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## THE IGC - WHERE WILL IT END?

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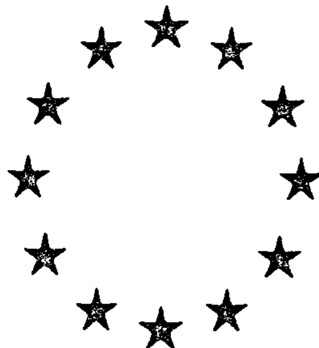
**EDRC Research Paper 4**



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## THE IGC - WHERE WILL IT END?

JOHN A. USHER

### Background

For many years changes to the text of the EC Treaty were few and far between, and tended to be highly specific in their nature, such as the 1965 Merger Treaty leading to a common institutional structure for the three Communities, and the 1975 Budgetary Treaty. Indeed between the signature of the original EEC Treaty in 1957 and that of the Single European Act in 1986, no change was made to the substantive policy provisions of that Treaty. The Single European Act however combined institutional reform with amendments and additions to the substantive provisions of the Treaty, providing for the completion of the internal market by the end of 1992 and conferring other express new competences on the Community; it also introduced express provisions on Political Cooperation which fell outside the normal Community legislative process and fell outside the jurisdiction of the European Court.

This pattern was developed further by the 1992 Maastricht Treaty on European Union which again made institutional changes, particularly with regard to the powers of the European Parliament, and again made amendments and additions to the substantive provisions of the Treaty, in particular to provide a mechanism for the development of Economic and Monetary Union. However, it also created a Union founded on the European Communities, supplemented by "the policies and forms of cooperation established by this Treaty". These policies and forms of cooperation comprise in particular the provisions on Foreign Affairs and Security and on Home Affairs and Justice which have become known as the second and third pillars of the Union (the Communities forming the first pillar). Like the Single European Act's provisions on Political Cooperation, these pillars fall outside the normal Community legislative process and fall outside the jurisdiction of the European Court.

This complex structure only became operational on the entry into force of the Maastricht Treaty in November 1993, and it may be wondered why a major revision should be contemplated so soon. The simple legal answer is that the Maastricht Treaty so requires: art.N(2) of that Treaty provides that "a conference of representatives of the governments of the Member States shall be convened in 1996 to examine those provisions of this Treaty for which revision is provided, in accordance with the objectives set out in Articles

A and B". The reference to art.A presumably indicates a desire to move to a further "stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen", whereas art.B states expressly that one of the objectives of the Union is "to maintain in full the "acquis communautaire" and build on it with a view to considering, through the procedure referred to in Article N(2), to what extent the policies and forms of cooperation introduced by this Treaty may need to be revised with the aim of ensuring the effectiveness of the mechanisms and the institutions of the Community."

While on a narrow reading of arts.B and N(2), the IGC might seem to be limited to matters arising from the Maastricht Treaty itself, more general issues have been raised in the reports, opinions and proposals submitted by all the Community institutions, all the Member States, and a Reflection Group consisting of representatives of Member States' Foreign Ministers and of the Commission President and two representatives of the European Parliament which was set up on 2 June 1995. The IGC has thus already given rise to a huge amount of material, though it must be said that much of it is easily accessible through the Internet. However, for the purposes of this paper, particular attention will be paid to the views expressed by the Commission, by the Reflection Group, and by the government of the United Kingdom in its IGC White Paper.

It may however be said at the outset that a common thread running through these submissions is that the provisions relating to the achievement of the Third Stage of Economic and Monetary Union are *not* in issue.

**The Agenda**

It is again common ground that the Maastricht Treaty itself requires certain matters to be discussed. As summarised by the Commission, these are:

the scope of the codecision procedure (EC Treaty art.189b(8);

security and defence (arts.J4(6) and J10);

energy, tourism and civil protection (Declaration No.1);

the hierarchy of Community acts (Declaration No.16).

The European Council subsequently agreed to add other items to this list of topics, notably the number of Commission members, the weighting of Member States' votes in the Council, and the measures required to facilitate the work of the institutions and ensure that they operate efficiently. More generally, it also agreed that consideration should be given to appropriate institutional arrangements to ensure that the Union will operate smoothly in the event of enlargement to include Cyprus, Malta and the countries of central and eastern Europe. This is of particular importance in so far as the EU is committed to starting accession negotiations with Cyprus and Malta six months after the conclusion of the IGC. Furthermore, the 1995 Madrid European Council expressed the hope that the initial phase of negotiations with at least some CEs would coincide with this.

It would appear that the European Parliament, the Council and the Commission have also agreed that two other matters should be put before the Conference. These relate to the operation of budgetary procedures, notably as regards the classification of expenditure, and the arrangements for exercising the executive powers conferred on the Commission to implement legislation adopted under the codecision procedure.

Essentially, this might seem largely to involve institutional "housekeeping" matters, though other participants have raised specific substantive issues. For example, the UK White Paper mentions the Common Fisheries Policy, where there have been well-known problems with regard to boats owned by national of other Member States, and animal welfare, a matter not just of political interest but also of legal interest in the UK following the judgment of the European Court in Case C-5/94 *R. v. MAFF ex p. Hedley Lomas* [1]. There the Court found that UK measures which prohibited the export of live sheep to Spain because of the alleged failure of Spanish slaughterhouses to comply with the relevant EC Directive on the stunning of animals before slaughter to be a breach of art.34 of the EC Treaty which could not be justified under art.36 of that Treaty, holding that a Member State may not unilaterally adopt corrective or protective measures designed to obviate a breach by another Member State of a rule of Community law; it further found that this was a breach of a rule of law designed to confer rights on individuals, and it was sufficiently serious to give rise to a liability in damages on the part of the UK if a direct causal link to the damage suffered by the applicant could be shown.

However, the emphasis of the Reflection Group's report, delivered in December 1995, is somewhat different. It suggests three main areas for discussion, the first of which is entitled "The citizen and the Union", with subheadings on "Promoting European values" (concerned to a large extent with human rights), "Freedom and internal security", "Employment", "Environment", "A more transparent Union" and "Subsidiarity". It is only in the second heading, "Enabling the Union to work better and preparing it for enlargement" that the institutional issues mentioned above are treated, and the third section is entitled "Giving the Union greater capacity for external action", and is concerned in particular with the development of a Common Foreign Policy and European security and defence policy. On the other hand, the Commission's formal Opinion, delivered in February 1996, while it deals effectively with the same three groups of themes, and makes "A People's Europe" its first major heading, nevertheless emphasises in its introduction the institutional problems arising from the likely enlargement of the Union. It states that:

> "....because of its scope and its diversity, this enlargement will be different from previous ones: an extended Europe is bound to be more heterogenous and therefore more complex.
>
> As the number of Union members increases, it creates a risk of the Union being watered down. As one Head of State put it, we have to avoid the situation where, as the last applicant country arrives, it joins something which no longer exists. Enlargement must be undertaken with safeguards for the achievements of forty years of European integration. These achievements are the basis of the Union's solidarity with the new Member States.
>
> That is why the European Union cannot commit itself to this round of enlargement without making sure that changes, sometimes far-reaching ones, are first made in the ways and means of its operation."

The IGC itself opened in March 1996, and the scope of the actual discussions may be discerned from the published programme for its work under the Italian Presidency until the end of June 1996, which appears to have involved three meetings on citizenship, three meetings on institutional matters, and three meetings on external action by the Union. It would appear that the meetings so far have involved statements of position by the participants rather than discussion of specific proposals, but at the conclusion of the Florence meeting of the European Council in June 1996, following the settlement of the crisis caused by the British policy of non-cooperation over restrictions on trade in beef and beef products, the hope was expressed that a first text would be available for the meeting in Dublin in December 1996 preceded by an informal summit would be held in October to take stock of the progress made.

There are therefore as yet no specific proposals on which this paper can comment, but it is not on the other hand possible to do justice to all the issues raised by the participants within its scope. The remainder of this paper is therefore devoted to consideration of a few specific problems arising within the overall framework of the issues under discussion so as to illustrate the range of views involved.

**Citizenship**

In the context of citizenship, after declaring that the right way for the Union to regain the commitment of its citizens is to focus on what needs to be done at European level to address the issues that matter to most of them such as greater security, solidarity, employment and the environment, the Reflection Group Report nevertheless places a heavy emphasis on human rights, stating that

> "Human rights already form part of the Union's general principles. For many of us they should, however, be more clearly guaranteed by the Union, through its accession to the European Convention on Human Rights and Fundamental Freedoms. The idea of a catalogue of rights has also been suggested, and a provision allowing for the possibility of sanctions or even suspending Union membership in the case of any state seriously violating human rights and democracy. Some of us take the view that national governments already provide adequate safeguards for these rights.
>
> Many of us think it important that the Treaty should clearly proclaim such European values as equality between men and women, non-discrimination on grounds of race, religion, sexual orientation, age or disability and that it should include an express condemnation of racism and xenophobia and a procedure for its enforcement."

The Commission is also sympathetic in its Opinion to the idea of accession to the European Convention on Human Rights and Fundamental Freedoms, although it also promotes the concept of the "European social model", emphasising its view that

> "Europe is built on a set of values shared by all its societies, and combines the characteristics of democracy, human rights, and institutions based on the rule of law, with those of an open economy underpinned by market forces, internal solidarity and cohesion. These values include the access for all members of society to universal services or to services of general benefit, thus contributing to solidarity and equal treatment."

The United Kingdom on the other hand asserts that it does not consider, however, that the European Union is the right context for the protection of fundamental human rights, or for a general clause, "as some partners have advocated," prohibiting discrimination for example on grounds of gender, sexual orientation, race, religion, age or disability. It notes that fundamental human rights are already protected by the European Convention on Human Rights (ECHR) to which all Member States are party, and which the Union too is bound to respect, under Articles F and K.2 of the Maastricht Treaty. It adds that these rights

are enforceable through the Commission and Court established by the ECHR Convention, and concludes that duplicating the ECHR in the Treaty would serve no useful purpose and might confuse the jurisdictions of the ECJ and the ECHR. It might merely be added that such confusion appears to exist already in much of the media.

Whatever the merits of the arguments, it may be submitted that this is a matter which will require conscious consideration, since the European Court has held in *Opinion 2/94* [2]that for the *Community* to accede to the Convention would amount to a constitutional change, and that such accession would therefore require a formal Treaty amendment.

With regard to the question of employment, there was clearly a difference of opinion in the Reflection Group.

> "While we are all aware that jobs will not be created simply by amendments to the Treaty, many of us want the Treaty to contain a clearer commitment on the part of the Union to achieving greater economic and social integration and cohesion geared to promote employment, as well as provisions enabling the Union to take coordinated action on job creation. Some of us advised against writing into the Treaty provisions which arouse expectations, but whose delivery depends primarily on decisions taken at business and state-level."

On the other hand, the Commission has proposed that specific provisions on employment be written into the Treaty, grounded in experience accumulated by the Community and which treat employment as a matter of common interest. They would aim at establishing the conditions for a common strategy for employment, stimulating cooperation between the interested parties, consolidating the arrangements for multilateral surveillance of Member States' multiannual programmes, and most generally taking employment into account in all Community policies.

As may be imagined, the UK government takes a somewhat different view. It asserts that it will oppose extending Community competence over employment, stating that it is businesses which make jobs and that creating the right conditions for employment is primarily a national responsibility.

It is of particular interest to note that both the Reflection Group and the Commission treat protection of the environment as an aspect of citizenship, which may be regarded as returning to the original justifications for Community action in the environmental field before it had express competence, when it was claimed that such action would improve living and working conditions and improve the standard of living of Community citizens. The reports suggest that an environment benefitting from a high level of

protection is one of the major concerns of citizens in the Union. This is hardly a new area of activity for the Community, having given rise to express provisions under both the Single European Act and the Maastricht Treaty, and in part the Reflection Group repeats the established justifications for Community action, stating that in essence, the environment has crossborder effects and that protection of the environment is an objective involving our survival not only as Europeans but also as inhabitants of the planet. It then moves to an indirect reference to the principle of subsidiarity, which after all was first introduced into the Treaty texts in the context of environmental competence under the Single European Act, suggesting that the Conference should examine how to improve the capacity of the Union to act more efficiently and to identify whenever that action should remain within the Member State.

The Commission on the other hand considers that the provisions of the Treaty directed at sustainable development and at a healthy environment should be reinforced in two ways:

- the right to a healthy environment, and the duty to ensure it, should be included in those provisions of the Treaty affecting the citizen;

- the environment should be specifically incorporated into the other policies of the Union.

By way of contrast, while the UK White Paper mentions the environment as a possible agenda item it sets out no proposals in the area.

It might finally be observed that the Reflection Group treats the principle of subsidiarity as an aspect of the citizen and the Union. At least it can be said that the link with the environment is well established. The statement of the principle of subsidiarity introduced by the Maastricht text is in art.3b of the EC Treaty, to the effect that "in areas which do not fall within its exclusive competence" the Community should take action only if and 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. This in fact repeated more generally what had been stated with regard to environmental competence by art.130r(4) of the EC Treaty, inserted by the Single European Act, under which "the Community shall take action relating to the environment to the extent to which the objectives ....... can be attained better at Community level than at the level of the individual Member States". Be that as it may, the Reflection Group believes it necessary to reinforce its proper application in practice, and that the Edinburgh Declaration should be the basis for that improvement. It

further states that "some of us" believe that its essential provisions should be given Treaty status, and in the UK White Paper it is clearly stated that the UK had suggested including in the Treaty elements of the subsidiarity guidelines agreed at the 1992 Edinburgh European Council and that this idea had been picked up in the IGC Reflection Group report. Discussion of subsidiarity does, however, lead to the question of the operation of Community and Union institutions.

The proposals at issue with regard to the institutions seem essentially to be concerned with the composition of certain of the institutions, voting procedures within them, and the decision-making and legislative process.

**Composition of Community and Union Institutions**

Since 1979, the European Parliament has been elected directly by the citizens of the Community, albeit not by uniform methods. The seats are nevertheless allocated to each Member State in a way which is not directly proportionate to population but which gives the bigger Member States more seats than the smaller ones. Until German reunification, the range went from 6 seats for Luxembourg to 81 each for Germany, France, the UK and Italy. However, following the reunification of Germany, it was agreed to recognise the demographic consequences at least to some extent: the number of seats for Germany was raised to 99 (an increase of 18 seats), but the seats for the other three big states were raised by six each to 87, making a total of 18 additional seats between those States. The consequence overall therefore was to increase the relative representation of the big Member States as compared to the smaller ones, but also to ensure that the increase for Germany was balanced by an increase for the other big States, thus showing that the balancing of political weight was as important as (if not more important than) the representation of additional population. Be that as it may, it may be wondered whether a possible way forward with regard to new small states would be not to eliminate their representation but to increase the representation of the bigger Member States.

This is a matter on which both the Commission and Parliament have expressed views for consideration at the IGC. The Commission has indicated that to prevent the European Parliament from becoming disproportionately large, there will have to be a limit on the number of its members, however many Member States there are in the Union. It would that the Parliament has itself proposed limiting its

membership to 700, and the Commission has expressed agreement with this. However, it recognises that one effect of this reduction would be that the electoral base of each Member of Parliament will rise, to over a million in the most highly populated Member States. The Commission considers that this further intensifies the need for a common electoral procedure so as to ensure, as is laid down in the Treaty, that the members are as representative as possible. The Reflection Group also recalls that a uniform electoral procedure should be established.

Greater problems arise where the institution is not necessarily meant to be representative. While the members of the Commission must neither seek nor take instructions from any government or from any other body, only nationals of Member States may be members of the Commission, and the Commission must, under the Treaty in its present version, include at least one national of each of the Member States, but may not include more than two members having the nationality of the same State. In practice there are currently 20 Commissioners, two from each of the big countries (which for this purpose include Spain) and one from each of the other Member States. One of the matters which will clearly be raised at the intergovernmental conference is whether the number of Commissioners should be reduced to one per State, and there have been ideas floated of grouping some of the smaller countries together to have a rotating Commissioner between them, which essentially is the system used for selecting Advocates-General before the Court (other than those who come from the four big countries). The Reflection Group recognises two alternative views:

> "one view within the Group is to retain the present system for the future, reinforcing its collegiality and consistency as required. This option would allow all members to have at least one Commissioner. Another view is to ensure that greater collegiality and consistency be attained by reducing the Commissioners to a lesser number than Member States and enhancing their independence."

The Commission itself takes the view that, in the context of enlargement, the number of its Members should be reduced to one per Member State. On the other hand, the UK suggests that

> "With further enlargements, however, it may not be appropriate to retain the present system. The IGC will consider how to achieve an acceptable balance. Among other options it has been suggested, for example, that large Member States might always appoint one Commissioner, while smaller Member States did not always enjoy this privilege; there might be a two-tier Commission, with voting and non-voting members; or one in which not all Commissioners were given specific portfolio responsibilities."

With regard to membership of the European Court, the Treaty is not specific as to the representation of each Member State; it merely states that the Judges and Advocates-General are to be

chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognized competence. However, the current Court of 15 judges is composed of one from each Member State, and until the enlargement of the Court shortly after Greek accession, if one took the judges and Advocates General together, there were always two members of the Court from the big Member States. However, since then there has been more of a trend towards meeting the Court's manpower needs, as exemplified in the number of Advocates General (in principle 8 but currently 9) rather than proportionate representation of the Member States.

In the case of the Court of First Instance, the Treaty provisions merely required that its members should be chosen from persons whose independence is beyond doubt and who possess the ability required for appointment to judicial office, and in its initial proposals on the matter, the European Court suggested that the Court of First Instance could be a small body with e.g. five judges. However, the Council eventually decided on the creation of a body with 12 judges (which turned out to have one judge from each Member State), and it has been enlarged to 15 following the 1995 accessions, with its three new members coming from each of the three new Member States.

However, as the Commission points out, the prospect of seeing some sixty judges at the Court of Justice and the Court of First Instance is a good ground for examining the consequences. In its report to the Reflection Group, the Court stressed how important it was for all the various national legal systems to be represented. However, it also pointed out that

> "any significant increase in the number of Judges might mean that the plenary session of the Court would cross the invisible boundary between a collegiate court and a deliberative assembly. Moreover, as the great majority of cases would be heard by chambers, this increase could pose a threat to the consistency of the case-law".

The Commission similarly agreed with the Court's view that the judges' term of office could be extended, while becoming non-renewable, stating that such a reform would reinforce even more firmly the judges' independence. In the Reflection Group, a majority of representatives similarly thought that the term of office of Judges should be extended to nine years, with no possibility of reappointment.

With regard to the consequences of future enlargement of the Union, however, some members took the view that the number of Judges should be fewer than the Member States in order to ensure efficiency and consistency. Other members of the Reflection Group took the line that all States should have a Judge at

the Court so that all legal systems of Member States are represented. A middle course put forward was that, for the purposes of national participation, not only Judges should count but Advocates General as well. It remains to be seen which of these alternatives will find favour.

**Voting procedures**

The interests of the Member States at the Community level are most directly represented in the Council of Ministers, defined in art.146 of the EC Treaty as consisting of a representative of each Member State at ministerial level, authorized to commit the government of that Member State. No-one has seriously suggested that a Member State should not be represented in the Council.

However, the Single European Act and the Maastricht Treaty have promoted a trend towards increased use of qualified majority voting. The original version of the EEC Treaty did, of course, contain a number of provisions allowing for a qualified majority to be used, and indeed in some matters it even allowed the Council to act by a simple majority - critics of the Single European Act would in fact count it as a retrograde step that whereas the old Article 49, dealing with legislation on the free movement for workers, allowed the Council to act by a simple majority, albeit without being required to consult the European Parliament, the new version introduced by Article 6(3) of the Single European Act requires the Council to act by a qualified majority, even if it is in co-operation with the European Parliament. On the other hand, simple majority voting remained possible in the area of vocational training under Article 128 of the original EEC Treaty, a provision held to be wide enough to cover the second phase of the programme on cooperation between universities and industry regarding training in the field of technology (COMETT II) in Cases C-51, 90 and 94/89 *United Kingdom, France and Germany v. Council*[3], until its replacement by the more specific provisions on education introduced by the Maastricht Treaty.

However, although the Treaty provided for majority voting, the opportunity was very rarely taken to make use of it. This, to a large extent, is usually attributed to the influence of the so-called Luxembourg Accords of 1966. In the light of the fact that the UK White Paper insists that qualified majority voting "works against the background of a political agreement known as the Luxembourg Compromise whereby, in the last resort, a Member State may insist that where it has a very important national interest at stake in a particular decision, discussion should continue until its fundamental problem has been resolved," and in

particular in the light of the UK's policy of non-cooperation in June 1996 in the context of the BSE crisis, the history of the matter is worthy of repetition.

In anticipation of the introduction of qualified majority voting in the Council of Ministers with regard to agricultural legislation under art. 43(2) and (3) of the EC Treaty, at the end of the second stage of the original transitional period (i.e. 1 January 1966), the French government pursued its "empty chair" policy in the second half of 1965, refusing to send a Minister to attend Council meetings. The Accords, which in reality appeared to be no more than a press release recording the terms of the settlement under which France agreed to end its "empty chair" policy, record the agreement of the Member States that even where decisions could be taken by a majority vote, where very important interests of a Member State were at stake, the members of the Council would endeavour to reach solutions which could be adopted by all the members of the Council, and a second paragraph added that the French delegation considered that where very important interests were at stake, the discussion must be continued until unanimous agreement was reached. Whatever may be the precise legal status of this agreement to disagree, it has been of considerable political importance. It gave rise to what was effectively a convention that policy-making legislation would only be adopted in the Council when a consensus had been achieved; so, for example, it took 17 years to reach agreement on a Directive concerning the activities of architects[14]. However, on one of the few occasions on which the United Kingdom formally invoked the Luxembourg accords, in relation to the 1982 agricultural prices, a vote was still taken and the United Kingdom was out-voted. It may nevertheless be doubted whether the all participants intended simply to override the Luxembourg Accords: it would appear that France (which voted with the majority) took the view that the agricultural prices as such were not "very important interests" for the UK, whose real argument was over contributions to the EC budget. In the light of that, the 1996 non-cooperation policy clearly did not fall within the scope of the Luxembourg Accords, even if they do still have any status.

That the use of unanimity, albeit with abstentions, was really a matter of political will, rather than legal obligation, is illustrated by the fact that although until 1986 the number of decisions taken by the Council on a majority basis barely reached double figures in any one year, in 1986, even though the Single European Act was not yet in force, during the first half of the year under the Dutch Presidency, some 43 items of legislation were adopted on a majority basis, and in the second half of the year, under the United

Kingdom presidency, no less than 55 legislative acts were adopted on a majority basis.[15] Subsequently, qualified majority voting has become the norm in most areas of Community policy-making (with the notable exception of taxation[4]), although the "Ioannina compromise" mentioned below may be seen as following in the same tradition as the Luxembourg Accords.

The Reflection Group records that in the case of Community legislation, a large majority in the Group was prepared to consider making qualified majority voting the general rule, on grounds of efficiency, since it would facilitate decision-making and, according to some, reduce discrepancies between the state of development attained by the internal market (qualified majority) and the policies in the social, fiscal and environmental spheres (in which unanimity is often the rule).

The Commission has similarly suggested that in an enlarged Union, adherence to unanimity would often result in stalemate. Indeed, the difficulty of arriving at unanimous agreement would rise exponentially as the number of members increased. The Commission accordingly proposes that qualified majority voting become the general rule, and it may be suggested that political pressure in this direction has been increased following the UK policy of non-cooperation in 1996.

The Commission however is willing to accept that unanimity need not necessarily be replaced by qualified majority voting as defined at present. It has suggested that in particularly sensitive fields, decisions could be taken by "super-qualified" majority voting, for example.

Qualified majorities involve a system of weighted voting, approximately related to the size of the Member State, so that the four big Member States, the United Kingdom, France, Germany and Italy, each have 10 votes, whereas at the other end of the scale, Luxembourg has two votes[5]. Until the accession of Spain and Portugal in 1986, the system was designed to ensure that no more than one big Member State could be out-voted, but that the big Member States could not by themselves out-vote the smaller Member States. However, from 1986 onwards, it has in fact been possible for two of the large Member States to be out-voted on a qualified majority vote; in other words, France and the United Kingdom, for example, could vote against a proposal and it could still become Community law. This trend has been continued following the Accession of Sweden, Austria and Finland (though it is still not possible for three big states to be outvoted), and gave rise to UK resistance, which led to the so-called "Ioannina compromise". While in principle following those accessions a qualified majority requires 62 of the total of 87 votes distributed

between the Member States, under that political compromise, "if members of the Council representing a total of 23 to 25 votes indicate their intention to oppose the adoption by the Council of a decision by qualified majority, the Council will do all within its power to reach, within a reasonable time and without prejudicing the obligatory time limits laid down by the Treaties and by secondary legislation, such as those in Articles 189b and 189c of the Treaty establishing the European Community, a satisfactory solution that can be adopted by at least 65 votes. During this period, and with full regard for the Rules of Procedure of the Council, the President, with the assistance of the Commission, will undertake any initiatives necessary to facilitate a wider basis of agreement in the Council. The members of the Council will lend him their assistance." This appears to be an attempt (albeit limited in scope) politically to preserve the rights of what would have been a blocking minority before the 1995 Accessions.

Indeed, the Council Secretariat has calculated that if the previous trend in the development of qualified majorities continued unaltered, in a Community of 28 (including Malta) a group of States representing less than half of the total population could constitute a qualified majority. By way of contrast, while the current qualified majority represents about 71% of the weighted votes, in those areas where it is anticipated that Community activity may involve less than all the Members of the Community, notably under the Social Protocol and eventually under the third stage of Economic and Monetary Union, a qualified majority has been reduced to two-thirds of the available votes.

Be that as it may, while it may be doubted that the votes of small states will be reduced, it may be wondered whether the votes of the big states might be increased, as has happened with the representation of the big States in the European Parliament following German reunification.

In this context, the Reflection Group reported that it had been stressed by some members that the extension of qualified-majority voting would increase the efficiency of the Union only if its decisions are supported by a significant majority of the Union's citizens. In this context, those members emphasised the need of adequately taking into account the size of population in the decision-making by the re-weighting of votes within the Council, and/or the adoption of a double significant majority of votes and citizens. Some members of the Group insisted that the effectiveness of the Union will depend on such decisions having the backing of as many European citizens as possible. For this to be the case, the revision should keep the qualified majority threshold at an effective level and such decisions should not leave a significant proportion

of the people of Europe in a minority. However, it would appear that there was no specific option enjoying broad support in the Group when it came to putting this into practice. According to the UK White Paper, the simplest solution would be to change the numbers of votes accorded to each Member State within the system so that the weighting of votes is in better proportion to the population of each Member State. Another approach would be to establish a second, population-related, criterion. Under this system, acts of the Council would require both a given number of votes and votes representing a certain proportion of the EU's population. The UK further insists that in both cases a decision would need to be reached on an appropriate voting threshold. A system which allowed countries representing a significant percentage of the EU's population or the major net contributors as a group to be outvoted would not be acceptable to the UK.

A final point on voting procedures is the revolutionary suggestion by the Commission that what holds true for Community legislation also holds true for the Treaty itself and amendments to it:

> "if in future the Treaty could, as at present, be amended only by unanimity, it would be in danger of stagnating in the state in which the 1996 conference left it, making future progress in the direction of European integration an unlikely prospect. The Commission considers that in future it should be possible to amend at least provisions that are not of a constitutional nature by a procedure which imposes fewer constraints than the one currently in force."

**Legislative Process and Decision-Making**

It is a distinctive characteristic of the EC Treaty that it does not lay down a single legislative procedure and does not provide for a single legislative authority; indeed, recent reforms designed to increase the influence of the directly-elected European Parliament have had the effect of adding to this multiplicity of systems. It is in practice necessary to look at each substantive enabling provision in the Treaty in order to determine which institution or institutions may act, the voting procedures to be used, and which, if any, institution or institutions must be consulted. However, leaving on one side the few provisions which expressly confer legislative power on the Commission [6], and the enhanced role for the Parliament in the budgetary procedure, [7] what the Treaty provisions have in common is that the procedure must start with a proposal from the Commission and that the legislation is finally adopted by the Council or, under the codecision procedure introduced by the Maastricht Treaty, the Council and Parliament jointly.

At its simplest, there may be no intermediate stage between Commission proposal and Council act, although it is more usual for consultation of some or all of the European Parliament, the Economic and

Social Committee and the Committee of the Regions to be required. On the other hand, the Council may be required to obtain the assent of the European Parliament, or, in many areas of activity, to act in cooperation or codecision with the European Parliament, and in these procedures also there may be a requirement to consult the Economic and Social Committee and sometimes the Committee of the Regions.

Both the Reflection Group and the Commission are of the opinion that there should be three types only of decision-making procedure: decisions adopted on Parliament's opinion, those adopted with its assent, and the codecision procedure involving Parliament and the Council, and that the codecision procedure should be applied more widely, and also made more simple. This last point can best be appreciated in the context of the historical development of the cooperation and codecision procedures.

The co-operation procedure was introduced by the Single European Act, and is now governed by art.189c of the EC Treaty. This effectively added a new stage or series of stages, commonly referred to as a second reading, to the previously existing method of legislation under which Parliament is required to be consulted when so provided by the Treaties. Hence, as before, the legislative process commences with a proposal from the Commission which is sent to the Council which in turn consults Parliament, and once the Parliament has given its opinion, the Commission considers whether to incorporate any of the Parliament's suggestions into its draft. However, when the Council considers the proposal in the light of the Parliament's opinion, rather than taking a final decision as it would under the original system, assuming any decision at all is to be taken, the Council is instead required to adopt a so-called "common position" by a qualified majority. Although no express time limits are laid down for this stage, it would appear that the fact that the Council is not required finally to commit itself, and the fact that it can act by a qualified majority, has meant that the reaching of a common position has not usually encountered the previous delays.

Once the Council has adopted a common position, then the matter goes back to the Parliament and the Parliament may do one of four things. It may simply approve the Council's position or, on the other hand, it may within a period of three months from the common position being notified to it, simply fail to take a position, in which case the Council would then simply adopt the proposal. At first sight, it might seem unlikely that the Parliament would take no position: however, in order to amend or reject the Council's common position, it has to act by an absolute majority of its members, and given the political balance (and, it may be said, the attendance record) of the members of the European Parliament before the

entry into force of the Single European Act, it may well have been thought that in practice it would be extremely difficult to obtain an absolute majority on much of the legislation which was likely to come before the Parliament. The reality is, however, that qualified majorities have regularly been obtained, for reasons which will be explained.

As a practical expedient, it would appear that Parliament's practice is to hold votes under the cooperation procedure (and also now under the codecision procedure) at the same time on the same day in each session week.

Where Parliament raises an absolute majority to reject the Council's common position [8], this does not however mean that the proposal is totally rejected; rather, it means that the Council may only adopt it if it acts unanimously, though it may be suggested that if an absolute majority is against a proposal in the Parliament, it is rather unlikely that the Council will be unanimous in its favour. The fourth possibility open to the Parliament is to amend the Council's common position by an absolute majority of its members [9]. At first sight this, as drafted, would appear to leave the Parliament with complete liberty to develop a second opinion on the proposal, assuming the necessary majority may be found. However, in order to try to make the second reading procedure more effective, the Parliament in fact accepted proposals to the effect that on the second reading, the Parliament should concentrate on the text as it leaves the Council, i.e. the Council's common position, and should restrict amendments to those which would return the text to that which resulted from the Parliament's original position, those which deal with matters in the common position which were not in or differ from the proposals submitted for first reading, and those which represent a compromise agreement between Parliament and Council. [10] It is therefore the case that no new amendments may be put at the second reading stage except to the extent that the common position represents a change from the original proposal or a compromise has been reached with the Council.

If the Parliament obtains an absolute majority to amend the Council's common position within these parameters, then the proposal goes back to the Commission, which has one month within which it may review the European Parliament's amendments, and revise its proposal only so as to take account of the amendments proposed by the European Parliament. The proposal then goes back to the Council which in turn may adopt, or fail to adopt, four alternative modes of action within the space of three months. First, it may adopt the Commission's revised proposal, and to do that it need act only by a qualified majority.

Secondly, the Council does have power itself to adopt amendments suggested by the European Parliament which have not been incorporated into the proposal by the Commission, but to do this the Council must act unanimously. Thirdly, the Council may itself make other amendments to the revised proposal submitted by the Commission, though in order to do this the Council must again act unanimously. Finally, the Council may simply fail to do any of those three things within the three months period, and although the Parliament can grant it a further one month extension, if the Council does not act by the end of that period, then the effect is that the Commission's proposal lapses. Although at first sight, this co-operation procedure would appear always to give the Council the last word, it may be noted that the Commission retains the right to alter its proposal at any time during the whole procedure, and it would therefore appear that the Commission could, if it felt that amendments pursued by the Council effectively changed the nature of its proposal, simply withdraw its proposal - as indeed it did in November 1986 with regard to the Erasmus scheme for student exchanges.

Although the Maastricht Treaty introduced the codecision procedure under art.189b, which takes the powers of the Parliament a stage further, and most internal market provisions of the Treaty now refer to this procedure, the cooperation procedure remains in force, having replaced a previous requirement of unanimity in some areas, such as much of the environmental legislation under art.130s, and it was even introduced for new areas such as Trans-European Networks, where under art.129d the cooperation procedure is to be used for measures other than guidelines envisaged in art.129c(1).

As will be seen from the simplified outline of the co-operation procedure given above, the scheme is one of Byzantine complexity, rivalling that of the budgetary procedure, but without on the face of it giving the Parliament so much power. However, if the cooperation procedure seems complex, the codecision procedure introduced by the Maastricht Treaty as art.189b of the EC Treaty is even more so.

The major differences from the cooperation procedure are that in the codecision procedure the Council cannot override the Parliament even by unanimity (which means that the Parliament has an effective veto, even if it in turn cannot override the Council), the resultant legislation is regarded by the Treaty as emanating from the European Parliament acting jointly with the Council [11], and it adds a process of conciliation to the basic pattern of the cooperation procedure at two different stages in the second reading. The first is where the Parliament under the cooperation procedure could reject the Council position by an

absolute majority: under the codecision procedure it may indicate by an absolute majority of its component members that it *intends* to reject the common position, and the Council may then convene the Conciliation Committee. The second is where the Council at the end of the second reading does not approve the act in question within three months of the matter being referred to it, given that unlike the cooperation procedure it may not even by unanimity act outside the scope of the Parliament's amendments; the only other choices available to the Council at the end of the second reading in the codecision procedure are to approve all the Parliament amendments on which the Commission has given a positive opinion by qualified majority and approve the act, or to adopt those amendments on which the Commission has given a negative opinion by unanimity. In the event that the Council does not approve the proposal after the second reading, the conciliation procedure effectively becomes a third stage in the legislative process.

The conciliation procedure involves the creation of a Conciliation Committee, which in terms of art.189b(4) is composed of the members of the Council or their representatives and an equal number of representative of the European Parliament. It has the task of reaching agreement on a joint text, by a qualified majority of the members of the Council or their representatives and by a majority of the representatives of the European Parliament. The Commission is entitled to take part in the Conciliation Committee's proceedings and is required to take all the necessary initiatives with a view to reconciling the positions of the European Parliament and the Council.

As indicated above, a meeting of the Conciliation Committee may be convened where the Parliament has indicated that it intends to reject a common position; under art.189b(2)(c), the Council may convene a meeting of the Conciliation Committee to explain further its position. The European Parliament may thereafter either confirm, by an absolute majority of its component members, its rejection of the common position, in which event the proposed act shall be deemed not to have been adopted, or propose amendments, also by an absolute majority of its component members. These amendments are then forwarded to the Council and Commission, and the Commission must deliver an opinion on them before further consideration by the Council.

The Conciliation Committee may also be convened, under art.189b(3), where the Council does not approve the act in question following the second reading. Here it is provided that if within six weeks of its being convened, the Conciliation Committee approves a joint text, [12] the European Parliament, acting by

an absolute majority of the votes cast, and the Council, acting by a qualified majority, have a period of six weeks from that approval in which to adopt the act in question in accordance with the joint text. If one of the two institutions fails to approve the proposed act, it is deemed not to have been adopted. Where the Conciliation Committee does not approve a joint text, [13] the proposed act shall be deemed not to have been adopted unless the Council, acting by a qualified majority within six weeks of expiry of the period granted to the Conciliation Committee, confirms the common position to which it agreed before the conciliation procedure was initiated, possibly with the amendments proposed by the European Parliament. Even here, however, the act in question may not be finally adopted if the European Parliament, within six weeks of the date of confirmation by the Council, rejects the text by an absolute majority of its component members.

It may be suggested that although it may be categorised as giving the Parliament a veto over the Council and the Council a veto over the Parliament, the real importance of the conciliation procedure lies in the creation of a formal legal framework for compromise between those institutions which would appear to work in practice despite its apparent complexity. The complexity itself arises in part from the aim of enabling proposals to be rescued from disagreement between those institutions at two different stages in the legislative process. It remains to be seen whether the fact that the Parliament is represented in the Conciliation Committee by a small team equal in number to the members of the Council will lead to the recognition of a special status for certain members of the European Parliament.

The Commission's view is that the procedure has on the whole worked well, but that it could be quicker and more effective if it were simplified. It would appear that a large majority in the Reflection Group was in favour of extending the scope of the codecision procedure, and the Commission's view is that it should apply to the adoption of all acts of a legislative nature, though it accepts that this would entail clarification of what actually constitutes a legislative instrument. By way of contrast, the UK government believes that the European Parliament is most likely to win public support, and develop its role, by the "responsible exercise" of powers it already enjoys. It further asserts that conciliation under the codecision procedure is not yet operating smoothly, claiming that the European Parliament has sometimes used its powers under this procedure irresponsibly, to try to force the Council to accept institutional changes not directly related to the legislation under discussion. The UK government believes that if the European Parliament is to win public trust and confidence, "it will need to

demonstrate that it has been using its new powers responsibly." This criticism takes on a certain irony in the light of the actions of the UK government in blocking totally unconnected legislation under its non-cooperation policy during the BSE crisis in June 1996.

**The Pillars of the Union**

One particular problem for the IGC will be the relationship between the Community and non-Community pillars of the Union. The Maastricht Treaty had the stated aim [14] of creating a "European Union" founded on the European Communities "supplemented by the policies and forms of cooperation established by this Treaty". The basic theory therefore appears to be that the Communities are a part of the Union, but that there are aspects of the activity of the Union which fall outside the competence of the Communities; in other words the widening of the scope of cooperation between the governments of the Member States was not necessarily accompanied by a correlative widening of the powers of the Community or by a deepening of its institutional structure.

The Union is often therefore described as resting on three pillars, the central (and strongest) of which is constituted by the Community treaties, flanked by the rather more slender pillars of the provisions on a Common Foreign and Security Policy and those on Cooperation in the Fields of Justice and Home Affairs. However, in terms of art.C of the Treaty on European Union, the Union is served by a single institutional framework which is intended to "ensure the consistency and the continuity of the activities carried out in order to attain its objectives while respecting and building upon the *acquis communautaire*". While therefore the same institutions are in principle involved in the activities of the Union and of all three Communities, their functions nevertheless differ as between the Community and the non-Community activities of the Union, and as between the three Communities.

Before attempting to analyze the concept of the "Union", it should be remembered that the Maastricht Treaty resulted from separate draft treaties respectively on Political Union and on Economic and Monetary Union, and that different solutions were adopted with regard to the achievement of those "unions". The provisions relating to Economic and Monetary Union take the form of amendments to the EC Treaty and therefore form an integral part of Community law [15]; on the other hand, in the context of the provisions relating to Political Union, a distinction was made between those matters which constituted

amendments to the existing Community treaties, and those which fell outside the scope of the Communities, notably the provisions on a Common Foreign and Security Policy and those on cooperation in the fields of Justice and Home Affairs.

It should be said at the outset, however, that the terminological distinction is not always maintained: it is somewhat blurred in the context of citizenship of the *Union*, which is inserted into the *Community* Treaty in arts.8 and 8a to 8e. Under art.8 of the EC Treaty as amended, every person holding the nationality of a Member State is a citizen of the Union, thus enjoying the rights conferred by the EC Treaty and being subject to the duties imposed thereby. Art.8a(1) provides that every citizen of the Union has the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaty and by the measures adopted to give it effect, and art.8b also gives certain political rights to every citizen of the Union residing in a Member State of which he is not a national: these are the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State, and the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which he resides, under the same conditions as nationals of that State. Indeed art.8c creates a right to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State, in the territory of a third country in which the Member State of which he is a national is not represented.

However, there is no Community or Union definition of a citizen of the Union other than the reference to persons holding the nationality of a Member State. Thus, in the case of the United Kingdom, only British citizens, British subjects with the right of abode on the UK, and British Dependent Territories citizens who acquire their citizenship from a connection with Gibraltar are treated as nationals of a Member State. [16] On the other hand, the German Declaration annexed to the EC Treaty refers to art.116 of the German Basic Law, which contains a definition which was wide enough, in the period before German reunification, to cover most East German citizens.

Following the example of the exclusion of the Political Cooperation provisions of the Single European Act from the jurisdiction of the European Court, art.L of the Maastricht Treaty similarly defines the provisions of that treaty subject to the jurisdiction of the Court in such a way as to exclude those on Foreign and Security Policy and those on Home Affairs and Justice (with one minor exception). Whilst at

first sight this takes these areas outside the scope of enforceable Community law, it may be wondered how total the exclusion is.

To take a simple example, joint action decided as a matter of foreign policy may be reflected in measures adopted by the Community: this is envisaged in the second paragraph of art.C of the Maastricht Treaty, which provides that "the Union shall in particular ensure the consistency of its external activities as a whole in the context of its external relations, security, economic and development policies." To this is linked art.228a of the EC Treaty, the effect of which is that where it is provided, in a common position or in a joint action adopted according to the provisions of the Treaty on European Union relating to the common foreign and security policy, for an action by the Community to interrupt or to reduce, in part or completely, economic relations with one or more third countries, the Council is empowered to take the necessary urgent measures as a matter of Community law. Thus, to take a clear example, the policy of imposing sanctions on Serbia and Montenegro is implemented at Community level by legislation adopted under art.228a of the EC Treaty. Indeed even before the entry into force of this provision, such measures were adopted under art.113 of the EC Treaty as a matter of common commercial policy.[17] These Regulations produce their normal effects under Community law and are subject to the normal judicial remedies of Community law, irrespective of their political genesis.

Furthermore, it should not be forgotten that, whatever may be said in the Maastricht Treaty, the European Court held in its *Opinion 1/91* [18] on the European Economic Area Agreement that, having regard to the Treaties then in force, the *Community* already had the objective of achieving European Union. How this might be reconciled with the terms of the Maastricht text goes beyond the scope of this paper, but it gives rise to the thought that it might even be legitimate for the Community (given the political will) to legislate in this area using the general power of art.235 of the EC Treaty, which allows the Council, in the absence of more specific powers, to enact legislation which is necessary to achieve the objectives of the Community.

It will be clear from what has been said above that the functions of Community and Union cannot be kept totally separate. However, a particular feature of the Provisions on Cooperation in the Fields of Justice and Home Affairs is that they expressly envisage that certain matters may be transferred to Community competence. The matters regarded as being of common interest under this title are listed in

art.K.1 under nine headings: asylum policy; rules governing the crossing by persons of the external borders of the Member States; immigration policy and policy regarding nationals of third countries; combating drug addiction; combating fraud on an international scale; judicial cooperation in civil matters; judicial cooperation in criminal matters; customs cooperation; and lastly police cooperation for the purposes of preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crime, in connection with the organization of a Union-wide system for exchanging information within a European Police Office (Europol).

The first three of these are clearly concerned with the treatment of third-country nationals, and it is therefore of interest to note that the question of visa policy, which might be thought to be implicit in the second and third objectives mentioned above will fall within the scope of Community competence by virtue of art.100c of the EC Treaty introduced by the Maastricht Treaty. Furthermore, by virtue of art.K.9, "the Council, acting unanimously on the initiative of the Commission or a Member State, may decide to apply Article 100c of the Treaty establishing the European Community to action in areas referred to in Article K.1(1) to (6)", although it is envisaged that such a decision would require national ratification.

However, of the three areas excluded from potential transfer to the Community, it might be argued that customs cooperation was already implicit in the concept of the customs union (which has existed since 1968). Furthermore, in the field of crime connected with Community assets, the Court has made it clear as a matter of Community law both that Member States must use their criminal law if necessary to enforce Community law [19] and that the Commission must cooperate with the Member States (e.g. by allowing its officials to give evidence) when they are trying to enforce Community law.[20]

Be that as it may, this is an area where the dividing line between Community activity and Union activity could change. While there would appear to have been some disagreement in the Reflection Group on the matter, the Commission proposes that what it regards as the shortcomings of the Treaty in the fields of justice and home affairs - notably its ineffectiveness and the absence of democratic and judicial review - be remedied by setting clear objectives and providing for appropriate instruments and methods, and that the best way of attaining all these objectives would be to transfer justice and home affairs to the Community framework, with the exception of judicial cooperation in criminal matters
and police cooperation.

On the other hand, the UK government appears to be of the opinion that

> "the Third Pillar has achieved a good deal in its first two years of operation. Apart from signature of four important Conventions (on Simplified Extradition Procedures, Fraud against the Financial Interests of the Community, a European Police Office (Europol) and a Customs Information System), there is now closer practical cooperation between the police, immigration and customs authorities of Member States than ever before."

Unfortunately, the UK White Paper fails to mention that the Europol Convention had failed to come into force because of a dispute between the UK and the other Member States over whether the European Court should be given jurisdiction with regard to that Convention, a matter which would appear only to have been settled contemporaneously with the settlement of the 1996 BSE dispute.

With regard to foreign and security policy, while there are suggestions for improved decision-making with majority voting, one of the most notable proposals discussed by the Reflection Group relates to the possibility of embodying the CFSP behind the figurehead of a "Mr or Ms CFSP". While there were clearly differing views on this, it is suggested that a synthesis option would be that the President of the Council together with the Commission, takes direct charge of CFSP affairs assisted by a Secretary General of the Council who would head the analysis and planning unit and have increased functions. "This option would be even more effective if the Secretary of the WEU and the Secretary-General of the Council were one and the same person." However, the Reflection Group concluded that there was no consensus on the personification of CFSP.

### Variable Geometry

After the special treatment of the UK and Denmark in the Maastricht Treaty, the question has to be asked whether this sets a precedent for the IGC. In principle, the Reflection Group appears to be against special treatment:

> "The Group rejects any formula which could lead to an à la carte Europe. As regards the guidelines to allow flexibility, there is a large majority view sharing the following criteria:
>
> - flexibility should be allowed only when it serves the Union's objectives and if all other solutions have been ruled out and on a case-by-case basis;
>
> - differences in the degree of integration should be temporary;
>
> - no-one who so desires and fulfils the necessary conditions previously adopted by all can be excluded from full participation in a given action or common policy;

- provision should be made for ad hoc measures to assist those who want to take part in a given action or policy but are temporarily unable to do so;

- when allowing flexibility the necessary adjustments have to be made to maintain the "acquis", and a common basis should be preserved to prevent any sort of retreat from common principles and objectives;

- a single institutional framework has to be respected, irrespective of the structure of the Treaty."

The Reflection Group also points out that several members, while agreeing with most of the above, stressed that such flexible arrangements in the Union should only be possible when agreed by all, as in the past. On the other hand, there were also some members who believed that, whereas such arrangements should in principle be temporary, they need not always be so, especially where they do not concern "core disciplines" of the EC.

Be that as it may, it will not have escaped attention that on many of the issues before the IGC, the UK has taken a different stance from that of the majority of other Member States. More worrying from the point of view of a UK academic is the fact that the UK policy of non-cooperation in the BSE crisis in June 1996 appears to have given rise to speculation as to the extent to which the other Member States could make arrangements between themselves without the UK. In principle, it may be suggested that there is nothing to prevent fourteen (or fewer) Member States entering into a Treaty between themselves on matters outside or additional to the existing Treaties - indeed the Maastricht Treaty itself, as mentioned above, envisages less than twelve Member States acting together in the "new" areas of Monetary Union and Social Policy. In the case of Monetary Union, the situation arises not just from the special treatment accorded to the UK and Denmark, but also from the fact that it was appreciated that not all Member States would meet the rather strict criteria for economic convergence laid down as the precondition for participation in the monetary union; such States are referred to as "Member States with a derogation", [21] and would, inter alia, be excluded from the decision-making process on certain matters [22].

The example could also be taken, however, of the Schengen Agreement on the elimination of border controls, to which the United Kingdom is not a party. This agreement was negotiated in June 1985 (i.e. before the adoption of the Single European Act) between Germany, France, and the Benelux countries, and has been acceded to by other Member States of the Union. Without entering into the substantive details of the agreement or of the 1990 convention for its application, which has now entered into force, it may be

noted that it sets out rules for crossing the signatory States' frontiers not just for their own citizens but also for citizens of all EC Member States,[23], and the Convention of Application distinguishes between treatment at the internal and external borders of the signatory states [24]. Since the external frontiers of a Schengen state may be with another Community state, this poses a possible conflict with art.7a of the EC Treaty requiring the *Community* to be an area without internal frontiers.

Furthermore, the Schengen Treaty indicates matters on which the signatory States are to take common initiatives at the *Community* level, such as VAT harmonisation [25], and it requires the development of common policies by its participants in areas such as visas for citizens of non-Member States of the EC [26] - a matter which is brought expressly into Community competence by the Maastricht Treaty under art.100c, providing that "the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, shall determine the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States."

There are indeed a number of other matters dealt with under the Schengen Agreement which would appear to fall within the Maastricht "Provisions on Cooperation in the Fields of Justice and Home Affairs" [27]. These include common rules on asylum [28] (where there is a further overlap with the Dublin Convention of 15 June 1990 between the Member States of the Community [29]), mutual assistance in police and security matters [30], judicial cooperation in criminal matters [31], and cooperation in the fight against drugs [32], as well as the creation of a Schengen Information System [33].

It may be wondered both whether it is actually open to a group of Member States to enter into an agreement on a matter which would appear to fall within Community competence (at least following the entry into force of the Maastricht Treaty) and how far this is an indicator of things to come if some Member States persist in endeavouring to block the common initiatives of others.

On the other hand, and rather more positively, it should also be observed that some members of the Reflection Group, and the Commission, have suggested that the content of the Schengen Agreement should be incorporated in the Treaty.

## FOOTNOTES

1. 23 May 1996

2. 28 March 1996

3. 11 June 1991

4. EC Treaty art.99

5. EC Treaty Article 148.

6. Arts.13(2), 33(7) and 90(3)

7. Notably under art.203(6).

8. See e.g. the rejection of a proposal relating to benzene in OJ 1988 C290/64

9. See e.g. the amendment of the proposal with regard to public supply contracts in OJ 1988 C13/62.

10. Rules of Procedure of the European Parliament art.51

11. See arts.173 and 189

12. Art.189b(5)

13. Art.189b(6)

14. Article A

15. In particular, arts.102a to 109m of the EC Treaty.

16. Note of 31 December 1982 amending the Declaration annexed to the 1972 Treaty of Accession.

17. See Council Regulations 3300/91 (OJ 1991 L315/1) and 1432/92 (OJ 1992 L151/4).

18. 14 December 1991

19. Case 68/88 *Commission v. Greece* [1989] ECR 2965

20. Case C-2/88 *Zwartveld* [1990] ECR I-3365

21. Art.109k of the EC Treaty as amended by the Maastricht Treaty.

22. Art.109k(5).

23. Art.1

24. Convention arts.2-4

25. Art.21

26. Arts.7 and 20; Convention arts.9-27.

27. Arts.K to K9

28. Convention arts. 29 et seq.

29. See Blanc, "Schengen: Le chemin de la libre circulation en Europe", Revue du Marché Commun 1991 p.722 at p.723.

30. Convention art.39 et seq.; this mutual assistance extends to cross-border surveillance for certain offences (art.40) and pursuit across frontiers for the same offences and, for example, after serious road accidents (art.41). Pursuing officers would be permitted to carry arms for their "legitimate defence".

31. Convention art.48 et seq.

32. Convention arts.70 to 76

33. Convention arts.92 to 119.