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THE EXTERNAL RELATIONS OF THE EUROPEAN COMMUNITY AND ITS MEMBER STATES AT THE TIME OF THE INTERNAL MARKET AND OF THE MAASTRICHT TREATY

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Introduction

The European Coal and Steel Community (1951) was the first stage of the European "integration" process. The treaty aimed at realizing a "common market" of coal, iron and steel. It included neither a common external tariff nor a common commercial policy.

In 1958, two other communities were created: the European Economic Community (EEC) and the European Community for nuclear energy (EURATOM). In 1967, on the basis of a revision treaty signed in 1965, the executive institutions of the three communities were merged. The meaning of this operation was clear: the importance of the ECSC and of EURATOM was too limited to justify separate bodies. Since the coming into force of the 1965 treaty, all the Community institutions—i.e. Commission, Council, Parliament and Court—have been common to the three Communities and have acted on the basis of one of the three treaties, as appropriate. But, as everybody knows, most of the time, they act on the basis of the EEC treaty. What we usually call the "European Community" is in fact the European Economic Community.

The Single European Act, which was signed in 1986 and came into force on July 1st 1987, can be considered as an important stage in the life of the European Community. It provides for the realization of an "internal market" including the abolition of all kinds of "borders." This internal market had to be completed in principle by the end of 1992. We have to admit that, for the time being, some measures still have to be taken to complete the internal market, essentially in the field of the free movement of people. But, in the other three fields—free movement of goods, free movement of capital and free movement of services—the "common market" is now very close to being an "internal market." It has even been noticed that, in some fields—banking for example— the European market is of a more "internal" nature than in the United States where the banking legislations vary more from one State to the other.

The MAASTRICHT treaty was signed on February 7 1992. It should have come into force on January 1st 1993. But ratification was delayed because of the refusal by the Danish people to approve it (referendum of June 2 1992). A new referendum, held in May 1993, gave a positive answer. Denmark can, now, ratify the treaty. In the United Kingdom, the ratification process is still going on. We can reasonably expect it to be completed in September or October. It is now very likely that the treaty will come into force before the end of the year.

The MAASTRICHT treaty represents another new stage in the life of the European community and even more important than the Single Act. Its objectives are threefold: first and foremost, creating an economic and monetary union; second, establishing some new fields of competence for the Community; third, strengthening the so-called "political union," i.e. the common action of the members of the Community in the field of foreign and security policy. The treaty also reinforces somewhat the powers of the European Parliament.

When the MAASTRICHT comes into force, the Member States of the European Community will be members of the "EUROPEAN UNION." This Union will include the three communities. The present EEC will be given a new name: the European Community

(EC). The other two Communities will still exist, but it becomes clearer that their role is limited in comparison to that of the EC.

In addition, this Union will include the cooperation of the Member States in the fields of common foreign and security policy and in the field of justice and internal affairs. This is an extension and a reinforcement of the so-called European political cooperation which has been in operation—without any formal basis until the Single Act—since 1971.

The two aspects of the European Union are substantially different. Both have consequences on external relations but, because of their substantial differences, they have to be studied separately.

1. *External Relations of the Community and its Member States within the Framework of the EEC (EC)*

1.1. Common Commercial Policy

The commercial policy is one the three "common policies" of the EEC treaty, along with agricultural policy and transport policy.

In the framework of these policies, member states have transferred a great deal of competence to the Community. As we will see, in the field of commercial policy, transfer is theoretically complete.

1.1.1. The basis of the common commercial policy: the customs union

The community is not merely a mere free trade area. It is a customs union in which a common external tariff applies to the relations between all Member States and third countries. Any product, once in free circulation in one of the Member States, is entitled to move throughout the entire Community.

Since the external tariff is "common," it cannot be administered by Member States. The level of the tariff depends only on decisions taken by the Community institutions, namely of the Council acting by a qualified majority on the basis of Commission proposals.[1]

1.1.2. The principle of the exclusive competence of the Community

Although the treaty does not expressly say so, the Court of Justice has stated that all "commercial policy" measures can only be taken by the Community with the result that Member States are deprived of any competence in this field.[2]

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[1] The agricultural products are not included in the external tariff because they are not protected by a customs duty but by a special amount (prélèvement). It does not make any difference from the point of view of the distribution of competences between Community and Member States. The products covered by the ECSC treaty are not governed by the common customs tariff.

[2] Donckerwolcke, case n° 78/77, Feb. 1, 1978, ECR. 169. The definition of the term "commercial policy" had to be clarified by the Court which accepts a broad interpretation. For example, the negotiation of an agreement to stabilize supplies comes within the scope of a "commercial agreement" (opinion n° 1/78, Oct. 4, 1979, ECR. 2871).

1.1.2.1. Commercial negotiations

Following article 113 EEC, the common commercial policy shall be based on uniform principles, particularly in regard to the conclusion of tariff and trade agreements. Where agreements with third countries need to be negotiated, the Commission shall make recommendations to the Council, which shall authorize the Commission to open the necessary negotiations. The agreements shall be concluded by the Council on behalf of the Community, acting by a qualified majority (art. 114).

All kinds of commercial negotiations, either bilateral or multilateral, are dealt with by the Community as such. The most obvious examples are, of course, the commercial "rounds" negotiated in the framework of GATT and, currently, the "Uruguay Round," which still has to be completed.

Since January 1st 1970 (end of the so-called "transitional period"), Member States have not been allowed to negotiate with third States in "commercial" matters. No "commercial agreement" can be concluded by a Member State.[3]

1.1.2.2. Protection against dumping and subsidies

Article 113 expressly includes trade protection measures "such as those to be taken in cases of dumping or subsidies" within the "uniform principles" on which the common commercial policy must be based.

This protection depends exclusively on Community decisions.

All anti-dumping protection is regulated by community law.[4]

An anti-dumping procedure is initiated by a complaint through a Member State or by a Member State itself. The Commission investigates the matter if it considers there is prima facie evidence that dumping exists. If dumping is found and if it causes injury to a major proportion of a Community industry, the Commission imposes a provisional anti-dumping duty through a Community regulation. The provisional duty is valid for a maximum period of four months. The Council can confirm it through a regulation adopted by a qualified majority on Commission proposals and in this case a time limit has not to be set.

1.1.3. Possible effect of the realization of the internal market

The Single act contemplated the coming into force of the internal market on January, 1st 1993.

Despite the fact that some community regulations are still lacking, we can say that the main element of the internal market has been present since then because of the abolition of all borders controls related to the movement of goods. This new—and essential—fact is mainly due to the abolition of the so-called "tax controls" which were, formerly, mainly

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[3] An exception was accepted because of the refusal of the USSR to negotiate any kind of agreement with the Community. In this particular case, Member States could carry on negotiating commercial agreements with the USSR under special Community authorization and supervision. This exception has disappeared since Community "recognition" by the USSR.

[4] Regulation 2423/88, July 11, 1988, (O.J.L. 209,1), entered in force on Aug. 5 1988. It replaced Council reg. 2176/84. See DE SMEDT, "survey of the revised basic EC anti dumping regulation," 17, International Business Lawyer (1989). The Court of Justice has given numerous decisions and is still doing so——in the field of anti-dumping measures. See for example RABE and SCHUTTE: EC anti-dumping law, current issues in the light of the jurisdiction of the court, CMLR, 1989, 643.

carried out at the borders and which will now rely on cooperation between the Member States' tax administrations.

At first view, one might imagine that this will not have any impact on commercial policy.

But, in fact, it does.

Pursuant to article 115 EEC, the Commission can authorize Member States to take the necessary protective measures if the execution of common commercial policy measures leads to deflection of trade or to "economic difficulties" in one or more of the Member States.

This safeguard clause has been used extensively and has led the Commission, in the majority of cases, to authorize a Member State to impose national import quotas on a product in free circulation and to require special import licenses. In at least one case, the imposition of quotas was the consequence of an agreement concluded at the Community level.[5]

The national quotas can be implemented only if there are border controls.

So the realization of the internal market raises the question as to whether or not the safeguard clause can still be implemented.

In his very famous White Book on the internal market (1985), the Commission spoke of the "desuetude" of article 115. In fact, this provision is still present and will stay in the treaty, except if it is expressly repealed through an amendement to the treaty. But the Commission has already stated its intention not to grant new authorizations on the basis of article 115.

If it is the case, it will be possible to say that the "national" aspects of the common commercial policy will disappear and this policy will really become a "common" one in every respect.

It also means that if the Community wishes to rely on quantitative restrictions, they will apply to the Community as a whole

1.2. External Relations other than Commercial Policy

1.2.1. The basis for Community external competence

Outside of commercial policy, there is a formal basis for an external competence of the community—in the EEC treaty—to conclude "association agreements" with a third State or a "union of States" or an international organization (art. 238) and to establish relations with the United Nations (art. 229), the Council of Europe (art. 230) or the OECD (art. 231).

In fact, the field of competence for external relations is far larger.

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[5] The "multifibres" agreement concluded within the framework of GATT led to national quotas. When there are de facto quantitative restrictions under voluntary restraint agreements negotiated between the Commission and third country producers—as is the case for Japanese cars—this normally leads to national quotas.

Article 115 led to implementation regulations: Council reg. 288/82 (OJ 82 L 35.1) and Council reg. 1765/82 (OJ 1982 L 195/1). The second reg. deals with the special problem of imports from *State trading countries*.

1.2.1.1. Court of justice case law

The Court of Justice has rejected the so-called "restrictive" interpretation of the treaty. On the contrary, it has stated that an external competence of the Community can exist even if a provision of the treaty does not expressly say so.

In the final stage of its jurisprudence, the Court accepted that when the Community is competent to act internally, it is also competent to act externally (so-called "foro interno-foro externo" principle).[6]

1.2.1.2. Fields in which the Community has an external competence

On the basis of the principle stated by the Court, the Community can act externally —and in particular conclude international agreements—in many diverse fields of activity, including for example agriculture, environmental protection, fisheries, research.

But it must be made clear that in all these matters, Community competence is not exclusive. Member States can still conclude agreements with third States, provided the agreements they conclude are fully compatible with Community agreements and with Community regulations.

1.2.2. Effect of the MAASTRICHT treaty

1.2.2.1. Enlargement of Community competences

1.2.2.1.1. Monetary union

The main consequence of the MAASTRICHT treaty will be the creation of a monetary union with a single currency (ECU).

This union can start as soon as 1997 and no later than 1999. It will not necessarily apply to all the members of the Community. At least at the beginning it is expected that only a limited number of Member States will participate in the union. Furthermore, the United Kingdom and Denmark benefit from a special opt out clause. It means that they will participate in the union only if they decide to do so.

The MAASTRICHT treaty provides for a transfer of monetary competences from Member States to the Community.

In the field of external relations, three provisions are relevant.

Article 109.3: "By way of derogation from article 228, where agreements concerning monetary or foreign exchange regime matters need to be negotiated by the Community with one or more States or international organizations, the Council, acting by a qualified majority on a recommendation from the Commission and after consulting the ECB, shall decide the arrangements for the negotiation and for the conclusion of such agreements. These arrangements shall ensure that the Community expresses a single position. The Commission shall be fully associated with the negotiations.

Agreements concluded in accordance with this paragraph shall be binding on the institutions of the Community, on the ECB and on Member States."

Article 109.4: "Subject to paragraph 1, the Council shall, on a proposal from the Commission and after consulting the ECB, acting by a qualified majority, decide on the position of the Community at international level as regards issues of particular relevance to eco-

[6] See case n° 22/70, Com./Council (European Road Transport Agreement), March 31, 1971, ECR 263; case n° 3,4,6/76; Kramer, July 14, 1976, ECR 1279; opinion n° 1/76, April 26, 1977, ECR 741.

nomic and monetary union and, acting unanimously, decide its representation in compliance with the allocation of powers laid down in article 103 and 105."

Article 109.5: "Without prejudice to Community competence and Community agreements as regards economic and monetary union, Member States may negotiate in international bodies and conclude international agreements."

It derives from the above that:

The Community has an external competence in the field of monetary matters and, particularly, if it is necessary, can conclude "monetary agreements,"

The Community as such could become a member of the international organizations acting in the field of monetary questions, especially the IMF. The question of whether or not Community membership would be in addition to the Member States' membership or would replace it could be raised at that time.

We have to recognize, on the basis of article 109.5, that the Community external monetary competence is not an exclusive one. But, taking into account the amount of "internal" competence transferred to the Community in that field, it is obvious that the main external competences will be also exercised by the Community.

Third States must be aware that, if the monetary union works, they will have to discuss and negotiate with the Community and no longer with individual Member States.

1.2.2.1.2. Other fields

The MAASTRICHT treaty adds some other fields of competence to the existing ones: education, vocational training and youth; culture, public health; consumer protection; trans-European networks.

In all these fields, the competence of the Community is in no way an exclusive one. It is not even a main one. On the contrary, it derives from the provisions of the treaty that the Community will act only to complement the Member States' action.

Nevertheless, it is likely that, in these fields, the Community will have the opportunity to participate in international agreements, usually in the framework of "mixed agreements" (to which the Community and its Member Statees are parties).

In some cases, the Community external action will be based upon express provisions.[7] If such a provision does not exist, the Community will rely upon the "foro interno-foro externo" principle.

In brief, it can be said that in all these fields third States will go on negotiating and concluding treaties with the Member States of the Community. But they may also have to negotiate with the Community, either alone or together with its Member States.

1.2.2.2. The principle of subsidiarity

The MAASTRICHT treaty introduces the principle of subsidiarity as a new general principle of Community law.

Article 3b: "In areas which do not fall within its exclusive competence, the Community

[7] For example, art. 126.3 (education, vocational training and youth): "The Community and the Member States shall foster cooperation with third countries and the competent international organizations in the field of education, in particular the Council of Euroep" (see also: art. 128 (culture), 129 (public health), 129c (trans-European networks).

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."

The question whether or not this provision will have a great impact on the Community system is controversial.

It cannot be excluded that the Community external action could be blocked, in some cases, by the subsidiarity principle.

But we have to bear in mind that the Community external action is mainly used in fields of exclusive competence (commercial policy)—where the subsidiarity principle does not operate by virtue of article 3b itself—or in fields where the Community obviously retains the essential competences (monetary policy).

It seems likely, in these conditions, that the subsidiarity principle will not modify the allocation of competences between the Community and its Member States as far as the external competences are concerned.

2. *External Relations of the Community and its Member States Outside the EEC*

2.1. Existing "political cooperation"

None of the Community treaties provide for the development of a common foreign policy. Outside of the economic questions which constitute the Communities competence, the Member States conduct their external relations without any constraint. In 1953, the Member States of the ECSC tried to build a "political community" along with the European Defence Community. But the failure—in 1954—of the EDC led them to give up the political community project.

In 1961–62, essentially under the leadership of France, a new project of "political community" was put on the table. But, once again, this time because of some fundamental disagreements between France on the one hand and the five other member states of the ECSC on the other hand, it did not come to anything.

In 1969, at the Hague conference, the six Heads of State or government of the Member States of the European Communities decided to try to set up a flexible system of political cooperation which would not need the creation of a new community.

This political cooperation has been operating since 1971.

2.1.1. Juridical basis

From 1971 to 1987, the political cooperation between the Member States of the European Communities had no formal basis in the sense that no international agreement was concluded. The aims and procedures of pilitical cooperation were simply described in several reports and communiques unanimously endorsed by the Heads of State or governments when they met at a "Summit" conference or, from 1975, within the framework of the European Council.

The Single Act, which came into force on July 1st 1987, gave a formal basis to the political cooperation which has now become "European cooperation in the field of foreign policy," the relevant provisions of which are all to be found in the Single Act (title III).

Despite the existence of this new basis, the principles and mechanisms on which the political cooperation has been based since 1971 were not changed.

2.1.2. Limited effect

Political cooperation, such as has been continuously operating since 1971, is not based on a "Community system"—namely a transfer of competences to a legal person distinct from States and to distinct institutions—but on mechanisms of a purely intergovernmental type. No international agreement can be concluded on behalf of a "Community."

The main bodies of the EPC are the Political Committee in which the Directors General of the political affairs of the foreign policy ministries of the Member States meet once a month and the meeting of the foreign policy ministers (at least four times a year but, in fact, much more often). The first body can only report to the second. The ministers of foreign affairs can state, in the form of a "declaration," the common view of the "European Community and its Member States" on a foreign policy question.[8] They can also decide upon a "common action" of the European Community and its Member States. The common positions and the common actions can be stated or decided only if every participant expressly agrees or at least raises no objection. If a common position or a common action is decided in this way, each Member State is supposed to comply with what has been decided. But if nothing has been decided, the Member States are free to conduct their policy on their own and in a totally independent manner.

In the field of the EPC, any question related to foreign policy can be discussed. In this framework, the Member States decided for example to impose sanctions against Argentina in 1982 following the invasion of the British Falkland islands by the Argentinian army. Since 1991, they have been trying to help found a solution to the Yugoslavian crisis using diplomatic means and, also, sanctions against Serbia.

Until the Single Act, it was clear that the "defence policy" was not included within the EPC because of the competences of both NATO and the WEU. Article 30.6 of the Single Act, states in a very cautious way that the Contracting Parties are willing to coordinate more their positions on the "political and economic aspects of security." Obviously, this leaves out the "hard core" of defence policy, namely its military aspects. In fact, since 1987, the defence policy—in the true sense of the word—has been left outside the EPC.

2.2. The effect of the MAASTRICHT Treaty

2.2.1. New fields of competence

The MAASTRICHT treaty includes provisions on "a common foreign and security

[8] The common positions and the common actions can be decided upon by the European Council itself. But the European Council normally meets only twice a year. So it can't have the continuous action that foreign policy usually requires. One of the interesting aspects of the P.C. is the common action of the Member States of the Community within the international organizations and, specially, within the United Nations. All the questions which are going to be discussed within the General Assembly are first discussed between the Member States which try to get to common positions and, very often, succeed. This does not apply to the Security Council.

policy" (title V) and provisions on "cooperation in the fields of justice and home affairs" (title VI). The second part does not represent an enlargement of competences in the sense that, before, such questions were already discussed within special groups composed of civil servants and the relevant ministers.

Nevertheless, this cooperation was far less active than that concerning the foreign policy matter.

We can expect that, following the MAASTRICHT treaty, cooperation between Member States will become closer.

It has also to be noticed that the treaty lists the "matters of common interest": asylum policy, rules governing the crossing by persons of the external borders of the Member States and the exercise of controls thereon, immigration policy and policy regarding nationals of third countries, combatting drug addiction, combatting fraud on an international scale, judicial cooperation in civil matters, judicial cooperation in criminal matters, customs cooperation, police cooperation for the purposes of preventing and combatting terrorism, unlawful drug trafficking and other serious forms of international crime.

But what is really new in the MAASTRICHT treaty is related to defence policy.

Article J.4: "The common foreign and security policy shall include all questions related to the security of the Union, including the eventual framing of a common defence policy, which might in time lead to a common defence."

As we can see, a common defence policy does not yet exist.

But the Union bodies have the right to decide the framing of a common defence policy. This objective can be achieved only through a treaty revision on the basis of a report to be presented in 1996 by the Council (of Ministers) to the European Council (see art. J.4/6).

It will need decisions about the relations between the European Union and the WEU because, pursuant to art. J.4/2, the WEU will be "an integral part of the development of the Union, to elaborate and implement decisions and actions of the Union which have defence implications."

Because the Brussels treaty which created the WEU will normally expire in 1998 we can expect that, if a defence policy can be established within the European Union, it will not be the case before 1998.

We also must be aware that the establishment of that common defence policy—and further of that common defence—will be difficult. All the present Member States of the EEC do not share the same conceptions about defence. One of them—Ireland—is a neutral State and is, of course, not a member of the WEU. Denmark only has an "observer" status within the WEU and has already expressed some distrust towards the whole concept of a common defence policy.[6] Furthermore, the relationship between the defence policy of the European Union and NATO raises a serious problem. France favours an "independent" European defence policy. Other States favour the establishment of strong links between the two organizations.

Finally, if the European Union is enlarged through the admission of States such as Austria, Sweden, Norway and Finland, it will increase the number of so-called neutral States since Austria and Sweden claim to belong to such a category.

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[6] See the EDIMBURGH European Council conclusions (Dec. 12 1992) which state that, for the time being, Denmark will not participate in the framing of the common defence policy.

In a word, the establishment of a European common defence policy will take time. Nevertheless, it seems likely that, one day, there will be a European common defence which will be a new and important factor in the international relations and equilibrium between the different parts of the world.

2.2.2. Institutions and the decision making process

Despite the fact that the MAASTRICHT treaty provisions related to defence policy and other fields of cooperation are much more precise and detailed than any earlier provisions, they introduce no revolutionary element with regard to what the decision making process in these fields has been until now.

What has been stated above (2.1.2.) about the common agreement principle will remain valid after the MAASTRICHT treaty comes into force.

In fact, all the important decisions will still be taken unanimously.[10]

What we can consider as the only new element is the fact that decisions will be taken by the Community institutions as such, namely the Council, instead of being taken by States. The Commission will get also more powers since it may refer any question and submit proposals relating to foreign policy to the Council.

Conclusions

——The completion of the internal market will strengthen the commercial unity of the Community.

——The MAASTRICHT treaty will expand the field of competences of the Community. The creation of the monetary union will make the Community a "monetary block" vis-à-vis the rest of the world.

——In the longer term, the MAASTRICHT treaty will also lead to the development of a "political" European block.

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[10] In a very cautious way, article J.3 states that when the Council decides (unanimously) that a matter should be subject to joint action, it can define (unanimously) some matters on which decisions are to be taken by a qualified majority.