

# The Law of the EUROPEAN UNION

Teaching Material



**EUROPEAN COMMUNITY SYSTEM:  
THE HISTORICAL PERSPECTIVE AND THE BASICS  
OF ECONOMIC INTEGRATION**

**J.H.H. Weiler**  
*European Union Jean Monnet Professor  
NYU School of Law*

AND

**Martina Kocjan**  
*Graduate Member of the Faculty of Law  
University of Oxford*

Copyright J.H.H. Weiler & M. Kocjan • 2004/05

These materials are offered as a public service by the Academy of European Law at the EUI in Florence and the Jean Monnet Center at NYU School of Law. They may be used for educational purposes only and cannot be commercialized in any manner. Their origin should be acknowledged in any use made of them.

U  
N  
I  
T

1-1

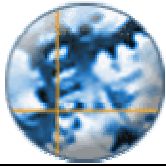
NYU  
School of Law  
2004/05

# TABLE OF CONTENTS

<b>Note and Questions .....</b>	<b>4</b>
<b>1. THE SCHUMAN DECLARATION OF 9 MAY 1950.....</b>	<b>6</b>
<b>2. PREAMBLES OF THE TREATIES.....</b>	<b>8</b>
<b>2.1 EC Treaty, pre-Maastricht-version .....</b>	<b>8</b>
<b>2.2 EC Treaty, post-Amsterdam version .....</b>	<b>9</b>
<b>2.3 Treaty on European Union (Maastricht).....</b>	<b>10</b>
<b>2.4 Treaty on European Union (Amsterdam) .....</b>	<b>11</b>
<b>2.5 Treaty on European Union (Nice).....</b>	<b>12</b>
<b>2.6 Treaty establishing a Constitution for Europe .....</b>	<b>12</b>
<b>3. ARTICLES 1 TO 6 EU TREATY .....</b>	<b>14</b>
<b>3.1 Treaty on European Union (Maastricht) Title I: Common Provisions .....</b>	<b>14</b>
<b>3.2 Treaty on European Union (Amsterdam+) Title I: Common Provisions.....</b>	<b>16</b>
<b>3.3 Treaty establishing a Constitution for Europe: Definition and objectives of the Union....</b>	<b>18</b>
<b>4. ARTICLES 1 TO 3 EC TREATY .....</b>	<b>20</b>
<b>4.1 Pre-Maastricht version.....</b>	<b>20</b>
<b>4.2 Post-Maastricht version .....</b>	<b>21</b>
<b>4.3 Post-Amsterdam version.....</b>	<b>22</b>
<b>5. CITIZENSHIP OF THE UNION .....</b>	<b>23</b>
<b>5.1 The road towards the launching of the European Citizenship.....</b>	<b>23</b>
<b>5.2 Key dates .....</b>	<b>25</b>
<b>5.3 Treaty Provisions on Citizenship .....</b>	<b>26</b>
5.3.1 EC Treaty, post-Nice version of Art. 17 to 21 .....	26
5.3.2 Other Relevant Treaty Provisions.....	28
5.3.3 Treaty establishing a Constitution for Europe .....	30
<b>5.4 Excerpt from the Citizens' guide to the Draft Constitution .....</b>	<b>31</b>
<b>5.5 Case C-85/96: Maria Martinez Sala and Freistaat Bayern.....</b>	<b>32</b>
<b>Note and Questions.....</b>	<b>32</b>
<b>5.6 Case C-184/99: Grzelczyk .....</b>	<b>35</b>
<b>5.7 Case C-413/99: Baumbast, R and Secretary of State for the Home Department .....</b>	<b>39</b>
<b>5.8 Case C-148/02: Garcia Avello v Belgium.....</b>	<b>45</b>

5.9	Case C-138/02: Collins .....	49
5.10	AG Opinion in Case C-209/03: Bidar .....	55
6.	EXCERPT FROM JOSEPHINE SHAW: LAW OF THE EU (3RD ED.) .....	69
7.	EXCERPT FROM JOSEPHINE SHAW: LAW OF THE EU (3RD ED.): EVOLVING FROM COMMUNITY TO UNION .....	86
8.	CONVENTION ON THE FUTURE OF EUROPE AND THE TREATY ESTABLISHING A CONSTITUTION FOR EUROPE.....	103
9.	EXCERPT FROM WILLEM MOLLE: THE ECONOMICS OF EUROPEAN INTEGRATION (4TH ED.).....	108

Update finished on: 28/Jan/2005



## **NOTE AND QUESTIONS**

---

There are four readings for this section:

- The Schuman Declaration
- Two excerpts from J. Shaw, European Union Law

Please be sure to read the first of the two excerpts (Ch. 1). Ch. 2 is a concise history of European Integration and should, at least, be skimmed – in combination with an overview of the recent developments; to be found in the first part of your Primary Sources pack.

- An excerpt from Molle, The Economics of European Integration
- In addition, you should read carefully and compare the Preambles of the EC, EU Treaty and the draft Treaty establishing the Constitution, Articles 2 & 3 of the EC Treaty in pre- and post-Maastricht version as well as in the Amsterdam version. Also, Articles 1-6 (ex art. A-F) of the Treaty on European Union in its Maastricht Treaty, in the Amsterdam version and in the draft Constitutional Treaty.

Last, but not least, Articles 17-21 (ex art. 8-8d) TEC establishing European Citizenship and Article I-10 of the draft Constitutional Treaty.

Analysis of the Schuman Declaration – whose relationship to European law is somewhat analogous to the relationship of the American Declaration of Independence to the American Constitution – will be the subject of the first class.

The reading from Shaw recaps the genesis of the Community and surveys its basic structure. It provides an immediate framework, historical and structural, within which to situate the Treaties -- the Constitutional Charter of the Community.

The reading from Molle lays out the essential elements of the economic theory of Free Trade Areas, Customs Unions and the "Common Market." As will be seen, the European Court of Justice rarely resorts to an explicit discourse of economic theory, but the theory is the constant backdrop, real or mythical, against which much legislation and case-law is pronounced. One virtue of Molle is that he is remarkably free of obfuscating jargon.

Classroom discussion will try to contextualise the information; to explore some of the political and social ramifications of the historical and economic background.

The excerpts from the Treaty of Rome, Maastricht, Amsterdam, Nice and the most recent draft of the Constitutional Treaty are designed to situate the general historical and economic context back into positive law.

Consider while you are reading the following themes:

- European Integration and the Community as a long term architecture for peace: How does the Treaty of Rome compare with classical Peace Treaties -- e.g. the Treaty of Versailles which brought hostilities in World War I to an end?
- The extent to which the Treaty, in its objectives (Preamble, Articles 2, 3) reflect economic theory.
- The rise, demise and revival of political theories of integration: Functionalism, Social Communication, Neo-Functionalism.
- The different incentives for negative and positive integration as viewed from a Member State perspective and the Community perspective
- Have the various Treaty amendments changed the underlying economic theory of European integration?

On Maastricht and Amsterdam:

- The different basic structure (the so-called Three Pillars) of the Treaty of European Union (TEU) (Title I)
- The extent to which the objectives of the European Community (Articles 2 & 3 TEU) expand the notion of the Common Market and the Community by comparison with the EC Treaty. In this context consider carefully whether the establishment of a European citizenship modifies the objective of an Ever Closer Union among the Peoples of Europe.

# 1. THE SCHUMAN DECLARATION OF 9 MAY 1950

[Emphases added]

World peace cannot be safeguarded without the making of creative efforts proportionate to the dangers which threaten it.

The contribution which an organized and living Europe can bring to civilization is indispensable to the maintenance of peaceful relations. In taking upon herself for more than 20 years the role of champion of a **united Europe**, France has always had as her essential aim the service of peace. A united Europe was not achieved and we had war.

**Europe will not be made all at once**, or according to a single plan. It will be built through **concrete achievements** which first create a **de facto solidarity**. The coming together of the nations of Europe requires the elimination of the age-old opposition of France and Germany. Any action taken must in the first place concern these two countries.

With this aim in view, the French Government proposes that action be taken immediately on one limited but decisive point:

It proposes that Franco-German production of coal and steel as a whole be placed under a common High Authority, within the framework of an organization open to the participation of the other countries of Europe.

The pooling of coal and steel production should **immediately provide for the setting up of common foundations for economic development as a first step in the federation of Europe**, and will change the destinies of those regions which have long been devoted to the manufacture of munitions of war, of which they have been the most constant victims.

The solidarity in production thus established will make it plain that **any war between France and Germany becomes not merely unthinkable, but materially impossible**. The setting up of this powerful productive unit, open to all countries willing to take part and bound ultimately to provide all the member countries with the basic elements of industrial production on the same terms, will lay a true foundation for their economic unification.

This production will be offered to the world as a whole without distinction or exception, with the aim of contributing to raising living standards and to promoting peaceful achievements.

In this way, there will be realized simply and speedily **that fusion of interest which is indispensable to the establishment of a common economic system; it may be the leaven from which may grow a wider and deeper community between countries long opposed to one another by sanguinary divisions**.

By pooling basic production and **by instituting a new High Authority, whose decisions will bind France, Germany and other member countries, this proposal will lead to the realization of the first concrete foundation of a European federation indispensable to the preservation of peace.**

To promote the realization of the objectives defined, the French Government is ready to open negotiations on the following bases:

The task with which this common High Authority will be charged will be that of securing in the shortest possible time the modernization of production and the improvement of its quality; the supply of coal and steel on identical terms to the French and German markets, as well as to the markets of other member countries; the development in common of exports to other countries; the equalization and improvement of the living conditions of workers in these industries.

To achieve these objectives, starting from the very different conditions in which the production of member countries is at present situated, it is proposed that certain transitional measures should be instituted, such as the application of a production and investment plan, the establishment of compensating machinery for equating prices, and the creation of a restructuring fund to facilitate the rationalization of production. The movement of coal and steel between member countries will immediately be freed from all customs duty, and will not be affected by differential transport rates. Conditions will gradually be created which will spontaneously provide for the more national distribution of production at the highest level of productivity.

In contrast to international cartels, which tend to impose restrictive practices on distribution and the exploitation of national markets, and to maintain high profits, the organization will ensure the fusion of markets and the expansion of production. [...]"

## **2. PREAMBLES OF THE TREATIES**

### **2.1 EC Treaty, pre-Maastricht-version**

#### **PREAMBLE**

[...]

DETERMINED to lay the foundations of an ever closer union among the peoples of Europe,

RESOLVED to ensure the economic and social progress of their countries by common action to eliminate the barriers which divide Europe,

AFFIRMING as the essential objective of their efforts the constant improvement of the living and working conditions of their peoples,

RECOGNISING that the removal of existing obstacles calls for concerted action in order to guarantee steady expansion, balanced trade and fair competition,

ANXIOUS to strengthen the unity of their economies and to ensure their harmonious development by reducing the differences existing between the various regions and the backwardness of the less favoured regions,

DESIRING to contribute, by means of a common commercial policy, to the progressive abolition of restrictions on international trade,

INTENDING to confirm the solidarity which binds Europe and the overseas countries and desiring to ensure the development of their prosperity, in accordance with the principles of the Charter of the United Nations,

RESOLVED by thus pooling their resources to preserve and strengthen peace and liberty, and calling upon the other peoples of Europe who share their ideal to join in their efforts,

HAVE DECIDED to create a European Economic Community and to this end have designated as their Plenipotentiaries:

[...]



## **2.2 EC Treaty, post-Amsterdam version**

### **PREAMBLE**

[...]

DETERMINED to lay the foundations of an ever closer union among the peoples of Europe,

RESOLVED to ensure the economic and social progress of their countries by common action to eliminate the barriers which divide Europe,

AFFIRMING as the essential objective of their efforts the constant improvements of the living and working conditions of their peoples,

RECOGNISING that the removal of existing obstacles calls for concerted action in order to guarantee steady expansion, balanced trade and fair competition,

ANXIOUS to strengthen the unity of their economies and to ensure their harmonious development by reducing the differences existing between the various regions and the backwardness of the less-favoured regions,

DESIRING to contribute, by means of a common commercial policy, to the progressive abolition of restrictions on international trade,

INTENDING to confirm the solidarity which binds Europe and the overseas countries and desiring to ensure the development of their prosperity, in accordance with the principles of the Charter of the United Nations,

RESOLVED by thus pooling their resources to preserve and strengthen peace and liberty, and calling upon the other peoples of Europe who share their ideal to join in their efforts,

DETERMINED to promote the development of the highest possible level of knowledge for their peoples through a wide access to education and through its continuous updating,

HAVE DECIDED to create a EUROPEAN COMMUNITY and to this end have designated as their Plenipotentiaries:

[...]

## **2.3 Treaty on European Union (Maastricht)**

### **PREAMBLE**

[...]

RESOLVED to mark a new stage in the process of European integration undertaken with the establishment of the European Communities,

RECALLING the historic importance of the ending of the division of the European continent and the need to create firm bases for the construction of the future Europe,

CONFIRMING their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law,

DESIRING to deepen the solidarity between their peoples while respecting their history, their culture and their traditions,

DESIRING to enhance further the democratic and efficient functioning of the institutions so as to enable them better to carry out, within a single institutional framework, the tasks entrusted to them,

RESOLVED to achieve the strengthening and the convergence of their economies and to establish an economic and monetary union including, in accordance with the provisions of this Treaty, a single and stable currency,

DETERMINED to promote economic and social progress for their peoples, within the context of the accomplishment of the internal market and of reinforced cohesion and environmental protection, and to implement policies ensuring that advances in economic integration are accompanied by parallel progress in other fields.

RESOLVED to establish a citizenship common to nationals of their countries,

RESOLVED to implement a common foreign and security policy including the eventual framing of a common defence policy, which might in time lead to a common defence, thereby reinforcing the European identity and its independence in order to promote peace, security and progress in Europe and in the world,

REAFFIRMING their objective to facilitate the free movement of persons, while ensuring the safety and security of their peoples, by including provisions on justice and home affairs in this Treaty,

RESOLVED to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity,

IN VIEW of further steps to be taken in order to advance European integration,

HAVE DECIDED to establish a European Union and to this end have designated as their plenipotentiaries:

[...]

## **2.4 Treaty on European Union (Amsterdam)**

### **PREAMBLE**

[...]

RESOLVED to mark a new stage in the process of European integration undertaken with the establishment of the European Communities,

RECALLING the historic importance of the ending of the division of the European continent and the need to create firm bases for the construction of the future Europe,

CONFIRMING their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law,

CONFIRMING their attachment to fundamental social rights as defined in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers,

DESIRING to deepen the solidarity between their peoples while respecting their history, their culture and their traditions,

DESIRING to enhance further the democratic and efficient functioning of the institutions so as to enable them better to carry out, within a single institutional framework, the tasks entrusted to them,

RESOLVED to achieve the strengthening and the convergence of their economies and to establish an economic and monetary union including, in accordance with the provisions of this Treaty, a single and stable currency,

DETERMINED to promote economic and social progress for their peoples, taking into account the principle of sustainable development and within the context of the accomplishment of the internal market and of reinforced cohesion and environmental protection, and to implement policies ensuring that advances in economic integration are accompanied by parallel progress in other fields,

RESOLVED to establish a citizenship common to nationals of their countries,

RESOLVED to implement a common foreign and security policy including the progressive framing of a common defence policy, which might lead to a common defence in accordance with the provisions of Article 17, thereby reinforcing the European identity and its independence in order to promote peace, security and progress in Europe and in the world,

RESOLVED to facilitate the free movement of persons, while ensuring the safety and security of their peoples, by establishing an area of freedom, security and justice, in accordance with the provisions of this Treaty,

RESOLVED to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity,

IN VIEW of further steps to be taken in order to advance European integration,

HAVE DECIDED to establish a European Union and to this end have designated as their Plenipotentiaries

[...]

## ***2.5 Treaty on European Union (Nice)***

### **PREAMBLE**

[...]

RECALLING the historic importance of the ending of the division of the European continent,

DESIRING to complete the process started by the Treaty of Amsterdam of preparing the institutions of the European Union to function in an enlarged Union,

DETERMINED on this basis to press ahead with the accession negotiations in order to bring them to a successful conclusion, in accordance with the procedure laid down in the Treaty on European Union,

HAVE RESOLVED to amend the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, and to this end have designated as their Plenipotentiaries:

[...]

## ***2.6 Treaty establishing a Constitution for Europe***

### **PREAMBLE**

[...]

DRAWING INSPIRATION from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law,

BELIEVING that Europe, reunited after bitter experiences, intends to continue along the path of civilisation, progress and prosperity, for the good of all its inhabitants, including the weakest and most deprived; that it wishes to remain a continent open to culture, learning and social progress; and that it wishes to deepen the democratic and transparent nature of its public life, and to strive for peace, justice and solidarity throughout the world,

CONVINCED that, while remaining proud of their own national identities and history, the peoples of Europe are determined to transcend their former divisions and, united ever more closely, to forge a common destiny,

CONVINCED that, thus 'United in diversity', Europe offers them the best chance of pursuing, with due regard for the rights of each individual and in awareness of their responsibilities towards future generations and the Earth, the great venture which makes of it a special area of human hope,

DETERMINED to continue the work accomplished within the framework of the Treaties establishing the European Communities and the Treaty on European Union, by ensuring the continuity of the Community acquis,

GRATEFUL to the members of the European Convention for having prepared the draft of this Constitution on behalf of the citizens and States of Europe,

[...]

### **3. ARTICLES 1 TO 6 EU TREATY**

#### **3.1 Treaty on European Union (Maastricht) Title I: Common Provisions**

##### *ARTICLE A*

By this Treaty, the High Contracting Parties establish among themselves a European Union, hereinafter called "the Union". This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen. The Union shall be founded on the European Communities, supplemented by the policies and forms of cooperation established by this Treaty. Its task shall be to organize, in a manner demonstrating consistency and solidarity, relations between the Member States and between their peoples.

##### *ARTICLE B*

The Union shall set itself the following objectives: -- to promote economic and social progress which is balanced and sustainable, in particular through the creation of an area without internal frontiers, through the strengthening of economic and social cohesion and through the establishment of economic and monetary union, ultimately including a single currency in accordance with the provisions of this Treaty; -- to assert its identity on the international scene, in particular through the implementation of a common foreign and security policy including the eventual framing of a common defence policy, which might in time lead to a common defence; -- to strengthen the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union; -- to develop close cooperation on justice and home affairs; -- to maintain in full the "acquis communautaire" and build on it with a view to considering, through the procedure referred to in Article N(2), to what extent the policies and forms of cooperation introduced by this Treaty may need to be revised with the aim of ensuring the effectiveness of the mechanisms and the institutions of the Community. The objectives of the Union shall be achieved as provided in this Treaty and in accordance with the conditions and the timetable set out therein while respecting the principle of subsidiarity as defined in Article 3b of the Treaty establishing the European Community.

##### *ARTICLE C*

The Union shall be served by a single institutional framework which shall ensure the consistency and the continuity of the activities carried out in order to attain its objectives while respecting and building upon the "acquis communautaire". The Union shall in particular ensure the consistency of its external activities as a whole in the context of its external relations, security, economic and development policies. The Council and the Commission shall be responsible for ensuring such consistency. They shall ensure the implementation of these policies, each in accordance with its respective powers.

#### *ARTICLE D*

The European Council shall provide the Union with the necessary impetus for its development and shall define the general political guidelines thereof. The European Council shall bring together the Heads of State or of Government of the Member States and the President of the Commission. They shall be assisted by the Ministers for Foreign Affairs of the Member States and by a Member of the Commission. The European Council shall meet at least twice a year, under the chairmanship of the Head of State or of Government of the Member State which holds the Presidency of the Council. The European Council shall submit to the European Parliament a report after each of its meetings and a yearly written report on the progress achieved by the Union.

#### *ARTICLE E*

The European Parliament, the Council, the Commission and the Court of Justice shall exercise their powers under the conditions and for the purposes provided for, on the one hand, by the provisions of the Treaties establishing the European Communities and of the subsequent Treaties and Acts modifying and supplementing them and, on the other hand, by the other provisions of this Treaty.

#### *ARTICLE F*

1. The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy.
2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.
3. The Union shall provide itself with the means necessary to attain its objectives and carry through its policies.

### **3.2 Treaty on European Union (Amsterdam+) Title I: Common Provisions**

#### *ARTICLE 1 (ex Article A)*

By this Treaty, the HIGH CONTRACTING PARTIES establish among themselves a EUROPEAN UNION, hereinafter called "the Union".

This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.

The Union shall be founded on the European Communities, supplemented by the policies and forms of cooperation established by this Treaty. Its task shall be to organise, in a manner demonstrating consistency and solidarity, relations between the Member States and between their peoples.

#### *ARTICLE 2 (ex Article B)*

The Union shall set itself the following objectives:

- to promote economic and social progress and a high level of employment and to achieve balanced and sustainable development, in particular through the creation of an area without internal frontiers, through the strengthening of economic and social cohesion and through the establishment of economic and monetary union, ultimately including a single currency in accordance with the provisions of this Treaty;
- to assert its identity on the international scene, in particular through the implementation of a common foreign and security policy including the progressive framing of a common defence policy, which might lead to a common defence, in accordance with the provisions of Article 17;
- to strengthen the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union;
- to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime;
- to maintain in full the *acquis communautaire* and build on it with a view to considering to what extent the policies and forms of cooperation introduced by this Treaty may need to be revised with the aim of ensuring the effectiveness of the mechanisms and the institutions of the Community.

The objectives of the Union shall be achieved as provided in this Treaty and in accordance with the conditions and the timetable set out therein while respecting the principle of subsidiarity as defined in Article 5 of the Treaty establishing the European Community.

#### *ARTICLE 3 (ex Article C)*

The Union shall be served by a single institutional framework which shall ensure the consistency and the continuity of the activities carried out in order to attain its objectives while respecting and building upon the *acquis communautaire*.

The Union shall in particular ensure the consistency of its external activities as a whole in the context of its external relations, security, economic and development policies. The Council and the Commission

---

<sup>+</sup> Articles 1 – 6 of the TEU have not been amended by the Treaty of Nice.



shall be responsible for ensuring such consistency and shall cooperate to this end. They shall ensure the implementation of these policies, each in accordance with its respective powers.

*ARTICLE 4 (ex Article D)*

The European Council shall provide the Union with the necessary impetus for its development and shall define the general political guidelines thereof.

The European Council shall bring together the Heads of State or Government of the Member States and the President of the Commission. They shall be assisted by the Ministers for Foreign Affairs of the Member States and by a Member of the Commission. The European Council shall meet at least twice a year, under the chairmanship of the Head of State or Government of the Member State which holds the Presidency of the Council.

The European Council shall submit to the European Parliament a report after each of its meetings and a yearly written report on the progress achieved by the Union.

*ARTICLE 5 (ex Article E)*

The European Parliament, the Council, the Commission, the Court of Justice and the Court of Auditors shall exercise their powers under the conditions and for the purposes provided for, on the one hand, by the provisions of the Treaties establishing the European Communities and of the subsequent Treaties and Acts modifying and supplementing them and, on the other hand, by the other provisions of this Treaty.

*ARTICLE 6 (ex Article F)*

1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.
2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.
3. The Union shall respect the national identities of its Member States.
4. The Union shall provide itself with the means necessary to attain its objectives and carry through its policies.

### **3.3 Treaty establishing a Constitution for Europe: Definition and objectives of the Union**

#### **Article I-1 Establishment of the Union**

1. Reflecting the will of the citizens and States of Europe to build a common future, this Constitution establishes the European Union, on which the Member States confer competences to attain objectives they have in common. The Union shall coordinate the policies by which the Member States aim to achieve these objectives, and shall exercise on a Community basis the competences they confer on it.
2. The Union shall be open to all European States which respect its values and are committed to promoting them together.

#### **Article I-2 The Union's values**

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

#### **Article I-3 The Union's objectives**

1. The Union's aim is to promote peace, its values and the well-being of its peoples.
2. The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, and an internal market where competition is free and undistorted.
3. The Union shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.

It shall promote economic, social and territorial cohesion, and solidarity among Member States.

It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.

4. In its relations with the wider world, the Union shall uphold and promote its values and interests. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in

particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.

5. The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Constitution.

**Article I-4**  
**Fundamental freedoms and non-discrimination**

1. The free movement of persons, services, goods and capital, and freedom of establishment shall be guaranteed within and by the Union, in accordance with the Constitution.

2. Within the scope of the Constitution, and without prejudice to any of its specific provisions, any discrimination on grounds of nationality shall be prohibited.

**Article I-5**  
**Relations between the Union and the Member States**

1. The union shall respect the equality of Member States before the constitution as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security.

2. Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Constitution. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Constitution or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

**Article I-6**  
**Union law**

The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States.

[...]

## **4. ARTICLES 1 TO 3 EC TREATY**

### **4.1 Pre-Maastricht version**

#### **Article 1**

By this Treaty, the High Contracting Parties establish among themselves a EUROPEAN ECONOMIC COMMUNITY.

#### **Article 2**

The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it.

#### **Article 3**

For the purposes set out in Art. 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein:

- (a) the elimination, as between Member States, of customs duties and of quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect;
- (b) the establishment of a common customs tariff and of a common commercial policy towards third countries;
- (c) the abolition, as between Member States, of obstacles to freedom of movement for persons, services and capital;
- (d) the adoption of a common policy in the sphere of agriculture;
- (e) the adoption of a common policy in the sphere of transport;
- (f) the institution of a system ensuring that competition in the common market is not distorted;
- (g) the application of procedures by which the economic policies of Member States can be coordinated and disequilibria in their balances of payments remedied;
- (h) the approximation of the laws of Member States to the extent required for the proper functioning of the common market;
- (i) the creation of a European Social Fund in order to improve employment opportunities for workers and to contribute to the raising of their standard of living;
- (j) the establishment of a European Investment Bank to facilitate the economic expansion of the Community by opening up fresh resources;
- (k) the association of the overseas countries and territories in order to increase trade and to promote jointly economic and social development.

## **4.2 Post-Maastricht version**

### **Article 1.**

By this Treaty, the High Contracting Parties establish among themselves a European Community.

### **Article 2.**

The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing the common policies or activities referred to in Articles 3 and 3a, to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment, a high degree of convergence of economic performance, a high level of employment and of social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.

### **Article 3.**

For the purposes set out in Article 2, the activities of the Community shall include, as provided by this Treaty and in accordance with the timetable set out therein:

- (a) the elimination as between Member States, of customs duties and quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect;
- (b) a common commercial policy;
- (c) an internal market characterized by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital;
- (d) Measures concerning the entry and movement of persons in the internal market as provided for in Article 100C;
- (e) a common policy in the sphere of agriculture and fisheries;
- (f) a common policy in the sphere of transport;
- (g) a system ensuring that competition in the common market is not distorted;
- (h) the approximation of the laws of the Member States to the extent required for the functioning of the common market;
- (i) a policy in the social sphere comprising a European Social Fund;
- (j) the strengthening of economic and social cohesion;
- (k) a policy in the sphere of the environment;
- (l) the strengthening of the competitiveness of Community industry;
- (m) the promotion of research and technological development;
- (n) encouragement for the establishment and development of trans-European networks;
- (o) a contribution to the attainment of a high level of health protection;
- (p) a contribution to education and training of quality and to the flowering of the cultures of the Member States;
- (q) a policy in the sphere of development cooperation;
- (r) the association of the overseas countries and territories in order to increase trade and promote jointly economic and social development;
- (s) a contribution to the strengthening of consumer protection;
- (t) measures in the spheres of energy, civil protection and tourism.

### **4.3 Post-Amsterdam version**

#### **Article 1**

By this Treaty, the HIGH CONTRACTING PARTIES establish among themselves a EUROPEAN COMMUNITY.

#### **Article 2**

The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.

#### **Article 3**

1. For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein:

- (a) the prohibition, as between Member States, of customs duties and quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect;
- (b) a common commercial policy;
- (c) an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital;
- (d) measures concerning the entry and movement of persons as provided for in Title IV;
- (e) a common policy in the sphere of agriculture and fisheries;
- (f) a common policy in the sphere of transport;
- (g) a system ensuring that competition in the internal market is not distorted;
- (h) the approximation of the laws of Member States to the extent required for the functioning of the common market;
- (i) the promotion of coordination between employment policies of the Member States with a view to enhancing their effectiveness by developing a coordinated strategy for employment;
- (j) a policy in the social sphere comprising a European Social Fund;
- (k) the strengthening of economic and social cohesion;
- (l) a policy in the sphere of the environment;
- (m) the strengthening of the competitiveness of Community industry;
- (n) the promotion of research and technological development;
- (o) encouragement for the establishment and development of trans-European networks;
- (p) a contribution to the attainment of a high level of health protection;
- (q) a contribution to education and training of quality and to the flowering of the cultures of the Member States;
- (r) a policy in the sphere of development cooperation;
- (s) the association of the overseas countries and territories in order to increase trade and promote jointly economic and social development;
- (t) a contribution to the strengthening of consumer protection;
- (u) measures in the spheres of energy, civil protection and tourism.

2. In all the activities referred to in this Article, the Community shall aim to eliminate inequalities, and to promote equality, between men and women.

## **5. CITIZENSHIP OF THE UNION**

### **5.1 The road towards the launching of the European Citizenship**

From: <http://www.historiasiglo20.org/europe/ciudad europea.htm>

See also: <http://www.europa.eu.int/scadplus/leg/en/s18000.htm>

The right of free movement of persons inside the Community was introduced in the constituent Treaty of the EEC, signed in Rome in 1957. This freedom didn't appear bound to any citizenship concept but rather it was closely linked to the acting of an economic activity. In consequence, the right of residence was recognised to workers and their families, linked to the right to exercise a labour activity in another member State of the EEC.

Although in the European Council, held in Paris in 1974, the necessity to grant special rights in the EEC to the citizens of the member States was put forward, it was the Tindemans Report, in 1976, when, for the first time, the purpose of going further of a mere common market with an objective of creating a community of citizens was clearly proposed. This report, edited by the Belgian prime minister to instances of the Summit of Paris 1974, had no success among the governments, though it had an important influence in later steps towards integration. In a chapter, titled *The Europe of the Citizens*, Tindemans proposed the enactment of different measures that made perceptible, by means of outward signs, the rise of a European awareness: unification of passports, the vanishing of border controls, the common use of the benefits of the Social Security systems, the accreditation of academic courses and degrees...

A second step was the calling in 1976 to elections by universal suffrage for the European Parliament. Although Parliament's competences were meagre, for the first time, one of the key elements of citizenship, democratic participation, turned up.

More audacious was the Project of Treaty of European Union, passed by the European Parliament, in February of 1984, and presented by the euro MP Alterio Spinelli (Spinelli Project).

In spite of its restraint, the Single European Act (1986) hardly included any of the Spinelli's project proposals, although it adopted, and that is fundamental, the objective of a political European Union. This way, few years later, two Intergovernmental Conferences were summoned to reform the Treaties. One of them was focused on the Economic and Monetary Union, the other one, solely in the political Union.

The Rome European Council, in October 1990, when establishing the IGCs guidelines, introduced a notion of European Citizenship, as an essential element of the Treaties reform, and with some characteristics and similar rights to those that later on were included in the Treaty of the European Union or Treaty of Maastricht. After diverse negotiation, and with the enthusiastic support of the European Parliament that passed two favourable resolutions in 1991, the Treaty of the European Union came finally to institutionalise European citizenship.

In comparison with citizenship of a State, citizenship of the Union is characterised by rights and duties and involvement in political life. It is designed to strengthen the ties between citizens and Europe by promoting the development of a European public opinion and a European political identity. This concept comes under the first pillar of the Treaty on European Union.

Under the terms of Article 17 (ex Article 8) of the EC Treaty, any person holding the nationality of a Member State is a citizen of the Union. Citizenship of the Union, which supplements national citizenship

without replacing it, is made up of a set of rights and duties that add to those that are already attached to the citizenship of a Member State.

This status of the citizenship of the Union means the following for any citizen of the Union:

- the right to move freely and to reside on the territory of the Member States (Article 18 of the EC Treaty);
- the right to vote and to stand as a candidate in elections to the European Parliament and in municipal elections in the Member State in which he resides, under the same conditions as nationals of that State (Article 19 of the EC Treaty);
- the right, in the territory of a third country in which his country is not represented, to protection by the diplomatic or consular authorities of another Member State, on the same conditions as the nationals of that State (Article 20 of the EC Treaty);
- the right to petition the European Parliament (Article 21 of the EC Treaty) and the right to apply to the ombudsman (Article 21 of the EC Treaty) in order to bring to his attention any cases of poor administration by the Community institutions and bodies, with the exception of the legal bodies.

It also means, following the entry into force of the Amsterdam Treaty (see, on this point the guide to the Amsterdam Treaty at <http://www.europa.eu.int/scadplus/leg/en/lvb/a12000.htm>):

- the right to apply to the European institutions in one of the official languages and to receive a reply in that language (Article 22 of the EC Treaty);
- the right to have access to European Parliament, Council and Commission documents under certain conditions (Article 255 of the EC Treaty).

The last three rights also apply to natural or legal persons with their residence or headquarters in a Member State.

Mention should also be made of:

- the principle of non-discrimination on grounds of nationality between citizens of the Union (Article 12 of the EC Treaty) and the principle of non-discrimination based on sex, race, religion, disability, age or sexual orientation (Article 13 of the EC Treaty);
- equal access to the Community civil service.



## 5.2 Key dates

1951: Treaty of Paris establishes the European Coal and Steel Community. It allows for freedom of movement in the Community for the workers of these industries.

1957: Treaty of Rome creating the European Economic Community allows for free movement in the Community based on economic activity.

1974: Paris Summit, at which attempts were made to define the special rights of nationals of the EEC.

1986: Single European Act includes provisions establishing an area without frontiers and abolishing checks on persons at internal frontiers, regardless of nationality. This was implemented in 1992.

1992: An extraordinary European Council is held in Birmingham, United Kingdom. It adopts a declaration entitled A Community close to its citizens.

1992: Maastricht Treaty introduces EU citizenship as a distinct concept guaranteeing additional rights.

1997: Treaty of Amsterdam extends the *rights* of EU citizenship. Introduces anti-discrimination clauses to protect EU citizens. The Schengen Agreement removing frontiers (except for those of Denmark, Ireland and the UK) is incorporated into the Treaty.

1999: Case C-85/96, Martnez Sala v Freistaat Bayern ruling. The European Court of Justice rules that nationals of a Member State can rely on their *European citizenship* for protection against discrimination by another Member State on grounds of nationality, within the scope of the application of the Treaty.

2000: Charter of Fundamental Rights of the EU proclaimed at Nice Summit.

2000: Declaration contained in the Treaty of Nice calls for a debate on the future of the European Union.

2000: Treaty of Nice reinforces provisions against discrimination and breach of fundamental rights by an EU Member State.

2001: Debate on the future of the European Union is launched.

2001: European governance: a White Paper, the European Commissions contribution to the debate on the future of the European Union.

2002: The Convention on the Future of Europe starts its work with the objective of drafting a Constitutional Treaty to the European Union.

2003: The Convention is due to present the results of its work.

2004: The constitution for Europe, clarifying the demarcation of responsibilities between the Union and the Member States, the status of the Charter of Fundamental Rights of the EU and the role of the national parliaments in relation to the institutions of the European Union, is signed.

## **5.3 Treaty Provisions on Citizenship**

### **5.3.1 EC Treaty, post-Nice version of Art. 17 to 21**

#### **PART TWO CITIZENSHIP OF THE UNION**

##### **Article 17**

1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship.
2. Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby.

##### **Article 18 \***

*(amended by the Treaty of Nice)*

1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.
2. If action by the Community should prove necessary to attain this objective and this Treaty has not provided the necessary powers, the Council may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1. The Council shall act in accordance with the procedure referred to in Article 251.
3. Paragraph 2 shall not apply to provisions on passports, identity cards, residence permits or any other such document or to provisions on social security or social protection.

##### **Article 19**

1. Every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State.

2. Without prejudice to Article 190(4) and to the provisions adopted for its implementation, every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State.

#### ***Article 20***

Every citizen of the Union shall, in the territory of a third country in which the Member State of which he is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State. Member States shall establish the necessary rules among themselves and start the international negotiations required to secure this protection.

#### ***Article 21***

Every citizen of the Union shall have the right to petition the European Parliament in accordance with Article 194.

Every citizen of the Union may apply to the Ombudsman established in accordance with Article 195.

Every citizen of the Union may write to any of the institutions or bodies referred to in this Article or in Article 7 in one of the languages mentioned in Article 314 and have an answer in the same language.

#### ***Article 22***

The Commission shall report to the European Parliament, to the Council and to the Economic and Social Committee every three years on the application of the provisions of this part. This report shall take account of the development of the Union.

On this basis, and without prejudice to the other provisions of this Treaty, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may adopt provisions to strengthen or to add to the rights laid down in this part, which it shall recommend to the Member States for adoption in accordance with their respective constitutional requirements.

### 5.3.2 Other Relevant Treaty Provisions

#### 1. Treaty of European Community (Amsterdam, 02/10/1997).

- **Article 12 EC Treaty** (ex Article 6).

*Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, **any discrimination on grounds of nationality shall be prohibited.** The Council, acting in accordance with the procedure referred to in Article 251, may adopt rules designed to prohibit such discrimination.*

- **Article 13 EC Treaty** (ex art. 6A). Excerpt.

*Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action **to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.***

- **Protocol annexed to the Amsterdam Treaty.** [Protocol integrating the Schengen acquis into the framework of the European Community.](#)

#### 2. Treaty of European Community (Maastricht, 07/02/1992).

**Declaration annexed to the Maastricht Treaty (N 2) on nationality of a Member State.**

#### 3. Treaty of Nice (26/02/2001). Declaration n23.

*Excerpt: The Conference calls for a deeper and wider debate about the future of the European Union. The Conference recognizes the need to improve and to monitor **the democratic legitimacy and transparency of the Union** and its institutions in order to bring them **closer to the citizens** of the Member states*

#### 4. Charter of Fundamental Rights (07/12/2000). Preamble.

*Excerpt: The Union contributes to the preservation and the development of these common values while **respecting the diversity of the cultures and traditions of the peoples** of Europe as well as **the national identities of Member States** and the organisation of their public authorities at national, regional and local levels; it seeks to promote balanced and sustainable development and ensures **free movement of persons** , goods, services and capital and the **freedom of establishment** .*

#### 5. Treaty of the European Union (Amsterdam, 02/10/1997).

- **Preamble.**  
*to establish a citizenship common to the nationals of their countries.*
- **Article 2 EU Treaty** (ex art. B).  
*to strengthen the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union .*
- **Article 6 EU Treaty** (ex Article F).

- *The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.*
  - *The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.*
  - *The Union shall respect the national identities of its Member States.*
  - *The Union shall provide itself with the means necessary to attain its objectives and carry through its policies.*
- **Article 7 EU Treaty (ex Article F.1).**
    - *The Council, meeting in the composition of the Heads of State or Government and acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the assent of the European Parliament, may determine **the existence of a serious and persistent breach by a Member State of principles mentioned in Article 6(1)**, after inviting the government of the Member State in question to submit its observations.*
    - *Where such a determination has been made, the Council, acting by a qualified majority, may decide **to suspend certain of the rights deriving from the application of this Treaty to the Member State in question**, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons. The obligations of the Member State in question under this Treaty shall in any case continue to be binding on that State.*
    - *The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 2 in response to changes in the situation which led to their being imposed.*
    - *For the purposes of this Article, the Council shall act without taking into account the vote of the representative of the government of the Member State in question. Abstentions by members present in person or represented shall not prevent the adoption of decisions referred to in paragraph 1. A qualified majority shall be defined as the same proportion of the weighted votes of the members of the Council concerned as laid down in Article 205(2) of the Treaty establishing the European Community. This paragraph shall also apply in the event of voting rights being suspended pursuant to paragraph 2.*
    - *For the purposes of this Article, the European Parliament shall act by a two-thirds majority of the votes cast, representing a majority of its members.*

### **5.3.3 Treaty establishing a Constitution for Europe**

#### ***Article I-10: Citizenship of the Union***

1. Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to national citizenship and shall not replace it.
2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Constitution. They shall have:
  - (a) the right to move and reside freely within the territory of the Member States;
  - (b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;
  - (c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State;
  - (d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Constitution's languages and to obtain a reply in the same language.

These rights shall be exercised in accordance with the conditions and limits defined by the Constitution and by the measures adopted thereunder.

## 5.4 Excerpt from the Citizens' guide to the Draft Constitution

Citizenship of the Union complements national citizenship and does not replace it.

The draft Constitution clearly asserts the rights which stem from citizenship: the right **to move and reside freely**, the right to **vote and to stand as candidates in elections to the European Parliament** and in **municipal elections**, the right to **diplomatic and consular protection**, the right to **petition the European Parliament** and the right to **refer matters to the Ombudsman and to write to the institutions in one of the Union's languages** and receive a reply in that same language.

The above list is by no means exhaustive and other rights of citizens of the Union are listed in a specific title of the draft Constitution devoted to the "The democratic life of the Union"; this refers to the right to take part in **democratic life** and the **right of access to documents**.

*Citizenship of the Union to complement national citizenship*

*List of rights which the citizens of the Union enjoy*

*A part of the Constitution is devoted to democratic life*

## 5.5 Case C-85/96: Maria Martinez Sala and Freistaat Bayern



### NOTE AND QUESTIONS

---

After having read the excerpts from the Treaty and draft of the Constitution and while reading the judgements of the ECJ below reflect on what were the possible reasons for the EU to develop the concept of citizenship and what meanings does citizenship have in the EU context. Will the eventual entry into force of the Constitution change this?

The Martinez Sala, the Grzelczyk and the Baumbast judgment illustrate the tendency of the Court to grant, based on the idea of equal treatment of nationals and non-nationals, comprehensive rights to Member State nationals residing on another Member State's territory, increasingly independent from the "economic categories" and based on the notion of "European Citizenship". Do such judgments render all harmonizing Community legislation concerning workers etc. obsolete?

#### **Maria Martinez Sala and Freistaat Bayern**

**C-85/96**

12 May 1998

Court of Justice

1998 [ECR] I-2691

<http://www.curia.eu.int/en/content/juris/index.htm>

#### **Summary of facts and procedure**

*The regional German authorities rejected the application of Mrs Sala Martinez, a Spanish national, legally resident in Germany, for child-raising allowance for her child. As the national court confirmed, the child-raising allowance was refused because the date of the child's birth fell within a period when Mrs Sala Martinez' residence permit had already expired and her application for extension was certified but not yet granted. In the course of the appeal proceedings, the national court addressed the Court of Justice for a preliminary ruling.*

#### **Judgment:**

[...]

- 46 By its fourth question the referring court seeks to ascertain whether Community law precludes a Member State from requiring nationals of other Member States to produce a formal residence permit in order to receive a child-raising allowance.



- 47 This question is based on the assumption that the appellant in the main proceedings has been authorised to reside in the Member State concerned.
- 48 Under the BErzGG, in order to be entitled to German child-raising allowance, the claimant, besides meeting the other material conditions for its grant, must be permanently or ordinarily resident in German territory.
- 49 A national of another Member State who is authorised to reside in German territory and who does reside there meets this condition. In that regard, such a person is in the same position as a German national residing in German territory.
- 50 However, the BErzGG provides that, unlike German nationals, 'a non-national', including a national of another Member State, must be in possession of a certain type of residence permit in order to receive the benefit in question. It is common ground that a document merely certifying that an application for a residence permit has been made is not sufficient, even though such a certificate warrants that the person concerned is entitled to stay.
- 51 The referring court points out, moreover, that 'delays in granting [residence permits] for purely technical administrative reasons can materially affect the substance of the rights enjoyed by citizens of the European Union'.
- 52 Whilst Community law does not prevent a Member State from requiring nationals of other Member States lawfully resident in its territory to carry at all times a document certifying their right of residence, if an identical obligation is imposed upon its own nationals as regards their identity cards (see, to that effect, Case 321/87 Commission v Belgium [1989] ECR 997, paragraph 12, and the judgment of 30 April 1998 in Case C-24/97 Commission v Germany [1998] ECR I-0000, paragraph 13), the same is not necessarily the case where a Member State requires nationals of other Member States, in order to receive a child-raising allowance, to be in possession of a residence permit for the issue of which the administration is responsible.
- 53 For the purposes of recognition of the right of residence, a residence permit can only have declaratory and probative force (see, to this effect, Case 48/75 Royer [1976] ECR 497, paragraph 50). However, the case-file shows that, for the purposes of the grant of the benefit in question, possession of a residence permit is constitutive of the right to the benefit.
- 54 Consequently, for a Member State to require a national of another Member State who wishes to receive a benefit such as the allowance in question to produce a document which is constitutive of the right to the benefit and which is issued by its own authorities, when its own nationals are not required to produce any document of that kind, amounts to unequal treatment.
- 55 In the sphere of application of the Treaty and in the absence of any justification, such unequal treatment constitutes discrimination prohibited by Article 6 of the EC Treaty.
- 56 At the hearing, the German Government, while accepting that the condition imposed by the BErzGG constituted unequal treatment within the meaning of Article 6 of the Treaty, argued that the facts of the case being considered in the main proceedings did not fall within either the scope *ratione materiae* or the scope *ratione personae* of the Treaty so that the appellant in the main proceedings could not rely on Article 6.
- 57 As regards the scope *ratione materiae* of the Treaty, reference should be made to the replies given to the first, second and third questions, according to which the child-raising allowance in

question in the main proceedings indisputably falls within the scope *ratione materiae* of Community law.

- 58 As regards its scope *ratione personae*, if the referring court were to conclude that, in view of the criteria provided in reply to the first preliminary question, the appellant in the proceedings before it has the status of worker within the meaning of Article 48 of the Treaty and of Regulation No 1612/68 or of employed person within the meaning of Regulation No 1408/71, the unequal treatment in question would be incompatible with Articles 48 and 51 of the Treaty.
- 59 Should this not be the case, the Commission submits that, in any event, since 1 November 1993 when the Treaty on European Union came into force, the appellant in the main proceedings has a right of residence under Article 8a of the EC Treaty, which provides that: 'Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect'. According to Article 8(1) of the EC Treaty, every person holding the nationality of a Member State is to be a citizen of the Union.
- 60 It should, however, be pointed out that, in a case such as the present, it is not necessary to examine whether the person concerned can rely on Article 8a of the Treaty in order to obtain recognition of a new right to reside in the territory of the Member State concerned, since it is common ground that she has already been authorised to reside there, although she has been refused issue of a residence permit.
- 61 As a national of a Member State lawfully residing in the territory of another Member State, the appellant in the main proceedings comes within the scope *ratione personae* of the provisions of the Treaty on European citizenship.
- 62 Article 8(2) of the Treaty attaches to the status of citizen of the Union the rights and duties laid down by the Treaty, including the right, laid down in Article 6 of the Treaty, not to suffer discrimination on grounds of nationality within the scope of application *ratione materiae* of the Treaty.
- 63 It follows that a citizen of the European Union, such as the appellant in the main proceedings, lawfully resident in the territory of the host Member State, can rely on Article 6 of the Treaty in all situations which fall within the scope *ratione materiae* of Community law, including the situation where that Member State delays or refuses to grant to that claimant a benefit that is provided to all persons lawfully resident in the territory of that State on the ground that the claimant is not in possession of a document which nationals of that same State are not required to have and the issue of which may be delayed or refused by the authorities of that State.
- 64 Since the unequal treatment in question thus comes within the scope of the Treaty, it cannot be considered to be justified: it is discrimination directly based on the appellant's nationality and, in any event, nothing to justify such unequal treatment has been put before the Court.
- 65 The answer to the fourth question must therefore be that Community law precludes a Member State from requiring nationals of other Member States authorised to reside in its territory to produce a formal residence permit issued by the national authorities in order to receive a child-raising allowance, whereas that Member State's own nationals are only required to be permanently or ordinarily resident in that Member State.

[...]

## 5.6 Case C-184/99: Grzelczyk

Rudy Grzelczyk and Centre public

d'aide sociale d'Ottignies-Louvain-la-Neuve

C-184/99

20 September 2001

Court of Justice

2001 [ECR] I-06193

<http://www.curia.eu.int/en/content/juris/index.htm>

### **Summary of facts and procedure**

*Mr Grzelczyk, a French national, undertook a course of studies in Belgium. During the first three years of his course, he defrayed his own costs of maintenance, accommodation and studies by taking on various minor jobs and by obtaining credit facilities. The fourth year of his studies being the most demanding, Mr Grzelczyk applied to the Public Social Assistance Centre ("the CPAS") for payment of the minimum subsistence allowance, or "minimex", for the year 1998/1999. He was initially granted the allowance.*

*His entitlement to the minimex was then withdrawn with effect from 1 January 1999 based on the fact that Mr Grzelczyk was a student.*

*When the benefit was introduced in 1974, entitlement was reserved to adults of Belgian nationality, residing in Belgium and not in possession of adequate resources. In 1987 entitlement was extended to include, amongst others, persons to whom the 1968 Community regulation on the freedom of movement of workers within the Community applied.*

*Mr Grzelczyk brought an action before the competent Belgian court challenging the CPAS's decision of 29 January 1999 to stop payment of the minimex.*

*The Labour Tribunal, Nivelles, referred a question to the Court of Justice of the European Communities concerning the compatibility of the Belgian law with Community law, that is, with the Treaty and, more specifically, the principles of European citizenship and non-discrimination enshrined in the Treaty. Was it contrary to Community law for entitlement to a non-contributory social benefit to be made conditional, in the case of nationals of other Member States (in this case France), upon their being regarded as workers, given that that condition did not apply to nationals of the host Member State (in this case Belgium)?*

## Judgment

[...]

27. In order to place the legal problem raised by this case in its context, it should be recalled that, in Case 249/83 Hoeckx [1985] ECR 973, concerning an unemployed Dutch national returning to Belgium where she made a fresh application for the minimex, the Court held that a social benefit providing a general guarantee of a minimum subsistence allowance, such as that provided for by the Belgian Law of 7 August 1974, constitutes a social advantage within the meaning of Regulation No 1612/68.
28. At the time of the facts giving rise to Hoeckx, all Community nationals were entitled to the minimex, although nationals of Member States other than Belgium had to satisfy the additional requirement of having actually resided in Belgium for at least five years immediately preceding the date on which the minimex was granted (see Article 1 of the Royal Decree of 8 January 1976, *Moniteur belge* of 13 January 1976, p. 311). It was the Royal Decree of 27 March 1987, which repealed the Royal Decree of 8 January 1976, which restricted entitlement to the minimex, in the case of nationals of other Member States, to persons to whom Regulation No 1612/68 applied. The residence condition, which had been amended in the meantime, was finally removed after infringement proceedings were brought by the Commission against the Kingdom of Belgium (Case C-326/90 *Commission v Belgium* [1992] ECR I-5517).
29. It is clear from the documents before the Court that a student of Belgian nationality, though not a worker within the meaning of Regulation No 1612/68, who found himself in exactly the same circumstances as Mr Grzelczyk would satisfy the conditions for obtaining the minimex. The fact that Mr Grzelczyk is not of Belgian nationality is the only bar to its being granted to him. It is not therefore in dispute that the case is one of discrimination solely on the ground of nationality.
30. Within the sphere of application of the Treaty, such discrimination is, in principle, prohibited by Article 6. In the present case, Article 6 must be read in conjunction with the provisions of the Treaty concerning citizenship of the Union in order to determine its sphere of application.
31. Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for.
32. As the Court held in paragraph 63 of its judgment in *Martínez Sala*, cited above, a citizen of the European Union, lawfully resident in the territory of a host Member State, can rely on Article 6 of the Treaty in all situations which fall within the scope *ratione materiae* of Community law.
33. Those situations include those involving the exercise of the fundamental freedoms guaranteed by the Treaty and those involving the exercise of the right to move and reside freely in another Member State, as conferred by Article 8a of the Treaty (see Case C-274/96 *Bickel and Franz* [1998] ECR I-7637, paragraphs 15 and 16).
34. It is true that, in paragraph 18 of its judgment in Case 197/86 *Brown* [1988] ECR 3205, the Court held that, at that stage in the development of Community law, assistance given to students for maintenance and training fell in principle outside the scope of the EEC Treaty for the purposes of Article 7 thereof (later Article 6 of the EC Treaty).
35. However, since *Brown*, the Treaty on European Union has introduced citizenship of the European Union into the EC Treaty and added to Title VIII of Part Three a new chapter 3 devoted to

education and vocational training. There is nothing in the amended text of the Treaty to suggest that students who are citizens of the Union, when they move to another Member State to study there, lose the rights which the Treaty confers on citizens of the Union. Furthermore, since *Brown*, the Council has also adopted Directive 93/96, which provides that the Member States must grant right of residence to student nationals of a Member State who satisfy certain requirements.

36. The fact that a Union citizen pursues university studies in a Member State other than the State of which he is a national cannot, of itself, deprive him of the possibility of relying on the prohibition of all discrimination on grounds of nationality laid down in Article 6 of the Treaty.
37. As pointed out in paragraph 30 above, in the present case that prohibition must be read in conjunction with Article 8a(1) of the Treaty, which proclaims 'the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.
38. As regards those limitations and conditions, it is clear from Article 1 of Directive 93/96 that Member States may require of students who are nationals of a different Member State and who wish to exercise the right of residence on their territory, first, that they satisfy the relevant national authority that they have sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence, next, that they be enrolled in a recognised educational establishment for the principal purpose of following a vocational training course there and, lastly, that they be covered by sickness insurance in respect of all risks in the host Member State.
39. Article 3 of Directive 93/96 makes clear that the directive does not establish any right to payment of maintenance grants by the host Member State for students who benefit from the right of residence. On the other hand, there are no provisions in the directive that preclude those to whom it applies from receiving social security benefits.
40. As regards more specifically the question of resources, Article 1 of Directive 93/96 does not require resources of any specific amount, nor that they be evidenced by specific documents. The article refers merely to a declaration, or such alternative means as are at least equivalent, which enables the student to satisfy the national authority concerned that he has, for himself and, in relevant cases, for his spouse and dependent children, sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their stay (see paragraph 44 of the judgment in *Case C-424/98 Commission v Italy* [2000] ECR I-4001).
41. In merely requiring such a declaration, Directive 93/96 differs from Directives 90/364 and 90/365, which do indicate the minimum level of income that persons wishing to avail themselves of those directives must have. That difference is explained by the special characteristics of student residence in comparison with that of persons to whom Directives 90/364 and 90/365 apply (see paragraph 45 of the judgment in *Commission v Italy*, cited above).
42. That interpretation does not, however, prevent a Member State from taking the view that a student who has recourse to social assistance no longer fulfils the conditions of his right of residence or from taking measures, within the limits imposed by Community law, either to withdraw his residence permit or not to renew it.
43. Nevertheless, in no case may such measures become the automatic consequence of a student who is a national of another Member State having recourse to the host Member State's social assistance system.

44. Whilst Article 4 of Directive 93/96 does indeed provide that the right of residence is to exist for as long as beneficiaries of that right fulfil the conditions laid down in Article 1, the sixth recital in the directive's preamble envisages that beneficiaries of the right of residence must not become an 'unreasonable burden on the public finances of the host Member State. Directive 93/96, like Directives 90/364 and 90/365, thus accepts a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States, particularly if the difficulties which a beneficiary of the right of residence encounters are temporary.
45. Furthermore, a student's financial position may change with the passage of time for reasons beyond his control. The truthfulness of a student's declaration is therefore to be assessed only as at the time when it is made.
46. It follows from the foregoing that Articles 6 and 8 of the Treaty preclude entitlement to a non-contributory social benefit, such as the minimex, from being made conditional, in the case of nationals of Member States other than the host State where they are legally resident, on their falling within the scope of Regulation No 1612/68 when no such condition applies to nationals of the host Member State.

[...]

## **5.7 Case C-413/99: Baumbast, R and Secretary of State for the Home Department**

**Baumbast, R and**

**Secretary of State for the Home Department**

**C-413/99**

17 September 2002

Court of Justice

ECR [2002] I-07091

<http://www.curia.eu.int/en/content/juris/index.htm>

### **Summary of facts and procedure**

*Mr and Mrs B, nationals of Germany and Colombia respectively, and their two children, who had respectively Colombian and dual German/Colombian nationality, were granted permits to reside in the UK for five years. Mr B was employed initially in the UK and subsequently in non-Community countries and his children went to school in the UK. On the Secretary of State's refusal to renew the residence permits at the end of the five-year period, proceedings were brought in which the adjudicator held inter alia that the children had a right of residence under art 12 of Regulation 1612/68 and Mrs B had a co-terminous right of residence, flowing from the same provision.*

*On the arrival in the UK of Mrs R, a US citizen, her husband, a French national, and their children, who had dual French/US nationality, Mrs R was granted leave to remain as the spouse of a Community national exercising a Community right. Mr and Mrs R divorced two years later. On subsequent applications by Mrs R and the children for indefinite leave to remain, the applications of the children were granted but that of Mrs R was refused, and the adjudicator upheld that decision.*

*On appeals in the two cases, the appeal tribunal referred to the European Court a number of questions on the rights of residence of the parties concerned, in the circumstances. Let us just note that the referring Court wanted to know whether persons admitted into the UK as members of the family of an EC migrant worker continue to enjoy the protection of Community law when he or she is no longer a migrant worker within the meaning of Article 39 EC.*

*Art 17(1) EC (ex art 8(1) of the EC Treaty) provides: "(1) ... Every person holding the nationality of a member state shall be a citizen of the Union." Art 18(1) EC (ex art 8a(1)) provides: "Every citizen of the Union shall have the right to move and reside freely within the territory of the member states, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect." Art 12 of Council Regulation 1612/68 on freedom of movement for workers in the Community provides: "The children of a national of a member state who is or has been employed in the territory of another member state shall be admitted to that state's general educational [...] courses [...] if such children are residing in*

*its territory. Member states shall encourage all efforts to enable such children to attend these courses under the best possible conditions."*

### **Judgment**

[...]

The second question

- 64 By its second question, the national tribunal seeks essentially to ascertain whether, where children have the right to reside in a host Member State in order to attend general educational courses pursuant to Article 12 of Regulation No 1612/68, that provision must be interpreted as entitling the parent who is the primary carer of those children, irrespective of his nationality, to reside with them in order to facilitate the exercise of that right notwithstanding the fact that the parents have meanwhile divorced or that the parent who has the status of citizen of the European Union has ceased to be a migrant worker in the host Member State.

Observations submitted to the Court

- 65 According to R and the Baumbast family, the provisions of Community law must be interpreted broadly so that the rights granted are effective, particularly where a right as fundamental as the right to family life is concerned. They thus submit that, in the case of minor children who have spent all their life living with their mother and continue to do so, the refusal to afford her a right of residence during the continuation of the children's education is an interference with their rights which impairs the exercise of those rights. They also submit that such a refusal is a disproportionate interference with family life, contrary to Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the European Convention').
- 66 The United Kingdom and German Governments as well as the Commission propose that the Court answer the second question in the negative. They submit that it is not possible to deduce from Article 12 of Regulation No 1612/68 a right of residence in favour of parents who are nationals of a non-member country. Their rights are determined by the criteria which directly govern the exercise of freedom of movement. Following divorce or termination by the spouse who is a Community national of his activity as a migrant worker in the host Member State, Community law does not confer on the spouse who is a national of a non-member country a right of residence derived from the children's right to be educated.
- 67 According to the United Kingdom Government, in circumstances where the host Member State is obliged to allow children to reside there in order to attend general educational courses under Article 12 of Regulation No 1612/68, its duty to encourage all efforts to enable such children to attend those courses under the best possible conditions is not to be interpreted as requiring that State to allow the person who is their carer to reside with them. The United Kingdom Government states that if and in so far as it is established that refusal of such a right of residence would unjustifiably interfere with family life as protected by Article 8 of the European Convention, the Home Office may grant exceptional leave to remain to the carer parent in derogation from the Immigration Rules.

Findings of the Court

- 68 First, Article 12 of Regulation No 1612/68 and the rights which flow from it must be interpreted in the context of the structure and purpose of that regulation. It is apparent from the provisions of the regulation, taken as a whole, that in order to facilitate the movement of members of workers'



families the Council took into account, first, the importance for the worker, from a human point of view, of having his entire family with him and, secondly, the importance, from all points of view, of the integration of the worker and his family into the host Member State without any difference in treatment in relation to nationals of that State (see, to that effect, Case 249/86 Commission v Germany [1989] ECR 1263, paragraph 11).

- 69 As is clear from the answer to the first question, Article 12 of Regulation No 1612/68 seeks in particular to ensure that children of a Community worker can, even if he has ceased to pursue the activity of an employed person in the host Member State, undertake and, where appropriate, complete their education in that Member State.
- 70 Second, according to the case-law of the Court, just like the status of migrant worker itself, the rights enjoyed by members of a Community worker's family under Regulation No 1612/68 can, in certain circumstances, continue to exist even after the employment relationship has ended (see, to that effect, *Echternach and Moritz*, paragraph 21, and Case C-85/96 *Martínez Sala* [1998] ECR I-2691, paragraph 32).
- 71 In circumstances such as those of the main proceedings, where the children enjoy, under Article 12 of Regulation No 1612/68, the right to continue their education in the host Member State although the parents who are their carers are at risk of losing their rights of residence as a result, in one case, of a divorce from the migrant worker and, in the other case, of the fact that the parent who pursued the activity of an employed person in the host Member State as a migrant worker has ceased to work there, it is clear that if those parents were refused the right to remain in the host Member State during the period of their children's education that might deprive those children of a right which is granted to them by the Community legislature.
- 72 Moreover, in accordance with the case-law of the Court, Regulation No 1612/68 must be interpreted in the light of the requirement of respect for family life laid down in Article 8 of the European Convention. That requirement is one of the fundamental rights which, according to settled case-law, are recognised by Community law (see *Commission v Germany*, cited above, paragraph 10).
- 73 The right conferred by Article 12 of Regulation No 1612/68 on the child of a migrant worker to pursue, under the best possible conditions, his education in the host Member State necessarily implies that that child has the right to be accompanied by the person who is his primary carer and, accordingly, that that person is able to reside with him in that Member State during his studies. To refuse to grant permission to remain to a parent who is the primary carer of the child exercising his right to pursue his studies in the host Member State infringes that right.
- 74 As to the Commission's argument to the effect that a right of residence cannot be derived from Article 12 of Regulation No 1612/68 in favour of a person who is not the child of a migrant worker, on the ground that possession of that status is a *sine qua non* of any right under that provision, having regard to its context and the objectives pursued by Regulation No 1612/68 and in particular Article 12 thereof, that provision cannot be interpreted restrictively (see, to that effect, *Diatta*, paragraph 17) and must not, under any circumstances, be rendered ineffective.
- 75 In the light of the foregoing, the answer to the second question must be that where children have the right to reside in a host Member State in order to attend general educational courses pursuant to Article 12 of Regulation No 1612/68, that provision must be interpreted as entitling the parent who is the primary carer of those children, irrespective of his nationality, to reside with them in order to facilitate the exercise of that right notwithstanding the fact that the parents have meanwhile divorced or that the parent who has the status of citizen of the European Union has ceased to be a migrant worker in the host Member State.

### The third question

76. By the first part of its third question, the national tribunal seeks essentially to ascertain whether a citizen of the European Union who no longer enjoys a right of residence as a migrant worker in the host Member State can, as a citizen of the European Union, enjoy there a right of residence by direct application of Article 18(1) EC.

### Observations submitted to the Court

77. According to Mr Baumbast, the fact that the right to reside freely within the territory of the Member States under Article 18 EC is subject to restrictions and is laid down in the EC Treaty does not deprive the right of direct effect. That provision should be interpreted to mean that Mr Baumbast continues to exercise a right of residence in the United Kingdom while he is working outside the European Union. Such an application of Article 18 EC would enable the right of freedom of movement laid down in the EC Treaty to be exercised simply on proof of nationality, but is consistent with pre-existing legislation on the subject.
78. The United Kingdom and German Governments argue that a right of residence cannot be derived directly from Article 18(1) EC. The limitations and conditions referred to in that paragraph show that it is not intended to be a free-standing provision.
79. Whilst underlining the political and legal importance of Article 18 EC, the Commission submits that the very wording of that provision, and in particular its first paragraph, shows its limitations. As Community law stands at present, the right to move and reside established by that article is conditioned by the pre-existing rules, both primary and secondary, which define the categories of persons eligible for it. Those rights are still linked either to an economic activity or to sufficient resources. Since the point of departure for the third question is that Mr Baumbast has no other Community law foundation for his right to reside in the United Kingdom, the Commission concludes that Article 18 EC cannot, as the law stands at present and in such circumstances, be of any use to him.

### *Findings of the Court*

80. According to settled case-law, the right of nationals of one Member State to enter the territory of another Member State and to reside there constitutes a right conferred directly by the EC Treaty or, depending on the case, by the provisions adopted to implement it (see, *inter alia*, Case 48/75 Royer [1976] ECR 497, paragraph 31).
81. Although, before the Treaty on European Union entered into force, the Court had held that that right of residence, conferred directly by the EC Treaty, was subject to the condition that the person concerned was carrying on an economic activity within the meaning of Articles 48, 52 or 59 of the EC Treaty (now, after amendment, Articles 39 EC, 43 EC and 49 EC) (see Case C-363/89 Roux [1991] ECR I-273, paragraph 9), it is none the less the case that, since then, Union citizenship has been introduced into the EC Treaty and Article 18(1) EC has conferred a right, for every citizen, to move and reside freely within the territory of the Member States.
82. Under Article 17(1) EC, every person holding the nationality of a Member State is to be a citizen of the Union. Union citizenship is destined to be the fundamental status of nationals of the Member States (see, to that effect, Case C-184/99 Grzelczyk [2001] ECR I-6193, paragraph 31).
83. Moreover, the Treaty on European Union does not require that citizens of the Union pursue a professional or trade activity, whether as an employed or self-employed person, in order to enjoy

the rights provided in Part Two of the EC Treaty, on citizenship of the Union. Furthermore, there is nothing in the text of that Treaty to permit the conclusion that citizens of the Union who have established themselves in another Member State in order to carry on an activity as an employed person there are deprived, where that activity comes to an end, of the rights which are conferred on them by the EC Treaty by virtue of that citizenship.

84. As regards, in particular, the right to reside within the territory of the Member States under Article 18(1) EC, that right is conferred directly on every citizen of the Union by a clear and precise provision of the EC Treaty. Purely as a national of a Member State, and consequently a citizen of the Union, Mr Baumbast therefore has the right to rely on Article 18(1) EC.
85. Admittedly, that right for citizens of the Union to reside within the territory of another Member State is conferred subject to the limitations and conditions laid down by the EC Treaty and by the measures adopted to give it effect.
86. However, the application of the limitations and conditions acknowledged in Article 18(1) EC in respect of the exercise of that right of residence is subject to judicial review. Consequently, any limitations and conditions imposed on that right do not prevent the provisions of Article 18(1) EC from conferring on individuals rights which are enforceable by them and which the national courts must protect (see, to that effect, Case 41/74 Van Duyn [1974] ECR 1337, paragraph 7).
87. As regards the limitations and conditions resulting from the provisions of secondary legislation, Article 1(1) of Directive 90/364 provides that Member States can require of the nationals of a Member State who wish to enjoy the right to reside within their territory that they themselves and the members of their families be covered by sickness insurance in respect of all risks in the host Member State and have sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence.
88. As to the application of those conditions for the purposes of the Baumbast case, it is clear from the file that Mr Baumbast pursues an activity as an employed person in non-member countries for German companies and that neither he nor his family has used the social assistance system in the host Member State. In those circumstances, it has not been denied that Mr Baumbast satisfies the condition relating to sufficient resources imposed by Directive 90/364.
89. As to the condition relating to sickness insurance, the file shows that both Mr Baumbast and the members of his family are covered by comprehensive sickness insurance in Germany. The Adjudicator seems to have found that that sickness insurance could not cover emergency treatment given in the United Kingdom. It is for the national tribunal to determine whether that finding is correct in the light of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (OJ, English Special Edition 1971 (II), p. 416). Particular reference should be made to Article 19(1)(a) of that regulation which ensures, at the expense of the competent Member State, the right for an employed or self-employed person residing in the territory of another Member State other than the competent State whose condition requires treatment in the territory of the Member State of residence to receive sickness benefits in kind provided by the institution of the latter State.
90. In any event, the limitations and conditions which are referred to in Article 18 EC and laid down by Directive 90/364 are based on the idea that the exercise of the right of residence of citizens of the Union can be subordinated to the legitimate interests of the Member States. In that regard, according to the fourth recital in the preamble to Directive 90/364 beneficiaries of the right of

residence must not become an 'unreasonable' burden on the public finances of the host Member State.

91. However, those limitations and conditions must be applied in compliance with the limits imposed by Community law and in accordance with the general principles of that law, in particular the principle of proportionality. That means that national measures adopted on that subject must be necessary and appropriate to attain the objective pursued (see, to that effect, Joined Cases C-259/91, C-331/91 and C-332/91 *Alluè and Others* [1993] ECR I-4309, paragraph 15).
92. In respect of the application of the principle of proportionality to the facts of the *Baumbast* case, it must be recalled, first, that it has not been denied that Mr *Baumbast* has sufficient resources within the meaning of Directive 90/364; second, that he worked and therefore lawfully resided in the host Member State for several years, initially as an employed person and subsequently as a self-employed person; third, that during that period his family also resided in the host Member State and remained there even after his activities as an employed and self-employed person in that State came to an end; fourth, that neither Mr *Baumbast* nor the members of his family have become burdens on the public finances of the host Member State and, fifth, that both Mr *Baumbast* and his family have comprehensive sickness insurance in another Member State of the Union.
93. Under those circumstances, to refuse to allow Mr *Baumbast* to exercise the right of residence which is conferred on him by Article 18(1) EC by virtue of the application of the provisions of Directive 90/364 on the ground that his sickness insurance does not cover the emergency treatment given in the host Member State would amount to a disproportionate interference with the exercise of that right.
94. The answer to the first part of the third question must therefore be that a citizen of the European Union who no longer enjoys a right of residence as a migrant worker in the host Member State can, as a citizen of the Union, enjoy there a right of residence by direct application of Article 18(1) EC. The exercise of that right is subject to the limitations and conditions referred to in that provision, but the competent authorities and, where necessary, the national courts must ensure that those limitations and conditions are applied in compliance with the general principles of Community law and, in particular, the principle of proportionality.

[...]

## 5.8 Case C-148/02: Garcia Avello v Belgium

Carlos Garcia Avello and État Belge

Case C-148/02

2 October 2003

Court of Justice

ECR [2003] I-0000

<http://www.curia.eu.int/en/content/juris/index.htm>

### **Summary of facts and procedure:**

*Mr. Garcia Avello, a Spanish national, and his Belgian wife, Isabelle Weber, reside in Belgium and have two children. The two children born from their marriage, Esmeralda and Diego, who were born in 1988 and 1992 respectively, have dual Belgian and Spanish nationality. Belgian law requires children to take the surname of their father, whereas Spanish custom is for children to take the first surname of each of their parents. In line with this custom the parents requested the Belgian authorities to change the surname of their children to Garcia Weber, but their application was refused as contrary to Belgian practice. Mr Garcia Avello challenged that refusal before the Belgian Conseil d'Etat; which subsequently referred a question to the ECJ as to whether the refusal was contrary to Community law, in particular the principles relating to citizenship of the European Union and the freedom of movement for citizens.*

*In his opinion of May 22, 2003 Advocate General Jacobs inter alia states that the refusal amounts to unjustifiable discrimination on grounds of nationality, prohibited by Community law, as it treats objectively different situations in the same way. In the opinion of Advocate General Jacobs, as a change of surname is allowed under Belgian law when serious grounds are given for the application, a systematic refusal to grant a change when the grounds given are linked to or inseparable from the possession of another nationality, must be regarded as discriminating on grounds of nationality.*

### **Judgement:**

[...]

20. It is first of all necessary to examine whether, contrary to the view expressed by the Belgian State and by the Danish and Netherlands Governments, the situation in issue in the main proceedings comes within the scope of Community law and, in particular, of the Treaty provisions on citizenship of the Union.
21. Article 17 EC confers the status of citizen of the Union on every person holding the nationality of a Member State (see, in particular, Case C-224/98 D'Hoop [2002] ECR I-6191, paragraph 27). Since Mr Garcia Avello's children possess the nationality of two Member States, they also enjoy that status.
22. As the Court has ruled on several occasions (see, inter alia, Case C-413/99 Baumbast and R [2002] ECR I-7091, paragraph 82), citizenship of the Union is destined to be the fundamental status of nationals of the Member States.

23. That status enables nationals of the Member States who find themselves in the same situation to enjoy within the scope *ratione materiae* of the EC Treaty the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for (see, in particular, Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraph 31, and *D'Hoop*, cited above, paragraph 28).
24. The situations falling within the scope *ratione materiae* of Community law include those involving the exercise of the fundamental freedoms guaranteed by the Treaty, in particular those involving the freedom to move and reside within the territory of the Member States, as conferred by Article 18 EC (Case C-274/96 *Bickel and Franz* [1998] ECR I-7637, paragraphs 15 and 16, *Grzelczyk*, cited above, paragraph 33, and *D'Hoop*, paragraph 29).
25. Although, as Community law stands at present, the rules governing a person's surname are matters coming within the competence of the Member States, the latter must none the less, when exercising that competence, comply with Community law (see, by way of analogy, Case C-336/94 *Dafeki* [1997] ECR I-6761, paragraphs 16 to 20), in particular the Treaty provisions on the freedom of every citizen of the Union to move and reside in the territory of the Member States (see, *inter alia*, Case C-135/99 *Elsen* [2000] ECR I-10409, paragraph 33).
26. Citizenship of the Union, established by Article 17 EC, is not, however, intended to extend the scope *ratione materiae* of the Treaty also to internal situations which have no link with Community law (Joined Cases C-64/96 and C-65/96 *Uecker and Jacquet* [1997] ECR I-3171, paragraph 23).
27. Such a link with Community law does, however, exist in regard to persons in a situation such as that of the children of Mr Garcia Avello, who are nationals of one Member State lawfully resident in the territory of another Member State.
28. That conclusion cannot be invalidated by the fact that the children involved in the main proceedings also have the nationality of the Member State in which they have been resident since their birth and which, according to the authorities of that State, is by virtue of that fact the only nationality recognised by the latter. It is not permissible for a Member State to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty (see in particular, to that effect, Case C-369/90 *Micheletti and Others* [1992] ECR I-4239, paragraph 10). Furthermore, Article 3 of the Hague Convention, on which the Kingdom of Belgium relies in recognising only the nationality of the forum where there are several nationalities, one of which is Belgian, does not impose an obligation but simply provides an option for the contracting parties to give priority to that nationality over any other.
29. That being so, the children of the applicant in the main proceedings may rely on the right set out in Article 12 EC not to suffer discrimination on grounds of nationality in regard to the rules governing their surname.
30. It is for that reason necessary to examine whether Articles 12 EC and 17 EC preclude the Belgian administrative authority from turning down an application for a change of surname in a situation such as that in the main proceedings.
31. It is in this regard settled case-law that the principle of non-discrimination requires that comparable situations must not be treated differently and that different situations must not be treated in the same way (see, *inter alia*, Case C-354/95 *National Farmers' Union and Others* [1997] ECR I-4559, paragraph 61). Such treatment may be justified only if it is based on objective considerations independent of the nationality of the persons concerned and is proportionate to the objective being legitimately pursued (see, *inter alia*, *D'Hoop*, paragraph 36).

32. In the present case, it is agreed that persons who have, in addition to Belgian nationality, the nationality of another Member State are, as a general rule, treated in the same way as persons who have only Belgian nationality on the ground that, in Belgium, persons having Belgian nationality are exclusively regarded as being Belgian. In the same way as Belgian nationals, Spanish nationals who also happen to have Belgian nationality will normally be refused the right to change their surname on the ground that, in Belgium, children take the surname of their father.
33. Belgian administrative practice, which, as is clear from paragraph 12 of the present judgment and from the question submitted, allows derogations from this latter rule, refuses to countenance among such derogations the case of persons who are in a situation such as that here in the main proceedings and who seek to rectify the discrepancy in their surname resulting from the application of the legislation of two Member States.
34. It is for that reason necessary to determine whether those two categories of persons are in an identical situation or whether, on the contrary, their situations are different, in which case the principle of non-discrimination would mean that Belgian nationals, such as the children of Mr Garcia Avello, who also have the nationality of another Member State may assert their right to be treated in a manner different to that in which persons having only Belgian nationality are treated, unless the treatment in issue can be justified on objective grounds.
35. In contrast to persons having only Belgian nationality, Belgian nationals who also hold Spanish nationality have different surnames under the two legal systems concerned. More specifically, in a situation such as that in issue in the main proceedings, the children concerned are refused the right to bear the surname which results from application of the legislation of the Member State which determined the surname of their father.
36. As the Advocate General has pointed out in paragraph 56 of his Opinion, it is common ground that such a discrepancy in surnames is liable to cause serious inconvenience for those concerned at both professional and private levels resulting from, inter alia, difficulties in benefiting, in one Member State of which they are nationals, from the legal effects of diplomas or documents drawn up in the surname recognised in another Member State of which they are also nationals. As has been established in paragraph 33 of the present judgment, the solution proposed by the administrative authorities of allowing children to take only the first surname of their father does not resolve the situation of divergent surnames which those here involved are seeking to avoid.
37. In those circumstances, Belgian nationals who have divergent surnames by reason of the different laws to which they are attached by nationality may plead difficulties specific to their situation which distinguish them from persons holding only Belgian nationality, who are identified by one surname alone.
38. However, as has been pointed out in paragraph 33 of the present judgment, the Belgian administrative authorities refuse to treat applications for a change of surname made by Belgian nationals in a situation such as that of the children of the applicant in the main proceedings with a view to avoiding a discrepancy in surnames as being based on serious grounds, within the meaning of the second paragraph of Article 3 of the abovementioned Law of 15 May 1987, solely on the ground that, in Belgium, children who have Belgian nationality assume, in accordance with Belgian law, their father's surname.
39. It is necessary to examine whether the practice in issue can be justified on the grounds submitted, by way of alternative argument, by the Belgian State and by the Danish and Netherlands Governments.

40. The Belgian State submits that the principle of the immutability of surnames is a founding principle of social order, of which it continues to be an essential element, and that the King can authorise a change of surname only in quite exceptional circumstances, which do not obtain in the case in the main proceedings. In the same way as the Belgian State, the Netherlands Government argues that the infringement of the rights of the children of the applicant in the main proceedings is reduced inasmuch as those children can in any event rely on their Spanish nationality and the surname conferred in accordance with Spanish law in every Member State other than Belgium. The practice in issue makes it possible to avoid risks of confusion as to identity or parentage of those concerned. According to the Danish Government, that practice, in so far as it applies the same rules to Belgian nationals who are also nationals of another Member State as it does to persons who are nationals of Belgium alone, contributes to facilitating integration of the former in Belgium and to attainment of the objective pursued by the principle of non-discrimination.
41. None of those grounds can provide valid justification for the practice in issue.
42. First, with regard to the principle of the immutability of surnames as a means designed to prevent risks of confusion as to identity or parentage of persons, although that principle undoubtedly helps to facilitate recognition of the identity of persons and their parentage, it is still not indispensable to the point that it could not adapt itself to a practice of allowing children who are nationals of one Member State and who also hold the nationality of another Member State to take a surname which is composed of elements other than those provided for by the law of the first Member State and which has, moreover, been entered in an official register of the second Member State. Furthermore, it is common ground that, by reason in particular of the scale of migration within the Union, different national systems for the attribution of surnames coexist in the same Member State, with the result that parentage cannot necessarily be assessed within the social life of a Member State solely on the basis of the criterion of the system applicable to nationals of that latter State. In addition, far from creating confusion as to the parentage of the children, a system allowing elements of the surnames of the two parents to be handed down may, on the contrary, contribute to reinforcing recognition of that connection with the two parents.
43. Second, with regard to the objective of integration pursued by the practice in issue, suffice it to point out that, in view of the coexistence in the Member States of different systems for the attribution of surnames applicable to those there resident, a practice such as that in issue in the main proceedings is neither necessary nor even appropriate for promoting the integration within Belgium of the nationals of other Member States.
44. The disproportionate nature of the refusal by the Belgian authorities to accede to requests such as that in issue in the main proceedings is all the more evident when account is taken of the fact that, as is clear from paragraph 12 of the present judgment and from the question submitted, the practice in issue already allows derogations from application of the Belgian system of handing down surnames in situations similar to that of the children of the applicant in the main proceedings.
45. Having regard to all of the foregoing, the answer to the question submitted must be that Articles 12 EC and 17 EC must be construed as precluding, in circumstances such as those of the case in the main proceedings, the administrative authority of a Member State from refusing to grant an application for a change of surname made on behalf of minor children resident in that State and having dual nationality of that State and of another Member State, in the case where the purpose of that application is to enable those children to bear the surname to which they are entitled according to the law and tradition of the second Member State.

[...]



## 5.9 Case C-138/02: Collins

**Brian Francis Collins v Secretary of State for Work and Pensions**

**Case C-138/02**

23 March 2004

Court of Justice

ECR [2004] 00000

<http://www.curia.eu.int/en/content/juris/index.htm>

### **Summary of facts and procedure:**

*Mr Collins was born in the US but holds dual Irish and American nationality. As part of his studies, he spent one semester in the UK, where he returned in 1980 and spent approximately 10 months doing casual and part-time work in pubs, bars and shops; to then again return to the US. On 31 May 1998 he came back to the UK with the intention of seeking work. Eight days later he claimed income-based jobseekers' allowance, which was refused because he was not habitually resident in the UK. He appealed to the UK courts which now refer a number of questions to the Court of Justice on the freedom of movement for workers and the principles of Community law applicable in the circumstances of the claimant, in particular, rights of European citizenship.*

*AG Ruiz-Jarabo in his Opinion of 10/7/2003 inter alia finds: Community law as it now stands does not require that an income-based social security benefit be provided to a citizen of the Union who seeks work in a Member State with whose employment market he lacks any connection or link.*

### **Judgement:**

[...]

Question 1

Observations submitted to the Court

- 21 Mr Collins contends that, as Community law currently stands, his position in the United Kingdom as a person genuinely seeking work gives him the status of a worker' for the purposes of Regulation No 1612/68 and brings him within the scope of Article 7(2) of that regulation. At paragraph 32 of its judgment in Case C-85/96 Martínez Sala [1998] ECR I-2691, the Court deliberately laid down the rule that persons seeking work are to be considered to be workers for the purposes of Regulation No 1612/68 if the national court is satisfied that the person concerned was genuinely seeking work at the appropriate time.
- 22 The United Kingdom Government, the German Government and the Commission of the European Communities, on the other hand, submit that a person in Mr Collins' position is not a worker for the purposes of Regulation No 1612/68.
- 23 The United Kingdom Government and the Commission argue that Mr Collins cannot claim to be a former' migrant worker who is now merely seeking a benefit under Article 7(2) of Regulation No 1612/68, because there is no relationship between the work which he did in the course of 1980 and 1981 and the type of work which he says he wished to find in 1998.

- 24 In Case 316/85 Lebon [1987] ECR 2811, the Court held that equal treatment with regard to social and tax advantages, which is laid down by Article 7(2) of Regulation No 1612/68, applies only to workers, and that those who move in search of employment qualify for such equal treatment only as regards access to employment in accordance with Article 48 of the Treaty and Articles 2 and 5 of that regulation.
- 25 The German Government draws attention to the specific circumstances in Martínez Sala, cited above, which were characterised by very close connections of long duration between the plaintiff and the host Member State, whereas in the main proceedings there is clearly no link between the earlier work carried out by Mr Collins and the work sought by him.

#### The Court's answer

- 26 In accordance with the Court's case-law, the concept of worker', within the meaning of Article 48 of the Treaty and of Regulation No 1612/68, has a specific Community meaning and must not be interpreted narrowly. Any person who pursues activities which are real and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a worker'. The essential feature of an employment relationship is, according to that case-law, that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration (see, in particular, Case 66/85 Lawrie-Blum [1986] ECR 2121, paragraphs 16 and 17, Martínez Sala, paragraph 32, and Case C-337/97 Meeusen [1999] ECR I3289, paragraph 13).
- 27 The Court has also held that migrant workers are guaranteed certain rights linked to the status as a worker even when they are no longer in an employment relationship (Case C-35/97 Commission v France [1998] ECR I-5325, paragraph 41, and Case C-413/01 Ninni-Orasche [2003] ECR I-0000, paragraph 34).
- 28 As is apparent from the documents sent to the Court by the Social Security Commissioner, Mr Collins performed casual work in the United Kingdom, in pubs and bars and in sales, during a 10-month stay there in 1981. However, even if such occupational activity satisfies the conditions as set out in paragraph 26 of this judgment for it to be accepted that during that stay the appellant in the main proceedings had the status of a worker, no link can be established between that activity and the search for another job more than 17 years after it came to an end.
- 29 In the absence of a sufficiently close connection with the United Kingdom employment market, Mr Collins' position in 1998 must therefore be compared with that of any national of a Member State looking for his first job in another Member State.
- 30 In this connection, it is to be remembered that the Court's case-law draws a distinction between Member State nationals who have not yet entered into an employment relationship in the host Member State where they are looking for work and those who are already working in that State or who, having worked there but no longer being in an employment relationship, are nevertheless considered to be workers (see Case 39/86 Lair [1988] ECR 3161, paragraphs 32 and 33).
- 31 While Member State nationals who move in search for work benefit from the principle of equal treatment only as regards access to employment, those who have already entered the employment market may, on the basis of Article 7(2) of Regulation No 1612/68, claim the same social and tax advantages as national workers (see in particular, Lebon, cited above, paragraph 26, and Case C-278/94 Commission v Belgium [1996] ECR I-4307, paragraphs 39 and 40).

- 32 The concept of worker' is thus not used in Regulation No 1612/68 in a uniform manner. While in Title II of Part I of the regulation this term covers only persons who have already entered the employment market, in other parts of the same regulation the concept of worker' must be understood in a broader sense.
- 33 Accordingly, the answer to the first question must be that a person in the circumstances of the appellant in the main proceedings is not a worker for the purposes of Title II of Part I of Regulation No 1612/68. It is, however, for the national court or tribunal to establish whether the term worker' as referred to by the national legislation at issue is to be understood in that sense.

[...]

### Question 3

#### Observations submitted to the Court

- 45 In Mr Collins' submission, there is no doubt that he is a national of another Member State who was lawfully in the United Kingdom and that jobseeker's allowance is within the scope of the Treaty. The result, as the Court held in Case C-184/99 Grzelczyk [2001] ECR I-6193, is that the payment of a non-contributory means-tested benefit to a national of a Member State other than the host Member State cannot be made conditional on the satisfaction of a condition when such a condition is not applied to nationals of the host Member State. Mr Collins acknowledges that the habitual residence test is applied to United Kingdom nationals as well. However, it is well established that a provision of national law is to be regarded as discriminatory for the purposes of Community law if it is inherently more likely to be satisfied by nationals of the Member State concerned.
- 46 The United Kingdom Government and the German Government argue that there is no provision or principle of Community law which requires that a benefit such as the jobseeker's allowance be paid to a person in the circumstances of Mr Collins.
- 47 With regard to the possible existence of indirect discrimination, the United Kingdom Government submits that there are relevant objective justifications for not making income-based jobseeker's allowance available to persons in the situation of Mr Collins. Unlike the position in Case C-224/98 D'Hoop [2002] ECR I-6191, the eligibility criteria adopted for the allowance at issue here do not go beyond what is necessary to attain the objective pursued. They represent a proportionate and hence permissible method of ensuring that there is a real link between the claimant and the geographic employment market. In the absence of such criteria, persons who have little or no link with the United Kingdom employment market, as in the case of Mr Collins, would then be able to claim that allowance.
- 48 According to the Commission, it is not disputed that Mr Collins was genuinely seeking work in the United Kingdom during the two months following his arrival in that Member State and that he was lawfully resident there in his capacity as a person seeking work. As a citizen of the Union lawfully residing in the United Kingdom, he was clearly entitled to the protection conferred by Article 6 of the Treaty against discrimination on grounds of nationality in any situation falling within the material scope of Community law. That is precisely the case with regard to jobseeker's allowance, which should be considered to be a social advantage within the meaning of Article 7(2) of Regulation No 1612/68.
- 49 The Commission also observes that it is clear that the right to stay in another Member State to seek work there can be limited to a reasonable period and that Mr Collins' right to rely on Articles

6 and 8 of the Treaty in order to claim the allowance, on the same basis as United Kingdom nationals, is therefore similarly restricted to that period of lawful residence.

- 50 None the less, the Commission submits that a requirement of habitual residence may be indirectly discriminatory because it can be more easily met by nationals of the host Member State than by those of other Member States. Whilst such a requirement may be justified on objective grounds necessarily intended to avoid benefit tourism' and thus the possibility of abuse by work-seekers who are not genuine, the Commission notes that in the case of Mr Collins the genuine nature of the search for work is not in dispute. Indeed, it appears that he has remained continuously employed in the United Kingdom ever since first finding work there shortly after his arrival.

#### The Court's answer

- 51 By the third question, the Social Security Commissioner asks essentially whether there is a provision or principle of Community law on the basis of which a national of a Member State who is genuinely seeking employment in another Member State may claim there a jobseeker's allowance such as that provided for by the 1995 Act.
- 52 First of all, without there being any need to consider whether a person such as the appellant in the main proceedings falls within the scope *ratione personae* of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1) (Regulation No 1408/71'), it is clear from the order for reference that the person concerned never resided in another Member State before seeking employment in the United Kingdom, so that the aggregation rule contained in Article 10a of Regulation No 1408/71 is inapplicable in the main proceedings.
- 53 Under the 1996 Regulations, nationals of other Member States seeking employment who are not workers for the purposes of Regulation No 1612/68 and do not derive a right of residence from Directive 68/360 can claim the allowance only if they are habitually resident in the United Kingdom.
- 54 It must therefore be determined whether the principle of equal treatment precludes national legislation which makes entitlement to a jobseeker's allowance conditional on a residence requirement.
- 55 In accordance with the first paragraph of Article 6 of the Treaty, any discrimination on grounds of nationality is prohibited within the scope of application of the Treaty, without prejudice to any special provisions contained therein. Since Article 48(2) of the Treaty is such a special provision, it is appropriate to consider first the 1996 Regulations in the light of that article.
- 56 Among the rights which Article 48 of the Treaty confers on nationals of the Member States is the right to move freely within the territory of the other Member States and to stay there for the purposes of seeking employment (Antonissen, cited above, paragraph 13).
- 57 Nationals of a Member State seeking employment in another Member State thus fall within the scope of Article 48 of the Treaty and, therefore, enjoy the right laid down in Article 48(2) to equal treatment.

- 58 As regards the question whether the right to equal treatment enjoyed by nationals of a Member State seeking employment in another Member State also encompasses benefits of a financial nature such as the benefit at issue in the main proceedings, the Court has held that Member State nationals who move in search of employment qualify for equal treatment only as regards access to employment in accordance with Article 48 of the Treaty and Articles 2 and 5 of Regulation No 1612/68, but not with regard to social and tax advantages within the meaning of Article 7(2) of that regulation (Lebon, paragraph 26, and Case C-278/94 Commission v Belgium, cited above, paragraphs 39 and 40).
- 59 Article 2 of Regulation No 1612/68 concerns the exchange of applications for and offers of employment and the conclusion and performance of contracts of employment, while Article 5 of the regulation relates to the assistance afforded by employment offices.
- 60 It is true that those articles do not expressly refer to benefits of a financial nature. However, in order to determine the scope of the right to equal treatment for persons seeking employment, this principle should be interpreted in the light of other provisions of Community law, in particular Article 6 of the Treaty.
- 61 As the Court has held on a number of occasions, citizens of the Union lawfully resident in the territory of a host Member State can rely on Article 6 of the Treaty in all situations which fall within the scope *ratione materiae* of Community law. Citizenship of the Union is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for (see, in particular, Grzelczyk, cited above, paragraphs 31 and 32, and Case C-148/02 Garcia Avello [2003] ECR I-0000, paragraphs 22 and 23).
- 62 It is to be noted that the Court has held, in relation to a student who is a citizen of the Union, that entitlement to a non-contributory social benefit, such as the Belgian minimum subsistence allowance (*minimex*'), falls within the scope of the prohibition of discrimination on grounds of nationality and that, therefore, Articles 6 and 8 of the Treaty preclude eligibility for that benefit from being subject to conditions which are liable to constitute discrimination on grounds of nationality (Grzelczyk, paragraph 46).
- 63 In view of the establishment of citizenship of the Union and the interpretation in the case-law of the right to equal treatment enjoyed by citizens of the Union, it is no longer possible to exclude from the scope of Article 48(2) of the Treaty - which expresses the fundamental principle of equal treatment, guaranteed by Article 6 of the Treaty - a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State.
- 64 The interpretation of the scope of the principle of equal treatment in relation to access to employment must reflect this development, as compared with the interpretation followed in Lebon and in Case C-278/94 Commission v Belgium.
- 65 The 1996 Regulations introduce a difference in treatment according to whether the person involved is habitually resident in the United Kingdom. Since that requirement is capable of being met more easily by the State's own nationals, the 1996 Regulations place at a disadvantage Member State nationals who have exercised their right of movement in order to seek employment in the territory of another Member State (see, to this effect, Case C-237/94 O'Flynn [1996] ECR I2617, paragraph 18, and Case C-388/01 Commission v Italy [2003] ECR I-721, paragraphs 13 and 14).

- 66 A residence requirement of that kind can be justified only if it is based on objective considerations that are independent of the nationality of the persons concerned and proportionate to the legitimate aim of the national provisions (Case C-274/96 Bickel and Franz [1998] ECR I-7637, paragraph 27).
- 67 The Court has already held that it is legitimate for the national legislature to wish to ensure that there is a genuine link between an applicant for an allowance in the nature of a social advantage within the meaning of Article 7(2) of Regulation No 1612/68 and the geographic employment market in question (see, in the context of the grant of tideover allowances to young persons seeking their first job, D'Hoop, cited above, paragraph 38).
- 68 The jobseeker's allowance introduced by the 1995 Act is a social security benefit which replaced unemployment benefit and income support, and requires in particular the claimant to be available for and actively seeking employment and not to have income exceeding the applicable amount or capital exceeding a specified amount.
- 69 It may be regarded as legitimate for a Member State to grant such an allowance only after it has been possible to establish that a genuine link exists between the person seeking work and the employment market of that State.
- 70 The existence of such a link may be determined, in particular, by establishing that the person concerned has, for a reasonable period, in fact genuinely sought work in the Member State in question.
- 71 The United Kingdom is thus able to require a connection between persons who claim entitlement to such an allowance and its employment market.
- 72 However, while a residence requirement is, in principle, appropriate for the purpose of ensuring such a connection, if it is to be proportionate it cannot go beyond what is necessary in order to attain that objective. More specifically, its application by the national authorities must rest on clear criteria known in advance and provision must be made for the possibility of a means of redress of a judicial nature. In any event, if compliance with the requirement demands a period of residence, the period must not exceed what is necessary in order for the national authorities to be able to satisfy themselves that the person concerned is genuinely seeking work in the employment market of the host Member State.
- 73 The answer to the third question must therefore be that the right to equal treatment laid down in Article 48(2) of the Treaty, read in conjunction with Articles 6 and 8 of the Treaty, does not preclude national legislation which makes entitlement to a jobseeker's allowance conditional on a residence requirement, in so far as that requirement may be justified on the basis of objective considerations that are independent of the nationality of the persons concerned and proportionate to the legitimate aim of the national provisions.

[...]

## 5.10 AG Opinion in Case C-209/03: Bidar

Dany Bidar v London Borough of Ealing Secretary of State for Education

Case C-209/03

11 November 2004

AG Geelhoed

ECR [2004] 00000

<http://www.curia.eu.int/en/content/juris/index.htm>

### **Summary of facts and procedure:**

*In the UK, assistance with living costs for students is primarily provided by means of a student loan from the State. This is offered at a rate linked to inflation which is lower than commercial rates and the student begins to pay back the loan only once they start earning above a certain amount. A national of a Member State is entitled to receive this loan if they are "settled" in the UK and have been resident in the UK for the three years prior to commencing their course. In order to be "settled" a person has to have lived in the UK for four years other than for the purposes of receiving full-time education.*

*Dany Bidar, a French national, moved to the UK in August 1998 and completed his final three years of secondary education in London. In September 2001 he enrolled on a course at University College London and applied to the London Borough of Ealing for funding. While he was granted assistance with tuition fees, he was refused a maintenance loan on the basis that he was not "settled" in the UK.*

*Mr Bidar challenged this decision, claiming that the residence requirement constituted discrimination on grounds of nationality, prohibited by the EC Treaty. The High Court asked the Court of Justice whether, following changes to the EC Treaty, notably the introduction of EU citizenship, assistance with living costs for students still remained outside the scope of the EC Treaty and if not what criteria should be used to determine whether the eligibility conditions were based on objective considerations.*

### **Opinion:**

1. In its judgments of 21 June 1988 in *Lair* and *Brown*, the Court ruled that at the stage of development of Community law at the material time, financial assistance granted to students for maintenance costs and training, as opposed to assistance to cover costs related to access to education, fell in principle outside the scope of the EEC Treaty.<sup>1</sup> In view of the evolution of Community law since that time, the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court), in this preliminary reference essentially asks the Court whether such assistance with maintenance costs for students, in either the form of grants or loans, continues to fall outside the scope of the EC Treaty for the purposes of the application of Article 12 EC and if not, under which conditions the Member States may restrict eligibility for such assistance.

[...]

---

<sup>1</sup> Case 39/86 *Lair* [1988] ECR 3161, at paragraph 15 of the judgment, and Case 197/86 *Brown* [1988] ECR 3025, at paragraph 18 of the judgment.

21. In various cases the Court has had occasion to consider whether EU citizens could derive entitlement to social benefits of various kinds from Article 18(1) EC. I refer in particular to *Martínez Sala*, *Grzelczyk*, *D'Hoop*, *Collins* and *Trojani*.<sup>2</sup>
22. In its judgments in cases concerning Article 18(1) EC, the Court has repeatedly emphasised that Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for.<sup>3</sup> Citizens lawfully resident in the territory of a Member State can rely on Article 12 EC in all situations which fall within the scope *ratione materiae* of Community law.<sup>4</sup> Those situations include those involving the exercise of the fundamental freedoms guaranteed by the EC Treaty and those involving the exercise of the right to move and reside freely in another Member State as conferred by Article 18(1) EC. This right to reside is, moreover, conferred directly on every citizen of the Union by a clear and precise provision of the EC Treaty, as the Court held in *Baumbast*.<sup>5</sup> It can therefore be invoked by individuals in proceedings before the national courts.
23. In its first judgment in this field, *Martínez Sala*, the Court ruled 'that a citizen of the European Union, ..., lawfully resident in the territory of the host Member State, can rely on Article [12] of the Treaty in all situations which fall within the scope *ratione materiae* of Community law, including the situation where that Member State delays or refuses to grant to that claimant a benefit that is provided to all persons lawfully resident in the territory of that State on the ground that the claimant is not in possession of a document which nationals of that same State are not required to have and the issue of which may be delayed or refused by the authorities of that State.'<sup>6</sup> As the child-raising allowance at issue in that case was covered by both Regulation No 1408/71<sup>7</sup> and Regulation No 1612/68 and was therefore within the scope *ratione materiae* of the EC Treaty, Mrs Martínez Sala was entitled to that benefit on the same conditions as German nationals.
24. The case of *Grzelczyk* concerned a French student studying in Belgium who, after having managed to provide for himself in the first three years of his studies, in his fourth and final year applied for a minimum subsistence allowance (minimex), as the combination of work and studies would be too demanding at that stage of his course. This benefit was first granted and then withdrawn as he was not a worker, but a student, and he did not have Belgian nationality. Although recognising the conditions imposed by Article 1 of Directive 93/96 on a student's right to reside in another Member State and that under Article 3 of that directive students are not entitled to maintenance grants by the host Member State, the Court observed that there are no provisions in the directive that preclude those to whom it applies from receiving social security benefits.<sup>8</sup> Where this implied *Grzelczyk* becoming a burden on the social assistance system, thus no longer fulfilling one of the conditions of residence, the Court pointed out that Directive 93/96 only requires students to make a declaration that they have sufficient resources at the beginning of their stay in the host Member State and that their financial position may change for reasons beyond their control. The fact that the directive aims at preventing students from becoming an

<sup>2</sup> Case C-85/96 *Martínez Sala* [1998] ECR I-2691; Case C-184/99 *Grzelczyk*, cited in footnote 16; Case C-224/98 *D'Hoop* [2002] ECR I-6191; Case C-138/02 *Collins* [2004] ECR I-0000 and Case C-456/02 *Trojani* judgment of 7 September 2004 [2004] ECR I-0000.

<sup>3</sup> E.g. *Grzelczyk*, cited in footnote 16 at paragraph 31 of the judgment.

<sup>4</sup> E.g. *Martínez Sala*, cited in footnote 18 at paragraph 63 of the judgment.

<sup>5</sup> Case C-413/99 *Baumbast* [2002] ECR I-7091 at paragraph 84 of the judgment.

<sup>6</sup> At paragraph 63 of the judgment.

<sup>7</sup> Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996, OJ 1997 L 28, p. 1.

<sup>8</sup> *Grzelczyk*, cited in footnote 16, at paragraph 39 of the judgment.



‘unreasonable’ burden on the public finances of the host Member State means that the directive ‘accepts a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States, particularly if the difficulties which a beneficiary of the right of residence encounters are temporary’.<sup>9</sup> As it had been established in earlier case-law that the minimex was within the scope *ratione materiae* of the EC Treaty and the conditions governing eligibility were contrary to Article 12 EC, Grzelczyk was entitled to this benefit.

25. In *D’Hoop*, a Belgian student was refused a tideover allowance (an unemployment benefit granted to young people who have just completed their studies and are seeking their first employment) by the Belgian authorities on the sole ground that she had completed her secondary education in France. Here, the Court considered that making eligibility for this allowance conditional on the school diploma having been obtained in Belgium places certain of its nationals at a disadvantage simply because they have exercised their freedom to move in order to pursue education in another Member State. ‘Such inequality of treatment is contrary to the principles which underpin the status of citizen of the Union, that is, the guarantee of the same treatment in law in the exercise of the citizen’s freedom to move’.<sup>10</sup> The Court did accept, however, that in view of the aim of the tideover allowance to facilitate for young people the transition from education to the employment market, it is legitimate for the national legislature to wish to ensure that there is a real link between the applicant for that allowance and the geographic employment market concerned. A single condition concerning the place where the diploma of completion of secondary education was obtained was, however, too general and exclusive in nature.<sup>11</sup>
26. The *Collins* Case arose from an Irish national, who had gone to the United Kingdom in order to find work there, being refused a jobseeker’s allowance on the ground that he was not habitually resident in the United Kingdom. Although Articles 2 and 5 of Regulation No 1612/68 do not refer to financial benefits assisting persons seeking access to the employment market, the Court considered that these provisions<sup>12</sup> ‘should be interpreted in the light of other provisions of Community law, in particular Article [12] of the Treaty’.<sup>13</sup> It went on to state that ‘[i]n view of the establishment of citizenship of the Union and the interpretation in the case-law of the right to equal treatment enjoyed by citizens of the Union, it is no longer possible to exclude from the scope of Article [39(2)] of the Treaty – which expresses the fundamental principle of equal treatment, guaranteed by Article [12] of the Treaty – a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State’.<sup>14</sup> As in *D’Hoop*, the Court recognised that the Member States may lay down conditions in order to ensure that there is a genuine link between an applicant for an allowance in the nature of a social advantage within the meaning of Article 7(2) of Regulation No 1612/68 and the geographical employment market in question. A residence requirement could be considered to be appropriate for this purpose, but must not go beyond what is necessary to attain that objective. In particular, its application must rest on clear criteria which are made known in advance and provision must be made for judicial protection.<sup>15</sup>
27. Finally, in *Trojani*, a French national working at a Salvation Army hostel in Belgium in return for board and lodging and some pocket money was refused the Belgian minimex benefit on the same grounds as *Grzelczyk*: he did not have Belgian nationality and could not benefit from the

---

<sup>9</sup> *Ibid.*, at paragraph 44 of the judgment.

<sup>10</sup> *D’Hoop*, cited in footnote 18, at paragraph 35 of the judgment.

<sup>11</sup> *Ibid.* at paragraphs 38 and 39 of the judgment.

<sup>12</sup> The Court in paragraph 60 of its judgment uses the term ‘this principle’, though it appears from the context that Articles 2 and 5 are the subject of this consideration.

<sup>13</sup> *Collins*, cited in footnote 18, at paragraph 60 of the judgment.

<sup>14</sup> *Ibid.*, at paragraph 63 of the judgment.

<sup>15</sup> *Ibid.*, at paragraphs 67 to 72 of the judgment.

application of Regulation No 1612/68. In this case the Court found, that the applicant could not derive a right of residence from Article 18(1) EC in conjunction with Directive 90/364 due to his lack of resources. However, as he was in possession of a residence permit and was lawfully resident in Belgium, he was entitled to benefit from the fundamental principle of equal treatment as laid down in Article 12 EC. The Court therefore concluded that, in so far as national legislation does not grant a social assistance benefit to EU citizens from other Member States, who reside lawfully within its territory even though they satisfy the conditions required of nationals of that Member State, this constitutes discrimination on grounds of nationality prohibited by Article 12 EC.<sup>16</sup>

### C – Citizenship and social benefits: overall picture

28. If these judgments are viewed together, a number of principles emerge in relation to EU citizenship as such and, subsequently, to the entitlement of EU citizens to non-contributory benefits of a social nature. By placing emphasis on the fundamental character of EU citizenship, the Court makes clear that this is not merely a hollow or symbolic concept, but that it constitutes the basic status of all nationals of EU Member States, giving rise to certain rights and privileges in other Member States where they are resident. In particular, EU citizenship entitles nationals of other Member States to equal treatment with nationals of the host Member State in respect of situations coming within the substantive scope of Community law. Pursuing studies in another State than that of which the EU citizen is a national cannot of itself deprive him of the possibility of relying on Article 12 EC.<sup>17</sup> As the cases described above make clear, various social benefits which Member States previously granted to its nationals and to economically active persons under Regulations Nos 1612/68 or 1408/71 now have been extended to EU citizens who are lawfully resident in the host Member State. I refer to the child-raising benefit in *Martínez Sala*, the minimex benefit in *Grzelczyk* and *Trojani* and the tideover allowance in *D'Hoop*. In these cases the benefits were covered by existing Community regulations and therefore clearly were within the scope *ratione materiae* of the Treaty.
29. In contrast, it is interesting to note that in *Collins*, the Court did not place the jobseeking allowance claimed by the applicant explicitly within the scope *ratione materiae* of the Treaty. Rather, in the context of interpreting the provisions in Regulation No 1612/68 on access to employment in other Member States, it used the concept of citizenship to draw it within the scope of the Treaty: 'in view of the establishment of citizenship of the Union and the interpretation in the case law of the right to equal treatment enjoyed by citizens of the Union, it is no longer possible to exclude from the scope of Article [39(2)] EC ... a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State.' In other words, it would appear that citizenship itself may imply that certain benefits can be brought within the scope of the Treaty, if these allowances are provided for purposes which coincide with objectives pursued by the primary or secondary Community legislation.
30. It is also clear from the case-law that entitlement by lawfully resident EU citizens to social benefits in these situations is not absolute and that the Member States may subject eligibility to these benefits to certain objective, i.e. non-discriminatory, conditions in order to protect their legitimate interests. In the two cases involving benefits which were aimed at assisting the beneficiary to gain access to the employment market, *D'Hoop* and *Collins*, the Court recognised that the Member States may impose requirements to ensure that the applicant has a real link with the relevant geographical employment market. These requirements must be applied in such a way that they comply with the basic Community principle of proportionality.

---

<sup>16</sup> *Trojani*, cited in footnote 18, at paragraph 44 of the judgment.

<sup>17</sup> *Grzelczyk*, cited in footnote 16, at paragraph 36 of the judgment.

31. As indicated, an EU citizen must also be lawfully resident in the host Member State in order to be eligible for social benefits. Under Directives 90/364 and 93/96, the EU citizen or student must possess sufficient resources to avoid becoming a burden on the public finances of the host Member State and he must be adequately insured against sickness costs. Here, too, these limitations and conditions must be applied in compliance with the general principles of Community law, in particular the principle of proportionality.<sup>18</sup> In *Grzelczyk* the Court thus held that the condition that an EU citizen must not become an unreasonable burden on the public finances of the host Member State did not preclude him, in the given circumstances, from being entitled to a social benefit. Neither, for that matter, did the fact that Article 3 of Directive 93/96 excludes students from entitlement to maintenance grants preclude him from receiving the minimex benefit. The notion of 'unreasonable burden' is apparently flexible and, according to the Court, implies that Directive 93/96 accepts a degree of financial solidarity between the Member States in assisting each other's nationals residing lawfully on their territory. As the same principle is at the basis of the conditions imposed by Directive 90/364, there is no reason to presume that this same financial solidarity does not apply in that context, too.
32. The question arises as to what is meant by the term 'a degree' of financial solidarity. Clearly the Court does not envisage the Member States opening up the full range of their social assistance systems to EU citizens entering and residing within their territory. To accept such a proposition would amount to undermining one of the foundations of the residence directives. It would seem to me that this is a further reference to the observance of the principle of proportionality in applying the national requirements in respect of eligibility for social assistance. On the one hand, the Member States are entitled to ensure that the social benefits which they make available are granted for the purposes for which they are intended. On the other hand, they must accept that EU citizens, who have been lawfully resident within their territory for a relevant period of time, may equally be eligible for such assistance where they fulfil the objective conditions set for their own nationals. In this respect, they must ensure that the criteria and conditions for granting such assistance do not discriminate directly or indirectly between their own nationals and other EU citizens, that they are clear, suited to attaining the purpose of the assistance, are made known in advance and that the application is subject to judicial review.<sup>19</sup> To this I would add that it should also be possible to apply them with sufficient flexibility to take account of the particular individual circumstances of applicants, where refusal of such assistance is likely to affect what is known in German constitutional law as the 'Kernbereich' or the substantive core of a fundamental right granted by the Treaty, such as the rights contained in Article 18(1) EC. It is interesting to note that this principle has been laid down in Article II-112 of the Charter of Fundamental Rights of the Union which is incorporated in the Draft Treaty establishing a Constitution for Europe.<sup>20</sup> This provides that any limitation on the exercise of the rights and freedoms recognised by the Charter must respect the essence of these rights and freedoms. Article II-105 of the Charter guarantees the freedom of EU citizens to move and reside within the territory of the Member States in terms which are essentially identical to Article 18(1) EC.
33. There has, in other words, been a marked development in EU citizenship (Articles 17 and 18(1) EC) in conjunction with the prohibition of discrimination on grounds of nationality (Article 12 EC) in providing a basis for entitlement to certain social benefits in the Member States in which EU citizens are lawfully resident. As I observed in paragraph 29, where the benefits concerned were required to be explicitly within the scope *ratione materiae* of the EC Treaty, the Court in *Collins* apparently accepted that this is the case if the benefit concerned is provided for purposes which coincide with the objectives of primary or secondary Community law. Persons who have moved to another Member State and have, at least initially, complied with the residence conditions laid down in the residence directives, but have since found themselves in a situation in which they

---

<sup>18</sup> *Baumbast*, cited in footnote 21, at paragraph 91 of the judgment.

<sup>19</sup> *Collins*, cited in footnote 18, at paragraph 72 of the judgment.

<sup>20</sup> CIG 87/04 of 6 August 2004.

need to apply for financial assistance are, subject to the limitations and conditions laid down by the Community legislature, entitled to such assistance on an equal footing with nationals of the host Member State. These limitations and conditions must be applied in such a way that the final result is not disproportionate to the aims for which they are imposed. Neither may that result amount to a discrimination of the EU citizen which cannot be objectively justified, where that EU citizen finds himself in the same material circumstances as a national of the host Member State and is sufficiently socially integrated in that Member State. In this regard, depending on the nature of the benefits concerned, the Member States may lay down such objective conditions as are necessary to ensure that the benefit is provided to persons who have a sufficient link with its territory.

## V – The preliminary questions

### A – *The first question: citizenship and maintenance assistance*

34. The first question referred by the High Court is aimed at ascertaining whether financial support provided by the Member States to students to assist them with maintenance costs continues to fall outside the scope of the application of the EC Treaty for the purposes of Article 12 EC, in view of the addition of Article 18 EC to the EC Treaty and in view of the developments in the field of education, since the Court gave its judgments in *Lair* and *Brown*.
35. Bidar observes, first, that he should be regarded as an EU citizen student who resided lawfully in the United Kingdom for more than three years before his courses commenced. Consequently, he is not in the position of an EU national falling within the ambit of Directive 93/96. As Community competence has been extended to the field of education, the material scope of the Treaty is not restricted to matters related to access to education, but also covers matters related to the encouragement of student mobility, including the provision of assistance with maintenance costs. He states that *Grzelczyk* confirms that the Court's judgment in *Brown* has been overtaken by these developments in Community law. Even if he is considered as falling within the scope of Directive 93/96, Bidar observes that the conditions imposed by that directive are not absolute and must be applied in accordance with the general principles of Community law, in particular the principle of proportionality. In this respect he points out that his education is already very much bound up with the United Kingdom education system. Finally, he submits that it is artificial to make a distinction between assistance with tuition fees on the one hand and maintenance grants and subsidised loans on the other, as denial of access to either constitutes an obstacle for students to the enjoyment of free movement.
36. As to Bidar's personal status the United Kingdom Government points out that, before the national court, he relied on Directive 93/96 and as such he cannot be regarded as being 'settled' within the United Kingdom. The German Government adds that by applying for a loan even before commencing his studies, Bidar deprived himself of the possibility of acquiring the right of residence under Directive 93/96 and of invoking Article 18 EC in conjunction with Article 12 EC.
37. All Member State Governments having submitted written observations and the Commission consider that financial assistance with maintenance costs provided to students continues to fall outside the scope of application of the EC Treaty. Various arguments were advanced in support of this assertion, e.g. The introduction of Article 149 EC which recognises the responsibility of the Member States for the content of teaching and the organisation of education systems. According to them this includes systems of student support. They point out that the right of residence provided for in Article 18(1) EC is subject to limitations and conditions laid down in the Treaty and the measures adopted to give it effect. Article 3 of Directive 93/96 excludes a right of migrant students to maintenance grants which, in their view, was confirmed by the Court in *Grzelczyk*. Reference was also made to Directive 2004/38 on free movement and residence within the

territory of the Member States<sup>21</sup> which must be transposed by the Member States by 30 April 2006. Article 24(2) of this directive explicitly provides that prior to acquisition of permanent residence, a right which is obtained after a continued period of five years of legal residence in the host Member State, that State is not obliged to grant maintenance aid for studies consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families.

38. More generally, the Austrian Government points out that the European Agreement on Continued Payment of Scholarships to Students Studying Abroad, adopted in the framework of the Council of Europe in 1969, is based on the principle that the home state is responsible for the payment of scholarships and that if the host state also were to become responsible in this regard, there would be danger of duplicate payments. Similarly, the Netherlands Government observes that as there is no coordination in this field at Community level, intermingling the home state and host state principles could have disruptive effects. The Danish and Finnish Governments also refer to the possible effects of a negative answer to the first question on their rules for granting maintenance assistance to students.
39. Firstly, I would observe that the answer to the first question of the High Court depends on the factual situation of the case. Although it focuses on whether or not assistance with maintenance costs for students now comes within the ambit of the EC Treaty, it is essential to establish under which set of rules that question must be appreciated. On the one hand, the United Kingdom in particular contends that, as Bidar is a national of another Member State who is in the United Kingdom in order to follow university education, he falls exclusively within the scope of Directive 93/96. Bidar, on the other hand, refers to the fact that he had already been resident in the United Kingdom for three years prior to taking up his studies and that he had also followed his secondary education in the United Kingdom. In that respect he submits that he is in the same factual situation as Ms D'Hoop and must be regarded as an EU citizen who had made use of his right to move to another Member State under Article 18(1) EC. This implies that the question as to his right to a student maintenance loan should be considered under that Treaty provision in conjunction with Article 12 EC. In my view there are strong indications on the basis of the facts set out in paragraph 5 that Bidar does indeed come within the second category and that he fulfils the conditions laid down in Directive 90/364. However, as it is up to the referring court to establish the facts and thereby determine which set of rules is applicable to the case, I will discuss both options.
40. Article 18(1) EC subjects the rights of EU citizens to move and reside within the territory of the Member States to the limitations and conditions laid down in the EC Treaty and the measures adopted to give it effect. As far as students are concerned, their situation is governed by Directive 93/96. This directive applies to students who have gone to another Member State to take up a course of studies. In other words, following a course of studies in the host Member State is the reason for them using the rights conferred upon them by Article 18(1) EC. Students in this situation must meet the conditions already mentioned in paragraph 18 above, particularly in respect of their financial independence. They must not become an unreasonable burden on the public finances of the host Member State nor, according to Article 3 of Directive 93/96, are they entitled to maintenance grants.

---

<sup>21</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ 2004 L 158, p. 77, as corrected in OJ 2004 L 229, p. 35.

41. In *Grzelczyk* the Court confirmed these principles as such, but attenuated their severity in the light of the circumstances of the case at hand. Although barring entitlement to a maintenance grant, it found that the directive was silent as to the possibility of acquiring a social security benefit, such as a minimum subsistence allowance. In addition, though the directive was aimed at avoiding students becoming an unreasonable burden on public finance, the Court considered that this principle was not to be applied in an absolute sense, but must be understood as meaning that in certain cases, such as that of *Grzelczyk* who had run into financial difficulty in his final year of studies, Member States must accept a degree of financial solidarity by supporting each other's nationals.
42. If *Bidar* is to be regarded as a student coming solely within the ambit of Directive 93/96, it is abundantly clear that Article 3 of the directive presents a considerable barrier for him being eligible for a maintenance grant in the United Kingdom. However, what is at issue is not eligibility for a maintenance grant, but eligibility for a (subsidised) loan to cover maintenance costs. Student loans are not covered explicitly by Article 3 of Directive 93/96 and indeed, in view of the fact that they now have been explicitly excluded by the parallel provision in Directive 2004/38, Article 24(2), it could be inferred that eligibility for such loans is not excluded by Article 3 of Directive 93/96.
43. That being said, the question as to whether students coming from other Member States should be eligible for student loans for maintenance costs must be answered by reference to the general principle of Article 1 of Directive 93/96 that in order to obtain the right to residence in the host Member State, students must declare that they possess sufficient resources to avoid becoming a burden on the social assistance system during their period of residence. As the Court stated in *Grzelczyk*, the directive only requires a declaration by the student to that effect at the beginning of his period of residence within the Member State. There are two reasons for querying whether this condition also applies to student loans for maintenance costs. The first is that such loans generally are not part of the social assistance systems of the Member States and indeed, in *Grzelczyk*, the Court made just this distinction. The second is that, although such loans are usually provided at non-commercial conditions and repayment in certain cases is waived, the burden on the public finances resulting from these aspects is smaller than in the case of benefits that do not have to be repaid.
44. Nevertheless, it is clear from the basic condition that students must of themselves possess sufficient resources on arriving in the host Member State, that they are precluded from applying for a (subsidised) loan in respect of maintenance costs. The cumulative effect of loans provided under conditions, such as those of the Student Support Regulations, constitutes a considerable burden on public finance, as is also apparent from the information provided by the national court on this point.<sup>22</sup> This justifies them being treated in the same manner as maintenance grants for the purposes of Article 3 of Directive 93/96.
45. I could, however, envisage an exception to this rule and, indeed, the Netherlands Government also suggested that in certain exceptional circumstances there may be reasons for applying Article 3 leniently. Referring to my earlier observation in paragraphs 31 and 32 that the conditions imposed by Directive 93/96 must be applied in accordance with the general principles of Community law, particularly the principle of proportionality, it must be ensured that the core of the fundamental rights accorded by Article 18(1) EC is respected. For instance, a student who first complied with the basic conditions of the directive may encounter financial difficulties at a later stage of his studies. In such a situation, it would seem to me that the logic of the *Grzelczyk* judgment should apply. Where, according to that judgment, under Articles 18(1) and 12 EC, an EU citizen, as a student, is entitled to a minimum subsistence allowance in his final year of

---

<sup>22</sup> See paragraph 70 of this Opinion.

studies on an equal footing with nationals of the Member State if his financial position has changed since he took up his studies, there would be no reason to exclude entitlement of EU citizens in a similar situation under those provisions to the less burdensome instrument of a student loan. In such exceptional situations the principle of financial solidarity between the nationals of the Member States entails that once a student has commenced a course of studies in another Member State and has progressed to a certain stage of these studies, that State should enable him to complete these studies by providing the financial assistance which is available to its nationals.

46. The second situation to be considered is based on the presumption that Bidar should not be regarded as a student falling within the scope of Directive 93/96, but as an EU citizen who has exercised his right to move to and reside on the territory of another Member State. This involves examining whether following the introduction of the provisions on EU citizenship and education, the scope of the EC Treaty now extends to financial support provided by the Member States for student'-s' maintenance costs.
47. In its judgments of 21 June 1988 the Court held that in view of the stage of development of Community law at that time, assistance for maintenance and training given to students, who did not enjoy worker or worker-derived status, in principle, falls outside the scope of the E(E)C Treaty for the purposes of Article 12 EC. This was explained by the fact that such assistance is to be regarded, on the one hand, as a matter of educational policy which is not as such included in the spheres entrusted to the Community institutions and, on the other, a matter of social policy which falls within the competence of the Member States in so far as it is not covered by specific provisions of the E(E)C Treaty.
48. After those judgments a number of provisions were added by the Treaty of Maastricht to the EC Treaty on education. Articles 3(1), sub q, and 149 EC now provide a basis for Community action in this area. The scope of these provisions is limited. Any action taken by the Community in this field is restricted to promoting cooperation between the Member States in various respects, including the mobility of students and teachers. Harmonisation is excluded explicitly. Though opening the possibility to take certain incentive measures in the field of education, the Treaty provisions in this area are based on the principle that the Member States retain responsibility for the content of teaching and the organisation of education systems.
49. I am not convinced that assistance granted for maintenance costs must still be regarded as falling outside the scope of Community law for the sole reason that such assistance must be regarded as an aspect of the 'organisation of education systems'. What is important in this context is that, although conferring limited powers on the Community institutions, these provisions do make it possible for the Community itself to adopt measures for facilitating the mobility of students, including the provision of financial assistance with maintenance costs. Not only is educational policy as such therefore now within 'the spheres entrusted to the Community institutions', this also applies to financial measures adopted to facilitate student mobility. In *Grzelczyk* the Court, too, attached importance to these developments since its judgment in *Brown*.<sup>23</sup>
50. The inclusion of these provisions on education is therefore indicative of the fact that the subject of assistance with maintenance costs now falls within the substantive scope of the EC Treaty. Furthermore, it is important that, in comparison with the situation in 1988 under the EEC Treaty, the EC Treaty grants fundamental rights to move and reside within the territory of the Member States not only to economically active nationals of the Member States, but also to nationals of the Member States who are not economically active. Certainly, the exercise of these rights has been made subject to limitations and conditions and to measures adopted to facilitate the exercise of

---

<sup>23</sup> *Grzelczyk*, cited in footnote 16, at paragraph 35 of the judgment.

this right. As has repeatedly been emphasised by intervening parties, these include conditions relating to the financial independence of these economically inactive EU citizens. It does not follow from this, however, that social benefits of various kinds, including financial support for maintenance costs, fall by their nature outside the scope of the Treaty. In this respect I need only refer to the case-law on EU citizenship and social benefits, reproduced above. The directives adopted to facilitate the exercise of the rights granted by Article 18(1) EC may lay down rules concerning eligibility for benefits provided by the Member States or even excluding such eligibility, this does not place these benefits outside the scope of the Treaty.

51. Maintenance assistance has long been regarded as a social advantage within the meaning of Article 7(2) of Regulation No 1612/68.<sup>24</sup> In *Lair* the Court observed that such assistance is particularly appropriate from a worker's point of view for improving his professional qualifications and promoting his social advancement.<sup>25</sup> In a more general vein, the Court considered in *Echternach and Moritz* that equal treatment as regards benefits granted to members of workers' families contributes to their integration in the society of the host country, in accordance with the aims of the freedom of movement of workers.<sup>26</sup> Where it is acknowledged that such a benefit comes within the scope *ratione materiae* of the EC Treaty for workers and given the rationale of this finding, it would seem to me artificial to exclude the same benefit from the scope of the Treaty for other categories of persons who are now also covered by the Treaty. The question whether these latter categories of persons are entitled to such benefits should be distinguished from the question whether the benefit itself is within the scope of the Treaty.
52. Furthermore, it is important in this regard to point to the development of the case-law described above in respect of the rights adhering to EU citizenship under Article 18(1) EC since the Court's judgment in *Martínez Sala*. Not only are EU citizens entitled to equal treatment with nationals of the host Member State in which they are lawfully resident with respect to matters coming within the scope *ratione materiae* of the Treaty, citizenship itself may provide a basis for bringing certain matters within that scope where the objectives pursued by the national measure correspond with those pursued by the Treaty or secondary legislation as is apparent from the Court's judgment in *Collins*. The Court has already recognised that benefits of the kind at issue in this case contribute to the integration of the recipients in the society of the host Member State in accordance with the aims of free movement of workers. As the provisions on citizenship likewise aim to facilitate the free movement of economically inactive persons, this provides a further reason for considering that they come within the scope *ratione materiae* of the EC Treaty.
53. I therefore conclude that the first question referred by the High Court should be answered in the negative, i.e. that since the introduction of Articles 17 EC et seq. on EU citizenship and in view of the developments in relation to the competence of the European Union in the field of education, assistance with maintenance costs for students attending university courses either in the form of subsidised loans or grants, no longer falls outside the scope of the application of the EC Treaty for the purposes of Article 12 EC and the prohibition of discrimination on grounds of nationality.

#### B – The second question: grounds for justifying differential treatment

54. By its second question the High Court asks the Court which criteria must be applied by the national court in determining whether the conditions governing eligibility for maintenance assistance are based on objectively justifiable conditions not dependent on nationality. This question is based on the premiss that the conditions laid down in the Student Support

---

<sup>24</sup> *Lair* and *Brown*, both cited in footnote 2, at paragraph 24 and paragraph 25 of the judgments respectively.

<sup>25</sup> *Lair*, *ibid.*, at paragraph 23 of the judgment.

<sup>26</sup> *Echternach and Moritz*, cited in footnote 11, at paragraph 20 of the judgment.



Regulations in respect of eligibility of EU citizens, who do not enjoy worker status or a status which is derived from a worker, for maintenance assistance, constitute discrimination within the meaning of Article 12 EC.

55. In order to be eligible for maintenance assistance economically inactive EU citizens are required to be 'settled' in the United Kingdom within the meaning of national immigration law. Periods spent receiving full-time education are not taken into consideration for calculating the period of being settled. Settled status must also be demonstrated by the possession of a residence permit. This same condition of 'being settled' does not apply to British nationals. They only need to have been ordinarily resident within the United Kingdom for the three years prior to commencing their studies. I would only remark in this regard that where the eligibility conditions are more cumbersome for EU citizens who are lawfully resident in the United Kingdom than for British nationals, it is quite clear that this amounts to an indirect discrimination on grounds of nationality within the meaning of Article 12 EC. Consequently, it must be considered whether such a difference in treatment can be justified under Community law.
56. Bidar and the United Kingdom, Austrian and German Governments assert that a difference in treatment of this type may be justified by objective considerations which are unrelated to the nationality of the persons concerned and are proportionate to the legitimate aim of the national provisions. The United Kingdom, German, Austrian and Netherlands Governments and the Commission assert further that the Member States are entitled to ensure that there is a real link between the student and the Member State or its employment market or that there is a sufficient degree of integration in society. The Finnish Government refers in this regard to a permanent structural and real link with the society of the Member State of study. The United Kingdom submits that it is legitimate for a Member State to ensure that the parents of students have made or the students themselves are likely to make, a sufficient contribution through work and hence taxation to justify the provision of subsidised loans. Referring to Advocate General Ruiz-Jarabo Colomer's Opinion in *Collins*, the Austrian, German and Netherlands Governments add that the Member States have a legitimate interest in preventing abuse of their student support schemes. As to the proportionality requirement, various Governments and the Commission contend that a minimum period of residence is both necessary and appropriate. In order to determine what is an adequate period, they refer to the period of five years required for permanent residence laid down in Article 16 of Directive 2004/38.
57. I have already had the opportunity in my Opinion of 27 February 2003 in *Ninni-Orasche*<sup>27</sup> to express my views on the circumstances in which EU citizens enjoy equal treatment under Articles 18(1) and 12 EC in respect of obtaining financial support with study costs. The facts of that case were comparable to those of the present case, but differed as to the basis of the right of residence and the personal circumstances of the persons concerned. However, the legal assessment of the grounds of justification for differential treatment is essentially the same.
58. As the Court has held on various occasions<sup>28</sup> and as all parties having submitted written and oral observations state, inequality of treatment can be justified only if it is based on objective considerations independent of the nationality of the persons concerned and it is proportionate to the legitimate aim of the national provisions. In this respect the Court has recognised that it is legitimate for a national legislature to wish to ensure that there is a real link between the applicant for an allowance in the nature of a social advantage within the meaning of Article 7(2) of Regulation No 1612/68 and the geographic employment market in question.<sup>29</sup>

---

<sup>27</sup> Case C-413/01 *Ninni-Orasche* 2003 ECR I-0000.

<sup>28</sup> See e.g. *D'Hoop* and *Collins*, both cited in footnote 18, respectively at paragraphs 36 and 66 of these judgments.

<sup>29</sup> See *D'Hoop* and *Collins*, both cited in footnote 18, respectively at paragraphs 38 and 67 of the judgments.

59. In both these cases the social benefits, the tideover allowance in the case of *D'Hoop* and the jobseeker's allowance in the case of *Collins*, were aimed at providing financial assistance to the beneficiaries either in the transition from education to employment or them otherwise genuinely seeking employment. In order to ensure that there was sufficient connection with the domestic employment market, the Court considered in *Collins* that a residence requirement is in principle appropriate, but that it must not go beyond what is necessary in order to attain that objective. The criteria used in applying this requirement must be clear, made known in advance and provision must be made for a means of redress of a judicial nature. Where a period of residence is required in order to be eligible, 'the period must not exceed what is necessary in order for the national authorities to be able to satisfy themselves that the person concerned is genuinely seeking work in the employment market of the host Member State'.<sup>30</sup> In *D'Hoop* the Court found that the requirement that a school diploma be obtained in Belgium in order to be eligible for the tideover allowance was 'too general and exclusive in nature', as 'it unduly favours an element which is not necessarily representative of the real and effective degree of connection between the applicant for that benefit and the geographic employment market, to the exclusion of all other representative elements'.<sup>31</sup>
60. In the case of maintenance assistance for students, be it in the form of a subsidised loan or a grant, the real link to be established is not primarily with the employment market of the host Member State, although that may be an aspect which may be taken into consideration. Rather, this link is to be found in the degree of affinity which the applicant for this assistance has with the educational system and the degree of his integration into society.<sup>32</sup> It would seem to me that where an EU citizen has followed his secondary education in a Member State other than that of which he is a national, which is more adapted to preparing him for entry to an establishment of higher or tertiary education in that Member State than elsewhere, the link with the education system of the host Member State is evident. In assessing the degree of integration, the individual circumstances of the applicant must necessarily be taken into account. As far as this is concerned, it should be emphasised that the situation of an EU citizen who has come to another Member State as a minor, as the dependant of another EU citizen, must be distinguished from EU citizens who have moved to another Member State as adults making their own choices. The chances that an EU citizen in the situation of *Bidar* has integrated into society as a young person, having lived there under the legal guardianship of his grandmother, who was already settled in the United Kingdom, and having followed secondary education in the host Member State, surely must be deemed to be greater than EU citizens arriving at later stages of life.
61. Obviously a Member State must for reasons of legal certainty and transparency lay down formal criteria for determining eligibility for maintenance assistance and to ensure that such assistance is provided to persons proving to have a genuine connection with the national educational system and national society. In this respect, and as the Court recognised in *Collins*, a residence requirement must, in principle, be accepted as being an appropriate way to establish that connection under the conditions set out in that judgment and cited in paragraph 59 above. It may be inferred from these conditions that the Court recognises that a residence requirement may be imposed as a starting point of the assessment of the situation of an individual applicant. The fact that it states that the period must not exceed what is necessary for the purpose of enabling the national authorities to satisfy themselves that a person is genuinely seeking work in the domestic employment market, indicates, however, that other factors must be able to be taken into account in that assessment. This is further borne out by its consideration in *D'Hoop* that the single condition applied by the national authorities in that case was too general and exclusive and that no account could be taken of other representative factors. Ultimately, it would appear to me that if the result of the application of a residence requirement is to exclude a person, who can

---

<sup>30</sup> *Collins*, *ibid.*, at paragraph 72 of the judgment.

<sup>31</sup> *D'Hoop*, *ibid.*, at paragraph 39 of the judgment.

<sup>32</sup> Cf. for children of workers, *Echternach and Moritz*, cited in footnote 11 at paragraph 35 of the judgment.

demonstrate a genuine link with the national education system or society, from the enjoyment of maintenance assistance, this result would be contrary to the principle of proportionality.

62. Additional factors which could be taken into account in a case such as the present one are the need for ensuring continuity in the education of the applicant,<sup>33</sup> the likelihood that he indeed will enter the national employment market and the possibility that he may not be eligible for maintenance assistance from other sources, such as the Member State of which he is a national as he no longer fulfils the eligibility criteria in that Member State.
63. It may also be recalled in this connection that the Court, in the context of Regulation No 1612/68, has stated that the freedom of workers must be guaranteed in compliance with the principles of liberty and dignity and the best possible conditions for the integration of the Community worker's family in the society of the host country.<sup>34</sup> There is no reason why this general principle should not apply in the context of the free movement of EU citizens as well.
64. All governments intervening in this case and the Commission point out that, according to Article 24(2) of Directive 2004/38, the Member States are not obliged to grant maintenance aid for studies to economically inactive EU citizens prior to acquisition of permanent residence. This status is only achieved after five years of continuous residence in the host Member State. Leaving aside that this directive entered into force on 30 April 2004, i.e. after the facts in the present case arose, and that it must be transposed by 30 April 2006, it would seem to me that in applying this condition, the fundamental rights conferred directly by the EC Treaty on EU citizens must be fully respected. This implies that the considerations set out above in respect of applying a residence requirement in individual cases are valid in respect of the application of a settlement requirement such as that contained in the Student Support Regulations and that account must be taken of all relevant factors in determining whether or not a genuine link exists with the educational system and the society of the host Member State. I do not consider that this amounts to an undermining of the requirement adopted by the Community legislature. Rather it is necessary to ensure that this requirement is applied in conformity with the fundamental provisions of the EC Treaty.
65. The United Kingdom Government contends that it is legitimate for a Member State to ensure that students' parents have contributed sufficiently, or that the students themselves are likely to make a sufficient contribution to the public finances through taxation in order to justify maintenance assistance being granted. This argument suggests that there is a direct or indirect link between the obligation of residents of a Member State to pay taxes and the entitlement to benefits of the kind at issue in the present case. If it is taken to its logical conclusion, this argument implies that if parents have not contributed to taxation or only made a modest contribution, their children would not be eligible for maintenance assistance, whereas students whose parents have contributed significantly would be entitled to such assistance. It does not seem probable that the United Kingdom seriously would accept the social discrimination inherent to this position. Furthermore, as it is loans which are at issue here, it is illogical to require that a person has first contributed to public finances in order to be eligible for a loan which he thereafter must repay even though there is an element of subsidy in the terms for granting this loan. This ground for justification therefore is inherently contradictory
66. Finally, it was submitted by various intervening Governments that the Member States have a legitimate interest in preventing abuse of their student support schemes and in preventing 'benefit tourism'. I do consider that this is indeed a legitimate concern of the Member States, but the

---

<sup>33</sup> *Echternach and Moritz*, *ibid.*, at paragraph 22 of the judgment.

<sup>34</sup> See *Di Leo*, cited in footnote 13, at paragraph 13 of the judgment; *Baumbast*, cited in footnote 21, at paragraph 50 and 59 of the judgment, and Case C-356/98 *Kaba* [2000] ECR I-2623 at paragraph 20.

manner in which this should be ensured should not be such as to undermine the fundamental rights of EU citizens residing lawfully within their territory. A simple residence requirement is too non-selective for achieving this aim. In my view it can be achieved adequately in the context of establishing whether or not an applicant has a genuine link with the national education system or society as set out above.

67. These considerations lead me to the following conclusion: where the result of the application of a settlement requirement, such as that laid down in the Student Support Regulations, to an EU citizen, who is sufficiently integrated into society in the host Member State, whose education is closely linked to the education system in the Member State and who is in a comparable situation to a national of the host Member State, is to deny that EU citizen access to assistance with maintenance costs, this amounts to an unjustified discrimination within the meaning of Article 12 EC in conjunction with Article 18(1) EC. In those circumstances, the result of the application of such a settlement requirement is not in proportion with the aim it seeks to achieve, i.e. that maintenance assistance is granted to those who have a genuine link with the national educational system.
68. In the light of the foregoing observations the following answer must be given to the second question. Conditions laid down in national law governing eligibility for assistance with maintenance costs for students must be objectively justified and unrelated to the nationality of EU citizens. In order to determine whether this is the case a national court must ascertain that these conditions are appropriate for establishing a real link between an EU citizen applying for such assistance and the national education system and society. In addition, these conditions must not go beyond what is necessary for achieving that aim.

[...]

## **VI – Conclusion**

73. I am, therefore, of the opinion that the Court should give the following answers to the questions referred by the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court):
- (1.) Since the introduction of Articles 17 EC et seq. on EU citizenship and in view of the developments in relation to the competence of the European Union in the field of education, assistance with maintenance costs for students attending university courses either in the form of subsidised loans or grants, no longer falls outside the scope of the application of the EC Treaty for the purposes of Article 12 EC and the prohibition of discrimination on grounds of nationality.
- (2) Conditions laid down in national law governing eligibility for assistance with maintenance costs for students must be objectively justified and unrelated to the nationality of EU citizens. In order to determine whether this is the case a national court must ascertain that these conditions are appropriate for establishing a real link between an EU citizen applying for such assistance and the national education system and society. In addition, these conditions must not go beyond what is necessary for achieving that aim.
- (3) Article 12 EC may only be relied upon to claim entitlement to assistance with maintenance costs from the date of the judgment of the Court except in cases where legal proceedings were already initiated for the same purpose prior to that date.

## **6. EXCERPT FROM JOSEPHINE SHAW: LAW OF THE EU (3RD ED.)**

*N.B.: The work this excerpt has been taken from has been published in 2000 and does NOT yet reflect ToA renumbering (see Primary Sources pack for a table containing pre and post-Amsterdam numbering) and developments that followed its publication – entry into force of the Treaty of Nice, the Convention on the Future of Europe and Treaty establishing a Constitution for Europe.*

### **[Preface]**

The creation of the European Community, and latterly the European Union, has not only involved the establishment of a new type of legal order operating in the international or transnational sphere – one which can only be understood if certain basic precepts of the study of national law are set aside; it has also brought into being a legal order in which a very specific and clear purpose is dominant. This is the promotion of a process of ‘integration’, leading towards a ‘union’ of European states and peoples. This purpose operates at a number of different levels, including those of the market (the dismantling of the national barriers to trade between states to create a single market), of money and the economy (the creation of a single currency and moves towards a single economic policy and policy on employment), and of internal and external security (the creation of an ‘area of freedom, security and justice’ and a ‘common foreign and security policy’). In addition, there are important political and legal dimensions to the integration process (the creation of political and legal institutions outside the nation state; the creation of a common political identity within the EU, particularly on the global stage). At every level, the issue of ‘integration’ is an underlying theme, although exactly what integration might imply varies according to circumstances. It does not, for example, automatically mean greater centralisation of decision-making, legal structures and policy choices. There are principles operating in the EU precisely to prevent over-centralisation. But what it does mean is that public policy choices across the EU become, above all, a matter of common concern, as do questions such as the liberal values of a democratic constitution. The constitutional and institutional framework studied in this volume exists for the purpose of facilitating the development of this multi-faceted project of ‘integration’. In addition, the Court of Justice makes frequent use of the aim of integration when it is interpreting EU law, and it will be a common theme which will be studied in this book. 1.3 contains an outline sketch of the some key dimensions of this aim, and the concept of ‘integration’ is one of those which receives attention in 1.5, which attempts to demystify certain aspects of the language of European integration.

In comparison to most national legal systems, and certainly in comparison to the legal systems of the states which form its constituent members, the legal system of the EU is particularly unstable and in a state of constant flux and change. Changes mainly come about either because of a dynamic intervention on the part of the Court of Justice in the interpretation of EU law, or because the Member States have negotiated and agreed further amendments to one of the key elements of the constitution of the EU – its basic Treaties. Since the reasons for these changes lie more frequently in the field of politics than law, it will be apparent that EU law can only properly be understood in its wider political and economic context, and that the successful study of EU law presupposes the acquisition of a substantial body of contextual knowledge. The wider ‘European’ and ‘global’ contexts in which the EU is situated are sketched in 1.4. A guide to reading across the broader European studies literatures is offered in 1.8. 1.7 offers assistance in locating the treaties, legislation and official documentation of the EU, and in making a basic selection from amongst the wealth of secondary legal literature which is available. We begin, however, with some basic facts about the European Union and the European Community.

### **1.2 The European Union and the European Community: The Basic Facts**

What we now call the European Union started out as a Community of six in the 1950s: France, the Federal Republic of Germany, Italy, Belgium, Luxembourg and the Netherlands. In 1973 Denmark, Ireland and the UK acceded; Norway signed a Treaty of Accession, but did not join when membership was rejected by popular vote in a referendum. Further expansion occurred in 1980 with the accession of

Greece, and in 1986 with the accession of Spain and Portugal, creating a Community of twelve. De facto expansion occurred once again in 1990, with the unification of Germany having the effect of bringing the former German Democratic Republic into the Community, although not as a separate member. The most recent accession process was completed at the beginning of 1995, with Austria, Finland and Sweden becoming members. Once again the people of Norway declined through a referendum vote to take up the opportunity of membership negotiated for them by their government. In 2000, with fifteen Member States and eleven official languages, the EU had a population of just over 375 million, a GDP of over € 8 billion and the highest share of world trade in terms of imports and exports of goods and services; all of this makes it a leading global economic and – potentially – political actor (Eurostat, 1999).

As we shall see in Chapter 3, enlargement, especially towards the east but also in the area of the Mediterranean, is a central preoccupation within the EU at present. The defining date was 1989, with the fall of the Berlin Wall and the later break up of the Soviet Union. There are numerous current candidates for membership at present. In a first group of countries, with accession negotiations in progress since 1998 are Cyprus, the Czech Republic, Estonia, Hungary, Poland and Slovenia. In late 1999, there was a fundamental reappraisal of priorities in the wake of the Kosovo crisis. The violent consequences of the break-up of the former Yugoslavia generally, and the impact of the bombing of Serbia and Kosovo, in particular, including the need for physical and political reconstruction in the wake of the NATO action, have all brought home the costs in economic and human terms of not enlarging the EU. The costs relate to the persistence of political instability and insecurity within the continent of Europe, close on the borders of the EU. The EU – in the form of the Heads of State and Government acting on the advice of the Commission – therefore took the decision in December 1999 to start accession negotiations in early 2000 with a further group of six countries (Bulgaria, Latvia, Lithuania, Malta, Romania and Slovakia). Only with Turkey, amongst the group of countries which have formally applied for membership, has the EU yet to start accession negotiations, although it is now recognised as a candidate country for which a pre-accession strategy has been formulated.

The term 'European Community' was the designation commonly used up to the end of 1993 for a political entity, composed of a number of distinct legal entities with separate international legal personality, which came to be generally identified as a single unit. These are the three Communities, of which two are confined in their application to particular sectors of the economy: the European Coal and Steel Community (ECSC), formed by the Treaty of Paris concluded in 1951 which came into force on July 25 1952, and the European Atomic Energy Community (Euratom), formed by the Treaty of Rome concluded in 1957 which came into force on January 1 1958. Also created in 1958 by a second Treaty of Rome 1957 was the European Economic Community (EEC), the 'everything else' Community, which acquired a hegemonic position within the political and legal framework of the Community. Confusingly, since 1993 when the Treaty on European Union came into force, the European Economic Community has been redesignated as the 'European Community', leaving the other two sectoral Communities with their existing titles. The Articles of what must now be termed the 'EC Treaty' are referred to in this book as Article 1 EC, etc. Where necessary, Articles of the 'old' EEC Treaty are designated Article 2 EEC, etc.

Much of the discussion in this book will be concerned with the provisions of the Treaties establishing and amending this 'general' Community, in particular those which establish and limit the powers of the institutions, which set the framework for adopting legislation and other policy measures, and which lay down general principles and frameworks for government under the rule of law. Legally, the three Communities remain distinct, although they have common institutions, formed in 1967 by the Merger Treaty. However, the powers of the institutions differ slightly between the three Communities. The ECSC Treaty also differs from the two later Treaties in that it can be described as a *traité loi*, or 'treaty-law' which itself prescribes in detail the policies to be pursued by the Community, and leaves merely issues of policy implementation to the institutions. The EEC and Euratom Treaties were developed as *traités cadre*, or 'framework treaties', which contain only the outlines of policy objectives to which the institutions must give concrete form with legislative instruments. To a large extent, this characteristic has been maintained with subsequent amendments of those Treaties. A further important distinction is that the ECSC Treaty was concluded for 50 years, and expires in 2002, whereas the Euratom and EEC Treaties were concluded for an indefinite duration. When the ECSC Treaty expires at midnight on July 24

2002, the matters which it deals with will be reallocated to the EC and Euratom Treaties, as appropriate.

The EEC Treaty was significantly amended in 1986 by the Single European Act, which established the so-called '1992' deadline, and sought to give the institutions the powers they needed to achieve the goal of completing the internal market by 31 December 1992. The Single European Act also introduced a form of institutionalised intergovernmental cooperation between the Member States regarding foreign policy, termed 'European Political Cooperation'.

The effect of the Treaty of Maastricht, or 'Treaty on European Union', has been to link the three Communities even closer together within the common structure of a European Union, a new entity built around the framework offered by the existing Communities. The Union is 'founded' on the European Communities (Article 1 TEU). The Union does not as such have legal personality, and so is not a legal body in the same way as the Communities. It is served by a single institutional framework, which is essentially that of the Communities themselves. The Treaty of Maastricht also supplemented the Communities by introducing additional policies and forms of intergovernmental cooperation in the areas of foreign affairs and justice and home affairs. It introduced what is commonly described as a 'three pillar' structure, of which the existing corpus of law based around the Communities remains the central pillar ('first pillar'). The side pillars are:

- Common Foreign and Security Policy (which has evolved out of European Political Cooperation) (Title V of the TEU: the 'second pillar' or 'CFSP'); and
- Police and Judicial Cooperation in Criminal Matters (Title VI of the TEU: the 'third pillar' or 'PJC').

In fact this precise structure and the current designation of the third pillar are the result of a further set of amendments to the whole framework of Treaties, introduced by the Treaty of Amsterdam. This Treaty was signed in 1997 and came into force on May 1 1999. The 'old' third pillar – Cooperation in the fields of Justice and Home Affairs (JHA) – was reduced in size and changed in scope as certain matters were transferred into the 'first pillar' or 'communitarised' (i.e. incorporated into the framework of the European Community in the strict sense). Figure 1.1 summarises the current framework and the links between the TEU and the EC Treaty. The constitutional structure of the EU will be discussed in greater detail in Chapter 4. Provisions of the Treaty on European Union are referred to in this book as Article 1 TEU, etc.

The Treaty of Maastricht was finalised in December 1991 following two intergovernmental conferences lasting one year on the subjects of economic and monetary union and political union, and was signed in February 1992. It established the framework allowing for monetary union to be achieved as of January 1 1999, when the euro (symbol: €) became the single currency in eleven Member States by means of the irrevocable locking of national exchange rates. The Treaty of Maastricht was due to come into force on 1 January 1993, but difficulties in the ratification process involving an initial rejection in a referendum in Denmark, ratification by only a small majority in a referendum in France, considerable opposition in the UK Parliament and a constitutional challenge in Germany delayed the coming into force of the Treaty until 1 November 1993. The Treaty of Maastricht itself provided for a further revision process to begin in 1996, with the convening of a conference of representatives of the Member States (an intergovernmental conference or 'IGC'). This IGC began in March 1996 and concluded in June 1997, with agreement upon the Treaty of Amsterdam which was signed in October 1997. One important change instituted when this Treaty was ratified and entered into force on May 1 1999 was the renumbering of both the EC Treaty and the Treaty on European Union. In the latter case, letters have been redesignated as numbers: for example, Article N TEU which provides for the convening of IGCs and lays down the process for formally amending the Treaties is now Article 48 TEU. Particular confusion arises from the renumbering of the EC Treaty, as clearly older literature and case law uses the previous numbering, and some well known legal structures within the EU have long been known by the relevant article numbers. A good example is the so-called 'Article 177 preliminary ruling procedure', under which national courts can refer questions of EU law to the Court of Justice for a ruling on interpretation or validity (now Article 234 EC). The 'new Article 177' is part of the EU's policy provisions on development cooperation policy with developing countries. Some of the number changes are quite bewildering. For example, (old) Article 30 EC lays down a prohibition on import restrictions on goods imposed by Member States, subject to exceptions set out in (old) Article 36. Article 30 has been renumbered Article 28 EC, but because of

deletions of intervening articles, old Article 36 is now new Article 30 EC! You are advised to consult the table of equivalences at the front of this book on regular occasions, in order to become familiar with the most important changes. Wherever appropriate, the text makes clear what the old *and* the new numbers are in specific areas.

The pattern of successive IGCs continues. At the 1996-97 IGC, the Member States were unable to agree upon the significant changes to the institutional framework long deemed necessary to permit the anticipated further enlargements, especially to the east, referred to above. Protocol No. 7 annexed to the TEU and the EC, ECSC and Euratom Treaties by the Treaty of Amsterdam in effect mandated certain institutional changes before any further enlargement and required a comprehensive review of the institutional provisions before the membership of the EU can exceed twenty countries. As accession negotiations have been proceeding with twelve countries in total since 2000 (and in some cases since 1998), swift action was clearly needed and on February 14 2000, after the requisite Opinions from the Commission and the European Parliament, the IGC was inaugurated. Its planned conclusion was December 2000 at the Nice meeting of the European Council under the French Presidency.

This section shows that in strict legal (if not political) terms the EU is a very limited body. However, just as the strictly incorrect term 'European Community' gained widespread acceptance in the 1970s and 1980s, so the term EU is being used more and more as the general overall descriptive term, and is not limited to its narrow political or geographical connotations. As 1.1 has already indicated, this book will generally refer to the 'EU' or the 'Union' when talking about the broad institutional and constitutional structures established by the EU Treaties as a whole, although an exception is made in the historical presentation of the earlier history of the European Communities in Chapter 2. It also uses the terms 'legal order of the EU' and 'EU law' in order to highlight the relevance of law and legal institutions right across the three pillar structure.

This terminology will be applied even in Parts V and VI of the book, which look at the relationship between EU law and national law and at the judicial control of the acts of the institutions, and which are, strictly speaking, focused almost exclusively on what the Court of Justice indeed continues to call 'Community law', i.e. the legal framework of the first pillar. However, although a broad terminology of 'EU' and 'Union' will generally be used, the strict legal differences between the work of the institutions across the EC and the EU still need to be fully recognised, and appropriate distinctions will be drawn in Parts II and III of the book. For example, to assist in delimiting more precisely the powers of the EC as a legal entity, the term 'Community competence' will generally be used, especially in Part III.

As a body based on international agreements between sovereign states, the EU is in many senses a creature of international law; however the Member States have endowed its institutions with uniquely far-reaching powers for the achievement of the objectives contained in the Treaties. It is now often described as a 'polity', an unspecific term for a political entity, or a 'polity-in-the-making'. The EU has a distinctive institutional structure, which operates across the three pillars on the basis of the principle laid down in Article 3 TEU and builds on the original institutional framework of the three Communities. In the first fifty years of its existence, the main legislative role has been fulfilled by the Council of the European Union which is composed of representatives of the Member States at ministerial level. The Member States are also represented in the European Council, a summit conference of Heads of State and Government who meet at least twice yearly to give overall policy direction to the EU. The European Parliament, while it is now directly elected by universal franchise and is therefore representative of the people, has fewer powers in the legislative field than the Council, and its role ranges between that of a consultative assembly in some policy areas and a full co-legislator in some fields. It is also the co-budgetary authority with the Council. The role of the European Commission within the EU is sometimes exaggerated by Member States hostile to extensions of the EU's competences; in fact, the Commission's role is limited to initiating policy, implementing measures adopted by the Council and ensuring that Member States fulfil their obligations under the Treaties. It is in a sense the civil service of the EU, but in many respects it is dependent upon national administrations for the actual day to day implementation of the policies of the Union. Moreover, like the European Parliament, the Commission continues to have a more restricted role in the two intergovernmental pillars of the EU, concerned with foreign policy and some areas of cooperation in home affairs.



The fourth institution is the Court of Justice which has the task under Article 220 EC of ensuring that the law is observed. It has been assisted since 1989 by a Court of First Instance, creation of which was provided for in the Single European Act. The Court has been responsible for developing the EU legal system in ways that were doubtless not imagined by the founders of the Treaties. Much of Part V will be concerned with explaining in detail those features which distinguish the European Union from an 'ordinary' international organisation, and which make the legal system operating in particular in relation to the 'Community' or 'first' pillar more akin to that of a federal state. This point will be sketched out initially in the overview of the EU legal order in 1.5. The Court has also been active in ensuring that within the 'Community' pillar itself the rule of law is applied, but it has been hitherto almost entirely excluded from exercising a judicial function within the second and third pillars. However, while it continues to play no role in relation to CFSP, since the transformation of the third pillar by the Treaty of Amsterdam from Cooperation in Justice and Home Affairs to Police and Judicial Cooperation in Criminal Matters, the Court now enjoys a restricted role in that field under Article 35 TEU. It also has a very restricted role in relation to the common provisions of the Treaty on European Union (Articles 1-7 EU), with its scrutiny role limited to Article 6(2) TEU which provides for fundamental rights protection. This question will be discussed in Part IV on 'Values and Principles in the EU constitutional framework'. Part VI examines the system of judicial control of the legality of legislative and administrative acts adopted by the institutions of the Union. This is one area in which the EU can rightly claim to have emulated in large measure the characteristics of the highly evolved legal systems of its Member States.

### **1.3 The Mission of the European Union**

Broad statements of the aims, goals and values of the European Community and the European Union are to be found in the Preambles and introductory sections of the founding Treaties. Article 1 TEU recalls the long standing commitment in the Preamble to the EEC Treaty to the creation of an ever closer union among the peoples of Europe, and identifies the creation of the Union as a new stage in this process, one 'in which decisions are taken as openly as possible and as closely as possible to the citizen'. The task is 'to organise, in a manner demonstrating consistency and solidarity, relations between the Member States and between their peoples'. The Union has the following objectives (Article 2 TEU):

- 'to promote economic and social progress and a high level of employment and to achieve balanced and sustainable development, in particular through the creation of an area without internal frontiers, through the strengthening of economic and social cohesion and through the establishment of economic and monetary union, ultimately including a single currency...;
- to assert its identity on the international scene, in particular through the implementation of a common foreign and security policy including the progressive framing of a common defence policy, which might in time lead to a common defence...;
- to strengthen the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union;
- to maintain and development the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime;
- to maintain in full the *acquis communautaire* and build on it with a view to considering to what extent the policies and forms of cooperation introduced by this Treaty may need to be revised with the aim of ensuring the effectiveness of the mechanisms and the institutions of the Community.'

The specifically socio-economic aspects of these aims are further elaborated in Articles 2, 3, 4 and 6 EC. Article 2 sets the European Community the task of achieving the promotion of harmonious, balanced and sustainable development of economic activities, a high level of employment and social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and of economic and social cohesion

and solidarity among Member States. The twin means for attaining this task are the creation of a common market and an economic and monetary union, and the implementation of common policies and activities themselves enumerated in Article 3. Article 4 outlines the goal of economic and monetary union, including the creation of a single currency. Article 6 strengthens the provisions of Article 2 and 3 relating to the environment by requiring that environmental protection 'must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development'. The reference to gender equality in Article 2 is picked up by another mainstreaming provision. Article 3(2) requires that 'in all the activities referred to in this Article, the Community shall aim to eliminate inequalities, and to promote equality, between men and women.'

In the earlier stages of the EU's development, the substantive law has comprised, above all, the law of the common market which has been developing steadily since 1958. For present purposes, we can take the common market referred to in Article 2 as practically identical to the 'internal market' defined in Article 14 EC, the achievement of which was the official central objective of the old European Economic Community between 1986 and the end of 1992. This provides that:

'The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty.'

The goal appears, therefore, to be a free market ideal that, as far as possible, the territory of the fifteen Member States should resemble a single national market, where there is a level competitive playing field for all economic actors and where distortions of competition based on artificial legal barriers such as differences in consumer protection or environmental regulation will be eliminated.

Article 3(1) EC in turn gives more details on the activities which are to be pursued with a view to attaining this goal. These include the creation of a customs union, involving the abolition of internal customs duties on trade in goods and the erection of a common external tariff and a complementary common policy on external trade, the abolition of other obstacles to trade in goods, measures to achieve the free movement of services, persons and capital between the Member States and measures concerned with the entry and movement of persons. These are essentially negative measures, in that they promote integration by removing existing barriers. Positive integration measures include the establishment of common policies, in fields such as agriculture and transport; the creation of these policies also reveals a certain dirigiste element in the thinking of the founders of the Treaty, alongside the commitment to the free market principles inherent in the four freedoms. The commitment to a policy on the harmonisation of national legislation also demonstrates a recognition that deregulated markets alone will not bring about the creation of a single internal market which respects the interests of consumers and the environment, to name but two interests which may be sacrificed in unfettered free market competition. In addition, although subsequent amendments to the original Treaty have brought regional policy goals of social and economic cohesion and solidarity within the remit of the EU's prescribed activities, there is no clear commitment in Article 3(1) to a general social policy, as a complement to the economic policies described above. However, particularly with the effective conclusion of the substantial legislative programme to complete the internal market by the end of 1992, the focus of law-making has shifted more into the fields of social policy, consumer policy and environmental policy. Article 3(1) also refers to a number of flanking policies where the EU is to make 'a contribution' or to 'promote' or 'encourage' policy, highlighting its secondary role in policy-making. These include research and technological development, health protection, education and training and the 'flowering of the cultures of the Member States'.

It is useful to pause briefly to consider the extent to which the EU has achieved some aspects of this 'mission'. The basic framework of a customs union has been in place since the late 1960s for the original Six, and this is a relatively easy framework to replicate each time that the EU has enlarged through further accessions. More challenging was the task of removing the other barriers – state and non-state in origin – to the completion of the single or internal market. This was the challenge associated with the Commission '1992' programme, along with the changes to the Treaties brought about by the Single European Act. Turning legal principle in the Treaties into empirical reality has been a lengthy process, as the Commission's ongoing strategy for the internal market makes clear.

In the economic sphere, the most significant innovation of the last decade for the EU has been

the establishment of the timetable for the achievement of economic and monetary union by the Treaty of Maastricht, and the subsequent introduction of the euro as a single currency for eleven Member States on January 1 1999 (the area often known as 'Euroland' or the 'Eurozone'). Thus far, the substantive law on these aspects of the EU's activities is not as well developed as the law of the common or internal market, along with the complementary activities highlighted in the previous paragraph. In particular, progress towards economic union has not advanced very far. An important direct correlate to EMU are new provisions committing the EU to 'the promotion of coordination between employment policies of the Member States with a view to enhancing their effectiveness by developing a coordinated strategy for employment', contained in Article 3(1)(i) EC. This is because of the need for measured responses to the fiscal disciplines and economic shifts brought about by participation by a Member State in EMU, as well as the endemic levels of high unemployment of the 1980s and 1990s in most European countries. In relation to questions of institutional and constitutional law addressed in this book, the discussion will concentrate on the institutions of monetary and economic union (4.22) and the questions raised by EMU as an instance of flexibility, as a number of Member States have opted out of 'Euroland' in the sense of the single currency, and some of the associated monetary if not economic policies (4.9).

It is interesting to note the gradual historical evolution of these programmatic provisions on the aims and goals of the European Communities and subsequently the European Union. Over the years, the list has gradually expanded, and has moved away from a primary emphasis upon the customs union and the common market towards complementary aims in relation to flanking policies such as the environment or consumer protection. In some cases, the development of a policy has preceded its inclusion in the list in Article 3(1). Environmental policy is perhaps the best example, as it was developed initially in the late 1970s and early 1980s in response to growing ecological concerns, but was only formally included in the Treaties in 1986 by the Single European Act.

#### **1.4 The Contexts of European Union**

The discussion of the aims and objectives of the EU in 1.3 has tended to reinforce the centrality of certain socio-economic goals in relation to the activities of the EU as a whole. Placing the EU in a wider context of Europe, and of the global political and economic orders more generally, highlights in addition the political objectives ascribed to the Union in Article 2 TEU. Historically, the EU has always had a broad political mission which needs to be understood in relation to the violent history of the continent especially in the first half of the twentieth century. Joseph Weiler captured this mission very effectively, when he characterised the EC (and later the EU) as pursuing the ideals of peace, prosperity and a form of 'supranationalism' which encapsulates a departure from a narrow and debilitating nationalism, and reinforces the idea of the European Union as 'community' (Weiler, 1994a). One outcome of the crisis in Kosovo in 1999 (and in a more general sense an outcome of the Balkan conflicts throughout the 1990s resulting from the break-up of Yugoslavia, which involved four wars in eight years and countless atrocities against civilians) has been the reinforcement of these historical ideals of the Community/Union. The ideals have evolved into a more concrete policy of promoting stabilisation and reconstruction. As one Commission document puts it, 'the EU is *itself* a model for overcoming conflict and promoting reconciliation through close cooperation to achieve common goals' (Commission, 1999a: emphasis added). Newspaper comment would have it that the United States of America largely paid for the bombing of Serbia and Kosovo, a programme of military activity instituted for the purposes of achieving the political objective of persuading Serbia to accord political autonomy to Kosovo and to cease its policy of ethnic cleansing.

In other words, the USA paid for the process of destruction. In turn, the European Union has been and will be, for the foreseeable future, paying for much of the process of reconstruction, both in economic and monetary terms but also in political terms as the EU tries to bring values of peace, democracy and respect for fundamental rights to South Eastern Europe as a whole. This has crystallized into a new type of external activity in the form of actively promoting processes of stabilisation and association with the EU of the countries of the former Yugoslavia (Croatia, Bosnia, the Federal Republic of Yugoslavia and the former Yugoslav Republic of Macedonia) and Albania and termed the 'Stabilisation and Association Process'. Even the long term prospect of accession is opened up. It is an activity which ties the EU and

its Member States to numerous other countries and international organisations who are 'stakeholders' in the process (a meeting of 38 countries and 15 international organisations formally endorsed the Stability Pact for South Eastern Europe). The Stability Pact is a long term programme of conflict prevention (3.12). The Stabilisation and Association Process is the EU's main contribution to the Stability Pact.

This presentation of the work of the EU appears to give it a grandiose status in the wider Europe. The conflation of 'some aspects of the collective political and economic life of the western, northern and southern European states now organized in something rather misleadingly called the European Union' (Garton Ash, 1999: 180) with 'Europe' as a wider geographical and geopolitical entity has been the subject of criticism. Garton Ash terms this conflation somewhat ironically the question of 'EU-rope'. It is part, he says, of a historical tendency by politicians to instrumentalize 'Europe' for the pursuit of national ends. In the UK, this takes the form of rigidly separating 'Britain' and 'Europe' or 'the continent', to reinforce a 'them and us' division. In France and Germany, by contrast, the national and the European are intertwined and conflated to such an extent that 'it is almost impossible to distinguish when [politicians] are talking about Europe and when about their own nations' (Garton Ash, 1999: 181). So quite apart from debates within the EU itself about the costs and benefits of taking a more active role in processes of stabilisation and reconstruction, it is also important to note a wider discussion about the idea of 'one Europe' or indeed 'several Europes' in which the role of 'EU-rope' as it currently operates (and as it will be presented in this book) is regarded as problematic. Can the EU become a bigger 'club' without changing its nature? What of the acute diversity and sometimes painful historical legacies which need to be taken into account during the enlargement process, as well as nuts and bolts questions about redesigning the institutions for more Member States and assimilating new Member States into the internal market, the single currency, the area of freedom, security and justice and the common policies in areas such as agriculture, the environment and competition. What, indeed, about the many people to whom it is 'EU-topia' to quote the title of a TV documentary programme broadcast in the UK in April 2000, focusing upon the many migrants – refugees, asylum-seekers and others – to whom 'EU-rope' remains a promised land. What measured response can come from the EU on this question, which is more than a knee jerk reaction against outsiders?

Beyond the specific context of identifying 'Europe' and the consequent role of the EU, there are a number of important *institutional*, *economic*, and *political* contexts in which the EU is nested as an organization based on treaties. There is, for example, an increasingly complex framework of intergovernmental organizations existing both to facilitate cooperation between states and also to pursue common political and economic goals, but stopping short of engaging in the processes of integration of states, economies and political and legal institutions characteristic of the EU. Some are 'global' in nature (although the United Nations itself is not discussed in what follows since that would shift the focus towards the domain of international law and international relations), and others are limited to the European domain. The principal ones with direct relevance to the evolution and work of the EU are:

The Council of Europe, established in 1949 to foster political, social and cultural cooperation between European states, and its most significant Treaty-based emanation, the European Convention on Human Rights and Fundamental Freedoms (ECHR). It is important not to confuse this body and its institutions with the EU. The institutions operating under the ECHR, to which all the Member States and the candidates for membership of the EU are signatories, are the Commission and Court of Human Rights, and these are based in Strasbourg. Membership of the Council of Europe is a minimum pre-requisite for accession to the EU. Note that the Court of Justice of the European Communities and the Court of First Instance are based in Luxembourg.

The Organisation for Economic Co-operation and Development (OECD), established in 1948 as the Organisation for European Economic Co-operation (OEEC), was originally based in Europe alone but now includes the other principal industrialised states. It exists to encourage economic cooperation and to coordinate development assistance to less developed countries. It is under the aegis of the OECD that the so-called G7 group of leading industrialised countries operates; it has now expanded to eight to include Russia. The OECD was responsible for establishing the European Bank for Reconstruction and Development (EBRD) in 1990 which supports the process of reconstructing the economies and infrastructures of the former communist countries. It has fostered cooperation in areas such taxation and

labour market studies. Its headquarters are in Paris.

The General Agreement on Tariffs and Trade (GATT) and the World Trade Organisation (WTO). The former was originally established in 1948 as a Treaty laying down rules governing international trade and facilitating a process of gradual dismantlement of barriers to free trade, and has been elaborated through a series of 'rounds' culminating in the Uruguay Round of 1986-1993 which reformulated the old GATT into the new GATT, added some significant new agreements on services and intellectual property rights, and established the WTO itself as the institutional basis for promoting and enforcing increased global free trade. The WTO came into being on January 1 1995. There is an elaborate dispute settlement mechanism enforcing free trade rules which are not dissimilar to the EU's own rules, and which is gradually shifting the emphasis of this international organisation from intergovernmental cooperation towards a system of economic integration. Most significant trading countries with market-based economies are members of the WTO which had 136 members in 2000; Russia and China, have been seeking membership for a number of years, but still remain outside, although the EU is sympathetic to their applications to join. The WTO is based in New York and Geneva.

The West European Union (WEU) (1955), the North Atlantic Treaty Organisation (NATO) (1949), and the Organisation for Security and Co-operation in Europe (OSCE) (1975) are the principal organisations in the field of security and defence cooperation, and they each interact with each other and with the EU's own CFSP. The most powerful of these organisations is undoubtedly NATO, which provides the framework in which the United States is in effect the ultimate guarantor of peace and security in Europe. It has recently enlarged to include some former communist countries which are also seeking to become members of the EU (Poland, Hungary and the Czech Republic: 1999). The WEU is a more limited organisation which was originally established as an intergovernmental framework within which Germany could rearm after the Second World War, and which is partly incorporated into CFSP itself as the possible basis for increased future defence cooperation. The OSCE is a wider intergovernmental body with 55 members and 7 partner states which is particularly concerned with promoting human rights and humanitarian values. It has played a role in dealing with conflicts in the former Yugoslavia and the former Soviet Union, and monitoring commitments by states to adhere to human rights and the rule of law. It has no enforcement powers. However, as a framework for discussion and dialogue and the promotion of liberal values it did play a role in diffusing some of the Cold War tensions through the 1970s and 1980s.

The process of economic and political integration in Europe is but one example of the wider phenomenon of 'regional integration' (see McCormick, 1999: 20-29 for a summary). Other examples are to be found in North America (North American Free Trade Association comprising the US, Canada and Mexico) and Latin America (the Mercosur comprising Argentina, Brazil, Paraguay and Uruguay), and other parts of the world. The five Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) have developed the Nordic Council, with the objectives of harmonisation of national laws, abolition of passport controls, common positions at international conferences and the development of joint ventures. The EU – as an 'experimental Union' (Laffan, O'Donnell and Smith, 2000) – is the first geographically and geopolitically significant bloc of countries displaying a higher degree of heterogeneity in economic, political and cultural terms to have taken the process so far beyond the core economic functions of constructing a common market and to have established complex supranational institutional structures. Yet as we shall see throughout this book, its capacity to expand further and even to carry forwards its current agenda is doubted by some. As the heterogeneity grows, the challenges become more complex and sometimes intractable. Moreover, the EU does not exist in isolation. For example, ideas about a 'common defence' are rendered infinitely more complex by the existence and continuing role of NATO, and the dominant American presence in guaranteeing European security.

A more general context for the EU is its relationship with the phenomena of 'globalisation' and 'internationalisation'. To some, the EU is both an incipient superpower in a political sense, contributing to emerging patterns of 'global governance' of which the intervention in Kosovo is one good example, and also a bulwark against the threatening processes of globalisation. While globalisation remains a highly contested term, it is said to be manifested by the 'ever-increasing global interconnectedness of people, places, capital, goods and services' (Axtmann, 1998: 2). Within the spheres of politics, the economy,

technology, law and culture levels of interconnectedness and internationalisation do vary dramatically, but processes such as the development of global financial markets allowing the instantaneous movement of huge capital sums across the world have called into question the capacity of nation states to exercise true economic sovereignty. The EU's own capacity to exercise economic sovereignty is in turn called into question by the development of a global trading order under the framework of the World Trade Organization.

The emphasis upon the macro political and economic contexts of EU should not conceal the continuing importance of the domestic dimension of European integration. The EU's Treaties and the activities of the EU's own institutions continue to be based upon and draw much of their legitimacy from the nation states themselves and their legal and political systems. National politics and institutions within the Member States are being 'Europeanised', but internal domestic debates, conditions and constraints are equally significant in determining the outcomes of bargaining and negotiation between the Member States, and within and between the EU institutions. In this book, the national *legal* dimension will be discussed in particular detail in Part V, and the national *constitutional* dimension will be touched upon in Chapter 5 and Part III on values and principles. The example of the controversy in Austria and across the EU generated by the inclusion of the populist Freedom Party in the governing coalition in early 2000 is drawn upon in particular in Part IV of the book.

## 1.5 Key Terms

It will already be apparent from the preceding paragraphs that there is a distinctive language of European integration. This section aims to demystify certain key concepts, some of which have already been mentioned, such as integration, intergovernmentalism, polity and sovereignty. It also provides a brief account of some of the main political and theoretical positions taken on the process of European integration, although clearly a detailed discussion of these questions goes beyond an introductory book on the legal framework of the EU such as this one (see the list of further reading for additional guidance). It is important to distinguish between the terms which are used to describe **political movements** which take a position in favour, or against more or less integration or in relation to specific dimensions of integration such as Economic and Monetary Union or a common defence policy and which offer a variety of different political readings of the achievements and current 'state' of the European Union, and **academic understandings** of the process of integration and of how the European Union works as a 'polity' and as a system of governance. Such academic positions often offer theories which seek to explain what has happened in the past and to predict what might happen in the future. They are sometimes combined with a political position, which can cause confusion for those studying the EU.

**Federalism** has cast a shadow over the evolution of the European Union in very significant ways. The terms **federation** or **federal union** are commonly used to describe a sovereign state where power is divided between a central authority and a number of regional authorities. The basis for the division of power is generally to be found in a Constitution. Federal states are well known in the modern world: they include the United States, Canada and the Federal Republic of Germany. Sometimes federal states break up; this has happened recently in case of the Soviet Union and Yugoslavia, and, in Canada since the 1980s, *Québécois* nationalists within the Province of Quebec have argued for unilateral secession from the federation.

Within the European Union, federalism has been propounded as one of a number of different methods for achieving the goal of an integrated Europe. Commonly federalists are seen as the 'radicals' advocating the rapid transition to a sovereign United States of Europe, with the relinquishing of sovereignty on the part of the Member States. A single central government would swiftly assume responsibility for the core activities typically pursued by a federal authority: foreign policy, defence and security, external trade and representation in international organisations, internal security and home affairs, management of the currency, macroeconomic policy, and matters concerned with citizenship. Such a federal authority would incorporate the key features of the modern democratic state, including in particular a legislature elected on the basis of universal suffrage. A judicial authority would mediate conflicts within the federal authority and between the federal authority and the constituent states on the

scope of their respective spheres of power, basing its resolution of disputes on a constitutional document. The term federalism has in fact never appeared in the EU Treaties, although it was suggested for inclusion in the opening article of the Treaty on European Union when it was first adopted in 1991. Eventually, the term was eradicated at the instance of the UK delegation. The pursuit of a federalist outcome to the ongoing European integration process is essentially a **political movement**, advocated by a minority of political parties within the Member States but, more often, by specialist interest groups such as the Federal Trust in the UK. As the basis for **academic understandings** of European integration, federalism comes most strongly into attempts to explain the nature of the EU legal order where the Court of Justice's **constitutionalisation** of the EU Treaties has created some akin to a federal legal order in which EU law is a supreme source of law (see 1.6). Academic statements on the 'state' of the EU today (see further Ch. 4) more frequently invoke the language of **confederation** or **cooperative federalism** (e.g. Wallace, 1994) to denote both those federal elements of the EU such as the legal framework discussed in this book, the budgetary arrangements and the role of the directly elected European Parliament, as well as the substantial interpenetration of national governments and the EU institutions which has occurred, while at the same time reinforcing the limited functional nature of the transfer of powers to a central authority.

Historically, there have been two dominant academic approaches to understanding and explaining the European integration process, both of which originated in the study of **international relations** – i.e. relations *between* nation states: **neo-functionalism** and **intergovernmentalism**. **Neo-functionalism** which has played a role in both practical politics and integration theory literature. It was probably the dominant account, offered in academic literature, of early integration processes, at least up to the mid-1960s when the European Community encountered significant opposition to the deepening of integration. In the political sphere, it also underlay the decision of the founding fathers of the Community such as **Jean Monnet** and **Robert Schuman** to abandon grand federalist projects and to promote instead the adoption of the ECSC Treaty which concentrated simply on putting two strategically important commodities – coal and steel – into the hands of a central authority outside national control. Subsequently they supported the EEC Treaty which, in particular in its original form, had a remit limited to economic integration. The Treaty also gave a powerful role in the determination of policy to the representatives of the Member States in the Council of Ministers. The idea behind neo-functionalism is that sovereign states may be persuaded in the interests of economic welfare to relinquish control over certain areas of policy where it can easily be proven that benefits are likely to flow from a common approach to problem solving. Power is transferred to a central authority which exists at a level above the nation state, and which exercises its powers independently of the Member States – a **supranational** body. However, that transfer of powers is viewed as just part of a continuing process. One level of integration will lead on to the next; a sectoral Treaty dealing with coal and steel leads on to a general Treaty covering all economic sectors; a **customs union** incorporating the removal of internal customs tariffs and the erection of a uniform external tariff leads on to a **common** or **internal market**, with comprehensive free movement for all commodities and factors of production. This in turn creates demands for some mechanism to eradicate the costs and obstacles to trade which result from shifts in the value of money between the different regions of the single market, involving either irrevocably fixed exchange rates, or even a single currency managed by a single central bank (a **monetary union**). Without serious damage to the weaker economies of the union, however, this cannot be effected without a convergence of economic policies, achieved either voluntarily, or through the transfer of macroeconomic powers to a central authority (an **economic union**), and without incorporating elements of a regional policy to ensure an equitable geographical distribution of resources (economic and social cohesion).

This process was termed '**spill-over**' by neo-functionalists, and as they have evolved, the European Community and later the European Union have indeed passed through a number of the stages described above, involving progressive transfers of power to them by the Member States. Spill-over has also operated in the extension of the powers of the old European Economic Community out of the purely 'economic' field into other related areas such as environmental and social policy. It has also fuelled the debate about **political union** in the EU. Two aspects of this concept can be identified, one substantive and the other procedural. According to the substantive notion of political union, the EU should exercise

political powers which are commensurate with its economic powers. For example, external trade competence should be linked to the introduction of foreign policy cooperation. A concept of citizenship of the Union should be introduced and then developed into a substantive expression of membership of a supranational polity. The Union becomes increasingly the guarantor of **internal** and **external security** for the Member States and citizens, and provides the fundamental guarantees of **constitutional government**, under the **rule of law**. In its procedural meaning, political union demands that the methods by which the transferred socio-economic competence is exercised do not lead to a net decrease in democratic and popular participation in and control of decision-making processes. In the EU, this is associated with calls for the European Parliament to be given greater powers, but also for the national parliaments to be protected *vis-à-vis* the growing power of the executive (i.e. governments) at the national and supranational levels.

If the functionalist logic is followed to its conclusion the supranational authority could, at a certain point, merge into a federal or confederal authority as more and more powers are transferred, and as the mechanisms for exercising these powers become increasingly separated from the nation state level. In this scenario the sovereign powers of the nation state are shared between the centre and its component parts, and power is exercised at the federal level not by the Member States, but by the autonomous organs of the federation, under the framework of a constitution. This means, in practice, if the traditions of Western liberal democracy are to be maintained, governance by a democratically elected legislature and a government which derives its **legitimacy** from the electoral process, as well as an active public sphere with mature political parties and an effective civil society. Within the EU, the European Parliament is in fact now a democratically elected body, but its legislative powers are still restricted, and it has little power or influence in relation to the Second and Third Pillars of the EU. Power continues, in very large measure, to be exercised by the representatives of the governments of the Member States, meeting as the Council. Pressure to alter this situation in order to remedy a **democratic deficit** within the EU is understandable and logical from a functionalist perspective. On the other hand, since the EU is not a **state** and is unlikely ever to become one anchored in a defined territory, with political authority over a given people, but rather is a rather ill-defined **polity**, rectifying the democratic deficit at the EU level does not mean simply replicating the parliamentary and divided power systems of the Member States in the EU context. The national dimension of EU democracy will therefore remain significant.

This, in sum, brings together the various phenomena of an **integration** process, linking together institutional and policy development with the key facet of **supranationalism**. To summarise, the essence of supranationalism is found in a gradual transfer of competences to the higher level, and in the evolution of a distinctive form of decision-making at the higher level where increasingly decisions are taken on a majoritarian basis, rather than by consensus. This form of supranationalism has been termed 'decisional supranationalism' by Weiler (1981), and has generally been an area in which the Community, and now the Union, has been quite weak, at least until the changes in the decision-making process introduced by the Single European Act, the Treaty of Maastricht and most recently the Treaty of Amsterdam. It can be distinguished from a specifically legal facet to the supranational nature of the Community, which Weiler has termed 'normative supranationalism'. This concerns the authority of the Court of Justice to give binding and authoritative rulings on the nature and effects of EU law, and to fashion a legal system in which EU law takes precedence over national law, often termed the **constitutionalisation of the Treaties**. In that respect, the EC has evolved more rapidly, and it is argued by some that the work of the Court of Justice has upset the delicate balance between the supranational and **intergovernmental** elements of the Treaties by acting as a **constitutional court**.

An alternative account of the development of the EU can in fact be offered by reference to the notion of **intergovernmentalism**. This term can be used to describe a basic **political position** which stresses that the EU is primarily a creature of its component states and should limit itself either to the types of activities more commonly undertaken by international organisations founded on Treaties, which are characterised by **cooperation** between states rather than by the independent actions of autonomous bodies or institutions and the development of equally autonomous policies, subject to the (supranational) rule of law. The intergovernmental position also tends to seek limits to scope as well as the depth of cooperation, placing a particular emphasis upon the goal of creating a free trading area. It tends to be



linked, politically, to support for **free market liberalism**. There have been conflicts throughout the history of the EC and the EU between the proponents of federalism and intergovernmentalism as basic positions on how these bodies should evolve.

The policies of Margaret Thatcher and Charles de Gaulle towards what was then the European Community fall into the category of intergovernmentalism, although they were each propounding rather different forms of nationalism as one of the key building blocks of their policies. More recently, it is associated with **Eurosceptic** political positions in the UK, which include arguments in favour of the withdrawal of the UK from the EU. The battle lines are frequently drawn over the concept of national sovereignty, with intergovernmentalists arguing in favour of a Community of states, or at most a union of states, in which state sovereignty is preserved, not a 'union of peoples' as the Preamble to the EC Treaty puts it. Intergovernmentalists will obviously oppose any extension of the supranational powers of the EU, involving the shift of 'Union' matters into the 'Community' pillar, an increased range of Community competence (e.g. more intervention in fields such as social policy), or an enhanced supranational element in the decision-making process through the strengthening of the powers of the Parliament and the extension of majority voting in the Council. In reality, the somewhat hybrid EU – built upon the EC and the second and third pillars – combines elements of both supranationalism and intergovernmentalism in terms of its operation, as a system of integration and cooperation.

As an **academic position**, intergovernmentalism is not intrinsically hostile to the EU, but rather offers a very different explanation as to how and why integration has occurred, and of the driving forces of integration. The key similarity is provided by a focus on explaining both the EU itself and the policies it pursues as the outcomes of bargains between states rather than in terms of the actions of the autonomous institutions of the EU. In part, intergovernmental explanations of European integration need to be understood as a critique of the explanatory inadequacies of neo-functionalism. There have been periods of the history of the EC and now the EU which are hard to explain in terms of a process of incremental spillover, notably when the French government partially withdrew from participation in the business of the EC in the 1960s until the other Member States agreed to proceed with decision-making almost entirely by unanimity in the Council rather than the reaching of qualified majorities as foreseen in the Treaties (see 2.7). More generally, the **euroclerosis** of the 1970s and early 1980s could be explained by the endemic refusal of the Member States to pursue jointly the agreed objectives of the founding treaties, and – equally – the revitalisation of the integration process after the Single European Act of 1986 and the political agreement on the Commission's White Paper on Completing the Internal Market of 1985 (Commission, 1985) are, on an intergovernmentalist understanding, best explained as a shift in the political preferences of the Member States in response to global economic challenges and domestic political priorities generated by a definitive end to the long post-war boom and rising unemployment. Interestingly, neo-functionalism as a theory of European integration also enjoyed a significant revival in the 1980s and early 1990s on the back of the single market programme, since these political events have also been explained as the product of the political entrepreneurship of the EU institutions, especially the Commission and the person of its President, Jacques Delors. Each theory claims to have the empirical evidence to support its own assertions.

As academic accounts or theories of the process of European integration, what both neo-functionalism and intergovernmentalism have in common is that they provide explanations which are framed in terms of an international relations paradigm of relationships between sovereign states, but with differing perspectives upon the EU as something quite separate from those states or something which is a mere creature of delegation by those states. An alternative approach is to treat the internal politics of the EU as if they were in fact the **domestic politics** of a state or non-state polity, and to use the insights of **comparative** or **national political science** rather than international relations as the basic tools of study. From the perspective of lawyers, what is offered by accounts such as those which characterise the EU as a '**multi-level governance system**' and which focus on the various actors within the policy-making process, is an opening to insert a realistic and balanced statement of the role of law and legal institutions in the EU system (Wincott, 1995a; Armstrong and Shaw, 1998; Hunt and Shaw, 2000).

Domestic politics accounts also fit well with the urgent need to provide a sound constitutional basis for the European Union, in view of its current crisis of **legitimacy** in the wake of the difficulties over

the Treaty of Maastricht. Consequently, theorists of democracy and constitutionalism are increasingly turning their attention towards the European Union. Studies concentrate on the functioning of the EU as a system of governance and upon its values and principles (see Parts II and III of this book). This is often termed the **normative turn** in EU studies.

One of the generally assumed virtues of the EU legal order described in the next paragraph has been its unity, uniformity and cohesive force (Shaw, 1996). The extent to which these basic principles can be sustained in the light of the **widening** (enlargement) and **deepening** (acquisition of new areas of competence, some of which are not directly related to the original economic mission, and which fall under the intergovernmental pillars or are shared between the various pillars) is not wholly clear. An even greater challenge to the current legal order is the increasing proliferation of **flexibility** within the system, and the sustenance given to ideas about **variable geometry**, **Europe 'à la carte'**, or **multispeed Europe**, in which some Member States proceed more quickly towards closer integration than others. The Treaty of Amsterdam made a twin contribution to 'flexible Europe'. It added to the 'unplanned architectural sprawl of flexibility' (Walker, 2000). To the existing opt-out/opt-in framework of EMU in which some countries have already moved to adopt a single currency, whilst others remain outside through political choice or economic necessity, it added a complex system of flexibility in the field of the free movement of persons and the removal of borders between the Member States. At the same time, the Treaty sought to 'constitutionalise' the use of flexibility in the form of **closer cooperation**, limiting the circumstances in which a group of Member States may go it alone to institute new policies or measures under the Treaties. At least the Treaty of Amsterdam brought to an end one infamous 'opt-out', that negotiated for the UK in the area of social policy by the Prime Minister John Major at the Maastricht IGC.

## 1.6 An Overview of some Key Elements of the Legal Order of the EU

An overview of any legal system should start with its basic structure, generally to be found in a constitution and associated documents. This is all the more important in the case of a federal-type legal system, where the constitution contains important rules governing the balance between central or federal and regional or state authorities in the law-making sphere, and on the relationship between federal and state law. Neither the European Community nor the European Union is, or can be, of course, explicitly described as a federation, although the legal order which now exists displays certain of the characteristics of a federal system. Nor does it have a constitution as such, but the Court of Justice now describes the founding treaties as the European Community's 'constitutional charter' (Case 294/83 *Parti Ecologiste 'Les Verts' v. European Parliament* [1986] ECR 1339 at p. 1365) (see, for more detailed discussion, Chapter 5).

However, much of the 'constitutional law' of the EU is contained not in the Treaties themselves, but in the judicial pronouncements of the Court of Justice which plays a pivotal role in the legal system, and which has a commitment to the pursuit of integration through law. It has consistently given a maximalist interpretation of the authority and effect of EU law, of the regulatory and policy-making competence of the institutions and of its power to control both the institutions and the Member States to ensure that 'the law is observed' (Article 220 EC). Inevitably, therefore, the study of EU law concentrates for much of the time on the work of the Court, but that focus should be tempered by an awareness that using a picture of the EU in which the edifice of EU law as interpreted by the Court is placed at centre stage tends to give the impression that the whole system is more advanced than in fact it is.

It also tends to understate the importance of the legislative and regulatory activities of the EU political institutions and the extent to which the institutional practices of those institutions can themselves create 'constitutional conventions' which form part of the corpus of EU constitutionalism. Moreover, it is somewhat misleading to focus on EU law as giving rise, above all, to a normative structure imposing duties on and granting rights to Member States and EU citizens, at the expense of its role, to give just one example, in creating a new supranational regional development policy leading to a substantial redistribution of public resources (Scott, 1995a: xi--xii). The rest of this overview is, notwithstanding these *caveats*, devoted to a brief explanation of the main areas of work of the Court in relation to the building of a constitutionalised order using the Treaties and general principles of law. It begins with a focus on the

'first pillar' – the law of the European Community, in the strict sense, for this has the most developed legal order with extensive judicial control of general constitutional principles and the rule of law.

One of the most important aspects of the Court's contribution has been its characterisation of the relationship between EU law and national law. On this topic, and on the question of the effect of EU law within the domestic legal systems of the Member States, there is little clear guidance in the Treaties themselves. Article 10 EC provides:

'Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.

They shall abstain from any measure which could jeopardize the attainment of the objectives of this Treaty.'

This provision has been described by AG Tesouro in Case C-213/89 *R v. Secretary of State for Transport, ex parte Factortame Ltd (Factortame I)* ([1990] ECR I-2433 at p. 2454) as the key to the whole system of remedies which exists for the enforcement of EU law. In terms of specific enforcement procedures, which can be seen as an extrapolation of the 'duty of Community loyalty' in Article 10, Articles 226 and 227 EC make it possible for the Commission and other Member States to bring infringing Member States before the Court of Justice, and Article 228 EC gives the Court the power to make a declaration stating that there has been an infringement and requiring the Member State to take measures to put an end to the infringement. Financial penalties for non-compliance were introduced by the Treaty of Maastricht, although these have yet to be used in practice. These measures allow for the 'direct enforcement' of EU law. They give no hint, however, that the obligations undertaken by the Member States under the Treaties they have signed are relevant at any level other than that of international law, which is primarily a law between states with minimal applicability to individuals. Individuals do not have recourse to the provisions in Articles 226 and 227 either to enforce EU law directly against the Member States themselves, or to force the Commission or another Member State to do this on their behalf. In fact, in an exercise of remarkable judicial creativity (Mancini, 1989), the Court of Justice has consistently distanced the EU legal system from 'ordinary' international law, arguing that by accession to the EU the Member States have transferred sovereign rights to the Community, creating an autonomous legal system in which the subjects are not just states, but also individuals. The Court has given effect to this view by enunciating four key principles:

- EU law penetrates into the national legal systems, and can and must be applied by the national courts, subject to authoritative rulings on the interpretation, effect and validity of EU law by the Court of Justice; in other words, the duty of 'Community loyalty' or 'fidelity' provided for in Article 10 applies to courts as well as to other organs of the Member States such as the government and the legislature;
- in this context individuals may rely upon rules of EU law in national courts, as giving rise to rights which national courts are bound to protect (the principle of 'direct effect');
- in order to guarantee the effectiveness of this structure, EU law takes precedence over conflicting national law, including national constitutional provisions (the principle of 'supremacy' or 'primacy');
- the organs and constituent bodies of the Member States, including the legislative, executive and judiciary, are fully responsible for reversing the effects of violations of EU law which affect individuals. This may, for example, involve the courts ordering the government to pay damages for loss caused by breach of EU law.

The Court has given an extensive task to the national courts which are responsible for ensuring what is often termed the 'indirect enforcement' of EU law at the instance of individuals. It has stressed the binding nature of EU law, including not only the Treaties themselves, but also those acts of the institutions (regulations, directives and decisions), to which binding effects are ascribed in Article 249 EC. These can, where appropriate, be enforced by individuals in national courts, if their provisions are justiciable (i.e. sufficiently precise and clear). It has also stressed that the European Union itself is bound by norms of

international law, in particular where they are contained in Treaties which the EU (or in strict legal terms one of the Communities) itself has concluded with third countries or international organisations as an international actor exercising legal personality, or where the EU has succeeded to the international Treaty obligations of the Member States. Finally, it has articulated a body of superordinate principles, 'general principles of law', which govern the activities of the EU institutions and of the Member States acting within the sphere of Community competence, and which include not only fundamental rights, but also procedural principles such as proportionality and legal certainty. These are not as such to be found in the Treaties but are in fact further products of the remarkable judicial creativity of the Court which has developed a body of individual rights and principles of administrative legality which ensure the application of the rule of law within the EU legal system. The Treaties, the acts of the institutions, binding norms of international law including international Treaties, the general principles of law, and the case law of the Court itself together constitute the body of sources of EU law.

The key to the structure of indirect enforcement lies in the organic connection between the Court of Justice and the national courts in Article 234 EC. This provides that national courts may, and in certain circumstances must, refer to the Court of Justice questions on the interpretation and validity of provisions of EU law where such questions are raised in the context of national litigation and the national court considers a reference necessary in order to enable it to give judgment. National courts must refer questions of doubt regarding the application of EU law to the Court in two situations: first, where the national court is one of last resort; second, where it is the validity of a rule of EU law which is in doubt. Only the Court of Justice has the power to invalidate a rule of EU law. The preliminary ruling procedure has limits, and it depends for its effectiveness on cooperation between national courts and the Court of Justice. It is not an appeal by the parties to the Court of Justice. The power to ask for a ruling lies solely with the national court, and the legislative and political authorities of the Member States may not interfere with the exercise of discretion. Correlatively, the Court of Justice does not have the power in the context of a preliminary ruling hearing to invalidate a provision of national law. It cannot even formally make a declaration of incompatibility with EU law, as it can in the context of Articles 226-228 EC.

It is limited to an interpretation of EU law. However, the manner in which the Court of Justice has often chosen to frame its rulings has given little choice to the referring court but to apply EU law in preference to national law, and in effect to invalidate provisions of national law. This duty flows from Article 10 for the national court, and it is a duty which gives rise to some difficulty in the context of the UK where the principle of parliamentary sovereignty leads judges conventionally to regard themselves as subordinate to the will of Parliament. The European Communities Act 1972 attempts, if only imperfectly, to resolve the difficulties raised by membership of the EU in conventional constitutional doctrine. In summary, therefore, the Court has constructed a system which comes close to the power conventionally held by the supreme court in a federal system, namely the power to invalidate state legislation which contravenes the federal constitution. Examples of the interaction of the various enforcement mechanisms, such as the litigation regarding the Merchant Shipping Act 1988 in the UK (*ex parte Factortame*) will be discussed in Chapters 8, 12 and 13.

In addition to controlling the exercise of sovereign power by the Member States, the Court also acts as the judge of the proper exercise of sovereign power by the European Community, and as an umpire in disputes regarding legislative authority between the institutions and between the EU's political organs and the Member States. This form of control likewise operates both directly in the Court and indirectly in litigation before the national courts. It will be seen from the above that individuals are not restricted in the national courts simply to asserting their EU law rights against the Member States. An individual may in addition question the validity of an act of an EU institution in the context of national litigation, and a national court which is minded to accept that allegation must refer a question to the Court for a ruling on validity. There are broadly two reasons why an individual might seek to challenge a rule of EU law. First, it may be unlawful because of its effects upon the complainant as an individual or part of group (e.g. a particular class of economic actors such as the producers of a particular commodity). In this context, the Court of Justice frequently makes reference to the fundamental rights of the affected group when ascertaining the legality of an EU act. Second, the complainant may argue that the act is in breach of some more general rule of legality or constitutionality: e.g. the manner in which the act was adopted

was in breach of the Treaty rules, it may fall outside the competence of the institution which adopted it, or it may fall outside Community competence altogether.

It is also possible to mount such a challenge directly in the Court of Justice itself, although there are strict restrictions on the standing of individuals under the provisions of Articles 230 and 232 EC which provide for the judicial review of unlawful acts and the unlawful failure to act on the part of the institutions. Member States, the Commission, the Council and, within limits, the European Parliament may also use Article 230 in order to seek the annulment of EU acts adopted by another institution. Through its decisions on such actions the Court of Justice has been concerned to construct a body of principles which delineate the powers of the institutions *inter se*, and of the Member States and the Community respectively. This is another area in which the Treaty, aside from setting out procedural rules which govern the legislative process and outlining minimum prerequisites of validity for EU acts such as a statement of reasons, does not provide much assistance to the Court. The tendency of the Court has been to interpret the powers of the Community broadly: the institutions are given certain tasks by the Treaties, and the Court has consistently held that they must be regarded as having either express or implied powers to carry out these tasks. Thus there is no explicit reserved area of sovereign powers for the Member States. However, the precise delineation of the powers of the States and of the Union remains a difficult area, as Chapter 6 will show. The advent of the principle of subsidiarity as a new criterion defining the relationship between the EU and the Member States, which may be justiciable before the Court, introduces a new range of challenges for the Court of Justice.

This outline has been limited to reviewing the legal order of the first pillar, that is, the 'European Community' in the strict legal sense. It has constructed a picture of unity and cohesion running through the legal order which is in fact partially undermined by the proliferation of systems of flexible integration such as EMU. Issues of flexibility, which have already been commented upon briefly in 1.5, will represent an underlying theme of many chapters, especially those parts of Chapter 5 dealing with the pillar system and the constitutional principles of the EU. In addition, it is important to conclude this outline by stepping beyond the confines of the first pillar, which has traditionally been the EU lawyer's primary domain. The writ of supremacy, direct effect and the 'constitutionalised treaty' more generally do not run in the second and third pillars. The forms of secondary 'law' provided for in relation to Common Foreign and Security Policy (common strategies, common positions and joint actions) and Police and Judicial Cooperation in Criminal Matters (common positions, framework decisions, decisions and conventions) cannot, for example, give rise to justiciable rights for individuals unless specifically adopted in national law. There is no equivalent to Articles 10 and 226-228 EC allowing the Commission to pursue proceedings against non-conforming Member States, although there is limited involvement of the Court of Justice in the third pillar after the Treaty of Amsterdam. The Court has limited jurisdiction under Article 35 TEU, including the possibility of references for preliminary rulings from national courts and the capacity to review the legality and to interpret certain measures taken under Title VI TEU (the third pillar) which will inevitably lead the Court to review the provisions of that Title more generally. On the other hand, in relation to a proliferation of legal practices such as the evolving institutional framework, international representation and the application of general principles such as transparency, it is an oversimplification to regard the first pillar as crudely separated from the second and third pillars. It may be still be a legal order of 'bits and pieces' as Curtin famously commented in 1993 (Curtin, 1993), but it is ever more a single legal order, with unified institutions, legal structures, values and principles. On that single legal order the Court of Justice performs an important cohesive function, operating in some domains as a constitutional court adjudicating between the various elements within the EU, including the institutions and the Member States, while upholding the 'rule of law'.

In view of all the many changes to the overall framework of the EU legal order since the early 1990s, including the institution and impact of the Treaty on European Union and the subsequent amendments in the Treaty of Amsterdam, the 2000 IGC, and the challenges of further enlargement especially towards the east, it seems wise to suggest that in ten years time the EU legal order may appear very different to how it is at present.

## **7. EXCERPT FROM JOSEPHINE SHAW: LAW OF THE EU (3RD ED.): EVOLVING FROM COMMUNITY TO UNION**

*N.B.: The work this excerpt has been taken from has been published in 2000 and does NOT yet reflect the ToA renumbering (see Primary Sources pack for a table containing pre and post-Amsterdam numbering) and developments that followed its publication – entry into force of the Treaty of Nice, the Convention on the Future of Europe and Treaty establishing a Constitution for Europe.*

### **2.1 Introduction**

The title and the text of this chapter and the one which follows seek to emphasise the dynamic and changing nature of first the European Community and then, later, the European Union and to highlight the fact that the processes of integration within Europe have not yet reached a conclusion or final stage of evolution. A basic knowledge of the history of the EC and the EU offers a number of benefits to the student:

- it gives a context to contemporary events, demonstrating that the current debates on the integration process have a long pedigree, and that ideas such as monetary union or political union are not simply novelties dreamt up by Jacques Delors in the late 1980s;
- it puts the EU firmly in the context of other developments within and outside Europe, recognising the significance for the European Union of events such as the unification of Germany, the end of the Cold War, the break up of the Soviet Union, the emergence of new democracies in Eastern and East Central Europe, as well as the economic context of the global trading order under the World Trade Organization;
- it highlights the ebbs and flows of the European Community and Union, which have coincided quite closely with the low and high points of the European economy since the Second World War;
- finally, the stop-start progress of political and economic integration emphasises the unparalleled contribution made by the Court at crucial points. Yet although the Court has been characterised as the ‘engine of integration’, when the events discussed in this chapter are reviewed subsequently in the context of developments in the EC legal system which form the main focus of this book, it will be seen that the work of the Court of Justice has not always run parallel to the political and economic evolution of the Treaties. In particular, sometimes there has been a fit and sometimes a misfit between political context and legal action; more often there appears to be a lag of some years between the point when work begins towards a new goal in the sphere of policy or politics and correspondingly significant progress in the construction of the EU legal framework.

The disadvantage of a summary account of the historical evolution of the EC and the EU is, of course, that it tends to suggest that there can be a linear account of this history. In fact, of course, different issues have evolved at very different speeds, and it is becoming increasingly difficult to provide a single account which stresses both the coherence of the effects of specific events such as Treaty amendments and the coherence of issues such as foreign and defence policy or justice and home affairs policy, which have evolved through a series of IGCs. Inevitably, the following account is severely constrained by the available space; additional elaboration upon the events and ideas discussed here can be found in the lists of further reading which follow at the end of these Chapters. This Chapter takes the narrative from the origins of the European integration process through to the conclusion and ratification of the Treaty of Maastricht. Chapter 3 picks up the story by presenting the key changes to the framework of European integration brought about by that Treaty, and carries on through the implementation of aspects of that Treaty to the preoccupations dominating the work of the EU in the year 2000.

## **2.2 The Roots of European Integration**

Although it would be wrong to characterise current developments in European integration as the direct descendants of earlier ideas and proposals, it is nonetheless of interest that the idea of a unified Europe is by no means new. The model of a Europe brought together not by military conquest, but in common pursuit of higher goals of peace, prosperity and stability has attracted the attention of thinkers since the Middle Ages. An institutional form of federal unity in Europe was argued for by prominent intellectuals of the Enlightenment such as Bentham, Rousseau, and, later, Saint-Simon. More concrete progress was made in the field of economic integration. The early period of capitalist organisation saw not only the transformation of the means of production and the shift to industrialisation, but also the integration of national markets, often achieved in parallel with national political unity. The next step was the liberalisation of trade between sovereign states, where Britain took a leading role with its commitment to free trade in the middle of the nineteenth century. However, none of the proposals for increased cooperation between states in the economic field such as a Central European customs union between the Hapsburg Empire and the German states in the 1840s achieved real success, and there was a resurgence of nationalism and protectionism in the late nineteenth century which eventually culminated in the First World War.

The interwar years saw continued discussion of the ideal of European integration as a better way forward for Europe than destructive interstate rivalry, most notably within the forum of the Pan-European Union founded in 1923 by the Austrian Count Richard Coudenhove-Kalergi. It is perhaps significant that amongst the pre-war membership of the Union were a number of politicians who played key roles in post-war Europe, including Konrad Adenauer, later Chancellor of the Federal Republic of Germany, and Georges Pompidou, later President of France. However, the influence of the Union did not succeed in saving the only initiative towards European integration of the interwar years put forward at the governmental level, the Briand Plan of 1929-30, a proposal by the French Foreign Minister for a confederal bond linking the peoples of Europe. The logic behind French foreign policy and the Briand Plan was that of achieving security for France against Germany by tying the latter firmly into a European structure of cooperation. The theme of the 'Europeanization' of Germany has been an enduring one which has enjoyed a renaissance since unification in 1990. Despite the modest nature of the proposals, the Briand Plan was never taken further because of scepticism and hostility in Britain, Italy and Germany.

## **2.3 The Post-war Climate of Change**

At the end of and just after the Second World War quite different attitudes to the prospects for European unity were apparent. Even before the end of the war, voices calling for a form of unity which prevented future wars could be heard in the Resistance movements of the occupied countries of continental Europe. Prominent figures in the Resistance movements such as Altiero Spinelli, who re-emerged much later as a champion of European federalism in the European Parliament in the late 1970s and early 1980s, argued for a federal Europe with a written constitution, state institutions such as a government and a Parliament, a judicial system and a common army. Resolutions supporting these propositions were passed at a conference of Resistance representatives held in Geneva in July 1944. It was believed at the time that support for European federalism would also come from Britain, in particular from Winston Churchill, who was popular in federalist circles following his dramatic offer to the French of the creation of a Franco-British union in 1940. The major driving force behind that offer was, moreover, Jean Monnet, who proved to be a key actor in post-war developments.

Churchill's loss of the British premiership with the victory of the Labour Party in the 1945 General Election, and the re-emergence of pre-war political leaders in many European countries at the expense of Resistance leaders, were two factors which contributed to the failure to translate the ideals of federalism into a concrete agenda for action. The immediate imperatives of national economic rebuilding took precedence over the proposal that post-war reconstruction should occur within an entirely new political framework. The danger was present, therefore, that as before the war the ideas of unity would not take root within the institutions of the state, and that rallying calls such as Churchill's famous speech in Zurich in 1946 and the resolutions of numerous federalist groups gathered at the Congress of Europe at The

Hague in 1948 would remain simply extragovernmental expressions of a desirable, but unattainable goal of integration within Europe. However, this view discounts a number of features which distinguish the two situations. These included the increasing closeness of certain key personalities such as Jean Monnet to centres of political power (Monnet had become head of the French Economic Planning Commission and thus was a senior civil servant), the willingness of federal idealists to countenance incremental strategies for achieving integration (the ideas of functionalism outlined in Chapter 1) and a greater global commitment to free trade and economic cooperation, evidenced by the adoption of the General Agreement on Tariffs and Trade (GATT) and the creation of the International Monetary Fund. Last but not least there was the need of the USA for stability in Western Europe in the context of the Cold War which followed hard on the heels of the Second World War and its consequent interest in and partial sponsorship of ideas of Western European integration.

In 1947 the USA committed itself to the so-called 'Truman Doctrine' which was a pledge of US support for 'free peoples who are resisting subjugation by armed minorities or by outside pressures'. The Americans had an interest in preventing a destabilising power vacuum in Europe. One outcome of this doctrine was the Marshall Plan to provide economic aid for reconstruction to countries in Europe committed to ideas supported by the USA, aid which, because of the underlying political motivation of the provider, was shunned by the Soviet Union and its allies in central and eastern Europe. The allocation, administration and delivery of American aid became the initial preoccupation of the first international organisation in the economic sphere set up in post-war Europe – the Organisation for European Economic Cooperation (OEEC) set up in 1948. The OEEC was a strictly intergovernmental organisation which never succeeded in achieving any of its grander ideals of economic cooperation, but nonetheless it had a wide membership within Europe and North America (sixteen founder members) which grew much larger when it gave way in 1961 to the Organisation for Economic Cooperation and Development (OECD) which encompasses other Western style economies such as Australia and Japan (see 1.4).

The broad attractions of a loose intergovernmental form of cooperation were also evident at an early stage in the political field where the grandly styled but rather ineffective Council of Europe was established in 1949 (see 1.4). The proposals for the Council of Europe grew out of the resolutions of the Hague Congress. Although the nature of the Council of Europe has always been bland (Urwin, 1995: 40), and it has consistently avoided controversial issues such as defence and security, it benefits from its symbolic role within Europe, including its role as a forum for discussion, and from the particular association it has acquired with political democracy and human rights. The most significant international instrument to come into being under the aegis of the Council of Europe is the European Convention on Human Rights and Fundamental Freedoms which came into force in 1953. Membership of the Council and signature of the Convention, while not demanding in the sense of requiring the signatory to relinquish a significant portion of state autonomy of action, have come to be benchmarks of acceptability amongst Western-style liberal democracies, achieved by countries emerging from dictatorship such as Spain and Portugal in the 1970s and more recently by the even newer democracies of central and eastern Europe.

As membership of the European Union has come to appear increasingly attractive to a range of European countries, the Council of Europe has become a convenient stepping stone in the process of achieving membership. However, at no time has the Council departed from the intergovernmental consensus-based approach to international cooperation.

Finally, in the military field, cooperation took a distinctly Atlanticist turn with the conclusion in April 1949 of the North Atlantic Treaty tying together the North American states with the European parties to the 1948 Treaty of Brussels – France, the UK and the Benelux countries. Germany was later brought into the Western European Union after the failure of the initiative for a European Defence Community in 1954. In 1955 Germany joined NATO.

## **2.4 From Grand Ideals to Incremental Stages**

A separate chapter in the evolution of integration in Europe was opened in May 1950 with the publication of the Schuman Plan, drawn up, on behalf of the French Foreign Minister Robert Schuman, by Jean



Monnet. This Plan was the precursor of the European Coal and Steel Community (ECSC). The text of the Plan neatly encapsulates the small and large visions of European integration which have marked the evolution of the European Community (Weigall and Stirk, 1992: 58--9). The plan itself was shaped around the proposal to place French and German coal and steel production under a common authority (a 'High Authority') outside national control and open to the participation of other European countries. However, although its immediate preoccupation was with supranational control of these two commodities alone, its wider agenda was evident. It declared this to be only the first step in the federation of Europe, and asserted that 'Europe must be organised on a federal basis'. However, 'Europe will not be made all at once or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity'. The ECSC therefore represents a clear example of the functional approach to integration.

This French proposal, attractive to Germany because it marked the first step towards recovering sovereignty over the Saarland, still then belonging to France, while allowing the fledgling Federal Republic to regain a place in the international community, attracted also the participation of the Benelux countries and Italy. Although the UK participated briefly in the negotiations leading to the conclusion of the ECSC Treaty, the plan to transfer control away from national governments to an appointed body proved unacceptable. Only a much smaller number of countries proved ready to participate in truly supranational international cooperation than in the looser arrangements of the Council of Europe.

The ECSC Treaty was concluded in Paris in April 1951, and contained an institutional structure rather different to that envisaged by the Schuman Plan itself, in particular with less strong elements of supranationalism. The actions of the High Authority at the centre of the institutional structure of the ECSC were to be tempered by a Council of Ministers, composed of representatives of the Member States, to give a greater intergovernmentalist input into the Community and to act as a political counterweight to the High Authority. Its task was to give its opinion to the High Authority which was charged with the principal decision-making power. The triad of political institutions was completed by a Common Assembly composed in the early years of representatives chosen by the national parliaments, and endowed only with consultative powers and a minimal role in ensuring the accountability of the High Authority. Some aspects of the institutional and decision-making structures were strongly supranational: decisions were to be taken and then implemented by the High Authority independently and action did not require a consensus of the Contracting Parties; furthermore, decisions of the High Authority were binding upon the Contracting Parties.

However, the potential for independent decision on the part of the High Authority was restricted by the nature of the ECSC Treaty as a *traité loi*. The four-pronged institutional pattern, which was later adopted as a model for the European Economic Community (EEC) in 1957, was completed by a Court of Justice, charged with ensuring observance of the law.

The ECSC Treaty created a common market for coal and scrap (Article 4). This comprises the abolition of internal customs duties and quantitative restrictions on imports and exports, measures and practices which discriminate between producers, purchaser or consumers, government aids and subsidies and restrictive practices tending towards the sharing or exploiting of markets. These essentially free market principles were fetters upon the possible dirigiste tendencies of the High Authority which might have resulted from the influence of its first President, Monnet, who was known to favour a strong element of central planning in the economy. Interestingly, unlike the later EEC Treaty, the ECSC Treaty does not provide for a complete customs union for coal and steel as it does not create a common external tariff for imports from third countries. In practice, the Member States have created a system of uniform external protection to avoid anomalies between coal and steel products and other products.

The ratification of the ECSC Treaty by the national parliaments and the entry into force of the Treaty did not inexorably lead towards closer integration. The success of the ECSC Treaty was followed closely by a serious failure – the Treaty establishing a European Defence Community (EDC) and the draft Statute for a European Political Community. This initiative was also based on a French proposal aimed at managing the re-emergence of Germany on the international stage. The Pleven Plan put forward by the French Minister of Defence proposed to apply the methods of the Schuman Plan to the field of defence, allowing German rearmament, then being vigorously urged by the USA, within the context of a European

Army. The Treaty establishing the EDC was concluded by the Six in May 1952 (the UK participated in early negotiations but then withdrew from the plan, despite Winston Churchill's championship of the concept of a European army in 1950), but then encountered serious difficulties at the ratification stage. However, even before ratification, the Parliamentary Assembly envisaged for the EDC was meeting and drafting, as required by Article 38 EDC, proposals for institutional reform to guarantee the democratic character of the Community in the form of a draft Statute for a European Political Community. Both plans collapsed when the EDC Treaty did not achieve ratification by the French parliament in August 1954. Some semblance of purely European cooperation in the defence field was rescued at the initiative of the UK, with the creation in 1954 of the Western European Union (WEU; see 1.4) bringing Germany into the security framework of the West. After years of obscurity, the WEU has enjoyed a strange renaissance since the mid-1980s offering a distinctive Western European voice in defence issues and as the basis for an expansion of European integration in the defence field. It has been specifically incorporated into the Common Foreign and Security Pillar since the Treaty of Maastricht as an 'integral part of the development of the Union providing the Union with access to operational capability' (Article 17 TEU) and is charged with the implementation of decisions of the Union which have defence implications.

Despite these setbacks further concrete progress towards European integration was made in the 1950s. This time the initiative for a '*relance européenne*' came from the Benelux countries, already tied together in tighter economic cooperation than the other members of the ECSC. The key to the new initiative was that economic integration should precede political integration, but that new instruments were needed to go beyond both the ineffectual OEEC and the sectorally-based ECSC. This broadening and deepening of the emphasis of economic integration is often said to be a classic example of the principles of 'spillover' outlined in 1.4. The proposal was for a general common market, and for specific measures in the emerging field of nuclear energy. Out of a discussion at Messina in June 1955 between the Foreign Ministers of the Six came the decision to convene a committee to elaborate one or more treaties to give effect to these proposals. The report of the committee, named after its Chairman Paul-Henri Spaak, a Belgian, was submitted and approved by the Foreign Ministers of the Six by May 1956 (Weigall and Stirk, 1992: Ch. 6).

The Spaak report called for the creation of a common market, which it defined as the result of the fusion of national markets to create a larger unit of production. This, it argued, would make for greater economic growth and an accelerated increase in the standard of living. The Report foresaw three main strands to the development of this common market: the achievement of a customs union and free movement of commodities and factors of production; the creation of a policy for the common market to ensure fair competition; and the adoption of measures to facilitate the transformation and modernisation of economies and enterprises, for example through investment aid and retraining of workers. What the Report did not propose were common educational or social policies, which were not regarded as necessary for the achievement of the common market. The institutional structure was based on that of the ECSC, with a Court, a Common Assembly, a Council of Ministers, and a central supranational authority, in this case termed the Commission. Once again the Commission was to be the pivotal political institution, but endowed with rather fewer powers than the High Authority under the ECSC Treaty. The Spaak Committee accepted that the many activities to be undertaken by the institutions for the achievement of these goals could not be regulated in detail in a Treaty, and that what was needed was not a *traité loi*, but a *traité cadre*, itself giving extensive law-making powers to the institutions, in particular to the Council. This Treaty was elaborated on the basis of the Spaak Report and signed in Rome in March 1957, along with a Treaty establishing a European Atomic Energy Community (Euratom). The process of parliamentary ratification proceeded smoothly and the Treaties entered into force on 1 January 1958.

The EEC represented a reversion to the vision of a Europe created by stages, with the common market as a stepping stone towards political union. As such, it is a remarkable triumph of common interest over diversity. The Six had very different motivations and goals in seeking the creation of the Community. France had long been pursuing a policy of preventing German domination of the continent of Europe. Germany saw supranational cooperation as the means to regain self-respect and standing in the international community. The Benelux countries sought to overcome the disadvantage of smallness in an increasingly global economy. Italy was looking for a new start and respectability. All the countries saw the

potential for economic benefit: in particular, the Germans sought outlets for their manufactured products, and France insisted on an agricultural policy which protected its large agricultural sector. Italy fought for the inclusion of the free movement of workers in order to capitalise on one of its greatest assets – its labour. At an institutional level, too, the document represents a compromise between federalists and intergovernmentalists, and like any document which is the result of compromise, the EEC Treaty contains inconsistencies which articulate the delicate balance between giving independence of action to the supranational institutions and retaining Member State control over the direction of the Community.

## **2.5 The Non-Participants in Supranational Europe**

The UK excluded itself from participation in the supranational project of the European Community from the outset of the negotiations for the ECSC Treaty. Soon after the ratification of the EEC Treaty, the UK spearheaded negotiations looking at the possibility of instituting some form of free trade arrangement between the Six and the other OEEC countries, but without a common external tariff or arrangements for the harmonisation of laws to prevent distortions of competition.

A number of Member States were anxious about the dangers of watering down their achievements; opposition was strongest from the French, and the negotiations came to an abrupt end when they were vetoed by General de Gaulle, then President of France. As a result of this rebuff a number of OEEC countries formed a separate, but looser arrangement for economic cooperation, the European Free Trade Association (EFTA), concluded by the Treaty of Stockholm in January 1960. The founder members of EFTA comprised the UK, Denmark, Sweden, Norway, Austria, Switzerland and Portugal. They were subsequently joined by Finland and Iceland, but numbers were reduced by the departure of Denmark, the UK and later Portugal to join the European Community. EFTA often sought closer economic relations with the Community, and in the 1990s these culminated in the signature of the Treaty creating the European Economic Area (EEA) which largely assimilated the relations between European Community and EFTA countries to internal European Community relations, and applied the basic principles of the internal European Community common market to those relations. This treaty, too, encountered difficulties in the ratification process when it was rejected by a referendum in Switzerland. However, the failure of one state to ratify this Treaty did not preclude it coming into force on 1 January 1994. Many of the members of EFTA were also applicants for membership of the EU, and on 1 January 1995, the accession to the EU of Austria, Finland and Sweden (the 'EFTAN' enlargement; see 3.2) reduced the participants in the EEA arrangements to Norway, Iceland, and Liechtenstein.

A change of attitude in the UK towards the European Community in the early 1960s resulted in two requests for membership in 1961 and 1967, which were vetoed or stalled by de Gaulle's opposition to British membership. Only after the departure of de Gaulle was the path opened to the enlargement of the Community.

## **2.6 The Early Years**

The years of the late 1950s and the early 1960s were years of economic boom with unprecedented growth which made the tasks of the nascent Community rather less daunting. The Treaty provided for a transitional period of twelve years, divided into three stages each of four years, ending on 1 January 1970. According to the original treaty timetable, at the end of this period, the common market should have been in place. Common economic interest dictated that during the first two stages progress was smooth involving the dismantling of tariffs and quota restrictions, the erection of a common external tariff, the liberalisation of the free movement of workers and the creation of a system protecting the social security interests of migrant workers, the adoption of the initial regulations for the implementation of the Community's competition policy, and the introduction of a system of common farm prices and common organisations of the market which form the basis of the Common Agricultural Policy (CAP). Up to this point the Member States moved forward by consensus, since during the first two stages the Treaty provided for decisions to be taken by the Council acting unanimously. The Commission under Walter Hallstein, its first President, played a key role in these achievements, initiating policy and brokering

agreements between the states, and there seemed little opposition at that time to its full exploitation of the supranational potential of the tasks which it had been assigned under the EEC Treaty. The Court of Justice too was busy carving out a distinctive role for itself within the Community system. In the ground breaking cases of *Van Gend en Loos* in 1963 (Case 26/62 [1963] ECR 1) and *Costa v. ENEL* in 1964 (Case 6/64 [1964] ECR 585) the Court sought to distance the early Community legal order from the conventional structure of international law by identifying the importance of the relationship between Community law and individual citizens of the Member States, and by asserting the superiority of Community law over the laws of the Member States. The Court argued that there had been a transfer of sovereign powers by the Member States to the Community.

Meanwhile, however, the warning signs for the Community had been present since 1958 when General de Gaulle came to power as the first President of the Fifth French Republic on a fiercely nationalistic platform. His view that cooperation within Europe should take place within a confederal structure in which the Member States retained full sovereignty was put forward in the Fouchet Plan of 1961, an attempt to divert the process of political union to his own ends. This proposal for a 'union of states' based on strictly intergovernmental precepts came to naught after encountering opposition in particular amongst the smaller states. Nonetheless it was clear that the favourable political circumstances in which the Community had flourished would not last for ever. The crisis point came when De Gaulle was faced with the prospect of the Community entering the third stage of the transitional period at the beginning of 1966 when many important decisions would be taken by a qualified majority in the Council.

## **2.7 De Gaulle and the Luxembourg Accords**

De Gaulle objected to qualified majority voting under the EEC Treaty as he felt that it would endanger French interests within the Community. Yet majority voting was due to apply to agricultural pricing decisions – one of the issues of keenest interest for France – from 1966. De Gaulle chose to make his stand, and to precipitate the most serious crisis in the history of the Community, not over majority voting as such but over a series of linked proposals put forward by the Commission in March 1965. These concerned the financing of the CAP through a system of own resources belonging to the Community rather than through contributions by the Member States, as well as increased Parliamentary input into the making of the budget. The Commission rightly saw these matters as linked: the CAP (then as now) represents the main expenditure by the Community; 'own resources' (then coming from the revenue of the Common Customs Tariff (CCT), agricultural levies at the external borders and a percentage of the new common turnover tax levied by all Member States – Value Added Tax (VAT)) – were intended to give the Community financial autonomy; and greater control by the European Parliament was a necessary democratic counterweight as control over the budget increasingly escaped the scrutiny of national Parliaments. France was not in favour of a greater role for the European Parliament, and used the lack of agreement on the package as a whole (i.e. the unwillingness of the other Member States to follow its line) to justify withdrawing from the work of the Council from June 1965 to January 1966. This period is sometimes called the period of '*la politique de la chaise vide*' (empty chair politics), and the deadlock was broken only by an agreement between the Six known as the Luxembourg Accords.

It was agreed, in the case of decisions which were to be adopted by a qualified majority, but where very important interests of one or more Member States were at issue, that the members of the Council would attempt, within a reasonable period of time, to reach solutions capable of adoption by unanimity. The French delegation added that in its view such discussion should continue indefinitely until a unanimous decision was reached. The delegations accepted that there was no common view on what should be done if unanimity could not be achieved, but agreed at that stage that this disagreement should not prevent the normal work of the Community being taken up once more. The result, in practice, of the Luxembourg Accords was that there was no voting in the Council. Just as the Member States arrived at the stage where majority voting would be introduced, they balked at the last hurdle. Thus De Gaulle had achieved his central objective of weakening certain supranational elements of the Community. The intergovernmental mode of decision-making based on consensus building prevailed over a federalist majoritarian approach as more and more of the Member States saw the attraction of maintaining the

practice of unanimity. After the accession of the UK, for example the Accords allowed British politicians to maintain what they have been fond of calling the 'veto' over decisions of the Community which the UK does not like. This lies at the heart of repeated Government statements to the Westminster Parliament that British interests can always be protected by the use of the veto.

Although the Luxembourg Accords are essentially in the nature of informal understandings between sovereign states, and as such have no formal status within the EC legal system, they have proved remarkably enduring. No legal challenge can be mounted by any individual, institution or Member State to a refusal on the part of the Council to proceed to a vote. Even the Commission which makes the proposals on the basis of which the Council acts is impotent in such a case. The Accords were responsible for nearly twenty years of legislative stagnation within the Community where negotiations lasting up to ten years might be needed before agreement was reached on the simplest pieces of legislation. There is only one recorded instance of the Council riding roughshod over one Member State's assertion of a vital national interest in order to block qualified majority voting, and this was in May 1982 when the UK was seeking to oppose the adoption of agricultural prices. Furthermore, as the European Council became increasingly important within the Community's political structure, the practice emerged of passing on decisions which could not be taken in the Council to the European Council where their substance would be reduced to the lowest common denominator in the best traditions of political compromise. Commitments in the European Council to break the legislative deadlock by agreeing to relinquish the practice of decision-making by unanimity proved to be empty rhetoric. Since provisions of the Treaty already provided for qualified majority voting in certain instances but these were being ignored, what was needed to revitalise the Community was not merely an increase in the range of decisions which could be adopted by a majority, but also a new willingness actually to vote on the part of the Council. Not until the adoption of the Internal Market Programme in 1985 and the entry into force of the Single European Act on 1 July 1987 were these two conditions satisfied. After that, remarkably rapid progress was made in many fields in the adoption of legislation required for the achievement of the single internal market.

The failure of the functionalist theory of European integration to take full account of the effects of resurgent nationalism as demonstrated by De Gaulle is one example of the deficiencies of the theory which led to its widespread rejection as a tool of analysis of the Community in the 1970s. However, it would be wrong to lay too much responsibility at the door of De Gaulle. The saga of the Luxembourg Accords and subsequent voting practice in the Council is symptomatic of how the Community has evolved, at least until the adoption of the Single European Act. The pressures of a global economy in recession, the impact of the oil crisis, the loss of confidence and prestige on the part of the Commission after the departure of President Hallstein and the effects of enlargement to incorporate countries with ever more diverse interests were all factors which contributed to the years of stagnation.

## **2.8 The Years of Stagnation**

The years following the 1965 crisis were marked not only by a protracted legislative stalemate, but also by a general loss of momentum on the part of the Community. The politics of incremental steps to European Union would normally have demanded a significant reappraisal of the direction of the Community at the conclusion of the transitional period by which time the European Community was to be one, common market. Yet creating the common market proved to be much more complicated than simply legislating for a common external tariff and prohibiting internal barriers to trade and factor movements. In fact, the hidden barriers composed of the multiplicity of national rules which govern the trading environments in each of the Member States proved resistant to removal, and, as the European economy moved into recession in the mid-1970s, underwent a revival as the Member States shifted increasingly towards national protectionism. Consequently, to say that the common market was complete at the conclusion of the transitional period would be merely an empty rhetorical statement.

Attempts to move on to the logical next step – the achievement of full economic and monetary union – were entirely fruitless. The Report of the Werner Committee in 1971 setting out a timetable for the achievement of monetary union by 1980 contained unrealistic goals. Currency instabilities in the 1970s

destroyed a number of attempts to peg exchange rates during that decade. The Community was too vulnerable to wider economic changes to be capable of translating any amount of goodwill into concrete progress.

Moreover, commitments such as that made at the Paris Summit in October 1972 to convert the (economic) Community into a (political) European Union proved equally worthless, as the Member States were incapable of translating words into actions. The Tindemans Report of 1975 drawn up at the instance of the European Council was left on the table by the Member States. Much the same fate was suffered by the draft 'European Act' drawn up by Genscher and Colombo, the German and Italian Foreign Ministers, which resulted only in a Solemn Declaration on European Union adopted by the European Council at Stuttgart in June 1983. However, some of these early attempts at constructing citizenship policies were picked up again in the late 1980s and 1990s, as ideas about political union constructed around a notion of membership were revitalised.

The most significant source of progress towards political union between 1970 and 1985 was the gradual increase in the intensity of intergovernmental cooperation in the foreign policy field and its subsequent institutionalisation as European Political Cooperation (EPC) in Part III of the Single European Act. Wherever possible, the Community has sought to present a common face to the outside world. However political cooperation of this nature has always been entirely voluntary on the part of the Member States and tended, then as now, to break down in the face of serious challenges to foreign policy cohesion such as the Argentinean invasion of the Falkland Islands in 1982 and the subsequent war between the UK and Argentina.

One proposal during this period does deserve greater attention and that is the Draft Treaty establishing a European Union (DTEU) adopted in 1984 by the European Parliament, as a counterweight to the initiatives of the diplomats and national politicians. In the climate of the time, when European Union was not high on the agenda of the Member States, the sponsorship of the DTEU by the Parliament could have been seen as a vain and impotent gesture on the part of an ineffective assembly. On the contrary, the DTEU played an important if indirect part in setting the agenda of closer integration for the second half of the 1980s.

The DTEU aimed not to sweep away the Community patrimony or *acquis communautaire*, but to build on existing achievements, albeit in an entirely new Treaty. The Treaty aimed to create a federal entity displaying the features of democratic accountability of its institutions, democracy in its decision-making processes, legitimacy through its respect for fundamental rights, and political decentralisation. The DTEU is notable for being the first semi-official Community document in which the concept of subsidiarity appeared. Article 12(2) regulates the case of concurrent competence held by the Member States and the Union:

'The Union shall only act to carry out those tasks which may be undertaken more effectively in common than by the Member States acting separately, in particular those whose execution requires action by the union because their dimension or effects extend beyond national frontiers.'

There are remarkable similarities between this formulation and that ultimately inserted in the Treaty of Maastricht.

In keeping with the hybrid and mixed traditions of European integration, the DTEU envisaged a combination of 'common action' (i.e. supranational action by the institutions of the Union) and 'cooperation' (i.e. intergovernmental decisions taken by the Member States and implemented by them). The aim of the DTEU was to create a bicameral legislature with the European Parliament – elected according to a uniform electoral system – holding equal powers with the Council of the Union. The Commission was to retain the right of initiative and the right to put forward amendments. The Draft proposed the institutionalisation of the European Council. The general policy aims of the Union would have remained broadly the same, although social policies would have been strengthened.

The fate of the DTEU is discussed in 2.10 on the re-launch of the Community.

## 2.9 Widening and Deepening

It should not be thought that the DTEU was the only bright spot of the post-transitional period era. On the contrary, during the 1970s and early 1980s the Community went through a significant process of widening and deepening. It was widened through the process of enlargement from Six to Twelve by 1986. This would not have occurred if the candidate countries had not seen the Community as a positive force creating increased economic and political cohesion in Europe. The Community was also deepened in two dimensions – the substantive and the constitutional.

In the domain of substantive competences, despite difficulties which can be attributed at least in part to the Luxembourg Accords, the Commission was able to persuade the Council to embark upon new legislative programmes which were not envisaged in the Treaty itself. The Community developed policies on the environment and in the field of research and development without actually holding specific powers in these areas. Creative use was made in these fields of Article 235 EEC (now Article 308 EC) which provides a residual general law-making power for the purposes of the achievement of the objectives of the Community where specific powers are not granted elsewhere in the Treaty. It was not difficult to argue that the environment with its obvious cross-border dimension, and research and development where cross-border cooperation can significantly increase the level and effectiveness of investment, should thus be brought within the ambit of Community policy-making, although countries such as Denmark were not wholly happy about such extensions of Community competence.

Less successful was the argument for the launch of a Community social policy. The roots of a more activist policy lay in the declaration of the Paris Summit in 1972 that the Member States attributed the same importance to energetic proceedings in the field of social policy as to the realisation of economic and monetary union, thereby seeking to give the Community a more human face. A Social Action Programme was elaborated by the Commission and accepted by the Council in 1974, but it resulted in few significant legislative measures.

In the process of the constitutionalisation of the EC Treaties, the 1970s saw a number of significant developments. The Court of Justice confirmed the supremacy of EC law, holding that national legislation may be 'disapplied' where it is contrary to Community law (*Case 106/77 Amministrazione delle Finanze dello Stato v. Simmenthal (Simmenthal II)* [1978] ECR 629). It also extended the concept of direct effect to directives, allowing individuals to rely upon directives in national courts in order to claim their EC rights (*Case 41/74 Van Duyn v. Home Office* [1974] ECR 1337).

In the field of external relations, the Court developed a theory of implied powers in *Case 22/70 Commission v. Council (ERTA)* ([1971] ECR 263) which considerably extended the scope of the EC's competence to conclude international agreements in place of the Member States. Finally, in the context of interinstitutional relations, it was established that legislation adopted by the Council would be annulled if the Council had failed to consult the European Parliament had where it was required to do so (*Case 138/79 Roquette Frères v. Council* [1980] ECR 3333). These are just four examples of many which illustrate that while the EC's political system partly stagnated, the Court of Justice vigorously pushed forward the development of the EC's legal system, considerably strengthening the hands of individuals claiming grievances against Member States alleged not to have observed EC law and of the supranational institutions within the Community structure, so that when the Community finally emerged into a period of positive growth in the political arena it was with a vastly changed legal system (see Chapter 5 on the constitutional development of European Union).

## 2.10 The Relaunch of the Community

The strong support for European Union coming from the European Parliament in the form of the DTEU was just one of the factors which lay behind the achievement of an interstate bargain needed to relaunch Europe. Indeed, the immediate impact of the DTEU should not be overestimated, since when the Draft came before the European Council at Fontainebleau in June 1984 it was not accepted, but shifted off for

discussion to an Ad Hoc Committee on Institutional Affairs, commonly named after its Chairman, James Dooge of Ireland. One of the first acts of the Dooge Committee was in fact to reject the DTEU as being too radical and open-ended, and proposing unacceptable levels of institutional reform.

On the other hand, the Dooge Committee was generally in favour of some reforms of the EEC Treaty, proposing, by a majority of its members (the UK opposing), the convening of an intergovernmental conference to prepare a draft European Union Treaty. The Committee also pointed out, that certain very basic things could be done to further the objectives of the Community, and these included the completion of the unfulfilled tasks under the EEC Treaty. This Report alone, however, would not have persuaded the UK and the other Member States sceptical of deeper integration to agree to significant reforms of the Treaty. Pressure came additionally from a number of different sources.

By 1984 François Mitterrand, then President of France, had become a firm proponent of taking the European Community project further. In general he was supported by Helmut Kohl, the German Chancellor and the other half of the firm Franco-German alliance which has existed at the heart of the European Community since the conclusion of a Treaty of Friendship between the two states in 1963. In the first half of 1984, France assumed the Presidency of the Community, and Mitterrand was determined to leave his mark. He kept up pressure on the UK by making constant reference to the possibility of creating a two tier Europe, with those Member States prepared to go further forging ahead in the creation of a European Union, leaving others such as the UK behind. This was opposed by the UK which did not want to risk falling behind as had happened once before in the 1950s. Mitterrand also engineered a resolution of the long-running dispute between the UK and the Community concerning the so-called British budget rebate, which recognised that the UK was a net over-contributor to the Community budget. Between the European Councils at Brussels in March and Fontainebleau in June 1984 the European Community hovered on the brink of breakdown. Eventually, at Fontainebleau, Margaret Thatcher accepted a compromise deal very similar to one she had rejected at Brussels, and she did not oppose the creation of either the Dooge Committee or a second Ad Hoc Committee on a People's Europe, chaired by Adonnino.

At the same time, a new President of the Commission was appointed, the French socialist Jacques Delors, who resolved to mark his occupation of the post by succeeding where previous Commission Presidents had failed in revitalising the Community and re-establishing the prestige of the Commission. In choosing the programme to complete the internal market as his flagship he went back to the economic and incrementalist roots of the Community to be found in the Schuman Plan and the Spaak Report, and found a proposal which offered something to everyone – Euro-sceptics, federalists, European business leaders – in its promise to bring growth to the European economy. In his task, Delors was assisted by the nomination to the Commission by Margaret Thatcher of Lord Arthur Cockfield, a committed free market liberal. Cockfield, appointed Commissioner responsible for the Internal Market, put together at the request of the European Council the so-called 'White Paper' setting out a total of nearly three hundred measures which would need to be adopted to remove the physical, technical and fiscal barriers to trade in the Community. Already in January 1985 Delors started making speeches proposing the achievement of these objectives by the end of 1992 (two terms of office for the Commission) and when the White Paper came before the European Council at Milan in June 1985 it was unanimously accepted. Where some Member States differed from the others was with regard to the necessity for institutional reform to make the White Paper a reality. The UK argued that it was possible to complete the internal market simply through informal improvements in the decision-making processes of the Council. However, anxious to bring some concrete achievement out of the Italian Presidency, the Italian Prime Minister called for a vote on the convening of an intergovernmental conference to discuss amendments to the Treaty necessary to implement the goals of the White Paper, and, uniquely within the history of the Community, the proposal for a conference was carried by a majority vote, with the UK, Denmark and Greece opposing.

Reluctantly, the UK participated in the conference, arguing for institutional reforms including majority voting and the strengthening of the European Parliament to be limited to those measures necessary to complete the internal market. Majority voting was successfully excluded by the minimalists from the contentious areas of fiscal harmonisation, the free movement of workers and social policy.



Progress towards monetary union was kept out of the main body of the Treaty, with merely a reference being made to it in the Preamble. European Political Cooperation was included in the Treaty, but although it was given an institutional framework, it was maintained on a strictly intergovernmental basis excluding the operation of the Community rules themselves. Negotiation of what became the Single European Act proceeded exceedingly quickly, and was concluded at the European Council in December 1985 in Luxembourg, ready for signature in February 1986.

At the time, the UK believed that it had scored a significant victory in removing the impetus for a two tier Europe, in persuading the rest of the Community of the benefits of the free market, and in minimising the impact of institutional reforms. Criticisms of the Single European Act came from the European Parliament which felt cheated of any role in the negotiations and objected to the outright dismissal of its initiative, and from pro-European commentators who feared that the SEA, being more intergovernmentalist in nature, might lead to a significant watering down of the supranational content of the Community and its legal order in particular. Subsequent events have, however, proved such pessimistic prognoses to be wrong, and now require a broad reassessment of the significance of the SEA, which claimed in its Preamble to be, and ultimately turned out to be, a stepping stone on the road to closer European integration.

## 2.11 The Single European Act

The provisions of the Single European Act can be divided into five categories. First, and foremost, there were provisions amending the EEC Treaty, with a view to the achievement of the goals of the White Paper. These comprised principally:

- Article 8a EEC, which contains a definition of the internal market and setting the deadline of 31 December 1992 (now Article 14 EC);
- a new law-making power to be exercised by the Council acting by a qualified majority in cooperation with the European Parliament, giving the Council the necessary means to achieve the objective in Article 8a (Article 100a EEC, now Article 95 EC);
- a new legislative procedure (the 'cooperation procedure') creating a Parliamentary second reading of proposed legislation, after the Council has adopted a 'common position' by a qualified majority and the Commission has reviewed the amendments proposed by the Parliament on its first reading (now to be found in Article 252 EC).

Further amendments to the EEC Treaty were introduced by the second category of provisions which consolidated *de jure* some of the extensions of competence which had occurred *de facto* since the early 1970s, and to establish some important new powers associated with the Community's core activities. An example of the latter was the inclusion of a law-making power in what is now Article 12(2) EC to allow the adoption of rules designed to prohibit discrimination on grounds of nationality against nationals of other Member States. In the area of new or reinforced competences, the most important developments concerned regional development, research and technological development, and the environment, each of which was further amended by the Treaties of Maastricht and Amsterdam (see now Articles 158-176 EC). Finally, in this context, there were minor amendments to the Treaty provisions concerned with social policy, most notably the first reference to the role of 'social partners' and the 'social dialogue' (i.e. the two sides of industry, unions and employer representatives) in relation to social legislation in what was then Article 118b EEC. Article 118a EEC introduced the first law-making power in the field of social policy to be based on qualified majority voting, specifically in the area of health and safety of workers.

The third category of provisions allowed for an important addition to the institutional structure of the Community, through the creation of a Court of First Instance, to be attached to the European Court of Justice (now Article 225 EC). This Court was set up by Council Decision and commenced work in 1989.

The last two categories of provisions did not amend the EEC Treaty itself. In other words, they did not form part of the supranational corpus of EC law, but operated in the conventional realm of international law. Title I of the Single European Act consolidated and institutionalised the activities of the

European Council, until then merely an *ad hoc* and informal gathering of the Heads of State or Government of the Member States. It was now required to meet at least twice a year and the leaders were assisted by their Foreign Ministers and a Member of the Commission (conventionally the President) (see now Article 4 TEU).

Finally, Title III of the Single European Act put the practice of European Political Cooperation (EPC) on a much firmer footing. Throughout this Title, the Member States were referred to as the High Contracting Parties, thereby stressing the intergovernmental nature of EPC; however, there were linkages with the Community's institutional structure in so far as the Ministers of Foreign Affairs meeting within the context of EPC were chaired by the representative of whichever Member State held the Presidency of the Council. The Commission was 'fully associated' with the work of EPC (Article 30(3)(b) SEA) and the Presidency was responsible for informing the European Parliament of the foreign policy issues currently at issue within EPC. The voluntarist nature of EPC was stressed by Article 30(1), which merely bound the High Contracting Parties to 'endeavour jointly to formulate and implement a European foreign policy' (see 3.1 for important changes to the nature of foreign policy cooperation introduced by the Treaty of Maastricht).

## **2.12 After the Single European Act**

The immediate prognosis for the Single European Act was not good. It encountered harsh criticism on account of the vagueness of its wording, the many derogations which it allowed Member States, and its assertion that completing the internal market was somehow a new goal for a Community which since 1958 has always been committed to creating a common market (Pescatore, 1987). These criticisms, however, fail to take into account that progress for the Community must always take the form of delicate interstate bargains, which themselves may be transformed into more positive achievements by subsequent political events and by the willingness of the institutions and the Member States to implement the provisions in good faith. By 1985 the Community was suffering a serious crisis of legitimacy. It was seen by many to be a lame duck since it could never deliver on its grandiose aims, and the much vaunted common market was quite clearly a chimera. The Community lurched from one crisis to another, beset by budgetary indiscipline, agricultural spending spiralling out of control, and the lack of an obvious contribution which it could make to the pursuit of macroeconomic growth in Europe. In the event, the Single European Act revitalised the fortunes of the Community, as the Member States became involved in a project for which all had enthusiasm. The 'Christmas Tree' (i.e. overoptimistic) economic analysis (up to 5 million new jobs; an increase in 5-7 per cent of GDP) of the team of economists charged by the Commission with the task of estimating the macroeconomic benefits of the single market or, to put it another way, the 'costs of non-Europe', generally prevailed over more sober judgments of the negative effects of uncontrolled industrial restructuring on more vulnerable regions (Cecchini, 1988; Cutler *et al.*, 1989).

From most perspectives, the progress made by the institutions towards the completion of the 1992 programme was impressive. The Commission rapidly put forward proposals for the bulk of the three hundred or so measures envisaged by the White Paper. The Council streamlined its decision-making machinery, adopting an amendment to its working procedures to allow any one member of the Council, or the representative of the Commission who attends without a vote, to call for a vote on a measure. This, coupled with a new willingness not to seek to rely upon the Luxembourg Accords, led to a remarkable acceleration in the legislative process. However, very many important and contentious measures still needed to be adopted unanimously, and in this context the old practice of building 'packages' which offer something for everyone in return for compromises has continued. That was evident in July 1992 when the important fiscal harmonisation measures were agreed by the Council with the UK conceding the power of the Community to set VAT rates in return for concessions on a favourable taxation level for Scotch whisky, an important UK export.

The European Parliament meanwhile continued to make full use of the limited powers which were conceded to it, maintaining its fruitful alliance with the Commission in order to exercise maximum influence over the legislative procedure at both first reading and second reading. It sought to protect the

use of the cooperation procedure by preventing the Council from using legal bases within the Treaty for measures which require a lower level of Parliamentary input. It did this by supporting Commission litigation in the Court of Justice and by bringing actions in its own name, seeking the annulment of measures enacted on the basis of the 'incorrect' legal basis. It enjoyed a mixed degree of success (on legal basis litigation see 6.8 and 7.18).

As progress was made quite rapidly towards the completion of the legislative goals set in the Single Market programme, extensive use was made of a new style of minimalist regulation by the institutions, which introduced essentially a new technique for harmonising the legislations of the Member States. In its case law on barriers to trade between the Member States, the Court of Justice had already made an important contribution to the goals of the internal market by holding that where a product is lawfully put on the market and sold in one Member State, it cannot normally be excluded from the market in the other Member States (the so-called *Cassis* principle, named after Case 120/78 *Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979] ECR 649). Products must be allowed to benefit from production in one trading environment and sale in another, unless the Member State seeking to impede import or marketing can successfully argue that the rules which it is applying to the imported product (and to identical national products) are necessary for the protection of certain mandatory interests such as consumer protection, health and safety or the protection of the environment. The Commission then altered its policy on the harmonisation of national laws in order to incorporate this principle of mutual recognition. Measures put forward for adoption set only basic minimum standards for products which, if complied with, guarantee the right to free movement. This approach had obvious attractions for states such as the UK which were pursuing a vigorous deregulatory approach at national level, and which argued for the adoption of this approach at Community level. The argument is that this approach sets the stage for products to compete freely in a wider market, with consumers effectively choosing the type of trading (and, therefore, regulatory) environment in which they would like products to be produced. Consumer lawyers have countered by pointing out the risk that hard won gains at national level in the field of consumer protection may be destroyed by a Community-wide deregulatory approach.

### **2.13 The Social Dimension of the Internal Market**

The apparent victory of free market economics within the internal market did not wholly remain unnoticed by social policy-makers, trade unions and socialist and social-democratic politicians. For example, while sponsoring the political and economic relaunch of the Community through the internal market programme, President Mitterrand constantly made clear his interest in creating a 'Social Europe'. However, his proposal for a 'European social space' in which basic principles for the protection of workers were to be introduced at a mandatory Community level languished at the bottom of the agenda until it was picked by the Belgian Presidency in 1987 with the proposal for a 'plinth of social rights'. Soon thereafter, in February 1988, some of the problems of the anticipated differential regional effects of the internal market – one of the other central 'social' concerns of the Community – were resolved at the Community level by an agreement in the European Council to restructure the European Regional Development Fund and the European Social Fund in order to channel more EC resources into regional development measures and away from the apparently bottomless pit of the CAP.

This was followed by the adoption by eleven of the then twelve Member States (the UK dissenting) of a Community Charter of Fundamental Social Rights Workers at Strasbourg in December 1989. It contains a declaration on the part of the signatories that the implementation of the Single European Act must 'take full account of the social dimension of the Community', and a statement of basic social rights of workers including freedom of movement, the right to fair remuneration, the importance of the improvement of living and working conditions, and the right to adequate social protection. This purely declaratory measure, to which the Commission attached an Action Programme containing a resumé of the measures which it intended to propose, was supposed to revitalise the social policy of the Community, just like the Social Action Programme of the 1970s. The results of the initiative were just as disappointing, since the political will amongst the Member States proved lacking, and the EC Treaty remained weak on the social policy front, requiring in all cases except health and safety at work a

unanimous vote for the adoption of social policy measures.

The Social Charter is not binding and it introduced no new law-making powers into the Treaty. It also declares – with explicit reference to the principle of subsidiarity – that implementation of many of the rights is the responsibility of the Member States, not the EC itself. Since this accorded with the strongly held view of the UK at the time, as it wished to see the EC only be minimally concerned with social policy, arguing that it was irrelevant to the achievement of the internal market and a matter for resolution at national level, it is perhaps difficult to see why the UK declined to sign such a document. However, for the UK and for Margaret Thatcher in particular, social policy became almost a symbol of its reserved sphere of national sovereignty. A new phase in the history of social policy opened up with the Social Policy Agreement which was attached to the Treaty of Maastricht, involving an opt-out for the UK between 1993 and 1997, and the subsequent re-incorporation of social policy into the Treaty mainstream by the Treaty of Amsterdam in 1999. In this revived story of social policy, the Community Social Charter has played a significant 'benchmarking' role.

## **2.14 Towards a Treaty on European Union**

Despite the failure of the Single European Act significantly to extend the overall ambit of the Community's activities, Jacques Delors did succeed after 1986 in keeping economic and monetary union and institutional reform on the diplomatic agenda. A positive note was maintained by the February 1988 agreement on budgetary discipline and reform of the structural funds. Soon afterwards in June 1988 the Hanover European Council reaffirmed the Community's commitment to the progressive realisation of EMU, and charged a committee chaired by Delors himself with the task of identifying the concrete stages needed to realise that aim.

The Delors Committee reported in April 1989. Its report identified the three basic attributes of monetary union: full currency convertibility, complete integration of financial markets and irrevocable locking of exchange rates. The Treaties already provided for the first two attributes to be achieved. The Report therefore concentrated on the third attribute, focusing on the need not only for exchange rates to be locked, but on the further step of the adoption of a single currency which would demonstrate the irreversibility of monetary union and remove the transaction costs of converting national currencies. However, without a convergence of economic conditions in the Member States and the adoption of certain common macroeconomic policies, even the locking of exchange rates cannot be successfully achieved. The Report therefore identified a crucial second stage in the achievement of monetary union in which budget deficits would be limited and European level institutions would be introduced which would gradually assume responsibility for monetary policy and exchange rate and reserve management.

This would follow an initial stage (which began in July 1990) in which all the European Community currencies would be brought within the exchange rate mechanism ('ERM') of the European Monetary System (EMS) which controls exchange rate fluctuations, and in which fiscal coordination is gradually intensified. The final third stage would begin with the irrevocable locking of exchange rates and a European Central Bank taking over the role of national central banks.

The Report did not receive unanimous acceptance from the Member States; in particular, disagreement existed on when the various stages should begin, on whether transition from Stage Two to Stage Three would be automatic and fixed in advance, on whether all currencies would be replaced by the new currency and on whether the new Community banking institutions should be independent of control by politicians as they are in Germany. The UK favoured not a single currency, but a 'common currency' in which a hard, convertible ECU would be created which would compete with national currencies and might gradually supersede them. Against the opposition of the UK, the other eleven governments agreed at the Rome European Council in October 1990 that Stage Two would begin in January 1994, and this date was provided for by Article 109e(1) EC, as amended by the Treaty of Maastricht (now Article 116 EC – although it is of historical interest only). The UK did agree, however, to the convening of an intergovernmental conference on Economic and Monetary Union and this started work in December 1990.

Some Member States were unwilling to allow the Community to continue along the path towards EMU without significant moves towards Political Union involving the extension of the competence of the Community, and the enhancement of the democratic accountability of its institutions. Chancellor Kohl, for example, knew that a Treaty under which the Member States transferred significant competence in economic and monetary policy-making to the Community would not be acceptable either to the German Parliament, the *Bundestag*, or to the *Länder*, unless the loss of democratic input into policy-making at national level were at least in part matched by an increase in democratic input at the Community level. President Mitterrand also supported further moves to Political Union. Consequently, a parallel intergovernmental conference on Political Union was convened to consider the competences of the Union, in particular competences in foreign affairs, defence and collective security, and the institutions necessary to make the Union operational.

The outcome of diplomatic hard bargaining was the Treaty of Maastricht, agreed by the Heads of State or Government in December 1991 and signed in February 1992. The Treaty formed the results of two separate bargaining processes, brought together only at the final stage. There was little interaction between the two conferences. After the departure of Margaret Thatcher and the arrival of John Major as British Prime Minister in late 1990, the UK was able to sign up to a Treaty laying down the stages for the achievement of EMU, while retaining the right as laid down in a Protocol not to proceed to participate in the third stage of monetary union (a similar Protocol was provided for Denmark, which would require a referendum before participation). However, in contrast to the positive progress on EMU the results of the debates on Political Union were much more modest changes. The IGC was unable to reach a single conclusion on the introduction of significantly enlarged competences and decision-making powers for the institutions in respect of social policy. Major refused to accept a new 'Social Chapter', and this was eventually concluded amongst the other eleven Member States as a separate Social Policy Protocol and Agreement outside the legal framework of the EC Treaty. Foreign policy also remained outside the structures of the Community proper, and, like the new field of cooperation in the internal fields of home affairs, immigration, asylum and the administration of justice, which codified existing informal arrangements, was given a separate intergovernmental 'pillar' operating alongside the supranational 'Community' pillar within the framework of an overarching European Union.

## **2.15 After the IGCs: the Struggle for Ratification of 'Maastricht'**

The difficulties encountered in a number of Member States in gaining political and popular acceptance of the Treaty of Maastricht, as required by the various ratification processes in the different states, were unprecedented in the history of amendments to the founding Treaties of the European Communities. For a number of months, it was doubtful whether the Treaty of Maastricht would even come into force, as ratification by all Member States is required of any Treaties amending the original Treaties of Rome. These difficulties have proved extremely significant in that they have affected the progress that the 'new' European Union has made since its inception. The feeling of popular disempowerment and disillusionment felt in a number of Member States and expressed in the ratification referendums of Denmark and France has challenged the legitimacy of the process of European integration, and its institutional forms, in a manner which may well shape aspects of the 1996 IGC.

The entry into force of the Treaty of Maastricht was originally foreseen for 1 January 1993. It eventually came into force on 1 November 1993, following protracted ratification procedures in particular in Denmark, France, Germany and the United Kingdom. Even in those Member States where ratification was relatively straightforward in political terms, complex constitutional amendments were required on matters such as the transfer of powers to the institutions of monetary unions, and giving effect to the concept of Union citizenship. It was the first Danish referendum in June 1992, in which – contrary to the urgings of all the main political parties – ratification was rejected by a majority of 47,000 votes, which threw the ratification process seriously off balance. For example, it was agreed in the UK to postpone further parliamentary debate regarding ratification until after a second (at then, as yet unplanned) Danish referendum. Hoping to re-launch 'Maastricht', as well as to benefit from internal divisions amongst opposition politicians, Mitterrand called a strictly unnecessary referendum in France which led to a very

narrow (51.05 per cent to 48.95 per cent) popular vote in favour in September 1992. This too contributed to the feeling that something was seriously amiss both in the content of the Treaty itself, and in the procedures whereby it had been agreed amongst the politicians.

Responding to the malaise, the European Council meeting in Edinburgh in December 1992 under the UK Presidency attempted to meet Danish concerns about political sovereignty halfway, without actually reopening the text of the Treaty, by accepting certain declarations, particularly on Economic and Monetary Union. The compromise achieved was of dubious legal status, but the position taken has never been formally challenged in any way. It has subsequently marked Denmark's participation in the EU and aspects of the shape of the Treaty of Amsterdam. The European Council also discussed in detail the implementation of the subsidiarity concept introduced by the Treaty, stressing that part of the concept which is concerned with 'closeness of the citizen'. That has been a significant *leitmotiv* of political rhetoric on EU governance ever since then, along with the principles of 'openness' and 'transparency'.

Picking up the pieces in Denmark, a new coalition government, supported by most opposition parties, led a successful campaign for ratification in a second referendum in May 1993. The 'yes' vote was 56.8 per cent. When the matter returned to the UK Parliament, however, an atmosphere of hostility to Maastricht almost prevailed, particularly when Conservative Euro-sceptic rebels entered an unholy alliance with opposition parties which objected to Major's failure to accept the Social Policy Agreement. Only the calling of a vote of confidence by Major on 24 July 1993 secured the passage of the Bill.

Meanwhile, in Germany a different type of ratification problem had emerged. Political ratification procedures, including extensive constitutional amendments, were completed in December 1992.

However, a number of objectors to more intensive integration brought a constitutional challenge to the conformity of the Treaty with the newly amended Basic Law before the Federal Constitutional Court in Karlsruhe. This delayed ratification by some eight months, and although the Court ultimately ruled against the applicants it delivered a judgment which appears to place strict limitations upon the constitutional possibilities of European Union, when they are set against the background of the German Basic Law and the prerequisites of German sovereignty (*Brunner* [1994] 1 CMLR 57). The nature and significance of the German challenge to EU constitutionalism is discussed in 5.13.

Undoubtedly the ratification crisis faced by the Treaty of Maastricht was a turning point in the development of European integration within the framework of what was about to become the European Union. Although some of the effects have been slow to emerge clearly, it was none the less apparent that there were acute legitimacy issues which came out of the can of worms in the context of the ratification debates which could never be sidelined again. It represents, in sum, a challenge to

'the traditional Monnet-Hallstein method of the "benign conspiracy". According to this method the EU operates with a process of small, gradual, technical adaptations without publicly clarifying the long-term political objectives. In the post-Cold War context the direct external threat to Western Europe has disappeared, and the whole of Europe is now involved in a democratic renaissance. In this context the old "benign conspiracy" is not only inadequate but directly counter-productive...' (Gustavsson, 1996: 223).

It will be apparent well before the end of the following Chapter which completes the historical narrative that the old method neither can, nor indeed are, any longer applied in the context of the evolving EU.

*Please see Section I, Part 4 and 5 of your Primary sources for a summary of developments, which followed the entry into force of the Maastricht Treaty.*

# 8. CONVENTION ON THE FUTURE OF EUROPE AND THE TREATY ESTABLISHING A CONSTITUTION FOR EUROPE

Source: The Citizen’s Guide to the Draft Constitution

## ORIGIN AND DEVELOPMENT OF THE DRAFT CONSTITUTION

The history of the European Union has over the past 15 years been marked by a series of changes to the European treaties. Each one was prepared by an Intergovernmental Conference (IGC) bringing together over a period of months the representatives of the governments of the Member States. The Commission also took part in the work of the IGCs, and the European Parliament was also involved.

*Treaties regularly revised*

**The Single European Act**, signed in February 1986, enabled the Union to create the single market and establish on its territory the freedom of movement of people, goods, services and capital, from which the business sector and the people of Europe now benefit.

The **Maastricht Treaty**, signed six years later, enabled the Union to move forward in a number of areas: the introduction of a single currency, a common foreign policy, cooperation in the area of justice and internal affairs.

After Maastricht, however, the further development of the European political union seemed to lose its momentum. The two IGCs which led to the signature of the **Amsterdam (1997) and Nice (2001) Treaties**, even though moderately successful, were characterised by a weaker political resolve and many institutional questions, capitally important though they were on the eve of the Union’s enlargement, remained unanswered (how to ensure the smooth running of a Union of 25 or more Member States, how to guarantee the legitimacy of the institutions representing the states and the people of Europe)

*Need for institutional reform to serve the enlarged Union*

When in December 2000, the heads of state and government of the 15 Member States, meeting in Nice, reached an agreement on the revision of the Treaties, they felt the need to pursue the institutional reform which many deemed too timidly expressed in the Treaty of Nice. The European Council accordingly instituted a **broader and more comprehensive debate on the future of the Union** with a view to fresh revision of the Treaties.

*The stimulus provided by the Nice European Council*

A year after Nice, the European Council met in **Laeken** and on 15 December 2001 adopted the *Declaration on the future of the European Union*, committing the Union to becoming more democratic, more transparent and more effective, and to paving the way for a Constitution in response to the expectations of the people of Europe.

*Laeken Declaration*

The **method** used so far to review the Treaties has come in for much criticism. European integration is a matter for all our citizens. The major stages in its development can no longer be decided at Intergovernmental Conferences held behind closed doors and involving only the leaders of the governments of the Member States. In order to prepare the next IGC in as transparent and as wide-ranging a way as possible, the European Council therefore decided to convene a **Convention** bringing together the main stakeholders in the debate: representatives of the governments of the 15 Member States and the 13

*The Convention: a new more open and more transparent method of revising the Treaties*

candidate countries, representatives of their national parliaments, representatives of the European Parliament and of the European Commission, 13 observers from the Committee of the Regions and the Economic and Social Committee, plus representatives of the European social partners and the European Ombudsman. The Convention method has made it possible for the first time for all European and national viewpoints to be expressed in a broad, open and transparent debate.

The **mandate** of the 105 member of the Convention and their alternates, under the chairmanship of Mr Giscard d'Estaing, was established by the Laeken European Council. The aim was to examine the essential questions raised by the future development of the Union, and to seek out responses to be presented in a document which will be used as the starting point for the negotiations of the IGC, which will, as set out in the Treaty on European Union, take the final decisions. Certain issues had been identified by the Laeken European Council. How to ensure better distribution of the Union's powers, how to simplify the instruments whereby the Union takes action, how to provide better guarantees of democracy, transparency and effectiveness in the European Union, how to simplify the current Treaties, and whether this simplification could pave the way for the adoption of a European Constitution.

In order to guide the debates of the Convention a **Praesidium** was set up, composed of twelve leading personalities: the Chairman, Mr Giscard d'Estaing and two Vice-Chairmen, Messrs Amato and Dehaene, representatives of the governments of the three Member States which held the Presidency of the Council during the Convention, two representatives of the national parliaments, two representatives of the European Parliament and two representatives of the Commission (Messrs Barnier and Vitorino). In addition, the representative of the Slovene parliament was invited to take part in the meetings.

The first session of the Convention was held on **28 February 2002**. The Convention met over a period of 15 months in **plenary sessions** lasting two or three days and involving one or two meetings monthly in the premises of the European Parliament in Brussels. In parallel with the Convention's plenary sessions, work was also organised within **working groups** or think tanks, each chaired by a member of the Praesidium and focusing on a series of specific topics.

In the interests of transparency, a Convention **Internet site** (<http://european-convention.eu.int>) published the contributions of the members of the Convention, the proceedings of the debates and the draft texts debated.

In order to further widen the debates and involve all the people of Europe, a plenary session of the Convention was devoted to listening to civil society. Contact groups, along the lines of the working groups, also enabled the organisations of civil society to put forward their points of view. A forum was opened for these organisations (social partners, business circles, NGO's, academic world, etc.) which thus had the opportunity to post on a dedicated Internet site ([http://europa.eu.int/futurum/forum\\_convention](http://europa.eu.int/futurum/forum_convention)) their contributions to the debate on the future of the Union.

*Mandate of the Convention: to provide a response to various questions on the future of Europe*

*Organisation of the work of the Convention: a President, Mr Giscard d'Estaing, a Praesidium to guide its work*

*Plenary sessions and working groups*

*An Internet site*

*Civil society forum*



After over a year of debates, the Convention reached a **consensus** to forward a draft Constitution to the European Council.

Mr Giscard d'Estaing accordingly submitted the results of the work of the Convention to the **Thessaloniki European Council** on 20 June 2003.

The text submitted by the Convention is a draft to serve as the basis for the work of the **Intergovernmental Conference** which will bring together the representatives of the governments and the European Commission and the European Parliament, starting in October 2003, prior to taking the final decisions.

*Convention consensus to submit a draft Constitution in preparation for the Inter-governmental Conference*

### **WHAT DOES THE DRAFT CONSTITUTION LOOK LIKE?**

The draft Constitution puts forward a **single text** to replace all the existing *Treaties* in the interests of readability and clarity. It consists of four parts.

Part I contains the provisions which define the Union, its **objectives**, its **powers**, its **decision-making procedures** and its **institutions**.

The **Charter of Fundamental Rights**, solemnly proclaimed at the Nice European Council in December 2000, has been incorporated into the draft European Constitution as Part II.

Part III of the draft Constitution focuses on the Union's **policies** and actions and incorporates many of the provisions of the current *Treaties*.

Part IV contains the final clauses, including the **procedures for adopting and reviewing** this Constitution.

*A single text: the European Constitution*

*Four parts:*

*I. The Constitution's fundamental provisions*

*II. Charter of Fundamental Rights*

*III. The Union's policies*

*IV. The final clauses.*

### **A CONSTITUTION FOR THE CITIZENS OF EUROPE** *The Union's values and objectives*

The draft European **Constitution** establishes the European Union, a **union of the peoples and States of Europe**. This Union is open to all European states which respect its values and undertake to promote them jointly.

*A Union of peoples and states*

The draft Constitution sets out the values on which the Union is based: respect for **human dignity, freedom, democracy, equality, the rule of law**, and respect for **human rights**. These values are common to the Member States in a society characterised by **pluralism, tolerance, justice, solidarity** and **non-discrimination**.

*The Union' values*

**Freedom of movement for people, goods, services and capital**, and the **freedom of establishment**, are guaranteed by the Union throughout its territory. The Constitution prohibits all **discrimination** on grounds of **nationality**.

*Fundamental freedoms and non-discrimination*

The aim of the Union is to **promote peace, its values and the well-being of its people**. It offers its citizens an area of freedom, security and justice, and a single market in which competition is free and undistorted. It works for a Europe of **sustainable development** based on balanced economic growth, a highly competitive social market economy, a high level of protection and improvement of the quality of the environment. It fosters **scientific and technical progress**. It takes action to stem **exclusion and discrimination** and promotes **justice and social protection, gender equality, inter-generational solidarity** and protection of **children's rights**. The Union promotes **economic, social and territorial cohesion and solidarity** between its Member States.

*The Union's objectives*

In order to attain these objectives, the Union has certain **powers** which are conferred upon it in the Constitution by the Member States. These powers are exercised using the **Community method** and specific instruments within a **single institutional framework**.

*Instruments to serve the Union's objectives*

The Union respects the **national identity** of its Member States, including with regard to local and regional autonomy. It respects the **essential functions of the State**, including those for ensuring territorial integrity, maintaining law and order and safeguarding internal security. By virtue of the **principle of sincere cooperation**, the Union and its Member States, in full mutual respect, assist each other in pursuing the tasks stemming from the Constitution. The Member States help the Union to fulfil its mission and refrain from any measures which would jeopardise the attainment of the objectives set out in the Constitution.

*The Union and the Member States*

The Union has a **legal personality** to assert and uphold its values and interests in the international arena. It contributes to **peace, security, the sustainable development** of our planet, **solidarity and mutual respect** among peoples, **free and fair trade, eradication of poverty** and **protection of human rights**, and in particular **children's rights**, and respect for and consolidation of **international law**.

*The Union and the rest of the world*

## **ENTRY INTO FORCE AND REVIEW OF THE CONSTITUTION**

### *Entry into force of the Constitution*

The constitutional Treaty is based on the assumption that it will be ratified by all the Member States. If after two years following its signature only four-fifths of the Member States have ratified it, the European Council will review the situation.

### *Entry into force of the Constitution*

*Subsequent reviews of the Constitution*

Reviews will normally be prepared by a Convention, unless their scope is limited. The Convention must adopt by consensus a recommendation to the Intergovernmental Conference, which will jointly agree on the amendments to be introduced. These amendments will enter into force only when they have been ratified by all the Member States in accordance with their respective constitutional rules.

*Review of the  
Constitution:  
confirmation of the  
Convention  
method*

Detailed information on the work of the Convention is available on the Europa server of the European institutions: <http://europa.eu.int/futurum> and [http://europa.eu.int/constitution/index\\_en.htm](http://europa.eu.int/constitution/index_en.htm).

## **9. EXCERPT FROM WILLEM MOLLE: THE ECONOMICS OF EUROPEAN INTEGRATION (4TH ED.)**

*(Footnotes omitted)*

### **Fundamental Concepts**

#### **Purpose and progress of economic integration**

The expression 'economic integration' covers a variety of notions. It may refer to the absorption of a company in a larger concern. It may have a spatial aspect, for instance if it refers to the integration of regional economies in a national one. In this book, economic integration is always used with respect to international economic relations, to indicate the combination of the economies of several sovereign states in one entity.

Economic integration is not an objective in itself, but serves higher objectives. The immediate, economic, objective is to raise the prosperity of all cooperating units. In the rest of this book we will go into the details of the theoretical foundations of, and the empirical evidence for, the relative increase of welfare through integration. The farther-reaching objective is one of peace policy; namely, to lessen the chance of armed conflicts among partners. We mention in passing that substantial empirical support exists for the statement that economic integration reduces conflicts between nations. Polacheck (1980), using data for 30 countries in the 1958-1967 period, showed that doubling the trade between two countries leads to a 20 per cent decline in the frequency of hostilities.

Used in a static sense, 'economic integration' represents a situation in which the national components of a larger economy are no longer separated by economic frontiers but function together as an entity. Used in a dynamic sense it indicates the gradual elimination of economic frontiers among member states (that is to say, the abolition of national discrimination), with the formerly separate national economic entities gradually merging into a larger whole. The dynamic interpretation is the more usual, and the one to be used in this book. Of course, the static meaning of the expression will apply in full once the integration process has passed through its stages and reached its object.

#### **Objects of integration**

Economic integration is basically the integration of markets. Economists make a distinction between markets of goods and services on the one hand, and markets of production factors (labour, capital, entrepreneurship) on the other.

Free movement of goods and services is the basic principle of economic integration. As is well known from classical international trade theory the free exchange of goods promises a positive effect on the prosperity of all concerned. It permits consumers to choose the cheapest good, generally widens the choice, and creates the conditions for further gain through economies of scale, etc.

The obvious welfare gains from the liberalisation of product markets are a good economic reason to start integration with that object. However, integration schemes tend to follow a political logic rather than an economic one. The political reasons to begin integration at the goods market are:

- lasting coalition between sectors demanding protection and sectors and consumers demanding cheap imports is hard to accomplish;
- substitute instruments (such as industrial policy, non-tariff barriers, and administrative procedures) can be used to intervene in the economic process;
- vital political issues like growth policy and income redistribution are guaranteed to remain within national jurisdiction.

Free movement of production factors can be seen as another basic element of economic integration. One argument for it is that it permits optimum allocation of labour and capital. Sometimes, certain production factors are missing from the spot where otherwise production would be most economical. To overcome that problem, entrepreneurs are apt to shift their capital from places of low return to more promising places. The same is true of labour: employees will migrate to regions where their labour is more needed and therefore better rewarded. A second argument is that an enlarged market of production factors favours new production possibilities which in turn permit new, more modern or more efficient uses of production factors (new forms of credit, new occupations, etc.).

The choice of production factors as the object of the second stage in the integration process is partly based on the economic advantages that spring from such integration. But here, too, we have to consider the political logic. The integration of labour markets seems to be the obvious choice in periods of a general shortage of labour (for instance the EC in the 1960s, see Chapter 9). A tangle of national regulations for wages, social security, etc. seems to leave politicians sufficient opportunities for practical intervention on the national level for them to accept general principles on the European level. With capital-market integration the issue of direct investments seems straightforward; many politicians may hope to attract new foreign investment in that way. For other capital movements the willingness to integrate is less obvious because integration would imply giving up the control of sensitive macro-economic instruments.

Policy approximation is the next stage of economic integration. In an economy which leaves production and distribution entirely to the market, the elimination of obstacles to the movement of goods and production factors among countries would suffice to achieve full economic integration. Not so in modern economies, which are almost invariably of the mixed type, the government frequently intervening in the economy. In economies of the mixed type, integration cannot be achieved without harmonising the policies pursued by the governments of the individual states. Policy making is on the whole more difficult to integrate than markets for goods, services and production factors. Politicians are likely to be the more unwilling to give up their intervention power, the more such elements are involved as employment policy or budgetary policies (referring to expenditure on schools, subsidies, as well as revenues from taxes). Moreover, national civil servants tend to uphold their way of operating interventional schemes as the most efficient, and since their very existence depends on complicated sets of rules, they are hardly inclined, in general, to cooperate towards harmonised policy. Thus, the conditions for a common currency or monetary integration will not readily be met. That is one reason why currency integration is mostly introduced at a late stage of integration. Even later comes the integration of points that touch the very heart of a nation's sovereignty, in particular the acceptance of a common defence policy.

### **Positive and negative integration**

With respect to modern mixed economies, Tinbergen (1954) distinguished negative integration (that is, the elimination of obstacles), and positive integration (that is, the creation of equal conditions for the functioning of the integrated parts of the economy). The former's demand on policy will be relatively simple (deregulation, liberalisation), but the latter will always involve more complex forms of government policy (harmonisation, coordination). Let us look somewhat closer at the differences.

Negative-integration measures are often of the simple 'Thou shalt not' type. They can be clearly defined, and once negotiated and laid down in treaties, they are henceforth binding on governments, companies and private persons. There is no need for permanent decision-making machinery. Whether these measures are respected is for the courts to check, to which individuals may appeal if infringements damage their interests.

Positive integration is more involved. It often takes the form of vaguely defined obligations requiring public institutions to take action. Such obligations leave ample room for interpretation as to scope and timing. They may, moreover, be reversed if the policy environment changes. As a consequence, they hold much uncertainty for private economic agents, who cannot derive any legal rights from them. Positive integration is the domain of politics and bureaucracy rather than law. No wonder then

that positive integration does not present a built-in stimulus for progress. Because politicians are more likely to opt for positive rather than negative integration, progress is likely to be slower, the higher the stage of integration, that is the farther integration proceeds on the path towards a Full Economic Union.

### **Stages of economic integration**

Integration can apply merely to product markets, to markets of production factors as well, and finally to different areas of economic policy. The higher the form of integration chosen, the higher the institutional demands to be fulfilled. Largely following the sequence of Balassa's (1961) classical work, we can describe the most important stages, by increasing degree of integration, as follows:

- In the free-trade area (FTA), all such trade impediments as import duties and quantitative restrictions are abolished among partners. Internal goods traffic is then free, but each country can apply its own customs tariff with respect to third countries. To avoid trade deflection (goods entering the FTA through the country with the lowest external tariff) internationally traded goods must be accompanied by so-called "certificates of origin" indicating in which country the good has been manufactured. That enables customs officers at frontiers between member countries with different outer tariffs, to determine whether duties or levies are still due (on goods originating from a third country), or whether the merchandise originates from another member state and can therefore be imported duty-free.
- In the customs union (CU), as in the free-trade area, all obstacles to the free traffic of goods among partner countries are removed. Moreover, one common external tariff is agreed upon, which does away with the certificates of origin at internal borders. Once a good has been admitted anywhere to the customs union, it may circulate freely.
- The common market (CM) is first of all a customs union. Moreover, production factors, that is, labour and capital, may move freely within the CM. That definition leaves various options as to the relation with third countries; different national regulations (comparable to the FTA), or a common regulation (comparable to the CU). Combinations of common policies (for instance for labour) and national policies (for example for capital) vis-à-vis third countries are possible.
- The economic union (EU) implies not only a common market but also a high degree of coordination or even unification of the most important areas of economic policy, market regulation as well as macro-economic and monetary policies and income redistribution policies. Not only is a common trade policy pursued towards third countries, but external policies concerning production factors and economic sectors are also developed.
- The monetary union (MU) is a form of cooperation which on top of a common market (notably free movement of capital) creates either irrevocably fixed exchange rates and full convertibility of the currencies of the member states, or one common currency circulating in all member states. Such a union implies quite a high degree of integration of macro-economic and budget policies.
- The economic and monetary union (EMU) combines the characteristics of the monetary union and the economic union. In view of the close interweaving of monetary and macro policies, integration evolves mostly simultaneously for both policy fields.
- Full economic union (FEU) implies the complete unification of the economies involved, and a common policy for many important matters. The situation is then virtually the same as that within one country. Given the many areas integrated, political integration (for example, in the form of a confederacy) is often implied.

The transitions between the various stages of integration are fluent and cannot always be clearly defined. The first stages, FTA, CU and CM, seem to refer to market integration in a classical laissez-faire setting, the higher stages (EU, MU, FEU) to policy integration. In practice, however, the former three stages are unlikely to stabilise without some form of policy integration as well (for instance, safety regulations for a FTA, commercial policy for a CU, or social and monetary policies for a CM (Pelkmans, 1980). So,

between a customs union and full integration, a variety of practical solutions for concrete integration problems are likely to occur.

The seven stages of integration just sketched have two characteristics in common. They abolish discrimination among actors from partner economies (internal goal). They may thereby maintain or introduce some form of discrimination with respect to actors from economies of third countries (external goal).

### **Degrees of policy integration**

All forms of integration described above require permanent agreements among participating states with respect to procedures to arrive at resolutions and to the implementation of rules. In other words, they call for partners to agree on the rules of the game. For an efficient policy integration, common institutions (international organisations) are created. However, for the higher forms of integration, such as a common market, the mere creation of an institution is not sufficient: they require transfer of power from national to union institutions.

All forms of integration diminish the freedom of action of the member states' policy-makers. The higher the form of integration, the greater the restrictions and loss of national competences. The following hierarchy of policy cooperation is usually adopted:

- Information: partners agree to inform one another about the aims and instruments of the policies they (intend to) pursue. This information may be used by partners to change their policy to achieve a more coherent set of policies. However, partners reserve full freedom to act as they think fit, and the national competence is virtually unaltered.
- Consultation: partners agree that they are obliged not only to inform but also to seek the opinion and advice of others about the policies they intend to execute. In mutual analysis and discussion of proposals the coherence is actively promoted. Although formally the sovereignty of national governments remains intact, in practice their competences are affected.
- Co-ordination goes beyond this, because it commits partners to agreement on the (sets of) actions needed to accomplish a coherent policy for the group. If common goals are fixed some authors prefer the term cooperation. Coordination often means the adaptation of regulation to make sure that they are consistent internationally (for example, the social security rights of migrant labour). It may involve the harmonisation (that is, the limitation of the diversity) of national laws and administrative rules. It may lead to convergence of the target variables of policy (for example, the reduction of the differences of national inflation rates). Although agreements reached by coordination may not always be enforceable (no sanctions), they nevertheless limit the scope and type of policy actions nations may undertake, and hence imply limitation of national competences.
- Unification: either the abolition of national instruments (and their replacement with union instruments for the whole area) or the adoption of identical instruments for all partners. Here the national competence to choose instruments is abolished.

### **Goods markets**

#### **Advantages**

Fully integrated goods markets imply a situation of free trade among member states. People aim for free trade because they expect economic advantages from it, namely:

- more production and more prosperity through better allocation of production factors, each country specialising in the products for which they have a comparative advantage;

- more efficient production thanks to scale economies and keener competition;
- improved 'terms of trade' (price level of imported goods with respect to exported goods) for the whole group in respect of the rest of the world.

Integration of goods markets implies first of all the removal of (all) impediments to free internal goods trade. In modern mixed economies such negative integration is not sufficient, however. For the market to function adequately there must be common rules for competition on the internal market and for trade with third countries.

### **Obstacles to free trade**

The free-trade area has been defined before as a situation where there are neither customs duties or levies with similar effect, nor quantitative restrictions or indeed any factor impeding the free internal movement of goods (the latter are often taken together under the heading of non-tariff barriers, or NTB). They can be described as follows:

- Customs duties or import duties are sums levied on imports of goods, making the goods more expensive on the internal market. Such levies may be based on value or quantity. They may be indicated in percentages or vary according to the price level aspired to domestically;
- Levies of similar effect are import levies disguised as administrative costs, storage costs or test costs imposed by the customs;
- Quantitative restrictions (QR) are ceilings put on the volume of imports of a certain good allowed into a country in a certain period (quota), sometimes expressed in money values. A special type is the so-called 'tariff quota', which is the maximum quantity which may be imported at a certain tariff, all quantities beyond that coming under a higher tariff;
- Currency restrictions mean that no foreign currency is made available to enable importers to pay for goods bought abroad;
- Other non-tariff impediments are all those measures or situations (such as fiscal treatment, legal regulations, safety norms, state monopolies, public tenders, etc.) which ensure a country's own products' preferential treatment over foreign products on the domestic market.

### **Motives for obstacles**

Obstacles to free trade are mostly meant to protect a country's own trade and industry against competition from abroad, and therefore come under the heading of protection. Protection can be combined with free trade. A customs union, for instance, prevents free trade with outside countries by a common external tariff and/or other protectionist measures, while leaving internal trade free.

Like individual countries, a customs union may hope to benefit from protection against third countries, that is, from import restrictions. From the extensive literature we have distilled the following arguments in favour of such measures:

- Independence from other countries as far as strategic goods are concerned, a point much stressed in the past and especially in times of war;
- The possibility of nurturing so-called 'infant industries'. The idea is that young companies and sectors which are not yet competitive should be sheltered in infancy in order to develop into adult companies holding their own in international competition;
- Defence against dumping. The healthy industrial structure of an economy may be spoiled when foreign goods are dumped on the market at prices below the cost in the country of origin. Even if the action is temporary, the economy may be weakened beyond resilience;
- Defence against social dumping. If wages in the exporting country remain below productivity, the



labour factor is said to be exploited; importation from such a country is held by some to uphold such practices and is therefore not permissible;

- Employment boosting. If the production factors in the union are not fully occupied, protection can turn the demand towards domestic goods, so that more labour is put to work and social costs are avoided;
- Diversification of the economic structure. Countries specialised in one or a few products tend to be very vulnerable; marketing problems of such products lead to instant loss of virtually all income from abroad. That argument applies to small developing countries rather than to large industrialised states;
- Shouldering-off balance-of-payment problems. Import restrictions reduce the amount to be paid abroad, which helps to avoid adjustments of the industrial structure and accompanying social costs and societal friction (caused by wage reduction and a restrictive policy, etc.).

Pleas for export restriction have also been heard. The underlying ideas vary considerably. The arguments most frequently heard are the following:

- Some goods are strategically important and must not fall into the hands of other nations; that is true not only of military goods (weapons) but also of incorporated knowledge (computers) or systems;
- Exportation of raw materials means the consolidation of a colonial situation; a levy on exports will hopefully increase people's inclination to process the materials themselves. If not, then at any rate the revenues can be used to start other productions;
- If too much of a product is exported, the importing country may be induced to take protective measures against a series of other products; rather than that, a nation may accept a 'voluntary' restriction of the exports of that one product.

In anticipation of further discussion, let it be pointed out that most arguments for protection do not hold water: protection in general has a negative effect on prosperity.

[... similar analysis for markets in services, capital and labour]