THE NEW TREATY ON EUROPEAN UNION: A FIRST ASSESSMENT

Introduction*

The Amsterdam Summit of the European Council on 16 and 17 June this year was awaited with great anticipation. With the prospect of enlargement in sight, the institutions and the decision-making procedures of the European Union needed to be revised whilst maintaining a careful balance between flexible integration on the one hand and social and political legitimacy on the other hand. For this reason, the Member States submerged themselves in a long bargaining process, which has resulted in a text larded with political compromises.

The European Institute of Public Administration organized a Euregional afternoon seminar on the outcome of the Intergovernmental Conference; the seminar was held on 3 July in Maastricht. The principal speaker of the afternoon was Professor Franklin Dehousse, who not only teaches at the University of Liège and the College of Europe in Bruges, but who has also acted as the IGC Special Representative of the Belgian Minister of Foreign Affairs. Professor Dehousse was thus in an excellent position to evaluate the outcome of the difficult negotiations.

One of his main remarks concerned the virtual absence of a coherent approach in the Treaty and the widespread use of protocols. Even though the new Treaty has established a consolidated cooperation between the Member States, the attempted institutional reform cannot be regarded, according to him, as much more than a 'small step'. Nevertheless, Dehousse's diagnosis is that progress has been made into the right direction, and that the European Union is brought closer to the citizen.

Below, you will find a first analysis of parts of the draft Treaty by three EIPA Faculty members who also presented their views during the IGC-afternoon.[1] Due to the publication date of this EIPASCOPE issue, their comments naturally concern the draft in circulation prior to the date of signing due to take place in Amsterdam in October 1997.

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A Contemplative View on the First Pillar of the New European Union

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After Amsterdam, one might easily be induced to think that EU Member States should have better obeyed an American proverb instructing us never to swap horses when crossing a stream. Indeed, whereas the main stream the IGC had been requested to cross was the adaptation of the EU institutions for the next enlargement, Member States put forward too many conditions or 'swaps' for both their representation and their capacity to act in the institutions of an enlarged European Union. The resulting failure to agree and the drowning of the necessary institutional reforms has focused the attention of a large part of the European Press. 'Amsterdam' has been judged a can of worms, a shamble and an irrelevance for Europe's needs (*the European*), a failure (*L'Echo*), a betrayer of ambitions (*De Standaard*), a result that nobody wanted (*Libération*), a wound leaving Europe disabled (*Le Soir*). In such a mood one would be eager hastily to throw away in the stream the failing EU and its unfinished Treaty. However, this would amount to throwing the baby out with the bathwater. Wisdom does not advise anybody to do so but rather to compare how clean the baby has become even though he still has a foot in the stream. Therefore, this text distances itself on purpose from the heated debate in order to compare the European Community – i.e. the First Pillar of the European Union – before and after Amsterdam.

'Where there is much light,
the shadow is deep...' (Goethe)

Progress in the field of employment and social policies has been advertised as a major achievement of the Intergovernmental Conference. Behind the dazzling lights announcing the new chapter on employment and the integration of the social chapter, there seems however to be a less bright reality. As far as the instrument to act in favour of employment is concerned (new chapter VIa EC Treaty, articles 109n-109s), two elements dim the potential effects of the Community's new competence. First, the essential instruments at the disposal of the Community will be recommendations and guidelines to Member States, i.e. not excessively productive economic tools. The possibility of using incentive measures does exist, yet the pilot projects they can give rise to are restricted to exchanges between Member States of information, practices and approaches towards employment, i.e. still no direct actions in favour of employment. The added value of this title is rather dubious if one considers that the EU already made the relevant recommendations to Member States in 1993 by adopting the Delors White Paper on Growth, Competitiveness and Employment. Second, the decision-making procedures set up for such weak decisions involve a maze of administrative and political processes. Before the Council can for example issue guidelines to Member States, it needs to await work being completed on no less than seven documents : a joint annual report by the Council and the Commission; conclusions of the European Council; a Proposal from the Commission; reports from the European Parliament, the Economic and Social Committee, the Committee of Regions and the newly established Employment Committee.

As regards the social policy of the European Union, the light is shed on the integration into the Treaty of the contents of the Social Chapter signed by 14 Member States in Maastricht. This agreement has given birth to two Directives on European works councils and parental leave which do not apply to Great Britain. The integration of the Chapter into the Treaty is operated by revising articles 117 to 119 EC so as to incorporate the articles of the Social Chapter. However, this improvement might be of value to the citizens of Great Britain but does not represent any progress for the citizens of the other 14 Member States. In fact, the articles of the Social Chapter are included in the Treaty without extension of the qualified majority to provisions requiring unanimity. Furthermore, the fields where the 14 were prohibited from acting are also excluded from any EU action in the new Treaty; this exclusion relates to pay, the right of association, the right to strike and the right to impose lock-outs. By retaining, in particular, under the unanimity rule, the two provisions regarding the protection of workers when their employment contract is terminated, and the financial contributions for promotion of employment and job creation, the EU does not seem to pay any great attention to its legitimacy in a period of social agitation.

There are however two noticeable, although halfhearted, improvements.[2] First, the codecision will apply to the provisions requiring qualified majority and contained in Article 118.1. However, codecision will not apply to Article 118.2 containing the provisions requiring unanimity, nor will it apply to Article 118b whereby the Council may decide to transform into a Community act the agreement reached among social partners. Within this procedure, referred to as the social dialogue, the European Parliament is not even consulted. The second halfhearted improvement resides in the fact that Article 119 on the principle of equal pay for men and women shall not prevent Member States from maintaining or adopting specific measures of positive discrimination in favour of the under-represented sex. Here however, the Treaty is knocking on an already open door. Indeed, the fact that such measures of positive discrimination should be specific, as opposed to automatic and general, has already been recognized by the Court of Justice since its judgement in the Kalanke case.

'Time shall unfold what plaited cunning
hides...' (Shakespeare's King Lear)

The stream the EU did not manage to cross has been described by the IGC negotiators as **the institutional Bermuda triangle.** The three inseparable institutional corners of the triangle which led the negotiators off track have been the number of European Commissioners, the reweighting of the qualified majority as provided in Article 148.2 EC, and the extension of the scope of the qualified majority to a significant number of provisions requiring a unanimous vote. The failure to agree on these three interlinked institutional issues has been officialized in the Treaty by a special protocol on the institutions which aims at setting the rules only for a later institutional adaptation of the EU to enlargement. The Protocol provides in Article 1 that as soon as the next new Member State joins the EU, the Commission shall comprise one representative for each Member State, provided that the weighting of the votes in the Council has been modified in order notably to compensate the larger Member States which will be required to relinquish their second Commissioner. The Protocol then provides in Article 2 that, before the sixth enlargement, an IGC must be convened in order to 'carry out a comprehensive review of the provisions of the Treaties on the composition and functioning of the institutions'.

Several comments and future scenarios (seven in all) for EU institutions can be drawn from this polymorphic Protocol and other related provisions.

First, an agreement on the reweighting of votes in the Council will be effective when the first enlargement enters into force; the number of Commissioners will then equal the number of Member States of the EU, as no Member State can retain two Commissioners and every Member State is entitled under Article 157 to

appoint one Commissioner.

Second, if no agreement were to be reached on the reweighting of votes when the first enlargement becomes effective, the Commission would subsequently retain the two Representatives designated by the larger Member States since the limitation of the Protocol would not apply.

Third, a general IGC could be convened as early as the first enlargement instead of a simple or 'mini' IGC revising only the weighting of votes as provided by Article 1 of the Protocol on institutions.[3] The intention to reopen the debate on the scope of the qualified majority in a general IGC as early as the first enlargement arises not so much from an interpretation of Article 1 of the Protocol but, indeed, from an entire political reinterpretation on the part of those Member States which felt disadvantaged by the non-agreement on the institutional issues on the eve of enlargement. Belgium in particular has pressed for such a reinterpretation of Article 1 by submitting a declaration to be inserted in the draft Treaty for signature in October in Amsterdam. The result of such a scenario would be a double IGC taking place first at the time of the first enlargement, and then after the fifth enlargement as provided for by article 2 of the Protocol. According to this scenario, both IGCs would discuss the three corners of the 'Bermuda triangle'.

Fourth, it should be mentioned that in the event of non-agreement on the reweighting of votes, the Council may still use Article 157 EC, which is explicitly covered by Article 1 of the Protocol and provides that 'the number of Members of the Commission may be altered by the Council acting unanimously', in order to allow one or more Member States to give up their second Commissioner as a gesture of goodwill.

Fifth, the revised Article 137 EC which restricts the total number of Members of the European Parliament to 700 might also need to be reconsidered before the general IGC scheduled to take place before the sixth enlargement by Article 2 of the Protocol. Indeed, one can imagine that the accession of less than 5 new Member States brings the total number of Members of the European Parliament above the ceiling of 700, consequently contravening Article 137 EC.

Sixth, if the six accessions which have been considered positively by the Commission were to take place simultaneously, all the abovementioned scenarios would not be worth mentioning since Article 2 of the Protocol provides in this case for a general IGC.

Seventh, in its communication on Agenda 2000 the European Commission signalled that a multiple accession could indeed take place and lead to a general IGC. According to the Commission, an IGC should be convened as soon as possible after the year 2000 to prepare the Union for enlargement by means of far-reaching reforms of the institutional provisions of the Treaty, including the generalized introduction of qualified majority voting. Because, following the terms of the Protocol, such an IGC is required only after five enlargements, and because the year 2000 is so close, it can be interpreted that the Commission is calling for the EU to prepare for a multiple enlargement. Once again, this scenario of multiple accession would prevent the EU from having to face all the possible stages involved in the 'Bermuda' Protocol.

'Since we cannot get what we like,
let us like what we get...' (Spanish Proverb)

Despite the non-agreement on institutional adaptation to enlargement, a number of **improvements to the functioning of the European Union** brought in by the Amsterdam Treaty need to be presented. First, we know that, due to this failure to agree, qualified majority voting (QMV) has not been extended to crucial parts of the Community's competences, namely the right to move and reside freely, the coordination of social security schemes, parts of the environmental policy and, in particular measures of a fiscal nature, fiscal provisions or culture. However, QMV has been extended to fields which might witness, or have already experienced, important Community actions. These fields include Research and Development, employment guidelines and incentives measures, social exclusion, equal treatment of men and women, public health, transparency, the countering of fraud, outermost regions and customs cooperation.

Second, the European Parliament turns out to be the kingpin. Not only will it need to approve the nomination of the President of the Commission, but essentially will it become co-legislator in almost all fields of Community action since the cooperation procedure has disappeared – except for one particular phase of monetary policy. The Parliament continues of course to be consulted only in some restricted areas, notably the employment and social fields, but nobody would have expected that its legislative powers would be upgraded to such an extent. By being the only party truly to believe in the probability of an extension of the codecision procedure, the Parliament confirms French scientist Pasteur's observation that chance favours the prepared mind. Another improvement relating to codecision is its simplification; by giving up the stage of the third reading in the Parliament, the simplification aims at speeding up the procedure which has currently lasts an average of approximately one year.

The third improvement concerns other specific aspects of the EU institutions. The Economic and Social Committee will be consulted on social matters, employment measures and public health. The Committee of Regions will be consulted on social matters, employment measures, vocational training, public health, environment and transport. The competence of the Court of Auditors essentially extends to the right to refer to the Court of Justice. As regards the Commission, the powers and autonomy of its President will be strengthened by two elements. Whereas a new first subparagraph in article 163 EC confers the political guidance of the Commission to its President, a Declaration grants the President broad discretion in the allocation of tasks within the College

of Commissioners.

A fourth improvement, even though its added value is lower, concerns the constitutionalization into Protocols of several rules already in place for the functioning of the European Union. Let us mention *inter alia* the Protocol on the application of the principles of subsidiarity which cements into the Treaty the *modus operandi* reached so far between EU institutions and Member States; the Protocol on transparency which makes official the right for citizens to access documents and calls upon the institutions to elaborate further their own rules of procedure in this regard; a Protocol which solves the long standing contention regarding the Institutions' permanent locations; a Protocol on the quality of Community legislation; and finally a Protocol which clarifies the role National Parliaments are entitled to play and in particular their right of information during the process of decision-shaping.

'Everything should be made as simple as possible, but not simpler...' (Einstein)

Although some provisions could have been listed above as improvements, they need to be distinguished for their **complexity and the legal uncertainty** they generate. First, the Treaty opens the door to so-called flexibility or closer cooperation while putting in place however a number of hurdles before some Member States are allowed to undergo legislative action by using the Union institutions and procedures. Specific hurdles can be found in article 5a EC whereas general hurdles applying also to closer cooperation in the Third Pillar are listed in article K15 of a the new title VIa Treaty on European Union (TEU). Closer cooperation needs for example to be a measure of last resort and to preserve the *acquis communautaire* as well as the Community policies. Problems will arise when checking whether a proposal for closer cooperation, which will first need a triggering vote by qualified majority, will obey such hurdles or not. It is indeed hard to predict how the criteria of last resort will be defined, whether in terms of time or urgency. Furthermore, it is hard to think of any flexible measure that would not affect either the *acquis* or a Community policy at the current level of European integration. The choice will have to be made between legal formalism and political pragmatism.

Further queries will probably arise when implementing the new articles Fa and 236 EC. These articles can be used to suspend the rights of a Member State, including its voting rights, should it breach the principles of liberty, democracy, human rights and the fundamental freedoms, and the rule of law as provided in Article F.1. Since this breach requires to be acknowledged by the Council meeting in the composition of the Heads of State or Government, it is likely that one will witness serious interferences between legal and political considerations. Moreover, since this suspension procedure does not apply to paragraph 2 of Article F which obliges the Union to respect the European Convention on Human Rights, one does not really know how this obligation will be applied in practice. Similar queries apply to the new paragraph of the preamble of the TEU whereby the Union declares its attachment to fundamental social rights as defined by the UN Social Charter of 1961 and the Community Charter of 1989. Indeed, the fact that several national Constitutions guarantee these rights even better than with a preamble, does not mean that the fundamental social rights are in fact enforced.

A third legal mystery surrounds the new article 7d EC. This article intends to protect the particular nature and mission of public services. The problem is that it does not really say more on this issue than article 90 EC or recent proposed EC legislation in the field, and it is surely less explicit than the Case Law on the liberalization of public services. It is uncertain as to what extent the European Court of Justice will be challenged by Member States to take into account this new article in the process of further liberalization.

A fourth legal attraction is the Declaration to the Final Act on sport. It is indeed hard to foresee the effects of a call made to the 'bodies' of the European Union to 'listen' to sports associations and to give 'special consideration to the particular characteristics of amateur sport. It is of course dubious what exactly the notion of listening should mean in the EC decision-making process; it is further uncertain whether, applied 'to the letter', such Declaration would not put into question parts of the judgement of the European Court of Justice in the *Bosman* case relating to the free movement of football players.

To conclude this section on the complex improvements, it should be noted that a number of Community instruments which were expected to be simplified, were actually not altered in Amsterdam. First, Declaration No. 16 of the Maastricht Treaty, which instructed the IGC to establish a more coherent hierarchy between the different Community legal acts, has not been carried out. Second, Article 113 has not been modified so as to make the Common Commercial Policy more coherent. In particular, the external competence of the Community in the fields of services and intellectual property challenged by the European Court of Justice in its opinion 1/94 has not been recognized in the new Treaty; according to the new fifth paragraph of Article 113 EC this competence can only be granted in the future by a unanimous decision of the Council. Third, the simplification of the complex comitology procedure whereby the Commission executes implementing legislative powers under the varying supervision of Member States, has been postponed, by a Declaration to the final Act, until the end of 1998 and it is proposed that the Commission be requested to then deliver on this matter.

'The entire ocean is affected by a pebble...' (Blaise Pascal)

The new Treaty on European Union is studded with **a plethora of Protocols and Declarations**. The problem

with this mosaic of safety nets is twofold. First, some unilateral or combined moves by Member States are not even necessary because they demand something already recognized by EC Law. Second, some of these instruments aim at safeguarding minor if not trivial interests compared to the constitutional nature of the Treaty. Declarations and Protocols not yet mentioned earlier intend notably to protect or favour island regions and overseas countries or territories, services such as general economic services, public service broadcasting, public credit institutions in Germany; voluntary service activities; animal welfare; churches and confessional organizations. Although it is legitimate that Member States hold specific interests, one may regret that the new Treaty has been chosen as the battlefield for safeguarding interests perceived as under threat. The Amsterdam phenomenon of 'protocolarization' certainly has disrupting and polluting effects upon the Treaty.

Conclusion

More than previous Treaties in the process of European integration, the First Pillar of the Amsterdam Treaty is the result of a compromise. On one hand, the compromise simultaneously stages positive upgradings of the Maastricht Treaty including democratic improvements, the extension of qualified majority voting, a procedure for closer cooperation, a capacity to act in favour of employment, and references to fundamental rights, social rights and transparency. On the other hand, one may regret not only that some of these achievements are modest, simply cosmetic, offset by protocolarization or wrapped up in legal uncertainty, but also that the same compromise stages the nebulous postponement of the institutional adaptation of the EU to enlargement. The European Union was thus given a bonus in Amsterdam but it is still sitting surrounded by a mist preventing it from wisely considering enlargement. As a compromise, the new Treaty on European Union offers, after Maastricht, an improved umbrella but a poor roof for an enlarged Union.