

SESSION III

**STATE SOVEREIGNTY AND STRUCTURAL CHANGES
OF THE WORLD ORDER**

THE DILUTION OF MEMBER STATES' SOVEREIGNTY AND EUROPEAN REGIONAL INTEGRATION

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I. *The Dilution of Member States' Sovereignty and European Regional Integration*

The problem of the loss of sovereignty which Member States see the European Community as presenting exercises the minds, at regular intervals, not only of lawyers and political scientists but also of politicians.

We would like to highlight, as an initial approach to the issue, the problems of the vocabulary used and in so doing grasp the opportunity of taking a cursory historical glance at the subject. Let us begin with the term "*regional economic integration*," to give the subject its real name. Is not the phenomenon of regionalism and of its influences on the restructuring of world-wide legal order the subject of our meeting, a highly topical subject and one particularly well chosen for the 'nineties?"

Allow me, moreover, to record here my most sincere thanks to the University of Hitotsubashi for having invited me to take part in these sittings and most particularly to my old friend, from Brussels and Paris, Professor Yoshio Otani.

Oddly enough, I could point out that the term "integration" or "European economic integration" does not appear in the constitutive texts of the European Communities, be they the Treaty establishing the European Coal and Steel Community, signed in Paris on 18 April 1951, which I shall refer to hereafter by its English initials ECSC, or the Treaty establishing the European Economic Community, signed in Rome on 25 March 1957—hence its name "the Treaty of Rome"—to which I shall refer essentially as "the Community." On the other hand, the term "integration" is enshrined in the very first line of the preamble to a more recent instrument—which is not yet in force—namely the Treaty on European Union, signed on 7 February 1992 in Maastricht in the Netherlands; I shall refer to it as the Treaty of Maastricht or simply as Maastricht. I would, however, add one word to define clearly the Europe of which I am speaking: in Paris and Rome in 1951 and 1957, six States, France, Germany, Italy and the Benelux countries (i.e. Belgium, the Netherlands and Luxembourg) gave a firm undertaking. Over the years they were joined by the United Kingdom, Ireland, Denmark, Greece, Spain and Portugal, bringing the number of Member States to twelve. Journalists use the generic term "the Twelve" rather than "the Community" or "the European Communities." Does this mean that when we are faced with the concept of regional integration we are dealing with a concept of recent appearance? This is certainly not our opinion. It was present when the ECSC was founded, in order to draw a distinction between it and all the traditional methods of simple cooperation, international or intergovernmental; however, what was taken on board above all in the new organization was its peculiarity of being *supranational*; moreover, it was difficult to perceive what was meant by this term: did it mean that the organization would be directed by a body independent of the governments of the appointing Member States, independent and even holding a position superior to these governments and capable of imposing its decisions on them? Or was it not rather an organization linked directly to the coal and steel business and production undertakings of the Community, i.e. a body with immediate powers and capable of imposing obligations for the undertakings directly without the States acting as intermediary? Both interpretations—which in fact comple-

ment each other—of this word “supranational” are accurate, both allude to a somewhat negative impact on the sovereignty of the Member States; the second is perhaps more original and more important, especially when measured against the Treaties of Rome where the former of the two interpretations became somewhat overshadowed, since the supreme body of the Community was no longer an independent body but a Council of national ministers. Indeed, is a supranational decision-making body possible at all once the question of imposing important unpopular decisions on States arises? Surely this can be done only by government representatives (with even these acting unanimously), since a supranational body can have only an initiating role, a role of impartial execution, of economic arbitrator and that of a watchdog but not legislative powers or powers of decision. This would seem to correspond to a description of the powers of the Commission of the European Communities.

In 1958 the driving force of the word changed, with the accent being placed on *common market*. It is, moreover, by this name almost as much as by “Community” that the latter is known. As early as 1951 the common market in coal and steel had been on the drawing-board, but with the Treaty of Rome the concept was supplemented by that of a customs union concerning all products (free movement of goods and a common external tariff), by the free movement of persons, services and capital and, in addition, by a number of common policies, such as transport, competition, some trade policy, a minimum of common social policy and general terms on a form of economic policy. Thus conceived, the 1958 common market was already far in advance on a number of other integrations, firstly, as we have seen, because it was a customs union and not only a free trade area (within the meaning of GATT, the difference being that the former has an external customs tariff and therefore a commercial policy, whereas the latter has not) and secondly because agriculture and agricultural products are included in this common market, a fact which many integrations throughout the world have not been able to achieve; finally, because the additional free movements and common policies, without being highly developed, and above all without being accompanied by a precise timetable as to realisation, nonetheless create a cohesion factor for the Community. This is perhaps insufficient since, while customs union was achieved in 1969, the common market and its policies were still trailing behind at the beginning of the 'eighties'.

The concept of the *internal market*, introduced by a revision of the Treaty of Rome known as the Single European Act in 1986, does comprise firstly a date for realisation, i.e. 1 January 1993 (or rather 31 December 1992) before which “an area without internal frontiers in which the movement of goods, persons, services and capital is guaranteed” must be created. The Single Act also contains four other series of provisions: the first are of an institutional order, in that the European Parliament, a democratic body, is afforded additional power by the taking of decisions by a procedure known as cooperation; this constitutes a transfer in the balance of decision-taking, supplemented by the passing of the Council of Ministers from unanimity to qualified majority. The achievement of economic and monetary union (EMU) is the new idea to gain ground; a European Monetary System (EMS) has already been created, as has also the ecu, but EMU itself was not ready; it was detached from the Single Act, where there is only a “for the record” mention in Article 20 (Article 102a EEC). On the other hand, the third idea, new and important policies are beginning to appear, one, highly topical, to ensure environment protection and the other,

more important for a Community and concerning research and development which is budgeted for; yet another, called "cohesion," to ensure compensation between rich regions and disadvantaged Member States. Finally, the last idea, which in 1986 had not reached fruition but was widely spoken about, European Political Cooperation, a somewhat blurred prefiguration of Political Union.

Is there a legal difference between common market and internal market? Doubtless the first gives an image of liberalisation of external trade between Member States with the establishment of an external customs belt, accompanied by the rule of non-discrimination and by that of free competition, whereas the intention of an internal market is to establish, in an area now without frontiers, a set of internal rules allowing a single market in goods as well as freedom of movement for persons. There would therefore be no difference as to substance but as to realisation: a common market leading, through its realisation, to an internal market, the latter being the fulfilment of the former. While in any event the Single Act envisages a number of rules to bring about the dismantling of intra-Community barriers embarked upon at the stage of the realisation of the common market, at the same time a vast approximation of national legislation was set in motion, in order precisely to ensure the smooth running of the internal market.

Incidentally, use of the words "*area* without internal frontiers" can be found in the definition of internal market and it will be used again when the EFTA countries come to be associated with the Community in order to form a unity with the internal market of the Twelve: this market of nineteen countries will be known as a European Economic Area (Treaty of Oporto).

If one wished to describe the Treaty of Maastricht in this move towards economic integration, one would have to say that, all things considered—with the notable exception of its provisions for a single currency—it brings little that is new to the strictly economic field. Only two provisions would need to retain our attention—that relating to "the establishment and development of trans-European networks in the sectors of transport infrastructures, telecommunications and energy" and that concerning the "realisation of social and economic cohesion" (already adumbrated in 1986) between the more or less developed regions in the different Member States. While Maastricht may do little in the economic field, it does more in the field of constructing the new concept of society in general, by establishing policies for culture, public health and consumer protection. . . . Likewise, it is active in the institutional field and in the political and democratic construction of the Community by creating citizenship of the Union, by reinforcing the powers of the European Parliament and by underpinning the Community by means of two more political devices, distinct from it and yet grouped to it, under the name *European Union*. These devices concern, on the one hand, the establishment of a common security and external policy and, on the other, the development of intergovernmental cooperation in affairs falling within the responsibilities of the Minister for the Interior (the Home Office) and the Minister for Justice (the Lord Chancellor's Office).

During the negotiations, the most fervent of the Europhiles secured a period during which this threefold complex of the Union was looked upon as constituting, and as having to develop into, a *federal structure*, a label which displeased in no uncertain terms other members of the Community (I remember some articles in "The Times" of London which spoke bitterly of the "F-word") who called for its deletion and replacement by the less

committed concept of an "ever closer union." However that may be, European integration is no longer simply economic, it is in the course of becoming *political* with Union, as witness this change of description which altered the name of the Community by deleting the word "economic": henceforth reference is to be to the "European Community."

Whatever the case, we cannot underestimate two words which Community lawyers use very often—and you will see how they are linked with the idea of the dilution of the sovereignty of the Member States. These words are the terms "Institution" and "competence." By "Institution," I mean the new bodies created in the Community ambit which are quite distinct from the Member States and their own bodies; I shall list the main institutions, in all innocence, even though the order in which I cite them might lead one to believe that I attach less importance to the second or third than to the first: they are a *Council* of national Ministers from the Member States, a *European Parliament* (EP), a *Commission* (executive) and a *Court of Justice*. The institutions create legal instruments, e.g. adopt Regulations (which the Court may pronounce null and void), thus giving rise to a legal order on a par with that of the Member States. With regard to "competence," this is a matter of responsibilities which the Member States delegate or transfer to the Community and to its institutions. The ECSC was empowered to deal only with coal and steel; later, European Community addressed above all economic activity, customs matters, industrial and agricultural production, transport and public health. It is because the Community was empowered to deal with these sectors that it, or rather its institutions, have a legal basis to act with regard to such matters.

The dilution of Member States' sovereignty arises because the Community, within the context of European integration, has received powers which its institutions exercise.

Naturally enough, we shall discuss the dilution of Member States' sovereignty in two parts, the first being the emergence of new powers to the advantage of the institutions (I) and the second, the creation of new European responsibilities (II).

II. *The Dilution of Member States' Sovereignty by the Emergence of New Powers Working to the Advantage of the Institutions*

To address this issue calls for a subtle approach; while the Community institutions develop, in number and in terms of power yield, intergovernmental influences (i.e. emanating from, and working to the advantage of, Member States) on the other hand come into being and protect the sovereignty of the Member States; Maastricht in the fortieth year of the building of Europe is proof of progress on both these fronts.

A. The Community Institutions and Their Development

An eminent lawyer well-versed in Community practices, Jean-Louis Dewost, has written a distinguished article on the Commission's pre-eminence among the Institutions.¹ On

¹ In "Mélanges Jean Boulouis, l'Europe et le droit" pp. 181–182; the article is entitled, imitating the play by the famous contemporary writer Ionesco "La Commission ou comment s'en débarrasser?" ("The Com-

a more controversial note, we would claim this pre-eminence is brought to notice by the violence—not always justified—of the political attacks surrounding it. The Commission was the butt of General de Gaulle's sarcasm, although at an official reception for the then President of the Commission, Mr Hallstein, he gave instructions for the latter to be received with all the ceremony normally reserved by the French Republic for Heads of State on official visit. Put more prosaically, these attacks are perhaps more evidence of the fact that the Commission is accused of being "a band of stateless technocrats" . . . i.e. those having their place outside the sovereignty of the Member States. On a more pragmatic note, it should be pointed out that, within the general structure of the Community, the Commission holds the monopoly in terms of initiative, in that the main instruments, those which emanate from the Council of Ministers, with the help (in varying degrees of importance) of the European Parliament, can be adopted only "on a proposal from the Commission." These words are to be found in fifty or so Articles of the Treaty of Rome and in all instruments of secondary legislation, to the extent that one can count on the fingers of one hand those instruments not adopted on a proposal from the Commission. This monopoly is reinforced by a basic provision (Article 149, first subparagraph, of the Treaty of Rome, retained by the Single European Act in the form of Article 149 (1) and transferred to Article 189 A (1) by the Maastricht Treaty) pursuant to which the Council can depart from the Commission proposal only unanimously, and this even where adoption of the instrument under discussion would require only a qualified majority; this affords the Commission a unique role in terms of legislative power over the Member States.

The Commission has, secondly, an executive power, i.e. power to adopt instruments applying the Treaty and acts of secondary legislation. This means it can either adopt general and regulatory instruments or take particular decisions; the various subparagraphs of Article 155 (unchanged in 1992) afford it these powers. However, in this connection the Member States, acting as members of the Council, have refused to a large extent to allow this Article to be applied (thus, to have their sovereignty eroded) by imposing the condition that application of texts which the Council adopts be decided either by the Council itself or, more insidiously, by cooperation between the Commission and experts from the Member States. This means that the Commission can adopt the executory instrument only if a majority of the experts accept the Commission draft. This procedure, known as the Management Committee procedure or referred to as "commitology," obviously restrains the Commission's power to execute measures. Among these executory powers mention may be made of the management—where they are possible—of safeguard clauses, granting a Member State which is in difficulties authorization not to apply a Community measure. Another example is provided by the powers which the Commission has in the organization, in terms of jurisdiction, of the Community—in particular it can bring a Member State before the Court of Justice and attack it for failure to fulfil its Community obligations (Articles 169–171). At all events, the Commission is present (or may be, should it so choose) in all proceedings before the Court.

The pre-eminent role of the Commission results not only from its powers; it is the outcome also of its status and of that of its members. The independence of the latter must

mision or how to get rid of it"). Mr J-L Dewost was Legal Adviser to the Council of the Communities and is at present Legal Adviser to the Commission of the Communities.

"be beyond doubt" and they must "in the general interest of the Community, be completely independent in the performance of their duties . . . (and) . . . shall neither seek nor take instructions from any government or from any other body . . ." (Article 157 EEC, Maastricht version, without change as to substance since its origin). On the other hand, the fact that the Commission "must include at least one national from each Member State" (same Article) would not be considered a sign of independence in relation to the Member States. The appointment procedure has developed since Maastricht towards a withdrawal of the power of the Member States; thus, although in the Treaty of Rome, Commissioners are appointed for four years and their term of office is renewable, and they are nominated by common accord of the Member States, since Maastricht they will be appointed by well-informed cooperation between the Member States and the European Parliament, a process taking place in several stages: nomination of the future President of the Commission by the Member States following consultation with the European Parliament, then nomination by the Member States in consultation with the nominee for President of the other members of the Commission, approval by the European Parliament of this nomination, appointment by the Member States (new Article 158); the fact that the nomination of the commissioners as a whole requires the approval of the European Parliament is a definite withdrawal of power from the Member States.

The fact that the Commission and its members cannot be revoked by the Member States, that they cannot be deprived of their term of office other than by a jurisdictional procedure, whereas the European Parliament itself can, by voting a collective censure motion, force the Commission to resign (Article 144, original text, supplemented by Maastricht) ensures to a great extent that the Commission is independent of the Member States.

One final provision which saw the light of day in Maastricht runs along the same lines: the Commission is appointed for five (and no longer four) years, in the image of the European Parliament, which is itself elected for five years. Since the nomination of the Commission follows the election of the European Parliament by six months, the result, if not legally at least politically, is that the two are connected. Whereas under the original system it was possible to talk of the Council-Commission tandem, condemned to get along with each other even if the interests which they represented might be tactically divergent, is it not possible that in future a Commission-Parliament tandem will be seen to emerge, one which is, if not hostile to the Member States, at least favourable to a wide interpretation of Community powers? This development leads one to address the effects of the increased powers of the European Parliament; let us do this before going on to consider the development of the other institutions and the creation of new ones.

a. *The increased powers of the European Parliament*

For a long time, the European Parliament was an institution of a purely formal nature only. It is true that the Treaty of Rome—and before that the Treaty of Paris (ECSC)—described it as one of the four institutions which made up the four-sided basis of the Community. However, neither its designation nor its powers fitted this description. There was no doubt that it was the democratic body, but it did not prove possible for those who drafted the Treaties to have it elected by direct suffrage. Thus, in the 1951–1957 Treaties, two defects—at least—characterised what was at that time referred to as the Assembly; it did not represent the peoples of the Community but was merely an emanation of the

Parliaments of the Member States, which each nominated from among its own members delegates to sit in Strasbourg. But to sit in Strasbourg and do what? To exercise some vague control over the executive, i.e. the Commission, a body independent, both in terms of nomination and powers, of the Member States. As far as the power exercised by the Assembly was concerned, we would submit that it was of a very watered-down parliamentary nature; the Assembly exercised no legislative function but only one of consultation. It had to give an opinion on the proposals of the High Authority (which became the Commission in 1965), but the latter was free to follow the former or to disregard it entirely. The Assembly certainly had a coercive power, which it moreover still possesses; it can oblige the Commission, by censure motion, to resign, although this can be done only with a strong majority, in fact on a double majority, on the one hand, of the two-thirds of the votes expressed and, on the other, of the members making up the Assembly. In other words, this is something very difficult to achieve and which, moreover should lead to the nomination of another Commission, not by the Assembly but, as has been said, solely by the governments of the Member States.

Thus the Assembly had in the initial schemes, those of the 1951–1957 Treaties, only a reduced role to play; it neither nominated the executive, nor did it vote any laws, although, of course, it could censure the executive.

In real terms, the essential power belongs to the Member States which make up the Council, although it is true that the Member States have surrendered some small fragment to this independent Commission which puts forward proposals for Community instruments and with which they may be called upon to negotiate in order to secure their adoption. You will now understand why I spoke earlier of the Council-Commission tandem.

Holding as it did a thankless, restrictive role, the Assembly, which very rapidly traded in its name for a much more political one, European Parliament, took forty years before acquiring power through a legal alliance with the Commission—and this, as I have already mentioned, to the detriment of the Council and the Council's decision-making powers—as I will now try to make clear.

The European Parliament will use its legal powers only sparingly, or even not at all. Its right to be consulted on proposals affords few opportunities of leverage. In matters as technical as those which form the subject of Commission proposals, to deliver a non-compulsory opinion is something of a thankless task; moreover it addresses a proposal which the Commission is there to defend but which is delivered without the Council, the only deciding body, being present. There is no doubt that the work of the parliamentary committees is of interest; the debates in plenary session are not. As concerns the power to censure, this was to be totally short-lived, for not once in forty-one years has a single serious censure motion been tabled; only some minor parliamentary groupings will avail themselves of this exercise and even then only rarely. In practice, the Assembly supports the Commission in dismantling the powers of the Member States.

And yet the European Parliament has a task to perform; in particular, it puts written and oral questions to the Commission and even to the Council, which is under an obligation to reply. It convokes not only the Commission, but also the President of the Council (namely, the Minister for Foreign Affairs of the Member State which, in alphabetical order for a six-month period, directs the work of the Council). The European Parliament brings politics into the debates, challenges the Commission and the Council, discusses their policy

and criticises in detail—but on a consultative basis—the draft budget. Its aim is to assume a quasi-political dimension.

Three victories were to highlight the increase in its powers before a fourth one, acquired under the Maastricht treaty.

In 1976 the European Parliament obtained from Member States a reform of its electoral mode. No longer was it to be a second degree emanation of the parliaments of the Member States but became democratically elected by direct universal suffrage. The French, Germans, British and Italians each elected 81 European Members of Parliament and the less populated Member States, such as Ireland and Luxembourg, elected only 15 and 6 respectively, out of a total of 521.

The second victory acquired by the European Parliament is to be found in two revised versions of the basic Treaties, in 1971 and 1975. It consisted of the acquisition of a certain decision-making power in the adoption of the annual budget. In some cases, the European Parliament can gain the upper hand over the Council in adopting the budget. We witnessed the appearance in the Official Journal of a budget signed by the President of the European Parliament, without the signature of the President of the Council, and it was valid. I am not going to enter into the technicalities surrounding the budget but will make a different point by indicating that the food aid policy which the Community has vigorously set up in favour of developing countries springs very largely from parliamentary initiative.

The third victory of the European Parliament over the Council, that is to say, the Member States, is more recent. In 1986, when the first major revision of the basic Treaties was adopted in the form of the European Single Act, the Member States conceded to the European Parliament the beginnings of participation in a legislative function which assumed the name of "cooperation procedure." Some decisions could not be adopted by the Council other than in "cooperation" with the European Parliament. It is not my intention to demonstrate this procedure because, while it is still in force, it has been overtaken somewhat by a procedure even more favourable to the European Parliament and adopted in 1992 as part of Maastricht. I will state merely that it comprises a sort of shuttle between the Commission, the Council and the European Parliament, each institution being called upon in turn to examine the textual suggestions proposed by the other; moreover, even if the Council has the last word, it can give it in certain cases only unanimously. To a great extent the Council must therefore take account of the amendments of the European Parliament.

The Treaty of Maastricht was to constitute the last stage—although it has not yet come into force—in this series of victorious power gain by the European Parliament. In political terms, this objective was not the main one. The Twelve Member States proposed firstly to bring about European monetary union, which, when the EEC Treaty was previously reviewed in 1986, had not reached fruition. They also had another concern, i.e. to make further progress along the path towards a political Europe, where, it must be said, something had been achieved in 1986, but it was something which never went beyond inter-governmental cooperation. They also had in view increased powers for the Community to supplement the realisation of the single market, scheduled for 1 January 1993. When it came to these major reforms, the European Parliament itself drew attention, in no uncertain terms, to the "democratic deficit" of which the Community was a victim. The European Parliament emerged from the negotiations substantially triumphant. Some

even maintain that the balance of the whole system has been upset to the European Parliament's advantage; without going as far as that, we would claim that it remains to be seen how application of the Treaty of Maastricht will develop.

Attention has already been drawn to the increase in power resulting from the fact that the Commission entered the orbit of the European Parliament; it has been pointed out that the nomination of the Commission is no longer within the powers of the Member States alone; let us leave aside certain extensions of the European Parliament's power of control, such as the power to make inquiries, the creation of an ombudsman, which are not targeted directly against the Member States. Let us instead talk of the European Parliament's participation in the power to legislate, since this participation makes it a genuine partner of the Council, i.e. of the Member States, in the legislative function. This power acquired by the European Parliament was to become known as "co-decision" to show that the European Parliament and the Council have to act in association in order to adopt certain important legal instruments. Naturally, co-decision is not the Community's only method of working. The procedures for consultation established as from 1957 and for cooperation, dating from 1986, remain applicable. But for some instruments, some fifteen cases in the Treaty, the latter makes provision for a European Parliament-Council co-decision procedure. These are often cases where the Community adopts a programme of work or a framework-law, i.e. gives a long-term commitment on the major options of a policy. I will mention only one case; the adoption of the multi-annual framework programme for Community research and development activities. I shall not go into detailed analysis of the procedure; I have already spoken of the "shuttle" between the European Parliament and the Council: Commission proposal, first reading by the European Parliament, which delivers a consultative opinion, first reading by the Council with a view to reaching a common position, second reading by the European Parliament, possible conciliation mechanism between the institutions, adoption by the Council. But in parallel with these various readings, the European Parliament has one formidable power: in four cases of opposition from the Council it may—admittedly by absolute majority of its members—demand rejection of the proposal, the effect of which would be to close the debate and mean having to start all over again. This procedure is complex in that it is inserted in a timetable with time limits to force the institutions to proceed with diligence. Of course, we will have to await implementation of the procedure to assess its efficiency. It is nevertheless a trump card acquired by the European Parliament and a definite limitation on the powers of the Council, i.e. to the detriment of the Member States.

This is not the only reform witnessed by the institutions. We have spoken of the increase in the powers of the Commission and the European Parliament, acquired by encroachment upon the powers of the Council. We have still to consider other institutional developments, in particular the appearance of new bodies.

b. *The appearance of new bodies and even of institutions*

Let us leave aside the fact that the Court of Auditors, the European Investment Bank, the Economic and Social Committee and the new Committee of the Regions have become institutions or quasi-institutions; this concerns the Member States only in so far as the concept of the institutional autonomy of the Community, as compared with the Member States, is gaining in weight; by being thus supplemented, the institutional aspect of the legal order

of the Community is asserting itself by the establishment of an organised entity. There is no doubt that the institution concept is becoming degraded somewhat by the fact that the quasi-institutions are not on a perfectly equal footing with the basic institutions. But how important are these disputes concerning precedence, even salaries and remuneration? What really counts is that the nebulous institutionality of the Community should affirm itself as a series of organised public powers, after the manner of a State, competing with the Member States.

Three other issues must be addressed.

We have hitherto made little mention of the Court of Justice other than to refer to its power under Articles 169 to 171 to condemn a Member State for failure to fulfil an obligation under Community law. Let us consider some statistics on cases before the Court. In 1992, out of 242 cases on which judgment was passed, 47, that is to say 20%, were cases of breach and in 35 of these cases, i.e. three-quarters, the Member State was condemned. How humiliating for a sovereign State. Adding strength to this tendency, the Treaty of Maastricht, by a provision intended to lend force to the effectiveness of Community law, made provision that if a Member State failed to comply with the judgment it would be brought before the Court a second time and the Court could "impose a lump sum or penalty payment on it." The fact that a sovereign State may be condemned to pay a fine is certainly an innovation of non-negligible proportion!

Once the Community received—we shall touch on this later on—powers in monetary matters, it was quite normal for bodies responsible for dealing with such powers to be created and their powers defined. The fixing of the price for wheat does not call for the same type of decision as that necessary for fixing the currency rate. It would doubtless have been conceivable to allocate the guardianship of monetary matters exclusively to the Commission; this would perhaps have been a logical step, in institutional terms, for the Community. On the other hand, since the Council, the Commission and the European Parliament share the governmental and law-making functions in the universe of the Community, such allocation would surely have ruffled the feathers of the monetary forecasters. For them it was necessary to set up a European Central Bank (this was the name finally adopted) and for the bank to be independent of everyone, i.e. of both the Member States and the Community institutions. Two provisions illustrate this point as follows: neither the ECB, nor a national central bank, nor any member of their decision-making bodies "shall seek or take instructions from Community institutions or bodies, from any government of a Member State or from any other body" (Article 107); "The ECB shall have the exclusive right to authorize the issue of banknotes within the Community" (Article 105a). In other words, pursuant to Article 105a, it will no longer be possible for the Bundesbank and the Banque de France to regulate currency circulation and Member States will lose the right to the free operation of the issue of paper money.

The last innovation is the European Council. It brings "together the Heads of State or of Government of the Member States and the President of the Commission." Such a body should meet with the approval of the Member States since, through the European Council, they dominate the Community. Is it really that new? Although its existence in fact now goes back almost thirty years in the form of summit meetings of Heads of State and of Government and it was born officially (?) in 1974 by meeting on a regular basis three times and then twice a year in normal session, without counting the extraordinary sessions,

it appears for the first time in a Community constitutional text in 1992 (Article D of the Maastricht Treaty). Since it does not produce any executory legal instruments, is the European Council really an institution? In point of fact, its political power is of vast proportion. Let us quote Article D: "The European Council shall provide the Union with the *necessary impetus* for its development and shall define the general *political guidelines thereof*." Very probably, embittered lawyers will dread the fact that with the European Council power will shift towards political pragmatism, taking the form of compromise solutions which do not always stick to the letter of the Treaty. At all events, its conclusions (or rather those of its Presidency) are not legal instruments which can be rendered enforceable in law; moreover, I find it hard to believe that the Court of Justice would condemn a Community or national act which ran counter to the Treaties but was inspired by the conclusions of the European Parliament. I have omitted to mention—but this may be excused because there is no reference to it anywhere—that no vote is taken in the European Council, at least on questions of substance, but that pronouncements are made by common accord. This does, however, enable the European Council—even if its members do not all agree as to the substance—to refer to the Council of Ministers the study of any given reform.

However this may be, the European Council is a body which does not dilute the sovereignty of the Member States. In reality it is an international residuum in the European and Community universe. What is more, it is not the only one.

B. International Residual Factors which Afford Protection to Member States

Whereas Community law places the Member States in a position of submission in terms of the legal order of the Community, international law places them on an equal footing vis-à-vis their partners, the other Member States. It is, moreover, very curious that terminologically the partner for the Member States should be the other Member States, whereas for the Community the partner can be in turn, the United States, Japan, Latin America, etc. There is another difference between Community society and international society; in the former, a vote is taken, whereas in the latter, decisions are often taken by consensus. Of course, not everything in the Community is conducted by qualified majority; all major decisions, because they are close to the hearts of the Member States, to their interests and their sovereignty, are taken unanimously. This is all the more true for decisions on the side-lines of what is strictly a Community issue, where unanimity and common accord reassume their rightful place; to step outside the Community mechanisms in order to create intergovernmental cooperation is to fall back into the realm of international proceedings.

Thus, in order to defend their interests against the Community, the Member States—and this is paradoxically an oddity—will constantly be claiming greater unanimity. In the amendments to be made to the Treaty, they will ask for the Community to be supplemented, not by further Community devices but by intergovernmental cooperation. Two movements must be mentioned: the encroachment, upon the application of the Community system, of international mechanisms, in particular through the development of unanimity and the appearance, side by side with the Community, of forms of action which are not Community in nature but fall within the ambit of intergovernmental cooperation.

a. *Encroachment upon the Community system of mechanisms more of an international than a Community nature*

This type of infiltration is threefold:

- a decision-making procedure, unanimity;
- a Community instrument, the directive;
- a body, the European Council.

All three are more of an international than a Community nature. Let us spend a minute considering each.

The normal Community procedure for taking decisions within the Council is the qualified majority procedure; we have already mentioned how it works, that is to say by allocating, by a weighted quota, the number of votes of each Member State; we have also shown that, in order to amend a Commission proposal, even if the proposal can be adopted by a Majority vote, the Council vote must be unanimous.

In the Treaty of Rome, the decisions adopted during the first eight years of the Community's operation had to be taken unanimously in nine-tenths of the cases and, in some rare cases, by qualified majority. I recall the first time a vote had to be taken; it was, I believe, in 1962, and we were all very moved at the Council because the Member States had up to then no intention of deciding otherwise than by common accord, but for once the vote was taken and one Member State was in the minority. Two other developments must be mentioned. In the ninth year, according to the Treaty, votes were to be held more often by qualified majority; however, the Treaty retained unanimity for decisions which it deemed important. To be clear, I will say that, in overall terms, majority voting will henceforth be necessary in 50% of the cases. Great fear was felt by most nationalist States, who dreaded finding themselves in a minority. The Community was in the midst of a crisis: it was the French who were most opposed to the majority. I cannot but mention the name of General de Gaulle in this context. For six months, France withdrew its delegation from Brussels and no Council meetings took place. Then negotiations took place and a compromise was found, a compromise more political than legal, it must be said. This compromise is known in the history of the Community as the "Luxembourg compromise": whenever a decision concerned an issue which was "of vital interest" to a Member State, that Member State could refuse that a vote be taken on the matter and could demand unanimity, whereas even the Treaty indicated that majority voting was possible. You will understand what I meant when I expressed my doubts as to the compromise being legal; I ought to say it was illegal. The annoying aspect of this breach of the Treaty was that it gave rise to exaggeration—I would say that between 1965 and 1985 voting took place only rarely. All the Member States without exception invoked the Luxembourg compromise at least once to avoid being placed in a minority. All did so, despite the fact that most of them claimed that the compromise was illegal. The drawback was that progress was very much slowed down; negotiations had to be conducted over and over again and the Community was not making any headway. In time, outlooks changed, fear of being in a minority began to recede and the desire to vote returned. This led, in 1986, to the first major review with the Single European Act, in which certain decisions which up to then had been taken unanimously were transformed into decisions adopted by majority. In 1992 the movement was given a boost by Maastricht, especially as regards the new Community

powers. Let us say that in 75% of the cases a vote is taken; in decisions of political import only unanimity is required. The connection between this phenomenon of majority and that of the dilution of the sovereignty of the Member States is evident.

I shall be briefer in dealing with the instruments of the Community, since my remarks will perforce be very abstract. Because of the principle of the immediacy of powers, individuals are bound directly by Community law without Member States having to transfer Community decisions into national law; this is what is meant by the direct effect. I would refer you to Article 189 of the Treaty under which the Regulation, the major legal act of the Community, "shall be binding in all its elements and be directly applicable in all Member States." On the other hand, there is another type of Community instrument, called a Directive, under which the task of taking the necessary measures for application is entrusted to the Member States themselves. Let us not invoke sovereignty but say simply that the margin for manoeuvre by the Member States is wider in the case of a Directive than in that of a Regulation. On the basis of these premises, let us say that Community law comprises more and more regulations, that the directives are becoming more and more accurate, so that the margin for transposition is shrinking, that, moreover, the Court takes the view that directives too have a direct effect, that, in effect, they may be invoked by individuals even before Member States have made them applicable in their legal order. This again is an erosion of the role of the Member States.

My last example of the encroachment of international mechanisms upon the Community system will be the body we have already mentioned twice, namely the European Council, the meeting of Heads of State or of Government of the Member States. I have already stated that the European Council is not an institution because it does not produce Community law, does not adopt regulations or directives. In addition to this, it does not operate by majority but by the common accord of its members. I would underline once more its importance, which has become manifest at the end of 20 years of its actual existence. The European Council is responsible for giving the lead in all the work, for giving the necessary boost, for defusing unshakeable opposition; it is the driving force.

The fact that Maastricht gave official status to the European Council is a victory for sovereignties—and not the only one at that. I wish now to talk of the appearance, in 1992, in the world of the Community of a new form of intergovernmental logistics.

b. *European Union and the appearance of forms of intergovernmental logistics*

Outside the EEC Treaty and the development of the Community proper, in 1992 two new activities emerged, resting on an intergovernmental structure. In the first place, progress is being made, in external relations, beyond the European political cooperation provided for in the Single Act since "a common foreign and security policy" has been set up; moreover, a series of Articles refers to "cooperation in the fields of justice and home affairs," a subject dealt with in a very informal way until then and one completely outside the Community ambit. While the Twelve may have been able, during negotiations, to accept this policy and form of cooperation—obviously with certain nuances—not one of them, on the other hand, could contemplate these issues being integrated into the Community nor becoming subject entirely to its procedures. Excluded from the outset will be a situation where the Commission is accorded, with regard to common foreign policy, the central role it exercises in the Community, where the Court of Justice has control over this policy or

where the qualified majority is applied in particular for basic decisions. The same goes for cooperation in home affairs: no Member State is prepared to make its immigration policy a Community matter, and this is what it is all about. In the past some people found it in themselves to reproach the Commission-Court of Justice tandem for having at times acted too fast and having unduly widened Community powers; they therefore took the view that it was wiser not to place oneself in a situation where such power was seen to be extended still further by a new AETR judgment. Moreover, nobody sees the Commission, even with the unanimous agreement of the Council, as empowered to declare war on a new Saddam Hussein, nor to force Member States to break off diplomatic relations. A similar reasoning exists for immigration policies; even though such policies are to a small extent linked to questions of the establishment of aliens in the Community, issues which fall within the competence of the Community, all consider that such policies also have a national security defence aspect.

However things may be, in the Maastricht text the amendments to the Community system on the one hand and the establishment of the common foreign policy and cooperation policy on the other are quite distinct. As far as the second two concepts are concerned, the Community mechanism as traditionally used is very low-key in this context.

In this connection, the first text of the intergovernmental negotiating Conference, a non-paper of April 1991, was not welcomed by the Commission, nor by accessories in the form of Belgium and Italy, who all fought to the end this tendency to remove these issues from the Community system. Was there a fear that Union, with its Policy and Cooperation both being more intergovernmental than Community, might become the principal player, with the Communities having to be content with the role of accessory or even second fiddle? The Commission made a case for the inseparability of foreign policy and Community commercial policy as well as of the Community's external economic relations. It categorically rejected this three-pillared construction. Nevertheless, it is on just such a structure that the Treaty on European Union rests. Four provisions merit our attention.

The first concerns the structure of the Union: "shall be founded on the European Communities, supplemented by the policies and forms of cooperation established by this Treaty." Let us not quibble about the strange nature of this sentence which bears the clear mark of political compromise. At all events, this wording is clear, for it gives an assured unity and identity to the Union (Article A, third subparagraph, of the Treaty of Union) while attributing to it two duties outside the Community itself.

It will be noted, moreover, that a reference which appeared very useful to some people has disappeared: in preparatory versions it was said that the Union was federal in vocation, in other words, common foreign policy was federal in vocation, as was also, moreover, intergovernmental cooperation on terrorism and immigration. If the press at that time is to be believed, the drawing of attention to this vocation made any acceptance by the United Kingdom particularly difficult. More moderately, other Member States had regrets concerning the reference to vocation, either because it went too far or not far enough, and yet others because it was too theoretical or too conceptual in nature. In the final text the federal vocation concept disappeared and its place was taken by a call for "an ever closer union."

A third remark on these structural provisions concerns their ongoing character. Nobody would have wanted the policy and cooperation powers of the Union to form a melting-pot in the Community in the long term. Rather than this, Article 236 EEC was adapted

and an insertion was made in the Treaty of a revision procedure peculiar to the Union and imposed on the Community (Article N) which, on the one hand, takes over this Article on a permanent basis and, on the other, links the revision with the first two Articles of the Treaty. Under these two Articles the Union has its place not only in the context of "an ever closer union among the peoples of Europe" but also in the ultimate achievement of a "single currency," a "defence policy" and several other things (Articles A and B of the Treaty on Union).

The fourth remark consists in drawing attention to the unity of the institutional framework. There was no question—as we have seen—of the mechanisms of the Treaty of Rome applying purely and simply in the two new fields of the Union. At least all the institutions are present in the Union (Article C), some being subsequently, if not completely left out, at least reduced to a minor role. Let us note again that the institutions keep an eye on the cohesion and continuity of measures, see to it that the "acquis communautaire" is complied with but also that the Union must "respect the national identities of its Member States" (Article F).

If one wished to conclude, one could consider the similarities and differences between the Single Act of 1986 and the Treaty on European Union. The latter has sometimes been spoken of as the Second Single Act. If by this is meant that the one and the other add an amendment to the EEC Treaty with the intergovernmental mechanisms of the Twelve, then this is undeniably the case, (subject to the dispute as to the unity and the three-pillared idea). If one compares the material weight of the 1992 reforms with those of 1986, it will be seen that there are major innovations in the present, as regards both the Community aspect and the intergovernmental aspect: there is a transition from an economic power to a genuine political power. The term "Second Single Act" therefore perhaps detracts from the value of something which deserves better than to be described as simply a banal 1992 addition to the 1986 Act.

What was the reason for this whole structural revolution which moved the power centre from the old supranational towards the intergovernmental? It was that a modulated transfer of responsibilities was taking place at the same time. Member States are losing their powers in a number of fields, yet they are losing them in a less absolute manner than in the 1951–1957 Treaties.

III. *The Dilution of Member States' Sovereignty by the Creation and Exercise of New European Responsibilities*

The Community (the Communities) and European Union have experienced three successive overhauls, the major one in 1957 and 1958 when the customs union was created, plus the four major freedoms of movement: goods, persons, services and capital, and when the principle and the broad outlines of certain policies of limited number were laid down: agriculture, transport, competition, social policy plus some general considerations for economic policy. To this may be added the common market in coal and steel with the ECSC in 1951 and civilian nuclear policy with Euratom in 1957. While 1957 to 1958 thus witnessed major developments, 1986 (the Single Act) was no more than supplementary: in fact, only three Community powers are new, scientific research and technological develop-

ment, environment and, a more across-the-board idea, that of financial compensation between the rich and poor regions, referred to as the economic and social cohesion policy. The Act, however, also comprises a time bomb in the form of European Political cooperation—this has made its entry without actually finding a foothold in the system itself. As early as 1960 there was indeed talk of political consultations; since 1970, summit meetings of Heads of State or of Government have taken place but there was no question of making them into some form of board of inspectors of finished work; from 1980 onwards there was perhaps no talk of creating political union, but the fact remains that the lack of any political dimension in the Community's existence was deplored. It is this grey area, on the edge of the Community, which European Political Cooperation deals with, albeit with purely intergovernmental methods. The "big bang" of 1992–1993 was to lead in the same direction by creating new responsibilities for the Community implemented in accordance with the procedures, and within the context, of the Treaty of Rome, on the one hand by establishing along intergovernmental lines a foreign policy and various forms of cooperation, known as European Union, on the other.

A. Increased Responsibilities in the Context of, and Pursuant to, the Procedures of the Treaty of Rome

"Henceforth more than 80% of European legislation will emanate from Brussels" were the words pronounced somewhat triumphantly by the President of the Commission the day after the Maastricht treaty was signed. Let us leave the responsibility for calculating the percentage to him. Was it calculated in terms of budget appropriations, pages in the Official Journal or number of centralised civil servants. The transfers are plentiful. If we had to list them, we would classify them under five headings. The monetary power function (EMU) will be common to all before the end of the century; a common foreign and security policy (CFSP) will be set up gradually; immigration and police and judicial cooperation will be dealt with together (as the third pillar in the structure); the major market and economic policies will be strengthened as an entity promoting European economic competitiveness; finally, a hardcore of policy for society as a whole is emerging, not only social policy, but policies on public health and culture, consumer policy and so on . . . 80% or more?

Of these five foundations of power, we shall address essentially the first, the fourth and the fifth; true, all five interact, but I cannot say everything. We shall speak first of a widening of powers brought about by the institutions, which will form a dilution of sovereignty; we shall then talk of a brake which, in 1986 and above all in 1992, was applied whenever a new power was transferred to the Community, in order to avoid the excesses attendant upon over-centralisation. The Community can act in these new fields of activity only if it has better results than the Member States; this is what is meant by subsidiarity, and it affords protection for the Member States.

a. *Ways available to the institutions for ensuring development of the Community*

The Treaty of Rome contains a number of very convenient Articles which enable the Community to act even if the power established by the Treaty is not precisely defined. Thus, these are Articles which enable the Community to act even if the power established by the

Treaty is not precisely defined. Thus, these are Articles which are directed towards an aim, without posing too many conditions and without defining what should be adopted. These Articles thus permit, depending on the desired objective, the adoption of exhaustive Community rules which the Member States, by negotiating between themselves in the traditional manner, could not achieve. I can cite four such Articles.

The first would be Article 43 of the EEC Treaty which is the basic operational Article covering agriculture. From 1949 to 1962, the organisation of agriculture in Europe had made on progress whatsoever, whereas the dismantling of industrial national protectionism had made slow but serious progress; nationalism, in terms of agriculture, continued. Although the Treaty of Rome comprises a whole title devoted to agriculture, with as many as ten Articles, they are framework provisions which the Community has to supplement by introducing market organisation for each agricultural product with a view of achieving objectives listed to a very large extent in Article 39. On this basis, the Council of Ministers for Agriculture set about dismantling national agricultural systems by taking the view that it could establish a wealth of rules and common organisations of markets as long as they were inspired by the objectives laid down in Article 39. For 20 years the common agricultural policy was to prove a success for the Community in legal, economic and political terms, by having—let us repeat it—absorbed national policies, and all this on the basis of a very general provision, Article 43.

There was another “miracle” Article, less known to the general public but well loved by the legal services; this was Article 103, which, when a problem of conjunctural policy arose, enabled the Council to take ‘appropriate measures’ by “acting unanimously.” Things moved rapidly, for there was no need to go before the European Parliament. The only condition was that what the Community wished to do should bring about an improvement in the conjunctural situation. Use was made of this Article, albeit less than of Articles 43 and 100. In 1992, Article 103 was completely overhauled.

With Article 100—as supplemented since 1986 by Article 100a—we enter another scenario, that of the approximation of laws. Of what does this consist? National legislation consists of what is not already part of Community legislation, such as are customs duties, freedom of movement for persons or, potentially, agriculture and transport. Other matters which have not become Community matters by the effect of the Treaty of Rome remain national matters; they thus fell—we are talking of the first fifteen years of the Community—within six national regimes (twelve since the subsequent accessions). Now these multifarious regimes, if not incompatible among themselves at least superimposed one on the other, will hinder the realisation of the common market. A Mercedes car manufactured in Germany will have to satisfy, apart from the technical rules in Germany, French rules before it can be placed on the market in France. In order to facilitate trade within the Community, Article 100 allows for the approximation of laws if this is necessary for the establishment of the common market (more precisely, if they “directly affect(s) the establishment” thereof). What do we mean by approximation? It consists of getting rid of those differences which are too great; the harmonisation of national procedures may be intended to mean ensuring the mutual recognition of products, manufacturing rules and national procedures. Article 100a, introduced in 1986, will make work even easier. All this will enable products to circulate but will have a destructive influence on national legislative systems. To put it very succinctly, all national rules having an effect on the common

market may be "semi-denationalised" and made semi-Community matters—as a result of approximation.

I come finally to Article 235: where the Treaty has not provided any rule for the action to be taken, but "if actions by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community," the Community may "take the appropriate measures" according to certain rules of procedure (Commission proposal, consultation by the European Parliament, unanimity by the Council). This rule, of which regular albeit not excessive use has been made, has been described by a famous legal adviser—who was not that much in favour of the building of Europe—as a "constituent power" because he claimed that it enabled the Community to create rules for its own operation. Without going as far as sharing this opinion, we do take the view that it is a potentially very effective rule.

Alongside these four legislative techniques for extending Community rules, we would have to make mention of an interpretational ruling of jurisdiction as applied by the Court of Justice. It is frequently for the Court of Luxembourg, when confronted with a difficulty relating to the extension of institutional powers, to interpret them along the lines of useful effect; by this I mean that when the texts themselves are silent on the matter, it has to search for the objectives of the Treaty. This so-called teleological method may lead to very wide interpretations of the Treaties. If one examines the findings of the Court in detail, one is even led to wonder whether the Court has not sometimes treated a gap in the Treaty as something that was in reality an express refusal by Member States to grant certain powers.

However that may be, the institutions, through regular and ongoing development of secondary Community legislation, have, as a result, largely weakened the legislative and rule-making sphere of the Member States.

While for most of the time the Member States may have shown themselves to be in favour of this creeping jurisdiction, in certain negotiations the problem has arisen of ascertaining whether intervention by the Community was in the last resort better than the diverse forms of intervention by the Member States would have been. This is a hotly debated topical issue known as subsidiarity: the Community can intervene only if it claims that it can do better than the Member States.

b. *The brake on Community development posed by the rule of subsidiarity*

This is a rule of recent appearance in the Community system. And yet it is not a rule without precedent since, while its origins may be found in ancient philosophy or that of the Middle Ages, more recently it has been relied upon by the Roman Catholic Church in its relations with totalitarian States as motivation for a limitation on the powers of such States in matters of teaching and education, the family being—according to the doctrine of the Church—in a better position to act than the State.

To return to the Community, let us mention the fact that this rule did not appear in the Treaty of Rome, but that it was introduced into Community law by the Single European Act in an isolated field, that of environment protection. According to Article 130r (4) of the EEC Treaty (1986 wording): "The Community shall take action relating to the environment to the extent to which the objectives referred to in paragraph 1 can be attained better at Community level than at the level of the individual Member States . . .".

Given that it widened, to an even more serious extent than the Single Act, the respon-

sibilities of the Community, by establishing several new fields of competence, the Treaty on European Union took this principle over in a new Article, 3b, of the Treaty as a general rule to be brought into play whenever the Community's power was not exclusive but concurrent with a power of the Member States. It is doubtless easy to understand the motivation of the Member States who, called upon to shed some of their responsibilities, are willing to do so only if they are assured that the Community can make better provision for the case in point than they could themselves. This fear, moreover, reflects the idea that while some matters may be readily understood to comprise actions better taken together, others are better resolved by being dealt with by each Member State individually. It is useful to cite the wording itself (Article 3b).

“Article 3b

The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.”

The difficulty will in future be how to define “exclusive competence”; it was the Court of Justice itself which, in its opinion 1/75 about commercial policy, introduced this notion of exclusive competence. After having pointed out that Articles 112 and 113 of the Treaty provided powers for the Community, the Court asked what exactly was the “exclusive character” of Community competence in this case and concluded that: “The provisions of Articles 113 and 114 concerning the conditions under which, according to the Treaty, agreements on commercial policy must be concluded show clearly that the exercise of concurrent powers by the Member States and the Community in this matter is impossible.” This means therefore that in future the institutions will in each case have to ascertain, by analysing the Articles which created the Community powers, whether or not the possibility of a concurrent power exists. In many instances the solution will be apparent, for example if the Community measure is of a supplementary nature, if it “contributes,” “supports” or “endeavours.” This is so in most of the new powers resulting from Maastricht, but it applies also to numerous other rules of the Treaty.

Thus, by a swing of the pendulum, the Treaty on Union first extends the Community's powers (working unfavourably towards the Member States) but limits this extension by the rule of subsidiarity (thus working in their favour). Then, by a new movement in the field of what we have called intergovernmental cooperation, if it obliges the Member States to cooperate within the Union, it does so not within the context of the Community but along the traditional lines of international law (acting favourably towards the Member States). However—and this has already been pointed out—such intergovernmental cooperation is exercised within the institutions, in the context of the Community (acting unfavourably

to the Member States).

B. In Certain Areas of a Political Nature, Cooperation Takes Place in an Intergovernmental Manner

As we have seen, we are concerned here with Title V of the Treaty on Union, dealing with a common foreign and security policy. Articles J to J 11, and Title VI, which covers cooperation in the fields of justice and home affairs (Articles K to K9).

a. Common foreign and security policy (CFSP)

In the area of external relations, the Treaty on Union caused Member States to pass from cooperation—which had been acquired since the Single Act—to a policy itself, i.e. something binding. It appears to have been a long-standing ambition of the Member States, adumbrated as early as the early sixties, that such a policy should see the light of day, but sovereignty obliged and nothing but coordination or informal cooperation was to take place until 1986. At the time, when the learned preambles to the Single Act were contemplated, the 1981 Genscher plan, the Genscher-Colombo plan of November 1981 and the Stuttgart Summit conclusions of June 1983 could, however, not be ignored. There was much talk here of foreign policy in particular, but let us repeat the point, with coordination and cooperation as the sole means to the end. We must not overlook Article 30 of the Single Act, which organised “European Political Cooperation.”

In December 1990, just before negotiations began, the French President and the German Chancellor sent to the President of the EEC Council a long letter largely clarifying the problem. The conclusions of the Summit of 14 and 15 December were bolstered thenceforth as far as CFSP was concerned. The intergovernmental conferences opened on the second day of the Summit, and the abbreviation CFSP became common parlance.

Of course, not everything was settled. The Commission began by denouncing the CFSP for taking things outside the realm of the Community; Denmark had no wish for defence to be discussed; the Netherlands did not want the European Council, the spear head of the CFSP, to be given too much strength; the British considered that the security of Europe should rest more on the Atlantic Alliance than on the CFSP.

It is curious to note that quite early in 1991 ideas were, except for defence matters, clear enough. Should one take the view that the work of the first quarter of 1991 was particularly fertile and that the Franco-German initiative had set things in the right direction? On the other hand, more sadly, should one take the view that the most essential part of the negotiations took place outside the intergovernmental conferences, in the Atlantic Alliance (NATO) or within the Western European Union (WEU) perhaps, and that the parties reserved their positions for a later date?

However things may be, the Treaty on European Union devotes a Title of twelve Articles J to J 11, plus four declarations, to the CFSP.

To give a brief summary of this Title, one could claim that it provides for a systematic cooperation obligation to be progressively replaced by the gradual implementation of compulsory joint actions (Article J 1) and by including defence problems in matters in which the Union is engrossed.

If one wishes, keeping closer to the text, to make a detailed, albeit brief, analysis of

its provisions, this would best be done by focusing on six points.

One Article is devoted to aims and means. It is impossible to make an amalgam of such an Article, each of the provisions of which is highly apposite. Should we not speak rather of four key ideas: common values and independence—democracy and human rights—increased security of the Union—cooperation in peace-keeping in a wider context? As to the means, let us say simply that CFSP rests on the cooperation-joint action tandem (Articles J 1 and J 2).

The institutional framework pushes to the fore the European Council with its precise task, since Stuttgart, of defining the principles and general guidelines of the Twelve. Turning now to the Council of Ministers for Foreign Affairs: this has a more day-to-day responsibility for political conduct—it takes decisions unanimously except with regard to executory measures.

The cooperation-joint action duality is, as we have seen, the basis for CFSP. Cooperation implies mutual information and cooperation, before adoption, each time this is possible (and unanimously), of a “common position.” Duties of loyalty, solidarity and conformity of national policies with these common positions must be respected in international organisations and at international conferences (Article J 2).

Joint actions are more than a common position, since the action will no longer be individual—each Member State—but common—Union. The text remains understandably silent, however, on the material content of what will constitute joint action: a statement or declaration, an approach, mediation, money, military force, a Treaty? There will probably be room in the future, when joint actions are first applied, for the content to be clarified.

Moreover, during the negotiations, clarification of the content of the common action did not seem a prerequisite. For many, the appropriate thing to do was to set up a common working method for the Ministers for Foreign Affairs, we would almost go so far as to say to create, pragmatically, a common ministry of the Union by the holding of informal and ongoing contracts between diplomats of the Member States; this would lead ineluctably, after a certain time, to contributions of means of any kind.

However that may be, it is said that Member States are bound, that is to say that they cannot diverge; if they act, they do so on behalf of the Union; there is always the possibility that they must hold consultations together before taking executory measures. What will be the nature of joint action? Will it be supra-national, international or will it be a collection of national actions? We shall exclude the first term. Let us remember in this context what we said concerning the absence of any international personality from the Union. It is our opinion that the third will in the beginning be the most frequent form of joint action, as seems to be acknowledged, moreover, by the text by emphasising the conditions for applying joint action by Member States, but that the action will be taken—otherwise it would not be joint—on behalf of the Union. Finally, we believe we have detected just a trace of possible international action in the fact that it is envisaged that the operational expenditure for implementing joint actions may be charged to the budget of the European Communities (Article J 11 (2))—and not to the Union, which has no budget. It should be added that when negotiations were being conducted, an out-and-out disconnection was contemplated, i.e. giving a free hand to any Member State with special problems (France in Chad or Greece with its Turkish neighbour?). Subsequently, the problem was left out altogether; on the other hand, where a Member State has special major difficulties in applying joint action,

the Council may adopt the appropriate measures (Article J 3).

In the field of security, three problems were highlighted in the discussions: the fact that some were strongly attached to the Atlantic Alliance, the reluctance on the part of Ireland (and of certain States seeking accession) to speak of defence matters, and, finally, a clearly-worded provision in the Treaty establishing the Western European Union (1954) by which nine Member States of the Community (and perhaps more tomorrow) offered mutual guarantees in the case of attack. Given all this, the text (Article J 4) had to be carefully worded while at the same time giving a very clear statement that in time the objective will indeed be common defence. Perhaps in 1996 defence policy will be spoken of in more precise terms (Article J 4 (6)). Until then, it will be possible for the Union's defence policy to be implemented within the context of the WEU (Article J 4 (2)), i.e. by a mutual defence and guarantee agreement between States. Furthermore, a Declaration by those Member States alone which are also members of the Western European Union is devoted to the—to some extent subordinate (“WEU will form an integral part of the process of the development of the European Union”)—role of the WEU in its relations with the European Union and in the relations—to be developed—with NATO, in the effort to transform the WEU into a “European pillar of the Atlantic Alliance.”

The wording of the provisions on a common foreign and security policy is perhaps a trifle ambitious, but it is a carefully worded text nevertheless for, since it provides for neither transfer of sovereignty, not even of powers, nor any fundamental automatic and binding obligation, the CFSP would appear to be a realistic stage in development along the path to Union. Its security aspect will, of course, have to take account of Atlantic viewpoints. This is a problem for 1996.

b. Cooperation established by the Treaty on Union in the fields of justice and home affairs

The length of this Title and the diversity of issues that it contains bear witness to the easily explosive nature of certain matters. Title VI speaks of drugs, terrorism, immigration and other problems in which Member States fully intended to keep a free hand.

In utter confusion, at the will of various instruments, or without any instrument at all, the Twelve had for some time taken on the coordination of their policies in the fields of justice and home affairs.

Some nine areas are deemed to be of common interest and thus fall within inter-governmental cooperation (Article K 1). They are the following:

- conditions of entry, movement and residence by nationals of third countries in the Community; combating unauthorized immigration and work;
- control of the crossing of external borders;
- asylum policy;
- drug addiction policy;
- combating fraud on an international scale;
- judicial cooperation in civil matters;
- customs cooperation for those aspects not covered by the EEC Treaty;
- judicial cooperation in criminal matters;
- police cooperation in matters of terrorism, drugs and international crime.

The methods of cooperation vary according to the areas, ranging from simple information and mutual consultations to signatures of conventions, the setting up of administrative

cooperation, the adoption of common positions and even—and here we find the concept again—joint actions (and this, moreover, complying with the principle of subsidiarity) (Article K 3).

An important innovation is, however, the fact that the visa policy for entry into the territory of the Community by foreign nationals (Article 100c of the Maastricht Treaty) was made a Community matter. However, this was only partially so. Firstly, the policy applies only to visas, not to other matters; the Council's only task is to "determine the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States." On the other hand, nothing is said about the conditions under which the visa will be granted by the Member State to which the first application is made, nor about the coordination between Member State to keep one another informed of details of the applicants for the visa (ten Member States already cooperate under the so-called Schengen agreement on these lastmentioned matters).

Let us repeat—when one encounters the nature of the "creeping jurisdiction" of the exercise by the Community of its powers, the importance of this final provision must be stressed. It could end up by taking over immigration matters as a whole first and more generally matters concerning cooperation in justice and home affairs. However, it was only under certain conditions that the commitment was made (ratification is necessary).

All the provisions of this intergovernmental cooperation are, as we have seen, approached with caution by Member States. Before concluding, let us remind ourselves that with an inborn sense of compromise, the Twelve agreed that this intergovernmental cooperation would take place within the institutional framework of the Community, not within that more international framework of a diplomatic conference of Member States. On the other hand, in Edinburgh in December 1992, they applied, at the request of Denmark, something of a soft pedal approach to the all-out Community trend mentioned in the two foregoing paragraphs.

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Can we, at the end of this research, take stock of the importance of the attacks made on the sovereignty of the Member States of the Community over the last 35 years? We would do so at our peril, for the rules and practices which, in the Community, lead to a withering away of sovereignty are numerous—as are also, it must be said, those which lead to limits being placed on such erosion. Given the European Parliament's desire to take, in the name of common democratic legitimacy, a firmer stand, the movement could become more pronounced; this would touch upon the Community and the Member States through the Council. As opposed to this, the intergovernmental process in CFSP and home and judicial affairs safeguards the sovereignty of Member States.

Account must also be taken of the fact that the Treaty on European Union is not yet in force; however, let us repeat, we believe that most of the provisions it comprises follow the lines of what Member States unanimously wish and that under the Treaty in the form adopted on 7 February 1992, or in some adapted form, it will be these provisions that will govern intra-European affairs before the year 2000.