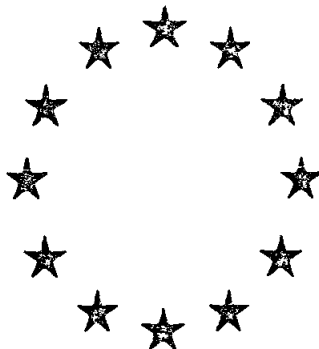


# EUROPEAN DOCUMENTATION AND RESEARCH CENTRE

## THE INTERGOVERNMENTAL CONFERENCE FLEXIBILITY IN ACTION?

*By Professor John A. Usher  
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**EDRC Research Paper 7**



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**European Documentation and Research Centre  
University of Malta  
Tal-Qroqq, Msida MSD 06  
Tel (356) 32902001/32902998  
Fax (356) 337624**

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## THE INTERGOVERNMENTAL CONFERENCE - FLEXIBILITY IN ACTION

JOHN A. USHER

### Introduction

The question of "flexibility" or "enhanced integration" has been raised in the current IGC. However, the problem was clearly presented in the Maastricht Treaty, and while the written version of this paper has been prepared before the conclusion of the IGC, and the dividing lines may therefore be drawn in different places by the time it is delivered, the general legal issues remain the same. The essential purpose of this paper is to see whether any discernable pattern is emerging from this developing diversity, and to consider, in particular, the consequences for EC and EU institutions, notably the European Court of Justice.

### Differential treatment in the EC Treaty

While the Community institutions may be under a duty to use their powers in the interests of the Community as a whole rather than in the interests of individual Member States, the Treaties have from the outset contained provisions giving special treatment to some Member States for some purposes, such as the Protocols to the original EEC Treaty on Luxembourg Agriculture or German Internal Trade.

However, the Maastricht Treaty clearly envisages situations where the fifteen Member States do not necessarily participate to the same extent in every policy or activity. In particular, it provides for less than fifteen Member States to act together in the areas of Monetary Union and Social Policy, and to that extent may be regarded as having already introduced the concept of a "two-speed" or "variable geometry" Community. While following the change in government in the UK the situation under the Social Protocol will be a matter of history, it can be used to illustrate the legal issues at stake - and it looks as if the UK will be in a similar situation with regard to the open frontiers policies derived from the Schengen Treaty.

The discussion of social legislation in the context of Community law is hardly novel: the first substantive legislation under the EEC Treaty was that on social security for migrant workers, adopted in 1958<sup>1</sup>. Nevertheless, the reluctance of the United Kingdom to see an extension of the Community's social competence is well known, and, in the context of discussion of a Community of less than all its members, the Maastricht Protocol on Social Policy does, of course, purport to allow fourteen (originally eleven) Member States to act together through the Community institutions. It may be doubted how far this adds any substantive rather than procedural elements: the Protocol on Social Policy refers to continuing "along the path laid

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<sup>1</sup> Council Regulations 3 and 4/58 (JO 1958 pp.561 and 597).

down in the 1989 Social Charter" (also signed by eleven Member States). That Charter declared expressly that its implementation "must not entail an extension of the Community's powers as defined by the Treaties", and listed in detail the existing provisions which could be used.

Legislation has in fact been issued under general Treaty powers which expressly states that it is intended to implement the Social Charter, such as Directive 91/533<sup>2</sup> on contracts of employment, which, since it was made under art.100 which requires unanimity in the Council, must at the least not have been opposed by the United Kingdom minister. This pattern was repeated in Council Directive 92/56 on collective redundancies<sup>3</sup>, which contains detailed extracts from three paragraphs of the Social Charter in its recitals, but which was again made under art.100, and therefore unanimously.

The present author remains of the opinion that most of the Social Policy Protocol may be achieved under the previous (and continuing) Treaty provisions, whether specific or general, and even the United Kingdom government in unsuccessfully challenging the Working Hours Directive in Case C-84/94 *UK v. Council*<sup>4</sup> argued not that it fell outside normal Community competence but that it should have been adopted under arts.100 and 235 (which require unanimity in the Council) rather than art.118a. One exception is that the Protocol permits national legislation which discriminates positively in favour of women, whereas it has been held that this is not possible under the existing equal treatment directive.<sup>5</sup> On the other hand, the first legislation to be adopted under the Protocol, Council Directive 94/45 on European Works Councils<sup>6</sup> has been applied by many of the firms affected to their UK workforce in the same way as it applies to their workforce in other EU States. Indeed, it may be argued that the situation of the UK does not amount to an opt-out: the EC Treaty has always, as indicated above, contained provisions on social policy which became binding on the UK on its accession; these provisions were developed further by the Single European Act 1987, by which the UK is fully bound, notably by the addition of arts.118a (on the basis of which the Working Hours Directive was adopted) and 118b. It may be suggested that the nature and legal consequences of these provisions have not been altered by the fact that under the Social Protocol the other 14 Member States have been given permission to use Community machinery to give effect to an alternative set of provisions which were originally intended to replace the social policy section of the Treaty, but did not in the end do so.

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<sup>2</sup> OJ 1991 L288/32

<sup>3</sup> OJ 1992 L231/26

<sup>4</sup> 12 November 1996

<sup>5</sup> Case C-450/93 *Kalanke v. Freie Hansestadt Bremen* {1995} ECR I-3051

<sup>6</sup> OJ 1994 L254/64

With regard to the United Kingdom's special treatment in the context of Economic and Monetary Union - which is only triggered when and if the UK gives notice that it does not intend to participate in the third stage <sup>7</sup> - it is sometimes forgotten that the former EEC Treaty from the outset required, under the original arts.103 and 105, coordination of economic policy and exchange rate policy, and in *Opinion 1/91* <sup>8</sup> the European Court also suggested that the attainment of Economic and Monetary Union was *already* a Community objective even before the Maastricht Treaty had been signed; it should therefore hardly be a surprise that the ECU has been defined in a series of Regulations enacted under art.235. Furthermore, legislation expressly intended to give effect to the first stage of Economic and Monetary Union had already been enacted, following the decision of the European Council in Madrid in June 1989 that that stage should begin on 1 July 1990. Attention might particularly be drawn to Council Decision 90/141 on the attainment of progressive convergence of economic policies and performance during stage one of EMU <sup>9</sup>, and Council Decision 90/142 amending the previous legislation on the Committee of Governors of the Central Banks of the Member States of the European Community <sup>10</sup>

In the case of Monetary Union, differentiation arises not just from the special treatment accorded to the UK and Denmark in the Protocols relating to those countries, 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", <sup>11</sup> and would, inter alia, be excluded from the decision-making process on certain matters <sup>12</sup>. Such States (including Denmark and the United Kingdom if they do not join the third stage when it eventually begins) are not fully involved in the institutional structure of the European Central Bank (ECB) or of the System of Central Banks (ESCB), and are not bound by all its acts. In one sense, the status of a Member State with a derogation is the obverse of a finding that other Member States fulfil the conditions for the adoption of a single currency. The status of a Member State with a derogation is however envisaged as being transitional rather than permanent.

One of the fundamental differences between the proposals of the Delors Committee and the text adopted in the Maastricht Treaty is that Delors recommended that the European Central Bank should come into being in the second stage of economic and monetary union, whereas the Treaty provided for an interim body, the European Monetary Institute, to operate during

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<sup>7</sup> Protocol 11 para.2

<sup>8</sup> [1991] ECR I-6079

<sup>9</sup> OJ 1990 L78/23

<sup>10</sup> OJ 1990 L78/25

<sup>11</sup> Art.109k of the EC Treaty as amended by the Maastricht Treaty.

<sup>12</sup> Art.109K(5).

the second stage. The reason for this may be found in the structure of the European Central Bank. Art.109a provides that the Executive Board of the ECB shall comprise the President, the Vice-President and *four* other members. The President, the Vice-President and the other members of the Executive Board are to be appointed from among persons of recognized standing and professional experience in monetary or banking matters by common accord of the Governments of the Member States without a derogation at the level of Heads of State or of Government. It is therefore clear that the Executive Board of the ECB need not be representative even of all the participating Member States. Indeed, it is provided that if there are Member States with a derogation, the number of members of the Executive Board may be smaller than provided for in art.11.1 of the Statute of the ESCB (a President, a Vice-President, and four others), but in no circumstances may it be less than four. On this basis it would be difficult to envisage all Member States being involved during the second stage, only for some of them to drop out because they could not participate in the third stage; hence the European Monetary Institute.

It is also clear that there may be "common" policies which only apply to participant States. The need (or hope) for an exchange rate policy is envisaged in art.109 of the EC Treaty as introduced by the Maastricht amendments; it should however be emphasised that this provision will only enter into force at the beginning of the third stage<sup>13</sup> and that it will not apply to Member States with a derogation<sup>14</sup> or to the United Kingdom if it decides not to participate.<sup>15</sup> Art.109(1) operates by way of derogation from art.228, which sets out the general procedure for the negotiation of international agreements between the Community and non-Member States or international organizations; it empowers the Council to conclude formal agreements on an exchange rate system for the ECU in relation to non-Community currencies - which seems to contemplate a return to something like the former IMF system - and lays down a special procedure for this to be achieved. The Council is required to act unanimously on a recommendation from the European Central Bank or from the Commission (which indicates that the power of initiative in this area is as much, if not more, with the ECB as with the Commission) after consulting the ECB in an endeavour to reach a consensus consistent with the objective of price stability, and after consulting the European Parliament. The procedure for negotiation is laid down in art.109(3), which provides that 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<sup>16</sup> 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. It is stated that these arrangements must ensure that the Community expresses a single position, and that the Commission must be "fully associated" with the negotiations.

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<sup>13</sup> Art.109e(3)

<sup>14</sup> Art.109k(3) and (4).

<sup>15</sup> UK Protocol art.5

<sup>16</sup> Though it will be recalled that under art.109(1) it needs to act unanimously to conclude the resultant agreement.

The implication of this is that whereas negotiations under the general art.228 are conducted by the Commission, the same is not necessarily the case under art.109, and the negotiations could, for example, be entrusted to the ECB. It is, however, clearly laid down that agreements concluded in accordance with art.109(3) are to be binding on the institutions of the Community, on the ECB and on Member States (but, of course, only those participating in monetary union).

What, however, the Treaty fails to deal with is the question of an exchange-rate mechanism in relations between Member States which participate in Economic and Monetary Union and those which do not. This is of particular importance in so far as the status of a Member State with a derogation is envisaged as being transitional rather than permanent. Under art.109k(2), at least once every two years, or at the request of a Member State with a derogation, the Commission and the European Central Bank must report to the Council in accordance with the procedure laid down in art.109j(1). After consulting the European Parliament and after discussion in the Council, meeting in the composition of the Heads of State or of Government, the Council shall, acting by a qualified majority on a proposal from the Commission, decide which Member States with a derogation fulfil the necessary conditions on the basis of the convergence criteria set out in art.109j(1), and abrogate the derogations of the Member States concerned. It may be submitted that this reference to art.109j(1) may create problems, because two of the criteria for convergence laid down in that provision relate to the exchange rate mechanism of the European Monetary System, and if the ECU had in fact by then become the single currency of a number of Member States, that exchange rate mechanism simply could not operate; rather, it would appear that the currency of a Member State with a derogation would have to stay in a defined relationship with the ECU as a foreign currency in order to qualify for admission to the third stage. The European Monetary Institute has prepared a draft framework for that relationship (a European Monetary System Mark II),<sup>17</sup> and the principles of this arrangement were approved by the European Council meeting in Dublin in December 1996.

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;

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<sup>17</sup> Report of the EMI to the informal ECOFIN Council, Verona, 12-13 April 1996.

- 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, it is recorded that 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.

### **Separate Treaties**

From the outset, the EC Treaty has expressly recognised in art.220 that the Member States may enter into separate Treaties which are nevertheless connected with the development of the Community, and in the context of the European Union, the Third Pillar provisions envisage a similar situation.<sup>18</sup> While the European Court has taken a broad view of the acts of the Community institutions which it may interpret under art.177 of the EC Treaty, it has consistently held that it does not have any inherent jurisdiction to interpret other Treaties or agreements entered into between the governments of the Member States. Thus in Case 44/84 *Hurd*<sup>19</sup> the Court held that it had no jurisdiction to interpret the agreement between the Member States establishing the European Schools, even though it could, in the context of the national taxation of a teacher at a European School, interpret art.5 of the EC Treaty so as to hold that a Member State could not use its tax system in such a way as to harm the Community budget.

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<sup>18</sup> Art.K3(2)(c)

<sup>19</sup> [1986] ECR 29; [1986] 2 CMLR 1

Jurisdiction to give preliminary rulings may however be conferred on the European Court by the express terms of agreements between the Member States (as under the Patents Convention <sup>20</sup>) or by specific Protocols to such agreements, as under the Brussels Convention on jurisdiction and the enforcement of civil and commercial judgments or the Rome Convention on the law applicable to contractual obligations. The Protocols to the Brussels and Rome Conventions provide only for preliminary rulings on questions of interpretation, and make no provision for questions of validity, being concerned only with Treaties rather than secondary legislation. On the other hand, the Patents Convention, while allowing only for the interpretation of the Convention itself, does allow questions to be referred as to the validity and interpretation of provisions enacted in implementation of the Convention, to the extent to which they are not national provisions.<sup>21</sup>

The Protocols and the Convention are also very specific as to the material to which references for preliminary rulings may relate. The Protocol on the interpretation of the Brussels Convention as amended allows more specifically, as might be expected, for the interpretation of that Convention and the Protocol annexed to it, for the interpretation of the interpretation Protocol itself, and for the interpretation of the successive Conventions on the accession of new Member States to these instruments. The Protocols on the interpretation of the Rome Convention similarly allow for the interpretation of that Convention, for the interpretation of the interpretation Protocol itself, and for the interpretation of Conventions on the accession of new Member States to these instruments. The Patents Convention allows for references not only on the interpretation of that Convention and but also of the provisions of the European Patent Convention which are binding upon every Community patent: in this context it may be observed that in its *Opinion 1/94* <sup>22</sup> on the competence of the Community to conclude the Uruguay Round Agreements, the European Court described the European Patent Convention as intergovernmental in origin and not a Community act<sup>23</sup>. The Court would therefore be given power, albeit only at the request of a Court in a Member State, to interpret provisions which result neither from a Community act nor a Treaty between the Member States alone.

The availability under other Conventions of a remedy developed in particular under art.177 of the EC Treaty has led on occasion to the adoption under those Conventions of concepts developed under the EC Treaty. Thus for example the concept of the primacy of EC law is

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<sup>20</sup> Which, however, is not yet in force.

<sup>21</sup> Art.73(1)(b)

<sup>22</sup> [1994] ECR I-5267

<sup>23</sup> Para.103

<sup>23</sup> [1983] ECR 3663; [1985] 1 CMLR 220

reflected under the Brussels Convention in Case 288/82 *Duijnste*<sup>24</sup>, where it was held that on a matter governed by the Convention, divergent national rules quite simply could not be applied.

More generally, 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 fifteen Member States acting together in the "new" areas of Monetary Union and Social Policy.

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: Italy, Spain, Portugal, Greece and Austria. The Luxembourg Presidency of the Schengen Agreement hopes that on December 19th, Denmark, Sweden and Finland will join, and that Association Protocols can be agreed for Norway and Iceland, which are members of the EEA but not of the EU. On the other hand, two EU members, the UK and Ireland, which have their own common travel area, will not be participants. Without entering into the substantive details of the agreement or of the 1990 convention for its application, which has now entered into force - albeit with its own variable geometry in that while seven members including France have abolished passport checks at airports for travel between those countries, France maintains land border checks with Belgium and Luxembourg<sup>25</sup> - 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.<sup>26</sup> Furthermore, the Convention of Application distinguishes between treatment at the internal and external borders of the signatory states<sup>27</sup>, systematic checking being required at the latter as the price for the freedom to cross the former. 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.

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<sup>25</sup> Reuter European Community Report, 15 October 1996

<sup>26</sup> Art.1

<sup>27</sup> Convention arts.2-4

Furthermore, the Schengen Treaty indicates matters on which the signatory States are to take common initiatives at the *Community* level, such as VAT harmonisation<sup>28</sup>, 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<sup>29</sup> - 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"<sup>30</sup>. These include common rules on asylum<sup>31</sup> (where there is a further overlap with the Dublin Convention of 15 June 1990 between the Member States of the Community<sup>32</sup>, though it would appear that the Schengen provision will lapse when and if the Dublin Convention enters into force), mutual assistance in police and security matters<sup>33</sup>, judicial cooperation in criminal matters<sup>34</sup>, and cooperation in the fight against drugs<sup>35</sup>, as well as the creation of a Schengen Information System<sup>36</sup>.

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 in the context of the IGC, some members of the Reflection Group, and the Commission, have suggested that the content of the Schengen Agreement should be incorporated in the EC Treaty.

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<sup>28</sup> Art.21

<sup>29</sup> Arts.7 and 20; Convention arts.9-27.

<sup>30</sup> Arts.K to K9

<sup>31</sup> Convention arts. 29 et seq.

<sup>32</sup> See Blanc, "Schengen: Le chemin de la libre circulation en Europe", *Revue du Marché Commun* 1991 p.722 at p.723.

<sup>33</sup> 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".

<sup>34</sup> Convention art.48 et seq.

<sup>35</sup> Convention arts.70 to 76

<sup>36</sup> Convention arts.92 to 119.

## **Institutional consequences**

Variable participation within a single Treaty, and linkages between separate Treaties, raise the question of how far a single institutional structure may operate at all levels. The Council of Ministers varies from its basic composition under the Social Protocol and in the third stage of economic and monetary union; in both those cases it contains or will contain representatives only of the participant governments. On the other hand it enjoys enhanced powers under the non-Community pillars of the Union. The Commission, Parliament and Court of Justice do not vary in their composition, but the Commission and the Parliament have reduced roles under the non-Community pillars. At first sight the Court of Justice has no role under those pillars except by agreement between the Member States, but it nevertheless does have a role under certain separate Treaties between the Member States and under the European Economic Area Agreement. The Court of Auditors would appear to have a role wherever expenditure is set against the Community budget (which may occur under the non-Community pillars). However, the European Central Bank would appear to fall between two stools: its Executive Board is not meant to be representative of all the participants, yet only nationals of participants may be appointed to it. This raises the more general issue of representation at the Community level, which is of particular importance in the context of variable geometry.

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, yet because of its directly representational nature, it is the body which is required to vary its membership in the context of the Social Protocol and Economic and Monetary Union.

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. However, in the

context of the Social Protocol or the third stage of economic and monetary union, the situation will arise where representatives of the citizens of member States which do not participate in those policy areas will be involved in the legislative process in relation to Community acts which will not in the area they represent. It might simply be observed that this is not an unfamiliar problem in the UK and is of particular importance in the context of the establishment of a separate Scottish Parliament.<sup>37</sup> It may also be observed however that while the Social Protocol provisions make use of cooperation between Parliament and Council under art.189c of the EC Treaty, they do not refer to codecision between Parliament and Council under art.189b.

The question whether the same institutions can act at all levels and for different combinations of participant States arises most clearly 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 has clearly been 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 recognised 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.

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<sup>37</sup> The point was given particular significance by the decision of the Ulster Unionists on 1 November 1996 as to how they would vote on gun control legislation which would not apply in Northern Ireland.

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."

If the membership of the Commission is finally to be determined by its functional needs rather than (indirect) national representation, then it clearly should be able to function at all levels, and it may be submitted that given the legal duties of its members that should be the situation and is the situation where variable geometry has so far been envisaged.

With regard to the European Central Bank, Art.109a of the EC Treaty provides that the Executive Board of the ECB shall comprise the President, the Vice-President and *four* other members. The President, the Vice-President and the other members of the Executive Board are to be appointed from among persons of recognized standing and professional experience in monetary or banking matters by common accord of the Governments of the Member States without a derogation at the level of Heads of State or of Government. It is therefore clear that the Executive Board of the ECB need not be representative even of all the participating Member States. Indeed, it is provided that if there are Member States with a derogation, the number of members of the Executive Board may be smaller than provided for in art.11.1 of the Statute of the ESCB (a President, a Vice-President, and four others), but in no circumstances may it be less than four. On this basis it would have been difficult to envisage all Member States being involved during the second stage, only for some of them to drop out because they could not participate in the third stage; hence the European Monetary Institute.

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. Be that as it may, the reality is that both Courts now normally sit in Chambers, rather than as Full Courts, and following the Maastricht amendments this is the case even in actions involving Member States: recent examples may be found of enforcement actions against Member States being decided by just three judges.<sup>38</sup>

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<sup>38</sup> Case C-117/95 *Commission v. Italy* (26 September 1996)

## Role of the European Court of Justice

### a) The European Economic Area

In the context of the wider Treaty framework, the European Economic Area Agreement introduces institutional linkages. The amendment of art.20 of the EC Statute of the European Court of Justice by Council Decision 94/993 has introduced a totally new concept by giving a right (albeit limited) to a non-Community institution and to certain non-Community states to submit observations on a reference to the European Court. These rights are given to the EFTA Surveillance Authority and the States, other than the Member States, which are parties to the Agreement on the European Economic Area (the EEA States), and may be seen as falling within the framework of institutional cooperation under the European Economic Area Agreement: indeed, under art.97 of the Rules of Procedure of the EFTA Court of Justice, it is conversely provided that a request from a court in an EFTA State for the EFTA Court to give an advisory opinion (the equivalent of a reference for a preliminary ruling) should be communicated to the Community Member States and to the EC Commission.

The status given by the amended art.20 to the EFTA Surveillance Authority and the EEA States falls between that of the Commission and the EC Member States on the one hand, and the Council, Parliament and Monetary Institute on the other: like the former, they are to receive notification of all references made to the Court, but they are only entitled to submit observations "where one of the fields of application of [the EEA] Agreement is concerned". The "field of application" of the EEA Agreement presumably extends beyond the interpretation of the Agreement itself to all those provisions of EC law which are applicable in EEA States.

Quite apart from the fact that the EFTA Surveillance Authority and the EFTA EEA States may be able to submit observations in cases referred to the European Court from courts in the EC where one of the fields of application of the EEA Agreement is concerned, that Agreement also envisages the possibility of references to the European Court from courts in EFTA states party to the EEA, though it would appear that no EFTA state has yet taken advantage of this possibility, and of requests for interpretation from Contracting Parties involved in disputes which have not been resolved by the EEA Joint Committee within three months.

In both cases the reference to the European Court may only be made where the question relates to provisions which are identical in substance to provisions of Community law (though art.111 on requests by Contracting Parties refers only to the EC and ECSC Treaties, and not the Euratom Treaty). In this light, the power of an EFTA Court to make a reference may be seen as an extension of the Court's case-law set out in Case C-355/89 *DHSS (Isle of Man) v Barr*<sup>39</sup>. There although a court in the Isle of Man, was not a court or tribunals "of" a

<sup>39</sup> [1991] ECR I-3479; [1991] 3 CMLR 325

Member State within the terms of art.177, it was held that in order to ensure the uniform application of, in that case, Protocol No.3 to the 1972 Act of Accession, a court or tribunal in the Isle of Man must be regarded as a court or tribunal able to refer questions under art.177. Similarly, it has been seen that while the Court will not consider concepts of national law,<sup>40</sup> it has been willing to interpret Community acts where what was at issue before the national court was not the Community act as such but national legislation which made reference to or used the language of the Community act.<sup>41</sup> It is therefore perhaps not as innovative as it might appear that the European Court should be given power to give preliminary rulings at the request of courts in EFTA states.

In its *Opinion* 1/91<sup>42</sup> on the compatibility of the original draft of the EEA Agreement with the EC Treaty, the Court accepted that there was nothing in the EC Treaty to prevent an international agreement conferring upon it jurisdiction to interpret the provisions of that agreement for the purposes of its application in non-Member States, that there was no objection in principle to the EFTA States being given the choice whether to authorize their courts or tribunals to make such a reference, or to the fact that there might be no obligation on the part of courts of last instance to make such a reference. However, the draft of the EEA Agreement which was the subject of that *Opinion* only provided for the European Court to "express itself" on the question referred, and the Court held that for it to have power only to give a non-binding opinion would change the nature of its functions under the EC Treaty, which it defined as being that of a court whose judgements are binding. It therefore found that version incompatible with EC law.

On the other hand, the final version allows the European Court to "decide" such matters. Nevertheless, the machinery envisaged in art.107 and Protocol 34 to the EEA Agreement will only become operative for the courts and tribunals of an EFTA State party to the EEA if and when that State decides to provide for its use.

The requests for interpretation from Contracting Parties involved in a dispute may also be seen to have analogies with procedures already established in earlier agreements, in this case the power of the "competent authorities" under the Protocols to the Brussels and Rome Conventions to refer matters on which there are differences of judicial interpretation. However, in this case the trigger is not necessarily differences of judicial interpretation but a failure to reach agreement in due time in the EEA Joint Committee.

The procedure envisaged, including notification of the request or reference and the submission of observations, is effectively that provided for in relation to references under the Community

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<sup>40</sup> Case 125/84 *Continental Irish Meat* [1985] ECR 3441, [1985] 3 CMLR 713

<sup>41</sup> Cases C-294/88 & C-194/89 *Dzodzi* [1990] ECR I-3763, and Case 231/89 *Gmorzynska-Bscher* [1990] ECR I-4003

<sup>42</sup> [1991] ECR I-6079; [1992] 1 CMLR 245

Treaties, except that in the case of requests from Contracting Parties, the President is to prescribe a period within which the Contracting Parties and the other persons on whom the request has been served may submit written observations, so that there is no automatic two-month period, and the "reasoned decision" on the request is to given in closed session.

Following the rejection by the European Court in its *Opinion 1/91*<sup>43</sup> of the judicial system established by the first version of the Agreement establishing the European Economic Area, including the power for it to give a non-binding opinion on the interpretation of the Agreement at the request of a court in an EFTA State member of the EEA, the EFTA States agreed, when the second version received the European Court's approval,<sup>44</sup> to set up their own court with power, inter alia, to give such advisory opinions. Despite this difference, the system is remarkably similar to that of references for preliminary rulings, although there is no power to raise questions of validity, since the requests must relate to the EEA Agreement itself; furthermore, there is no obligation on courts and tribunals against whose decisions there is no judicial remedy under national law to request an opinion, and indeed the power to request an opinion may be limited to such courts. On the other hand, it may submitted that art.96(4) of the Rules of Procedure represents an improvement over the system under the EC Treaty in that it provides expressly for the EFTA Court to ask the national court for clarification, which may prove to be a method of avoiding problems of admissibility.

While this provision may not be identical in content to art.177 of the EC Treaty and art.41 of the ECSC Treaty and therefore not subject to the express obligation to follow or take account of the case-law of the European Court under art.6 of the EEA Agreement and art.3(2) of the EFTA Court Agreement<sup>45</sup>, considerable reference was made to that case-law in the EFTA Court's judgment on the first request for an advisory opinion in Decision E-1/94 *Restamark*<sup>46</sup>. On the substance, which involved art.16 of the EEA Agreement on State monopolies (the equivalent of art.37 of the EC Treaty), the EFTA Court applied the EC concept of direct effect<sup>47</sup>, holding that in the case of conflict between implemented EEA rules and national statutory provisions, individuals and economic operators must be entitled to invoke and claim at the national level any rights which could be derived from provisions of the EEA Agreement.

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<sup>43</sup> [1991] ECR I-6079; [1992] 1 CMLR 245

<sup>44</sup> *Opinion 1/92* [1992] ECR I-2821

<sup>45</sup> For further discussion see Kronenberger, "Some questions raised by the *Restamark* judgment" [1996] ICLQ 198

<sup>46</sup> [1995] 1 CMLR 161

<sup>47</sup> Even though in *Opinion 1/91* (at paras 27 and 28) the European Court appears to have doubted whether the EFTA states were obliged to accept this concept, and that of the primacy of EC law (which, it may be submitted, is inherent in the concept of direct effect).

## b) Variable Geometry

In the context of variable geometry, it is at the level of the Court of Justice and of the Court of First Instance that serious issues arise which do not so far appear to have been addressed in the Treaty texts or in the published documentation in relation to the IGC. Put very simply, can Member States which do not participate in a particular area of joint activity, and their citizens, exercise EC judicial remedies in relation to acts adopted in that area?

With regard to actions for annulment, the established situation is that in so far as rights of action are conferred upon them by the substantive Treaty provisions, and with regard to the acts susceptible to challenge under the provisions, no real problems of locus standi would appear to arise with regard to actions for annulment brought by Member States, the Council or the Commission. Indeed, in Case 166/78 *Italy v. Council*<sup>48</sup>, it was held that Italy was not barred from seeking the annulment of a Council Regulation by the fact that its representative at the relevant Council meeting had voted in favour of that Regulation; the implication appears to be that, within its express limits, the right of action conferred upon Member States to seek the annulment of a Community act is unconditional. It is also clear that the Member States and these institutions do not have to show that they have an interest in bringing the proceedings<sup>49</sup>, although it would appear that like other litigants<sup>50</sup> they need to show that they have an interest in the grounds for annulment that they put forward, i.e. that the alleged breach would have made a difference to the outcome.<sup>51</sup>

On the other hand, it may be observed that a government, even the government of an area falling within the Community, which is not that of a Member State as such, is treated on the same basis as a natural or legal person, as happened to the government of Gibraltar in Case C-298/89 *Gibraltar v. Council*<sup>52</sup>, i.e. it has to show that the act at issue is of direct and individual concern to it. Does a non-participant government therefore have an absolute right to bring an action for annulment, or does it have to show direct and individual concern?

A related problem has in fact already arisen in the context of references for preliminary rulings, under the 1971 Protocol on the interpretation by the Court of the 1968 Judgments Convention, where the Court took an approach not mentioned in the Treaty texts. The background is that the first reference under that Protocol, Case 12/76 *Tessili Como v. Dunlop*<sup>53</sup> was heard in 1976, before the Member States which had joined the Community in 1973 had

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<sup>48</sup> [1979] ECR 2575, 2596

<sup>49</sup> E.g. Case 45/86 *Commission v Council* [1987] ECR 1493

<sup>50</sup> See Case 90/74 *Deboeck v. Commission* [1975] ECR 1123

<sup>51</sup> Case 259/87 *France v Commission* [1987] ECR 4393

<sup>52</sup> [1993] ECR I-3605

<sup>53</sup> [1976] ECR 1473

signed the Accession Convention to the Brussels Convention, which occurred in 1978 (and was eventually introduced into the legal systems of the UK by the Civil Jurisdiction and Judgements Act 1982). At the outset, it may be observed that the bench included Lord Mackenzie Stuart<sup>54</sup>. In the course of the proceedings, the question arose as to whether the UK and Ireland could exercise the right to submit observations with regard to the interpretation of a Convention to which they were not parties. The answer given by the European Court was that under the 1972 Act of Accession, the new Member States were *legally obliged* (emphasis added) to accede to the 1968 Convention, and that they therefore had an interest in expressing their views when the Court was called upon to interpret a Convention to which they were required to become parties.

If this test were to be applied more generally, in particular in the context of direct actions for annulment, it would produce some interesting results in the current areas of variable geometry. In the context of economic and monetary union, the "Member States with a derogation" remain bound by the obligation to achieve that objective and therefore would be able to challenge acts of Community institutions representing the participant States and ostensibly binding only on those States. On the other hand, if the UK gives notice that it will not participate, it will not be subject to the basic Treaty obligation, and under the Court's test would not be able to exercise its special rights as a Member State, but would rather be left to show direct and individual concern. The same would presumably be the case with regard to acts adopted under the Social Protocol. It may however be submitted that it would be preferable if the matter were to be settled in an express provision of a revised EC Treaty.

With regard to private actions for annulment, it may be suggested that the requirement to show direct and individual concern circumvents the problem: there is a long history of actions for annulment being brought by applicants who are neither citizens of nor resident in a Member State.<sup>55</sup> However, could a UK court faced with a dispute relating to the way a UK employer has voluntarily given effect to the European Works Council Directive adopted under the Social Protocol make a reference as to its interpretation? To the extent that the Directive is to be regarded as a Community act and the court is a court or tribunal of a Member State, it may be suggested that this question should be answered in the affirmative. While the analogy is not perfect, there are a number of instances where the Court has been

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<sup>54</sup> Though Advocate General Warner did not give an Opinion in such a case until Case 143/78 *De Cavel v. De Cavel* [1979] ECR 1055, which was heard (if not registered) after the Accession Convention had been signed.

<sup>55</sup> See, to take a couple of random examples, Case 60/81 *IBM v Commission* [1981] ECR 2639, or Case C-49/88 *Al-Jubail Fertiliser v Council* [1991] ECR I-3187

willing to interpret Community acts where what was at issue before the national court was not the Community act as such but national legislation which made reference to or used the language of the Community act. <sup>56</sup>

## Conclusions

At the institutional level, leaving on one side the specific situation of the European Central Bank, differential integration is most directly reflected in the body in which Member States as such are represented, the Council of Ministers. If a lawyer might make such a comment, it may be suggested that bodies whose composition varies are likely to lose influence as against those which operate in the same composition in the whole range of their activities. On the other hand, the European Court of Justice, despite its current "demonisation" by some national politicians, has been given a role in a number of separate agreements between the Member States, and in the EEA Agreement with non-Member States; furthermore, it has applied the fundamental concept of primacy in the context of such separate agreements, and has seen the concept of direct effect (and intrinsically of primacy) followed by the EFTA court in the context of the EEA. It may be asserted that the rule of law remains at the heart of the EC and the systems which have now been built around it, even if questions remain to be answered as to the consequences of variable geometry in the area of judicial review.

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<sup>56</sup> Cases C-294/88 & C-194/89 *Dzodzi* [1990] ECR I-3763, and Case 231/89 *Gmorzynska-Bscher* [1990] ECR I-4003

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