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CONSTITUTIONAL DEVELOPMENTS IN THE EUROPEAN COMMUNITY AND THE IMPACT OF THE SINGLE EUROPEAN MARKET AFTER 1992

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The Single European Act, by its amendments to the Treaty establishing the European Economic Community, seeks to achieve by the end of 1992 an internal market comprising an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the treaty. To this end, a very substantial amount of new legislation is being enacted in the form of Council Regulations and Directives, currently estimated at some 279 separate measures, many of which will also need implementing legislation in the Member States.

The origins of the Single European Act can be traced to an initiative of the European Parliament, an initiative which in turn is generally attributed to the idea of an Italian Member, the late Altiero Spinelli. Under his chairmanship, the Institutional Committee of the European Parliament prepared a draft Treaty on European Union, which was adopted by the Parliament in February, 1984.¹ Although the draft did not enter into force, some of its themes were taken up in the Single European Act. A further impetus was provided by the Commission, which in January, 1985, proposed realizing the objective of a market without internal frontiers by the end of 1992.² The detailed measures for the removal of physical, technical, and fiscal barriers were set out in a White Paper, which specified the program, timetable and methods for creating a unified economic area in which persons, goods, services and capital would be able to move freely. The Commission's proposal partly reflected the central themes of the Parliament's draft Treaty, which included the attainment of the internal market and the institutional reforms considered necessary for that

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1. See F. CAPOTORTI, M. HILF, F. JACOBS & J. JACQUÉ, *THE EUROPEAN UNION TREATY* (1986).

2. *Completing the Internal Market: White Paper from the Commission, 1985 COMMISSION OF THE EUROPEAN COMMUNITIES DOCUMENTS, COM (85) 310 final.*

purpose. The proposed reforms included majority voting in the Council in areas where the EEC Treaty still required unanimity, and greater powers for the European Parliament itself in order to make the Community's legislative process more democratic. In all of these areas, the Single European Act introduced, as I shall suggest, significant amendments to the EEC Treaty.

In addition, the Single European Act made other amendments to the Treaty. Among other things, it introduced into the EEC Treaty a new chapter entitled "Co-operation in Economic and Monetary Policy (Economic and Monetary Union);" new provisions on social policy; a new title, "Economic and Social Cohesion," providing for a more developed regional policy; a new title "Research and Technological Development;" and a further new title "Environment." These additions to the Treaty represented virtually the first substantive amendments, the earlier Treaty amendments being essentially of an institutional and budgetary character. Other innovations, not involving amendments to the EEC Treaty itself, included the provision, for the first time, of a treaty basis for the co-ordination of the foreign policy of the Member States.

Finally, the Single European Act introduced significant institutional innovations affecting the legislative, executive and judicial branches of the Community. It introduced a wider use of the majority vote in the Council, thus facilitating, in areas central to the single market, the adoption of the necessary Community legislation. It enlarged, in many areas, the role of the European Parliament in the adoption of Community legislation. It created the possibility of conferring wider implementing powers on the Commission. And it made possible the establishment of a new judicial organ, the European Court of First Instance.

In certain fundamental respects, the constitutional foundations of the Community remain unaffected by the Single European Act. The basic principles of the "direct effect" or self-executing character of many provisions of the Treaties and of Community legislation, as well as the "primacy" of Community law in the event of conflict, with the laws of the Member States, had already been developed by the Court of Justice and had already been widely accepted by the courts of the Member States. Nevertheless, it is possible to discern the outline of further constitutional developments in some of the provisions of the Single European Act. In this short paper, I will seek first to sketch briefly some of the developments that seem to follow directly from the Act, second to discuss some developments that have occurred independently since the signature of the Act, and last to touch on some

developments that may occur in the future under the impetus of the Act.

I will begin with the changes introduced by the Act itself, and in particular those affecting the four Community institutions, namely the Council; the European Parliament, the Commission and the Court of Justice.

From the point of view of achieving the single market, perhaps the most significant development of the Single European Act is the introduction of majority voting in one key area. Many obstacles to trade within the common market result from differences between the laws of the Member States. In some cases, these obstacles could be, and were, struck down by the Court as contrary to article 30. The scope of article 30 is broad: as interpreted by the Court, it covers "[a]ll trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade."³ Since article 30 has direct effect, an importer can rely on it in his national court. But article 36 provides for significant exceptions: measures affecting interstate trade can be justified under that article (if not discriminatory or constituting disguised restrictions on trade) on a wide variety of grounds. Those grounds are: "public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archeological value; or the protection of industrial and commercial property." Moreover, those exceptions were apparently somewhat enlarged by the Court in the *Cassis de Dijon* case, where it held that obstacles to the free movement of goods resulting from disparities between national marketing rules must be accepted insofar as they were necessary to satisfy "mandatory requirements" relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defense of the consumer.⁴ The Court appears to have concluded that, provided that they were not discriminatory, measures necessary for those purposes do not fall within the prohibition of article 30 at all.

Where measures are justified under article 36 or necessary under the *Cassis de Dijon* principle, obstacles to trade can be removed only by the harmonization of the laws of the Member States. Harmonization could be achieved by directives adopted under article 100, but such directives could only be adopted unanimously. It should be stressed that, even before the Single European Act, legislation could be

3. Procureur du Roi v. Dassonville, 1974 E.C.R. 837, 852.

4. Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein, 1979 E.C.R. 649.

adopted in the Council by a qualified majority under other Treaty articles, but not harmonization measures under article 100. Such a measure could therefore be blocked by a single Member State, and to that extent, the "sovereignty" of the Member States in this field was preserved. The new article 100a, introduced by the Single European Act, was therefore of constitutional significance in providing (in paragraph 1) that such measures (with certain exceptions set out in paragraph 2) shall be adopted by a qualified majority in the Council. Certain safeguards for the Member States are introduced, however, as explained below. The requirement of unanimity has also been preserved for legislation in certain other fields, including fiscal harmonization.

A second constitutional development introduced by the Single European Act is an increase in the powers of the European Parliament. Before the Treaty amendments introduced by the Act, the Parliament had the right to be consulted before the Commission's legislative proposals were adopted by the Council, but the Parliament's role in the legislative process ended at that point. The Act introduced a new "co-operation procedure" in many fields of legislation: here, a somewhat complex two-stage process, giving the Parliament greater influence, is followed. In practice, since the introduction of this procedure, many of the Parliament's amendments to legislative proposals have been adopted.

The Commission retains, in most areas, the sole right to initiate legislation. In these areas, legislation can be enacted only on a proposal from the Commission. Once again, in practice, however, the result of the introduction of majority voting in the Council is to increase the influence of the Commission. In addition, the Single European Act enables greater powers to be conferred on the Commission for the adoption of implementing legislation.

The Court of Justice, retaining its role as the final interpreter of the Treaty and of Community legislation, sees that role expanded under the Single European Act by the jurisdiction to rule on the interpretation of the new provisions themselves, and on the substantial corpus of Community legislation being enacted under the new provisions, especially under article 100a. This jurisdiction will be of a constitutional type where the compatibility of Member State legislation with Community law is at issue. A specific new kind of jurisdiction is conferred on the Court by article 100a(4), which permits certain safeguard measures to be adopted by a Member State where a harmonization measure has been adopted by a qualified majority, and introduces a special form of expedited procedure for the review of such safeguard measures by the Court.

It was in part in order to enable the Court of Justice "to concentrate its activities on its fundamental task of ensuring uniform interpretation of Community law"⁵ that the Single European Act provided for the establishment of a new Court of First Instance, a court with jurisdiction to hear certain categories of cases at first instance with an appeal to the Court of Justice on points of law. Despite its initially rather limited jurisdiction, extending principally to antitrust cases and to disputes between the institutions and their staff, the Court of First Instance, established in October, 1989, is likely to have a considerable effect on the Community's judicial system. In addition, as the preamble to the Decision of the Council establishing the Court of First Instance explains, "[I]n respect of actions requiring close examination of complex facts, the establishment of a second court will improve the judicial protection of individual interests."

In particular, by providing for more effective scrutiny (e.g., of the Commission's findings of fact in antitrust cases), the Court of First Instance may be able to contribute to the realization of an emerging principle of European law, that all measures must be subject to effective judicial review of findings of both law and fact.

Mention of this principle leads to consideration of another aspect of the constitutional development of the Community which, in contrast to those mentioned above, is not based on amendments to the Treaty introduced by the Single European Act, but which has emerged independently, if concurrently. I refer to recent developments in the scope of judicial review — and I shall limit myself to a few significant developments since the signature of the Single European Act but which, it must be emphasized, are legally quite independent of it.

The first such development is judicial review of Community measures, a development which well illustrates the creative approach of the Court to the scope of judicial review. Article 173 of the EEC Treaty, by its terms, provides for judicial review of measures of the Council and Commission, but in *Les Verts v. European Parliament*,⁶ the Court had to decide whether it had jurisdiction to entertain an action for annulment brought against the European Parliament under that article. The Court held that, despite the terms of article 173, such jurisdiction must be held to exist. It would be incompatible with the rule of law for any of the Community institutions to take measures capable of having legal effects if those measures were not subject to review by the Court. As the Court put it, "[T]he European Economic Commu-

5. Preamble to Council Decision, 31 O.J. Eur. Comm. (No. L 319) I (1988).

6. Parti écologiste 'les Verts' v. European Parliament, 1986 E.C.R. 1339.

nity is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the . . . Treaty”⁷ — a Treaty which the Court, in a notable form of words, described as the “basic constitutional charter.” According to the Court, the reason why the European Parliament was not expressly mentioned among the institutions whose measures were subject to review under article 173 was that, in the original version of the Treaty, the Parliament had powers of consultation and political control, but no powers to adopt measures intended to have legal effects vis-à-vis third parties. The Court may have had particularly in mind the new budgetary powers conferred on the European Parliament by the budgetary treaties. The exercise of those powers by the European Parliament was itself under challenge at the time of this case, and shortly afterwards the Court annulled the Community budget for the year in question on the ground that the Parliament had exceeded its powers.⁸

In the passage cited above, the Court refers to the need for judicial review both of the institutions and of the Member States. At this point it may be helpful to explain the legal basis of this form of constitutional adjudication. In the system of checks and balances, which is a central feature of the Treaty, the counterpart to judicial review of the Community institutions is review of the conduct of the Member States to ensure their observance of the Treaty. This is achieved in part by Commission proceedings under article 169 of the treaty. The Commission’s use of this procedure has developed considerably over the years, and an interesting recent feature was developed in response to a resolution of the Parliament itself of February 9, 1983.⁹ Since then the Commission has presented to the European Parliament a report in which the Commission provides a systematic survey of its monitoring of the Member States’ application of Community law. Since 1985, incidentally, the Commission has included in its report a section on decisions of the superior courts of the Member States, a section which makes for particularly interesting reading as it reveals a wide variety of attitudes in the various national courts, even though the general trend is undoubtedly one of acceptance of the obligation to give effect to Community law.

However, in the operation of the Community legal system, article 177 — enabling the Court to give preliminary rulings on references from the courts of the Member States — has provided a mechanism

7. *Id.* at 1365.

8. Council of the European Communities v. European Parliament, 1986 E.C.R. 2155.

9. *Resolution*, 28 O.J. EUR. COMM. (No. C 343) 8 (1985).

for judicial review of perhaps greater constitutional significance. The ostensible function of article 177 is to ensure the uniform application of Community law in all the Member States. As the Court states in the *Rheinmühlen* case, "Article 177 is essential for the preservation of the Community character of the law established by the Treaty and has the object of ensuring that in all circumstances this law is the same in all States of the Community."¹⁰ However, while it is no doubt essential that Community law should be applied uniformly throughout the Community, article 177 can also be regarded as embodying a dual form of judicial review. Article 177 gives the Court jurisdiction to rule on the interpretation of both the Treaty and Community legislation, as well as on the validity of Community legislation. Rulings on validity enable the Court, for example, to review the compatibility of Community legislation with general principles of law, which are reflected to varying degrees in the constitutional and legal traditions of the Member States. Thus, the Court has exercised its article 177 jurisdiction to rule on validity of legislation in such a way as to ensure that the legislation complies with such basic principles as the principle of proportionality, the principle of non-discrimination and the principle of respect for fundamental rights. There is, therefore, an obvious parallel between the review of validity under article 177 and judicial review in direct actions under article 173. The article 177 route has the distinctive feature, however, of not being subject to the strict conditions of access to the Court in a direct action under article 173. Thus, an individual who does not have the capacity to challenge a piece of Community legislation directly in the Court may have an alternative means of challenge by obtaining a reference from his national court on the validity of the legislation. In this way, despite the limits imposed by the Treaty on direct actions, the Community legal system can be regarded as ensuring to the individual a means of obtaining judicial review of any Community measure by which he or she is affected.

The second function of judicial review available under article 177 is the review of conduct, not of Community institutions, but of Member States themselves. This arises where a ruling on the interpretation of Community law — as opposed to its validity — puts in issue the compatibility of a Member State's conduct with Community law itself. Thus, the individual who seeks to exercise some right which has been granted by Community law but has not been transposed effectively into national law, may be able to obtain an interpretation of the Community provision to which a national court will then give effect in the

10. *Rheinmühlen-Düsseldorf v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel*, 1974 E.C.R. 33, 38.

absence of any implementing measures in the Member State and notwithstanding any national legislation to the contrary.

Underlying this form of judicial review is the principle, now well recognized throughout the courts of the Community, that Community law prevails over any conflicting national law. The development of this principle illustrates yet another function of article 177: the process of developing certain principles of a constitutional character for which no express provision is made in the Treaties. It was by rulings given under article 177 that the Court laid down the principle of the primacy of Community law in well-known cases such as *Costa v. ENEL*¹¹ in 1964 and *Simmenthal*¹² in 1978, even though the principle itself may seem a necessary corollary to the need for Community law to be uniformly applied in all Member States. It would, after all, be illogical to suppose that the relationship between Community law and national law should be subject, in each Member State, to different resolutions depending upon the particular arrangements made in that state for the reception of Community law.

Perhaps the most fundamental principle developed in rulings under article 177 is that of the direct effect of Community law, a principle first laid down in *Van Gend & Loos*¹³ in 1963 and subsequently developed in such a way as to apply, not only to various provisions of the Treaty, but also to much of Community legislation. The importance of direct effect for the subject of judicial review is that it makes the national courts responsible for ensuring the effective implementation of Community law.

When the principle of direct effect and the corollary of the primacy of Community law are recognized by national courts, the result is the creation of what may be regarded as constitutionally protected Community rights, prevailing within the legal systems of the Member States over national legislation. There is thus introduced a new form of constitutional review. It is new for those Member States which already recognized constitutional review in their internal legal systems, because it effectively transforms that review so as to control national measures by Community standards. It is new also for those Member States which, like the United Kingdom, had not previously known any form of constitutional review.

While the principles of direct effect and primacy have long standing in Community law, the full recognition of this new form of consti-

11. *Flaminio Costa v. ENEL*, 1964 E.C.R. 585.

12. *Amministrazione delle Finanze dello Stato v. Simmenthal S.P.A.*, 1978 E.C.R. 629.

13. *Van Gend & Loos v. Netherlandse Administratie der Belastingen*, 1963 E.C.R. 2.

tutional review has been accepted only recently by many Member States. I will mention two very recent illustrations, taken from the United Kingdom and France.

In the United Kingdom it had been thought that, because of the sovereignty of Parliament, the European Communities Act of 1972, which gives effect to Community law in the United Kingdom, could be overridden by a subsequent conflicting act of Parliament. However, in the *Factortame* case in 1989, it appears to have been accepted that acts of Parliament must yield to the case-law of the European Court, and it appears to follow from the decision of the House of Lords in that case that any act of Parliament subsequent to the European Communities Act must be read as subject to directly enforceable rights arising under Community law.¹⁴ In France, where the supreme administrative court (Conseil d'Etat) had taken the position that it could review administrative measures but not legislation, the decision of October 20, 1989 in the *Nicolo*¹⁵ case marks a new departure. There, the Court appeared prepared to give effect to the provisions of the EEC Treaty as overriding French legislation in the event of conflict. Taken together, these developments in the courts of the Member States constitute full acceptance of the principles stated by the Court of Justice on the direct effect and primacy of Community law.

Finally, I would mention briefly two possible future developments that may occur under the impetus of the Single European Act. One is the development of the "social dimension" of the Community.¹⁶ It has sometimes been overlooked that "social law," as well as economic law, has a place in the Community and is already reflected in a body of social legislation. The Commission has proposed that the single market program should be accompanied by a broader "social dimension," and has proposed the adoption of a Community Social Charter setting out the fundamental social rights of workers. The proposed Charter is very wide-ranging, and in some areas, it may involve a significant extension of the Community's competence.¹⁷

A second possible development is further progress towards economic and monetary union, possibly leading ultimately to the creation of a single European currency and to the establishment of a single

14. *Regina v Secretary of State for Transport*, 3 Comm. Mkt. L.R. 1 (1988).

15. *Nicolo*, Conseil d'Etat, 1989 LEBON 108.243.

16. See Koopmans, *Equal Protection — The Social Dimension of European Community Law*, 11 MICH. J. INT'L L. 1 (1989).

17. For a discussion from a U.K. perspective, see SELECT COMMITTEE ON THE EUROPEAN COMMUNITIES, THIRD REPORT, 1989, HL PAPER 6-I.

European central bank.¹⁸ These proposals have profound constitutional implications, but they are considered by some as necessary if a true single market is to be attained, and if the full benefits are to be derived from it. The proposals will also require new amendments to the Treaty. If such amendments come about, then a new chapter on constitutional developments in the Community will have to be written.

18. *See similarly* SELECT COMMITTEE ON THE EUROPEAN COMMUNITIES, SECOND REPORT, 1989, HL PAPER 3-I.