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Dublin after Schengen: Allocating Responsibility for Examining Asylum Applications in Practice*

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Introduction

In the 1980s the Member States of the European Union were faced with a substantial increase of the inflow of migrants and refugees which was, to say the least, perceived[1] by policy makers as being a threat to security and stability. It also increased the belief that this movement was overloading the capacity of the nation states to receive immigrants and was, furthermore, responsible for the emergence of resistance and fear, and even of xenophobic and racist feelings, among the host populations forcing the governments to take restrictive legislative and administrative measures.

Along with this inflow, the number of asylum applications dramatically increased which led to the competent authorities being overloaded, to the exhaustion of resources and to unacceptable backlogs and delays in the examination of asylum applications. The Member States individually adopted restrictive measures to deal with the high volume of applications. In an effort to reconcile humanitarian concerns with economic and political imperatives, reform mainly focused on procedures rather than on substance. The individual restrictive action, however, was not only revealed to be insufficient and ineffective but also had immediate negative effects in neighbouring countries. These countries, as a consequence, experienced an increase in the volume of claims they received, which led to a race for the most restrictive policies with serious results for the right of asylum. This situation called for a coordinated response at European Union level. Moreover, the creation of the single market and the expected abolition of internal border controls accentuated the need for a common approach, since it was believed it would facilitate the intra-community movements of asylum seekers.

This was the context in which the Convention Determining the State Responsible for Examining the Applications for Asylum Lodged in one of the then twelve Member States of the European Communities (the Dublin Convention) was signed by eleven of the then twelve Member States at the meeting of the Immigration Ministers held in Dublin on the 15 June 1990.[2] It was the first legal instrument signed with the purpose of achieving the free movement of persons, which was imperative for the establishment of the internal market. The third paragraph of the preamble of the Convention states that it is intended as a back-up measure to enable checks on persons at internal borders to be abolished.

The Dublin Convention was designed to avoid long delays in the adjudication process and to respond to two kinds of phenomenon:

- Firstly, the problem of so-called "refugees in orbit" (refugees that fail to find a state willing to take responsibility for examining their asylum applications and are therefore shuffled from country to country in a constant quest for asylum).
- Secondly, it addresses the problem of multiple asylum claims, simultaneously or successively lodged in different Member States by the same alien.[3]

The Dublin Convention, like the Schengen Convention's provisions on asylum, is not aimed at harmonising substantive or procedural rules of asylum but rather is limited to fixing uniform criteria for the allocation of responsibility to one single State for the examination of an asylum application.[4]

On 1 September 1997, seven years after its signature, the Dublin Convention finally entered into force in the twelve European Union Member States which had originally signed the instrument.[5] In Sweden and Austria, the Convention entered into force on 1 October 1997 and in Finland on 1 January 1998. The Dublin Convention has replaced the Schengen provisions on asylum.[6] The replacement was decided by the Schengen Executive Committee meeting in Bonn on 26 April 1994, by means of the so-called Bonn Protocol. In the future, according to the Amsterdam Treaty, the Dublin Convention will have to be replaced by a binding Community ("First Pillar") instrument, probably a regulation.[7] This new instrument is likely to improve both its substance and the involvement of the European Union institutions.[8]

The objective of this article is to outline the main aims and features of the Dublin Convention and to briefly compare them with the Schengen provisions on asylum. Secondly, it will report on the experiences of the Convention's first year of implementation: the problems and limitations of the Convention as well as relevant lessons drawn from the practical application of Schengen. Thirdly, it will confront the aims with the results so far and it will comment on necessary future developments.

The Dublin Convention on Asylum: Aims and Features

Why was the Convention signed?

The aim was to establish the principle that one single Member State is responsible for dealing with an alien's (i.e. a national of a third country according to Art. 1 of the Convention) asylum application, by agreeing that one Member State only is responsible for handling an asylum claim made by an individual. By introducing this definite responsibility of a particular Member State, it avoids the

* *Un bref résumé de cet article en français figure à la fin.*

situation of refugees in orbit[9] and multiple applications of asylum, a situation which would otherwise have been facilitated by the creation of the internal market. Moreover, wasteful duplication of Member States' resources is avoided and backlogs and delays in the examination of asylum procedures are reduced.

WHY?

- Increase of asylum applications/ delays in processing/ exhaustion of resources
- "a space without internal frontiers"

CALLED FOR A COMMON RESPONSE TO TACKLE

- Intra-Community movements of asylum seekers determined by the choice of the "best" asylum state
- "Refugees in orbit"
- "Asylum shopping"

How is the responsibility allocated?

The Convention sets out the criteria that determine which Member State is responsible for examining an asylum application in a hierarchical order. The first criterion relates to family reunification[10] and meets a concern expressed by the UNHCR. The State where certain members of the family of the asylum applicant already have refugee status is the State responsible, provided that the persons concerned so desire it. The members of the family are restricted to the spouse, unmarried children under eighteen, and the parents of the applicant if he/she is unmarried and under eighteen. In this respect, the UNHCR has already called for a wider interpretation of "family member" in the application of the Convention. Secondly, the Member State who issued a valid residence permit[11] is responsible. Thirdly, the Member State who issued a valid visa is the competent authority. The Convention provides several exceptions and modifications that might occur in practice, e.g. responsibility in cases where the applicant is in possession of more than one residence permit or visa. Fourthly, in cases of illegal entry,[12] the Member State entered is responsible unless the applicant has been living in the country where he/she lodged the application for six months. Fifthly, if the alien entered legally, the Member State responsible for the control of that entry[13] is the one who should examine the application, unless the application was lodged in another Member State and in both States the visa obligation is waived. Finally, in cases where none of the above criteria applies, the first Member State[14] where the application claim is made is called upon to examine the claim. It is ensured that applications made at the embassy of a Member State are deemed to be lodged in that Member State (if the legislation of the Member State in question permits an asylum application to be made abroad). The selection of the criteria does not therefore take into consideration the choice of the asylum seeker[15] but rather the conditions of his/her access to the European Union and to some extent the personal conditions of the asylum seeker.

HOW?

- One single state is responsible for examining an asylum application
- No harmonisation of substantive and procedural rules of asylum
- Uniform criteria for the allocation of responsibility
  - Family reunification
  - Residence permit
  - Visa
  - Illegal entry
  - Control of entry
  - Application lodged

BUT

- Opt-out clause
- Humanitarian clause

What does the responsibility imply?

The Member State responsible for examining the application will process the application in accordance with national legislation and international obligations.[16] As the national laws are not harmonised, this agreement presupposes mutual confidence in each other's legislation and adjudication processes, which relies on the fact that there is a common framework for the different national laws constituted by the Geneva Convention as amended by the New York Protocol. As we will argue later, although this might be a sound beginning, further harmonisation on substantive and procedural rules of asylum have to follow in order to avoid the possibility of applicants perceiving variability in their chances of success depending on the country in which they make the application. Such a perception might encourage them to apply in the most lenient country.

The rule of exclusive competence is offset by the sovereign right of a Member State to examine an application presented by an alien, as long as he/she agrees, even though it would not be competent according to the criteria set out in the Convention (the opt-out clause). Moreover, any Member State can accept the request of another Member State to examine an application for humanitarian reasons (the humanitarian clause), again with the consent of the claimant. In the same way, a decision to reject an asylum application is not imposed on other Member States, which are free to examine the application. Furthermore, as mentioned, the Dublin Convention does not obviate the right to send an applicant to a safe third country in accordance with the Geneva Convention, which means that it should only take place if it respects the principle of non-*refoulement*. The concept of responsibility does not provide the guarantee that the asylum application will be examined in substance by one of the Member States, and also does not confer on the asylum applicant an individual right to a material examination of his/her application. Therefore both the Dublin Convention and the Schengen asylum provisions have limited importance for the protection of asylum seekers and should be complemented by other instruments aimed at ensuring access to a fair asylum procedure for asylum seekers.[17]

Once the responsibility is allocated there are basically

three obligations incumbent upon the responsible State. First of all, they should take charge, that is they should grant entry to the applicant. Secondly, they should complete the examination of the asylum application. Thirdly, they should readmit or take back the applicant who is in another Member State irregularly (pending the examination of his/her application or after its rejection) or who has withdrawn his/her application and introduced a new claim in another Member State**.** The conditions which ensure that Member States take charge of and readmit applicants according to the Convention are quite informal and flexible. Moreover the delays are relatively short.

What are the practical arrangements set by the Convention?

In view of its application, the Dublin Convention provides for mechanisms of exchange of information, both in terms of general information, e.g. on national legislation and statistics, and in terms of individual information. It also set up, under Art. 18 of the Dublin Convention, a Committee of Representatives of the Member States to follow the application of the Convention (Article 18 Committee). This Committee has adopted a series of guidelines focusing on a number of practical issues, such as time periods for replying to a request for transfers or readmission, the implementation of transfers, use of means of proof to determine responsibility, etc.[18] However, we will later point to areas in which the adoption of additional guidelines is needed in order to ensure the efficient functioning of the Convention.

Did Schengen provide a blueprint for Dublin?

The Schengen provisions on asylum and the Dublin Convention are inspired by the same philosophy and have the same goals. Moreover, their specific provisions are quite similar, although Dublin, is a more refined and complete instrument. One can still identify some differences while comparing both Conventions.[19]

First of all, while the Dublin Convention is applicable in all 15 EU Member States, the Schengen asylum rules were applied fully in seven Member States only, namely Germany, France, the Benelux countries, Spain and Portugal.[20] The EU is currently preparing adequate legal solutions for extending the Dublin Convention to Norway and Iceland, who have signed a cooperation agreement with Schengen. The possibility of concluding a parallel Convention to the Dublin Convention is under consideration. Such a parallel Convention is also an option for other non-EU Member States such as applicant countries in Central and Eastern Europe and Switzerland.

Other differences are merely differences in wording which do not seem to lead to different results, e.g. the definition of an asylum application. Some others have been overcome in reality, e.g. in Dublin the criteria are presented in a clear hierarchical order, unlike the Schengen system, though in practice a similar order was applied in the Schengen context. Other differences, however, – e.g. concerning the allocation of responsibility – relate to aspects which though basically the same could lead to divergent practical results. More importantly some differences have an impact on the protection offered to refugees.

As highlighted previously, the Dublin Convention distinguishes between the criteria resulting from a valid residence permit and a valid visa giving priority to the first, while in the case of Schengen these criteria have equal weight. Moreover, where an asylum seeker is in possession of more than one residence permit the Schengen Agreement establishes that the State that issued the visa that expires last is responsible. Dublin, however, attributes the responsibility to the State having issued the residence permit for the longer period, and only when the period of validity of the permits is identical is the expiry date taken into account.

In both Conventions, the State issuing the visa is released from its responsibility if it has obtained authorisation from another state, or in the case of a transit visa, if it has ascertained from the other State that the applicant fulfilled the conditions for entry into that State. However, the Dublin Convention specifies that the authorisation and confirmation have to be written. This exigency was taken over by the Schengen group initially but abandoned once their visa policies were harmonised. Presumably, this will also happen in the context of the European Union but until harmonisation is achieved the difference will persist.

For asylum seekers possessing a transit visa, but who are not required to have a visa for the Member State where they lodged their asylum application, the provisions in the two Conventions are different. Within Schengen, the State first entered is responsible, while within Dublin the responsibility lies with the State where the application is submitted. In the framework of Dublin, asylum seekers belonging to the limited group for whom visa requirements are waived are therefore free to choose the country in which they present their asylum application. This makes it more in tune with UNHCR Conclusion 15 which states "the intentions of the asylum seeker as regards the country in which he/she wishes to request asylum should as far as possible be taken into account".[21]

In cases of illegal entry, within Dublin the responsibility of the State whose external (EU) border has been crossed ceases if the applicant has been living in the State where he/she makes his/her application for at least six months. The right of a State to obviate from the allocation according to the criteria set are foreseen in both Conventions, however, under Dublin the wishes of the applicant have to be respected.[22] In conclusion, from a refugee protection perspective, the provisions of the Dublin Convention include some important improvements on the Schengen asylum rules.

These examples confirm that Dublin is not merely a copy of the asylum chapter of the Schengen implementation convention.[23] Moreover, as a result of the practical implementation of the Schengen provisions since March 1995, and due to the decisions adopted to resolve problems of interpretation and the application of certain provisions, both conventions have grown even further apart. To some extent the differences were overcome by means of decisions on the interpretation of Dublin and its application. Still actual differences persist and will be mentioned in the following section as they are

problems which the Member States will have to cope with in applying the Dublin Convention, and from which lessons can be drawn on the Schengen experience.

The Dublin Convention in Practice

This section will try to identify the problems that have arisen in the implementation of the Dublin Convention and will explore its shortcomings or limitations. To ensure an effective and smooth application of the Convention a number of implementation measures have been approved by the Council, e.g. a standard form for determining the Member State responsible for examining an application for asylum and the general guidelines for the implementation of the Convention with a common interpretation of the concepts used in it.[24] The Article 18 Committee has adopted texts clarifying the Convention.[25] However, the process is still not complete. We will first outline some of the necessary instruments and guidelines for the interpretation and application of the Convention which need to be adopted, developed or complemented to ensure a smooth application of the Convention, both from an administrative and a refugee protection point of view.

What further guidelines and instruments are needed?

Eurodac

Eurodac (European Automated Fingerprint Recognition System) is a system for the collection, storage, exchange and comparison of fingerprints of asylum applicants. This computer system allows for the comparison of asylum seekers' fingerprints with the aim of determining, with certainty, the Member State responsible for examining an asylum request. It aims to avoid multiple asylum applications lodged in several Member States under different names by tracking down applicants who have been refused asylum or who have been removed/ expelled from another Member State. The Eurodac system is based on a separate convention and it is currently being discussed but is far behind schedule.[26] As with other conventions it has to be first ratified by the Member States, though it is proposed that the convention might enter into force among the ratifying Member States before all of them have completed the process of ratification.

The entry into force of this convention will certainly have an impact on the application of Dublin, as it will facilitate the exchange and use of information in individual cases foreseen in Art. 15 of the Dublin Convention. There have been problems regarding the exchange of this information and efforts are being made to improve the quality of the exchange of information, by improving storage of and access to such information in Member States and by agreeing on principles of best practice in this respect. Moreover, Eurodac permits that the identity of the asylum seeker, and the EU Member State in which they first arrived, can be confirmed. In the meantime, the exchange of asylum seekers' fingerprints is being carried out on a bilateral basis according to national laws and respecting EU principles on data protection.

In this respect lessons have to be drawn from the application of Schengen and administrations should avoid repeating the same mistakes. Although Schengen did not foresee a computer system containing fingerprints or any other data on asylum seekers, the storage and processing of personal data in the Schengen Information System (SIS) has resulted, in some cases, in preventing individuals from lodging an asylum application in a Member State. In at least two cases, such rejections have been condemned in court.[27] In these cases the courts did not oppose the storage of data in the SIS (the registration as undesirable aliens in another Member State was not related to the asylum procedure), but the administrative procedure (based on SIS information) which resulted in the refusal of entry at the border even though the people in question were at risk of persecution on return to their country of origin.

Need for a flexible system of proof

It has already been mentioned that the Article 18 Committee has adopted decisions on the means of proof.[28] These are the decisive means by which a Member State decides whether or not to assume responsibility for examining an asylum application. Experience with the application of the Schengen Convention showed that many requests to take charge were based exclusively on the statement of the asylum seeker and were consequently not accepted. As a result, the Schengen States adopted a recommendation to accept, in individual cases, requests based on the statement of the applicant provided that this statement is consistent, sufficiently detailed and verifiable. In the framework of Dublin, the Article 18 Committee decisions on the means of proof states that responsibility for examining the asylum application should be based on as few requirements of proof as possible and that Member States should accept responsibility on the basis of indicative evidence. If the establishment of proof carried excessive requirements, the procedure for determining responsibility would ultimately take longer than the examination of the actual application for asylum. In that case, the Convention would fail to have the desired effect since the delays would create a new category of refugees in orbit, asylum seekers whose applications would not be examined until the Dublin procedure had been completed. In addition, under too rigid a system of proof the Member States would not accept responsibility and the Convention would be applied only in rare instances, while those Member States with more extensive national registers would be penalised since their responsibility could be proved more easily.

Practice has shown that this problem is far from being resolved. In March 1998, half a year after the entry into force of the Dublin Convention, the Justice and Home Affairs ministers acknowledged that the Convention did not work, in particular because of the difficulties in establishing the Member State through whose borders an applicant entered the EU. In May, the Justice and Home Affairs Council again discussed the issue of the assessment criteria and Southern countries argued for decisions to be based on serious and more reliable grounds.[29] The conclusion of the Eurodac convention and its application will certainly contribute to solving this problem which is still contentious among the Member States.

Need to adjust time limits

The Dublin Convention includes provisions related to the obligation to take charge of an applicant (and to transfer or take him/her back and to reply to a request) within certain time limits. If a Member State, where an application for asylum has been lodged, considers that another Member State is responsible for examining the application it may, within six months, ask the other Member State to take charge of the applicant. A delay of three months from receipt in answering the request to take charge is provided for.[30] In the Schengen Convention there were no fixed time limits, though the contracting states initially agreed to exactly the same time limit. In practice this deadline proved to be too long, as it did not prevent the disappearance of applicants. Consequently, the Schengen Executive Committee adopted two recommendations which were: first, a time limit of, in principle, one month to reply to a claim was fixed; and, second, for urgent requests (e.g. refusal of entry) that the States shall try to reply within the time limit set by the requesting State. The Article 18 Committee has reduced the initial deadline of three months to one month taking into account the Schengen experience.[31]

After acceptance of the request to take charge, or take back, the transfer of the applicant has to take place within one month (Art. 11(5)) under Dublin. This time limit was taken over by the Schengen States initially, but it seemed it was impossible to comply with in practice in spite of the efforts of the requesting State. For that reason the Schengen Executive Committee decided that the requested State remain responsible even if the time limit is not respected when this is due to exceptional circumstances, such as illness, pregnancy or criminal detention. Also in such cases the States determine, by common agreement, the time limit for each concrete case, even when the applicant has disappeared. In practice, the Dublin authorities in Member States have also applied the same principles, this being another of the areas in which the Dublin authorities have benefited from the previous Schengen experience. Nevertheless, this is an issue which still raises some problems in practice, and further guidelines on how to tackle them should follow. Moreover, the time limits to reply to a request for information on individual cases have to be adjusted to permit greater speed in the exchange of information.[32]

Treatment of members of the same family

One of the problems that the Dublin Convention faces relates to the division of responsibility for examining the asylum applications of members of the same family. A problem particularly arises when couples lodging an application for asylum in the same country are separated as a consequence of the application of the Dublin criteria for the allocation of responsibility. A situation like this may appear, for example, when members of the same family are in possession of a visa issued by embassies of different Member States, or where they have crossed different external borders when entering EU territory in an irregular manner. This is an undesirable situation that also occurred in the application of the Schengen asylum chapter.[33]

Within Art. 9 of Dublin a responsible State can request that another State assume responsibility on humanitarian grounds based on family and cultural reasons, in so far as the person concerned so wishes. There is, however, no guarantee that the requested State will agree to the transfer of responsibility. In addition, Art. 9 can be applied only at the request of another Member State.

Hence, it has been argued that this article does not establish an individual right for the asylum applicant entitling him/her to have his/her application examined by a given Member State, but merely refers to an administrative possibility for contracting parties to arrange for a transfer of responsibility.[34] The asylum applicant could only prevent Art. 9 being applied by not giving his/her consent to the transfer, but could not claim the application of this provision him/herself. However, asylum applicants have successfully appealed in court against such an administrative decision, by claiming a right to have their application transferred on the basis of Dublin Art. 9 and Schengen Art. 36.[35]

Another question relates to the scope of the application of this humanitarian clause: to what types of family reunion does it apply? In April 1997, the Schengen Executive Committee adopted a Decision identifying situations in which the humanitarian clause could be applied. The Decision points out, that the clause can be invoked in cases in which a family member is gravely ill, has a serious handicap, is old, is pregnant or has a newborn child, or where minors risk being separated and left unattended. The Article 18 Committee also adopted, in September 1998, a similar decision clarifying the application of this humanitarian clause.

These decisions do not contemplate other situations in which Dublin Art. 9 could be applied, for instance to reunite family members who risk being separated from one of their members who is already in possession of humanitarian, temporary, or de facto, status and therefore legally residing in a Member State; or couples who have not concluded a legally valid marriage yet live in a long-term relationship.[36] Thus, the Article 18 Committee could take further steps to apply this humanitarian clause in a more generous manner.

Furthermore, in the framework of Dublin, it seems also that in those cases the Member States could use the right to examine an application submitted to it even if it is not responsible under the criteria set out in the Convention, provided that the asylum applicant agrees to it. The opt-out clause, which we will mention next, can therefore also apply for family reunification purposes.

Application of the opt-out clause

The Dublin Convention provides for an opt-out clause,[37] which allows a State to examine an asylum application submitted to it even though it is not responsible according to the Convention.[38] In the case of the Schengen Agreement, the corresponding provision[39] limited the possible use of the clause to special circumstances, particularly those derived from national legislation. This is not the case with the Dublin Convention[40] which could, therefore, be applied in a wider sense. This opt-out clause

has been applied for very different reasons and purposes: sometimes in the interest of the applicant, for medical (serious illness and pregnancy) and humanitarian reasons: in other cases in order to accelerate the handling of an application.[41] Art. 3(4) stipulates that a Member State can examine the application, provided that the applicant for asylum agrees to this. The Schengen agreement did not include such a provision, so in this respect Dublin is a better instrument from an asylum seeker's perspective. However, it cannot be guaranteed that this rule of the Dublin Convention is always applied in the best interest of the asylum seeker only. Some EU Member States' authorities consider that the mere fact of having lodged an asylum application in a Member State indicates the applicant's agreement to the claim being processed in that particular State.[42]

In other cases, it was applied to avoid the application of the "safe third country" clause by the Member State responsible for the examination of the application. Lower Courts in the Netherlands obliged the administrative authorities to apply this clause when the responsible Member State according to the Dublin criteria would not follow the general Dutch policy of not expelling a particular groups of asylum seekers.

Also in other cases, the State may undertake to examine the asylum application if, during the procedure of determining which is the responsible Member State, it has already examined the substance of the claim. In any case, guidelines on its application should be provided as suggested by the UNHCR.

Application in time

Another question that arises related to the application of the Dublin Convention concerns "application in time". In the absence of any provisions setting its retroactive application, Dublin is not (nor was Schengen) retroactively applicable.[43] However, the question remains, whether in relation to the facts that determine the responsibility of a country to examine an asylum application the same understanding applies. That is whether only the facts occurring after the entry into force of the Convention can be taken into account or whether, conversely, facts happening before that date can also be considered for the allocation of responsibility. The Schengen States reached a pragmatic consensus on the consideration of certain facts relevant to the allocation of responsibility, even though they may be antecedent to the entry into force of the Convention. Those are: visas and residence permits issued before the date of the entry into force of Schengen but valid on and after that date; asylum proceedings initiated but not concluded before the date of its entry into force; the recognition of refugee status and permission given to a family member of the applicant to reside is relevant to the determination of the responsible Member State even when this recognition was made prior to 26 March 1995. The Schengen States did not, however, come to a common agreement regarding the allocation of responsibility based on a previous rejection of a refugee status made before 26 March 1995.

In respect to the Dublin Convention retroactive application to asylum applications submitted before the Convention entered into force is clearly excluded but it does not provide any guidance regarding the retroactive application of facts related to events which occurred before its entry into force. However, it would hardly make sense to exclude every fact, which may be relevant for the application of the Dublin Convention from its scope of application, because it already existed before 1 September 1997.[44] Otherwise, as argued, Dublin would only cover persons born after September 1997.[45] For this reason, the flexible implementation of the application of time limits stipulated in the Convention is needed.

What are the limitations of the Convention?

Limited scope of the Convention

One of the shortcomings of the Dublin Convention lies in the fact that it only contemplates asylum applicants that seek protection under the Geneva Convention of 1951 from a Member State by claiming refugee status. It does not include those persons who seek some kind of temporary or humanitarian status according to national legislation or other international conventions. It has also to be noticed that the applicants frequently do not distinguish clearly between political persecution, within the meaning of Art. 1 of the Geneva Convention and other forms of persecution, like inhuman treatment and torture or risks of violence or civil war. They normally seek protection on whatever grounds it might be granted. This limitation is quite relevant specially when it has been recognised that the number of these kinds of refugees looking for temporary protection is considerable and has risen due to the adoption of the restrictive asylum laws and policies. Anyway, it is clear that Dublin is not applicable in cases where any other form of protection is applied.[46] Furthermore, it raises some problems concerning the application of the Convention.

The Dublin experience has provided some cases in which an asylum application is withdrawn and replaced by a claim for temporary protection. In these cases does the Convention still apply and should the transfer to the competent State take place? If an asylum applicant withdraws a claim Dublin becomes in principle inapplicable. The Legal Service of the Council gave its opinion of the application of the Dublin Convention in these cases and pointed out that the aim of the Convention is to determine the State responsible for examining applications for asylum.[47] Thus, it can be assumed that the provisions of the Convention do not apply where an application has been withdrawn, because there is no need to determine the State responsible for examining an application that no longer exists.[48] It must therefore be concluded that the provisions of the Dublin Convention do not apply in cases where asylum applications are withdrawn, apart from the two cases covered by the Art. 3(7)[49] and Art. 10(1)(d),[50] when the applicant lodges a new application in another Member State. Although the Convention applies solely to asylum applicants and not to persons seeking other kinds of protection, there is one exceptional case in which the Convention applies to persons who are not asylum applicants. This is the case of Art. 10(1)(e), which provides that the State responsible

must take back "an alien whose application it has rejected and who is illegally in another Member State". But that is only the logical consequence of the rejection of the application.[51] From a legal point of view this provision cannot be used as an argument to extend the scope of the Convention. This does not provide any guidance regarding situations in which, before the withdrawal of the asylum application, another Member State has given a positive reply to a request to take over or to take back the applicant.[52] There is neither a clear solution to cases in which the transfer has taken place before the withdrawal. Therefore guidelines regarding the application of the Convention to asylum applicants who withdraw their claim should be agreed upon.

Lack of substantive and procedural harmonisation

This has been pointed out as one of the most serious issues raised by the Convention. As we mentioned above the responsible Member State is due to examine the asylum application in accordance with its national law and international obligations. As the national legislations of the Member States are not harmonised, this agreement presupposes mutual confidence in each other's legislation and adjudication processes, which relies on the fact that there is a common framework to the different national laws constituted by the Geneva Convention as amended by the New York Protocol. Indeed, it has been acknowledged that although all Member States apply the same international rules regarding refugees very important divergences persist among them (e.g. agent of persecution, competent authorities, appeal rights). In the absence of harmonisation, the probability of success of a claim varies from Member State to Member State. Applicants seek to apply to the most liberal State which in turn cannot maintain the standards for very long. This situation will eventually result in an undesirable de facto harmonisation according to the lowest standard.

It is true that some progress has been achieved in this respect since the signature of the Dublin Convention. Harmonisation efforts regarding asylum procedural rules were crowned by the adoption of the resolution on manifestly unfounded asylum applications; the resolution on a harmonised approach to questions concerning host third countries; conclusions on countries in which there is generally no serious risk of persecution[53] and also the resolution on the minimum guarantees for asylum procedures.[54] With respect to the harmonisation of substantive law an important breakthrough was achieved by the adoption in March 1996 of a Common Position on the notion of "refugee". More recently, in May 1998, the Council adopted two joint actions concerning the financing of specific projects to assist displaced persons, asylum seekers and refugees, which is a first small step to bringing reception and integration facilities and practices in the EU Member States closer. Most of these instruments are, however, not legally binding and therefore do not guarantee a substantive or procedural equivalence of the asylum decisions in all the Member States. The Amsterdam Treaty introduced some improvements regarding cooperation in the fields of Justice and Home Affairs and it allows room for expectations towards faster progress regarding harmonisation of asylum policies and procedures. Asylum, as well as other policies related to the free movement of persons, has been transferred to the First Pillar and the measures to be adopted in this field have been listed in Art. 63 of the TEC, which also states a deadline of five years for its implementation.

Safe third country

The Preamble of the Dublin Convention states that it provides a guarantee for all asylum applicants that their applications will be examined by one of the Member States.[55] This is not, however, the case as each Member State retains the right to send the applicant to a third State. The Dublin Convention[56] allows any Member State to send an applicant for asylum to a third State, once a Member State has been assigned the responsibility to process an asylum claim. This possibility has been heavily criticised due to the absence of explicit stated requirements for the Member States to inquire into the conditions in the third country before sending the applicant there. Human rights and other pressure groups have expressed the concern with this situation, which might undermine the objective of reducing the number of refugees in orbit and lead involuntarily to the *refoulement* of an asylum seeker. In combination with the increasing number of readmission agreements signed, this concept represents an attempt to create a buffer zone around Western Europe. This might be a legitimate way of stimulating the creation of reliable systems for refugee protection, which are also financed by the agreements, in neighbouring countries, namely in Central and Eastern Europe. However, it should not be a way for Western Europe to neglect its role in ensuring refugee protection.

In this respect there are court cases, in which asylum seekers have appealed against a transfer decision arguing that the EU Member State responsible for processing their asylum case, would return them to a third country, from where they would risk being sent back to their country of origin and subjected to persecution. Avoiding such persecution being the original reason why applicants sought asylum in a certain Member State. The possibility of appealing against the transfer is not based on the Dublin Convention but on national law, and thus it is not available in all of the Member States. Just to give one example, according to the Finnish Aliens' Act, applications for asylum are considered manifestly unfounded and are not subject to appeal, if the applicant can be sent to another State which is responsible for examining the application according to the Dublin Convention.[57]

It has been argued that the possibility of appealing against being transferred to the responsible Member State should be granted to asylum seekers, and that the appeal should have a suspensive effect. However, this would not be compatible with the principle that the Dublin Convention is based on mutual trust in Member States' asylum procedures. Therefore, the solution should be found in a common approach by the European Union Member States towards safe third countries. The harmonised application of the "safe third country" notion, expressed in the 1992 London resolution, is already a step

in that direction. In Paragraph 3(a) it indicates that the Member State in which asylum has been submitted is to examine whether or not the principle of the third country can be applied. The procedures for sending the applicant to the host third country are to be set in motion before considering whether or not to transfer responsibility to another Member State pursuant to the Dublin Convention. This option would, however, create a risk of the passport control authorities in some Member States proceeding to make arrangements for the return of the applicant to a third country before considering the criteria of the Dublin Convention (e.g. Art. 4, the applicant having a family member who is a recognised refugee in another Member State).[58] This particular problem does not appear in Finland because, according to the Finnish Aliens' Act (Art. 39), whenever an alien applies for asylum in Finland the decision on refusal of entry is always made, not by the passport control authorities, but, by the Directorate of Immigration, i.e. the same authority which is responsible for processing the asylum application and the procedures pursuant to the Dublin Convention. In this context, the relevant Dublin elements of the application are to be processed first in Finland.

In any case Western Europe should preserve its commitment to granting protection and reaffirm its role and responsibility as regards the refugee problem. The removal to a third host country should only take place if it has been established that the receiving country will indeed admit the asylum seeker, will observe the principle of non-*refoulement* and will consider the claim. It should be noted that the Dublin Convention stipulates that the processing of an asylum application by the responsible State should be undertaken in accordance with its obligations under the 1951 Convention.[59]

Judicial control

As with Schengen, the Dublin Convention excludes the jurisdiction of the Court of Justice to ensure uniform interpretation and application of its provisions and to resolve any differences arising between Member States or between individuals and national authorities. The Article 18 Committee (Art. 18) is charged with examining any question regarding the application or interpretation of the Convention at the request of one or more Member States. The Decisions and actions of this Article 18 Committee are also not subject to judicial control by the Court of justice, even though the operative decisions adopted by it may indirectly affect the rights of an individual.

A question also arises about the direct applicability of the Dublin Convention; whether the Dublin Convention does in itself establish individual rights. The Council Secretariat, as mentioned previously has looked at this issue at the request of the Austrian delegation which stated that the Convention is addressed to Member States, i.e. it lays down a procedure between Member States to which the asylum applicant is not a party. Therefore, although the applicant's interests and special links with a particular Member State might be taken into account, no provision entitles an asylum applicant to have his/her application examined by a particular Member State, not even Arts. 3(4) and 9 requiring the asylum applicant's agreement to apply certain criteria.[60] Individuals may appeal against a transfer decision according to national laws.[61] However, this possibility of resorting to the national courts, if the possibility is granted by national law (and we have already mentioned cases in which this possibility is granted, in contrast with others when it is not), does not promote uniformity or consistency in the interpretation and application of these provisions.

In the future this situation will change in view of the replacement of the Dublin Convention by a Community instrument as a result of the implementation of the Amsterdam Treaty. This is a necessary and welcome development from the perspective of asylum seekers and refugees but also from the point of view of the administrations in charge, which can rely on a uniform application and interpretation of the instrument in contrast with the enforcement resulting from national case law.

PROBLEMS AND LIMITATIONS

- Completion and development of implementation measures
- Limited scope of the Convention
- Lack of material and procedural harmonisation
- Safe third country
- Judicial control

Conclusions

Though the impact of the Dublin Convention on the refugee problem is not crucial[62] its importance should not be underestimated. As one can observe from the graphs at the end of this article Dublin does not apply to the vast majority of asylum claims although this statistical data shows that the number is increasing. Nevertheless, it is the first binding instrument in force in the European Union in the field of asylum, confirming the Member States' will to ensure protection for those in need, by sharing the responsibility of examining an asylum application. After being applied for one year, it is quite hard to draw conclusions on its application or on the question of whether it has fulfilled its aims.

Further comparative study is needed on its implementation by the various Member States' administrations and enforcement by national courts. One can, however, attempt to point out the positive aspects of the Convention for the protection of the asylum seekers and also for the administrations in charge of asylum procedures, as well as the negative points.

The Convention is an important instrument for the Member States' authorities in processing asylum applications, by providing legal prerequisites for the exchange of information about applicants. In this respect it certainly contributes to fighting abuses of asylum procedures and situations of multiple asylum applications, even in a preventive way. Moreover, it has established practical cooperation between the administrations in charge and permits an increase in knowledge of others' asylum procedures. The Convention has also brought to light the differences between Member States' policies, procedures and standards which need to be tackled in the future, not only for the sake of the smooth application of

the Convention itself, but, in order to provide the EU with its own answers and strategies to the asylum dilemma.

From the perspective of asylum seekers, the application of the Convention is a challenge both for practitioners and decision-makers as it leaves the door open to a more restrictive or, conversely, a more generous application. In practice, the application by the various Member States differs. Much depends on how it is tackled in practice: for example, concerning the issue of claims of members of the same family or how the concept of the third safe state is applied. Both questions have been handled differently by the Member States. In this respect the timing of the entry into force was important and the climate might even have been somewhat more favourable than in previous years of crisis.

The decrease in the number of asylum claims in almost all European Union Member States does not exclude having goals for hastening asylum applications. In addition, delays and backlogs should be reduced, rejected applicants should be sent back to their home country and abuse should be deterred. These important goals are, however, secondary to the real objectives of asylum, which are to provide protection to the persecuted, to grant asylum seekers an individual examination of their claim, to achieve procedural fairness and to meet humanitarian concerns. We can only hope that these concerns will be reflected in the future development of instruments, guidelines of interpretation and applications, which will ensure an efficient and common approach in the application of the Convention. Some limitations of the Convention will be overcome in the long term. It is still not known when, although a time limit was set by the Amsterdam Treaty, and to what extent the European Court of Justice will be granted jurisdiction regarding the interpretation of disputes arising from the application of the Dublin Convention. The development of binding instruments at the level of the European Union to harmonise procedural and substantive asylum rules has a long way to go, although an important breakthrough was achieved in Amsterdam. Furthermore, a comprehensive European Union strategy in the field of asylum is based on an ideal solution of fighting the root causes. As the Commission suggests in its Communication, true solidarity and burden sharing between the Member States and objective public information will take time to emerge. The Dublin Convention's entry into force, with all its limitations and problems was a welcome first step on the long path the European Union has to take to develop its refugee strategy. This strategy will, as stated by the High Commissioner for Refugees, "reaffirm Europe's leadership and solidarity with the global refugee problem".

RÉSUMÉ

La Convention de Dublin sur l'asile, conclue en 1990 entre 12 Etats membres et à laquelle les nouveaux Etats membres, l'Autriche, la Finlande et la Suède étaient tenus d'adhérer au moment de leur adhésion à l'UE, est entrée en vigueur le 1er septembre 1997. Cette convention fut conçue à une époque de très forte augmentation des demandes d'asile afin de réduire les longs délais dans les procédures de traitement des demandes d'asile et d'éviter de gaspiller les ressources des Etats membres à cause d'une redondance d'efforts. En outre, elle se voulait une réponse coordonnée aux situations des réfugiés "en orbite" et aux demandes d'asile multiples, qui étaient facilitées par la création du marché intérieur. Dès lors, la Convention de Dublin fixe des critères communs afin de déterminer l'Etat membre qui sera responsable de l'examen d'une demande d'asile. Elle ne visait pas à harmoniser les règles de procédure ou de fond en matière d'asile dans les Etats membres. La Convention de Dublin contient six critères de base classés par ordre hiérarchique, ainsi que des modifications et exceptions qui servent à identifier l'Etat qui sera chargé de l'examen. Ces critères sont les suivants : regroupement familial, visa ou permis de résidence en cours de validité délivré par un Etat membre déterminé, franchissement irrégulier de la frontière d'un Etat membre, responsabilité du contrôle à l'entrée et Etat membre dans lequel la demande est introduite en premier lieu. L'Etat qui est responsable selon les critères de la Convention, examine la demande en vertu de ses lois nationales et de la Convention de Genève de 1951 et son Protocole de 1967. L'Etat membre responsable a l'obligation de conduire la procédure à terme jusqu'à ce qu'une décision définitive ait été rendue et des dispositions sont prévues pour réadmettre le demandeur d'asile dans l'Etat membre responsable s'il se trouve sur le territoire d'un autre Etat membre.

Bien que la Convention de Dublin n'ait pas un impact vital sur le problème des réfugiés, il ne faut cependant pas sous-estimer son importance. Il s'agit en effet du premier instrument contraignant en vigueur dans l'Union européenne dans le domaine de l'asile, confirmant ainsi la volonté des Etats membres d'assurer la protection des personnes concernées au moyen d'un partage de la responsabilité du traitement de la demande d'asile. Un an à peine après son entrée en vigueur, il est difficile de tirer des conclusions sur ses applications ou de répondre à la question de savoir si elle a atteint ses objectifs. Il faudrait pour cela une étude comparative approfondie sur sa mise en oeuvre par les différentes administrations des Etats membres et sur son interprétation et son contrôle par les juridictions nationales. On peut, toutefois, tenter de déceler les problèmes d'application et les limites de la Convention, en mettant en évidence les autres instruments et lignes de conduite en matière d'interprétation et d'application qui sont nécessaires pour en améliorer le fonctionnement.

La Convention représente un important instrument au service des autorités des Etats membres pour instruire les demandes d'asile, dès lors qu'elle pose le cadre juridique requis pour un échange d'informations sur les demandeurs d'asile et, sous cet angle, elle contribue certainement à lutter contre les abus en matière de procédure d'asile ainsi que contre les situations de demandes multiples, et ce même à titre préventif. En outre, elle instaure une coopération pratique entre les administrations compétentes et permet d'accroître les connaissances des procédures d'asile de chacun. Du point de vue de la protection des demandeurs d'asile, la Convention laisse une certaine marge de manoeuvre, du

moins pour l'instant, pour une application plus généreuse ou plus restrictive, selon le cas, et l'on rencontre dans la pratique des exemples de ces deux approches. La Convention a aussi mis au jour les différences entre les politiques, les procédures et normes des Etats membres qu'il faudra résoudre à l'avenir, non seulement pour une application harmonieuse de la Convention, mais aussi pour tenter d'esquisser les réponses et stratégies de l'Union européenne face au dilemme de l'asile.

NOTES

1 See for a discussion on the real and perceived threats posed by immigration into Western Europe, Sarah Collinson, *Beyond Borders: West European Migration Policy Towards the 21st Century*, (London: Royal Institute of International Affairs,1993).

2 Denmark signed and ratified the Dublin Convention in the following year.

3 The Preamble of the Dublin Convention mentions the objectives of avoiding situations of "refugees in orbit" – in which the applicants for asylum are left in doubt for too long as regards the likely outcome of their applications – and of ensuring that applicants are not referred successively from one Member State to another without any of these States acknowledging themselves to be the competent authority to examine the asylum application. The preamble is mute, however, in relation to the problem of so-called "asylum shopping".

4 The Schengen Agreement was signed in 1985 by Germany, France and the Benelux countries and was intended to allow for the removal of internal border controls among its signatories. The Schengen Implementation Convention (SIA) was signed in 19 June 1990. It contains, not only provisions on asylum, but also on the control of external borders, visas, police and judicial cooperation and the setting up of an information system.

5 The ratification process was delayed in some of the Member States. In the Netherlands the delay was due to discussions on the competence of the Court of Justice. Eventually, the initial demand by the Dutch First Chamber to attribute competence to the Court of Justice (which would have required that all the other EU Member States ratify an additional protocol) was replaced by an alternative solution, that of adding a unilateral declaration which states that any decision of the Committee charged to supervise the implementation of the Dublin Convention, has no binding effect on the Dutch Courts. Ireland, ironically, was the last country to ratify the Convention. An Asylum Bill and its implementation regulations had first to be approved.

6 Title II, Chapter 7, Arts. 28-38 of the Schengen Implementation Convention

7 Johannes van der Klaauw, The Dublin Convention: a difficult start, paper presented a the 6th colloquium 'Schengen's Final Days? Incorporation in the New TEU, External Borders and Information Systems (EIPA, Maastricht 5-6 February 1998), p. 2.

8 Communication from the Commission, towards an area of Freedom, Security and Justice, COM (1998) 459 final, Brussels, 14.07.1998.

9 On the basis of Art. 3(1), every asylum seeker is assured that his/her application will be examined by one of the Member States. As will be pointed out later, this might not always be the case as each Member State retains the right to send the applicant to a third State.

10 Art. 4.

11 Art. 5.

12 Art. 6.

13 Art. 7.

14 Art. 8.

15 Position defended by the European Parliament, Resolution on the Right of Asylum, O.J. of the European Communities No. C 99 of the 12 March 1987, and Resolution of 15 March 1990.

16 This is stated explicitly in Dublin Art. 3(5) and Schengen Art. 29(2).

17 See for example Van der Klaauw (1998), p. 5.

18 O.J. 1997 L 281/1 of 14 October 1997.

19 The Spanish Presidency of the Schengen Group drafted a comparative analysis of the two texts back in 1992.

20 The United Kingdom and Ireland have not joined the Schengen Group, wishing to maintain border controls. In Greece provisions relating to the lifting of land border controls have not yet been implemented, and in the Nordic countries a number of technical arrangements need to be made, such as the implementation of external border control measures in airports, or participation in the Schengen Information System. The Nordic countries include EU Member States (Denmark, Finland, Sweden) and non-EU Member States (Norway, Iceland). Those countries established an area of freedom of movement within the Nordic Passport Union back in 1957 and agreed to implement the provisions of the Schengen Agreement on 19 December 1996 in order to preserve the integrity of the Nordic Passport Union. See, for example, Lars Bay Larsen, *Schengen, the Third Pillar and Nordic Cooperation*; in Monica den Boer (ed.) The Implementation of Schengen, First the Widening, Now the Deepening, (Maastricht: European Institute of Public Administration, 1997), pp.17-23.

21 As pointed out by Roel Fernhout, Schengen and the Internal Market: An Area Without Internal Frontiers – Also Without Refugees?, *The International Spectator*, (November 1990), p. 687.

22 Art. 3(4) and Art. 29(4).

23 These differences have no practical consequences as the coexistence of both Conventions was excluded by means of the Bonn Protocol, which established the replacement of the Schengen provisions on asylum, by the Dublin Convention. This was foreseen in the Schengen Convention itself, Art. 134. Schengen fulfilled its aim in being a laboratory for the European Union. The question which remains concerns the incorporation of the Schengen *acquis* regarding asylum in the framework of the EU.

24 Furthermore, a text was adopted on the way in which means of proof are used in the framework of the Convention, i.e., on the calculation of periods of time; providing a flow chart on the distribution of responsibility; conclusions on the transfer of the asylum applicants; the form of a *laissez passer* for the transfer of applicants. All these texts are available in: Compilation of texts on European Practice with respect to asylum, O.J. C 274, 19 September 1996, which were partially replaced and adapted by decisions of the Article 18 Committee mentioned next.

25 Decisions No. 1/97 and No. 2/97 of the Article 18 Committee concerning provisions for the implementation of the Dublin Convention, 9 September 1997, O.J. L 281/1, 14 October 1997; Decision No. 1/98 of the Article 18 Committee, 2410/3/98 rev. 3.

26 The problematic issues regarding the establishment of this convention concern whether there is an obligation or not to take the fingerprints of asylum seekers and the extension of the system to the collection of fingerprints of illegal immigrants. Other problems relate to questions of whether Community management and funding would be agreed upon, the role of the Court of Justice, provisions regarding protection of personal data and the right of access to documents by the persons concerned.

[27] Igel vs. France, Administrative Court Strasbourg, 3 April 1995 and Ciuciu vs. France, Administrative Court Lyon, 5 April 1995.

[28] Decisions No. 1/97, No. 2/97 and No. 1/98.

[29] Agence Europe, 21 March 1998 and 30 May 1998.

[30] Art. 11 (4) of the Dublin Convention.

[31] "The Member State which is requested ... should make every effort to reply to the request within a period not exceeding one month", Art. 4 (1) of Decision 1/97. The possibility of fixing the delay of one month as maximum time limit is under consideration.

[32] Art. 28 of the decision 1/97 and Art. 15 of the Dublin Convention.

[33] Migration News Sheet, November 1996.

[34] Draft reply to questions put by the Austrian delegation in compilation of texts on European practice with respect to asylum.

[35] Van der Klaauw (1998) p. 6.

[36] See UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, paragraph 185 and Van der Klaauw (1998) p. 5.

[37] Art. 3(4).

[38] This clause was introduced to respect the Member States constitutional obligations related to the right of asylum.

[39] Art. 29(4) of the Schengen Implementation Convention.

[40] Art. 3(4).

[41] Accelerated procedures are applied according to Member States' legislation, for example, in cases when asylum seekers destroy or withhold documentation without a reasonable excuse.

[42] Van der Klaauw (1998) p. 4.

[43] Hailbronner, Kay, The Schengen II/Dublin Rules on Asylum Problems and Prospects, paper presented in the 5th colloquium "Schengen, Policy Coordination and Judicial Cooperation" (EIPA, Maastricht, 23-24 January 1997), p. 7.

[44] The Dublin Convention entered into force on 10 January 1997 in relation to Austria and Sweden and 1 January 1998 in relation to Finland.

[45] Hailbronner (1997), p. 7.

[46] It is a matter of national law and bilateral agreements whether a humanitarian refugee seeking protection can be returned or deported to another Member State or to a Third State. For example, between Nordic countries the Nordic Passport Union can be applied. It stipulates the conditions when a person who has illegally entered one Nordic country from another can be returned or deported within the Nordic countries.

[47] The Legal Service of the Council has given its opinion on the application of the Dublin Convention in cases where asylum applications are withdrawn, see O.J. No. C 254, 19 August 1997 (13304/97 ASIM 246).

[48] Ibidem.

[49] Art. 3(7) of the Dublin Convention provides that: "An applicant for asylum who is present in another Member State and lodges an application for asylum there after withdrawing his/her application during the process of determining the State responsible shall be taken back, under the conditions laid down in Art. 13, by the Member State with which that application for asylum was initially lodged, with a view to completing the process of determining the State responsible for examining the application for asylum."

[50] Art. 10(1)(d) refers to: "an applicant who has withdrawn the application under examination and lodged an application in another Member State".

[51] See Art. 10(4) of the Convention, which reads: "The obligations specified in paragraph 1, points (d) and (e) shall cease to apply if the State responsible for examining the application for asylum, following the withdrawal or rejection of the application, takes and enforces the necessary measures for the alien to return to his/her country of origin or to another country which he/she may lawfully enter".

[52] Academics have argued that the withdrawal, or change, of arguments in those cases does not prevent a transfer of responsibility which has already taken place (either in cases where the transfer of the asylum seeker has not yet been carried out or in cases where the applicant is already in the country accepting responsibility). See, Kay Hailbronner (1997), p. 11.

[53] In London, 30 November and 1 December 1992.

[54] Adopted in June 1995.

[55] See also Art. 3(1) of the Convention, which reads: "Member States undertake to examine the application of any alien who applies at the border or in their territory to any one of them for asylum."

[56] Art. 3(5).

[57] Arts. 34 and 34 a (19.12.1997/1269) of the Finnish Aliens Act. However, the administrative decision (the rejection of the asylum application, the application for a residence permit attached to it, and the decision to refuse entry, which are all made at the same time) by the Finnish Directorate of Immigration, is submitted to the District Administrative Court of the province of Uusimaa, and the asylum applicant has an opportunity to be heard, as regards of refusal of entry, before the decision is submitted to the Court.

[58] Van der Klaauw (1998), p. 7.

[59] It has been argued that the Geneva Convention is violated if not in substance at least in its spirit by permitting a return to a third State, which may not provide sufficient access to asylum procedures.

[60] As was pointed out, it will be for the national courts to have a final word on whether the Dublin Convention creates individual rights beyond those determined by national laws: Kay Hailbronner (1997), p. 16.

[61] Art. 11(5).

[62] The impact of the Schengen provisions was also limited and it did not apply to the large majority of the asylum claims submitted in the European Union.

Other Bibliography:

José J. Bolten, "From Schengen to Dublin", *Nederlands Juristenblad*, Vol 5 (January 1991), pp.165-177.

Elspeth Guild, *The Developing Immigration and Asylum Policies of the European Union*, (The Hague: Kluwer Law International, 1996), pp.113-139.

Kay Hailbronner and Claus Thiery, "Schengen II and Dublin: responsibility for asylum applications in Europe", *Common Market Law Review*, Vol. 34, No 4 (August 1997), pp.957-989.

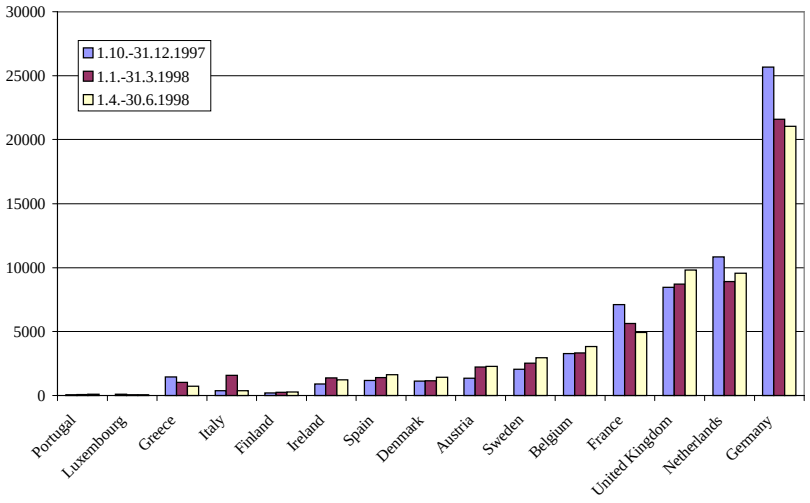
Peter-Cristian Müller-Graff, "The Dublin Convention: pioneer and lesson for Third Pillar Conventions", in Roland Bieber and Joerg Monar (eds), *Justice and Home Affairs in the European Union, the Development of the Third pillar*, (Brussels: College of Europe, 1995), pp.49-63.

Johannes van der Klaauw, "The Dublin Convention, the Schengen asylum chapter and the treatment of asylum applications", in Giuseppin and Jansen (ed) *Het Akkord van Schengen en vreemdelingen*, (Utrecht: Nederlands Centrum Buitenlanders, 1997), pp.37-47.

George Ress, "Die Auswirkungen der Abkommen von Schengen und Dublin auf die Asylpolitiek der EG", in Alexis Pauly (ed.) *Les Accords de Schengen: abolition des frontières intérieures ou menace pour les libertés publiques* (Maastricht: European Institute of Public Administration, 1993), pp.79-104.

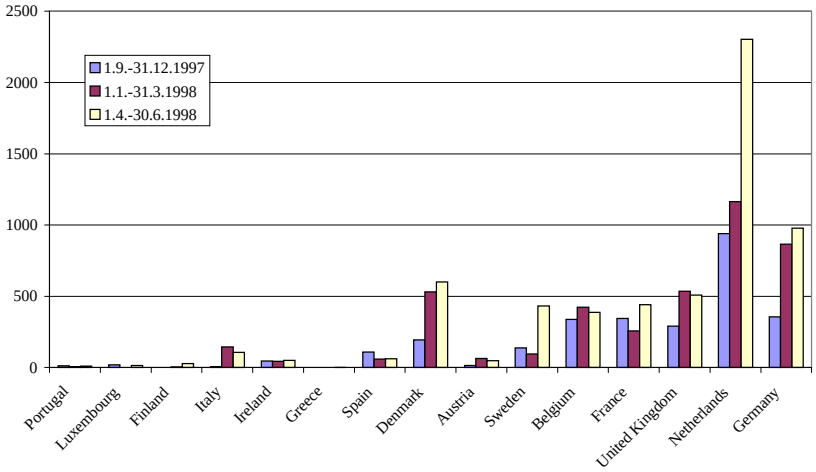
Patrick Stéfanini et Frédérique Doublet, "Le droit d'asile en Europe: la Convention relative à la détermination de l'Etat responsable de l'examen d'une demande d'asile présentée auprès d'un Etat membre des Communautés européennes", *Revue du Marché Commun* (1991), pp. 391-399. ❑

Statistical data on the total number of asylum applications in the EU Member States



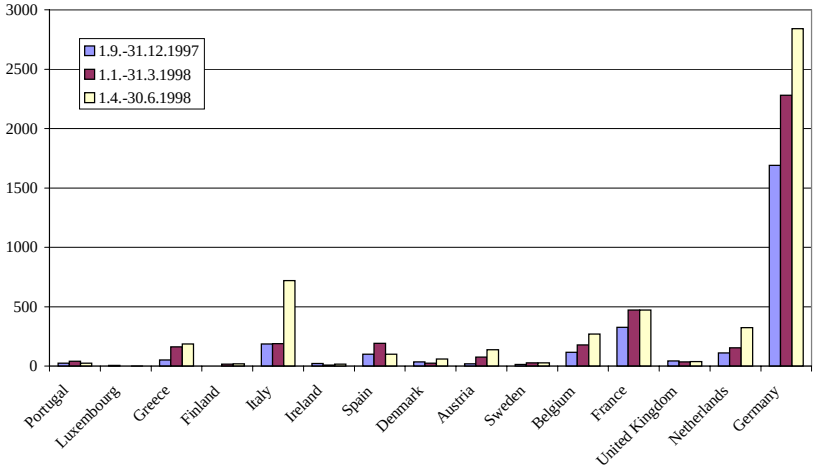
Statistical data on the application of the Dublin Convention

Total number of transfer requests (of persons) submitted by a given Member State to the other Member States



Statistical data on the application of the Dublin Convention:

Total number of transfer requests submitted by Member States to a given country



The Secret Life of Comitology *or* the Role of Public Officials in EC Environmental Policy*

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1. Introduction

In his book "*Politics of Globalisation*", Ulrich Beck[1] asks what would happen if the European Union were to apply for membership of the European Union. In Beck's view, the EU's application would be rejected owing to its lack of democratic structures.

But what about the Member States themselves? This rather naïve question is much more difficult to answer because – although the Member States of the European Union are certainly democratic states – they are being deprived more and more of their capacities to act as sovereign democratic states.

The Member States have had to face up to this reality for years. The environmental sector serves as just one example: up to 90% of all environmental legal acts within the national legal systems are of EU origin and national parliaments have – at least in these areas – sometimes nothing other to do than to simply transform European directives into national legislation.[2]

This "decline" of national parliaments has been only gradually compensated by the strengthening of the powers of the European Parliament. For example, legal activity in the legislative process has drastically decreased over the last few years in the environmental sector. Legal activity is still maintained in the executive process, but here legal acts (the so-called implementation acts) are decided by national experts together with the European Commission and the European Parliament is excluded. In this respect, one could say that the growing importance of the European Parliament within the legislative process has – at least in the environmental field – not really increased the powers of the European Parliament as more and more decisions are delegated to the Commission (in the so-called comitology committees) and the Member States.

In addition, both the European Parliament and the national parliaments have to implement more and more international treaties and conventions which have been decided by experts in international organisations (such as United Nations, NATO, the World Bank, the International Monetary Fund, the G-7). Today, already 28% of all proposals of the European Commission have their origin in international treaties (which have to be implemented in the Community).[3] This present trend towards "denationalisation" and "deparliamentarisation" will further increase as decisions are taken more and more at international and global level. As a result the role of the executives will be heightened and a new form of international elite will be created with the responsibility for decision-making.

Historically, the "Act", "Loi" or "Gesetz" has first of all symbolised its source, namely the will of the people, and then its effect, namely its supremacy over the monarch's ordering powers.[4] Today, international organisations have become the monarch and the people have – through their parliaments – lost their supremacy when deciding on an "Act", "Loi" or "Gesetz". In this respect, one might say that the national parliamentarians are increasingly turning into executive policy-makers who have to obey international obligations. One might even say that we are entering a post-parliamentary age where national parliaments are losing decision-making powers and the European Parliament only partially compensates for this loss of sovereignty.

The process of "governance without government" or "governance without legitimacy" in international organisations (and agencies) is becoming both necessary and ever more problematic.

At European Union level, the role of the national administrations and of national civil servants in the environmental sector (at European level), in particular within the executive process, has – surprisingly – up till now received very little attention from the scientific sector. The reason for this lack of interest relates partly to the structure of the Treaty itself; committees in the environmental sector are not mentioned in the Treaties. Art. 157 2 TEC states that in the performance of its duties the European Commission shall neither seek nor take instructions from any government or other body. Each Member State must respect this principle and not seek to influence the members of the Commission in the performance of their tasks. Art. 157 2 TEC therefore supports the view that the Commission is a hermetic body which does not provide links to the Member States (e.g. by establishing committees). This image of the Commission ignores some basic features of the proceedings in the Commission (and the Council). The traditional view of the Commission is that it is the sole executor of Community policies. Curiously, there is nothing in the treaties to suggest that the Commission should have the exclusive right to manage Community policy and to take decisions of an executive nature. It is more the case that Community policies are normally

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* *Un bref résumé de cet article en français figure à la fin.*
See announcement of seminar "Managing European Environmental Policy – The Role of Public Officials in the Policy Process of the European Community" on page 42.

managed by the Commission under powers conferred by secondary legislation adopted by the Council and delegated to the Commission under Art. 145 3 TEC.

As regards the Council, Art. 145 TEC stipulates that it shall "have power to take decisions". The Council is therefore widely understood as being the legislative body of the EC. This presumption is misleading. In reality, the Council is the main source of legislation but it also exercises executive powers (and is a more or less permanent negotiating forum in which, below the level of a Ministers meeting, Coreper and working party meetings create a spirit of multinational cooperation).

Over the last few years there has been a significant trend, particularly within the European Union, towards a mutual interweaving, intermixing, interlinking and merging between the national and Community levels.[5] Particularly at Community level, the political decision-making process is becoming ever more labyrinthine, as it were, and decisions are increasingly the result of negotiations within informal or formalised networks. In 1997, 10950 meetings (an increase of 1.3% on the previous year) were organised by the European Institutions and other European bodies. The Joint Interpreting and Conference Service provided 138,000 interpreter days (9% more than in 1996).[6] The multi-level interaction of civil servants from national and international administrations has thus reinforced the trend towards the "sharing" or "fusing" of powers between bureaucrats and politicians.[7]

In an increasing number of areas, national civil servants are becoming involved in expert committees of the Commission who advise the Commission in preparing proposals (within the legislative process), working groups of the Council (composed of civil servants) whose task is to prepare the meetings of COREPER and the Council of Ministers (within the legislative process) and comitology committees whose task is to implement (within the executive process) the legal acts decided upon by the Council or by the Council and the Parliament.[8] In the environmental sector, there are approximately 100 consultative committees composed of national civil servants and other experts assisting the Commission in shaping proposals put to the Council.[9] It is difficult to create an exact picture as to the number of expert committees of the Commission and their activities in the environmental sector. The Commission differentiates between 5 special committees created by legal act, 65 permanent expert groups of the Commission and 35 ad-hoc expert groups. With respect to this differentiation, it is worth mentioning that in the *Anglopharm* case,[10] the Court announced its dis-satisfaction with the fact that the Commission insists on using its right to decide whether or not to consult advisory expert groups. The Court stated that the drafting and adaptation of Community rules is founded on scientific and technical assessments which must themselves be based on the results of the latest international research. In carrying out such assessments, the Commission should therefore consult experts on scientific and technical issues because neither the Commission nor the comitology committees, which generally comprise representatives of the Member States, are in the position to carry out the type of assessment required. According to the Court, this means that the consultation of expert groups may be mandatory in some cases to ensure that measures adopted at Community level are both necessary and adapted to the objective of protecting human health as pursued by the legislative act in question.

The object of this article is *not* to describe the Comitology decision 87/373/EEC or to explain the different committee procedures as this has already been done elsewhere.[11] The intention is more to look into the "daily life" of the comitology committees from the point of view of a national civil servant and to analyse their working methods, rules of procedure, style of negotiation and composition. There will be a critical assessment of the comitology committees in the environmental sector in terms of their efficiency and effectiveness, and against the background of the discussions on the democratic deficit in the EU. The article will conclude with some realistic proposals as to how the comitology system can be reformed.

2. "Comitology" in the Environmental Sector

In EC environmental law an initial distinction should be made between the approximately 130-150 legal acts of the Council and the amending acts of the Council (or the Council and the Parliament) within the official legislative procedure and the approximately 100 implementation acts of the Commission and the Council within the executive procedure (on the legal basis of Article 145, third indent and the Comitology decision 87/373/EEC of July 1987).[12]

The spectrum of executive measures set up by the implementation acts covers:

- adaptation to technical progress, mainly by amending the annexes (for example Council Directive 91/676 concerning the protection of waters against pollution caused by nitrates from agricultural sources; Directive 94/67 EC on the incineration of hazardous waste);
- the evaluation of standards and substances and the establishment of lists (Directive 94/62/EC on packaging and packaging waste);
- approval of funds (in the case of the LIFE-committee, Art. 13 of Regulation 1973/92 of 21 May 1992, modified by 1404/96);
- rule-making activities of an abstract general type (for example plans on how to protect the Community's forests from pollution, Commission Regulation 836/94 of 13 April 1994);
- decisions regarding the lifting of import bans or the fixing of quotas for substances and stipulations for the use of certain substances (to be put on the market) (Regulation 3093/94 on substances that deplete the ozone layer);
- collection of data (Council Directive 92/43 on the

conservation of natural habitats and of wild fauna and flora).

According to the budget, the total number of comitology committees in the environmental sector has increased from 0 in 1975 to 17 in 1985 and 34 in 1998. However, Directorate-General XI itself lists 36 comitology committees, of which 20 were active in the year 1995.[13] Among the different comitology committees one can differentiate between advisory committees, management committees (Type IIa or Type IIb) and regulatory committees (Type IIIa or Type IIIb). The relationship between the Member States' officials within these committees and the European Commission is different in each of the three committees and the five procedures.

- Within an *advisory committee*, the Commission only has to take the opinion of the committee "into utmost consideration" before it implements its draft measure.
- Within a *management committee*, the Commission can only be prevented from proceeding with its draft measure if there is a qualified majority of the Member States' votes against the Commission proposal. If this is the case, the Commission *may* implement the measure if the Council does not take a different decision within one month (Type II–a). In a IIb committee the Commission *must* defer the implementation of its proposal up to three months. The Council will then have three months to take another decision by qualified majority.
- "In contrast, within a *regulatory committee*, the Commission needs a qualified majority of the Member States' votes *for* its proposed measure (62 out of 87 votes)".[14] If this is not the case the Commission will have to present a proposal to the Council, which can either accept the proposal or override it by unanimity (IIIa procedure). In addition, in the regulatory committee (Type IIIb) the Council can also override the proposal of the Commission by simple majority. "Clearly, the last type, particularly the IIIb version, within which the Council can pull the 'emergency brake', the Commission's freedom to act is limited".[15] In the environmental sector, nearly all comitology committees are regulatory committees (Type IIIa or Type IIIb).

2.1 Voting procedures and implementation practice in the environmental sector

According to the only official sources from 1995 the 20 committees which met in 1995 issued 35 opinions, of which 30 were positive and 5 not positive, i.e. did not reach a qualified majority in favour (approx. 17%).[16]

There are several reasons why one should hesitate before assuming that the official figures give a realistic picture of the exact number of comitology committees and voting procedures.

Several studies on comitology committees show how the working procedures are clearly geared towards consensus. Statistically, voting patterns indicate that over 90% of all opinions expressed were favourable towards the Commission's position.[17] These statistics are generally interpreted as showing that voting patterns do not necessarily imply the dominance of the Commission but more that the Commission tends to make proposals acceptable for the Member States. On the other hand, the comitology committees do not want to rely on the Council (politicians) to intervene.[18] Another reason is that contrary to what "scholars (and even European institutions) had believed for a long time, the IIIa and even the IIb procedure provide the Commission with quite a strong position".[19] This argument can be illustrated by three practical cases:

(a) During a 1995 meeting of the so-called Article 19 Committee (IIIa) established by the Council Regulation (EEC) 1836/93 of 1993 (OJ 1993 L 168/1) (the so-called EMAS-regulation) the Commission did not obtain a qualified majority in favour of its proposal (there were only 48 votes in favour). Germany, Italy and Austria voted against, Spain, Greece and Luxembourg abstained. Hence, the Commission had to refer the decision back to the Council which, in a meeting held in December 1995, could neither reach a qualified majority in favour of the proposal nor unanimity against it. Consequently, the Commission adopted the proposal in February 1996 (OJ 1996 L 34/42).

(b) Another interesting case concerned the implementation of Directive 91/689/EEC on hazardous waste within a regulatory committee (Art. 18 of Directive 75/442/EEC as amended – Type IIIa). The initial proposal of the Commission to implement the Directive (with the aim of establishing a list of hazardous waste) was not approved by qualified majority by the committee and therefore had to be referred to the Council. The Council had to decide on the proposal by 21 December 1994 at the latest but could not reach an agreement (especially) because of the negative position of the United Kingdom.[20] This time the Commission did not adopt its original proposal but gave the Council another opportunity to find a solution!!! Consequently, the Council established a list of hazardous substances (OJ L 2356/14 of 31.12.1994).

(c) As regards the IIb procedure, the Commission had no problem overcoming the resistance of the Member States when it came to implementing Directive 91/672/EEC of 23 December 1991 (OJ L 377 of 31.12.1991). One proposal of the Commission to implement the Directive on the standardisation and rationalisation of reports on the implementation of certain directives went very far and was not accepted by many of the Member States. In addition, when it came to vote on the proposal not all Member States showed up at the meeting. The result was that although the overall attitude towards the proposal was very negative the

remaining Member States could not reach a negative opinion. Consequently, the Commission implemented its proposal.

The voting patterns in the above-mentioned cases indicate that the impressive record of consensual voting behaviour does not necessarily mean that there are no conflicts between the Member States and the Commission within the committees. The voting practice in the environmental sector shows however that the position of the Commission is stronger than expected even in policy fields (such as the environmental sector) where the vast majority of committees are regulatory ones. On the other hand, the Member States seem for a long time to have neglected the problem of the Council having to vote unanimously against a Commission proposal in the case of a IIIa procedure (if the committee has not approved it beforehand).

2.2 The secret life of comitology or the problem of intransparency and complexity

Much of the administrative and policy-making work of the Community has, until very recently, been characterised by secrecy. Working documents and protocols of committee sessions have rarely seen the light of day and it has been very difficult for researchers to gain access to internal committee documents, either from the Council or the Commission. Together with the immense complexity of the various procedures, this in no way creates the transparency which is supposedly one of the main new objectives of improving EC legislation. Sometimes even those experts who represent their countries in these committees have difficulty in identifying the exact type and form of the committee. There are various possible reasons for this:

- *The different committees meet together*

Lots of committees meet together on matters in which they have a common interest and common competences. For example, Article 1 of the rules of procedure for the "Habitats Committee" (92/43/EEC of 21 May 1992) provides for joint meetings with the scientific and technical committee for the purposes of modifying Directive 79/409/EEC on the conservation of wild birds. The same procedure is foreseen in the Committee set up under Directive 91/676/EEC of 12 December 1991 and the Urban Waste Water Committee 91/271/EEC of 21 May 1991 (as authorised by Article 9 of Council Directive 91/676/EEC).

- *The committees established by the budget do not meet at all*

One interesting case is that of the Drinking Water Directive 80/778/EEC,[21] Articles 14 and 15 of which set up a committee to deal with the adaptation of the rather unimportant Annex III. Because of its limited competences, the committee never convened, although in the Community budget it is listed as a IIIb committee (with a budget of ECU 10,000 for the financial year 1996). In the actual text of the Directive however the committee is not defined as a IIIb committee. The Commission proposal – not yet adopted by the Council – to revise the Drinking Water Directive now provides for the creation of a IIb committee.[22]

- *The same committee may be allocated tasks by several legal acts.*

Most of the legal acts in the environmental sector decided on by the Council make provision for the establishment of a comitology committee. However, it appears that very often one committee is allocated the task of implementing several legal acts.

In the air sector for example, the regulatory committee (IIIa) set up under Directive 96/62 EC of 27.9.1996 has implemented Directive 80/779/EEC, Directive 82/884/EEC and Directive 85/203/EEC. Furthermore, the regulatory committee (IIIa) in Directive 79/113/EEC decided on the implementation of 7 legal acts.

In the waste sector, a single comitology committee (the waste committee set up under Directive 75/442/EEC, as amended) exercises implementing powers for the most important aspects of the Community's waste management policy. Despite this impressive concentration of power within one committee, evidence has shown that committees are even more important in the case of other European Union policies. In the food sector for example, some 35 directives and regulations make reference to the Standing Committee on Foodstuffs. In his analysis of the food sector, Falke has identified 117 different groups of tasks.[23]

- *The committees change their nature when it comes to voting on a certain proposal*

Very often, comitology committees only exist when it comes to the vote on a formal proposal. Representatives of European interest groups are generally invited to participate in committee sessions. The same applies to environmental groups, though they are rarely present. In some cases (such as the case of the Article 19 Committee of the EMAS regulation) the committee acts as an advisory committee as long as it is composed by various groups. The comitology committee only exists when it comes to a formal vote and even then only national delegations are allowed to participate.[24]

This mixture of working group and comitology committee sometimes makes it very difficult for national civil servants to know when they have to act as a representative of a Member State within a comitology committee and when as an independent national expert.

- *The committees may set up information exchange groups and technical sub-groups*

Nearly every rule of procedure of the different comitology committees allows for ad-hoc groups, technical groups or informal groups to be set up or for experts to be invited to discuss special technical issues. The IPPC – Comitology Committee is supplemented

with an IPPC Information Exchange Forum and by Technical Working Groups. Furthermore, Article 10 of the Rules of Procedure provides the option of inviting experts. For some representatives these distinctions between the different groups (committees, technical groups, scientific groups, etc.) are not very clear especially in view of the fact that they sometimes meet at the time or on the same floor.

3. Negotiating comitology – the power struggle between the institutions

3.1 Difference in opinion as to what sort of committee to set up

There is regular disagreement as to the appropriate committee procedure, with the Commission and the Parliament favouring advisory and management committees and the Council generally favouring regulatory committees. The Council's stance ensures that the Member States have the chance of having some influence on the proceedings. As a rule, the Commission itself proposes advisory committee procedures for the exercise of implementing powers under Article 100a TEU.[25] For proposals not relating to the Internal Market it is also possible to envisage a IIa, IIb or even a IIIa committee. The choice between these types depends on the type of measure to be adopted and the requirements of the sector in question. For example, in its proposed directive on the new water framework directive, the Commission has proposed a IIIa procedure.[26] Yet once a common position with the Parliament and the Council has been achieved, it seems to be quite arbitrary as to what type of committee is finally set up under the committee procedure of any given directive.

3.2 The problem of the Council delegating implementing powers to itself –Directive 91/414/EEC

Furthermore, within EC environment law it is not always clear on what basis the Council confers or does not confer implementing powers on the Commission. In those cases where the Council has assumed implementing powers for itself and acted in the absence of formal parliamentary participation, it has been tempted to circumvent previous legislative decisions. This happened when, in the context of the implementation of the Pesticide Directive 91/414/EEC, the Council approved the infiltration of pesticides in groundwater at a rate which went beyond the limits set by the Drinking Water Directive.

The Parliament protested against the continued procedure for the implementation of this directive and, consequently, the Court of Justice annulled the Council Implementation Act 94/43/EC of 27 July 1994, in case C-303/94 of 18 June 1996. The Court held that the Council could not be required to draw up all details of regulations or directives. It was therefore sufficient for only the essential elements of the matter to be dealt with to have been adopted in the legislative process. On the other hand, the Court held that the implementing directive did not respect the provisions enacted in the basic directive and that the provisions of the contested directive had been amended without the Parliament having been consulted. Consequently, the Court decided that the Parliament's prerogatives had been violated and that the directive therefore had to be annulled.

3.3 The power struggle between the Member States in the Council

Finally, there is no general agreement within the Council as regards the setting up of a certain comitology procedure.

In the case of the amendment of the Drinking Water Directive 80/778/EEC, in an early draft proposal of 1994 the Commission proposed a IIb Committee for the implementation of annexes II and III. Later on, in its official proposal 94 (612) the committee procedure was changed into a IIa one. In its first reading, the Parliament made an amendment and asked to be informed and formally involved in the implementation of the Directive according to the comitology procedure (a reference was made to the Modus-Vivendi (OJ C 102, 4.4.1996) in the text). This request was rejected by the Commission in its amended proposal 97(228) in which – interestingly! – the Commission proposed that the Parliament be only informed (according to the Plumb-Delors Agreement) about the implementation of the Directive.

The positions of the various Member States concerning the committee procedure varied considerably. In the Council Working group of 12 September 1997, only the United Kingdom agreed on a IIa Procedure whereas Germany and Italy preferred a IIb procedure. Denmark requested a IIIb procedure. All of the other Member States reserved their opinion. Later on in a Council working group of 10 October 1997 the Dutch chair suggested that a IIb procedure be set up. However, the Commission insisted on a IIa procedure. Austria was now asking for a IIIa procedure to be set up and France even for a IIIb procedure. Finally, in December 1997 the Council was able to agree on a IIb procedure. However, in its second reading the European Parliament again made reference to the Modus Vivendi of April 1996 and requested the introduction of a completely new type of comitology procedure in the text. In addition, it asked for the committee to meet in public, to publish the agenda two weeks in advance and to publish the minutes for the meeting.

At the time of writing, the Council has not yet reacted to this new proposal (see Table 1) .

4. Composition of committees and rules of procedure

In general, all comitology committees in the environmental sector are composed of two governmental experts per Member State, although the wording of the texts and the rules of procedure do not oblige the committees to be exclusively composed of governmental experts but also allow private and scientific experts. The rules of procedure of the Urban Waste Water Committee allow each Member State to be represented by no more

than 4 officials. Contrary to this, Article 6 of the rules of procedure of the IPPC-Directive allow each Member State to send one representative to the Committee (the Commission only pays the costs of one representative). In addition, whilst one would expect national civil servants to be members of the comitology committees, this is not always the case. Committees may include "representatives of the Member States", "highly qualified persons", "experts" or "experts from the private sector". As regards the composition of the committees, one has to bear in mind the distinction between comitology committees and scientific committees, whose task is mainly to advise the Commission and the comitology committee on the implementation of certain aspects. In the environmental sector, the most important scientific committee is the Scientific Committee for Toxicity, Ecotoxicity and the Environment. Its members are exclusively scientists from institutes and universities who are appointed by the Commission (Decision 97/579/EC of 23 July 1997).[27]

Generally, the rules of procedure on the composition of the committees merely give a rough idea of who is to represent the Member States, which agendas are to be discussed or which formal rules of procedure are to be followed. The rules of procedure allow lots of committees to create subgroups composed of independent experts and lobbyists. The members of the committees are generally appointed by national administrations, although in some cases they are appointed by the Commission (Art. 4 of Decision L 105/29 of 26.4.1988). The committees usually meet at the Commission's headquarters in Brussels (Borchette-building) or Luxembourg (Plateau Kirchberg), although exceptions to this are possible (Art. 9 of OJ L 105/29 of 26.4.1988).

The Commission's duties as regards convening the meetings, the time limit for distributing the agenda and materials to the Member States are very different and depend on the rules of procedure of the respective committee. The rules of procedure of the Habitat Committee for example require that the agenda and materials be sent out 21 days before the meeting, in special cases 10 working days, in the case of the Urban Waste Water Committee this is 35 days (Art. 3 RP), in special cases 21 days, and the LIFE Committee (Regulation 1973/92 of 21.5.1992) and the draft proposal for the IPPC-Committee both specify 35 days in advance (Art. 3), in special cases 10 days and 14 days respectively. As regards time arrangements, in case C-263/95 of 10 February 1998 the Court of Justice ruled that the deadlines stated in the rules of procedure must be respected by the European Commission (and therefore that there is no possibility of shortening the period of notice without the approval of the Member States). Furthermore, the Court ruled that the Member States should have the necessary time to study the documents, that these documents should (also) be sent to the Permanent Representatives of the Member States (and not only to the members of the committee) and that they should be drafted in the language of each State.[28]

5. The Council and the scope of delegation powers in the environmental sector

In the environmental sector, the Council has for a long time attached great importance to regulating matters itself in the legislative process as much as possible (such as timetables and annexes in the directives 70/220 EEC, 76/769 EEC, 70/157 EEC, 76/464 EEC etc.), primarily because the powers of the Parliament were previously only of a consultative nature. In some very sensitive areas (such as in the case of the implementation of Annexes I to V in Directive 92/43/EC on the conservation of natural habitats and of wild fauna and flora), the Council has assumed implementing powers for itself (without stating in detail why it was doing so). In the case of Directive 76/464/EEC on dangerous substances discharged into the aquatic environment, the Council did not delegate any implementation powers. In addition, no committee was set up in the basic text of Directive 76/464/EEC. As a consequence, very little has come of the further amendment and implementation of Directive 76/464/EEC. So far, emission limits and environmental quality standards have been laid down for only 18 of the 130 priority "black substances" in altogether 6 Council directives.[29] After the last amendment of this directive, no further measures were taken, probably because after the ratification of the Single European Act the Council had to decide by qualified majority (Art. 100a of the Treaty establishing the European Community).

This is a very poor result, particularly in view of the fact that no less than 1500 dangerous substances qualify for inclusion on the "black list" of the directive. This very slow decision-making process can be explained by the fact that it was the Council of Ministers who always had to amend the directive in the legislative process. On the other hand, it was not possible to speed up the procedure because no committee was laid down in the basic act 76/464/EEC. Furthermore, following the ratification of the Maastricht Treaty in 1993, the Council required the involvement of the Parliament and qualified majority voting (according to the co-decision procedure) if it wanted to amend the directive and to include a comitology procedure. There was apparently never enough political will to do so. The Commission now intends to include Directive 76/464/EEC and its implementation acts in the new water framework directive (COM (97) 49, OJ 184/97).

Despite these examples, it has become clear in the nineties that the Council's practice of assuming the responsibility for regulation as much as possible has come to an end. It now seems to be the case that the Council generally delegates very broad powers to the Commission, mainly to relieve its own workload (such as in the case of Directive UVP 85/337, the Nitrate Directive 91/676 or the Urban Waste Water Directive 91/271), or in order to escape the growing influence of the Parliament in the legislative process. The latter argument is supported by the empirical findings of Dogan who shows that in the period 1987-1995 a comitology committee was set up for only 16.7% of all

the legal acts decided according to the consultation procedure. On the other hand, in those cases where the cooperation and co-decision procedure were applied, a comitology committee was established for 49.6% of all acts.[30] Only in some cases is the Council not willing to delegate broad powers (such as in the case of Directive 96/61/EC on integrated pollution prevention and control).

It has been shown over the last few years in particular that the basic legal texts of the Council often use an exceptional amount of vague legal concepts and offer derogation clauses for the national systems. Using wording such as "the Member State may adapt to technical process the directive" the European legislator therefore does not clearly delimit the delegation of implementing powers. On the other hand, this practice gives the Commission broad powers of implementation by means of the comitology committees.[31]

6. Comitology and the quality of the legal acts

From the point of view of the national administrations charged with applying the legal acts, constant adaptation, amendment and implementation – as in the case of Directives 67/548/EEC, 70/220/EEC and 76/769/EEC – contributes considerably to the fragmentation of law and poses immense problems for the civil servants in the Member States who have to implement and apply them.[32] A good example of this is Directive 67/548/EEC. The Commission, in its 14th report on the control of the application of Community law, had to admit that the Member States had difficulty in keeping up with the constant amendments to the directive and incorporating the technical adaptations into their legal systems.[33] The Commission has adapted Directive 67/548[34] to technical progress 17 times. The Council itself dealt with the technical adaptation twice because the Commission proposal was blocked by the implementation committee on the eighth and eleventh adaptation to technical progress of the Directive. Furthermore, the Council itself adapted the Directive to technical progress several times and amended it seven times. The last time Directive 67/548 was amended completely was the seventh amendment (Directive 92/32). All in all, this Directive has been amended and adapted 27 times.[35] In order to improve the situation, the Directive is now in the process of consolidation (almost 2000 pages long).

The Council also amended Directive 76/769 EEC[36] on restrictions on the marketing and use of chemicals 16 times, mainly by enlarging or altering the annexes to include certain substances (for example by means of the well-known PCP Directive 91/173). Directive 70/220/EEC on the approximation of the laws of the Member States relating to measures to be taken against air pollution by gases from positive ignition engines of motor vehicles[37] was implemented by the Commission twice and amended by the Council seven times (including Council Directive 74/290/EEC[38] which had to be decided upon by the Council because the comitology committee blocked it).

However, the greatest problem is still that many rules appear to overlap one another. In this respect it still has to be seen whether especially the Directive 96/61/EC on integrated pollution and control and the proposed new Water Framework Directive (COM (97) 49 final) might help in the future. More generally, from the point of view of legal clarity it would seem necessary to publish an updated version of the implemented basic act with every implementation act.

Finally, the clarity, and therefore applicability, of the provisions in the annexes is decreasing rapidly as the number of changes increases. The reason for this is that the changing legal act often mentions only the change in the annex itself, and not the complete new version of the annex now applicable. Therefore, one has to obtain an overall view of all changing legal acts and make a comparison in order to be able to understand the technical provisions of the annex.

7. Conclusion

The concept of the separation of powers and democracy in general has been developed for the classical and sovereign national state but not for international organisations such as the European Union. The famous judgment of the German Constitutional Court on the Treaty of Maastricht was a good illustration of how many difficulties are involved in defining democracy in a "denationalised world".[39]

International organisations continuously gain competences and decision-making powers without creating well-developed democratic structures at the same time. Furthermore, international organisations and agencies lack public identification and support because of their technocratic decision-making procedures and geographical distance from the citizens. The German Constitutional Court has therefore invented the artificial notion of "Staatenverbund" (somewhat more than a confederation and somewhat less than a federation of states) in order to define the European Union. This term is trying to identify an organisation which is not a federal state (and will probably not develop into one) nor a typical international organisation.

Both the Member States and the European Institutions seek to balance their interests and powers in this "Staatenverbund":

- As regards comitology, the Council of the European Union is happy with the current structure because it means that the "overloaded" Ministers do not have to decide on every detail in the legislative process. The delegation of wide implementation powers to the comitology committees does not pose a threat to national sovereignty because the large number of regulatory committees guarantees that the national administrations may – if they want – exercise a maximum of control over the implementation activities of the European Commission. Furthermore, the more powers the Council delegates, the more the Ministers of the European Union can escape from the growing

influence of the European Parliament in the legislative process.

- The European Commission is happy because the Council – in order to discharge itself from its heavy workload – has been tempted to delegate very broad implementation powers to the Commission. Furthermore, despite some difficulties the negotiation style in the comitology committees seems to be more consensual and the Commission can push through most of its proposals. Furthermore, the large number of IIIa committees within the environmental sector guarantees that the Commission's proposals can be overridden only by unanimity in the Council (in the case that the Commission does not get 62 votes in favour of its proposed measure).
- The European Parliament has certainly been unhappy for a long time as it was excluded from all implementation activities. Nowadays, things have changed gradually because both the European Commission and the Council have – since the signing of the Treaty of Maastricht – been under more and more pressure from the Parliament and they have already made concessions to the European Parliament.[40] However, these concessions are of an informal nature. The new proposal of the European Commission[41] (with the objective of reforming the provisions of the Treaty relating to implementing measures) is very ambivalent in this respect and provides a greater informal but not necessarily a greater formal role for the European Parliament. It firstly proposes that the Parliament should be informed of committee proceedings on a regular basis. Secondly, if the Commission does not receive a qualified majority for its proposal in the regulatory procedure, it *may* present a proposal. Only in this case will the Parliament be formally involved according to the Treaty provisions (e.g. Artt. 189c and 189b TEC). As the Commission is not legally obliged to do so, the question remains whether it will present a new proposal. Only if the Commission presents a proposal will the role of the European Parliament increase. It will then be a question of whether this proposal of the European Commission will be acceptable to the Council of Ministers but especially to the European Parliament.

Comitology shows that academic questions such as whether Europe might move towards more federalism or intergovernmentalism are highly abstract debates. The present characteristics of European integration are dominated by the growing influence of the European and the national executives in the policy-making process of the EU (within the broader context of the growing influence of "experts" in international organisations in general). With this in mind, one could say that the growing importance of the European integration process is developing in parallel with the growing influence of the Member States in "Brussels"[42] and at the same time the impact of "Europe" in the national administrations. This can best be illustrated by the growing number of comitology committees (in the environmental sector) whose decisions have an enormous impact on the national legal, political and economical systems of the Member States. These committees guarantee that the Member States have resort to considerable "blocking power" against the Commission in the executive process. On the other hand, regulatory committees have not hindered the Commission to push through the vast majority of its proposals.

A more profound controversy surrounds the fact that "comitology" touches upon an elementary aspect of Community law, namely the institutional balance. More generally speaking, the balance of power between the institutions and the Member States, and between the institutions themselves, has altered in significant ways.

Criticising this reality would mean offering an alternative. But what would be this alternative be? Regulating in the legislative process as detailed as possible (and consequently giving more powers to both the Council and the European Parliament?) or delegating even more powers to agencies and standardisation bodies? None of the two solutions would seem to respond to the problem.

The Council and the European Parliament have neither the political will, the expertise, nor the structure to decide alone on detailed legislative and/or implementation acts.

As regards the proposal to delegate more powers to agencies, in its Meroni decision the ECJ[43] set up obstacles to the decision-making powers of regulatory agencies. The delegation to standardisation bodies would lead to even more intransparency and decisions would be left to experts and interest groups.

Obviously the issue of committees and comitology needs a combined (and not separate) answer to the question as to how the European Union addresses the question of effectiveness, efficiency, transparency and – within this context – democracy.[44]

As regards the question of effectiveness, one might say that the fact that European and national experts rather than politicians take the decisions might be good for the overall state of the environment because politicians are not experts and cannot judge important technical questions. Therefore, politicians and diplomats should decide only on the essential questions. On the other hand, some observers argue that the system of committees should be seen as enhancing the effectiveness and efficiency of the Community's institutional structure in that it provides a link between the Member States and the Community administrations. The development of networks and the involvement of national experts in the implementation process at European level should have a positive effect on the implementation of EC environmental law.

Although this observation is certainly true, the complexity of the different committees ranging from advisory committees to regulatory committees (Type

IIIb) and the various complicated procedures could be seen as a bureaucratic mechanism which is robbing the Community decision-making process of its last vestiges of democratic accountability. Democratic legitimation therefore needs reinforcement. But how? Whilst during the seventies and eighties commentators on the "democratic deficit" of the EC almost unanimously supported the strengthening of the European and the national parliaments, the focus has meanwhile shifted to one of activating the citizens, decentralising powers and the access to the courts, enabling access to documents and information, opening up the meetings of the Council of Ministers, etc.[45]

This shift of attention is important as the future will very much depend on the question how international organisations can be made visible, accountable and transparent to the citizens. In the European Union the element of transparency, or rather, the lack of transparency, is a moot point when it comes to comitology. At least one (very modest) proposal to increase transparency would be to "streamline" the hundreds of different rules of procedures and provide for clearer and standardised rules of procedures. Furthermore, the Commission should publish an overview of the different types of Committees in the environmental sector, their composition, tasks, competences etc. Especially in the field of comitology, a comprehensive guide should be published explaining in which cases which committees assume the function to implement several acts (like the "Art. 18 Committee" in the waste sector) and in which cases they act as an advisory committee, a management committee (type a or type b) or a regulatory committee (type a or type b). Furthermore, in those cases where the comitology committees create sub-groups these groups should be composed beside the representatives from (industrial) lobby groups as well of experts from environmental NGOs.

If international organisations continue to develop intransparent technocratic decision-making processes, they will increasingly loose public support. On the other hand, the citizens have to become active themselves (why not together with the parliaments) at international level and develop "their" concepts for international organisations. Who knows, in ten years' time there may be mass demonstrations against the decision-making procedures in global institutions.

RÉSUMÉ

La comitologie ne désigne en aucun cas ce que la simple analyse du mot pourrait laisser supposer. Il ne s'agit pas d'une science des comités, mais d'une pratique très réaliste et complexe permettant aux exécutifs nationaux et européen de décider sur de nombreuses questions techniques. Au regard du fonctionnement du pouvoir exécutif au sein des Etats, un tel système peut apparaître comme le triomphe de la bureaucratie au détriment de la démocratie. Cet article essaie d'analyser la comitologie dans le domaine de la politique de l'environnement.

NOTES

1 Beck, U. (Ed.), *Politik der Globalisierung*, Frankfurt am Main, 1998, p. 32.

2 35% of all legal acts in Denmark are of EU origin, 50% in the Netherlands and Germany, 80% in the UK and up to 95% in Portugal, Greece, Italy and Spain. See: Demmke, C., Bremser oder Vorreiter? – Deutsche Umweltverwaltung und europäische Umweltpolitik, will be published in: Die Verwaltung 1/99.

3 Lamport, C./Lughofer, S., Keine Angst vor Brüssel, Wien 1995, p. 56.

4 Winter, G., "Reforming the sources and categories of EC legal acts: A Summary", in: Winter, G. (Ed.), *Sources of European Union law*, Baden-Baden 1995, p. 23.

5 See very detailed: Schmidt-Aßmann, E., "Verwaltungskooperation und Verwaltungskooperationsrecht in der Europäischen Gemeinschaft", *Europarecht*, No 3, 1996, p. 270 et seq.

6 European Commission, *General Report on the Activities of the European Union 1997*, Brussels/Luxembourg 1997, pp. 450-451.

7 Wessels, W., Comitology: fusion in action. Politico-administrative trends in the EU system, *Journal of European Public Policy*, June 1998.

8 See the concept of the Policy Cycle: Windhoff-Héritier, A., *Policy-Analyse*, Frankurt/New York, 1987; Pedler, R.H./Schaefer, G.F. (Eds.), *Shaping European Law and Policy: The Role of Committees and Comitology in the Political Process*, Maastricht 1996.

9 European Commission, SEC (96) 2371 of 13 December 1996.

10 Case C-212/91, Judgment of 25 January 1994, ECR 1994, p.I-0171.

11 See Pedler, R./Schäfer, G. (Ed.), *Shaping European Law and Policy*, op.cit.

12 These figures refer only to the environmental sector in the strict sense of the term. This means that animal protection and consumer protection are excluded, as well as the legal acts decided within the EURATOM Treaty. Furthermore, this number does not include all the international conventions concluded by the EC.

13 European Commission, Directorate-General XI, Inter-institutional Relations, *List of Committees*, Brussels, 13 December 1996.

14 Schäfer, in: Pedler/Schäfer, op.cit. p. 14.

15 Schäfer, in: Pedler/Schäfer, op.cit, p. 14.

16 See: Euroean Commission, *Fonctionnement des Comités en 1995*, Brussels, 18 June 1996, p. 5. (Council Directive 74/290/EEC adapting Directive 70/220/EEC; Council Directives 87/432 and 90/517 adapting Directive 67/548/EEC, Directive 94/31/EC implementing Directive 91/689, Directive 91/596 implementing 90/220/EEC Council Directive 96/21 adapting Directive 94/54).

17 J. Falke, "Comitology and other committees: A Preliminary Assessment", in: Pedler/Schäfer, op.cit, p. 139/140; J. Falke/G. Winter, "Management and regulatory committees in executive rule-making", in: G. Winter, *Sources and Categories of European Union Law*, Baden-Baden 1996, p. 567 et seq.

18 Wessels, W., "Comitology: fusion in action. Politico-administrative trends in the EU system", *Journal of European Public Policy*, June 1998, p. 225.

19 Toeller, A.E., " "The Article –19 Committee" on the Regulation on the Environmental Managment and Audit Scheme", published in: van Schendelen/Pedler, *EU-Committees as influential policy makers*, Aldershot, p. 207-236 (forthcoming).

[20] See General Secretariat of the Council, 1817th session – 15-16 December 1994.
[21] OJ L 229/11 of 30 August 1980.
[22] Article 15 of the Commission's Proposal for a Council Directive, COM (94)612, OJ C 131 of 30 May 1995. See also: Amended proposal COM (97)228 final of 4.6.1997
[23] Falke, J., in Pedler/Schäfer, p. 117-166; See also: Joerges, C.\Neyer, J., "Multi-Level Governance, Deliberate Politics and the Role of Law", Paper presented at the European University Institute, Florence, 9-10 December 1996, pp. 10-11.
[24] See Toeller op.cit., p. 210.
[25] In this context, it is worth mentioning that around 20% of all environmental acts are based on Art. 100 TEC.
[26] COM (97) 49 final of 26.2.1997.
[27] In this case it is interesting to note that DG XXIV gives very detailed information about the Committee, its Agenda, Members and discussions on the Internet. See: http://www.europa.eu.int/comm/dg24/health/sc/sct/index_en.html
[28] Case C-263/95 of 10 February 1998 concerned an action brought under Article 173 of the EC Treaty against the Federal Republic of Germany concerning the annulment of Commission Decision 95/204/EC of 31 May 1995 implementing Article 20(2) of Council Directive 89/106/EEC.
[29] Interestingly, the Council did not implement the Directive itself but amended the Directive within the official legislative process on a proposal of the Commission and after consulting the Parliament
[30] Dogan, R., "Comitology: Little Procedures with Big Implications", *West European Policies*, No 3, 1997, pp. 31-61.
[31] Broad powers of implementation have been delegated for example through Council Directive 91/156/EEC of 26 March 1991 (OJ L 78/32) on waste which set up a committee charged with defining a list of waste and adapting the technical annexes of the directive. Council Directive 91/689/EEC of 12 December 1991 (OJ L 377/20) set up a committee with the task of defining a list of hazardous waste and adapting the technical annexes of the directive.
[32] OJ L 196, 16.8.1967, OJ L 76, 20.3.1970, OJ L 262, 27.7.1976.
[33] European Commission Services Document, 14th annual report on monitoring the application of Community law, Com (97) 299 final, 29.5.1997, p. 93.
[34] Council Directive 67/548/EEC of 27 June 1967, OJ L 196 of 16 August 1967.
[35] At the time of Greece's accession, the annex of the Directive was amended to provide for the Greek translation.
[36] Council Directive 76/769/EEC of 27 July 1976 on the approximation of laws, regulations and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations, OJ L 262/201.
[37] OJ L 76/1 of 20 March 1970.
[38] OJ L 159/61 of 28 May 1974.
[39] BVerfG, Judgment of 12.10.1993.
[40] See the Klepsch-Millan agreement of 13 July 1993 (OJ C 255 of 20.9.1993, p. 19), the so-called Modus Vivendi (OJ C 102 of 4.4.1996) and the Samland-Williamson agreement of 25.9.1996.
[41] Proposal of the European Commission for a Council Decision laying down the procedures for the exercise of implementation powers conferred on the Commission, OJ C 279/5 of 8.9.1998.
[42] Golut, J., "State Power and Institutional Influence in European Integration: Lessons from the Packaging Waste Directive", *Journal of Common Market Studies*, September 1996, p. 313 et seq.
[43] EJCE – C-9,10/1956, Meroni, ECR 133, 157.
[44] Metcalfe, Les, "Building Capacities for Integration: The Future Role of the Commission", *EIPASCOPE*, No 2, 1996, p. 8.; Winter, G., "On the effectiveness of the EC Administration: The Case of Environmental Protection", *Common Market Law Review*, No. 33, 1996, p. 689 et seq.
[45] For a very illustrative account of the whole topic of openness and transparency, see: Deckmyn, V./Thomson, I. (Ed.), *Openness and Transparency in the European Union*, EIPA 1998. ❑

Table 1

Institution	**Document**	**Position on Comitology procedure**
European Commission	Draft proposal 1994	IIb
European Commission	Proposal 94 (612), OJ C 131, 30.5.1995	IIa
European Parliament	First reading, OJ C 213, 15.7.1997	Rejection of Comitology, reference to the Modus Vivendi
European Commission	Proposal 97 (228), COM (97) 228 final of 4.6.1997	IIa, Rejection of Modus Vivendi, instead acceptance of Plumb-Delors Agreement
Council Working group	Working group meeting of 12 September 1997, Dossier No. 95/0010 (SYN)	UK accepts a IIa procedure, D and I prefer IIb, DK requests IIIb, all others reserve their positions
Council Working group	Working group meeting of 10 October 1997, Dossier No. 95/0010	NL proposes a IIb procedure, Austria requests IIIa, France IIIb, Commission maintains its IIa proposal
Council of Ministers	Common Position C4-0083/98 – 95/0010 (SYN)	Decision to adopt a IIb procedure
European Parliament	Second reading (A4-0146/98)	Reference to the Modus Vivendi, request for new comitology procedure

The Boundaries of the Negotiating Power of the Candidates for Membership of the European Union: Some Theoretical Considerations and Practical Implications*

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Introduction

The negotiations for accession to the European Union should be more appropriately called "entrance examinations", rather than negotiations. The candidate countries will have to demonstrate their ability to assume the obligations of membership known as the "*acquis communautaire*". However, the candidates do have room for manoeuvre in defining the terms of their accession to the Union. The question is how much "bargaining" power do they have and how can they utilise it in practice?

This short note is a companion piece to an earlier paper entitled "Negotiating Effectively for Accession to the European Union: Realistic Expectations, Feasible Targets, Credible Arguments".[1] The purpose of this follow-up paper is to delineate the boundaries of the negotiating discretion of the candidate countries. To that end, it attempts to derive relevant lessons by analysing the concept of negotiations.

Of course, simply by examining theoretical concepts, we will not be able to arrive at a complete answer to the question posed above. The complete answer depends on the technicalities of each particular issue under discussion and is further determined by the context in which the negotiations for accession to the European Union take place and the overall preparations of applicant counties to adopt the *acquis*. Although, the negotiations between each of the candidates and the EU will be conducted bilaterally, they will also be held within the context of the enlargement process and will unavoidably be influenced, even decisively so, by the outcome of the negotiations with the other candidates and by the more general issues that will shape the broader process of expanding the membership of the EU. These kinds of considerations will be the subject of a future paper.

In general terms, the objective of any kind of negotiation is to arrive at an outcome which is acceptable to both or all sides.[2] Since there may be many such mutually acceptable outcomes, the sides involved in negotiations try to devise strategies that lead to the best possible outcome as seen from their perspective. When this problem is expressed mathematically, the task of a negotiator is to find out whether the chosen options of each side lead to an equilibrium solution. That is, to obtain a solution, the optimum option for each side must ultimately coincide. Otherwise, one or both sides must make a different choice, which necessarily requires a compromise and therefore a departure from the optimum. The extent of this "deviation" or "departure" from the initial optimum is determined by the negotiating effort, strategy, power, etc., of each side.

It follows that the "art" of negotiation is to find a way so that the best outcome, as perceived by one's own side, is close to what is believed to be the optimum for the other side. This "convergence" of choices can be achieved either by moving one's own position or by "pushing" the other side to move its position. The former is often called concessions while the latter is called exercise of power.

Nonetheless, much of the skill in negotiations involves neither concessions, nor the exercise of power. It involves, on the one hand, an appraisal of what is in principle acceptable to the other side (and to one's own side) and, on the other, feeding information to the other side to shape its expectations, precisely because the strategy of the other side will be formulated on the basis of assumptions and assessment of what is acceptable to one's own side. To put it in different words, negotiations begin even before the bargaining starts, because the pre-bargaining "posturing" and agenda-setting are also significant to the final outcome.

Our analysis suggests that, on the basis of the reasonable hypothesis that the applicant countries have little negotiating power, the best strategy for them is to aim for outcomes that would be close to those preferred by the EU. As already said, this is because in this context, negotiating or bargaining power means the ability to force the other side to deviate from its optimum. The outcomes that would be preferred by the EU are largely those that can be derived from the application of existing rules.[3]

The concept of negotiations[4]

There are two ways of defining negotiations. The first is to look at the outcome of negotiations. Accordingly, negotiations are an attempt to arrive at a mutually acceptable result. As already mentioned in the Introduction, each side tries to achieve the best possible result for itself, so a satisfactory conclusion of the negotiations is feasible only when the range of acceptable

* *Un bref résumé de cet article en français figure à la fin.*

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outcomes for one side coincide fully or partially with the range of acceptable outcomes for the other side. Hence, when one enters a negotiating situation, one must necessarily have formed a view as to the range of acceptable outcomes to the other side. Otherwise, if there were no concurrence of acceptable outcomes, there would be no need to negotiate at all.

The second way of defining negotiations is to look at the basic characteristics of negotiations. All negotiations, from buying a second-hand car to determining the terms of accession into the EU, share the same three fundamental characteristics:

- *Process of discovery:* The two sides inform each other about what they need or what they offer. So they learn about each other and form opinions about the strengths and weaknesses of each other. Information, therefore, is a vital instrument of negotiations which can be used to shape perceptions and expectations.
- *Strategic interaction:* In a negotiating situation the two sides also seek to influence each other and shape each other's behaviour for the purpose of achieving the best possible outcome for themselves. The best possible outcome is the one which maximises the gains and/or minimises the losses of each side. So in negotiations each side sets priorities and targets which it attempts to reach and tries to predict the reaction of the other side to its own actions.
- *Process of exchange:* Each side tries to shape the other's behaviour by offering something or by conceding something. Each side's strength is determined by what it has to offer or deny to the other side and each side's weakness is determined by what it requests. A mistake which is often committed in negotiations is to concede something simply because it is of little value to one's own side. The same thing may be of much greater value to the other side and, therefore, can give significant leverage to the side that can offer it.

The interaction of the two sides and the attempts to shape each other's behaviour take place on two levels:

- *Technical level:* Issues or disputes are resolved with reference to a given set of rules, criteria or benchmarks, without attempting to establish any cross-linkages with other issues. This is because cross-linkages make the resolution of one issue conditional or dependent on resolution of another. By contrast, resolution according to the given rules in essence isolates each issue from the rest.
- *Political level:* Issues or disputes within a certain (policy) area are resolved without reference to the rules applying to that area. Therefore, cross-linkages are necessarily established with other issues and the final outcome is a "package" involving technically unrelated issues. So in this context, "political argumentation" does not mean politics in the ordinary sense of the word. It only means the definition of a "package deal" that includes technically distinct issues and is acceptable to both sides.

As mentioned above, a fundamental characteristic of negotiations is the strategic interaction through which each side attempts to influence the behaviour of the other. Behaviour, and ultimately the final outcome of negotiations, can be influenced or shaped in three ways:

- *Legal/technical arguments:* The use of legal and/or technical arguments presupposes the existence of a set of benchmark rules or criteria which are acceptable to both sides. Much of the legal or technical argumentation concerns the definition of the appropriate benchmark criteria[5] and the interpretation of the meaning of such criteria.[6] The skill in using argumentation as a negotiating tool is to identify the relevant analogy between the mutually accepted principles and the issue at hand.
- *Promotion of mutual interest:* Here each side tries to persuade the other side that what it seeks or proposes is actually also in the interest of the other side. This is probably the most effective way of influencing the behaviour of the other side because if that side finds that legal/technical arguments go against its interests, it will inevitably seek to "politicise" the subject under discussion by creating cross-linkages and by resorting to power (if it has any).
- *Use of power:* If legal/technical arguments are ignored or are unsuccessful and if appeals to mutual interest go unheeded, the only other means left for influencing the behaviour of the other side is to resort to power. As the famous 19th century German strategist von Klaussewitz said that war is a continuation of politics through other means, similarly the use of power is the continuation of negotiations through other means. However, power in this context does not mean the use of physical force. It only means the ability to impose conditions on the other side or to deny something that the other side wants irrespective of legal or technical considerations. Hence, power appears at the political level of negotiations where the outcomes are in the form of a package or even involve deals with issues that have nothing to do with the subjects under negotiation.

From the preceding brief review of the main components of negotiations it is obvious that effective negotiation, in general, and proof of a country's ability to assume the obligations of membership of the EU, in particular, have an important characteristic in common. They both depend decisively on the use of appropriate information and statistics. No one can negotiate successfully unless he/she uses information effectively both in transmitting it and receiving and then analysing it. Information is vital, on the one hand, to establish clearly one's own position and views and, on the other, to understand the other side's position, views and acceptable alternatives.

Although there are basically two possible methods of achieving one's objectives in a negotiating situation – persuasion and argumentation according to the principles that apply to the subject under negotiation and use of power to force the other side to deviate from its optimum by cross-linking issues – it is always more difficult to successfully manage cross-linkages between the various chapters of the accession negotiations. For one thing, there are no simple rules how to establish such linkages. This is a matter of judgement for the negotiators. For another, the exercise of power invites counter measures. This means that any attempt at cross-linkages will most probably be met with a counter-attempt at cross-linkages too. The process then becomes unpredictable and, therefore, very difficult to manage. It is much easier (in principle) to demonstrate compliance with EC rules to the Union and, where necessary, use the EC's rules to arrive at an outcome that is acceptable to both sides. The latter relies on creative interpretation of the rules.

Where cross-linkages have to be made, the applicants are likely to be more successful if they emphasise mutual interest, rather than attempt to resort to power (of which they have little and which initiates a process of counter-measures that is difficult to control). That is, where an applicant cannot make any more concessions, it would probably be more effective pointing out to the EU that it is also in its own interest to minimise the cost to be borne by the applicant and prospective new member of the Union.

The emphasis on rules as a negotiating approach also addresses one of the main tasks facing any negotiator; that of adequate preparation and presentation of credible positions. By giving prominence to the information which is needed and the reasoning that should be used, the negotiator in fact has to deal both with the issue of strategy and the issue of preparation of negotiating positions. These two issues are inextricably linked.

Understanding the dynamics of negotiations

The issues examined in the previous section can also be analysed in a more rigorous manner. The use of a simple model will enable us to highlight a number of other important aspects of negotiating interaction and identify more clearly the boundaries of the negotiating power of the applicant countries.

In particular, this section seeks to formalise the concepts of relative gains and losses and power. Without claiming that other issues are unimportant, it appears to us that the chief negotiators of the applicant countries have two primary concerns: (a) how to present a credible position to the EU (to demonstrate sufficient compliance with the *acquis communautaire*), and (b) how to gauge any negotiating power they may have and how to wield it.

We addressed the first concern in the paper cited in footnote 1. In this paper we expand on our previous work by examining the link between the drafting of a credible paper and the overall national strategy on EU membership. As we explain in the last two sections of this paper, the applicant countries and the chief negotiators should look beyond the accession negotiations when they prepare their position papers. They will better serve their national interests by asking how the targets they seek to achieve through the negotiations will help their countries benefit more from EU membership in the longer term. But, first, this section takes a closer look at negotiating power. To facilitate our task we will formalise the concept of power.

A simple model

Let's begin by defining a party's objective in some bilateral negotiations. Assume that the purpose of the negotiations is to determine a certain common rule that can be effectively implemented only if both parties agree (e.g. exchange rate management, cross-border cooperation in fighting international fraud, etc). Further assume that each side derives benefits and experiences costs from defining and implementing such a common rule.

The negotiating objective of each side is to maximise net benefits:

$B = G(x) - C(x)$

where B denotes net benefits, G is the function of gross gains from regulation x, while C is the function of gross costs of compliance with regulation x.

Each party derives the optimum level of regulation x (that maximises B) by differentiating the equation with respect to x and by setting it equal to zero (i.e. no extra benefits can be obtained) so that

$Bx = Gx - Cx = 0$ [the subscripts denote the first-order derivatives]

This means that x is optimised (from their perspective) when marginal gains equal marginal compliance costs, or $Gx = Cx$

The purpose of the negotiations is to define a common x when xi (the optimum for party i) is not equal to xj (the optimum for party j). As a result, both parties will have to move away from their optimum solution. Our purpose here is to understand how far each party will be prepared to move when net benefits are very much unequal, as in the case of the EU and any of the applicant countries. That is, Bi* differs from Bj*, where "*" denotes the level of B when x is optimised.

To gauge the willingness to move, we postulate that their negotiating effort is a function of the potential reduction in net benefits they suffer by moving away from their optimum. In addition, we postulate that the negotiating effort is directly proportional to the reduction in net benefits. We can then define function, N, such that

$Ni = ai(Bi^* - Bic)$

where Bic is the amount of B of party i determined by the level of x which is commonly decided (i.e. the outcome of the negotiations) and "ai" is a parameter

Since B* is fixed and since it must be the case that

B* > Bc, N must be a function that increases at an increasing rate because the difference between B* and Bc also increases at an increasing rate. This is caused by the bell-shaped curvature of function B. The exact slope of N is also determined by parameter "a". Parameter "a" which denotes how the size of potential losses translates into negotiating effort, captures such aspects of negotiations as the costs of the negotiations and other procedural issues (in a way it corresponds to the institutional constraints within which negotiations take place). For our purposes we do not need to elaborate it further. We also assume for the sake of simplicity that negotiations themselves are costless.

If xi* is smaller than xj*, then the objective of negotiations is to find an xc such that

xi* < xc < xj*

Ni has an upward slope rising from left to right and starting at zero at point xi*. It reaches its maximum value at the point where xi, say xi', makes Bi = 0. That is, xi' imposes a constraint. By contrast, Nj has a downward slope declining from left to right until it reaches zero at the point xj*. It starts at its maximum value where x, say xj', makes Bj = 0.

For an equilibrium solution to exist xc must have a value so that xj' < xc < xi'. This means that Ni and Nj must intersect each other, otherwise they have no common value and, therefore, no equilibrium solution.

That equilibrium solution is reached when neither side has any incentive to negotiate further. That solution has a real life counterpart. Each side will initially be willing to make small deviations from their optimum, but as the deviations increase, so will their negotiating effort because greater deviations will signify greater potential losses. The equilibrium is at that level of x, xc, where their negotiating effort is equalised. That is,

Ni at xc = Nj at xc, or ai(Bi* - Bic) = aj(Bj* - Bjc)

If the ratio of parameters ai and aj, ai/aj, represents the "technology" of negotiations (i.e. is given by existing institutions, skills, etc.), and if the tenacity with which each party negotiates is directly proportional to the size of the loss of net benefits, then the outcome of the negotiations will be determined by the ratio of relative losses of each party

(Bj* - Bjc)/(Bi* - Bic) = ai/aj

This simple result is illuminating because it shows that the negotiated outcome does not depend on the absolute level of gains and losses but on the relative cost of deviating from the optimum solution of each party. So in determining their negotiating strategy each party has to make a guess, first, as to what is the optimum outcome of the other side and, second, how much it will lose out by deviating from that outcome.

There are two corollaries to the result derived above. First, negotiators should not be impressed by arguments about the size of absolute costs. In this sense, it does not matter whether the other side is either much bigger or much smaller, or whether the absolute gains or costs are much bigger or smaller. What matters is the cost of departing from the theoretical optimum, which may be much less than not having any agreement at all.

Second, we see once more that providing and obtaining information are important because this is how each side evaluates the reaction and willingness of the other to move away from its preferred position. We have abstracted here from issues such as bluffing and posturing. No party enters negotiations by revealing its true preferences. Indeed, bluffing and misleading information may change the final outcome drastically. Note, however, that no one would suggest applicant countries should bluff or cheat. They are under such intense scrutiny that it is in their interest to demonstrate to the EU their true preferences and capabilities.

We can now consider the concept of power, which, in the context of this paper, manifests itself in cross-linkages between different issues. To be able to do that, we have to define power in such a way as to allow us to explore the nature and implications of cross-linkages. First, however, we need to motivate the definition we use below.

As explained in the previous section, power is a relative concept. It denotes, on the one hand, the degree of a party's control over resources or other assets that another party wants. On the other hand, it also denotes that first party's need for resources or other assets controlled by the other party. Hence, for the purposes of this paper, power is a relative relationship denoted by:

> "the ability to withhold something the other side wants while having little need for something that the other side is in a position to withhold"

This definition suggests that the power of party i is greater, the greater the need of or benefit to party j from asset y controlled by party i, and the smaller its own need or benefit from asset x controlled by party j. Power, P, of party i is a function such that

Pi = f[Bj(x, y), Bi(x, y)]

For the sake of simplicity, we assume that there is a one-to-one relationship between B and our cardinal measure of P and that the two parties experience net benefits which can be expressed in the same units. Under these conditions, the function above can be written as

Pi = Bj(x, y) – Bi(x, y)

The net benefits of parties i and j from the negotiations are, respectively

Bi = Gi(x) – Ci(y) and Bj = Gj(y) – Cj(x)

The cost borne by each party is the value of the units of either x or y that have to be given up in "exchange" of the gains of either y or x. This kind of "exchange" establishes direct cross-linkages between x and y.

The negotiating objective of party i is to maximise Bi = Gi(x) – Ci(y).The corresponding objective holds for party j. This means that power can also be expressed as

Pi = [Gj(y) – Cj(x)] – [Gi(x) – Ci(y)] = [Gj(y) + Ci(y)] – [Gi(x) + Cj(x)]

We can now see the relationship between negotiating objectives and negotiating power. There are several interesting cases (for simplicity the results below are presented in terms of the effect on party i):

(i) The higher the gains of party j, Gj, the higher the power of party i, Pi (ceteris paribus). In a way this is not a very interesting result because it stems directly from the definition of power.

(ii) Correspondingly, the higher the gains of party i, Gi, the lower its own power, Pi. Again this is a direct result of our definition.

(iii) Ci = 0 (party i faces no cost). This could happen when party i experiences no costs in granting y to party j or in making concessions on issue y. In this case its power would be lower than otherwise, ceteris paribus. Now, this is a rather unexpected result. However, it does make sense because it indicates that party i has more power (to refuse something and/or to demand more of something else) when concessions are more painful. Similarly, the power of party i is lower, the more painful the concessions of demanded from party j (i.e. Cj).

(iv) Gi = 0 (party i experiences no gain). Its power is higher than otherwise because it is as if party i is very difficult to satisfy. As many salespersons have discovered, it is not easy to sell a product to difficult customers with weird preferences or with little need.[7]

The analysis can also be generalised to many subjects. The objective for each party would still be to maximise

Bi = Gi (xa, ..., xn) – Ci(ya, ..., yn)

where "xa, ..., xn" and "ya, ..., yn" are the various negotiated subjects

Although we have not developed the tools in this paper that would allow us to analyse such multi-subject cases, there is an observation worth making. Assuming that all subjects are of equal value, the greater (smaller) the number of subjects for which Gj > 0 and the smaller (greater) the number for which Gi > 0, the stronger (weaker) the negotiating power of party i.

Preliminary conclusions

Contrary to common perception, if a party is interested only in a few subjects, it does not necessarily follow that it would be easier for it to be satisfied and that negotiations would consequently be less difficult. It may also mean that it is determined to negotiate much harder because it has only few demands and, therefore, more power and stronger negotiating position. The corollary is that when a party is interested in many subjects, the negotiations may become as a result more complex, but it would be an easier task, ceteris paribus, to satisfy that party because it would also have relatively less power (because it would have many more demands).

The main result of the analysis is perhaps paradoxical at first glance. When questions of power and negotiating strategy are considered, the most commonly held belief one encounters is that those who have power, gain the most. Yet we have seen that there is an inverse relationship between negotiating gains and negotiating power because power is proportional to what the other side needs and inversely proportional to what is requested from the other side. In a sense, power is like a currency that has to be expended to obtain benefits from negotiations. The purpose of negotiations is not to maximise power (i.e. deny everything to the other side and request nothing from the other side). The purpose is to maximise potential gains by making as many requests as can be tolerated or satisfied by the other side. Not surprising, the toughest negotiations take place in situations where there is asymmetry between the parties, when one side has little to gain or to lose or when it is interested in just a few issues. In those situations, mutually acceptable cross-linkages and trade-offs are difficult to achieve.

It is for the reasons explained above that the negotiator who wants to maximise his/her side's benefits has to take risks and make demands and offers that in effect make his/her own side more vulnerable. This is why negotiations are to a large extent unpredictable and their successful conclusion requires a substantial dose of judgement, discretion and willingness to take risks.[8]

The insights we derive from theoretical considerations are very pertinent to the negotiations for accession to the European Union. They show more rigorously what is by now fairly recognised in Brussels and national capitals; that the applicant countries will be in a weak negotiating position if they attempt to make too many demands on the EU and that the negotiations are likely to be tougher for them than in the past because of the sheer asymmetry between the EU and any of the applicants (of course the negotiations are tougher anyway because the *acquis* is much larger).

Above all they show the dangers of attempting to resort to power through cross-linkages. The EU is likely to be a demander on fewer issues than any of the applicants (in the sense of asking for deviations from the *acquis*, which is the benchmark for the negotiations). Furthermore, any attempt on behalf of the applicants to establish cross-linkages need not lead to a speedier resolution of disagreements because it is also more likely that any deal would founder on the objections of at least one of the 15 existing member states. Resolution would require the consent of all 15 Member States, which means that as the membership of the EU increases internal common positions will be more difficult to achieve and, as a result, the EU will become a tougher side.

Although the applicants are not powerful, they are not powerless. They may not have the capability to force the EU to accept bargains it considers unfavourable to itself, but they can certainly act to further their objective of gaining admission to the Union. Even though cross-linkages would be risky, the applicants should not ignore the possibility of moving the EU from its preferred position with regard to those issues for which the EU's relative losses are smaller than those of the applicants.

But, above all, it is certainly within the capability of the applicants to shape the EU's attitude through the provision of the "correct" information. The sections that follow explain how the applicants can further their objectives by providing information that will boost their credibility.

The concept of membership in relation to the accession negotiations

A question that arises is whether the applicant countries, which have little negotiating power, should concentrate their efforts on persuading the EU that they do indeed qualify for membership and that they can implement Community rules faithfully and effectively? Not necessarily. What should be clear in any negotiator's mind must be the motives of the country that seeks entry into the EU. This is an important but potentially overlooked issue. The motives are a mix of political and economic objectives (e.g. political stability, access to EU markets and funds, etc). Yet these motives are not explicitly linked to the targets of the accession negotiations.

The prospective entry into the EU is not only a challenge or threat. It is also an opportunity to derive gains which are not directly related to the subjects of the accession negotiations. A case in point is the potential boosting of the competitiveness of the economy of a new member as a result of entry of foreign investors who perceive it as a less risky place for business. In this sense and in relation to the accession negotiations, the question that must always be asked is the following: "Will complete compliance with the EU rules, on the one hand, or any requested derogations, on the other, help us in the longer term to safeguard and even strengthen, for example, our economy?" (The same question can be posed about any other aspect of membership.) In other words, the requested derogations need not be those that simply protect the status quo before entry into the EU. They should be those that will be indispensable to an internationally strong economy in the next decade or two. Perhaps paradoxically, to identify the "right" derogations that should be asked for, negotiators should look at issues beyond the negotiations themselves.

We define in Table 1 three approaches to EU membership and the accession negotiations. In the left-hand column we identify three steps in the process of preparation for entry into the EU. The first step is to perform a "gap analysis" of the differences, similarities and incompatibilities between the *acquis communautaire* (i.e. the obligations of membership) and existing national rules and policies. The next step is the definition of negotiating objectives and the drafting of position papers. The third step involves a much broader assessment of the costs of entry into the EU and the opportunities that are opened up by that entry. The adoption of the *acquis* that is initiated and the definition of negotiating targets take place within a wider framework of analysis that incorporates views about the role that the country will play as a member of the EU.

There are also at least three basic approaches in relating the assessment performed at each step with the accession negotiations. These are also shown in the table. What we call the "passive" approach confines itself to seeking derogations that simply minimise the costs of adjustment and of adopting the *acquis*. The "reactive" approach aims not only to minimise costs but also to safeguard certain national policies which are considered to be important for the national economy. The "proactive" approach looks beyond the negotiations and asks how membership of the EU can be used to strengthen the national economy. Consequently, the negotiating targets are not necessarily those that maximise short-term or monetary gains, but those that will enable the country to achieve it long-term objectives.

The right answer to the question above about the derogations to be asked and the specific features of the "right" model will undoubtedly differ significantly from one applicant to another. Yet, the main message is the same for all. Successful accession negotiations should not be simply defined in terms of the number of the concessions that can be extracted from the EU. The successful outcome of the negotiations are those that result in terms of accession that enable an applicant country to become a strong and prosperous member of the Union. (See Table 1.)

Components of a credible negotiating position

In this last section we examine very briefly what needs to be considered in preparing a credible negotiating position in the context of each applicant's own membership model. There are at least seven components that make up a credible negotiating position. These components are:

(1) The *acquis* that has to be adopted by the applicant.
(2) The objectives, views and attitudes of the EU (and its member states) on the future development of the policy/rules under discussion.
(3) The corresponding situation for the applicant.
(4) The contribution of the sector/industry under discussion to the economy of the applicant and the contribution it can make (or not) to the EU and to the "common interest".
(5) The capacity of the applicant's public administration to enforce EC and rules.
(6) The treatment accorded to other candidate countries.
(7) The precedents created by past accession negotiations.

We have dealt with components 6 and 7 in another paper.[9] The remaining components, with the exception of item 4, are outside the scope of this short note. Component 4 is more relevant to this note because it relates to one of the basic instruments in shaping the outcomes of negotiations; i.e. appeals to mutual interest or to the common Community interest. Such appeals should constitute an essential characteristic of the applicants' approach to the accession negotiations.

Everything which is presented to the EU, either opening positions or requests for derogations, must be

hinged on some EU objective or EU rule. For example, it has been found to be in the "common interest" to promote the growth of under-developed regions, provide financial services to Eastern Europe, promote cross-border cooperation on R&D, protect the environment and to attract back to EU flags ships and jobs for seafarers (e.g. 1997 guidelines on state aid). It is also in the "common interest" not to cause economic disruption in a prospective Member State resulting in a widening instead of narrowing of the gap between rich and poor member states (e.g. Articles B EU and 2 EC).

In this context, a candidate country could benefit more substantially in the longer-term if it obtained a protocol that simply recognised the importance of the sectors/industries under discussion to its economy and acknowledged that the application of Community principles and the formulation of Community programmes will take that into account. Such a protocol need not include any derogations. It would be very similar to protocols obtained by Ireland, Greece, Portugal and Spain. Their protocols acknowledged the need of those countries to develop economically and pledged not only Community support for that purpose but also appropriate application of Community rules. This kind of protocol could prove extremely useful five or ten years after accession. Hence, the wording of Articles B, 2 and 130(a) on economic and social cohesion should be used to preface any presentations on sensitive sectors/ industries or requests for exceptions. It would not be difficult for the applicants to argue their case because their Association Agreements with the EU already provide that they are to be considered as "Article 92(3)(a) regions" which qualify for state aid for regional development.

More generally, the applicants should make clear to the other side that it is in the EU's interest to have new members with healthy economies rather than members with structural weaknesses. Therefore, the costs of too rigid or too quick application of the *acquis* must be highlighted in trying to persuade the EU that it is not to its disadvantage to be flexible.

Conclusion

Any good negotiator sets his/her priorities before entering the negotiating process. Similarly, the prospective members of the EU would have to identify their own priorities and their "bottom line" – what they cannot concede. At the same time, however, they need to understand the EU's bottom line. It would make no sense for them to seek anything that the EU will not grant them (unless such demands are made as a negotiating ploy, but this kind of stratagems are risky because they spoil the atmosphere of the discussions).

There is also little doubt that the prospective members will be expected to comply fully with the requirements of their Association Agreements (especially the provisions on free trade) and with the *acquis*-compatible international obligations they have already assumed in the context of GATT, IMO, etc. These Agreements and international obligations cover a substantial part of the internal market *acquis*.

In addition, full compliance will be expected with the targets identified in the Accession Partnerships which provide for the implementation of national plans for the adoption of the *acquis*. However, it is still unclear what status these National Plans will have because they will be decided between the applicants and the Commission while the accession negotiations will formally be conducted with the member states.

It follows that the applicants will have more room for manoeuvre in those areas of the *acquis* which are not covered either by fundamental Community principles concerning the internal market or by Association Agreements or where the *acquis* itself admits to possible exceptions. It is plausible, therefore, to conclude that the applicants should not waste valuable negotiating capital seeking derogations from fundamental principles or obligations that they have long accepted under their Association Agreements. In summary, they would more effectively and productively concentrate their efforts on (a) non-core areas of the *acquis*, (b) those provisions of the *acquis* that allow for exceptions, (c) issues not covered by Association and other Agreements and (d) issues on which the EU itself will be a demander.

As in all negotiations, during the accession discussions there are bound to be attempts by all sides to link issues. The success of the applicants in obtaining exceptions or extra resources from the Union will very much depend on their ability to link concessions in one area with demands in another. Their position will become stronger, the less willing is the EU to extend all privileges and freedoms to them (e.g. free movement of persons) and the more slowly the EU wishes to integrate them in Community policies (e.g. common agricultural policy). Ironically, their non-integration in one area may become their trump card for supporting their requests for slower integration in another area.

Bearing in mind the concepts of negotiations explained earlier, we conclude that the best strategy for a candidate country is to

- prove that on the whole it complies with EC rules,
- where compliance is not possible, demonstrate that the exceptions it seeks are allowed by existing rules, and
- the exceptions are in the EU's own interest because they minimise the cost of entry that has to be borne by the prospective member and, therefore, reduce potential demand for EU assistance.

RÉSUMÉ

Les limites du pouvoir de négociation des pays candidats à l'adhésion à l'Union européenne : considérations théoriques et implications pratiques

Cet article applique les concepts théoriques des négociations à l'élargissement de l'Union européenne. Il se propose d'examiner le pouvoir de négociation que peuvent exercer les pays qui souhaitent adhérer à l'UE.

Il conclut que les pays candidats auront une marge de manoeuvre plus grande dans les domaines de l'acquis communautaire qui ne sont pas couverts par les principes fondamentaux de la Communauté concernant le marché intérieur ou par leurs accords d'association, ou encore dans un domaine où l'acquis autorise d'éventuelles dérogations. Les pays candidats ne doivent pas gaspiller leur précieux capital de négociation à tenter d'obtenir des dérogations par rapport aux principes ou obligations fondamentaux qu'ils ont acceptés depuis longtemps en vertu de leurs accords d'association.

En revanche, ils pourraient concentrer de manière plus efficace et plus productive tous leurs efforts sur (a) les domaines non fondamentaux de l'acquis, (b) les dispositions de l'acquis qui autorisent des dérogations, (c) des questions qui ne sont pas couvertes par les accords d'association ou autres et (d)) des questions pour lesquelles l'UE sera elle-même demandeuse.

Comme dans n'importe quelle autre négociation, toutes les parties tenteront au cours des discussions d'adhésion de relier plusieurs questions. Le degré de réussite des candidats à obtenir des exceptions ou des ressources supplémentaires de la part de l'Union dépendra très largement de leur capacité à lier les concessions dans un domaine à des exigences dans un autre domaine. Cela renforcera leur position, dans la mesure où l'Union européenne est moins disposée à leur accorder tous les privilèges et libertés (p. ex. libre circulation des personnes) et qu'elle souhaite les intégrer le moins rapidement possible dans les politiques communautaires (p. ex. politique agricole commune). De façon ironique, on peut dire que leur non intégration dans un domaine pourrait devenir leur atout majeur pour soutenir leurs requêtes d'une intégration plus lente dans un autre domaine.

L'analyse théorique montre que la meilleure stratégie pour un pays candidat est de :

- *prouver que, dans l'ensemble, il satisfait aux règles communautaires ;*
- *démontrer, lorsque la conformité aux règles s'avère impossible, que les exceptions qu'il réclame sont autorisées par les règles en vigueur, et*
- *montrer que les dérogations sont dans l'intérêt même de l'UE, dès lors qu'elles minimisent le coût de l'entrée que doivent supporter les futurs membres et réduisent, par conséquent, la demande potentielle d'aide communautaire.*

NOTES

1 Published in *Eipascope*, no. 1998/1 (Maastricht: European Institute of Public Administration).

2 Negotiations can be bilateral or multilateral. We refer here mostly to bilateral negotiations. It should be noted, however, that accession negotiations are in essence multilateral, given that all 15 Member States of the EU have to reach consensus and that the European Parliament has to grant its consent.

3 Even this general statement, however, has to be qualified. Where EC policies involve transfer of resources (e.g. structural operations), there is currently under way a reform process, which is essentially aimed at avoiding the application of the present rules to the future member states.

4 This and the following section draw on the following seminal works on strategy, negotiations and game theory: T. Schelling, *The Strategy of Conflict*, (Cambridge, MA: Harvard University Press, 1960); H. Raiffa, *The Art and Science of Negotiation*, (Cambridge, MA: Harvard University Press, 1982); A. Dixit and B. Nalebuff, *Thinking Strategically*, (New York: W.W. Norton, 1991).

5 For example, the restrictions on the nationality of the master of a vessel are contrary to Articles 6 and 48 of the EC Treaty. However, member states have in effect argued that the appropriate benchmark criterion is Article 55, which exempts activities connected with the "exercise of official authority".

6 For example, a matter of interpretation is whether the master of a vessel exercises official authority so as to benefit from the exemption of Article 55.

7 As someone said, the best time to buy something is when you least need it. This may be otherwise inane advice, but it does suggest that one can bargain hard when one has little need.

8 The personal characteristics that are attributed to successful negotiators, i.e. skill, willingness to take risk and even flair, are responsible for the frequently reported problems emerging between negotiators and their own side! Risk-taking and flair do not normally characterise the decisions made by teams or committees. This is why it is said that the toughest negotiations are those which are conducted at home before the sides meet.

9 See P. Nicolaides & S. Raja Boean, *A Guide to the Enlargement of the European Union*, (Maastricht: EIPA, 1997). ❑

Table 1:
Approaches to EU Membership and the Accession Negotiations

	Passive	**Reactive**	**Proactive**
Gap Analysis: EU – national rules	Yes	Yes	Yes
Accession Negotiations	Arguments for transitional derogations (cost of adjustment)	Arguments for derogations (costs plus safeguard own policies)	Arguments for derogations (costs plus safeguard own policies; in common interest)
Adoption of *acquis* within "own model" of EU membership	No	No	Internal reform to adjust and strengthen national policies

Fiscal Policy in the Member States under EMU*

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1. Introduction

The launch of EMU, which is expected to represent a source of benefits for European economies facing recovery after years of slowdown, to some extent implies the end of national fiscal policies. A key-element of EMU will in fact lie in the disciplined and coordinated fiscal policies of all its participants. If we take a look at the years following the 1990-91 supply-side shock and the 1992 currency crisis, we see that fiscal policies in Member States have been restricted both according to the criteria stated by the Maastricht Treaty and due to the levels of deficit inherited from the past and the consequent need to reduce them.

Budget deficits under EMU will have to decrease further than they already have been and with the acceptance of the even stricter provisions contained in the Stability and Growth Pact possibly tend to zero (the Maastricht Treaty itself only requires a deficit of not more than 3% of GDP) in order to maintain convergence in the long run, although, as we will see, there are no effective sanctions if a Member State fails to meet the target once EMU has started. In fact, in principle, interest rates should not be pushed upwards by any deficit-prone or inflationary policy. In addition, the end of the exchange rate regime in the EU means that weaker economies will no longer be allowed to devalue their currencies in order to limit the impact of asymmetric shocks.[1]

The main purpose of this paper is to consider whether fiscal policy according to EMU's constraints is sustainable particularly in the context of high unemployment and low growth. In this respect, this paper is mainly based on previous studies which developed possible scenarios in order to examine this sustainability. The paper also considers the implications of the sanctions stated in the Stability and Growth Pact on EMU Member States' economies should they actually be applied. In this respect, a negative economic scenario characterised by asymmetric shocks is presented in order to try to establish whether the EMU provides measures which may help economic recovery by enhancing regional convergence. A comparison with US fiscal federalism is also made to compare the means used in the US to achieve stabilisation. Finally, the discussion is extended by considering whether fiscal policies in a Monetary Union should in principle incorporate stabilising functions, and whether a Monetary Union actually needs a centralised fiscal policy in order to pursue such stabilisation.

2. EMU's Fiscal Policy constraints and its effects on national policies

According to the Commission's forecasts,[2] the benefits of EMU should mainly consist of: 1) reduced budget deficits and coordinated fiscal policies; 2) lowered costs for businesses, price transparency and lower prices for consumers; 3) monetary stability due to the absence of exchange rate fluctuations; 4) the creation of a euro-area capable of attracting investors thanks to a stable level of interest rates. The sustainability of EMU itself, however, lies in economic recovery being maintained in the long term and no Member State being forced to pursue goals which are not stated in the Treaty on European Union and in the Stability and Growth Pact. The criteria should in fact be sustained at a desirable level in the long run, which would certainly be easier if there were no economic downturns.

Let us now see what has been the main implication of convergence criteria towards EMU with respect to fiscal policy. Since the Maastricht Treaty imposes low budget deficits – that is deficits which do not amount to more than 3% of GDP – in order to keep interest rates low, some inflation-prone and less disciplined countries – such as Italy, and Spain, which suffered considerably from the 1992-95 slowdown – have found it difficult to satisfy this criteria because they are facing economic recession. Though it is also very easy to say these Member States have had more disciplined fiscal policies because they are now subject to the Maastricht criteria, it is also true that the huge amount of public debts they inherited from the past also made it necessary for them to reduce their deficits and to correct the trends in their public finances.

While these economies have succeeded in satisfying the criteria their unemployment levels have generally risen, as has the average EU unemployment rate when compared to the US rate.[3] Therefore, during the convergence process towards the so-called Maastricht criteria, restrictive fiscal policies may have contributed to a further rise in unemployment, beyond that caused by the economic downturn in these countries alone. Summing up, since EMU will imply the maintenance of tight fiscal policies, the question whether such policies will help economic recovery remains open.

In examining how fiscal policy should be conducted under EMU according to the spirit of the Treaty one can see, firstly, that the rules of fiscal policy as proposed by the Treaty of Maastricht contain explicit rules on the

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* *Un bref résumé de cet article en français figure à la fin.*

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public finances of the individual Member States of the EU as a necessary condition for the entry in EMU.[4] Secondly, after entry, Member States must retain fiscal flexibility for stabilisation purposes, but as public debt monetisation is forbidden,[5] they should avoid excessive deficits which may lead to an unsustainable fiscal position. Countries running excessive deficits have to correct their position otherwise they are subject to penalties and fines. In this respect, the Treaty of Maastricht suffers from a remarkable weakness, that is it lacks provisions for the creation of a strong federal institution to help Member States conduct national fiscal policies. The Stability and Growth Pact, agreed at the European Council in Dublin on 13 December 1996, provides guidelines for Member States' governments with respect to fiscal policy. It imposes sanctions on those states which have transgressed budgetary discipline (by having a deficit of more than 3% of GDP) – we will not focus on the exceptions which will allow a Member State to avoid such sanctions. What is important to emphasise is that it seems that while some measures aimed at the enforcement of budgetary discipline exist, any measure to help a State towards a recovery is apparently missing. Broadly speaking, according to the spirit of the Stability and Growth Pact it may seem that if a Member State in economic downturn loses control of its deficit it is punished, rather than given support to improve its economy.[6]

During the Third phase of EMU, when the conduct of monetary policy is centralised at the European level and, therefore no longer available as a policy tool at the national level, budgetary policy will be the main macroeconomic policy instrument available for individual Member States in order to limit the impact of recessions, especially as a result of asymmetric shocks. In such a context due to the impossibility of lowering interest rates and resorting to currency devaluation larger deficit changes might be required. However, according to the Mundell-Fleming model,[7] in the new policy environment of EMU, budgetary policies will in principle become more effective in softening the impact of cyclical fluctuations with centralised monetary policy and irrevocably fixed exchange rates between Member States. However, unless national policies are coordinated, these budgetary policies will increase the changes in the budget deficit required in order to obtain the same degree of stabilisation achieved in the past.

The actual deficit changes which took place during past severe recessions, such as that of 1992-95, usually started from markedly higher pre-recession deficit levels. The impact on the economy of budgetary policy changes during recession under EMU should, however, be different from that of a rise in a deficit from, let us say, 8% to 10% of GDP, which may have been seen in the past. This is because at higher rates the deficit is more likely to shift on to an unsustainable path, as such fiscal expansion generally leads to an increase in the risk premium on interest rates, in order to avoid inflation.

In the flexible exchange rate regime Member States facing recession were able to improve their situations by increasing their competitiveness and by lowering wages, social security transfers and taxation levels. However, such advantages often vanished because of the volatility of the exchange rates regime. With the EMU and the single currency, things change. Variations in labour costs, or labour law, as well as the level of skill and mobility of the labour force become key-factors once the exchange rate advantage disappears, especially in case of economic downturns. Therefore, a stricter fiscal policy will affect the competitiveness of firms but other microeconomic policies – affecting labour market flexibility and taxation level – will also play a predominant role.

In short, after the launch of EMU, fiscal and monetary policy will run according both to the Stability and Growth Pact and to the provisions stated in the Maastricht Treaty (no fiscal solidarity, no monetisation of public debt). However, no form of coordination of fiscal policies among Member States has been conceived of so far, and it is possible to predict that there may be fiscal policies in some EMU countries which will be run in a different way from that stated in the Treaty. In these cases, the sanctions stated by the Stability and Growth Pact could be applied.

However, the most apparent lack of form of coordination regards fiscal policy. If there is a common monetary policy, that is the European Central Bank (ECB) fixing short-term interest rates to have an anti-inflationary effect, other economic policies (such as taxation level, social security, labour cost and labour mobility) will still depend on each government's policies, and all governments will run their own national policies according to their domestic priorities, but not necessarily with a significant degree of coordination.

3. Are there alternatives to fiscal federalism?

Let us now draw a scenario, where an asymmetric shock affects EU economies and deepens regional disparities in terms of output, growth level, income and employment levels. We have seen that when a country joins EMU it loses its ability to use monetary and exchange rate policy in order to stabilise its economy. In the case of a shock affecting Italy, for instance, with flexible exchange rates the Lira would depreciate, and the resulting real depreciation would raise export demand and help the Italian economy recover. This is not the case with EMU. Moreover, adjustments are unlikely to come about through migration for, while the free movement of labour is a theoretical reality within the EU, migration is still difficult because of language and cultural differences. Indeed it may even be considered politically unacceptable as a mean of making adjustments. Doyle, at the time when the Delors Report was launched,[8] found that this leaves EU's fiscal policy as the main mechanism for absorbing such shocks.[9]

The question is whether there is a net transfer system according to EMU provisions. In case of a country-specific recession due to an asymmetric shock, the institutional framework of EMU does not provide for forms of cooperation. The Cohesion Fund, which we may compare to US federal taxes in this case, amount to less than 1.5% of EU's GDP. According to the US pattern, a region which is hit by a shock could benefit from a minimum fiscal transfer through the form of a smaller contribution to the EU's budget, as in the US where a

State in economic downturn in effect pays less taxes through the receipt of social transfers which are financed by the other States. Examples of fiscal flows in the US and Canada show that there is no fiscal federalism in the context of EMU where, in comparison, the budget is small and redistribution is limited. However, single governments can still carry out stabilisation policies using domestic fiscal instruments to an extent which is comparable to that of the US and Canada.

These considerations arise from the question of whether economies in a downturn (as in the case of asymmetric shocks, which are often country-specific) could be better stabilised by a federal-type of fiscal solidarity or by the simple respect of fiscal policy rules implemented at the national level by each EMU Member State.

When considering to what extent the US and Canada can be used as a reference point for the EU Bayoumi and Masson[10] drew the following three conclusions:

a) The size of the federal flows varies significantly depending on the institutional structure of the country concerned, so that neither the US nor Canada provide a benchmark for EMU.
b) The stabilisation which is performed by national governments in the EU is comparable to that which occurs in the US or Canadian federal fiscal systems at the national level. Therefore, there does not seem to be a case for a federal system among EU countries on stabilisation grounds at the federal/European level, unless increasing integration limits their ability to carry out stabilisation policies in the framework of EMU. (This, however, is supposed to be the case).
c) Both federations, the US and Canada, have remarkable redistributive functions. Even in the case of US, where there is no specific requirement for the federal government to pursue a policy of equality in income level, the federal fiscal system reduces long-term income differentials by 22 cents in a dollar. On the other hand, according to Bayoumi and Masson, the EU Structural and Cohesion Funds, which amount to 0.45% of the EU's GDP and do not have stabilising functions nor aim at redistributing wealth and equalising incomes, would not be sufficient to pursue such goals. In contrast to the US and Canada, the lack of an adequate fiscal instrument would expose the EU to regional economic disparities unrelated to the underlying trends of regional development, causing strain and dissatisfaction with the EMU and undermining its proper functioning, which would have particular consequences on unemployment levels. Sachs and Sala-i-Martin pointed to the US experience to enforce this view.[11]

They contend that the US federal fiscal system responds to regional shocks by offsetting about one-third of the effect of the impact through tax and transfer payments and lower federal taxes. Their conclusion is that an EMU without a sufficiently large fiscal apparatus would produce a detrimental impact, at least, in terms of sustainability. Von Hagen, however, shows that the estimates presented in Sachs and Sala-i-Martin are biased upward, because they do not separate transitory from permanent"regional shocks.[12] This distinction is clear in the empirical evidence, which shows that the US fiscal system offsets only around 10% of a transitory regional shock, a finding which is confirmed by Atkeson and Bayoumi.[13] Masson and Taylor present evidence for Canada showing the similar, relatively small role of the federal fiscal system in dealing with regional shocks.[14]

More generally, the question of whether the lack of an apparent fiscal integration in EMU would be offset according to US and Canadian patterns still remains unanswered, and the literature cannot reach an unanimous conclusion about how to settle it.

Is there really an alternative to fiscal federalism for EMU then? Looking back over the years, the call for a sizeable centralised fiscal budget goes back to the era of the McDougall Report of 1977, which estimated that a budget of about 5% of the Community's GDP would be required for a viable EMU.[15] The Delors Report judged that a central bank budget of that size would not be politically feasible in the near future and therefore called for the greater coordination of fiscal policies among the members to achieve the same purpose.

What form then should such net transfers assume? The McDougall Report and the Delors Report, which were mainly concerned with the problem of reducing disparities in per capita income through equalising and stabilising mechanisms, pointed to using public finances in unitary and federal states. This appears to be the approach also advocated and employed by the EU.

Fiscal policy under EMU should therefore involve net fiscal transfers to countries under recession, in order to stabilise rather than to redistribute wealth. Such transfers should also include a certain proportion of funds devoted specifically to the process of structural adjustment: a concept which already exists in EMU, especially in the context of regional policies as well as the structural elements of the functional policies. In addition to helping reduce disparities in the growth rate in per capita income, such an approach to net regional transfers would give birth to self-sustaining growth, reducing and eliminating the need for such net transfers in the long term.

The McDougall Report of 1977 showed that within both the unitary and federal states up to 40 per cent of regional disparities in per capita income are eliminated by fiscal transfers. Nevertheless, according to the McDougall Report the main purpose of the stabilisation policy would be to stabilise incomes, rather than to redistribute wealth. In combination with national provisions such as unemployment benefit, the tax system would execute automatic transfers among regions, without requiring any appropriation and spending authority at the EU level of coordination of national spending policies, that is without fiscal policies. From a politicoeconomic point of view, however, there are two alternatives which are not equally desirable. Firstly, increasing the EU budget would mean increasing the power of central administration both in comparison to Member States' governments and to ECB. Secondly, a federal tax system with redistributive functions, in contrast, would not make the actual transfers subject to political discussion at the

national level. The theory of fiscal federalism suggests, in fact, that national administrations would recognise the priorities and needs of the individual Member States better, especially in case of an economic downturn[16] requiring more expansionary national fiscal policies.

The whole matter clearly implies a political choice as to how much redistribution should occur across countries, rather than a choice based on economic necessity related to Monetary Union. Such choice depends on the pressures of public opinions and speculation about this is beyond the scope of this paper. However, political pressures for such redistribution may grow in the EU in response to other forces for increased integration, in particular the Single Market and the EMU itself. As a matter of fact, a political discussion has already taken place in the EU Member States in order to clarify what will become of the savings coming from the reduction in interest rates, and whether the ECB will be enabled to use these resources and how. However, this involves the role and the tasks of the ECB and does not affect the question whether fiscal policy in EMU can actually play a decisive role – at a state or federal level – in softening the impact of recessions and asymmetric shocks. It appears clear that any fiscal federalism on the US or the Canadian pattern would mean a further loss of national sovereignty in fiscal matters, which would probably seem a too great a step towards federal economic integration in the framework of a non-federal political integration process.

4. Does a centralised fiscal policy matter in the EMU?

The orthodox Mundell-Fleming model of 1961 suggested that in the context of a monetary union the domestic effectiveness of fiscal policy would be enhanced[17] by autonomous fiscal policies. But given that fiscal policy intervention is perceived to be desirable and feasible in national terms, how autonomous can national fiscal policies be in a Monetary Union? The basic issue is whether market forces rely on Monetary Union to effect the necessary consistency between national fiscal policies and the common monetary policy of the EU, or whether some forms of coordination of national fiscal policies by the community are also required.

Whether in a monetary union national fiscal polices should be flexible and autonomous is now considered. If countries are hit by adverse country-specific shocks that the Union's monetary policy cannot address, and if the lack of fiscal integration rules out any automatic transfer through the Community budget for stabilisation purposes, Member States must be able to respond by incurring a budget deficit if the Union is not to be subjected to intolerable stresses.[18] Such deficits would automatically arise as tax revenues decline and social expenditures increase in order to soften the social impact of the shock – loss of jobs, etc. – and their magnitude could be increased by discretionary fiscal changes.

It should also be noted that, as Robson suggested,[19] achieving an optimal level of stabilisation does not necessarily require the centralisation of the stabilisation functions.

In principle, the problems could be addressed through policy coordination interventions of Member States. Policy coordination faces other difficulties, however, not least of which is that, even if it is based upon rules and even more so if it is discretionary, it requires continual intra-community negotiation, which takes time.

Fiscal discipline has also to do with the avoidance of unsustainable public debt. If a Member State runs a deficit and incurs public debt over a period and at a rate that threatens its capacity to service that debt, the debt is ultimately unsustainable. The incentives to engage in deficit financing will certainly be modified in various ways by the institution of Monetary Union.[20] It is therefore conceivable that the incentives to fiscal discipline may be reduced. One important reason for supposing this to be true is that the sanction of exchange rate depreciation against imprudent national policies will be lacking in Monetary Union.

Nevertheless, decisions have to be made on the means to be adopted to protect the Monetary Union and the financial system from the effects of excessive deficits of Member States. The choice seems to lie between the imposition of rigid ex ante limits on deficits and debt, which may hinder sustainable deficits, on the one hand, and some more flexible forms of fiscal surveillance that would be more clearly defensible in terms of national economic situations and community policy objectives on the other. The Stability and Growth Pact seems to solve the dilemma in favour of the first hypothesis, which means that although Member States do not lose any sovereignty as regards fiscal policy their room for manoeuvring in case of recessions is considerably reduced.

With respect to coordination between fiscal and monetary policy, the Commission has often suggested in the past a US-like policy mix, that is a combination of expansionary monetary policy and tightened fiscal policy, which is actually the opposite of what was pursued in the late 1980s and also throughout the first half of 1990s by most Member States, as reported by Buti, Franco and Ongena.[21]

The experience of large budget deficits in 1980s and early 1990s and the efforts made by EU Member States to restrain debt incurred due to fiscal policies in the 1980s have caused a delay in convergence which almost jeopardised the start of the third phase of the EMU. The additional borrowing which is needed to pay the interest on existing debt in some Member States could still create problems for sustainability – in terms of fiscal policy – even after the final entry into the third phase. If such a condition – that is the upward limit public debt – is violated, and the public debt in an EMU country keeps on growing, budgetary policies would then have to be changed and may have to be supported by the sale of public assets which could also negatively affect the country's foreign exchange reserves. This is why the Treaty prevents the Member States from running excessive deficits. Therefore, the evidence does not support the theory of Mundell's optimum currency areas that national fiscal policies can create deficits to absorb the negative effects of shocks without problems of sustainability. Thus, the main problem is how to establish rules for budgetary stability in the long run for members of the EMU, and the abovementioned consideration justifies the provisions

regarding the rules for fiscal policy which are contained in the Maastricht Treaty and in the Stability and Growth Pact.

Besides, two other important implications of undertaking direct fiscal action for stabilisation purposes through the budget of an economic community may be underlined. First, asymmetric shocks can be expected to diminish in relative importance if economies converge in their structures as a result of integration. Secondly, if direct fiscal interventions for stabilisation at community level were to be limited to providing assistance to Member States, the whole budgetary cost of stabilisation would be substantially reduced.

5. Concluding remarks

The achievement of a reduction of regional disparities in output and unemployment levels should be seen as a long-term goal. Those who conceived the EMU knew that, with respect to fiscal policy, a positive scenario with low interest rates, no shocks and sustained growth would allow a tightened fiscal policy to be sustainable in the context of a Monetary Union. Yet, the EMU is made up by asymmetric economies, whose low degree of integration in microeconomic issues – mainly labour market flexibility and taxation level – is one of the main reasons why such economies are affected to a different degree by economic shocks. However, the membership of the EMU should protect weaker economies from such shocks, such as the crisis of 1992-93, and their impacts which are immediately reflected in prices, inflation rate and on interest rates.

The conclusion emerging is that the creation of the EMU will be associated with national government having a smaller scope in fiscal policies, thus indirectly contributing to greater fiscal discipline among the participating states. Yet, the Treaty does not provide for any significant centralisation of the national government budgets in the EMU. This implies that there will not be any explicit automatic transfer mechanism which redistributes income, thereby softening the social consequences for the Member States hit by asymmetric demand shocks. Under these conditions, the national governments are likely to push for higher transfer payments from the budget of the EU through negotiation.

The main consequence would be that, in case of asymmetric shocks, a tightened fiscal policy (which allows low deficits and low long-term interest rates) and a lax monetary policy (which leads to low short-term interest rates) could be barely sustainable in the long-term. Therefore, a common fiscal policy from the countries participating to the EMU would not itself be sustainable and, even if it were sustainable, it would be insufficient and not appropriate for every country. In this perspective, a long-lasting growth appears to be the only real condition not only to reduce gaps in economic performances and to lower unemployment rates, but also to avoid the whole EMU being put under pressure. In case of an asymmetric shock, the lack of a fiscal federalism may cast a shadow of uncertainty on the forthcoming EMU.

RÉSUMÉ

Cet article porte essentiellement sur la politique fiscale après le lancement de la troisième phase de l'Union économique et monétaire (UEM) et sur le caractère soutenable de l'UEM dans le contexte de taux de chômage élevés et de croissance faible. A ce sujet, on peut se demander quel sera l'impact des sanctions stipulées dans le Pacte de stabilité et de croissance et si l'UEM prévoit des mesures destinées à contribuer à la relance en cas de chocs asymétriques.

En premier lieu, les politiques fiscales seront resserrées comme ce fut le cas lors des récessions de 1992-95, compte tenu des règles stipulées dans le Traité de Maastricht et dans le Pacte de stabilité et de croissance (faibles déficits budgétaires, pas de monétisation de la dette publique). En fait, s'il y a une politique monétaire commune assurée par la Banque centrale européenne (BCE), qui fixe les taux d'intérêt à court terme dans une perspective anti-inflationniste, d'autres politiques économiques, y compris la politique fiscale, sont conduites au niveau national, de sorte que les gouvernements nationaux définiront probablement ces politiques selon leurs priorités internes, mais pas nécessairement avec un degré élevé de coordination.

Même si les politiques fiscale et monétaire seront menées suivant les dispositions stipulées dans le Pacte de stabilité et de croissance et le Traité de Maastricht, aucune forme de coordination entre les politiques fiscales des Etats membres n'a été conçue jusqu'ici, et l'on peut facilement prédire que les politiques fiscales dans certains Etats membres seront conduites autrement que ne le stipule le Traité. Contrairement aux Etats-Unis et au Canada, l'UEM ne prévoit aucune disposition concernant la solidarité fiscale au-delà du respect de ses règles relatives à la politique fiscale. Par ailleurs, on ne trouve jusqu'ici aucune réponse unanime dans la littérature économique à la question de savoir si le fédéralisme fiscal à l'américaine permettrait de mieux assurer une stabilisation. Il faut savoir que le thème du fédéralisme fiscal dans le cadre d'une future Union monétaire en Europe a fait son apparition pour la première fois dans l'agenda européen grâce au rapport Mc Dougall en 1977. Tout cela implique en fait un choix politique : si cela devait aboutir à un fédéralisme fiscal basé sur le modèle américain ou canadien, ce choix impliquerait une perte supplémentaire de la souveraineté nationale en matière fiscale et un trop grand pas vers l'intégration économique fédérale dans le cadre d'un processus d'intégration politique non fédéral.

La question du Pacte de stabilité et de croissance répond à la nécessité d'imposer des limites rigides ex-ante au déficit et à la dette, ce qui signifie que bien que les Etats membres ne perdent pas leur souveraineté en matière de politique fiscale, leur marge de manoeuvre en cas de récession est considérablement réduite. Le principal problème consiste à savoir comment établir des règles pour assurer une stabilité budgétaire à long terme aux membres de l'UEM. La Commission a suggéré dans le passé une sorte de mix de politiques, c'est-à-dire une combinaison d'une politique fiscale renforcée et

d'une politique monétaire expansionniste.

La principale conclusion que l'on peut tirer est que la création de l'UEM sera associée à la portée plus limitée des politiques fiscales des gouvernements nationaux, créant ainsi une plus grande discipline fiscale parmi les pays participants. Or, le Traité ne prévoit pas de centralisation importante des budgets nationaux dans l'UEM, ce qui implique qu'il n'y aura pas de mécanisme de transfert automatique de la solidarité fiscale qui redistribue les revenus, allégeant ainsi les effets sociaux sur les Etats membres frappés par les chocs asymétriques. Toutefois, l'une des conséquences négatives pourrait être qu'en cas de chocs asymétriques, le mix de politiques susmentionné serait difficilement soutenable à long terme et finirait même par mettre en péril le caractère durable de l'UEM dans son ensemble. On peut donc s'attendre à ce que les chocs asymétriques perdent de leur importance si l'intégration micro-économique entraîne une convergence des structures économiques.

NOTES

1 Economic theory usually considers "asymmetric" those shocks which hit countries with different intensity in terms of loss of GDP and unemployment trend. An updated analysis of an asymmetric shock scenario under EMU can be found in M. Obstfeld and G. Peri, Regional Non-adjustments and Fiscal Policy, in Economic Policy, London, April 1998, No. 26, pp. 17-63.

2 A complete and exhaustive view of EMU's advantages is contained in the Green Paper for the introduction to Economic and Monetary Union, European Commission, Brussels, 1995.

3 The average level of unemployment in the 15 EU countries during 1997 was 10.9% against 4.6% in the US. For further details see OECD: Annual Economic Report, 1998 Edition. Other interesting comparisons between EU and US with respect to unemployment are contained in N. O'Kennedy, Unemployment in EU and in the US: Macroeconomic Perspectives, EUI, Working Papers, Florence 1997.

4 The four convergence criteria to be satisfied by Member States for entering the third phase of EMU are: a) with respect to public finance, a ratio of budget deficit to GDP which is not higher than 3% and a ratio of public debt to GDP which is not higher than 60%; b) a per-year inflation rate which is no more than 1.5% higher than the average of the three Member States performing the lowest inflation rates; c) nominal long-term interest rates no more than15% higher than the average of the three Member States performing the lowest long-term interest rates; d) with respect to national currencies, a period of at least two years of membership to the Exchange Rate Mechanism (ERM).

5 The Treaty of Maastricht clearly rules out any monetisation of public debt, which takes place when a Central Bank buys government bonds which have been issued in order to finance a budget deficit. In doing so, the Central Bank keeps interest rates low since it has to increase the money supply, so that monetary policy remains expansionary, which may cause inflation. This is against the principle of price stability which is a pillar of the whole EMU.

6 See F. Amtenbrink, J. de Haan and O.C.H. Sleijpen, Stability and Growth Pact: Panacea or Placebo? in Europan Business Law Review, No. 20, 1997.

7 See R. Mundell, A Theory of Optimum Currency Areas, in American Economic Review, vol. 53, 1961, and Capital Mobility and Stabilisation Policy under Fixed and Flexible Exchange Rates, in the Canadian Journal of Economics, November 1963. These papers explain the basics of the Mundell-Fleming macroeconomic model, characterised by a perfect capital mobility and fixed exchange rates. This model is still a fundamental point of reference for any analysis dealing with fiscal and monetary policies in the framework of free capital mobility and fixed exchange rates which characterise EMU's macroeconomic environment.

8 The "Delors Report" of 1989 launched the plan for a real Economic and Monetary Union (EMU) to be adopted in three phases. See European Commission: Report on Economic and Monetary Union in the European Community, Official Publications of the EC, Luxembourg, 1989.

9 M.F. Doyle, Regional Policy and European Economic Integration, in Committee for the Study of Economic and Monetary Union, Official Publications in the EC, Luxembourg 1989.

10 T. Bayoumi, P.R. Masson, Fiscal Flows in US and Canada: Lessons for Monetary Union in Europe, in European Economic Review No. 39 (2), 1997, pp. 253-274.

11 J. Sachs and X. Sala-i-Martin, Optimum Fiscal Policy and Optimum Currency Areas, Harvard University, Mimeograph, 1989.

12 J. Von Hagen, Policy Coordination in the EMS with Stochastic Asymmetries, in C. Wihlborg, Financial Regulations and Monetary Arrangements after 1992, Amsterdam, North-Holland, 1992.

13 A. Atkeson and T. Bayoumi, Do Private Capital Markets Insure Against Risk in a Common Currency Area? Evidence from the United States, in University of Chicago Working Papers, 1991.

14 P.R. Masson and M. Taylor, Common Currency areas and Currency Unions, in International Monetary Fund Working Papers, Washington, 1991.

15 European Commission: Report of the Study Group on the Role of Public Finance in European Integration ("McDougall Report"), Official Publications of the EC, Luxembourg 1977.

16 See P. Masson, Fiscal Dimension of EMU, in International Monetary Fund Working Papers,1996.

17 R. Mundell, op. cit. (see end note 7).

18 Following the standard economic theory, we assume that a Monetary Union consists of countries A and B. If A is hit by an asymmetric shock, B is favoured by an increase in aggregate demand. The shock in country A creates an increase in unemployment and a decrease in output. The consequence is that income taxes collected by the government in A decline, while unemployment payments increase. We see the opposite effect in country B. Thus, A needs more income redistribution from B.

19 P. Robson, The Economics of International Integration, Routledge, London-New York, 1998, pp. 130-138, and C.A. Goodhart and S. Smith, Stabilisation, in European Economy No. 5 (1993), pp. 417-55.

20 P. Masson and M.P. Taylor, Policy Issues in the Operation of Currency Unions, Cambridge University Press, 1993.

21 M. Buti, D. Franco, H. Ongena, Budgetary Policies during Recessions: Retrospective Application of the Stability and Growth Pact to The Post-War Period, in Economic Papers No. 121, May 1997, European Commission, Luxembourg, pp. 10-11. ❑

Principaux arrêts rendus par la Cour de justice des Communautés européennes durant la période comprise entre le 15 mai et le 15 septembre 1998

*Susanne Dreyer-Mälzer et Jesper Svenningsen**

Bien que cette période comprenne les vacances judiciaires de la Cour de justice et du Tribunal de première instance, un certain nombre d'arrêts intéressants méritent d'être mentionnés.[1]

I

Dans le domaine des **relations extérieures**, la Cour a rendu un important arrêt dans l'affaire C-53/96, Hermès International, du 16 juin 1998. La Cour a été saisie de la question de savoir si une décision provisoire, telle que celle qui est par exemple visée par le droit de procédure civile néerlandais, qui permet de solliciter une décision immédiate par provision, relève de la notion de "mesure provisoire" au sens de l'article 50 de l'accord TRIPs. C'était la première fois depuis la signature de l'accord OMC, y compris l'accord TRIPs, par les Communautés européennes, que la Cour était appelée à interpréter cet important accord. Quoique plusieurs Etats membres aient invoqué l'avis de la Cour 1/94 (Rec. 1994, p. I-5267) pour contester la compétence de la Cour pour traiter de cette question, au motif que les dispositions de l'accord TRIPs relèvent essentiellement de la compétence des Etats membres, la Cour a estimé qu'elle disposait d'une compétence en la matière. La Cour a relevé que lors de l'interprétation de l'article 50 de l'accord TRIPs il est question non seulement du droit national mais aussi du droit européen – la réglementation relative aux marques. Dès lors, la Cour a fait valoir qu'il existe un intérêt communautaire certain à ce que, pour éviter des divergences d'interprétation futures, cette disposition reçoive une interprétation uniforme, quelles que soient les conditions dans lesquelles elle est appelée à s'appliquer.

Reste la question suivante : l'interprétation par la Cour de l'article 50 de l'accord TRIPs, étant donné qu'il a une influence sur la législation communautaire, suppose-t-elle également l'effet direct de cette disposition ? Cette question est très intéressante et a d'ailleurs été abondamment discutée dans la littérature sur le sujet. La Cour doit encore y apporter une réponse explicite. Mais cet arrêt présente déjà un argument en faveur de l'effet direct de l'accord TRIPs.

II

En ce qui concerne les **principes du droit communautaire**, la Cour a statué sur trois affaires similaires le 15 septembre 1998 : Edis, C-231/96, SPAC, C-260/96 et Ansaldo Energia, C-279/96 concernant le délai de forclusion pour obtenir le remboursement d'une taxe indûment versée. Le fait que la taxe a été indûment versée est établi par la Cour de justice dans un premier arrêt datant de 1993 (Ponente Carni, C-71/91 et C-178/91, Rec. 1993 p. I-1915). La Cour a jugé dans ses trois décisions que ce délai était compatible avec le droit communautaire dès lors qu'il s'applique de la même manière aux demandes de remboursement fondées sur le droit communautaire et sur le droit interne. Il en est ainsi même si la directive, sur laquelle est basée la demande, n'a pas encore été correctement transposée en droit national au moment où le délai commence à courir. Cet arrêt soulève la question de savoir si la partie requérante peut désormais demander réparation en vertu des règles sur la responsabilité de l'Etat pour avoir omis de transposer correctement la directive, ou si ces demandes sont à nouveau exclues par les délais de forclusion nationaux, qui ne sont pas moins favorables pour les demandes fondées sur le droit communautaire que pour celles fondées sur le droit interne.

La jurisprudence de la Cour de justice dans l'arrêt *Deutsche Milchkontor* continue à soutenir les administrations nationales qui refusent la répétition des aides communautaires indûment versées si les entreprises bénéficiaires peuvent invoquer la disparition de l'enrichissement sans cause. Dans l'affaire C-298/96, Oelmühle Hamburg, du 16 juillet 1998, la Cour a dit pour droit que le droit communautaire ne s'oppose pas, en principe, à ce qu'une réglementation nationale permette d'exclure la répétition d'aides communautaires indûment versées, en prenant en considération des critères tels que la disparition de l'enrichissement dans des conditions particulières.

A noter également dans ce domaine la décision prise dans l'affaire C-226/97, du 16 juin 1998, Johannes Martinius Lemmens. Cet arrêt est peut-être décevant pour tous ceux qui, au cours du mois dernier, ont conduit un véhicule en état d'ivresse aux Pays-Bas et qui avaient espéré que les règles néerlandaises relatives aux éthylomètres ne seraient pas compatibles avec le droit communautaire étant donné qu'elles n'avaient pas été notifiées à la Commission conformément à la Directive 83/189/CEE prévoyant une

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procédure d'information dans le domaine des normes et réglementations techniques (JO 1983, L 109, p. 8). Dans le célèbre arrêt CIA Security International (C-194/94, Rec. 1996 p. I-2201), la Cour a interprété la directive en ce sens que la méconnaissance de l'obligation de notification, imposée par les articles 8 et 9 de la directive, entraîne l'inapplicabilité des règles techniques concernées, de sorte qu'elles ne peuvent pas être opposées aux particuliers. Elle a par conséquent dit pour droit que ces derniers peuvent se prévaloir des dispositions précitées devant le juge national, auquel il incombe de refuser d'appliquer une règle technique nationale qui n'a pas été notifiée conformément à la directive. Dans l'arrêt Lemmens, la Cour considère que l'absence de notification de règles techniques, constituant un vice de procédure dans leur adoption, rend ces dernières inapplicables en tant qu'elles entravent l'utilisation ou la commercialisation d'un produit non conforme à ces règles. Elle n'a par contre pas l'effet de rendre illégale toute utilisation d'un produit qui est conforme aux règles non notifiées. Par voie de conséquence, la méconnaissance de l'obligation de notifier n'a pas eu pour effet de rendre inopposable la preuve obtenue au moyen de l'appareil en question.

III

Dans le domaine de la **libre circulation des marchandises**, la question du droit de location et de prêt a fait l'objet d'un arrêt intéressant. Dans l'affaire C-61/97, Egmont Film, du 22 septembre 1998, la Cour a dû déterminer si les règles sur la libre circulation des marchandises ou la directive 92/100/CEE, du 19 novembre 1992, relative au droit de location et de prêt, s'opposent à ce qu'une personne titulaire d'un droit exclusif de location interdise dans un État membre la mise en location de copies d'une oeuvre cinématographique alors même que la mise en location de ces copies aurait été autorisée sur le territoire d'un autre État membre. La question était de savoir si la violation de l'article 30 pouvait se justifier en vertu de l'article 36 comme il s'agissait du domaine spécifique du droit de propriété intellectuelle. Alors que l'objet spécifique d'une marque ou d'un brevet est de lancer un produit pour la première fois sur le marché, l'objet spécifique d'un droit d'auteur doit être vu de manière différente. La Cour a dit pour droit, comme dans l'affaire Metronome (C-200/96, Rec. 1998 I 1953), que la mise en circulation d'un film ou d'un support de son ne peut donc pas, par définition, rendre licites d'autres actes d'exploitation de l'oeuvre protégée, tels que la location, qui ont une nature différente de celle de la vente ou de tout autre acte licite de distribution. Tout comme le droit de représentation par voie d'exécution publique d'une oeuvre, le droit de location demeure au nombre des prérogatives de l'auteur et du producteur en dépit de la vente du support matériel qui contient l'oeuvre. Cela signifie que même si la mise en circulation de copies a été autorisée sur le territoire d'un Etat membre, le titulaire du droit peut interdire la location de ces copies dans un autre Etat membre.

IV

La Cour a également statué sur plusieurs affaires dans le domaine de **l'égalité de traitement entre hommes et femmes**. Dans l'affaire Kathleen Hill et Ann Stapleton, C-243/95 du 17 juin 1998, la Cour a dû interpréter la directive 75/177/CEE relative à l'application du principe de l'égalité des rémunérations entre les travailleurs masculins et les travailleurs féminins . Comme on pouvait s'y attendre, la Cour a jugé que la directive s'oppose à une législation qui prévoit que, lorsqu'un pourcentage beaucoup plus élevé de travailleurs féminins par rapport à celui de travailleurs masculins exerce son emploi à temps partagé, les travailleurs à temps partagé qui accèdent à un emploi à temps plein se voient attribuer un échelon de l'échelle des rémunérations applicable au personnel travaillant à temps plein inférieur à celui de l'échelle des rémunérations applicable au personnel employé à temps partagé dont ces travailleurs bénéficiaient auparavant, en raison de l'application par l'employeur du critère du service calculé par référence à la durée du temps de travail effectivement accompli dans un emploi, à moins que cette législation ne soit justifiée par des critères objectifs et étrangers à toute discrimination fondée sur le sexe.

Le 30 juin 1998, la Cour a considéré dans l'affaire C-394/96, Mary Brown, que la directive 76/207/CEE, du 9 février 1976, relative à la mise en oeuvre du principe de l'égalité de traitement entre hommes et femmes en ce qui concerne l'accès à l'emploi, à la formation et à la promotion professionnelles, et les conditions de travail, s'oppose au licenciement d'un travailleur féminin à un moment quelconque au cours de sa grossesse en raison d'absences dues à une incapacité de travail causée par une maladie trouvant son origine dans cette grossesse. Poursuivant son raisonnement, la Cour a constaté que la circonstance que le travailleur féminin a été licencié au cours de sa grossesse sur la base d'une clause contractuelle permettant à l'employeur de licencier les travailleurs, quel que soit leur sexe, après un nombre déterminé de semaines d'absence continue est sans incidence.

V

En ce qui concerne la **politique sociale**, deux arrêts ont vu le jour dans le cadre de la directive 80/987/CEE concernant le rapprochement des législations des États membres relatives à la protection des travailleurs salariés en cas d'insolvabilité de l'employeur. Dans l'affaire C-125/97, Regeling, du 14 juillet 1998, la Cour a constaté que dans l'hypothèse où un travailleur est titulaire de créances afférentes à des périodes d'emploi antérieures à la période de référence, l'imputation des paiements effectués par l'employeur au cours de cette dernière période sur les créances nées pendant celle-ci, nonobstant l'existence de créances antérieures demeurées impayées, aurait pour effet de porter directement atteinte au minimum de protection garanti par la directive. La Cour a considéré qu'il serait contraire à la finalité de la directive d'interpréter son article 4, paragraphe 2, de telle façon que le travailleur, dans cette dernière hypothèse, ne puisse bénéficier de la garantie pour les pertes de salaires qu'il a effectivement

subies pendant la période de référence. En conséquence, les paiements de rémunération effectués par l'employeur au cours de cette dernière période doivent être imputés, par priorité, sur des créances antérieures, comme le prévoient de nombreuses règles du code de droit civil dans différents Etats membres.

Dans l'affaire C-235/95, AGS Assedic Pas-de-Calais, du 16 juillet 1998, la Cour a jugé que les articles 4, paragraphe 3, et 11 de la directive ne s'opposent pas à l'application de dispositions telles que l'article D 143-2 du code du travail français, fixant un plafond pour la garantie de paiement des créances impayées des travailleurs salariés, lorsque l'État membre a omis de communiquer à la Commission les méthodes selon lesquelles ledit plafond a été fixé.

La raison en est que les dispositions concernent les relations entre les États membres et la Commission et qu'elles n'engendrent aucun droit dans le chef des particuliers qui soit susceptible d'être lésé en cas de violation, par un État membre, de l'obligation de communication préalable à la Commission des méthodes selon lesquelles ledit plafond a été fixé.

VI

En ce qui concerne la **liberté d'établissement** (**fiscalité directe**), l'affaire Imperial Chemical Industries, C-264/96, du 16 juillet, montre une nouvelle fois que même si les questions de fiscalité directe ne relèvent pas encore du champ d'application de la législation communautaire, les administrations fiscales des Etats membres doivent tenir compte du droit communautaire lors de l'application des règles nationales en matière de fiscalité. Il s'agissait ici d'une règle fiscale au Royaume-Uni qui, en ce qui concerne les sociétés établies dans cet État membre qui font partie d'un consortium au travers duquel elles détiennent une société holding, subordonne le droit à un dégrèvement fiscal à la condition que l'activité de la société holding consiste à détenir uniquement ou principalement les actions de filiales établies dans les États membres. La Cour a considéré dans cette affaire qu'il n'y avait aucune justification possible de la violation de l'article 52 du traité. On ne pouvait admettre qu'une telle règle soit utilisée pour éviter des montages purement artificiels dont le but serait de contourner la loi fiscale du Royaume-Uni. De même, la Cour ne pouvait accepter l'argument relatif à la cohérence du régime fiscal (voir, en ce sens, l'arrêt Bachmann, Rec. 1992, p. I-249) car en l'espèce, aucun lien direct de cette nature n'existait entre, d'une part, le dégrèvement fiscal, dans le chef de la société de consortium, des pertes subies par une de ses filiales résidant au Royaume-Uni et, d'autre part, l'imposition des bénéfices des filiales situées hors du Royaume-Uni.

VII

Pour ce qui est de la **protection des consommateurs**, la Cour a rendu un arrêt intéressant sur l'étiquetage des denrées alimentaires (Directive 79/112/CEE du 18 décembre 1978) dans l'affaire C-385/96, Hermann Josef Goerres, du 14 juillet 1998. Les questions préjudicielles ont été soulevées dans le cadre d'une procédure pénale dirigée contre M. Goerres, poursuivi pour avoir mis en vente dans son commerce en Allemagne divers produits alimentaires non étiquetés en langue allemande, mais uniquement en langues française, italienne ou anglaise. Conformément à sa décision antérieure dans l'arrêt Piageme contre Peters (C-369/89, Rec. 1991, p. I-2971), selon laquelle la directive s'oppose à ce qu'une réglementation nationale impose exclusivement l'utilisation d'une langue déterminée pour l'étiquetage des denrées alimentaires, sans retenir la possibilité que soit utilisée une autre langue facilement comprise par les acheteurs, la Cour a dit pour droit qu'une réglementation nationale qui prescrit l'utilisation d'une langue déterminée pour l'étiquetage des denrées alimentaires, mais qui permet également l'utilisation d'une autre langue facilement compréhensible par les acheteurs est compatible avec l'article 14 de la directive précitée. Par ailleurs, la Cour a jugé que toutes les mentions obligatoires prévues par la directive doivent figurer sur l'étiquetage dans une langue facilement comprise par les consommateurs de l'État ou de la région concernés, ou au moyen d'autres mesures telles que dessins, symboles ou pictogrammes. Une étiquette complémentaire apposée dans le magasin à l'endroit où se trouve le produit concerné n'est pas une mesure suffisante pour assurer l'information et la protection du consommateur final.

VIII

Comme prévu, l'arrêt rendu dans le domaine du **droit des marques** a suscité un vif intérêt. Pour la première fois depuis l'entrée en vigueur de la directive relative aux marques européennes, la Cour a été appelée à se prononcer sur la question de l'épuisement du droit de marque. Alors que la Cour AELE a opté dans son arrêt 2/97 pour l'épuisement international, la Cour de justice européenne s'est prononcée en faveur de l'épuisement communautaire dans l'arrêt Silhouette du 16 juillet 1998 (C-355/96). La Cour a jugé que l'article 7, paragraphe 1, de la directive 89/104 ne peut être interprété en ce sens que, sur le seul fondement de cette disposition, le titulaire d'une marque est habilité à obtenir une injonction interdisant à un tiers d'utiliser sa marque pour des produits qui ont été mis dans le commerce hors de l'Espace économique européen sous cette marque par le titulaire ou avec son consentement. Quoique l'on trouve également de bons arguments en faveur de l'épuisement mondial, cette décision doit au moins réjouir le Bundesgerichtshof allemand puisqu'il a renoncé à sa compétence en matière d'épuisement mondial dans la célèbre décision "blue jeans" en 1996.

IX

Au cours de la période considérée, la Cour a également rendu plusieurs arrêts dans le domaine du **droit de l'environnement**. A cet égard, citons l'affaire Mecklenburg (C-321/96 du 17 juin 1998) portant sur l'interprétation de la directive 90/313/CEE concernant la liberté d'accès à l'information en matière d'environnement. La question soulevée était de savoir si la position que l'administration chargée de la préservation des sites

avait adoptée dans la procédure d'approbation des plans de construction du "contournement ouest" était une "information relative à l'environnement" au sens de l'article 2, sous a), de la directive.

Les parties au principal ont procédé toutes les deux à l'analyse du terme "mesure" au regard du droit allemand. Elles étaient en désaccord sur la question de savoir si une position de l'administration comme celle faisant l'objet du litige au principal constitue un acte lié à un cas d'espèce, tourné vers un objectif déterminé et ayant un effet réglementaire, conditions pour qu'une telle qualification puisse être retenue en droit national. La Cour estime que le législateur communautaire a entendu donner à ladite notion une signification large, qui englobe à la fois des données et des activités concernant l'état de ces secteurs. En conséquence, la prise de position est couverte par l'article 2, sous a), de la directive en ce sens qu'elle est de nature à influer, en ce qui concerne les intérêts de la protection de l'environnement, sur la décision d'approbation des plans de construction. Par ailleurs, la Cour a dit pour droit que la notion d'"instruction préliminaire" figurant à l'article 3, paragraphe 2, de la directive doit être interprétée à la lumière des versions établies dans les autres langues et qu'elle n'inclut une procédure administrative qui se limite à préparer une mesure administrative, que dans l'hypothèse où elle précède immédiatement une procédure contentieuse ou quasi contentieuse et procède de la nécessité d'acquérir des preuves ou d'instruire une affaire avant l'ouverture de la phase procédurale proprement dite. Par conséquent, la prise de position n'est pas couverte par l'exception prévue à l'article 3, paragraphe 2.

Le 14 juillet 1998, la Cour a statué sur la question des normes relatives aux émissions sonores d'aéronefs dans l'affaire C-389/96, Aher-Waggon GmbH. Les questions sur l'interprétation de l'article 30 du traité ont été soulevées dans le cadre d'un litige opposant Aher-Waggon à l'office fédéral allemand de l'aviation, à la suite du refus de ce dernier de lui délivrer un permis de vol pour un avion à hélices, qui avait été précédemment immatriculé au Danemark. La juridiction de renvoi voulait savoir en substance si l'article 30 du traité s'oppose à une réglementation nationale qui subordonne la première immatriculation sur le territoire national d'avions préalablement immatriculés dans un autre État membre au respect de normes sonores plus sévères que celles prévues par la directive 80/51/CEE, tout en en exemptant les avions qui ont obtenu l'immatriculation sur ledit territoire avant la mise en application de cette directive. S'agissant de l'établissement de normes plus strictes que celles de la directive, il suffit de constater que la limitation des émissions sonores des avions est le moyen le plus efficace et le plus commode de lutter contre la pollution sonore qui découle de ces derniers. C'est pourquoi, la Cour a jugé que les règles allemandes plus strictes étaient compatibles avec l'article 30 en ce sens qu'elles s'appliquent à tout avion, neuf ou d'occasion, indépendamment de son origine et qu'elles n'empêchent pas l'utilisation en Allemagne d'avions immatriculés dans un autre État membre.

X

Dans le domaine des **marchés publics**, la Cour a fait valoir, dans l'affaire C-323/96 du 17 septembre 1998, Commission des Communautés européennes contre Royaume de Belgique, que le Vlaamse Raad est également un "pouvoir adjudicateur" au sens de la directive sur les marchés publics de travaux. Il est quelque peu difficile de comprendre que les autorités belges aient pu soutenir que l'organe législatif ne relève pas de la notion d'Etat. Même un parlement doit respecter les règles relatives aux marchés publics et publier un avis au JOCE. Or le Vlaamse Raad avait manqué à cette obligation. En outre, le Vlaamse Raad avait appliqué la procédure négociée la plus flexible sans justification. Il est regrettable que les soumissionnaires lésés n'aient que peu de chances d'obtenir réparation. Les deux arrêts en date du 24 septembre dans Tögel et EvoBus (C-76/97 et C-111/97) sont intéressants en ce qui concerne la protection du droit de recours en matière de passation de marchés publics de services lorsqu'un Etat membre n'a pas transposé l'une des deux directives relatives aux procédures de recours. En cas de privation de leur droit de recours, les justiciables peuvent demander la réparation des dommages subis en raison de l'absence de transposition de la directive dans le délai prescrit.

XI

A noter également la question préjudicielle soulevée par la Finlande dans le domaine des **transports** (C-412/96, Kainuun Liikenne Oy, du 17 septembre 1998).

L'administration publique peut-elle refuser de faire droit à une demande d'une entreprise privée de transport d'obtenir une suppression partielle de son obligation d'effectuer le transport de passagers sur l'itinéraire pour lequel elle dispose d'une licence ? La Cour relève tout d'abord que le règlement 1191/69 concernant les obligations de service public dans le domaine des transports ne permet pas à une entreprise d'obtenir une suppression partielle de son obligation de service public. Cependant, la décision de maintenir les obligations de service public est soumise au respect de certaines règles. Le maintien d'une obligation de service public n'est permis que pour garantir la fourniture de *services de transport suffisants*. Compte tenu de ce qui précède, la Cour a jugé que les autorités nationales disposent d'un large pouvoir d'appréciation pour évaluer si la garantie de services de transport suffisants exige le maintien d'une obligation de service public.

NOTE

[1] Pour rappel, tous ces arrêts sont disponibles sur Internet dans les langues officielles de l'Union européenne. L'adresse est la suivante: Http://www.curia.eu.int. Vous trouverez un renvoi à cette adresse sur la page d'accueil de l'IEAP, Http://www.eipa.nl.
La page d'accueil de la Cour contient également le calendrier hebdomadaire et, depuis quelques semaines, des statistiques très intéresssantes concernant les procédures.

ANNOUNCEMENTS / *ANNONCES*

Seminar

Managing European Environmental Policy – The Role of Public Officials in the Policy Process of the European Community

Maastricht (NL), 29-31 March 1999

European integration is still associated with the loss of sovereignty of the Member States, the centralisation of tasks and competences in "Brussels," bureaucratisation, long and complicated decision-making processes and over-regulation through thousands of (unnecessary) regulations and directives, which the Member States have to implement and apply. The role played by national (and regional) administrations in the decision-making process has received very little attention either from the scientific or the public sectors. This seminar aims to explore the role and importance of Member State administrations in the policy process at three different stages:

- the preparatory phase in the European Commission;
- the decision-making phase within the Council;
- the implementation phase in the "comitology committees."

The seminar is designed for civil servants from the Member States who are involved in the policy process in the Community. The purpose is to help them understand the EC policy process and the role they themselves play in shaping the outcome of policy decisions.

On the first day, participants are informed about the decision-making process, both in theory (Maastricht and Amsterdam Treaties) and in practice. The speakers have been carefully selected from both the scientific and public sectors (European institutions and national departments of the environment). Particular focus is given to the role of national experts and officials in the preparatory phase of policy shaping in the Commission and the decision-making phase in the Council of Ministers.

The second day deals exclusively with the implementation of European environmental policy and the issue of comitology. The day starts with an introduction to the comitology decision 87/373 EEC and then proceeds with further in-depth analysis of recent developments in the environmental sector. A simulation exercise and a case study are used to deepen participants' understanding of the role they play, how different players interact and how their decisions affect policy.

The third day focuses on the impact of European environmental policy on national administrations. A case study deals with the internal coordination of European environmental policy in one Member State. In addition, discussions are planned concerning the role of public officials in the decision-making process in this area and assessing the role and importance of the IMPEL environmental inspectors. The seminar ends with a general discussion on the growing importance of national officials in the decision-making process. A publication entitled *"Managing European Environmental Policy – The Role of Public Officials in the Policy Process"* (available in English and as an updated version in German) is available as background material (price: NLG 65) and can be ordered in advance.

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Seminar

The Enlargement of the European Union: Taking Stock of Progress during the Screening Stage

Maastricht (NL), 17-18 December 1998

This two-day open seminar has three objectives. Firstly, it aims to review the progress of the screening stage of the accession negotiations, in the process identifying the achievements made so far and, in particular, any difficult issues that may have emerged.

Secondly, the seminar intends to provide a European Union audience with the opportunity to hear the views of representatives of the countries that have applied for membership of the Union. These representatives will present and explain their countries' preparations for formal negotiations and for the adoption and effective implementation of the *acquis communautaire*.

Thirdly, it seeks to stimulate debate on the overall process and content of the screening and the subsequent negotiations. The purpose of this debate is to enable participants to develop informed views about the likely outcome and timespan of the negotiations.

The speakers at the seminar will be EU Presidency and Commission officials and the Ambassadors of the applicant countries.

The working language of the seminar will be English.

A registration form can be found enclosed with this edition of EIPASCOPE. A full programme can be obtained from:

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European ✶ *Public Affairs*

The **Maastricht Master's** programme in European Public affairs is being launched as a co-operative venture by Universiteit Maastricht and the European Institute of Public Administration. Both institutions are located in the city of Maastricht. The programme will begin in September 1999. The profile of the Maastricht Master's has the following characteristics:

- It focuses on 'Europe', taking account of cross-national diversity as well as the European Union and its institutions
- It has a integrated, multidisciplinary curriculum, that addresses issues of European public management
- It concentrates on developing problem-solving capacities and skills

If you would like further information and application forms please contact:

The Director of Studies, EPA Office,
Universiteit Maastricht, P.O. Box 616, 6200 MD Maastricht, The Netherlands
Tel: +31 43 388 3449; Fax: +31 43 321 0498; E-mail: Huub.Spoormans@metajur.unimaas.nl

Colloque

Gestion et contrôle du budget communautaire

Maastricht, les 3 et 4 décembre 1998

Chaque année, l'UE dépense des milliards d'écus. Pourtant, le fonctionnement réel du cycle budgétaire de l'UE, la manière dont l'UE s'assure de pouvoir gérer les dépenses centrales et décentralisées, les modes de contrôle du flux monétaire et leurs responsables, et les méthodes de gestion financière des principaux fonds de l'UE restent un mystère pour beaucoup d'entre nous.

Afin de clarifier ces questions, l'IEAP a invité un certain nombre d'experts éminents, issus du monde institutionnel et universitaire. Les participants auront l'occasion de discuter longuement des aspects susmentionnés avec les experts invités. L'objectif du colloque est de préparer le terrain pour des plans d'action concrets destinés à rendre le processus budgétaire de l'UE plus facile à gérer et plus transparent.

Le groupe cible comprend les responsables de la gestion, de la vérification et du contrôle des fonds de l'UE aux niveaux communautaire, national, régional et local, ainsi que les intervenants dans la coordination nationale des fonds communautaires (ex. Politique agricole commune, Fonds structurels).

Vous trouverez dans cette édition d'EIPASCOPE un bulletin d'inscription.

Le programme complet peut être obtenu auprès de
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Colloquium

Managing and Monitoring the EU-Budget

Maastricht, 3 and 4 December 1998

Billions of ECU are spent by the EU each year. However, many remain mystified about how the budgetary cycle of the EU actually works, how the EU makes sure it can manage central and decentralised expenditure, how the money flow is controlled and by whom, and how the EU's largest funds are financially managed.

EIPA has invited a number of outstanding institutional and academic experts to demystify these issues for us. Ample opportunity will be given to the participants to discuss the abovementioned issues with the invited experts. The objective of the colloquium is to prepare the ground for practical scenarios to make the EU budgetary process more manageable and transparent.

The target group consists of officials involved in managing, auditing and controlling EU funds at EU, national, regional and local level, as well as those involved in the national coordination of EU-funds (e.g. the Common Agricultural Policy, the Structural Funds).

A registration form can be found enclosed with this edition of EIPASCOPE.

A full programme can be obtained from:
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Seventh Colloquium

Schengen Still Going Strong. Evaluation and Update

Maastricht, 4 and 5 February 1999

The incorporation of Schengen into the Treaty on European Union is a complex process with political and legal aspects that pertain to its delineation and its allocation to the pre-existing legal bases in the Treaty. One of the objectives of the Schengen Colloquium is to generate updated information about this process and about the prospects of finalising the process when the Treaty of Amsterdam enters into force.

Other than this general issue, attention will be devoted to the curious situation that will arise from the **Schengen Group's** association with the Nordic countries and the simultaneous opt-in arrangement for the United Kingdom and Ireland; the initiatives that are being undertaken vis-à-vis non-EU-Member States (in particular the accession countries); the democratic control of Schengen; illegal immigration; the harmonisation of visa policy; the role of non-governmental organisations; cross-border police competences; and mutual legal assistance practices in Schengen and the Third Pillar of the European Union.

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Repetition of Seminar/*Répétition du séminaire:*

Managing Change in Human Resource Management in Public Administration / *Comment adapter la gestion des ressources humaines dans l'administration publique à l'évolution générale?*

Maastricht, 4 and 5 March 1999

The aim of this seminar is to analyse and discuss changes in the management of human resources in public administration. Issues to be dealt with are flexibility in working patterns and remuneration as well as the decentralisation of personnel policy. Particular attention will be paid to the management of the 'Senior Civil Service', this having undergone specific changes in several countries. The seminar will provide comparative overviews of the topics involved (e.g. flexibility in working patterns and remuneration) as well as case studies of the experiences in various countries.

The seminar is intended for officials involved in human resource management in public administration.

The working languages of the seminar will be English and French.

L'objectif de ce séminaire est d'analyser les changements intervenus au niveau de la gestion des ressources humaines dans l'administration publique et d'en débattre. Les aspects abordés seront ceux de la flexibilité des modes de travail et de la rémunération, ainsi que la décentralisation des responsabilités liées à la politique du personnel. Une attention toute particulière sera consacrée à la gestion à l'échelon des hauts fonctionnaires, qui a fait l'objet de modifications précises dans plusieurs pays. Les organisateurs du séminaire brosseront un tableau comparatif par thème (ex. flexibilité des modes de travail et de la rémunération) et présenteront une étude de cas relatant l'expérience de certains pays.

Le séminaire s'adresse aux fonctionnaires responsables de la gestion des ressources humaines dans l'administration publique.

Les langues de travail du séminaire seront le français et l'anglais.

For further information, please contact/ Pour de plus amples informations, veuillez contacter:
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Seminare des *Europäischen Instituts für öffentliche Verwaltung*
in Zusammenarbeit mit der
Hochschule für Verwaltungswissenschaften, Speyer

Der politische Entscheidungs- und Umsetzungsprozeß in der Europäischen Union und seine Bedeutung für die Bundesländer

Maastricht (NL), 8. – 12. Februar 1999

Seit Mitte der 80'er Jahre sind die deutschen *Länder* in zunehmendem Maße zu der Erkenntnis gelangt, daß sie sich im Rahmen der rechtlichen Möglichkeiten verstärkt an der Gestaltung der Europäischen Union (EU)/ Europäischen Gemeinschaft (EG) beteiligen müssen, um ihre Eigenständigkeit im Prozeß der europäischen Integration zu wahren und zu stärken. Während der letzten Jahre wurde diese Einsicht in die Tat umgesetzt: die meisten Länderministerien haben Europareferate eingerichtet; alle Bundesländer haben in Brüssel Informationsbüros eingerichtet. Wichtiger noch ist die aktive und konstruktive Rolle die Ländervertreter im politischen Entscheidungsprozeß in zunehmendem Maße übernommen haben durch ihre Mitarbeit an den Arbeitsgruppen des Rates und im Regionalausschuß.

Das Seminar ist für Bedienstete der Bundesländer geplant, die noch relativ wenig Erfahrung und Kontakt mit der Europäischen Union haben, Kenntnisse in diesem Bereich jedoch in ihrer Arbeit oder in ihrer zukünftigen Arbeit brauchen. Es vermittelt grundlegendes Wissen über die Strukturen und Entscheidungs- und Umsetzungsprozesse in der Europäischen Union und die Rolle, die die Länder dabei heute spielen bzw. spielen können.

Es ist die Aufgabe dieses gemeinsamen Seminars, Bediensteten der Bundesländer die Gelegenheit zu bieten:

- ihr Verständnis der politischen Entscheidungs- und Implementationsprozesse auf europäischer Ebene zu vertiefen,
- ihre Kenntnisse über wichtige Bereiche der europäischen Politik zu verbessern,
- die Problematik der Beziehungen zwischen *Ländern*, Bund und EU besser kennenzulernen.

Die europäische Integration nach dem Amsterdamer Unionsvertrag: Herausforderungen für Politik und Verwaltung der deutschen Bundesländer

Maastricht (NL), 19. – 23. April 1999

Das Seminar spricht in erster Linie Bedienstete der Bundesländer an, die bereits weitgehende Erfahrungen in der Zusammenarbeit mit den europäischen Institutionen haben, diese Institutionen gut kennen und auch mit dem Vertrag über die Europäische Union vertraut sind. Ziel des Seminars ist es, grundlegende Probleme der institutionellen, politischen und wirtschaftlichen Weiterentwicklung der europäischen Integration aus der Perspektive der deutschen Bundesländer zu diskutieren. Es soll die Teilnehmer in die Lage versetzen, über ihre Zusammenarbeit mit europäischen Institutionen zu reflektieren und ihr Wissen und ihr Verständnis der europäischen Integration, insbesondere auch im Hinblick auf aktuelle Entwicklungen, zu vertiefen. Dabei werden die Mitgestaltungs- und Mitwirkungsmöglichkeiten der Bundesländer im Entscheidungsprozeß und in der Gestaltung der Politik der Europäischen Gemeinschaft hinterfragt.

Das Seminar ist ein Diskussionsseminar. Das EIPA-Team, ergänzt durch Europa-Experten aus Wissenschaft und Praxis, diskutiert kritisch mit den Teilnehmern folgende Themen:

- Grundprinzipien der europäischen Integration
- Institutionen und Entscheidungsprozesse in der EG
- EG-Recht, nationales Recht und nationale (regionale) Verwaltung
- Wirtschaftspolitische Herausforderungen
- Das Verhältnis zwischen der Europäischen Union, den Mitgliedstaaten, den Ländern und Regionen
- Perspektiven für den europäischen Integrationsprozeß im nächsten Jahrtausend aus der Sicht des Rates, der Kommission und des Parlamentes
- Perspektiven für eine Neudefinition des Verhältnisses zwischen der Europäischen Gemeinschaft und den Ländern und Regionen.

Eine Teilnahme an den Seminaren ist für alle Bediensteten der deutschen Bundesländer möglich. Weitere Informationen und Anmeldeformulare erhalten Sie bei:

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EIPA website: http://www.eipa.nl

Seminar

Committees and Comitology in the Political Process of the European Community

Maastricht, 26-28 January 1999

Committees play a significant role in the various phases of the political process in the European Community. They participate in designing, deciding and implementing EC policy: expert or advisory committees help the Commission in the process of drafting legislation; Council working parties or committees prepare decisions of the ministers; and in the process of implementation, so-called 'Comitology' committees supervise the implementation of EC law.

The seminar is designed to help civil servants from the Member States and the Community institutions to gain a better understanding of the role these committees play in the policy process both from a theoretical and from a practical point of view. In the first part of the seminar a typology of committees – based on their function in decision-making – will be developed, followed by simulations and case studies of the various types of committees designed to illustrate the role they play in the policy process and the way they operate.

The combination of theoretical discussions and interactive learning will give participants the opportunity to improve their theoretical and practical knowledge of the work of committees in all aspects of Community policy-making and implementation.

The working language will be English.

For more information and registration forms please contact:
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Seminar

Who's Afraid of European Documentation?

Maastricht, 16-18 June 1999

The European Institute of Public Administration is organising its sixth seminar on European Documentation at its premises in Maastricht on 16-18 June 1999.

The aim of this seminar is to provide those working continually or occasionally in the field of European affairs, both inside and outside Community institutions, with the ability to trace and use European documents, by offering them a complete survey of the main European documents (off and on-line) and methods of gaining access to them.

The seminar, which will be conducted in English, is open to all persons working in or with European affairs, Community officials, legal experts, information specialists from the Member States of the EU or from applicant Member States.

EIPA would like to invite you to attend this seminar.

To obtain more information, please contact:
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Seminar / *Séminaire*

European Negotiations / *Négociations européennes*

Maastricht

8-12 March, 7-11 June, 11-15 October and 22-26 November, 1999 /
du 8 au 12 mars, du 7 au 11 juin, du 11 au 15 octobre et du 22 au 26 novembre 1999

This is a practical seminar which aims to explore and define the strategies and tactics inherent in European bilateral and multilateral negotiations, and to develop ways to promote their efficient conduct. It is intended for civil servants from Member States and Community institutions and designed to involve full participation. While providing a theoretical framework, the seminar aims above all to help participants improve their negotiation capabilities and therefore places emphasis on practical skills development. Moreover, the multinational composition of the group should offer participants an ideal opportunity to discover together the special dynamics of the negotiation process in general and of European Union negotiations in particular.

Ce séminaire, à caractère pratique, vise à explorer et à définir les stratégies et tactiques inhérentes aux négociations européennes, qu'elles soient bilatérales ou multinationales, et à montrer comment les mener avec plus d'efficacité. Il est destiné aux fonctionnaires des Etats membres et des institutions communautaires et est fortement participatif. S'il fournit un cadre théorique, ce séminaire est avant tout conçu pour aider les participants à perfectionner leurs talents de négociateurs, et met donc l'accent sur le développement des aptitudes pratiques. En outre, la composition multinationale du groupe devrait offrir aux participants une occasion unique de découvrir ensemble la dynamique particulière du processus de négociation en général, et notamment des négociations européennes.

Working languages: English and French (with interpretation)

Langues de travail: anglais et français (l'interprétation simultanée étant assurée)

For more information and application forms, please contact:
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Maastricht Experts Meet to Discuss EU Enlargement

A group of 100 people working in Maastricht-based institutes met on 4 November to discuss the impact of EU enlargement from an institutional, economic and Central European perspective. The meeting was organised by the **House of Europe** – a group of eight internationally-oriented institutes based in Maastricht – and consisted of lectures by Prof. Bruno de Witte, Professor of European Law, Universiteit Maastricht, Prof. Phedon Nicolaides, Professor of Economics, European Institute of Public Administration and Marius Lukosiunas, Project Manager, European Journalism Centre.

A publication of the conference is forthcoming.

Commenting on the event, House of Europe Chairman and Rector of Universiteit Maastricht, Prof. Nieuwenhuijzen Kruseman, said: "This is the first in a series of House of Europe afternoon seminars to be hosted by the participating institutes. The idea is to provide staff working in House of Europe institutes with the opportunity to meet each other and to exchange ideas and experiences."

House of Europe members: Center for European Studies (CES), European Centre for Development Policy Management (ECDPM), European Institute of Public Administration (EIPA), European Journalism Centre (EJC), Hogeschool Maastricht (HM), Maastricht School of Management (MSM), Universiteit Maastricht (UM), United Nations University/Institute for New Technologies (UNU-Intech).

Institutional News

* BOARD OF GOVERNORS:

At their meeting of **6 November 1998**, the Board of Governors of EIPA unanimously approved:

- the appointment of Mr Raymond PIGANIOL (F) as the new member representing France on EIPA's Board of Governors, succeeding Mrs Christine NIGRETTO, who has left the DGAFP services. Mr Piganiol is Head of the Department for European and International Affairs within the Directorate-General for Administration and the Public Service at the Ministry of the Public Service, Administrative Reform and Decentralisation (a post created by interministerial decree, of 13 July 1998, as part of the structural reform of the Directorate-General). Mr Piganiol was previously on the Board of Governors from March 1989 until November 1994 and member of the Bureau from November 1992 until November 1994. In view of his past experience, Mr Piganiol will also replace Mrs Nigretto on the Bureau of EIPA's Board of Governors.

* SCIENTIFIC COUNCIL:

At their meeting of **19 June 1998**, the Board of Governors of EIPA unanimously approved:

- The appointment of Professor Francesco PIZZETTI (I), Director of the *Scuola Superiore della Pubblica Amministrazione*. He is to succeed Professor Guglielmo NEGRI in this function.
- The appointment of Mr David WALKER, Head of the Training Unit in DG IX, who has succeeded Mr Alberto HASSON, as member representing the European Commission on EIPA's Scientific Council.
- The appointment of Dr András INOTAI (H), General Director of the Institute of World Economy, as the Hungarian observer on EIPA's Scientific Council.

At their meeting of **6 November 1998**, the Board of Governors of EIPA unanimously approved:

- The appointment of Mr Richard BAYLY (UK), Acting Chief Executive of the Civil Service College, succeeding Dr Stephen HICKEY, who has left the Civil Service College and returned to the Department of Social Security as Principal Finance Officer.
- The Board also agreed that Mr Derry ORMOND (currently Vice-Chairman of the Scientific Council), who announced that he will retire from the OECD at the end of this year, and Dr Stephen HICKEY (former Chief Executive of the Civil Service College) should remain members of EIPA's Scientific Council.

Visit by the President of the Republic of Bulgaria to EIPA on 2 October 1998

On the occasion of a state visit to the Kingdom of the Netherlands and on the invitation of the Queen's Commissioner Baron van Voorst tot Voorst to the Province of Limburg, the President of the Republic of Bulgaria, H.E. Mr Petar STOYANOV, and his spouse, Mrs Antonina STOYANOVA, accompanied by a delegation of members of the Bulgarian Cabinet, visited the European Institute of Public Administration.

President of the Republic of Bulgaria, H.E. Mr Petar Stoyanov

During this visit a cooperation agreement has been signed between the Republic of Bulgaria, represented by the Bulgarian Minister of State Administration, H.E. Mr Mario TAGARINSKI, and the European Institute of Public Administration in Maastricht, represented by its Director-General, Mrs Isabel Corte-Real.

Bulgarian Minister of State Administration, H.E. Mr Mario Tagarinski and Director-General of EIPA, Mrs Isabel Corte-Real

The aim of this cooperation agreement is to enhance and extend links with the EU. In addition it entitles the Bulgarian authorities to:

- appoint a representative of their administration as an observer on EIPA's Scientific Council;
- be represented on EIPA's scientific staff; the teaching and research of the holder of the position would concern relations between the European Union and his/her country and the implications of the Internal Market for his/her country, as well as other subjects relating to European integration. ❑

East/West Cooperation between NISPAcee * and EIPA's Scientific Council

What should the role of the civil service training institutions be in the pre-accession and institution building processes? Does the new approach of 'twinning' between the ministries in Member States and the candidate countries mean the focus of effort and resources is on the vertical development of the EU leaving the horizontal problems in the shadows? How should East/West cooperation be organised to support the training institutions so they can cope with the increasing training needs in spite of having scarce resources? The financial support of the Commission and the Dutch Government made it possible to discuss these questions at a conference in Maastricht on 19 to 20 October 1998.

The NISPAcee representatives remarked on the value of 'twinning' in providing long-term commitment and in developing relationships between the institutions of East and West. Many agreed that this is an improvement on the short-term project approach, as it allows capacities for the implementation of the *acquis* to be built up. However, focusing training and development on sector institutions, e.g. on customs or labour inspectorates, may lead to difficulties of coordination, while many important horizontal issues, such as policy making and coordination, management and motivation, accountability, quality of service and ethics, do not get enough attention because they do not belong to EU competencies. However, these issues are still vital for the achievement of sustainable results in sector administrations. Therefore the horizontal development needs catered for by the central training institutions should also have a recognised role in the pre-accession process.

The experience of Member States suggests that it is equally important to create capacities for policy making at the European level and to defend national interests in a complex environment as to implement EU policies at a national level. In the pre-accession phase the number of civil servants needing a thorough European training is relatively limited, but the number will expand enormously the moment the country becomes a member of the EU. Then it may be too late to launch such training programmes.

The participants agreed that it is in the common interest of all that the candidate countries become efficient members as soon as possible. Various networking ideas were proposed in order to facilitate the exchange of experience, programmes, materials and teachers between the institutes. The NISPAcee Steering Committee and EIPA will develop these ideas further to produce practical solutions.

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* Network of Institutes and Schools of Public Administration in Central and Eastern Europe. ❑

Visite du ministre belge de la Fonction publique, André FLAHAUT, à l'IEAP, le 16 juin 1998

Recent and Forthcoming EIPA Publications

Recent

Guide to Official Information of the European Union
3rd Edition
Veerle Deckmyn
EIPA 1998, 65 pages: **NLG 30**
(Disponible également en français)

Taming the Third Pillar. Improving the Management of Justice and Home Affairs Cooperation in the EU
Current European Issues Series
Monica den Boer
EIPA 1998, 44 pages: **NLG 15**
(Only available in English)

An Institution's Capacity to Act: What are the Effects of Majority Voting in the Council of the EU and in the European Parliament?
Current European Issues Series
Madeleine O. Hosli
EIPA 1998, 26 pages: **NLG 15**
(Only available in English)

Regionalism, Competition Policy and Abuse of Dominant Position
Working Paper
Sanoussi Bilal and Marcelo Olarreaga
EIPA 1998, 19 pages: **NLG 15**
(Only available in English)

Competition Policy and the WTO: Is there a need for a multilateral agreement?
Working Paper
Sanoussi Bilal and Marcelo Olarreaga
EIPA 1998, 18 pages: **NLG 15**
(Only available in English)

Coping with Flexibility and Legitimacy after Amsterdam
Current European Issues Series
Monica den Boer/Alain Guggenbühl/Sophie Vanhoonacker (eds)
EIPA 1998, 259 pages: **NLG 65**
(Mixed texts in English and French)

The Senior Civil Service: A comparison of personnel development for top managers in fourteen OECD member countries
This research was carried out under the authority of The Office for the Senior Public Service in the Netherlands
EIPA 1998, 99 pages: **NLG 25**
(Only available in English)

Openness and Transparency in the European Union
Veerle Deckmyn and Ian Thomson (eds)
EIPA 1997, 169 pages: **NLG 60**
(Only available in English)

Europäische Umweltpolitik und nationale Verwaltungen: Rolle und Aufgaben nationaler Verwaltungen im Entscheidungsprozeß
Christoph Demmke (Hrsg.)
EIPA 1997, 285 Seiten: **NLG 65**
(Eine frühere Fassung dieser Veröffentlichung ist in englischer Sprache erhältlich)

Schengen, Judicial Cooperation and Policy Coordination
Monica den Boer (ed.)
EIPA 1997, 274 pages: **NLG 65**
(Mixed texts in English and French)

Agenda 2000: An Appraisal of the Commission's Blueprint for Enlargement
Current European Issues Series
Marie Soveroski (ed.)
EIPA 1997, 142 pages: **NLG 40**
(Only available in English)

Managing European Environmental Policy: The Role of the Member States in the Policy Process
Christoph Demmke (ed.)
EIPA 1997, 255 pages: **NLG 65**
(An adapted version is available in German)

Free Trade Agreements and Customs Unions: Experiences, Challenges and Constraints
Madeleine O. Hosli and Arild Saether (eds)
Co-published by Tacis services DG IA, European Commission, Brussels and the European Institute of Public Administration, Maastricht, the Netherlands
Tacis/EIPA 1997, 316 pages: **NLG 25** (to cover postage and packing)
(Only available in English)

Managing Universal Service Obligations in Public Utilities in the European Union
(Compilation of papers)
EIPA 1997, 131 pages: **NLG 25**
(Only available in English)

Undercover Policing and Accountability from an International Perspective
Monica den Boer (ed.)
EIPA 1997, 218 pages: **NLG 65**
(Only available in English)

A Guide to the Enlargement of the European Union: Determinants, Process, Timing, Negotiations
(Revised Edition)
Current European Issues Series
Phedon Nicolaides/Sylvia Raja Boean
EIPA 1997, 53 pages: **NLG 17.50**
(Only available in English)

Forthcoming

Schengen's Final Days? The Incorporation of Schengen into the New TEU, External Borders and Information Systems
Monica den Boer (ed.)
EIPA 1998, approx. 175 pages: **NLG 65**
(Mixed texts in English, French and German)

L'Euroformation des administrations régionales et locales d'Europe"
(Actes de la Conférence interrégionale; Barcelone, juin 1998) /
Eurotraining for Regional and Local Authorities in Europe
(Proceedings of the Interregional Conference; Barcelona, June 1998)
Sous la direction de Eduardo Sánchez Monjo
IEAP 1998, environ 200 pages: **NLG 65**
(Pour faciliter la compréhension de cet ouvrage et lui assurer une large diffusion, les textes sont publiés dans la langue originale mais aussi en traduction française et anglaise)

All prices are subject to change without notice.
A complete list of EIPA's publications is available on request from the Publications Department.

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