THE FUTURE OF THE EUROPEAN CONSTITUTION:
PERSPECTIVES ON THE IMPLEMENTATION AND REVISION OF MAASTRICHT

College of Europe
Trans European Policy Studies Association
Brugge, 23-24/VI/1995

a. Programme
1. "Une grande responsabilité pour la présidence espagnole"/ Robert Toulemon
2. "L'avenir de la constitution européenne: finalités et stratégies"/ Philippe Manin
3. "The implementation of Maastricht: the new (Maastricht-) Europe and old institutional trends: an interim balance"/ Wolfgang Wessels
4. "Overall implementation of the Treaty on European Union: the new (Maastricht-) Europe and old institutional trends: an interim balance : synopsis"/ Wolfgang Wessels
5. "An appraisal of the implementation of the Treaty of Maastricht: policies, institutions and procedures"/ F. Basabe Lloréns, D. Brites Correia, D. Cullen, U. Diedrichs, V. Guerreiro, A. Koulaïmah Gabriel, D. Oste, P. Myers, M. Nortes Marin (College of Europe)
6. "Aperçu de deux problématiques: la hiérarchie des normes et les listes des compétences"/ E. Bribosia
7. "The economic and monetary union"/ Jef van Ginderachter
8. "Commentaires sur le discussion paper de M. J. van Ginderachter"/ P. Maillet
9. "The development of the third pillar in view of the Intergovernmental Conferebce of 1996"/ Jörg Monar
10. "The implementation of the provisions related to the fields of justice and home affairs since the entry into force of the Treaty of the European Union (November 1993-April 1995)"/ David Cullen, Christine Grau, Philip Myers, Jörg Monar

L'AVENIR DE LA CONSTITUTION EUROPEENNE
Perspectives sur la mise en oeuvre et la révision de Maastricht

THE FUTURE OF THE EUROPEAN CONSTITUTION
Perspectives on the Implementation and Revision of Maastricht

Brugge, 23 & 24-06-1995

PROGRAMME

Une conférence proposée et organisée conjointement par / This Conference

was proposed and organized jointly by

le Collège d'Europe

&

the Trans European Policy Studies Association

Organisateurs / Organizers

Collège d'Europe / College of Europe, Brugge
Trans European Policy Studies Association (T.E.P.S.A.), Brussels

Lieu / Venue

Oud Sint-Jan, Mariastraat 38, Brugge

Dates

23 & 24-06-1995

VENDREDI / FRIDAY, 23-06-1995

SEANCE D'INTRODUCTION / INTRODUCTORY SESSION

9.30 **Accueil et introduction / Welcoming address and introduction**
Gabriel FRAGNIERE

Présentation du rapport de la Commission européenne à l'attention du Comité des experts/Presentation of the report of the European Commission in anticipation of the Experts Committee
Marcelino OREJA AGUIRRE

10.15 **Présentation du thème général/Presentation of the general topic**
Jacques VANDAMME
Jean-Victor LOUIS

11.00 **Pause-café / Coffee break**

11.30 **Présentation du rapport du Parlement Européen à l'attention du Comité des experts/ Exposé on the report of the European Parliament in anticipation of the Experts Committee**
Jean-Louis BOURLANGES

12.30 **Déjeuner** (libre) / **Lunch** (free)

14.15 **Commissions / Committees**

15.45 **Pause-café / Coffee break**

16.15 **Commissions / Committees** (continued)

18.00 libre / free

20.00 **Dîner / Dinner** (Oud Sint-Jan)

COMMISSION I / COMMITTEE I

Finalités et stratégies / Aims and Strategies

Présidence / Chair : Robert TOULEMON

Rapport de base / Initial report : Association Française d'Etudes pour l'Union Européenne (AFEUR), Paris

Introduction : Philippe MANIN

Commentaires / Comments : Nikos FRANGAKIS
Jacques MOREAU
Karlheinz NEUNREITHER
Thomas JANSEN

Rapporteur : John PINDER

COMMISSION II / COMMITTEE II

Le cadre institutionnel / The Institutional Framework

Présidence / Chair : Jean-Paul JACQUE

Rapport de base / Initial report : Collège d'Europe, Bruges - Institut d'Etudes Européennes, ULB, Bruxelles

Introduction : Wolfgang WESSELS

Commentaires / Comments : Andrew DUFF
Rudolf HRBEK
Michel PETITE
Jean-Denis MOUTON
Massimo SILVESTRO
Jean-Louis QUERMONNE
Blanca VILA COSTA

Rapporteur : Vlad CONSTANTINESCO

COMMISSION III / COMMITTEE III

Union économique et monétaire / Economic and Monetary Union

Présidence / Chair : Jacek SARYUSZ-WOLSKI

Rapport de base / Initial report : Groupe d'Etudes Politiques Européennes (G.E.P.E.), Bruxelles

Introduction : Jef VAN GINDERACHTER

Commentaires / Comments : Iain BEGG
Maria KARASINSKA-FENDLER
Kamil JANACEK
André SZASZ
Alejandro LORCA CORRONS
Marc VANHEUKELEN

Rapporteur : Pier Carlo PADOAN

COMMISSION IV / COMMITTEE IV

Politique étrangère et de sécurité / Foreign and Security Policy

Président / Chair : Hans-Peter NEUHOLD

Rapport de base / Initial report : Istituto Affari Internazionali, Roma & Instituto d'Estudoes Estrategicos e Internacionais, Lisboa

Introduction : Alvaro VASCONCELOS

Commentaires / Comments : Graham AVERY
Jean CHARPENTIER
Christian FRANCK
Lyndon HARRISON
Simon NUTTALL
Alfred PIJPERS
René SCHWOK

Rapporteur : Gianni BONVICINI

COMMISSION V / COMMITTEE V
Justice et affaires intérieures / Justice and Home Affairs

Présidence / Chair : Paul DEMARET
Rapport de base / Initial report : Institut für Europäische Politik, Bonn - Collège d'Europe, Brugge
Introduction : Jörg MONAR
Commentaires / Comments : Brigid LAFFAN
Stéphane RODRIGUES
Lode VAN OUTRIVE

Rapporteur : Olivier AUDEOUD

Observations générales sur les travaux des Commissions
Le rapport de base de chaque Commission traitera de l'application de Maastricht et indiquera les changements intervenus depuis sa mise en oeuvre. Il définira les problèmes de l'élargissement et en dégagera les implications institutionnelles. Il fournira éventuellement un matériel statistique approprié prêt à être publié. Des propositions informelles seront suggérées. Le rapport est présenté par un "introducteur". Le "rapporteur" est la personne chargée de résumer les débats de la commission au cours de la séance plénière.
General observations on the work of the Committees
The initial report of each Committee will deal with the enforcement of Maastricht and will indicate the changes that have occurred since its implementation. The report will define the problems of enlargement and will identify the institutional implications thereof. It may provide relevant statistical material subject for publication. Informal proposals will be suggested.
The report is presented by an "introducteur".The "rapporteur" will summarize the debates of the Committee during the plenary session.

SAMEDI / SATURDAY, 24-06-1995

9.30 **Séance de clôture / Closing Session**
Présentation des rapports des Commissions et synthèse / Presentation of the reports of the Committees and Conclusions
Présidence / Chair : Wolfgang WESSELS

10.45 **Pause-café / Coffee break**

11.00 **Table ronde finale / Final Round Table**
Modérateur / Moderator: Gabriel FRAGNIERE
Emilio GABAGLIO
Jacek SARYUSZ-WOLSKI
Leo C. TINDEMANS
Zygmunt TYSZKIEWICZ
Wolfgang WESSELS

12.30 **Réception / Reception** (Oud Sint-Jan)

LISTE DES ORATEURS / LIST OF SPEAKERS

Olivier AUDEOUD, Professeur agrégé, Facultés de Droit à l'Université de Paris

Graham AVERY, Chief Adviser, DG IA "External Political Relations", European Commission, Brussels

Iain BEGG, Professor, South Bank University, London

Gianni BONVICINI, Director, Istituto Affari Internazionali, Rome

Jean-Louis BOURLANGES, Membre du Parlement Européen, France

Jean CHARPENTIER, Professeur émérite, Directeur de la Recherche, Centre Européen Universitaire de Nancy

Vlad CONSTANTINESCO, Professeur, Directeur du Centre d'Etudes Internationales et Européennes, Université Robert Schuman, Strasbourg

Paul DEMARET, Directeur du Département juridique, Collège d'Europe, Brugge, Professeur, Université de Liège

Andrew DUFF, Director, Federal Trust for Education and Research, London

Gabriel FRAGNIERE, Recteur du Collège d'Europe, Brugge

Christian FRANCK, Professeur, Université Catholique de Louvain, Secrétaire général, Groupe d'Etudes Politiques Européennes, Bruxelles

Nikos FRANGAKIS, Director, Greek Center of European Studies and Research (EKEME), Athens

Emilio GABAGLIO, Secrétaire général, Confédération Européenne des Syndicats (CES), Bruxelles

Lyndon HARRISON, MEP for Cheshire West and Wirral, United Kingdom

Rudolf HRBEK, Professor, College of Europe, Brugge, Institut für Politikwissenschaft, Eberhard-Karls-Universität, Tübingen

Jean-Paul JACQUE, Directeur, Service juridique, Conseil de l'Union européenne, Bruxelles, Professeur, Collège d'Europe, Brugge

Kamil JANACEK, Chief Economist, Komercni Banka, Prague

Thomas JANSEN, Membre de la Cellule de Prospective, Commission européenne, Bruxelles

Maria KARASINSKA-FENDLER, General Director, Foundation for European Studies - European Institute, Lodz

Brigid LAFFAN, Professor, Department of Politics, University College, Dublin, College of Europe, Brugge

Alejandro LORCA CORRONS, Professor, Chairman, Spanish Group for European Studies, Universidad Autónoma de Madrid

Jean-Victor LOUIS, Professeur, Université Libre de Bruxelles, Vice-Président, Groupe d'Etudes Politiques Européennes, Bruxelles

Philippe MANIN, Professeur, Université de Paris I Panthéon-Sorbonne

Jörg MONAR, Director, Institut für Europäische Politik, Bonn, Professor, College of Europe, Brugge

Jacques MOREAU, Délégué général, Fondation Europe et Société, Paris

Jean-Denis MOUTON, Directeur, Centre Européen Universitaire, Nancy

Hans-Peter NEUHOLD, Director, Austrian Institute for International Affairs, Laxenburg

Karlheinz NEUNREITHER, Directeur général, Parlement Européen, Bruxelles

Simon NUTTALL, Visiting Fellow, Centre for International Studies, London School of Economics, Professor, College of Europe, Brugge

Marcelino OREJA AGUIRRE, Membre de la Commission européenne, Bruxelles

Pier Carlo PADOAN, Professor, Istituto Affari Internazionali, Rome, College of Europe, Brugge

Michel PETITE, Directeur de la Task Force CIG, Commission européenne, Bruxelles

Alfred PIJPERS, Senior Staff Member, Europa-Instituut, University of Amsterdam

John PINDER, Professor, College of Europe, Brugge, Chairman, Federal Trust, London, Professor, College of Europe, Brugge

Jean-Louis QUERMONNE, Professeur, Collège d'Europe, Brugge, I.E.P. de Grenoble, Université Pierre Mendès France, Directeur d'études et de recherche, F.N.S.P., Paris

Stéphane RODRIGUES, Secrétaire général de l'I.S.U.P.E., Paris

Jacek SARYUSZ-WOLSKI, Under-Secretary of State for European Integration, Council of Ministers, Warsaw

René SCHWOK, Professeur, Département de Science politique, Université de Genève

Massimo SILVESTRO, Directeur, Direction générale "Affaires politiques et institutionnelles", Parlement Européen, Luxembourg

André SZASZ, Former Executive Director, Nederlandsche Bank, Professor of European Studies, University of Amsterdam

Leo C. TINDEMANS, Ministre d'Etat, Membre du Parlement Européen, Belgique

Robert TOULEMON, Inspecteur général des Finances, Directeur général honoraire des Communautés européennes, Président de l'Association Française d'Etudes pour l'Union Européenne (AFEUR), Paris

Zygmunt TYSZKIEWICZ, Secretary-General, Union of Industrial and Employers' Confederations of Europe - UNICE, Brussels

Jacques VANDAMME, Professeur, Président de la Trans European Political Studies Association, Bruxelles

Jef VAN GINDERACHTER, Professeur, Facultés Universitaires de Namur

Marc VANHEUKELEN, Conseiller, DG XIX "Budget", Commission européenne, Bruxelles

Lode VAN OUTRIVE, Professor, Katholieke Universiteit Leuven

Alvaro VASCONCELOS, Director, Instituto de Estudoes Estrategicos e Internacionais, Lisbon

Blanca VILA COSTA, Expert détaché auprès du Service juridique, Commission européenne, Bruxelles, Professeur, Universidad Autónoma de Barcelona, Collège d'Europe, Brugge

Wolfgang WESSELS, Director, Political and Administrative Department, College of Europe, Brugge, Professor, Institut für Politikwissenschaft, Universität Köln

COLLEGE OF EUROPE & T.E.P.S.A. CONFERENCE 1995
Brugge

L'AVENIR DE LA CONSTITUTION EUROPEENNE
Perspectives sur la mise en oeuvre et la révision de Maastricht
(23-24 juin 1995)

THE FUTURE OF THE EUROPEAN CONSTITUTION
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(23-24 June 1995)

Message pour les Conférences TEPSA de Madrid et de Bruges

UNE GRANDE RESPONSABILITE POUR LA PRESIDENCE ESPAGNOLE

Par R. TOULEMON
Président de l'Association française d'Etudes
pour l'Union européenne (AFEUR)

Association française d'étude pour l'Union européenne
(AFEUR)

R. TOULEMON

Paris, le 7 juin 1995

Message pour les Conférences TEPSA de Madrid et de Bruges

Une grande responsabilité pour la Présidence espagnole

La présidence espagnole se situe à un moment décisif pour l'évolution de l'Union européenne. C'est en effet au cours du 2ème semestre de 1995 que se dessineront les orientations de la Conférence de 1996 au sein du groupe préparatoire de représentants des chefs d'Etat et de gouvernement. Il n'est pas exclu, par ailleurs, que la Présidence espagnole ait à faire face à de graves difficultés résultant des perturbations causées au fonctionnement du marché unique, notamment mais pas seulement agricole, par les discordes monétaires et plus particulièrement par la perte de valeur de la lire italienne et dans une moindre mesure de la peseta.

L'objet de ce papier sera d'une part de donner quelques indications, nécessairement provisoires, sur ce que pourrait être la politique européenne de l'équipe CHIRAC-JUPPE.-CHARETTE-MILLON-BARNIER, d'autre part de présenter quelques suggestions concernant la réforme institutionnelle en particulier sur le problème de l'équilibre entre "grands" et "petits" Etats et sur celui de l'Exécutif.

I - LA NOUVELLE POLITIQUE EUROPEENNE DE LA FRANCE

Il est évidemment prématuré de formuler une appréciation sur les positions que défendra la nouvelle équipe au pouvoir en France. On observera tout d'abord que le gouvernement JUPPE a une assez forte coloration "européenne", non seulement du fait du Premier Ministre lui-même mais aussi et surtout parce que le nouveau ministre des Affaires étrangères, Hervé de CHARETTE, et celui de la Défense, Charles MILLON sont des Européens affirmés qui n'hésitent pas à se réclamer du fédéralisme, ce qui, en France, est devenu exceptionnel. Le nouveau président de la République a un passé européen contrasté : au négatif l'appel de Cochin (1976), rédigé sous l'influence de l'équipe JUILLET-GARAUD, au positif le soutien décisif apporté à l'Acte unique et au traité de Maastricht. Si CHIRAC le veut, il est sans doute le Président le mieux placé pour faire accepter à la partie la plus réticente de l'opinion française un pas décisif vers l'Europe fédérale.

Mais le voudra-t-il ? Les doutes subsistent non pas tellement à cause de la répudiation du fédéralisme dans le discours dominant au RPR et dans de larges franges de l'UDF, mais à cause de l'illusion entretenue dans les milieux dirigeants de la diplomatie, de la haute administration et de l'économie, suivant laquelle il serait possible de concilier élargissement et approfondissement en constituant un ou plusieurs cercles d'intégration renforcée mais, pour l'essentiel intergouvernementale, au sein d'une Union large mais limitée à la gestion du marché unique. Telle était la conception de l'ancien Premier Ministre BALLADUR. Telle est aussi celle de l'ancien Président GISCARD d'ESTAING qui, dans un article du Figaro publié avant

l'élection présidentielle, plaidait pour un noyau dur conforme aux propositions de la CDU, mais apparemment en dehors de l'Union et sans armature institutionnelle bien définie. Quant à BALLADUR, il rêvait de plusieurs cercles, l'un militaire avec le Royaume-Uni, l'autre monétaire avec l'Allemagne, donnant à la France une position centrale...

Aussi faut-il attendre que la diplomatie française constate l'irréalisme de telles conceptions, pour que soient créées les conditions d'un réel progrès de l'intégration ne créant aucune autre différenciation entre Etats que celles, provisoires, qui résultent de leur niveau de développement et qui situe les cercles d'intégration avancée à l'intérieur d'une Union aux institutions renforcées.

Un autre sujet d'inquiétude résulte de l'ambition exprimée par CHIRAC de jouer un rôle de médiateur entre les positions allemandes et britanniques. Le risque est grand que sur les questions institutionnelles, Paris continue d'être plus près de Londres que de Bonn.

Ce sont bien entendu, non les questions institutionnelles mais les questions économiques et plus particulièrement celle de l'emploi qui dominent les préoccupations du gouvernement et de l'opinion. JUPPE a fait de la réduction du chômage l'axe essentiel de sa politique et a formulé dans sa déclaration gouvernementale l'espoir que l'Union pourrait y contribuer, en particulier par la mise en oeuvre des chantiers du Livre blanc. Il a aussi fait part de son inquiétude quant aux conséquences des désordres monétaires, mais n'a pas mentionné l'écotaxe pourtant inscrite au Livre blanc mais généralement ignorée malgré des débats récents et une nouvelle proposition, très décevante, de la Commission qui envisage de laisser les Etats faire ce qu'ils veulent dans ce domaine.

Enfin, au cours des derniers jours, le thème des menaces sur "le Service public à la française" a mobilisé les syndicats et l'opinion. L'ouverture des services publics à la concurrence serait mieux comprise si les obligations de service universel et la création, dans certains domaines (surveillance de la frontière, contrôle aérien, définition de certaines normes) de services publics européens étaient rappelées ou proposées.

Si elles le voulaient, l'Allemagne, l'Italie et l'Espagne auraient sans doute la possibilité d'obtenir un assouplissement des positions institutionnelles de la France en contrepartie de concessions aux préoccupations économiques, monétaires et agricoles du gouvernement français.

Enfin, l'aggravation de la situation dans l'ex-Yougoslavie est un facteur appelé à prendre de l'importance dans les semaines qui viennent. Contribuera-t-il à rapprocher les points de vue sur l'avenir de l'UEO, la réforme de l'OTAN, la création en principe souhaitée par la France d'un "ministère européen des Affaires étrangères" (formule qu'utilisait l'ancien ministre Alain LAMASSOURE, en ajoutant que le ministère devrait se situer sous l'autorité directe des gouvernements), c'est difficile à dire. Il est douteux que l'on sorte de la situation actuelle marquée par un bilatéralisme franco-britannique dans le cadre ONU-OTAN, tant que les autres partenaires ne seront pas disposés à prendre plus de risques et à consentir un plus grand effort. L'essentiel sera dans les mois qui viennent de maintenir un front diplomatique commun face à Washington et à Moscou.

II – QUELQUES SUGGESTIONS POUR LA REFORME INSTITUTIONNELLE

L'AFEUR et le Centre d'études européennes de Paris I ont constitué sous l'égide du professeur Philippe MANIN et en liaison avec TEPSA un groupe de réflexion sur la Conférence de 1996 dont les conclusions ne seront pas disponibles avant l'automne.

Les suggestions qui suivent concernant l'équilibre entre grands et petits Etats et au sujet de la création d'un Exécutif politique commun doivent être considérées comme des contributions à la réflexion commune. Elle n'engagent pas le groupe MANIN et ne préjugent pas ses conclusions.

1. L'équilibre entre "grands" et "petits"

Les propositions multiples concernant l'Europe à plusieurs vitesses ou à noyau dur de même que certaines propositions de réforme institutionnelle aboutissant à créer deux catégories d'Etats membres (pour la Présidence, la Commission, voire le droit de veto) ont suscité une légitime inquiétude de la part des Etats les moins peuplés. Leurs porte–parole ont multiplié les déclarations hostiles à de tels projets (notamment à la réunion de Sesimbra) ou affirmant leur volonté de figurer dans le noyau dur (Autriche). Ces inquiétudes se sont exprimées au Parlement européen qui est allé jusqu'à rejeter un compromis apparemment raisonnable sur le mode de vote au Conseil. Le refus du Parlement de prendre en considération les populations des Etats membres dans le mode de votation au sein du Conseil s'est fondé apparemment sur l'argument selon lequel c'était le Parlement qui était représentatif des populations. Cette logique conduirait à donner chaque Etat la même voix au Conseil et un nombre de députés au Parlement exactement proportionnel à la population, suivant le modèle américain du Sénat et de la Chambre. A mon avis, ce décalque du système américain serait une erreur. Il est plus sage et plus conforme à la tradition communautaire de conserver des votes pondérés au Conseil et une certaine sur représentation des petits Etats au Parlement. Mais il est douteux que les Etats les plus peuplés puissent accepter que des décisions soient adoptées au Conseil par des majorités d'Etats représentant moins de la moitié de la population de l'Union. Or, tous les candidats potentiels, sauf la Pologne, sont des Etats comptant moins de 10 millions d'habitants.

Le rôle de TEPSA et celui de la présidence espagnole peut être décisif en vue de la recherche de solutions qui devraient être acceptables pour tous et qui sont assez faciles à définir :

– acceptation d'une réforme du vote au Conseil suivant le principe de la double majorité (des Etats réunissant la moitié ou les deux tiers de la population),

– pas de discrimination entre catégories d'Etats,

– maintien de la rotation des présidences mais avec possibilité de répartition entre plusieurs Etats, suivant les suggestions du Comité NOEL du Mouvement européen,

– maintien d'au moins un ressortissant par pays dans la Commission,

– création d'un Exécutif politique commun, à partir de la Présidence du Conseil européen.

Cette dernière suggestion est de beaucoup la plus ambitieuse et la plus originale. Elle appelle une présentation et une justification particulières.

2. Présidence ou Autorité politique

Au cours de la campagne pour l'élection présidentielle, Jacques CHIRAC, s'est prononcé en faveur de la création d'une Présidence du Conseil européen d'une durée de trois ans. Cette proposition n'a été prise au sérieux ni en France ni ailleurs. Elle a été considérée comme un geste en faveur de Valéry GISCARD d'ESTAING à qui on prête généralement l'ambition d'être candidat à une telle fonction. La principale critique qu'appelle cette proposition et qu'elle n'a apparemment fait l'objet d'aucune consultation préalable avec les partenaires de la France.

Cependant tous ceux qui sont sincèrement attachés au renforcement des institutions européennes et à un renforcement des institutions européennes et à une adaptation de ces institutions à l'élargissement auraient intérêt à ne pas écarter sans examen cette proposition. C'est en effet la première fois qu'une voix française autorisée reconnaît la nécessité de placer à la tête de l'Union européenne une personnalité n'exerçant pas ou n'exerçant plus de fonction nationale.

Il serait donc judicieux de reconnaître les aspects positifs de cette proposition tout en lui apportant des amendements qui pourraient aboutir à un compromis acceptable entre des positions jusqu'à présent inconciliables.

Il faut en effet être conscient de ce que la création d'une Europe politique à secrétariat intergouvernemental totalement extérieur à la Commission est aujourd'hui la ligne de la plus grande pente.

C'est pourquoi la création d'une Présidence de l'Union est intéressante dans la mesure où elle confierait un rôle éminent, non à un secrétariat intergouvernemental mais à une Autorité disposant d'une légitimité politique propre. Cela supposerait

- que la Présidence soit investie par le Parlement et responsable devant lui,

- que cette Présidence ne soit pas solitaire mais collégiale (un Président entouré de quatre à six vice-présidents, de manière à assurer à ce niveau un certain équilibre géographique et entre Etats plus ou moins peuplés).

Si ces deux conditions étaient remplies, rien ne s'opposerait à ce que ce collège présidentiel joue le rôle d'un Cabinet restreint qui d'une part, gérerait la PESC avec l'appui de la Commission et de ses services, d'autre part dirigerait les travaux de la Commission.

L'indépendance de la Commission, y compris pour le vote, subsisterait mais seulement dans les domaines où la Commission exerce le rôle d'une autorité d'arbitrage (concurrence, contrôle des infractions). Dans ces conditions, une Commission nombreuse, où tous les Etats auraient au moins un ressortissant serait acceptable.

Bien entendu le schéma ci-dessus se prête à de nombreuses variantes. L'essentiel est de constituer un Exécutif politique assez proche du Conseil européen pour bénéficier de la confiance des Etats, qui dispose en même temps de la confiance du Parlement et soit soumis à son contrôle, qui assure sous son autorité l'unité de l'administration de l'Union. Le schéma se prête aussi à une évolution avec une 1ère étape au cours de laquelle coexisteraient une Présidence du Conseil européen et une Présidence de la Commission travaillant en liaison très étroite, en vue d'une fusion ultérieure.

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Je sais que ces idées surprendront car elles ne correspondent ni au schéma traditionnel des fédéralistes, ni à celui des défenseurs de l'intergouvernementalisme. Nous n'avons pas eu le temps d'en discuter de manière approfondie au sein de l'AFEUR où elles soulèveront certainement des objections. Mon souhait est que les Instituts TEPSA acceptent de les examiner de manière approfondie et sans préjugés.

(2)

COLLEGE OF EUROPE & T.E.P.S.A.
Brugge

CONFERENCE 1995

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COMMISSION 1 : FINALITES ET STRATEGIES

Discussion paper

par

Ph. MANIN
Professeur,
Université Paris I Panthéon-Sorbonne

L'AVENIR DE LA CONSTITUTION EUROPEENNE

COMMISSION I : FINALITES ET STRATEGIES

PAR : Philippe MANIN, professeur à l'université PARIS I PANTHEON - SORBONNE

Le champ d'étude de la Commission I, si l'on se reporte seulement à son intitulé, est extrêmement large.
Il a été néanmoins précisé, par une indication qui figurait sur l'avant-projet de programme du colloque, qui précisait que la question dite de la "géométrie variable" de l'Union européenne devait occuper une place centrale[1].
Par ailleurs, il est demandé aux Commissions du colloque de traiter de l'application du traité de Maastricht et d'établir une sorte de "bilan" de celui-ci avant de poser les problèmes provoqués par le futur élargissement de l'Union[2].
C'est sur ces bases que le présent rapport a été établi, étant entendu qu'il ne prétend pas être exhaustif et qu'il doit avant tout servir de support à la discussion.

-1. ESSAI D'APPRECIATION DES APPORTS DU TRAITE DE MAASTRICHT

Dans le cadre du travail de cette commission, il ne peut être question que d'une appréciation de caractère global. Il s'agit en définitive de se demander si le traité de Maastricht, qui a formellement créé "l'Union européenne", a modifié les caractères essentiels des "Communautés européennes" tels que ceux-ci avaient été fixés à l'origine et modifiés par les révisions successives des traités[3].

Le traité de Maastricht représente certainement l'événement le plus important affectant la construction européenne depuis la création des Communautés.
Il semble être à l'origine de trois effets dont la portée doit être appréciée :

- l'élargissement du champ d'action
- le refus d'appliquer les techniques de l'intégration aux domaines de la politique étrangère et de sécurité et de la justice et des affaires intérieures
- l'introduction, à un niveau important, des techniques de l'intégration différenciée ("géométrie variable")

-1.1. L'ELARGISSEMENT DU CHAMP D'ACTION

A priori, l'élargissement du champ d'action de l'Union européenne par rapport à celui qu'avait les Communautés européennes paraît considérable.
Il a cependant besoin d'être précisé et relativisé.

-1.1.1. Le champ d'action de l'Union européenne s'étend bien au delà du champ d'action des Communautés en ce qu'il couvre une "politique étrangère et de sécurité commune" (dite "deuxième pilier", titre V du traité, art. J à J.11) et une "coopération dans les domaines de la justice et des affaires intérieures" (dite "troisième pilier", titre VI du traité, art. K à K9).

-1.1.1.1. En ce qui concerne le deuxième pilier, il doit être rappelé qu'à partir de 1971, les Etats membres des Communautés ont établi entre eux une "coopération politique".

Le champ d'action de cette coopération a concerné en fait, dés l'origine, la politique étrangère dans les domaines non couverts par les traités communautaires[4].
Cette coopération politique a abouti assez vite à l'adoption de positions communes et, plus rarement, à l'engagement d'actions communes, sur le fondement de décisions prises à l'unanimité au niveau de la réunion des ministres des affaires étrangères ou des chefs d'Etat ou de gouvernement dans le cadre des "conférences au sommet", puis du Conseil européen.
La Commission, d'abord tenue à l'écart, a été peu à peu associée aux délibérations de la coopération politique. Le Parlement européen a obtenu d'être tenu informé de celles-ci, de pouvoir poser des questions et de voter des résolutions. En revanche, la Cour de justice n' a jamais reçu compétence pour intervenir dans ce domaine.
Reposant d'abord sur une base juridique quasi-informelle (des rapports et des déclarations approuvés ou adoptés par les conférences au sommet des chefs d'Etat ou de gouvernement des Etats membres transformées à partir de 1975 en "Conseil européen"), la coopération politique a reçu un fondement juridique beaucoup plus formel à partir de l'Acte Unique européen qui a institutionnalisé la pratique existante dans son titre III : "dispositions sur la coopération européenne en matière de politique étrangère".
L'on pourrait conclure de ce rappel que l'élargissement du champ d'action de l'Union européenne à la politique étrangère et de sécurité commune ne constitue une nouveauté qu'en apparence et qu'il s'agit en fait d'une confirmation de ce qui existait déjà.
Cette interprétation serait cependant, à notre avis, réductrice.
En définitive, il nous semble :

- qu'il est exact que les dispositions du titre V bénéficient d'une "acquis" fondé sur une pratique ancienne qui a considérablement facilité leur acceptation. Il y a donc une bonne part de confirmation de l'existant,
- que ces mêmes dispositions donnent à l'intervention de l'Union dans ces domaines une plus grande ampleur, ne serait ce que parce qu'elles sont directement imputées à l'entité nouvelle qu'est l'Union,
- que la nouveauté essentielle est constituée par l'inclusion dans le champ de cette politique de la <u>défense</u> qui avait été, jusque là, soigneusement tenue à l'écart des compétences communautaires pour préserver le monopole de l'OTAN et de l'Union de l'Europe Occidentale[5]. Il est vrai que cette extension relève d'une démarche très prudente puisque l'article J.4 prévoit, au titre des questions de sécurité, "la définition *à terme* d'une politique de défense commune, qui pourrait conduire, *le moment venu*, à une défense commune" (mots soulignés par l'auteur). Il s'agit là néanmoins du point de départ d'un mouvement que l'Union ne pourra pas placer en position secondaire. C'est l'un des apports fondamentaux du traité de Maastricht[6].

-1.1.1.2. La coopération dans les domaines de la justice et des affaires intérieures constitue, plus que le deuxième "pilier", une nouveauté relative. Une telle coopération existait en effet, entre les Etats membres, sur une base informelle dont le point de départ, dans le temps, a été variable suivant les domaines. Et il n'y a pas, comme pour la défense dans le cadre du deuxième pilier, d'adjonction d'une matière d'importance fondamentale à celles qui étaient déjà traitées sur cette base.
L'apport du traité est donc plus strictement d'ordre institutionnel. En effet, cette coopération reçoit, pour la première fois, un fondement juridique formel. Elle bénéficie aussi d'une systématisation à la fois dans son contenu (liste des "questions d'intérêt commun" donnée par l'article K.1) et dans ses mécanismes institutionnels.

-1.1.2. Dans le cadre communautaire, le champ d'action est également élargi de façon importante.
Mais l'on ne peut mettre sur le même plan tous les apports du traité.
Il va de soi en effet que l'apport fondamental - sans commune mesure avec les autres - est constitué par les dispositions sur la politique économique et monétaire (titre VI du traité CE) visant à établir, entre les Etats membres, l'Union économique et monétaire,

objectif très ancien de la Communauté dont la réalisation avait malheureusement dû être repoussée à plusieurs reprises[7]. Ces dispositions élargissent les compétences communautaires dans un domaine essentiel et ce, sur la base - dans le domaine monétaire - d'une prise en charge par la Communauté de tous les moyens d'action importants[8].
A côté de cela, les élargissements de compétence résultant du traité dans des domaines variés apparaissent de portée limitée[9]. Ils sont en effet tous très strictement régis par le principe de subsidiarité compris comme signifiant que l'essentiel des compétences continue d'appartenir aux Etats, la Communauté n'intervenant qu'à titre complémentaire et, la plupart du temps, à l'intérieur de limites étroites[10].
De plus, souvent, ces nouveaux champs d'intervention communautaire ne font que confirmer une compétence que la Communauté avait déjà exercée en adoptant des dispositions sur le fondement de l'article 235 du traité CEE[11]. Il ne s'agit donc, dans ces cas, que de nouveautés relatives.

-1.2. LA PLACE DE LA COOPERATION INTERGOUVERNEMENTALE

-1.2.1. Il convient, là encore, de relativiser l'affirmation, souvent présentée, suivant laquelle le traité de Maastricht a systématiquement favorisé le recours aux techniques de pure coopération intergouvernementale aux dépens des techniques dites de l'intégration que les traités instituant les Communautés avaient créées et perfectionnées.

Il est exact que le deuxième et le troisième "piliers" reposent sur les mécanismes fondamentaux de la coopération intergouvernementale légèrement améliorés par l'utilisation d'un cadre institutionnel commun aux Communautés[12]. Dans le cadre du troisième "pilier", l'on a préféré privilégier le recours à la technique traditionnelle de la convention internationale plutôt que d'utiliser les moyens du droit communautaire dérivé.
Il y a donc bien eu, dans ces deux domaines très importants, un refus de recourir aux principes institutionnels qui avaient cependant fait leurs preuves dans le cadre communautaire.
Mais, à l'opposé, l'on constate que l'union économique et monétaire repose, essentiellement, sur des mécanismes intégrationnistes poussés.
Certes la politique économique (art. 102A à 104) continue de reposer sur le principe - comme cela était déjà le cas - d'une "coordination" entre Etats membres. Mais la plupart des décisions sont prises, en ce domaine, à la majorité qualifiée. L'on constate également que la Commission a un rôle très important à jouer[13] et que l'intervention du Parlement n'est pas exclue.

En ce qui concerne la politique monétaire en tout cas (art. 105 à 109M), les Etats membres qui participent à la troisième phase transfèrent leurs compétences monétaires, à compter de l'entrée en vigueur de cette phase, aux organes communautaires qui sont, d'une façon habituelle, le Système européen de banques centrales (S.E.B.C.) et la Banque centrale européenne (B.C.E.) et, pour certaines décisions, le Conseil de l'Union européenne[14]. En règle générale, tous ces organes prennent leurs décisions à la majorité.
Compte tenu des pouvoirs donnés, dans le cadre monétaire, à des organes composés de personnes indépendantes des gouvernements (S.E.B.C. et B.C.E.), l'on n'hésitera pas à aller jusqu'à dire qu'il y a là une reprise du principe utilisé pour la CECA dans laquelle l'organe indépendant des gouvernements - la "Haute Autorité" - disposait des pouvoirs nécessaires pour "gérer" le domaine commun.

-1.2.2. En présence d'un tel contraste, il est évidemment intéressant de se demander comment il se peut que le traité de Maastricht ait pu à la fois s'engager totalement dans la voie de l'intégration dans un domaine aussi essentiel que la politique monétaire (et

même économique) et rejeter ce même système pour la politique étrangère et pour la justice et les affaires intérieures.
Sans prétendre donner une explication complète, l'on mettra en avant les facteurs suivants :

- le fonctionnement de l'union économique et monétaire exige l'efficacité. La pression des milieux économiques s'est fait sentir notamment parce que l'union économique et monétaire est considérée comme le complément nécessaire du "grand marché" qui a constitué jusqu'à présent le moteur essentiel de la construction communautaire,
- le schéma adopté pour la Communauté est, pour toutes ses caractéristiques fondamentales, imité du système allemand dans lequel la gestion de la politique monétaire est confiée à une institution indépendante de l'exécutif et du législatif,
- les gouvernements continuent de se référer à un schéma traditionnel selon lequel la politique étrangère est de nature à toucher, plus que les autres domaines, à leurs "intérêts vitaux" et, de ce fait, ne peut que reposer sur des mécanismes qui respectent la "souveraineté" de l'Etat. Ce schéma est vraisemblablement désuet car l'on peut observer que, dans le monde actuel, la politique économique touche probablement plus aux "intérêts vitaux" d'un Etat que bien des questions relevant de la politique étrangère. Il continue néanmoins d'être adopté par la plupart des responsables politiques,
- le deuxième et le troisième "piliers" de l'Union reposent sur des habitudes de coopération intergouvernementale dont les mécanismes ont été utilisés dés l'origine et dont il est difficile de se défaire. Ce facteur est probablement particulièrement important pour le troisième "pilier" pour lequel l'on a maintes fois relevé qu'il aurait été assez facile et peu risqué pour les Etats - moyennant le maintien du vote à l'unanimité pour un certain nombre de questions - de l'inclure dans les compétences de la Communauté européenne.

-1.3. L'INTRODUCTION, A UN NIVEAU ELEVE D'IMPORTANCE, DE LA "GEOMETRIE VARIABLE"

-1.3.1. L'intégration différenciée ou "géométrie variable" signifie qu'à l'intérieur de l'Union ou des Communautés, un Etat ou plusieurs Etats sont ou peuvent être régis par des règles différentes des règles dites "générales", c'est à dire censées s'appliquer à tous.

-1.3.2. Il a été souvent relevé que dans les traités communautaires, avant Maastricht, il existait déjà des recours aux techniques de l'intégration différenciée[15].
Mais il est certain que la géométrie variable n'occupait qu'une place très marginale car elle était considérée comme contraire à l'un des principes fondamentaux de la Communauté - arrêté lors du premier élargissement (1973) - à savoir le principe dit de "l'acquis communautaire" qui postule que le droit communautaire doit s'appliquer globalement à tous les Etats membres.
Ces clauses de géométrie variable n'avaient, en tout état de cause, aucune incidence sur les conditions de fonctionnement des institutions.

-1.3.3. Bien que le principe de l'acquis communautaire ne soit pas abandonné et ait été en particulier réaffirmé à l'occasion du dernier élargissement (1/01/95), le traité de Maastricht a accepté la "géométrie variable" qui occupe maintenant une place importante dans l'économie des traités.
Cette "géométrie variable" prend deux aspects fondamentalement différents[16].

-1.3.3.1. La géométrie variable impersonnelle dans le cadre de l'Union économique et monétaire.

Ne participeront à la troisième phase de l'union (et donc à la monnaie commune) que les Etats membres qui répondent aux "critères de convergence". Les autres seront "en dérogation". Ils ne participeront donc pas aux organes de "gestion" de la politique monétaire, de mêmequ'aux votes du Conseil portant sur ces questions (sauf ceux relatifs à l'entrée en vigueur de la troisième phase et à l'inclusion d'un Etat jusque là en dérogation). Tout Etat en dérogation qui vient à respecter les critères de convergence doit être admis dans l'union. La participation à la troisième phase est définitive et il n'est prévu ni retrait, ni exclusion.
Ce mécanisme, dont on vient de rappeler les principales caractéristiques, ne doit rien à l'improvisation des dernières phases de la négociation. Elle fait partie d'un système soigneusement mis au point et qui repose sur la prise en considération non de la volonté mais des "capacités" des Etats. Ce système est censé défendre les intérêts de la Communauté - dont la politique économique et monétaire a besoin de s'appuyer sur des Etats dont la situation est suffisamment "saine" - et non les intérêts ou les désirs d'un ou de plusieurs Etats en particulier.

-1.3.3.2 La géométrie variable au profit d'un ou plusieurs Etats désignés.
Pour faire en sorte que, dans la phase finale de la négociation, le traité de Maastricht soit accepté par tous, il a été nécessaire d'autoriser deux régimes dérogatoires (clauses dites "d'opting out"). Un troisième s'y est ajouté après la signature.
Dans le cadre de l'union économique et monétaire, le Royaume-Uni et le Danemark ont été autorisés à ne participer à la troisième phase que s'ils en manifestent la volonté (et à la condition, dans ce cas, de respecter les critères de convergence)[17]. Cette exclusion est réversible car il suffit d'une manifestation de volonté de leur part pour que ces Etats entrent - et à titre définitif - dans le système de droit commun.
Dans le cadre de la politique sociale, l'extension du champ d'application de celle-ci, voulue par 11 Etats, était repoussée par le Royaume-Uni. Cette extension ne s'est donc appliquée qu'aux 11 (aujourd'hui 14) par le moyen d'un accord annexé au traité de Maastricht, étant précisé que cette action des Etats participants utilisera les organes communautaires dont les règles de fonctionnement sont adaptées (protocole social). Ce régime dérogatoire ne pourra cesser, le cas échéant, que moyennant l'utilisation de la procédure de révision du traité.
Dans le cadre des dispositions relatives à la défense (article J.4), le Danemark a d'ores et déjà bénéficié du paragraphe 4 qui prévoit que l'on peut prendre en considération "le caractère spécifique de la politique de sécurité et de défense de certains Etats membres". En effet, le Conseil européen a pris acte de ce que cet Etat, seulement "observateur" à l'U.E.O., ne participerait pas à l'élaboration et à la mise en oeuvre des décisions et des actions de l'Union ayant des implications en matière de défense. Ce régime dérogatoire peut cesser sur simple manifestation de volonté du Danemark. Ce régime dérogatoire n'a pas, pour le moment, la même portée que les deux précédents car la politique de défense commune de l'Union n'existe pas encore. La portée pratique de la dérogation devrait donc être limitée.

-1.3.4. Il nous paraît important de noter que l'application de toutes les clauses de géométrie variable susvisées ont des implications institutionnelles. En effet, les Etats qui ne participent au cercle d'intégration plus poussée sont exclus des organes spécialisés ainsi que des votes au Conseil de l'Union européenne qui relèvent des domaines concernés. Ceci, qui aurait probablement été considéré comme une monstruosité dans le cadre du traité CEE il y a quelques années, a été en définitive assez facilement accepté.

-2. LES OBJECTIFS

-2.1. LES EVOLUTIONS A EVITER

-2.1.1. La réduction de l'Union à un "grand espace économique".

Ce danger est souvent présenté comme la transformation de l'Union et des Communautés en une "zone de libre-échange"[18].

Cette transformation supposerait la réalisation des conditions suivantes :

- marginalisation de tout ce qui ne concerne pas la réalisation et le maintien du "grand marché".

Il ne fait pas de doute que, depuis l'entrée en vigueur du traité CEE, cet objectif constitue le ciment le plus fort de la construction européenne. Bien des aspects des politiques communes existantes (prix communs agricoles, aspects essentiels de la politique des transports, règles de concurrence) et à venir (monnaie unique) peuvent d'ailleurs être justifiés par leur caractère indispensable à la réalisation d'un véritable marché unifié. Il ne peut donc être exclu que, peu à peu, tout ce qui ne relève pas de l'objectif du grand marché soit considéré comme tout à fait subsidiaire et seulement digne de relever d'une coopération épisodique et particulièrement souple comme c'est le cas en matière de politique étrangère. Quant à la politique de défense commune, qui n'existe pas encore, il pourrait paraître plus simple de continuer à considérer qu'elle incombe avant tout à l'OTAN,

- affaiblissement des politiques tendant à renforcer la "cohésion" de l'Union.

Ces politiques sont fondées sur des "transferts" des Etats les plus riches vers les Etats les moins riches. Elles sont un des ciments de l'Union. Mais l'élargissement de l'Union à un nombre important d'Etats, qui seront pendant longtemps des "débiteurs nets", va aboutir à leur alourdissement en termes de coûts. Le risque existe de voir les Etats choisir l'option de l'affaiblissement de ces politiques pour éviter d'en supporter les conséquences financières[19], quitte à privilégier l'aide bilatérale[20],

- dilution de la politique commerciale commune.

Le risque de voir la Communauté décider de mettre fin à l'existence d'un tarif extérieur commun et d'une politique commerciale commune est probablement très faible. Mais, dans un contexte de libre-échange se généralisant dans le monde[21], le tarif extérieur commun et la politique commerciale commune peuvent perdre l'essentiel de leur signification et de leur portée

L'on peut considérer que la conjonction de toutes ces circonstances relève de l'improbable. Malgré tout, comme on a essayé de le montrer, il existe une ou plusieurs causes à la réalisation de chacune des conditions.

-2.1.2. La multiplication des coopérations particulières à l'intérieur de l'Union.

La cohérence de l'Union n'est pas affectée par le fait que certains Etats puissent établir entre eux une coopération spécifique dans des domaines qui ne relèvent pas du noyau fondamental des compétences communautaires[22].

En revanche, s'il arrivait qu'à la suite de désaccords importants sur certains objectifs, se forment à l'intérieur de l'Union des "cercles" faisant participer des Etats différents il est probable que la cohérence de l'Union et sa perception par les tiers seraient fortement affectées. L'Union finirait par ressembler à une addition d'alliances entre Etats selon un modèle dont l'Histoire fournit de nombreux exemples et dont a pu voir toutes les limites.

Ce danger ne doit pas non plus être considéré comme théorique. L'on évoque en effet quelquefois la formation, à côté du cercle "monétaire", d'un "cercle" de défense.

-2.2. LES ACTIONS POSITIVES

-2.2.1. La mise en oeuvre des compétences nouvelles

Comme on a pu le voir, les compétences nouvelles essentielles résultant du traité de Maastricht concernent la politique économique et monétaire et la défense. Elles ne peuvent être mises sur le même plan.

-2.2.1.1. L'union économique et monétaire.

Cette union fait l'objet de dispositions précises et complètes du traité. La mise en oeuvre signifie donc l'application correcte du traité. Depuis l'entrée en vigueur du traité, les signes semblent tout à fait positifs. L'on peut constater en particulier en France qu'un consensus s'instaure peu à peu sur la nécessité de la monnaie unique, qui ne laisse à l'écart que les fractions extrêmes de l'opinion politique.
L'on peut aussi constater l'action vigoureuse des organes communautaires - Institut monétaire européen et Commission - pour rendre totalement crédible le passage à la monnaie unique.
Mais il est vrai que si, au moment de constater le passage à la troisième phase, ce qui, en pratique conduit au premier semestre de 1998 [23], il fallait aussi constater qu'un Etat important ne répond pas aux conditions, la situation risquerait d'être politiquement difficile. Elle le serait également si le respect des critères de convergence par tel ou tel apparaissait douteuse.

-2.2.1.2. La défense.

La mise en oeuvre des dispositions sur la défense constitue une opération beaucoup plus complexe. Elle exige en effet l'emploi de la procédure de révision du traité de façon à inclure dans celui-ci les dispositions qui créent effectivement la politique de défense commune. Il appartiendra à la conférence intergouvernementale de 1996 de commencer à examiner cette question (art. J.4, par.6).
Or la définition d'une politique de défense commune, qui n'a jamais été sérieusement étudiée depuis l'échec du traité créant la Communauté européenne de défense, pose des problèmes d'une complexité redoutable, tant du point de vue des objectifs que du point de vue des mécanismes.
Elle est de plus de nature à provoquer l'intervention et les pressions, à la fois des Etats-Unis et de la Russie.
En dépit de sa difficulté, cette tâche doit être entreprise. La non utilisation de l'avancée constituée par l'article J.4 du traité de Maastricht constituerait un grave échec qui aurait des répercussions sur l'ensemble de l'Union.

-2.2.2. L'amélioration du cadre institutionnel.

Ce point relève des travaux de la Commission II

-2.2.3. La place à donner à la "géométrie variable"

Il ne fait pas de doute que le débat sur ce point occupera une place centrale dans les prochaines années.
Ayant écarté l'option d'une large acceptation de la géométrie variable au moyen des "cercles différenciés" (cf supra 2.1.2), il reste à envisager deux scénarios.

-2.2.3.1. Le scénario de la "refondation" de l'Union par un nombre limité d'Etats.

Cette thèse a été présentée en termes particulièrement vigoureux par l'ancien président de la République française, Valery GISCARD D'ESTAING[24].
Celui-ci a fait un constat particulièrement pessimiste de l'évolution de la construction européenne le conduisant "à conclure, avec regret, que le projet d'intégration européenne, audacieusement lancé au lendemain de la dernière guerre par les "pères fondateurs" de l'Europe, ne pourra être réalisé de la manière dont ses promoteurs l'avaient conçu"[25].
Constatant alors que "la grande Europe n'est pas un cadre approprié pour la poursuite du projet d'intégration européenne", il a proposé que, tout en laissant subsister la grande Europe - dite "Europe-espace" - sous une forme qui serait nécessairement non fédérative, un certain nombre d'Etats - ceux participant à la monnaie unique et emmenés par la France et l'Allemagne - créent entre eux une autre structure, coexistant avec la précédente, "l'Europe- puissance", qui constituerait une véritable "union politique"[26].
Quels que soient les mérites de ce projet, l'on peut douter qu'il corresponde aux réalités politiques du moment. L'occasion de s'opposer à certaines évolutions dommageables a probablement été manquée lors de la négociation du traité de Maastricht où la France et l'Allemagne auraient pû, à condition d'agir en union étroite, refuser le projet tel qu'il se présentait et en proposer un autre fondé sur une union beaucoup plus étroite. Il aurait alors appartenu aux autres Etats de se déterminer.
De toute évidence, ce qui n'a pu être fait à ce moment là peut encore moins l'être maintenant.

-2.2.3.2. Le scénario de la limitation de la géométrie variable dans sa place et sa portée

L'on considère que l'Union ne pourra pas éviter, pour une durée indéterminée, une certaine "dose" de géométrie variable. Celle-ci n'est acceptable qu'à la condition de n'apparaître que là où elle ne peut être évitée et pour servir l'Union et non les intérêts de certains membres.

-2.2.3.2.1. Les compétences traditionnelles de la CEE (CE).
La géométrie variable n'a jamais existé en ces matières sauf par le mécanisme des "périodes transitoires" (et de "l'opting out" social dont il sera question plus loin). Il n'y a aucune raison pour que le futur élargissement modifie les habitudes sur ce point. L'on peut seulement envisager, lors de ces élargissements, le recours particulièrement poussé au système de la période transitoire.

-2.2.3.2.2. L'union économique et monétaire.
La géométrie variable est destinée à occuper, de toute façon, une place importante dans l'Union puisqu'elle est prévue, par le traité, pour la troisième phase. L'élargissement, dans de grandes proportions, de l'Union aboutira, selon toute vraisemblance, à prolonger pour longtemps, la période pendant laquelle il existera des Etats "en dérogation".
L'intégration monétaire différenciée est donc destinée à devenir une réalité fondamentale de l'Union européenne dans son devenir.
Conçue comme devant servir les intérêts de l'Union dans son ensemble et non les intérêts ou les préoccupations de tel ou tel Etat, ce modèle d'intégration différenciée, qui ménage au demeurant toutes les possibilités d'évolution, ne nous paraît pas critiquable. Se posera néanmoins la question du degré de liberté monétaire des Etats ne participant pas à la troisième phase. Une utilisation agressive de cette liberté poserait en effet de graves problèmes.

-2.2.3.2.3. La politique de défense.

Dans l'état actuel des choses, l'acceptation de la géométrie variable paraît inévitable dans le domaine de la défense en raison de la diversité d'attitudes des Etats membres à l'égard de ce problème. Il faut notamment donner aux Etats qui se prétendent "neutres" de se préparer - et de préparer leur opinion - à un engagement plus déterminé dans l'Union dans ce domaine. En tout état de cause, il vaut certainement mieux accepter la géométrie variable et réaliser une politique de défense plutôt que de l'exclure et ne pas réaliser cette politique. A la différence de l'union économique et monétaire pour laquelle l'entrée dans le cercle restreint dépend de facteurs objectifs, l'entrée dans le cercle restreint de la défense commune dépendrait de la volonté de l'Etat considéré. La contrepartie de cette souplesse serait la définition précise des objectifs de la politique commune et l'existence de mécanismes institutionnels contraignants. L'entrée dans le cercle restreint devrait être définitive.

-2.2.3.2.4. La politique étrangère.
La débat en ce domaine est particulièrement délicat. L'on peut en effet se faire l'avocat d'une différenciation qui permettrait de rendre la politique étrangère plus efficace. Ainsi l'introduction du vote à la majorité aurait pour contrepartie la possibilité donnée aux Etats de la minorité de ne pas se considérer comme engagés. Le risque d'une telle évolution est, de toute évidence, de diminuer gravement la cohérence et la lisibilité de l'Union. L'on risquerait d'en arriver au danger dénoncé plus haut, à savoir l'autorisation de créer, au sein de l'Union, des coalitions variables. L'introduction de l'intégration différenciée nécessite donc une étude approfondie prenant en considération les aspects politiques et institutionnels.

-2.2.3.2.5. Les clauses "d'opting out".
Les clauses qui permettent à un Etat de décider, de façon purement discrétionnaire, de participer ou non à un domaine d'action commune de l'Union n'ont pas eu d'autre justification que d'obtenir qu'un Etat accepte le traité de Maastricht.
Elles sont à l'évidence l'antithèse de la notion d'union. Elles créent de plus de graves risques de distorsion en permettant à l'Etat qui bénéficie de l'opting out d'appliquer des règles moins rigoureuses que celles qui s'appliquent aux autres (ceci est très évident dans le domaine social).
"L'exemple" donné par Maastricht ne devrait pas être suivi. Il devrait au contraire être considéré comme le contre-exemple qui doit servir à bannir pour l'avenir le recours à de telles clauses.
Il n'est pas certain - et peut-être même improbable- que le futur élargissement soit l'occasion de créer de nouvelles clauses d'opting-out car les principaux Etats candidats - les "PECO"- sont plus demandeurs d'intégration que de différenciation.
Le problème est donc plutôt celui des clauses d'opting out déjà accordées.
Il serait tout à fait anormal que de telles clauses, que l'on peut accepter pour une durée limitée, deviennent une composante permanente de l'Union. A cet égard, l'idée, lancée par Robert TOULEMON, de "rendez-vous" périodiques qui permettraient de réexaminer ces clauses et de mettre les Etats concernés devant le choix de les abandonner ou de sortir de l'Union doit retenir l'attention.

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[1] la présente commission ne doit pas s'intéresser aux "réformes institutionnelles" à apporter, le cas échéant, à l'Union européenne car ceci relève de la Commission II compétente pour "le cadre institutionnel"

[2] l'on prend comme hypothèse que, dans l'espace d'un délai qui ne peut encore être fixé, l'Union européenne à vocation à admettre : Malte et Chypre, la Pologne, la Hongrie, la république tchèque, la république slovaque, la Roumanie, la Bulgarie, la Slovénie, l'Esthonie, la Lettonie et la Lithuanie. Ceci n'exclut pas, vraisemblablement à plus long terme, l'admission de la Croatie, de la Serbie-Monténégro, de la Bosnie, de la Macédoine ainsi que de l'Albanie, voire de la Turquie. Par ailleurs, si la Suisse, l'Islande et la Norvège (revenant sur son récent refus) manifestaient le désir d'entrer dans l'Union, tout porte à croire qu'elles y seraient admises. Cependant seul le premier groupe, dont on sait qu'il est composé d'Etats qui, dans l'état actuel des choses, souhaitent fortement entrer dans l'Union - et dont certains ont déjà posé leur candidature - bénéficie déja d'une sorte de consensus sur le principe de l'admission. Avec ce seul groupe, l'Union européenne passe de 15 à 27 Etats membres.

[3] l'on sait que l'on doit continuer à parler "des" Communautés européennes puisqu'il en existe trois (CECA, CEE, CEEA). Mais la CEE était devenue la Communauté de référence, la place des deux autres étant subsidiaire. C'est donc par rapport à la CEE - qui, déjà, reposait sur un choix institutionnel profondément différent de celui qui fondait la CECA - que l'analyse doit être poursuivie.

[4] ainsi tout ce qui relève de la notion de "politique commerciale", dans ses aspects internes et externes, dépent entièrement des dispositions di traité CEE (aujourd'hui CE).

[5] l'article 30, par 6 de l'Acte unique parlait néanmoins de la coopération "sur les questions de la sécurité européenne". Mais il n'assignait pas aux parties contractantes la mission de mettre sur pied une politique commune de défense mais, de façon plus limitée, de "coordonner davantage leurs positions sur les aspects politiques et économiques de la sécurité".

[6] juridiquement, l'instrument de la création de la politique commune de défense est l'adoption, par la procédure de révision du traité, de dispositions complémentaires.

[7] l'établissement d'une U.E.M. avait déjà été envisagée en 1969 et 1970. Elle a donné lieu au "rapport WERNER" (octobre 1970) qui contenait un schéma précis d'union. Lors de la négociation de l'Acte unique européen, la France et l'Allemagne souhaitaient l'élargissement de la compétence communautaire au domaine monétaire. L'opposition du Royaume-Uni n' pas permis d'aller au delà d'une simple disposition de pure forme (art. 102A) ne donnant aucune base réelle à la réalisation d'une telle union.

[8] ce point ne sera pas développé compte tenu de ce qu'il relève de la compétence de la commission III

[9] les nouveaux domaines de compétence sont : l'éducation et la jeunesse (la formation professionnelle relevait déjà de la compétence de la CEE), la culture, la santé publique, la protection des consommateurs, les réseaux transeuropéens, l'industrie, la coopération au développement, l'entrée et la circulation des personnes dans le marché intérieur. Il est aussi mentionné, mais seulement "pour mémoire" une compétence "dans les domaines de l'énergie, de la protection civile et du tourisme" qu'il appartiendra, le cas échéant, à la conférence de 1996 de mettre en oeuvre. Il faut aussi rappeler que le champ d'application de la politique sociale a été élargi de façon significative sur le fondement d'un accord qui figure en annexe au traité et auquel le Royaume-Uni n'est pas partie.

[10] ainsi en particulier lorsque le traité impose à la Communauté de ne poursuivre aucune action d'harmonisation des dispositions nationales (santé, formation professionnelle, culture).

[11] par exemple dans les domaines de la protection des consommateurs, de la coopération au développement et, plus rarement, dans les domaines de l'éducation, de la culture, de la santé.

[12] l'on ne développe pas ce point que l'on considère comme relevant de la commission II.

[13] les décisions du Conseil sont prises sur recommandation ou sur proposition de la Commission. Le Conseil ne doit prendre ses décisions à l'unanimité que pour l'application de l'article 103A qui ne devrait normalement jouer qu'à titre exceptionnel ainsi que, le cas échéant, pour remplacer les dispositions du protocole sur la procédure applicable en cas de déficit excessif. L'article 104C a créé un nouveau mécanisme de décision dans lequel le Conseil statue sur recommandation de la Commission à la majorité des deux tiers des voix pondérées.

[14] ainsi le Conseil est compétent en matière de relations monétaires extérieures (art. 109). C'est également au Conseil qu'il incombe d'accorder le "concours mutuel" à un Etat qui connaît des difficultés de balance des paiements (art. 109H°

[15] dans le traité CEE, la géométrie variable se traduit par une clause autorisant une coopération spécifique entre les Etats membres de l'union BENELUX et de l'union Belgique-Luxembourg (art. 233). Elle se traduit aussi par des clauses de "dérogation" qui sont elles-mêmes de plusieurs types : clauses temporaires dans le cadre des périodes transitoires accordées à tous les nouveaux membres, clauses dites de sauvegarde permettant également des dérogations temporaires, prise en considération de facteurs spécifiques à des Etats non nommément désignés (article 8C devenu article 7C dans l'actuel traité), prise en considération de facteurs spécifiques à des Etats désignés (ainsi les règles du protocole sur le "commerce intérieur allemand", devenu caduc depuis la réunification). Le mécanisme financier compensateur établi au profit du Royaume-Uni - et qui ne repose pas sur des dispositions du traité - constitue aussi une dérogation.

[16] en se limitant à ce qui nous paraît être les deux expressions dominantes de la géométrie vaariable dans le traité de Maastricht, on laisse de côté les clauses de "coopération particulière" qui figurent dans l'article J.4 par 5 et dans l'article K7. Il s'agit néanmoins également de clauses de "géométrie variable".
L'analyse des différents aspects que peut prendre la géométrie variable a déjà fait l'objet de nombreuses études; cf notamment : J.L. QUERMONNE, la différenciation dans l'Union européenne : l'Europe à "géométrie variable", in "la différenciation dans l'union européenne", institut d'études européennes, U.L.B., groupe d'études politiques européennes, journée d'études du 10 décembre 1994.

[17] protocole n° 11 pour le Royaume-Uni, protocole n°12 pour le Danemark. Le Danemark a, dans l'état actuel des choses, notifié sa volonté de ne pas participer, ce dont le Conseil européen a pris acte à Edimbourg. Le gouvernement britannique n'a pas encore fait part de ses intentions; le silence de sa part signifierait la non participation (art. 1, ali.2 du protocole)

[18] dans sa définition habituelle, la zone de libre-échange est constituée par des Etats qui, par voie de traité, décident de supprimer les frontières douanières existant entre eux. La zone de libre-échange n'implique donc pas de tarif extérieur commun et de politique commerciale commune (il s'agirait alors d'une "union douanière"). A fortiori, elle n'implique pas de "politiques communes". Mais elle peut comporter des règles considérées comme étant le complément dela libre-circulation, telles que des règles de concurrence. L'exemple le plus complet et le plus perfectionné de traité instituant une zone de libre-échange est, actuellement, l'accord de libre échange nord-américain (ALENA) signé le 17 décembre 1992 entre le Canada, les Etats-Unis et le Mexique.

[19] il est significatif à cet égard - et inquiétant de relever la multiplication des déclarations allemandes sur l'impossibilité pour cet Etat - le plus gros contributeur net - de voir sans cesse la charge communautaire s'alourdir.

[20] cette tendance paraît déjà sensible pour l'aide aux Etats A.C.P. comme le manifeste le refus d'augmentation (et même de maintien) des crédits du F.E.D.

[21] cf ainsi les propositions de création d'une zone de libre échange "transatlantique".

[22] par exemple l'article 130L prévoit que des programmes de recherche peuvent être pris en charge par certains Etats membres qui assurent leur financement.

[23] la troisième phase peut entrer en vigueur en 1997 si le Conseil constate, avant le 31 décembre 1996, qu'une majorité d'Etats répond aux critères de convergence. Si ce n'est pas le cas, elle doit entrer en vigueur le 1er janvier 1999 sans condition de majorité, le Conseil ayant seulement à constater, avant le 1er juillet 1998, quels sont les Etats qui remplissent les conditions et quels sont ceux qui ne les remplissent pas. Il est aujourd'hui admis que la première hypothèse est devenue théorique.

[24] deux articles parus dans "Le Figaro" des 10 et 11 janvier 1995, publiés ensuite sous forme de brochure : "pour une nouvelle Europe".

[25] brochure, p. 21.

[26] en dépit de la référence à une "union fédérative", l'on constate que, dans sa description de l'Union politique étroite, M. Giscard d'Estaing a donné en définitive une large place à des mécanismes que l'on peut considérer comme "intergouvernementaux" puisque fondés sur des conseils de ministres des gouvernements des Etats membres et une commission parlementaire composée de membres des parlements nationaux (cf brochure p. 44 et 45).

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THE INSTITUTIONAL FRAMEWORK

THE IMPLEMENTATION OF MAASTRICHT: THE NEW (MAASTRICHT -) EUROPE AND OLD INSTITUTIONAL TRENDS, AN INTERIM BALANCE

Discussion Paper by

Wolfgang Wessels, Jean Monnet Professor, Universität zu Köln,
College of Europe, T.E.P.S.A.

This paper presents the conclusions relating to the Report "An Appraisal of the Implementation of the Treaty of Maastricht : Policies, Institutions and Procedures" and is associated with the paper "Aperçu de deux problématiques : la hiérarchie des normes et les listes de compétences en vue de la CIG 96"

Note to Readers

This paper is just one of three which have been prepared for the "Institutional Framework" Committee of the Conference on the "Future of the European Constitution" to be held at the College of Europe, Bruges, June 1995. In order that readers may have a full overview of the issues, we have listed below the three papers prepared for this Committee.

"An Appraisal of the Implementation of the Treaty of Maastricht: Policies, Institutions and Procedures", prepared by a research team at the College of Europe, Bruges.

"Aperçu de deux problématiques: La hierarchie des normes et les listes des compétences en vue de la CIG '96", prepared by E.Bribosia, Institut d'Etudes Européennes, ULB, Brussels.

"The Implementation of Maastricht: the new (Maastricht-)Europe and old institutional trends - an interim balance", prepared by Prof.Dr.W.Wessels, Jean Monnet Professor, Universität zu Köln, College of Europe, Bruges, TEPSA.

The Implementation of Maastricht: : The new (Maastricht-) Europe and old institutional trends. An interim balance .

I. On the relevance: The reform debate - distorted or empirically valid?

1. Beyond a cold reading: a look at empirical bases

The debate on the IGC' 96 quite often starts from perceptions of the Maastricht Treaty as it was discussed and worded between 1990-92 without taking into account of how the new provisions have been put into practice and how they are used. The purpose of this paper is to bring the "new EU realities" back into the debate. Distorted perceptions about the (after Maastricht) EU based simply on a "cold reading" of the Treaty are risky as they might lead to unhelpful political steps in the wrong directions.

The crucial puzzle thus is: Is the Maastricht Europe of 1995 different from that of how the fathers and mothers of the Maastricht Treaty formulated the provisions in 1991-92; whatever the answer to the puzzle is, we need to analyse the consequences for the debates on the IGC 96. Do we discuss reforms of the realities as they have developed since 1993 or do we stay on an abstract, meaningless level of a political discourse which is far away from the real life; perhaps even more important: do we take into account the positive and negative points of the Maastricht Treaty in an analytically valid way or do we just reconfirm our prejudices? Do we really concentrate really on the major key issues (e.g. hierarchy of norms) or do we stick to ideological battles?

2. The use of quantitative methods: towards educated guesses

By presenting mainly quantitative data we would like to bring your attention to the partly perhaps surprising, and partly perhaps "reconfirming" evolution of the EU realities; we hope to identify or grasp some overall trends, which of course - as we all agree - need some longer periods of observation and more qualitative interpretations; our first results should serve to establish "educated guesses" about the performance of the Maastricht Treaty and thus serve to make proposals for the IGC more reasonable.

II. Major findings

1. Constitutional implementation

a) Overall picture

In spite of the controversies surronding the Maastricht Treaty during the ratification process, the institutional and procedural innovations of the Maastricht Treaty have nearly all been implemented in formal terms, by the middle of 1995 and without major new renegotiation battles (see table 1). At least in this respect the package deal of Maastricht had enough weight

to be carried through. Whatever higher expectations were and are, the institutional and procedural map of the EC has changed with the EU - for better or for worse.

b) At the same time table 1 highlights several and diverging developments among policy fields and pillars. There is no uniform "single" interpretation possible.

2. Institutional performances

The evolution of the institutional roles are uneven among institutions, sectors and pillars alike:

a) for the EP a clear increase in the legislative function (co-decision, assent procedures) and in a pre-elective function (nomination of the Commission) can be observed. However, no progress in increasing its influence can be observed for the Second and Third pillar. Though newly elected, the EP was able to organise itself rather efficiently. Lessons from failed mediations with the Council are to be looked more closely.

b) National Parliaments have considerably enlarged their role in national (EU-)procedures, but not used the new EU provisions as offered in Declaration No.14.

c) The European Council has - as before - continued to play its dominant role as constitutional architect, promoter (setter) of principle guidelines and as a de facto decision-making body for nearly all sectors and for each pillar. It adopted several strategy papers which concern several policy fields and pillars.

d) The Council - as the cornerstone in the single institutional framework - has the most uneven record

- a decline in the output in normal EC business;
- a quite modest output in the newer policy sectors of the EC (see table 1);
- a large output in the CFSP pillar using new procedures (common position J2 to a restricted degree, joint actions J3 to a larger degree) (see table 1); the real impact of these activities are open to large and controversial debate.
- an output feature in the Third Pillar.

The need to look for a more rational way of structuring legal acts, e.g. by a hierarchy of norms, is evident.

Majority voting took place in about 10% of the legislative cases in the First pillar. In the Second and Third pillars the major feature seems to be a reinforced "institutionalised intergovernmentalism" leading to a frustrating blocking of many dossiers.

Some internal adaptations seem still to be the victim of bureaucratic infighting amongst several groups of national civil servants.

e) The interpretation of the Commision's role also shows a mixed record

- a decline of initiatives in the classical EC areas;
- a moderate output of initiatives in new policy areas of the EC;

- a yet to be clarified input of initiatives in the Second pillar (normally linked with those for external relations of the First pillar);
- one proposal for the Third pillar.

The internal organisation of the Commission has been extended and adapted. Again within this body not all the consequences of the Maastricht Treaty have been fully digested.

f) The working method of the Court has been streamlined; given the short period of time no major impact of Court rulings on applying the new provisions can yet be discerned, though cases on new articles, including subsidiarity, are pending.

g) The Committee of the Regions has started to work. It has issued 42 opinions, including 11 on its own initiative (see table 1). The internal organisation and working methods are being established.

3. Procedural implementation

New procedures are becoming dominant features of the EU decision-making, thus replacing or at least subordinating traditional procedures.

Above all the co-decision procedure has become a major vehicle for the EC to take binding decisions. In spite of its procedural complexity and various consensus-shaping requirements in both bodies, the efficiency in the use of this procedure is rather high.

Some new procedures in the Second and Third Pillars (common postions and joint actions) must seriously be reconsidered as their overall usefulness seems limited and the efficiency of achieving a decision is clearly suboptimal.

4. Organizational implementation

Administrative adaptation in each body follows institutional and procedural changes, though sometimes with quite considerable delays and intra-administrative power struggles.

III. Conclusions: A strong trend towards a newer stage of fusing actors and policies

1. The implementation record of the institutional framework offers some useful overall lessons for the reform debate.

2. An even closer move towards Brussels

The institutional growth, the intensive use of some new procedures and administrative differentiation are indicators of more interactions among equal actors from several public policy levels. The EP is moving "more into Brussels" as are new national actors (e.g. regions)

3. "Expansion tous azimuts"

The scope of policies dealt with in the EU has grown so as to cover new or revised policy sector (expansion in "tous azimuts"), but there is apparently no overall, cross-sectoral dynamic at work. Actors use the new areas of competence but to variable degrees. Some new provisions (e.g. J3) are extensively used, others, such as health policy, to a very limited degree. Indeed these findings belong to the most surprising results, which certainly need more reflection. An impact of the application of the subsidiarity principle is not clearly observable.

4. Towards a new institutional equilibrium?

Contrary to most other periods in the EC's history, relations among the EU institutions have not been settled down with a range of what some call an "institutional equilibrium". The range and variety of relationships has been considerably enlarged over the sectors, procedures and pillars. Given the new procedural dynamics, the "battle for power" is continuing more intensively.

This leads to an even stronger and more complex fusion in both directions: in a horizontal way among the EU institutions and in a vertical way among several governmental levels.

The implementation record of the Maastricht Treaty so far has thus been a further extrapolation of fundamental integration trends of the post-war history of Western Europe. The strong move towards creating a "common", broadly based and widely accepted institutional framework with a high degree of participation of many different actors has been reinforced.

5. Basic shortcomings of this institutional framework - as have been criticized widely - such as the lack of transparency and accountability - have not been overcome, but the impact of several procedures have made the complexity even larger in spite of some rather marginal efforts (such as opening some parts of Council sessions).

6. The post-Maastricht experience shows also that the basic dilemma between the urge for a broad and intensive participation, on the one hand, and efficiency, transparency and accountability on the other, have not been solved by the implementation of the Maastricht Treaty. If the constitutional piece-meal-engineering approach continues in the IGC' 96, as it seems will be the case in summer 1995, we must be aware that the basic shortcomings to which the criticisms refer will not be overcome.

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THE INSTITUTIONAL FRAMEWORK

OVERALL IMPLEMENTATION OF THE TREATY ON EUROPEAN UNION: THE NEW (MAASTRICHT -) EUROPE AND OLD INSTITUTIONAL TRENDS, AN INTERIM BALANCE

Synopsis by

Wolfgang Wessels, Jean Monnet Professor, Universität zu Köln,
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of the Report "An Appraisal of the Implementation of the Treaty of Maastricht : Policies, Institutions and Procedures" associated to the paper "Aperçu de deux problématiques : la hiérarchie des normes et les listes de compétences en vue de la CIG 96"

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- an output feature in the Third Pillar.

The need to look for a more rational way of structuring legal acts, e.g. by a hierarchy of norms, is evident.

Majority voting took place in about 10% of the legislative cases in the First pillar. In the Second and Third pillars the major feature seems to be a reinforced "institutionalised intergovernmentalism" leading to a frustrating blocking of many dossiers.

Some internal adaptations seem still to be the victim of bureaucratic infighting amongst several groups of national civil servants.

e) The interpretation of the Commision's role also shows a mixed record

- a decline of initiatives in the classical EC areas;
- a moderate output of initiatives in new policy areas of the EC;

- a yet to be clarified input of initiatives in the Second pillar (normally linked with those for external relations of the First pillar);
- one proposal for the Third pillar.

The internal organisation of the Commission has been extended and adapted. Again within this body not all the consequences of the Maastricht Treaty have been fully digested.

f) The working method of the Court has been streamlined; given the short period of time no major impact of Court rulings on applying the new provisions can yet be discerned, though cases on new articles, including subsidiarity, are pending.

g) The Committee of the Regions has started to work. It has issued 42 opinions, including 11 on its own initiative (see table 1). The internal organisation and working methods are being established.

3. Procedural implementation

New procedures are becoming dominant features of the EU decision-making, thus replacing or at least subordinating traditional procedures.

Above all the co-decision procedure has become a major vehicle for the EC to take binding decisions. In spite of its procedural complexity and various consensus-shaping requirements in both bodies, the efficiency in the use of this procedure is rather high.

Some new procedures in the Second and Third Pillars (common postions and joint actions) must seriously be reconsidered as their overall usefulness seems limited and the efficiency of achieving a decision is clearly suboptimal.

4. Organizational implementation

Administrative adaptation in each body follows institutional and procedural changes, though sometimes with quite considerable delays and intra-administrative power struggles.

III. Conclusions: A strong trend towards a newer stage of fusing actors and policies

1. The implementation record of the institutional framework offers some useful overall lessons for the reform debate.

2. An even closer move towards Brussels

The institutional growth, the intensive use of some new procedures and administrative differentiation are indicators of more interactions among equal actors from several public policy levels. The EP is moving "more into Brussels" as are new national actors (e.g. regions)

3. "Expansion tous azimuts"

The scope of policies dealt with in the EU has grown so as to cover new or revised policy sector (expansion in "tous azimuts"), but there is apparently no overall, cross-sectoral dynamic at work. Actors use the new areas of competence but to variable degrees. Some new provisions (e.g. J3) are extensively used, others, such as health policy, to a very limited degree. Indeed these findings belong to the most surprising results, which certainly need more reflection. An impact of the application of the subsidiarity principle is not clearly observable.

4. Towards a new institutional equilibrium?

Contrary to most other periods in the EC's history, relations among the EU institutions have not been settled down with a range of what some call an "institutional equilibrium". The range and variety of relationships has been considerably enlarged over the sectors, procedures and pillars. Given the new procedural dynamics, the "battle for power" is continuing more intensively.

This leads to an even stronger and more complex fusion in both directions: in a horizontal way among the EU institutions and in a vertical way among several governmental levels.

The implementation record of the Maastricht Treaty so far has thus been a further extrapolation of fundamental integration trends of the post-war history of Western Europe. The strong move towards creating a "common", broadly based and widely accepted institutional framework with a high degree of participation of many different actors has been reinforced.

5. Basic shortcomings of this institutional framework - as have been criticized widely - such as the lack of transparency and accountability - have not been overcome, but the impact of several procedures have made the complexity even larger in spite of some rather marginal efforts (such as opening some parts of Council sessions).

6. The post-Maastricht experience shows also that the basic dilemma between the urge for a broad and intensive participation, on the one hand, and efficiency, transparency and accountability on the other, have not been solved by the implementation of the Maastricht Treaty. If the constitutional piece-meal-engineering approach continues in the IGC' 96, as it seems will be the case in summer 1995, we must be aware that the basic shortcomings to which the criticisms refer will not be overcome.

Overall Implementation of the Treaty on European Union[1]

The chart below details all those articles which were modified or introduced by the Treaty on European Union and which could then be implemented in some measurable way, i.e. an article provided for some kind of legislation or the establishment of a new institution. The chart includes the article number, a short description of its contents and an indication of whether or not the article has been used and, if applicable and available, how many times.

First Pillar (EC Treaty) - Provisions relating to Policy Sectors

Article Number	*Subject*	*Used/ No. of times used*
8a	Free movement of Union citizens	No
8b	Right to vote in municipal elections for EU citizens	Yes (not yet incorporated into national law in all Member States)
	Right to vote in EP elections for EU citizens	Yes
8c	Diplomatic and consular protection	No
8e	Commission report on citizensship	Yes
	Strengthen citizens' rights	No
57§2	Free movement of professionals	Yes
75§1	Measures to improve transport safety	1
100a	Approximation of laws (codecision)	11
100c	Common visa list	Proposed
100d	Uniform visa format	Yes
103§3	Council adoption of recommendation on guidelines for Member States' economic policies	Yes
104a	Prohibition of privileged access by public bodies to financial institutions	Yes

[1]This chart is drawn from "An appraisal of the implementation of the Treaty of Maastricht: policies, institutions and procedures", contribution for the College of Europe, TEPSA conference - "The future of the European Constitution: Perspectives on the implementation and revision of Maastricht", June 1995.

104b§2	Definition of Article 104 prohibitions	Yes
104c	Excessive government debt procedure	Yes
109e§5	Member States start process towards independence of central banks	Yes
109f	Establishment of EMI	Yes
105, 106,107,108,108a,109,109a/b/c/g/h/i/j/k/l	Articles relating to the third stage of EMU	No
(Article 2 of Agreement on social policy)	Social policy directives (excluding UK)	1
126	Education	2 (+ 3 minor acts)
127	Vocational training	2 (+2 minor acts)
128	Culture	0
129	Public Health	0 (+ minor acts)
129a	Consumer Protection	2
129c (1)	Guidelines for the establishment of TENs	Not yet approved
130	Industry	0
130d	Creation of the Cohesion Fund	Yes
	Reform of Structural Funds	No
130i	R&D - multi-annual framework	1
130o	R&D - supplementary or specific programmes	22
130p	R&D: Annual Report by the Commission	Yes
130s (3)	Adoption of Environmental Action Programmes	No
130w	Development policy measures	3

First Pillar (EC Treaty) - Provisions relating to institutional and procedural matters

138§3	EP electoral procedure (EP assent)	No
138b	Right of EP to request Commission to submit proposals for legislation	2
138c	Setting up of a temporary committee of inquiry	No
	Provisions governing the exercise of inquiry by common accord of the Commission, Council and EP	Yes
138e	Appointment of an Ombudsman	No
	Regulations and general conditions governing the performance of the Ombudsman's duties	Yes
158	Nomination of the Commission	Yes
159	Replacement of a Commissioner	No
161	Appointment of Commission VPs	Yes
165	Possibility for ECJ to sit in plenary session or in chambers	Yes
168a	Composition, jurisdiction and rules of procedure of the Court of First Instance	Yes (not 168§2)
171	Fines on Member States by ECJ	No
173	'Recours en annulation' against acts by EP and Council	1
	Actions brought by the EP to protect its prerogatives	3
180	ECJ jurisdiction on obligations of national central banks and ECB	0
188b	Composition and rules of procedure of Court of Auditors	Yes
188c	Statement of assurance	In process
	Court of Auditors annual and special reports	1 annual 14 special

189b	Codecision procedure	35 (including 2 rejections)
198§1	Right of ECOSOC to submit opinions on own initiative	39
198b	Committee of the Regions: election of chair & officers	Yes
198c	Committee of the Regions: Obligatory consultation Optional consultation Own initiative opinions	 16 15 11
228§3	International agrements requiring EP assent	5
228a	Economic sanctions	4

Second Pillar (CFSP)

J.2	Common positions in CFSP	11
J.3	Joint actions in CFSP	15
J.4	Request by the EU to the WEU to take actions	0

Third Pillar (Justice and Home Affairs)

K.3.2	Joint positions in JHA	0
	Joint actions in JHA	2
	Convention in JHA	1
K.4.1	Establishment of K.4 Committee	Yes
K.9	'Paserelle Clause' in JHA	No

Final Provisions

N	Revision of the Treaty	0
O	Accession of new Member States	4 (3 implemented)

COLLEGE OF EUROPE & T.E.P.S.A.
Brugge

CONFERENCE 1995

L'AVENIR DE LA CONSTITUTION EUROPEENNE
Perspectives sur la mise en oeuvre et la révision de Maastricht
(23-24 juin 1995)

THE FUTURE OF THE EUROPEAN CONSTITUTION
Perspectives on the Implementation and Revision of Maastricht
(23-24 June 1995)

THE INSTITUTIONAL FRAMEWORK

AN APPRAISAL OF THE IMPLEMENTATION OF THE TREATY OF MAASTRICHT : POLICIES, INSTITUTIONS AND PROCEDURES

Report by

F. Basabe Lloréns, D. Brites Correia, D. Cullen, U. Diedrichs, V. Guerreiro,
A. Koulaïmah Gabriel, D. Oste, P. Myers, M. Nortes Marin

This paper should be read in tandem with "The Implementation of Maastricht: the new (Maastricht-) Europe and Old Institutional Trends - an Interim Balance" by W. Wessels and is associated with the report "Aperçu de deux problématiques: la hiérarchie des normes et les listes des compétences en vue de la CIG 96" by E. Bribosia

Note to Readers

This paper is just one of three which have been prepared for the "Institutional Framework" Committee of the Conference on the "Future of the European Constitution" to be held at the College of Europe, Bruges, June 1995. In order that readers may have a full overview of the issues, we have listed below the three papers prepared for this Committee.

"An Appraisal of the Implementation of the Treaty of Maastricht: Policies, Institutions and Procedures", prepared by a research team at the College of Europe, Bruges.

"Aperçu de deux problématiques: La hierarchie des normes et les listes des compétences en vue de la CIG '96", prepared by E.Bribosia, Institut d'Etudes Européennes, ULB, Brussels.

"The Implementation of Maastricht: the new (Maastricht-)Europe and old institutional trends - an interim balance", prepared by Prof.Dr.W.Wessels, Jean Monnet Professor, Universität zu Köln, College of Europe, Bruges, TEPSA.

LIST OF CONTRIBUTIONS

AN APPRAISAL OF THE IMPLEMENTATION OF THE TREATY OF MAASTRICHT: POLICIES, INSTITUTIONS AND PROCEDURES

ANALYSIS BY POLICY SECTOR

INTERNAL MARKET - Victor Guerreiro/ Danja Oste

TRANSPORT POLICY - Victor Guerreiro

ECONOMIC AND MONETARY UNION - Mercedes Nortes Marin

SOCIAL POLICY - Victor Guerreiro/ Danja Oste

EDUCATION, VOCATIONAL TRAINING AND YOUTH - Felipe Basabe Lloréns

CULTURE - Felipe Basabe Lloréns

PUBLIC HEALTH AND CONSUMER PROTECTION - Felipe Basabe Lloréns

TRANS-EUROPEAN NETWORKS - Dora Brites Correia

INDUSTRY AND RESEARCH AND TECHNOLOGICAL DEVELOPMENT - Felipe Basabe Lloréns

ECONOMIC AND SOCIAL COHESION - Dora Brites Correia

ENVIRONMENTAL POLICY - Dora Brites Correia

EXTERNAL POLICIES OF THE UNION - Andrea Koulaimah Gabriel

JUSTICE AND HOME AFFAIRS - David Cullen

INSTITUTIONS

EUROPEAN PARLIAMENT - David Cullen

ROLE OF NATIONAL PARLIAMENTS - David Cullen

THE COUNCIL OF THE EUROPEAN UNION - David Cullen/ Philip Myers

THE COMMISSION - Philip Myers

THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES - Felipe Basabe Lloréns

THE COURT OF AUDITORS - Felipe Basabe Lloréns

THE ECONOMIC AND SOCIAL COMMITTEE - David Cullen

COMMITTEE OF THE REGIONS - David Cullen

NEW PROCEDURES

CO-DECISION PROCEDURE - Dora Brites Correia

THE ASSENT PROCEDURE - Andrea Koulaimah Gabriel

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1.- INTRODUCTION

The debate on the forthcoming IGC is already fully underway and we are still at least a year away from the actual 'conference' itself. Never before in the Union's history has a Treaty revision attracted so much, sustained attention. Academics, practitioners and journalists alike seem to be bombarding one another with policy documents, reflection papers, articles and reports each making a set of proposals for reform of all or part of the Treaty on European Union (TEU). Political parties, lobby groups, Union institutions and some national parliaments have or are in the process of issuing similar documents with their ideas on how the Treaty should look after 1996. Even actors outside the Union - including prospective Member States - have become involved in this dynamic process of reform proposal and counter-reform proposal. It seems as if there will be no shortage of ideas to inspire the IGC's participants when they eventually sit down around the table next year.

However, whilst there seems to be an abundance of reform proposals for the future, not much has been done in terms of assessing the current state of play under the Treaty on European Union. It is mostly assumed that the innovations and modifications introduced at Maastricht have been successfully implemented and used without encountering any great difficulties. This is a dangerous assumption to make given the scale of the changes introduced by the TEU. It would seem logical that before any meaningful reform proposals can be made, a thorough appraisal of the implementation and use of the TEU should be undertaken. This would then allow for a debate to take place on the 'reality'of the post-Maastricht European Union rather than on perceptions based on a 'cold' reading of the Treaty text.

It is the aim of this paper to make just such an appraisal of the implementation and use of the Treaty on European Union so that further debate might be based on reality rather than mere assumption. By introducing the facts about the implementation and use of the TEU, it is hoped that this paper will make a contribution to the preparation of more realistic, better-defined and more effective reform proposals.

1.1.- STRUCTURE OF THE REPORT

This paper has been organised in a way which, it is hoped, will prove to be the most useful for the reader. Each Union policy area in turn is adressed, largely mirroring the order in which they appear in the Treaty itself. Each policy area section follows the same pattern of presentation: a short historical overview, an account of the main changes brought about by the TEU, an analysis of the implementation and use of those changes since the entry into force of the Treaty and some concluding remarks on the matter. The part of the paper dealing with the policy areas is followed by a look at the Union institutions and the way in which they were affected by the provisions agreed at Maastricht. Once again each section has the same format: some introductory remarks giving an historical overview, a discussion of the main innovations of relevance to that institution and a report of their implementation thus far, concluding with some final remarks. It is inevitable that there is some ovelapping between these various sections; this is inherent in such a paper given the structure of the TEU itself.

However, it is the intention of this report to allow not only for an insight into the implementation of the Treaty as a whole, but also to give an account of the implementation of the changes in each specific area so that any subsequent reform proposals may concentrate on either the totality of the Treaty or one particular part thereof.

When dealing with a subject as broad and as complex as the implementation of the TEU it is important that all aspects are covered so that a complete and acurate picture may be obtained. This explains the extensive and comprehensive nature of this report. However, in order that the reader may gain an initial overview of the progress made in implementing the Treaty on European Union, a table has been included at the begininning of this document showing the use of each of those Treaty provisions modified or introduced at Maastricht and which could lead to some tangible result which could be measured. It should be pointed out, though, this table is intended only to give an indicative overview of progress so far and a complete account of the implemention of each article may be found in the appropriate section of this paper.

1.2.-OVERALL IMPLEMENTATION OF THE TREATY ON EUROPEAN UNION

The chart below details all those articles which were modified or introduced by the Treaty on European Union and which could then be implemented in some measurable way, i.e. an article provided for some kind of legislation or the establishment of a new institution. The chart includes the article number, a short description of its contents and an indication of whether or not the article has been used and, if applicable and available, how many times.

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8c	Diplomatic and consular protection	No
8e	Commission report on citizensship	Yes
	Strengthen citizens' rights	No
57§2	Free movement of professionals	Yes

75§1	Measures to improve transport safety	1
100a	Approximation of laws (codecision)	11
100c	Common visa list	Proposed
100d	Uniform visa format	Yes
103§3	Council adoption of recommendation on guidelines for Member States' economic policies	Yes
104a	Prohibition of privileged access by public bodies to financial institutions	Yes
104b§2	Definition of Article 104 prohibitions	Yes
104c	Excessive government debt procedure	Yes
109e§5	Member States start process towards independence of central banks	Yes
109f	Establishment of EMI	Yes
105, 106,107,108,108a,109,109a/b/c/g/h/i/j/k/l	Articles relating to the third stage of EMU	No
(Article 2 of Agreement on social policy)	Social policy directives (excluding UK)	1
126	Education	2 (+ 3 minor acts)
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128	Culture	0
129	Public Health	0 (+ minor acts)
129a	Consumer Protection	2
129c (1)	Guidelines for the establishment of TENs	Not yet approved
130	Industry	0

168a	Composition, jurisdiction and rules of procedure of the Court of First Instance	Yes (not 168§2)
171	Fines on Member States by ECJ	No
173	'Recours en annulation' against acts by EP and Council	1
	Actions brought by the EP to protect its prerogatives	3
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188c	Statement of assurance	In process
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189b	Codecision procedure	35 (including 2 rejections)
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198b	Committee of the Regions: election of chair & officers	Yes
198c	Committee of the Regions: Obligatory consultation Optional consultation Own initiative opinions	 16 15 11
228§3	International agrements requiring EP assent	5
228a	Economic sanctions	4

Second Pillar (CFSP)

J.2	Common positions in CFSP	11
J.3	Joint actions in CFSP	15
J.4	Request by the EU to the WEU to take actions	0

Third Pillar (Justice and Home Affairs)

K.3.2	Joint positions in JHA	0
	Joint actions in JHA	2
	Convention in JHA	1
K.4.1	Establishment of K.4 Committee	Yes
K.9	'Paserelle Clause' in JHA	No

Final Provisions

N	Revision of the Treaty	0
O	Accession of new Member States	4 (3 implemented)

2. ANALYSIS BY POLICY SECTOR

2.1.- INTERNAL MARKET: THE FOUR FREEDOMS

2.1.1.- Introduction

Thanks in part to the SEA, most of the legal work dealing with the completion of the internal market was accomplished by its mandated deadline of 31 December 1992. For this reason, provisions related to the internal market were not subject to great discussion during the negotiation of the Treaty on European Union (TEU). This is the reason why the content of the internal market provisions did not change significantly. Therefore changes introduced by the TEU in the field of the internal market concern mainly the modification of the decision-making process in the relevant articles.

2.1.2.- Innovations introduced by the TEU and their implementation

2.1.2.1.- Free movement of goods (articles 9-37)

The TEU changed neither the content nor the decision-making process of those parts of the Treaty of Rome dealing with the free movement of goods[1]. This statement is also true for the provisons on agriculture (Title II).

2.1.2.2.- Free movements of persons (articles 48-51)

One of the fundamental principles of the internal market is the freedom of workers, trainees and self-employed persons to live and work in another Member State. This right was progressively extended to other, non-economically active categories and was formalized in three directives in 1990 which extended the right of establishment to pensioners, students and other citizens who could prove that they were able to support themselves in the host country.

Between the entry into force of the TEU and the end of 1994, only one Council directive has been adopted concerning the right of residence for students[2].This directive replaces the former

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[1]The free movement of goods covers the provisions concerning the customs union as well as the elimination of quantitative restrictions between Member States.

[2]Council directive 93/96/EEC of 29 October 1993 on the right of residence for students (OJ L 317, 18.12.93, p.317).

In the context of the free movement of persons it should also be mentioned that the abolition of border controls for individuals remains an unsolved problem in the context of the completion of the internal market. The main reason is that governments want to ensure that the opening of frontiers will not led to an increase of international terrorism, drug smuggling and, crime and clandestine immigration. To provide the citizen with full freedom of movement and ,on the other hand, ensure security, some measures are necessary. One of them is the reinforcing of controls at the external frontiers of the EU if the internal frontiers among Member States are removed. Furthermore all EU countries must finally have the same standards on immigration, asylum rights and visas.

On the basis of article 100c (3) of the TEU the Commission adopted on 13 July 1994 a proposal for a Council directive on the introduction of a uniform format for visas to facilitate the free movement of persons within the Union[7]. In terms of decison-making process qualified majority voting is required in the Council. With this proposal the Commission complements its proposal for a regulation of December 1993[8] determining those third countries the nationals of which must be in posession of a visa when crossing the external borders of the Union (unanimity in the Council is required). The directive on an uniform visa format was agreed in March of this year, whilst the visa regulation is still under discussion.

2.1.2.3.- Free movement of services (articles 52-66)

In general terms the Maastricht Treaty has not led to any change in the content of articles 59 to 66 dealing with freedom to provide services.
After the entry into force of the TEU the Commission focused largely on the area of financial services. Two directives have been adopted in this field: one (94/19/EC) on deposit-guarantee schemes and another (94/18/EC) coordinating the requirements for the drawing-up, scrutiny and distribution of the listing particulars to be published for the admission of securities to official stock-exchange listing. Besides these two directives, the Commission dealt with five other proposals for directives concerning the free movement of financial services[9]. The legal basis for all these adopted and proposed Directives was article 57 §2 which follows the co-decision procedure.

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[7]COM(94)287.

[8]COM (93) 684.

[9]These five proposals for a directive concern: a) the reinforcement of prudential supervision (OJ C229 / 25.8.93), b)undertakings for collective investment in transferable securities (OJ C59 / 2.3.93), c)investor compensation (OJ C321 / 27.11.93), d)protection of animals during transport (OJ C142/ 25.5.94), e)cross-border money transfer (OJ C360 / 17.12.94).

2.1.2.4.- Free movement of capital (articles 67-73H)

Since May 1994[10] the movement of capital is entirely free throughout the European Union; the fundamental step towards completion of this aspect of the internal market was mainly due to both the ECJ's impulsion[11] and the SEA, which allowed the abolition on restrictions to the free movement of capital.

Nevertheless, Chapter 4 of the Treaty dealing with the free movement of capital was entirely modified by the TEU. In fact Articles 67 to 73 have been replaced by Articles 73b to 73g since January 1st 1994. The goal of the TEU in this specific sector was to formalise within the Treaty legal efforts to attain the free movement of capital.

There has been no legislative work in this area since the implementation of the the TEU.

2.1.2.5.- Common rules on competition, taxation and the approximation of laws (articles 85-102)

Some Articles of Title V were amended by the TEU, most of them involving only minor changes in the decision-making process.

The main modification in this title are: EP consultation is required for Article 94 on State aids; and the ECOSOC consultation is now required for Article 99 on tax provisions. Both EP and ECOSOC consultation are needed for Article 100 on approximation of laws; and finally, Article 100a henceforht uses the co-decision procedure (Art. 189b).

Legal base	Comission proposal	adoption by the Council
Art. 99	11	2
Art. 100a	30	11

Source: General Report on the activities of the EU 1994

[10]Greece abolished the last existing restrictions in accordance with directive 92/122/CEE on 16.5.94. The other Member States applied free movement of capitals since 1.1.93.

[11]see Constantiesco, Kovar, Simon: Traité sur l'Union Européenne, ed. Economica 1995, p;175.

2.1.3.- Conclusion

The TEU did not bring any major modifications to this particular sector. As the single Market was virtually completed in 1993 as a result of the provisions included in the SEA, the changes introduced by the TEU were mostly concerned with decision-making procedures. The fact that the Maastricht Treaty aimed to transform the internal market into a European Union, explains why those changes focused on the externalities of the single market such as EMU and Justice and Home Affairs.

2.2.- TRANSPORT POLICY (articles 74-84)

2.2.1.- Introduction

Since the elabolration of the Rome Treaty, transport policy has been considered necessary for the accomplishment of the internal market. Thanks to the SEA, the freedom to provide services in the transport sector was realised in 1992[12]. This explains why the Commission presented a White Paper in the same year on future developments in the common transport policy[13]. By this the Commission introduced a new global approach giving transport policy a new orientation to tackle the problems created by the liberalization of this sector into an integrated market.

In fact the growth of traffic - due to the implementation of the internal market - created the necessity to deal with transport safety for goods as well as for persons. Moreover, the negative environmental effects had to be considered. Therefore, the Council adopted conclusions in December 1994 on transport and environment, stressing the need to take greater account of environmental protection requirements in transport policy. In particular, it advocated transfering some particularly polluting road and air traffic to rail and waterways, developing public transport and setting limits for motor vehicle emissions based on best available technologies.

2.2.2.- Innovations introduced by the TEU and their implementation

Apart from the inclusion of the chapter on Trans-European Networks, the TEU did not introduce any major changes to Transport policy. The minor changes which were adopted strengthened the EP's position by introducing the co-operation procedure (see Art. 75 (1)), introduced the consultation of both the E.P and ECOSOC (see Art. 75 (3)) and formalized transport safety as a new area of competencies (see Art. 75 (1) (c)).

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[12]see Constantinesco, Kovar, Simon, op.cit. p.208.

[13]COM(92)494 final 2.12.92.

Since the entry into force of the TEU, only 2 legal acts have been adopted on the basis of article 75:

- Directive 94/55EC on the approximation of laws of the Member States with regard to transport of dangerous goods by road.
- Council Regulation (EC) no 844/94 amending Regulation no 1101/89 on structural improvements in inland waterway transport.

and seven proposals from the Comission are still working their way through the legal process, most of them dealing with safety issues:

- proposal for a Council directive on the licencing of a railways undertaking (JO no C 24/28.1.1994)
- proposal for a Council directive on approximation of the laws of the Member States with regard to transport of dangerous goods by rail. (COM (94)- 573 final)
- proposal for a Council directive on admission to the occupation of roads, haulage... (codified directive) (COM (93) 586 final)
- proposal for a Council directive on uniform procedures for checks on transport of dangerous goods by road. (JO no C 26/29.1.1994)
- proposal for a Council regulation (EC) amending Council regulation (EEC) n° 3821/85 and Council directive 88/599/EEC on recording equipment in road transport. (JO no C 243/31.8.94)
- proposal for a Council directive laying down maximum authorized weights and dimensions for road vehicles over 3.5 tonnes circulating within the Community (JO no C 38/8.2.1994)

2.2.3.- Conclusion

As said before, the TEU did not modify significantly the provisions of transport policy. Nevertheless the new title on Trans-European Networks introduced by the TEU, and the new provision on the Cohesion Fund have a direct influence on the scope of transport policy.
Furthermore, the main challenge for transport policy in the future will be the integration of environmental aspects.

for the achievement of what it calls the Economic and Monetary Union (EMU), with very elaborate provisions regarding institutions and procedures.

The next step is to make a list of the procedures set out in the Treaty for the relevant provisions concerning EMU, after which, we will examine the timetable. A distinction can be made among the procedures[18], with respect to, on the one hand, those common to other policies (see table 1 below), and on the other, those specific to the EMU.

TABLE 1 - Procedures common to other policies

a) **Co-operation Procedure (Article 189c - 4 cases)**
1. Multilateral surveillance (Article 103 (5))
2. Application of prohibition of privileged access (Article 104a (2))
3. Application of prohibition of assuming commitments and overdraft facilities (Article 104b (2))
4. Issuence of coins (105a (2)) with approval of ECB
(b) **Simple consultation to European Parliament with qualified majority from the Council (1 case)**
1 Rules for application of protocol on excessive deficit (104c (14), third subparagraph)
(c) **Non-consultation with unanimity in the Council (1 case)**
1- Measures appropriate to the economic situation (Article 103a (1) and (2))

18 The list is taken from the "Rapport sur le fonctionnement de l'Union Européene" (presented by the Commission), 10.05.1995

TABLE 2 - Procedures specific to EMU[19]

(a) Council Qualified Majority, following:

1. report from Commission, opinion of the Monetary Committee, opinion and recommendation from Commission, having considered observations of member states concerned - Excessive deficits (Article 104c (6))

2. recommendation of ECB after consulting EP and Commission - Implementing measures provided for by statute of ESCB (Article 106 (6)), this same procedure: limits and conditions under which ECB can impose fines, etc. (Article 108 (3))

3. recommendation from European Central Bank (ECB) or Commission after consulting ECB - Exchange-rate policy (Article 109 (2))

4. opinion of Commission and consultation of Monetary Committee - Protective measures - Stage 2 of EMU (Article 109i (3))

5 (Council elaboration of draft report), recommendation of Commission, report to European Council, conclusion European Council, and informing the European Parliament - Co-ordination of Economic policy of Member States (Article 103 (2))

6. proposal from Commission, consultation of ECB and of the Economic and Financial Committee, President of the Council shall inform the EP - Composition of Economic and Financial Committee (Article 109c (3))

7. recommendation of ECB, consultation of Commission, assent of European Parliament - Technical modifications of statutes of ESCB (Article 106 (5))

(b) Council unanimity, following:

8. (of those States without derogation), proposal from Commission, consultation of ECB - Introduction of ECU as the single currency and related measures (Articles 109l (4) and 109l (5))

9. recommendation from ECB after consulting European Parliament - Exchange rates of ECU with non-Community currencies (Article 109 (1))

(c) Others

10. Commission and European Monetary Institute Report to the Council, opinion of EP, assessment by Council and decision by Council meeting in the composition of Heads of State and Government (QM) - Entry into stage 3 in 1997 (Article 109j (3)), entry into stage 3 in 1999 (Article 109j (4))

11. Council super qualified majority voting and recommendation of the Commission, having considered observations of the Member States concerned - Excessive deficit (Article 104c (6))

19 The following procedures are listed without any clear classification due to the difficulty in defining a proper thematic or functional distinction among them.

The timetable for the achievement of the EMU is divided into three stages. Stage 1 started on 1 July 1990 (already before the entry into force of the Treaty) with the complete liberalisation of capital movements. Other requirements were:

1. Belonging to the narrow band of the EMS (it originally referred to as $\pm$ 2.5% ($\pm$ 6% for Spain and Portugal); due to monetary turbulence during the summer of 1993, the band is set at $\pm$ 15% for all Member States);

2. Submittance of an economic convergence programme to the Commission (up until now, 11 Member States have presented their convergence programmes, Luxembourg is not required to due to its fulfilment of the convergence requirements).

For the preparation of the second phase, the Council adopted a number of decisions and regulations[20]. This allowed stage 2 to start at the date set out in the Treaty. This stage was initiated on 1 January 1994. It is the so called convergence period. Rules on budgetary discipline are by now compulsory [21]. Between the entery into force of the Treaty and the end of 1994, a total of 8 legal acts (all Council Decisions and Regulations) have been adopted. For the most part, the provisions establishing these measures were very explicit as to the procedural and chronological framework of their adoption. In only one case was Article 235 used as legal base[22].

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20 - Council Regulation (EC) n. 3605/93 of 22 November 1993 on the application of the Protocol on the excessive deficit procedure annexed to the Treaty establishing the European Community.
- Council Regulation (EC) n. 3603/93 of 13 December 1993 specifying definitions for the application of the prohibitions referred to in Articles 104 and 104 b of the Treaty .
- Council Regulation (EC) n. 3604/93 of 13 December 1993 specifying the definitions for the application of the prohibition of privileged access referred to in article 104 a of the Treaty.
- 93/716/EC: Council Decision of 22 November 1993 on the statistical data to be used for the determination of the key financial resources of the European monetary Institute.
- 93/717/EC: Council Decision of 22 November 1993 on the consultation of the European monetary institute by the authorities of the Member States on draft legislative provisions.
- Council Regulation (EC) n. 3607/ 93 On the extension of the application of privileges and immunities to the EMI.
94/7/EC Council recommendation on the broad guidelines of the economic policies of the Member States and the Community (after a Commission Recommendation)

21 The Commission adopted a Recommendation on the *broad guidelines of the economic policies of the Member States and on the multilateral surveillance* (25 may COM (94) 217) from article 103.2. This gave placed to the adoption of a recommendation by the Council 94/480 EC of 11 of July .
- A first exercise on the evaluation of the excessive deficits based on the procedures fixed in the Council Regulation (EC) n. 3605/93
- Some rules concerning restrictions to the financing of public deficits having entered into forced, the Member States adopted, for the essential, the legislative measures required. They also started doing the necessary legislative modifications for the independence of their Central Banks.

22 Council Regulation (EC) n° 3320/94. On the consolidation of the existing Community legislation on the definition of the ecu following the entry into force of the Treaty on the European Union (OJ n° L 350 of 31.12.94, p. 27). The aim of this Regulation was to provide for a greater transparency.

TABLE 3 - List of adoptions for Stage 2

Legal Basis	Commission proposal	ESC opinions	EP 1st/single reading	Amended Com proposal	Common position	EP second reading	Council adoption
235	1		1				1
102a to 109m	7	4	7	5	2	2	7

Source: European Commission: General Report on the Activities of the EU, 1994

Apart of the legal acts, the European Parliament has been quite active in emitting Reports and Resolutions. Also the Commission has elaborated several studies.[23]

As the Council stated, deadlines for the adoption of legal acts have been entirely respected.[24] Certain procedures, such as the multilateral surveillance and budgetary surveillance to avoid excessive public deficits are already being applied. The former was put to use in 1994 marking the reinforcement of economic policy coordination. Concerning the latter, budgetary surveillance, the Council has recently applied for the first time this procedure aiming at further convergence from the Member States. [25]

The European Monetary Institute was also created within the set deadline (1 January 1994). Its main function comprises the preparation of the third stage of EMU and the strengthening of the co-ordination of the monetary policies of the Member States. It has been consulted on several occasions, on both national and Community legislative proposals.[26] Further activities for the readiness of the third phase are also being pursued.

The Treaty envisaged two possible starting dates for this phase. In summary, the Treaty sets the deadline of before the end of 1996 when the Council will have to decide whether a majority of Member States meet the Convergence criteria, and in this case, set a date for the beginning of stage 3. Otherwise, this final stage will automatically start on 1 January 1999,

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23 Most recently, *Green Paper on the Practical Arrangements for the Introduction of the Single Currency*, 31 May 1995.

"La deuxième phase de l'union economique et monétaire a commencé, comme prévu, le 1er janvier 1994. Toutes les mesures necessaires à la mise en ouvre de la deuxième phase et concernant, d'une part, le fonctionement de l'Institut Monétaire européen (IME) et, d'autre part, les définitions pour l'application de certaines dispositions spécifiques (l'interdiction de l'accès privilégié et du financement monétaire, procédure concernant lmes déficits excessifs) ont été adoptés dès l'entrée en vigueur tu TUE [...]". *Projet du Rapport du Conseil sur le fonctionnement du Traité sur l'Union Européenne, page19.*

25 *Projet du Rapport du Conseil sur le fonctionnement du Traité sur l'Union Européenne, page20.*

26 See *Commission General Report 1994, page 27.*

for those countries meeting the convergence criteria.[27] Countries not meeting these criteria, will be granted a derogation until they meet them.

Concerning the meeting of the convergence criteria by the member States, this is the current situation:[28]

- on public finances (budgetary deficit under 3% of GDP and public debt under 60% of GDP), 3 countries at the moment meet this criteria: Germany, Ireland and Luxembourg,[29]
- In 1994, 11 Member States had an inflation of 3% or less (i e. with the exception of Greece, Italy, Spain and Portugal),
- on long term interest rates, 8 Member States converge towards 6.8% (i.e. with exception of Spain, Portugal, Italy and Greece),[30]
- as of the summer of 1993, all Member States respect $\pm$ 15% band, which will remain.[31] Nevertheless, during 1994, monetary stability has increased;

With regard to the current situation, the following is the most probable scenario:[32]

- it is not likely that the 3rd phase will start on 1 January 1997,
- it is not likely that all Member States will able to pass to the third phase at the same time,
- the adoption of the single currency will be a process of three phases:

    1. Decision on the passage to the third phase
    2. Effective start of the third phase (with irrevocable fixed parities)

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27 Very briefly, these Convergence criteria regard to:
- price stability
- public finances (art 104 c and attached Protocol: debt and deficit)
- exchange rate stability
- stability being reflected by long term interest rates.

28 See *Agence Europe* of 10 and 11 April 1995, p. 7 and *Agence Europe* of 1 June 1995, p. 5.

29 This percentages are given taking account not only of the current situation but also of the tendency

30 See *Agence Europe* of 8 April 1995, p. 1 of Annex, based on the first annual report of the EMI. The new Member States were not considered.

31 See *Agence Europe* of 7 December 1994, p. 6.

32 See *Agence Europe* of 10 and 11 April 1995, p. 6.

3. Entry into circulation of the single currency (around 2003)

2.3.3.- Remarks: Possible issues for the 1996 IGC

Criticism has been made concerning the large number of powers that remain in the hands of the Council[33] (which means, ultimately the Member States). This is especially with respect to the relatively small role played by the Parliament. The European Parliament feels that this leads to a democratic deficit, that should be the object of revision in the 1996 IGC in order to achieve a better balance of power. In concrete terms, the EP has asked [34]:

1. To be informed as of right in the case of Commission's recommendations (103.4) and opinions (104 c) to the Council.

2. To be systematically consulted where the Treaty provides for adoption of recommendations of economic guidelines by the Council (Articles 103, 104c, [35] 109 and 109j)

3. Right to the President of the European Parliament to appoint two members of the economic and financial Committee (Article 109c (2))

The Commission has asked that the provisions of the Treaty regarding Economic and Monetary Union should not be re-opened in the 1996 IGC, considering that "it is one of the parts of the Treaty that functions well"[36]. In spite of this and apart from the imbalance of powers, there is a certain number of questions that could be addressed. Briefly, these are as follows:

-In the other policy fields, the institutions asked for a rationalisation of procedures. Although the EMU has a lot of different and complicated procedures, no one has mentioned a simplification.

-Is the current political infrastructure adequate to face a durable Monetary Union? The Bundesbank has argued that it is inadequate.

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33 See for example Dr R Dunett in "Legal issues of Maatricht Treaty" Chapter 9: "Legal and Institutional Issues affecting Economic and Monetary Union" , p. 135

34 ***European Parliament Draft Report** on the operation of the Treaty on the European Union with a view to the 1996 intergovermental conference.*

35 Concerning this Article 104 C relative to the proccedure on the excessive deficit, the Commision has pronced itself in the following terms "[...] L'information au Parlement européen est assurée par la Commission et le Conseil. La Commission s'attache à donner très tôt au Parlement européen les motifs qui lui permettent de recommander au Conseil de juger excessif les déficits des Etats membres [...]" *Rapport sur le fonctionnement du Traité sur l'Union Européenne (présenté par la Commission). Du 10.05.1995.*

36 See declarations of Jacques Santer concerning this respect in *Agence Europe of 10 and 11 april 1995, page 7.*

-Since it seems unavoidable that only a group of countries are able to meet the convergence criteria within the deadlines, it would be convenient to make a better clarification of the rules concerning relations between Member States that enter the Monetary Union and those that are granted a derogation.

-There is one important danger for the Community in aiming for Monetary Union: following to its adoption, a Member State may suffer a specific economic shock that cannot be dealt with through national fiscal means[37]. This risk is due to the lack of an appropriate fiscal instrument within the Community budget. Several Commission Reports[38] have stressed the need for a common fiscal policy. Furthermpore, the Bundesbank maintains the need to go further in a transfer of authority in the fiscal field. Negotiations in this respect are however very difficult and the chances of it not being successful are quite high. One of the problems is the small size of the Community budget, which constitutes a very sensitive issue.

2.3.4.- Conclusion

The activities of the Institutions concerning the implementation of EMU can be regarded as satisfactory. Procedures and deadlines have been respected. The answer to the question of whether the EMU will be some day achieved will depend on economic performance and political will. The activities of the institutions give reason to be optimistic.

2.4.- SOCIAL POLICY(117-125)

2.4.1.- Introduction

The social dimension included in the Treaty of Rome aimed at supporting the implementation of the free movement of persons within the common market. At that time, the promotion of that policy was made mainly through Article 121 which permits the Council to adopt measures to implement social security of migrants workers, and through Article 118 which allows the Commission to promote collaboration on social issues between Member States.

This new step came about through the implementation of the SEA which enlarged the scope of social policy. For the first time it was recognized that the social dimension should be taken into account with regard to the implementation of an integrated internal market. Thus, three new elements were introduced in the Treaty: Articles 130a to 130e on economic and social cohesion; Article 118a which allows the Council to take directives in the field of workers' health and safety; and finally Article 118b elaborating provisions on the social dialogue between social partners.

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37 Because the member State will lose the intrument of exchange rate adjustment and its right to run a budget deficit will be curtailed.

38 Delors Report para 29, Werner Report 13 and 14 and Report on the role of Public Financing in European Integration (Commission pub ref II/10/77/E)

Nevertheless, by the end of the 80's, the United Kingdom strongly questioned the relevance of a "European" social policy, stressing that the less the governments intevene, the better labour markets work. Thus the British approach collided with the other member states in 1989 for the signing of The Charter of Fundamental Social Rights for workers which established a set of rights for workers and marginalized people.

2.4.2.- Innovations introduced by the TEU and their implementation

As the British government refused to adopt the Social Charter, it also refused in 1991 to adopt the proposals for amendments of the social chapter. As a result of this, a compromise was found no major amendments were introduced in the EC Treaty, but the social policy protocol and an agreement were signed. As a consequence the following provisions have now determined the coverage of social policy:

-the social chapter (articles 117 to 125)
-Protocol on social policy (protocol n° 14 annexed to the Treaty)
-Agreement on social policy (included in the protocol)
-Protocol concerning the implementation of article 119 of the Treaty (Protocol n° 2)

Concerning the social chapter of the Treaty, the TEU did not change considerably the decision-making process: as one of the most important provisions Article 118a is still based on the co-operation procedure (Article 189c), co-decision, which would have enlarged even more the role of the European Parliament, was not introduced in this field. Only in the new policy areas of education , vocational training and youth (Article. 126 and Article 127), culture (Article 128) and public health (Article129), have the powers of the European Parliament been increased, with the introduction of the co-decision procedure. Nevertheless, those news fields cannot be considered as "the core" of social policy.

Protocol n° 14 on social policy was signed by the twelve Member States but stressed that only eleven of them "wish to continue along the path laid down by the 1989 Social Charter" and by that the United Kingdom could remain outside participation of the Agreement annexed to it. The Agreement intended to go further in the implementation of the Social Charter, in conformity with the Social Action Programmme.

Concerning the legal framework, the Social Policy Protocol authorises the 11 Member States[39] to use the "institutions, procedures and mechanisms of the Treaty for the purposes of making and applying amongst themselves acts and decisions required to give effect to the Agreement annexed to the Protocol". A new form of qualified majority voting in the Council was introduced which differs from article 148 (2) of the Treaty. In other words, a legal act requiring a majority will be adopted with 44 out of 66 votes leaving the United Kingdom out of the decision making procedure in the Council. Decisions requiring unanimity will be adopted eleven Member States.

[39]Austria, Finland and Sweeden are, since their accession, also participating in the Agreement.

As for the annex of the Social Protocol, the Agreement covers mainly the same fields laid down in the provisions of the Treaty. It remains unclear however as to what legal basis shall be applied in the future for the approval of social legislation. In this context, it is feared that any coherence in the field of social policy will disappear. Therefore, the whole decision-making procedure became even more complicate after the implementation of the TEU.

Since the implementation of the TEU, the legal work on social policy has been as follows: 8 legal acts have been proposed by the Commission. Only three of them have been adopted by the Council.

Adopted acts were:

- Directive 94/33/EC on the protection of "young people at work", based on Article 118a (following Article 189c procedure);

- Regulation n° 2062/94 on "European Agency for Safety and Health at Work" was adopted under Article 235;

- Directive 94/45/EC on the "European Works Council" is based on Article 2 of the Agreement on Social Policy annexed to the Treaty (following procedure 189c).
This directive was the only one adopted under the Agreement since the entry into force of the Treaty on European Union. The Commission decided to take recourse to this Agreement following the failure to achieve unanimous agreement within the Council, despite the broad consensus between most of the Member States on the proposal presented in 1991[40].

The proposals of the Commission which are still undergoing the legal process are as follows:

- Proposal for a Directive on saveguarding of employees; rights in the event of transfers of undertakings[41] based on Article 100;

- Proposal for a regulation on the application of social security schemes to employed persons, self employed persons and members of their families[42] based on Article 51 combined with Article 235;

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[40]see European Commission "General Report on the activities of the EU-1994", Brussels 1995, p.205.

[41]OJ C274 / 1.10.94

[42]OJ C 143 / 26.5.94

- Proposal for a Directive amending Directive 89/655/EEC[43] based on 118a;

- Proposal for a Directive on protection of workers from exposure to chemical agents[44] based on Article 118a

- Proposal for a Directive on protection of workers from exposure to physical agents[45] based on Article 118a

2.4.3.- Conclusion

The conclusion might be that the Agreement on Social Policy has been used rarely within the legal work of the Commission (only once), because the Commission considered to use it only when it is impossible to reach a decision among the 15 Member States. Therefore the future use of the Agreement will show if it causes a real harm to the coherence of the social policy.

2.5.- EDUCATION, VOCATIONAL TRAINING AND YOUTH (Arts. 126-127)

2.5.1.- Introduction

Of the new policies introduced by the Treaty on European Union, it is only those aimed at EDUCATION, VOCATIONAL TRAINING AND YOUTH, set out in Articles 126-127, which have been subject to further development and concretisation in the form of major Community legislative acts, already adopted and ready for implementation, namely the multiannual Community Action Programmes in the field of education (Socrates), vocational training (Leonardo da Vinci) and youth (Youth for Europe III). These three programmes strengthen existing Community measures and, following the wording of the respective articles in the Treaty, complement the work of the Member States, while, at the same time, respecting their cultural diversity and their responsibility for the content and organisation of the areas in question.

In fact, in accordance with the principle of subsidiarity, it has been recognised that in the general field of "education", economic, social and technological trends require a minimum level of joint action, although no reference has at any moment been made to a genuine "education policy" as such. Advances have been possible and faster in these fields, in comparison with those of culture, public health or consumer protection, due, firstly, to the existence of previous Community measures (Erasmus, Lingua, Force, Youth for Europe, etc), some of them with very successful results, which were initially enacted as a necessary

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[43]OJ C 104/ 12.4.1994

[44]OJ C 165/16.6.93

[45]OJ C 77/ 18.3.93

complement to the completion of the single market (free movement of students, etc), and, secondly, to the close link between these fields and those covered by the White Paper on Growth, Competitiveness and Employment, especially in the case of vocational training.

2.5.2.- Education (Article 126)

2.5.2.1.- Innovations introduced by the TEU

The Treaty on European Union introduces in Article 126 a whole new field of action, education, which expands upon the previous succinct reference to a common vocational training policy made in the former article 128. Measures taken in this field are in general not to go any further than encouraging cooperation between Member States and, only if necessary, should they be extended to supporting and supplementing their action. The Council may adopt two types of measures, namely incentive measures and recommendations; any harmonization of the laws and regulations of the Member States is expressly excluded. The former type of measures follows the co-decision procedure, the latter require qualified majority within the Council.

2.5.2.2.- Implementation

The recent Parliament and Council Decision of 14 March 1995 establishing the Community Action Programme in the field of education (1995-1999) SOCRATES (JO L87 20.04.95) constitutes the major action taken on the basis of Article 126 since the entry into force of the TEU. It is based to some extent on earlier activities, especially under the Erasmus and Lingua programmes, but also introduces new measures designed to encourage transnational cooperation in school and higher education, language skills and open and distance learning.

SOCRATES is conceived as a single umbrella programme, comprising both new and previously existing programmes. It seeks to introduce a European dimension into all levels of education. Drawing on a common framework of objectives, which underpins and supplements the Member States' initiatives, it aims at simplifying and rationalising the organisational and budgetary facilities for all Community measures in the field of school and higher education.

The SOCRATES programme has not been yet implemented to the extent of having introduced radical changes in the organisation and internal institutional structure of the Erasmus and Lingua programmes, except for the initial organisational split of the latter; in fact, its respective Vademecum and Modus Vivendi have not yet been adopted.

The three main components of the SOCRATES programme are: higher education (Erasmus), school education (a new programme known as Comenius, set up along the lines of Erasmus)

and horizontal measures, which include language skills in the Community (Lingua, now split up into a non-unitary structure), open and distance learning and exchange of information and experience (Euridice, Arion...). The major changes involve the extension of the Community's activities to the field of school education and the horizontal nature given to the teaching of language skills.

Other measures in the field of education include the adoption by the Commission of the "Communication on education and training in the face of technological, industrial and social challenges", as a follow-up to the White Paper on Growth, Competitiveness and Employment (23.11.94), and the "Communication on synergies between the recognition of diplomas for academic and vocational purposes" (13.12.94); as well as the Council conclusions on the cultural and artistic aspects of education (21.06.94), the Council resolution on the promotion of statistics on education and training (5.12.94) and the more significant Council Decision declaring 1996 as European Year of Lifelong Learning.

2.5.3.- Vocational training (article 127)

2.5.3.1.- Innovations introduced by the TEU

The new Article 127 of the TEU replaces former Article 128 which already enabled the Council to lay down the general principles for implementing a common vocational training policy. The new wording refers to a vocational training policy which shall support and supplement the action of the Member States. The aims of this policy are closely linked to those of the industrial and social policies of the Union. Article 127§4 indicates the cooperation procedure for the adoption of measures in the field, which under no circumstances may include the harmonization of the laws and regulations of the Member States.

2.5.3.2.- Implementation

The adoption of the Council Decision of 6 December 1994 establishing a Community Action programme for the implementation of a vocational training policy (1995-1999) LEONARDO DA VINCI signifies the first step in the development of a genuine Community vocational training policy, the latter being a characteristic which differentiates it from education and culture. The use of qualified majority for the adoption of legislative texts in the areas of both education and vocational training has proven satisfactory, although incentive measures and recommendations are the only measures available.

The LEONARDO programme has the same pattern of a single umbrella programme as SOCRATES, as well as its organisational and budgetary aims and implications. Its Vademecum and Modus Vivendi have already been adopted. LEONARDO also builds on the experience of previous programmes (including COMETT, PETRA, IRIS, EUROTECNET, FORCE), but is new in a number of important ways, namely the coverage of all fields and

aspects of vocational training (even comprising the development of language skills), a more strategic approach in working towards the achievement of specific objectives and a more integrated approach in so far as it seeks to break down the barriers between initial and continuing training and university-enterprise cooperation.

LEONARDO, on the one hand, supports and supplements the actions of the Member States through a common framework of objectives and, on the other, establishes a set of Community measures, some already existing, to stimulate the development of vocational training systems, provisions and actions in the Member States.

Complementary measures concerning vocational training include, among others, Council Regulation 1131/94 transfering CEDEFOP's (European Centre for the Development of Vocational Training, founded in December 1975) headquarters from Berlin to Thessaloniki, in accordance with the Declaration adopted at the European Council of Brussels taking effect on 1 September 1994.

2.5.4.- Youth (Article 127)

2.5.4.1.- Innovations introduced by the TEU

The inclusion of provisions on youth policy within the TEU can be explained by the need to educate and inform European youth of the process of European integration, as well as to create a genuine European civil identity, especially among the younger generations and even more so amongst those of them who are disadvantaged and have a weak sense of citizenship. The Treaty on European Union does not establish any specific article devoted to youth, but the aims covered in the definition of the Community's education and vocational training policies necessarily refer to and include measures concerning youth.

2.5.4.2.- Implementation

The Third Phase of the YOUTH FOR EUROPE programme (1995-1999) was adopted on 14 March 1995, simultaneously with SOCRATES; the second phase of the programme already involved the EFTA and EEA countries. In comparison with the second phase of the programme, the third diversifies and develops the measures concerning youth exchanges and education/training, and includes initiatives to foster a spirit of mutual tolerance and understanding as part of the Union's fight against racism and xenophobia.

Other measures include the adoption of Council Conclusions on the promotion of voluntary service periods for young people (JO C348, 9.12.94).

2.6.- CULTURE (Art. 128)

2.6.1.- Introduction

The inclusion of culture with its own legal basis in the TEU is explained by some authors as being part of the general attempt by the Union's institutions to pursue policies aimed at bringing the European Union closer to the people. The new Article 128 sets the tone for the Union's cultural activities; subsidiarity and respect for national and regional diversity are more than ever the guiding principles. The Union is also encouraged to highlight Europe's common cultural heritage and take account of cultural aspects in its other policies (Article 128§4 -horizontal principle); the latter is one of the main reasons for the difficulty in setting clear limits between a "purely cultural policy" and others concerning telecommunications, media and the audiovisual industry, and even the information and communication policy of the Union itself.

2.6.2.- Innovations introduced by the TEU

Both the objectives and the instruments (incentive measures, excluding any harmonization of the laws and regulations of the Member States, and recommendations) set out for the Union's cultural policy in Article 128§5 and, above all the decision-making procedure chosen, which requires unanimity voting at the Council throughout the whole of the codecision procedure, transform the area of culture in practice into a rather purely declarative than an operational one.

The European Parliament[46] qualifies this double requirement of codecision and unanimity, in its preliminary documents leading to the adoption of a Report on the Functioning of the TEU, as "*aberrante*". It also considers that the principle of subsidiarity is clearly misused here as a legal instrument to impose an ambiguous framework which in practice blocks any serious, major measure in the field.

2.6.3.- Implementation

Following the entry into force of the TEU, the Commission presented a "Communication on the EU's action in support of culture" on 27 July 1994, which was favourably received by the Council on 10 November 1994. The Council also adopted some Conclusions stating its intention to fuse the various strands of cultural heritage policy into a single project (17 June 1994), as well as addressing cooperation in the field of archives, and children and culture. Other attempts to start a global EU cultural policy include the consultations currently being

[46] DOC PE 212.450/fin./Part II, Opinion of the Committee on Culture, Youth, Education and the Media

undertaken by the Commission in the Member States with a view to producing a "Communication on cultural heritage" and an Action Programme.

However, since the adoption of any new programme developed on the basis of Article 128 is still pending (the Ariane, Kaleidoscope 2000 and Raphael Programmes), work in the field continues on existing pilot projects; hence the campaigns to preserve Europe's architectural heritage, the annual Kaleidoscope programmes encouraging cultural exchanges in every artistic discipline, the European Community Youth and Baroque Orchestras, the European City of Culture, the European Cultural Month in European third countries' major cities and the Aristeion Prizes (European literature prize and European translation prize).

The only major projects widening the scope of the Union's activities, undertaken on the basis of Article 128, and currently not yet adopted, are the proposals for a multiannual **Ariane** programme aimed at promoting knowledge and distribution of European literary works and a multiannual Kaleidoscope 2000 programme for the promotion of cultural exchanges.

2.6.4.- Remarks

The general impression is that the cultural dimension of the Union can only be effective if the institutions move away from the idea of "taking cultural aspects into account" and towards coordinated measures as the first stage in the introduction of a real policy in the field.

2.7.- PUBLIC HEALTH AND CONSUMER PROTECTION (Arts. 129 - 129a)

2.7.1.- Public Health (Art. 129)

2.7.1.1.- Innovations introduced by the TEU

The European Union's powers in the area of public health have had a specific legal basis since the entry into force of the TEU: Article 129 sets out a framework for action and defines the respective roles of the Member States and the Union. The Union's task is relatively limited, essentially helping to ensure a high level of health protection by encouraging cooperation between the Member States and, if necessary, supporting the action they take. Therefore the Union's action in this area is mainly concerned with preventing illnesses and major health scourges, by promoting research into their causes and transmission and providing information and education.

Harmonization of health systems and health policies throughout the Union is obviously not the aim at present; the principle of subsidiarity is clearly expressed in Article 129§2. The Commission may, though, take any useful initative to promote coordination among the policies and programmes of the Member States. Article 129§4 establishes the co-decision procedure and qualified majority for the adoption of measures in this field.

2.7.1.2.- Implementation

The Commission issued a Communication on the Framework for Community action in the field of public health as soon as November 1993, which was followed by a Council resolution of 2 June 1994. Essentially, it stresses the need, in the interests of continuity and consistency in Community policy, for multiannual programming of existing and future initiatives and the identification of priority areas for action such as cancer, drug dependence, AIDS and other transmissible diseases, health promotion, education and training, disease surveillance and the collection of reliable health data. However, the multiannual programme of Community action (1995-1999) on health promotion, information, education and training is still half-way through the legislative process.

Only certain pluriannual actions have already been adopted, especially in the fields of disease prevention, although these are limited to the provisional extension of previously existing programmes, such as "Europe against AIDS" or "Europe against cancer" until the end of 1995. In fact, proposals made by the Commission for the adoption of an Action Plan 1995-1999 to combat cancer, a Community Action Programme on the prevention of AIDS and certain transmissible diseases and a Community Action Programme on the prevention of drug dependence are still in the process of being adopted, due to the duration of the co-decision procedure.

More specific measures have been taken by the Council in health-related issues such as BSE (Bovine Spongiform Encephalopathy), the extension of the Handynet system up until 1996 for disabled people, etc, which to a certain extent prove the ambiguity in the use of legal bases in this area.

In this last respect, since the entry into force of the TEU health protection has become an element of other Community policies (horizontal principle). As an example, the Green paper on European Social Policy emphasizes the relationship between public health policy and social, environmental and economic policies.

In the preliminary documents leading to the adoption of its Report on the Functioning of the TEU, the European Parliament[47] expresses the fear that Article 129 is in fact being used by the Member States as an excuse to slow down any cooperation on health matters. It even insists on the fact that there is no reason to prevent categorically all harmonization in areas where it makes sense, such as the establishment of minimum quality provisions and criteria as far as health treatment, diagnostics and health care are concerned.

[47] DOC PE 212.450/fin./Part II, Opinion of the Committee on the Environment, Public Health and Consumer Protection.

2.7.2.- Consumer protection (Art. 129a)

2.7.2.1.- Introduction

The new powers established by Article 129a of the TEU give the Community considerable freedom of action in the area of consumer protection, with a choice of measures adopted pursuant to Article 100a or specific actions which support and supplement the policies of the Member States. Article 129a.2 establishes the codecision procedure for the adoption of measures in this field.

2.7.2.2.- Implementation

Recent experience casts doubts on the extent to which the Community has intended to make use of the possibilities arising from these new powers. In fact, the second Commission three-year Action Plan for consumers (1993-1995) shows a very limited scope for Community initiatives.

Consumer protection so far has fundamentally focused on aspects concerning the protection of consumer health and safety and the protection of consumers' economic and legal interests, albeit without a global definition of clear policy objectives.

Apart from the two Green Papers already published on "Consumer access to justice" and on "Guarantees for consumer goods and after-sales service", the Action Plan envisages only one legislative proposal, the directive on "Claims concerning foodstuffs". Two legislative acts have nevertheless been adopted using the new legal basis, namely the Council decision on the creation of a Community information system concerning home and leisure accidents (EHLASS, Decision 3092/94/EC) and the directive on "protection for purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis" (Directive 94/47/EC). Another directive on "Consumers' protection for long-distance purchasing contracts" ("vente à distance") is currently in the process of being adopted.

Other planned action is mainly concerned with very general and imprecise objectives, such as improving information and training, and supporting national consumer organizations; with regards to the latter, on 19 May 1994 the Commission inaugurated the Coline European Network, which creates a computerized link between five national consumer information centres.

2.7.2.3.- Remarks

The major conclusion to be drawn is that consumer policy has not yet become a priority, despite the current size of the internal market and the close interrelationship with its full realisation. One of the major problems regarding action in this field has been that of the use

of its specific legal basis and its overlapping with others, such as Art.100a or other articles within the framework of the Internal Market (E.g. 17th Directive adapting to technical progress Directive 76/768/EEC relating to cosmetic products, 29.06.1994).

Nevertheless, the Commission has also defended the idea that consumer interests should also be taken into account when other Community policies are drawn up (**horizontal principle**), more specifically on the question of cross-border payments.

The European Parliament[48] considers in its Report on the Functioning of the TEU that consumer rights will only be effectively protected by laying the foundations for a genuine consumer policy. It encourages the Commission to step up its legislative efforts and calls upon it to use Article 129a, the specific legal basis for consumer protection policy, as the legal basis for its proposals. Urgent action is also encouraged in the field of consumer protection concerning financial services, closely linked to the free movement of capital.

2.8.- TRANS-EUROPEAN NETWORKS (129B-129D)

2.8.1.- Introduction

The inclusion of a Title in the TEU dealing specifically with TENs stressed the importance of designing a coherent strategy for transport, energy and telecommunications networks for the accomplishment of a truly integrated internal market - furthermore, the setting-up of these networks was the centrepiece of the White Paper on growth, competitiveness and employment.

2.8.2.- Implementation

Most of the legislative work is still at the proposal stage, following the work of the Christopherson Group on transport and energy networks, and on environment; and of the Bangemann Group in telecommunications and information structures. These groups allowed for a vast consultation with national officials and representatives of the industries concerned and provided an institutional framework for the preparation of the Commission's proposals.

The TEU lays down three main conditions for the setting-up of TENs (as foreseen in article 129C, §1):
1. the definition of guidelines, objectives and priorities, leading to the identification of projects of common interest;
2. the adoption of measures to assure the interoperability of national networks;
3. the establishment of a mechanism for financial support at the Community level.

[48] DOC PE 212.450 /fin./Part II, Opinion of the Committee on the Environment, Public Health and Consumer Protection.

As far as the first condition is concerned, these general guidelines still have to be defined, negotiations being politically delicate since they determine the priority projects and therefore which projects are eligible for Community funding. The Council has already adopted a map on a transeuropean road infrastructure[49] as well as lists of projects in energy networks and high-speed train links; progress in information technology has been slower. There have been proposals by the Commission in all of these fields[50], but since these guidelines must be adopted according to the 189B procedure (Article 129D), its adoption has not yet taken place.

As for the second condition, the Commission has also presented proposals on a number of issues[51], the legislative process being still in an early stage - the procedure required is co-operation with the EP.

As regards the financing of the TENs, for the transport sector and in the four "cohesion countries", the Cohesion Fund may provide financial assistance for projects included in the TENs. The general conditions for the financing of the TENs have been detailed in a proposal from the Commission, which is still in the process of being adopted by the Council[52]. An additional source of funding is the European Investment Fund[53], since a great proportion of its financial resources will be allocated to the TENs.

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49 Decisions 93/628 and 93/629, O.J. n°L305, 10 December 1993, pp. 1 and 11

50 COM (94) 106 for transport networks; COM (93) 685 for energy netwoks; and COM (93) 347 for telecommunications.

51 For example on the interoperability of high-speed train network, on action to develop an ISDN network; and on promotion of energy technology.

52 COM (94) 62

53 Council Decison 94/375/EC, 6.6.94 (based on article 235)

2.9.- INDUSTRY AND RESEARCH AND TECHNOLOGICAL DEVELOPMENT (Arts. 130 & 130f-130p)

2.9.1.- Industry (Art. 130)

2.9.1.1.- Introduction

The introduction of Title XIII on "Industry" (exclusively integrated by **article 130**) within the Treaty on European Union is to be explained in pure terms of economic and, more specifically, political choice and consensus among Member States. All parties and institutions agree on the declaratory, and not operational, nature of the text.

2.9.1.2.- Implementation

No legislative measure has been so far adopted on the basis of article 130; to the contrary, measures directly or indirectly linked to the so-called "industrial policy" of the Union have used such diverse legal bases as art.130s (environment), art.92 (state aids)... or other concerning the fields of competition, transport, audiovisual industry and telecommunications, common commercial policy, vocational training, research and technology or technical harmonization.

With the entry into force of the TEU, industrial competitiveness has become one of the stated objectives of European integration. The Commission's White Paper on Growth, Competitiveness and Employment proposed practical solutions for achieving dynamic, job-creating growth based, among other things, on development of the information market and action to gear up European businesses for competition on world markets. The Commission adopted on 14 September 1994 a "Communication on an industrial competitiveness policy for the EU", pinpointing the steps to be taken to achieve these objectives. The Council's Resolution of 21 November 1994 stressed the progress made so far, particularly on the basis of the White Paper, regarding the improvement of the European industrial competitiveness; another previous Council Resolution stressed the relevance of SMEs and handcraft activities for the European industry.

Community action has continued through the traditional mechanisms in what concerns individual industrial sectors (shipbuilding, textiles, steel...).

2.9.1.3.- Remarks

The principle of subsidiarity leaving a broad "marge de manoeuvre" to the Member States in the field, the article 130 cannot be envisaged for the future in its current wording as a basis for an "ad hoc" industrial policy, but for the adoption of complementary measures to other

economic policies of the Union. Article 130 is likely to be very scarcely used due to the exigence of unanimity voting and the controversial political context that already surrounded its adoption and inclusion in the Treaty.

2.9.2.- Research and Technological Development (Arts. 130f- 130p)

2.9.2.1.- Introduction

The changes introduced by the Treaty on European Union in the field of Research and Technological Development mainly consist of punctual and procedural modifications; it was the Single European Act the legal text that set the determinant reforms in this area by means of the former articles 130f to 130q.

Article 130f.1 legitimises the promotion of all research activities deemed necessary by virtue of other policies of the Union, therefore cases like medical or environmental research , which could hardly be justified by the exclusive objective of industrial competitiveness. Article 130h also underlines the need to coordinate the research and technological development of both the Community and the Member States so as to ensure their mutual consistency. No major and structured institutional framework is defined for this coordination.

Articles 130i and 130j, dealing with the definition, objectives, decision-making procedure and implementation of the multiannual Framework Programme and its specific programmes, redefine the structure of the main measures for action in this field. Basically, they change from consultation to codecision procedure for the adoption of the multiannual Framework programme, and from cooperation to consultation for the adoption of the specific programmes.

The European Parliament[54] has expressed in the preliminary documents to the adoption of its Report on the Functioning of the TEU its concern about the risk of curbing its rights by this replacement of procedures, although it acknowledges the advantages .

2.9.2.2.- Implementation

The Fourth Research and Technological Development Framework Programme (1994-1998) was adopted by the Parliament and the Council as early as on 26 April 1994, being one of the first major initiatives, for its institutional and financial implications, taken after the entry into force of the TEU following the codecision procedure. The Framework Programme in the field of research and training for the European Atomic Energy Community (1994-1998) covering nuclear research activities over the same period was adopted parallely on the same

[54] DOC PE 212.450 /fin./Part II, Opinion of the Committee on Research, Technological Development and Energy.

day. The Fourth Framework Programme has been agreed, in spite of the extreme complexity of its procedure, this is, codecision and unanimity voting at the Council, in a record time of 10 months.

However, most observers share the opinion of the Commission[55] contained in its Report on the Functioning of the TEU that this extremely short delay has been "the product of exceptional circumstances"; all institutions were aware of the risk of immediate interruption of the existing Community research actions and programmes if a global decision was not attained by the end of 1994, together with the urgency imposed on the European Parliament by the celebration of elections in the month of June of the same year.

The Fourth Framework Programme was also put into immediate operation in a record delay. All its specific programmes were approved in three successive waves, namely in July (2), November (7) and December (11+2) 1994[56], by means of more than twenty legislative acts; this has to a certain extent been favoured by the use of the cooperation procedure and simple consultation with the Parliament, imposed by article 130o§2. Calls for proposals were issued for many of these programmes on 15 December 1994. In fact, in spite of the extreme celerity in the adoption of the whole pack of necessary Community measures in the field, both the decision-making procedure and the different categories of acts have proved to be too complex for an effective and normal implementation of a Community R&D policy.

First discussions have also been undertaken on the coordination of research policies and activities in Europe. The Commission has adopted a relevant Communication on the subject, following the recommendations set out in the White Paper on Growth, Competitiveness and Employment and the Conclusions of the Corfu European Council.

In what concerns institutional matters, the Commission adopted a Decision creating the European Science and Technology Assembly, a body set up to facilitate dialogue between science and industry at European level, as well as between the Commission and the European research community. The future activities of both CREST and COST have been redefined and more closely linked with the multiannual Framework Programme.

[55] Commission Européenne, Rapport sur le fonctionnement du Traité sur l'Union Européenne, SEC (95) 731 final, Bruxelles, 10 mai 1995, p.44.

[56] European Commission, General Report on the activities of the European Union 1994, pp.88-89.

2.10.- ECONOMIC AND SOCIAL COHESION (130A-130E)

2.10.1.- Introduction

Economic and social cohesion was one of the main issues on the table during the IGC on Political Union that opened in Rome in December 1990. The reinforcement of cohesion between Member States was understood by many as being a side payment for Southern countries for their agreement to the EMU project. Calls for greater cohesion were centred around four main topics[57]: include economic and social cohesion as one of the objectives of the Union and one of the guiding principles of policy formulation and implementation; creation of new financial instruments explicitly linked to EMU to help lagging Member States to pursue development plans within a framework of stricter budgetary discipline; reform of the own resource system, with the introduction of the principle of progressive contributions to the budget; and finally a reform of the intervention criteria of the Structural Funds with the objective of rendering the funds more operational and effective through a revision of co-financing rates and eligibility criteria. The results of the negotiations led to the inclusion of substantial changes in the Treaty, which however fell short of the demands put forward by the Southern Member States during the IGC.

2.10.2.- Innovations introduced by the TEU

The Maastricht Treaty introduced several changes on the way cohesion is approached by the Union. Firstly, economic and social cohesion is considered as one of the general objectives of the Union (Article B: "promote economic and social progress (...) through the strengthening of economic and social cohesion and through the establishment of economic and monetary union, ultimately including a single currency"). The goal of greater economic and social cohesion is also one of the principles mentioned in Articles 2 and 3. Former Title V was fundamentally changed: new Title XIV contains the instruments through which the Union will try to achieve the goals set in the above mentioned articles. Hence, in Article 130A, the general aim of cohesion is maintained but its scope is enlarged to include rural areas, in anticipation of the effects of a CAP reform and an alignment of prices. Article 130B is changed to include cohesion as one of the issues to be considered not only at the stage of policy implementation as before but also at the stage of policy formulation.

In this same article, a periodical report on cohesion from the Commission to the EP, the Council, the Ecosoc and the Committee of the Regions is introduced. This report is intended to assess the results of the policies pursued by the Union every three years and may bring about the adoption of necessary actions outside the framework of the Funds, albeit that unanimity in the Council is required. Article 130B thus provides a legal basis for the adoption of specific actions, which increases the flexibility of EU structural intervention and leaves a margin of political manoeuvre for the Member States.

Article 130D establishes in its first paragraph a reformulation of principles, if not practices. Thus, this first paragraph of article 130D reaffirms the need to coordinate the

57 According to CLOOS J. *et al*, "Traité de Maastricht, Genèse, Analyse, Commentaires", 1993, p.152

action of the Funds and other financial instruments, defining their tasks and priorities, introducing the assent procedure for the EP and the consultation of the Committee of the Regions for the adoption of the Regulation. The major change introduced by this article, in its second paragraph, was the commitment to create a Cohesion Fund before the end of 1993 - the objectives of its interventions would be "to provide a financial contribution to projects in the fields of environment and trans-European networks in the area of transport infrastructure". The Fund would be set up after the opinion of the new Committee of the Regions had been considered and after the assent of the EP. To fully understand the functioning of the fund, it is necessary to turn to the Protocol on Economic and Social Cohesion annexed to the Treaty, where the conditions of eligibility to the new fund are laid down; those conditions result in the eligibility of all Member States whose GNP per capita is below 90% of the EC average and have presented a convergence programme to fulfill the conditions established in Article 104c.

The last major change introduced by the TEU in Title XIV concerning Economic and Social Cohesion was in article 130E, where the procedure for the all the implementation decisions of the ERDF was changed from consultation to cooperation.

The Protocol on Economic and Social Cohesion also includes some political commitments on the reform of the own resouce system. Although not enforceable by jurisdictional means, the Protocol is a formal part of the Treaty. It establishes the following:
- the EIB will devote most of its resources to the promotion of cohesion and the Member States are willing to increase its capital if necessary;
- the Structural Funds will be reformed and their efficiency and amount will then be reexamined, taking into account the concentration principle;
- the decision to create a Cohesion Fund is reaffirmed and the conditions to be eligible to the fund are listed;
- the Member States declare their willingness to allow a greater flexibility in the allocation of the Structural Funds so that specific needs not covered under the present Regulation are more adequately met;
- the Member States also declare to be ready to modulate the levels of EC co-financing in Structural Funds projects to avoid excessive budgetary expenditure in less prosperous countries;
- the recognition of cohesion as a priority goal of the Community and the commitment to study all the measures necessary to achieve it;
- finally, the Member States state their intention of considering the contributive capacity to the common budget of each member State; using cautious phrasing, the Member States furthermore pledge to study ways to correct the regressive elements of the current system on less prosperous Member States (i.e. look into the restructuring of CAP expenditure).

2.10.3.- Implementation

These changes resulted in the reform of the structural funds, carried out after the Treaty was signed but before its entering into force[58]. This reform incorporated many of the principles included in the TEU and the annexed protocol, especially in terms of the concentration priciple and the modulation of Community co-financing rates. After the adoption of the Reform, the priority was then its implementation - during the last months of 1993 and the first semester of 1994 the Commission negotiated the new Community

58 Regulation (EEC) n°2081/93, 20 July 1993 OJ L 193

Support Frameworks (CSFs) with the Member States as well as the new Single Programming Documents. In accordance with the Edinburgh Agreement, there was an increase of financial resources allocated to structural action, but in parallel with an extension of geographical coverage. In agreement with the new environmental provisions, especially Article 130R, implementation of regional policy started to consider environmental aspects to a greater extent.

However, the major immediate consequence of the entry into force of the TEU for regional policy was the setting-up of the Cohesion Fund. The procedure for its adoption (as foreseen in Article 130D) is the assent procedure - this resulted in a fairly long and difficult negotiation process with the EP; the fact that the new Committe of the Regions had to give its opinion on the final text only contributed to delaying the procedure.

The creation of the Cohesion Fund (CF) is especially relevant in institutional terms since it was the first time that the assent procedure was used in the legislative process. Moreover the process was under a particular constraint - the cohesion financial instrument (CFI), which had allowed the allocation of the financial resources earmarked for 1993 due to the delays in the ratification process, had to be replaced as soon as possible, not only because its validity was limited to 1 April 1994, but also because this instrument did not have all the characteristics the TEU assigned to the Cohesion Fund (such as conditionality of assistance). It can then be concluded that the adoption of the Fund was a first testing ground for inter-institutional relations as defined by the TEU - in this context, the analysis of this procedure is therefore necessary.

ADOPTION PROCEDURE OF THE COHESION FUND

Date	Stage of the Procedure	Comments
21 December 1993	Commission's proposal for a CF Regulation and an implementing Regulation[59]	CF proposal took into account the experience of the CFI
28 February 1994	Agreement in COREPER	Position could not be submitted to the Council due to the delay of the report of the Committee of the Regions[60]
10 March of 1994	Council extends the CFI until the end of 1994, as the Regulation of the interim instrument foresaw in its article 11.	It was then stated that the adoption of the final regulation has proved to be impossible due to "procedural reasons".[61]

59 COM (93) 699 final, 21 December 1993.

60 The fact that this Committee did not convene for its first meeting on 15th January as scheduled was the main reason why the setting-up of the Fund missed its 1st April deadline.

62 Through Council Regulation 566/94, 10.3.94 (extending Regulation 792/93)

9/10 March 1994	First meeting of the Committee of the Regions	Committee chose the rapporteurs on the proposal
24 March 1994	EP debated the proposal establishing the CF adopting the interim Ruiz report.	More than 60 "recommendations" were foreseen[62]: the EP formally instructed its President to open the conciliation procedure.
5/6 of April	Opinion of the Committee of the Regions approved unanimously.	It proposed several amendments on subsidiarity and partnership, along with provisions for the implementation of the CF.
19 April 1994	Council approved draft regulation	After an informal meeting between the Presidents of the Council, the Commission and the EP (see comments below).
6 May 1994	EP gives its assent	
16 May 1994	Final regulation was adopted by the General Affairs Council	It replaced the interim financial instrument as from its publication in the Official Journal[63].

One last comment on the conciliation between the EP and the Council, which was a fundamental step in assuring the assent of the Parliament. The purpose of the meeting, organised by the Presidency, was to give "all the necessary explanations" to the MEPs so that their assent could be given in the last plenary session of the legislature (from 2 to 6 of May). The conciliation between the Council and the EP led to the inclusion of 35 of the 60 amendments proposed by the Parliament. The most important of these amendments relate to the institutional aspect: during the conciliation procedure, the Council agreed to include the implementation provisions in an annex of the final regulation (and not in a separate regulation), therefore subject to parliamentary assent.

It can be concluded that although the assent procedure is usually considered as a negative co-decision power, the bargaining leverage of the EP allowed the adoption of a great part of the proposed amendments as the result of a constant dialogue with the Council. The EP thus responded well to this increased participation in the legislative process and made the timely adoption of the regulation possible.

Other important measures taken to increase economic and social cohesion relate to the implementation of the basic principles of the July 1993 reform: transparency, monitoring,

62 Resolution A - 3 0143/94, Official Journal n°C 114, p.38

63 O. J. n°L 130, 25th May 1994, p.1

partnership and evaluation. In the framework of the execution of the different CSFs several decisions were taken by the Commission, especially regarding partnership with national and regional authorities and financial control and/or evaluation of interventions.[64]

The accession of Finland, Sweden and Austria brought about the need to adapt the implementation of regional policy - this was in fact one of the major issues during the negotiations. There were two major changes: the creation of Objective 6 (Arctic regions) and the inclusion of Burgenland in Austria as an Objective 1 region. There was also a financial adaptation, through the extension of the eligibility period of projects presented until April 95 retroactively to December 94 or the date of entering into force of the Acts of Accession.[65]

In terms of Community Initiatives, there was a limited extension of geographical scope through a flexibilization of application of eligibility criteria. Some new initiatives were created, such as Rechar, Resider, Konver, Retex, Youth start, Adapt.

2.10.4.- Remarks

The most visible aspect of the changes introduced by the TEU has been the creation of the Cohesion Fund. As for the rest of the provisions of the Treaty relating both to the reform of the Structural Funds intervention criteria and of the own resource system, no major legal acts have been passed since the entry into force of the Maastricht Treaty. In fact most of the legislation adopted is related to the normal implementation of the EU's regional policy, falling into the Commission's management competencies.

This can be explained by the economic recession that hinders any move to an increased solidarity between Member States as well as the need for extensive reform brought about by the prospective of Eastern enlargement. This issue will certainly be one of the main topics at the next IGC along with a reform of the budget which is the appropriate framework to approach a matter with such political implications.

2.11.- ENVIRONMENTAL POLICY (130R-130T)

2.11.1.- Introduction

The Title on environmental policy was introduced by the SEA to bring into the Community sphere a field that had been dealt with in an intergovernmental manner. In fact, before the SEA, most of the environmental legislation was based on Article 235 of the Treaty of Rome. Since the environmental articles were very recent, the 1990 IGC did not look into this policy sector in any great detail. The resulting changes introduced by the

64 One of the most important being Commission Regulation (EC) n°1681/94, 11.7.94,concerning irregularities and recovery of sums wrongly paid in connection with the financing of structural policies (i.e. ERDF, ESF, EAGGF, FIFG and Cohesion Financial Instrument) and setting-up of an information system in this field (OJ L 178, 12.7.94). After the creation of the Coheison Fund a similar regulation was adopted to assure the financial control of the implementation of this fund (Regulation (EC) n°1831/94, 26.7.94).

65 Council Regulation (EC) 3193/94, 24.12.94, OJ L 337

TEU complemented the existing provisions but did not involve a major modification of environmental policy-making in the Union.

2.11.2.- **Innovations introduced by the TEU**

The main changes introduced by the TEU in the field of environmental policy were of two kinds: in terms of substance, there was a reinforcement of the principle of horizontal application of environmental protection (Article 130R, §2[66]); in terms of decision making procedures, there was an extension of qualified-majority voting and the role of the EP was increased through the use of the cooperation and the new 189B procedures.

The new decision-making procedures are described in Art. 130 S:
§1 Normal Procedure:

Qualified majority voting in the Council in cooperation with the EP after consultation with the Ecosoc

§ 2 Derogations:

Unanimity in the Council with consultation of the EP and Ecosoc when adopting
* provisions of fiscal nature (relate to Art. 99)
* measures concerning town and country planning, land use and management of water resources
* measures affecting a Member State's choice of energy sources.

However the Council may decide by unanimity to change to majority voting.

§ 3 Action Programmes:

Now formally voted by the Council in accordance with the co-decision procedure (Art. 189B). Implementation measures are adopted either under paragraph 1 or 2, depending on the subject

§ 4 Financing and Implementation

The Member States finance and implement environmental policy. Derogations are foreseen as regards financial support by the Cohesion Fund.

These procedural changes were aimed at improving efficiency in environmental law-making, since the previous legal basis requiring unanimity (Article 130R as introduced by the SEA) led to a very slow decision-making process. An additional problem concerned confusion over the legal basis especially with regard to internal market (article 100A only required qualified majority voting), which has produced a substantial ECJ caselaw.

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66 The principles listed in this article are: a high level of protection, restating art. 100A and reinforcing this objective in the context of environmental policy; taking into account the diversity of situations; precautionary principle; preventive action; rectification of environmental damage at source; polluter-pay principle; integration of environmental protection requirements into the definition and implementation of other Community policies; and finally a safeguard clause;

The Treaty on European Union tried to resolve these problems through procedural diversification. As can be seen above, the new Article 130S foresees four different decision making procedures: the standard procedure is co-operation with the EP; however there are derogations to this general procedure which foresee consultation with unanimity or qualified majority voting in the Council; and finally the co-decision for the adoption of the Environmental Action Programmes. This multiplicity of procedures presents a serious risk of institutional conflicts as well as increasing disputes over choice of the legal basis.

Therefore one of the main issues to be raised when analysing the implementation of the new environmental provisions will be an assessment of the efficiency of environmental law-making so that the usefulness of the above mentioned changes can be discussed.

2.11.3.- Implementation

From the entry into force of the TEU to the end of 1994, ten legal acts (directives and regulations) have been adopted. Out of these, three had Article 100A as legal basis (189B procedure) and the remaining seven were adopted under Article 130S §1/2, of which six were according to the co-operation procedure.

These figures however do not allow for a full understanding of the situation in environmental policy. Due to the longer delays involved in the new 189B procedure as opposed to the co-operation procedure, many of the Commission's proposals under the former Article are still in the pipeline. Hence it is necessary to consider previous stages of the legislative procedure:

Legal Basis	Commission Proposal	ECS/COR Opinions	Interaction EP/Council	Formal Adoption	Total
100A	1	2	3	3	9
130S,§1/2	2	5	4	7	18

Source: European Commission, General Report on the Activities of the EU, 1994

Both legal bases continue to be used for environmental policy making; the relatively low rate of adoption of acts according to the 189B procedure might be explained by difficulties linked to the setting-up of the procedure in general. As for Article 130S, it is clear that the changes as amended by the TEU have allowed for a swift adoption of major legal texts - that is to say, the objective behind generalising qualified majority voting seems to have been attained. However, this increase in efficiency was achieved at the expense of a multiplication of decision-making procedures that has produced two immediate consequences: lack of transparency and accessibility to environmental policy-making, and increased difficulties in assessing the factors determining the choice of the appropriate legal basis. The integrated approach to environment has meant that the accomplishment of the internal market must take into account environmental concerns - however, the line dividing strict environmental measures and those with internal market implications is actually very thin and subject to political influence.

There is a particularly revealing case study: the amending of Directive 85/337/EEC on Environmental Impact Assessment (EIA). This directive has been incorrectly transposed and implemented by several Member States and has given rise to a number of infringement procedures by the Commission. It is of fundamental importance in several

policy-areas (notably regional policy) and its updating and reinforcement has been a political priority for the Commission and some Member-States. Therefore, the Commission presented a proposal amending this Directive[67], taking into account the new procedural framework and intending to clarify its scope. The legal basis mentioned in the proposal is Article 130S, §1, i.e. co-operation procedure. However, in the 1994 General Report[68], this directive is mentioned under both the internal market and the strictly environmental legal bases - that is to say, at this early stage of the legislative procedure (the Ecosoc and the Committe of Regions having just given their opinion), the Commission still envisages a change of legal basis that would lead to the adoption of the act according to the co-decision procedure. This lacks clarity and once again underscores the need to coordinate between these two policy-areas which has not been satisfactoraly dealt with under the TEU.

2.11.4. Remarks

The conclusion might then be that changing decision-making procedures has not simplified decision-making in environmental policy and that coordination problems between environment and single market have remained[69]. One of the main issues as regards this policy-area in terms of the IGC 96 will then be to revise the current procedural arrangements in view of their simplification along with a clarification of the relationship between environment and internal market.

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67 COM (93) 575, 16 March 1994

68 European Commission, "General Report on the Activities of the EU - 1994", Brussels 1995, pp.480 and 508

69 "Ainsi, tout en apportant des améliorations de fond à la formulation d'une politique de l'environnement qui demande encore à être développée, le Traité a aussi accru les difficultés en matière de base juridique et de clarté du processus décisionnel." Commission des Communautés Européennes, "Rapport sur le Fonctionnement du Traité sur l'Union Européenne", SEC (95) 731 final, Bruxelles, 10.05.95, p. 45

2.12.- EXTERNAL POLICIES OF THE UNION

During the Intergovernmental Conference of 1991, the Commission had taken the stance that in matters of external policies, the situation stemming from the Single European Act was inconsistent because it divided policies that were by nature two aspects of one single policy: external relations. The Commission's view, which would have led to a real "single institutional framework" in the field of external relations, was watered down into a structure of two pillars, by which you had the external economic policy dealt with within the Community framework and the political foreign and security policy constituting a separate pillar. For reasons of clarity, the following chapter will present three distinct parts, (1) common commercial policy, (2) development policy, and (3) common foreign and security policy, followed by a conclusion in which the implementation of Article C and of the existing "passerelles" will be assessed.

2.12.1.- Common Commercial Policy(110-116)

2.12.1.1.- Introduction

Before the modification of the EEC Treaty in 1993, three legal bases were provided for the treatment of external policies: Chapter 4 of Title 2 (economic policy) concerned the common commercial policy, Article 113 of which related specifically to the conclusion of trade agreements. Article 238 of the Final Provisions allowed the conclusion of association agreements. Finally, Article 228 added to the existing confusion by awarding the Community a more general Treaty-making capacity. A major lacuna existed, related to development policy: unilateral or contractual action by the Community had to be taken using the existing Articles 113 and 238 and often Article 235 was often used to complete such weak legal bases.

2.12.1.2.- Innovations introduced by the TEU

The changes brought to the common commercial policy in the Treaty on European Union were to delete the useless articles (111, 114 & 116), to refer the procedure of conclusion of international trade agreements (without changing it substantially) to Article 228, and to adapt the contents of Article 115 to the achievement of the Single Market.

In spite of its inherent contradictions with the Internal Market, Article 115 was kept in the Treaty but its use by Member States has been made more difficult and is more strictly monitored by the Commission.

Article 228 clarifies the procedures to conclude international agreements. In the field of common commercial policy it does not change the previous modalities, since Article 228.3 specifies that agreements based on Article 113 shall be concluded by the Council acting on qualified majority and excludes any participation of the European Parliament. Article 228 further provides that agreements referred to in Article 238, as well as agreements establishing a specific institutional framework, having important budgetary implications or

amending an act adopted under co-decision, require the assent of the European Parliament[70].

2.12.1.3.- Implementation

legal basis (CCP)	procedure provided for	use of the revised provision
Article 115	administration by the Commission of safeguard clauses	0
Article 113 / 228.3.§2[71]	assent of the EP	1

The combination of the achievement of the Internal Market and of the limitations introduced by the Treaty on European Union on Article 115 has led to the non-use of this legal basis to allow the Member States to impose restrictions on trade. To balance this, and to substitute the nationally-based safeguard clauses included in the different import regulations, new import regulations (518/94, 519/94) were adopted in March 1994. In addition, a regulation (520/94) was adopted establishing a Community procedure ror the administration of quantitative quotas. This means that import licenses awarded to importers from third countries are valid all over the Community territory.

This was supposed to be the only major change in trade policy, the other two being only of a technical nature. The European Commission has, however, expressed its regret[72] with regard to the deletion of Article 116, which provided for a procedure to harmonize Member States' positions in international economic organisations. Following this deletion, the 1994 version of the International Cocoa Agreement was revised to base it solely on Article 113 and no longer on 113/116.

It was finally the referral of the procedure of conclusion of international agreements to Article 228 that had the furthest reaching consequence. Indeed, had the Uruguay agreement been concluded under the former Treaty, whatever the outcome of the discussion on the role of the Member States in the ratification process, the EC legal basis would have most likely been Article 113, probably in conjunction with Article 235, or even with some of the articles related to services, or to the achievement of the internal market. In any case, the role of the European Parliament would have been, at the most, consultation. With the new version of Article 228, the EP has had to give its assent, because the Uruguay Round Final Act created "a specific institutional framework" , the WTO. The consequence of such a modification was, therefore, more substantial than initially expected. Although not a direct consequence of the implementation of the Treaty on European Union, it is worthwhile mentioning the new restrictive interpretation given

[70]this assent of the Parliament has to be given by the majority of the vote cast in the Parliament and no longer the majority of the members of the EP.

[71]this table only contemplates the use of the assent procedure in the field of common commercial policy, and not the overall implementation of article 228.3.§2.

[72]Commission's report, page 59.

by the ECJ on trade policy. Opinion 1/94 thus restricts it to trade in goods, provision of transborder services, as well as, in the framework of intellectual property, to the implementation of protective measures to fight the imports of counterfeit goods. This restrictive interpretation, results in the fact that within the multilateral trade negotiations, certain decisions will have to be implemented in the Community with the use of a wider range of legal bases.

2.12.2.- Development Cooperation (130U-130Y)

2.12.2.1.- Introduction

The impact of the introduction of a new title on development cooperation has to be assessed while keeping in mind two elements. The first is that, contrary to EP claims, the competence of the EC in the field of development cooperation does not affect cooperation with the ACP countries. Basically it means that in the field in which development cooperation instruments are most developed, the cooperation procedure introduced by the Treaty in the field of development policy is not applicable. The impact of Title XVII on the ACP-EC relations cannot therefore be assessed as part of the implementation of the Treaty on European Union. The second, and most important, element that has to be underlined is that Title XVII simply formalises a policy which already existed and which was implemented through other legal bases of the Treaty (mainly 113 and 235), following guidelines by the Council of Ministers, which have the same objectives today listed in Title XVII. Furthermore, development policy is, per se, a policy founded on international agreements, the most important of which were and still are concluded on the basis of article 238. Finally, it should be mentioned that because of the pre-existence of the policy prior to its inclusion in the Treaty, certain measures to adapt it to its new legal form were taken between the period when the Treaty was signed and when its was finally ratified. For the purpose of this analysis, these will be treated as aspects of the implementation of the TEU.

2.12.2.2.- Innovations introduced by the TEU

Title XVII of the Treaty on European Union starts by stating the objectives of the EC development policy, in Article 130 U. In May 1992, the Commission adopted a landmark communication on "development policy to the run-up 2000: the consequences of the Maastricht Treaty". This communication gave way to a resolution from the Council and the Member States on development policy in the run-up to 2000, of 18 November 1992. Both documents specify the objectives stated in Article 130 U. In addition, Article 130U §2 insists on the need to promote democracy and human rights. This objective was already stated in a declaration by the Council and the Member States[73] in November 1991: the Commission, since, presents an annual report on the different measures taken to implement this requirement.

[73]declaration of the Council of Ministers and of the representatives of the MemberStates on Human Rights, Democracy and Development, of 28 November 1991.

In order to achieve these objectives, Article 130 W provides for the procedure to be used to adopt acts in this field: the EP has gained in this battle of competences since it is involved in the decision-making through the cooperation procedure. This "victory" must however be nuanced by Article 130 W-3, which excludes cooperation with the ACP from this procedure. The other means to achieve the objectives of development policy is through cooperation with third countries and international organisations, including the enactment of international agreements.

Finally, Title XVII sets the two underlying principles of EU development cooperation: the horizontal principle and the principle of complementarity. The horizontal is mentioned in Article 130V which compells the EC to take into account the objectives referred to in Article 130U in the other policies it implements. As for the principle of complementarity, according to Article 130U, there is a direct corollary: coordination is referred to in Article 130X which allows the Commission to take initiatives in that direction.

2.12.2.3.- Implementation

legal basis	nature of legislative output	role of the E.P.	times used
130 W	Regulations	co-operation	3
130 Y/228§3	Trade & cooperation agreements	consultation	2

Implementation has taken place in accordance with the objectives set by Article 130U and taking into account the procedure set by Article 130 W, i.e. cooperation procedure. Three Council regulations have been adopted on this basis: the 1995-2000 European Investment Partners Scheme, a Council regulation in the field of employment creation and support to small and micro entreprises in the Maghreb, and one on financial and technical cooperation with the Occupied Territories. Article 130W has also been a source of dispute between the Council and the Commission and the Parliament. Indeed the Commission made a proposal on the basis of Article 235 for a Council decision providing further macro-financial assistance for Algeria. When rendering its opinion, the EP opposed the legal basis and viewed Article 130W as the correct one. The Council finally adopted the piece of legislation (in December 1994) as proposed by the Commission, i.e. on the basis of Article 235.

Not much secondary legislation has been adopted in the field of development cooperation. This is understandible in light of the fact that EC development policy is only complementary to that of the Member States, and that it is partly based on contractual committments of the Community, enacted under Article 238 or Article 130Y. In the field of cooperation with international organisations, the Community, as such, has been involved in the Conference on Population and development held in Cairo in September 1994, in the World summit on social development of Copenhagen, March 1995, and is currently involved in the preparation of the Beijing UN Fourth World Conference on Women (September 95). In all cases, the Commission has done the necessary preparatory work to present a Community position at these conferences. In addition, two agreements have been concluded on the basis of Article 130Y combined with Article 228§3, one with Sri Lanka, and one with India, whilst the agreement with Nepal is awaiting conclusion.

Following the provisions of Article 228 § 3, the European Parliament was merely consulted in these occasions.

Concerning the two underlying principles of the EC development cooperation policy, their implementation cannot be assessed in terms of legislative output. However some thought has been given by the institutions on the best ways to respect them.

The principle of complementarity was considered before the entry into force of the Treaty on European Union. The Commission, hence, presented as early as March 1993, a communication to the EP and the Council on "procedures for coordination between the Community and its Member States at policy and operational levels". In December 1993, the Council presented conclusions calling for coordination at the policy and operational levels as well as in international fora. As a result, the Commission was given the task of coordinating policies in the areas of family planning, food security, health, combating AIDS, education, aid instruments and the campaign against poverty. It has already presented communications specifying how this coordination will be done in the following areas: campaign against AIDS, health cooperation, coordination of food security policies and practices, coordination of education projects.

The horizontal principle is more of a figleaf, due to the far-reaching implications that a thorough implementation would have. The requirement of Article 130V can easily remain a "lettre morte" and would require a pro-active policy to enhance the powers of the commissioners and directorates in charge of development policy so as to enable them to have a say in the policy making of other sectors, which are highly influential, such as agriculture. Conscious of the unconsistencies that can arise from the implementation of other policies regardless of development cooperation objectives, some officials of the Commission produced a working paper providing institutional guidelines and submitted it to the Council which decided in November 1994 to study the matter further.

2.12.3.- Common Foreign and Security Policy (article J)

2.12.3.1.- Introduction

The creation of a Common Foreign and Security Policy was one of the highest profile items of the Treaty on European Union, and it gave rise to a lot of expectations. The TEU created a new policy basing it on an acquis of 20 years of European Political Cooperation. After a first serious attempt of codification in the SEA[74], the 2nd pillar constitutes a qualitative leap from its predecessor in 3 ways:

-The single institutional framework:
This is supposed to ensure the consistency called for in Article C between the Community and the Intergovernmental pillar.

[74]many reports mark the evolution of EPC leading to its progessive codification. The most mportant ones: Davignon (1970), Copenhagen (1973), Tindemans (1975), London (1981) and finally the committments included in the Stuttgart Solemn Declaration of 1983.

- the instrumentalisation of foreign policy:
Indeed, one of the major weaknesses of EPC was its informal and unbinding character. It gave foreign policies of the Member States the possibility to be coordinated, and, in some limited cases, the globality of the Member States could "speak with one voice". However, the Community as such did not dispose of instruments of policy-making. The TEU attempted to give the Union such instruments.
-the security and defence dimension:
It was impossible during the Maastricht negotiations to include defence as one of the components of cfsp. The Treaty is most unclear as to what constitutes the defence identity of the Union, and this issue will become a major point of discussion at the IGC 96.

2.12.3.2.- The innovations introduced by the TEU

The innovations introduced by the second pillar on the precedent system can be summed up by using the three abovementioned directions.

The creation of the single institutional framework has important consequences on the administrative, procedural and financial dimensions of CFSP. Indeed, albeit their weight is different from from that provided for in the Community sphere, the three institutions involved in the decision-making intervene in the second pillar: the Commission, thus, gained a shared right of initiative (Article J.8.3) and the Parliament, according to Article J.7, is kept informed and consulted by the Presidency. It can also (Article J.7§2) ask questions and put forward recommendations to the Council. In terms of administration, having a single institutional framework means that the Council structure in this field is identical to the one in the Community realm: the secretariat of EPC, hence, has disappeared, and the Political Committee's role has had to be redefined. Procedurally, Title V describes a decision-making mechanism in which, for the first time, the European Council's role is clearly stated. Finally, the financial provisions of Article J11 allowed for a dual financial system: the administrative costs run through the EC budget, and the operational expenditure is covered by contributions by Member States and/or by the Community budget, a provision that has had major interinstitutional consequences.

The instrumentalisation of foreign policy is meant to transform a "communauté de vues", which was the purpose of EPC, into a "communauté d'action". Accordingly, two new instruments have been designed: systematic cooperation (Article J2), including the definition of constraining common positions and joint actions (Article J3) in areas of common interest. The Treaty on European Union did not define what the areas of common interest were, but the European Council of Maastricht in December 1991 listed 4 areas of common interest in which joint actions would be needed: CSCE process, disarmement and arms control, nuclear non-proliferation, control of transfers of military technology and arms exports towards Third Countries. Furthermore, the Lisbon European Council in June 1992 determined the geographical zones that constituted areas of common interest for reasons of proximity: Maghreb and Middle East, Eastern Europe, ex-Soviet Union.

Concerning the security dimension, CFSP has extended the scope of European foreign policy to all aspects of security, and not just economic and political aspects, and has

established an organic link between the EU and the WEU as a first step which would pave the way towards the eventual framing of a common defence policy which might in time lead to a common defence (Article J4).

2.12.3.3.- Implementation

2.12.3.3.1.- Overview of the implementation of CFSP

Legal basis	Times used	Decision
Art. J2	11	adoption of a common position
Art. J3	16[75]	adoption of a joint action
art. J3.1	*2*	*guidelines by the European Council*
art. J3.2	*0*[76]	*definition of decisions to be adopted by qualified majority*
Art. J4	0	passerelle between the EU and the WEU
Art. J7.§2	4	recommendations by the EP to the Council
Article J8-3	0[77]	Commission shared right of initiative
Article J11	2	-decision of the Council on a scale for distributing the expenditure among MS. -decision to finance some operational expenditure (Mostar) through the EC budget.

2.12.3.3.2. From a "Communauté de vues" to a "Communauté d'action": the implementation of Articles J2 and J3

The implementation of Article J2

11 Common Positions were adopted between the entry into force of the Treaty on European Union and the 1st of April 1995. They concerned 7 subjects of common interest[78]. 8 out of 11 common positions, concerning 4 of these subjects were actually initiating an Article 228A procedure. Only in the case of Ukraine and Rwanda were these

[75]we must add to this figure the joint action adopted in the beginning of May 1995 on anti-personnel mines.

[76]This provision has been implemented once in may 1995 in the joint action on anti-personnel mines.

[77]During its meeting on 31 May 1995, the Commission put forward proposals for common positions on relations with the Transcaucasian republics and with Russia.

[78]Former Yugoslavia, Ukraine, Haïti, Rwanda, Sudan, Libya, Burundi.

common positions defining objectives and priorities. The balance sheet that can be drawn on this instrument of CFSP is therefore mitigated: on the one hand, it does insure consistency with the Community realm. On the other, it hasn't really served its purpose to the extent that this instrument is designed to lead to a greater political convergence between the Member States. 75% of the common positions adopted led to greater consistency between the 2 pillars, only two were real policy formulations. Indeed one would have expected a common position to present the overall strategy of the Union in matters of interest.

The implementation of Article J3

The balance sheet one can make about joint actions is also mitigated. This innovation of the TEU created expectations that it did not meet. 16 Joint actions were adopted, concerning 7 different subjects of common interest.

As provided for in Article J3, European Council guidelines were given in Brussels, in October 1993 and in Corfu in June 1994. All Joint Actions adopted for the moment were on the basis of these European Council guidelines.

Technically, there were 15 Joint Actions adopted. However, they only concern seven different topics. The profile of the Joint Actions differs a lot. They strech from monitoring the elections in Russia, to organising a far-reaching but time limiting preventive diplomacy exercise, the Stability pact, to supporting the transition towards a multiracial democracy in South Africa. Here is a list of the Joint Actions adopted:

1)Former Yougoslavia	6 decisions have been taken concerning the support for the conveying of aid to Bosnia Herzegovina and 2 concerning the administration of Mostar. This Joint Action is still in process.
2)South Africa	support for the transition towards multi-racial democracy in South Africa. This included the support for elections, which were already held, as well as the elaboration of a framework which would foster the economic and social conditions for transition.This joint action is still in process.
3)Russia	dispatch of a team of observers to the Parliamentary elections in the Russian Federation. As provided in the Joint Action itself, it was concluded on 31 December 1993.
4)promotion of stability & peace in Europe	This was the object of 3 decisions. Following an initiative of French Prime Minister E. Balladur, this exercise of preventive diplomacy was launched in Paris in May 1994. Two sets of regional round table meetings (one concerning the PECO and one on the Baltic states) took place in which the parties concerned discussed confidence-building and minority-related issues. The aggregate of the result forms the "Stability Pact" concluded in Paris in May 1995 and then transfered to the OSCE who will be in charge of ensuring its respect.

5)Middle East Peace Process	This three-fold action contains, the support of the palestinian police, monitoring of elections, and the setting of a temporary international force. It is still in progress.
6) Non-Proliferation	this Joint Action concerns the preparation of the 1995 conference on Non Proliferation and consists of a diplomatic exercise to encourage the signature of the NPT by as many countries as possible.
7) Dual-Use goods	Joint Action adopted, parallel to a Council regulation in the field of Common Commercial Policy, on the control of exports of dual-use goods

2.12.3.3.3.- The implementation of the security and defence aspects

Since the Rome Declaration in 1984, the Western European Union has been considered as the European pillar of the North Atlantic Alliance and as the defence arm of the European Community/European Union. This linkage with the EU became "organic" with the entry into force of the Treaty on European Union. Indeed Article J4-2 specifies that the WEU is "an integral part of the development of the European Union", and forsees a procedure by which the Union could request the WEU to elaborate and implement decisions and actions of the Union which have defence implications. This provision has never been used since there is no consensus on the form that "the eventual (...) common defence policy" should take. However, the EU and the WEU cooperate in the framework of the administration of Mostar, where the WEU is in charge of the policing of the city.

On the practical side, some decisions were taken to allow this institutional link to be established. The seat of the WEU has been transferred to Brussels, i.e. nearby both the EU and NATO. As provided for by the Declaration of the WEU annexed to the TEU, synchronisation of meetings and working methods, close cooperation between the Councils and General Secretariats as well as between the EP and the WEU Assembly, have been undertaken. The length of Presidencies have been equalised although the order of succession of Presidencies has not been harmonised, as a result of the differenciation in membership.

2.12.3.3.4.- The procedural implementation of and the institutional adaptation to the second pillar

One important aspect of CFSP that has to be examined when assessing the implementation of the Treaty is the impact of the single institutional framework on CFSP and the use of procedures in it. Indeed, during the IGC, the role of the Commission and of the Parliament was heavily discussed as well as the question of voting modalities in the Council.

The Commission has been very cautious in using its right of initiative. Until June 1995, it hadn't tabled any EC-like proposal. Instead the Commission has used its right of initiative in conjunction with its duty to ensure consistency between the pillars, by drafting mixed communications on general matters.

The EP has tried to exploit the possibilities offered by Article J7 by using its right to make recommendations to the Council. It has done so in four occasions, all related to Joint Actions: on South Africa, Bosnia-Herzegovina (2) and elections in Russia.
The relation between the Council and the European Parliament seemed to be, from the wording of Title V, one in which the European Parliament would be the "demandeur", by asking for its views to be taken into account. However the implementation of Article J11, on financing, did accord the EP with a greater say and has created a series of yet unresolved inter-institutional tensions. In June 1994, the Council gave its guidelines concerning the financing of CFSP: this was to be made on a GNP scale for the operational costs covered by the Member States. The problem arose when the Member States were unable, or unwilling, to pay their contributions to the administration of the City of Mostar. The Council then decided to draw from the EC budget. "Single Institutional Framework" oblige the EC rules to be respected for that. The Parliament finds suddenly itself in the position of having a final say on part of the financing of the CFSP. The EP has asked for an Interinstitutional Agreement to resolve the discord. The Council rejects such a request.

Having a single framework has also led to an internal adaptation of the working methods of the institutions. The EP has indeed transformed the name of its political committee into the CFSP committee. As for the Commission, after opting, during the last Delors commission, for the creation of a specific DG concerned with External Political Relations (DGIA), it has favoured a more integrated approach, joining economic and political considerations and dividing up the foreign affairs "portfolio" on a geographic basis: thus 4 Commissionners are in charge, and the President keeps a global say on CFSP in general[79].

The adaptation of the Council, as the central institution of CFSP has been more substantial. Having a single institutional framework has led to the disapperance of the EPC secretariat and to the redefinition of the role of the Political Committee in relation to the COREPER. The secretarial backup of the Council in this field is now given by a directorate on CFSP included in the Secretariat General of the Council. As for the repartition of tasks between the Political Committee and the COREPER, this was a delicate issue because, although the composition of the Political Committee is higher ranking than that of the COREPER, the latter is still the one filtering the work of the Council. The modus vivendi that has been found is that the Political Committee formally puts matters for discussion to the COREPER, but the COREPER only acts as a mailbox, those matters being simply forwarded on the Council agenda.

The major challenge that the three-pillar construction puts on the institutions is the coherence that has to be ensured. In the case of external policies, the single institutional framework can have a double effect: on the one hand, it ensures better consistency between two areas of policy that used to be apart. But, adversly, the proximity of the two areas can create frictions, since the predominant institutions in each of them (mainly the

[79]After a period of transition, from January to June 1995, in which the DGIA was in charge of political relations + relations with Europe, the Commission has reshuffled its external relations structure, following the Commissionners portfolios: DGIA is in charge of "Europe" as well as the conduct of CFSP in general; DGIB is responsible for relations with the Mediterranean, Latin America and certain countries of Asia (developing countries); DGIC deals with relations with OECD countries as well as with global trade issues (World Trade Organisation). Finally, DGVIII maintains the same field of competence, the A.C.P. countries, with the addition of South Africa.

Council and the Commission) fear an erosion of their respective competences. This kind of suspicion has led to an unconfortable use of the possibilities opened up by the Maastricht treaty.

2.12.4.- Conclusion: the assurance of coherence between the two pillars

The essential difference between the pillar-structure of the TEU and that of the Single European Act lies in the fact that closer links, in some cases procedural, were instituted between the two pillars, and that Article C of the Common Provisions of the Treaty on European Union entrusted the Council and the Commission with the responsibility of ensuring consistency of the Union's external activities as a whole in the context of its external relations, security, economic and development policies

Economic sanctions have long been the area in which the instrumental and the political competences conflicted. Indeed, as a measure, trade and economic sanctions fall within the realm of the Community whilst the decision to adopt them is clearly political and belongs to governments. The Treaty on European Union sets out a procedure resolving this question: Article 228A provides for the adoption of sanctions, on Commission's proposal, by qualified majority in the Council, following a Common Position or a Joint Action taken in the second pillar. Article 228A was used in 4 occasions. The implementation of this passerelle clause can be seen through a case study: in the case of Haïti, the process started in the form of a decision from the Council of Ministers adopting a Common Position based on Article J2[80]. Subsequently, the Commission made a proposal on the basis of Article 228A and the Council adopted a Regulation on the discontinuation of certain economic and financial relations with Haïti[81]. On the basis of Article 228A and 73G, consistency was ensured with the United Nations' positions by adopting a Regulation prohibiting the satisfying of claims by the Haïtian authorities with regard to contracts and transactions the performance of which was affected by the measures imposed by or pursuant to U.N. Security Council resolutions 917(94), 841(93), 873(93) and 875(93)[82]. At the same time the Member States' representatives jointly decided, within the framework of the ECSC, to stop coal and steel trade with Haïti[83]. Finally, the fourth dimension of coordination, this time with Member States policies, was ensured through the adoption by the Council of a recommendation to the Member States concerning the discontinuation of certain economic and financial relations with Haïti[84]. The reverse operation took place in October 1994 when the sanctions were lifted.

The other area in which an increased consitency has been achieved is the control of export of Dual Use goods. They fall, by nature, into the two areas of military security and of

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[80]Council decision 94/315/CFSP on the reduction of economic relations with Haïti, of 30 May 1994.

[81]Council Regulation n° 1263/94 of 30 May 1994.

[82]Council Regulation n°1264/94 of 30 May.

[83]Decision of the representatives of the Member States within the Council of 30 May 1994, n° 94/314/ECSC

[84]Council Recommendation 94/313/EC of 30 May 1994.

trade in goods and, have therefore been the object of a Joint Action and of an Article 113 Council regulation, both documents referring to each other.

In terms of global external policy, the institutions are inevitably fighting a battle of influence over their competences. Both Council and Commission are in charge of implementing Article C. The Council is in the privileged position to do so through its Common Positions. The Commission has presented mixed communications covering both economic and political aspects of the EU relations with the Countries of Central and Eastern Europe, the Mediterranean, the Middle East, the former Soviet Union and Japan. The European Council, although not mentioned in Article C, has taken a leading role in providing "consitency" by adopting, at the Essen European Council (december 1994) a new type of sui generis document: "strategy", a document which provides a global view, of the Union as a whole, since both pillars and both levels (supranational, and MemberStates) share it, which increases the intergovernmental aspect of external policies.

2.13.- JUSTICE AND HOME AFFAIRS (Title VI)

2.13.1.- Introduction

Justice and home affairs is new territory for European integration and as such, its incorporation into the framework of the European Union was significant in itself. It is significant when one considers the subject matter concerned. Justice and home affairs has traditionally been seen as a sensitive national issue, and quite clearly the domain of the nation-state. The mere thought of even discussing issues relevant to this area at the EU level would have been dismissed as out of hand.

Various factors have emerged, which, according to some, quite clearly highlighted the absolute need for greater co-operation and co-ordination in these areas. Some of the factors are namely: the completion of the internal market and the need to ensure free movement of persons (i.e. the breaking down of internal borders and their replacement with adequate compensatory measures), the rising problem of immigration, drug trafficking, terrorism and fraud. These latter issues are now global problems. International organised crime transcends national boundaries. As such a more global (or one could refer to it as regional) co-operation was clearly needed. All the more if one was to meet the requirements of Art. 8a on Free movement of persons, it is of utmost importance that there is close co-operation to ensure that adequate "compensatory measures" are properly installed.

The need to co-operate more closely at the European level was accepted and as a result it was incorporated into the framework of the European Union. It was not however incorporated into the more solid legal framework of the EC Treaty, rather a hybrid so-called Third Pillar was created. The Third Pillar, or more correctly Title VI TEU refers to Co-operation in the fields of Justice and Home Affairs.

At the time of the drafting of the TEU, considering the sensitivity surrounding the issue, one could not have reasonably expected to see a complete communitarisation of an area that has for so long has been dealt with in such a secretive fashion by Member State Governments, with little or no participation of national parliaments. As such, even though justice and home affairs are now part of the Union Treaty, in essence, decisions are still taken at more or less an intergovernmental level[85]. One could nearly refer to it as institutionalised intergovernmentalism. Normal Community legal instruments, provided for under Art 189 EC Treaty (namely regulations, directives and decisions) do not apply to areas covered by the Third Pillar[86]. Rather, instruments of a inherently intergovernmental character are to be used e.g. international conventions and the widespread use of soft law (see below). Nor do Community institutions such as the European Parliament and the

[85]At best Title VI TEU Cooperation in the filds of Justice and Home Affairs could a hybrid mix between Community instruments and classical intergovernmentalism.

[86]However there are possibilities for a change in this set-up in the future. See Art. K.9 TEU.

Commission have as active a role in the legislative process as they do in the First Pillar[87]. The Council, the Community Institution which most represents the interests of the Member States is quite clearly the power broker in the Third Pillar.

It would be wrong to presume that there was no co-operation even at the intergovernmental level before the TEU among all Member States. There were in fact various frameworks for co-operation among Member States . These included:

- *TREVI (Terrorisme, Radicalisme et Violence International).* TREVI was formally set up on 29 June 1976 by Justice and Home Affairs Ministers of the then nine Member States. It had several working groups dealing with for instance the combating of terrorism and drug related crime. Recently it set up an ad hoc Working Group to develop Europol.

- *Group on Judicial Co-operation.* This Group was established in the seventies in the framework of European Political Co-operation (EPC) to ensure greater co-operation in civil and criminal law.

- *Ad Hoc Immigration Group.* Ministers responsible for immigration and combating drugs and terrorism along with the Commission vice-president decided on 20 October 1986 to set up a high level ad hoc group to deal with areas such as immigration, asylum, control at borders, visa policy and so forth. This Group was responsible for the drawing up of the Dublin Convention (still to be ratified by two Member-States) and the Convention on the Crossing of External Borders (to be signed) which was re-drafted with the entry into force of the TEU.

- *CELAD (Comité Européen pour la Lutte Anti-Drogues).* CELAD was set up on the instigation of the December 1989 European Council to fight against the production and use of drugs.

- *GAM '92 (Groupe d'Assistance Mutuelle)*, consisting of representatives of customs authorities of the Member States was set up in 1989 in response to the completion of the internal market and the removal of internal borders. Its main aim was to draw up a Convention on the Customs Information System and "to establish a customs external frontier strategy, with the goal of introducing compensatory measures at the external frontier of the Community"[88].

- *The Co-ordinators' Group on Free Movement of Persons*. The Co-ordinators' Group, established by the Rhodes European Council in 1988, had as its aim to co-ordinate the confusing range of groups dealing with all aspects of free movement of persons.

This is a list of groups that involved all Member States of the European Community. The Treaty on European Union institutionalised all those groups that existed before in the framework of the K.4 Committee in order to ensure greater co-ordination and greater responsibility for the actions of the various groups. It was also hoped that this would ensure on the whole greater efficiency whole decision making process. This will be assessed at a later stage.

There were, and still are of course groups whose membership goes beyond simply the European Union. These include: the Groupe Pompidou (to combat drugs), Club de Vienne (anti-terrorism), Quantico Group (World Terrorism), Club de Berne (terrorism), Groupe

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[87]Nonetheless, the role of both Institutions is more than what they had before the TEU.

[88]Patrick Ravillard, "Customs Cooperation in the Context of Title VI of the Treaty on European Union" in Monar and Morgan (eds), The Third Pillar of the European Union, 1994, p. 220.

de Dublin (Combat Drugs), PWGOT (Police Working Group on Terrorism), and a European-wide network of permanent correspondents to tackle football hooliganism.

Apart from all aforementioned groups, one should also mention the Schengen Convention applying the Schengen Agreement of 1985 which was signed in 1990. The peculiar aspect about Schengen is that its membership is only open to Member States of the EU. The reason for this is that action at the Schengen level (the abolition of internal borders complemented by the introduction of compensatory measures) is seen as a precursor for what will eventually agreed upon at the level of the EU. However at the moment, only ten (including Austria) Member States have signed the Convention, and it has only entered into force (26 March 1995) in seven of these (Germany, France, Belgium, Luxembourg, Netherlands, Spain and Portugal). This has in practice introduced what is commonly referred to as variable geometry.

2.13.2.- Innovations introduced by the TEU

The situation before the Treaty on European Union was indeed highly secretive and non-transparent. Much of what was discussed at this level was not made public until it was too late to be of any use. It was hoped that provisions under the Treaty on European Union would provide greater transparency, coherence and efficiency .

2.13.2.1.- Aims and Objectives of Title VI

Title VI contains few articles. Their importance in the future could be significant. Article K.1 specifies the areas that are covered by this Title and rather peculiarly coins them as "matters of common interest". These are:

"(1) asylum policy;
(2) rules governing the crossing by persons of the external borders of the Member States and the exercise of controls thereon;
(3) immigration policy and policy regarding nationals of third countries:
(4) combating drug addiction in so far as this is not covered by (7) to (9);
(5) combating fraud on an international scale in so far as this is not covered by (7) to (9);
(6) judicial co-operation in civil matters;
(7) judicial co-operation in criminal matters;
(8) customs co-operation;
(9) police co-operation for the purposes of preventing and combating terrorism, unlawful drug-trafficking and other serious forms of international crime, including if necessary certain aspects of customs co-operation, in connection with the organisation of a Union-wide system for exchanging information within a European Police Office (Europol)."

As one can see, this is a motley collection of "matters of common interest" which cover wide-ranging areas and some of which are already partly dealt with in the EC Treaty (e.g. asylum, immigration, drug addiction and fraud). Action taken in these will be according to Article K.1: "For the purposes of achieving the objectives of the Union, in particular

the free movement of persons, and without prejudice to the powers of the European Community".

2.13.2.2.- Legal Instruments and Procedures

The legal instruments provided for in Article K.3 are:

- Joint positions. No joint position as yet has been adopted by the Council. It is as of yet very unclear exactly what a joint position should entail. There is also confusion as to whether a joint position in Art K.3 is the same as common positions which according to Art K.5 should be defended by Member States within international organisations and international conferences;

- Joint actions. The same confusion surrounds that of joint actions. Once again there is no strict interpretation as to the meaning and scope of a joint action. Nevertheless, two joint actions have been adopted by the Council. However this may confuse the matter even further as both are of an inherently different nature. The first concerned travel facilities for school pupils from third countries resident in a Member State[89]. The second joint action[90] concerning Europol essentially an elaboration of the 1993 Ministerial Agreement.

- Conventions. Conventions are classic instruments in public international law. Conventions provided for under Article K.3(2)(c) may allow the Court of Justice to be involved, in cases of interpretation. However this provision is not compulsory. Otherwise the Court is completely excluded. The non-involvement in general of the Court of Justice in Title VI is of great concern as there appears to be almost no judicial control over activities in this Title. With regard to democratic control, ironically, the EP may have a greater role in conventions in Title VI as it must be consulted (Article K.6) than in Article 220 EC Treaty where no role is envisaged. (See section on the main actors).To date only one Convention has been adopted under this legal basis[91]. Control of the Court of Justice in terms of interpretation was not provided for in the Convention. In the future, when Member States are confronted with disputes and realise that jurisdiction of the Court of Justice in this regard may be needed, a Protocol may be annexed to the Convention.

There are presently nine conventions under discussion. These are:

- Draft Convention on the crossing of the external borders
- Draft Convention setting up a European Information System (EIS)
- Draft Convention on the establishment of Europol

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[89]Decision 94-795/JAI on a joint action adopted by the Council on the basis of Art. K.3(2)(b) of the Treaty on European Union concerning travel facilities for school pupils from third countries resident in a Member State. OJ No L 327, 19.12.1994.

[90]Joint action concerning the Europol Drugs Unit on the basis of Art. K.3(2)(b) of the Trety on European Union. OJ No L 62, 20.3.1995.

[91]Convention on the simlified extradition procedure between the Member States of the European Union. OJ No L 78, 30.3.1995.

- Draft Convention on the uses of information technology for customs purposes (CIS)
- Draft Convention on the protection of the Communities' financial interests
- Draft Convention on extradition between the Member States of the European Union
- Draft Agreement between the Member States of the European Union on the enforcement of driving disqualifications
- Draft Convention on scope, jurisdiction and the enforcement of judgements in matrimonial matters (Brussels Convention II)

and finally

- Draft Convention on the service in the States of the European Union of judicial and Extra judicial Documents in Civil or Commercial Matters.

Apart from these instruments provided for in Article K.3, the Council has also made widespread use of the more traditional instruments of soft law such as conclusions, recommendations, statements and resolutions, the legal effect of which is extremely unclear[92].

2.13.2.3.- **Voting rules**

Failure to reach an agreement on the above draft conventions (some of which have been on the table for some years now) is indicative of the difficulties related to the unanimity rule which have slowed down and almost blocked completely the decision making process. Unanimity is more so the rule Title VI. Article K.4 (3) specifies the following: "The Council shall act unanimously, except on matters of procedure and in the cases where Article K.3 expressly provides for other voting rules". Therefore, unanimity is required for the adoption of joint actions and joint positions and the drawing up of conventions, in the case where the Council decides to apply Article 100c EC Treaty to action in the areas referred to in Article K.1(1) to (6), and in the budgetary provisions of Article K.8. on the charging of operational expenditure to the Budget of the European Communities.

Unanimity means that in nearly all the cases so far, a compromise, entailing a less than optimal result, has had to be sought. As such, quite often, decisions are taken on the basis of the "lowest common denominator" between the Member States. This clearly hinders the effectiveness and the quality of decisions taken in the fields of justice and home affairs. This can be quite clearly seen from the first Convention adopted under Title VI which is far from complete. The risk of adopting less than perfect Conventions thwarted by the unanimity rule, regardless of their substance, is very high.

Possibilities for voting rules other than unanimity are not that usual in Title VI. According to Article K.3 (2)(c) §2, measures implementing conventions shall be adopted, unless

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[92]For a list of all Council conclusions, recommendations, statements and resolutions relating to Justice and Home Affairs, see the Council Report on the Functioning of the Treaty on European Union, April 10 1995, in European Report, No 2032, 12 April 1995, Annex XI(a) pp.45-47.

otherwise provided, by a majority of two thirds of the High Contracting Parties. This provision has not yet been used. More importantly, when using the "paserelle" of Article K.9, the Council may determine the relevant voting conditions relating to an application of Article 100c EC Treaty.

2.13.2.4.- Working Structures

The five-level working structure is larger and more complicated than the working structure that exists in the EC Treaty. It has also shown to be slow cumbersome and ultimately ineffective. Why then was such a structure created. Such difficulties must have been foreseen. At present the structure consists of the Working Parties followed by the Steering Groups, the K.4 Committee, Coreper and the Council. The overriding reason for the creation of such a lengthy negotiation procedure was a result of the need to incorporate working structures that previously existed within the Union framework of Justice and Home Affairs without unduly undermining the traditional role of the Coreper. Consequently, Article K.4 provided for the creation of a Co-ordinating Committee consisting of senior officials. The K.4 Committee essentially took over the work of the Group Co-ordinators - Free Movement of Persons and incorporated the first set of groups mentioned above (e.g. TREVI, CELAD, Ad Hoc Group Immigration).

In practice these groups have not changed radically since the entry into force of the TEU. The name has changed. They have been incorporated into the Union framework, and working conditions have changed slightly (e.g. the use of more working languages), but the members have more or less stayed the same. The relationship and the division of labour between the K.4 Committee and the Coreper has not yet been clarified. In the hierarchy of working structures, the K.4 Committee comes after the Coreper in importance, yet clearly, the national experts in the field pertain to the K.4 Committee.

At the time of the drafting of the TEU, a compromise had to be sought to incorporate these "semi-intergovernmental groups" to overcome this politically sensitive problem. Nevertheless, at this stage and in view of the forthcoming IGC, a rationalisation of the working structures should be envisaged.

2.13.2.5.- The Main Actors in Title VI

The Council and the Member States

The Council is the most important actor in Title VI. Its role is clearly enhanced in comparison to the diminished role of the Commission and the European Parliament. In terms of actual acts adopted, it must be said that the Council has been quite active. However such Council activities vary in importance as has already been mentioned, the legal instruments used tend to be those of classic intergovernmental co-operation, of no legally binding nature. Consequently, whereas the Council has adopted 40 to 50 statements, conclusions, resolutions etc., these are not binding and are clearly not of the same significance as a regulation or directive for instance. It is often argued that this is the best that one can expect form such politically sensitive issues. If this is the case, one clearly has to lose out in terms of efficiency and effectiveness.

Further to the strong position of the Council, the Member States themselves have a role in initiation of proposals. From areas referred to in Article K.1 (1) to (6) Member States have a shared right of initiative with the Commission. From areas K.1 (7) to (9), Member States have the sole right of initiative. From the information available, it would appear that only once has a Member State not holding the Presidency, used this right of initiative (UK proposal for a joint action concerning the protection of the financial interests of the Communities).

Commission

The Commission sees its role reduced in comparison to the EC Treaty. It has the shared right of initiative in the areas referred to in Article K.1 (7) to (9). With regard to submitting proposals, the Commission has not been terribly active with only two proposals[93]. It has more tended to concentrate on providing discussion papers and Communications (e.g. Asylum and Immigration and Proposed Action Plan to Combat Drugs). The reason for limited use of the right of initiative may be due to the fact that the Commission, taking a more pragmatic stance, feels that it is not yet the time to deal with the more sensitive areas dealt with in Title VI.

European Parliament

The European Parliament in several reports has expressed its utter disillusionment at the role it has been accorded in Title VI. Art. K.6 states that:

"The Presidency and the Commission shall regularly inform the European Parliament of discussions in the areas covered by this Title.
The Presidency shall consult the European Parliament on the principal aspects of activities in the areas referred to in this Title and shall ensure that the views are duly taken into consideration.
The European Parliament may ask questions of the Council or make recommendations to it. Each year, it shall hold a debate on the progress made in the implementation of the areas referred to in this Title."

Its role has been enhanced from that of no involvement at all before the Treaty on European Union. In an area however that directly touches the citizens, proper democratic control would be the least that would be expected, according to the European Parliament.

The provisions of Article K.6 are vague to say the least and quite open to interpretation. What does one mean by consultation. Is it the same as consultation provided for in the EC Treaty. What does one mean by "principal aspects of activities". Will the Parliament be informed on an ex ante of a posteriori basis. This is wholly at the discretion of the actors involved.

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[93]Commission, Proposal for an External Frontiers Convention and a Regulation on Visa Reequirements for Third Country Nationals, COM Documents 1993/684 Final. Commission, Proposal for a Convention on the Protection of the Financial Interests of the Communities, OJ No L 216, 6 August 1994.

With regard to the annual debate that should be held on progress made in the implementation of the areas referred to in Title VI. The European Parliament, in this regard, was quite critical of the annual debate for 1994, in a sense that the debate failed to produce manifest results in view attempting to ensure greater progress in the following year.

Apart from the provisions of Article K.6, there are essentially two other ways by which the European Parliament can become more intensively involved in the fields of justice and home affairs:

1) use of the K.9 passerelle whereby Article 100c EC Treaty will be applied to areas of common interest in Articles K.1(1) to K.1(6). In this case the Parliament would have a more formalised role as provided for in the First Pillar;

2) The Budget. if under Article K.8.2, operational expenditure was charged to the budget of the European Communities, this would fall under non-compulsory expenditure whereby the Parliament would have the last say.

The European Parliament is clearly unhappy with its present level of involvement and has already asked for a more formalised relationship between itself, the Council and the Commission through the adoption of an Inter Institutional Agreement. In the December 1993, the European Parliament forwarded to the Council and the Commission a draft IIA providing a better information and ex ante consultation procedure for the Parliament. As of yet on inter institutional text has been agreed.

The Court of Justice of the European Communities

The role of the Court of Justice of the European Communities is extremely limited. Judicial control of Title VI is non existent. The only area whereby the Court of Justice can play a role is in Conventions adopted in accordance with the provisions of Article K.3 (as mentioned above). These Conventions may (therefore it is not compulsory) stipulate that the Court of Justice "shall have jurisdiction to interpret their provisions and to rule on any disputes regarding their application"; This provision has not been used.

As with the Parliament, if Article 100c EC Treaty is applied to areas referred to in Article K.1(1) to (6), provisions in the EC Treaty concerning the Court of Justice will apply.

2.13.2.6.- The Relationship between Justice and Home Affairs in Title VI TEU and the EC Treaty

The relationship between the First and the Third Pillar rather confusing. Even though both are under one single institutional framework, the procedures, instruments and working methods, as mentioned above, are quite different.

Furthermore, the reasons for some areas being dealt with in the First Pillar and others in the Third Pillar is not at all apparent. Aspects of immigration and control at external borders should have links with Article 7a and free movement of persons. Parts of asylum policy are dealt with in the EC Treaty under Article 100c (determination of third countries

whose nationals should be in possession of a visa when crossing the external borders of the Member States) yet the major aspects have been placed in the Third Pillar. Article 129 EC Treaty on public health seems to overlap with Article K.1(4) on the question drug addiction/dependence. No-one is quite sure as to what is the exact difference between the two provisions. Finally there is confusion as to the division between Article K.1(5) - combating fraud on an international scale and Article 209a EC on "measures to counter fraud affecting the financial interests of the Community"[94].

In theory, there should be no problem as Article K.1 quite clearly states that action in the areas that are considered matters of common interest, should be "without prejudice to the powers of the European Community". However, in practice, the artificial division becomes rather confusing.

2.13.2.7.- "Passerelle"

Article K.9 also provides a bridge form the Third Pillar to the First, through which areas in Articles K.1(1) to K.1(6) may be communatarised. This provision has not yet been used. In fact, in a Commission SEC Doc on the possibility of applying K.9 to Asylum policy, the Commission took a rather moderate approach by stating that the time was not yet right for the use of the paserelle[95]. There is of course also the argument that sporadic use of the paserelle will simply complicate the situation even further and what is needed is an overall change or reform of Title VI.

2.13.3.- Remarks

The plan of action and programme of work approved by the European Council in December 1993[96] are far from being completed. Many issues are under discussion and some of these are near completion (see list of Conventions). Once again the unanimity issue is thwarting the process. Furthermore the legal instruments used are of a limited legally binding nature. For the forthcoming 1996 IGC, a review of the present decision making procedures, working methods and legal instruments would be advisable.

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[94]In this regard it may be rather surprising that the proposal (UK) for a joint action concerning the protection of the financial interests of the Communities on the basis of Art. K.3 TEU falls under Tile VI and that the Art. 209a EC Treaty does not apply.

[95]Commission, Report to the Council on the possibility of applying Article K.9 of the Treaty on European Union to asylum policy, SEC Documents 1993/1687 Final (in response to Declaration No 31 annexed to the Treaty on European Union.

[96]Rapport du Conseil au Conseil européen, Plan d'action dans le domaine Justice et Affaires intérieures, Bruxelles le 2 décembre 1993, 10655/93 JAI 11 and Programme de travail prioritaire pour 1994 et structures à instaurer dans le domaine "Justice et Affaires intérieures", Bruxelles, le 2 décembre 1993, 10684/93 JAI 12.

2.13.4.- Citizenship

2.13.4.1.- Introduction

Although Articles 8-8e represent the first time that citizenship has been included in the Treaty, the ideas behind them can be traced back at least as far as the 'Adonino' Report[97] on a 'People's Europe' prepared for the IGC in 1985 which led to the Single European Act. The concept of "Union citizenship" is not perhaps on a par with that of a Member State, but it has nonetheless received a great deal of attention, especially when it became a key issue in the run-up to the second Danish referendum on the TUE. It should also be born in mind that treaty articles other than 8-8e are of relevance to 'citizenship', for example the EP ombudsman (Article 138e), the right to petition the EP (Article 138d) and social policy provisions.

2.13.4.2.- Innovations introduced by Maastricht

As suggested above, the whole of this section was an innovation in treaty terms. Article 8 establishes the principle of such a thing as Union citizenship, which is conferred upon all those holding the citizenship of one of the Member States. Interestingly, it says that citizens enjoy certain rights and shall be subject to certain duties but the following articles seem only to deal with the rights and not with the duties.

Article	*Subject*	*Procedure*	*Comments*
8a	Free movement of Union citizens	Council unanimity EP assent	Not yet been used
8b	Right to vote and stand in municipal elections for Union citizens living in a Member State of which they are not nationals	Council unanimity EP consultation	Agreed 19.12.94[98] Must be incorporated into national law by end of 1995. Local derogations in B and Lux
	Right to vote and stand in EP elections for Union citizens living in a Member State of which they are not nationals	Council unanimity EP consultation	Agreed 6.12.93[99] First used in 1994 when 2-35% of those eligible in each Member State registered to vote[100].

97 Bull. EC 3-1995

98 OJ No L 239, 30.12.1993, p.34

99 OJ No L 368, 31.12.1994, p.38

100 See "Raport sur le fonctionnement du Traité sue l'Union Européenne" presented by the Commission, SEC(95) 731 final, p.9 and annex 1

8c	Diplomatic and consular protection for all EU citizens by authorities of any Member State	International negotiations	Guidelines agreed in EPC before Nov '93 No subsequent progress except on ad hoc basis e.g. Rwanda June 1994[101]
8e	Commission to submit a report every 3 years Strengthen or add to rights of EU citizens	Report submitted to EP, Council and ECOSOC Council unanimity, EP consultation, Member State adoption in accordance with their respective constitutional requirements	Interim report issued by Commission late 1993 Not yet used

As can be seen from the table, the only real advances in terms of citizenship have been made in the area of voting rights for EU citizens living in a Member State of which they are not nationals, and in the case of municipal elections these must still be incorporated into national law. It seems, therefore, that the idea of Union citizenship remains something very much of a symbolic nature rather than actually entailing tangible benefits for the majority of EU citizens who reside in the Member States of which they are nationals.

[101] ibid.

3. INSTITUTIONS

3.1.- THE EUROPEAN PARLIAMENT

3.1.1.- Introduction

The traditional role of the European Parliament has been that of ensuring a certain amount of democratic control over the activities of the Communities. It has in this regard tended to take a maximalist view of the responsibilities assigned to it in the Treaties. Through a wide interpretation of Treaty provisions and constant revision of its rules of procedure, it has managed to accumulate a considerable amount of influence. The SEA brought it more into the legislative process through the co-operation procedure. Nevertheless, many felt that this fell far short of a comprehensive power of control. The Treaty on European has gone some way to rectify this. Powers of the European Parliament have been considerably increased through provisions of the TEU which sees the European Parliament increase its role in both the legislative process and furthermore in terms of political control.[102]

3.1.2.- Innovations introduced by the TEU and their implementation

3.1.2.1.- Increased role in the legislative process

Art 189b

The most important change in the legislative process has been the introduction of the procedure of co-decision with the Council by Art 189b. Co-decision with the Council has been extended to fourteen areas in the Treaty.[103] So far 124 proposed acts have been subject to the co-decision procedure, 33 of which have been adopted by the Council. In 15 of these cases, conciliation was used. 2 cases were not accepted by the Parliament. One of these (voice telephony) was rejected after the intention to reject. Finally a new proposal was adopted. In the other (biotechnology), an agreement was reached in the Conciliation Committee, however this was rejected in the Plenary Session of the European Parliament. As such, 34 procedures in all have been concluded.

The procedure in general has worked relatively well in its first few years of operation. This was due to a great extent to an Inter institutional text concerning "Arrangements for the proceedings of the conciliation committee under Article 189b"[104]

One problem that has arisen during the use of the co-decision procedure concerns the question of comitoligy. Comitoligy is a committee procedure whereby technical national

[102]Report of The Council of Ministers on the Functioning of the Treaty on European Union, 10 April 1995, P. 7.

[103]For further information on the co-decision between the Council and the European Parliament, see chapter on the procedures.

[104]OJC No C 329, 6.12.1993, p. 141.

experts assist members of the Commission to decide on how acts adopted should be implemented. The fear of the European Parliament is that decisions taken on such technical matters may in fact alter the substance of what was agreed by common accord between the Council and the Parliament, thereby leading the Parliament to ask who is accountable for such decisions and what kind of scrutiny and control is there in reality. This may be viewed in some corners as the Parliament seeking influence in the Commission's executive powers of implementation which would go beyond the provisions of the TEU.

Finally however, a modus viviendi was established by the European Parliament, the Commission and the Council on the 20 December with the aim of resolving any difficulties in the adoption of acts covered by the 189b procedure as a result of the process of comitology.

Assent Procedure

The procedure of assent of the Parliament has been extended by the TEU beyond simply the conclusion of international agreements to: Art 8a § 2, Art 105 § 6, Art 106 § 5, Art 130 D, Art 138 § 3, Art 228 § 3, Art O TEU[105]

The following is a list of assents given by the European Parliament from 1 November to 28 February 1995[106]:

External Relations:

Regulation on for certain procedures for applying the Agreement on the European Economic Area (EEA)

Agreement on the European Economic Area - interim "acquis"

Applications from Austria, Norway, Finland and Sweden for membership of the EU.

Conclusion of the agreements resulting from the Uruguay Round multilateral trade negotiations (1986-1994)

Development:

Conclusion of the protocol on financial and technical co-operation between the EC and the Syrian AR

Environment:

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[105]See Commission, Rapport sur le Fonctionnement du Traité sur l'Union Européenne, 10. 05. 1995, SEC(95) 731 final, Annexe 6.

[106]See Council Report Annex V(e) p. 27

Substances that deplete the ozone layer - conclusion of an international agreement (Montreal Protocol)

Regional Policy:

Regulation establishing a Cohesion Fund

Art 189c

Co-operation procedure which was established in the SEA has been extended to further areas. The scope of application of co-operation now covers Art 6, Art 75. 1, Art 84, Art 103 § 5, Art 104 A § 2, Art 104 B § 2, Art 105 A § 2, Art 125, Art 127, Art 129 D, Art 130 E, Art 130. O, Art 130 S 1 and 3, Art 130 W, Art 118 A, Art 2 § 2.[107]

3.1.2.2.- Political control of the Commission

Art 158 Nomination of the Commission

Art 158 provided for the terms of office of the Parliament and the Commission to be of the same length (five years) thereby providing the framework for better co-ordination and coherence between the two bodies. Furthermore, the TEU granted the Parliament considerable political control over the Commission. The Parliament is be consulted on the choice of President. Furthermore, according to Art 158.2 par 3:

"The President and the other members of the Commission thus nominated shall be subject as a body to a vote of approval by the European Parliament. After approval by the European Parliament, the President and the other members of the Commission shall be appointed by common accord of the government of the Member States".

Even though the Commission is to be approved collectively, the Parliament once again interpreted the provisions of the Treaty relatively broadly in establishing individual hearings of each Commission nominee. This procedure which lasted from 4-10 January (see chapter on the Commission) was not without controversy. The Commission as a body was approved on the 18 January but this was not before several criticisms of some of the 20 Commission nominees were openly voiced. Such a procedure, which was not explicitly foreseen in the provisions of the Treaties, did have as an effect to alter the relationship between the Commission and the Parliament. In this regard the European Parliament has used its rules of procedure to extend its scope. It is in rule 33 for instance where the need to "request the nominees to appear before the appropriate committees" is specified.

In Art 158 it is merely stated that the Parliament will be consulted with regard to the nominee for Commission President. Rule 32 of the Parliament's rules of procedure interprets this as the right of the Parliament to "approve or reject the nomination by a majority of the votes cast" after the nominee has made a statement before the Parliament. Even if this has no legal founding, in the case of a negative vote, this would quite clearly

[107]Commission, Rapport sur le fonctionnement... op. cit. Annexe 5.

have considerable consequence. Such was not the case however with the nomination of Jacques Santer.

3.1.2.3.- Increased role of the European Parliament in other areas

Art 138c

This Article provides the possibility of setting up a temporary Committee of Inquiry to investigate "alleged contraventions or maladministration in the implementation of Community law, except where the alleged facts are being examined before a court and while the case is still subject to legal proceedings". The Parliament can set up such a Committee at the request of a quarter of its members. Such powers extend not only to the activities of the Institutions but also the Member States.

On 20 December 1994, an inter institutional text was established between the European Parliament, the Council and the Commission on the provisions governing the exercise of the European Parliament's right of inquiry.[108]To date the Parliament has not requested the setting up of a temporary Committee of Inquiry.

Art 138d

A Committee of Petitions had previously existed within the European Parliament, however this had not been provided for or legitimised by any Treaty provision. The EC Treaty rectified this through Art 138d which allows any citizen of the Union or equally anyone legally residing in a Member State to address "a petition to the European Parliament on a matter which comes within the Community's fields of activity and which affects him directly". Art 138d has to a great extent simply institutionalised what has already existed in practice for a considerable amount of time.

Art 138e Appointment of the Ombudsman

Unlike the Committee of Petitions, the Parliament had neither requested nor shown any support for the inclusion of provisions for the creation of an Ombudsman. Rather in the past some considered that such a body would take from the powers of the Parliament. The Ombudsman according to the provisions of Art 138e will receive complaints from citizens of the European Union or anyone legally resident in a Member State "concerning instances of maladministration in the activities of the Community institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role."

The main role of the Parliament with regard to the Ombudsman is that of setting up general guidelines and conditions governing the performance of the Ombudsman's duties after seeking opinion of the Commission and with the approval of the Council acting by a qualified majority.

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[108]See Council Report, op.cit. Annex V(f).

A decision of the European Parliament was adopted on the 9 March on the regulations and the general conditions governing the performance of the Ombudsman's duties[109].. To date the Parliament has not yet used the provisions of Art 138e to appoint an Ombudsman.

Art 138b

Art 138b provides the European Parliament with right to ask the Commission to submit proposals for legislation. The Parliament will act by a majority of its members. According to the Commision Report on the functioning of the TEU[110] such a provision has been used twice by the European Parliament: Résolution du PE du 20.4.1994 sur la prévention et la réparation des atteintes à l'environnement, JO C 128 du 9.5.1994 and Résolution du 4.5.1994 sur la sécurité des hôtels contre les risques d'incendie, JO C 205 du 25.7.1994. These are at the moment being examined by the Commission[111].

The Commission is not however obliged to proceed with a proposal in these areas. In such a situation, however, one runs the risk of creating a strained relationship between the Parliament and the Commission, if it appears that the Commission is not taking the Parliament's suggestions seriously. A recent Code of Conduct between the European Parliament and the Commission (15 March 1995)[112] should ensure that such problems are avoided.

With regard to the legislative process, the Commission and the European Parliament agreed that:

"When, pursuant to Article 138b, Parliament requests the Commission to submit legislative proposals, the Commission shall take the utmost account thereof.

The Commission decisions on such requests shall be duly reasoned on a case-by-case basis, in necessary, eve in a sitting of Parliament[113]"

The Code of Conduct goes beyond aspects related only to Art 138b and attempts to create an overall better working relationship between the European Parliament and the Commission. Its aim is also to increase the democratic legitimacy of the Union's decision-making process through greater consultation and exchange of information between the Commission and the Parliament. The Commission will also attempt to forward legislative proposals to the Parliament at as early a stage as possible. A periodic assessment of the Code of Conduct will be made to ensure that its provisions are being properly applied.

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[109]See OJC L No 113, 4.5.1994, pp. 15-18.

[110]Commission, Rapport sur le ofnctionnement du Traité sur l'Union Européenne, Bruxelles, le 10.05.1995, SEC(95) 731 final, p.14

[111]Ibid.

[112]European Parliament, Resolution on the Commission's annual programme of work, Annexed Code of Conduct negotiated with the Commission, 1(b) B4-0501/95.

[113]Ibid part 3.3

Art 206

The budgetary powers of the Parliament have been increased to give it greater influence in the discharge of the Commission in connection with the Commission's exercise of powers of the implementation of the budget. The European Parliament acts on a recommendation from the Council by a qualified majority.

Economic and Monetary Union

According to Art 109f, the European Parliament is to be consulted on the nomination of the President of the European Monetary Institute[114]. Parliament is also to be consulted on the appointment of the President, Vice-President and other members of the Executive Board (see Art 1091 EC Treaty and Protocol Art 50 of Protocol (No 3) on the Statute of the European System of Central Banks and the European Central Bank.

EP's Role in Justice and Home Affairs

Much to the dismay of the European Parliament its role in the third pillar has been severely curtailed. It is in these very areas (police co-operation, customs co-operation crossing of external borders etc.) that the Union citizens are directly affected, and as such the Parliament feels it should be directly involved at the very least in exerting a certain amount of control over the activities in the third pillar. However the provisions of Art K provide limited participation.

Art K.6 for the Parliament to be consulted on the principal activities of the third pillar and ensures that the views of the Parliament will be taken into consideration. Such provisions are very vague and leave a great deal of scope for interpretation. There is no obligation on the Commission or the Presidency to provide relevant information in time for it to be of any use to the Parliament. The decision of the Commission for instance to inform the Parliament on certain proposals seems wholly discretionary. The Parliament can questions of the Council, however this of limited value. According to Art K6 §3 the Council will hold an annual debate on the progress made in the implementation of the areas referred to in Title VI. The Parliament was very critical of the 1994 annual debate and the failure to ensure better progress in the following year.[115]

The only other way whereby the Parliament could be more involved in activities of justice and home affairs is:

[114]The President of the European Monetary Institute has already been appointed. See relevant chapters in this report.

[115]OJ C18/39 of 23.1.1995, Resolution on the progress made during 1994 in the implementation of co-operation in the fields of justice and home affairs pursuant to Title VI of the Treaty on European Union.

a) if the passerelle of Art K9 was used to transfer areas of common interest in Arts K.1 (1) to K.1 (6) to Art 100c EC Treaty where the Parliament had a more formal role to play;

or

b) if under K.8. 2, expenditure under Title VI was charged to the Budget of the European Communities. If operational expenditure was charged to the Communities' Budget, this would fall under non-compulsory expenditure whereby the Parliament would have the last say.

Neither of the two have yet to be seriously considered. In December of 1993 the European Parliament forwarded to the Commission and the Council a draft IIA providing a better information procedure and better ex ante consultation for the Parliament. This was not however accepted by the Council.

EP's role in Common Foreign and security policy

Once again in the second pillar, there have been problems of interpretation. The Presidency shall consult Parliament on the main aspects and choices of the CFSP and the Parliament shall be regularly informed by the Commission and the Presidency on the development of the CFSP. As in the third pillar, an annual debate will be held on the progress in implementing the CFSP. Once again the Parliament has broadly interpreted its right to be consulted before any important decision is taken. The Presidency thinks otherwise.

3.2.- ROLE OF NATIONAL PARLIAMENTS

3.2.1.- Introduction

The need to work more closely and involve the national parliaments in EC process was foreseen even before the entry into force of the Treaty on European Union. Contacts between the national parliaments and the European Parliament included:

- *COSAC* (Conférence des organes spécialisés dans les affaires européennes des Assemblées de la Communauté)- meetings between committees specialising in EU affairs in national parliaments and the relevant committees in the European Parliament. The COSAC procedure has shown to be quite successful.

- *The Conference of Presidents* - meetings between the President of the European Parliament and the Presidents of the national parliaments which meets biannually.

-*Assises* - The Conference of the Parliaments is not in fact something new. It met for the first (and only) time in December 1990 in Rome where it adopted a Joint Declaration.

Since the entry into force of the Treaty on European Union, the Parliamentary Assises has not been used[116].

3.2.2.- Innovations introduced by the TEU

Declaration No 13 on the role of national parliaments in the European Union

This Declaration requests an increase in exchange of information between the national parliaments and the European Parliament. A more formal relationship should be established ensuring regular meetings between the national parliaments and the European Parliament. It also suggests that national parliaments should receive Commission legislative proposals with enough time to comment on them[117].

Declaration No 14 on the Conference of the Parliaments

Declaration No 14 "invites the European Parliament and the national parliaments to meet ...as a Conference of the Parliaments (or 'Assises')" which would be consulted on the main aspects of EU activities. The President of the European Council and the President of the Commission would also report to each session of the Assises.

The increasing scope of the EU activities is quite clearly going to affect (some might fear it to be an undermining of) traditional activities of the national parliaments. However,

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[116]On the other hand, meetings in the framework of COSAC have been quite regular.

[117]This will require some Governments to change their procedure of provision of EU information to their respective parliaments. Greater co-operation between government and parliament is clearly needed in some Member States.

there is also a growing recognition that the national parliaments cannot be ignored as they are the democratically elected representatives of each Member State. The two declarations foresee, at least the need for greater co-operation and partnership between the national parliaments and the European Parliament to ensure that neither side feels that they are being undermined.

It must not be forgotten that the national parliaments have a direct role to play in many aspects covered by the TEU:[118]

Traditionally, national parliaments play a direct role in the transposition of Community directives.

Modification of the Treaties may require constitutional revision in Member States thereby requiring the active participation of the parliaments.

Ratification of Conventions under Art 220 but now also under Art. K3 §2c relating to matters concerning justice and home affairs. This is important seeing that in Title VI, considering that the main legislative instruments are those more in line with instruments of public international law such as conventional. If the national parliaments want to influence the process, they can do so refusing to ratify conventions which have already been signed by their respective governments.

The use of the *passerelle* in Art. K.9 may also involve the national parliaments as it states: "It shall recommend the Member States to adopt that decision in accordance with their respective constitutional requirements.[119]

Other areas where the national parliaments may be involved or: citizenship (Art. 8e), the drawing up of a uniform election procedure for the European Parliament elections (Art. 138 §3), and decisions on own resources (Art. 201).

Problems relating to involvement of the national parliaments concern to a great extent, the differing situations in each Member-State.

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[118]See Commission, Projet de Rapport sur le Fonctionnement du Traité sur l'Union Européenne, le 19 avril 1995, p.15.

[119]See chapter on justice and home affairs for further details.

3.3.- THE COUNCIL OF THE EUROPEAN UNION

3.3.1.- Introduction

The Council is the highest legislative body in the European Union. It is made up of the respective Ministers or representatives of each Member-State at ministerial level, authorised to commit the government of that Member State[120].

3.3.2.- Innovations introduced by the TEU

In some areas the TEU has given the European Parliament greater power in the legislative process (see chapters on the Parliament and procedures). However this is quite restricted and ultimately it is still the Council that adopts legislation.

The Council's ability to take decisions in quick and effective manner have been reinforced by the extension of qualified majority voting (see chapter on procedures for further information). In 1994, the Council took 48 decisions by qualified majority.[121] Out of 95 meetings in the year of 1994, in all, 148 decisions, 46 directives and 274 regulations were adopted by the Council.[122]

3.3.3.- Role of the Council in the Second and Third Pillars

The Treaty on European Union institutionalised the areas of Common Foreign and Security Policy (Title V TEU) and Justice and Home Affairs (Title VI TEU) in what is commonly known as the second and third pillars. These entail subject areas which are very sensitive at the national level and directly affect the national sovereignty of a country. For this reason, the Community legislative procedure of the EC Treaty (the first pillar) does not apply. The decision making process could be best described as intergovernmentalism institutionalised under the Union framework. As the Council is the Community institution that best represents the interests of the Member States, it is the Council that carries greatest weight in such nationally sensitive areas as CFSP and JHA[123].

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[120]Art 146 EC Treaty.

[121]European Commission, General Report on the activities of the European Union 1994, p.409.

[122]Ibid. p. 419.

[123]For further details, see chapters of CFSP and JHA.

3.3.4.- The European Council

3.3.4.1.- Introduction

The fundamental provisions dealing with the European Council are to be found in the section of the TEU dealing with common provisions; it is not defined (though it is referred to) within the EC Treaty, a characteristic introduced when the European Council was first formalised by the Single European Act in 1987; one consequence of this is that the European Council does not fall under the judicial control of the ECJ. The TEU did not however merely transfer these provisions from the SEA to the TEU, rather they were added to. These additions are described below.

3.3.4.2.- Innovations introduced by Maastricht and their Implementation

Article D - A Definition of the European Council

The European Council is said to "provide the Union with the necessary impetus for its development and shall define the general political guidelines thereof" (Article D TEU). This formalises what had always been the case before; major changes in the Union's structure (e.g. reform of the Treaties, enlargement) have always been formally launched and agreed to by the European Council. Political guidelines have been provided by the numerous 'conclusions' produced after each European Council meeting.

The frequency of meetings remains the same - "at least twice a year" - although there were three in the course of 1994: Corfu in June, Brussels in July and Essen in December. This additional meeting was necessitated by the lack of agreement within the European Council on the candidate for President of the new Commission.

Two other additions once again serve merely to formalise existing practice:

- meetings are now to be held under the chairmanship of the head of the government or state of the country holding the Presidency of the Council;
- declarations annexed to the Treaty (nos.3 & 4) allowing the European Council to invite the finance and economics ministers to meetings dealing with EMU.

These new Treaty provisions have been used when necessary since the entry into force of the Treaty.

A new paragraph was added to Article D instructing the European Council to submit to the Parliament a report after each of its meetings and a yearly written report on the progress achieved by the Union; the latter was being produced for the first time during April 1995.

Other New Provisions of Relevance to the European Council

Article	*Policy Area*	*Terminology used*	*Number of times used*
103	Sets broad guidelines for economic policies of the Member States and Community	European Council	2 [124]
109a	Nomination of Executive Board of European Central Bank	Governments of the Member States at the level of Heads of State or of Government	0
109b	Report by ECB to European Council	European Council	0
109f	Appointment of President of European Monetary Institute	Governments of the Member States at the level of the Heads of State or of Government	1
109j	Decision to move to the third stage of EMU	Council meeting in the composition of the Heads of State or of Government	0
109k	Decision to withdraw derogations from Member States in order to join the third stage of EMU	Council meeting in the composition of the Heads of State or of Government	0
J.8	Definition of principles of and guidelines for the common foreign and security policy	European Council	2

The difference in terminology is of vital importance. When acting as the Council at the level of heads of state and government, the European Council de facto becomes an institution under the judicial review of the ECJ - something impossible for the European Council in its normal guise since it is not officially an institution of the European Community (nor is it included in Article 173 EC). The Member States must - or should - have been fully aware of this factor when deciding on what terminology to employ in referring to the European Council in the Treaty. The term "governments of the Member States at the level of Heads of State or of Government" would appear to avoid any form

[124] 22.12.1993 (OJ L 7, 11.1.1994, p.9) and 11.7.1994 (OJ L 200, 3.8.1994, p.38)

of possible judicial review and is arguably a yet more intergovernmental formulation than the term "European Council".

3.3.4.3.- Remarks

The European Council's position as the highest body has been reinforced by the TEU: it steps in when appointing 'presidential' figures and setting general guidelines for key areas such as EMU and CFSP. Although not actually mentioned in Article K, it is clear from Council press releases that the European Council also plays an important role in Justice and Home Affairs, such as agreeing to the annual work programme. Thus, the image - and probably the reality - of the European Council being the superior body in the system has been maintained and strengthened. However, one factor contributing to this 'superior' position of the European Council has been that it has always agreed matters by consensus without proceeding to a formal vote; Articles 109j(3) and 109j(4) introduce for the first time qualified majority voting amongst the heads of government or state. Whilst it may be true that the term used here is the "Council meeting in the composition of the Heads of State or Government", it may fundamentally change the atmosphere within which the Member States discuss in the European Council and may render the differentiated image of it somewhat less 'serene'. Further, the fact that these two articles refer to qualified-majority voting means that the heads of state or of government are - in these cases - no longer equals with the weighting of the votes differentiating their strength around the negotiating table.

3.4.- THE COMMISSION

3.4.1.- Introduction

The role of the Commission was influenced in two ways by the TEU - three articles dealing specifically with the Commission were changed (only one of which fundamentally though) and the Commission's existing powers were extended to the new policy areas (including the Second and Third Pillars) introduced by Maastricht. This reflects the tendency shown in previous reforms - the Commission benefits as much , if not more, from the introduction of new policy areas as it does from any changes to the articles directly governing the Commission.

3.4.2.- Innovations introduced by Maastricht and their Implementation

3.4.2.1.- Articles dealing specifically with the Commission (Art.155-163 EC)

Article 158 - The Nomination of the Commission

This article, allowing for a new procedure for the nomination of the Commission, was used for the first time in 1994/95. It introduces co-terminous five year terms of office for the Commission (previously four year terms) and the Parliament and gives the Parliament the right to give its opinion on the choice of Commission President and to have a vote of approval for the Commission as a whole.

Date	*Stage in Process*	*Comment*
15 July 1994	Member States choose candidate for President	Jacques Santer is compromise candidate
21 July 1994	Parliament opinion on candidate for President	52.2% of votes in favour of candidate (only 49.9% including abstentions)
26 July 1994	Candidate officially nominated by common accord of Member States	Jacques Santer is the official nominee
31 October 1994	Member States nominate candidates for Commissioners	-
4-10 January 1995	EP holds individual hearings of each Commission nominee	This stage not strictly foreseen by the Treaty
18 January 1995	EP delivers vote of approval on the Commission "as a body"	71.9% of votes cast in favour
23 January 1995	Decision by common accord of Member States appointing the Commissioners and Commission President	20 new Commissioners take up their positions including the 3 from the new Member States

This procedure is indirectly criticised by the Council report [125]: "the procedure took seven months...; it was felt in some quarters that this was too long". The Commission's paper [126] however points out that the lengthiness of the procedure was to some extent due to the fact that the accession treaties for the three new Member States came into force just when the Commission was being renewed.

Comments:

- the Treaty does not specify what majority is required for the 'opinion' of the Parliament on the Member States' choice of candidate for Commission President. Although this 'opinion' is of no legally binding value whatsoever, it is of some political relevance, at least in the eyes of the Parliament. As is usual, where no majority is specified in the Treaty, the Parliament must "act by an absolute majority of the votes cast" (Article 141).

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125 Report of the Council of Ministers on the Functioning of the Treaty on European Union (adopted by the EU's Foreign Ministers at their meeting in Luxembourg on April 10, 1995), published in "European Report - Document", supplement to European Report no.2032 - 12 April 1995, p.9

126 "Rapport sur le fonctionnement du Traité sur l'Union Européenne", unpublished Commission document, 19.4.95, p.11

Since abstentions are not understood as being votes cast, the presidential candidate may be approved by less than 50% of the total number of votes cast plus abstentions; this was the case with Jacques Santer who received only 49.9% of the total number of votes cast plus abstentions. Therefore it is only because the Parliament was required to achieve its most easily attainable majority that the Member States' candidate was approved in a consultative vote.

- As on past occasions, the EP understood the TEU provisions in an expansive rather than restrictive manner. Accordingly, "Parliament has built on these Treaty provisions by providing in its Rules of Procedure that candidate Commissioners must appear before the competent parliamentary committee for questioning in a public hearing"[127]. As was seen earlier this year, though these hearings cannot lead to the blockage of the nomination of individual Commissioners by the Parliament, they can carry some political weight both inside and outside the EP.

Article 159 - Replacement of a Commissioner

This article deals with the way in which a vacancy resulting from the death, resignation or compulsory retirement of a Commissioner should be filled. Although the TEU added to this article, the additions were merely "a tidying-up exercise, writing into the Treaty of Rome provisions of the Merger Treaty" [128]. The President of the Commission must be replaced according to the normal procedure for the nomination of President; any other member of the Commission is replaced by a new member appointed by common accord of the Member States, thus bypassing any role for the Parliament. Neither of these replacement procedures have yet needed to be used.

Article 161 - Commission Vice-Presidents

Contrary to the previous practice of the Member States appointing six Vice-Presidents by common accord, the reformed Article 161 permits the Commission itself to appoint up to the reduced number of two Vice-Presidents from amongst its members. This provision was first used on February 1st 1995 when two Commissioners were appointed as Vice-Presidents.

3.4.2.2.- Other Areas of Change for the Commission

The role of the Commission has been intensified by other changes made in the TEU. Most of the aspects listed below are dealt with in more detail in the appropriate section of this paper.

In Articles J and K the Commission is to be fully associated with the work undertaken in the areas of common foreign and security policy and justice and home affairs. It enjoys an albeit limited, shared right of initiative in each of these areas.

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127 Part B: Explanatory Statement, Draft Report of the Committee on Institutional Affairs on the development of the European Union, Rapporteur: D.Martin, PE 211.919//B, 16.3.95, p.15

128 D.Macrae in O'Keefe & Twomey 1994, p.172

3.5.- THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

3.5.1.- Introduction: Innovations introduced by the TEU and their implementation

Besides the confirmation and enlargement of the role of the Court of First Instance (art. 168a) and the possibility for the Council to attribute new competences to this institution, with the exception of referrals for preliminary rulings, the major changes introduced by the Treaty on European Union concerning the Court of Justice are: the possibility for the Court to impose, on the Commission's demand, a lump sum or penalty payment to the State that has failed to take the necessary measures to comply with a Court's judgment within the time-limit laid down by the Commission (art. 171); and both the extension of most of the clauses contained in articles 164 to 188 in order to include the European Central Bank (arts. 173, 175, 176, 177), as well as the attribution of powers to the EMI/ECB, similar to those conferred upon the Commission in respect of national central banks.

Measures provided by article 171 have not been used yet by the Court, although the Commission already informed the Member States in July 1994 that it would be ready to apply them, as well as of the fact that it would include a specific clause in its reasoned opinions addressed to Member States not having complied with the judgments of the Court.

In what concerns the powers of the Court and its exercise in matters related with the Second and Third Pillar (art. L and art.K.3§2.c), it may be only competent, within the Third Pillar, in the case of conventions in which it is expressly stipulated that the Court shall have jurisdiction to interpret their provisions and to rule on any disputes regarding their application. This clause was not used by the Council in the only case so far of its kind, the Convention on a simplified procedure for extradition among Member States (10 March 1995 - JO C78 30.03.95).

Several cases have already been brought before the Court concerning new articles of the TEU, such as the principle of subsidiarity (art.3B), the free movement of capital (articles 73B to 73H) and other new legal bases of the Treaty.

Both the Commission[129] and the European Parliament[130] express in their respective Reports on the Functioning of the TEU, as well as the Court of Justice[131] in a more indirect way, the convenience of the extension of the competence of the Court to areas relating to the common and foreign security policy, justice and internal affairs and those covered by the Schengen Agreement, especially in those cases where rights and obligations of the individual citizens could be affected.

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[129] Commission Européenne, Rapport sur le fonctionnement du Traité sur l'Union Européenne, SEC(95) 731 final, Bruxelles, 10 mai 1995, p.26.

[130] European Parliament, Resolution on the functioning of the Treaty on European Union with a view to the 1996 IGC - Implementation and development of the Union, A4-0102/95, Brussels, 17 May 1995, pp.3-4.

[131] Rapport de la Cour de Justice sur certains aspects de l'application du Traité sur l'Union Européenne, Luxembourg, 18 mai 1995.

3.5.2.- THE COURT OF JUSTICE

3.5.2.1.- The implementation of the new provisions of the TEU

The repercussions of the entry into force of the TEU have only had very limited effects in what concerns the everyday activity of the Court, due to the excessively long delay that have required both the approval and implementation of some of its new basic procedural and institutional dispositions. The procedure for the adoption of the new Statute of the Court and Rules of Procedure respectively finished on 22 December 1994 and 21 February 1995, therefore not having yet been implemented and used to a full extent.

Both the Commission[132] and the European Parliament[133] consider in their respective Reports that more flexible internal operating arrangements should be introduced to permit the Court to keep its efficiency in spite of the increase in workload and the prospect of enlargement; in that respect, the Court[134] itself has also suggested the convenience of changing the exigence of unanimity within the Council, contained in art.188§3, for any future modification of its Rules of Procedure.

The Court has regularly made use of the opportunities offered by article 165§3 and by the increase in the number of judges to sit in most of the cases in courtrooms and not in plenary session; in that respect, the Member States and the institutions have shown a cooperative attitude by substantially reducing the number of cases in which the Court is requested by a party to the proceedings to sit in plenary session. This has been one of the main reasons for the reduction of the average duration of proceedings before the Court:

Nature of Year Proceedings	**1992**	**1993**	**1994**
Preliminary rulings	18.8	20.4	**18**
Direct appeals	25.8	22.9	**20.8**
Appeals (Pourvois)	17.5	19.2	21.2

Source: Rapport de la Cour de Justice sur certains aspects de l'application du Traité sur l'Union Européenne, Luxembourg, 18 mai 1995, p.4.

The increase in the duration of the appeals (pourvois) can be explained due to the relative increase of appeals concerning EC Competition Law, which require longer and more complex procedures than the common cases regarding issues brought by EC officials.

Both the Council and the European Parliament have also used in several occassions the new versions of articles 173§1 and 173§3 allowing them to bring respectively before the Court acts taken by the Parliament, by the Council and the Parliament according to

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[132] Vid. supra.

[133] Vid. supra.

[134] Vid. supra.

art.189b and by another institution attacking the powers and prerogatives of the Parliament.

The rest of new articles of the TEU (art.171, art. K.3§2.c) and those articles concerning the European Monetary Institute/European Central Bank, as above mentioned, have not yet been applied.

The accession of the three new Member States to the EU in 1995 had consequences on the nomination of the judges of the Court, since the new global number of 15 rended unnecessary the designation of a second judge from one of the Member States; the problem was solved by temporarily changing the category of this second, at the moment Italian, judge to that of an Advocate-General. Proposals have been made to enable the Advocate-Generals, and not only the judges, in the election, among the judges, of the President of the Court.

3.5.2.2.- Some final remarks: the change of the nature of the Court of Justice

The consolidation of the role of the Court of First Instance has caused major changes in the nature of the cases brought, disposed of and pending before the Court of Justice and therefore has redefined its priorities and main objectives as institution:

Cases registered before the Court:

Nature of Proceedings / *Year*	1992	1993	1994
Preliminary rulings	162	204	**203**
Direct appeals	251	265	**125**
Appeals (Pourvois)	25	17	13
Other cases	4	4	13
TOTAL	442	490	**354**

Source: Report of the Council of Ministers on the functioning of the TEU, 10.04.95, p.28.

Cases disposed of by the Court:

Nature of Proceedings / *Year*	1992	1993	1994
Preliminary rulings	157	196	163
Direct appeals	171	132	100
Appeals (Pourvois)	13	11	20

Opinions	1	1	1
Special proceedings	3	2	9
TOTAL	**345**	**342**	**293**

Source: Ibid, p.28.

Cases pending:

Nature of Proceedings / *Year*	1992	1993	1994
Preliminary rulings	232 (269)	240 (277)	**259 (317)**
Direct appeals	405 (433)	109 (115)	134 (140)
Appeals (Pourvois)	31 (31)	36 (37)	29 (30)
Opinions	2 (2)	1 (1)	3 (3)
Special proceedings	1 (1)	3 (3)	4 (4)
TOTAL	**671 (736)**	**389 (433)**	**429 (494)**

Source: Ibid, p.29.

It may be noted that 57.3% of the current cases having been registered before the Court concern preliminary rulings; the activity of assuring a unitary interpretation of EC Law has become the major task of the Court, approximating its role to that of a national Supreme Court of Appeal. However, there has been a considerable slowing-down in the Court's judicial activities in 1994; the number of pending cases has also increased in the same period, the Court having settled fewer cases than it receives. Some critical voices among the doctrine have denounced the recent decrease in the "coherence" and "quality" of the Court judgments, as well as the presence of a certain phenomenon of "politicisation".

3.5.3.- THE COURT OF FIRST INSTANCE

3.5.3.1.- The implementation of the new provisions of the TEU

Most of the conclusions above presented concerning the Court of Justice are also applicable to the case of the Court of First Instance. The new version of its Rules of Procedure could only be adopted on 17 February 1995, after its approval by both the Council and the Court of Justice. The consequences of the new version of **article 168A**, enlarging the jurisdiction of the CFI with the exception of referrals to preliminary rulings, will only be fully assessed after a longer period of implementation of the Council decisions transfering these competences (mainly Council Decision 07.03.94, JO L66 10.03.94, but also Regulations 40/94 and 2100/94); new transfers of competences have not therefore been yet implemented.

The increase in the workload of the CFI has been considerable after the entry into force of the TEU, although the average duration of the proceedings has remained stable or even decreased, with the exception of the appeals by officials. In fact, the productivity of the CFI has proved to be remarkably high during this period. Its workload is in any case bound to increase further with the litigation concerning, among others, intellectual and industrial property (more than 400 cases are expected for late 1996-1997). The transfer of jurisdiction concerning EC Competition Law, especially State aids and anti-dumping procedures, has involved the study of highly complex economic affairs with a particular negative effect on the productivity of the CFI.

The main measures taken by the CFI to tackle this increase in workload are contained in its new Rules of Procedure, which both rationalises the internal structure and working methods of the courtrooms, the number of their members being now three, and reduces the duration of the oral hearings and the extension of the final decisions.

Court of First Instance - Cases:

Cases *Year*	1992	1993	1994
Cases registered	116	**589**	(397)
Cases disposed of	120	99	**(436)**
Cases pending	166	**653**	(618)

Source: CFI - Provisional figures for 1994

The Court of First Instance firmly regrets in its Report on the Functioning of the TEU addressed to the President of the Court of Justice on 17 May 1995[135] the confusion created by the ambiguous denomination attributed to this institution by the Treaty, as well as the difficulty arisen for the differentiation, from a purely terminological point of view, between the Court of Justice of the European Communities (Court + CFI) and the Court of Justice as a integrating part of it.

3.5.3.2.- Final remarks

Both the Court of Justice and the Court of First Instance ascertain, in their respective reports on the functioning of the TEU, the positive impact that the reinforcement of the role of the Court of First Instance, provided by the TEU, has had both for the protection of the rights of individuals and for the quality and efficiency of the jurisdictional system of the Community, insofar as it has clearly enabled the Court of Justice to consecrate itself to the task of ensuring the uniform interpretation and application of EC law.

[135] Contribution du Tribunal de Première Instance en vue de la Conference Intergouvernementale 1996 au Rapport de la Cour de Justice sur certains aspects de l'application du Traité sur l'Union Européenne, Luxembourg, 17 mai 1995.

3.6.- THE COURT OF AUDITORS

3.6.1.- Introduction

The Treaty on European Union has upgraded the rank of the Court of Auditors from that of a simple organ of the European Communities to the category of full Community institution. As such, it plays an increasing role within the Union; the Treaty has also established the principles of budgetary discipline (art. 201a) and sound financial management (art. 205) as major landmarks of the European construction, thus reinforcing the relevance of the external auditing function carried out by the Court of Auditors.

3.6.2.- The implementation of the new provisions of the TEU

The new members of the Court of Auditors were appointed by Council Decision of 7 February 1994.

In addition to its Annual Report, the Special Reports and Opinions issued by the Court of Auditors have been generally acknowledged for their quality as fundamental instruments for budgetary and economic purposes. The number of Reports and Opinions issued since the entry into force of the TEU has not drastically changed (in fact it has slightly decreased), compared to the previous situation.

The 1994 Essen Summit of the European Council has made a general appeal to all institutions and Member States encouraging them to undertake stricter follow-up measures of the Reports of the Court, insofar as they point out areas in which improvements are possible and desirable. In fact, recent Reports from the Court, both Annual and Special, have continued insisting on the absence of control of budgetary management in many fields, the non-achievement of objectives despite significant expenditure and the failure to take corrective action following the Court's previous observations.

In spite of Declaration No 21 annexed to the TEU, which formally calls on the institutions to consider, with the Court, all appropriate ways of enhancing the effectiveness of its work, the Court of Auditors mentions recent cases where its work has been hindered by members of the Commission, Parliament and Member States; however, the major problems encountered, which concerned Community measures managed by the EIB, are in the process of being definitely solved.

The Commission, which, according to Art. 201a, is now compelled not to make any legislative proposal or adopt any implementing measure with appreciable budgetary implications, without providing assurance of their capability to be financed within the limit of the Community's own resources, acknowledges in its Report on the Functioning of the TEU[136] the improvement and intensification of the cooperation with the Court of Auditors. The Resolution on the functioning of the TEU adopted by the European

[136] Commission Européenne, Rapport sur le fonctionnement du Traité sur l'Union Européenne, SEC(95) 731 final, Bruxelles, 10 mai 1995, pp.26-27.

Parliament[137] suggests the extension of the role of the Court of Auditors to all areas of European Union activity, as well as the extension of the term of office of its members to an only, non-renewable period of nine years.

The Court of Auditors has not yet been able to provide the Parliament and the Council with the "statement of assurance", established in Article 188c, examining the soundness of the budget and the legality and regularity of financial operations concerning the 1994 budgetary exercise. The Court will henceforth soon exerce this new power for the first time; the balance sheet of the 1994 budget was rended to the budgetary authority and the Court of Auditors by the end of last month (28 April 1995).

Legal action has been brought before the Court of Justice against the Court of Auditors of the European Communities in a relatively increasing number of cases in the last months, especially in the case of issues concerning officials from the European institutions.

[137] European Parliament, Resolution on the functioning of the Treaty on European Union with a view to the 1996 IGC - Implementation and development of the Union, A4-0102/95, Brussels, 17 May 1995, p.11, §26.

3.7.- THE ECONOMIC AND SOCIAL COMMITTEE

3.7.1.- Introduction

Traditionally the role of the Economic and Social Committee has been that of providing a forum for social dialogue. It must be consulted by the Council and the Commission where the Treaty so provides. The Council and the Commission may also request of the ECOSOC its opinion in accordance with a set time limit (Art. 198). Its members comprise of those coming from wide-ranging categories of economic and social activity, such as "representatives of producers, farmers, carriers, workers, dealers, craftsmen, professional occupations and representatives of the general public".

3.7.2.- Innovations introduced by the TEU

Art. 194 reinforces the independent status of the members of the ECOSOC in the performance of their duties.

Art. 196 reinforces the Committee's right to adopt its own rules of procedure independent of other Community bodies.

Finally and most importantly, The Economic and Social Committee may now submit opinions at its own initiative where it considers it appropriate (Art 198 §1).

3.7.3.- Remarks

The Economic and Social Committee has been accorded greater freedom and flexibility to contribute effectively to the economic and social dialogue in the Union. It has used its new powers by issuing 39 opinions at its own initiative (up to 31 March 1995). It has issued a total of 221 opinions, 2 of which are information reports, 11 additional opinions, 39 own initiative opinions, 39 opinions on referral by the Commission and 138 opinions on referral by the Council[138].

[138]See Report of the Council of Ministers on the Functioning of the Treaty on European Union, adopted 10 April 1995, Annex VII(b).

3.8.- COMMITTEE OF THE REGIONS

3.8.1.- Introduction

In 1988, the Commission established its own Consultative Council of Regional and Local Authorities. Members of the Council were appointed by the Commission on the joint nomination of the CEMR, IULA and the AER and was administered by DGXVI for Regional Policy.

3.8.2.- Innovations introduced by the TEU and their implementation

The Consultative Council of Regional and Local Authorities was replaced following the entry into force of the TEU by a permanent body called the Committee of the Regions (Chapter 4 TEU Arts 198a-198c). Its establishment is seen as a response to the demand to bring the policy making process closer to the citizen, through sub-national participation in the European integration process. This Committee, with advisory status comprises of representatives of both regional and local bodies. There are 189 members who hold office for three years.

From the beginning, it was decided through Protocol 16 of the TEU to accord the Economic and Social Committee and the Committee of the Regions with a same organisational structure.

The Committee of the Regions according to Art 198c must be consulted by the Council or the Commission where the Treaty so provides. The Council or the Commission may also request an opinion of the Committee of the Regions subject to a time limit. Furthermore the Committee may issue own initiative opinions.

The obligatory consultation procedure applies to the areas of: Education, Culture, Public Health, Trans-European Networks and Social and Economic Cohesion.

Initially, the Committee had some difficulties in organising itself internally. After overcoming several teething problems, the Committee held its first session on the 9/10 March 1994. The first day of the meeting comprised mainly of procedural aspects such as the appointment of the President (Jacques Blanc) and Vice-President (José Maragall). However on the second day already, the Committee had begun preparation for an opinion on the proposal for a Council Regulation establishing a Cohesion Fund and proposal for a Council Regulation establishing a cohesion financial instrument.[139]

The Committee of the Regions has organised itself into several committees (Regional Development, Social and Economic Cohesion etc.) and on paper has been very active. To date it has issued 42 opinions[140]:

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[139]See COM(93). Opinion of the Committee was issued on the 5/6 April 1994.

[140]See Rapport de la Commission sur la fonctionnement du Traité sur l'Union Européenne, Bruxelles, le 10.05.1995, SEC(95) 731 final. Annexe 2.

A)	Obligatory Consultation - Art 198c §1	16
B)	Optional (opinions requested by either the Council or Commission - Art 198c §2	15
C)	Own initiative opinions- 198c §4	11

Such figures on their own may lead one to suggest that the Committee of the Regions has been quite active in its first few years of operation. The difficulty is of course in assessing whether both the Council and the Commission took the opinions and views of the Committee into account. According to the Commission, in the first two sets of opinions (above), points made by the Committee have been duly taken into consideration. This would suggest that the Committee has taken a pragmatic approach in submitting moderate opinions which have a greater chance of receiving a positive response by the Commission. The own initiative proposals however, according to the Commission, seem to have lost a certain amount of focus.[141]

Problems that still exist in the Committee are mainly as a result of its heterogeneous make-up which will be difficult to resolve. The varying regional structures in the Member States of the Union mean that you have representatives of small local authorities, of Counties and of Landers, each one with widely differing competences and responsibilities, all however sitting at the same table in the Committee of the Regions.

[141]Ibid p. 15.

4.- NEW PROCEDURES

4.1.- CO-DECISION - 189 B

4.1.1.- Introduction

The procedure described in Article 189B was considered to be one of the major innovations of the Maastricht Treaty as regards the decision-making process. The so called "co-decision" procedure increases the participation of the EP in the legislative process for important areas of EC activity, therefore enhancing transparency and democracy. However, the need to preserve the delicate balance of power between institutions has resulted in the creation of an extremely complex procedure, the efficiency of which efficiency has been questioned. Moreover, the Treaty left many questions unanswered, namely with respect to modalities of execution (i.e. comitology) and the internal organisation of the conciliation committee.

The following analysis will try to assess the functioning of the "co-decision" procedure in these first months of implementation of the TEU, considering not only its scope of application and efficiency, but also its effect on inter-institutional relations. Finally the reform of the procedure will be discussed, in view of the IGC 96.

4.1.2.- Implementation of the Procedure

Stage of the Procedure	Number of Acts
Commission's Proposals	124
Adopted:	33
*Conciliation	15
*No Conciliation	18
Rejected	2

Source: Rapport sur le Fonctionnement du TUE, Commission des Communautés Européennes, SEC(95) 731 final, 10.05.95, p.19

From the table above it is quite clear that the procedure has worked well allowing for the adoption of 33 legal acts in 18 months. The two rejections by the EP (both after a conciliation procedure) had different origins: the biotechnology directive was rejected in the third reading, in plenary session, due to disagreement with the position of the conciliation committee regarding the substance of the proposal; in the case of the "téléphonie vocale" directive, it was impossible to find an agreement on the comitology question in the conciliation committee.

The comitology question was subsequently solved through a *modus vivendi* between the EP, Council and Commission but the fact that a procedural question prevented

the adoption of a major legal text is highly revealing of the political interests at stake. As the Council report puts it: "The application of the new procedure has been complicated by the linkage which was initially established with other matters, including committee procedure and amounts deemed necessary."[142]

Whether these initial difficulties in implementing the new procedure can be solved within the framework of interinsitutional relations[143] or whether they will bring about a change of the procedure in the next revision of the Treaty remains to be seen. For the moment it is very significant that all institutions agree that, as it stands now, co-decision is an extremly complex procedure - in fact, the Council mentions the problems of coordination between the Conciliation Committee and the EP meeting in plenary session; as for the EP, it makes several suggestions to the IGC 96 on how to simplify the procedure, namely through the suppression of intermediary phases such as the intention to reject after the first reading, the introduction of a simplified conciliation procedure at that stage and the harmonization of majorities required to reject the final text[144].

These matters appear yet more relevant if it is considered that one of the issues on the agenda for 96 is the extension of co-decision to other areas of EU activity. This extension cannot be achieved at the expense of the efficiency of thre decision-making process - therefore a reform of the 189B procedure will certainly be a priority for the IGC along with a simplification and systematisation of the remaining legislative procedures.

4.2.- ASSENT PROCEDURE

4.2.1.- Introduction

The Treaty on European Union introduced both a qualitative and a quantitative change to the assent procedure. This decision-making modality, which constitutes the only true form of "co-decision" requires the explicit agreement of the European Parliament in order that a decision may be taken. The Single European Act introduced this procedure in order to involve the European Parliament in the ratification of association agreements (concluded under Article 238) and accession of new member states (Article 237). The voting modality for the European Parliament was the absolute majority of the members composing the Parliament,

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"Report of the Council of Ministers on the functioning of the Treaty on European Union", 10.4.95, published in European Report n°2032, 12.04.95, p.8

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That is to say through interinstitutional arrangements such as the abovementioned *modus vivendi* or the agreement on the working procedures of the conciliation committee concluded even before the entering into force of the TEU (on the 21.10.93).

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The EP suggest other changes designed less to simplify the procedure than to modify the existing political balance of power - for example by giving the Commission the power of proposing and putting to the vote a compromise between the position of the two delegations in the conciliation committee; and also proposing to suppress the possibility of unilateral action by the Council after the conciliation committee failed to reach an agreement. (source: "EU Treaty and Intergovernmental Conference", Resolution A4 - 0102/95, pp.11/12

which led on various occasions to the rejection by the Parliament of agreements already signed by the Council. The TEU extended the assent procedure to 7 situations, four of which are of a legislative nature (Article 8a(2) on citizenship, Article 105(6) on conferring specific tasks to the European Central Bank, Article 106(5) on amendments to the Statute of the ESCB/ECB and Article 130d on the Structural funds and on the Cohesion Fund) and one of a constitutional character (Article 138(3) on a uniform electoral procedure for the European Parliament). The modification of the modalities to conclude external agreements has also led to an extension of the range of international agreements requiring the Parliament's assent[145]. This scope enlargement was accompanied by a procedural differentiation within the assent procedure itself, since it only requires the majority of the votes cast in the EP in most of the cases. The "qualified assent" is reserved for the crucial matters: accession (Article O-TEU) and the uniform electoral procedure, and was therefore excluded from the conclusion of association agreements.

4.2.2.- Implementation of the procedure

Stage of the Procedure	Number of Legal Acts
Commission's Proposals (initiated before TEU)	32 (20)
Adopted:	7
***International Agreements**	5
***Accession**	1
***Legislative Acts**	1

Source: Rapport sur le fonctionnement du TUE, Commission des Communautés Européennes, SEC(95) 731 Final, 10.05.95, p.20.

Among the 7 policy areas in which the assent of the European Parliament is required, only 3 have so far been subject to the implementation of this procedure. In the case of accession, the European Parliament approved as a whole the accession of the 3 Nordic applicants and of Austria. In the field of international agreements, the European Parliament gave its assent five times. Three were based on Article 238[146], which meant a relaxing of the stipulated threshold in the EP from "qualified assent" to "votes-cast" assent. It is worthwhile singling out the case of the financial protocol with Syria; indeed, the new procedure allowed for the approval of the agreement which the EP had rejected under the former voting requirements for assent. Another concerned the conclusion of the Uruguay Round negotiations: the EP benefited from the extension of assent to "agreements establishing a specific institutional framework". Further, the Montreal Protocol on "substances that deplete the ozone layer" had to be approved by the European Parliament because it "entailed amendment of an act concluded under the procedure

[145] Article 228(3) requires the assent of the European Parliament for agreements establishing a specific institutional framework, agreements having important budgetary implications, and agreements entailing the amendment of an act adopted under article 189B procedure, as well as for article 238 agreements.

[146] Regulation on certain procedures for applying the Agreement on the EEA and Agreement on the EEA-interim "acquis".

referred to in Article 189b". Finally, the assent procedure has been used once in the framework of regional policy for the establishment of the Cohesion Fund.

In the areas of accession and uniform electoral procedure, there is consensus on the fact that "qualified assent" is necessary. Indeed, both matters are crucial for the future of the Union and of the European Parliament. The downgrading of the voting requirements for Article 238 agreements has also had a positive effect since it no longer gives an activist minority[147] the possibility to block an international agreement. As for the extension of the assent requirement to other types of agreements, it has proven beneficial to the EP and it guarantees (as in the Montreal Protocol) that its powers in internal policies are not affected by the conduct of external affairs. However, this extension has also provoked some controversy over the interpretation of concepts such as "agreements having important budgetary implications" (in the case of the Fisheries agreement with Greenland").
All in all, assent for international agreements and accession is seen as the only way for the EP to participate effectively in the decision-making. This is not true for legislative acts, and both the Commission and the European Parliament echo their skepticism vis-à-vis a procedure that merely empowers the EP to approve or disapprove without allowing it to have some constructive input in the legislation concerned.

147 In the previous cases where the EP refused to give its assent to Mediterranean Protocols, the majority of the vote cast was in favour, but abstentions and absenteism were too high to allow for an absolute majority in favour.

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L'AVENIR DE LA CONSTITUTION EUROPEENNE
Perspectives sur la mise en oeuvre et la révision de Maastricht
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THE FUTURE OF THE EUROPEAN CONSTITUTION
Perspectives on the Implementation and Revision of Maastricht
(23-24 June 1995)

LE CADRE INSTITUTIONNEL

APERÇU DE DEUX PROBLEMATIQUES:
LA HIERARCHIE DES NORMES ET LES LISTES DE COMPETENCES

Discussion Paper by

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This paper is associated with the Report "An Appraisal of the Implementation of the Treaty of Maastricht: Policies, Institutions and Procedures" prepared by a research team at the College of Europe, Bruges and "The Implementation of Maastricht: the new (Maastricht-) Europe and Old Institutional Trends - an Interim Balance" by Prof. Dr. W. Wessels.

Note to Readers

This paper is just one of three which have been prepared for the "Institutional Framework" Committee of the Conference on the "Future of the European Constitution" to be held at the College of Europe, Bruges, June 1995. In order that readers may have a full overview of the issues, we have listed below the three papers prepared for this Committee.

"An Appraisal of the Implementation of the Treaty of Maastricht: Policies, Institutions and Procedures", prepared by a research team at the College of Europe, Bruges.

"Aperçu de deux problématiques: La hierarchie des normes et les listes des compétences en vue de la CIG '96", prepared by E.Bribosia, Institut d'Etudes Européennes, ULB, Brussels.

"The Implementation of Maastricht: the new (Maastricht-)Europe and old institutional trends - an interim balance", prepared by Prof.Dr.W.Wessels, Jean Monnet Professor, Universität zu Köln, College of Europe, Bruges, TEPSA.

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PREMIÈRE PARTIE

HIÉRARCHIE DES NORMES

INTRODUCTION

La Déclaration n° 16 jointe au traité de Maastricht prévoit que *la conférence intergouvernementale qui sera convoquée en 1996, examinera dans quelle mesure il serait possible de revoir la classification des actes communautaires en vue d'établir une hiérarchie appropriée entre les différentes catégories de normes.*

La question de la hiérarchie des actes communautaires figurera dès lors à l'ordre du jour de la conférence et, à ce titre, il nous a paru utile de faire le point des propositions ayant été formulées à ce sujet.

Pour ce faire, nous procéderons, dans un premier temps, à un bref exposé de la problématique en tentant de mettre en évidence, d'une part, les raisons pour lesquelles il paraît opportun voire impératif à certains de remettre de l'ordre dans les actes communautaires et d'instaurer une hiérarchie entre ceux-ci et , d'autre part, les obstacles et difficultés qui risquent d'être rencontrés.

Dans un deuxième temps, nous nous référerons aux propositions préalables au traité de Maastricht relatives à la hiérarchie des normes et aux raisons pour lesquelles la tentative de reclassification des actes a échoué et été reportée à la conférence de 1996.

Enfin, nous nous pencherons sur les propositions récentes afin de rendre compte de l'état des débats à ce propos et d'en tirer certaines conclusions.

I. PROBLÉMATIQUE

Dans l'ordre juridique communautaire, la seule typologie existante est celle de l'article 189 du traité qui classe les actes en fonction, d'une part, des destinataires et, d'autre part, de la force obligatoire propre à chacun d'eux. La nature, législative ou exécutive des actes, le processus décisionnel et les organes intervenant dans l'adoption de ceux-ci ne sont nullement pris en compte comme critères de différenciation entre les actes. De plus, on a vu se multiplier des actes dits atypiques ou innommés étrangers à cette classification.

Depuis l'entrée en vigueur du traité de Maastricht, les procédures de décision brillent par leur multiplicité (les spécialistes ne parvenant même plus à s'accorder sur leur nombre exact)[1] et leur complexité. Trouver une cohérence au sein de ce magma relève de la prouesse et ce notamment en raison de l'absence de correspondance entre la solennité plus ou moins grande de la procédure et une place plus ou moins élevée dans la hiérarchie des normes.[2]

De nombreuses voix s'élèvent en vue d'une réduction du nombre de procédures et de leur simplification afin de pouvoir répondre aux exigences de transparence et d'efficacité accrue du processus décisionnel. L'idée d'instaurer une hiérarchie entre les actes communautaires relève du même souci de rationalisation et de démocratisation. Il s'agit d'établir une distinction claire entre les fonctions législatives et exécutives et d'y faire correspondre un processus décisionnel déterminé. Cela permettrait, par exemple, de réserver l'intervention du Parlement européen aux actes de nature législative justifiant un véritable débat parlementaire et de soumettre les autres actes à caractère plus technique et d'importance politique moindre à une procédure simplifiée.

L'extension de la procédure actuelle de codécision à de nouveaux domaines[3] - éventuellement à tous ceux où le Conseil statue à la majorité qualifiée - rendrait une telle mesure encore plus nécessaire pour désengorger

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1 PIRIS J.C., "Après Maastricht, les institutions communautaire sont-elles plus efficaces, plus démocratiques et plus transparentes?", *RTD eur.*, janv-mars 1994, pp. 1-37

2 J.P. JACQUÉ, "le labyrinthe décisionnel", *Pouvoirs,* n° 69, 1994, pp. 23-34

3 Cette possibilité est expressément prévue à l'article 189 B point 8 qui précise que *le champ d'application de la procédure visé au présent article peut être élargi, conformément à la procédure prévue à l'article N, paragraphe 2, du traité sur l'union européenne, sur base d'un rapport que la Commission soumettra au Conseil au plus tard en 1996*

le Parlement européen et lui permettre de se consacrer aux débats politiques d'importance majeure.

Mais ceci renvoie automatiquement à une autre question qui est celle de l'identification du (ou des) détenteur(s) du pouvoir exécutif dans la Communauté. A cet égard, il est important de relever la superposition de deux problématiques :

La première se situe au niveau communautaire et consiste à déterminer la répartition des attributions entre le Conseil et la Commission en matière d'exécution des normes, en appliquant des critères plus ou moins proches du schéma classique de séparation des pouvoirs.

En effet, dans l'état actuel du traité, les compétences d'exécution de la Commission dépendent encore en grande partie de l'habilitation du Conseil qui reste maître dans des "cas spécifiques" de se réserver la mise en oeuvre des normes qu'il adopte. De surcroît, très souvent, l'intervention de divers comités vient entourer l'action de la Commission[4] (pratique connue sous le nom de "comitologie"). Sans entrer dans le détail des problèmes intrinsèques à la comitologie, il faut néanmoins rappeler que la situation actuelle entraîne une confusion entre les rôles respectifs du Conseil et de la Commission dans l'exécution des normes, brouillant les cartes quant à la responsabilité de chacun d'eux et compromettant, par conséquent, l'efficacité du contrôle parlementaire.

En outre, selon le Parlement, cette pratique pourrait se révéler un moyen pour le Conseil de l'écarter de la procédure d'adoption de certaines décisions par une délégation systématique à la Commission. Le rôle du Conseil est en effet préservé en dernier ressort par l'intervention de comités.

A cet égard, le Parlement a défendu le point de vue que, dans les domaines soumis à la procédure de codécision, il n'est plus acceptable que le Conseil puisse seul déléguer ou participer aux mesures d'exécution de textes adoptés en codécision. Et même si, le 20 décembre 1994, un modus vivendi (prévoyant une information régulière et précoce des commissions parlementaires sur les actes soumis aux comités, et un engagement du Parlement à se prononcer rapidement lorsqu'il y a urgence) a pu être trouvé,

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4 L'article 145, 3ème tiret, du traité, tel que modifié par l'Acte unique européen, prévoit que le Conseil *confère à la Commission, dans les actes qu'il adopte, les compétences d'exécution des règles qu'il établit. Le Conseil peut soumettre l'exercice de ces compétences à certaines modalités; Il peut également se réserver, dans des cas spécifiques, d'exercer directement des compétences d'exécution..."*

c'est dans l'attente du réexamen de cette question par la Conférence intergouvernementale de 1996. Il est dès lors aussi important d'examiner les solutions proposées à ce problème particulier dans les différentes propositions.

La seconde problématique est liée à la subsidiarité et à la répartition de la mise en oeuvre de la "législation" de l'Union entre le niveau communautaire et le niveau étatique. La question posée est celle du degré de décentralisation nécessaire ainsi que de l'opportunité de reconnaître dans le traité le principe du fédéralisme d'exécution.[5]

Par ce biais, les problématiques de subsidiarité et de séparation des pouvoirs communautaires se rejoignent et même se superposent. À la clarification au niveau communautaire de ce qui relève de la fonction législative et de la fonction exécutive ainsi que des organes responsables de l'exercice de chacune de ces fonctions, il faut ajouter la répartition de ces fonctions entre le niveau communautaire et celui des États membres. Un lien étroit apparaît ici entre la hiérarchie des normes et le problème abordé dans la seconde partie de ce rapport de la répartition des compétences au sein de l'Union. En effet, il devra impérativement être tenu compte, dans l'élaboration d'éventuelles listes de compétences, des questions de l'intensité de l'intervention législative communautaire et de la gestion et du contrôle de l'exécution des lois, sans quoi il ne peut être prétendu à une application complète du principe de subsidiarité.

On peut relier cette problématique à celle plus spécifique de la directive qui est souvent citée comme l'instrument subsidiaire par excellence. Aux termes de l'article 189 "*la directive lie tout État membre destinataire quant au résultat à atteindre, tout en laissant aux instances nationales la compétence quant à la forme et aux moyens*" . On considère généralement que c'est l'instrument le moins interventionniste. L'influence de la base juridique sur la répartition verticale des compétences et sur le plus ou moins grand respect du principe de subsidiarité semble ici directe.[6]

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5 Sur cette notion, voir K. LENAERTS, "A new institutional equilibrium? In search of the 'Trias Politica' in the European Comunity", in *From Luxembourg to Maastricht : Institutional change in the EC after the Single European Act*, Ch. ENGEL, W. Wessels (Eds), Institut für Europaïsche Politik, Bonn, 1992, pp. 139-159

6 Néanmoins nous nous référerons aux remarques de M. Ehlermann qui fait fort judicieusement remarquer qu'il y a "une forte tension, voire une contradiction entre les exigences de la subsidiarité au niveau législatif et celles prévues au niveau administratif." La directive est conforme à la subsidiarité au niveau législatif mais pose des problèmes en matière de transparence et surtout de contrôle, nécessitant pour son application

La directive pose néanmoins des problèmes non négligeables et souvent dénoncés. On reproche la tendance des institutions qui adoptent des directives à entrer de plus en plus dans le détail au point de ne laisser plus aucune marge d'appréciation aux États membres lors de la transposition. Par ailleurs, en cas de carence des États membres, l'efficacité limitée des directives est problématique.

En reprenant les termes de J.V. LOUIS, "les infractions aux directives posent à l'Union des problèmes préoccupants, qui obligent à s'interroger sur l'opportunité de maintenir un acte d'efficacité limitée et à rechercher d'autres formules en vue de réaliser l'objectif originairement assigné à la directive : préserver une certaine marge d'intervention aux États afin de tenir compte de leur diversité."[7]

II. PROPOSITIONS ANTÉRIEURES AU TRAITÉ DE MAASTRICHT

La Déclaration sur la hiérarchie des actes communautaires, jointe au traité de Maastricht, résulte de l'incapacité de s'accorder lors des négociations du Traité sur l'Union européenne sur diverses questions découlant de l'instauration d'une nouvelle typologie des actes dans l'ordre communautaire.

Sans retracer le déroulement chronologique des négociations à ce sujet,[8] il est important de rappeler dans quel contexte s'est déroulée la réflexion sur la typologie et la hiérarchie des actes communautaires, les grandes lignes des propositions présentées ainsi que les points d'achoppement auxquelles elles se sont heurtées.

La discussion sur la hiérarchie des actes communautaires s'est déroulée en liaison directe avec celle ayant trait à l'introduction d'une

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l'intervention d'une autorité centrale, la Commission. "Au niveau du contrôle, c'est donc le règlement qui permet de respecter plus de subsidiarité que la directive.

7 J.V. LOUIS, "Les institutions dans le projet de Constitution de l'Union européenne", Rapport présenté au Centre Robert Schuman, Florence, mai 1994

8 Nous nous permettons de renvoyer à cet égard à l'ouvrage de MM. J. CLOOS, G. REINESCH, D. VIGNES et J. WEYLAND, *Le traité de Maastricht,* Bxl, Bruylant, 1993 qui retrace de manière claire et détaillée l'évolution de la réflexion sur la hiérarchie des normes dans le cadre des négociations préalables au traité de Maastricht (pp. 368-373).

procédure de codécision. En effet, si le principe d'une procédure de codécision permettant une participation accrue du Parlement au processus décisionnel avait la faveur de plusieurs délégations, certaines d'entre elles mettaient l'accent sur le risque d'asphyxie législative en cas d'application d'une procédure aussi lourde à tous les actes sans distinguer selon leur plus ou moins grande importance politique . C'est ainsi que naquit dans les esprits le lien étroit entre la typologie des actes et le débat sur la codécision. [9]

L'examen des différentes propositions permet de constater la "témérité" décroissante des propositions en la matière au fil des négociations. Plus on a évolué vers des propositions concrètes et susceptibles d'être mises en oeuvre, plus le poids du compromis nécessaire s'est fait sentir de sorte qu'on a abouti à des suggestions peu novatrices pour terminer par un abandon ou plutôt un report de la problématique.

a) Premières propositions

Concrètement, sans omettre les nuances et les degrés d'élaboration divers, on relèvera que la note de réflexion de la délégation italienne, [10] comme le document soumis par la Commission à la Conférence intergouvernementale sur l'Union politique[11] ou la résolution Colombo du 12 décembre 1990,[12] expriment une volonté de remettre en cause fondamentalement la typologie existante et d'instaurer une hiérarchie nouvelle basée sur les fonctions (constitutionnelle, législative, réglementaire, administrative ou de gestion) auxquelles on fait correspondre des actes de nature différente et des procédures appropriées au degré occupé dans cette hiérarchie.

La directive est supprimée mais l'idée qui la sous-tend réapparaît sous diverses modalités. Dans une première proposition, c'est la définition donnée de la loi, [13] associée à la possibilité prévue de confier sa mise en oeuvre en

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9 J. CLOOS, G. REINESCH ..., *Le Traité de Maastricht,* op. cit., pp. 369-370

10 Note de la délégation italienne sur la typologie des actes communautaires, 20 septembre 1990, SN 3936/90

11 document de la Commission relatif à "Légitimité démocratique : hiérarchie des normes, compétences d'exécution et procédure législative" in "Conférences intergouvernementales : contributions de la Commission", *Bull. CE,* Supt 2/91, p. 115-123

12 Résolution portant sur "les bases d'un projet de Constitution" adoptée par le Parlement européen le 12 décembre 1990, *Europe Documents,* n° 1674, 19 décembre 1990

13 Il est prévu que la loi *détermine les principes fondamentaux, les orientations générales et les éléments essentiels des mesures à prendre pour sa mise en oeuvre*

tout ou partie aux États membres qui permet, tout comme la directive, de préserver la diversité des États membres tout en évitant les problèmes liés à l'efficacité limitée de la directive. [14] Dans une autre, l'instauration de la notion de loi-cadre *dont l'application concrète peut être expressément régie par les lois des États membres ou des entités mineures.*[15] remplit les mêmes objectifs.

Parmi les propositions émises lors des négociations du Traité sur l'Union européenne, la résolution Bourlanges du 18 avril 1991 [16] se distingue quelque peu par la combinaison effectuée entre deux distinctions : celle entre les actes législatifs et les actes réglementaires et celle entre les actes apparentés aux actuelles directives (lois-cadres et actes réglementaires-cadres) et ceux apparentés aux actuels règlements (lois et actes réglementaires). Le maintien de cette dernière distinction est justifié par son adaptation aux besoins de la construction communautaire et sa conformité au principe de subsidiarité. Il est précisé que les dispositions de la loi-cadre *dont découle une obligation inconditionnelle et précise produisent un effet direct.* Avec J.V. LOUIS, on peut regretter qu'il ne soit pas indiqué s'il s'agit d'effet horizontal - entre particuliers - ou seulement vertical - à l'égard de l'État.[17] En effet, la Cour de justice s'est depuis longtemps prononcée en faveur de l'effet direct "vertical" des directives[18] mais elle s'est aussi prononcée jusqu'ici sans équivoque contre l'effet direct "horizontal" de celles-ci, [19] malgré l'insistance croissante des Avocats généraux pour une remise en cause de cette jurisprudence. Seule une reconnaissance de l'effet direct "horizontal" des lois-cadres permettrait de pallier les inconvénients liés à l'efficacité limitée de la directive.

En matière de pouvoirs d'exécution, ces premières propositions tendent, d'une part, à concentrer ces pouvoirs, au niveau communautaire, dans le chef de la Commission, moyennant l'instauration d'un mécanisme d'évocation au profit du Parlement et du Conseil [20] et, d'autre part, à

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14 Document Commission, op . cit.

15 Résolution Colombo, op. cit.

16 Résolution adoptée par le Parlement européen sur la nature des actes communautaires le 18 avril 1991

17 J.V. LOUIS, *Les institutions dans le projet de Constitution de l'Union européenne,* op. cit.

18 Voy. J.V. LOUIS, *L'ordre juridique communautaire,* Collection "Perspectives européennes", Commission des Communautés européennes, Bruxelles, 1993, pp. 143-152
J. RIDEAU, *Droit institutionnel de l'Union et des Communautés européennes,* LG.D.J., 1994, pp. 685-691

19 ibidem

20 Document de la Commission, op. cit. et résolution Bourlanges, op; cit.

prévoir une certaine décentralisation, conformément au principe de subsidiarité.[21]

b) Deuxième étape le repli

Le non-paper de la Présidence luxembourgeoise de mars 1991 et son projet de traité sur l'Union de juin 1991 témoignent tous deux de l'abandon de l'idée d'une refonte totale de la typologie des normes communautaires au profit de propositions plus modestes. Dans le premier document, cela consiste à n'introduire que la notion nouvelle de loi dans la typologie existante en la définissant par sa procédure d'adoption (codécision) et par son contenu (principes généraux et règles essentielles dans un domaine donné). Dans le second, le concept de loi est maintenu mais sa définition n'est plus que fonctionnelle : il s'agit d'un acte (directive ou règlement) adopté par la procédure de codécision.

Comme on peut le constater, au départ d'une tentative de délimiter le domaine d'application de la codécision par la définition de l'acte législatif, on en vient à définir la loi par sa procédure d'adoption, ce qui réduit beaucoup l'utilité du concept et rend compréhensible son abandon par les projets subséquents.[22]

c) Troisième étape l'abandon

Le texte de la Présidence néerlandaise ne comprend plus aucune allusion à une nouvelle typologie des actes et la référence à la loi est supprimée à l'article 189 du traité. Le champ d'application de la procédure de codécision est délimité en fonction des matières et plus en fonction du caractère législatif des normes à adopter comme cela avait été envisagé à l'origine. [23] Le problème de la hiérarchie des normes est renvoyé à la Conférence intergouvernementale de 1996 par une déclaration annexée à la version définitive du traité de Maastricht.

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21 Dans les notes explicatives du document de la Commission une référence expresse est faite au principe de subsidiarité qui "serait pleinement respecté puisque c'est dans chaque loi, au cas par cas, qu'il serait décidé de la répartition des tâches entre les autorités nationales et l'exécution communautaire".

Dans les résolutions Colombo et Bourlanges, c'est la notion de "loi-cadre" qui permettra de remplir ce but de décentralisation.

22 J. CLOOS, G. REINESCH..., *Le Traité de Maastricht*, op. cit., pp. 372-373

23 Ibidem, pp. 373-376

III. NOUVELLES PROPOSITIONS DANS LA PERSPECTIVE DE LA CONFÉRENCE INTERGOUVERNEMENTALE DE 1996

A. PROPOSITIONS PRÔNANT UNE REFONTE TOTALE DE LA HIÉRARCHIE DES NORMES

a) Rapport Herman sur la Constitution de l'Union européenne

Il faut commencer par préciser que ce rapport s'inscrit dans une perspective globale, celle de l'élaboration d'une Constitution de l'Union européenne.

Typologie

La typologie des actes proposée dans le rapport résulte d'une refonte complète de la typologie actuelle. L'article 31 consacré aux "actes de l'Union" distingue trois types de lois :

- les lois constitutionnelles qui modifient ou complètent la Constitution.
- les lois organiques, régissant notamment la composition, les missions ou les activités des institutions et organes de l'Union.
- les lois ordinaires dans les autres cas.

Il faut ajouter à cela, les règlements d'exécution et les décisions individuelles qui sont adoptés conformément à la Constitution et aux lois.

A chacun de ces types de lois, correspond une procédure impliquant le Parlement européen et le Conseil, les majorités requises au sein des deux institutions variant en fonction du niveau occupé dans la hiérarchie.

Loi-cadre

La directive disparaît de la typologie des actes communautaire, mais la notion de loi-cadre est introduite. Selon les termes de la Constitution, les lois-cadres *se limitent à définir les principes généraux de la matière, fixent une obligation de résultat pour les États membres et les autres autorités et chargent les autorités nationales et les autorités de l'Union de leur mise en oeuvre*. Cette formule a l'avantage de permettre flexibilité, souplesse et décentralisation comme pour les directives tout en supprimant les inconvénients liés à leur efficacité relative. En effet, les dispositions

suffisamment complètes et précises des lois-cadres peuvent conférer directement des droits et obligations aux particuliers, indépendamment de leur mise en oeuvre par les différents États.[24] Cette faculté est prévue expressément par l'article 31 en vertu duquel *les lois et les règlements sont obligatoires en tous leurs éléments sur le territoire de l'Union.* L'hypothèse des lois-cadres qui nécessitent des mesures d'exécution pour sortir leur plein effet est aussi rencontrée car l*a loi peut prévoir les dispositions qui s'appliquent en cas de carence des États membres dans la mise en oeuvre des lois-cadres.*[25]

Pouvoir d'exécution

En ce qui concerne l'exécution des lois, on soulignera la volonté manifeste de mettre l'accent sur la décentralisation, conformément au principe de subsidiarité, car l'obligation d'exécuter les lois de l'Union est imposée aux États membres au premier paragraphe de l'article 34. Ceci constitue la première consécration du "fédéralisme d'exécution" en droit communautaire.[26]

Au niveau communautaire, la Commission se voit reconnaître directement par la Constitution l*e pouvoir réglementaire en vue de l'exécution des lois* ainsi que le *pouvoir de prendre des mesures individuelles en vue de l'application du droit de l'Union (dans les cas prévus par le traité ou par la loi organique).* La possibilité de charger le Conseil du pouvoir réglementaire dans des cas spécifiques est prévue moyennant l'intervention d'une loi, ce qui a pour effet non négligeable, par rapport à la situation actuelle, d'imposer l'intervention du Parlement dans le cas où le Conseil veut se réserver des pouvoirs d'exécution déterminés.[27]

La situation actuelle en matière d'exécution se voit donc modifiée dans le sens d'un rééquilibrage en faveur de la Commission, ce qui a le mérite de rendre la situation plus transparente et plus conforme au principe de la séparation des pouvoirs.

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24 J. V. LOUIS, "Funciones de la Uniòn", in *La Constituciòn europea,* Actas de El Escorial, Madrid, 1994, pp. 145-155

25 Cette idée d'un pouvoir de substitution de l'Union en cas de carence des États membres figurait déjà dans la résolution Colombo du 12 décembre 1990 qui prévoyait que "si un État membre ne prend pas les dispositions qui répondent aux prescriptions prévues par les lois cadres, l'Union peut par une loi remédier à ce manquement;"

26 J.V. LOUIS, *Les institutions dans le projet de Constitution de l'Union européenne,* op. cit., p. 12

27 J.V. LOUIS, "Funciones de la Uniòn", op. cit.

Toutefois, le projet est nettement moins clair en ce qui concerne la répartition du pouvoir exécutif entre le niveau communautaire (la Commission) et le niveau des États membres. La formulation de l'article 34 permet de conclure à un partage du pouvoir réglementaire entre les États membres et la Commission mais aucun critère précis de délimitation ne semble pouvoir être déduit du texte.[28] Soit, il faut en conclure qu'il appartiendra au législateur de se prononcer au cas par cas. Soit, il faut interpréter l'obligation imposée aux États membres d'appliquer le droit de l'Union comme l'imposition d'une tâche d'ordre administratif ou de gestion, le pouvoir réglementaire proprement dit résidant en premier lieu dans le chef de la Commission, sauf mention expresse en faveur des États membres.[29]

b) Rapport du Mouvement européen international sur les questions institutionnelles [30]

Typologie

Ce rapport doit être rapproché du rapport Herman sur la question de la hiérarchie des normes. En effet, le système proposé reprend en grande partie celui prévu à l'article 31 du projet Herman. Il propose identiquement de distinguer entre la loi constitutionnelle, la loi organique, la loi ordinaire, les règlements d'exécution et les décisions individuelles. toutefois, certaines différences apparaissent quant aux procédures et au champ d'application des lois constitutionnelles et organiques.

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28 J.V. LOUIS dans le commentaire qu'il consacre au rapport Herman (op. cit.) effectue un rapprochement avec le projet Spinelli (source d'inspiration partielle du rapport Herman en matière de pouvoir d'exécution) et souligne l'inversion dans la formulation; Selon le projet Spinelli "sans préjudice des compétences attribuées à la Commission, l'application de ce droit est assurée par les États membres." alors qu'au terme de l'alinéa 2 de l'article 34, "sans préjudice du premier alinéa, la Commission dispose du pouvoir réglementaire en vue de l'exécution des lois." En l'absence de précisions supplémentaires, on peut se demander si la différence de formulation est constitutive d'une différence réelle quant à la répartition du pouvoir d'exécution entre la Commission et les États membres et si l'on peut réellement en déduire que, dans le rapport Herman, l'accent est mis sur la nécessaire décentralisation.

29 A. MANGAS MARTIN, "Las funciones de la Uniòn : anàlisis del sistema de fuentes y de la elaboraciòn y control del cumplimiento de las normas en el Proyecto de Constituciòn de la Uniòn europea", in *Actas de El Escorial,* Madrid, 1994, pp. 157-173

30 Comité de réflexion sur les questions institutionnelles, Mouvement européen international, mars 1995

Loi-cadre

La définition de la loi ordinaire est reprise intégralement de la résolution Bourlanges de 1991 [31]. Elle est proche de la notion de loi-cadre car elle *détermine les principes fondamentaux, les orientations générales, et les éléments essentiels des mesures à prendre pour sa mise en oeuvre. La loi fixe notamment les droits et les obligations des particuliers et des entreprises ainsi que la nature des garanties dont ils doivent bénéficier dans tout État membre.* Une proposition supplémentaire est intéressante car elle consiste à octroyer à la Cour de justice la possibilité d'exercer un contrôle marginal sur le respect par le législateur des caractéristiques de la loi.[32]

Pouvoir d'exécution

En matière d'exécution des lois, les principes suivants sont proposés :

Sans préjudice du pouvoir reconnu à la Commission pour l'exécution des lois, les États membres assureraient leur mise en oeuvre. Toutefois, la loi pourrait réserver au Conseil et au Parlement le soin de prendre des règlements dans des cas spécifiques.

La première phrase correspond à peu de chose près à la formule retenue par le projet Spinelli, (si ce n'est que, dans ce projet, il était question "d'application du droit de l'Union" alors qu'ici on traite de l'exécution des lois). [33] Si on la compare à l'article 34 du rapport Herman, on constate une inversion dans la formulation mais, comme nous y avons déjà fait allusion précédemment, nous ne pensons pas pouvoir en déduire une volonté d'instauration d'une plus ou moins grande décentralisation en matière d'exécution, en l'absence de précisions supplémentaires.

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31 Cette même définition figurait aussi dans le document de la Commission sur la hiérarchie des normes (op; cit.)

32 La redéfinition du rôle de la Cour de justice liée à l'instauration d'une nouvelle hiérarchie des normes est un aspect important de la question qui est rarement développé dans les propositions mais la Cour de justice, dans son "Rapport sur certains aspects de l'application du traité sur l'Union européenne" de mai 1995 a rappelé que si la Conférence intergouvernementale était amenée à établir une nouvelle hiérarchie des normes, "il serait indispensable de prévoir les conséquences que ces modifications devraient emporter pour le système des recours et notamment pour le droit des particuliers d'agir en annulation contre ces actes."

33 Projet de Traité d'Union européenne, adopté par le Parlement européen le 14 février 1984

La seconde phrase présente quant à elle une certaine originalité car elle ne prévoit pas la possibilité de réserver un pouvoir réglementaire au Conseil seul, mais bien de le réserver au Conseil et au Parlement dans des cas spécifiques. [34] On se doit néanmoins de souligner le paradoxe d'une telle proposition. En effet, au départ d'une démarche qui vise à instaurer une hiérarchie afin de désencombrer le Parlement et de lui permettre de se consacrer aux actes nécessitant un véritable débat parlementaire, on aboutit à le recharger de l'examen d'actes réglementaires qu'on voulait précisément lui soustraire.

c) Rapport Weidenfeld-Bertelsmann [35]

Ce rapport s'inscrit dans la même lignée, il propose d'adopter une nouvelle hiérarchie des normes basée sur les propositions existantes de la Commission et du Parlement européen et qui distinguerait entre lois constitutionnelles, lois organiques, lois de réglementation et règlements d'application. Ceci permettrait une séparation entre les actes selon leur fonction réelle, proche de la distinction pratiquée dans la plupart des États membres.

B. PROPOSITIONS PRÔNANT DES MODIFICATIONS PONCTUELLES DE LA TYPOLOGIE DES ACTES

En ce qui concerne les autres propositions actuellement élaborées dans le cadre de la préparation de la Conférence intergouvernementale, on ne peut que constater la pauvreté des développements consacrés à la hiérarchie des normes.

Si nombreuses sont les propositions qui font allusion à la nécessité de revoir la typologie des actes communautaires dans la perspective de l'instauration d'une hiérarchie des normes, rares sont celles qui accompagnent ces déclarations d'intention par des propositions concrètes et des développements consistants.

- La Commission, dans son "Rapport sur le fonctionnement du traité de l'Union européenne" du 10 mai 1995, procède à une évaluation

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34 C'est nous qui soulignons;

35 Europe 1996 - Programme de réforme de l'Union européenne, Werner Weidenfeld (éd.), *Stratégies et options pour l'Europe,* Éditions Bertelsmann Stiftung, Gütersloh, 1994

d'ensemble des nouvelles règles du processus décisionnel et met en évidence différentes faiblesses :

- la complexité du système décisionnel
- le manque de logique de la ventilation des différentes procédures entre les domaines d'action respectifs
- le trop grand nombre et le manque de transparence des types de procédures d'exécution

Elle conclut ensuite à la nécessité d'une simplification radicale des processus législatifs, *en relation avec la notion de hiérarchie des actes que le Traité a inscrite à l'ordre du jour de la nouvelle conférence intergouvernementale*. Si la prise de position en faveur d'une nouvelle hiérarchie des actes est claire, elle ne conduit à aucune proposition concrète.

- La Résolution du Parlement européen sur le fonctionnement du Traité sur l'Union européenne dans la perspective de la Conférence intergouvernementale 1996 du 17 mai 1995 apporte certaines précisions supplémentaires. Le point de départ est la référence très générale à *l'introduction d'une certaine hiérarchie des normes afin de limiter le volume des actes soumis au Parlement et au Conseil.*

Néanmoins, un pas supplémentaire est effectué par l'introduction d'*une nouvelle catégorie d'actes d'application, dont la responsabilité appartiendrait à la Commission sur habilitation de l'autorité législative.* En outre, une simplification de la "comitologie" entraînerait l'attribution de la responsabilité générale des mesures d'exécution à la Commission. Seuls les comités consultatifs pourraient encore entourer l'élaboration de ces mesures. Cependant, cette concentration des pouvoirs dans le chef de la Commission a pour corollaire la possibilité prévue pour le Conseil et le Parlement *de rejeter la décision de la Commission et de demander soit l'élaboration de nouvelles mesures d'exécution, soit la mise en oeuvre d'une procédure législative complète.*

- Le document de réflexion élaboré par E. Guigou pour le Groupe Parlementaire du Parti des Socialistes Européens (janvier 1995) émet une proposition fort proche en matière d'exécution des décisions : *l'exécution des décisions du Conseil et du Parlement doit être réalisée par la Commission seule, mais en donnant au Conseil et au Parlement un droit d'annuler a*

posteriori une mesure prise par la Commission en la remplaçant par une alternative adoptée d'un commun accord.[36]

- On citera encore le document du "European Liberal Democrat and Reform Party (EP)" consacré à la Conférence intergouvernementale de 1996 qui propose la simplification des procédures de comitologie et l'établissement d'une distinction claire entre les fonctions législatives et exécutives du Conseil par l'introduction d'une hiérarchie des normes. Ce dernier point fait aussi partie des priorités énumérées dans le document du CEPS [37] qui souligne l'importance de cette distinction entre fonctions législatives et exécutives dans un but de transparence. Par ailleurs, ce document fait montre d'un grand scepticisme quant aux possibilités d'aboutissement d'une nouvelle tentative de rationalisation des procédures et d'instauration d'une hiérarchie des normes.

- Un document tranche par son orientation c'est le Document de travail sur "la typologie des actes juridiques de l'Union et leurs interrelations" de la Commission institutionnelle du Parlement européen. [38] Le principe fondamental de l'établissement d'une hiérarchie des normes est rappelé; il s'agit *d'établir une distinction tranchée entre les mesures législatives authentiques qui doivent faire l'objet d'un débat parlementaire complet, et les autres actes normatifs qui peuvent être arrêtés par l'exécutif politique responsable*. La typologie des actes communautaires est envisagée de la manière suivante :

Il n'est plus question d'introduire les notions de "lois" et "lois-cadres" en lieu et place des "règlements" et "directives" quand il s'agirait d'actes de nature législative car *ce changement de terminologie* ne modifie rien sur le fond et n'est *ni nécessaire, ni politiquement faisable.* Seule une *clarification terminologique du caractère exécutif des actes législatifs délégués à l'exécutif est utile.*

La distinction entre règlement et directive devrait être maintenue car elle a fait ses preuves. Les dérives qui ont pu être constatées dans la pratique quant à la précision trop grande qui caractérisait les directives, peuvent être

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36 On peut se demander à cet égard si le commun accord doit exister seulement entre le Parlement et le Conseil ou s'il requiert aussi l'accord de la Commission.

37 Centre for European Policy Studies, *Preparing for 1996 and a Larger European Union,* by P. Ludlow in collaboration with N. Ersbøll, R. Barre, CEPS Special Report N° 6, pp. 44-52

38 Document de travail du 15 mars 1995, Rapporteur: W. Rothley, (PE 211.103/rév)

corrigées par une autodiscipline accrue des institutions et par le contrôle judiciaire. On remarquera que les problèmes liés à l'efficacité limitée des directives ne sont eux nullement résolus par une telle autodiscipline. Une des questions les plus problématique posées par la directive reste dès lors sans réponse.

La seule réelle reclassification proposée est celle des actes d'exécution. Cette reclassification qui devrait reposer sur le principe d'une limitation à l'essentiel du pouvoir législatif et d'un renforcement de l'exécutif, responsable politiquement pourrait se faire de la manière suivante:

Les décisions individuelles relèveraient en priorité des administrations nationales sauf en cas de dévolution expresse à la Commission.

L'adoption de règles concernant des modalités techniques sans importance politique propre pourrait être déléguée par le législateur à la Commission sous la forme de "règlements d'exécution" ou de "directives d'exécution". Seule l'assistance d'un comité consultatif pourrait être prévue mais un pouvoir d'annulation des actes arrêtés par la Commission serait attribué au Conseil et au Parlement.

C. PROPOSITIONS OPPOSÉES À L'ÉLABORATION D'UNE NOUVELLE HIÉRARCHIE DES NORMES

- D. Martin, dans l'exposé des motifs de son projet de résolution sur le développement de l'Union européenne, justifie son absence de proposition en matière de hiérarchie des normes par une comparaison des coûts et bénéfices d'un tel exercice. En effet, il lui paraît difficile voire impossible de concilier les différentes manières nationales d'appréhender cette problématique. Il suggère néanmoins de tenter d'établir des critères pour l'utilisation par préférence de la directive, du règlement ou d'un autre instrument communautaire.

- Le document rédigé par F. Vibert du European Policy Forum [39] se distingue par son approche très critique à l'égard de la hiérarchie des normes. Le point de départ est la question de savoir si l'instauration d'une hiérarchie des actes est le meilleur moyen pour aboutir à une simplification et à une rationalisation des procédures.

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39 F. VIBERT, *A Core Agenda for the 1996 Inter-Governmental Conference,* European Policy Forum, mai 1995, pp. 27-30

Deux objections sont ensuite formulées quant à l'établissement d'une hiérarchie des normes. Premièrement, cela dissimule une distribution hiérarchique des pouvoirs dans l'Union en vertu de laquelle la plupart des pouvoirs importants sont exercés au niveau de l'Union, les États membres agissant uniquement dans des matières résiduelles. Deuxièmement, cela institue une même hiérarchie entre les institutions, les institutions nationales étant subordonnées à celles de l'Union.

Selon lui, le modèle hiérarchique est celui qui est le moins compatible avec un système décentralisé de gouvernement. Il faut donc être conscient que derrière la défense de l'introduction d'une hiérarchie des normes, se cache une volonté de centralisation de la distribution des pouvoirs en Europe et pas seulement de rationaliser la typologie des actes et les procédures.

Enfin, il propose quelques pistes alternatives pour améliorer les procédures qui vont de l'amélioration de l'utilisation concrète de la directive, à un renforcement du test de subsidiarité avant l'adoption de mesures au niveau européen ou à une procédure qui aurait pour effet qu'une directive n'entre en vigueur qu'à condition d'avoir été transposée dans un nombre suffisant d'États membres avant une certaine date.

On constate que toute cette démonstration se base sur le fait que l'instauration d'une hiérarchie des normes aurait immanquablement un effet centralisateur en réduisant les compétences des États à la part congrue et en subordonnant leurs institutions à celle de l'Union. Or, il y a là, nous semble-t-il une confusion entre deux problématiques, celle de la séparation des pouvoirs et celle de la subsidiarité. En effet, dans les projets prônant l'instauration d'une hiérarchie des normes, un premier but poursuivi est celui de redéfinir les rôles de chaque institution au niveau communautaire dans le processus d'adoption des normes (logique de la séparation des pouvoirs) et, généralement, s'ajoute un second but qui est justement celui de favoriser une certaine décentralisation au profit des États membres (logique de la subsidiarité). On cherche dès lors en vain les conséquences qu'on pourrait en déduire quant à une limitation massive du champ d'action des États membres ou encore quant à une subordination des institutions nationales à celles de l'Union.

CONCLUSIONS

Au terme de ces développement, nous nous bornerons à relever certaines tendances décelables dans l'état actuel des propositions relatives à la typologie des actes communautaires.

On constate que la majorité des propositions s'accorde quant au caractère opportun voire nécessaire d'une révision de la typologie actuelle des actes. Néanmoins, la plupart des propositions qui marquent leur accord sur le principe d'une telle révision, ne s'appesantissent nullement sur les raisons qui la justifient ou sur les modalités concrètes qui permettraient sa mise en oeuvre.

Une des seules constantes qui semble se dégager est la volonté d'instaurer une distinction claire entre fonctions législatives et exécutives et de rationaliser l'exercice de celles-ci. Mais ici encore, rares sont les propositions qui s'aventurent plus avant et ébauchent des formules envisageables.

Or, on sait que l'échec des négociations préalables au traité de Maastricht en matière de hiérarchie des normes doit être imputé non pas à un désaccord quant au principe mais plutôt à l'impossibilité de s'accorder sur les modalités de mise en oeuvre de celui-ci. On peut se demander si, lors des négociations à venir, un consensus pourra être maintenu au moment du passage à l'élaboration de propositions plus concrètes ou si, au contraire, à l'image de ce qui s'est passé avant Maastricht, on devra se contenter de modifications de détail et d'un report de la problématique *sine die*.

DEUXIÈME PARTIE

LISTE DE COMPÉTENCES

I. PROBLÉMATIQUE

Dans le cadre de ce rapport, nous ne prétendons nullement rendre compte de l'ensemble des questions que soulève la répartition des compétences au sein de l'Union européenne. Nous nous contenterons dès lors de brosser un rapide tableau de la situation actuelle et de mettre en évidence les raisons pour lesquelles le thème de l'élaboration de listes de compétences revient à l'ordre du jour dans le cadre de la préparation de la Conférence intergouvernementale de 1996.

La lecture des traités permet immédiatement de se rendre compte de l'absence de sections ou d'articles consacrés à une énumération précise des compétences communautaires, de celles des États membres et de celles qui permettraient encore l'intervention, moyennant des modalités particulières, des deux niveaux de pouvoir.(compétences partagées, concurrentes ou parallèles selon les appellations).

En effet, "le traité CEE ne procède pas, comme certaines constitutions fédérales classiques, à des attributions de compétences à la Communauté dans des domaines entiers. Les attributions se font plutôt en fonction de la réalisation d'objectifs : le marché commun puis le marché intérieur, ou de la mise en oeuvre de certaines politiques communes, comme en ce qui concerne l'agriculture, les transports ou les relations commerciales extérieures et , bientôt, la monnaie." [40] Les responsabilités attribuées à l'Union le sont donc en fonction d'objectifs à atteindre et non pas de matières nettement délimitées. [41]

Le principe à la base des traités est celui des compétences d'attribution, [42] il a pour corollaire la compétence des États dans les

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40 Commentaire Megret, *Le droit de la CEE*, 2è éd. 1993, vol. 10, Édition de l'Université de Bruxelles, p. 581

41 C.D. EHLERMANN, "Quelques réflexions sur la Communication de la Commission relative au principe de subsidiarité", *Revue du Marché Unique Européen*, 4/1992, pp. 215-230

42 On citera particulièrement, depuis l'entrée en vigueur du traité sur l'Union européenne, le premier alinéa de l'article 3B qui précise que *"La*

domaines n'ayant pas fait l'objet d'une telle attribution à l'Union. [43] Mais la Cour de justice n'a pas retenu une interprétation stricte des compétences conférées à la Communauté; elle a au contraire rendu possible une extension de celles-ci, en particulier dans le domaine des relations extérieures grâce à la théorie des compétences implicites. [44] De plus, l'article 235 a permis à la Communauté d'intervenir dans de nombreux domaines où le traité n'avait pas prévu à l'origine son intervention.

Lorsque dans un domaine donné, la Communauté est compétente, encore faut-il déterminer ce que cela implique quant à la possibilité d'intervenir des États membres. En effet, on constate, en règle générale, que le dessaisissement des États membres résulte, non de l'attribution de compétences elle-même mais bien de leur exercice. [45]

Progressivement,la Cour de Justice des Communautés européennes a reconnu certaines compétences attribuées par le traité CE comme exclusives (politique commerciale commune, politique commune de conservation des ressources de pêche). Dans ce cas, il est généralement reconnu que les institutions communautaires ont l'obligation d'agir et que les États ne sont plus autorisés à intervenir dans ces domaines à partir de l'entrée en vigueur des traités ou d'autres délais éventuellement fixés (expiration de la période de transition ...). L'intervention des États membres est alors subordonnée à une habilitation des institutions communautaires. [46]

On oppose généralement aux compétences exclusives, les compétences concurrentes. Ce type de compétences implique pour les autorités étatiques le pouvoir d'intervenir tant que, et, dans la mesure où, les institutions n'ont pas exercé leurs compétences pour remplir les objectifs qui leur sont assignés par les traités. [47] Les mesures nationales ne peuvent cependant jamais, en application de l'article 5 du traité, avoir pour effet de rendre plus difficile l'exercice futur par la Communauté de ses compétences propres. [48]

Communauté agit dans les limites des compétences qui lui sont conférées et des objectifs qui lui sont assignés par le présent traité."

43 J. RIDEAU, *Droit institutionnel de l'Union et des Communautés européennes,* L.G.D.J., Paris, 1994, pp. 373-425 (particulièrement pp. 374-376)

44 "La compétence pour prendre des engagements internationaux peut non seulement résulter d'une attribution explicite par le traité, mais également découler de manière implicite de ses dispositions.", Arrêt du 31 mars 1971, Commission / Conseil, *Rec,* p. 263.

45 J.V. LOUIS, *L'ordre juridique communautaire,* 6è éd. revue et mise à jour, Commission des Communautés européennes, Bruxelles, 1993,

46 J. RIDEAU, *Droit institutionnel...,* op. cit., p. 377

47 ibidem

48 J.V. LOUIS, *L'ordre juridique communautaire,* op. cit., p. 26

Le caractère très large des objectifs assignés par le traité à la Communauté combiné à l'interprétation de la Cour de justice et notamment à la reconnaissance de la primauté du droit communautaire tant originaire que dérivé sur le droit national, a entraîné un rétrécissement constant des compétences des États membres, parfois au-delà de ce qui avait pu être imaginé par eux. [49]

Tant que les États membres avaient l'impression de maîtriser le système de dévolution de compétences à la Communauté, ce qui était possible en raison de l'approche sectorielle et fonctionnelle suivie pendant longtemps et de la pratique de l'unanimité pour les décisions au Conseil, le problème du partage des compétences ne s'était pas posé.[50]

Une conjonction de phénomènes, particulièrement liés à l'adoption de l'Acte unique européen(AUE) et du traité sur l'Union européenne(TUE), a fait émerger le problème dans toute son acuité.

En effet, l'AUE et le TUE ont, en l'espace de quelques années, étendu à deux reprises les compétences de la Communauté, notamment dans des domaines relevant dans certains États membres des compétences d'entités fédérées. En même temps, ils ont consacré un accroissement du champ d'application du vote à la majorité qualifiée surtout pour les nouvelles compétences mais aussi en ce qui concerne certaines anciennes compétences.

Le développement des compétences communautaires a progressivement eu pour effet de susciter des craintes de certains États redoutant une centralisation croissante et une réduction proportionnelle de leur souveraineté. Le malaise était ressenti par les Parlements nationaux qui se voyaient dépouillés de leurs prérogatives législatives au profit d'un système emprunt d'un déficit démocratique certain. De même, les composantes de certains États (*Länder* ...) considéraient le transfert de certaines de leurs compétences au niveau communautaire comme une perte d'autonomie, vu la manière insatisfaisante dont elles participent au processus de décision communautaire. S'ajoutaient à cela les "appréhensions manifestées par les opinions publiques qui avaient le sentiment de plus en

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49 K. LENAERTS et P. van YPERSELE, "Le principe de subsidiarité et son contexte : Étude de l'article 3B du traité CE", *Cahiers de Droit Européen,* 1994, pp. 3-83 (Voy. surtout pp. 3-7)

50 J. CLOOS, G. REINESH ..., *Le Traité de Maastricht,* op. cit., pp. 141-142

plus vif de subir des décisions adoptées par des centres de pouvoir ressentis comme lointains et mystérieux". [51]

La réponse qui fut apportée à ces diverses craintes d'expansion communautaire incontrôlée fut l'introduction du principe de subsidiarité dans le traité (article 3B). Ce principe était considéré comme pouvant jouer le rôle d'un garde-fou général et présentait, en outre, l'avantage non négligeable de réunir partisans (Allemands) et adversaires (Anglais) d'une Europe fédérale. [52]

Nous n'aborderons pas, dans le contexte de ce rapport, les nombreux problèmes liés à la définition, la nature, la mise en oeuvre ou la justiciabilité de ce principe. [53]

Néanmoins, il faut en tenir compte en raison de la définition de son champ d'application (*les domaines qui ne relèvent pas de la compétence exclusive de la Communauté*) qui a eu pour effet de reposer la question de la délimitation entre compétences exclusives et compétences "concurrentes".[54]

Par ailleurs, l'évaluation de son efficacité en tant que "garde-fou" face au risque de centralisation croissante peut jouer un rôle important dans la nécessité ressentie par certains de renforcer ce principe par l'élaboration de listes de compétences.

D'autre part, le principe de subsidiarité éclaire d'un jour nouveau les propositions qui prônent, après le TUE, l'instauration de listes de compétences lors de la future révision des traités. Il n'est plus possible de se retrancher derrière la crainte d'une centralisation croissante sans au préalable démontrer que le principe de subsidiarité ne joue pas son rôle attendu de régulateur et que sa seule insertion dans le traité n'a pas suffit à mettre fin à la dérive centralisatrice inhérente au système communautaire.

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51 J. RIDEAU, *Droit institutionnel de l'Union et des Communautés européennes,* op. cit., p 405

52 J. CLOOS, G. REINESCH, ..., *Le Traité de Maastricht,* op. cit., p. 142

53 Voy. notamment parmi les articles les plus récents : K. LENAERTS et P. van YPERSELE, "Le principe de subsidiarité et son contexte", op. cit.; G. STROZZI, "Le principe de subsidiarité dans la perspective de l'intégration européenne : une énigme et beaucoup d'attentes", *RTD eur,* 30 (3), 1994, pp. 373-390; CONSTANTINESCO V., KOVAR R. et SIMON D., *Traité sur l'Union européenne, Commentaire article par article,* Paris, Economica, pp. 107-118 et particulièrement la bibliographie commentée p; 115 et s.

54 Voy. infra Communication de la Commission sur le principe de subsidiarité où une tentative de définition et de délimitation des compétences exclusives de la Communauté est réalisée.

Le système de listes de compétences déterminées est présenté comme une exigence propre à l'État de Droit. Il est fait référence aux Organisations internationales qui ne disposent que des compétences qui leur ont été attribuées par les traités constitutifs ou aux Gouvernements qui ne disposent que des pouvoirs que les lois leur ont expressément attribués. [55]

La transparence est un autre mobile pouvant justifier la nécessité de formuler de manière claire la répartition des compétences entre Communauté et États membres afin d'améliorer la lisibilité du système et de le rendre plus facilement accessible.

Pour que le débat à ce sujet puisse se dérouler dans des conditions optimales, il est donc important non seulement d'analyser les propositions effectuées quant à leur substance et à leur praticabilité mais encore d'identifier les mobiles qui les sous-tendent.

II. APERÇU DES PROPOSITIONS

Au sein des documents que nous avons examinés, dans le cadre de cette étude, nous avons pu distinguer deux grandes tendances par rapport à l'établissement de listes de compétences lors de la future révision du Traité de l'Union européenne.

La première réunit les projets ou prises de position qui s'opposent à l'élaboration de listes de compétences revenant à l'Union européenne, aux États membres ou partagées entre les deux niveaux de pouvoir et ce, soit pour des raisons de principe soit pour des raisons pragmatiques, de pure opportunité politique.

La seconde tendance rassemble, en revanche, les propositions en faveur de la réalisation de telles listes; certaines poussant même l'exercice jusqu'à une tentative concrète d'élaboration de listes.

A. PROJETS OPPOSÉS À L'ÉLABORATION DE LISTES DE COMPÉTENCES

Différentes justifications sont invoquées pour rejeter les propositions ou revendications en vue de l'élaboration de listes de compétences.

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55 E. GARCíA de ENTERRíA, "La regulación de las competencias de la Unión en el proyecto de Constitución", *La Constitución europea*, Actas de El Escorial, Madrid, 1994, pp. 197-211

Plusieurs des documents examinés mettent l'accent sur les difficultés pratiques et les risques pour l'acquis communautaire que pourrait comporter une telle entreprise. En effet, le danger de se voir embarquer dans des discussions sans fin sur le bien fondé du maintien de telle compétence au niveau communautaire ou, au contraire, sur la nécessité de son retransfert aux États membres risque fort de mener à des négociations impossibles, étant donné les conceptions divergentes de États membres.

- *Le Parlement européen*

La Résolution sur le fonctionnement de l'Union européenne du 17 mai 1995 précise que *l'établissement d'une liste fixe de compétences de l'Union européenne et des États membres constitue une option trop rigide et trop difficile à réaliser.*

Le Rapport "Martin" préalable à l'adoption de cette résolution, rejette l'idée d'élaborer une liste de compétences compte tenu du rapport coût / bénéfice d'une telle opération et de l'existence du principe de subsidiarité comme garde-fou face à un risque de centralisation croissante au niveau européen.

Le projet Herman de Constitution de l'Union européenne fait aussi l'économie de telles listes de compétences. Le cours donné à l'Escorial en juillet 1993 par le professeur Garcia de Enterria, membre du groupe d'experts qui a assisté le rapporteur de la Commission institutionnelle de l'époque, Marcelino Oreja.[56] donne un éclairage intéressant.

Le premier argument avancé pour justifier l'absence d'élaboration de listes de compétences dans le projet de Constitution, contrairement à la solution qui avait été retenue par le projet Spinelli, [57] est celui du caractère difficile voire délicat d'un tel exercice. En effet, pour refléter de la manière la plus exacte possible la répartition actuelle des compétences entre l'Union et les États membres, une simple consultation des traités n'est pas suffisante, il faut tenir compte de tout l'acquis communautaire et donc aussi du droit dérivé et de la jurisprudence de la Cour de justice. Or, ceci peut se révéler être une tâche particulièrement ardue et comporte le risque qu'une atteinte soit portée à l'acquis communautaire.

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56 E. GARCíA de ENTERRíA, "La regulación de las competencias de la Unión en el proyecto de Constitución", op. cit.

57 Voy. infra

Mais le deuxième argument semble avoir été encore plus déterminant. L'auteur part du constat du bon fonctionnement et de l'absence de problèmes posés par le système actuel. Il déduit cela de l'absence d'arrêt de la Cour de justice qui aurait annulé un acte législatif de l'Union pour excès de compétence.[58] Le principe de la primauté du droit communautaire sur les droits nationaux, reconnu depuis 1964 comme un des piliers de l'ordre juridique communautaire, suffirait à régler les éventuels conflits, à l'image du système fédéral américain fondé sur quelques principes-clés dont l'interprétation jurisprudentielle a permis l'évolution.

Le système fédéral européen basé, au contraire, sur une technique de listes de compétences (cf. modèles allemand et espagnol [59]) n'a pas été adopté et ce en raison de la difficulté d'appliquer un tel système à la construction communautaire, du grand nombre de conflits auxquels risquerait de donner lieu l'interprétation de ces listes et de la satisfaction relative dont faisait l'objet le système existant.

- *Plusieurs États membres*

la Belgique, dans le Rapport d'initiative de M. Eyskens, rejette l'idée de dresser une liste de compétences pour définir précisément le champ d'application de la subsidiarité *car elle contribue à la décommunautarisation des compétences de l'Union européenne et entrave leur évolution dynamique.*

L'Espagne, dans son document élaboré en vue de la Conférence intergouvernementale de 1996 [60], s'est aussi penchée sur la question de la réalisation d'un catalogue de compétences. Le point de départ réside dans l'examen des propositions effectuées dans le Rapport Weidenfeld-Bertelsmann à ce sujet. La thèse défendue est critiquée en raison de son caractère prématuré. Il serait, en effet, dangereux de figer la construction européenne *alors que les circonstances objectives d'une fédération n'existent*

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58 Selon J.V. LOUIS, tirer de l'inexistence de telles décisions de la Cour l'absence de problème posé par le système en vigueur est un argument à double tranchant car on pourrait tout autant "soutenir que la Cour n'a pas trouvé dans les traités des limites suffisamment précises pour lui permettre de sanctionner la violation des règles de compétences." (in "Quelques réflexions sur la réforme de 1996", *Mélanges Siotis,* à paraître)

59 M. GARCíA de ENTERRíA se réfère particulièrement dans son commentaire (op. cit.) à la présence de listes de compétences dans la Constitution espagnole qui n'a nullement permis d'éviter les conflits entre les deux niveaux de pouvoirs.

60 Document espagnol, "La Conferencia intergubernamental de 1996 : Bases para une reflexión.", mars 1995.

pas encore. En outre, les conceptions nationales fort différentes à propos de la répartition des compétences entre les différents niveaux conjuguées aux structures territoriales diverses que présentent les États membres risquent de mener à des négociations impossibles.

- *Autres documents*

Le Comité de réflexion sur les questions institutionnelles du Mouvement européen international est d'avis *qu'à ce stade de l'intégration, l'établissement de listes de compétences ne s'impose pas et serait d'ailleurs très délicat... La rédaction de listes sera inutile si les domaines sont décrits de façon trop large, et réductrice voire nuisible, si les négociateurs sont guidés par un esprit restrictif.*

Dans le document du "European Policy Forum" rédigé par F. Vibert [61], la question est posée de savoir si l'établissement de listes de compétences constitue réellement le moyen adéquat pour clarifier et stabiliser la division des pouvoirs et des responsabilités entre l'Union et ses États membres et ainsi mettre fin aux craintes exprimées face à la centralisation croissante. Afin de répondre à cette question, l'auteur brosse d'abord un bref aperçu des différents modèles de répartition des responsabilités dans un système où cohabitent plusieurs niveaux de pouvoirs (systèmes américain, suisse, canadien et allemand).

Ensuite, il distingue entre quatre différents objectifs que devrait viser une clarification dans l'énumération des compétences : une définition plus claire des politiques communes, une garantie de stabilité par la mise sur pied d'une division des pouvoirs durable entre l'Union et les États membres, la définition d'une structure particulière des pouvoirs de l'Union et enfin, une clarification de l'exercice des pouvoirs.

Par ailleurs, il évalue de manière critique la façon dont ces objectifs pourraient être effectivement atteints par l'élaboration de listes de compétences. On relèvera particulièrement le scepticisme exprimé quant à la possibilité de fixer la division des pouvoirs de manière permanente. Il invoque tout d'abord le caractère mouvant des fonctions gouvernementales et de l'appréciation de ce qui peut être mieux réalisé collectivement au sein d'une Union. Ensuite, il ajoute que l'instauration d'une liste des compétences réservées aux États membres historiquement ne s'est pas révélée comme une garantie efficace contre la centralisation croissante. Seule l'exclusion de

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61 F. VIBERT, *A Core Agenda for the 1996 Inter-Governmental Conference,* op. cit.

l'Union de certains domaines permettrait d'atteindre un tel objectif. Enfin, selon lui, en définissant des aires de compétences exclusives et partagées, on tend à favoriser un système de pouvoirs indépendants et coordonnés pour l'Union et les États membres qui a souvent tendance, par le jeu d'autres facteurs, à entraîner une centralisation croissante.

B. PROJETS EN FAVEUR DE L'ÉLABORATION DE LISTES DE COMPÉTENCES

a) Propositions antérieures à la préparation de la Conférence intergouvernementale

Quelques projets plus anciens doivent être exposés pour donner un panorama plus complet des propositions en vue d'une clarification de la répartition des compétences au sein de l'Union.

- *Projet Spinelli* [62]

Il doit être cité pour le caractère élaboré et novateur de la solution qu'il préconise. Au sein des compétences de l'Union, qui sont des compétences d'attribution, est établie une distinction entre les compétences exclusives et les compétences concurrentes (article 12). [63]

Dans le domaine des compétences exclusives de l'Union, *les institutions de l'Union sont seules compétentes pour agir; les autorités nationales ne peuvent intervenir que pour autant que la loi de l'Union le prévoie.*

Dans le cadre des compétences concurrentes, les États membres peuvent agir dans la mesure où l'Union n'est pas encore intervenue. Mais, celle-ci ne peut agir que moyennant le respect du principe de subsidiarité et l'adoption d'une loi organique entraînant le déclenchement de l'action commune dans un secteur non encore abordé par l'Union.

La catégorie des "compétences potentielles" doit encore être mentionnée.(article 11) Il s'agit de certaines matières relevant de la coopération entre États qui peuvent par le biais d'une procédure particulière

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62 Voy.. CAPOTORTI F., HILF M., JACOBS F., JACQUÉ J. P., *Le Traité d'Union européenne,* Éditions de l'Université de Bruxelles, Bruxelles, 1985, pp. 57-74

63 Une telle distinction avait déjà été effectuée par la Commission dans les propositions présentées lors de la préparation du rapport Tindemans, *Bull. CE,* suppl. 5/75, paragraphes 11 à 18.

devenir l'objet d'actions communes soit sous la forme d'une compétence exclusive soit sous celle de compétences concurrentes. Il faut souligner que ce mécanisme est le seul qui permette d'étendre le champ d'application de l'action commune, à l'exclusion de toutes compétences implicites ou d'un mécanisme comme celui de l'article 235 du traité CEE.

Dans la partie du traité relative aux politiques de l'Union, il est défini pour chaque politique, le type de compétence dont dispose l'Union.

Il ne s'agit pas à proprement parler d'un système de listes de compétences mais le résultat auquel on aboutit est fort proche étant donné que chaque matière est directement rattachée à un des types de compétences définis dans le traité.

- *Rapport intérimaire de V. Giscard d'Estaing* [64]

Dans le cadre des discussions relatives à la subsidiarité, ce rapport constitue une autre tentative d'élaboration de listes de compétences. Il commence par présenter l'alternative qui devra être tranchée entre l'explicitation de la répartition des compétences, comme dans la plupart des Constitutions fédérales, et l'introduction d'un principe général de subsidiarité qui constituerait une garantie suffisante en soi.

Ensuite, les politiques déjà communautaires au sens du traité CEE sont énumérées et il est distingué au sein de celles-ci entre *celles transférées à la Communauté quant à leur principe et leur contenu et celles transférées uniquement en ce qui concerne des objectifs à réaliser et dont la réalisation pèse en partie sur les États membres.*

Enfin, deux listes sont élaborées :

- la première énumère les compétences dont la Communauté envisage de se doter et précise quel impact aurait le principe de subsidiarité sur celles-ci.

- La seconde est consacrée aux compétences qui ne devraient pas être enlevées aux États membres et qui pourraient faire l'objet d'une liste dans la perspective de la rédaction d'une future Constitution européenne.

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64 Rapport intérimaire fait au nom de la Commission institutionnelle du Parlement européen sur le principe de subsidiarité, 4 juillet 1990, Doc. A3-163/90/partie B

Il est cependant précisé qu'il ne s'agit pas de listes exhaustives de compétences car *dans la réalité des choses, la complexité des situations crée parfois un certain enchevêtrement des compétences dont il est difficile de ne pas tenir compte*. L'optique était dès lors plutôt de provoquer des interrogations et de constituer une base de réflexion.

V. Giscard d'Estaing n'a finalement pas été suivi par la commission institutionnelle qui, devant les difficultés politiques et pratiques de cet exercice et le risque qu'il soit porté atteinte à l'acquis communautaire, a préféré se contenter de l'affirmation du principe de subsidiarité dans le traité.[65] Celui-ci, conjointement avec les principes d'attribution des compétences et de proportionnalité devrait suffire à limiter l'exercice des compétences. [66]

- *Communication de la Commission sur le principe de subsidiarité* [67]

De longs développements y sont consacrés à la définition et à la délimitation des compétences exclusives et des compétences partagées. Rappelant qu'en vertu du principe d'attribution de compétences, la règle est la compétence nationale et l'exception, la compétence communautaire, elle en déduit *l'inutilité, sur le plan constitutionnel, d'une liste des compétences réservées aux États membres*. Mais elle n'en omet pas pour autant les problèmes politiques posés par l'absence d'une telle liste qui entraîne les collectivités décentralisées de certains États membres et l'opinion publique à conclure *qu'il n'y a pas de limitations précises aux interventions de la Communauté accusée de pouvoir se mêler de tout.* Elle se pose dès lors la question de l'opportunité d'indiquer les principaux domaines de compétences réservés aux États membres.

Ensuite, elle se penche sur une difficulté qui apparaît avec plus d'acuité depuis le Traité de Maastricht, l'absence de définition ou de contenu clairs des deux blocs de compétences (exclusives et partagées). [68]

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65 V. GISCARD D'ESTAING, "La règle d'or du fédéralisme européen", *Revue des Affaires européennes*, n°1, 1991, pp. 63-66

66 K. GRETSCHMANN, "The Subsidiarity Principle : Who is to do What in an Integrated Europe", in *Subsidiarity : The Challenge of Change*, IEAP, Maastricht, 1991, p 45 et s.

67 Communication de la Commission au Conseil et au Parlement européen sur le principe de subsidiarité, 27 octobre 1992, *Agence Europe, Europe Documents*, n° 1804/05, 30 octobre 1992, (Voy. surtout annexe)

68 En effet, le champ d'application du principe de subsidiarité est défini à l'alinéa 2 de l'article 3B du traité de l'Union comme ne s'étendant pas aux domaines où la Communauté dispose d'une compétence exclusive.

À cet égard, la Commission tente une définition théorique de la compétence exclusive en la caractérisant par un élément fonctionnel (l'obligation d'agir pour la Communauté qui doit clairement et précisément résulter du Traité) et un élément matériel (le dessaisissement des États membres du droit d'intervenir unilatéralement).

Elle présente enfin une liste des compétences qui doivent être considérées comme exclusives,. au sein des compétences actuelles. Le bloc de compétences exclusives proposé est organisé autour des quatre libertés fondamentales et de certaines politiques communes indispensables à l'établissement du marché intérieur ou corollaires de celui-ci. La délimitation de ce bloc est amenée à évoluer en fonction des progrès de l'intégration européenne et ne saurait être pétrifiée.

Cette tentative de délimitation du domaine des compétences exclusives de la Communauté a fait l'objet de nombreuses réactions et critiques. [69] En effet, l'interprétation de la Commission du concept de compétence exclusive s'éloignait sensiblement de celle de la Cour de justice qui n'avait reconnu, jusqu'alors, que deux matières comme appartenant à cette catégorie (la politique commerciale commune et la politique commune de conservation des ressources de pêche). Ces critiques sont révélatrices de *la difficulté d'appliquer, in concreto, le concept des compétences exclusives dans un système "constitutionnel" qui attribue des responsabilités en fonction d'objectifs à atteindre et non pas de matières nettement délimitées.* [70]

- *Rapport du Sénat français* [71]

Ce rapport considère l'élaboration de listes de compétences comme un problème décisif, reflet de l'affrontement entre deux conceptions - Communauté centralisée ou Communauté subsidiaire.

En outre,. la référence faite à l'article 3B du Traité de l'Union à la notion de compétence exclusive, rend d'autant plus impératif l'établissement

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69 Voy. C.D. EHLERMANN, "Quelques réflexions sur la communication de la Commission relative au principe de subsidiarité, *Revue du Marché Unique Européen*, 4/1992, pp. 215-230; K. LENAERTS et P. van YPERSELE, "Le principe de subsidiarité et son contexte...", op. cit., pp. 23_27; J. RIDEAU, *Droit institutionnel de l'Union et des Communautés européennes*, op. cit., pp. .377-378

70 C.D. EHLERMANN, "Quelques réflexions sur la communication de la Commission...", op. cit., p. 218

71 Rapport de la délégation du Sénat français pour les Communautés européennes sur le principe de subsidiarité par M. PONIATOWSKI, 12 novembre 1992

d'une délimitation nette entre compétences exclusives et concurrentes, qui ne peut être laissée à la seule appréciation des institutions communautaires.

La solution réside donc, selon le rapporteur, dans l'élaboration, dans le cadre d'une conférence intergouvernementale, de listes de compétences (exclusives et concurrentes) qui devront être soumises aux Parlements des États membres. L'avantage est qu'une fois la répartition des compétences fixée dans des listes, toute modification de celle-ci doit être exposée clairement.

b) Documents préparatoires à la Conférence intergouvernementale de 1996

La plupart de ces documents, contiennent des prises de position favorables à l'établissement de listes de compétences dans un but de rationalité, de transparence et de démocratie. Néanmoins, au delà de cette position de principe, il n'est bien souvent fait référence ni aux modalités pratiques, ni aux lignes directrices qui permettraient de réaliser un tel exercice.

Les formules utilisées sont révélatrices du manque de substance de la plupart des propositions dans ce domaine. A titre d'exemple, nous citerons la prise de position en faveur de *l'établissement d'une liste claire de compétences ayant pour but d'éliminer ou de restreindre le champ des compétences concurrentes.*,[72] la proposition que *la Conférence intergouvernementale tente d'énumérer les compétences réservées aux États membres.* [73] la déclaration en faveur de *l'élaboration d'une liste de compétences de l'Union européenne, des États membres et des gouvernements régionaux ou locaux.* [74] et une position *favorable à l'élaboration d'un catalogue de compétences, à tout le moins dans un but de clarification et comme point de référence pendant les négociations.* [75]

72 Document de travail sur la subsidiarité rédigé par G. Berthu, Commission institutionnelle du Parlement européen, 16 janvier 1995

73 Document de réflexion du groupe parlementaire des socialistes européens élaboré par E. Guigou, op. cit.

74 Document du "Group of the European Democrat and Reform Party", op. cit.

75 Document du "Centre for European Policy Studies", "Preparing for 1996 and a Larger European Union : Principles and Priorities", op. cit.

On trouve les développements les plus complets en ce domaine dans le rapport du groupe "Europa 96" de la Fondation Bertelsmann. [76] En effet, une grande partie du rapport est consacrée à la répartition des compétences et à l'équilibre fédéral qui doit être maintenu entre le Centre et les États membres. De plus, il contient une tentative concrète d'élaboration d'un catalogue de compétences (basé sur la répartition sous-jacente au traité de l'Union.) ce qui en constitue le principal intérêt.

Il est important de retracer l'ensemble du raisonnement afin de se rendre compte de la portée exacte de la proposition.

Le point de départ réside dans la nécessité d'assurer *l'équilibre fédéral entre le niveau européen, d'une part, et les États membres, d'autre part* afin de prévenir un glissement excessif vers le niveau européen car il existe des indices incontestables d'une centralisation croissante. Une répartition claire des compétences permettrait *une imputation non ambiguë des responsabilités garantissant l'équilibre fédéral et la transparence requise.*

Ensuite, il est fait référence au principe de subsidiarité qui est considéré comme insuffisant pour résoudre le problème des compétences et de la tendance à la centralisation européenne mais constitue néanmoins une maxime d'action qui peut être efficace dans l'espace politique en tant que principe régulateur.

Face à l'impuissance du principe de subsidiarité pour clarifier la répartition des compétences, le rapport conclut à la nécessité d'élaborer un catalogue des compétences qui décrive l'état de cette répartition et représente de manière systématique la structure complexe de celle-ci, fournissant du même coup des points de repère à la Cour de justice pour trancher les conflits de compétence.

L'originalité du catalogue proposé est qu'il ne se base pas sur des listes de compétences exclusives ou partagées mais qu'il établit une distinction entre les compétences primaires et les compétences partielles des États membres et de l'Union européenne. Quand un niveau de pouvoir (les États membres ou l'Union) dispose des compétences primaires dans un domaine, cela signifie qu'il dispose de la compétence de principe pour régir la matière. Les seules interventions qui peuvent être effectuée par l'autre

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76 Europa'96 *Reformprogramm für die Europäische Union.* Strategien und Optionen für Europa - Werner Weidenfeld (Hrsg). Verslag Bertelsmann Stiftung, Gütersloh, 1994

niveau résultent alors des compétences partielles qui lui sont attribuées au sein de ce domaine donné.

Le principe suivant est proposé afin de régir l'attribution des compétences primaires : *l'unité, si elle est nécessaire, la multiplicité, chaque fois qu'elle est possible.* Ce principe doit servir pour l'attribution future de compétences primaires à la Communauté mais il doit aussi avoir pour fonction dès maintenant de servir de base à un réexamen des compétences dont elle dispose actuellement et à une révision éventuelle de la répartition des compétences. Dans la même optique, les compétences ne devraient plus être définies en terme d'attribution fonctionnelle de tâches décrite de manière large mais bien en termes d'attribution concrète et précisément délimitée de domaines déterminés.

Certains principes régulateurs sont néanmoins jugés nécessaires en cas de conflits de compétences. Le principe de loyauté à l'Union européenne, selon lequel l'Union et les États membres doivent tenir compte des responsabilités de l'autre niveau pour toute intervention, est ainsi considéré comme primordial. À cet effet, il est proposé de modifier l'article 5 du traité afin qu'il joue dans les deux sens et entraîne une coopération loyale entre les différents niveaux.

Enfin, le rapport propose une suppression ou une formulation nettement plus restrictive de l'article 235. L'ajout de nouvelles compétences communautaires pourrait encore être réalisé mais moyennant la formule de révision des traités, telle que prévue à l'article N du traité de l'Union.

Que penser à ce sujet?

Il faut commencer par préciser que ces listes ont comme premier mérite, celui d'exister. En effet, l'examen des autres documents révèle le laconisme des propositions quand il s'agit de concrétiser le principe de l'élaboration de listes de compétences. Mais la tentative, toute louable quelle soit, démontre aussi toute la difficulté d'une telle entreprise. Le paradoxe est que la volonté de tenir compte le plus possible de toutes les nuances de la répartition actuelle de compétences aboutit à un résultat qui, dans bien des cas, n'apporte pas les clarifications requises et bien au contraire risque de poser de nombreux problèmes d'interprétation.[77]

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77 Pour un commentaire critique de ce rapport, voy. J.V. LOUIS, "Quelques réflexions sur la réforme de 1996", op. cit.

L'objectif poursuivi tel qu'il est présenté semble être double : d'une part, permettre un maintien durable de l'équilibre fédéral et prévenir efficacement un glissement excessif de compétences vers le niveau européen et, d'autre part, améliorer la transparence du système communautaire. On peut néanmoins se demander si la transparence ne constitue pas plutôt un prétexte, le véritable mobile étant la lutte contre une centralisation croissante. Si l'on doit juger cette proposition sous l'angle de la transparence, le bilan n'est pas réellement satisfaisant quant à la clarification apportée par l'élaboration de ces listes. Par ailleurs, les principes proposés pour régir l'organisation des compétences seraient applicables non seulement pour l'avenir mais aussi pour le passé, avec une possibilité de retransfert aux États membres de compétences conférées à l'Union. Le risque est grand que cela ne débouche sur une rediscussion globale de l'ensemble de l'acquis communautaire.

CONCLUSIONS

A l'issue de ces développements, on constate, au sein des propositions examinées, un partage presque égal entre les partisans et les opposants au principe de l'établissement de listes de compétences à l'occasion de la prochaine révision des traités.

La plupart du temps, les arguments présentés à l'appui des listes de compétences sont liés à un besoin de transparence et de rationalisation du système de répartition de compétences existant. Au delà de ces justifications, le but, avoué ou non, est souvent de fixer des limites claires aux compétences communautaires afin de protéger les États membres et leurs composantes contre une centralisation croissante.

Les arguments contre l'élaboration de telles listes sont le plus souvent de type pragmatique. Si les vertus clarificatrices du système de listes de compétences sont parfois contestées, ce sont surtout les difficultés pratiques et la peur de négociations interminables risquant de porter atteinte à l'acquis communautaire qui poussent à s'opposer à un tel exercice.

On relèvera, enfin, que les deux documents qui affichent le plus clairement le but qu'ils poursuivent - mettre fin au risque de dérive centralisatrice - aboutissent à des conclusions diamétralement opposées quant aux effets de l'introduction dans les traités de listes de compétences. Le rapport Weidenfeld estime que la réalisation d'un catalogue de compétences aurait pour effet de garantir l'équilibre fédéral et, par conséquent, permettrait d'éviter une centralisation abusive. Au contraire, le document du "European Policy Forum" dénonce les effets centralisateurs que ne manquerait pas d'avoir l'établissement de listes de compétences dans la construction communautaire.

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L'AVENIR DE LA CONSTITUTION EUROPEENNE
Perspectives sur la mise en oeuvre et la révision de Maastricht
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THE FUTURE OF THE EUROPEAN CONSTITUTION
Perspectives on the Implementation and Revision of Maastricht
(23-24 June 1995)

THE ECONOMIC AND MONETARY UNION

Discussion paper by

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* I am grateful for comments on an earlier draft made by D. BIEHL, J.-Cl. KOEUNE, J.-V. LOUIS, I. MAES, J. VANDAMME, P. VAN DEN BEMPT, and M. VAN HEUKELEN. All remaining errors of course are mine.

Historical background

In the Monnet-Schuman doctrine on European integration the Economic and Monetary Union (EMU) can be seen as the last but one stage for a political union (PU): Europe should be built in a pragmatic way step by step creating a de facto solidarity between nations and peoples.The first step would be a customs union, to be followed by an economic community with some common policies such as the common agricultural policy, the common transport policy, the common commercial policy, the common rules on competition, not to forget the internal market with free movement of goods, services, persons and capital, and the development cooperation.Economic and social cohesion, research and technological development and environment were introduced in a later stage for both economic and political reasons.

From the beginning however it was quite clear that a good working customs union and economic community could not be sustained without an economic and monetary union; otherwise the internal market would break apart.It is not surprising therefore that the first attempt to create an EMU was already made in 1970 with the Werner report.After the rapid realisation in the sixties of the customs union and the framing of the essential Community policies EMU would be the final stage of economic integration to be realised in 1980, which would necessarely lead to a kind of political integration, an ever closer union among the peoples of Europe.However the international monetary turmoil at the end of the 1960's and the oil shocks of the 1970's made this European dream impossible at that time.

The same idea emerged after the revision of the Treaties by the Single European Act of 1986 once the project "Europe 1992" on the achievement of the internal market was agreed upon.But after the fall of the Berlin wall on 9 November 1989 and the breakdown of communism in Eastern Europe and the Soviet Union it became clear that the unified Germany (and others) wanted a clear parallel development between EMU and PU.That is also the reason why there were two intergovernmental conferences which started in Rome on 15 December 1990 : one on EMU and another one on PU, which eventually led to one overall revision of the European Treaties.

The Treaty of Maastricht

In the Treaty on European Union (TEU), signed in Maastricht on 7 February 1992, which came into force on the 1st of November 1993, Title VI on Economic and Monetary Policy (Articles 102a-109m), together with protocols N° 3 on the Statute of the European System of Central Banks and of the European Cantral Bank, N° 4 on the Statute of the European Monetary Institute, N° 5 on the excessive deficit procedure and N° 6 on the convergence criteria referred to in Article 109j of the Treaty establishing the European Community, is one of the most detailed and consistent of all.The EMU was well prepared by the Delors Committee (Report of 1989), many studies and thorough discussions by central banks and finance ministries.It was carefully worded during the Intergovernmental Conference.If the articles on EMU can be fully implemented as agreed upon, European integration will have made substantial progress.As to the articles on PU, which were rather the result of diplomatic negociations, it was evident from the beginning that they would need revision and adaptation in 1966 before the European Union would be further enlarged.

So the Intergovernemental Conference (IGC) of 1996, which, according to article N.2 of the TEU, will examine those provisions of the treaty for which revision is provided, can and should introduce many improvements in the TEU such as the introduction of the two intergovernemental pillars on common foreign and security policy (CFSP) and on cooperation in the fields of justice and home affairs (CJHA) into the core of the Treaty, new institutional rules, more efficiency, transparency and democracy in the legislative process, a better definition of the (exclusive and mixed) competences of the European Union (EU), etc.In the IGC 1996 however the articles on EMU should not be touched upon.They provide for the required objective criteria and a precise timetable for the implementation of the EMU.

As was already the case with the Werner Report two tendencies could be perceived in the preparation of the EMU in the TEU:

- the economic one, which considers the monetary union as the final stage in economic integration, but which cannot be attained without a deep convergence in economic performance and close coordination of economic and fiscal policies based on structural adjustment dictated by market forces and transparent competition;

- the monetary one, which believes that through close coordination of monetary policies irrevocably fixed exchange rates can be obtained, to be followed by a new single currency, which should in its turn have positive effects on the macro-economic policy to be followed by the Member-States.

As in the Werner Report both aspects were taken into account in the final wording in the TEU: a reasonable compromise between "economists" and "monetarists", which, if it had not been reached, would perhaps have postponed the EMU sine die.In order to implement this agreement however, it was accepted that a minimum of requirements should be fulfilled to be a member of the EMU and consequently that not all Member-States of the Union would be part of the EMU from the first day on.

In this context it should be stressed that from the conceptual point of view there is great asymmetry between the highly centralised monetary union and the rather decentralised economic union, which, if the former is to be put in operation, requires a very strong mechanism for coordinating national economic policies (some have even put forward the idea of a European economic government).

Convergence of economic performance

Coordination of economic policy between Member-States was already mentioned in the Rome Treaty of 25 March 1957 (articles 103-116), but it was only with the convergence decision of the Council of Ministers of 18 February 1974 that greater attention was given to this aspect.This decision however was hardly implemented, because the economic situation after the first oil shock was too difficult and national interests too divergent, but also because the exercice was to cumbersome.The Council had to establish (non published) quantified guidelines for the budgets of the Member-States, the monitoring being done by the special Committee on short term economic and financial policies.

Multilateral surveillance realy started after the Council decision of 12 March 1990.The exercice took place every 6 months and was highly facilitated by the presentation of medium-term convergence plans by the Member-States.It is not clear if this decision is still formally in existence after the TEU, but the multilateral surveillance exercice and the definition of general guidelines on economic policy is now a common practice in the EU, based essentially on the preparatory work of the Monetary Committee.

The question is if those procedures have had any impact on the economic policies pursued by the Member-States.The answer is not straithforward.On the one hand there is no quantified indication that Member-States are following the general guidelines or detailed recommendations of the European Institutions, but on the other hand there is clear evidence that most if not all Member-States are constantly adapting their economic, fiscal and budgetary policies to European standards in view of the EMU, because they probably realise that this is the best in their own interest and that doing it together makes it easier.

This will probably continue as long as the national interest coincides with the European one.The demonstration effect of well performing countries such as Germany in terms of inflation, public deficit, interest rates, growth and employment is probably also a strong argument in favour of an orthodox budgetary policy, given the high degree of economic integration between Member-States.There is general agreement that in a highly competitive world economic performance is essential and that this objective cannot be reached if wages and salaries exceed productivity.

Three stages in the realization of EMU

The well known technique of the progressive stage-wise realization of an objective, already used in the EEC-Treaty for the customs union, was introduced once again for the EMU.

Stage I started on the 1st of July 1990 with the complete liberalization of capital movements in 8 Member-States (Ireland, Spain, Portugal and Greece could benefit from exceptions until the 31st of December 1992; Greece benefited from an additional exception until the 30th of June 1994).At the same time coordination of economic and monetary policy was strenghtened through the convergence decision providing for multilateral surveillance and the decision on cooperation between Member States'central banks.During this period all obstacles to the private use of the ECU were also to be taken away.

During this period substantial progress was made in matters of price stability (the average rate of inflation for EU-12 dropped from 4.7 % in 1990 to 2.9 in 1995), but problems became greater in relation with public deficits (average increase from 4.0 to 4.7 %) and, most of all, in exchange rate stability.The EMS was severely attacked.The British Pound and the Italian Lira left the system, whereas other currencies devalued.On the 2nd of August 1993 the margins of fluctuation were broadened from 2,25 to 15 %, which could not prevent the Spanish Peseta and the Portuguese Escudo to devalue again early 1995.Unemployment became the most important problem in the EU, since the rate rose from 8.0 % in 1990 to 10.6 % in 1995 (21.9 % in Spain).

Stage II started on the 1st of January 1994 with the creation of the European Monetary Institute (EMI) located in Frankfurt and whose main task is to strenghten coordination of monetary policies and prepare stage III.It also replaces the Committee of the governors of central banks and the European Fund for Monetary Cooperation.From that date on also the financing of public deficits are regulated: monetary financing through central banks is not allowed and there is no privileged access of the public sector to financial institutions.During the second stage each Member State shall start the process leading to the independence of its central bank, which is already the case in many Member-States.Evaluation of the medium term convergence programmes, which started in stage I, and their implementation continued. General guidelines on economic policy for the Union and the Member States were decided and recommendations made.The first exercice on the evaluation of excessive deficits according to art. 104c & 5 and 6 was made at the end of 1994 (cfr. infra).

During stage II the EMI and the European Commission have to prepare and propose solutions for all technical problems involving the passage to stage III, including those concerning the replacement of national currencies by one single currency. In its 1st Annual Report of April 1995 the EMI stresses that there is need for a considerable time period (3 years ?) before a new set of paper money (7 bank notes from 5 to 500 ECU) and coins (9 in total from 0.01 to 5 ECU) can replace the 12 billion banknotes existing it the EU.According to the meeting of the Finance Ministers in Versailles on the 10th of April 1995 this single currency would be in circulation early 2003.

Stage III will start on the 1st of January 1997 or, at the latest, on the 1st of January 1999.At that moment the EMI will be replaced by the European Central Bank (ECB) and the European System of Central Banks (ESCB).The ECB will conduct one monetary policy for all the members of the EMU in a system of irrevocably fixed exchange rates to be followed by the replacement of the national currencies concerned by one single currency, which will be issued by or under the authority of the ECB.Before making this essential step EMU-members should fulfil a certain number of requirements.

The EMU criteria

In the field of **economic policy** the TEU provides for a procedure of mutual surveillance in order to ensure sustained convergence of economic performances of the Member States and conformity with the broad guidelines of the economic policies of the Member-States and of the Community.If the economic policies of a Member-State are not consistent with the broad guidelines or if they risk to jeopardize the proper functioning of the EMU, the Council may, acting by qualified majority, make the necessary recommendations to the Member-State concerned and eventually decide to make its recommendations public.In this respect there shall be close monitoring also of the development of their budgetary situation and of their stock of government debt.

In the field of **monetary policy** the primary objective of the ESCB shall be to maintain price stability (art. 105), which requires the independance of central banks.In order to become a member of the EMU the candidates should achieve a high degree of sustainable covergence by referenece to the following criteria (art. 109j 1 and protocols n° 5 and 6):

- a high degree of price stability: a rate of inflation not exceeding by more than 1,5 percentage points that of, at most, the three best performing Member States in terms of price stability;

- the sustainability of the government financial position:

  a budget deficit of at maximum 3 % of GDP, unless

  either the ratio has declined substantially and continuously and reached a level that comes close to the reference value,

  or, alternatively, the excess over the reference value is only exceptional and temporary and the ratio remains close to the reference value;

  a debt ratio of at maximum 60 % of GDP,

  unless the ratio is sufficiently diminishing and approaching the reference value at a satisfactory pace;

- the observance of normal fluctuating margins within the European Monetary System (EMS) for at least the last 2 years before the examination; in particular the Member-State shall not have devalued its currency's bilateral central rate against any other Member-State's currency on its own initiative for the same period;

- the durability of convergence reflected in the long term interest-rate levels: at maximum 2 percentage points above the three best performing Member States in terms of price stability.

There is of course a close relationship between these criteria.If for instance a country runs an excessive budget deficit, say 5 % of GDP year after year, its stock of public debt will increase, inflation pressure will be important, the exchange rate of the national currency unstable and interest rate high.The key indicator however seems to be the budget deficit.

The 3 % level can be justified to the extend that public infrastructure investment can be financed on loans, but on that assumption, a broader range, say 2-4 % could do, according to the amount of public investment planned.Probably the strict figures were chosen in order to stop any possible bargaining.

The average inflation- and interest-rate of the 3 best performing countries referred to has to be understood as an simple average, although a GDP-weighted average would be more appropriate.

The exchange rate criterion should in my view be understood to refer in principle to the 2,25 % margin of the EMS and not to the 15 % margin as some argue.So the 4 devalutions of the peseta since 1992 and the 3 of the escudo seem to exclude Spain and Portugal for the time being.The same is true for the for Italy and the United Kingdom, who left the EMS.

In the present situation (see table in annex) only 2 countries (Germany and Luxemburg) seem to be able to fulfil all the criteria in 1996.With special efforts others could follow such as Ireland, the Netherlands, Finland and Danemark (but the last one does not wish to be part of the EMU), possibly also France, Austria and even Belgium.In 1998, where no majority of Member-States fulfilling the criteria is required, there might be more.

It should be noticed however that those criteria are not applied automatically.There will be an overall assessment taking into account also the balance of payment situation and the development of unit labour costs within each country.The final decision will of course be political, but within narrow predetermined limits: all criteria require strict observance, with the exception of the deficit and, even more, the debt criterion for which, if not respected, there must be clear indications that there is substantial improvement observed and projected.

The sanctions

If during the mutual surveillance procedure the public deficit is not under control, the Council shall make recommendations to the Member State concerned. The first recommendations in this respect ware made in December 1994 to all Member States with the exception of Ireland and Luxemburg.If there is no effective action they can be made public according to art. 103 & 4.If they are very specific they will presumably have an effect on the creditworthiness of the Member State concerned - which will have to pay a higher interest rate in the capital market - and this as such is already a heavy sanction.The capital market can also anticipate this evolution and react earlier.

But there is more: in the 3rd phase of EMU the Council may decide to give notice to the Member State to take measures within a specific timetable and if the Member State fails to comply, the Council may (art.104c 11):

- require the Member State concerned to publish additional information, to be specified by the Council, before issuing bonds and securities;

- invite the European Investment Bank to reconsider its lending policy toward the Member State concerned;

- require the Member State concerned to make a non-interest-bearing deposit of an appropriate size with the Community until the excessive deficit has, in view of the Council, been corrected;

- impose fines of an appropriate size.

With these sanctions in mind, one should not - on the assumption that they are really applied to a EMU-member - reconsider a weakening of the economic (budgetary) and monetary criteria, because the entering EMU-member would immediately be in difficulty to maintain itself in the club.Since in EMU there is no adjustment possible any more through the exchange rate, each member has to take the necessary measures through its economic and fiscal policy.On the other hand it must be recognized also that, being a member of the EMU could facilitate the solution of structural problems for certain countries.

The establishment of the EMU

The procedure is as follows (art. 109 j and k).The European Council decides not later than 31 December 1996 whether a majority of Member States fulfils the necessary conditions for adoption of a single currency, whether it is appropriate for the Community to enter the third stage of EMU and,if so, the date for beginning the third stage.The Council shall then decide on which Member States shall have a derogation.

If in 1996 a majority of Member States (i.e. 8 out of 15, although some argue that 7 out of 13 would do) will not have fulfilled the requirements, which is highly likely, the EMU can start later, but it will at any rate on the 1st of January 1999, whatever the number of participants.

In each case the decision as to which Member States fulfill the criteria shall be taken - on the basis of the reports prepared by the Commission and the EMI - by a qualified majority according to art. 148.2 i.e. with 62 out of 87 votes (or 71 %).

The voting system may be changed - unanomously - in the IGC 1996 according to the Ioannina compromise, which could eventually have an effect on the decision process on EMU in 1998 - if the IGC has been completed by then - but not in 1996.So the voting system would be the only modification in the EMU rules following the IGC.

It should be noted however that, once the list of countries fulfilling the criteria is established, no Member-State can prevent another one to enter into the third stage of the EMU (protocol n° 10).

Room for other citeria ?

Some argue that the criteria which have been defined should be reviewed in the IGC, or at least be interpreted in a more flexible way.This claim mainly comes from countries which are likely not to be taken in the first batch.This demand is in my view unreasonable, not only vis-à-vis those who do fulfil the conditions but also, and even more, for those who do not, because if they were to be taken in, they would probably not be in a position to sustain the obligations resulting from EMU and be immediately in difficulty since no member of EMU will take the risk of financing public deficits of members that cannot sustain the necessary discipline.EMU-members would not agree to finance, be it indirectly, unreasonable budget deficts of other countries.

Others claim that new criteria should be added to the 4 already mentioned.Of course it would be easier to create an EMU when real and social criteria such as growth, economic structure and employment would be taken into account.It should be stressed however that those criteria are not necessary to start an EMU, seen from a purely technical point of view.So an EMU can be put in operation between members that show an unemployment rate of 15 to 25 %, but it will be difficult to do so from a political point of view since the EMU might be considered to be an obstacle to

an active employment policy (structural adjustment does have employment effects in the long run only).Such kind of arguments will probably be taken into consideration in the final decision of the European Council.But bringing these elements in the TEU as explicit criteria could only delay the formation of an EMU between those Member States that are in a position to do so.

It might also be an excuse to claim more assistance - beyond the Structural Funds (142 billion ECU for the period 1993-1999) and the Cohesion Fund (15 billion ECU) - from the EU for those that are not in a position yet to enter the EMU..It should be born in mind however that, with the enlargement of the EU to Central - and Eastern Europe, it is highly unlikely that new European funds will be put in place in order to speed up their development in view of the EMU.Member States who are real candidates should take proper action themselves, even if such policies imply some restrictive measures.Such policies are necessary, at least in the short run, in the interest of the people, because otherwise the imposed and required structural adjustments may even be more painful.Moreover, if some countries are not allowed in the first batch, they should not forget that every two years there is be a review of their situation; they can even ask for one in the meantime.

Once the EMU is in operation, there is a whole arsenal of means to make sure that each member fulfils its obligations (see above), but it should be considered if there is no need for an automatic equilibrating fund in case of (unforeseen) heavy shocks in the economy, because ad hoc decisions of institutions might imply some delay, which could cause irreparable damage.The case of a natural catastrophy with heavy consequences on the production apparatus is straightforward, but there could be also purely economic events with the same effect e.g. a sudden and abnormal increase in the balance of payments deficit or in the unemployment ratio.In order to absorb such shocks a special stabilization fund could be put in place to provide automatic and immediate assistance, limited however in time and amount - beyond all lending facilities which will be provided - to the countries involved, which are members of the EMU.This has nothing to do of course with structural assistance, which might be provided before and during the EMU.Such a (small) stalization fund could be financed by EMU-members through payment of a kind of insurance premium.

The nature of EMU

One vital point still to be discussed is the nature of the EMU.As already stated it is not strictly necessary to introduce a new common currency; an irrevocable set of fixed exchange rates with unlimited convertibility could suffice.But given the bad experiences in the European Monetary System (EMS), with sudden speculative attacks on certain currencies, which, given the magnitudes involved, can in no way be countered efficiently with Central Bank interventions, it seems appropriate to go immediately for a new currency, the so-called big bang approach.This would not only lower the tranaction costs for firms and individuals arrising from conversions from one Community currency into another, but also increase the

credibility of the EMU and the transparency of prices all over the EU.The existence of parallel currencies is too costly.The transition period should be as short as possible - e.g. 6 months - but this should be carefully prepared, e.g.in asking that one year ahead all (national) prices be labeled in the new currency as well, so that the public get used to the coming change, somewhat in the same way that the British introduced the decimal system in 1970.

According to the TEU the new currency shall be the ECU - accounts, bank notes and coins - but it shall be no basket currency any more, on the contratry a currency in its own right (art. 109 l & 4).Its intrinsic value could therefore substantially differ from its present value say vis-à-vis the DM.

Conclusions

Since the EMU provisions are carefully worded in a very detailed way the Maastricht Treaty articles on that subject should not be modified.All possible necessary actions can be taken.The institutional framework is in place.

The only indirect change may be the voting system, which could have an effect on the transition into the third stage of EMU in 1999.May-be also a special EMU stabilization fund for EMU members could be put in place.

The criteria for accession to the EMU should be maintained as they are and new - social - criteria should not be introduced, because they are not strictly necessary for the establishment of an EMU, even if they would make it easier from a political point of view.The risk is that they would cause unnecessary uncertainty and delay.

The best solution to create the EMU,seems to be to go as soon as possible for a new currency without following the long road of so-called irrevocably fixed exchange rates.This means the great leap forward, which should be prepared well in advance but which is not without risks.Therefore it should be prepared with great care.

Annex

KEY FIGURES FOR EMU
(estimates 1996)

	Inflation rate	Public deficit	Public debt	Interest rate (1/1995)	Growth rate	Unemployment rate
B	2.6	- 4.0	136.0	8.4	3.1	9.3
Dk	2.4	- 2.2	78.2	9.0	3.0	8.0
D	2.4	- 2.0	58.9	7.4	3.4	6.5
Gr	9.0	- 12.9	128.1	..	1.7	10.8
E	4.4	- 4.7	66.1	11.1	3.2	21.2
F	2.1	- 3.9	55.6	8.3	3.2	10.6
Irl	2.7	- 1.5	79.1	9.5	5.3	15.7
I	3.8	- 7.9	128.6	12.0	3.2	10.4
L	2.7	+ 2.0	9.9	8.4	3.2	3.1
Nl	2.5	- 2.7	78.0	7.9	3.3	9.4
Oe	3.1	- 4.2	..	7.3	3.3	3.5
P	4.4	- 4.8	72.3	11.2	3.2	5.6
Su	2.7	- 2.5	..	9.5	5.1	13.9
Sw	3.1	- 7.3	..	11.2	2.7	6.6
UK	3.3	- 3.4	53.1	8.5	2.8	7.6
UE 15	3.0	-4.0	73.0	9.0	3.2	10.0
Ref val	3.8	3.0	60.0	9.5		

Source: Commission, EC Economic Data, 1995 - N° 1

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THE ECONOMIC AND MONETARY UNION

Discussion paper by

J. VAN GINDERACHTER
Honorary Director of the European Commission
Senior Research Fellow

COMMENTAIRES SUR LE DISCUSSION PAPER DE M. J. VAN GINDERACHTER

par

P. MAILLET
Professeur émérite (chaire Jean Monnet) à l'Université de Lille 1
Directeur général honoraire à la Commission européenne

Le document introductif par Van Ginderachter présente de façon excellente l'historique du sujet et les stipulations du traité, je n'ai rien à ajouter.

Il formule également de façon très claire différentes graves options actuelles, et prend des positions sur lesquelles je vais exprimer rapidement mon plein accord (passer d'un coup à la monnaie unique, introduire rapidement l'Union monétaire) ou un accord nuancé (ne pas remettre en cause le traité).

Par contre, le document se focalise sur l'union monétaire, telle que prévue par le traité. Il en résulte deux lacunes : l'étroite liaison entre l'union monétaire et l'union économique, avec la nécessité d'une coordination des politiques budgétaires mal prévue par le traité, la prise en compte de la diversité de l'Union, avec son inévitable cheminement à géométrie variable, qu'il faut soigneusement organiser. Ces deux points devraient être examinés par le CIG 96, je m'y appesantirai donc un peu.

I ACCORD SUR DEUX POINTS

Introduire rapidement l'Union monétaire et passer d'un coup à la monnaie unique.

On a tellement parlé de la monnaie unique, on a tellement dit que c'était, non seulement un complément, mais également une condition nécessaire pour le bon fonctionnement du marché unique, que les opérateurs économiques et plus largement le grand public (au moins dans la plupart des pays) comprendrait mal qu'on tergiverse. Il faut certes vérifier que les conditions économiques de base sont remplies (d'où la certitude que l'opération ne concernera au début qu'un nombre limité de pays), mais il sera probablement raisonnable de ne pas manifester une rigidité excessive sur le respect des critères nominaux de convergence (dont le chiffrement, pour les finances publiques, résulte de raisonnements valables, mais approximatifs).

Accord également sur l'idée de passer d'un coup - ou très vite - à la monnaie unique. Il faut donc accélérer la préparation.

II NUANCE SUR UN POINT

Faut-il élargir les critères de convergence ?

V.G. est nettement contre. Il écrit : "not necessary from a purely technical point of view", mais reconnaît l'aspect politique décisif du chômage. D'accord avec lui pour ne pas demander une modification formelle du traité, mais il faut renforcer, lors de la CIG, l'accord sur l'idée, qui figure déjà dans le traité, que des aspects d'économie réelle sont à prendre en considération. Il faut absolument rompre l'impression, trop générale dans les opinions publiques, que l'Union ne se préoccupe guère du problème de l'Europe, à savoir le chômage et se concentre trop sur d'autres objectifs.

Est-il dangereux d'ouvrir la boite de Pandore ? Sûrement. Mais il arrive qu'il soit encore plus dangereux de ne pas l'ouvrir, car la poudre qui est dedans peut exploser. Plus trivialement, il n'est jamais bon de voiler la réalité.

III DEUX NECESSAIRES COMPLEMENTS AU TRAITE

a) La mise en oeuvre d'une véritable union économique et monétaire

Le texte V.G. traite de l'Union monétaire, mais pas de l'Union économique. Or les deux sont étroitement liées, mais le traité n'est pas assez explicite sur ce point.

Les deux volets de la politique macro-économique, monétaire et budgétaire, doivent être mis, de façon étroitement cohérente, au service des mêmes objectifs : il n'y a pas un volet au service de certains objectifs et l'autre au service d'autres, mais pour être efficace, la politique macro-économique doit constituer un tout.

Avec la mise en place de l'Union monétaire, la politique budgétaire demeurera le seul instrument macro-économique important à la disposition des Etats nationaux.

Or, dans une économie européenne qui est encore loin d'être complètement intégrée, les chocs (d'origine interne ou externe) demandant des réponses vont continuer à être assez différents d'une économie à l'autre. D'autre part, le budget est le reflet de choix politiques qui doivent continuer à pouvoir différer entre les Etats. Pour ces deux raisons, la diversité des politiques budgétaires va demeurer longtemps une exigence d'une Europe diversifiée.

Mais, en même temps, l'interdépendance accrue des économies nationales rend indispensable l'organisation de la compatibilité de ces politiques, et donc leur coordination au service des grands objectifs définis en commun.

Ce thème a souvent été évoqué mais n'a pas encore reçu de réponse satisfaisante dans le Traité.

Ni la procédure de définition des priorités des grands objectifs, ni la procédure de coordination des politiques budgétaires nationales entre elles, ni la procédure destinée à garantir la cohérence de la politique monétaire et des politiques budgétaires, ne sont suffisamment définies dans le traité. Un progrès est nécessaire et c'est là une tâche fondamentale pour la CIG 96. (1)

b) L'organisation monétaire d'un espace européen différencié.

Le traité de Maastricht prévoit explicitement un cheminement progressif et différencié vers l'Union monétaire (majorité de pays si en 97, nombre éventuellement encore plus faible si en 99). Il est donc certain qu'on aura, pendant plusieurs années, coexistence dans l'Union entre une "monnaie unique" pour certains pays et des monnaies nationales pour d'autres : cette coexistence doit être soigneusement organisée.

A cet égard, plusieurs pistes sont explorables, différant notamment par le degré d'intégration. Ainsi, à un extrême, on peut envisager a priori une formule de change flottant (avec flottement plus ou moins pur) analogue à celui qu'a connu la Livre sterling pendant des années. On peut au contraire envisager la poursuite d'une formule type SME, où on mettra l'accent sur le caractère ajustable des parités (et où on s'efforcera de ne pas répéter les erreurs ayant conduit aux perturbations de l'automne 1992, en procédant en temps voulu aux ajustements nécessaires), mais où on maintiendra fortement les engagements de coordination des politiques, pour préparer les pays isolés à rejoindre le peloton.

On peut probablement imaginer aussi des formules intermédiaires.

La CIG devra examiner les mérites respectifs des diverses formules alternatives, notamment sous l'angle de la préoccupation du bon fonctionnement du grand marché intérieur dans une vision dynamique (bonne orientation des spécialisations, bonne utilisation des facteurs de production) et en dégager des conclusions de caractère institutionnel. C'est un aspect fondamental de l'organisation de l'Europe à géométrie variable. (2)

(1) Nous partageons pleinement la position exprimé dans la Résolution du Parlement européen sur la CIG 96 (17 mai 1995).
"Les dispositions monétaires devraient cependant être contrebalancées par une coordination renforcée des politiques économiques... et par une articulation nette avec l'article 2 du traité affirmant que toutes les institutions de l'Union doivent oeuvrer en vue de "... promouvoir un niveau d'emploi et de protection sociale élevé, le relèvement du niveau et de la qualité de vie, la cohésion économique et sociale et la solidarité entre les Etats membres...
Oeuvrer au plein emploi devrait être un objectif exprès des Etats membres et de l'Union"

Par contre, l'idée de créer un Comité de l'emploi va à l'encontre de la préoccupation d'avoir une véritable politique macro-économique profondément cohérente en toutes ses composantes et vis-à-vis de tous les objectifs.

(2) Le réseau Jean Monnet en économie a déjà exploré certains de ces sujets dans l'ouvrage collectif "L'Europe à géométrie variable, transition vers l'intégration", Pierre Maillet et Dario Velo, ed. L'Harmattan, coll. Prospective européenne, Paris 1994.
Plus généralement, le thème est actuellement en voie d'exploration par les trois groupes de travail (juristes, économistes, politologues) mis en place dans le cadre de l'action Jean Monnet.

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JUSTICE AND HOME AFFAIRS

THE DEVELOPMENT OF THE THIRD PILLAR IN VIEW OF THE INTERGOVERNMENTAL CONFERENCE OF 1996

Discussion paper by

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This paper presents some conclusions relating to "The implementation of the Provisions related to the Fields of Justice and Home Affairs since the Entry into Force of the Treaty on European Union".

The Development of the Third Pillar in View of the Intergovernmental Conference of 1996

Referring to the three "pillars" of the Union - as has become common usage - easily creates the impression that the only differences between these pillars are those of the different policy areas they cover, their different legal bases and different decision-making procedures.

Yet there is in fact another major difference which is often not rightly appreciated or even overlooked because it does not result from an analysis focusing on the Union structure : this is the different level of the development of policy-making and of political "acquis" in each of the three pillars.

In this respect the Third Pillar of the Union, i.e. justice and home affairs, is clearly the weakest, the least developed of the three pillars.

As it has been shown in the first part of "The Implementation of the Provisions Related to the Fields of Justice and Home Affairs since the Entry into Force of the Treaty on European Union" (henceforth referred to as the 'Progress Report')(pp. 4-9), cooperation in the sphere of justice and home affairs - when introduced in the Union Treaty - did not have any political and legal basis comparable to those of the first and second pillars: There was neither an "acquis communautaire" which had grown over almost 40 years nor twenty years of continuously developed procedures and experience with intergovernmental cooperation in the sphere of EPC. Fragmentation and uncoordinated ad-hoc decisions prevailed in the entire area and clear responsibilities were difficult to establish.

Taking into account the previous situation, the introduction of justice and home affairs into the framework of the Treaty has clearly been a pioneer deed, and this in at least three respects :

First, the Treaty has defined - in Article K.1 - an ambitious set of areas of common interest ranging from asylum and immigration policy, the combating of all major forms of international crime to judicial, customs and police cooperation. It seems not exaggerated to speak of a real revolution of the formerly limited and fragmentated fields of cooperation.

Second, the Treaty has established a single institutional framework for all these areas of cooperation, putting an end to the multiplication and fragmentation of bodies and procedures which had taken place previously.

Third, the Treaty has brought intergovernmental cooperation in justice and home affairs closer to the integrated community structure than ever before. Although still essentially an intergovernmental framework of cooperation the Third Pillar is closely linked to the first by

- the role of the Community institutions (Council, Commission, Parliament)

- the inclusion of certain Community features such as the COREPER and the possibility of qualified majority voting on certain measures of implementation.

- the famous "passerelle" of Article K.9 which allows for the application of Article 100c of the EC Treaty to action in areas referred to in Article K.1(1) to (6).

Taken together, all this constitutes without any doubt a first major breakthrough, from a political, a constitutional and an institutional point of view.

But if we come to the question of what concrete progress has been made following this initial breakthrough the picture is clearly less positive.

As the analysis of the new legal instruments (pp. 14-15 of "The Progress Report") has shown, only two "joint actions" of a rather limited scope and one "convention" have been adopted up until now, and the Member States failed to agree on one single "joint position".

On the other hand there are no less than nine conventions (some of which are of major importance) under discussion and since the entry into force of the Union Treaty the Council has adopted over fifty non-binding texts such as resolutions, recommendations or conclusions. One also has to note that there has been a considerable quantitive increase in meetings of the various bodies involved in justice and home affairs since the entry into force of the Union Treaty (p. 50 of "The Progress Report").

The huge discrepancy between, on one hand, the few legal acts adopted and, on the other hand, many legal acts under discussion, the many non-binding measures adopted and the considerable increase in meetings since the TEU has entered into force clearly shows that there is a major "blockage" in the Third Pillar. The reasons for this "blockage" stemming from "inside" the Third Pillar have been identified in the "Progress Report".

(1) **a particularly cumbersome multi-level structure of decision-making** (pp. 18-19 of the "Progress Report") which slows down the decision-making process and can cause frictions in the system,

(2) the **predominance of the unanimity rule** (pp. 20-21 of the "Progress Report") which tends to block decisions on major issues and to produce less than optimal results due to the "lowest common denominator" effect,

(3) the **limited role of initiative played until now by the Commission**, partly for tactical reasons partly because of its relatively weak position (pp. 22-29 of the "Progress Report"), which prevents it from acting as a driving force in the Third Pillar,

(4) **uncertainities as regards the nature and the scope of the legal instruments of Title VI** (pp. 14-17 of the "Progress Report") which make at least some of the Member States reluctant to use them,

(5) **difficulties as regards the division of competences between the EC and the intergovernmental sphere** (pp. 11-12 and 36-37 of the "Progress Report") which causes confusion on the legal basis to be chosen and complicates the decision-making process,

(6) the **lack of specific provisions on cooperation with third countries and international organizations** which can rduce the effectiveness of measures because in most of the areas covered by Article K.1 effective action can only be taken in cooperation with third countries or international organizations (pp. 37-38 of the "Progress Report").

To these one has to add the "external" factors which make progress inside the Third Pillar difficult :

(7) the **highly different political and legal traditions of the Member States in respect to a number of the areas of "common interest"** (e.g. asylum and immigration policy, police cooperation) which cause serious obstacles to substantial common actions and positions,

(8) the **existence of a separate framework of cooperation, the Schengen framework**, which - although being presented as a "precursor" for the Union - for the time being allows those Member States wanting to make progress with respect to the abolition of internal border controls and compensatory measures to bypass Title VI and the Community institutions (in a different sense this is also true for the Dublin Convention),

(9) the **political sensitiveness of certain areas of "common interest" in the national context** (asylum and immigration is, again, a good example) which makes it quite difficult for some Member States to agree to certain common measures, particularly in pre-election times,

(10) **certain difficulties between individual Member States** (e.g., the Anglo-Spanish controversy over Gibraltar or the failure of Franco-German cooperation in the Third Pillar area during the German Presidency) which can effectively block progress on central issues.

With these the list of negative factors affecting justice and home affairs is not yet exhausted. One has to add two more which are not responsible for the limited results achieved until now under Title VI but affect the political and legal legitimacy of cooperation in the fields of justice and home affairs :

(11) the serious **democracy deficit** caused by the very limited powers of control and scrutiny of the European Parliament (pp. 30-32 of the "Progress Report") and the absence of effective scrutiny procedures in at least some of the national parliaments as well (pp. 35-36 of the "Progress Report"),

(12) the **deficit of judicial control** caused by the exemption of justice and home affairs cooperation from the jurisdiction of the European Court of Justice[1] (pp. 32-33 of the "Progress Report") which represents a danger for the coherent application of Community law and for the judicial protection of individuals.

It should obviously be the task of the Intergovernmental Conference of 1996 to introduce reforms which can effectively counter or even lift these negative factors. The question is, however, what would be a realistic strategy and catalogue for reforming the Third Pillar. As regards the strategy two remarks have to be made.

The first is that it must certainly be avoided to put issues on the 1996 agenda other than questions of constitutional character, which means competences, institutions and procedures. It could actually appear quite tempting to table a number of major unresolved policy issues which are blocking effective progress such as the question of burden-sharing in asylum policy (p. 46 of the "Progress Report") or the unresolved problems of the EUROPOL Convention

1 With the exception of Article K.3.2 (c) par. 3.

(p. 66-67 of the "Progress Report"). However, the conference could be overburdened and fragmented if it would also have to address sensitive policy questions on which the responsible ministers have repeatedly failed to agree. No doubt, therefore, that the focus should be on constitutional issues.

The second remark concerns the overall strategy. As usual there will be those opting for a maximalist strategy. Such a strategy would consist of aiming at the creation of a Community competence for most or all areas mentioned in Article K.1, qualified majority decision making in the Council, an exclusive right of inititiative for the Commission, a legislative role for the European Parliament and full control of the Court over all acts adopted in the sphere of justice and home affairs.
However, it does not need a deep analysis to come to the conclusion that, taking into account

- the still very much divergent positions of the Member States on key issues of justice and home affairs,

- the problems of constitutional law and national sovereignty resulting from a full communitarization of Title VI (as regards police affairs, for instance), and

- the rather negative "post-Maastricht" climate,

such a maximalist approach would not only have no chance of success but could even prove to be highly counterproductive.

Therefore it seems to be a rather realistic strategy in view of the Intergovernmental Conference to maintain the Third Pillar as a separate decision-making system while trying at the same time to arrive at more efficiency and effectiveness and even at a higher degree of integration by way of individual changes in the areas of decision-making procedures and competences.

As regards the first group of the above mentioned "internal" negative factors (1 to 6) the following changes should be put on the list of necessary reforms :

(A) **Rationalization of the decision-making structure.** Since the K.4 Committee regroups the senior officials responsible for justice and home affairs in the national administrations, it should be clearly established as the central preparatory body for Council decisions under Title VI; the role of the COREPER should be limited to

checking measures elaborated by the K.4 Committee in respect to their compatibility with measures in the EC framework or in the CFSP.

(B) **Extension of majority voting in the area of implementing measures** : All measures implementing joint positions, joint actions and conventions adopted pursuant to Article K.3 should be adopted by qualified majority voting. This could increase efficiency in the decision-making process and help the Member States to get used to the "culture" of majority voting in the Third Pillar.

(C) **Extension of the Commission's right of initiative to the areas referred to in Article K.1(7) to (9)** : The Commission should have a right of initiative in all areas covered by Title VI because it could clearly contribute something in the areas from which it has been excluded up until now (particularly in the area of customs affairs where it already has a competence in the EC framework). It could also help the Commission to develop a more active role in general in the Third Pillar.

(D) **Clarification of the scope and legal nature of joint positions and joint actions according to Article K.3.2 (a) and (b)** : a clear disitinction between the two instruments should be established and it should be stipulated that they commit the Member States in the positions they adopt and in the conduct of their activity.

(E) **Application of Article 100c EC Treaty to the areas of Articles K.1 (2) (rules governing external border crossing), K.1 (4) (combat against drugs addiction) and K.1 (5) (combat against fraud on an international scale)** : In all these areas Community competences already exist (Article 100c EC Treaty : visa policy; Article 129 EC Treaty : public health; Article 209a EC Treaty : measures countering fraud against the financial interests of the Community). Communitarization of these areas would prevent further difficulties as regards the division of competences and increase efficiency.

(F) **Introduction of a specific provision on cooperation with third countries and international organizations** : This provision should enable the Member States to conclude conventions and other types of agreements on behalf of the Union (which has no legal personality until now) with third countries and international organizations.

As regards the "external" negative factors (7-10) most depend on the internal context and sensitive political positions of the Member States which cannot be the object of a treaty

revision. As regards the problem of the Schengen and Dublin Conventions, however, the following reform would make sense :

(G) **Inclusion of the Schengen and Dublin Conventions under the Thrid Pillar on the basis of Article K.3 (c) while giving Member States an "opting out" possibility from decision-making and implementation** : This would improve the coherence of policy-making and strengthen the cooperation framework under Title VI.

In respect to the deficits in terms of democracy and judicial control the following reforms should be put on the agenda :

(H) **The European Parliament should be consulted on all joint actions and conventions adopted under Article K.3.2 (b) and (c), and on the proposal of any Member State or the Commission, the Council should be enabled to decide by qualified majority to adopt such an act only after the assent of the European Parliament has been obtained** : Such a provision would considerably strengthen the position of the Parliament but at the same time leave still a large margin of discretion to the Member States as regards compliance with the Parliament's views.

(I) **Jurisdiction of the Court of Justice to interpret the provisions of conventions and other legally binding acts adopted under Title VI and to rule on any disputes regarding their application should be made compulsory** : Such a provision is necessary to ensure adequate legal guarantees under the Third Pillar and to settle disputes of the division of competences between the Thrid Pillar and the other two pillars of the Union.

All these elements of reform would still keep essential parts of the intergovernmental nature of the Third Pillar intact but would represent real improvements in respect to efficiency, democratic scrutiny and judicial control which could pave the way for even more substantial progress at the next Intergovernmental Conference. This is, after all, also a strategy and a catalogue of reforms which correspond most to the process character of the "ever closer Union".

(10)

COLLEGE OF EUROPE & T.E.P.S.A.
Brugge

CONFERENCE 1995

L'AVENIR DE LA CONSTITUTION EUROPEENNE
Perspectives sur la mise en oeuvre et la révision de Maastricht
(23-24 juin 1995)

THE FUTURE OF THE EUROPEAN CONSTITUTION
Perspectives on the Implementation and Revision of Maastricht
(23-24 June 1995)

JUSTICE AND HOME AFFAIRS

THE IMPLEMENTATION OF THE PROVISIONS RELATED TO THE FIELDS OF JUSTICE AND HOME AFFAIRS SINCE THE ENTRY INTO FORCE OF THE TREATY OF THE EUROPEAN UNION (November 1993 - April 1995)

A Progress Report in View of the Intergovernmental Conference of 1996

Research Group on the Third Pillar of the Union Treaty

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The Implementation of the Provisions Related to the Fields of Justice and Home Affairs since the Entry into Force of the Treaty on European Union (November 1993 - April 1995)

A Progress Report in View of the Intergovernmental Conference of 1996

Research Group on the Third Pillar of the Union Treaty

This report consists of two distinct papers, issued separately. The first paper seeks to provide a detailed account of the progress made in implementing the provisions of Title VI of the Treaty on European Union which deal with justice and home affairs. It gives an historical overview of cooperation in this area before 1993, a discussion of the nature of the relevant provisions in the Treaty, an appraisal of the role of the Union institutions and national actors in the post-Maastricht set-up and a comprehensive briefing on the progress made in each of the individual policy areas addressed in Title VI. This paper was prepared by David Cullen and Philip Myers (College of Europe, Bruges) and Christine Grau (Institut für Europäische Politik, Bonn).

The second paper, which should be read in conjunction with this, comprises some concluding remarks reflecting the findings of the first paper. This second paper was written by Jörg Monar, Director of the Institut für Europäische Politik in Bonn, and has been issued separately.

THE IMPLEMENTATION OF THE PROVISIONS RELATED TO THE FIELDS OF JUSTICE AND HOME AFFAIRS SINCE THE ENTRY INTO FORCE OF THE TREATY ON EUROPEAN UNION
(November 1993 - April 1995)

A Progress Report in View of the Intergovernmental Conference of 1996

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THE IMPLEMENTATION OF THE PROVISIONS RELATED TO THE FIELDS OF JUSTICE AND HOME AFFAIRS SINCE THE ENTRY INTO FORCE OF THE TREATY ON EUROPEAN UNION (November 1993 - April 1995)

A Progress Report

1. Introduction

On 1 November 1993, the Treaty on European Union, after some delay, finally entered into force. The Treaty itself is far from being one coherent body of legislation, rather it reflects one big compromise, attempting in some way or another to overcome vastly differing standpoints of the Twelve Member States involved. The Treaty on European Union is an imperfect Treaty. It is hard to argue otherwise. It is a package deal. The TEU does not have legal personality in terms of public international law. Parts of it, or sub-groups of the TEU (namely the EC Treaty), however, do have legal personality.

One substantial aspect of this compromise or package deal is perfectly reflected in the establishment of a hybrid so-called "Third Pillar" or, more correctly, what has been coined Title VI Provisions on Co-operation in the fields of justice and home affairs. The Second Pillar comprises Provisions on a Common Foreign and Security Policy (Title V). The First Pillar comprises the traditional Communities. Several authors have used the image of a three-columned Roman temple to describe the Union Treaty. The aforementioned three pillars are covered by a roof (therefore the temple image). This roof in abstract ensures a single institutional framework[1] whereby the common provisions (Title I - A-F) must be respected by all three pillars.

The institutionalisation of justice and home affairs within a Treaty context is a significant step forward to the informal, discrete, and inherently non-transparent diplomacy-like intergovernmentalism that reflected co-operation in these areas before the entry into force of the Treaty on European Union (see below). However the final agreement to incorporate such

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1 According to Article C TEU "The Union shall be served by a single institutional framework which shall ensure the consistency and the continuity of the activities carried out in order to attain its objectives while respecting and building upon the *acquis communautaire* ..."

areas was not at all an easy one. Apart form CFSP[2], these areas were arguably the most sensitive points in the process of negotiation that culminated in Maastricht in 1991 of a hybrid-like Title which at times appears contradicting, overlapping (with areas in the EC Treaty) but which nonetheless is an important addition to European integration. As it was drafted in Maastricht, Title VI is not fully communitarised. The legal instruments provided for in Article 189b EC Treaty do not (at the moment) apply to any of the areas referred to in Title VI. At the other extreme, however, one cannot go so far as to conclude that the Title is purely and simply intergovernmental. It is, at best, a mix. One may refer to it as institutionalised intergovernmentalism. The redeeming aspect of this Title on co-operation in the fields of justice and home affairs is the very fact that it now exists within a single institutional framework[3] and thus has to respect the relevant principles and provisions. It is no longer purely intergovernmental as activities in these areas now may be (to various degrees) subject to some form of democratic, legislative and judicial control.

A formalised (albeit rather limited) role now exists for the Community institutions and the possibility in the future of using a bridge or "passerelle" to bring some areas dealt with in Title VI into the remit of the EC Treaty is formally provided for. As will be shown throughout this report, there are inherent flaws and difficulties related to this hybrid structure which have served (along with other reasons) to slow down[4] the process of decision making in the fields of justice and home affairs.

Nevertheless, when attempting to assess the conclusions of this report, the reader should at all times bear in mind firstly the sensitivity of the areas involved and more importantly, the fact that the TEU has only been in force for less than two years. This is perhaps not enough time to properly evaluate progress in these areas.

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2 It may even be reasoned that the incorporation of provisions related to justice and home affairs is more significant than the creation of a Common Foreign and Security Policy which had in part had already been partly introduced through the Single European Act under the name of European Political Cooperation.

3 See Article C TEU.

4 Some would even argue that progress has been virtually halted.

2. Background: Treatment of areas related to Justice and Home Affairs before the entry into force of the Treaty on European Union.

Areas dealt with in the fields of justice and home affairs such as police and customs co-operation, combating international crime etc. are highly sensitive areas in the national arena and are areas which are traditionally perceived to directly affect the sovereignty of a nation state. This is one of the main reasons why they remained out of the domain of European integration for so long. However, it would be wrong to presume that the European aspects of such pressing issues were simply ignored by the Member States of the EEC.

The *Treaty of Rome* in 1957 made no specific reference to matters related to justice and home affairs. The reasons for this are quite evident. The Treaty of Rome was primarily an economic, sector-based Treaty. Only free movement of workers (i.e. for economic reasons) within the EEC was mentioned[5]. In the 1970s, a more concerted effort was made in certain aspects related to justice and home affairs. Suggestions of an EC passport, freedom of movement of non-wage workers, and the right of EC citizens to vote in local elections were made. However, a considerable amount of time would have to pass before any of these measures were seriously considered. The EC passport was adopted in the mid-1980s. Freedom of movement for all persons in the Member States was decided in 1990 (the adoption of three directives which covered almost all aspects of freedom of movement and not just specifically linked to economic reasons[6]). Finally, Article 8b TEU provides the right for Union citizens "to vote and to stand as a candidate at municipal elections in the Member State in which he resides"[7]

5 Article 220 EEC Treaty provided for the conclusion of agreements. This provision could consequently affect areas of justice and home affairs.

6 Directives 90/364/EEC, 90/365/EEC and 90/366/EEC granting respectively rights of residence to pensioners, students and persons with economic means.

7 A directive has already been signed in this regard - see section on citizenship.

In June 1984, the European Council at Fountainbleau requested that a report on a *Europe of the Citizens* be drawn up, the result of which was the Adonino Report[8] which forwarded various suggestions including the creation of a people's Europe.

The Palma Report in 1989 assessed the means by which the abolition of external border controls could be successfully achieved. This was given a more definitive jump start in June 1985 with the publication of the Commission White Paper on the Completion of the Internal Market. This Report once again stressed the need to abolish controls on people at internal border crossings in accordance with the demands for the completion of the internal market by the end of 1992. The abolition of internal border controls would need to be complemented by appropriate compensatory measures such as the establishment of stricter external border controls and the harmonisation of immigration and asylum policies. Increased co-operation of police and customs authorities among the Member States would also be needed.

Concrete measures were taken in the form of the Single European Act. Article 8a of the Treaty of Rome, as modified by the SEA, incorporated the objective of the abolition of all border controls on persons. Other areas related to justice and home affairs such as police co-operation and immigration were however considered too sensitive to place in the main body of the Treaty, thereby reflecting the feeling by many that such areas should remain wholly within the competence of the national governments. As a result, a Declaration (which is in general not considered legally binding) was annexed to the Treaty[9]. At the time of negotiations leading to the drafting of the TEU, the same difficulties of sensitivity would have to be faced.

8 Bull EC 3-1985.

9 General Declaration on Articles 13-19 of the Single European Act: "Nothing in these provisions shall affect the right of Member States to take such measures as they consider necessary for the purpose of controlling immigration from third countries, and to combat terrorism, crime, the traffic in drugs and illicit trading in works of arts and antiques."

2.1 Frameworks for Co-operation among Member States (pre TEU)

TREVI

TREVI which stands for "Terrorisme, Radicalisme, Extremisme et Violence International" was established on the basis of a decision of the Ministers responsible for Justice and Home Affairs of 29 June 1976. Before this, EC ministers had met in Rome on 1 December 1975 where it was agreed to organise meetings of justice and home affairs ministers and high civil servants with the aim of keeping one another informed of the state of terrorist activities in each country. The activities of the TREVI group were prepared by a committee of high civil servants. Working groups and meetings were to take place twice yearly; however, by 1986, the group had only met six times. By 1989 however, TREVI became more active (due to increased attempts to complete the internal market) and was subdivided into four working groups:

- TREVI I Anti-Terrorism
- TREVI II Public Order, Equipment and Training
- TREVI III Drugs and Organised Crime
- TREVI 1992 Abolition of Borders

Furthermore, in 1991 an Ad-hoc Working Group on Europol was established to begin work on establishing a European Police Office. It was this ad-hoc working group that prepared much of the groundwork for the establishment Europol Drugs Unit.

Ad Hoc Immigration Group

Ministers responsible for immigration and combating drugs and terrorism, as well as the appropriate Commission vice-president, decided at a conference in London on 20 October 1986 to take action towards the realisation of free circulation within the EC. Measures were to be taken to combat terrorism, drug dealing, illegal immigration and other serious forms of crime. Subsequent areas of activity included: controls at borders, visa policy, asylum, and exchange of information between immigration authorities. In this regard and in order to draw up and co-ordinate these measures, a high level ad hoc group comprising advisors to immigration ministers and Commission representatives was established. This ad-hoc group was responsible for the drawing up of two important conventions:

1) The Convention Determining the State Responsible for Examining Applications for Asylum lodged in one of the Member States of the European Communities, signed in Dublin on 15 June 1990[10]. This Convention has not yet entered into force as it has not yet been ratified in all Member States.

2) The Convention on Controls of Persons Crossing External Frontiers of the Member States has not yet been signed by all Member States due to a dispute between the United Kingdom and Spain over the status of Gibraltar. Since the entry into force of the TEU, the Commission has reformulated a draft Convention in accordance with the provisions of Title VI[11].

Judicial Co-operation

As early as the mid 1970s a judicial co-operation group was meeting in the framework of EPC dealing with both criminal and civil aspects. Its aim was to achieve a greater form of harmonisation of the differing legal aspects of the Member States.

Groupe d'Assistance Mutuelle '92

GAM'92 consisted of a working group made up of representatives of the customs authorities in the Member States, along with a Commission representative. In response to the removal of barriers at internal frontiers, this group's aim was to elaborate measures to hinder the smuggling of goods such as drugs, firearms and pornographic material.

The Group of Free Circulation Co-ordinators

The Co-ordinators' Group on the Free Movement of Persons was established by the Rhodes European Council in 1988. Its aim was to co-ordinate the confusing range of groups dealing with all aspects of free movement of persons and justice and home affairs in general. The Group comprised of a high-ranking official from each Member State.

10 Published in Bull. EC 6/1990.

11 COM(93) 684 final.

CELAD

In December 1989 at a European Council meeting it was decided to establish a committee to fight against the production and the use of drugs. The Comité Europeéen pour la Lutte Anti-Drogues acted in the following areas: co-operation with drug producing and transit countries, combating the associated money exchanges and action in the health sector. Its activities were also backed up by a working group in the framework of EPC.

This is a list of groups that involved all Member States of the European Community. These groups did not simply disappear with the entry into force of the Treaty on European Union. Rather they were formally institutionalised in the framework of the Co-ordinating Committee, provided for in Article K.4 TEU, in order to ensure greater co-ordination and greater responsibility for the actions of the various groups. It was also hoped that this would ensure on the whole greater efficiency throughout the decision making process (see section on working procedures and structures of Title VI).

There were, and still are of course other intergovernmental groups whose membership go beyond simply the European Union. These include:

Interpol (The International Criminal Police Co-operation)

Groupe Pompidou (to combat drugs),

Club de Vienne (anti-terrorism),

Quantico Group (World Terrorism),

Club de Berne (terrorism),

Groupe de Dublin (Combat Drugs),

PWGOT (Police Working Group on Terrorism), and a

European-wide network of permanent correspondents for the exchange of information on football hooliganism.

2.2 Schengen

Apart from all aforementioned groups, one should also mention the Schengen Convention applying the Schengen Agreement of 1985 which was signed in 1990. The peculiar aspect about Schengen is that its membership is only open to Member States of the EU. The reason for this is that action at the Schengen level (the abolition of internal borders complemented by the introduction of compensatory measures[12]) is seen as a precursor for what will eventually be agreed upon at the level of the EU. However at the moment, only ten Member States (including Austria) have signed the Convention.

The Schengen Convention only entered into force or became fully applicable on 26 March 1995 in seven countries (Germany, France, Belgium, Luxembourg, Netherlands, Spain and Portugal). For the first three months, these countries will enjoy a three month transitional period in which it is not compulsory to abolish identity checks at borders.

This entry into force of the Schengen Convention among some EU Member States has in practice introduced what is commonly referred to as variable geometry. Some countries have decide to embark on a more intensive form of cooperation with the main objective being the abolition of all internal border controls. Such a scenario was already envisaged at the time of the drafting of the Treaty on European Union and, as such, a certain amount of flexibility has been formally institutionalised within the TEU. Article K.7 for instance reads:

"The provisions of this Title shall not prevent the establishment or development of closer co-operation between two or more Member States in so far as such co-operation does not conflict with, or impede, that provided for in this Title."

The one major problem that emerges with the functioning of the Schengen Convention is that it has been formulated purely in the intergovernmental mould and, consequently, no role for the Community Institutions has been envisaged.

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12 e.g. the strengthening of the external border of the Schengen Space, increased police and customs co-operation, provisions on visas and extradition and the establishment of a Schengen Information System.

3. The Treaty on European Union and Justice and Home Affairs

As already mentioned, the incorporation of areas related to the fields of justice and home affairs was significant in itself. Chancellor Kohl provided the important political impulse at the Luxembourg European Council in 1991, by insisting upon the need to adopt initiatives regarding asylum policy, immigration policy and the creation of a European Police Authority[13]. Germany, more so than any other country, felt the need and urgency to ensure a greater degree of progress in justice and home affairs. The informal, non-transparent, intergovernmental-style co-operation that existed prior to the TEU provided important forums for consultation and exchange of information. Nevertheless, there were inherent weaknesses. Their secretive working methods exacerbated the democratic deficit in the areas. Furthermore, and perhaps more importantly, the ad-hoc structure was highly ineffective and precious few binding decisions were made. Problems with this style of intergovernmental co-operation can be seen with the initiatives that the Schengen countries made. The Schengen Agreement was signed in 1985. The Schengen Convention applying the Agreement of 1985 was signed in 1990. This had to be ratified consequently by the Contracting Parties' national parliaments. The Convention finally came into force, after several delays, on 26 March 1995, and even then, not throughout all of the signatory states.

On the level of the Twelve, the draft External Border Convention failed to be signed due to a dispute between the UK and Spain over the status of Gibraltar. The process of successful conclusion of the Dublin Convention has also reflected the slow and cumbersome nature of intergovernmental co-operation.

In the end, however, not all areas would be incorporated into the EC Treaty. In fact most were to be placed in Title VI which was neither 'communautaire' nor classically intergovernmental but rather a strange mix between the two. The resulting compromise, Title VI or the Third Pillar, is characterised by the following:

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13 Germany's increased pressure to incorporate justice and home affairs into the Community was in much part due to the increased influx of migrants from the East, and the increasingly unstable climate in Central and Eastern Europe.

- the creation of new legal instruments (joint actions, joint positions), which have not yet been clearly defined, alongside more traditional intergovernmental ones (conventions, resolutions, conclusions, declarations etc.[14]);
- the predominance of the unanimity rule;
- the incorporation of these areas into the single institutional framework of the European Union;
- a formalised but restricted role for the Commission, the European Parliament and the Court of Justice of the European Communities;
- a strengthened role of the Council;
- and provisions for the linking of some areas in the Third Pillar to the First Pillar.

Only limited aspects of justice and home affairs were incorporated into the EC Treaty.

3.1 Within the EC Treaty

The EC Treaty already contained provisions for the free movement of persons following the SEA (Article 8a EEC, Article 7a EC). Article 7a EC Treaty states that:

"The internal market will comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty"

As a result, the EC Treaty, according to many appeared to be the most logical area to deal with immigration and asylum. However, only limited aspects of asylum policy were placed in the EC Treaty and the incorporation of immigration in Title VI TEU seems to reinforce the argument that Article 7a § 2 only refers to movement of EU nationals and not nationals of third countries. Policy regarding nationals of third countries will now be dealt with in Title VI TEU.

14 Of these intergovernmental instruments, only conventions are expressly provided for by Article K.3.

Article 100c EC Treaty

Article 100c EC Treaty provides two areas of EC competence in visa policy:

a) The determination of third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States. Unanimity is required. From 1 January 1996, this will change to qualified majority.

b) Measures relating to a uniform format for visas must be adopted by 1 January 1996.

According to Article 100c.2 EC Treaty, in the case of an emergency situation in a third country, which could lead to a sudden inflow of nationals of that country into the EC, the Commission may, by qualified majority, and on the recommendation of the Commission, decide to introduce a visa requirement for up to six months.

An increased role is provided for the Member States in that the Commission must examine any request made by a Member State that it submit a proposal to the Council.

A role for the K.4 Co-ordinating has also been foreseen. According to Article 100d: "The Coordinating Committee...shall contribute, without prejudice to the provisions of Article 151, to the preparation of the proceedings of the Council in the fields referred to in Article 100c".

Furthermore, the scope of Article 100c EC Treaty, may be extended in the future by means of Article K.9 TEU to action in areas referred to in Article K.1(1) to (6). This is commonly referred to as the *passerelle* clause.

On 10 December 1993, the Commission forwarded a Communication to the Council and the European Parliament on two aspects:

(1) Proposal for a decision based on Article K.3 of the Treaty on European Union establishing the Convention on the crossing of the external frontiers of the Member States; and:

(2) Proposal for a regulation, based on Article 100c of the Treaty establishing the European Community, determining the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States.[15]

Neither proposal has yet been adopted. It is the first example however of the difficulties to be faced in the division of competences between the First and the Third Pillar. Even though both proposals are inextricably linked, they have had to be formulated separately due to the fact that each has a different legal basis, hence the reason for a Commission Communication. This has resulted in a considerable degree of confusion.

The Commission proposal for a regulation laying down a uniform format for visas on the basis of Article 100c EC Treaty was adopted by the Justice and Home Affairs Council on 9 and 10 March 1995[16].

3.2 Title VI TEU Co-operation in the Fields of Justice and Home Affairs

Title VI TEU refers to provisions on co-operation in the fields of justice and home affairs. It has not been incorporated into the Treaty as a common policy, which may suggest a lesser degree of integration. Title V TEU, on the other hand has been referred to as provisions on a common foreign and security policy.

Title VI consists of Articles K to K.9. Article K.1 lists the areas which should from this point onwards be considered as "matters of common interest". Once again, it is made quite clear that these areas are not, in the near future being considered as common policies. The matters of common interest, as specified in Article K.1 (1) to (9) are as follows:

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15 COM(93) 684 final.

16 See Council Press Release 5423/95 (Presse 69) p.14.

(1) asylum policy;
(2) rules governing the crossing by persons of the external borders of the Member States and the exercise of controls thereon;
(3) immigration policy and policy regarding nationals of third countries;
(4) combating drug addiction in so far as this is not covered by (7) to (9);
(5) combating fraud on an international scale in so far as this is not covered by (7) to (9);
(6) judicial co-operation in civil matters;
(7) judicial co-operation in criminal matters;
(8) customs co-operation;
(9) police co-operation for the purposes of preventing and combating terrorism, unlawful drug-trafficking and other serious forms of international crime, including if necessary certain aspects of customs co-operation, in connection with the organisation of a Union-wide system for exchanging information within a European Police Office (Europol).

The areas mentioned above as matters of common interest are to be "without prejudice to the powers of the European Community", and activities in these areas should be in line with "achieving the objectives of the Union, in particular the free movement of persons". It is important to note that, in Article K.1, links to the First Pillar are made.

3.2.1 Legal Instruments Used

Title VI has provided for new legal instruments which are to be used along more traditional instruments of public international law, such as joint positions, joint actions and common positions. The nature and scope of such instruments is not at all clear. Some form of definition or interpretation is therefore needed so that they can be more effectively put to use. The more traditional convention also features strongly in Title VI (Article K.3.2 (c) § 2). Finally, whilst not mentioned in Article K.3, the Council has nonetheless made widespread use of soft law instruments such as resolutions, declarations, conclusions, statements etc.

Joint Positions

According to Article K.3.2 (a), the Council may adopt joint positions and promote "any co-operation contributing to the pursuit of the objectives of the Union". No joint position as yet has been adopted by the Council, and as such it is still very unclear exactly what a joint position should entail. There is also confusion as to whether a joint position in Article K.3.2 (a) is the same as common position specified in Article K.5.

Joint Actions

The same confusion surrounds that of joint actions. Once again there is no strict interpretation as to the meaning and scope of a joint action. Nor should one presume that a joint action in the framework of justice and home affairs is identical or even similar, for that matter, to joint actions provided for in the framework of Common Foreign and Security Policy (Article J.3).

Two joint actions have nevertheless been adopted by the Council. However this may confuse the matter even further as both are of an inherently different nature. The first concerned travel facilities for school pupils from third countries resident in a Member State[17]. The second joint action[18] concerning Europol is essentially an elaboration of the Ministerial Agreement of 2 June 1993 (see section on police co-operation).

Conventions

Conventions are classic instruments in public international law. Conventions provided for under Article K.3(2)(c) may allow the Court of Justice to be involved, in cases of interpretation. However this provision is not compulsory. Otherwise the Court is completely excluded. The non-involvement in general of the Court of Justice in Title VI is of great concern as there appears to be almost no judicial control over activities in this Title. With regard to democratic control, ironically, the EP may have a greater role in conventions in

17 Decision 94-795/JAI on a joint action adopted by the Council on the basis of Art. K.3(2)(b) of the Treaty on European Union concerning travel facilities for school pupils from third countries resident in a Member State. OJ No L 327, 19.12.1994.

18 Joint action concerning the Europol Drugs Unit on the basis of Art. K.3(2)(b) of the Treaty on European Union. OJ No L 62, 20.3.1995.

Title VI as it should be consulted[19] (Article K.6) than in Article 220 EC Treaty where no role for the Parliament is envisaged[20].To date only one Convention has been adopted under this legal basis[21]. Control of the Court of Justice in terms of interpretation was not provided for in the Convention. In the future, when Member States are confronted with disputes and realise that jurisdiction of the Court of Justice in this regard may be needed, a Protocol may be annexed to the Convention.

There are presently nine conventions under discussion[22]. These are:

- Draft Convention on the crossing of the external borders
- Draft Convention setting up a European Information System (EIS)
- Draft Convention on the establishment of Europol
- Draft Convention on the uses of information technology for customs purposes (CIS)
- Draft Convention on the protection of the Communities' financial interests
- Draft Convention on extradition between the Member States of the European Union
- Draft Agreement between the Member States of the European Union on the enforcement of driving disqualifications
- Draft Convention on scope, jurisdiction and the enforcement of judgements in matrimonial matters (Brussels Convention II)
- Draft Convention on the service in the States of the European Union of judicial and Extra judicial Documents in Civil or Commercial Matters.

Common Position

According to Article K.5, Member States shall take it upon themselves to defend common positions adopted under the provisions of Title VI within international organisations and at

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19 This is of course open to interpretation as to whether consultation on the drawing up of a convention is in line with the provision of consultation of "principal aspects of activities" under Article K.6.

20 See section on the role of the Institutions for further information on their participation in Title VI.

21 Convention on the simplified extradition procedure between the Member States of the European Union. OJ No L 78, 30.3.1995.

22 Two of the main stumbling blocks with regard to the conclusion of these conventions concern provisions for the role of the Court of Justice and budgetary aspects.

international conferences. Once again, one has to ask, what exactly is a common position? Does it refer to a joint position as mentioned above or is it, in nature, more comparable to the provisions in Article J.5 TEU relating to Common Foreign and Security Policy? Once again, no clear-cut definition has been made in this regard. Nor have the authors of this Report found any evidence that such a formal common position has been taken on the legal basis of Article K.5 TEU. The Council did make some reference to the expression of common positions in international organisations and conferences in its Conclusions of the December 1994 Justice and Home Affairs Council meeting. It stated:

"Le Conseil est convenu de certaines règles applicables à l'expression et à l'elaboration des positions communes à prendre par l'UE dans les organisations et conférences internationales en ce qui concerne le domaine JAI"[23].

This however does not provide us with the clarification that is needed.

Resolutions, Recommendations, Declarations, Conclusions etc.

As one can see from above, the adoption of new legal instruments and the perhaps more legally binding conventions have had limited success. In many cases, the more traditional instruments such as resolutions have been preferred. Such instruments are often referred to as soft law as their legal nature is very unclear. It is generally accepted however, that they are not legally binding but rather, they simply provide a political declaration of intent. It is often argued that when dealing with issues that directly touch one's perception of national sovereignty, the only feasible way of proceeding is through such instruments so as to allow flexibility and room for manoeuvre for the Member States. Once a convention, on the other hand, is signed by all contracting parties and ratified by all national parliaments, it becomes legally binding and should be enforced. Consequently, Member States are far more wary of signing conventions. From this point of argumentation, it is not surprising that so many draft conventions in the Third Pillar are still under discussion.

23 1808e session du Conseil, Justice et Affaires Intérieures, Bruxelles, le 30 Novembre et le 1er décembre 1994, Mise en oeuvre de l'article K.5, Communication à la Presse, 11321:94 (Presse 252).

According to the Commission Report on the Functioning of the Treaty on European Union[24], over fifty resolutions, recommendations or conclusions have been adopted by the Council. These are of course, as the Report states, traditional measures of co-operation which were already provided for in the Treaty and are in no way dependent on Title VI TEU

3.2.2 Working Procedures and Structures

Article K.4 provides for the establishment of a Co-ordinating Committee consisting of senior officials to provide a co-ordinating role for activities in Title VI. The Committee shall also:

"- give opinions for the attention of the Council, either at the Council's request or on its own initiative;

- contribute, without prejudice to Article 151 of the Treaty establishing the European Community, to the preparation of the Council's discussions in the areas referred to in Article K.1 and, in accordance with the conditions laid down in Article 100d of the Treaty establishing the European Community, in the areas referred to in Article 100c of that Treaty."

The Commission is to be fully associated with the work of the Co-ordination committee.

The K.4 Committee does not replace the role of the COREPER in Title VI, rather it provides extra layers to the already complicated working structure. Why was this extra committee created? What is important to note here is that the K.4 Committee, in substance, does not change a great deal. The intergovernmental fora for co-operation that existed before the TEU needed to be incorporated in some way, and as such a Co-ordinating Committee was created to reorganise and incorporate all the groups under one structure. The K.4 Committee therefore represents in many respects (under an institutionalised structure) a continuation of groups such as the Co-ordinators - Free Movement of Persons, Ad -hoc Immigration, TREVI, and the former EPC Group on judicial co-operation, in all but name (see organigramme of the K.4 Committee). In most cases, the same national civil servants have

24 Commission des Communautés Européennes, Rapport sur la Fonctionnement du Traité sur l'Union Européenne, Bruxelles, le 10.05.1995. SEC(95) 731 final, P.47.

been appointed, and the working methods have not changed greatly, except perhaps for the use of a greater number of working languages.

Two positive points are that

(1) the K.4 Committee structure will now provide greater transparency and even control as the Commission is fully associated and the European Parliament should be kept informed of its activities insofar as K.6 provides; and

(2) this one structure should go a considerable way towards avoiding excessive overlapping and duplication of work. Apart from three sub-groups under the K.4 Committee (Steering Group I - Asylum and Immigration, Steering Group II - Police and Customs Co-operation, and Steering Group III - Judicial Co-operation), a horizontal element is introduced which should assist in avoiding duplication within the K.4 structure.

With regard to the latter point however, there have been problems in that many people involved have expressed concerns that the present multi-level structure has, if anything, complicated the process making it rather slow and cumbersome. At present the five-level working structure consists of:

1) Working Parties
2) Steering Groups
3) K.4 Committee
4) COREPER
5) Justice and Home Affairs Council

There is greater accountability of the activities of working groups dealing with justice and home affairs. The relationship and the division of labour between the K.4 Committee and COREPER[25] has not yet been fully clarified. In the hierarchy of working structures, the K.4 Committee comes after the COREPER in importance, yet clearly, the national experts in the field pertain to the K.4 Committee. At this stage and in view of the forthcoming

25 One interesting point to note is that the K.4 Committee has the right to give opinions for the attention of the Council. The COREPER, on the contrary, cannot provide own initiative opinions.

Intergovernmental Conference in 1996, some form of rationalisation of the working structures should be envisaged[26].

3.2.3 Decision Making Modalities

In all except some minor exceptions, unanimity dominates the voting rules in the Third Pillar. For areas that are still considered so sensitive to the national sovereignty of Member States, it was decided that it was not the appropriate time to advocate a widespread use of qualified majority voting in the fields of justice and home affairs. Even with areas that are dealt with in the EC Treaty concerning justice and home affairs, unanimity is often required (see section on provisions in the EC Treaty on justice and home affairs). In this regard, the intergovernmental aspect of requiring unanimity in decision making has prevailed. The unanimity rule, whilst safeguarding each and every Member State's national interests in such sensitive issues has been blamed for limiting the efficiency of decision making in Title VI. Failure to reach agreement on nine draft conventions is indicative of the difficulties related to the unanimity rule which has managed to slow down and almost block completely the decision making process.

According to Article K.4.3:

"The Council shall act unanimously, except on matters of procedure and in cases were Article K.3 expressly provides for other voting rules.

Where the Council is required to act by a qualified majority, the votes of its members shall be weighted as laid down in Article 148(2) of the Treaty establishing the European Community, and for the adoption, acts of the Council shall require at least eight members."

Unanimity is therefore required for the adoption of joint actions, joint positions and conventions. It is also required in the case where the Council decides to apply Article 100c EC Treaty to action in the areas referred to in Article K.1(1) to (6) (the so-called *passerelle*),

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26 For a more complete and comprehensive analysis of the functioning of the K.4 Coordinating Committee both in the First Pillar 5 (Article 100d EC Treaty) and the Third Pillar, see Michael Niemeier, "The K.4 Committee and its Position in the Decision Making Process", forthcoming in Jörg Monar & Roland Bieber (eds.) 1995.

and in the budgetary provisions of Article K.8 on the charging of operational expenditure to the Budget of the European Communities.

Exceptions to the unanimity rule

There are some exceptions to the unanimity rule, however these are rather minor:

- According to Article K.3.2(a), the Council may decide that measures implementing a joint action are to be adopted by a qualified majority.

- Regarding conventions adopted in accordance with the provisions of Title VI, Article K.3.2(c)§2 specifies that: "Unless otherwise provide by such conventions, measures implementing them shall be adopted within the Council by a majority of two thirds of the High Contracting Parties."

- Finally, qualified majority may be introduced through the use of the passerelle. According to Article K.9:

"The Council, acting unanimously..., may decide to apply Article 100c of the Treaty establishing the European Community to actions in areas referred to in Article K.1(1) to (6), *and at the same time determine the relevant voting conditions relating to it*"[27].

As such, when using the provisions of Article K.9, the Council can also decide to use voting requirements other than unanimity.

Unanimity means that in nearly all the cases so far, a compromise, entailing a less than optimal result, has had to be sought. As such, quite often, decisions are taken on the basis of the "lowest common denominator" between the Member States. This clearly hinders the effectiveness and the quality of decisions taken in the fields of justice and home affairs. This can be clearly seen from the first Convention adopted under Title VI on simplified extradition procedures which is far from complete. The risk of adopting less than perfect Conventions thwarted by the unanimity rule, regardless of their substance, is very high.

27 Italics have been added.

3.2.4 The Role of the Institutions, Member States and the National Parliaments in the Third Pillar

3.2.4.1 The Commission

The Commission's Right of Initiative

The birth of the Third Pillar brought with it a right of initiative for the Commission in the area of Justice and Home Affairs (JHA) - albeit a more limited one than that of the Member States; the Commission may not make any proposals on judicial cooperation in criminal matters, customs cooperation and police cooperation (Articles K.1.7-9. and K.3.2). The wisdom of excluding Commission initiatives from these areas has been questioned in the past especially in the area of customs cooperation in which the Commission already had some experience[28]. Although this limited right of initiative for the Commission is inferior to the complete right of initiative which the Member States enjoy (Articles K.1.1-9. and K.3.2), it does represent a major increase in the role the Commission can play in JHA compared to the situation before the TEU. That said, the Commission feels a sense of frustration at being excluded from these three areas of "common interest", especially in the area of judicial cooperation in criminal matters where it feels it has much to contribute and where the reasons for its exclusion seem to be less obvious[29].

As suggested by the Commission itself[30], the provisions of the Treaty dealing with the right of initiative in the Third Pillar (Article K.3.2) seem to have had only a minor impact on the way in which proposals are made. In the TREVI dominated JHA environment before Maastricht it was the presidency which made the proposals; this continues to be the case to

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28 Customs cooperation was already partly regulated by Council regulation (EEC) No.1468/81 as amended by Council Regulation (EEC) No.945/87. See chapters by Monar (p.73) and Ravillard (pp.218-221) in Monar &Morgan 1994.

29 Commission officials, Summer 1994

30 "Rapport sur le fonctionnement du Traité sur l'Union Européenne", Commission, SEC (95) 731 final, 10.5.95, p.49

a large extent despite the introduction of Article K.3.2. According to Commission statistics[31], only once has a Member State not holding the Presidency used the right of initiative[32], with the Commission exercising its right only twice[33]. Interestingly none of these initiatives has lead to the agreement of a legal instrument in the sense of Article K.3.2 (i.e. a joint position, a joint action or a convention). This would imply that so far only those proposals put forward by the Presidency have found agreement[34] - a situation identical to that before the TEU. It should be pointed out that most of the texts adopted under the Third Pillar have not been of the nature foreseen by Article K.3.2, most coming in the form of conclusions, recommendations and resolutions[35] - instruments which have been carried over from the pre-Maastricht arena of purely intergovernmental justice and home affairs cooperation; the Treaty is not clear as to whether the Commission - in as much as it is "fully associated" (Article K.4.2) - can use its right of initiative for such instruments. It is also noteworthy that the Commission is responsible for two of the nine draft conventions listed as being "under examination" in the Council's report on the functioning of the Treaty[36]. This figure is perhaps more impressive than it first looks since of those nine conventions, only four seem to fall under those areas of common interest upon which the Commission may table proposals.

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31 "Rapport sur le fonctionnement du Traité sur l'Union Européenne", Commission, SEC (95) 731 final, 10.5.95, p.49

32 The UK proposed a common action on the protection of the Community's financial interests in 1994.

33 Proposal for a Convention on the Crossing of the External Frontiers, O.J. C11, 5.1.95; and Proposal for a Convention on the Protection of the Communities' Financial Interests, O.J. C216, 6.8.94

34 Such an assertion cannot however be made with total certainty since official documents and press releases tend not to indicate from where the original proposal emanated; in fact, on only two occasions do such texts cite the origin of the proposal, namely the two joint actions agreed so far: Decision 94-795/JAI on a joint action adopted by the Council on the basis of the Art. K.3(2)(b) TEU concerning travel facilities for school pupils from third countries resident in a Member State (OJ L327, 19.1294) and Joint action concerning the Europol Drugs Unit on the basis of Art. K.3(2)(b) TEU. In both cases the preamble refers to the "initiative of the Federal Republic of Germany", the country holding the Presidency at the time the proposals were first tabled. Mention is also made elsewhere of the UK and the Commission as being the initiators of proposals on protection of the EC's financial interests; however, as stated these did not result in the agreement of any legal instruments in the sense of Art.K.3(2).

35 Texts have also taken the form of decisions, statements and other kinds of documents. See Annex XI(a) of the "Report of the Council of Ministers on the functioning of the Treaty on European Union" adopted by the EU's foreign ministers at their meeting in Luxembourg on April 10, 1995.

36 Annex XI(b) of Council report, 10.4.95, op.cit.

Table 1: Total number of agreed legal instruments (Article K.3.2) in JHA, the number of which fall within the Commission's right of initiative and the number of which were actually tabled by the Commission[37]

Type of Text agreed	*Total Number*	*Total number which could have been tabled by the Commission*	*Total number actually tabled by the Commission*
Joint Action	2	1	0
Convention	1	0	0
Joint Position	0	0	0

Table 2: Draft Conventions and the Potential Role of the Commission [38]

Total number of draft conventions	*Total number which could have been tabled by the Commission*	*Total number actually tabled by the Commission*
9	4	2

37 The information included in these tables has been produced by comparing the texts in question (as listed in Annexes XI a/b of the Report of the Council of Ministers on the functioning of the TEU adopted by the EU's foreign ministers in Luxembourg 10.4.95 and in Annex 15 of the Commission's Report, SEC (95) 731 final, 10.5.95) and the areas listed as being of common interest on which the Commission may use its right of initiative according to Articles K.1 and K.3.2. This information should therefore be treated with some caution and seen as indicative rather than definitive.

38 See above note.

Table 3: Other Texts Agreed and the Potential Role of the Commission[39]

Type of Text agreed	*Total number of texts agreed*	*Number of texts falling within Article K.1.1-6.*
Resolutions	7	6
Recommendations	8	2[40]
Decisions	3	0
Statements	2	0
Conclusions	16	13

A number of comments can be made on the basis of the information presented in the above tables.

- Obviously the information included here concerns only those texts which have been adopted or drafted (the nine conventions) since the TEU came into force. It does not (and surely cannot) take into account what the Commission might theoretically have done in the areas where it has a shared right of initiative. So far texts[41] concerning areas of common interest on which the Commission can table proposals account for 58% of the total number of texts[42] agreed by the Fifteen. This would imply that the Member States' ministers have spent a disproportionately large amount of time dealing with the three areas of common interest (out of a total of nine) on which the Commission is not allowed to table proposals; such a statement should of course be seen in

39 See above note.

40 This is assuming that the Recommendation on the responsibility of organizers of sporting events (Press release 10550/93) and the Recommendation for the exchange of information on the occasion of major events or meetings (Press release 11321/94) fall under Article K.1.9. It should also be pointed out here that the five recommendations on the fight against trade in human beings for the purposes of prostitution (agreed 29/30.11.93, Press Release 10550/93) have been treated as one text in order not to distort the above figures.

41 By which is meant joint actions, conventions, resolutions, recommendations, decisions, statements and conclusions agreed so far plus the nine draft conventions under examination but excluding "other texts" as listed in the Commission Report on the Functioning of the TEU, SEC (95) 731 final (10.5.95), Annex 15.

42 See preceding note.

context. Proposals are tabled on the basis of perceived need and political will rather than the desire to ensure an equal number of texts for each area of common interest. Thus, it can be argued that the three areas from which the Commission is excluded may be those in which there is the most political will or perceived need and they have therefore been subject to the most attention within the Council. However, even with this in mind, the fact of the matter is that Commission proposals seem to be excluded from nearly half of the work in the Third Pillar. Once again, though, to put this in another light, it does show that the Commission could - if it saw fit - play its full role in the Third Pillar in over half of JHA business so far, which of course represents a quantum leap compared to its position before the TEU came into force.

- Despite the fact that over half of the texts agreed so far (plus the nine draft conventions) fall within areas on which the Commission could make proposals, the Commission has chosen not to exploit the possibility of making proposals in those areas to its fullest extent. In fact, as mentioned above, the Commission has (by March 30 1995) only made two proposals[43]; the question begs itself therefore why might this be. The Commission offers its own explanation: "La Commission a, au moins dans un premier temps, préféré contribuer aux travaux par des communications d'ensemble (sur l'immigration at l'asile[44], relative au plan de lutte contre la drogue[45]), dont la principale valeur ajoutée a été le caractère global, recouvrant à la fois les domaines d'action communautaire et de coopération entre Etats membres."[46] This tendency to opt for communications rather than proposals seems to reflect two factors: on the one hand that the Commission is continuing to pursue a pragmatic, non-confrontational approach to the Third Pillar[47], attempting to 'test the water' in JHA policy-making and creating for itself at least the role of provider of information; as one Commission official put it, the Commission set itself the initial aim of establishing its credibility in this new area of its activity. This was to be achieved not by tabling proposals but by producing communications in order to encourage public debate and eradicate the image

43 Commission Report, 10.5.95, op cit., p.49

44 COM (94) 23

45 Doc.8077/94 CORDROGUE 24 et COM (94) 234

46 Commission Report, 10.5.95, op cit., p.49

47 For a discussion of the Commission's choice between a pragmatic, 'gradualist' approach and a more conflictual doctrinaire one see chapters by Monar in Monar & Morgan, 1994, and Myers in Monar, 1995 (forthcoming).

of policy-making behind 'closed doors'; the goal was to make the Commission a "partner" at the table[48]. On the other hand, there is the role of the K.4 Committee which some have suggested provides the "real impetus and initiative"[49] in JHA work. Indeed in reading the Council press releases, this Co-ordinating Committee seems to play a large role in preparing texts for submission to the Council[50]; however, Coreper is also invariably mentioned in this context too so perhaps both bodies are responsible for the "real impetus and initiative". One of the key differences between Coreper and the K.4 Co-ordinating Committee should be born in mind here: according to Article K.4.1 the Co-ordinating Committee may give opinions on its "own initiative"[51], something Coreper does not have the power to do (Article 151 EC: the committee "shall be responsible for preparing the work of the Council and for carrying out the tasks assigned to it by the Council"). How many of the Presidency proposals or those the source of which is not known have emanated from the K.4 Committee remains unclear.

One final comment should be made on the subject of the Commission's right of initiative; despite what has been said about the non-controversial stance of the Commission, it has - with a spirit of procedural cheekiness similar to that more often displayed by the EP - found a way of putting forward texts - or at least a part thereof - on subjects on which it does not officially have the right of initiative. The example of this is to be found in the draft convention on the protection of the Community's financial interests[52]: Title III of the convention deals with the application of national law. In a footnote to that title the Commission points out that it does not have the right of initiative in this area but that it has presented the articles under that title as material "for reflection" so as to offer a full document". Thus the Commission has found a way of circumventing its handicaps in terms of its limited right of initiative at least in documents which deal with 'mixed' subjects. It

48 Speech by Adrian Fortescue, 'Joint Research Project on the Third Pillar of Maastricht', Second Expert Meeting, Bruges, 19.9.94

49 Jessrun d'Oliveira in O'Keefe &Twomey, 1994, p.263

50 e.g. the EUROPOL Convention (Press release 7760/94, p.5), Draft Convention on the use of information technology for customs purposes (p.7), Draft Convention establishing a European Information System (p.7), relations with third countries (p.8), rules governing use of the JHA budget (Press Release 11321/94, p.8), Convention on simplified extradition procedure between EU Member States (p.10),etc.

51 Though not stated in the Treaty, "own initiative" opinions produced by the K.4 Committee first pass through Coreper before being presented to the Council (Speech by M.Niemeier, 'Joint Research Project on the Third Pillar of Maastricht', Second Expert Meeting, Bruges, 20.9.94)

52 op cit.

remains to be seen whether or not the Member States allow the Commission to 'get away with it'.

The Commission is "fully associated"

Article K.4.2 which states that the Commission should be "fully associated with the work" of the Third Pillar has apparently never been defined, but observers believe that it goes further than "mere observer status"[53]. This appears to be the case: it is said that the Commission is involved at all levels and in all areas - even those where it has no formal right of initiative; it is further asserted that the Commission makes a positive contribution and has become an invaluable partner[54]. This would suggest therefore that the Commission is able to play an important role throughout the Third Pillar - even if that does not include making proposals - and that its strategy of fostering credibility and creating the image of being a true partner at the table is working. The extent to which the Commission might be influencing the debate is unclear, but the fact that it is associated with the work of the K.4 Committee and Coreper, as well as with that of the Council itself, renders the issue of the right of initiative slightly less crucial; in any case, if First Pillar practice is anything to go by, it is often the case that once a proposal has been tabled and the discussions commenced, the proposal is regarded as being the 'joint property' of those around the table. As the Commission is fully associated, therefore, it may be able to exercise some influence on the contents or direction of that 'joint property'.

The Commission and the Passerelle Clause (Article K.9)

The Commission has a shared right of initiative to use this article to transfer areas of common interest (Article K.1.1-6 only) to Article 100c in the First Pillar. It could easily be imagined that the Commission would believe the use of this article to be in its own interest since it seeks to place certain areas of JHA into the Community arena where the powers of the Commission are undeniably stronger than those in the Third Pillar. Whether such a statement is true or not, on the first occasion that the Commission had of using this article, it chose not to request such a transfer to the First Pillar, leaving asylum policy firmly within the realms

53 Monar in Monar & Morgan 1994, p.72

54 M.Niemeier, German Ministry of the Interior, op cit.

of the semi-intergovernmentalism of Article K[55]. On the one hand this represented an interesting 'political' choice in institutional terms by the Commission since it had unilaterally decided to put forward the report on the possible use of Article K.9 mentioned in the relevant declaration[56]. The apparent 'political activism' of this gesture was however neutered by the fact that the Commission was arguing against any transfer to the communitarian First Pillar. The affect of such a move by the Commission was most probably intended to convince the Member States that it was a reliable and realistic partner not interested in tabling clearly politically unacceptable proposals.

Final Remarks

Since the entry into force of the Third Pillar provisions, the Commission appears - at least in its behaviour to the outside world - to have continued to pursue its policy of pragmatism and 'cooperation' - a policy dating back to at least 1990[57] - rather than one of political activism which tended to be prevalent in the mid Eighties[58]. The Commission has as a result managed to make itself into an important player in the JHA environment. Whilst in formal terms the Commission's powers under the Third Pillar are clearly not as generous as those it enjoys in the Community arena, in practice it has managed to exploit its limited role to a large extent. Its influence is not one which can easily be measured in terms of proposals tabled - though this is of course of interest, rather the fact that it has become seen as "invaluable partner" which makes "a positive contribution" to "all areas" of common interest on "all levels"[59] is perhaps more telling. This is apparently the goal of the Commission. Whether the Commission is 'rewarded' in terms of extension of powers or not - for example a shared right of initiative for customs cooperation and judicial cooperation in criminal matters - is a question which can only be answered after the IGC.

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55 In accordance with a declaration annexed to the TEU (No.31), the Commission produced a report on the possible application of Article K.9 to asylum policy. The Commission's report, which was unsolicited, proposed leaving asylum policy where it was in the Treaty given the late entry into force of the TEU (SEC (93) 1687 final).

56 See Monar in Monar & Morgan, 1994, pp.73-74

57 As suggested by comments made by Commissioner Martin Bangemann in March 1990 as cited in report of the Committee on Civil Liberties and Internal Affairs on cooperation in the fields of justice and home affairs under the TEU (Robles Piquer Report), EP Doc.No. A3-0215/93 p.13.

58 See the Robles Piquer Report (op cit.) for a discussion of this change of policy direction, p.13.

59 M.Niemeier, op cit.

3.2.4.2 The Council

The Council, the Institution that most represents the interests of the Member States, is clearly the main actor in Title VI. In terms of output, it has been particularly active (see chart on Council activity in this report). Furthermore the Council has made extensive use of the K.4 Co-ordinating Committee.

However, as already mentioned, the majority of this output consists of resolutions, recommendations, declarations, statements and conclusions. So far, the Council has only adopted two joint actions and one convention. This, it must be said, is a relatively small amount.

3.2.4.3 The European Parliament

The European Parliament has on several occasions expressed utter disillusionment with the role that it has been accorded in Title VI. In a recent Opinion of the Committee on Civil Liberties and Internal Affairs for the Committee on Institutional Affairs on the functioning of the Treaty on European Union with a view to the 1996 Intergovernmental Conference, the Parliament is particularly critical and requests increased powers of control and scrutiny[60] in areas of justice and home affairs as treated in Title VI TEU.

Article K.6 specifies the role of the Parliament in Title VI:

"The Presidency and the Commission shall regularly inform the European Parliament of discussions in the areas covered by this Title.

The Presidency shall consult the European Parliament on the principal aspects of activities in the areas referred to in this Title and shall ensure that the views are duly taken into consideration.

The European Parliament may ask questions of the Council or make recommendations to it. Each year, it shall hold a debate on the progress made in the implementation of the areas referred to in this Title."

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60 Report on the functioning of the Treaty on European Union with a view to the 1996 Intergovernmental Conference -implementation and development of the Union, Part II, Opinion of the Committee on Civil Liberties and Internal Affairs, 4 May 1995, A4-0102/95/PART II.

Its role has been enhanced from that of no involvement at all in the areas of justice and home affairs before the Treaty on European Union. In an area however that directly touches the citizens, proper democratic control would be the least that would be expected. Article K.6, according to many, falls far short of providing effective democratic control over activities in Title VI.

The provisions of Article K.6 are vague, to say the least, and quite open to interpretation:

What meant by consultation?
Is it the same as consultation provided for in the EC Treaty?
What is meant by "principal aspects of activities"?
Will the Parliament be informed on an ex *ante* or *a posteriori* basis?

This is wholly at the discretion of the actors involved (but not however the Parliament). The Council for instance, may have a widely differing perception of when and how the European Parliament's views are "duly taken into consideration". In this regard, one evidently runs the risk of straining relations considerably between the Institutions.

The European Parliament, for its part, is clearly unhappy with its present level of involvement and has already requested a more formalised relationship between itself, the Council and the Commission through the adoption of an Interinstitutional Agreement (IIA). In the December 1993, the European Parliament forwarded to the Council and the Commission a draft IIA providing a better information and ex ante consultation procedure for the Parliament. As of yet no Interinstitutional text has been agreed.

With regard to the annual debate that should be held on progress made in the implementation of the areas referred to in Title VI. The European Parliament, in this regard, was quite critical of the annual debate for 1994, in the sense that the debate failed to produce manifest results in view of ensuring greater progress in the following year.

Apart from the provisions in Article K.6, there are essentially two other ways in which the European Parliament can become more intensively involved in the fields of justice and home affairs:

1) Use of the K.9 passerelle whereby Art. 100c EC Treaty will be applied to areas of common interest in Articles. K.1(1) to K.1(6). In this case the Parliament would have a more formalised role as provided for in the First Pillar;

2) There is also a possibility of the European Parliament increasing its role through budgetary aspects. Article K.8 allows the Council, acting unanimously, to charge operational expenditure in Title VI to the budget of the European Communities. If this was the case, operational expenditure would fall under non compulsory expenditure, whereby the European Parliament would have greater influence. This appears to be an indirect way by which the Parliament can gain greater control over implementation of areas related to Title VI[61].

3.2.4.4 The Court of Justice of the European Communities

One of the major concerns over the functioning of the Third Pillar is the lack of effective judicial control. The Court of Justice is in fact only mentioned once with regard to the adoption of conventions in accordance with the provisions of Title VI. Article K.3.2.(c) § 3 states that:

"Such conventions may stipulate that the Court of Justice shall have jurisdiction to interpret their provisions and to rule on any disputes regarding their application, in accordance such arrangements as they may lay down."

This provision is limited in itself to the power of interpretation. Moreover, it is up to the Council, at its own discretion, to decide whether or not to give the Court of Justice competence in this area. In the one and only convention that has been adopted by the Council under the provisions of Title VI, the Convention drawn up on the basis of Article K.3 of the Treaty on European Union on simplified extradition procedure between the Member States of the European Union, no mention is made of the Court of Justice of the European Communities.

Judicial review is practically non-existent in Title VI. Through the K.9 procedure, the Court of justice could gain full jurisdiction if the Council decided to apply Article 100c EC Treaty to action in areas referred to in Article K.1(1) to (6). This does not however appear likely in the short term and furthermore, Article K.9 does not apply to action in areas referred to in K.1(7) to (9) (namely judicial co-operation in criminal matters, customs co-operation and police co-operation).

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61 This may in part may explain the non-use so far of the EC budget for operational expenditure in Title VI.

The European Parliament Resolution on the functioning of the Treaty on European Union with a view to the 1996 Intergovernmental Conference - Implementation and development of the Union (Bourlanges/Martin report)[62] requests that:

"The European Court of Justice should have full means to ensure respect for EU laws and of the EU institutional balance; its competence should also be extended to areas relating to the common foreign and security policy, justice and internal affairs and those covered by the Schengen Agreement."

Furthermore, the Court of Justice itself, in its Report on certain aspects of the application of the Treaty on European Union[63], is surprisingly critical of the role that it has been accorded by the TEU in the fields of justice and home affairs covered by Title VI. The Report states as follows:

"D'abord, il est évident que la protection juridictionnelle des particuliers affectés par les activités de l'Union, spécialement en vertu de la coopération dans les domaines de la justice et des affaires intérieures, devrait être assurée et organisée de façon à permettre la cohérence dans l'interprétation et l'application du droit communautaire d'une part et, d'autre part, des dispositions adoptées dans le cadre de ladite coopération. Ensuite, il peut être nécessaire de déterminer les limites des compétences de l'Union vis-à-vis des Etats membres, ainsi que celle de chaque institution de l'Union. Enfin, des mécanismes appropriés devraient être prévus pour assurer la mise en oeuvre uniforme des décisions prises.

De toute évidence, la nécessité d'assurer l'intérpretation et l'application uniforme du droit communautaire, ainsi que des conventions indissociablement liées à la réalisation des objectifs des traités postule l'existence d'une jurisdiction unique, telle que la Cour, qui dit definitivement le droit pour l'ensemble de la Communauté. Cette exigence est essentielle dans toute affaire revêtant un caractère constitutionel ou présentant autrement un problème important pour la développement du droit".

The fact that the Court of Justice has itself voiced concern over the functioning of Title VI is very significant.

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62 PE 190.441

63 Cour de Justice des Communautés Européennes, Rapport de la Cour de Justice sur certains aspects de l'application du Traité sur l'Union Européenne, Luxembourg, mai 1995.

3.2.4.5 The Court of Auditors

The Court of Auditors is not mentioned in Title VI. Nor is it mentioned alongside the other Institutions in Article E TEU. Nonetheless, the Court of Auditors would be required to audit expenditure incurred under the Third Pillar which has been charged to the budget of the European Communities. This scenario has not yet occurred as the provisions to charge operational expenditure to the budget of the European Communities in Article K.8.2 second indent has not yet been used. However, the possibility of controlling expenditure that is charged to the Member States has been suggested[64]. In a Report by the Court of Auditors in view of the forthcoming 1996 IGC (yet to be published), the Court has requested a more formal role in the Third Pillar, which would essentially require an amendment of Article E of the TEU.

3.2.4.6 Member States

The Member States themselves have an important role, which strongly reinforces the intergovernmental character of Title VI. In Title VI, it is the Member State that plays an active role what is normally considered the exclusive competence of the Commission in the First Pillar - that being the right of initiative. The Member States (i.e. any Member State) along with the Commission share the right of initiative in areas referred to in Article K.1(1) to (6), but more significantly, the Member States have the sole right of initiative in the areas referred to in Article K.1(7) to (9), namely the more politically sensitive issues.

So far, out of the three legislative acts adopted[65], two (both joint actions) refer to the initiative of the Federal Republic of Germany[66]. However, it would appear that these initiatives were taken whilst Germany was holding the EU Presidency. The right of initiative provided for in Article K.3 has only been used once by a Member State other than the

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64 See Agence Europe No 6498, Saturday, 10 June 1995.

65 Council Decision of 30 November 1994, on a joint action adopted by the Council the basis of Article K.3 (2)(b) of the Treaty on European Union concerning travel facilities for school pupils from third countries resident in a Member State, OJ L 327, Joint Action of 10 March 1995 adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning the Europol Drugs Unit, OJ L 62/1 and the Council Act of 10 March 1995 drawing up the Convention on simplified extradition procedure between the Member States of the European Union, OJ C 78/1.

66 With regard to the Convention adopted, no reference is made to an initiative of any Member State.

Member State holding the Presidency. This was namely a United Kingdom proposal for a joint action on the protection of the financial interests of the Communities[67]. As such one could conclude that the Member States have not made extensive use of their powers of initiative in Title VI.

3.2.4.7 National Parliaments

The national parliaments of the Member States do not have a defined role in Title VI. Nevertheless, their powers of control may prove even greater than those of both the European Parliament and the Court of Justice. This role for national parliaments concerns the adoption of conventions under Title VI. According to Article K.3.2 (c), the Council may "draw up conventions which it shall recommend to the Member States for adoption in accordance with their respective constitutional requirements". This in most, if not all, cases will require the ratification by the respective national parliaments and at times even referenda. This process, as has become quite evident in recent years, can extremely cumbersome and time consuming as is the case with the Dublin Convention which was signed in 15 June 1990 but has not yet been ratified by all Member States. Equally problematic was the process of ratification of the Schengen Convention of 1990 applying the Schengen Agreement of 1985 in the national parliaments of the Contracting Parties. The Convention cannot enter into force until the instruments of ratification have been deposited by all Member States involved. As a result, this may indirectly give the national parliaments greater bargaining power. As a consequence, Member State governments will be more inclined to appease their respective parliaments in order to ensure a smooth ratification process. On the other hand, the difficult ratification process may also be used by the Member State governments to block the entry into force of an act.

The role of the national parliaments in the Third Pillar will inevitably differ, depending on their respective constitutional status with regard to the subjects dealt with. As a result, at present, some national parliaments are consulted on an *ex ante* basis, whereas others will be lucky to be informed of a decision that has already been taken.

Other forums do exist for national parliaments to become involved which are not restricted to the Third Pillar. Much of this involves the forging of better relationships with the

67 See Commission, Rapport sur la fonctionnement du Traité sur l'Union Européenne, Bruxelles, le 10.05.1995, SEC(95) 731 final, p. 49.

European Parliament. Declaration No 13 on the role of national parliaments in the European Union requests an increase in the exchange of information and the establishment of a more formal relationship between the national parliaments and the European Parliament. Declaration No 14 calls for a Conference of the parliaments (i.e. national parliaments and the European parliament - the Assises) which could be consulted on the main aspects of EU affairs.

The COSAC forum (Conférence des organes spécialisés dans les affaires européennes des Assemblées) predates the Treaty on European Union. It entails meetings between committees specialising in EU affairs in national parliaments and the relevant committees in the European Parliament. There have been three meetings between the Committee on Civil Liberties and Internal Affairs and the chairmen of the relevant committees of the national parliaments, all of which have been very successful as a forum for co-operation and exchange of information[68]

3.2.5 The Relationship between Justice and Home Affairs in Title VI TEU and the EC Treaty

The relationship between the First and the Third Pillar is still quite unclear. Even though both are under one single institutional framework, the procedures, instruments and working methods, as mentioned above, are quite different. The logic behind some areas being dealt with in the First Pillar and others in the Third Pillar is also quite unclear.

Aspects of immigration and control at external borders would have links with Article 7a EC and free movement of persons. Some small aspects of asylum policy are dealt with in the EC Treaty under Article 100c (determination of third countries whose nationals should be in possession of a visa when crossing the external borders of the Member States and measures related to a uniform format for visas). Article 129 EC Treaty on public health seems to overlap with Article K.1(4) TEU on the question of drug addiction/dependence. No-one is quite sure as to what is the exact difference between the two provisions. Finally there is confusion as to the division between Article K.1(5) TEU -combating fraud on an international scale and Art. 209a EC on "measures to counter fraud affecting the financial interests of the

68 18 & 19 June 1992, 18 & 19 March 1993 and 22 & 23 March 1995.

Community"[69]. In theory, there should be no problem as K.1 quite clearly states that action in the areas that are considered matters of common interest, should be "without prejudice to the powers of the European Community". However, in practice, the artificial division becomes rather confusing[70].

Passerelle

Article K.9 also provides a bridge form the Third Pillar to the first, whereby areas in Article K.1(1) to (6) can be communatarised. This provision has not yet been used. In fact in a Commission 'SEC' document on the possibility of applying Article K.9 to Asylum policy, the Commission took a rather moderate approach by stating that the time was not yet right for the use of the passerelle[71]. There is of course also the argument that sporadic use of the passerelle will simply complicate the situation even further and what is needed is an overall change or reform of Title VI.

3.2.6 Relations with Third Countries

Activities at the level of the European Union also have considerable consequences for non-EU countries. In this regard, it is important both for the EU countries and third countries to develop some form of cooperation. Many third countries have already expressed a desire and almost urgency to be associated with activities in the Third Pillar. In many respects, it would not be logical to consider that cooperation in combating international crime, drug smuggling etc should be confined to some European counties. The problems related to justice and home affairs are equally important for the non-EU but nevertheless European countries (especially in Central and Eastern Europe). The idea of "Fortress European Union" cannot apply for the

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69 In this regard it may be rather surprising that the proposal (UK) for a joint action concerning the protection of the financial interests of the Communities on the basis of Art. K.3 TEU falls under Tile VI and that the Art. 209a EC Treaty does not apply.

70 For a more detailed analysis, see section on the assessment of individual policies.

71 Commission, Report to the Council on the possibility of applying Article K.9 of the Treaty on European Union to asylum policy, SEC Documents 1993/1687 Final (in response to Declaration No 31 annexed to the Treaty on European Union), see section on the Commission.

fields of justice and home affairs. Consequently, increased cooperation within the EU should not serve as an obstacle to more intensive cooperation with third countries.

On 8 September 1994 a Ministerial Conference on Drugs and Organised Crime was held in Berlin. This was held between EU Ministers for justice and home affairs and their counterparts in the six countries of Central and Eastern Europe (CEECs)[72] that have Association Agreements with the EU. The resulting Berlin Convention deals with several areas in which the EU and the CEECs should increase cooperation in the following areas:

(1) Drugs
(2) Radioactive and nuclear products
(3) Traffic in human beings
(4) Illegal immigration networks
(5) Illegal traffic of motor vehicles[73]

Furthermore, on a global level, the first ministerial conference on international organised crime was held in Naples (21-23 November 1994) under the auspices of the United Nations.

With increased cooperation at the EU level especially in the framework of the Third Pillar, the EU must make sure not to ignore the plight of third countries in the relevant areas of justice and home affairs. It is also very much in the interest of the European Union not to have problems on its "doorstep". For this reason, more institutionalised dialogue should be considered between the EU and third countries in general (and not only those that have Association Agreements). Greater thought should also be put into creating some form of structured relationship with activities of the Third Pillar. Some form of observer or associate status to the activities of the Third Pillar could be considered.

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72 See Agence Europe No 6312, 10 September 1994.

73 It is interesting to note that these areas are very similar to the areas mentioned in the Joint Action concerning the Europol Drugs Unit, which are subject to the exchange and analysis of information and intelligence. Perhaps closer ties between third countries and EDU/Europol is already being envisaged.

4. An Analysis of Progress Made in the Individual Policy Areas of Title VI

4.1 Council Activity under Article K according to Subject Area[1]

Type of Act	*Asylum*	*External Borders*	*Immi-gration*	*Drug addic-tion*	*Fraud*	*Judicial Coop. in civil matters*	*Judicial Coop. in criminal matters*	*Customs Coop.*	*Police Coop.*	*Applica-tion of K.9*	*Racism & Xeno-phobia*	*Inter-preta-tion of K.5*[2]	*Rela-tions with 3rd states*	*Art.K in general*	*Total type of act*
Joint Action	0	0	1	0	0	0	0	0	1	0	0	0	0	0	**2**
Joint Position	0	0	0	0	0	0	0	0	0	0	0	0	0	0	**0**
Conven-tion	0	0	0	0	0	0	1	0	0	0	0	0	0	0	**1**
Resolu-tion	1	0	3	0	2	0	0	0	1	0	0	0	0	0	**7**
Recom-menda-tion	0	0	2	0	0	0	0	0	6	0	0	0	0	0	**8**
Decision	0	0	0	0	0	0	0	0	3	0	0	0	0	0	**3**
State-ment	0	0	0	0	0	0	1	0	1	0	0	0	0	0	**2**
Conclu-sion	5.5[3]	1.5[4]	1[5]	0	0	0	0	1	1	1	2	1	2	0	**16**
Draft Con-vention	0	1	0	0	1	2	2	1	2	0	0	0	0	0	**9**

Type of Act	*Asylum*	*External Borders*	*Immi-gration*	*Drug addic-tion*	*Fraud*	*Judicial Coop. in civil matters*	*Judicial Coop. in criminal matters*	*Customs Coop.*	*Police Coop.*	*Applica-tion of K.9*	*Racism & Xeno-phobia*	*Inter-preta-tion of K.5*[6]	*Rela-tions with 3rd states*	*Art.K in general*	***Total type of act***
Others	2	1	1	0	0	0	0	1	7	0	0	0	0	1	**13**
Total acts in sense of K.3.2	**0**	**0**	**1**	**0**	**0**	**0**	**1**	**0**	**1**	**0**	**0**	**0**	**0**	**0**	**3**
Total number agreed	**8.5**	**2.5**	**8**	**0**	**2**	**0**	**2**	**2**	**20**	**1**	**2**	**1**	**2**	**1**	**52**
Total inc. draft con-ventions	**8.5**	**3.5**	**8**	**0**	**3**	**2**	**4**	**3**	**22**	**1**	**2**	**1**	**2**	**1**	**61**

1 It should be pointed out that the information contained in this table and the evaluation of to which each category each document belongs has been arrived at by a combination of definitive data taken from the Council and Commission reports on the functioning of the TUE (Report of the Council of Ministers, 10.4.95, op cit, Report presented by the Commission, 10.5.95) and speculation on the legal basis of those texts on which no definitive information is at hand. This information should therefore be seen as indicative rather than definitive.

2 Article K.5 refers to the expression of common approaches in international organisations and conferences. The document indicated in this list is a set of conclusions concerning the implementation of this article (Press Release 11321/94).

3 The .5 refers to the Council's Conclusions concerning the Commission communication on immigration and asylum (20.6.94, Press Release 7760/94). Similarly to the communication in question, these conclusions deal with both immigration and asylum and therefore, for numerical reasons, have been split between the two columns.

4 The .5 document refers to the Council's Conclusions on the operating procedures and development of the Centre for Information, Discussion and Exchange on the crossing of frontiers and and immigration (CIREFI) (30.11/1.12.94, Press Release 11321/94). Given the fact that these conclusions deal with both immigration and the crossing of external frontiers, for numerical reasons the document has been split between the external frontiers and immigration columns.

5 These figure includes the two documents referred to in the preceding footnotes.

6 Article K.5 refers to the expression of common approaches in international organisations and conferences. The document indicated in this list is a set of conclusions concerning the implementation of this article (Press Release 11321/94).

4.2 Asylum, External Borders and Immigration

Relevant Documents

Council Resolution on minimum guarantees in asylum application procedures, doc.5354/95 ASIMM 70, 9.3.95

Council Conclusions on racism and xenophobia, Press Release 10550/93 (Presse 209)

Council Text on evidence in the context of the Dublin Convention, Press Release 7760/94 (Presse 128 - G)

Form of laisser-passer for the transfer of an asylum applicant from one Member State to another, Council Press Release 7760/94 (Presse 128 - G)

Procedure for drawing up joint reports on the situation in third countries, Council Press Release 7760/94 (Presse 128 - G)

CIREA - Distribution and confidentiality of joint reports on the situation in certain third countries, Press Release 7760/94 (Presse 128 - G)

Standard form for determining the State responsible for examining an application for asylum, Council Press Release 7760/94 (Presse 128 - G)

Conclusions on the Commission Communication on immigration and asylum, Council Press Release 7760/94 (Presse 128 - G)

Conclusions on conditions for the readmission of persons who are illegally resident in a Member State but who hold a resident permit for another Member State (Article 8(2) of the draft External Frontiers Convention), Council (General Affairs) Press Release 10314/94 (Presse 219 - G)

Council Conclusions on Racism and Xenophobia (Adoption of the contribution of the JHA Council), adopted on 10.3.95 (no reference available)

1994 programme of joint surveillance operations on third countries, Council Press Release 5044/94 (Presse 24 - G)

Second Report on CIREA's activities, Council Press Release 7760/94 (Presse 128 - G)

Guidelines for joint reports on third countries, Council Press Release 7760/94 (Presse 128 - G)

Commission Communication on Immigration and Asylum Policies, COM (94) 23, 23.2.94

4.2.1 Introduction

The basic immigration and asylum situation since the entry into force of the TEU in November 1993 has changed little to that which came before it, so fundamentally changed as it was by the fall of the Berlin Wall. Migration pressure is still high, the main sources being Eastern Europe and Northern Africa. In addition to efforts by the Union to ease migration pressure by giving help to emigration countries, regulations were sought to control the migration flows into the Union[74]. By this the Member States tend to understand preventing immigration into the Union, as none of the EU countries has accepted officially the need for immigration in the long term. Still, immigration policy is mainly seen as a way to regulate the already existing flows such as the unification of families or the exchange of students. Especially given present unemployment rates, the States are very careful about allowing immigration except maybe for humanitarian reasons.

On the other hand, major attention has been given to asylum seekers whose number increased constantly until 1992[75]. It was obvious for the Member States that national legislation alone would not be enough with decisions in one country influencing the situation in others[76]. Therefore, although the Dublin Convention was still not ratified and the TEU had not come into force, resolutions were taken in December 1992 by the Member States in the classical intergovernmental way in order to create a common approach for asylum policy[77]. Additionally, the Union's experience with regard to migration flows from former Yugoslavia in the time between the signing of the TEU in December 1991 and until its coming into force had an important impact on some Member States (e.g. Germany) who took care of most of the displaced persons created by the conflict. Instruments were repeatedly demanded to confront these situations with some kind of increased burden-sharing.

As a whole, both the need to find common agreements on asylum policy as well as the development of concepts for immigration in the short and medium term became necessary for

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74 For statistics on migration movements in the European Union see e.g. Eurostat : Schnellberichte. Bevölkerung und soziale Bedingungen. No. 12/93, Luxembourg 1993.

75 See documentation of the UNHCR Regional Office for the European Communities, Brussels, August 1994, in : DRÜKE Luise, **The Position of the UNHCR**, paper presented at the conference in Bruges on 19/20 September 1995.

76 The Netherlands experienced e.g. an increase of asylum-seeker numbers after the change of the national asylum law in Germany. See speech of Herbert SCHNOOR, Innenminister des Landes Nordrhein-Westfalen on *"Dimensionen einer europäischen Einwanderungs- und Asylpolitik"* at an expert meeting on 14 November 1994 in Brussels, p.3ff.

77 Resolutions were made on manifestly unfounded asylum application, on host third countries and on safe countries of origin. Documentation see footnote No.74.

the Member States. This chapter will investigate the achievements and the failures of the Union in the area of immigration and asylum policy before trying to evaluate whether or not cooperation has improved in comparison to that before Maastricht.

4.2.2. State of the Art — the Development Since the TEU

According to the Treaty on European Union, immigration and asylum policy as well as the crossing of external borders are defined by Article K.1 as "matters of common interest" with the purpose of achieving the objectives of the Union, in particular the free movement of persons. The most important result after one and a half years of the Treaty having come into force is that in the policy fields dealt with in Article K.1, (1)-(3), not one single common action has been agreed upon[78]. However, four resolutions have been adopted, six recommendations have been given and eleven conclusions have been made in the last eighteen months apart from some other minor decisions taken by the Council. Given the short time period, the record of immigration K.1, (1)-(3) is good compared to other areas of the Third Pillar, e.g. cooperation in civil law. In the following, the areas will be addressed in the order of the Treaty.

4.2.2.1. K.1(1) : asylum policy

The first initiatives in the area of asylum policy had been taken by the Ad Hoc Group on Immigration. The cooperation led to the Palma document of 1989, in which the members of the group announced the aim of establishing a common refugee policy on the basis of the Geneva Convention[79]. The next major step was the signing of the Dublin Convention in June 1990, which, however, has still not been ratified by all of the Member States. In the meantime, however, most Member States are working with the rules laid down by the Dublin Convention. With regard to the decisions taken there, the Council published a conclusion in June 1994 in a text laying down further rules for the Dublin Convention. The rules about the use of evidence agreed then are regarded as being of high practical use for the

78 See European Commission : Bericht über die Funktionsweise des Vertrags über die Europäische Union, Anhang 15, **SEK(95) 731 endg.**, Brüssel, 10. Mai 1995.

79 The different States had quite different definitions of the terms 'refugees' (like of many other terms in this area, e.g. immigrants) which they have tried to solve by taking the Geneva Convention's definition as a minimum standard. The problem has, however, still not been completely solved.

implementation of the Dublin Convention[80]. Most of the provisions made are a part of the Schengen agreement which has come into force in March 1995. These Schengen provisions will be superseded, however, as soon as the Dublin Convention has been ratified by the last two Member States.

Before the signing of the Maastricht Treaty, the Ad Hoc Group on Immigration had prepared a working programme for the harmonisation of national policies. This programme was adopted in Maastricht in December 1991. Consequently, in December 1992, three resolutions were adopted[81] and the creation of CIREA, a clearing house for the exchange of information, was agreed upon. The resolutions, without being legally binding, have *de facto* become important for the Member States[82]. Furthermore, the ministers decided to start to harmonise material asylum law which led to the first important decision on the Union level since the entry into force of the TEU. In March 1995, an agreement was reached on minimum guarantees for asylum seekers (resolution of minimum guarantees concerning asylum procedures[83]). It includes basic requirements in the areas of delivery of evidence, data protection and legal guarantees for the rights of asylum seekers. Apart from establishing basic procedural harmonization of asylum law, a common European asylum law has, however, not been envisaged[84].

The exchange of information has worked rather well in the area of asylum policy. The above mentioned CIREA has taken up work (still without a budget of its own, however). In June 1994, the Council agreed a series of measures on distribution and confidentiality to be taken when dealing with reports received by CIREA about the situation in certain third States[85]. Another conclusion agreed at the same Council meeting laid down Rules of Procedure with regard to common reports about the situation in third countries[86]. The harmonisation of reports is supposed to ensure that the situation in third countries will not be judged differently in different Member States and therefore lead to different decisions.

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80 NANZ Klaus-Peter, *"Das Schengener übereinkommen : Personenfreizügigkeit in integrationspolitischer Perspektive"*, in : **Integration 2/94**, p.108.

81 See footnote 78.

82 HAILBRONNER Kay, *"Rechtliche Aspekte einer europäischen Asyl- und Einwanderungspolitik"*, speech at the expert meeting on immigration and asylum policy in the Verbindungsbüro Nordrheinwestfalen in Brussels on 14 November 1994, p.3.

83 Decision adopted by the Council on 9 March 1995, **Doc. No.5354/95, ASIMM 70.**

84 HAILBRONNER Kay, see footnote 82.

85 Press document No.7760/94, Press 128-G, 20.06.1994.

86 *ibid.*

As a result, it must be said that there have been very few decisions of importance in the framework of K.1 with regard to asylum policy. This can be explained by the fact that asylum policy was a matter of great importance already before the entry into force of the TEU. Several important decisions, such as the Dublin Convention, had then already been taken. On the other hand, a significant number of small technical decisions have been taken[87], which will maybe not help to harmonise asylum policy, but to foster closer agreement in the decision-making in this area. The only question of importance for some Member States where they feel they have not yet reached a satisfactory agreement is the above mentioned question of burden-sharing. The only agreement reached so far on this matter deals with the creation of an instrument to be used in the case of emergency situations. However, no criteria have been decided upon which can be used. It must therefore be expected that the question will be forced back on to the agenda by those Member States unhappy with the situation.

Relations to third countries have been an important topic in the area of asylum policy. In addition to the agreements made on the basis of Schengen with third countries about the transfer of asylum seekers through these States, the Council has only been able to agree on a recommendation concerning a pattern for bilateral agreements between a single EU Member State and third country[88]. Here, multilateral agreements might be of use but have not been decided upon, yet. During the German Presidency, a meeting with the Middle and Eastern European Countries (MEECs) took place in Berlin in September 1994 in order to deal with migration problems on a broader level. The Berlin declaration suggests closer cooperation between the Union and the CEECs in migration matters but will have to be extended in the medium term.

4.2.2.2. K.1(2) : Rules governing the crossing by persons of the external borders of the Member States and the exercise of control thereon

The rules governing the crossing by persons of the external border are of major importance as a compensation for the opening of the frontiers between the EU Member States. Rules for

87 Examples are the approval of a standard form to determine which State is responsible for examining an asylum request; the recommendation on a standard document for extradition of third country nationals and the approval of a list of honorary consuls entitled to issue form visas, see **Agence Europe No.6259**, Saturday, 25 June 1994.

88 Official document for the parliament and press document No.11321/94, Press 252-G (decision by the Council of 30.11/01.12.1994).

the better control of the external borders have both been laid down in the Schengen Agreement and in the External Borders Convention which covers all the EU Member States. Unfortunately, the External Border Convention has not been ratified (although it has been finalised in June 1991) due to the conflict between Spain and Great Britain over Gibraltar. No major progress has been made so far in finding a solution.

In the framework of the Third Pillar, however, modest coordination measures have been approved. In June 1994, a programme for common action in the surveillance of air and maritime traffic in 1994 was accepted[89]. CIREFI, the counterpart of CIREA has been approved[90]. It will become an information, reflection, and exchange centre for questions regarding the crossing of external frontiers and immigration.

With the entry into force of Schengen, which is not a part of the Third Pillar, first experiences are being made with stricter external border controls as a compensation for the open internal frontiers. The effect on the Member States not being members of Schengen is still to be seen; if the attraction of Schengen increases for non-Schengen countries (as the accession of Austria to Schengen might suggest), development towards a future coherent policy might be possible.

The European Parliament has presented several reports on the crossing of the external frontiers by persons[91], always emphasising that there should be one Community visa for all Member States. Strong controls would be needed to guarantee the free movement of people which the Parliament seeks to attain by close cooperation with national parliaments. Schengen has always been seen only as a first step by the EP.

4.2.2.3. K.1(3) : Immigration policy and policy regarding nationals of third countries

Article K.1(3) TEU includes conditions of entry and movement as well as residence by nationals of third countries on the Member States' territory (including family reunion and

89 Press document No.5044/92, Press 24-G, Council decision of 21/22 June 1994.

90 Press document No.11321/94, Press 252, Council conclusion of 30.11/01.12.1994.

91 European Parliament, report Froment-Meurice **(Dok. A3-193/94)** and report Beazley **(Dok. A3-190/94)**.

access to employment). Article K.1(3) TEU also includes the combating of unauthorized immigration, residence and work of third country nationals. In the area of immigration and asylum policy, the subjects falling under Article K.1(3) TEU have been subject to the most decisions since November 1993

Three resolutions have been taken concerning the conditions of entry to the Union for third country nationals. The resolutions taken are :

- Resolution concerning restrictions to the entry of third country nationals wanting to exercise a profession[92].
- Resolution concerning restrictions for the admission of third country nationals into the territory of the Member States for working on a self-employed basis[93].
- Resolution concerning the admission of third country nationals into the territory of the Member States of the European Union for taking up studies[94].

The three recommendations cover quite a broad group of third country nationals as they lay down conditions for both employees and specific groups of people such as the self-employed and students. The Member States have stated in these rather 'restrictive[95]' resolutions, that none of the Member States is performing a policy of active immigration. On the other hand, exceptions have been made for frontier workers, or people with higher qualifications, for third countries with special relations etc. This leads to the fact that the resolutions do not create a common harmonised approach, but add to the different rules existing in different countries. Each Member State still allows its special 'clientele' to enter the country, only a common framework has been created[96].

Furthermore, five recommendations have been adopted in the area of immigration and migration. The recommendations were concerned with the illegal trade in human beings with regard to prostitution[97]. It has been a major concern by the Commission to stop the trade with women which has grown after the fall of the Berlin wall. The major concern in this respect has not been the punishment of the women, who must be regarded as victims, but to

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92 Press document No.7760/94, decision adopted by the Council on 20 June 1994.

93 Press document No.11321/94, decision adopted by the Council on 30 November 1994.

94 Press document No.11321/94, decision adopted by the Council on 30 November - 1 December 1994.

95 See, **Agence Europe No.6255**, Monday/Tuesday 20/21 June 1994, p.7.

96 See footnote 78, pp.50/51.

97 Press document No.10550/93, recommendations adopted by the Council on 29/30 November 1993 and 20 June 1994.

prevent the groups organising the 'transport' entering the Union illegally. This concern is by nature closely linked to external border protection.

With regard to the better integration of migrants, the European Union has also started initiatives to combat xenophobia and racism. Two conclusions by the Council in December 1993 and March 1995 try to counter the disadvantages which migrants suffer and support the integration of the migrants in the different Member States[98]. The European Parliament had presented an own-initiative report on the same subject[99] in which it demanded that the Council create a legal and institutional framework for the national, ethnic, cultural and religious minorities in the Union in order to achieve their better integration. Additionally, it asked for a financial programme to implement measures decided upon. An 'integration chapter' has also been part of the Commission's communication (see below) which was presented in February 1994. This chapter has at that time been criticised mostly by Germany and Spain[100] although the initiative on the conclusion on xenophobia and racism had been started by France and Germany. A comprehensive approach would be desirable.

In global terms, the area of K.1(3) has seen some basic developments since the coming into force of the Maastricht Treaty. Article K.1(3) is closely linked to 'positive' actions under the Second Pillar and the EC Treaty which try to help reduce migrant flows when and where they first start. The better coordination of all three pillars might help lead to a more coherent policy; the chances of this actually happening are, however, low.

Further initiatives by the Commission and the EP

The EP itself presented an own-initiative report on the basic principles of a European Refugee Policy[101] in December 1993 in which it asked the Commission to make suggestions for a comprehensive refugee and immigration policy which reflects the situation of refugees with regard to the Geneva Convention and which will guarantee a fair treatment of the asylum application of refugees and their future integration. The EP also asked for a communitarisation of asylum policy under Article 100c which would include more rights for the EP too.

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98 Press document No.10550/93, Press 209, conclusion of the Council of 29/30 November 1993; and Press document No.54 : 3/95, Press 9-G, Council conclusion of 10 March 1995.

99 European Parliament, report Tsimas, **Dok. A3-0073/94**, Brussels, 1 February 1994.

100 See **Agence Europe No.6197**, Thursday, 24 March 1994, p.5.

101 European Parliament, report Lambrias, **Dok. A3-0402/93**, Brussels, 3 December 1993.

In February 1991, the Commission presented a communication on immigration and asylum policy to the Council and the European Parliament which included some of the demands of the Parliament mentioned above[102]. The very comprehensive approach suggested ways "in which to act jointly with a view to reducing migratory pressure, controlling migratory flows and assuring the integration of the legal immigrants[103]". The communication was completed by a thorough collection of statistics and data which made the communication very useful for further discussions. Both the Parliament and the Council responded to the Commission's communication. COREPER was charged with making a detailed examination of the communication which resulted in a conclusion of the Council in June 1994[104], in which the Council welcomed the communication with the criticism mentioned above.

4.2.3. Summary — A Qualitative Analysis of The Developments in K.1, (1)-(3)

As in the other policy areas of the Third Pillar, quantitatively, there has been a rather impressive increase in meetings since the TEU has come into force[105]. On the one hand, concrete results in the shape of legally binding output have been very low, the existing possibilities of the TEU not being fully used. One might see this as a consequence of the short amount of time during which the Treaty has been in force, which is, of course, true. On the other hand, decision-taking has shown to be very difficult. Apart from the structural weakness of the Third Pillar (see section on the institutions), the lack of political must be seen as a major factor, a good example being the External Border Convention, which has been agreed upon before the TEU but which is still not ratified.

The use of non-binding legal decisions was possible before the TEU, therefore, there can be no talk of a '*saut qualitatif* with regard to the legal output of the Third Pillar. It seems like the Member States do not feel mature enough to take decisions on the base of K.3. The reasons for the hesitance of the Member States have been outlined thoroughly by the report of the Commission about the functioning of the TEU[106]. Additionally, the new structures introduced as a result of the TEU for the justice and home affairs policy making - with the five different levels - has complicated the work of the Council. The former Ad Hoc Group

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102 **COM(94) 23 endg.**, Brüssel, 23. February 1994.

103 See **Agence Europe No.6197**, Thursday, 24 March 1994, p.5

104 Press document No.7760/94, Press 12-G, 20 June 1994.

105 In 1995, over 250 meetings have been counted until mid-May in the framework of the Third Pillar. GRADIN Anita, *"The Commission's view on developments in the area of home and justice affairs"*, speech at the Europäisches Forum in Bonn, 11 May 1995, p.1.

106 See footnote 78, pp.50/51.

on "Immigration" (founded 1986) has been transformed to the Steering Group Immigration and Asylum, whereby competence problems have arisen with the working groups taking care of single topics[107]. Furthermore, relations with third countries, who have either been a member of some of the former intergovernmental groups (e.g. Switzerland) or who have an interest in cooperating, has not been decided upon. A solution is highly desirable for both sides as the issue of migration cannot be restricted to the Union.

The Schengen Agreement, on the other hand, has come into force in March 1995. It showed, that the cooperation of fewer Member States willing to cooperate may be more efficient. Yet, it is still obvious — as in the case of the Dublin Convention — that between the signing of agreements and their ratification some years might pass[108]. This leaves a midterm-perspective for immigration and asylum policy, which does not give much hope for quick harmonisation leading to a common asylum policy, but it may on the other hand also make it easier for some rather reluctant States to join conventions of the Dublin type. Schengen has shown that a comprehensive approach can be made if it is desired by the governments[109].

With regard to Schengen, its relations with the European Union have not been discussed, yet, with the exception of the above mentioned asylum rules in Schengen which will be out of force as soon as the Dublin Convention has been ratified by all Member States. Here, solutions may be found which could give a further impetus for a common immigration and asylum policy on the Union level.

With regard to the involvement of the other Community institutions, the area of K.1, (1)-(3) has shown itself to be a subject of great concern for both the Commission and the European Parliament. The Commission's right of initiative has been used by presenting the above mentioned communication as well as smaller initiatives, which has turned out to be very good for the Union given that the Member States themselves are not too eager on delivering initiatives. The Commission is furthermore included in the structure of the Third Pillar by its participation in the steering groups and ministerial meetings. This gives the cooperation in the area of immigration and asylum policy a coherence which is highly needed.

The European Parliament has been drawing up own-initiative reports, but has otherwise been mostly left out of the decision-making (apart from being informed by the Council on some

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107 *ibid.*, pp.52/53.

108 NANZ Klaus-Peter, see footnote 80, pp.92-108.

109 For a detailed analysis of the content of Schengen (like external borders' control and visa policy) see article Nanz.

topics). As the Commission has the right of initiative in K.1, (1)-(3), information in these areas is more available to Parliament; most decisions taken, however, are not based on a Commission initiative and have therefore not been discussed by the EP. The further involvement of the EP is highly desirable, especially with regard to the lack of transparency which exists. As the meeting of the EP committee on internal affairs with its homologous committees on the national level in March 1995 showed, the information on the national level is in most Member States not an adequate form of compensation for the lack of information and transparency[110] on the European level.

The non-involvement of the Court of Justice leaves questions open with regard to the juridical strength and interpretation of the legally non-binding but *de facto* important decisions, especially in the area of asylum policy. The legal protection will probably in the mid-term remain a matter for the Member State, which leaves the problem that there might be different interpretation on different subjects. Here, solutions have to be found.

On the whole, the results in the area of K.1, (1)-(3) TEU are — on the basis of the short period of time during which the TEU has been in force — rather positive. The problems in these areas (too many levels involved, legally non-binding decisions) are similar to the problems in other areas of the Third Pillar. For the area of K.1(3) a more comprehensive approach for immigration policy and less technical discussions are desirable. The Union should find a common position with regard to immigration, as the Union will be an immigration area in the mid-term.

For the area of asylum policy, progress has been made which, perversely, has increased existing problems such as the separation of asylum and visa policy. Further, the External Borders Convention - as the necessary compensation for K.1(1) and K.1(3) - should finally be ratified. It will be left to the intergovernmental conference to find a solution for the existing contradictions.

110 Projet de conclusions : réunions de la Commission des libertés publiques et des affaires intérieures du Parlement européen avec les commissions homologues des parlements nationaux, Bruxelles, le 22/23 mars 1995.

4.3 Combating Drug Addiction

Relevant Document

Commission, "Communication from the Commission to the Council and the European Parliament on a European Union action plan to combat drugs (1995-1999)", COM (94) 234 final, 23.6.94

This 'matter of common interest', which can be found in Article K.1.4 TEU, has the dubious pleasure of being the only area named in Article K.1 TEU in which no one document has yet been agreed by the Council or been the subject of a draft convention[111]. This situation should soon be rectified, though, as the Council's conclusions pertaining to the Commission's communication on an action plan to combat drugs are due later this month (June '95) in time for the European Council in Cannes 1995[112] (at its meeting in March the Council adopted an opinion on the Commission's communication and it also drafted certain proposals for inclusion in the European plan to combat drugs[113]; however, these have not been published and are apparently not 'texts' in the normal sense of the word as used in Title VI as they are not listed in the tables of texts adopted included in the Council and Commission reports on the functioning of the TEU[114]). The Commission's preferred strategy, similar to that recommended in the immigration and asylum policies communication[115], favours an all-embracing approach fully-exploiting the new opportunities laid down in the TEU: by using provisions in public health, common foreign and security policy and justice and home affairs, the Commission advocates a three-pronged policy aimed at demand reduction, combatting illicit trafficking and action at international level.

The Commission's triple-approach and its desire to exploit all the new Treaty provisions immediately highlight one of the major problems encountered in the area of EU drug policy, namely a plethora of Treaty bases. Public health, CFSP and JHA provisions are each to be found in a different pillar of the TUE. This multi-faceted approach is not so unusual in the

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111 According to the lists of texts adopted in JHA included in Annex XI(a) of the Council report (10.4.95) and Annex 15 of the Commission report on the functioning of the TEU (10.5.95) (op cit.).

112 Twenty-Eighth General Report on the activities of the European Union (1994), European Commission, 1995, p.369

113 Council Press Release 5423/95 (Presse 69 - G), 9-10.3.95

114 Annex XI(a) of the Council's Report, 10.4.95, and Annex 15 of the Commission's Report on the functioning of the TEU, 10.5.95

115 COM (94) 23 final

post-Maastricht set-up, but the situation for drugs policy is rendered more complicated by the apparent confusion created by the lack of differentiation between the various articles. For example, Article K.1.4 TUE refers to combating "drug addiction" whilst Article 129 EC (Public Health) talks of "drug dependence". Whilst it may be true that Article 129 EC is restricted to "incentive measures" and "recommendations", the voting requirements of the two articles are widely divergent, with Title VI requiring unanimity and Article 129 EC either the 189b EC procedure or qualified majority. Such a difference in procedure makes it likely that the Commission, which may use its right of initiative in this area in Title VI, will first attempt to use Article 129 EC and then, only by default, put forward proposals under K.1.4 TEU. Whilst it is perhaps too early to test the validity of such a statement, there is already a Community communication on the field of drug dependence launched under Article 129 EC. Further, the First Pillar-Third Pillar overlapping is made all the more obvious by the fact that, in addition to the *action plan* to combat drugs proposed in the Commission communication referred to above (which mentions the fight against drug *addiction* laid down in Article K.1.4 TEU as an important legal basis), a Community *action programme* aimed at preventing drug *dependence* is in the process of being adopted in the codecision procedure on the basis of Article 129 EC. Semantics seem to play an important role here.

However, there seems to be some confusion within Title VI itself as to the possible legal basis for drug-related measures and it is partly this which has led to the rather disappointing performance in Article K.1.4 TEU. "Combating drug addiction in so far as this is not covered by (7) to (9)" has resulted in the fact that much has been done in the area of drugs under judicial cooperation in criminal matters, customs cooperation and police cooperation (e.g. a report by the Drugs and Organised Crime group was prepared in November 1993; this report dealt with the fight against crime linked to drugs, the fight against organised crime and cooperation with the states of Central and Eastern Europe; as can be seen, none of these three aspects fits exactly with Article K.1.4 TEU[116]). Any fight against drugs, as suggested in the Commission's communication, must include some kind of strategy to tackle the supply of drugs reaching the Member States[117]. The drugs-related measures taken on these bases will be discussed in the appropriate section of this report, but given the fact that health and demand aspects of drug addiction are included in Article 129 EC (and with a less stringent voting requirement) and that the supply and criminal aspects are dealt with elsewhere in

116 Council Press Release 11321/94 (Presse 252 - G), 30.11-1.12.94, p.I

117 It should also be pointed out that the fight against the traffic in illicit drugs has also been named as a possible specific priority objective for CFSP (COM (94) 234 final, 23.6.94, p.45). There is, therefore, room for possible duplication of legal basis between the Second and Third Pillars too.

Article K, it seems difficult to know what exactly is left to be dealt with under Article K.1.4 TEU.

4.4 Combating Fraud on an International Scale

Relevant Documents

Council Resolution on fraud on an international scale - protection of the financial interests of the EU, 29/30.11.93, Press Release 10550/93 (Presse 209)

Council Resolution on the legal protection of the financial interests of the Communities, 6.12.94, OJ No C 355, 14.12.94

Draft Convention on the protection of the Communities' financial interests, COM (94) 214, 6.8.94 (proposed by the Commission)

Proposal by the United Kingdom for a joint action on the protection of the Communities' financial interests (no reference available)[118]

Commission, "Protecting the Community's Financial Interests. The Fight against Fraud", Annual Report by the Commission, the latest one concerning 1993, COM (94) 94, 23.3.94

Commission proposal for a regulation dealing with administrative penalties in the area of fraud against the Community, OJ C 216, 6.8.94

Once again, the reference to international fraud in Article K.1 TEU provides for a diffuse legal basis: "combating fraud on an international scale in so far as this is not covered by (7) to (9)". In addition to this, the TUE introduced Article 209a EC which also deals with fraud affecting the financial interests of the Community, the subject of the two texts adopted so far under Title VI. Article 209a EC has a slightly more restricted scope than that of Article K.1.5 TEU since the former can only be applied to the financial interests of the Community rather than fraud on the international scale in general. However, unlike the case of drug policy, the First Pillar provision for fighting fraud against the Community offers no legislative procedure of a more advantageous nature than the unanimity provisions of Title VI. In fact, Article 209a EC foresees no form of legislative procedure whatsoever and instead provides for what looks to be rather 'intergovernmental' "close and regular cooperation" with

118 Referred to in the Commission's report on the functioning of the TEU, 10.5.95, p.49

"the help of the Commission". As a result, any legislative measures must be taken either under Title VI or under Article 235 EC, the latter being the case for the Commission's proposal for a regulation dealing with administrative penalties in the area of fraud against the Community budget[119]. It is not even clear whether or not Article 209a EC on its own can make meaningful use of the traditional features of the First Pillar - the exclusive right of initiative for the Commission and the jurisdiction of the Court of Justice - since the cooperation in question is organised by the Member States themselves and since it foresees no legislative procedure. It should be pointed, though, that the first paragraph of Article 209a EC does differ significantly from the relevant Title VI provisions in so much as it obliges Member States to take the same measures to counter fraud affecting the financial interests of the Community as they take to counter fraud affecting their own financial interests; here the jurisdiction of the Court does presumably become a highly relevant factor.

Whilst the first of the Council's resolutions dealing with the protection of the Communities' financial interests is rather modest in both length and content, the second one, agreed in 1994, seems to show a desire to go further. Short of mentioning the word 'harmonisation', it insists that there are wide "variations... as to what constitutes an offence" and its legal consequences which may affect any cooperation between Member States[120]. The Council is of the opinion that "the criminal laws of the Member States should be made more compatible"[121]. In addition to this recognition of the need for some 'alignment' in national law, the resolution requests that a series of guiding principles for the development of measures in this area be established. However, this document does not actually establish the mechanisms by which these measures are to be implemented, rather it requests that a requisite legal instrument be elaborated as soon as possible. This legal instrument should be based on the UK's proposal for a joint action in the area as well as on the Commission's proposal for a draft convention between the Member States. As yet, no such document has been agreed; the JHA Council is under some pressure to move this dossier along since the European Council in Essen in December 1994 requested that either a joint action or a convention on this issue be adopted during the first semester of 1995[122]. At its meeting in March 1995 the Council had a wide-ranging discussion on the 'judicial' aspect of combating fraud where it decided that a first binding legal instrument should be drawn up and that this should be confined to basic matters in the initial stage. Other problems arising in this area will be

119 submitted 7.7.94, OJ C 216, 6.8.94

120 OJ No C 355, 14.10.94, p.2

121 ibid.

122 see Conclusions of the Presidency of the Essen European Council, Agence Europe, 11.12.1994

examined at a later date when a second instrument is being drawn up[123]. There is no indication of whether or not this first legal instrument will be based on Articles K.1.5 or K.1.7 TEU - another example of lack of clarity within Title VI, the important difference being that the Commission would be given a right of initiative if the former were used. It could also be that a mixed base is used in which case the role of the Commission in terms of initiative is not obvious. One interesting aspect is that the Council has said it will create a "binding legal document"[124] which would seem to suggest a convention including a role for the ECJ; this would be the first time that this particular Treaty provision has actually been made use of by the Council. It is clear that this is an issue of importance to both the Member States and the Union institutions. Not only was it the subject of discussion at the European Council in Essen in 1994, but it is also the only area in which a Member State not holding the presidency has used its right of initiative - the UK's proposal for a joint action. The Commission has shown its readiness to push forward in this area; apart from this being the subject of the only truly original convention that the Commission has proposed, the Commission has also taken some non-legislative measures to help in the fight against fraud affecting the Community's financial interests. Among these have been the reorganisation of the *Unité de Coordination pour la Lutte Anti-Fraude* ((UCLAF)[125], the establishment of a telephone hotline to which alleged cases of fraud could be reported[126] and the establishment of an advisory committee for the coordination of fraud prevention, the task of which is to collect and analyse information from the Member States in order to render subsequent Commission action more coordinated and effective[127].

It should be noted that despite the wider scope of application of Article K.1.5 TEU than that of Article 209a EC (fraud on an *international scale* rather than just that *affecting the Community's financial interests*), only documents dealing with fraud against the Community have so far been launched in association with Title VI. This is a reflection of the preoccupation of many of the Member States with alleged abuse of the Community budget[128]. The European Parliament, in its resolution of December 1993, recognises the difference in

123 Council Press Release 5423/95 (Presse 69 - G), 9-10.3.95

124 ibid.

125 "Euro-fraud squad turns on the heat", Financial Times, 14.11.94

126 This hotline has apparently resulted in one useful call per day out of a total of 1700 between November 1994 and January 1995. Source: "EU steps up war on fraud", The European, 27.1.95 and Agence Europe, 9.2.95, p.6

127 Commission Decision of 23 February 1994 setting up an advisory committee for the coordination of fraud prevention, OJ L 61, 4.3.94, p.27

128 This preoccupation is equally evident in the Council's conclusions of 11 July 1994 concerning the fight against fraud, OJ C 292, pp.1-2.

the scope of application between the two articles and argues that Article 209a EC should be used for measures against fraud of the Community[129]. This however reveals another of the Treaty's inconsistencies: Article 209a EC foresees only administrative cooperation. For this to be effective it would also surely require judicial cooperation (in both civil and criminal matters), customs cooperation and police cooperation. Clearly these are in the domain of Title VI and not Article 209a EC and thus the EP's assertion seems to be slightly misguided given the actual Treaty provisions. It does though highlight an area for possible reform in the future if only on the grounds of organisational consistency. In fact, the implementation of Article 209a EC is to be the subject of a report to be issued by the Commission before the end of 1995[130]. The fact that such a review of the success of this article is foreseen could be interpreted as implying that there was some doubt in the minds of certain Member States as to the possible effectiveness of the provisions set down in Article 209a. The contents of the report may well be instrumental in setting the tone of any possible reform of the various sections of the Treaty dealing with fraud against the Community, including Article K.1.5.

4.5 Judicial Cooperation in Civil and Criminal Matters

Relevant Documents

Convention on simplified extradition procedure between the Member States of the European Union, agreed 10.3.95, OJ No C 78, 30.3.95

Council Statement on Extradition, Press Release 10550/93 (Presse 209)

Draft Convention on Extradition between the Member States of the European Union (no reference available)[131]

Draft Agreement between the Member States of the European Union on the enforcement of driving disqualifications (no reference available)

Draft Convention on scope, jurisdiction and the enforcement of judgements in matrimonial matters (Brussels Convention II) (no reference available)

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129 EP Resolution of 16.12.93 on combating international fraud, OJ C 20/186, 20.1.94

130 Council Conclusions of 11 July 1994 concerning the fight against fraud, OJ C 292, pp.1-2

131 Draft conventions under examination by the JHA Council are listed in Annex XI(b) of the Council Report on the functioning of the TEU, 10.4.95(op cit.) but there is no indication of dates of proposal or of publication. References are however given for the two draft conventions proposed by the Commission (see chapter on the Commission).

Draft Convention on the service in the States of the European Union of Judicial and Extrajudicial Documents in Civil or Commercial Matters (no reference available)

The only convention actually to have been agreed so far under Title VI falls under the area of judicial cooperation in criminal law and deals with a simplified procedure for extradition. This convention takes its place in a hierarchy of texts dealing with the matter: a statement on extradition in November 1993 which requested the appropriate working party to draw up a series of measures which might be incorporated into a convention aimed at facilitating extradition between the Member States, a first convention on a simplified extradition procedure adopted in March 1995 and a second convention on extradition which is still at the draft stage. The action plan for 1994 agreed by the European Council in December 1993 sees extradition as one of the two areas to be targeted in judicial cooperation in criminal matters (the other one being action against international organised crime)[132]. The importance attached to this subject seems to have been translated into policy output with both a statement and a convention already having been agreed (the latter is in the process of ratification and will enter into force 90 days after it has been ratified by all Member States; it may, however, be applied in advance between those Member States which make a statement to that effect when depositing the instrument of ratification). They both deal with the requirements and proceedings for extradition, with the convention going on to look at the execution of sentences too[133]. Thus far the texts agreed are of relevance to criminal cases where the suspect concerned gives his/her consent to the extradition. A second convention is being prepared on other extradition procedures, probably including cases where suspects do not give their consent to the extradition. Exactly why these matters should be dealt with in two separate conventions is not stated anywhere in the Council's conclusions, but the inference is that those particular aspects of extradition to be dealt with in the second convention may pose constitutional problems for certain Member States[134]. Thus by proceeding with a convention on the less controversial areas allowed for something at least to be agreed between the Member States. Once again this reflects the sense of urgency felt with regards to this issue.

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132 Council, Restricted Note, "Plan d'Action dans le domaine de JAI", 10655/93, 2.12.93, pp.14-15

133 Council Press Releases 10550/93 (Presse 209), 29-30.11.93, p.7, and 5423/95 (Presse 69 - G), 9-10.3.95, p.8

134 See Council Press Releases 7760/94 (Presse 128 - G), 20.6.94, p.11, and 11321/94 (Presse 252 - G), 30.11-1.12.94, p.10

Thus far extradition has been the only aspect of judicial cooperation in criminal matters in which texts have actually been adopted[135]. This is not to say, though, that progress has not been made elsewhere. The Council's other priority area for 1994 was action against organised crime. A programme of action was agreed by the Council in November 1993 which was prepared by the ad hoc Working Group on Organized Crime set up in September 1992[136]. This programme provided for further reflection on possible measures in the field of judicial cooperation (in addition to those falling under police cooperation) such as a means of determining the criminal responsibility of moral persons in relation with offences resulting from international organised crime and cooperation in the matter of 'letters rogatory' for modern investigation techniques including the interception of communications[137]. The Brussels European Council of December 1993 went on to emphasize the importance of judicial cooperation in the fight against international organised crime[138]. Little since then seems to have been done, although this statement is based on the contents of the Council's press releases which are not always the most 'generous' sources of information. The only comment made recently by the Council on this matter is that it has approved a report on organised crime in the EU in 1993 drawn up by the ad hoc Working Party on International Organised Crime with the help of a questionnaire sent to all the Member States[139]. No details as to the contents of this report have been published.

Whilst not being the subject of any agreed documents[140], judicial cooperation in civil matters has been addressed in two draft conventions proposed by the Council presidency. One deals with the extension of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgements to certain areas of family law[141]. Although not listed as being one of the main ingredients of the 1994 JHA work programme[142], the idea of extending the Brussels Convention of 1968 was mooted at the Brussels European Council in December 1993. It

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135 Texts of the kind are included in the appropriate annexes to the Council (10.4.95) and Commission (10.5.95) reports on the functioning of the TEU, op cit.

136 Council Press Release 10550/93 (Presse 209), 29-30.11.93, p.8

137 Council action plan in the area of JHA 1994, op cit., p.16

138 Council Press Release 11321/94 (Presse 252 - G), 30.11-1.12.94, p.9

139 Council Press Release 5423/95 (Presse 69 - G), 9-10.3.95, p.II

140 Texts as included in the lists of adopted texts in Annex XI(a) of the Council Report (10.4.95) and Annex 15 of the Commission Report (10.5.95) on the functioning of the TEU, op cit.

141 Draft Convention on scope, jurisdiction and the enforcement of judgements in matrimonial matters (Brussels II Convention), listed in Annex XI(b) of the Council Report on the functioning of the TEU, 10.4.95, op cit.

142 Council Press Release 10550/93 (Presse 209), 29-30.11.93, p.4

appeared, however, that the Member States favoured drawing up a separate convention to this purpose but one which still followed the principles and general approach of the Brussels Convention. The JHA Council, meeting in June 1994, asked the K.4 Committee to press ahead with discussions concentrating first on divorce, legal separation and marriage and related matters concerning matrimonial property, and at a later stage looking at other aspects of family law, in particular custody of children[143]. A first draft - "Convention de Bruxelles II" - was presented by the presidency in late November 1994; this dealt with those issues which the K.4 Committee had looked at first. Discussions within the Council led to the conclusion that the custody of children should also be included in this first text and it was agreed that the convention should be adopted in the first quarter of 1995. Since then, discussions have centred on defining the scope of the convention (whether or not custody of children and related matters should be included) and determining which national body in the Member States should be competent. The Council concluded by asking its 'ancillary bodies' to submit a draft text to its meeting in June 1995 which would cover those areas referred to above including those relating to children[144].

Other areas which have been dealt with under this title include a draft convention on the enforcement of driving disqualifications and one dealing with the transmission of legal acts. These subjects are mentioned for the first time in the press release from the last JHA Council meeting in early March[145]; however, the text of this press release refers in the case of both dossiers to the Council's preparatory bodies being asked to either complete or speed up their "proceedings", implying that these matters had been the subject of discussions in the past although no mention had been made of them in the press releases. This is indicative of the lack of transparency in the JHA Council.

4.6 Customs Cooperation

Relevant Documents

Council, Conclusions concerning a contribution to the development of a strategic plan of the Union to combat customs fraud in the internal market, Council Press Release 11321/94 (Presse 252 - G)

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143 Council Press Release 7760/94 (Presse 128 - G), 20.6.94, p.10

144 Council Press Release 5423/95 (Presse 69 - G), 9-10.3.95, pp.10-11

145 Council Press Release 5423/95 (Presse 69 - G), 9-10.3.95, pp.13-14

Customs strategy at external frontiers, Council Press Release 5423/94 (Presse 69 - G)

Draft Convention on the uses of information technology for customs purposes (Customs Information System), known as the 'CIS Convention' (no reference for text available - see Council Press Release 5423/95 (Presse 69 - G))

Customs cooperation is one the areas in Title VI that has tended to attract less attention in either the media or scholarly work; this is perhaps a little unfair since it gives the impression that little or nothing has been achieved in this area. Much of the work carried out in relation to this subject since the entry into force of the TEU has been a continuation of initiatives launched within the Mutual Assistance Group '92 before November 1993: discussion of the Customs Information Convention (CIS), the elaboration of a plan for a strategy on customs at the external border and helping with the development of a strategic Union plan to combat customs fraud in the internal market[146]. As can be seen from the list of relevant documents above, these happen to be the three areas in which the most progress has been made.

Agreement of the draft CIS convention - the main priority in the area of customs cooperation - has been bugged by (at least) two problems[147]. The first has recently been solved at the JHA Council meeting in March 1995: the Member States decided that the Convention could in fact be provisionally applied at an early stage subject to a specific agreement being drawn up to that end. The second problem proved to be more stubborn; it concerns the role of the Court of Justice in the Convention. Some Member States sought to include far-reaching powers for the ECJ (jurisdiction over disputes between Member States and preliminary rulings on interpretation), whilst some favoured a partial or total exclusion of the Court from all matters related to the Convention; others took positions somewhere between the two extremes. This particular discussion has been going on for more than a year and is similar to that frustrating the adoption of the draft EUROPOL convention. In the area of customs, however, those Member States seeking to exclude the ECJ from the CIS convention could be said to be on slightly weaker ground than they are in the area of police cooperation: police cooperation is clearly not a partial or complete Community competence. Customs is an area in which both the Community and the Member States have competence for different matters, a fact which has enabled the Commission to table a proposal dealing with the use of information

146 see Ravillard in Monar & Bieber, forthcoming

147 Council Press Release 5423/95 (Presse 69 - G), 9-10.3.95, p.12

technology within the Community's sphere of competence[148]. Even the Council's press release has to admit that "in that context [the one of the regulation] the Court's jurisdiction is self-evident"[149]. As such, arguments on the ground of consistency and legal uniformity tend to make the case of those Member States arguing against a role for the ECJ more difficult to defend. Another consideration here is that, were the CIS convention to include a role for the Court, this might be used as a precedent when deciding on the role of the Court in the EUROPOL convention; in these circumstances the position of the Member States seeking to exclude the Court might be more understandable. As is typical of the JHA Council when facing such problems, the CIS dossier was sent back to COREPER for further consideration of the problem. Interestingly, though, it was not sent back to the K.4 Committee; this is unusual since the Council press releases normally speak of the problematic dossiers being sent back to both of the Council's 'ancillary' or 'preparatory' bodies[150].

The question of customs cooperation at the Union's external border has been on the table since before the TEU was signed - as with many of the areas in Title VI, it became a matter of importance, if not perhaps action, after the Single European Act set the deadline of December 31st 1993 for the creation of the internal market. However, it seems that the development of a strategy for such cooperation has been more problematic than first imagined; the Council refers to the agreement of a plan on the organisation of joint surveillance operations at the Union's external borders "so as to make customs cooperation more tangible and operational"[151]. This would seem to imply one of two things - either that the strategy for the previous year had not been successful in making customs cooperation tangible and operational at the external border or that there had been no previous strategy. On the basis of the Council press releases it is impossible to throw any light onto the validity of either of these two statements since no mention is made of such a strategy prior to March 1995.

Some progress has been made with regard to measures against customs fraud in the internal market. This area is once again a subject of shared competence with the Community being responsible for customs fraud in fields such as agriculture; the Commission proposal referred

148 Proposal for a Council Regulation on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters, OJ C 56, 26.2.93, p.1 and OJ C 80, 17.3.94, p.12

149 Council Press Release 7760/94 (Presse 128 - G), 20.6.94, p.6

150 e.g. the admission and residence of displaced persons (Press Release 11321/94 (Press 252 - G)30.11-1.12.94, p.5), and the draft EUROPOL Convention (Press Release 7760/94 (Presse 128 - G), 20.6.94, p.5, and Press Release 5423/95 (Presse 69 - G), 9-10.3.95, pp.4-5)

151 Council Press Release 5423/95 (Presse 69 - G), 9-10.3.95, p.II

to above, which is aimed at introducing information technology into customs and agricultural matters, also deals with certain anti-fraud aspects[152]. As for work under Title VI, the Customs Coordination Group, one of the sub-groups of Steering Group II of the K.4 Committee, has been active in defining a strategic plan for the European Union to combat fraud within the internal market. It has made an evaluation of the increased risks of fraud, especially fraud of an international character, which have resulted from the abolition of internal borders. The Group's most recent document, discussed by the JHA Council in November/December 1994, goes on to deal with a number of areas in which it believes closer cooperation is indispensable[153]. It is unclear how much progress has been made on this matter in the meantime.

Whilst only some limited advances appear to have been made in customs cooperation, one should not be too hasty in criticising the absence of agreed legislative texts adopted on the basis of Title VI. This is partly because of the progress made in the Community pillar for those areas for which it is competent to act. However, a lack of legislation under Title VI might conceal progress made on the administrative level; many more modest measures taken for customs cooperation may be agreed and implemented after discussion by those 'on the frontline', i.e. the national customs authorities, and not require legislative procedures or the constant attention of the JHA Council. It is difficult to say how much might have been achieved at this level since no reference is made of it in published Council documents and the very nature of such discussions renders them less transparent than those carried out on higher JHA levels, with even those on higher levels not being renowned for their openness. Another explanation for the apparent lack of progress may be due to the fact that work undertaken in the area of customs cooperation often incorporates detailed consultation of the national customs authorities, for instance by means of a questionnaire[154], which may slow down the preparation of policy documents. If this consultation procedure is a factor in the length of the policy process in this area, it may be that such delays are justified in so much that the final measures agreed take more account of the situation on the ground and potential problems in terms of policy implementation.

152 OJ C 56, 26.2.93, p.1 and OJ C 80, 17.3.94, p.12

153 Council Press Release 11321/94 (Presse 252 - G), 30.11-1.12.94, p.III

154 Ravillard, op cit.

4.7 Police Cooperation

Relevant Documents

Joint Action concerning the Europol Drugs Unit on the basis of Article K.3(2)(b) of the TEU, 10.3.95, OJ L 62, 20.3.95, p.1

Council Resolution on the interception of telecommunications, Press Release 10550/93 (Presse 209)

Council Recommendation on the fight against money laundering, Press Release 10550/93 (Presse 209)

Council Recommendation on the responsibility of organizers of sporting events, Press Release 10550/93 (Presse 209)

Council Recommendation on environmental crime, Press Release 10550/93 (Presse 209)

Council Recommendation on the organization of a training module on the operational analysis of crime, Press Release 10550/93 (Presse 209)

Council Recommendation for the exchange of information on the occasion of major events or meetings, Press Release 11321/94 (Presse 252 - G)

Council Recommendations (5) on the fight against trade in human beings for the purposes of prostitution, Press Release 10550/93 (Presse 209 - G)

Council Decision to forward to the EP documents on international organized crime - Recommendations to the Council and report of the ad hoc working party, Press Release 10550/93 (Presse 209 - G)

Council Decision on EDU/EUROPOL: appointment of Mr Storbeck as coordinator of the EDU, extension of the term of office of Mr Bruggeman as caretaker deputy coordinator until end of 1994, Press Release 7760/94 (Presse 128 - G)

Council Decision on EDU/EUROPOL staff: Appointment from 1.1.95 for three years or until the entry into force of the Convention of two assistant coordinators and two members of the Steering Committee, Referred to in Press Release 11321/94 (Presse 252 - G)

Council Statement on the financing of terrorism, Press Release 10550/93 (Presse 209)

Council Conclusions on international organized crime, Official communication to the EP

Assessment of the terrorist threat; document relating to the internal and external threat to Member States of the Union, Council Press Release 7760/94 (Presse 128 - G)

Interim report to the Council on money laundering, Council Press Release7760/94 (Presse 125 - G)

Council guidelines for the training of instructors, Press Release 11321/94 (Presse 252 - G)

EDU/EUROPOL activities report (1.1.94-31.12.94), Council Press Release 5423/95 (Presse 69 - G)

EDU/EUROPOL work programme (January to June 1995), Council Press Release 5423/95 (Presse 69 - G)

Strategy to combat the illicit trafficking of drugs, Council Press Release 5423/95 (Presse 69 - G)

Report on organized crime in the European Union in 1993, Council Press Release 5423/95 (Presse 69 - G)

Draft Convention setting up a European Information system (EIS) (no reference available)

Draft Convention on the establishment of EUROPOL (no reference available)

If the number of agreed documents referred to in the Council's press releases is indicative of activity in an area, then police cooperation - with 22 documents[155] - appears to have been the matter of common interest in Title VI in which the JHA Council has excelled itself in adopting conclusions, recommendations and the such like. However, this abundance of policy documents should not be allowed to conceal the Council's failure to agree perhaps the one single most important document related to police cooperation - the Convention establishing a European Police Office (EUROPOL). This particular issue has been the leitmotif of virtually all JHA Council discussions since the entry into force of the TEU; preparation of the Convention was identified as being one of the "main ingredients" in the Council's action plans and work programmes during the very first JHA Council meeting in November 1993[156]. Progress on this dossier has undeniably been made - in March 1995 the Council "expressed satisfaction ...at the substantial progress made on all aspects of EUROPOL since its meeting in December 1994"[157] - and thirteen articles[158] are deemed to have been completed[159]. Key

155 as listed in Annex XI(a) of the Council report (10.4.95) and Annex 15 in the Commission report (10.5.95) on the functioning of the TEU, op cit.

156 Council Press Release 10550/93 (Presse 209), 29-30.11.93, p.4

157 Council Press Release 5423/95 (Presse 69 - G), 9-10.3.95

158 ibid.

issues upon which agreement has still not been found, despite requests to do so by the two Brussels European Councils in 1993[160] and a deadline of June 1995 for adoption of the Convention being set by the Essen European Council in 1995[161], include citizens' access to data pertaining to them and a number of institutional questions such as the role of the EP, the Court of Justice and the Court of Auditors. The Council still hopes to be in a position to meet the June deadline and has sent the draft text back to the K.4 Committee and Steering Group II which deals with police cooperation (as well as with customs cooperation) in order to complete discussions on the outstanding issues. It should be pointed out, though, that a deadline for the Convention's adoption has been set and not met in the past[162] and that even once the convention has been agreed, a number of years will still be required before ratification by the fifteen Member States has been completed.

Two other issues related to EUROPOL have also been the object of the JHA Council's attention. The first is the draft convention setting up a European Information System (EIS) - an network similar to the Schengen Information System (SIS) and therefore also closely linked to the blocked draft external borders convention. The EIS is designed to "enable the authorities designated by Member States of the Union to have access to reports on persons and objects for the purpose of border controls and other police and customs checks"[163]. The draft convention has, however, mostly come up against the same obstacles as those encountered by that on the Customs Information System - the role of the Court of Justice and the question of consultation of the EP[164]. The EIS convention has also encountered the specific difficulty of how to ensure compatibility with the SIS. Information regarding the progress of discussions on the draft EIS convention is rather limited - only one reference is made to it in all the JHA Council press releases since the TEU came into force - and it is therefore impossible to account for the fact that it has still not been agreed.

The second EUROPOL-related issue dealt with by the Council has proved to be more fruitful: the creation of the European Drugs Unit (EDU). This body is a precursor to EUROPOL itself and its establishment was laid down as one of the priorities of the JHA work programme for

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159 The total number of articles is thought to be somewhere in the order of 27 though neither the definitive number of articles nor the text of the draft convention itself have been published officially.

160 Commission, Twenty-Seventh General Report on the activities of the European Union (1993), 1994, point 976

161 Council Press Release 5423/95 (Presse 69 - G), 9-10.3.95

162 October 1994 was the deadline set by the European Council on 29.10.93 (Council Press Release 10550/94 (Presse 209), p.8)

163 Council Press Release 7760/94 (Presse 128 - G), 20.6.94

164 ibid., p.6

1994[165]. The history of the EDU dates back to before the entry into force of the TEU: in late December 1991 (before the TEU had even been formally signed) a report by the relevant national ministers to the European Council unanimously recommended the setting up of EUROPOL, beginning with a drugs intelligence unit since drug trafficking and its associated problems were considered to be the most urgent issue at the time. The JHA ministers, meeting on 18 September 1992, established a deadline for the setting up of the EDU, namely 1 January 1993, and put together a pilot team in Strasbourg to discuss the practical arrangements. However, due to various delays this deadline was not met. On 2 June 1993 the ministers responsible for justice and home affairs, meeting in Copenhagen, approved a ministerial agreement for the creation of the EDU[166]. As a result, the EDU eventually came into being in the Hague in January 1994 "pending the setting up of EUROPOL"[167]. The non-operational team of national liaison officers and the few staff directly recruited has been responsible for exchanging and analysing information and data on unlawful drug trafficking, the criminal organisations involved therein and its associated money laundering once two or more Member States are concerned. In June 1994 the 1995 budget for the EDU was set at ECU 3.7 million[168] to be financed by the Member States directly rather than make use of Article K.8 TEU to charge it to the Community budget. Since then the Copenhagen ministerial agreement upon which the EDU was based has been replaced by a 'joint action', taken on the basis of Title VI, which extends the scope of the EDU by introducing three new areas into its remit: illicit trafficking of radioactive and nuclear materials, illegal immigration networks and the illegal trafficking of motor vehicles[169]. Once again, following on from the budget decision made in 1994, Article 7 of the joint action implicitly excludes the possibility of charging the EDU's operational expenditure to the Community budget and establishes a system by which the financial contribution of each Member State may be calculated. Now that the rather ad hoc ministerial agreement made in Copenhagen has been replaced with a more solid legislative foundation for the EDU, there seems to be little more that needs to be agreed for the Unit to function and fulfill its current objectives. It is therefore imaginable that the EDU will remain in its current state until EUROPOL is finally born. However, should the EUROPOL convention continue to be blocked by institutional questions, one might see the EDU being given an increasingly large number of areas in which it may act. Such a

165 Council Press Release 10550/93 (Presse 209), 29-30.11.93 , p.4

166 Council Press Release 5423/95 (Presse 69 - G), 9-10.3.95, p.I

167 ibid.

168 Council Press Release 7760/94 (Presse 128 - G), 20.6.94 , p.4

169 Council Press Release 5423/95 (Presse 69 - G), 9-10.3.95, p.I and Joint Action of 10 March 1995 adopted by the Council on the basis of Article K.3 of the TEU concerning the EDU (OJ L 62, 20.3.95, pp.1-3)

possibility does provide the Member States with an alternative forum in which to see police cooperation advanced until they manage to finalise the illusive EUROPOL convention.

As can be seen from the list of relevant documents at the beginning of this section, many other aspects of police cooperation have been addressed in the form of recommendations, resolutions, statements, decisions and other documents. This seems to be indicative of the ad hoc way in which many police cooperation matters have been addressed; some, though, form part of a wider strategy, such as those dealing with terrorism and international organised crime. Many of the latter resulted from a programme of action contained in a report by the ad hoc Working Group on Organised Crime in November 1993[170]. Terrorism has been a recurrent theme in JHA Council meetings, mostly concentrating on studies and assessments of the internal and external threat posed by terrorist activities; little information is available on this subject but a more substantial policy document is due for submission to the Council during their meeting in June 1995. Thus it would seem that the structures relating to police cooperation in Title VI decision-making are rather flexible; on the one hand, they allow for the development of long term measures and strategies such as those for EDU/EUROPOL or international organised crime, but, on the other, they also provide for 'one off' decisions to be taken in response to a perceived need or development such as the recommendation for the exchange of information before major events or meetings or the guidelines on training instructors. However, the question must be asked whether or not these various kinds of agreements and texts are of any practical use since they have no legal or binding effect whatsoever; it is perhaps still too early to assess accurately the value of these documents. Nonetheless, the very limited use of the legislative measures foreseen for Title VI does little to alter the impression that the ministers seem happy to agree to traditional, intergovernmental forms of text but are less willing to approve conventions, joint actions and joint positions.

170 Council Press Release 10550/93 (Presse 209), 29-30.11.93 , p.8

5. An Overview of progress in the fields of justice and home affairs

Plan of Action and Priority Working Programme for 1994

On 29 and 30 November 1993 the Justice and Home Affairs Council adopted a plan of action in the fields of justice and home affairs and a priority working programme for 1994 which were subsequently approved by the European Council on 10 and 11 December 1993. These two documents were to form the basis for development of justice and home affairs, following its incorporation into the Treaty on European Union.

The working programme and plan of action are both divided into three chapters:

I. Asylum and Immigration
II. Police Cooperation, Customs Cooperation and the Fight against Drugs and
III. Judicial Cooperation[171].

Under each section the priorities are specified for 1994. In hindsight, the working programme has been over optimistic in its outlook. Much of what was considered has yet to be achieved, and as such the working programme is still valid today in 1995[172] as it was when it was drafted.

Whilst some aspects of the work programme and plan of action have been implemented, many actions which are considered priority have yet to be achieved. Some of the more important aspects which have still not be agreed to for various reasons include:

- Progress on the entry into force of the Dublin Convention
- Harmonised application of the definition of a refugee in accordance with Article 1.a of the 1951 Geneva Convention.
- Definition for minimal guarantees for procedures of examination of requests for asylum

171 Note, the structure of the K.4 Committee has been similarly divided in three sections or steering groups: Steering Group 1 (Asylum and Immigration), Steering Group 2 (Police and Customs Cooperation) and Steering Group 3 (Judicial Cooperation - Civil & Criminal Law).

172 It appears that no new working plan was adopted for 1995.

- The possibility of re-drafting the London Resolutions in accordance with the instruments provided for in Title VI TEU (Joint Action or Convention)
- Conclusion of the Convention on the Crossing of External Frontiers (although the Commission did re-draft the Convention in accordance with Article K.3, it has yet to be signed by all Member States)
- Conclusion of the Convention on Europol by October 1994
- Finalisation of the Customs information System
- Extension of the scope of application of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgements to certain areas of family law

As already mentioned in other parts of this report, only three acts have been adopted using instruments specifically provided for in Title VI TEU (two joint positions and one Convention). Nevertheless, it must be said that other issues contained in the working programme and plan of action have been dealt with using more traditional instruments of public international law (Resolutions, Recommendations, Decisions, Statements and Conclusions). Some examples (to name but a few) include[173]:

- Resolution on fraud on an international scale
- Resolution on limitations on admission of third-country nationals to the Member States for employment
- Resolution on the legal protection of the financial interests of the Communities
- Recommendation on money laundering
- Recommendations (5) on the fight against trade in human beings for the purposes of prostitution
- Decision on the forwarding to the European Parliament of documents on international organised crime
- Statements on the financing of terrorism and on extradition
- Conclusions on racism and xenophobia, on international organised crime

Once again, however, the problem arises in that it is very difficult to assess the legal effect of such decisions mentioned above. Such acts of soft law tend to give the Contracting Parties

173 For a list of all Council activities, see Report of the Council of Ministers on the functioning of the Treaty on European Union, adopted 10 April 1995, Annex XI(a), 2032, 12 April 1995 published in European Report No 2032. See also analysis of the individual policy areas in this and the chart on Council activities in this Report.

considerable flexibility and room for manoeuvre. It is doubtful whether they are binding other than in the psychological sense, in that the Member States involved have made a commitment to act in certain areas and consequently may feel obliged to act accordingly. However, this obligation is not a formal one. It also leaves wide open the possibility of an *à la carte* scenario, whereby Member States are free to pick and choose the areas in which they would like to participate.

An assessment of progress on the plan of action and the priority working programme is difficult for two reasons. The first refers to the point made above. It appears that the Council has been very active in its treatment of justice and home affairs as the impressive list of resolutions, recommendations, conclusions etc would suggest. However, the question is of course, to what extent does this high level of activity represent a high level of effectiveness and efficiency?

The second problem concerns the nature of the working programme. Its scope of activities is wide and covers most of the relevant aspects of asylum, immigration, customs and police cooperation, the fight against drugs and finally judicial cooperation. Whereas it sets out the appropriate structures (namely priority working groups), it does not set any specific deadline (other than 1994) for when the areas considered should be agreed upon. It simply states that the various working groups should present a report to the Council by the end of 1994. Julien Schutte of the Ministry of Justice in the Hague makes the valid point:

"...it has to be acknowledged, that this document does not represent a proper working programme, in that it contains no indication as to the time limits within [which] each of the programme items have to be completed, the form of the envisaged result, the initiating authority, the method of financing and the available budget[174]"

Many of the priority actions are worded so vaguely that it is unclear as to how one should proceed in these areas, whether a convention should be drawn up or does it merely entail more intensive informal cooperation.

In terms of concrete action in accordance with the legal instruments provided for under Title VI, it must be stated that progress has been exceedingly slow.

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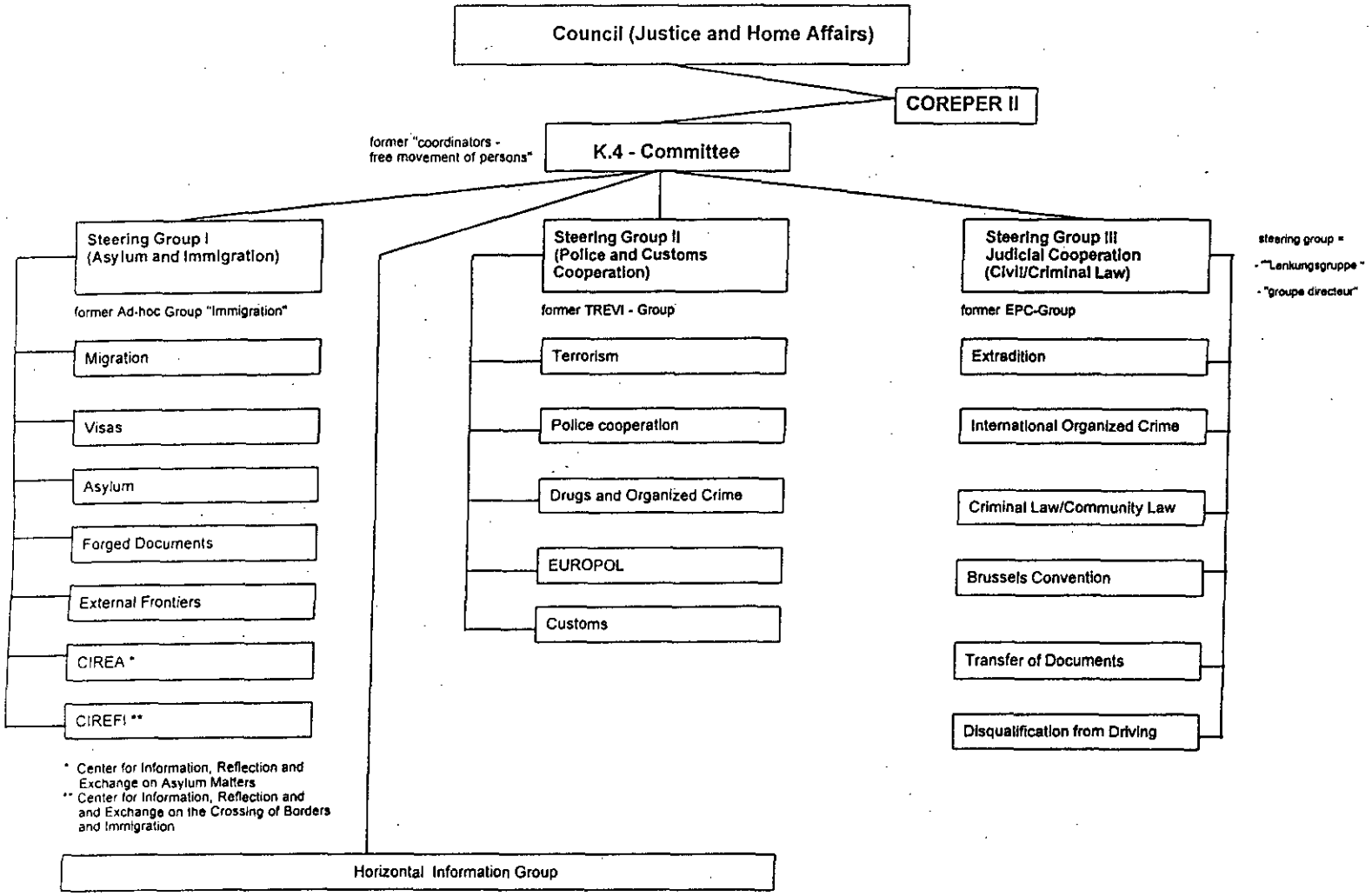
174 Footnote no. 12 in text of Julian J.E. Schutte, "Judicial Coopertaion in the Union Treaty" in Joerg Monar and Roger Morgan (eds.), The Third Pillar of the European Union, European Interuniversity Press, Brussels, Bruges Conferences, N.S. 5, p. 185.

Annex 1

Structures of intergovernmental cooperation in the fields of Justice and Home Affairs (Titel VI EU Treaty)



* Center for Information, Reflection and Exchange on Asylum Matters
** Center for Information, Reflection and and Exchange on the Crossing of Borders and Immigration

Source: M.Niemeier, "The K.4 Committee and its Position in the Decision-Making Process", Contribution to Second Expert Meeting of the Joint Research Project on the Third Pillar of Maastricht, Bruges 19-20 September 1994