

# Intergovernmental Conference 1996: Which Constitution for the Union?

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**Abstract:** This paper addresses the five major structural issues on the agenda of the 1996 Intergovernmental Conference (IGC) of the Member States of the European Union: the option of replacing the treaty framework by a European constitution; the issue of fundamental rights in the Union; the future of the three-pillar structure; the puzzling question of how to allow for variations in European integration without endangering unity; and, finally, the political 'evergreen' of the division of competencies between the Union and its Member States. The analysis is based on the contributions by EC institutions and a series of prominent (groups of) experts and scholars which were published before the political bargaining started with the establishment of the so-called reflection group preparing the formal agenda of the conference.

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## I. Introduction

Looking at the ongoing debate on how to reform the European Union during the forthcoming Intergovernmental Conference (IGC), it is undeniable the very basic structure of European supranational co-operation which is once again at stake. Clearly, the most political phase of the whole process has only just begun with the formal setting up of a reflection group consisting of personal representatives of the Heads of State and Government at the June 1995 European Council in Messina. However, the more informal early stages of preparation of the IGC, which were dominated by the presentation of discussion papers by groups of academics and bureaucrats (in fact starting already with the presentation of the Maastricht compromises), as well as reports by the European institutions on the functioning of the Treaty on European Union (during spring 1995), have shown that -- at least at the expert level -- the issues under consideration go even far beyond those few matters explicitly scheduled for review in the TEU<sup>1</sup> or meanwhile put on the agenda by the European Council<sup>2</sup>: Should the Union be based on an explicit constitution which possibly guarantees fundamental human (and even social) rights? Should the present system of three 'pillars' with different sets of institutional and rules of competence be prolonged? How about more flexibility for differentiated integration within diverse policy fields -- possibly at the expense of unity? Shall the principle of subsidiarity be reformulated? Should individual Member States be allowed or even forced to step out of the Union? The latter questions are mainly raised in the perspective of a Union further enlarged to the East and South. Joint policy-making in a Community of up to 30 members, including the Central and Eastern European Countries plus Cyprus and Malta, would have to pay tribute not only to increased numbers but as well as to increased diversity. This brought the dispute over variable geometry, multiple speeds or pick-and-choose Europe back on the political agenda.

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<sup>1</sup> Mainly the co-decision procedure and the issue of introducing a hierarchy of norms.

<sup>2</sup> I.e. the legislative role of the EP, number of Commissioners, weighting of votes, budgetary procedures, and comitology.

Over the last two years, all those topics converged into what may be called a genuine constitutional debate<sup>3</sup>. Not only a series of profound and innovative proposals with respect to specific problems, but also at least two comprehensive proposals for a European Constitution have been published with a view to the IGC<sup>4</sup>. For the purpose of this article, we concentrate on some of the major topics of this discussion, because they touch aspects of the basic legal and political structure, in other words the overall constitutional architecture of the European political system. Following the outline of relevant political and expert statements concerning those issues, we will present reflections from legal and political science points of view, as well as some political and pragmatic recommendations<sup>5</sup>.

## II. Treaty or Constitution?

### A. *The Proposals*

As outlined above, a series of developments have widened the scope of the IGC to a point where many argue that the time to draft a formal Constitution has come. Two lines of reasoning converge in that respect: the first being the more fundamental aspiration to solve the pressing problems of the Union with a single stroke (see below i.), the second being the rather pragmatic perception of the necessity to redraft the Union framework (possibly without major reforms) in order to make it more accessible and appealing for the European citizens (ii.).

(i.) Among the many proposals suggesting a profound reform of the European Communities in connection with the creation of a single constitutional framework is, for instance, the

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<sup>3</sup> Furthermore, the difficult ratification process of the Maastricht Treaty (February 1992 until October 1993) made obvious that the 'Maastricht Union' marks a still unsatisfactory stage of democracy at the European level. For lack of space, we could not include the debate on reforms regarding the direct as well as representative democratic elements of EC policymaking (but see e.g. Falkner and Nentwich 1995; Nentwich and Falkner 1995).

<sup>4</sup> European Constitutional Group 1993, and Herman Report 1994, see below.

<sup>5</sup> For reasons of space, we concentrate on the new contributions made in the ongoing debate and decided not to include the vast general literature on the legal and political system of the Union, e.g. the constitutionalisation of the EC-Treaty, which clearly represents the relevant background of the whole debate.

German *CDU/CSU paper*<sup>6</sup>. It calls for 'a constitution-like document (...) delimiting the respective competencies of the EU, the Member States and the regions in clear language and defining the ideal basis of the Union'. This document should be oriented towards the federal state model and the principle of subsidiarity<sup>7</sup>. 'Justus Lipsius'<sup>8</sup> ask for a new and single legal entity, the European Union, which should be given legal personality and treaty making power<sup>9</sup>. Therefore, he wants to replace the existing number of treaties by one 'Treaty-Charter' which should be 'as short and readable as possible, dealing with principles, competence and institutional matters, and on the other hand, a number of Protocols annexed to it, dealing in detail with specific matters, such as the Internal Market'<sup>10</sup>. The *Committee of the Regions* (CoR) is currently the only EU body which explicitly calls for a 'basic text' which should include provisions concerning the fundamental rights of the European citizens, the aims of the European Union, the institutions of the Union, and the competencies of these institutions<sup>11</sup>.

With regard to a genuine draft constitution, there are -- apart from several proposals dating from before the Maastricht Treaty<sup>12</sup> -- also two recent and widely discussed examples for the 'qualitative leap' policy. The *European Constitutional Group*<sup>13</sup> has already by choice of name expressed its thorough belief in the need for a constitution, and indeed presented a draft<sup>14</sup>. Obviously, the future of European integration desired by this Group would digress considerably, not only from the present institutional structure but also from underlying guiding principles in European policy as outlined or at least allowed for by the Treaties -- such as the

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<sup>6</sup> The two leading politicians of the major fraction in the German Bundestag (christian-democrat CDU/CSU), Wolfgang Schäuble and Karl Lamers, on 1 September 1994, presented a paper entitled 'Reflections on European Policy'.

<sup>7</sup> CDU/CSU September 1994, p 5 (our translation).

<sup>8</sup> An anonymous 'international civil servant' obviously from the EC Council.

<sup>9</sup> 'Justus Lipsius' 1995, p 51.

<sup>10</sup> 'Justus Lipsius' 1995, p 52.

<sup>11</sup> CoR Resolution from 20 April 1995, CdR 136/95, pt 14. Interestingly, the CoR calls the Maastricht Treaty 'a European constitutional text', CdR 136/95, 2.

<sup>12</sup> E.g. Parliament's Draft Treaty on European Union 1984 (so-called Spinelli initiative), OJ 84/C 77/33; or the proposals by Allais 1991.

<sup>13</sup> This group consists of thirteen members from France, Switzerland, Germany, Austria, Italy, Sweden, Spain, and the UK, who are mostly university scholars and often economists.

<sup>14</sup> European Constitutional Group 1993.

establishment of a (albeit de facto extremely minimalist) model of social market economy rather than, as they suggest, a radically neo-liberalist regime. From this perspective, drafting a completely new constitutional framework is also rooted in the wish to depart from the present *acquis communautaire*.

The 1994 *Herman Report* by the Institutional Committee of the EP, too, is not only clearly in favour of a European Constitution but even proposes an elaborated draft. Along with many legal scholars, this report argues that the existing Treaties together with several acts of equal value, some leading principles drawn from the case law of the ECJ (mainly direct applicability and primacy), and a series of special rights conferred upon the citizens of the Union, *already* constitute a constitutional legal order. However, rapporteur Herman argues for a fully-fledged explicit constitution for two reasons: First, a constitution would put an end to the fiction of still untouched sovereignty of the Member States and of the ambiguity allowing the national governments to blame Brussels for failures and to attribute success to themselves<sup>15</sup>. Second, a formal constitution would rank comparatively higher than the present treaty framework in terms of democracy, not least because not only the Member States, but also the EP should be involved in its formulation and adoption<sup>16</sup>. Among the many innovative provisions of the Constitution proposed in the *Herman Report* is the entry into force as soon as the majority of Member States representing at least four fifths of the population ratified it<sup>17</sup>. Those Member States which could not ratify in due time would either have to withdraw or stay in the changed Union. In case of withdrawal special agreements between the Union and these Member States should treat them as privileged associated partners similar to the status in the EEA agreement<sup>18</sup>.

Clearly, the whole idea of a formal constitution for the Union provokes strong reactions of the 'anti-federalists' among the European politicians. To cite just one example: *John Major*

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<sup>15</sup> Herman Report 1994, II.3.

<sup>16</sup> Herman Report 1994, III.C.2.

<sup>17</sup> A comparable provision of the 1984 Draft Treaty on European Union asked that the necessary majority of Member states represent two thirds of the overall population (Article 82).

<sup>18</sup> Herman Report 1994, Article 47 of the proposed Constitution.

stated that he believed `that the Nation State will remain the basic political unit in Europe'<sup>19</sup>, and that he would not accept constitutional change that impacts on the British parliament<sup>20</sup>.

(ii.) Obviously, consensus on a radical departure -- i.e. putting in place a fully-fledged European constitution with all the political symbolism usually involved in constitutions<sup>21</sup> -- seems quite unlikely at the moment. But there is still another, much more pragmatic aspect of this debate: As e.g. the *Commission* argues, `the Union's basic treaties are difficult to read and understand, which is hardly likely to mobilise public opinion in their favour'<sup>22</sup>. It considers that the `three Communities and the Union should be merged into a single entity, as should the Treaties (...)'<sup>23</sup>. Furthermore, the Commission's report advocates a `fundamental text' listing the rights and duties of the European citizens<sup>24</sup>. A similar route is also suggested by the *EP's* recent resolution on the IGC: the Treaty should be rewritten in order to simplify and make it more appealing to the citizens; for example, the provisions concerning citizens' rights should be placed at the beginning, those covering the institutions or the content of policies should be separated, and out-of-date articles deleted<sup>25</sup>. One specific proposal made in the EP resolution is to bring together within a single article the economic rights that are scattered throughout the Treaty (such as the right of establishment or the free movement of labour), and to reinforce these rights<sup>26</sup>. The *ECJ* also favours a codification and settlement of the primary law<sup>27</sup>.

*Ludlow and Ersbøll*<sup>28</sup> argue that `the form and even the tone in which the inter-governmental agreement is presented to the public will be crucial for its immediate acceptability and its long term durability. The final text must be clear and appealing.'<sup>29</sup> They

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<sup>19</sup> John Major, Speech at the University of Leiden, 7 September 1994, p 5 of manuscript

<sup>20</sup> Major cited from Agence Europe, 9 January 1995, p 3.

<sup>21</sup> As Ludlow and Ersbøll (CEPS) 1995, p 54, put it: a constitution should `capture the higher ground'.

<sup>22</sup> Commission Report, SEC(95) 731, p 34.

<sup>23</sup> Commission Report, SEC(95) 731, p 34.

<sup>24</sup> Commission Report, SEC(95) 731, p 4.

<sup>25</sup> EP Resolution from 17. 5. 1995, PE 190.441, pt 2.

<sup>26</sup> EP Resolution from 17. 5. 1995, PE 190.441, pt 7.

<sup>27</sup> ECJ Report from May 1995, pt 23.

<sup>28</sup> Their paper is part of a project on the IGC 1996 at the Brussels-based Centre for European Policy Studies (CEPS).

<sup>29</sup> Ludlow and Ersbøll (CEPS) 1995, p 53.

highlight three considerations as regards this all but easy task: the European voters ought to be made aware of the values for which Europe stands, and of the obligations as well as the rights that membership of the Union entails; the Treaty should be consolidated and simplified; and finally, they propose that the European Council commission an 'official introduction and commentary written in non-technical language'<sup>30</sup>.

These statements claim for the Union several classic features of written constitutions: First, to offer some basic orientations for the common polity, in a comprehensible manner. Second, to inform the citizens, at best in form of a catalogue, about their rights and duties. Third, even the desired effect on the citizens at the psychological level is parallel to what usually constitutions aim at: to increase the identification with the political system, and to mobilise the people for the common cause. It can thus be argued that at least concerning the underlying aims and some major elements, even those who pragmatically call for a 'consolidation' of the European treaties envisage something indeed very close to a constitution.

### *B. The Status Quo and Beyond: A Pragmatic View*

But how short do the present treaties indeed fall compared to what lawyers accept as a fully-fledged constitution? It was already mentioned that the legal framework of the Union and the Communities already fulfils some of the major tasks of a constitution. Looking at the role of the ECJ, the issue of fundamental rights which are granted to the citizens, the relationship between the national and the European law, the notion of 'new legal order' as used by the Court, etc., one has to conclude that the process of constitutionalising began a long time ago and is still under way incrementally -- particularly keeping in mind that there is no generally acknowledged list of items which necessarily have to be dealt with in a 'genuine' constitution, and that international examples are quite diverse in this respect. The classic distinctive element between a 'constitution' on the one hand, and a 'treaty' on the other may be seen in the way how future amendments are being processed. There are two alternatives:

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<sup>30</sup> Ludlow and Ersbøll (CEPS) 1995, p 55.

either by 'internal' institutions and procedures (which would in the European case mean by the Council and/or the Parliament) or by 'external' negotiations (involving only the institutions of the Member States, as they stay the 'masters of the treaties'). But this distinction is not particularly helpful in our context, as already today, the system for constitutional amendments at the EU level is somewhere in between these two extremes -- and moving towards the first alternative. First, there is Article 235 ECT which allows for an incremental transfer of competencies from the Member States to the Community level without a ratification process (by unanimous decision of the Council on a Commission proposal), at least to a certain extent (*argumentum* 'within the objectives of the Community'; see also the debate on a catalogue of competencies, below). This would in most political systems qualify as constitutional amendment. Second, the EU institutions are increasingly getting involved in the debates preceding treaty amendments (see the reports to, and participation in, the Reflection Group as well as the mediating role of the Commission in the last IGC). It would fit into the past decade's development towards an increasingly parliamentary democracy at the European level if this *de facto* consultative function was changed into a right of assent for the European Parliament to all 'constitutional amendments' -- as the EP demands<sup>31</sup>.

Regarding the already somewhat ambivalent present nature of the Union's basic texts, the question of whether to call a future codification of the Treaties a constitution rather than a new treaty might be more a matter of symbolism and political presentation than content. We therefore suggest not sticking too much to the labels of 'constitution' or 'treaty'. What is clearly to be recommended is to make the legal maze more coherent and transparent for the citizens. Otherwise, they (particularly in the new and the future Member States) might increasingly feel sorry to see their formerly more coherent and transparent national systems virtually superseded by a constitutional patchwork which makes it considerably more difficult to identify oneself with. The widespread anti-European feelings which are reported

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<sup>31</sup> In our view, in this case the dividing line between treaty and constitution would obviously be transgressed, even when the institutions of the Member states would continue to have to ratify the amendments assented by the EP.



by recent opinion polls are based not only on some of the policy outcomes but also on the perceived remoteness of the 'Brussels system'. Thus much will depend on the contents of the 1996 reforms (e.g. more possibilities for citizens' participation; clear-cut setting out of the principle of democracy and the rule of law) and on how they are brought about (more open and democratic debates instead of publicity campaigns and top-down approach). On that basis, calling what will happen in 1996 the 'drafting of a European Constitution' might well play a role in getting the attention of the European citizens and to collectively agree on some European fundamental principles which might then, in turn, guide future developments. But the labelling of the new intergovernmental consensus will certainly not be the prime factor determining the future of European integration.

### **III. A Bill of Fundamental Rights for the EU?**

One important aspect within the drafting of a European constitution would certainly be the question how to deal with the protection of fundamental rights. This is a long-standing debate which led to considerable tension between some national constitutional courts and their European counterpart over the question if there is appropriate protection of the basic rights by the ECJ (a matter which is closely related to the doctrine of supremacy of EC law even over constitutional law of the Member States). The ECJ's position which has increasingly been accepted by the national courts is based on the acknowledgement that the fundamental rights be an unwritten part of the Community's primary law. The Court of Justice protects them as part of the general principles of Community law against violation by secondary Community legislation. The ECJ draws on the Convention on the Protection of Human Rights and Fundamental Freedoms of the Council of Europe (CoE) and on the relevant national provisions. Article F (2) TEU took this established practice on board. Without going into the details of this complex area, one can conclude that although the Community in practice respects the fundamental rights, their protection in the Union context might nevertheless be improved. Therefore, a change of the situation is under discussion. Apart from the *FT Round*

*Table's*<sup>32</sup> proposal to simply insert in the Treaty a provision explicitly charging the Court with the task of ensuring that the institutions respect the fundamental rights<sup>33</sup>, there are two major alternatives:

First, the Union (or the European Community) could join the European Convention. Whether this is at least legally possible for the Union/Community, is currently the subject of a pending request for an opinion of the ECJ. Among others the *EP*<sup>34</sup> and the British *Federal Trust Round Table*<sup>35</sup> favour this alternative.

The other option would be to draw up a catalogue of fundamental rights as part of the primary law of the Union, i.e. as a part of the TEU or a formal European Constitution. Among the political and academic commentators, the *Europäische Strukturkommission*<sup>36</sup> states that with regard to giving the judicial system the necessary amount of authority, democratic basis and acceptance, any democratic community ought to have basic rights enshrined in a treaty by the directly legitimised institutions (for the Union they seem to suggest that this be both the EP and the national parliaments)<sup>37</sup>. The *German Bundesrat* suggested that the possibility of introducing a list of fundamental rights in the Treaty be examined<sup>38</sup>. The chair of the IGC reflection group, *Carlos Westendorp*, asked in a document on 'the elements of a Spanish position' for the adoption of a Charter on Fundamental Rights and Liberties which would be protected by the Court of Justice in Luxembourg<sup>39</sup>. The *CoR* asked that a catalogue of fundamental rights be included in the Treaty<sup>40</sup>.

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<sup>32</sup> The Federal Trust for Education and Research (FT) is a non-governmental London-based organisation founded in 1945 and devoted to the study of 'the future of democratic unity between states and peoples' with a principal focus on the European Union and the U.K.'s role within it. It has established a Round Table consisting of well-known scholars, public servants, MPs and MEPs, with a view to prepare and monitor the IGC '96.

<sup>33</sup> Federal Trust Papers N° 3, p 26 f.

<sup>34</sup> EP Resolution from 17. 5. 1995, PE 190.441, pt 7.

<sup>35</sup> Federal Trust Papers N° 3, p 6.

<sup>36</sup> This basically German initiative, lead by Werner Weidenfeld, was carried out within a research project on 'strategies and options for Europe' conducted jointly by the 'Forschungsgruppe Europa' (University Mainz) and the Bertelsmann Stiftung.

<sup>37</sup> Europäische Strukturkommission 1994, p 42.

<sup>38</sup> Agence Europe, 1 April 1995, p 3.

<sup>39</sup> See Agence Europe, 11 February 1995, p 3.

<sup>40</sup> CoR Opinion from 20 April 1995, CdR 136/95, p 8

In one of the most elaborated proposals concerning the *content* of such a catalogue, the *Europäische Strukturkommission* suggests a limitation to the 'essential basic and human rights', including dignity, the equality principle, the respect for one's physical integrity, and freedom of the individual, as well as derogated rights such as right to property and professional freedom. While the inclusion of detailed social rights is left open for political negotiation within the Member States, the Strukturkommission considers at least basic social rights to be necessary within the Internal Market<sup>41</sup>. The Constitution proposed by the *Herman Report* includes in its Title VIII a list of 'Human Rights Guaranteed by the Union'. The lists has 24 items, ranging from the right to life, the freedom of thought, including the right to conscientious objection, the protection of the family, to some social rights (such as the right to work) and collective social rights (including the freedom to strike). The ECJ would be responsible for actions by individuals claiming violation of these human rights by the Union<sup>42</sup>. The *European Parliament* urges for the 'inclusion of an explicit reference in the Treaty to the principle of equal treatment irrespective of race, sex, age, handicap or religion (including mentioning the fundamental social rights of workers set out in the [EC Social] Charter, enlarging upon them and extending them to all citizens of the Union)'; a ban on capital punishment; the application of the provisions in the Treaty on equal rights not only to economic rights but to all aspects of equality for women<sup>43</sup>. Furthermore, *Parliament* demands 'a clear rejection [in the Treaty] of racism, xenophobia, sexism, discrimination on grounds of a person's sexual orientation, anti-Semitism, revisionism and all forms of discrimination and guarantee adequate legal protection against discrimination for all individuals resident within the EU.'<sup>44</sup>

A specific provision on xenophobia and racism was also requested in 'The elements of a *Spanish position*'<sup>45</sup>, and on several occasions by the Commissioner responsible for social affairs, Pádraig Flynn. This seems one matter where consensus on the appropriateness to act at

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<sup>41</sup> Europäische Strukturkommission 1994, p 42.

<sup>42</sup> Herman Report 1994, Article 38 of the proposed Constitution.

<sup>43</sup> EP Resolution from 17. 5. 1995, PE 190.441, pt 7.

<sup>44</sup> EP Resolution from 17. 5. 1995, PE 190.441, pt 7.

<sup>45</sup> Agence Europe, 11 March 1995, p 6.

the European level seems a realistic perspective. The intergovernmental negotiations would also be eased by the fact that xenophobia and racism are not a very common issue in the existing national constitutions yet. This is quite different concerning many other fields of prospective European fundamental rights -- which is why clashes of culture and values might hinder easy compromise in the IGC. But despite all political and legal obstacles, it is hard to see how the question of fundamental human and social rights can be left out in any constitutional text that aims at serving as a reference point for human identities.

#### **IV. The Future of the Three-Pillar System**

While adding a third pillar to the Union (the second had already been introduced by the Single Act), the Maastricht Treaty nevertheless calls for a re-assessment of the pillar structure<sup>46</sup>. That the new area of cooperation, justice and home affairs (JHA), was left outside the ordinary Community framework means that not only different and far less democratic decision-making rules are applicable, but also that the ECJ is not competent in this sector. Furthermore, the present three-pillar structure has anything but increased transparency of the Union framework. The ongoing debate has suggested two possible policies against this background: either to merge the pillars (or at least the third into the first pillar), or to improve at least their structure.

For instance, the *Economic and Social Committee* (ESC) wants to give 'the Community responsibility for justice and home-affairs policies', arguing that 'these issues are too important and too sensitive for European citizens to be confined to the intergovernmental sphere without democratic checks, at the risk, inter alia, of creating two speeds and discrimination'<sup>47</sup>. It furthermore points at the necessity to achieve consistency between commercial policy, development co-operation and foreign and security policies (CFSP), and consequently calls for a unitary decision-making framework<sup>48</sup>. Taken together, these two demands add up to a total merging of the three pillars. With the proposed Constitution in the

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<sup>46</sup> See Article B dash 5 TEU.

<sup>47</sup> CES 273/95 fin, pt I.5.9.

<sup>48</sup> CES 273/95 fin, pt I.5.10.

*Herman Report*<sup>49</sup>, the three-pillar-system would have disappeared completely, too. Among the academic contributions, the *FT Round Table* considers the transfer of the third pillar into Community competence as the simplest and best solution, against the background of its conclusions on the necessity of majority voting and improved participation of the Parliament<sup>50</sup>. In contrast, the *Guéna Report*<sup>51</sup> is strongly opposed to a merger of the second or third pillar into the first: 'In these sectors specific modes of co-operation and decision-making are necessary.'<sup>52</sup> Their character of intergovernmentalism should be rather reinforced and new efficient institutions set up, such as two Secretariats-General for each of the pillars and a European Senate of representatives of the national parliaments<sup>53</sup>.

A more pragmatic way of simplifying the Union's architecture might be to adapt the second and third pillars to the most pressing demands, while other aspects such as the voting procedures, right of initiative, and types of legal instruments might still be distinct. In the centre of demands for reform are clearly the role of the Parliament and the Courts. The *EP* asks for shared democratic accountability between itself and national parliaments for matters which do not form part of the first pillar<sup>54</sup>. It also wants the roles of the ECJ, the Court of Auditors, and its own role strengthened 'in those areas where there is currently inadequate scrutiny at European level' (CFSP, EMU, JHA)<sup>55</sup>. The *ECJ* explicitly requests an extension of its competencies to the areas covered by the second and third pillars<sup>56</sup>.

In contrast, the *Commission* suggests that the situations of the second and third pillars are not the same. Concerning CFSP, it seems satisfied that 'Parliament plays a role similar to that of national parliaments in relation to national foreign policy'. But it states that matters of JHA 'warrant a greater degree of parliamentary control especially where binding legal instruments are involved', since 'questions in the area of justice and home affairs are likely to have a

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<sup>49</sup> See Herman Report 1994, Articles 41 ff. of the proposed Constitution.

<sup>50</sup> Federal Trust Papers N° 3, p 31.

<sup>51</sup> Presented on behalf of the delegation of the French Senate for the European Union by Senator Yves Guéna on 19 February 1995.

<sup>52</sup> Guéna Report (French Senate) 1995, p 9.

<sup>53</sup> Guéna Report (French Senate) 1995, p 43 f.

<sup>54</sup> EP Resolution from 17. 5. 1995, PE 190.441, pt 3.iii.

<sup>55</sup> EP Resolution from 17. 5. 1995, PE 190.441, pt 4 and 23.iv.

<sup>56</sup> ECJ Report from May 1995, pt 4.

direct effect on individuals' basic rights and public freedoms'.<sup>57</sup> Also the *FT Round Table* sees 'no valid justification for excluding the Court' from JHA<sup>58</sup>, while it argues that the ECJ should have jurisdiction in the field of the second pillar 'at least where the rights of individuals are affected, and perhaps as regards the fulfilment of Treaty procedures and obligations as well.'

From the viewpoint of democratic theory, one must oppose 'the weakness, not to say the absence, of democratic control at Union level in the fields of activity where the inter-governmental process still holds away'.<sup>59</sup> Even concerning the second pillar, there is no convincing reason to continue excluding foreign and security policy from democratic and judicial control. Obviously, the restriction of this area to governmental policy and therefore to intergovernmental bargaining corresponded to long-standing tradition. Nonetheless it is incompatible with an enlightened policy towards democratisation of the Union. At least the pursue of what was outlined above as the more pragmatic and hence probably consensual strategy, i.e. not completely merging all three pillars but aiming at full judicial and parliamentary control over them, seems recommendable -- while different decision-taking rules for highly sensible areas of CFSP could remain applicable (e.g. unanimity or opt-outs if a Member state is out-voted). This brings us to another fundamental question of the IGC 1996, i.e. how to manage even increased structural diversity among up to 30 Member States while still aiming at the unity which has been the central aim of European integration.

## **V. Flexibility within Unity: Variations in European Integration?**

The perspective of a possible doubling of Member States in the near future, bringing about even increased structural diversity, has made the subject of differentiation within the project of European integration ever more topical. The concepts put forward are located on a continuum extending between the poles of unity on the one hand, and flexibility on the other.

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<sup>57</sup> Commission Report, SEC(95) 731, p 14.

<sup>58</sup> Federal Trust Papers N° 3, p 26.

<sup>59</sup> Commission Report, SEC(95) 731, p 18.

### A. *The Models*

Under the most 'unitarian' solution all 'common' policies are conducted by all members of the Community jointly. Thus, no flexibility in terms of participation in principle, or even in time, is allowed for. Departing from this original pattern of the European Economic Community, co-operation outside the Treaties has been going on between some of the Member States for a long time already (e.g. European Monetary System, Schengen Agreement). In terms of primary EC law, however, the concept of a unitarian Community has finally been given up at Maastricht, where opt-outs from political goals agreed on by the others were granted to the UK and Denmark.

Within a more flexible model of European integration, three criteria are useful for categorisation: *goals* (are they shared by all Member States or not?), *speed* of goal achievement (are some members given more time than others for reaching specific goals?), and *independence* for single members concerning opting-in or opting-out (only in groups?; at any time?).

Within the extremely flexible option of a 'Europe à la carte' or 'pick and choose Europe', each Member state decides individually in which policy area 'on the menu' it wants to participate, without in principle being concerned by effects or costs of the others (no common goal, maximal flexibility for the single Member state). A first step towards this strategy is the opt-out of the UK from the social policy innovations of the Maastricht Treaty. In its most far-reaching variant, this model would allow for national choices to be reversed at any given point in time, subject only to prior notification to the European partners (and not only in IGCs).

In contrast, a 'Europe of several speeds' or 'multiple tracks' implies that all Member States jointly decide which policies to pursue (common goals), but then allow for temporary derogations for those members which cannot or do not want to proceed at the same speed as others. Economic and monetary union as provided for in the Maastricht Treaty is an example

of such a strategy<sup>60</sup>, and the same is true for the tradition of granting transitional periods to new Member States.

Between the two options of 'pick and choose' (maximum flexibility concerning goals and participants) and 'Europe of multiple speeds', several more concepts may be located. Thus, a 'hard core' of EU Member States (or 'Kerneuropa') implies that an inner circle of countries would participate in all policy areas which are included in the Treaties, while the other members which cannot or do not want to do so would constitute less involved layers 'around' them. The concept of 'variable geometry', on the other hand, is slightly more cohesive as all Member States would have to participate in some European policies, but diverse groups of members could participate in further fields of European activity (without, however, as much flexibility for individual members as in the model of 'pick and choose'). In a nutshell: 'hard core' means that some members participate in all policies, whereas 'variable geometry' implies that all members participate in some specific areas. Clearly, those concepts are not mutually exclusive but focus on different aspects.

Analysing the relevant proposals during the ongoing reform debate, a quote by *John Major* might well stick in ones mind: 'The fact is that there are not *two* approaches to Europe among Governments of the Union, but one and twelve. *One* because we are all firmly committed to a strong and effective European Union. But *twelve* because no two Governments have identical approaches.'<sup>61</sup> What makes the overview on the present state of the debate specifically difficult is the fact that the notions outlined above often appear in diluted forms, or are even applied unsystematically.

### *B. Political Statements*

The clearest position might be attributed to the present *British government*: By arguing that greater flexibility was the only way in which it was possible to build a Union rising to ultimately 20 or more Member States, John Major promotes the concept of pick-and-choose

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<sup>60</sup> However, the British and later the Danish managed to be granted the possibility to opt-out in Protocols to the Treaty.

<sup>61</sup> John Major, Speech at the University of Leiden, 7 September 1994, p 2 of manuscript



Europe, where each government could decide whether or not to participate in any given European policy, but everybody should be allowed to participate everywhere. For him, the 'real danger' is 'in talk of a 'hard core', inner and outer circles, a two-tier Europe, (...) a union in which some would be more equal than others. There is not, and should never be, an exclusive hard core either of countries or of policies.'<sup>62</sup> So far, those options have been rejected by most *other governments* who rather promoted some variant of a variable geometry. In many cases, the upholding of a single institutional framework was advocated.

For example the German *CDU/CSU paper*, although not explicitly decided on the choice of a variable geometry or a multi-speed model, strongly opposes a 'Europe à la carte'. In order to avoid any drifting apart of the different regions of an ever bigger Union, it proposes the strengthening of a 'hard core' of Member States, i.e. France and Germany as an 'inner core' and the Benelux countries. These countries should not only participate in all Union policies but also act more closely and more Union-oriented than others, and should be the motor of initiatives, especially in the field of the new Maastricht policies such as monetary, fiscal, economic, and social policies<sup>63</sup>. However, the paper is not very precise in terms of how to put this into practice (specifically considering the heterogeneity even between the 'core states') and how to organise the relationship with the rest of the Member States.

In France, a development towards more flexibility took place: In April 1994, the Minister for European Affairs, *Lamassoure*, had still elaborated measures in order to create a contagious effect on the other Member States, i.e. giving them an incentive to participate in all the Union's policies. Thus, he suggested attributing the status of 'new founder members' to all who entered into the third phase of EMU and participated in all other policy areas<sup>64</sup>. In autumn 1994, Prime Minister *Balladur* suggested a Europe of three circles, one of them being the Conference on Security and Co-operation in Europe (CSCE), including countries which would not be members, at least for a long time. The middle circle would accordingly be the current Union based on the Maastricht Treaty, and the inner one a more structured

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<sup>62</sup> John Major, Speech at the University of Leiden, 7 September 1994, p 6 of manuscript

<sup>63</sup> CDU/CSU September 1994, pp 7 f.

<sup>64</sup> See Agence Europe, 18 April 1994, p 7.

organisation `sur le plan monetaire comme sur le plan militaire'<sup>65</sup>. Some months later, however, his outline allowed for even more flexibility: `We should move forward with those who can and want to do so in each area where progress is necessary -- currency, defence, internal security amongst others. We shall thus build circles of stronger co-operation which will not necessarily group together the same member States on each subject.'<sup>66</sup>

The *Spanish* government has on several occasions stated that some flexibility in the sense of `variable geometry' was inevitable<sup>67</sup>, but that there should not be any irreversible exclusion, on the one hand, or a `pick-and-choose Europe' on the other. This government therefore opts for a solution of variable geometry (which is also called scenario of `reinforced solidarity') which nonetheless: should be a last resort only; maintain all *acquis communautaire*; have the core in principle open to all Member States; be compatible with the idea of a community of law founded on a single institutional framework; and provide for flanking policies for strengthening the overall coherence of the Union, and allow real convergence of those lagging behind<sup>68</sup>. However, nothing should prevent any country from leaving the hard core.

The *European Commission* favours the concept of different speeds of integration provided that this happens in a single institutional framework and be centred on a common objective<sup>69</sup>. As the Commissioner for constitutional questions recently put it: `Even when a policy only concerns a minority of Member States, institutional unity should not be affected, notably regarding the Parliament's role of political control which should extend to all areas of co-operation.'<sup>70</sup> Concerning tendencies towards an `à la carte Europe', the Commission obviously regrets that this exists at the moment at least in the case of the social policy<sup>71</sup>, and strongly opposes any such concepts for the future.

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<sup>65</sup> Le Figaro, 30 August 1994.

<sup>66</sup> Cited from Agence Europe, 30 December 1994, p 1.

<sup>67</sup> See Agence Europe, 11 February 1995, p 3; 11 March 1995, pp 4 f.

<sup>68</sup> Paper of the Spanish Government called `The 1996 Conference -- bases for discussion', cited from Agence Europe, 11 March 1995, pp 4 f.

<sup>69</sup> Commission Report, SEC(95) 731, p 6.

<sup>70</sup> Marcelino Oreja Aguirre, Agence Europe 26. 4. 1995, p 4.

<sup>71</sup> Commission Report, SEC(95) 731, p 6.

The *EP* also rejects the option of a 'pick-and-choose Europe'. In fact, one of several conditions set out by Parliament is that any flexible arrangements due to increasing diversity of the EU should not lead to the possibility of individual pick-and-choose. Furthermore, such arrangements must not, according to the EP, undermine the single institutional framework; the *acquis communautaire*; the principles of solidarity and economic and social cohesion throughout the European Union; as well as 'the principle of equality of all States and citizens of the Union before the Treaty'<sup>72</sup>. The control 'over those Union policies which are pursued by a limited number of Member States on a temporary basis' (a formulation which indicates that the EP in fact prefers a more cohesive multiple speed solution only) should be exercised by the European Parliament as a whole<sup>73</sup>.

### *C. Expert and Scholarly Viewpoints*

If we turn to the more academic positions, a 'Europe à la carte' is again rejected by the majority. Even the *European Constitutional Group* provides for a core area of policies without opt-outs, if only concerning 'obligations accepted by qualified majorities as necessary to maintain free and open markets.'<sup>74</sup> Outside this policy nucleus however, they opt for a pick-and-choose model.

In contrast, *Ludlow and Ersbøll* reject any such pattern, even if moderated, because it 'reduces the essential obligations of EU membership to a bare minimum, thereby destroying many of the essential linkages that underpin the present package and reducing the single institutional framework to a marginal role.'<sup>75</sup> They also dismiss the 'hard core' model because it might have a similar effect 'since the single institutional framework would in practice be reserved for 'lesser' business and the obligations, let alone the rights of weaker states, would be bound to be reduced if not to totally disappear'<sup>76</sup>.

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<sup>72</sup> EP Resolution from 17. 5. 1995, PE 190.441, pt 15.

<sup>73</sup> EP Resolution from 17. 5. 1995, PE 190.441, pt 16.

<sup>74</sup> European Constitutional Group 1993, 2a, p 5.

<sup>75</sup> Ludlow and Ersbøll (CEPS) 1995, p 56.

<sup>76</sup> *Ibid.*

*Ludlow and Ersbøll* develop five guiding principles for any recommendable path towards more diversity: (1) opting in should be the norm, opting out the exception; (2) all Member States should participate in the single institutional framework; (3) those who opt out should have less than full rights in the institutions in relation to the business in which they do not intend to participate; (4) they should be obliged to accept the majority's 'droit de regard', including the right of their partners to define their own non-conformity as destabilising or unacceptable; (5) the Treaty should incorporate detailed provisions to deal with unacceptable or destabilising behaviour in articles that apply across the board<sup>77</sup>. They suggest that making opting-out a 'normal business' and not placing the onus on those who opt out will inevitably tend to dilute the notion of the Union and reduce it in due course to no more than an association of states<sup>78</sup>.

'*Charlemagne*'<sup>79</sup>, too, see shortcomings of flexible models. They discuss for example the primacy of those policies carried out by all Member States over those of only a group of states; problems concerning the external competencies *vis-à-vis* third countries; and the functioning of the institutions in those fields without overall Union competence. Here the authors differentiate between those institutions which carry out their tasks in whole independence and in the general interest of the Union, such as the Commission and the Courts (and possibly the EP), on the one hand, and the Council, on the other. For the first group the paper advocates continued participation of those nationals whose Member States opted out for a specific policy<sup>80</sup> -- which corresponds to the current practice in social policy. Finally, any variable geometry must, in the eyes of '*Charlemagne*', respect the *acquis communautaire* without stepping back<sup>81</sup>.

'*Justus Lipsius*' judges the concept of multi-track Europe to be insufficient to solve the problems which will arise -- implying that among a group of almost thirty members, it might

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<sup>77</sup> Ibid, pp 56 f.

<sup>78</sup> Ibid, p 57.

<sup>79</sup> '*Charlemagne*' is the pseudonym of a group of anonymous members of the cabinet of the former Secretary-General of the Council of Ministers and now Danish representative to the reflection group, Niels Ersbøll.

<sup>80</sup> '*Charlemagne*', October 1994, pp 74 ff.

<sup>81</sup> '*Charlemagne*', October 1994, pp 77 f.

well not be possible to find agreement on common goals in all important areas, even if temporary derogations be permitted. A 'Europe à la carte' is simply not 'conceivable' to him 'because it would be unable to provide for the necessary balance between rights and obligations among all Member States because it would entail distortions of competition, negate the concept of a single market, prevent the EU from acting as a single entity in the outside world, etc.'<sup>82</sup>. However, 'Lipsius' judges the possibility of a 'variable geometry' to be interesting and, despite the limits and difficulties it could raise, necessary. He recommends a number of principles be respected (which correspond with those suggested by aforementioned authors, e.g. a single institutional framework). 'A large, thick, strong, common base'<sup>83</sup> should incorporate all policies in which divergences between Member States could give rise to significant distortions of competition, and even for the optional policies outside of these common core policies, a minimum of rules should be mandatory, so that derogations never be full and/or absolute. Moreover, 'Lipsius' suggests that the Treaty provide for the possibility of adopting compensatory measures in cases of distortion of competition because of non-participation. A rule of non-interference should guarantee that particular co-operations may not affect common policies.

To sum up, there seems a certain opinion leadership for models of 'variable geometry' which nonetheless respect both the *acquis communautaire* and the integrity of European integration in terms of external representation and internal cohesion.

#### *D. Let-Out-Clause*

One way of solving at least some of the problems of different aspirations and perceptions concerning the further development of the Union could be the introduction of a so-called let-out-clause. There are two aspects to this.

First, the predicted complications with the United Kingdom during the IGC, because this country seems the most reluctant at the moment to join any progress on the path of further integration. *Parliament* suggests that consideration be given to proceeding without the minority

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<sup>82</sup> 'Justus Lipsius' 1995, p 15.

<sup>83</sup> 'Justus Lipsius' 1995, p 16.

if at the IGC '96, 'despite broad agreement among a majority of Member States and peoples of the European Union' no unanimous decision can be reached. This could be made effective by 'instruments to enable a Member state to leave the EU, subject to meeting certain criteria'<sup>84</sup>.

The other aspect concerns mainly the perspective of further enlargement, as among the next candidates are some with comparatively weak and short democratic tradition. Since the attachment to the 'principles of democracy' is a criterion of membership (Article F TEU), *Ludlow and Ersbøll* discuss what happens if, as a result of regime change, a Member state starts to breach these principles<sup>85</sup>. One solution would obviously be to cease its membership. More generally even, under the proposed EU charter of the *European Constitutional Group*, 'any Member state may decide to leave the Union under procedures that meet its own constitutional requirements'<sup>86</sup>. On the other hand, if a state ceases its membership in the Council of Europe on the grounds of violation of its Convention on Human Rights it shall also cease to be a member of the Union<sup>87</sup>.

#### *E. Towards a Solution?*

Quite obviously, the choice of more or less flexibility concerning the opt-out of European policies also touches basic political concepts: From the viewpoint of an advanced social market economy with relatively high social, environmental, and consumer standards, there exists a strong interest in preventing any 'pick and choose' model which would necessarily imply distortion of competition while completely open markets have to be maintained. As far as policies which do not affect conditions of competition -- e.g. defence -- are concerned, however, things indeed do look different. In the longer run, a certain degree of flexibility might in such areas even bear uniting impact, allowing for innovations first to be tested among a few only.

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<sup>84</sup> EP Resolution from 17. 5. 1995, PE 190.441, pt 17.

<sup>85</sup> Ludlow and Ersbøll (CEPS) 1995, p 35.

<sup>86</sup> European Constitutional Group 1993, 2c, p 5.

<sup>87</sup> European Constitutional Group 1993, 2c, p 5.

Whatever the specific model of increased flexibility adopted for them, the main conditions developed in the debate as outlined above should be respected: a strong core of activities which all Member States share, centred around the internal market and its flanking policies; the maintenance of the single institutional framework; and no stepping back behind the present *acquis communautaire* (and even its improvement as far as the social policy opt-out of the UK is concerned).

But apart from flexibility concerning the participation of individual members in the variety of areas in principle chosen for joint European policy (at least among some states), the current reform debate also focuses on a more specific attribution of single powers to the supranational level, possibly in a catalogue of competencies.

## **VI. Division of Competencies between EU and Member States**

So far, the delimitation of the respective spheres of activity between the Union legislator and the Member States, as laid down in the Treaties, is rather an allocation of functions than a concrete and unambiguous division of competencies. Although European lawyers used to call it a system of 'single authorisations' (*Einzelermächtigungen*), meaning that the supranational level can only act if there is a specific authorisation to be found in the Treaties, it is also acknowledged that some of these authorisations are quite comprehensive and allow for a very broad range of activities 'to attain, in the course of the common market, one of the objectives of the Community' (Article 235 ECT; see also Article 100a ECT<sup>88</sup>). In the past, the Union legislator tended to make frequent use of these subsidiarity competencies. The so-called principle of subsidiarity in Articles A TEU and 3b ECT was introduced in the last IGC in order to counter-balance this tendency towards centralisation. Article A affirms that 'decisions are taken as closely as possible to the people'; Article 3b makes the principle somewhat more operational (although by no means unambiguous) by requiring the Community to act only where the objectives 'cannot be sufficiently achieved by the Member

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<sup>88</sup> We already mentioned the role of these provisions in the frame of the debate on the constitutional character of the Union, see II.B.

States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.'

However, the political as well as academic discourse since the entry into force of the TEU made it clear that this compromise formula falls short of a clear-cut legal solution to the problem of division of competencies in a quasi-federal setting such as the EU. Therefore the issue is very likely to be on the agenda of the IGC '96, and it is definitely a major feature of the ongoing reform debate.

#### *A. A Catalogue of Competencies or Strengthening Subsidiarity?*

The *Europäische Strukturkommission* for instance argues that the subsidiarity principle as formulated in Article 3b ECT cannot suffice the demands because it does not provide clear enough criteria for the division of competencies, but leaves the decision to actors (Commission, governments) which cannot be expected to always apply it systematically and in a restrictive manner<sup>89</sup>. In contrast, a detailed catalogue of competencies ('*Kompetenzkatalog*') should, according to this group, describe the given division of competencies as transparently as possible, and provide principles for further transfers as well as for the exercise of competencies. Clearly, the aim of the *Europäische Strukturkommission* is a stable distribution of competencies contrasting what they see as the traditional trend towards ever more supranational policies. Therefore, its detailed catalogue of competencies<sup>90</sup> attributes in the case of all major policy areas *primary* and *partial competencies* to either the Union or the Member States. For example, foreign policy, security and military are suggested as primary competencies of the Member States, with partial competencies of the Union (called CFSP) including co-ordination, mutual information, common actions and implementation decisions. On the other hand, for example fisheries and agricultural policies are suggested as primary competencies of the Union, while national structural policies in the agricultural area are mentioned as partial competency for the Member States. In general, primary competencies of one level should allow only for interventions by the other level if an

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<sup>89</sup> Europäische Strukturkommission 1994, p 17.

<sup>90</sup> Europäische Strukturkommission 1994, pp 20 ff.



explicit enumerative partial competency has been provided. In the absence of subsidiary competence provisions like Article 235 ECT, any further transfer of additional competencies would only work with ratification by the Member States. An interesting detail about the Europäische Strukturkommission's proposal is the inherent criticism that the EC interfere with competencies of the Member States via financial incentives, for example in the fields of education, health, or culture<sup>91</sup>. Therefore, restrictive enumeration of eligible financial transfers is suggested: The desire for European financial resources should not be a determining criteria for the transfer of competencies in the long term. Furthermore, the Europäische Strukturkommission wants to submit the Union to a generalised principle of loyalty, including the respect of internal national structures within the exercise of Union policies<sup>92</sup>.

The proposal of the Europäische Strukturkommission has been welcomed by several commentators: The *CDU/CSU paper* endorses the idea of a strict list of competencies<sup>93</sup> and also the *German Bundesrat* requests a list of the Union's competencies<sup>94</sup>. While agreeing with the idea of a 'Kompetenzkatalog' as proposed by the Europäische Strukturkommission in principle, *Ludlow and Ersbøll* argue that it should not be accompanied by a total elimination of Article 235 ECT:

`[I]n any healthy polity there must be room for the interplay of political forces to redefine the frontiers between the different levels of government as an[d] when circumstances change. Something like Article 235, remodelled perhaps to allow a stronger role for the European Parliament through the introduction of co-decision procedures, would therefore seem to be indispensable.'<sup>95</sup>

Also the *EP* wants to retain Article 235 ECT, but wants to use it only as a last resort and after assent of the EP<sup>96</sup>. In contrast, the *ESC* proposes that the co-operation procedure should

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<sup>91</sup> *Ibid.*, p 27.

<sup>92</sup> *Ibid.*, p 29.

<sup>93</sup> *CDU/CSU* September 1994, p 5.

<sup>94</sup> *Agence Europe*, 1 April 1995, p 3.

<sup>95</sup> *Ludlow and Ersbøll (CEPS)* 1995, p 16.

<sup>96</sup> *EP Resolution* from 17. 5. 1995, PE 190.441, pt 12.ii. In general, the *EP* suggests that the IGC should primarily concentrate not on transferring new powers to the EU institutions, but on clarifying their respective roles (*ibid.*, pt 18).

be used, and that consultation of the ESC should also be mandatory<sup>97</sup>. Also '*Justus Lipsius*' wants to keep Article 235 because he sees it still necessary for example to set up new organs; but he proposes the co-decision procedure and even wants to delete the reference to the Common Market in that provision. In general, he suggests no major changes in the area of competencies and thinks that a clear-cut catalogue would be too difficult to establish<sup>98</sup>. Also the *FT Round Table* argues that a catalogue of competencies would 'require very thorough preparation, by what would amount to a constitutional conference', and therefore concludes that 'it is not a matter for the forthcoming IGC'<sup>99</sup>.

Another relevant matter of debate is the further elaboration of the principle of subsidiarity, either in combination with the drafting of the '*Kompetenzkatalog*', such as the *German Bundesrat* requests<sup>100</sup>, or without this. For example *John Major* announced his intention to 'block any attempt to extend Community competence to inter-governmental areas such as foreign affairs, defence and home affairs', and his determination to 'aim to strengthen subsidiarity which has already led to a reduction in Commission activity'<sup>101</sup>.

The *European Constitutional Group's* visions, too, clearly favour the national *vis-à-vis* the supranational level. Thus, they want to see a restrictive catalogue of Community competencies, the abolishment of Article 235, and a strengthened subsidiarity principle. The *European Constitutional Group* sets comparatively narrow limits upon the powers of the Union: without specific conditions for Union action being fulfilled, its bodies should not have any explicit powers<sup>102</sup>. Among the existing competencies of the Union, a number would have to be cancelled, for example in the fields of environmental protection and social policy. In cases where amendments to Union measures would, in the view of a qualified minority of a 'Chamber of Parliamentarians', pertain to the distribution of powers between the Member

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<sup>97</sup> CES 273/95 fin, pt I.9.

<sup>98</sup> '*Justus Lipsius*' 1995, p 41.

<sup>99</sup> FT Trust Paper N° 6, p 28.

<sup>100</sup> Agence Europe, 1 April 1995, p 3.

<sup>101</sup> Major cited from Agence Europe, 25 May 1995, p 2.

<sup>102</sup> European Constitutional Group 1993, 3a, p 71.

States and the Union, the final decision would lay with this Chamber consisting of national parliamentarians which are expected to protect national autonomy<sup>103</sup>.

In contrast, the *Spanish* government has shown itself as a defender of the *acquis communautaire* and the competencies of the supranational institutions. It has stressed that a more explicit definition of the subsidiarity principle might even be a negative thing<sup>104</sup>. However, it suggested that national parliaments should have the right to address complaints to the ECJ on the grounds of subsidiarity. *Klaus Hänsch*, the former EP President, commented in that respect that: 'This could be, under certain conditions, at least an improvement on the suggestion (...) [of a] Chamber of Subsidiarity'<sup>105</sup>.

But the *European Constitutional Group* wants to go even further in the direction of renationalisation: if any of the judgements by the ECJ pertained to the distribution of powers, a Member state or a qualified majority of the Chamber of Parliamentarians might call for review of the adjudication by the *Union Court of Review*, consisting of representatives of national judiciaries<sup>106</sup>. Members of national judiciaries making up this additional Court shall therefore see that Union competencies are not exceeded, and that directly applicable Union law and the jurisdiction of the ECJ be very limited. They argue that a

`system of diversified law is much more likely to offer protection to individuals and to a decentralised system of Union government than according a dominant role to a single Court such as the Court of Justice that has a vested interest in the extension of a single superior law.'<sup>107</sup>

Concerning the role of the European Court of Justice and the principle of primacy of EC law, the proposal of the *European Constitutional Group* suggests that 'the next Intergovernmental Conference must specifically reject the concept that there is a general hierarchy of authority to be developed in the Union'<sup>108</sup>. The Group does not mind that their 'proposals in

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<sup>103</sup> European Constitutional Group 1993, 2c, p 8.

<sup>104</sup> Paper of the Spanish Government called 'The 1996 Conference -- bases for discussion', cited from Agence Europe, 11 March 1995, pp 4 f.

<sup>105</sup> Hänsch 1995, p 6.

<sup>106</sup> European Constitutional Group 1993, 2c, p 9.

<sup>107</sup> European Constitutional Group 1993, II, p 3.

<sup>108</sup> *Ibid.*, p 3.

this area will be seen by some observers as challenging a significant part of the legal acquis<sup>109</sup>.

### *B. No Escape from Politics?*

Despite widespread criticism especially in the legal sphere (mainly focusing on the difficulties to operationalise the subsidiarity principle in legal terms)<sup>110</sup> it seems that in political terms, the principle of subsidiarity has worked quite well. Since Maastricht, the Commission justifies its proposals and gives the reasons why it thinks the legislative act in question is adequate for regulation at the European level. Both Parliament and Council discuss the need of the policy project in terms of subsidiarity. Even though one might eventually argue that the EP, being a supranational institution, has no incentive to avoid legislation at the European level, the same can hardly be said of the Council of Ministers. The members of the latter represent not the Union's interests, but the Member States'. Furthermore, the ministers are politically dependent of their national parliaments, which in turn are the main losers in terms of competencies if activities are shifted to the supranational level. Therefore, the Council seems well equipped and in an adequate political position to watch that the principle of subsidiarity be applied with care. Most national second chambers which represent the federated states (e.g. the Austrian and the German Bundesrat) are considerably weaker than the states' chamber at the EU level. Given these structural conditions and the experience of restrictive use of EC competencies during the past two years, one could argue that the project of a genuine 'Kompetenzkatalog' is not one of high priority -- except from a political position which wants to restrict joint policy making at the European level. In any case, it has to be acknowledged that the decision on which level a specific policy should be shaped (i.e. the attribution of political competencies) will always be political, be it rather done in a single stroke during the IGC (drafting of a catalogue) or on a

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<sup>109</sup> Ibid., p 13.

<sup>110</sup> Which is hardly surprising since it is a genuine political principle: There is usually a lot of political judgement and discretion involved in deciding how something might be achieved 'better' in politics.

case-to-case basis (as it has been so far involving 'enumerated competencies' in connection with more general subsidiary empowerments such as Article 235 ECT).

At least, there is one consensus emerging from the relevant expert contributions: the IGC should at least try to simplify the division of competencies in order to make it more transparent for the uninitiated citizen who tries to understand what the European polity is all about.

## VII. Conclusions

In fact, the just mentioned consensus is not only emerging concerning the matter of division of competencies, but as well with respect to the question of whether a European constitution should replace the existing intricate treaty framework, and the merging of the pillar structure. Simplification and increased transparency are also a major issue in the ongoing institutional debate<sup>111</sup>. However, the forthcoming IGC will most likely not be remembered as 'the conference when everything was simplified'. By contrast, any solution to the issue of making the Union's structure more flexible while preserving (as far as possible) its unity will tend to make the constitutional framework even more complicated than it is now.

The issues we have dealt with here are different in yet another dimension from the institutional and procedural questions on the agenda for 1996: Concerning the latter no real 'qualitative leaps' seem to be necessary in order to achieve still considerable improvements with regard to democratic reform of the Union's policy-making structure<sup>112</sup>. By contrast, simplification of the constitutional framework; solving the issue of the protection of fundamental rights; and operationalising the principle of subsidiarity with a view to establishing a proper catalogue of Union competencies are fundamental questions which can hardly be dealt with in a pragmatic step-by-step manner, but need to be addressed with firm political commitment -- something which, at the time of writing, was not very likely to emerge.

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<sup>111</sup> Falkner and Nentwich 1995, p 118 ff.

<sup>112</sup> Falkner and Nentwich 1995a, conclusions.

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