoption, by qualified majority voting, of Community directives eliminating distortions in the common market caused by disparate national regulations.<sup>101</sup>

To date, the Conservative Thatcher-Major governments of the United Kingdom have posed the most significant challenge to the maintenance of the difficult equilibrium between rights and obligations principle in the EU.<sup>102</sup> Historically, the UK has always been reluctant to develop the EU beyond the stage of a free trade area.<sup>103</sup> That was one of the reasons why the UK, in the 1950s, decided not to join the Common Market of the Six, but rather to form a much looser alternative: the European Free Trade Agreement ("EFTA").<sup>104</sup> During the Maastricht negotiations, the Conservative government insisted that the EU would refrain from developing a single and comprehensive macroeconomic, monetary and social policy.<sup>105</sup> Although the UK ultimately failed to prevent its partners from going ahead, it managed to escape the constraints of the EU's social dimension through the Social Protocol.<sup>106</sup> Furthermore, Prime Minister Major obtained a Protocol on European Monetary Union ("EMU") stating that the UK should not be obliged or committed to participate

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*oliberalism and Regulated Capitalism in the Treaty of Amsterdam*, at 5 (University of Wisconsin Working Paper on European Studies No. 2, 1998).

99. Since the 1950s, the emphasis on the need for positive integration in the EU framework has only grown. It is interesting in this regard to compare the formulation of the original EEC Treaty Article 2 with EC Treaty Article 2 that emerged from the Amsterdam negotiations.

100. See Van Tichelen, *supra* note 66, at 340. Currently CONSOLIDATED EC TREATY, *supra* note 2, art. 96.

101. See CONSOLIDATED EC TREATY, *supra* note 2, art. 96 (ex EC TREATY art. 101): "Where the Commission finds that a difference between the provisions laid down by law, regulation or administrative action in Member States is distorting the conditions of competition in the common market and that the resultant distortion needs to be eliminated, it shall consult the Member States concerned. If Such consultation does not result in an agreement eliminating the distortion in question, the Council shall, on a proposal from the Commission, acting by qualified majority, issue the necessary directives. The Commission and the Council may take any other appropriate measures provided for in this Treaty." The article has never been put into practice.

102. For a good insight into the European perspective of the Thatcher and Major governments, see MARGARET THATCHER, *THE DOWNING STREET YEARS* 536, 727 (1993); JOHN MAJOR, *THE AUTOBIOGRAPHY* 264 (1999).

103. For an historical overview of the UK's attitude towards European integration, see STEPHEN GEORGE, *AN AWKWARD PARTNER: BRITAIN IN THE EUROPEAN COMMUNITY* (1998). For the UK's alternative approach during the 1950s, see MIRIAM CAMPS, *BRITAIN AND THE EUROPEAN COMMUNITY* (1964).

104. See EMILE BENOIT, *EUROPE AT SIXES AND SEVENS: THE COMMON MARKET, THE FREE TRADE ASSOCIATION AND THE UNITED STATES* (1961); MIRIAM CAMPS, *supra* note 103.

105. For the UK's attitude during the Maastricht negotiations, see ANTHONY FORSTER, *BRITAIN AND THE MAASTRICHT NEGOTIATIONS* (1999); Stephen George, *The British Government and the Maastricht Agreements*, in 2 *THE STATE OF THE EUROPEAN COMMUNITY: THE MAASTRICHT DEBATES AND BEYOND*, at 177 (Alan W. Cafruny & Glenda G. Rosenthal eds., 1993).

106. See Protocol (No. 14) on Social Policy to the TEU, Feb. 7, 1992.

in the final stage of the Euro.<sup>107</sup> In preparation for the Amsterdam negotiations, Major seemed determined to continue with the opt-out strategy.<sup>108</sup> The Labor Party's election victory in May 1997, just one month before the end of the Amsterdam negotiations, enabled the Member States to integrate the Social Protocol into the Treaty's mainstream. This brought an end to what the Commission had called an example of "a 'pick-and-choose Europe' . . . which flies in the face of the common European project and the links and bonds which it engenders."<sup>109</sup> At the same time, incoming Prime Minister Tony Blair reversed Major's plea for "easy flexibility," foreseeing the danger that other Member States might use it to leave the UK behind.<sup>110</sup>

The Treaty of Amsterdam's provisions on closer cooperation reflect Blair's concerns. Closer cooperation may affect neither the competences, rights, obligations and interests of the non-participants, nor the *acquis communautaire*. As an ultimate safeguard, any Member State has the possibility of blocking the creation of a closer cooperation framework.<sup>111</sup> According to the initial Franco-German vision of October 17, 1996, decisions to establish frameworks of enhanced cooperation would have been made only by those Member States specifically concerned.<sup>112</sup> No Member State would have been able to veto such a decision. This was not only rejected by the UK, but also by Spain, Portugal, Denmark, Sweden and Ireland.<sup>113</sup> In its final version, the Amsterdam Treaty stipulates that the Council can, in principle, grant authorization for closer cooperation by qualified majority.<sup>114</sup> However, any Member State may block the vote by invoking "important and stated reasons of national policy,"<sup>115</sup> thus maintaining maximum national control. In its opinion for the IGC 2000, the Commission proposed "putting an end to the right of a Member State to request a unanimous decision . . . . In the larger Union such a veto would present too

107. See Protocol (No. 11) on Certain Provisions Relating to the United Kingdom of Great Britain and Northern Ireland to the TEU, Feb. 7, 1992.

108. See John Major, Address at the *Universiteit Leiden* William and Mary Lecture (Sept. 7, 1994).

109. Commission, Opinion to the Intergovernmental Conference 1996, *supra* note 91, at 21-22.

110. See EUROPEAN REPORT, May 8, 1997, at 1-5.

111. On the Treaty of Amsterdam's closer cooperation provisions, see FILIP TUYTSCHAEVER, *DIFFERENTIATION IN EUROPEAN UNION LAW* (1999); COPING WITH FLEXIBILITY AND LEGITIMACY AFTER AMSTERDAM (Monica den Boer, Alain Guggenbuhl & Sophie Vanhoonacker eds., 1998); Claus-Dieter Ehlermann, *Retrospective: Differentiation, Flexibility, Closer Co-operation: The New Provisions of the Amsterdam Treaty*, 4 EUR. L. J. 246 (1998); Giorgio Gaja, *How Flexible is Flexibility Under the Amsterdam Treaty?*, 35 COMMON MKT. L. REV. 855 (1998); Helmut Kortenber, *Closer Cooperation in the Treaty of Amsterdam*, 35 COMMON MKT. L. REV. 833 (1998); Eric Philippart & Geoffrey Edwards, *The Provisions on Closer Co-operation in the Treaty of Amsterdam*, 37 J. COMMON MKT. STUD. 87 (1999); Jo Shaw, *The Treaty of Amsterdam: Challenges of Flexibility and Legitimacy*, 4 EUR. L. J. 63 (1998).

112. See Youri Devuyt, *The Treaty of Amsterdam: An Introductory Analysis*, 10 ECSA REV. 12 (1997).

113. See *id.* at 13.

114. See CONSOLIDATED TEU, *supra* note 2, art. 40; CONSOLIDATED EC TREATY, *supra* note 2, art. 11.

115. CONSOLIDATED TEU, *supra* note 2, art. 40; CONSOLIDATED EC TREATY, *supra* note 2, art. 11.

great an obstacle to the — essential — implementation of the mechanism of closer cooperation.”<sup>116</sup>

So far, the closer cooperation provision has been used only once, to enable the integration of the Schengen *acquis* in the EU framework without the participation of the UK and Ireland.<sup>117</sup> As the Wise Men’s report by Jean-Luc Dehaene, Richard von Weizsäcker and David Simon notes, the Amsterdam Treaty’s closer cooperation clauses “are so complex and subject to such conditions and criteria that they are unworkable.”<sup>118</sup> Thus, the issue has been put back on the political agenda. In the words of the Wise Men’s report:

In a larger and more diverse Union, flexibility in the institutional framework is even more important than at present. Enlargement will increase diversity. This does not imply that Member States should be allowed to opt out of any policy they choose: the European Union would not survive if Member States were allowed to pick and choose among obligations of the Union. But it does imply that, in a more heterogeneous aggregate of Member States, some will wish to go further or faster than others . . . . This seems both legitimate and indispensable.<sup>119</sup>

### C. *Between Solidarity and the Promotion of Narrow Self-Interest*

From the start, Schuman insisted that Europe had to be “built by practical actions whose first result will be to create a *de facto* solidarity.”<sup>120</sup> In legal terms, solidarity has traditionally been associated with the general principle according to which Member States and Community institutions “are bound by a duty of mutual loyalty and cooperation.”<sup>121</sup> This principle has been derived from what used to be EEC Treaty Article 5.<sup>122</sup> *Stricto sensu*, this Article contains three basic obligations: the Member States must take all necessary measures to ensure fulfillment of the obligations arising out of the Treaty; they must facilitate the achievement of the Community’s tasks; and they must abstain from any measure which could jeopardize the attainment of the objectives of the Treaty.<sup>123</sup> The European Court of Justice, however, has come to interpret these obligations as the expression of a more general principle imposing on Member States and Community institutions mutual duties of genuine cooperation and

116. Commission, Adapting the Institutions to Make a Success of Enlargement, *supra* note 16, at 8.

117. See Protocol Integrating the Schengen Acquis into the Framework of the European Union, annexed to the TREATY ON EUROPEAN UNION and to the TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Oct. 2, 1997.

118. Dehaene et al., *supra* note 25, at 7. The complexity of the Treaty of Amsterdam’s closer cooperation provisions can be explained by the fact that they form a compromise between entirely different viewpoints on flexibility. See Alexander C-G. Stubb, *A Categorization of Differentiated Integration*, 34 J. COMMON MKT. STUD. 283 (1996).

119. Dehaene et al., *supra* note 25, at 7.

120. Schuman, *supra* note 41, at 76.

121. Giorgio Gaja, *Identifying the Status of General Principles in European Community Law*, in 2 SCRITTI IN ONORE DI GIUSEPPE FEDERICO MANCHINI: DIRITTO DELL’UNIONE EUROPEA 450 (1998).

122. Currently CONSOLIDATED EC TREATY, *supra* note 2, art. 10.

123. See *id.*

assistance.<sup>124</sup> Furthermore, since the entry into force of the Treaty of Maastricht, the EU has the explicit "task . . . to organize, in a manner demonstrating consistency and *solidarity*, relations between the Member States and between their peoples."<sup>125</sup>

Community solidarity is closely linked to the idea of reciprocity. When referring to Article 5, the European Court of Justice has on several occasions spoken about "the rule imposing *reciprocal* obligations of bona fide cooperation."<sup>126</sup> By providing assistance or making concessions to a partner that finds itself in difficulty, the other Member States and the EU institutions can expect a similar treatment whenever they appeal to the solidarity principle. While the Court has explicitly recognized that the Member States accepted the Community legal system "on a basis of reciprocity,"<sup>127</sup> it has strongly rejected Member State attempts to use the reciprocity or counter-measure argument to excuse their non-observance of Community obligations, emphasizing that the Community is a legal order where Member States "shall not take the law into their own hands."<sup>128</sup>

Solidarity is not merely a legal concept, but also something real in the EU's political practice. First, solidarity plays an important role during the EU decision-making process. Even where Council decisions can be adopted by qualified majority voting, the drafting process of Community directives and regulations is characterized by a constant attempt to avoid the marginalization of particular Member States. In the words of seasoned European Parliament official Dietmar Nickel, even in those areas where the Council is able to vote by majority, political proposals

certainly cannot be promoted against a group of Member States, or even one Member State if it were seen as a concerted attempt to overturn the vital interests of this Member State. The solidarity between the Member States in the Council would never admit such a result. Nobody, and certainly not the Commission would seriously try. Everybody would know that this would overstretch the rules of the game.<sup>129</sup>

Instead, the EU's legislation is often accompanied by assurances in the form of transition periods and, less frequently, specific derogations for Member States

124. For an excellent overview of the case-law, see Vlad Constantinesco, *L'art. 5 CEE, de la bonne foi à la loyauté communautaire*, in *DU DROIT INTERNATIONAL AU DROIT DE L'INTEGRATION: LIBER AMICORUM PIERRE PESCATORE* 97 (Francesco Capotorti et al. eds., 1987); Claire-Françoise Durand, *Les Principes*, in 1 *COMMENTAIRE MEGRET: LE DROIT DE LA CEE: PREAMBULE, PRINCIPES, LIBRE CIRCULATION DES ARCHANDISES* 25 (2d ed. 1992); John Temple Lang, *Community Constitutional Law: Article 5 EEC Treaty*, 27 *COMMON MKT. L. REV.* 645 (1990); John Temple Lang, *The Core of Constitutional Law of the Community - Article 5 EC*, in *CURRENT AND FUTURE PERSPECTIVES ON EC COMPETITION LAW* 41 (Lawrence W. Gormley ed., 1997).

125. CONSOLIDATED TEU, *supra* note 2, art. 1 (ex TEU art. A).

126. Case 358/85, *France v. European Parliament*, 1988 E.C.R. 4821.

127. 1964 E.C.R. at 594.

128. Cases 90 and 91/63, *Commission v. Belgium and Luxembourg*, 1964 E.C.R. 625, 631. For more details see Geert Wils, *The Concept of Reciprocity in EEC Law: An Exploration into these Realms*, 28 *COMMON MKT. L. REV.* 245 (1991).

129. Dietmar Nickel, *The Amsterdam Treaty: A Shift in the Balance Between the Institutions?*, Jean Monnet Chair Working Paper Series, Harvard Law School (1998) available at <<http://www.law.harvard.edu/Programs/JeanMonnet/papers/98/980701.html>>.

facing particular problems.<sup>130</sup> It is not surprising therefore that, upon leaving his post as Minister of Foreign Affairs of Luxembourg in 1999, Jacques Poos explicitly thanked his colleagues for their "unfailing support to the smallest of the Member States" and for their "spirit of solidarity which characterizes the General Affairs Council."<sup>131</sup>

Second, EU solidarity takes a financial form. International trade agreements concluded by the EU often go hand in hand with internal compensatory adjustment in the form of financial aid or intervention promises in such fields as agriculture and textiles. The purpose is to provide assistance to Member States that might suffer specific negative consequences from the application of the international agreements in question.<sup>132</sup> The best known example of financial solidarity in the EU is its extensive economic and social cohesion effort.<sup>133</sup> Since the SEA of 1986, the EC aims explicitly "at reducing disparities between the levels of development of the various regions and the backwardness of the least favored regions or islands, including rural areas."<sup>134</sup> This objective is pursued through the transfer of financial means from the rich to the needy regions via the Community's Structural Funds (European Agricultural Guidance and Guarantee Fund, European Social Fund, European Regional Development Fund) and the Cohesion Fund.<sup>135</sup> While less than 5 percent of the budget in 1975, cohesion spending increased to 35 percent in 1999.<sup>136</sup> Although an expression of solidarity, the cohesion effort is also very much the result of reciprocity during the Maastricht negotiations. The Cohesion Fund was established upon the insistence of Spain and the other poorer Member States.<sup>137</sup> They agreed to go along with the macroeconomic convergence criteria in the EMU framework only on condition they would receive additional cohesion assistance. Reciprocity went both ways, since the actual use of the Cohesion Fund was made conditional on the respect of the Maastricht Treaty's deficit reduction objectives.<sup>138</sup> While significant disparities remain, the EU's cohesion efforts are having some effect: GDP per capita in the four Cohesion countries (Greece, Portugal, Spain and

130. For examples of derogations during the legislative process, see DE SCHOUTHEETE, *supra* note 7, at 103.

131. AGENCE EUROPE, June 23, 1999, at 8.

132. For examples related to the EU's conclusion of the Uruguay Round, see Youri Devuyst, *The European Community and the Conclusion of the Uruguay Round*, in 3 THE STATE OF THE EUROPEAN UNION 456 (Carolyn Rhodes & Sonia Mazey eds., 1995).

133. On the EU's cohesion policy see COHESION POLICY AND EUROPEAN INTEGRATION: BUILDING MULTILEVEL GOVERNANCE (Liesbet Hooghe ed., 1996); Liesbet Hooghe, *EU Cohesion Policy and Competing Models of European Capitalism*, 36 J. COMMON MKT. STUD. 457 (1998); James Mitchell & Paul McAleavey, *Promoting Solidarity and Cohesion*, in DEVELOPMENTS IN THE EUROPEAN UNION 174 (Laura Cram, Desmond Dinan & Neill Nugent eds., 1999).

134. CONSOLIDATED EC TREATY, *supra* note 2, art. 158 EC (ex EC Treaty art. 130a).

135. See the references in note 133.

136. See David Allen, *Cohesion and Structural Adjustment*, in POLICY-MAKING IN THE EUROPEAN UNION 209 (Helen Wallace & William Wallace eds., 1996).

137. See KAPTEYN & VERLOREN VAN THEMATAAT, *supra* note 2, at 1024; Mark A. Pollack, *Regional Actors in an Intergovernmental Play: The Making and Implementation of EC Structural Policy*, in 3 THE STATE OF THE EUROPEAN UNION 363 (Carolyn Rhodes & Sonia Mazey eds., 1995).

138. See Gary Marks, *Structural Policy and Multilevel Governance*, in 2 THE STATE OF THE EUROPEAN COMMUNITY 391 (Alan W. Cafruny & Glenda G. Rosenthal eds., 1993).

Ireland) is gradually converging towards the EU average, rising from 65 percent of the EU average in 1986 to 76.5 percent in 1996.<sup>139</sup>

With the Agenda 2000 debate regarding the EU's financial perspectives for the period between 2000 and 2006, the solidarity theme became a hot issue on the European political agenda in 1998 and 1999.<sup>140</sup> Germany, backed by the Netherlands, Sweden and Austria, called for a mechanism to correct budgetary imbalances. Their purpose was to obtain a cut in their net contribution to the EU budget.<sup>141</sup> At the start of the debate, German Chancellor Gerhard Schröder declared that it had become necessary to change traditional German policy. "In the past," he said, "many of the necessary compromises could be achieved because the Germans have paid for them. This policy has come to an end."<sup>142</sup> Schröder and several of his colleagues from the richer countries tackled the debate on the basis of Commission figures calculating for each Member State the balance between budgetary contributions and receipts.<sup>143</sup> The view that budget contributions should be equivalent to the budget returns, the so-called *juste retour* theory, was strongly condemned in the European Parliament. Jutta Haug, Parliament's reporter on the issue, emphasized that the *juste retour* attitude was "contrary to the indivisible nature of the financial and non-financial rights, benefits and obligations deriving from Union membership and from the principle of solidarity between the Member States."<sup>144</sup> As budgetary calculations do not include the benefits that are derived from the internal market or the Euro, Haug noted that the net-contributor concept was methodologically extremely imprecise.<sup>145</sup>

While recognizing that the full benefits of EU membership cannot be measured solely in budgetary terms, the agreement on the EU's financial perspectives reached at the Berlin European Council of March 1999 did lead to a correction of the "politically unacceptable anomalies in burden-sharing," thus allowing for a reduction in the financial contributions of Austria, Germany, the Netherlands and Sweden.<sup>146</sup> The UK abatement was maintained. Perhaps even more significant was the overall reduction in EU funding that resulted from the Berlin European Council.<sup>147</sup> As a result of the Member States' eagerness to cut

139. See Commission of the European Communities, Sixth Periodic Report on the Social and Economic Situation and Development of the Regions of the European Union, SEC(99) 66 final at 7 (1999).

140. See Commission of the European Communities, Agenda 2000: For a Stronger and Wider Union, COM(97) 2000 final (1997).

141. For a critical comment see Laureano Lazaro Araujo, *La Union Europea, Entre la Cohesion y la Desintegracion*, POLITICA EXTERIOR 81 (68-1999).

142. Spiegel-Gespräch mit Gerhard Schröder, "Uns die Last Erleichtern," DER SPIEGEL, Jan. 4, 1999, at 44. Translation by the author.

143. See Commission of the European Communities, Financing the European Union: Commission Report on the Operation of the Own Resources System, COM(98) 560 final (Oct. 7, 1998).

144. Jutta Haug, Report on the Need to Modify and Reform the European Union's Own Resources System, A4-0105/99, at 17 (Mar. 8, 1999).

145. See *id.* at 17.

146. David Galloway, *Agenda 2000 - Packaging the Deal*, 37 J. COMMON MKT. STUD. 9. See also Berlin European Council, Presidency Conclusions, Mar. 24-25, 1999, in BULL. EUR. UNION at para. I.4 (3-1999).

147. On the Berlin's budgetary results, see Brigid Laffan, *The Berlin Summit: Process and Outcome of the Agenda 2000 Budgetary Proposals*, 12 ECSA REV. 6 (1999).

their contributions to the EU budget, the Berlin financial perspectives include a general decrease in the transfer of budgetary means from the Member States to the EU. In 1999, the ceiling for total appropriations for payments for the EU stood at 1.24 percent of the EU's combined GDP.<sup>148</sup> The Berlin financial perspectives aim at reducing this level from 1.13 percent in 2000 to 0.97 percent in 2006. This caused sharp criticism from the European Parliament, which regretted that, at a time when more action was expected from the EU in a host of areas, the financial perspectives made no provision for realistic levels of funding.<sup>149</sup> Parliament particularly noted the significant reduction of budgetary means for the fight against long-term unemployment. It also feared that the lack of funding would prevent the EU from taking urgent action to improve unforeseen catastrophic situations.<sup>150</sup> In view of the Member States' tendency to retreat behind their own budget walls, Parliamentarians seemed to worry that EU solidarity risked ending up as mere rhetoric.<sup>151</sup>

#### D. Between a Functional and a Thematic Division of Powers Among the Institutions

The institutional framework created by the Treaty of Rome was coherently functional.<sup>152</sup> The European Commission, Council of Ministers, European Parliament and European Court of Justice each received powers that applied to all thematic domains under the Community's competence and went well beyond the traditional intergovernmental setup.<sup>153</sup> The Commission obtained the exclusive right to take the legislative initiative, and was to act as the independent guardian of the Treaties and as the body implementing EU policies.<sup>154</sup> The Council was to serve as the main decision-maker, and could, in certain areas after a transition period, exercise that function by qualified majority.<sup>155</sup> Parliament was originally intended as a consultative body but gradually gained co-decision status on most legislative issues.<sup>156</sup> Finally, the Court of Justice had jurisdiction to give binding rulings on the validity and interpretation of Community acts.<sup>157</sup>

148. See Commission of the European Communities, *The Community Budget: The Facts in Figures*, SEC(99) 1100, table 16 (1999).

149. See European Parliament Resolution on the Results of the Extraordinary European Council in Berlin on March 24-25, 1999, 1999 O.J. (C 219) 191, at paras. 4 & 5.

150. See *id.*

151. See *id.*

152. See in particular Pierre Pescatore, *L' Exécutif Communautaire: Justification du Quadripartisme Institué par les Traités de Paris et de Rome*, 4 *CAHIERS DE DROIT EUROPEEN* 387 (1978).

153. See *id.*

154. See CONSOLIDATED EC TREATY, *supra* note 2, arts. 211-219 (ex EC TREATY arts. 155-163).

155. See CONSOLIDATED EC TREATY, *supra* note 2, arts. 202-210 (ex EC TREATY arts. 145-154).

156. See CONSOLIDATED EC TREATY, *supra* note 2, arts. 189-201 (ex EC TREATY arts. 137-144).

157. See CONSOLIDATED EC TREATY, *supra* note 2, arts. 220-245 (ex EC TREATY arts. 164-188).



The most important deviation from the functional scheme is the Maastricht Treaty's pillar structure.<sup>158</sup> While the Maastricht negotiators did incorporate Common Foreign and Security Policy (CFSP) and Cooperation in Justice and Home Affairs (JHA) as new fields of action under the EU umbrella, both areas of activity were kept separate from the Treaty of Rome's decision-making methods, continuing to function on the basis of largely intergovernmental working methods.<sup>159</sup> The search for consensus dominated EU activity in the two new pillars. In addition, the Maastricht Treaty maintained specific preparatory decision-making structures for both CFSP and JHA.<sup>160</sup> In CFSP, this centers around a network of Political Correspondents based in each Ministry of Foreign Affairs and a Political Committee composed of the Political Directors.<sup>161</sup> JHA is also endowed with its own Coordinating Committee of senior national officials from the Justice and Home Affairs Ministries.<sup>162</sup> Both the Political Committee and the JHA Committee have traditionally maintained a most uneasy relationship with the Coreper, the Committee of Permanent Representatives of the Member States to the EU that is charged with the horizontal task of preparing the work of the Council.<sup>163</sup>

The Amsterdam Treaty confirmed the Member States' intention to proceed in the direction of a Council-based structure for the CFSP, separate from the Community's external economic relations.<sup>164</sup> Amsterdam notably turned the Council Secretary General into the High Representative for the CFSP and created a CFSP Early Warning and Planning Unit in the framework of the Council Secretariat.<sup>165</sup> With regard to JHA, however, the Amsterdam Treaty made a step towards a "communitarization." Visas, asylum, immigration and other policies related to the free movement of persons were transferred from the third pillar to the Community pillar.<sup>166</sup> This, however, came with a cost to the institutional purity of the Community pillar. During a five year transitional period, decision-making on visas, asylum, immigration and free movement of persons remains largely intergovernmental. For the first time in the Community pillar's

158. See Weiler, *supra* note 2. For an excellent comparison between the intergovernmental structure of the CFSP pillar and French President Charles de Gaulle's Fouchet proposals, see C. W. A. Timmermans, *The Uneasy Relationship between the Communities and the Second Union Pillar: Back to the 'Plan Fouchet'*, *LEGAL ISSUES OF EUROPEAN INTEGRATION* 61 (1996). On the Fouchet proposals, see ROBERT BLOES, *LE PLAN FOUCHET ET LE PROBLEME DE L'EUROPE POLITIQUE* (1970).

159. See *supra* note 11.

160. See *supra* note 2.

161. The functions of the Political Committee are specified in CONSOLIDATED TEU, *supra* note 2, art. 25 (ex TEU art. J.15).

162. The functions of the Coordinating Committee are specified in CONSOLIDATED TEU, *supra* note 2, art. 36 (ex TEU art. K.8).

163. See PETERSON & BOMBERG, *supra* note 44, at 241.

164. See *L'UNION EUROPEENNE ET LE MONDE APRES AMSTERDAM* (Marianne Dony ed., 1999); Alan Dashwood, *External Relations Provisions of the Amsterdam Treaty*, 35 *COMMON MKT. L. REV.* 1019 (1998); Jörg Monar, *The European Union's Foreign Affairs System After the Treaty of Amsterdam: A 'Strengthened Capacity for External Action'?*, 2 *EUR. FOREIGN AFF. REV.* 423 (1997).

165. See CONSOLIDATED TEU, *supra* note 2, art. 26 (ex TEU art. J.16); Declaration on the Establishment of a Policy Planning and Early Warning Unit, annexed to the Final Act of the Amsterdam Conference.

166. See CONSOLIDATED EC TREATY, *supra* note 2, tit. IV.

history, the right of legislative initiative is shared between Member States and the Commission.<sup>167</sup> The Council decides by unanimity and the role of the European Parliament is limited to consultation.<sup>168</sup> Following this five year period, the Commission will receive the exclusive right of initiative and the Council shall then decide by unanimity on the parts of this new EC Treaty Title which will be dealt with through the co-decision procedure, including qualified majority in the Council.<sup>169</sup> From the entry into force of this new Title, the European Court of Justice was granted a limited jurisdiction.<sup>170</sup> For the first time in the history of the third pillar, the Court also received limited jurisdiction regarding police and judicial cooperation in criminal matters for issues not related to the validity or proportionality of law enforcement in the Member States.<sup>171</sup> Although bringing JHA cooperation closer to Community pillar practices, the Amsterdam Treaty simultaneously helped to sustain particular thematic exceptions that are gradually contaminating the traditional functional working methods of the Community pillar.<sup>172</sup>

Particularly in the Community's external relations field, the Member States seem no longer inclined to accept the logic behind the Community method. While international economic transactions increasingly go beyond trade in goods, the Member States in the Maastricht and Amsterdam negotiations refused to broaden the Community's common commercial policy mechanisms to trade in services, trade-related aspects of investment and intellectual property protection.<sup>173</sup> With regard to EMU's external representation, the Member States

167. See CONSOLIDATED EC TREATY, *supra* note 2, art. 67.

168. See *id.*

169. See *id.*

170. See CONSOLIDATED EC TREATY, *supra* note 2, art. 68.

171. See CONSOLIDATED TEU, *supra* note 2, art. 35.

172. See Monica den Boer, *Justice and Home Affairs Cooperation in the Treaty on European Union: More Complexity Despite Communautarization*, 4 MAASTRICHT J. EUR. & COMP. L. 310 (1997); Jörg Monar, *Justice and Home Affairs in the Treaty of Amsterdam: Reform at the Price of Fragmentation*, 23 EUR. L. REV. 320 (1998); Ercüment Tezcan, *La Coopération dans les Domaines de la Justice et des Affaires Intérieures dans le Cadre de l'Union Européenne et le Traité d'Amsterdam*, 34 CAHIERS DE DROIT EUROPEEN 661 (1998).

173. In Opinion 1/94, 1994 E.C.R. I-5267, the European Court of Justice held that the power to conclude the Uruguay Round's General Agreement on Trade in Services (GATS) and Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) was shared by the EC and its Member States. The Court also made clear that in areas of mixed competence, the EC and its Member States are under a duty of cooperation. This results from the requirement of unity in the international representation of the Community. See Jacques H. J. Bourgeois, *The EC in the WTO and Advisory Opinion 1/94: An Echernach Procession*, 32 COMMON MKT. L. REV. 763 (1995); Meinhard Hilf, *The ECJ's Opinion 1/94 on the WTO - No Surprise, but Wise?*, 6 EUR. J. INT'L. L. 245 (1995); Pierre Pescatore, *Opinion 1/94 on "Conclusion" of the WTO Agreement: Is There an Escape from a Programmed Disaster*, 36 COMMON MKT. L. REV. 387 (1999). During the Maastricht and Amsterdam negotiations, the Member States refused to bring their GATS and TRIPs powers under the EC's common commercial policy. See Youri Devuyst, *The EC's Common Commercial Policy and the Treaty on European Union: An Overview of the Negotiations*, 16 WORLD COMPETITION: L. & ECON. REV. 67 (1992); Marc Maresceau, *The Concept 'Common Commercial Policy' and the Difficult Road to Maastricht*, in THE COMMUNITY'S COMMERCIAL POLICY AND 1992: THE LEGAL DIMENSION 3 (Marc Maresceau ed., 1993); Magali Michaux-Foidart, *Vers une Extension de l'Art. aux Droits de Propriété Intellectuelle?*, in L'UNION EUROPEENNE ET LE MONDE APRES AMSTERDAM, *supra* note 164, at 217; Eleftheria Neframi, *Quelques Réflexions sur la Réforme de la Politique Commerciale par le Traité d'Amsterdam: le Maintien du Statu Quo et l'Unité de la Représentation Internationale de la*

have equally refused to use the Community's common commercial policy model. For EMU matters, the Community is to be represented at both the Council/ministerial and central banking levels. The Commission, which acts as the negotiator in trade policy matters, will be involved only "to the extent required to enable it to perform the role assigned to it in the Treaty."<sup>174</sup>

*E. Between a Supranational Integration Engine and a Commission Under Member State Control*

The drafters of the Treaty of Paris establishing the ECSC emphasized the need for an independent High Authority that would function as the real engine of the integration process.<sup>175</sup> In Jean Monnet's own words:

The independence of the Authority vis-à-vis governments and the sectional interests concerned is the precondition for the emergence of a common point of view which could be taken neither by governments nor by private interests. It is clear that to entrust the Authority to a Committee of governmental delegates or to a Council made up of representatives of governments, employers and workers, would amount to returning to our present methods, those very methods which do not enable us to settle our problems.<sup>176</sup>

From the very start, however, some Member States resisted the idea of granting independent supranational powers to the High Authority. Belgium and the Netherlands were particularly active in this regard, insisting on the creation of a Council of Ministers to exercise political control over the High Authority.<sup>177</sup> They feared that the High Authority would be biased towards France and Germany and would prevent the Belgian and Dutch governments from reacting appropriately to the specific problems in their coal and steel sectors.<sup>178</sup>

After the failure of the supranational European Defence Community ("EDC"),<sup>179</sup> which had been designed along the lines of the supranational ECSC, the negotiators of the Rome Treaties establishing the EEC and Euratom obtained an early consensus not to extend the ECSC High Authority's impressive decision-making powers to the EEC and Euratom Commissions.<sup>180</sup> Instead,

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*Communauté*, *CAHIERS DE DROIT EUROPEEN* 137 (1998); Catherine Smits, *Vers une Extension de la Politique Commerciale Commune au Commerce des Services?*, in *L'UNION EUROPEENNE ET LE MONDE APRES AMSTERDAM*, *supra* note 164, at 193.

174. Vienna European Council, Presidency Conclusions, Dec. 11-12, 1998, in *BULL. EUR. UNION* at para. 14 (12-1998). For a detailed analysis, see Chiara Zilioli & Martin Selmayr, *The External Relations of the Euro Area: Legal Aspects*, 36 *COMMON MKT. L. REV.* 273 (1999).

175. See DIRK SPIERENBURG & RAYMOND POIDEVIN, *THE HISTORY OF THE HIGH AUTHORITY OF THE EUROPEAN COAL AND STEEL COMMUNITY: SUPRANATIONALITY IN OPERATION* (1994).

176. *THE ORIGINS AND DEVELOPMENT OF EUROPEAN INTEGRATION*, *supra* note 41, at 77.

177. See Hanns Jürgen Kusters, *Die Verhandlungen über das institutionelle System zur Gründung der Europäischen Gemeinschaft für Kohle und Stahl*, in *THE BEGINNINGS OF THE SCHUMAN-PLAN 1950/51*, *supra* note 39, at 73; Albert Kersten, *A Welcome Surprise? The Netherlands and the Schuman Plan Negotiations*, in *id.*, at 285; MILWARD, *THE EUROPEAN RESCUE OF THE NATION STATE*, *supra* note 39, at 65, 94. The best general introduction to the balance between the ECSC institutions remains PAUL REUTER, *LA COMMUNAUTE DU CHARBON ET DE L'ACIER* (1953).

178. See *id.*

179. On the failure of the EDC see, EDWARD FURSDON, *THE EUROPEAN DEFENCE COMMUNITY* (1980); FRANCE DEFEATS EDC (Raymond Aron & Daniel Lerner eds., 1957).

180. Originally, the ECSC High Authority, the EEC Commission and the EAEC Commission coexisted. The Treaty establishing a Single Council and a Single Commission of the European Com-

a more cautious approach was chosen which left decision-making in the hands of Member State representatives in the framework of the Council.<sup>181</sup> The Council's decision-making powers were counterbalanced, however, by the exclusive right of legislative initiative granted to the European Commission.<sup>182</sup> Whenever the Council wanted to deviate from the Commission's proposal it needed unanimity.<sup>183</sup> As Michel Petite indicates, this last element is still essential to the EU's institutional balance.<sup>184</sup> The exclusive right of initiative would be a mere illusion if Commission proposals could be easily amended without its agreement and participation. In practice, the Commission has the habit of formally adopting compromise texts that amend its original proposals. This then allows the Council to vote by qualified majority on the amended proposal.<sup>185</sup>

Some Member States have never been enthusiastic about the Commission's independent right of initiative. During the 1960s, French President Charles de Gaulle resented the way in which Walter Hallstein, the first Commission President, operated autonomously, as if he was the head of an embryonic European government.<sup>186</sup> Upon de Gaulle's insistence, the Luxembourg Compromise of 1966 stated that "[b]efore adopting any particularly important proposal, it is desirable that the Commission should take up the appropriate contacts with the Governments of the Member States."<sup>187</sup>

Of greater impact on the Commission's role was the 1974 transformation of the old-style summit meetings of heads of state and government into formal European Council sessions.<sup>188</sup> Through its institutionalization in the Single European Act and the Maastricht Treaty as the body that "shall provide the Union

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munities, 1965 O.J. 152 at para. 2 [hereinafter Merger Treaty] created one Commission of the European Communities, exercising competences under the three Treaties. On the Commission and its evolution, see AT THE HEART OF THE UNION: STUDIES OF THE EUROPEAN COMMISSION (Neill Nugent ed., 1997); THE EUROPEAN COMMISSION (Geoffrey Edwards & David Spence eds., 1997).

181. See MILWARD, THE EUROPEAN RESCUE OF THE NATION STATE, *supra* note 39, at 210, 216-18.

182. See Pescatore, *supra* note 66, at 168.

183. See *id.*

184. See Michel Petite, *Avis de Temps Calme sur l'Art. 189 A Paragraphe 1: Point d'Equilibre entre le Droit d'Initiative de la Commission et le Pouvoir Décisionnel du Conseil*, 3 REVUE DU MARCHE UNIQUE EUROPEEN 197 (1998).

185. Between 1986 and 1996, the Commission has in only four cases made qualified majority voting impossible by refusing to accept a compromise in Council as its own. According to Michel Petite, *Id.*, the Commission motive for not allowing majority voting was (1) to protect a minoritization of the countries with the heaviest economic interest in a dossier; (2) to avoid the lack of coherence with an already established policy; and (3) to avoid the lack of compatibility with a general Treaty principle.

186. See in particular CHARLES DE GAULLE, MEMOIRES D'ESPOIR: LE RENOUVEAU, 1958-1962 195 (1970).

187. BULL. EUR. COMMUNITIES at 8 (3-1966). See also MIRIAM CAMPS, EUROPEAN UNIFICATION IN THE SIXTIES: FROM THE VETO TO THE CRISIS (1966); HANS VON DER GROEBEN, THE EUROPEAN COMMUNITY: THE FORMATIVE YEARS: THE STRUGGLE TO ESTABLISH THE COMMON MARKET AND THE POLITICAL UNION 1958-66 (1987); John Lambert, *The Constitutional Crisis, 1965-66*, 4 J. COMMON MKT. STUD. 205 (1966).

188. On the European Council, see MARY TROY JOHNSTON, THE EUROPEAN COUNCIL: GATEKEEPER OF THE EUROPEAN COMMUNITY (1994); JAN WERTS, THE EUROPEAN COUNCIL (1992); SIMON BULMER & WOLFGANG WESSELS, THE EUROPEAN COUNCIL: DECISION-MAKING IN EUROPEAN POLITICS (1987).

with the necessary impetus for its development and . . . define the general political guidelines thereof,"<sup>189</sup> the European Council has, in practice, become a parallel engine of European integration, determining in large measure the speed and content of the EU's adaptation process. The regular European Council meetings have, according to several authors, introduced a heavy dose of intergovernmentalism in the EU's political process, leading to a dangerous deviation from the Community method.<sup>190</sup> Between 1995 and 1998, the European Council made no less than 80 requests for Commission proposals and studies. The proliferation of specialized Council compositions (numbering 21 in 1998) also contributed to a significant increase in the number of demands for Commission proposals.<sup>191</sup> As a result, around 20 percent of the Commission's legislative proposals in 1998 were a direct response to specific requests by (European) Council and Parliament.<sup>192</sup> A further 35 percent of the Commission's legislative proposals were the direct result of international agreements. Yet another 25 to 30 percent concerned amendments of existing EU law.<sup>193</sup> And 10 percent of legislative initiatives were required by the Treaty and secondary legislation (such as the fixing of annual agricultural prices). This left only 5 percent for genuine "own initiative" proposals.<sup>194</sup>

In addition, the Commission's key role in the legislative process has been eroded by the co-decision procedure which has turned the European Parliament into an equal legislative partner of the Council.<sup>195</sup> During the conciliation phase in the co-decision procedure, the Commission has lost the possibility of preventing a qualified majority vote in Council even if a compromise text deviates substantially from the Commission's original proposal.<sup>196</sup> As Parliament's *Activity Report* on co-decision states, "Parliament is now in direct contact with the Council and no longer needs the mediation and filtering role the Commission played in the past to communicate with the Council."<sup>197</sup> While the Commission

189. CONSOLIDATED TEU, *supra* note 2, art. 4 (ex TEU art. D).

190. See Pescatore, *supra* note 152, at 400; RICHARD H. LAUWAARS, CONSTITUTIONELE EROSIE: REDE UITGESPROKEN TER GELEGENHEID VAN ZIJN AFSCHIED ALS HOOGLERAAR EUROPEES RECHT AAN DE UNIVERSITEIT VAN AMSTERDAM (1994). Not everyone agrees with the assessment of the Community method purists. Jacques Delors, for instance, believes that the European Council "is well integrated in the Community architecture" and plays a useful role (AGENCE EUROPE, Sept. 16, 1999, at 5). Timmermans, *supra* note 158, at 61, points out that "without a European Council it would have even been more difficult for the Community system in the daily struggle against vested national interests preferring to be voiced through the intergovernmental bargaining process and intrinsically allergic to the supranational method." Timmermans also recalls that the creation of the European Council was a concession to the French government in order to obtain its agreement to direct elections for the European Parliament.

191. See Commission of the European Communities, Better Lawmaking 1998: A Shared Responsibility: Commission Report to the European Council, COM(98) 715 final at 6.

192. See *id.* at 5.

193. See *id.* at 4.

194. See *id.* at 4-5.

195. See CONSOLIDATED EC TREATY, *supra* note 2, art. 251 (ex EC TREATY art. 189b).

196. This constitutes a formal Treaty exception to the rule that the Council can only change Commission proposals by unanimity.

197. European Parliament Delegations to the Conciliation Committee, Activity Report 1 Nov. 1993 - 30 Apr. 1999: From entry into force of the Treaty of Maastricht to entry into force of the Treaty of Amsterdam, at 12.

is present at all conciliation meetings and is often requested by the other institutions to help reconcile conflicting positions, one privileged observer of conciliation practice has noted that "the Commission sometimes feels in a clear position of inferiority, whereas the other two institutions enjoy an increased sense of solidarity which in turn serves to improve the chances of an agreement being found."<sup>198</sup>

While the Commission's role as the engine of the integration project has been somewhat overshadowed by the European Council, it is in the area of the Commission's implementing powers that the tendency towards Member State tutelage has become particularly pronounced. The Treaty of Rome granted the Commission a number of important implementing powers, including those in the field of competition policy.<sup>199</sup> The Treaty also specified that the Commission would exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter.<sup>200</sup> The Member States were eager, however, to keep an eye on the Commission's executive powers. In 1962, when delegating implementing powers to the Commission in the agricultural field, the Council devised the so-called comitology process: it established committees composed of national officials that were to be consulted by the Commission before it could take the necessary implementing decisions.<sup>201</sup> Since then, the number of such committees has grown considerably.

In 1986, while negotiating the SEA, the Member States made a point of strengthening their position in the implementation of Community law. They explicitly stipulated that the Council, when delegating implementing powers to the Commission, may impose certain requirements or may even reserve the right to exercise implementing powers itself.<sup>202</sup> It seemed that the Member States wanted to ensure that the Internal Market project, which involved the adoption of ca. 280 directives, would not lead to an exponential expansion of the Commission's executive powers with important economic and financial consequences.<sup>203</sup> In fact, the first legal measure adopted under the SEA's provisions was the Council's Comitology Decision of 1987, which structured the exercise of implementing powers conferred on the Commission.<sup>204</sup> In practice, three groups of Member State committees (advisory, management and regulatory)

198. Michael Shackleton, *The Politics of Codecision* 15 (June 1999) (unpublished paper presented at the ECSA biennial conference (on file with author)).

199. See CONSOLIDATED EC TREATY, *supra* note 2, arts. 85, 86, 88 (ex EC TREATY arts. 89, 90, 93).

200. See CONSOLIDATED EC TREATY, *supra* note 2, art. 211 (ex EC TREATY art. 155).

201. See European Parliament Task Force on the Intergovernmental Conference, Briefing on Comitology, at 3 (Mar. 17, 1997).

202. See CONSOLIDATED EC TREATY, *supra* note 2, art. 202 EC (ex EC TREATY art. 145).

203. See JEAN DE RUYT, L'ACTE UNIQUE EUROPÉEN 140 (1989); Claude Blumann, *Le Pouvoir Exécutif de la Commission à la lumière de l'Acte Unique Européen*, in 1 REVUE TRIMESTRIELLE DE DROIT EUROPÉEN 23 (1988).

204. See Council Decision 87/373 of July 13, 1987: Laying Down the Procedures for the Exercise of Implementing Powers Conferred on the Commission, 1987 O.J. (L 197) 33.

oversee the Commission's executive powers.<sup>205</sup> In several cases, these committees give the final word to the Member States.

The comitology procedure has been the subject of severe criticism. The Committee of Independent Experts that examined mismanagement in the Commission was particularly clear in this respect:

[T]he pro-integration perspective of the Commission tends to create tensions with the inter-governmental perspective of the Council. These have led the Council to strengthen its own position . . . through the creation of an array of committees allowing . . . the representatives of the Member States an opportunity to exercise a high level of monitoring and supervision over the management of programmes by the Commission . . . . [I]n practice, they tend to be a mechanism through which national interests are represented in the implementation of Community policies, sometimes to the extent that they become a forum for 'dividing up the spoils' of Community expenditure and permit the Member States, at times, to use their influence in programme management committees to ensure that contractors from each Member State obtain a 'fair share' of the overall funding available.<sup>206</sup>

#### F. Between Decision-making Efficiency and the Unanimity Trap

To the Community's founders, the intergovernmental practices of the Council of Europe had demonstrated that inaction and passivity were the logical corollary of unanimous decision-making. In Paul-Henri Spaak's words, "unanimity formulae are the formulae of impotence."<sup>207</sup> For Spaak, the success of European integration depended largely on the willingness of the participants to leave ancient notions of sovereignty behind and accept the principle of majority voting. While the Treaty of Rome stipulated that from January 1966 the transitional unanimity rule would give way to qualified majority voting in a limited number of policy fields such as agriculture, this proved unacceptable to French President Charles de Gaulle. The reasons for de Gaulle's opposition were formulated as follows by his Foreign Minister, Maurice Couve de Murville:

205. On the Comitology process, see SHAPING EUROPEAN LAW AND POLICY: THE ROLE OF COMMITTEES AND COMITOLGY IN THE POLITICAL PROCESS (Robin H. Pedler & Günter F. Schaefer eds., 1996); Francesca E. Bignami, *The Democratic Deficit in European Community Rulemaking: A Call for Notice and Comment in Comitology*, 40 HARVARD INT'L L. J. 451 (1999); Kieran Bradley, *Comitology and the Law: Through a Glass, Darkly* 29 COMMON MKT. L. REV. 693 (1992); Michelle Egan & Dieter Wolf, *Regulation and Comitology: The EC Committee System in Regulatory Perspective*, 4 COLUM. J. EUR. L. 499 (1998); Christian Joerges & Jürgen Neyer, *From Intergovernmental Bargaining to Deliberative Political Processes: the Constitutionalisation of Comitology*, 3 EUR. L. J. 273 (1998); Koen Lenaerts, *Regulating the Regulatory Process: "Delegation of Powers" in the European Community* 18 EUR. L. REV. 23 (1993); Ellen Vos, *The Rise of Committees*, 3 EUR. L. J. 210 (1998).

206. Committee of Independent Experts, Second Report on Reform of the Commission: Analysis of Current Practice and Proposals for Tackling Mismanagement, Irregularities and Fraud, at para. 7.15.3, 7.15.12 (Sept. 10, 1999). The reform of the Comitology Decision in 1999 did nothing to remove the Member States' direct influence over the Commission's implementing powers. For the currently applicable Comitology rules, see Council Decision 1999/468/EC of June 28, 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, 1999 O.J. (L 184) 23.

207. Paul-Henri Spaak, *Document 52: Il n'y a plus un moment à perdre si nous voulons nous sauver (11 décembre 1951)*, in LA PENSÉE EUROPÉENNE ET ATLANTIQUE DE PAUL-HENRI SPAAK, *supra* note 34, at 283. The author's translation.

When creating a European Community, abandoning sovereignty comes with it and nobody has ever contested this . . . . It must be done at one condition, however, and without this nothing goes . . . . Unanimity is indispensable. Here is a crucial question of principle: how could anyone imagine that one would, without our agreement and *a fortiori* against our will, dispose of our sovereignty? It is also a question of good sense: who could imagine that a policy measure would be made acceptable and applicable in a country that has refused it because it believes it goes against its principles or against its political or economic interests.<sup>208</sup>

In an attempt to prevent qualified majority voting from entering into force, France in June 1965 brought the Community to a halt for seven months by practicing an "empty chair" policy.<sup>209</sup> During this period, no French representatives attended Community meetings. The crisis was resolved by the Luxembourg compromise of January 1966: Where, in the case of decisions which could be taken by majority vote, a Member State would invoke its vital interests, the Council would endeavor to reach solutions that could be adopted by all Members.<sup>210</sup> France, however, added that "where very important interests are at stake, the discussions *must* be continued until unanimous agreement is reached." While noting that there was a divergence of views on what should be done in the event of failure to reach unanimous agreement, the Council refrained from applying majority voting for two decades.<sup>211</sup>

It took the EU's Member States until the SEA of 1986 before they actually started eliminating unanimous decision-making in the Council.<sup>212</sup> The creation of an Internal Market by the end of 1992 - characterized by the free movement of goods, services, capital and persons - was the main goal of the SEA.<sup>213</sup> The Member States, including the UK's Conservative Prime Minister Margaret Thatcher, agreed that the new Market necessitated a more effective decision-making system.<sup>214</sup> As a result, the SEA allowed qualified majority voting in the Council for the adoption of Internal Market directives.<sup>215</sup> Even after the Maastricht Treaty had expanded the scope of qualified majority voting, several important fields of Community action, such as fiscal harmonization, remained under the unanimity rule.

In preparation for the Amsterdam Treaty, commentators and negotiators spoke of overcoming the joint decision trap<sup>216</sup> which unanimity engenders as

208. MAURICE COUVE DE MURVILLE, *UNE POLITIQUE ETRANGERE 1958-1969* 297 (1971). The author's translation.

209. See *supra* note 187.

210. See BULL. EUR. COMMUNITIES at 9 (3-1966).

211. See *id.*

212. See MARTIN WESTLAKE, *THE COUNCIL OF THE EUROPEAN UNION* (1999); FIONA HAYES-RENSAW & HELEN WALLACE, *THE COUNCIL OF MINISTERS* (1996).

213. See DE RUYT, *supra* note 203, at 149; SEA, *supra* note 2, art. 13.

214. It is interesting to note that French President François Mitterrand and German Chancellor Helmut Kohl had already in 1984 agreed on the necessity to return to the qualified majority voting procedures foreseen in the Treaty of Rome as a way to circumvent in part Margaret Thatcher's negativism towards further European integration. See JEAN LACOUTURE, 2 MITTERRAND: UNE HISTOIRE DE FRANCAIS: LES VERTIGES DU SOMMET 115 (1998).

215. See SEA, *supra* note 2, arts. 14, 16, 18.

216. See Fritz Scharpf, *The Joint-Decision Trap: Lessons from German Federalism and European Integration*, 66 PUB. ADMIN. 239 (1988). On the political effects of qualified majority voting,



the key to maintaining efficiency in the context of enlargement.<sup>217</sup> In its opinion before the Amsterdam negotiations, the Commission argued that “the difficulty of arriving at unanimous agreement rises exponentially as the number of Members increases.” As “adherence to unanimity would often result in stalemate,” the Commission proposed “qualified majority voting [as] the general rule.”<sup>218</sup> Prime Minister Major added another reason for moving to majority voting. In an attempt to put pressure on the Commission and the other Member States during the BSE crisis, he announced to the House of Commons on May 21, 1996 that the UK could not continue to cooperate “normally” in the Community legislative process as long as there was no agreement on a framework allowing a progressive lifting of the embargo on exports of British beef and veal.<sup>219</sup> The UK therefore reserved its position on virtually all questions requiring unanimity in the Council, leading to the temporary blocking of around 60 acts at various Council meetings.<sup>220</sup> Agreement on a framework was finally reached at the Florence European Council of June 21-22, 1996.<sup>221</sup> In spite of this, the Amsterdam negotiators did not succeed in agreeing to a significant extension of qualified majority voting.<sup>222</sup>

The IGC that was launched by the Helsinki European Council in December 1999 again has “the possible extension of qualified majority voting in the Council” on its agenda.<sup>223</sup> The Commission’s position has remained largely the same: “qualified majority voting should be the rule and unanimity the exception . . . in the knowledge that unanimity in an enlarged Europe will make decision-making extremely difficult and, in the case of some policies, will mean the end of any serious prospect of deepening European integration.”<sup>224</sup> In February 2000, Austrian FPÖ leader Jörg Haider illustrated the Commission’s point by threatening to block EU decision-making if Austria would be isolated: “If no one sits around the table with us, there will be no decisions taken in Europe. Europe needs our vote,” he said.<sup>225</sup>

While there is a certain amount of pressure to move towards a quasi-generalization of qualified majority voting in the Council of Ministers, few Member States have signaled a willingness to tackle the unanimity rule for such Constitutional questions as Treaty reform or enlargement. In the Reflection Group preparing the Amsterdam negotiations, “a few members [nevertheless] expressed concern about retaining unanimity on primary legislation in a Community en-

see Madeleine Hösli, *Coalitions and Power: Effects of Qualified Majority Voting on the Council of the European Union*, 34 J. COMMON MKT. STUD. 255 (1996).

217. See Reflection Group, *supra* note 12, at para. 100; Youri Devuyt, *The European Union’s Future: A Preview of the Intergovernmental Conference of 1996*, 38 RES PUBLICA 21 (1996).

218. Commission, Opinion to the Intergovernmental Conference 1996, *supra* note 91, at 21.

219. See 1996 GEN. REP. at para. 1031 (1997).

220. See *id.*

221. See 1996 GEN. REP. at para. 1031 (1997); Florence European Council, Presidency Conclusions, June 21-22, 1996, in BULL. EUR. UNION at para. I.8 (6-1996).

222. See Devuyt, *supra* note 6, at 626.

223. Helsinki European Council, *supra* note 5.

224. Commission, Europe and the Challenge of Enlargement, *supra* note 16, at 22.

225. Nigel Glass and Martin Fletcher, *Haider Threatens to Paralyse EU*, THE TIMES, Feb. 5, 2000; Denis Staunton, *Haider Threatens Anti-EU Revolt*, THE OBSERVER, Feb. 6, 2000.

larged to 30 members since such a procedure would render decision-making extremely difficult, and could in the future leave the Union in a state of paralysis.”<sup>226</sup> Commission President Prodi raised the issue for the first time at the opening ceremony of the IGC 2000.<sup>227</sup> In Prodi’s words the question was, “How do we stop the Treaty becoming fossilized after our Conference if we keep the requirement that amendments can be made only with the agreement of 28 governments, 28 national parliaments and referendums?”<sup>228</sup> He added that this was an issue on which the debate was “just beginning.”<sup>229</sup> More generally, hardly any proposals have been made in favor of changing the consensus practice that governs decision-making in the European Council. The European Council not only plays a major role in Treaty reform<sup>230</sup> and enlargement,<sup>231</sup> it also discusses strategic foreign policy questions,<sup>232</sup> the broad guidelines of economic policies<sup>233</sup> and the EU’s employment situation.<sup>234</sup> In sum, all major political debates in the EU currently take place in an essentially intergovernmental body that is likely to continue functioning by consensus.

### G. *Between Non-hegemonic Decision-making and Grand Power Politics*

The decision-making rules of the original Treaty of Rome were characterized by an attempt to avoid dominance or hegemony by one or a few Member States. In order to construct a suitable climate for Franco-German reconciliation and to ensure the participation of the small Benelux countries, the founders set up a delicate decision-making system aimed at preventing a return to the power politics of the inter-war period. These rules were intended to protect the smaller countries from dominance by the larger members.<sup>235</sup> In the words of former Vice-President of the European Commission Christopher Tugendhat:

the beauty of the Schuman and subsequent proposals was that they held out the prospect of guarantees of equality . . . . In the Community, a system of rules, obligations and procedures of a detailed kind was laid down and has since been further developed to guarantee that the rights of all members will be respected and that reconciliation between the larger ones will not be at the expense of the smaller.<sup>236</sup>

In practice, the Community system contains two important guarantees against hegemonic decision-making. First, within the Council, the smaller Member States have traditionally received a relatively larger share of the votes than the big Member States. For example, Belgium has 5 Council votes for a population of 10 million inhabitants. Germany, with a population of 80 million,

226. Reflection Group, *supra* note 12, at para. 99.

227. See Romano Prodi, Speech at the Opening of the IGC, (Feb. 14, 2000) (on file with author).

228. *Id.*

229. *Id.*

230. See CONSOLIDATED TEU, *supra* note 2, art. 48 (ex TEU art. N).

231. See CONSOLIDATED TEU, *supra* note 2, art. 49 (ex TEU art. O).

232. See CONSOLIDATED TEU, *supra* note 2, art. 13 (ex TEU art. J. 3).

233. See CONSOLIDATED EC TREATY, *supra* note 2, art. 99 (ex EC TREATY art. 103).

234. See CONSOLIDATED EC TREATY, *supra* note 2, art. 128.

235. See MONNET, *supra* note 38, at 353-354.

236. CHRISTOPHER TUGENDHAT, MAKING SENSE OF EUROPE 36 (1986).

got only 10 votes.<sup>237</sup> In this sense, qualified majority voting provides a much more congenial environment for the small members than the harsh power politics typical of purely intergovernmental deal-making. Second, the Commission, as an independent body, was granted the exclusive right of legislative initiative.<sup>238</sup> It has the duty to exercise this function in the interest of the Community as a whole.<sup>239</sup> The Commission's monopoly on legislative initiative was notably intended to protect the small Member States from the undue pressure and deal-making which are typical of intergovernmental structures in which the right of initiative belongs to individual members.

This does not mean that Europe's traditional "great powers" no longer try to play a special role in EU decision-making. Each European Council meeting, for instance, is preceded by a Franco-German summit which is often crucial to the European Council's agenda-setting. The creation of the European Council was itself the direct result of a joint initiative by French President Valéry Giscard d'Estaing and German Chancellor Helmut Schmidt.<sup>240</sup> The "privileged friendship" linking Paris and Bonn, [now Berlin]<sup>241</sup> has, indeed, been the real engine behind much of the European integration project. The ECSC, for instance, started as a successful attempt by France to build a new relationship with Germany. While de Gaulle and Adenauer deepened and institutionalized the Franco-German relationship in the form of the Elysée Treaty of 1963, many of the subsequent European initiatives and deals were prepared or brokered between Giscard and Schmidt or Mitterrand and Kohl.<sup>242</sup>

In the foreign policy field, the Contact Group on Bosnia has perhaps been the most visible recent example of the large Member States' attempt to return to the old *directoire* practice where a few large countries take decisions having wide-ranging implications, also for the other partners.<sup>243</sup> In preparation for the

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237. See CONSOLIDATED EC TREATY, *supra* note 2, art. 205 (ex EC TREATY art. 148).

238. See CONSOLIDATED EC TREATY, *supra* note 2, arts. 250-52 (ex EC TREATY arts. 189a-c).

239. See CONSOLIDATED EC TREATY, *supra* note 2, art. 213 (ex EC TREATY art. 157).

240. See *supra* note 188.

241. The term "privileged friendship" is from François Mitterrand. See LACOUTURE, *supra* note 214, at 96, 118 (1998).

242. See ROY F. WILLIS, FRANCE, GERMANY AND THE NEW EUROPE (1968); FRANCE-GERMANY 1983-1993 (Patrick McCarthy ed., 1993); THE FRANCO-GERMAN RELATIONSHIP IN THE EUROPEAN UNION (Douglas Webber ed., 1999).

243. On the "directoire" concept in EU politics, see Pierre Pescatore, *L'Exécutif Communautaire*, *supra* note 152, at 396-400; Philippe de Schoutheete, *The European Community and its Sub-Systems*, in THE DYNAMICS OF EUROPEAN INTEGRATION 113-115 (William Wallace ed., 1990). Attempts to form foreign policy *directoires* are nothing new in European history. The most famous example in the post World War II era is French President Charles de Gaulle's memorandum of Sept. 17, 1958 in which he proposed "that an organization comprising the United States, Great Britain and France should be created and . . . would make joint decisions in all political questions affecting global security" as a tripartite directorate steering the Atlantic Alliance. The idea was rejected by President Dwight D. Eisenhower who argued that "[w]e cannot afford to adopt any system which would give to our other Allies, or other Free World countries, the impression that basic decisions affecting their own vital interests are being made without their participation." For the text of de Gaulle's memorandum and Eisenhower's reply see ALFRED GROSSER, THE WESTERN ALLIANCE: EURO-AMERICAN RELATIONS SINCE 1945 186-188 (1980). For the historical details, see MICHAEL M. HARRISON, THE RELUCTANT ALLY: FRANCE AND ATLANTIC SECURITY 88 (1981); MARC TRACHTENBERG, A CONSTRUCTED PEACE: THE MAKING OF THE EUROPEAN SETTLEMENT 1945-1963

Amsterdam negotiations, Belgian Foreign Minister Erik Derycke had been especially critical of the *directoire* formula whereby the smaller countries were asked to contribute significant human and financial resources to the EU's peace efforts in Bosnia, but were kept ill-informed on the foreign and security policies being pursued.<sup>244</sup> Derycke returned to the issue in 1999 while commenting on the Rambouillet peace conference on Kosovo: "if Belgium is excluded from the deliberations . . . there is no reason why it should feel obliged to offer solidarity or to participate" in operations to guarantee the peace.<sup>245</sup> According to the Belgian Foreign Minister, accepting "directorates of large powers" would for the smaller Member States "mean a return to . . . the inevitable role of being cannon fodder."<sup>246</sup>

The division of power between large and small Member States is again playing a major role, this time during the Treaty reform process launched by the Helsinki European Council in December 1999. It is an issue that was not resolved during the Amsterdam negotiations. France in particular argued that, following the accession of several smaller Member States, the original distribution of Council votes had caused an exaggerated over-representation of the smaller countries.<sup>247</sup> France also proposed to reduce the number of Commissioners to about ten, each holding broad portfolios, this in order to "keep these people from creating mischief."<sup>248</sup> The Dutch Presidency's proposal for an Amsterdam Protocol tried to link the two French ideas.<sup>249</sup> Under this proposal, a re-weighting of the votes in the Council favoring the larger Member States would be counter-balanced by a new Commission composition in which the large Member States would lose their second Commissioner.<sup>250</sup> Ultimately, however, lengthy discussions among heads of state and government failed to produce an agreement. A proposal for the re-weighting of the current number of votes allocated to each Member States provoked heated discussion, even between traditional allies. Belgium, for instance, resented the fact that their Dutch Benelux partner had classified itself as a middle large country with more votes than its somewhat smaller southern neighbor.<sup>251</sup> An alternative proposal for the introduction of an entirely new double qualified majority scheme, requiring both a qualified majority of Member States and a qualified majority of the EU population, was rejected by French President Chirac as it would break the relative power parity between France and Germany (since Germany's population is larger than France's).<sup>252</sup>

242 (1999); Maurice Vaisse, *Aux Origines du Mémorandum de Septembre 1958*, in 58 *RELATIONS INTERNATIONALES* 253 (1989). For de Gaulle's own interpretation, see DE GAULLE, *supra* note 186, at 214.

244. See Erik Derycke, Address before the Symposium Austria: A New Partner in the European Union (Apr. 3, 1995) (on file with author).

245. AGENCE EUROPE, Feb. 10, 1999, at 4.

246. *Id.*

247. See Devuyst, *The Treaty of Amsterdam: An Introductory Analysis*, *supra* note 112, at 11.

248. French official cited in Lionel Barber, *A Punctured Image*, *FIN. TIMES*, June 15, 1998 at 17.

249. See *id.*

250. See *id.*

251. See *id.*

252. See *id.*, at 12.

Since the heads of state and government did not feel any immediate need to make this change — enlargement was not yet imminent — the decision was simply postponed.<sup>253</sup>

In its opinion for the IGC 2000, the European Commission recommended adopting a more straightforward system of double simple majority, whereby a decision would stand adopted if it had the support of a simple majority of Member States and a simple majority of the EU's total population.<sup>254</sup> In addition to having the advantage of simplicity and transparency, the system would not have to be modified with each new accession.

#### *H. Between Parliamentary Control and Parliamentary Governance*

The European Communities were set up as a largely technocratic project. To the founders, the democratic nature of the Community seemed self-evident, since it was based on democratic Member States.<sup>255</sup> Nevertheless, the Treaty of Rome provided for a Parliamentary Assembly.<sup>256</sup> It changed its name to the European Parliament in 1962.<sup>257</sup> The Assembly was composed of delegates from national parliaments.<sup>258</sup> All members thus had a double mandate until the first direct elections of the European Parliament that took place in 1979.<sup>259</sup> The Assembly was mainly granted the right to control the Commission.<sup>260</sup> In the legislative process, it had a consultative role.<sup>261</sup> Since the early days, Parliament's powers have increased significantly.<sup>262</sup> Having started under a system of Parliamentary control, the EU has gradually moved in the direction of Parliamentary governance, with Parliament playing a major role in Community decision-making.

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253. See *id.*; Protocol on the institutions with the prospect of enlargement of the European Union, annexed to the Treaty on European Union and the Treaties establishing the European Community, the European Coal and Steel Community and the European Atomic Energy Community, Oct. 2, 1997.

254. See Commission, *Adapting the Institutions to Make a Success of Enlargement*, *supra* note 16, at 32.

255. See Kevin Featherstone, *Jean Monnet and the "Democratic Deficit" in the European Union*, 32 J. COMMON MKT. STUD. 149 (1994).

256. See EEC TREATY, *supra* note 2, art. 137.

257. See Resolution of Mar. 30, 1962, 1962 O.J. 1045.

258. See EEC TREATY, *supra* note 2, art. 138.

259. The direct elections are based on the Act concerning the Election of the Representatives of the Assembly by Direct Universal Suffrage Annexed to the Council Decision of Sept. 20, 1976, 1976 O.J. (L 278) 1.

260. See *id.* arts. 143-144.

261. Throughout the EEC Treaty, specific articles determined when the Assembly needed to be consulted before an article could be adopted by the Council. See *id. passim*.

262. On the European Parliament and the evolution of its political powers, see RICHARD CORBETT, *THE EUROPEAN PARLIAMENT'S ROLE IN CLOSER EU INTEGRATION* (1998); FRANCIS JACOBS, RICHARD CORBETT & MICHAEL SHACKLETON, *THE EUROPEAN PARLIAMENT* (1995); Karlheinz Neunreither, *The European Parliament*, in *DEVELOPMENTS IN THE EUROPEAN UNION*, *supra* note 133, at 62. On the relationship between Parliament and Commission, see MARTIN WESTLAKE, *THE COMMISSION AND THE PARLIAMENT: PARTNERS AND RIVALS IN THE EUROPEAN POLICY MAKING PROCESS* (1994).

From the start, the Assembly had the right to vote a motion of censure against the Commission.<sup>263</sup> Once such a motion has been adopted, the Commission is obliged to resign as a body.<sup>264</sup> A double majority is required for a motion of censure to succeed: a majority of the component Members of Parliament and two-thirds of the votes cast.<sup>265</sup> Six censure motions have been tabled since Parliament was directly elected in 1979, but so far none has been adopted.<sup>266</sup> The motion of censure weapon has been reinforced since the Treaty of Maastricht granted Parliament the right to establish temporary Committees of Inquiry to investigate alleged contraventions or mismanagement in the implementation of Community law.<sup>267</sup> The BSE Committee of Inquiry charged with the examination of the Commission's attitude during the BSE crisis, for instance, had a considerable impact on the strengthening of the EU's consumer protection policy both in practice (by forcing the Commission to shift responsibility for public health risks from the Directorate General for Agriculture to the Directorate General for Consumer Affairs) and in Treaty law (via the Treaty of Amsterdam).<sup>268</sup> The visible impact of the Committee of Inquiry on the work of the European

263. See CONSOLIDATED EC TREATY, *supra* note 2, art. 201 (ex EC TREATY art. 144). See also Jean-Louis Clergerie, *L'Improbable Censure de la Commission Européenne*, 111 REVUE DU DROIT PUBLIC ET DE LA SCIENCE POLITIQUE 201 (1995).

264. See *supra* note 263.

265. See *id.*

266. The most significant motion was tabled on Dec. 17, 1998 by Pauline Green, then Chair of the Socialist Group. The same day, Parliament had decided not to grant the Commission the budget discharge for 1996. According to Green, this meant that the Commission was not assured of the Parliament's confidence at a moment when crucial decisions on the EU's future were being prepared in such areas as enlargement, the financial perspectives for 2000-2006 and the related discussion on the reform of the EU's agricultural and cohesion policy. Green proposed a motion of censure - in lieu of a motion of confidence which is not foreseen by the Treaties - as the only way for Parliament to mark its confidence in the Commission. In the mean time, almost daily press stories accusing French Commissioner Edith Cresson of financial mismanagement, fraud and nepotism were quickly undermining the credibility of the entire College. To save itself from a defeat in Parliament, the Commission agreed with the creation of a Committee of independent experts that would examine the charges. While the creation of this Committee enabled Green to withdraw her motion, a "real" motion of censure tabled by French nationalist Hervé Fabre Aubespy nevertheless succeeded in gathering 232 votes in favour, 293 against and 27 abstentions. When on Mar. 15, 1999 the Wise Men surprisingly accused the entire Commission of a lack of responsibility, the College of Commissioners - for the first time in EU history - decided to resign collectively. While the real target of most criticism had been Commissioner Cresson, she had successfully used the "shield of collegiality" to rebuff attempts at sanctioning her individually, but the result was the resignation of the entire College. In Parliament, the Commission's resignation - just before the Parliamentary elections of May 1999 - was celebrated as a victory. Parliament kept up the pressure after the elections, during the individual hearings with the nominees for the new Commission posts. Each new Commissioner was notably asked to confirm that he or she would resign individually upon the President's request. For the background of this episode, see Laura Cram, *The Commission*, in DEVELOPMENTS IN THE EUROPEAN UNION, *supra* note 133, at 44; John Peterson, *The Santer Era: the European Commission in Normative, Historical and Theoretical Perspective*, 6 J. EUR. PUB. POL'Y 46 (1999).

267. See CONSOLIDATED EC TREATY, *supra* note 2, art. 193 (ex EC TREATY art. 138c). See also Michael Shackleton, *The European Parliament's New Committees of Inquiry: Tiger or Paper Tiger?*, 36 J. COMMON MKT. STUD. 115 (1998); Andreas Mauer, (Co-)Governing after Maastricht: The European Parliament's Institutional Performance 1994-1998: Lessons for the Implementation of the Treaty of Amsterdam, POLI 104, EN 01-99, 33.

268. See Reimer Böge, Report on the European Commission's Follow-Up of the Recommendations made by the Committee of Inquiry into BSE, EUR. PARL. DOC. PE 223.656: fin.2 (1997).

Commission was notably the result of Parliament's warning that a motion of censure would be tabled if its recommendations were not carried out. In addition to exercising control on the Commission's activities, the Commission's investiture is, since the Maastricht Treaty, preceded by a Parliamentary vote of approval on the Commission as a whole.<sup>269</sup> Before this vote, each of the candidates for Commissioner is grilled during a Parliamentary hearing.<sup>270</sup>

The budget is another area where Parliament's political power has been visible since the 1970s. The Council has the final say over the compulsory side of the budget, necessarily resulting from the Treaties or from acts adopted in accordance with them.<sup>271</sup> This compulsory budget mainly concerns agricultural expenditure.<sup>272</sup> In 1970, Parliament received the final word over the non-compulsory expenditures which currently cover 55 percent of the budget, including most of the non-agricultural budget lines.<sup>273</sup> In 1975, Parliament was granted the right to reject the budget as a whole.<sup>274</sup> It made use of this power in 1979 and 1984.<sup>275</sup> Since 1988, Parliament, Council and Commission have sought to avoid the annual repetition of budgetary fights by adopting Inter-Institutional Agreements that determine the EU's financial perspectives on a multi-annual basis.<sup>276</sup> Since the 1975 agreement, Parliament has also gained the authority to grant the "discharge" to the Commission in respect of the implementation of the budget. By granting the discharge, Parliament confirms that the budget has been correctly implemented.<sup>277</sup> The discharge procedure has become highly political. While based on an examination of the Commission's accounts and annual report by the Court of Auditors, it has turned into an opportunity for Parliament to criticize the Commission's management policies.<sup>278</sup>

Finally, the expansion of European Parliament's powers has been most spectacular in the legislative field. The first step was taken with the introduction

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269. See CONSOLIDATED EC TREATY, *supra* note 2, art. 214 (ex EC TREATY art. 158). Since the Treaty of Amsterdam, the nomination of the person who the governments intend to appoint as President of the Commission must also be approved by the European Parliament.

270. These individual hearings are not explicitly foreseen in the Treaty.

271. See CONSOLIDATED EC TREATY, *supra* note 2, art. 272 (ex EC TREATY art. 203).

272. On the European Parliament's budgetary powers, see IAIN BEGG & NIGEL GRIMWADE, *PAYING FOR EUROPE* (1998); BRIGID LAFFAN, *THE FINANCES OF THE EUROPEAN UNION* (1997); Brigid Laffan & Michael Shackleton, *The Budget*, in *POLICY-MAKING IN THE EUROPEAN UNION*, *supra* note 136, at 71.

273. See Treaty amending Certain Budgetary Provisions of the Treaties establishing the European Communities and of the Treaty establishing a Single Council and a Single Commission of the European Communities, Apr. 22, 1970, 1971 O.J. (L 2) 1.

274. See Treaty amending Certain Financial Provisions of the Treaties establishing a Single Council and a Single Commission of the European Communities, July 22, 1975, 1977 O.J. (L 359) 1.

275. See Brigid Laffan & Michael Shackleton, *The Budget*, in *POLICY-MAKING IN THE EUROPEAN UNION*, *supra* note 136, at 78.

276. For an analysis of the first of these Agreements, see Michael Shackleton, *Budgetary Policy in Transition*, in *THE STATE OF THE EUROPEAN COMMUNITY: POLICIES, INSTITUTIONS AND DEBATES IN THE TRANSITION YEARS 65* (Leon Hurwitz & Christian Lequesne eds., 1991).

277. See CONSOLIDATED EC TREATY, *supra* note 2, art. 276 (ex EC TREATY art. 206).

278. See *supra* note 272.

of the cooperation procedure in the SEA,<sup>279</sup> followed by the co-decision procedure in the Maastricht Treaty.<sup>280</sup> During the negotiations of the Treaty of Amsterdam, Parliament succeeded in securing a significant extension of its legislative co-decision right.<sup>281</sup> The co-decision procedure leads to the adoption of Community legislation signed jointly by the Presidents of Parliament and the Council, for which the two institutions are equally responsible. Under the co-decision procedure, Parliament delivers its opinion on Commission proposals before the Council adopts a common position. Furthermore, Parliament can propose amendments and ultimately veto the final adoption of legislative texts. In case of a disagreement between Council and Parliament, a Conciliation Committee is set up to bridge the differences of view.<sup>282</sup> Bringing the co-decision procedure into practice required a profound change in the EU's legislative culture. From the 1950s until the Maastricht Treaty's entry into force on November 1, 1993, the Council had been solely responsible for law-making. This changed quickly. Between November 1, 1993 and April 30, 1999, no less than 165 co-decision procedures were completed.<sup>283</sup> Conciliation meetings between Parliament and Council were needed in 66 of these 165 cases, representing 40 percent of the procedures.<sup>284</sup> Parliament soon sent Council the message that it had an interest in negotiating seriously.<sup>285</sup> Of the 913 amendments adopted by Parliament in co-decision (between November 1993 and April 1999), 74 percent were accepted by the Council either unchanged or in compromise form.<sup>286</sup> Another 4 percent were deemed already covered by another part of the common position.<sup>287</sup> Under the cooperation procedure, which also allowed Parliament to introduce amendments, but without Conciliation Committee or veto right, the Council had adopted only 21 percent of Parliament's amendments (between July 1987 and July 1997).<sup>288</sup>

279. See CONSOLIDATED EC TREATY, *supra* note 2, art. 252 (ex EC TREATY art. 189c). See also David Earnshaw & David Judge, *The Life and Times of the European Union's Co-operation Procedure*, 35 J. COMMON MKT. STUD. 543 (1997).

280. See CONSOLIDATED EC TREATY, *supra* note 2, art. 251 (ex EC TREATY art. 189b).

281. See *supra* note 6.

282. See CONSOLIDATED EC TREATY, *supra* note 2, art. 251 (ex EC TREATY art. 189b).

283. For a statistical overview, see European Parliament, Activity Report of the Delegations to the Conciliation Committee, Nov. 1, 1993-Apr. 30, 1999: Codecision procedure under Article 189b of the Treaty of Maastricht presented by Vice Presidents Nicole Fontaine, Renzo Imbeni & Josep Verde i Aldea, PE 230.998 (May 6, 1999). See also Ricardo Gosalbo Bono, *Co-Decision: an Appraisal of Experience of the European Parliament as Co-Legislator*, 14 Y.B. EUR. L. 21 (1994).

284. See European Parliament, Activity Report of the Delegations to the Conciliation Committee, *supra* note 283, at 6.

285. In July 1994, Parliament vetoed the Council's position on voice telephony as the conciliation had not produced agreement. Parliament has since rejected one other Council common position (in 1995, on biotechnology, after agreement in conciliation). It once closed a file without the need to formally reject as the Council abandoned the proposal in light of Parliament's opposition (in 1998, on transferable securities). In addition, Parliament twice adopted an intention to reject, successfully threatening the Council into making the necessary concessions. See European Parliament, Activity Report of the Delegations to the Conciliation Committee, *supra* note 283.

286. See *id.*, at 14. These are second reading amendments.

287. See *id.*

288. See Maurer, *supra* note 267, at 25.



The exceptional position of Parliament in the EU's institutional framework has enabled it to gradually extend its grip on the Commission.<sup>289</sup> In comparison with the position of national parliaments vis-à-vis national governments, the European Parliament is a much more independent and threatening institution. Several reasons might be advanced to explain this. First of all, in most West European parliamentary systems, the parliament's ability to sack the government is counterbalanced by the executive's power to dissolve the assembly.<sup>290</sup> In most Western European countries, parliamentarians know that by voting down a government they might provoke early parliamentary elections, thus putting their own seat in danger. This constitutional balance is absent in the EU, giving Members of the European Parliament the freedom to criticize and censure the Commission without any fear of personal consequences.<sup>291</sup>

Secondly, parliamentary politics in most Western European countries is based on a majority-minority game largely absent in the European Parliament. Between 1979 and 1999, the two largest groups (the Party of European Socialists, ("PES")) and the European Peoples Party, ("EPP")) determined Parliament's agenda to a large extent. In the newly elected Parliament of 1999, the EPP and the European Liberal, Democrat and Reform Party ("ELDR") formed a "coalition" for the election of the Parliament's President, to the detriment of the weakened PES. But with only 283 Members ("MEPs"), the "EPP-ELDR coalition" has no majority in a Parliament with 626 seats.<sup>292</sup> And there is no leftist majority either: PES, Ecologists and the other parties on the left represent 290 MEPs. During the Parliament's formal vote of investiture on September 15, 1999, President Romano Prodi's Commission could count on a large support of 414 MEPs, with only 142 against. Support for individual Commission proposals, however, will on each occasion require a new exercise of conviction.<sup>293</sup> In contrast with most national governments, the Commission cannot rely on the solid support of a stable majority.

Third, in most West European parliamentary systems, the majority-minority game relies on party discipline. In the European Parliament, the multinational political groups attempt to coordinate positions on a European scale, but are not marked by strong discipline. In practice, the political behavior of MEPs is still largely determined by national politics. This can be explained by the fact that national parties determine the composition of electoral lists. National parties determine who will get a position that allows candidates to get (re-)elected. Furthermore, European elections take place in a national context with election districts that do not reach beyond the traditional Member State borders. MEPs

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289. See Renaud Dehousse, *European Institutional Architecture After Amsterdam: Parliamentary System or Regulatory Structure?*, 35 COMMON MKT. L. REV. 595 (1998).

290. See, e.g., FIVE CONSTITUTIONS: CONTRASTS AND COMPARISONS (S.E. Finer ed., 1979).

291. In the alternative constitutional system based on a genuine separation between the branches of government, neither parliament nor the executive have the ability to bring each other down. This is not the EU system either.

292. For the composition of the European Parliament elected in 1999 and the election of its President, see GEN. REP. EU 1999 at para. 1012 (2000).

293. European Parliament, Resolution on the Prodi Commission, Sept. 15, 1999; GEN. REP. 1999 at para. 1033 (2000).

who go beyond the guidelines of their own national party in an attempt to build genuine European-scale strategies face potential punishment. The fate of Wilfried Martens, a former Belgian Prime Minister who served as President of both the EPP and its Parliamentary Group (1994-1999), serves as an example. The Flemish Christian Democrats disapproved of Martens' successful strategy of turning the EPP into the most powerful group by bringing in the British Conservatives and Berlusconi's Forza Italia. As a result, Martens got into trouble with his home base and did not return to the European Parliament after the 1999 elections.

Fourth, since the daily legislative work of the European Parliament rarely makes the headlines, MEPs have a strong incentive to get into fights with the Commission to obtain media attention. The consequence of this institutional constellation is a European Parliament with a great deal of power, drawn into fights with the Commission, and neither restrained by a majority-minority discipline, nor by the risk of provoking early elections.

As late as 1993, the German Federal Constitutional Court still regarded the EU's democratic legitimization as deriving in large measure from the national parliaments.<sup>294</sup> It viewed the role of the European Parliament as marginal. Parliament's rapid ascension to power since 1993 has rendered the German Constitutional Court's reasoning entirely out of date.<sup>295</sup>

### *I. Between Legislative Harmonization, Policy Coordination and Resource Allocation*

In contrast with most international organizations, which are merely able to produce resolutions or recommend draft treaties for ratification by their members, the Community produces binding secondary legislation that has precedence over national law. Community legislation takes the form of regulations or directives.<sup>296</sup> Regulations are binding in their entirety for all Member States and their citizens.<sup>297</sup> They are directly applicable without 'transposition' into national law and are used in areas of strong Community competence such as external trade, agriculture and competition policy.<sup>298</sup> Directives are only binding as to the result to be achieved.<sup>299</sup> National authorities have the choice of form and method in implementing directives. They are used to promote the harmonization of legislation among the Member States in such areas as environmental or consumer protection.<sup>300</sup>

294. See *Entscheidungen des Bundesverfassungsgerichts*, *supra* note 46.

295. See *id.*

296. For the definition of regulations and directives, see CONSOLIDATED EC TREATY, *supra* note 2, art. 249 (ex EC TREATY art. 189).

297. For a good overview, see KAPTEYN & VERLOREN VAN THEMAAT, *supra* note 2, at 324.

298. See *id.*

299. See *id.*

300. See SACHA PRECHAL, *DIRECTIVES IN EUROPEAN COMMUNITY LAW: A STUDY OF DIRECTIVES AND THEIR ENFORCEMENT IN NATIONAL COURTS* (1995); Chrisiaan Timmermans, *Community Directives Revisited*, 17 Y.B. EUR. L. 1 (1999).

While the EU's traditional legislative activity continues, this legislative work has been supplemented by a move towards policy coordination. In the environmental area, the Commission has been actively pushing voluntary agreements between public authorities and industry.<sup>301</sup> In the difficult field of company taxation, the Commission has attempted to gradually bring the Member States closer together by aiming at policy coordination rather than harmonization through a Code of Conduct that leaves the Member States formally in charge.<sup>302</sup> In the attempt to build a European employment strategy, the negotiators of the Treaty of Amsterdam have even explicitly excluded the possibility of harmonization of laws and regulations of the Member States.<sup>303</sup> Instead, they have opted for policy coordination through annual "guidelines."<sup>304</sup> A similar procedure exists in the field of macroeconomic policy. The guidelines are formally adopted by the Council upon a Commission proposal. They serve as the benchmark for a peer review process during which the Council assesses the economic and employment policies of each Member State. In contrast with directives, they have no direct effect, and the Member States do not have to fear lawsuits against their national policy based on the guidelines. Still, the review process can lead to the adoption of recommendations addressed to the Member States.

Reliance on policy coordination instead of legislative harmonization in the Community pillar contrasts to some degree with the evolution in JHA. Cooperation in JHA between 1993 and 1997 had achieved only a very limited success.<sup>305</sup> This was blamed in part on the fact that the Treaty of Maastricht had deprived JHA of the normal Community instruments.<sup>306</sup> The Amsterdam Treaty therefore provided the Council with the power to adopt framework decisions for the purpose of approximating the laws and regulations of the Member States in the area of police and judicial cooperation in criminal matters.<sup>307</sup>

In addition to its regulatory task via legislation and policy coordination, the EU has increasingly become involved in resource allocation on a scale not foreseen by the founders. As part of the Common Agricultural Policy, the original six Member States had in 1962 set up a European Agricultural Guidance and Guarantee Fund covering expenditure incurred to finance structural adaptations (the Guidance section) and to finance interventions in agricultural markets (the Guarantee section).<sup>308</sup> With the start of the Social Fund in 1971 and the Euro-

301. See Philippe Renaudière, *Phénomènes et Instruments 'Consensuels' ou Non-Contraignants en Droit Communautaire de l'Environnement*, AMENAGEMENT-ENVIRONNEMENT 3 (Special Issue, 1997); Marc Pallemmaerts, *The Decline of Law as an Instrument of Community Environmental Policy*, 9 L. & EUR. AFF. 338 (1999).

302. See Commission of the European Communities, *Towards Tax Co-ordination in the European Union: A Package to Tackle Harmful Tax Competition*, COM(97) 495 final at 5.

303. See CONSOLIDATED EC TREATY, *supra* note 2, art. 129; Patrick Venturini, *Social Policy and Employment Aspects of the Treaty of Amsterdam* 22 FORDHAM INT'L L.J. 594 (1999).

304. See CONSOLIDATED EC TREATY, *supra* note 2, art. 128 EC.

305. See *supra* note 11.

306. See Reflection Group, *supra* note 12, at para. 48.

307. See CONSOLIDATED TEU, *supra* note 2, art. 34.

308. The legal base for these funds can be found in CONSOLIDATED EC TREATY, *supra* note 2, art. 34 (ex EC TREATY art. 40).

pean Regional Development Fund in 1975, the EU began developing a policy to foster social and economic cohesion on a European scale.<sup>309</sup> As explained above, cohesion policy was strengthened in the Single European Act and beefed up with the Maastricht Treaty's Cohesion Fund.<sup>310</sup> In addition, during the 1990s, numerous important multi-annual programs have been added to the EU budget relating to both internal policies and external activities.<sup>311</sup> As a result, the financial management tasks conferred on the Commission grew almost exponentially. The available Commission staff — recruited for legislative, regulatory and external policy tasks — was not always fully equipped and trained to manage such significant budgets.<sup>312</sup> While certainly a heavy burden on the Commission, the budgetary significance of the EU's distributive policies should not be overstated. These programs are, indeed, severely constrained by the EU's restrictive budgetary ceiling. Mark Pollack's detailed analysis of the EU's activities demonstrates that it remains first and foremost an active regulator, with the pace of regulation in such areas as environmental and consumer protection only slightly diminished in comparison with the 1992 Internal Market-creation era.<sup>313</sup>

#### *J. Between a Coherent and a Fragmented Law Enforcement Regime*

The Community not only creates binding law, but is also equipped with an elaborate set of rules designed to ensure the correct application of Community legislation. Former Commission President Walter Hallstein was famous for his warning that, since the Community's only weapon is the law it creates, the Community's mission would be doomed if it would not be able to ensure the binding and uniform nature of Community law in all Member States.<sup>314</sup> In the 1950s, it was entirely uncertain how the new legal system created by the Community Treaties would function in practice. Particularly unclear was whether Community law would be uniformly binding and enforceable in all Member States.<sup>315</sup> Only in the Netherlands and Luxembourg was the primacy of international trea-

309. The legal base for the European Social Fund can be found in CONSOLIDATED EC TREATY, *supra* note 2, arts. 136-148 (ex EC TREATY arts. 123-125). The European Regional Development Fund was established on the basis of EC Treaty Article 235. See Regulation 724/75, 1975 O.J. (L 73) 1.

310. See *supra* note 133.

311. See *supra* note 272.

312. See European Commission, *Reforming the Commission: Consultative Document*, COM (00) 10 final.

313. See Mark Pollack, *The End of Creeping Competence? EU Policy-Making since Maastricht* 38 J. COMMON MKT. STUD. (forthcoming 2000).

314. See Walter Hallstein, Address before the European Parliament (June 17, 1965). On the importance of the concept of the rule of law in the Community's early years, see STUART A. SCHEINGOLD, *THE RULE OF LAW IN EUROPEAN INTEGRATION* (1965); LORD MACKENZIE STUART, *THE EUROPEAN COMMUNITIES AND THE RULE OF LAW* (1977). For a contemporary perspective, see MARIA LUISA FERNANDEZ ESTEBAN, *THE RULE OF LAW IN THE EUROPEAN CONSTITUTION* (1999).

315. On the reception of EC law in the Member States, see 1 FIDE KONGRESS: NATIONAL CONSTITUTIONAL LAW VIS-A-VIS EUROPEAN INTEGRATION (Jürgen Schwarze ed., 1996); Antero Jyränki, *Transferring Powers of a Nation-State to International Organisations: The Doctrine of Sovereignty Revisited*, in NATIONAL CONSTITUTIONS IN THE ERA OF INTEGRATION, *supra* note 76, at 61.

ties over national law well established.<sup>316</sup> Germany and Italy, on the contrary, had a dualist legal tradition in which international agreements had to be transformed into the national legal order by an act of parliament.<sup>317</sup> Transformed treaties took precedence only over earlier national legislation, but could be superseded by later legislative acts.<sup>318</sup> The French Constitution recognized the supremacy of international treaty law over subsequent national legislation, but the prevailing doctrine in French courts was that they were not allowed to set aside French laws conflicting with earlier international agreements.<sup>319</sup> The Belgian legal situation was unclear.<sup>320</sup>

According to the Treaty of Rome, it was up to the Court of Justice to "ensure that in the interpretation and application of this Treaty the law is observed."<sup>321</sup> In terms of enforcement, the Treaty foresaw two major roads of access to the Court. Direct actions include the possibility for the Commission to bring Member States before the Court for failure to fulfil their Treaty obligations.<sup>322</sup> This procedure has become more threatening to the Member States since the Maastricht Treaty granted the Court the power to impose penalty payments on Member States that fail to comply with earlier judgments.<sup>323</sup> Furthermore, during the Maastricht negotiations, the Court of Justice held in its famous *Francovich* judgment that Member States are liable for loss and damage caused to individuals by breaches of Community law for which the Member States can be held responsible, such as the non-transposition of a directive within the required period.<sup>324</sup> Indirect actions concern questions on the validity and interpretation of Community law that are brought before the European Court of Justice by national courts or tribunals. National courts against whose decisions there is no judicial remedy under national law are obliged by the Treaty of Rome to

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316. See Bruno de Witte, *Direct Effect, Supremacy, and the Nature of the Legal Order*, in *THE EVOLUTION OF EU LAW* 179 (Paul Craig & Grainne de Burca eds., 1999).

317. See *id.*

318. See *id.*

319. See *id.*

320. See *id.*

321. CONSOLIDATED EC TREATY, *supra* note 2, art. 220 (ex EC TREATY art. 164). On the role of the European Court of Justice and its impact on the EU's institutional framework, see RENAUD DEHOUSE, *THE EUROPEAN COURT OF JUSTICE: THE POLITICS OF JUDICIAL INTEGRATION* (1998); *THE EUROPEAN COURT AND NATIONAL COURTS, DOCTRINE AND JURISPRUDENCE: LEGAL CHANGE IN ITS SOCIAL CONTEXT* (Anne-Marie Slaughter, Joseph H. H. Weiler & Alec Stone Sweet eds., 1998); Alec Stone Sweet and James A. Caporaso, *From Free Trade to Supranational Polity: The European Court and Integration*, in *EUROPEAN INTEGRATION AND SUPRANATIONAL GOVERNANCE* (Wayne Sandholtz and Alec Stone Sweet eds., 1998); Eric Stein, *Lawyers, Judges, and the Making of a Transnational Constitution* 75 *AM. J. INT'L L.* 1 (1981).

322. See CONSOLIDATED EC TREATY, *supra* note 2, art. 226 (ex EC TREATY art. 196).

323. See CONSOLIDATED EC TREATY, *supra* note 2, art. 228 (ex EC TREATY art. 171).

324. See Joint Cases C-6/90 and C-9/90, *Francovich v. Italy*, *Bonifaci v. Italy*, 1991 E.C.R. I-5357. See also GEORGES VANDERSANDEN & MARIANNE DONY, *LA RESPONSABILITE DES ETATS MEMBRES EN CAS DE VIOLATION DU DROIT COMMUNAUTAIRE: ETUDES DE DROIT COMMUNAUTAIRE ET DE DROIT NATIONAL COMPARE* (1997); Ami Barav, *State Liability in Damages for Breach of Community Law in the National Courts*, 16 *Y.B. EUR. L.* 87 (1996); Gerhard Bebr, *Case Law: Joint Cases C-6/90 and C-9/90, Francovich v. Italy, Bonifaci v. Italy, Judgment of the Court of Justice of 19 November 1991*, 29 *COMMON MKT. L. REV.* 187 (1992); Roberto Caranta, *Governmental Liability after Francovich*, 52 *CAMBRIDGE L. J.* 272 (1993); Josephine Steiner, *From Direct Effect to Francovich: Shifting Means of Enforcement of Community Law*, 18 *EUR. L. REV.* 3 (1993).

bring those questions before the European Court.<sup>325</sup> These questions often concern a conflict between national and Community law. The Court's so-called preliminary rulings are binding on the national judges.<sup>326</sup> The purpose of the system of preliminary rulings is to preserve a high degree of unity and coherence in the interpretation of European law throughout Member States.

During the first half of the 1960s, the Court used the system of preliminary rulings to establish a strong Community legal order that was years ahead of European political integration. The two building blocks of the Court's Community legal order were the principles of direct effect and primacy.<sup>327</sup> Primacy means that in conflicts between the law of a Member State and Community law, the latter has precedence.<sup>328</sup> Direct effect implies that individuals (and companies) can rely on Community law before national courts to challenge the law of their Member State.<sup>329</sup> Both principles were enunciated in the framework of preliminary questions. While some of the Member State governments had intervened before the Court to argue against direct effect and primacy, both principles were already well-established as *acquis communautaire* when the Community went through its first enlargement from the Six to the Nine in 1973.<sup>330</sup> Via the system of preliminary rulings, direct effect and primacy, the Community was able to combine coherence and uniformity with a certain degree of decentralization. As John Temple Lang wrote, the "duty imposed by constitutional law of the EU on national courts and national authorities to see that Community law is applied and respected in the national legal orders makes every national court in a sense also a Community court."<sup>331</sup>

For the European Court of Justice, Community law also has an absolute primacy over national Constitutions. Allowing national Constitutional Courts to assess the validity of Community law on the basis of national constitutional standards would, according to the Court of Justice, gravely affect the European law's unity and efficacy.<sup>332</sup> For the European Court, "the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the Constitution of that State or the principles of a national constitutional struc-

325. See CONSOLIDATED EC TREATY, *supra* note 2, art. 234 (ex EC TREATY art. 177). See also ARTICLE 177 EEC: EXPERIENCES AND PROBLEMS (Henry G. Schermers, Christiaan W. A. Timmermans, Alfred E. Kellermann & J. Steward Watson eds., 1987). On the statistical importance of this provision, see Alec Stone Sweet & Thomas L. Brunell, *The European Court and the National Courts: A Statistical Analysis of Preliminary References, 1961-95*, 5 J. EUR. PUB. POL'Y 66 (1998).

326. See *supra* note 325.

327. For an excellent overview, see de Witte, *Direct Effect, Supremacy, and the Nature of the Legal Order*, *supra* note 316; Pavlos Eleftheriadis, *The Direct Effect of Community Laws: Conceptual Issues*, 16 Y.B. EUR. L. 205 (1996).

328. See *supra* note 327.

329. See *id.*

330. See *id.*

331. John Temple Lang, *The Duties of National Authorities under Community Constitutional Law*, 23 EUR. L. REV. 109 (1998). On the same theme, see Eric F. Hinton, *Strengthening the Effectiveness of Community Law: Direct Effect, Article 5 EC, and the European Court of Justice*, 31 N. Y. U. J. INT'L L. & POL. 307 (1999).

332. See *supra* note 331.

ture.<sup>333</sup> Still, the Italian Constitutional Court, the German Federal Constitutional Court and the Danish Supreme Court — in acts of defiance — have all declared that they would nevertheless be competent to control the consistency of Community law with the fundamental principles of their respective Constitutions.<sup>334</sup> As Sten Harck and Henrik Palmer Olsen have put it, the problem is that the European Court of Justice, the German Constitutional Court, the Danish Supreme Court and the Italian Constitutional Court all see themselves as the final arbiter of the validity of Community regulatory acts, each deriving its authority from a different constitutive instrument.<sup>335</sup> The three national Constitutional Courts continue to disagree with the European Court's view that the obligation of national courts to protect their national Constitutions is subordinate to their obligation to respect the supremacy of Community law.

Resistance to the supremacy of the European Court of Justice also arose during the negotiation of the Treaty of Amsterdam. The UK's blunt attack against the Court in wake of the dispute over the working time directive was unsuccessful.<sup>336</sup> Conservative Prime Minister Major had announced that he wanted to limit the impact of the Court's judgements in view of their "disproportionate costs on governments or business."<sup>337</sup> Still, the Amsterdam Treaty does contain a dangerous precedent with regard to the primacy of Community law. In the new Community Title on visas, asylum, immigration and other policies related to the free movement of persons, the European Court of Justice receives limited jurisdiction, which may not be related to measures concerning the maintenance of law and order and the safeguarding of internal security.<sup>338</sup> The Council, Commission or a Member State may request Court of Justice rulings on the interpretation of this Title.<sup>339</sup> However, such interpretations shall not affect judgements of Member State courts which have become *res judicata*, thus undercutting the primacy principle in practice.<sup>340</sup>

333. Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratstelle für Getreide und Futtermittel*, 1970 E.C.R. 1125, 1134.

334. See Bruno de Witte, *Sovereignty and European Integration: The Weight of Legal Tradition*, 2 MAASTRICHT J. EUR. & COMP. L. 145 (1995); Ulrich Everling, *The Maastricht Judgment of the German Federal Constitutional Court and its Significance for the Development of the European Union*, 14 Y.B. EUR. L. 1 (1994); Matthias Heregen, *Maastricht and the German Constitutional Court: Constitutional Restraints for an 'Ever Closer Union'*, 31 COMMON MKT. L. REV. 235 (1994); Matthias Kumm, *Who is the Final Arbiter of Constitutionality in Europe?: Three Conceptions of the Relationship between the German Federal Constitutional Court and the European Court of Justice*, 36 COMMON MKT. L. REV. 315 (1999).

335. See Sten Harck & Henrik Palmer Olsen, *Decision Concerning the Maastricht Treaty, Supreme Court of Denmark, April 6, 1998*, 93 AM. J. INT'L L. 209 (1999).

336. See *supra* note 51.

337. A PARTNERSHIP OF NATIONS: THE BRITISH APPROACH TO THE EUROPEAN UNION INTER-GOVERNMENTAL CONFERENCE, *supra* note 59, at 16, 17.

338. See CONSOLIDATED TEU, *supra* note 2, art. 68.

339. See *id.*

340. See *id.*; see also Albertina Albors-Llorens, *Changes in the Jurisdiction of the European Court of Justice under the Treaty of Amsterdam*, 35 COMMON MKT. L. REV. 1273 (1998); Ole Due, *The Impact of the Amsterdam Treaty upon the Court of Justice*, 22 FORDHAM INT'L L. J. 548 (1999).

### K. *Between Directly Applicable Rights for EU Citizens and Intergovernmental Law*

As indicated in the preceding section, Community law creates rights and obligations not only for the Member States but also for European citizens, and this in contrast to most international treaties. As early as the Van Gend & Loos judgment of 1963, the European Court of Justice explicitly recognized that the Treaty of Rome

is more than an agreement which merely creates mutual obligations between the contracting states . . . . Independently of the legislation of the Member States, Community law . . . not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.<sup>341</sup>

At the end of the 1960s and the beginning of the 1970s, the Court confirmed that such rights included fundamental human rights. Although the Treaty of Rome had not explicitly referred to respect for fundamental rights,<sup>342</sup> the Court stated unambiguously that such rights formed an integral part of the general principles of law whose observance it protected.<sup>343</sup> In Maastricht and Amsterdam, the treaty basis for the link between the EU, its citizens and the protection of their fundamental rights was substantially strengthened. The Treaty of Maastricht created the concept of the "citizenship of the Union," explicitly adding that the "[c]itizens of the Union shall enjoy the rights conferred by the Treaty and shall be subject to the duties imposed thereby."<sup>344</sup> The Treaty thus formalized the relationship between the citizens and the Union, complementing but not replacing the relationship between the citizens and their Member States. Even the German Federal Constitutional Court, in its famous Maastricht judgment of 1993, came to the conclusion that "with the establishment of Union citizenship . . . a legal bond is formed between the nationals of

341. Van Gend & Loos v. Nederlandse Administratie der Belastingen, *supra* note 61, at 12.

342. That the EEC Treaty of 1957 did not explicitly refer to the protection of fundamental rights is not entirely surprising. First, the EEC Treaty contained mainly economic provisions. In this framework it did provide for "the principle that men and women should receive equal pay for equal work" (EEC TREATY, *supra* note 2, art. 119). Second, the six original Member States were all also party to the Council of Europe's European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950. There seemed no need to duplicate the Council of Europe's advanced protection mechanism that had only entered into force in 1953.

343. See Case 29/69, Stauder v. City of Ulm, 1969 E.C.R. 419, 425; Case 11/70 Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, 1970 E.C.R. 1125, 1134; Case 4/73 J. Nold Kohlen- und Baustoffgrosshandlung v. Commission, 1974 E.C.R. 491, 507-08. For the evolution of the case-law since the 1960s, see Gérard Cohen-Jonathan, *La Protection des Droits Fondamentaux par la Cour de Justice des Communautés européennes*, in IN THE NAME OF THE PEOPLES OF EUROPE: A CATALOGUE OF FUNDAMENTAL RIGHTS 44 (Roland Bieber, Karel de Gucht, Koen Lenaerts & Joseph Weiler eds., 1996); Koen Lenaerts, *Le Respect des Droits Fondamentaux en tant que Principe Constitutionnel de l'Union européenne*, in MELANGES EN HOMMAGE A MICHEL WAELBROECK 423 (1999); J. H. H. Weiler & Nicolas J. S. Lockhart, 'Taking Rights Seriously' Seriously: The European Court of Justice and its Fundamental Rights Jurisprudence, 32 COMMON MKT. L. REV. 51 & 579 (1995).

344. CONSOLIDATED EC TREATY, *supra* note 2, art. 17 (ex EC TREATY art. 8). On the European citizenship, see PAUL MAGNETTE, *LA CITOYENNETE EUROPEENNE* (1999); SIOFRA O' LEARY, *THE EVOLVING CONCEPT OF COMMUNITY CITIZENSHIP: FROM FREE MOVEMENT OF PERSONS TO UNION CITIZENSHIP* (1996); Linda Hiljemark, *A Voyage around Article 8: An Historical and Comparative Evaluation of the Fate of European Citizenship*, 17 Y.B. EUR. L. 135 (1999).



the individual Member States which . . . provides a legally binding expression of the degree of the *de facto* community already in existence.”<sup>345</sup>

The Treaty of Amsterdam contained further specifications of the rights and freedoms which are central to the Union’s action. The Treaty lists “liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law” as the principles on which the EU is founded.<sup>346</sup> It adds that the “existence of a serious and persistent breach” of these principles may lead to the suspension of the (voting) rights of the Member State in question.<sup>347</sup> Respect for the principles listed above also became an explicit precondition to applying for EU membership.<sup>348</sup> Furthermore, the Treaty of Amsterdam granted the Community an explicit competence to take appropriate action in combating discrimination based on sex, racial or ethnic origin, religion or belief, disability, age, and sexual orientation.<sup>349</sup>

While adding new references to citizens’ rights, the Member States ensured that they would keep full control over the implementation of the anti-discrimination provision. Action can only be taken upon unanimous agreement of the Council, and therefore the anti-discrimination clause does not have direct effect.<sup>350</sup> Anti-discrimination was not the only field of action where the Member States explicitly excluded direct effect. It was also the case with regard to the new legal instruments (framework decisions) foreseen in the area of police and judicial cooperation in criminal matters.<sup>351</sup> The Member States feared actions by individuals before domestic courts against their national police and judicial practices. Furthermore, while Council, Commission and Member States may request Court of Justice rulings on the interpretation of the new Community Title on visas, asylum, immigration and other policies related to free movement of persons, individuals cannot do so.<sup>352</sup> While the formal recognition of the citizen’s fundamental rights in the EU framework was largely the result of the Court’s case law, the Member States proved reluctant to promote the further evolution of the law in areas that concern the rights and obligations of individuals via direct effect.

In a further move to establish fundamental rights, the Cologne European Council of June 1999 decided to draw up a Charter of Fundamental Rights of the

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345. Entscheidungen des Bundesverfassungsgerichts, *supra* note 46, at para. 39.

346. See CONSOLIDATED TEU, *supra* note 2, art. 6.

347. See CONSOLIDATED TEU, *supra* note 2, art. 7.

348. See CONSOLIDATED TEU, *supra* note 2, art. 49.

349. See CONSOLIDATED EC TREATY, *supra* note 2, art. 13. On the basis of this new power, the European Commission on Nov. 25, 1999 came forward with a Communication and three proposals to combat discrimination in the EU. See Commission of the European Communities, A Step Forward for the EU - Empowering Victims of Discrimination, IP/99/89 (Nov. 25, 1999). See also Mark Bell, *The New Article 13 EC Treaty: A Sound Basis for European Anti-Discrimination Law?*, 6 MAASTRICHT J. EUR. & COMP. L. 5 (1999); Leo Flynn, *The Implications of Article 13 EC - After Amsterdam, Will Some Forms of Discrimination be More Equal than Others?*, 36 COMMON MKT. L. REV. 1127 (1999).

350. See *supra* note 349.

351. See CONSOLIDATED TEU, *supra* note 2, art. 34.

352. See CONSOLIDATED EC TREATY, *supra* note 2, art. 68.

European Union.<sup>353</sup> The new EU Charter would contain the fundamental rights and freedoms as well as the basic procedural rights guaranteed by the European Convention and derived from the constitutional traditions common to the Member States. The Charter would also include the fundamental rights that pertain only to the Union's citizens. The Charter is currently being elaborated by a body composed of representatives of the Heads of State and Government and the Commission President, as well as of Members of the European and national parliaments. Its legal form and relationship to the Council of Europe's European Convention for the Protection of Human Rights and Fundamental Freedoms remain to be decided. Either the Charter is integrated in the EU Treaty framework, or it becomes a mere political declaration. The declaratory option would add little in substance and would not be in proportion to the magnitude of the drafting exercise. In case of a legally binding EU system for the protection of fundamental rights, however, it would be important to avoid potential conflicts with the evolving Council of Europe system.<sup>354</sup>

#### *L. Between an EU of Member States and an EU of the Regions*

The EU constitutes a Union of Member States that have signed and ratified the founding Treaties. As the Court of Justice has repeatedly stated, the Member States remain responsible for a failure to fulfill Treaty obligations,<sup>355</sup> even if the breach is actually committed by a region or agency that is independent according to national constitutional law.<sup>356</sup>

While a Union of Member States, the EU has in recent years made room for the participation of the Regions in the decision-making process. Since the Maastricht Treaty, Member States may be represented in the Council by any representative at Ministerial level, whether from the national or regional government, as long as the representative is authorized to commit the government of that Member State.<sup>357</sup> Thus, Ministers from the Regions can directly participate in Council deliberations. In Belgium, for instance, there is no national Minister for culture or education. Representation in the Council is therefore assured on a

353. See Cologne European Council, Presidency Conclusions, June 3-4, 1999, in BULL. EUR. UNION at para. I.64 (6-1999). After the Court's Opinion 2/94 of Mar. 28, 1996, the EU's direct accession to the Council of Europe's European Convention for the Protection of Human Rights and Fundamental Freedoms had been ruled out. See Opinion 2/94, 1996 E.C.R. I-1759. See Johan Ludwig Duvigneau, *From Advisory Opinion 2/94 to the Amsterdam Treaty: Human Rights Protection in the European Union*, 25 LEGAL ISSUES EUR. INTEGRATION 61 (1998).

354. For an analysis of the EU's human rights policy, see THE EUROPEAN UNION AND HUMAN RIGHTS (Philip Alston with Mara Bustelo & James Heenan eds., 1999); THE EUROPEAN UNION AND HUMAN RIGHTS (Nanette A. Neuwahl & Alan Rosas eds., 1995); Philip Alston and J. H. H. Weiler, *An "Ever Closer Union" in Need of a Human Rights Policy*, 9 EUR. J. INT'L L. 658 (1998).

355. See CONSOLIDATED EC TREATY, *supra* note 2, art. 226 (ex EC TREATY art. 169).

356. See Case 77/69, *Commission v. Belgium*, 1970 E.C.R. 237, 243. See also Kurt Riechenberg, *Local Administration and the Binding Nature of Community Directives: A Lesser Known Side of European Legal Integration* 22 FORDHAM INT'L L. J. 696 (1999). Member States may not rely on national provisions or practices to justify their failure to fulfill their obligations, see Case 30/72, *Commission v. Italy*, 1973 E.C.R. 667, 671-72; Case 215/85, *Commission v. Belgium*, 1985 E.C.R. 1039, 1054.

357. See CONSOLIDATED EC TREATY, *supra* note 2, art. 203 (ex EC TREATY art. 146).

rotating basis by a Minister from Belgium's Flemish, French-speaking or German-speaking language communities.<sup>358</sup> A coordination mechanism between the regions and the federal government ensures that a single Belgian position is determined before each Council meeting.<sup>359</sup>

The Maastricht Treaty also created the Committee of the Regions.<sup>360</sup> The Committee consists of 222 representatives of regional and local bodies.<sup>361</sup> It has an advisory status and must be consulted by the Council or by the Commission where the Treaty so provides.<sup>362</sup> It may also be consulted by the European Parliament.<sup>363</sup> The Committee may issue opinions on its own initiative when it considers that specific regional interests are at stake.<sup>364</sup> At its five plenary sessions in 1999, the Committee adopted 8 resolutions and 70 opinions, 14 in cases where consultation was mandatory under the Treaty.<sup>365</sup> In practice, the Committee's opinions have not seemed to carry much weight in the EU's decision-making process.<sup>366</sup>

The Regions themselves, however, seem to be exerting an ever greater influence on the EU's future. The German regional challenge to the European integration project has been particularly pronounced in recent years.<sup>367</sup> During the Amsterdam Treaty negotiations, the regional challenge was personified by Bavarian Prime Minister Edmund Stoiber.<sup>368</sup> While Chancellor Helmut Kohl's federal government depended on the support of Stoiber's Christian Social Union (CSU), the Bavarian Premier never made a secret of his Euro-skeptic attitude.<sup>369</sup> Stoiber got the help from Saxony's Kurt Biedenkopf and several other Länder whose representatives needed to approve the new Treaty in the Bundesrat.<sup>370</sup> During the final stage of the Amsterdam negotiations, the Länder forced Chancellor Kohl to veto any meaningful extension of qualified majority voting.<sup>371</sup>

358. See Accord de Coopération entre l'Etat Fédéral, les Communautés et les Régions, Relatifs à la Représentation du Royaume de Belgique au sein du Conseil de Ministres de l'Union Européenne, Annexe II (Supplément à la Revue de la Presse, Ministère des Affaires Etrangères, du Commerce Extérieur et de la Coopération au Développement, Mar. 9, 1994).

359. See *id.*, arts. 2-6. When representing their Member State in the Council, the Regions of a single Member State have to come up with a unified position since CONSOLIDATED EC TREATY, *supra* note 2, art. 205 (ex EC TREATY art. 148) does not allow splitting the vote of a Member State.

360. See CONSOLIDATED EC TREATY, *supra* note 2, arts. 263-65 (ex EC TREATY arts. 198a-c).

361. See *id.*

362. See *id.*

363. See *id.*

364. See *id.*

365. See GEN. REP. EU 1999 at para. 1059.

366. See Rosarie E. McCarthy, *The Committee of the Regions: An Advisory Body's Tortuous Path to Influence*, 4 J. EUR. PUB. POL'Y 439 (1997).

367. See Richard E. Deeg, *Germany's Länder and the Federalization of the European Union*, in 3 THE STATE OF THE EUROPEAN UNION: *supra* note 132, at 197; Rudolf Hrbek, *The German Länder and EC Integration*, 15 J. EUR. INTEGRATION 180 (1992).

368. See Devuyt, *Treaty Reform in the European Union: The Amsterdam Process*, *supra* note 6, at 623.

369. William Paterson, *The German Christian Democrats*, in POLITICAL PARTIES AND THE EUROPEAN UNION 53 (John Gaffney, ed., 1996); *The FT Interview*, FIN. TIMES, June 7, 1997.

370. See Devuyt, *Treaty Reform in the European Union: The Amsterdam Process*, *supra* note 6, at 623.

371. See *id.*

After Amsterdam, the *Länder* continued their regional challenge to the Community method by threatening to block the ratification of the IGC 2000 in the German Bundesrat if the Commission continued its competition policy investigation against state aid for Germany's regional savings banks.<sup>372</sup>

#### IV.

#### CONCLUSION

Since the mid-1980s, European integration has made great leaps forward. The EU forms the world's largest internal market, now accompanied by the Euro as the common currency for eleven of the fifteen Member States. The development of a European Security and Defense Policy took a concrete shape at the Helsinki European Council in December 1999.<sup>373</sup> Only two months earlier, the Tampere European Council of October 1999 approved an ambitious action plan for cooperation in JHA that should lead to the creation of an Area of Freedom, Security and Justice.<sup>374</sup> Simultaneously, the EU is pursuing the most challenging enlargement process in its history.

Still, in institutional terms, the Member States have a tendency to move forward just one day at a time, through *ad hoc* solutions. While this tendency has forestalled lengthy debates between the Member States on the end-goal of European integration, it has resulted in a complex patchwork of legal texts under the EU umbrella.<sup>375</sup> By failing to pursue the institutional logic behind the Rome Treaty, the Member States have created a Union hanging between what remains from the Community method and a series of compromise solutions that lead in the intergovernmental direction.

It is no surprise that the Helsinki European Council failed to retain the Wise Men's idea for a Constitutionalization of the EU Treaty framework. A real Constitutionalization of the EU's political process based on method, logic and coherence will hardly be possible unless the Member State governments, which have very different preferences with regard to the EU's end-goals, are ready to make the fundamental political choices which have been hidden away or avoided in the current patchwork of Treaty provisions. In the words of Francisco Seixas da Costa, the Portuguese State Secretary for European Affairs who presided over the Treaty reform process at working level, the Member States have during the first half of 2000 opted to widen rather than deepen the European integration process:

372. See AGENCE EUROPE, Jan. 29, 2000, at 10; Eiko R. Thielemann, *Institutional Limits of a Europe with Regions: EC State-Aid Control Meets German Federalism*, 6 J. EUR. PUB. POL'Y 399 (1999).

373. See Helsinki European Council, *supra* note 5, at para. 25.

374. See Tampere European Council, Presidency Conclusions, Oct. 15-16, 1999, in BULL. EUR. UNION at para. I.2 (10-1999).

375. Complicating the picture is George Tsebelis and Amie Kreppel's conclusion that while some of the Treaty of Rome's founders (such as Paul-Henri Spaak and Walter Hallstein) and opponents (such as Charles de Gaulle) had an accurate perception of the Community method, later political actors often had a very incomplete, or plainly wrong, understanding of the institutions they were reforming. See George Tsebelis and Amie Kreppel, *The History of Conditional Agenda-Setting in European Institutions*, 33 EUR. J. POL. RES. 41 (1998).

To make possible the enlargement of Europe to the Eastern European countries and to offer them political stability and economic development, the Fifteen have made an implicit choice, opting for a Union that differs from the one that has existed to date. The challenge of enlargement has changed the quality of the Union and reduced the ambition of the European undertaking. This may be regrettable but could not be avoided.<sup>376</sup>

Former Commission President Jacques Delors has made a similar assessment.<sup>377</sup> For Delors, the road chosen by the heads of state and government is leading the EU away from the federal Community method defined by the Founders. While underlining the historical importance of the accession process, Delors simultaneously emphasizes that an enlarged EU — with a multitude of Member States defending an even greater variety of viewpoints than today — will not be able to pursue the ambitious political union aims underlying the Maastricht Treaty.<sup>378</sup> Such an evolution, Delors maintains, is “not . . . of a nature to please those who remain faithful to the ideals and political thinking of the Fathers of Europe, Monnet, Schuman, Adenauer, Gasperi and Spaak.”<sup>379</sup> As a way forward, Delors proposes a “two circle Europe.” Under this system, the European Union would become the home of the greater Europe. A more ambitious avant-garde, open to all European countries having the necessary political determination to leave ancient notions of sovereignty behind, would form a new European Federation of Nation States. On the basis of a coherent Constitutional framework, the Federation would continue with the deepening of the European integration process.<sup>380</sup>

If the Member States fail to use the Community method to make a significant institutional leap forward during the IGC 2000, a new Schuman-like initiative along the lines of Delors’ proposal for a Federation of Nation States should indeed be adopted. Those Member States sharing the goal of giving European integration a new dynamism based on institutional efficiency and coherence could form the new and open core of Europe. While such a scenario might be difficult to realize without a major political crisis, it could well be necessary to prevent the enlarged EU from becoming an uninspiring League of Nations.<sup>381</sup>

376. AGENCE EUROPE, Jan. 14, 2000, at 3.

377. See Jacques Delors, *Reuniting Europe: Our Historic Mission*, in AGENCE EUROPE, Jan. 3 & 4, 2000, at 2; Jacques Delors, *Critique la Stratégie d’Elargissement de l’Union*, in LE MONDE, Jan. 19, 2000.

378. See *supra* note 377.

379. *Id.*

380. See *id.*

381. For a similar perspective, see Valéry Giscard d’Estaing and Helmut Schmidt, *Europe’s Lesson*, in AGENCE EUROPE, Apr. 17, 2000 at 3; Joschka Fischer, *FROM CONFEDERACY TO FEDERATION*, *supra* note 6.