

THE TREATY ON EUROPEAN UNION OR, A GUIDED TOUR OF MAASTRICHT

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I. INTRODUCTION

The Treaty on European Union,¹ or the Maastricht Treaty as it has become known colloquially,² represents a bold attempt to take the process of economic and political integration among the twelve EC Member States to a radically higher level. As observers of the political scene in Europe will have noted however, the path to ratification, and hence entry into force, of the Treaty has been fraught with difficulty. The Danes in a popular referendum in June 1992 narrowly rejected ratification,³ but reversed this position in a further referendum held in May 1993.⁴ The French in their October 1992 referendum gave ratification a 'petit oui' or bare approval⁵, and in the UK the Maastricht Bill, after considerable delay, received its second reading in the House of Commons in May 1993, and is, at the time of writing, before the House of Lords for consideration.⁶ It now seems likely that the Act will receive the Royal Assent in late 1993, thus permitting British ratification of the Treaty. Of the major EC states, only Germany, with the Bundestag's resounding vote in favour of ratification in December 1992, appears to have had little difficulty in making the necessary progress towards ratification.⁷ Similarly, Ireland, the Benelux countries and the peripheral Mediterranean states of the EC do not appear to entertain doubts about the benefits to them of further integration and have proceeded to ratification without delay.

What, then, is the content of this Treaty which makes it so controversial and which has produced such serious political fault lines not just among EC Member States but also within a number of those states? The answer to this question, involving as it does a variety of conflicting political postures both among and within the Member States, is not simple. It is, however, possible to point to two major elements of contention within the Treaty which have caused considerable debate. The first of these is the argument that the Maastricht Treaty strengthens the interventionist powers of the Commission to an unacceptable extent, thus eroding the sovereignty of the Member States. While it is clear that the powers of the Commission *per se* have not been increased by the TEU, it is obvious nonetheless that the areas in which it may exercise its right of legislative initiative have

1 For the text of the Treaty and its attached Protocols and Declarations see (1992) 31 ILM 247.

2 After the Dutch seaside town where the Treaty on European Union was signed.

3 *Keesing's Record of World Events*, Vol. 38, 1992, p. 38942. 50.71% of those voting rejected the TEU.

4 See Delegation of the Commission of the EC to Australia and New Zealand, *EC News*, p. 1. The reversal of the Danish position occurred as a result of concessions made to Denmark at the December 1992 Edinburgh Summit in the areas of monetary union and European Citizenship. See *Official Journal of the EC* 98/C 348/01.

5 *Keesing's Record of World Events*, Vol. 38, 1992, p. 39081. 51.04% of those voting voted in favour of the TEU.

6 British Prime Minister John Major experienced considerable difficulty in securing passage of the Bill, meeting substantial opposition from MPs in his own Conservative Party. It is not anticipated that delay will be experienced in the House of Lords.

7 *The Times*, Saturday 5 December, 1992, p. 3.

been extended significantly. It must be remembered, as will be demonstrated below, that the Commission has no power of primary legislation; that function lies entirely within the purview of the Council. It should be emphasised, however, that the Commission enjoys extensive powers of secondary legislation *via* the legislative mandate of the Council, thus the broadening of the Council's competences will lead to a corresponding broadening of the Commission's derivative legislative power.

The second major element of contention contained in the TEU is that of monetary union under a European System of Central Banks (ESCB) and a European Central Bank (ECB). It is argued here that the level of monetary and economic convergence which the Treaty demands will effectively rob Member States of their economic sovereignty by placing economic decision-making in the hands of a remote and politically independent institution. This view of the TEU is undoubtedly correct since the primary aim of the Treaty is to weld the economies of Europe into a single economy with a single currency. Whether one favours or disfavors this approach depends not upon a legal interpretation of the relevant provisions of the TEU, but whether one agrees with the underlying philosophy of this new stage in European integration.

Although much of the public political debate has been dominated by the two major issues referred to above, sight should not be lost of the fact that the TEU also deals with a number of factors which, while not of the same political magnitude as those issues, nonetheless are of substantial significance in the overall development of the Community. Some of the institutional changes, for example, may appear relatively minor, but they go some way to redressing problems concerning the functioning of the EEC Treaty which have emerged in the past. The close integration of the European Parliament into the policy making, legislative and supervisory processes of the Community is a significant factor, as is the creation of an EC Ombudsman to deal with questions of Community maladministration and the extension of the European Court of Justice's jurisdiction.

The purpose of this article is to provide a guide to the Maastricht Treaty on European Union by identifying those policy and institutional changes of significance effected by the Treaty, and by placing them in the context of the EC's existing patrimony or *acquis communautaire* as it is generally termed.⁸ It will also attempt to judge to what degree the TEU takes the EC down the federal road, bearing in mind that the original inclusion of the word 'federal' was dropped by the European Council on the perhaps specious grounds that, according to Dutch Prime Minister Ruud Lubbers, 'the term meant different things to different people'.⁹

II. THE EUROPEAN COMMUNITY

Although it is common to talk of the European Community there are in fact three separate communities served by common institutions. These are the European Coal and Steel Community (ECSC) established in 1951 by the Treaty of Paris, the European Economic Community (EEC) and European Atomic Energy Community (EURATOM) both of which were

⁸ The *acquis communautaire* is comprised of those matters which are now, without dispute, a matter of Community competence. It includes, in the legal field, such matters as the direct effect of EC law and the principle that EC law is superior to conflicting domestic law. On the meaning of 'direct effect' see below, pp 108-109.

⁹ *Keesing's Record of World Events*, Vol 37, 1991, p 38658.

created by the Treaty of Rome in 1957. A Merger Treaty adopted in 1965 placed the three communities under the aegis of a single Council, Commission and Court. Of these three treaties the most significant is the EEC.¹⁰ Drafted following a highly influential report by the then Belgian Foreign Minister Paul-Henri Spaak, the EEC Treaty was designed to facilitate economic and political integration among the original six Member States. This was to be achieved by creating a customs union throughout which economic factors of production – goods, capital, workers and entrepreneurs – could move without impediment, leading to a more rational and efficient allocation of resources within the Community. The customs union was supplemented by a range of policies including a transport policy, a commercial policy, a competition policy, and a, by now infamous, common agricultural policy. While there was no explicit statement of the political aspirations of the EC in the Treaty of Rome, it was nonetheless assumed that economic integration would eventually lead to political integration, although the precise extent to which such integration should be taken was never formally acknowledged. In order to facilitate these aims the treaty took the form of a *traité cadre* or framework treaty containing a mixture of specific rules and general policies which were to be implemented by an array of legislative measures by the competent EC institutions.

The EC remained a community of six until 1973 when Denmark, Ireland and the UK acceded, expanding the number of Member States to nine. In 1979 Greece became a Member State, and finally, in 1986, accession of the two Iberian Peninsular states to the EC extended membership to the present twelve. A further important development in the EC which took place in 1986 was the adoption of the Single European Act (SEA). This was an amendment to the EEC Treaty which was introduced primarily to facilitate the completion of the internal market, that is the full free movement of all goods, services, people and capital within the EC, by 1992.¹¹ The major effect of the SEA was to accelerate legislative procedures by introducing weighted majority voting in certain areas as a substitute for unanimity which could always be affected by a veto where the issue was seen to affect the vital national interests of an opposing state.¹² The SEA also introduced new titles concerning the protection of the environment within the Community, vocational training, research and technological development and the creation of a mechanism for foreign policy cooperation.

Before examining the potential changes introduced into the EEC Treaty by the TEU, it is necessary to examine in outline the structure of the institutions of the EC and their various powers and procedures.

10 For a collection of important EC Treaties see B Rudden and D Wyatt, *Basic Community Law*, (Oxford, Clarendon Press, 2nd edn, 1986).

11 On the perceived benefits of the single market see P Cecchini, *The European Challenge 1992: The Benefits of a Single Market*, (Aldershot: Wildwood House, 1988). This work is also known as *The Cecchini Report*.

12 The veto was introduced by the so-called Luxembourg Accords of 1965. These were adopted following a crisis in the EC precipitated by French withdrawal from the Council. The crisis was resolved by adopting the accords which stipulated that wherever a matter affecting the vital national interests of a Member State was raised, that Member State could veto any decision on that matter. See D A C Freestone and J S Davidson, *The Institutional Framework of the European Communities*, (London and New York: Croom Helm, 1988), pp 68-9.

III. THE INSTITUTIONS OF THE EUROPEAN COMMUNITY

Under Article 4 EEC, the EC is equipped with four major institutions with which to carry out its tasks. These are:

1. the Council of Ministers
2. the Commission
3. the European Court of Justice (ECJ)
4. the Assembly or European Parliament (EP).

1. The Council of Ministers

The Council consists of representatives of the Member States, each state delegating one member, usually of ministerial rank, to represent it.¹³ Which minister attends a Council meeting will vary according to the issue under discussion. If the question is one of finance, the finance ministers of the Member States will attend; if the subject matter concerns agriculture, the ministers of agriculture will attend, and so on. Although the Council is clearly a political body, in that the Members States' interests are directly represented, its main function is, in fact, legislative.¹⁴ The Council usually acts on a proposal of the Commission and must, in a significant number of cases, consult with the EP and in some cases obtain its opinion.¹⁵ If the EP is opposed to a particular piece of legislation, the Council may only adopt it by unanimity.¹⁶ Following amendment of the Treaty by the SEA, the majority of decisions, as was indeed originally provided for by the EEC Treaty itself, are taken by qualified majority. Under this voting procedure the Member States are assigned a particular number of votes. France, Germany, Italy and the UK, the 'Big Four', are given ten votes each; Spain is given eight; Belgium, Greece, The Netherlands and Portugal five; Denmark and Ireland three and Luxembourg two. This makes a total of 76 votes, of which 54 are required to achieve a qualified majority.¹⁷ This shift to primary reliance on qualified majority voting has not, however, completely eradicated unanimous voting procedures, with the attendant possibility of a veto when Member States consider their vital national interests to be at risk.

The European Council

It is perhaps appropriate at this point to mention an institution which did not appear in the original EEC Treaty but which has been subsequently recognised by Article 2 SEA. This is the European Council, a body which should not be confused with the Council of Ministers. At the Paris Summit of 1972, it was agreed by the Heads of Government that they should meet, accompanied by their Foreign Ministers, three times a year. The function of this avowedly political body is to set the agenda for progress in the EC and to deal with any other broadly political issues which might arise from time to time. While the SEA recognises the existence of the European Council,¹⁸ the deliberations of that body are specifically excluded from the jurisdiction of the ECJ.¹⁹

¹³ Article 2 Merger Treaty.

¹⁴ Article 145 EEC.

¹⁵ See, for example, Article 43(2) EEC setting out the procedure for the adoption of legislation in the sphere of agriculture.

¹⁶ Article 149 EEC.

¹⁷ Article 148(2) EEC.

¹⁸ Article 2 SEA.

¹⁹ Article 30 SEA.

2. The Commission

The Commission is comprised of 17 members who, although nationals of the Member States, do not represent their countries' interests but are servants of the EC.²⁰ The Big Four and Spain are entitled to have two Commissioners each, the remaining states one Commissioner each.²¹ The functions of the Commission are essentially twofold. First, the Commission enjoys the power of legislative initiative.²² This it may do *proprio motu* or at the request of the Council of Ministers. What is clear is that the Council may not act without a proposal for legislation having been first presented to it by the Commission. The Commission's power to initiate legislation is not open-ended: it must act within the powers conferred upon it by the Treaty.²³ This has not, however, proved to be excessively problematical in terms of expanding the ambit of the Commission's competence, since Article 235 EEC provides the Commission with a general power to initiate legislation if this is necessary for the proper functioning of the Common Market. A reasonably high degree of elasticity clearly attaches to this particular provision.

The Commission's second function is to act as the 'watch-dog' of the EC.²⁴ It is the Commission which initiates action against Member States which fail to fulfil their obligations under the Treaty and it is the Commission which supervises the implementation of the EC's competition and anti-dumping policies.

A notable feature of the Commission is its collegiate *modus operandi*. Although individual Commissioners are assigned portfolios representing important sectors of the EC's activities, under the existing EEC Treaty, these Commissioners cannot be dismissed individually if they fail to measure up to the political demands of the Council. They can, however, be dismissed for serious misconduct in office or if they engage in activities which are in conflict with their obligations as Community servants.²⁵ The only procedure which may be invoked against the Commission if it is deemed to have somehow failed in its political duty is provided for in Article 144 EEC. This procedure, which is known as a vote of censure, requires the Commission to be dismissed as a whole by the EP by a vote of two thirds of MEPs. The Article 144 procedure, which has never been enforced against the Commission, is arguably redundant since the EP and the Commission have generally found themselves politically united against the Council rather than pitched against each other.²⁶ Nonetheless, this particular provision has not been altered by the TEU.

3. The European Court of Justice

The ECJ, which consists of thirteen judges,²⁷ is required by Article 164 'to ensure that in the interpretation and application of this Treaty the law is observed'. In fulfilment of this obligation the Court is given a wide array of powers and functions. It can act as an international court in disputes

20 Article 10(1) Merger Treaty.

21 This is a matter of convention rather than law.

22 Article 155 EEC.

23 Article 4(1) EEC.

24 Article 155 EEC.

25 Article 13 Merger Treaty.

26 The procedure has, however, been engaged on four occasions, but the requisite majority has never been obtained. See Freestone and Davidson, *op cit*, at 59, 79-80.

27 Article 165 EEC.

between Member States.²⁸ It can function as a constitutional court under its Article 177 EEC procedure whereby the courts of the Member States remit cases involving an EC law element to it for authoritative determination. It functions as an administrative law court by reviewing the legality of EC acts,²⁹ the grounds of review being modelled upon those of the French *Conseil d'Etat*, a body to which the ECJ itself bears a notable resemblance. The ECJ may also function as a civil court in circumstances where Community action or inaction has led to pecuniary loss by an affected natural or legal person.³⁰ And finally, the Court enjoys the role of an industrial tribunal in disputes between the EC and its employees.³¹ Through its primarily teleological method of interpretation the Court has contributed significantly to the development of EC law and, hence, European integration.³²

Under Article 11 of the SEA (new Article 164A EEC), the ECJ was given the power to create a Court of First Instance whose primary function is to hear cases concerning the legality of EC acts under Articles 173, 175 and 184 EEC. The Court of First Instance was established in 1989 and has operated with some success since that date.³³

4. The European Parliament

Originally called the Assembly under the EEC Treaty,³⁴ that body very quickly, but informally, changed its name to the European Parliament. Following amendment of the Treaty by the SEA, the change of name was given official sanction. Although the EP was at first convoked by appointing members of national parliaments to it, it is now a directly elected body. Its formal legal powers, although few in number, have been significantly maximised by the EP's creativity in expanding these powers to their full potential. As we have already seen the EP is required to be consulted in the adoption of legislation.³⁵ Failure properly to consult the Parliament will result in the legislation being struck down by the ECJ on the grounds that this amounts to the infringement of an essential procedural requirement under Article 173 EEC.³⁶ The EP is also given an important role in the adoption of the EC's budget. Not only is the EP responsible for the allocation of non-compulsory expenditure,³⁷ but the budget may not be adopted without Parliamentary consent.³⁸ Finally, the EP exercises a direct supervisory role over the Commission. As indicated above, the EP has the power to dismiss the Commission *en bloc* by a vote of censure.³⁹

At the political level, although the Council is not formally subject to EP oversight, the EP has nonetheless exercised a quasi-supervisory role over it by keeping Council action under periodic review. Parliament reports on

28 Article 170 EEC.

29 Articles 173 and 184 EEC.

30 Article 215 EEC.

31 Article 179 EEC.

32 See D Freestone, 'The European Court of Justice' in J Lodge, *Institutions and Policies of the European Community*, (London: Frances Pinter, 1983), at 43-53.

33 See T Kennedy, 'The Essential Minimum: The Establishment of the Court of First Instance', (1989) 14 *European Law Review*, pp. 7-29.

34 Articles 4 and 137 EEC.

35 See above p. 000.

36 Case 138/79 *SA Roquette Freres v Council* [1980] *European Court Reports* (ECR) 3333; Case 139/79 *Maizena v Council* [1980] ECR 3393.

37 That is, that part of EC expenditure not allocated to the implementation of the Community's major policy areas.

38 See Freestone and Davidson, *op cit*, chapter 5.

39 Article 144 EEC. See above p 106.

the Council three times a year, and the President of the Council has now adopted the practice of addressing the EP once a year.⁴⁰ The possibility of a broad form of political control therefore exists despite the absence of formal legal powers on the part of the EP.

Among the other powers provided for in the EEC Treaty which have been creatively developed by the EP are its ability to commence an action before the ECJ under Article 175 EEC where, in its opinion, either the Commission or the Council has failed to act in conformity with the Treaty.⁴¹ While the EP is not competent to seek review of the legality of a Community act under Article 173 EEC, a matter which has been viewed by some commentators as illogical and theoretically indefensible,⁴² it is nonetheless entitled to intervene as an interested third party in cases before the ECJ.⁴³

5. Other European Community Institutions

In addition to the four major institutions described above, two further subsidiary institutions should also be noted. First, the Court of Auditors. This was established by the Budgetary Powers Treaty of 1975 to exercise supervision and control over the implementation of the EC budget. Since it is the Commission which is responsible for the implementation of the budget, the Court of Auditors exercises an important supervisory role over that institution. Second, the Economic and Social Committee of the EC which is composed of a variety of sectional interests such as trades unions, employers organisations, farmers and so on, enjoys a consultative role under the Treaty.⁴⁴ Where consultation of the ESC is obligatory prior to the adoption of legislation by the Council, it must be demonstrated that the ESC has been properly consulted.⁴⁵

IV. SOURCES OF EUROPEAN COMMUNITY LAW

Before passing on to consider the general effects of the TEU, it is appropriate to examine briefly the primary sources of EC law. First and foremost the treaty itself is a direct source of law not only for the Member States *inter se*, but also, where certain conditions are satisfied, for individuals within those states. The ECJ has held that where a treaty provision is clear, precise and in need of no further measures of implementation, it may be relied upon directly in the national courts of the Member States either as a defence to, or a cause of action in, a dispute with a Member State or a private individual.⁴⁶ This is known as the doctrine of direct effect.⁴⁷ Where a treaty provision is invoked against a Member State in a national court, this is known as vertical direct effect;⁴⁸ where it is invoked against another individual it is termed horizontal direct effect. A significant number of the EEC Treaty's provisions have been declared by the Court to have such effects. A small number of examples here will serve to

40 See Freestone and Davidson, *op cit*, 79-80.

41 Case 13/83 *Parliament v Council* [1985] ECR 1513.

42 See P Pescatore, 'Reconnaissance et controle judiciaire des actes du Parlement Européen' [1978] *Revue Trimestrielle du Droit Europeen*, p 158.

43 See the cases cited above at note 34.

44 Article 193 EEC.

45 Article 173 EEC and see the cases cited above at note 37.

46 Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

47 See Freestone and Davidson, *op cit*, p 28-38.

48 This was the case in *Van Gend en Loos* above note 43, in which the plaintiff, a private company, recovered customs duty wrongly levied by the Dutch state by invoking Article 12 EEC in the Dutch courts.

demonstrate the kind of issues which have been considered by the ECJ to be a direct source of law for national legal systems or legal orders as the Court prefers to term them. First, Article 48 EEC which permits the free movement of workers throughout the EC has been held to produce direct effects.⁴⁹ Similarly Article 52 EEC which provides for the free movement of those who wish to establish themselves in business in an EC state other than their own has been declared to give rise to rights which individuals may enforce directly before the courts of Member States.⁵⁰ States which attempt to exclude workers, entrepreneurs or providers of services from entering and operating upon their territory may therefore be challenged in their own courts by individuals relying upon the relevant Treaty article. An important provision which was held to have horizontal direct effect at an early stage in the EC's development was Article 119 EEC which recognises the principle that men and women should receive equal pay for equal work. Thus in *Defrenne v SABENA*⁵¹ the ECJ held in a far reaching judgment that SABENA, the Belgian national airline, had violated the principle established by Article 119 EEC when it required female cabin crew to retire at an earlier age than their male counterparts thereby affecting the pension entitlements of the former.

In order to carry out their functions under the Treaty, the Council and the Commission are given the power to take legislative action. As we have seen above,⁵² the Council is the primary legislator, while the Commission, in the absence of any empowering article in the Treaty, is a secondary legislator, largely implementing the policies determined in Council legislation. The legislative measures or acts which may be adopted by the Council and the Commission are laid down in Article 189 EEC. These are regulations, directives, decisions, recommendations and opinions. They are defined by Article 189 EEC as follows:

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A decision shall be binding in its entirety upon those to whom it is addressed.

Recommendations and opinions shall have no binding force.

Each of these legislative devices requires some explanation. First, there is a clear division between binding and non-binding acts. Only regulations, directives and decisions are legally binding. Recommendations and opinions are simply devices by which the Council or, more usually, the Commission indicates to Member States or individuals within those states its position upon a particular issue. A prudent state or individual is advised to follow the Commission's recommendations or opinions, since they may well constitute a precursor to more formal legal action.

Second, the binding acts which may be adopted by the Council and the Commission are qualitatively different. Regulations are the legislative instrument *par excellence*, since they have general normative effect throughout the EC.⁵³ Once a regulation is adopted it becomes part of the national legal order of Member States and can be relied upon by individuals before national courts and tribunals without the need for national measures

49 Case 167/73 *Commission v France* [1974] ECR 359.

50 Case 2/74 *Reyner v Belgian State* [1974] ECR 631.

51 Case 43/75 [1976] ECR 455.

52 See above, p 105.

53 This is the meaning of 'directly applicable' in Article 189 EEC.

of implementation. Indeed, any attempt by a Member State to implement a regulation will be a violation of EC law, since the process of domestic implementation, in the view of the ECJ, obscures the Community provenance of the act.⁵⁴ Directives are the legislative device which is used to ensure the harmonisation of national laws to accord with some EC policy such as, for example, technical standards in manufactured goods. Here, Member States are given a period of time, which varies from directive to directive according to the subject matter of its concern, in order to allow them to take the necessary domestic legislative action to implement the directive. Decisions are particular legislative instruments which are directed at named states or natural or legal persons. They therefore only produce legal effects for the persons so named. This device is used, for example, by the Commission in the conduct of its competition policy where decisions may be adopted by the Commission to exempt technical infringements of EC competition law or to impose fines on enterprises engaged in anti-competitive practices.⁵⁵

V. THE EFFECTS OF THE TREATY ON EUROPEAN UNION

Before analysing the precise impact of the TEU, it is appropriate to make some inquiry into the nature of the instrument under consideration. Essentially, it is a treaty at international law which is designed to have two major effects. First, it supplements the existing EC Treaties by establishing a new and much broader rationale for the existence and activities of the Community. Second, it introduces a considerable number of amendments to the EC Treaties which not only modify existing institutional arrangements, but which also introduce substantial new policy areas. A number of amendments, however, simply rationalise a variety of changes which have already been effected by other instruments such as the Merger Treaty, the Budgetary Powers Treaty and the SEA. Other changes introduced by the TEU simply include in the EC Treaties a number of matters which were regulated by subordinate instruments. The legislative process which is now expressly included in Article 189(a) European Community Treaty (ECT)⁵⁶ reflects the *status quo* which is dealt with by various EC institutions' rules of procedure.⁵⁷ These have simply been elevated to the status of treaty law for the purposes of transparency and certainty.

It is intended in this article to focus primarily on the changes of major significance introduced by the TEU, since these may be characterised as the central elements in the restructuring of the EC, and, as might be expected, they are the changes upon which much of the political debate has been focused. The areas which will be considered below are:

1. The remodelled and expanded *raison d'être* for the Union.
2. European Citizenship and free movement of persons.
3. Monetary Union and the creation of a European System of Central Banks and a European Central Bank.
4. Institutional changes.

⁵⁴ Case 93/71 *Leonesio v Ministry of Agriculture* [1972] ECR 287.

⁵⁵ See Regulation 17/62 *Journal Officiel*, 1962, 204.

⁵⁶ This appellation will be used hereafter to denote the changes which will be effected by the TEU should it enter into force.

⁵⁷ See Freestone and Davidson, *op cit*, chapter 4.

1. The remodelled and expanded *raison d'être* for the Union.

As indicated above, the EC was founded upon the twin premises of economic and political integration or as the Preamble to the Treaty of Rome termed it, 'an ever closer union among the people's of Europe.'⁵⁸ The commitment to political integration contained in the Treaty is both implicit and somewhat open-ended, but might, in a practical sense, be said to be coterminous with the rather more finite economic objectives of the EC. In other words, the assumption of the drafters of the EEC Treaty was that political union would progress as far as necessary for the implementation of those economic objectives. Underpinning the whole of the Treaty of Rome was a belief in a form of free market economics and the whole ideological baggage that accompanies such a belief. Again, however, this belief was nowhere stated explicitly in the Treaty, but it was implicit in the creation of a customs union, the elimination of state subsidies and monopolies and the introduction of a relatively sophisticated system for regulating competition.⁵⁹ The TEU is much more explicit in its identification of the ideological grounds upon which the Union is to be founded. These are located in the Preamble to, and Article B of, the TEU.⁶⁰

The Preamble to the TEU may be said to represent a more or less coherent statement of western liberal democracy, underpinned by its attendant capitalist economic system. The first two preambular paragraphs indicate that the TEU marks a new stage in the process of European integration and that such progress is necessary in order to provide a firm base for the future construction of a Europe whose political divisions no longer exist. The Preamble then goes on to confirm the Member States attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and the rule of law. Article F TEU also specifically mentions that the Member States of the Union are 'founded on the principles of democracy' and that the Union shall respect as general principles of Community law fundamental rights 'as guaranteed by the [European Convention on Human Rights] and as they result from the constitutional traditions common to the Member States'. The democratic imperative is also evident in the wish of the parties to enhance the democratic function of the Union's institutions so as to enable them to carry out their tasks more efficiently. Two other themes also run throughout the Preamble. These are the importance of economic development for promoting the economic and social welfare of the people within the Member States of the EC through cooperation and convergence of their respective economies, and the enhancement of the free movement of people. This latter is to be facilitated in two ways: first, through the creation of a common European citizenship,⁶¹ and second, by facilitating the free movement of peoples in general while having regard to the security of the Member States' populations through cooperation on justice and home affairs. Within the Preamble one also finds first mention of the principle of subsidiarity. Preambular paragraph 10 provides that the parties to the TEU are:

⁵⁸ Article 2 EEC.

⁵⁹ Article 3 EEC.

⁶⁰ New Title VI ECT (Article GD25 TEU) which deals with economic and monetary policy also alludes to the ideology which underpins the Community. Article 102a EEC provides, *inter alia*: The Member States and the Community shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources, and in compliance with the principles set out in Article 3a.

⁶¹ See below, pp 115-117.

RESOLVED to continue 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 in accordance with the principle of subsidiarity.

The principle of subsidiarity, which made its initial appearance in the Draft Treaty on European Union of 1987, is effectively defined by Article G(B)(3) TEU (Article 3(b) ECT), as follows:

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

Clearly this provision deals with those areas of activity which straddle the border between Community and Member State competence. If a matter lies within the field of the Community's competence, which is primarily defined by the Treaty, then the Community clearly has unfettered jurisdiction to act. Where a matter falls within an area of overlapping competences, then subsidiarity requires that it be dealt with by the Member States individually at a local level rather than by the Community, unless the former are unable to achieve the objectives involved by themselves or unless the objectives of themselves might be better achieved by Community action. While it is difficult to give concrete examples of where the principle of subsidiarity might operate,⁶² nonetheless one can envisage it functioning in the broad area of economic, social and related policies. Whether or not a matter does or does not lie within the exclusive competence of the Community is ultimately a matter for the ECJ to determine.⁶³

In many respects the principle of subsidiarity has become a pivotal aspect of the argument in the UK between those who are pro and those who are anti Maastricht. Those who are in favour of the TEU argue that subsidiarity represents an essential guarantee that as many decisions as possible will be taken at the local or Member State level, while those who are termed 'Euro-sceptics' take the view that subsidiarity is no safeguard that national sovereignty will be protected at all given the new and extremely broad areas of activity which have been assigned by Member States to the Community.⁶⁴ An objective assessment of the principle would seem to suggest that it will have little effect upon the development of Community competence not only within the areas clearly and explicitly delineated by the TEU, but also within those fields which are not at first glance a matter of Community concern. Reference to the original EEC Treaty will serve to illustrate that matters which were not initially thought to be of concern to the Community were subsequently brought within its ambit by political accommodation within the Council and by expansive decisions of the ECJ.⁶⁵ It might also be observed here that given the ECJ's

62 Although it has been reported that a list of areas where the principle of subsidiarity should prevail was agreed at the Edinburgh Summit. *The Times*, Monday December 14, 1992, p 6.

63 For two different views of the nature of subsidiarity see A G Toth, 'The Principle of Subsidiarity in the Maastricht Treaty', (1992) 29 *Common Market Law Review* 1079 and D Z Cass, 'The Word That Saves Maastricht?: The Principle of Subsidiarity and the Division of Power Within the European Community', (1992) 20 *Common Market Law Review* 1107.

64 See European Policy Forum, *Subsidiarity: No Panacea*, (London: European Policy Forum, 1992).

65 See, for example, the ECJ's liberalising decisions in the area of free movement of goods, Article 30 EEC (prohibition of quantitative restrictions and measures having an equivalent effect thereto). In particular see Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon Case)* [1979] ECR 649. This was a landmark case in the liberalisation of trade in the Common Market. The ECJ held that any product lawfully manufactured in one Member State should, in principle, be marketable in any other Member

highly integrationist tendencies, which are exhibited through its teleological approach to interpreting important policy areas within the Treaty, there are few matters lying within the broad economic field which will not be subject to Community oversight.⁶⁶

The Union⁶⁷ which is to be founded upon the EC is established by Article A TEU. Article B TEU then goes on to state the Union's objectives. These are:

to promote economic and social progress which is balanced and sustainable, in particular through the creation of an area without internal frontiers, through the strengthening of economic social cohesion and through the establishment of economic and monetary union, ultimately including a single currency ... ;
 to assert its identity on the international scene, in particular through the implementation of a common foreign and security policy including the eventual framing of a common defence policy, which might in time lead to a common defence;
 to strengthen the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union;
 to develop close cooperation on justice and home affairs;
 to maintain in full the *acquis communautaire* and build on it ...

All these objectives are to be achieved according to the various timetables set out in the TEU, while having regard to the principle of subsidiarity. The new Article 2 ECT inserted by Article GB2 TEU also extends, and to some extent, redefines the tasks of the Community. While the unamended EEC Treaty simply requires the creation of a common market for the attainment of the objectives of the Community, Article 2 ECT now requires the establishment of an economic and monetary union in order to promote throughout the Community 'a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment, a high degree of convergence of economic performance, a high level of employment and of social protection, the raising of the standard of living and the quality of life, and economic and social cohesion and solidarity among Member States.' The new Article 3 ECT defines the methods and policies by which the tasks set out in Article 2 ECT are to be accomplished. These include not only various aspects of the 'four freedoms' – that is the free movement throughout the internal market of goods, services, persons and capital – but also policy areas covered by the original EEC Treaty and those introduced by the SEA. These latter include policies relating broadly to social matters, research and technological development and the environment. New policy areas brought within the Community's competence by the TEU are:

- strengthening the competitiveness of Community industry
- encouraging the establishment of trans-European communications networks
- contributing to a high level of health protection
- contributing to education and training of quality and to the flowering of the cultures of the Member States

State. Member States were, however, left with some residual power to impose restrictions, but these were available only to satisfy 'mandatory requirements' (*exigences imperatives*) such as the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer.

⁶⁶ See, for example, S Davidson, 'Free Movement of Goods, Workers, Services and Capital' in J Lodge, (ed), *The European Community and the Challenge of the Future*, (London: Frances Pinter, 1989).

⁶⁷ The term 'Union' and 'Community' appear to be synonymous within the context of the TEU.

- promoting overseas development and development cooperation
- strengthening consumer protection
- taking of measures in the spheres of energy, civil protection and tourism

In total, the new Article 3 ECT subsumes 20 discrete policy areas which are now placed under Community competence. This clearly has the effect of extending the power of the Community's institutions throughout a much broader area than is the case under the unamended EEC Treaty. It is worth pointing out here, that even in the relatively restricted policy fields of the present EEC Treaty, it has been possible for the Community to extend its legislative competences by a generous interpretation of those policies and the provisions dealing with their implementation. With the extension of policy fields, it seems likely that, despite the existence of the principle of subsidiarity, the development of the Community's power will be even more far-reaching. The Commission, for example, will enjoy the right of legislative initiative in a substantial number of areas which, at present, remain clearly within the reserved domain of the Member States.

It is, however, in the field of economic and monetary policy that, perhaps, the most obvious inroads will be made into national sovereignty. While convergence of the economic and monetary policies of Member States was initiated by the SEA, it is with the TEU we find this area of Community activity taken to the arguably logical conclusion of monetary union by way of a single currency. While this issue will be dealt with extensively later in this article, it is appropriate at this juncture to indicate that Article 3(a) ECT establishes economic and monetary convergence as a necessary prerequisite to the attainment of the tasks of the Community as defined by Article 2 ECT. Furthermore, Article 3(a) ECT gives, once again, a clear indication of the capitalist ideology upon which the Community is based. It provides in paragraph 1 that the Member States must adopt an economic policy 'which is based on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition.' Concurrently with this convergence we find that Article 3(a)(2) ECT requires the Member States to move towards an irrevocable fixing of exchange rates leading to the introduction of a single currency and a monetary policy, the primary objective of which is to maintain price stability. In pursuing these objectives, the TEU requires both the Member States and the Community to comply with the guiding principles of 'stable prices, sound public finances and monetary condition and a sustainable balance of payments.' It will be apparent from this that the TEU largely entrenches a conservative view of public finances, and it is arguable that the guiding hand of the Chicago School of economics might be discerned in the formulation of the monetary principles which underpin the Community's structure.

2. European Citizenship

Article G(C) TEU (Article 8 ECT) establishes citizenship of the Union by stating that every person who holds the nationality of a Member State shall be a citizen of the Union. For these purposes, a Declaration attached to the TEU by the Conference states that it shall be for the Member States themselves to determine who is to be regarded as a national. Nationality is therefore to be determined solely by reference to the domestic law of the

Member States. Thus, after entry into force of the TEU, individuals will effectively enjoy two levels of citizenship or nationality: that of their own state and that of the Union. Some progress on creating a European identity among the peoples of Europe has already been made through the introduction of a common format passport which, although having a uniform burgundy red colour and the title of 'European Community' emblazoned at its head, nonetheless retains the national insignias and names of the Member States on its front cover.⁶⁸ This largely symbolic arrangement will certainly take on real significance when citizenship of the Union is finally established.

What then are the rights which attach to citizenship of the Union? First, every citizen is entitled to move and reside freely within the territory of any other Member State subject to limitations based on public health, public policy and public security which exist in various other provisions of the EEC Treaty and associated legislation.⁶⁹ This is a marked advance on the right to free movement within the unamended Treaty of Rome where such a right of free movement depended on a person's economic status as a worker, a provider or recipient of services or persons who sought to establish themselves in business in another Member State.⁷⁰ Although the ECJ has been reasonably creative in extending the ambit of these provisions to seekers after work and part-time workers,⁷¹ for example, nonetheless it remains evident that the EEC treaty did not grant citizens of Member States a general right to free movement.⁷²

Second, citizens of the Union are entitled, no matter what their nationality, to stand for elections to local government bodies and to the EP under the same conditions as nationals in the Member State in which they are putting themselves forward for election to office.⁷³ As yet, however, there has been no movement to suggest that Union citizens should be entitled to stand for national parliaments. This, conceivably, would be the next logical stage in the process of political integration.

The third right which attaches to Union citizenship is that of diplomatic or consular protection by the diplomatic representatives of any Member State in third states where the citizen's own country lacks appropriate representation.⁷⁴ British citizens, for example, would be entitled to protection by French diplomatic authorities should they find themselves in difficulty in a state where Britain was not represented diplomatically but France was. To some extent this already happens on an informal basis, but the TEU makes clear that the process must be formalised by Member States taking the appropriate legal steps *inter se* and with third states.⁷⁵

68 See Point 10 of the Final Communiqué issued at the European Summit held in Paris on 9 and 10 December 1974 concerning a Passport Union, COM (75) 322 and Resolution of the Representatives of the Governments of the Member States of the European Community, Meeting within the Council of 23 June 1981, Official Journal, 1981, C241/1. See also, A Durand, 'European Citizenship', (1979) 4 European Law Review, 3-14 and A C Evans, 'Entry Formalities in the European Community' (1981) 6 European Law Review, 3-13.

69 Article 8a(1) EEC. Restrictions on free movement are contained in Articles 48(3) and 56(1) EEC and in Directive 64/221, Official Journal, Special Edition, 1963-64, 117.

70 See R Plender, 'An Incipient form of European Citizenship' in F Jacobs, (ed.), *European Community Law and the Individual*, (Amsterdam: North Holland, 1976).

71 See Case 53/81 *DM Levin v Staatssecretaris van Justitie* [1982] ECR 1035.

72 See D Wyatt and A Dashwood, *The Substantive Law of the EEC*, (London: Sweet and Maxwell, 2nd edn., 1987), 162-5.

73 Article 8(b)(1) and (2) EEC.

74 Article 8(c) ECT.

75 *Ibid.* The necessary steps must be taken by 31 December 1993.

Finally, all citizens of the Union are granted the right to petition the EP in accordance with the procedures laid down in the new Article 138(d) ECT. The significance of this particular right is questionable, given that the EP is not empowered to grant redress to an aggrieved individual, should his or her petition be found to hold substance.

A matter which is distinct from, but related to, the issue of Union citizenship is that of the treatment of nationals of third states. Here, the Community is empowered by Article 100(c)(1) ECT to put into place a common policy for such persons. Under this new provision, the Council acting unanimously upon a proposal from the Commission and after consulting the EP must determine the third states whose nationals must be in possession of a visa when crossing the external borders of any of the Member States.⁷⁶ Furthermore, by 1st January 1996 the Community is obliged by the TEU to adopt a uniform format for visas for nationals from third states.⁷⁷

The effects of the provisions concerning Union citizenship and a common policy concerning the nationals of third states is to create a 'common market' in people. At present only citizens of the Member States have the right to free movement within the EC, nationals of third states lawfully in the territory of one of the Member States are limited to residence and movement in that state and may not freely enter another EC Member State. The effect of the new provisions will be that not only will nationals of Member States be able to move freely throughout the territory of the Twelve, but so too will nationals of third states who fulfil the common visa requirements of the Community. Some Member States, notably Britain, took the view at Maastricht that this would prejudice their national security. To counterbalance this view therefore, Article 100(c)(4) ECT provides:

This Article shall be without prejudice to the exercise of the responsibilities incumbent upon the Member States with regard to the maintenance of law and order and the safeguarding of internal security.

The TEU also introduces a new Title VI into the EEC entitled 'Provisions on Cooperation in the Fields of Justice and Home Affairs'. While not laying down a common policy in this area, the TEU nonetheless indicates that the Member States 'shall regard the following areas as matters of common interest.' There then follows a list of basic areas upon which the Member States are obliged to consult. These are:⁷⁸

- asylum policy
- rules governing the crossing of the external borders of the Member States
- immigration policy
- combating drug addiction
- combating fraud
- judicial cooperation in criminal and civil matters
- customs cooperation
- police cooperation for the purposes of preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crime.

⁷⁶ Article 100(c)(3) ECT.

⁷⁷ *Ibid.*

⁷⁸ Article K1 TEU.

To facilitate this latter, it is proposed that a Union-wide system for exchanging police intelligence – to be named Europol – should be established.⁷⁹ In addition a Coordinating Committee of senior officials is to be created to make appropriate recommendations to the Council in pursuit of these objectives.⁸⁰ Again, the TEU here formalises much that has been occurring at an informal level. The so-called ‘Trevi Group’ which consists of internal affairs ministers, senior officials, police and other intelligence agencies has for a number of years functioned as a mechanism for information exchange and cooperation in the areas referred to above. It is, however, abundantly clear that as the Community moves towards a clearly federal structure that this form of cooperation needs to be placed upon a sound footing. It simply recognises that the projected common market in people is likely to create new, and perhaps easier, targets for international criminals and terrorists.

3. Monetary Union and the creation of a European System of Central Banks and a European Central Bank.

Perhaps the central, and most controversial, feature of the TEU is its clear commitment to the phased and gradual introduction of a single European currency to be administered by a European System of Central Banks within the Community of Twelve. Not only was this a major issue of contention at Maastricht for Britain and Denmark, but events subsequent to the adoption of the TEU have demonstrated how economically and politically difficult the path to monetary union is likely to be. Already the timetable established by Maastricht⁸¹ appears to over-optimistic, since the levels of economic and monetary convergence which are conditions precedent to the implementation of the various stages of action in the monetary field seem unlikely to be met within the time limits fixed. The European Exchange Rate Mechanism (ERM) which sought to facilitate convergence of the Member States’ currencies by fixing their exchange rates *inter se* within established margins has recently been placed under considerable pressure and has all but disintegrated. Nevertheless, the ambitious project for monetary union is said to remain essentially on track.

As indicated above, economic and monetary union is to be phased in gradually in three stages. Stage I is to all intents and purposes under way, but begins officially with the entry into force of the TEU. Stage II begins on 1st January 1994,⁸² and stage III must begin not later than 1st January 1999.⁸³

Stage I

Within Stage I the Member States are to follow convergent economic and monetary policies which are subject to coordination by the Council.⁸⁴ The Council itself must, on the initiative of the Commission, adopt a number of programmes in line with certain principles established by the TEU, and keep those programmes under surveillance.⁸⁵ The major principles to be observed by the Council in establishing the appropriate programmes may be described as being financially prudent. Thus, Article 104(c) ECT

⁷⁹ Article K1(9) TEU.

⁸⁰ Article K4 TEU.

⁸¹ See below, p 121.

⁸² Article 109(e) ECT.

⁸³ Article 109(j)(4) ECT.

⁸⁴ Article 103(1) EEC.

⁸⁵ Article 103(2) and (3) EEC.

provides that 'Member States shall avoid excessive government deficits', the question of what is 'excessive' to be determined by the Council under a Protocol⁸⁶ annexed to the TEU. Similarly, Article 105 EEC provides that price stability is one of the main objectives of monetary convergence.

Stage II

During Stage II, which begins on 1 January 1994,⁸⁷ a European Monetary Institute (EMI) is to be created to coordinate the monetary policies of Member States and to prepare the way for progress to Stage III.⁸⁸ This is supposed to be achieved by 1996, but flexibility is built into the system with the net effect that Stage III may commence at any time after December 1996, but no later than 1 January 1999.⁸⁹

The EMI is a transitional institution which is to exist only for the duration of Stage II. Once Stage III is entered the EMI is dissolved and ceases to exist. Article 109(f) ECT determines the constitution of the EMI. It is to be directed and managed by a Council consisting of a President and the Governors of the national central banks of the Member States.⁹⁰ The President, who must be selected from among persons having recognized standing and professional experience in monetary or banking matters, is to be appointed by common agreement by the heads of state or government of the Member States.⁹¹ The functions of the EMI are set down in Article 109(f)(2) ECT and include:

- strengthening cooperation between national banks;
- strengthening coordination of monetary policies of Member States with the aim of ensuring price stability
- monitoring the EMS
- facilitating the use of the European Currency Unit (ecu) and the smooth functioning of the ecu clearing system

Furthermore, the EMI is given a right of consultation where Member States propose to adopt legislation whose subject matter lies within the EMI's field of competence.⁹²

During Stage II two economic obligations are imposed upon Member States. First, they must take steps to ensure that their central banks become politically independent, and, second, they must strive to avoid excessive deficits.⁹³

In preparation for Stage III the Commission and the EMI must report to the Council on the legislative and other measures taken by Member States in the fields of economic and monetary union and on the progress made towards a high level of convergence as indicated by reference to four stated criteria.⁹⁴ The four criteria which are stated in Article 109(j)(1) ECT are:

- the level of inflation as assessed by reference to the three Member States with the lowest levels of inflation in the Community
- the sustainability of the Member State's financial position determined largely by reference to the level of the government's deficit

⁸⁶ Entitled *Protocol on the Excessive Deficit Procedure*.

⁸⁷ Article 109(1)(e) ECT.

⁸⁸ Article 109(f) ECT.

⁸⁹ Article 109(j)(4) ECT.

⁹⁰ Article 109(f)(1) ECT.

⁹¹ Article 109(f)(2) ECT.

⁹² Article 109(f)(6) ECT.

⁹³ Article 109(e)(4) ECT.

⁹⁴ Article 109(j)(1) ECT.

- membership and stability of the Member State's currency within the ERM
- the durability of the level of economic convergence achieved by the Member State and of its participation in the ERM as reflected by long-term interest rate levels

In addition to these four major criteria, the Commission and the EMI must also take account of the development of the ecu, the results of the integration of the markets, the balance of payments position on the current account, the development of labour costs and other price indices.⁹⁵ On the basis of the reports Council, acting on a recommendation of the Commission, must, by a qualified majority assess:⁹⁶

- Whether the Member State in question fulfils the necessary condition for the adoption of a single currency; and
- Whether a majority of the Member States fulfil the necessary condition for the adoption of a single currency.

On the basis of this assessment and in the light of an opinion obtained from the EP, the Council, meeting in its composition of heads of state or government, must determine whether the necessary conditions exist to enter Stage III or the stage of monetary union.⁹⁷ If the conditions do exist, the Council will set the date for entry into Stage II. This must be done by the end of 1997 at the latest, and if no date is set by then, a mandatory date of 1 January 1999 for the commencement of the final stage applies automatically.⁹⁸ Only Member States which fulfil the necessary conditions for monetary union will be allowed to progress to Stage III.⁹⁹ States which do not satisfy the conditions are referred to as 'Member States with a derogation' and they will be permitted to enter the economic and monetary union when the Council is satisfied that they fulfil the necessary conditions.¹⁰⁰ At the moment only Britain is not part of this system, since a separate position was negotiated by the British government at Maastricht. The British position is covered by a Protocol¹⁰¹ to the TEU which effectively reserves Britain's right to determine whether, and at what time, it will enter into monetary union. Britain is thus not bound to follow the timetable leading to Stage III if it considers it inappropriate to do so.

Similarly, while Denmark did not seek to negotiate a special status on monetary union for itself at Maastricht, it was nonetheless obliged to make provision for the possibility that a referendum required by the Danish constitution might create an obstacle for it in moving to Stage III should the outcome of that referendum disfavour monetary union. In a separate Protocol to the TEU, Denmark agreed that it should be treated as a derogating state within the terms of Article 109(k) EEC until conditions permitted it subsequently to abrogate the derogation. The irony of this position will not perhaps be lost when it is recalled that a referendum in Denmark in June 1992 disfavoured any ratification of the TEU at all.

⁹⁵ The criteria to be used here are contained in a protocol to the TEU entitled, *Protocol on the Convergence Criteria Referred to in Article 109(j) of the Treaty Establishing the European Community* [i.e. the amended EEC Treaty].

⁹⁶ Article 109(j)(2) ECT.

⁹⁷ *Ibid.*

⁹⁸ Article 109(j)(4) EEC.

⁹⁹ Article 109(k)(1) EEC.

¹⁰⁰ *Ibid.*

¹⁰¹ Entitled, *Protocol on Certain Provisions Relating to the United Kingdom of Great Britain and Northern Ireland*.

Following this rejection of the TEU Denmark, at the Edinburgh Summit in December 1992, renegotiated its position on movement to Stage III with the final result that it, like the UK, will not be required to enter into currency union should this be thought inappropriate by the Danes.¹⁰² This separate position was formally approved by the Danish people in a second referendum held in May 1993.¹⁰³

Stage III

Once the date for the commencement of Stage III has been set or, at the latest, by 1 July 1998, the European System of Central Banks and the ECB will be established in accordance with a Protocol¹⁰⁴ annexed to the TEU. By Article 106(1) EEC the ESCB is to be composed of the independent central banks of the Member States and the ECB, and it is to enjoy legal personality¹⁰⁵ and independence from both Member States and Community institutions.¹⁰⁶ The ESCB is governed by the decision-making bodies of the ECB which are comprised of a Governing Council and an Executive Board.¹⁰⁷ The Governing Council is composed of the Governors of the Member States' central banks and the six members of the Executive Board.¹⁰⁸ These latter are chosen from persons having recognised standing and professional experience in monetary or banking and are appointed by the common accord of the Member States for an eight year period of office.¹⁰⁹ While the Governing Council is entrusted with formulating monetary policy in accordance with the principles established by the TEU, the Executive Board is charged with implementing that policy.¹¹⁰ One other important function of the Governing Council is that it alone will have the exclusive right to authorise the issue of bank notes within the Community.¹¹¹ While this might suggest that there will be a uniform ecu note, Article 16 ESCB Protocol provides that 'the ECB shall respect as far as possible existing practices regarding the issue and design of bank notes.'

The tasks of the ESCB are set down in Article 3 of the ESCB Protocol. These are:

- to define and implement the monetary policy of the Community
- to conduct foreign exchange operations
- to hold and manage the official foreign reserves of the Member States
- to promote the smooth operation of payment systems

From these broadly stated tasks it can readily be discerned that the competence of the ESCB will be wide-ranging and will subsume much of the important economic decision-making which presently lies within the purview of the central banks of Member States.

Once Stage III begins, the Council acting unanimously (save for those states with a derogation) on a proposal from the Commission and after

¹⁰² *The Times*, Monday December 14, 1992, pp 1, 6 and 7.

¹⁰³ *Ibid.* For the text of the Resolution on the Danish position see Official Journal of the EC 98/C 348/01.

¹⁰⁴ Entitled, *Protocol on the Statute of the European System of Central Banks and of the European Central Bank* (hereafter ESCB Protocol).

¹⁰⁵ Article 106(2) ECT.

¹⁰⁶ Article 105(1) ECT.

¹⁰⁷ Article 106(3) EEC.

¹⁰⁸ Article 109(a)(1) ECT.

¹⁰⁹ Article 109(a)(2)(b) ECT.

¹¹⁰ Article 12(1) ESCB Protocol.

¹¹¹ Article 16 ESCB Protocol.

consulting the ECB, must adopt the conversion rate at which their currencies are to be irrevocably fixed.¹¹² The ecu will then be substituted for these currencies and become the Community's single currency in its own right. Clearly, where there are states with derogations, the exchange rate of their currencies will need to be calculated on the basis of the external rate of the ecu.

There is no doubt that the controversial nature of economic and monetary union is reflected by the complexity of the TEU's provisions, of which the above explanation is but a simplified version. While the three stage procedure is clearly necessary to give states time to adapt their economies and monetary performance to the degree of convergence required by the TEU, it is clearly complicated not only by the possibility of derogations by states whose economies and currencies are performing badly, but also by the uncertainty engendered by the British and Danish positions. Furthermore, it may be argued that the timetable laid down by the TEU has been overtaken by events. Devaluations of the British Pound, the Irish Punt, the Italian Lira, the Spanish Peseta and the Portuguese Escudo as well as the negative result in the Danish referendum have caused substantial disruption not only to the timetable for monetary union, but also to the economic conditions which are supposed to underpin its attainment.

4. Institutional changes

The European Council

The European Council is formally incorporated within the institutional framework of the Community by the TEU which also further defines both its composition and functions. Article D TEU provides that the European Council shall bring together the heads of state or government of the Members States and the President of the Commission who shall be assisted by ministers for foreign affairs of the Member States together with a member of the Commission. The European Council is to meet at least twice a year¹¹³ and its main function will be to 'provide the Union with the necessary impetus for development' and to define the general political guide-lines for the achievement of this impetus.¹¹⁴ Thus, the main features of the European Council, as a political organ providing the motive force for the Community's development, are retained. An important development within the TEU, however, is to make the European Council accountable to the EP by providing that it must submit a yearly written report on the progress achieved by the Union.¹¹⁵ Clearly this report will be subject to debate within the EP, but whether or not the President or any other member of the European Council will be prepared to participate personally in the presentation of the report to Parliament and in the subsequent debate remains to be seen. Past experience, however, would certainly seem to suggest that MEPs would wish to see the development of such a practice.¹¹⁶

112 Article 109(g) ECT.

113 Article D, indent 2 TEU.

114 Ibid.

115 Article 3, indent 3 TEU.

116 Note the convention by which the President of the Council of Ministers addresses Parliament on the progress made under his or her state's presidency. See F Jacobs and R Corbett, *The European Parliament*, (Boulder: Westview Press, 1990), 3-4.

The Commission

The major change in the provisions dealing with the Commission is to extend its term of office to a period of five years.¹¹⁷ This means that the Commission's term of office will be coterminous with that of the EP. This is entirely logical given that it is the EP which enjoys the power of censure over the Commission by virtue of Article 144 EEC.¹¹⁸

The European Parliament

There are a number of changes in the competences of the EP. First, it is given a right of indirect legislative initiative. Under Article 183(b) EEC the EP acting by a majority of MEPs may request the Commission to submit a legislative proposal on matters on which it considers that a Community act is necessary for the purpose of implementing any aspect of the Treaty. While there is clearly no legal requirement that the Commission must comply with the EP's request, the fact that the EP exercises political control over the Commission will necessarily ensure the potency of such a suggestion.

Second, the EP is given an enhanced legislative capacity by the inclusion of a power of co-decision in Article 189(b) EEC. This means that where the procedure under Article 189(b) is explicitly referred to in the Treaty for the purposes of adopting legislation in a particular area, both the Council and the EP must agree to the Commission's proposal before it can be adopted. Within Article 189(b) there is a detailed and complex procedure to allow the Council and the EP to modify the Commission's proposals, but ultimately, if agreement cannot be reached between the two institutions following the intervention of a bi-institutional Conciliation Committee, then the proposal must fall.

Third, the TEU grants the EP power to establish a temporary Commission of Inquiry to investigate alleged contraventions in, or the maladministration of, Community law, except where the matter is *sub judice* before the ECJ or the courts of the Member States.¹¹⁹ This power is further supplemented by two further developments in the TEU: the right of individuals to petition the EP and the appointment by the EP of an Ombudsman. Although individuals enjoy a right of petition to the EP under its current Rules of Procedure,¹²⁰ the insertion of the right in the Treaty by Article 138(d) clearly gives it a more prominent status. While the EP is devoid of any power to grant remedies to a petitioner who is aggrieved by Community action in a particular field, nonetheless, since the Commission is the major executive organ of the Community and thus the institution most likely to come into direct conflict with individuals, and since the Commission is responsible to the EP, it may well prove to be the case that Parliament will be able to exert pressure upon that institution where there is evidence of some maladministration by it.

The creation of the office of a Community Ombudsman represents the third prong of the trident established under the new Parliamentary framework of the TEU to tackle questions of maladministration. The Ombudsman is to be appointed by the EP and his or her term of office is coterminous with the five year term of office of the EP itself.¹²¹ Despite the fact that the EP has the power to appoint the Ombudsman, and despite the fact that the

117 Article 158 ECT.

118 See above, p 106.

119 Article 183(c) ECT.

120 See F Jacobs and R Corbett, *op cit*, 242-3.

121 Article 138(e) ECT.

Ombudsman must make an annual report to Parliament, he or she remains completely independent in the conduct of his or her duties.¹²² Only the ECJ is capable of removing the Ombudsman from office if 'he no longer fulfils the conditions required for the performance of his duties or if he is guilty of serious misconduct.'¹²³

Article 138(e)(1) EEC empowers the Ombudsman to receive complaints from any citizen of the Union or from any natural or legal person residing in or having its registered office in a Member State concerning maladministration by any Community institution or body except the ECJ or the Court of First Instance acting in their judicial roles.

The European Court of Justice and the Court of First Instance

There are relatively few changes either to the institutional structure or the competences of the ECJ and CFI. The most notable major change for the CFI is its incorporation into the EEC Treaty, while the most significant changes for the ECJ are an increase in its jurisdictional competences in certain areas. The first of these is to be found in Article 171(2) EEC which deals with circumstances in which a Member State fails to comply with a judgment of the Court. In the present EEC Treaty a failure by a Member State to obey a judgment of the ECJ results only in whatever political opprobrium attaches to the disobedience: the ECJ is powerless to impose a penalty against the delinquent state. Article 171(2) EEC permits the Commission to bring a case before the ECJ if a Member State fails to take the necessary measures to comply with a judgment of the Court within the period of time specified in that judgment. In so doing, the Commission may recommend to the Court the amount to be paid by way of a lump sum penalty or periodic penalty payments.¹²⁴ If the ECJ then finds that the Member State has not complied with its judgment, it may impose a lump sum penalty or penalty payment upon that state.¹²⁵ Clearly, the Court is not obliged to follow the recommendation of the Commission as to *quantum* of the penalty, since it is given a discretion in this area. It is interesting to note that the TEU does not seek to set limits to the *quantum* of penalty, which seems to suggest that the ECJ is granted unlimited jurisdiction in this area. This view is further buttressed by Article 172 which expressly stipulates that in the case of regulations adopted jointly by the EP and Council which provide for penalties, the Court is to enjoy unlimited jurisdiction.

Further extension of the ECJ's jurisdiction lies in the field of judicial review of Community acts. This has primarily been necessitated by the development of the EP's power of co-decision in the legislative procedure under Article 189(c), but it has also been used to clarify a number of areas of difficulty encountered by the Court.

As we have already seen above, the jurisdiction of the Court with regard to regulations adopted jointly by the EP and Council is unlimited as far as the imposition of financial penalties is concerned. In addition, however, the ECJ is given competence to review the legality of acts adopted not only by the Council and Commission, but also acts jointly adopted by the Council and the EP under the co-decision procedure referred to in Article 189(c). In addition, acts of the ECB may be challenged, but only those acts

¹²² Article 138(e)(3) ECT.

¹²³ Article 138(e)(2) ECT.

¹²⁴ Article 171(2), indent 2 ECT.

¹²⁵ Article 171(2), indent 3 ECT.

of the EP which are intended to produce effects *vis-a-vis* third parties may be the subject matter of judicial review. The range of persons granted *locus standi* to challenge such Community acts remains, however, limited. Only Member States, the Council and the Commission are given power to challenge all Community acts, while individuals may challenge decisions and, in very limited circumstances, regulations adopted by Community institutions.¹²⁶ Conspicuous by their absence from this list of those institutions enjoying *locus standi* are the ECB and EP. The omission of the latter is particularly surprising given that there has been much academic discussion upon the question of institutional equality in proceedings before the ECJ. Indeed, in the 1987 Draft Treaty on European Union, the EP was given *locus standi* specifically to enable it to challenge the legality of Community acts.¹²⁷ It would appear that the drafters of the TEU considered it undesirable to give the EP a broader legal ability to police the implementation of the Treaty. The reason for this might be that the EP is seen primarily as a political body whose main concern should be with political remedies. This, however, does not bear scrutiny for, as we have seen, the EP will enjoy co-legislative competence with the Council in certain areas, and may, in addition, under Article 175 initiate proceedings against the Council and the Commission if they fail to act when required to do so by the Treaty. Nonetheless, both the EP and the ECB are entitled under Article 173 to bring actions before the ECJ in order to protect their 'prerogatives'. How the Court is likely to interpret the latter term must remain a matter of speculation, since nowhere is the term defined. For that matter, the term is not used anywhere else in the Treaty, so what the content of this highly nebulous term is likely to be is impossible to judge.

The Court of Auditors

This body, which was originally created by the Budgetary Treaty to oversee the implementation of the Community budget by the Commission, is brought within the framework of the EEC Treaty by Article 188(b).

CONCLUSION

According to Article R TEU the Maastricht Treaty was supposed to have entered into force on the 1st January 1993, following the receipt of the instruments of ratification of all twelve EC Member States. As a result of the difficulties experienced by the governments of certain Member States in obtaining the necessary constitutional approval for ratifying Maastricht within the timescale envisaged, it is clear that the date originally specified in the Treaty for its entry into force has long passed. This possibility appears to have been foreseen by the TEU's drafters, as Article R further provides that in the event of the original date for entry into force of the Treaty being superceded, it will enter into force one month after the deposit of the last (twelfth) instrument of ratification. The current rate of ratifications would seem to suggest that the Treaty will enter into force some time in the Autumn of 1993. It would appear, however, that this delay will not retard progress towards European union unduly, save in the area of monetary union where, clearly, the timetable has been severely affected.

¹²⁶ On the question of review of EC acts see T C Hartley, *Foundations of Community Law*, Oxford: Clarendon Press, 2nd edn, 1988), Part IV and Freestone and Davidson, *op cit*, 137-151.

¹²⁷ See D Freestone and S Davidson, 'The EUT: Legal Problems' in J Lodge, (ed), *European Union: The European Community in Search of a Future*, (London: MacMillan, 1986), 129-30.

As indicated above, however, this may not be significant, given that the performance of the EMS and the existence of other unfavourable economic indicators suggests that practical progress in this area is, in any event, well behind schedule. Certain commentators are, however, optimistic that the majority of states within the EC will be using a single currency by the end of the millenium.

It would seem therefore that the new shape of Europe is set. It is undoubtedly federal in nature with a considerable range of policies, and hence powers, being transferred from the Member States to the central EC institutions. Whether one approves or disapproves of the federal route to which 'The Twelve' have committed themselves, there can be little doubt that for the rest of the world the new EC will be a geo-political unit of great economic, political and military strength. It is perhaps prudent therefore, for those outside the region to understand the internal as well as the external dynamics of the 'new' Europe and the effects which they are likely to have on its relations with the rest of the world in the post-1993 period.