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The European Economic Community in the
Federalizing Process of Western Europe

by Harald ^{Wolfgang W.}Knuth

A thesis submitted to Carleton University
in partial fulfillment of the requirements
for the degree of Master of Arts in Political
Science

Department of Political Science

Carleton University

Ottawa, Canada

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Abstract

The thesis investigates the stage of the European Economic Community in an assumed federalizing process of Western Europe. As most important among the federal features has been found the establishment of a central government. Accordingly the thesis examines the degree of representative qualification, independence from the constituent governments, and legislative powers of the Community organs with regard to their potential development into a federal legislative body. The focus is on the European Parliament and on the Council. With regard to a future executive the Commission's role (establishment, parliamentary responsibility and independence) is investigated as well as the distribution of competences in the administration of Community law. The conclusion shows, that the important federal features are only to a very low degree present in the Community, and that the federalizing process has already been reversed.

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Abbreviations

ABl:	Europäische Gemeinschaften, <u>Amtsblatt der Europäischen Gemeinschaften</u>
BGBI:	Bundesrepublik Deutschland, <u>Bundesgesetzblatt</u>
BT-Drs.:	Bundestagsdrucksachen = Bundesrepublik Deutschland, <u>Verhandlungen</u> <u>des Deutschen Bundestages: Anlagen zu den</u> <u>Stenographischen Berichten</u>
Bulletin:	Edited by Bundesrepublik Deutschland, Presse- und Informationsamt der Bundes- regierung
CJEPS:	<u>The Canadian Journal of Economics and</u> <u>Political Science</u>
CMLRev:	<u>Common Market Law Review</u>
NJW	<u>Neue Juristische Wochenschrift</u> (German Law Journal, Weekly)
Steno Berichte:	Bundesrepublik Deutschland, <u>Verhandlungen des Deutschen Bundestages,</u> <u>Stenographische Berichte</u>

VI

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C: Mitteilungen und Bekanntmachungen (containing informations)
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I

Preliminary Remarks

A.

Introduction

European unification has been an important concern almost ever since the end of World War II. The communist threat to Europe made it clear that no single European nation by itself could withstand Soviet aggression. But even apart from such a threat, the recent experience with the dangers of nationalism called for an integration of the European states in order to avoid further mutual destruction.

In spite of this situation, which was realised by European statesmen almost immediately after the war,¹ there is no unification on a large scale under way. The most that has been achieved is the Council of Europe which, however, has only a slim moral effect on European politics. Nor can the North Atlantic Treaty Organisation, including Canada and the United States in addition to most western European States, claim to be the core of a genuine political union.

Closer coordination of the national economies has been achieved between the member states of "Little Europe". As a result, politics, too, have become more coordinated than they used to be. These countries have succeeded in setting up the European Coal and Steel Community (ECSC), the European Atomic Energy Community (Euratom) and the European Economic Community (EEC, also called the Common Market).

In spite of the failure to establish a European Defence Community as a second step in the process of European unification after the building of the Coal and Steel Community, the three other organisations are still regarded as steps towards further unification. The most essential factor in

1. See, for instance, Churchill's famous speech in Zurich in 1946, quoted in R. Bowie, The Process of Federating Europe, in Federalism, Mature and Emergent, p. 498.

this process is the European Economic Community which, due to its broad scope of jurisdiction in economic matters, has the strongest influence of all three Communities on national economies and politics.

The goal of unification was supposed to be a new European nation, superimposed on the nations of the original "Six". Of course, the best which could be hoped for was a European federal state, hopefully including also other states from the rest of the European continent.

The function of the three Communities as a kind of skeleton of such a European federation seemed to be underscored by the merger, on July 1, 1967, of the Commissions of the Common Market, of Euratom, and the High Authority of the Coal and Steel Community; and by the establishment of one Council of Ministers for all three Communities to replace the separate Councils which previously existed. The agreement on this merger¹ also provides for one common budget for all three Communities. The European Parliament and the Court of Justice had been already common organs of all three Communities since the establishment of the Common Market and Euratom².

The concentration of the powers of the two Commissions and of the High Authority in one common Commission should have led naturally to an elevated position for the new Commission, as compared with the status of the three formerly existing authorities.

The natural consequence of this in turn should have been the strengthening of the Communities - indeed of the consolidated Community - as against the Member States, whose interests are represented in the Council, while the Commission represents the Community interests.

On the other hand, apart from the merger itself it has not been possible to discern in the development of the Communities a trend towards further unification. Quite the reverse, the way in which the Common Market has developed has brought about its most severe crisis, and the unifying process in Western Europe may already have been reversed.

1. See the Treaty Establishing a single Council and a single Commission of the European Communities from April 8, 1965, (in the following briefly quoted as: merger agreement) in ABl, No. 152, 1967, pp. 2 to 12. For the coming in force of the treaty on July 1, 1967, see ibid., p. 1. English translation of the treaty 3 CMLRev 1965-66, pp. 37-89.

2. Convention Relating to Certain Institutions Common to the European Communities, signed with the treaties on the EEC and on Euratom in Rome on March 25, 1957; English text in European Yearbook, vol. 5, 1959, pp. 587 to 595.

B.

Scope of Investigation

The task of this paper will be to examine the role so far of the Common Market in the process towards a European federation.

As experience shows, it is unlikely that a European federation can be established just by one single act of policy, without relying on an existing organisation. Such an act was not possible even immediately after World War II, when the dangers of nationalism were still fresh in people's memories and communism seemed a real threat. It is for this reason that the "Europeans" chose the "functional approach"; that is to say the establishment of several communities, with the same member states but with particular fields of responsibility for each, with the intention that the several Communities eventually would join in a federation.

This "functional approach" had been directed towards "Little Europe", originally of the "Six" but later to be extended to include also Great Britain, Ireland, Denmark and Norway. So far only the "Six" have achieved a stage of development which gives some hope for further unification. With them there exist, in spite of all setbacks, more prerequisites for federation than with any other group including a significant number of European states. Among the three organisations of the Six, however, the EEC is the most important. It has assumed powers in more fields under national jurisdiction than Euratom or the Coal and Steel Community. For this reason the "Europeans" eventually assigned to it the role of the second step towards unification, after the attempts with the Defence Community as a second step had failed.

In recent years it has been argued that discussion about the European Communities no longer should stick to the old dispute whether the Communities were some sort of federation or confederation, for historically they were absolutely new phenomena; attention therefore should be directed to their practical development¹. This statement is correct insofar as there have not

1. So for instance the German Chancellor Willy Brandt in an interview with Radio Luxembourg on July 2, 1971; Bulletin No. 103 from July 6, 1971, on pp. 1134 f. Cf. also Brandt's interview with Le Monde, Bulletin No. 104 from July 7, 1971, on p. 1149.

been communities of a similar kind before. Nevertheless, such statements are made for political reasons only, namely in order to avoid political disputes about what the communities' goals should be. Political science, however, must occupy itself with the question of what impact the Communities have or may achieve concerning the issue of a western European federation.

The following investigation will be restricted to reviewing the extent to which federal features already exist within the European Economic Community. An examination of the further development which the EEC is likely to take in the future in the direction of a federation seems beyond the natural scope of this paper.

II

The Theory of Federalism

The determination of the federal features must be derived from the definition of a federation. This definition, in turn, comes from a discussion of the federal principle.

A.

Federalising Process or Static Model?

The classical school of federalism, particularly German constitutional lawyers in the nineteenth and early twentieth century, compared the term federation to the term confederation. A federation was considered to be a state comprising several other states which preserved their legal capacity as separate political entities, but had transferred a part of their sovereignty to the federal state. A confederation was thought of as a mere association or league of states which came together for common purposes while preserving full sovereignty; there was no second set of government, and no decisions were made by the association which could have binding effect upon dissenting member states. Unlike a federation a confederation was an international organisation¹.

Such a definition may make it impossible to identify an association either with the federal or with the confederal scheme. For example, the European Economic Community does not qualify as a state. Under the said terminology, therefore, it cannot be a federation². However,^d^s the Treaty establishing the EEC makes Community decisions binding upon the member states³, several of which may be taken by majority vote⁴, the EEC has at the same time surpassed the stage of a confederation as just defined⁵.

1. This comparison, with similar definition, is still to be found in Theodor Maunz, Deutsches Staatsrecht, pp. 169-171.

2. In accord with this statement: Peter Hay, Federalism and Supranational Organisations: Patterns for New Legal Structures, p. 87.

3. Cf. Art. 189 of the EEC-Treaty which, for instance, expressly declares directives of the Community binding on the member states.

4. Cf. Art. 148, par. (1) and (2) of the EEC-Treaty.

5. For examples of the confusion in the - even official - use of both terms "federation" and "confederation" see K.C. Wheare, Federal Government, pp. 10 f and 32 f.

The "classical" notion of federalism is opposed most strongly by Friedrich. He recognises as a federation associations of any group beings which create new entities, while maintaining the constituent groups. So for him, associations made by several churches or trade unions, forming greater organisations which embrace the constituent members, are federations¹.

On the political level Friedrich objects to having the principle of sovereign states related to federalism. State sovereignty means the power of the state "to determine (its) own competence"², that is the unchecked power of the state to decide upon the scope of its own jurisdiction. The unilateral extension of the fields of jurisdiction already held is, of course, of the utmost importance in this context. Because federation means, as Friedrich puts it, spatial division of political power between the federal state and the constituent states³, state sovereignty is incompatible with federalism. Neither the constituent members alone nor the federal state alone can be sovereign, because neither of them can have the power unilaterally to extend their own spheres of jurisdiction, that is to say neither of them can change the division of powers as arranged between them without the consent of the other part.

However, sovereignty, in its classical meaning, is also not divisible: It is impossible to divide him "who has the last word",⁴ because such a division would end the single supreme personality. So the division of political power between two sets of government in a federation is not a division of sovereignty, because sovereignty cannot be divided at all, and therefore also not in a federation.

Consequently there exists no sovereignty in a federation.

Friedrich develops his broad concept of federalism further when he declares that federalism is no static pattern but "the process of federalising a political

1. Carl Friedrich, Federalism, National and International, in Theory and Practice, pp. 3 and 9. For a definition of a federation of political communities cf. p. 12. Cf. also Friedrich's Man and his Government, p. 595. The idea found already expression by Sobei Mogi, The Problem of Federalism, p. 1111.

2. The classical notion of state sovereignty as referred to by Friedrich in Man and his Government, p. 552.

3. Ibid., p. 597. See Friedrich also in Federalism, National and International, p. 13 and note 17.

4. Friedrich, Man and his Government, pp. 585-609; cf. also in Federalism, National and International, p. 12.

community"¹: This process may begin with a league in which the member states develop ever closer links with each other and eventually establish a second set of genuine government for their common purposes. By chance the process may even result in a new larger unitarian state². Or the federalising process may take just the reverse direction, gradually substituting a federation for a unitarian state, particularly an empire³. Eventually such a unitarian state may be dissolved into several totally independent new political entities.

To Friedrich, federalism, understood merely as such a process, makes the opposition of federation and confederation meaningless, as there exists no static pattern on which to apply one term or the other. His concept of federalism includes such events as the dissolution of the British Empire into the loose association of the Commonwealth, as well as the building of the American nation, traced from the first links between the thirteen colonies up to the strong national American consciousness of the present.⁴

There are great merits in Friedrich's idea. It is true that federalism is incompatible with the old-fashioned concept of state sovereignty. To be sure, that type of sovereignty already became outmoded with the emergence of modern international organisations which, gradually, assumed responsibilities and powers from the states. However, that concept of sovereignty has recently experienced a new impetus from the continuing emergence of new states which became too self-conscious. Therefore, it is essential to realise that in a federal union there is no place for such old-fashioned concepts of sovereignty.⁵

1. Friedrich, Federal Constitutional Theory and Emergent Proposals, in Federalism, Mature and Emergent, A. MacMahon ed., p. 514 f.. He elaborates on federalism as a process more in his Federalism, National and International ..., esp. pp. 1, 8, 9, 14 and 35.

2. Friedrich, Man and his Government, p. 591, footnote 13, speaks about "an advanced phase of the federalising process in the direction of unity". This seems imprecise, resulting from the fact, that Friedrich sets no goal for the federalising process. Such "advanced phase" actually is already beyond the stage of federation and therefore has left the federalising process. This is true because the goal and end of the federalising process is federation itself. On this issue see the further elaboration on the following pages.

3. Friedrich, Federalism, National and International, ... p. 3. Cf. also pp. 9 f.

4. Ibid., pp. 10 and 23.

5. Attention to this fact was already drawn by Carl Schmitt, Verfassungslehre, 1928, pp. 372 f.

It is important as well to be aware that no federation can be created just by one political stroke, but that it takes a long development, stage by stage, to bring independent states into federation. Attention should again and again be drawn to this fact, as Friedrich does. It is this fact which European statesmen realised when they initiated the functional approach towards European federal union.¹

Nevertheless, the theory of the federalising process as put forward by Friedrich needs some adjustment. For the politician as well as for the political scientist it is essential to know whether a political process is continuing, has come to a halt or even may have been reversed.

A political process is a development of political factors, that is of their nature and of their constellation. Development, in turn, means change in a particular direction. A political process then means change of the nature and constellation of political factors in a particular direction. This definition implies that the development, and therefore also the process, has by nature a particular goal. Whether or not a development is going on can be determined only by comparison with a static place or point. Only the approach towards, or the departure from the goal of the development can be the criterion for judging whether the development in a process is in progress or reversed. The goal of a process therefore must have a fixed place.

The only goal of the federalising process can be federation. According to the nature of the goal of federation, it must be situated at the end of the federalising process. However, federation must not be thought of as a mere point at the top of that process. A comparison of existing federations shows that no one federal union is exactly like another.² Even more, established federal states have undergone changes of their federal structure while still remaining

1. That there exist developments "towards or away from federalism" was realised by Donald C. Rowat, Recent developments in Canadian Federalism, CJEPS, vol. 18, Feb. 1952, pp. 1 to 16, esp. p. 1; and similarly, as early as 1935, by Norman Rogers, The Political Principles of Federalism, CJEPS, vol. 1, August 1935, p. 338.

2. Cf., for example, the comparison of the federations of the United States, Australia, Switzerland and Canada by Wheare, op.cit., pp. 1-3 and 16-20.

within the framework of federation.¹ Federation, therefore, must cover a broad section, rather than a mere spot, at the end of the federalising process. Within this section the federalising process may still continue, aiming, for instance, at a more consolidated form of federation which, as this term indicates, however, must still be within the federal scope. However, the general political process will cease to be a federalising process if, and as soon as, it has passed through the "section federation".

So the constructive federalising process,² which starts off with a loose league, will become a process towards unitarism if, and as soon as, it has passed on its way through the "section federation"; because then the political development enters the section of unitarian state and no longer has a federation as its goal. Accordingly the dissolving federalising process, which is aimed at the dissolution of a unitarian state into a federation, will become a process towards the substitution of a mere league for the formerly unitarian state if and as soon as it has passed through the "section federation" in the opposite direction.

1. The best example seems to be represented by the United States where the federation has assumed powers, formerly not regarded as being in the federal sphere, by means of political change and of a changed judicial interpretation as well. See for instance the child-labour tax case, 259 U.S. 20, and the case Hammer v. Dagenhart, 247 U.S. 251, from 1922 and 1918 respectively, in which the regulation by Congress of child employment was held *ultra vires*, even though the respective statutes pretended to regulate different subjects which were within the federal jurisdiction. In practice these court decisions were revised by the National Labour Relations Board v. Jones + Laughlin Steel Corp. case, 301 U.S. 1, from 1937. - For the change by legislation see the election of Senators by the state legislatures as provided for in Art. 1, sec. 3 of the US constitution, and their direct election by the people since 1913 according to Amendment 17.
2. For the purpose of clear distinction the process which is aimed at the establishment of a new federal political union by several separate political entities will be termed "constructive federalising process", while it seems appropriate to call the dissolution of a unitarian state into a federation a "dissolving federalising process".

By this definition it also becomes clear that the process which leads to the dissolution of a unitarian state but never was aimed at federation cannot under any circumstances be called a federalising process. Therefore, for instance, the transformation of the British Empire into the British Commonwealth was not a federalising process; suggestions to transform it into a federation were never followed¹.

The definition of the federalising process shows that preceding social and political processes in which federation was not the goal must be excluded. Such preceding processes may serve as background conditions in which the federalising process is initiated. To that extent they may be regarded as preceding stages which happen to create the prerequisites for federation. Only if those preceding processes are aimed at creating the prerequisites for the purpose of initiating the federalising process, however, may they be included directly in the latter, marking an early stage of the federalising process.

When considering any single case, it may be difficult to decide whether a political process is aimed at federation. Such difficulties result largely from the fact that the tendencies of a political process are hard to define, and that the process may end up at a place other than its original goal. These practical difficulties do not disprove, therefore, the principle that only a process which is aimed at federation can be regarded as a federalising process.

Following the given definition, the term "federalising process" will be used throughout this paper only for a political process toward federation. On the other hand, as federation is the kind of state association² to which the federalising process is supposed to lead, there is no reason not to define the nature of federation in accordance with actual existing federal states. However, the knowledge that the federalising process exists makes it superfluous for the federal principle to compare federation with what was understood as confederation. For the purposes of this investigation, at least, it is sufficient to distinguish between federations, political entities involved in the federalising process, and other associations or organisations of states which are not in that process.

1. On proposals to mould the British Empire into a federation cf. Wheare, op.cit., pp. 9 f.

2. "Federations" or organisations which are not states are not of concern in this paper. For this reason it is not necessary to elaborate on the merits of the use of the word federation in such broad terms.

This also avoids the need for an additional term to describe groups of states as between federation and "confederation".

Another distinction which has been made in terms of federalism must still be considered before a final definition can be achieved. This distinction is among a federal c o n s t i t u t i o n , a federal g o v e r n m e n t and a federal s o c i e t y ¹.

In order to determine whether a grouping of political entities has arrived at the stage of federation, its whole system of government must be examined. If a constitution were regarded merely as a body of written rules about the system of government, it is not sufficient to restrict the investigation to this constitution. A political entity formally may have a federal constitution, but this does not necessarily prevent it from acting as a unitarian state. On the contrary there may be a federal form of government, even though the formal constitution bears unitarian features².

A federal s o c i e t y may be understood as a society which is composed of several groups of human beings which are, and want to remain, distinct from each other in some essential characteristics; yet at the same time have other essential characteristics in common which make them appear, and which make them want to be, one united group³. Such a federal society may be an important prerequisite for the establishment of a political federal system, and one may doubt whether a federal government can last if it is not based on a federal society. Nevertheless, both do not necessarily go hand in hand. A federal society may be bound together

1. William Livingston, Federalism and Constitutional Change, p. 4. Wheare op.cit., pp. 19-29, esp. p. 20, only distinguishes between federal constitutions and federal government.

2. Wheare, loc.cit., especially refers to Argentina, Venezuela and Mexico as belonging to the first type, while to Brazil, Austria, Germany (the Empire, the Weimar Republic and the Federal Republic as well) and the USSR he even denies written federal constitutions. Canada is given as example for a state without a written federal constitution but which has a federal form of government. His distinction in practice seems formalistic, but may have the advantage of clear definitions.

3. This definition indicates that the term federation indeed can be used in a very broad sense, reaching beyond the sphere of political communities, as is done by Friedrich.

by force in a unitarian state. Or on the other hand, in spite of its desire for federal union, a society may be separated into several independent states because the federalising process was not set in train or because the division is effected by some kind of force.

A restriction of this investigation merely to a written constitution would not permit a precise statement about the federal structure of the Common Market. On the other hand, a sociological research, concerning the issue of federal society thorough as it might be, would do so much less; at most it could give indications as to the presence of prerequisites for a federation. The present investigation, therefore, will be concerned with the federal system of government, and the term "federation" will be understood in the course of this paper as applying to a political union with a federal form of government.

The nature of a federation seems to follow from the definition of the federal principle as the federalising process, and from the exclusion of particular species from that process. It has been understood that political entities which federalise form an association for the purpose of cooperation between their governments in common political matters. Mere leagues of political entities, however, which are designed not to transgress their status as a league, have been excluded from the - constructive - federalising process¹. It is no argument against this exclusion that such a league may happen to have the same political structure as that of another league which is within the federalising process. The essential distinction is that the first stops at such stage, while the latter is aimed at further consolidation. The difference becomes visible when the latter achieves that consolidation, while the first still remains in its former stage. The consolidation of the league in the federalising process, which makes the difference visible, demonstrates itself in the establishment of a new common government for all members of that former league.

Federation then is the term which describes that political entity with a legal personality and a government (the central government) of its own in which several smaller political entities have joined for the purpose of common policies, while the latter preserve their own legal personalities and their own governments to deal with matters in their own field of responsibility. A federation, therefore, may be defined as a political community in which the political power is divided between two - or possibly even more - sets of government which are coordinated, yet, in their own spheres of jurisdiction, are independent of each other².

1. The given definition excludes mere leagues of states in any event from the dissolving federalising process.

2. This definition comes close to the federal test applied by Wheare, op.cit., p. 33, which reads: "Does a system of government embody predominantly a division of powers between general and regional authorities, each of which, in its own sphere, is coordinate with the others and independent of them?" In this context it is not essential that Wheare is concerned with federation as a static design only, because federation has a static place as well in the theory followed in this paper. The division of sovereignty, which Wheare seems to include in the federal principle (footnote 2 on p. 14), of course cannot be accepted. - A similar definition as given in this paper can be found in Rogers, op.cit., p. 337. It is interesting that also Friedrich, Man and his Government, p. 596, in spite of his restriction of federalism to a mere process, in one place comes close to the definition given here when he says: "... we have federalism only if a set of political communities coexist and interact as autonomous entities, united in an order with an autonomy of its own".

B.

The Main Features of Federalism

One may distinguish two different groups of federal features. One group is to be used to distinguish a federation from a unitarian state. An examination using this group would show whether or not a political entity had constituent members each with its own legal personality and individual government. As features in this group have been suggested: the principles of territorial integrity; of political integrity; of equal status; and of equal treatment, or non-discrimination, between the constituent members.¹

The task of this paper, however, is to examine the role of the European Economic Community in the constructive federalizing process in western Europe; that is to say, to what extent federal features have been attained on the suggested path leading towards a European federation built by separate nations. For the purpose of this examination it is necessary to make use of those features which allow a distinction between a federation, on the one hand, and a mere association of several separate states on the other. These features, therefore, do not show primarily whether the identities of the composite states in a union are still maintained, but whether they have succeeded in establishing a federal union.

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1. Rogers, op.cit., pp. 341 - 343, who mentions as a fifth feature the "principle of adoption", which is to mean that constitutional amendments would require the consent of a majority of the constituent members. In contrast to the other four, the latter criterion has also a "positive" side, which may indicate that federation by several, formerly independent, states has been achieved.

The required group of federal features can be derived from the definition of a federation. This definition asserts that there must be - at least - two sets of government: a central government, and state governments.¹

Obviously a federation must be by nature a democratic system. The spatial division of powers, the required co-operation of the constituent members, and the protection of regional minorities implicit in the federal principle, can only be guaranteed in a democratic system. Totalitarian governments would not respect any of these principles, but would probably attempt to usurp all powers at the first opportunity.² But it is true that non-democratic countries also use the federal model. This, however, is mainly for purposes of deception, but the need to achieve a functional division of administration can also play a part. Correctly such a state is not a federation, for here there exists no genuine division of powers. This applies also to the division of legislative powers between two sets of government.

The consequence of implying the democratic principle in the federal system is that there must also be a separation of powers within each set of government. This means that the central government and the state governments must each consist of a

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1. This is most precisely expressed by Southanam, Union-State Relations in India, p.8. Other authors imply this system. Wheare, op.cit., pp. 2, 6, 10 and 12 f, for instance, describes the independence of both sets of government from each other. Friedrich, Federalism, National and international ..., p. 24, describes the composition of a federal government (implying the persistence of the regional governments), but - according to his broad federal concept - refers to such "federal government" as well as an organ of a mere league.
 2. Attention to this issue is drawn by Wheare, op.cit., pp. 46 f.
Gerhard Mangone, The Fallacy of World Federalism, Current History, vol. 39, Sept. 1960, pp. 164 f.

legislative and an executive branch. 1 From the implication of the democratic principle it follows also that the legislatures of both sets of government must represent the people. As regards the executive, there must be some kind of responsibility.

The second main aspect expressed in the definition of a federation is that both sets of government are distinct from, and coordinate with each other. This means that neither is subordinate, but that each is equal to, and independent from, the other. 2 This is of great importance in the nature of governments in a Federal State. While it seems not wholly inconceivable to have the principle of representation construed as including indirect representation, mutual independence of both levels of government means that neither government can be set up by the other, or be otherwise responsible to it. This holds true both for the legislative as well as for the executive branch of government. Each legislative assembly, therefore, derives its powers immediately from the people. That is to say, the assemblies at both levels must be elected directly by the people. The application of the democratic principle to this feature would require universal suffrage. Neither assembly can be subject to dissolution - or even to mere instruction - by the other level of government. A central legislature which is established by the regional governments is not independent from the latter and therefore is not a genuine federal organ. The reverse is also true. For the same reason the executive branch of both sets

1. Thus the term "government" is neither used in the broad American meaning, including the judiciary as well, nor in the restricted sense of the German "*Regierung*", referring to the executive only. The judiciary here may be excluded, because there is no typical federal principle of full judicial branches on either level. This does not refer to the need for a federal "arbitrator" who is mentioned later as a federal organ.

2. This coordination, rather than subordination, of one level of government to the other is very strongly emphasised by Wheare, op. cit., pp. 12, 14 - 16 and 30 f.

must be either of the presidential type - that is, elected by the people of the respective level in the federation -, or it must be set up by the legislative branch of its own level of government. In the first instance the executive branch would be responsible directly to its electorate; in the second, the executive would be responsible to the assembly of its own level which, therefore, alone can force its resignation. It would be contrary to the federal principle if, for instance, the federal executive were to be established, or could be dismissed by the regional governments, or if the central government had the power to replace a regional executive.

Another consequence of the independence and equality of federal and regional governments is that both, to be able to carry out their governmental activities, must have the right to operate directly upon the people.¹ The government holding jurisdiction in a field must therefore retain the power to decide on the "if" as well as on the ways and means of operation. That is to say that both sets of government must have in principle, though not necessarily in every single case, the power to decide within their respective fields of jurisdiction upon the imposition or remission of legal obligations. They must also have the power to decide within their respective fields whether or not, and what, action shall be brought against citizens who do not comply with the obligations imposed upon them by the respective government. Thus a federation seems to require for both sets of government a competence to pass laws directly binding upon the people, and a competence to execute these laws, which are the means of direct authority over the people.

As regards the executive powers, this does not mean that both sets of government must have their own subordinate bodies for the execution of law in all fields under their jurisdiction.² The system of "borrowed agencies" and of mandate administration,³

1. Wheare., op. cit., p. 2 and 13. Critically Livingstone, op. cit., p. 11.

2. As. Southanani, op. cit., p.8, seems to suggest.

3. On this see, for instance, Article 85 of the Basic Law (Grundgesetz) of the Federal Republic of Germany.

which finds application particularly in the field of tax-collection, indicates that an administrative body of one level of government may act as an agent also for the government of the other level without thereby impairing the federal principle. It would, therefore, not seem incompatible with the federal principle for the central government to employ no subordinate administrative body of its own in fields under its jurisdiction in which it can make use of administrative bodies of the regional governments, always provided that the central government retains, in its field of competence, powers of decision concerning the actions to be taken by those bodies.

This power of both sets of government to operate directly upon the people by means of legislative and administrative activities implies the subjection of the people to both of them. On the other hand, the necessity of having both the federal and the regional legislatures directly elected by the people gives the latter democratic rights with respect to both sets. Such a relationship between citizen and government is manifested in the particular citizenship. The federal system thus implies a twofold citizenship: that of the regional community and that of the federation.¹ Lack of a federal citizenship may, therefore, be regarded as an indication that a federation has not yet been achieved.

Full separation and equality of both sets of government requires also that both sets have the financial means at their disposal necessary for each to work independently of the other within its own spheres of competence. While it seems unlikely that governments ever will admit to having sufficient financial sources, it is essential that a government should not, as a matter of principle, depend on

1. The fact that also the British Commonwealth, as a loose association of states, has a common citizenship, ~~proves~~ rather than disproves that in the much more consolidated federation there must be a common citizenship. It is interesting that also Friedrich, within his broad federal concept, states that "federal elections require" a federal citizenship; see his Federalism, National and International ..., p. 30. It seems not necessary that there is a special declaration about citizenship. Such declaration is missing, for instance, in the constitutions of the German laender which, however, establish residence requirements for regional elections.

another government for the satisfaction of its financial needs. Each government in a federation should, therefore, have the "exclusive powers of raising revenue in some fields" ¹ for its own purposes, of drawing up its own budget, and especially of deciding about its own expenditures.

The reason for having two independent and equal sets of government in a federation is, as the definition of federalism shows, to have the political powers divided between them. The federal principle indicates that the dividing line will have the effect of assigning matters of common concern (e.g. defence) to the federation, leaving matters of regional concern to the constituent governments. This may be concluded because the reason for entering into federation is to have common problems disposed of by common efforts, while enabling the constituent entities to retain power and responsibility in fields of regional interest, thus avoiding surrender to a larger unitary state. For this reason the "spatial" division of powers ² grants each government a separate sphere of jurisdiction, not to be invaded by the other. ³ It is this feature which makes, as already mentioned, sovereignty in its classical meaning incompatible with federation; because it would give that set which would hold such sovereignty the power to change unilaterally, and even to abolish fully, the distribution of jurisdiction. ⁴ The absence of such sovereignty on either level is, therefore, a decisive test for the allocation to both sets of government of autonomous jurisdiction over separate fields.

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1. As Rowat, op. cit., p. 14, puts it. See also Wheare, op. cit., pp. 24 and 28.
 2. This term does not describe the typical federal division of powers absolutely precisely, but another more appropriate term does not yet seem to have been found.
 3. Wheare, op. cit., p. 2; Southanam, op. cit., p. 8; Friedrich, Federalism, National and International ..., p. 9 and 13; similar Livingstone, op. cit., p. 10.
 4. See section A of this chapter, p. 6. See also Friedrich, Man and his Government, p. 596, as well as in Federalism, National and International ..., p. 12.

Such a grant of autonomy would require an independent arbitrator to judge on invasions into the autonomous sphere of either set of government, and to assure its sanctity.¹

The federal arbitrator must, in turn, rely on a clear and visible constitutional decision. It seems necessary, therefore, for a federation to have a written constitution, embodying the federal principle, and in particular stating precisely the exclusive spheres of jurisdiction.²

On the other hand, it is clear that the political situation, and particularly the problems at stake, will not remain static. However, precise long range predictions about political developments and about the requirements for meeting them are not possible. Every division of powers between the general and the regional governments, therefore, will be exposed some day to the problem that this division is no longer appropriate. For this reason federal constitutions should not be kept rigid; they must permit a readjustment of the distribution of powers. This makes the amending process one of the most important devices in a federal system. As no single government nor even one set of government may have the competence to change the division of powers by its sole action, the constitution must provide for an amending process which requires the consent of both levels to changes of federal aspects. It seems acceptable, however, for reasons of flexibility to restrict the requirement of consensus to a mere majority on the part of the

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1. Rowat, op. cit., p. 14 f. See also Friedrich, Federalism, National and International ..., p. 26, and Livingstone, op. cit., p. 10. There seems to be, however, no typical federal principle that every citizen must have the legal power "to have disputes relating to the powers and functions of the Central Government and of the units decided by the courts", as Southanam, op. cit., p. 8, suggests. Such right of the individual follows from the democratic principle that all public power is subject to law and order. The federal principle is not concerned with the individual as such.
 2. This seems to be generally recognized. See J. Rivero, Introduction to a Study of the Development of Federal Societies, International Social Science Bulletin, vol. 4, spring 1952, p. 25; Rowat, op. cit., pp. 14 f; Southanam, op. cit., p. 8; Wheare, op. cit., pp. 53 - 55. Also Friedrich, Federalism, National and International ..., pp. 8 and 10, thinks that the protection of the spheres of autonomy on either level against encroachments can, "on the higher levels" of the federalizing process, be achieved only "within the context of a constitution". - Of course a written constitution is typical not only for a federation, as Livingstone, op. cit., p. 10, points out. However, it is essential for a federation.

regional governments.¹

Similar consensus may be deemed necessary if there is provision for changes in the territories of the constituent communities.² However, in a federation there is no need for power to change the borders of the regional units, although the existence of such power in principle is not contrary to the federal system. The issue of territorial changes within a union is, therefore, not an appropriate test for an investigation of whether a federation has been established by formerly independent states, though it is appropriate for distinguishing a unitarian from a federal state. This has already been mentioned at the beginning of this chapter.³

The arrangement of power division between the central government and the regional governments will be different in every case, according to what it is deemed necessary or expedient to handle centrally. However, some guide to the general line of such a division can be found in the purposes for which a federation is set up.

The most important purpose seems to be common defence against one or more common enemies.⁴ Accordingly, the union will normally have jurisdiction in defence matters.⁵ It seems a logical consequence that also the right of diplomatic

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1. This point is best described by Rogers, op. cit., pp. 343 f. See also Friedrich, Federalism, National and International ..., pp. 10 and 31; and Wheare, op. cit., pp. 16, 21 and 23, who makes the process of "adaptation" a decisive federal test. For a clear brief statement see Rowat, op. cit., pp. 14 and 16.
 2. See Wheare's reference to the Indian constitution, op. cit., p. 27.
 3. See p. 14, *supra*.
 4. Rogers, op. cit., pp. 338 f; Wheare, op. cit., p. 37
 5. So far as known, this is true in all present federations. The case of the Federal Republic of Germany gives an interesting example. Her constitution (Basic Law) from 1949 did not contain any provision on defence matters: That time there was supposed to be no German army; there had also been lack of German "sovereignty", and respective reservations of the Western Allies. It was only because the Basic Law gives the residual power to the *laender* (provinces) that there arose a dispute whether the *laender* or the federation should have jurisdiction over defence matters. The constitutional amendment from March 26, 1954, changing Art. 73, No. 1 of the Basic Law, eventually gave the jurisdiction to the federation.

representation will rest with the federation: Diplomatic intercourse is as important a means of defence¹ as the actual operations of the armed forces. To grant both the federation and the constituent communities the right to have their own permanent diplomatic representatives assigned to third countries would necessarily lead to the impairment of national defence policies by conflicting diplomatic activities. So it can be said that, while no federal principle necessarily requires exclusive federal jurisdiction over defence (in its usual narrow sense of meaning) and diplomatic activities, both fields will normally be reserved to the federal government.

Another main reason for independent states to federate is to achieve economic advantages from their union.² Federation will provide them with an economic union. Especially trade barriers between the federalizing communities will be abolished, and it seems that there must be a common currency. In any event, the external tariff will be a common tariff. For this the central government must have exclusive jurisdiction over tariff and excise duties - to prevent internal trade barriers similar to quota-restrictions - as well as over currency.³

Furthermore, to be able to discharge its duties in its fields of jurisdiction, the federal government must have the right to conclude international treaties. This is not disputed in the literature. The problem generally discussed in relation to the federal treaty power is that the federation may not have the additional power to implement those of its treaties which deal with subject matters coming under regional jurisdiction of legislation; for the implementation of such treaties the federal government may have to rely on the regional governments.⁴ This seems an indication that within a federal system it is conceivable for the constituent

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1. For instance to prevent wars, to gain allies against an enemy or to assure neutrality, at least, of a strong nation in the war against another nation.
 2. Rogers, op. cit., p. 339 f. Wheare, op. cit., p. 37.
 3. Rogers, op. cit., p. 339. He also includes in the sphere of exclusive federal jurisdiction the power "to regulate trade and commerce ...". This statement seems to be too general; it is clear, that there will be some competence in trade and commerce with the constituent members, because, as Wheare op. cit., p. 127, puts it, "the control of economic affairs in the federal system is not unitary but multiple."
 4. For a discussion of the situation in Australia, Canada, and the United States see Wheare, op. cit., pp. 172 - 178.

communities also to conclude, in their fields of jurisdiction, their own treaties with foreign states.¹

So, while the central government's ability to conclude international treaties is an essential federal feature, it cannot be said that this power must rest exclusively with the federal government; and it can also not be said that the federal government must have the means to implement the treaties insofar as they cover spheres of regional jurisdiction.

There are still two items to be included in the test of federation: secession and admission of new members.

Even if the secession of the southern states of the US had succeeded more than a hundred years ago, the rest probably would have remained within union. One may conclude that, though only the civil war eventually brought about federal consolidation, a dissolution of the American federation would have occurred only if several more member states had followed the southern example. This means that secession of one or more members does not necessarily abolish federation among the rest; however successive secession without strong resistance of the union probably would have that effect, and would even indicate that what exists is only a loose association rather than a federation.

The same must be concluded with regard to the admission of new members. Particularly the admission of a strong nation - in terms of population, area, economics and military strength - as compared with the previous members, is not only likely to change the nature of, and the constellations within, the union; it also seems an indication that the links between the previous members are not very strong. The same holds true also for the admission of smaller new members if several occur within a short period.

For those reasons secession and admission of new members as such do not decide whether or not a federation exists; but it can be said that the more freely secession,

1. Thus a right to conclude international treaties rests with the Laender of the Federal Republic of Germany, subject to some cooperation of the federal government. Art. 32, par. 3, of the Basic Law reads: "Insofar as the Laender have power to legislate, they may, with the consent of the Federal Government, conclude treaties with foreign states". On this issue see also Maunz, op. cit., pp. 292 - 294.

and admission of new members, is allowed, the looser is the structure of a federation.¹

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The foregoing discussion may be resumed as follows:

In a federation the political power is divided between two - or possibly more - sets of government which are equal to each other, and which are autonomous in their respective spheres of jurisdiction.

There must be a central government as well as regional governments. Each government must consist of a legislative and an executive branch. The legislative branch must be a representative organ, directly elected by the people by universal suffrage. The legislature must be independent of the other governments of the union, not only in its existence but also in its operations in its own spheres of jurisdiction. It must also have the power by virtue of its own legislative competence to operate directly upon the people. The executive branch either must be of the presidential type or be established by - and responsible to - its own legislature; but it must be independent from the other governments. Each executive must have the power to operate directly on the people by means of its own administrative activities.

There must also be a separate sphere of autonomous jurisdiction for each government. Such a sphere should include a taxing power in separate fields for each government, to establish the principle that the governments of both sets are financially independent of each other. The federal government should have exclusive jurisdiction over tariff and excise duties as well as over the currency. It must have the power to conclude international treaties, although also the constituent members may have treaty powers in their own fields of jurisdiction; and although the implementation of federal treaties on matters in the sphere of regional jurisdiction (if ever there exists a federal treaty power in those fields) may be left to the regional governments. The federal government should be solely competent for external representation. Federal jurisdiction in defence policies needs no further discussion in this context because it may be said simply that no common defence policy exists in the Community.

1. Friedrich, Federalism, National and International ..., p. 28.

In a federation furthermore there should be a written constitution, including a provision for a typical federal amending process and the guarantee of autonomy for both sets of government in their own spheres. It is not permissible for either the member states or the union to be "sovereign" in the classical sense of the meaning of this term. There should also be a federal arbitrator to assure both regional and federal autonomy, and a common citizenship both on the federal and regional level.

The federation should build an economic union. Secession and admission of new members seem to be additional tests of the federal structure of a political organisation.

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A political body which fully meets all these characteristics may be the most complete federation. However, it has already been said that the federal principle allows for variations. The decisive point in considering whether or not a political organization is a federation, therefore, is not whether it fully meets all these criteria but whether "the federal principle (is) predominant in it".¹

One might try to arrive at an answer to this question of the predominance of the federal principle by concluding whether or not most federal features are present to a significant degree in a community. Although such a method seems an appropriate way of investigation in principle, one must keep in mind that every feature bears different importance. The most essential of all the federal features is the existence of two distinct sets of government independent of each other, with their respective legislative and executive branch, etc.. Most other federal features are derived from this fundamental principle. For this reason, a statement on the presence of a federation is dependent in the first place on the confirmation of two such sets of government. If they can be found in a political organization, the federal principle is predominant. The other federal features may then serve as additional criteria.

For the said reasons the following investigation will be limited to examining whether or not, or to what extent, a second set of government - a central government - has been established in the European Economic Community. Because of space limitation the rest of the federal features may be left aside in this inquiry.

1. Wheare, op. cit., p. 15.

III Federal Features in the European Economic Community

It is obvious that the six member states of the European Economic Community have maintained their own legal personalities, still possess their own government, and still deal with a broad range of subject matters as their own exclusive responsibilities. On the other hand, it is equally evident that the EEC has not yet arrived at a stage of development which would allow it already to qualify as a federation.

It is exactly for these reasons that the following investigation has to be concerned with the involvement of the EEC in a federalizing process. As a result from this statement it follows that the inquiry cannot be limited to a mere affirmation or negation of the presence of the examined federal features. In order to find the stage which the Common Market has achieved in the supposed federalizing process it is necessary to look for the degree to which such features are already present. This means to trace even their roots, and of course the stage of their development.

A consequence of the involvement of the EEC in a constructive, not a dissolving, federalizing process¹ is that the further discussion must center around the EEC itself rather than around the member states. This does not mean that the states will be left entirely out of consideration. However, they will be included into the discussion only in so far as the powers and positions still held by the states have a bearing upon the development of the Community towards a federation.

A.

The Political Structure of the Community: A Brief Survey

To facilitate the tracing of the federal development in the European Economic Community it seems expedient, first to take a glance at the whole political structure of the EEC.

1. For the terms "constructive" and "dissolving federalizing process" see supra part II, Chapter A, on p. 9, especially footnote 2.

The organs of the EEC are the European Parliament, the Council of Ministers, the European Commission and the Court of Justice. The European Parliament and the Court have been common organs of all three western European Communities, that is of the Coal and Steel Community, of Euratom, and of the Economic Community, since the establishment of the latter two.¹ On July 1, 1967, also the Commission, now called Commission of the European Communities, (briefly: European Commission) and the Council of Ministers became common organs of the three Communities by virtue of the merger agreement of April 8, 1965.²

The European Parliament³ has one hundred and forty two members: thirty six from France, Germany, and Italy, and fourteen from Belgium and the Netherlands each, while there are six members from Luxembourg. The members of the European Parliament are chosen by and from the national parliaments, but sometime in the future they are to be elected directly by the people by universal suffrage.⁴

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1. According to the "Convention Relating to Certain Institutions Common to the European Communities", signed with the "Rome Treaties" on March 25, 1957; English text in European Year-book, vol. 5, 1959, p.p. 587 to 595.
 2. "Treaty Establishing a single Council and a single Commission of the European Communities" from April 8, 1965, (in the following briefly quoted as: merger agreement) in ABl, No. 152, 1967, pp 2 to 12. For the coming in force of the treaty on July 1, 1967, see ibid., p.1. English translation of the treaty 3 CMLRev 1965-66, pp. 37 - 89.
 3. The general provisions on the European Parliament are contained in Articles 137 to 144 of the EEC-Treaty.
 4. Art. 138 of the EEC-Treaty. With the admission of the four candidate states, the United Kingdom, Ireland, Denmark and Norway, the number of members in the European Parliament will increase to 208; see No. 72 in: The United Kingdom and the European Communities, presented to Parliament by the Prime Minister by Command of Her Majesty, July 1971, Command paper No. 4715 (in the following cited as: White Paper 1971).

The political groupings in the European Parliament, after its initial establishment, followed party affiliation rather than national lines. The members sit in political party groups transcending national borders, not in national groups. Presently the Parliament has fifty-one Christian Democrats, thirty-seven Social Democrats, twenty-four Liberals, nineteen Gaullists and ten other members.¹

There shall be an annual session of the European Parliament, commencing in March.² Parliament may, on the request of a majority of its members, or on the request of the Council or the Commission, convene also in extraordinary sessions.³

The Council of Ministers⁴ is composed of one member of each national cabinet,⁵ designated according to the matter under discussion. The Council shall ensure the coordination of the economic policies of the member states.

As a rule the Council acts on a formal proposal by the Commission, which it may reject by simple majority but modify only by unanimous vote.⁶ At the

1. Cf. Europäisches Parlament, Bulletin 1971-1972, Mitglieder-Liste, pp. 16 f.
2. EEC-Treaty, Art. 139; Euratom-Treaty, Art. 109; and ECSC-Treaty, Art. 22, in their version of Art. 27 of the merger agreement from April 8, 1965.
3. Art. 139 of the EEC-Treaty, Art. 109 of the Euratom Treaty and Art. 22 of the ECSC-Treaty.
4. The general provisions on the Council are contained in Article 1 to 8 of the merger agreement and in Art. 145, 148 to 150, 152 and 153 of the EEC-Treaty. See also Art. 115, 118 to 120 and 122 of the Euratom-Treaty, and Art. 26 and 28, par. 2 to 7, of the ECSC-Treaty.
5. Art. 2 of the merger agreement.
6. Art. 149 of the EEC-Treaty.

beginning of the transition period unanimity was required also for many other decisions of the Council. However, the EEC-Treaty foresees the partial replacement of the unanimity requirement by qualified majority vote during the course of the transition period. A qualified majority consists of twelve out of seventeen votes. For this purpose France, Germany, and Italy have four and Belgium and the Netherlands have two votes each, while Luxembourg has one. In matters not proposed by the Commission the majority must include the votes of four countries.¹ A Council decision in matters coming under the qualified majority rule and not proposed by the Commission, therefore, cannot be taken against the combined votes of the Benelux countries.

The C o m m i s s i o n² shall consist of nine members, one of them to be President, and three members to be Vice-Presidents.³ The members of the Commission must be nationals of a member state, and no more than two of them shall be nationals of the same state, while each state shall have at least one member. Until July 1, 1970, the Commission had fourteen members⁴ and it will be extended again to the same number with the admission of the four candidate states.⁵ The Commission members shall be appointed by the national governments, acting in common agreement.⁶ They are, however, not representatives of the national governments and not allowed to take orders from them.⁷

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1. Art. 148 of the EEC-Treaty. With the admission of the four candidate states the allotment of votes to each member state will be as follows: France, Germany, Italy and United Kingdom 10 votes each; Belgium and the Netherlands 5 votes each; Denmark, Ireland and Norway 3 votes each; Luxembourg 2 votes. See White Paper 1971 (footnote 4 on p. 27, supra), No. 70.
 2. The general provisions on the Commission are found in Art. 155 of the EEC-Treaty and in Articles 9 to 19 of the merger agreement. The latter Article has repealed the formerly controlling Articles 156 to 163 of the EEC-Treaty.
 3. Art. 10 and 14 of the merger agreement.
 4. Art. 32 of the merger agreement.
 5. See No. 71 of the White Paper 1971 (footnote 4, p. 27, supra).
 6. Art. 10 and 11 of the merger agreement.
 7. Art. 10, par. 2, of the merger agreement.

The term of office of the members of the Commission is four years, but it is renewable.¹ The Commission as a whole is politically responsible to the European Parliament which can force its resignation, regardless of the term of office.² The tenure of office of the single member may be terminated - in addition to collective resignation, to regular expiration of office, and to the case of death - by resignation of the member or by his removal from office. Removal is possible, on a petition by the Council or by the Commission, by means of a decision of the European Court of Justice because the member has committed a serious offence or no longer meets the requirements for the performance of his duties.³

The Commission supervises the gradual establishment of the common market as foreseen by the EEC-Treaty and ensures the application of the Treaty.⁴ Its decisions are taken by an absolute majority of all its members.⁵

The Court of Justice⁶ is composed of seven judges who are appointed by the national governments, acting in common agreement, for a term of six years each. New judges shall be appointed every three years. The judges must meet the requirements of their respective countries for the

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1. Art. 11 of the merger agreement.
 2. Art. 144 of the EEC-Treaty; see also Art. 140.
 3. Articles 12 and 13 of the merger agreement.
 4. Art. 155 of the EEC-Treaty.
 5. Art. 17 of the merger agreement.
 6. See Articles 164 to 188 of the EEC-Treaty; also Art. 30 of the merger agreement, and the protocol on the charter of the Court of the EEC from April 17, 1957; BGBI 1957, part II, p. 1166.

highest national judicial office. They choose their President from among themselves for three years.¹

It is the duty of the Court to ensure the observance of law and justice in the application and interpretation of the EEC-Treaty.² For this purpose, the Court hears, within the framework of the EEC-Treaty, appeals by the Commission against acts of member states; and appeals by member states against acts of the Council or the Commission, as well as appeals against acts of other member states. The Court may also hear appeals by physical and legal persons against acts of the Council or the Commission if the said persons are affected by those acts. The Court has the power to annul acts of the Council and of the Commission.³

The Court is assisted by two advocate-generals who are appointed for a six years term each in the same way and under the same requirements as the judges.⁴

In addition, the European Economic Community has an Economic and Social Committee,⁵ the European Investment Bank,⁶ the European Social Fund⁷, and the Development Fund for Overseas Countries and Territories⁸. The Economic and Social

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1. See Articles 165 and 167 of the EEC-Treaty.
 2. Art. 164 of the EEC-Treaty.
 3. Articles 169, 170, 173 and 174 of the EEC-Treaty.
 4. Articles 166 and 167 of the EEC-Treaty.
 5. Art. 4, par. 2, and Articles 193 to 198 of the EEC-Treaty.
 6. Articles 129 and 130 of the EEC-Treaty; see also the protocol on the charter for this bank, from March 25, 1957; BGB1 1957, part. II, p. 964.
 7. Articles 123 to 128 of the EEC-Treaty; see also regulation No. 9 by the Council on the European Social Fund from August 25, 1960; AB1 1960, p. 1189.
 8. Association Convention from March 25, 1957, especially Articles 1 and 6. See also Annex A to the Convention.

Committee is a common organ both of the EEC and of Euratom.¹ Without formal agreement, also the Secretariat of the Council of Ministers and the Information Service were made common institutions of both Communities, and now are common institutions of all three Communities.²

Since the merger of the executives there is also a common Committee of Comptrollers for the three Communities instead of the formerly separate three committees.³

On the authority of Article 151 of the EEC-Treaty the Council established, at its first meeting in January 1958, the Committee of Permanent Representatives of Member States.⁴ In the meantime this Committee has received a statutory basis under Art. 4 of the merger agreement. It is the task of the Committee to prepare the Council decisions and to execute Council instructions given to it. In practice the Committee has assumed responsibilities from the Council, in particular in the negotiations on Commission proposals. Its members are the heads of the delegations of the six member states to the Community.⁵

On a first view this political structure seems already to resemble the system of central government in a federation. The European Parliament and the Council of Ministers might be compared to the lower and the upper house of the federal parliament, the Commission to the federal executive, and the Court of Justice to the federal arbitrator. However, a closer examination shows that these organs are still very different from such institutions.

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1. Art. 5 of the "Convention on Common Organs of the European Communities" from March 25, 1957; BGBI 1957, part. II, p. 1165.
 2. Paul Reuter, Juridical and Institutional Aspects of the European Regional Communities, in Law and Contemporary Problems, vol. 26, summer 1961, p. 384. See also P.H.J.M. Houben, The Merger of the Executives of the European Communities, 3 CMLRev 1965-66, p. 38.
 3. Art. 22 of the merger agreement.
 4. Alting von Geusau, European Organisations and Foreign Relations of States; A Comparative Analysis of Decision Making, p. 132.
 5. Ibid., p. 103, footnote 56, and p. 132.

B.

The Legislature

1.

The European Parliament

Both in the EEC-Treaty and in the Euratom-Treaty the European Parliament is called only "Assembly".¹ In its constituent session in March 1958 the latter however adopted the name "European Parliament",² anticipating a federal development which envisages this body as the main legislative organ. Though in official language the French particularly insist on the name "Assembly", European Parliament has become the generally accepted term. Even the two French Fouchet-Plans for a political union in 1961 and 1962, which were drawn up by the French government, used the name "European Parliament".³

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1. Art. 137 - 144 of the EEC-Treaty; Artl . 107 - 114 of the Euratom-Treaty.
 2. Resolution from March 20, 1958, AB1. 1958, p.6., and resolution from March 21, 1958, ibid, p. 7.
 3. 1 st Fouchet-Plan, submitted November 2, 1961, in Die Politische Union, Presse- und Informationsdienst der Europaeischen Gemeinschaften ed., pp. 11-17; see Art. 7. 2 nd Fouchet-Plan, submitted January 18, 1962, ibid., pp. 17 - 20; see Art. 10. See also draft of the other Five for a political union, submitted January 1962, ibid., pp. 20 - 24.

a.

Representation of the People

In our discussion of the federal principle we found that the main central legislative body in a federal union should be a representative organ, evolved from direct elections by universal suffrage by the people which it represents.

Article 137 of the EEC-Treaty does say that the European Parliament shall be composed of "representatives of the peoples of the states" which are united in the Community. To that extent, it goes beyond the Statute of the Council of Europe¹ which refers to the members of the Consultative Assembly of the Council of Europe as "representatives of each member, elected by its parliament". Because it is the states that are members of the Council of Europe, the delegates to its Consultative Assembly are representatives of their states, not of the people. On the other hand, with regard to the European Parliament Art. 137 of the EEC-Treaty indicates representation of the peoples of the member states of the Common Market.

In fact, however, there is no such difference in the way in which the members to the said two bodies are selected. The members of the European Parliament are not directly elected, as one might assume from Art. 137 of the EEC-Treaty, but appointed by the national parliaments from their own ranks. The decision about procedure and prerequisites for the appointment also rests with each member state². Article 25 of the Statute of the Council of Europe provides essentially for the same kind of appointment to the Consultative Assembly³. Accordingly the members of the European Parliament are as little elected by direct popular vote as the members of the Consultative Assembly. In spite of the declaration in Art. 137 of the EEC-Treaty, therefore the members of the European Parliament do not represent the people.

For a full assessment of the impact of this fact on the federalizing process in Western Europe it is essential to note that the ECSC-Treaty contained a different

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1. Reprinted in Lawson, op.cit., pp. 25 to 40. See Art. 25, par.a.
 2. Art. 138, par. 1, of the EEC-Treaty; Art. 108, par. 1, of the Euratom-Treaty; and Art. 21, par. 1, of the ECSC-Treaty.
 3. However, it also gives the executives of the member states the right to additional appointments necessary in a time in which their parliaments are not in session - provided, their parliaments have made no regulations for vacancies in such circumstances.

device. The members of the Common Assembly of the ECSC could either be appointed by and from *within* the national parliaments, like the members to the European Parliament; or they could be elected directly by universal suffrage. The decision on one procedure or the other rested with each member state.¹ The exclusion of direct elections to the European Parliament then seems a retrograde step in the suggested federalizing process, since the European Parliament has become the common parliamentary organ of all three Communities, replacing the Common Assembly of the ECSC, which meant that the Treaty on the ECSC had to be reconciled with the new rule of the EEC-Treaty.²

On the other hand, all three treaties - on the Coal and Steel Community,³ on the EEC, and on Euratom - now provide that the European Parliament shall draw up proposals for future direct elections by universal suffrage, the procedure for which is to be the same in all the member states. After such proposals the Council of Ministers, acting unanimously, shall pass the respective provisions and recommend their adoption to the member states.⁴ Considering that actually direct elections to the former Common Assembly of the ECSC never took place, the said mandate for the introduction of direct elections to the European Parliament may even be regarded as an advance: such a mandate had been lacking before. It seems that another advance over the earlier stipulations for the Common Assembly of the ECSC is that direct elections to the European Parliament will have to follow a common procedure, applicable in all member states; and that they will be based on common prerequisites for the eligibility of voters and candidates. The European Parliament put forward a

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1. Treaty establishing the European Coal and Steel Community, Art. 21, in BGBI, 1952, part II, pp. 447 to 475. English version, with parts of the Treaty omitted, in Lawson, op.cit., pp. 69 to 107.
 2. This was done by the Convention Relating to Certain Institutions Common to the European Communities, Art. 2, par. 2, in BGBI, 1957, part II, pp. 1156 to 1165. English version in European Yearbook, vol. 5, 1959, pp. 587 to 595. The respective provisions of all three treaties now read the same; see Art. 21 ECSC-Treaty, Art. 138 EEC-Treaty, and Art. 108 Euratom-Treaty.
 3. Reference is made, of course, to the new version of the ECSC-Treaty.
 4. Art. 21, par. 3 and 4, ECSC-Treaty; Art. 138, par. 3, EEC-Treaty; and Art. 108, par. 3, Euratom-Treaty.

proposal about the direct election of its members in 1960. A draft convention,¹ which is part of that proposal, envisaged the expansion of the number of delegates to four hundred and twenty-six, one hundred and eight representatives to be elected in France, Germany and Italy, forty-two in Belgium and the Netherlands, and eighteen in Luxembourg. The legislative period would be five years. A procedure common to all member states would have been used for the election, with uniform requirements for the eligibility of voters and candidates. A person eligible could have been a candidate in any member state. Members of the European Parliament would not have been allowed to accept directives with regard to their voting. An interim period was envisaged during which one third of the members would still have been chosen by the parliaments of the member states from their own ranks, and during which the electoral provisions of the states would still have predominated, also for the direct elections to the European Parliament.

To be sure, even an election according to this system would not be in full conformity with the principle of direct representation. The allotment of seats as foreseen in that proposal was based on the existing states in the Community rather than on population. So, according to the figures of that time, the average number of inhabitants in a constituency, after the interim period, would have approximated to 490.000 in Germany, 465.000 in Italy, and 415.000 in France, while it would have been about 266.000 in the Netherlands, 215.000 in Belgium, and not even 18.000 in Luxembourg.² Though it is impossible to assure exactly the same number of inhabitants in all constituencies of any political unit, the discrepancy between the number of people represented in France, Germany and Italy on one hand, and Luxembourg, or even only Belgium, on the other, justifies the statement that representation of a large number of people in the former group of states would not really have existed.

However, this indicates only that the proposals of the European Parliament would not have brought about full application of the federal principle as far as elections are

1. Draft Convention on Direct Elections, of May 17, 1960, in AB1 No. 37 of June 2, 1960, p. 834. The English text is reprinted in Roy Pryce, The Political Future of the European Community, Annex 2, pp. 98 to 100.
2. Pryce, op.cit., pp. 88f., esp. table p. 89 as quoted from Political and Economic Planning, Direct Elections and the European Parliament, Occasional paper No. 10, 24 th October, 1960, p. 8.

concerned. A putting into effect of those proposals would nevertheless achieve a very essential step forward in the federalizing process; and once a European Parliament has been evolved from direct elections, by and large it is most likely that this parliament would push further towards real representation of the people. To ask for this already in 1960 or even today means that expectations are too high: to allow for representation in a lower house disregarding particular national interests requires a genuine federal sentiment which knows of no distrust among the member states, and among their people. Such an attitude does not yet seem to have been achieved among the European nations.

In spite of the restricted federal aim of the said proposals of the European Parliament, the Council of Ministers did not adopt them. Nor did it pass other provisions on the subject, although the treaties on all three Communities leave a deviation from the proposals of the European Parliament to the Council's discretion.¹

The main reason for the Council not taking a decision on direct elections was obviously that the French Government did not feel that this issue was ripe for consideration.² So even in January 1971 President Pompidou still insisted that the European Parliament must be elected directly only some time in the future. That would be after more powers had been conferred upon the Community, and when accordingly the European Parliament would hold more powers.³ The European Parliament itself stated in a resolution, in 1969, that there were already many powers transferred from the member states to the Community, for which accordingly there was no more parliamentary control; for this reason the Council would be obliged to take a decision on the question of direct elections to the European Parliament in order to re-introduce democracy. Because of this resolution, and later because of a direction by the heads of governments at the Hague meeting in December 1969, the Council took up the issue of direct elections in 1969, which had not been on its

1. So also Ernst Wohlfahrt in Wohlfahrt-Everling-Glaesner-Sprung, Die Europäische Wirtschaftsgemeinschaft, p. 436, note 6 to Art. 138 of the EEC-Treaty.
2. See the communiqué on the meeting of the Foreign Ministers of the Community on July 10, 1961, reprinted in Bericht im Namen des Rechtsausschusses über den Entschliessungsantrag ... betreffend allgemeine unmittelbare Wahlen für das Europäische Parlament, in Europäisches Parlament, Sitzungsdokumente 1968 - 1969, Document No. 214, p. 4.
3. Cf. Press Conference by Mr. Pompidou of January 21, 1971, 26 Europa Archiv 1971, vol. 2, p. 133.

agenda since 1963. However, there is still no progress.¹

Because of stagnation at Community level, in all national parliaments draft legislation was introduced for unilateral direct elections; that is, to have an individual state's members of the European Parliament elected directly in national elections. Interesting enough, the first such bill was introduced in the French National Assembly, in June 1963. It influenced the subsequent bills in the other member states, the first of which was that by the Social Democratic Party in the German Bundestag, proposed one year after the French bill. In 1968 new national initiatives for unilateral direct elections were started again by a French draft law. Italy followed with several national initiatives; and here in 1969 a great public campaign and a plebiscite also took place. Nevertheless, no law has yet been passed concerning direct elections in any of the member states.² The reason for the lack of progress may be seen in the German example. There it was the Social Democratic Party which introduced a draft law about unilateral direct elections in 1964. The Social Democrats were in opposition in the Bundestag at the time. In 1965 the proposal was rejected by the coalition parties, the Christian Democrats and the Liberals. Rejection was based on the legal opinion that the introduction of unilateral elections was against the Treaty which provided only for common elections throughout the Community. There were also political reasons. So precedence was given to the extension of the Parliament's powers. Direct elections restricted to one member state were asserted to have no effect on the European Parliament's position, and not even to be an incentive for direct elections in other member states.³ Mr Mommer, the initiator of the draft law, imputed that the driving force behind rejection was in reality the fear of

1. For the full story cf. Harald Knuth, *Direkte Wahlen zum Europäischen Parlament: Entwicklungsstand und Tendenzen*, Zeitschrift für Parlamentsfragen 1969, pp. 49 f.. For additional information see written answers by the German Department of Foreign Affairs to the Bundestag, *Steno Berichte*, vol. 71, 18th session of December 5, 1969, p. 628 A, and vol. 72, 51 st session of May 8, 1970, p. 2558A. For the present situation see Foreign Minister Scheel before the German Bundestag on March 2, 1972, *Steno Berichte*, 6. legislature, 175. session, pp. 10148 B to 10149 C.
2. For details on moves on national level in the member states cf. Harald Knuth, *op.cit.*, pp. 50-55. For later information see Beate Kohler, *Direkte Wahlen zum Europäischen Parlament: Grundlagen und Probleme der Gegenwärtigen Initiativen*, 26 *Europa Archiv* 1971, p. 729; Proposition de Loi No. 1558 from November 3, 1971, on direct elections in Luxembourg, pp. 1 and 2. For coming initiatives in the British House of Commons cf. Interview with Mr Michael Stewart, *Wie einen Abgeordneten für Strassburg wählen*, *Europa Union*, March 1972, p. 3.
3. Cf. Schriftlicher Bericht des Ausschusses für Auswärtige Angelegenheiten of February 19, 1965, *Verhandlungen des Deutschen Bundestages, Anlagen zu den Stenographischen Berichten*, vol. 96, Drs. IV/3130.

making President de Gaulle angry by unilateral national elections.¹ In fact also in the other member states most proposals about direct elections had been presented by opposition parties, while the parties in power rejected the bills. So it is interesting that in January 1972 it was the Christian Democratic Party, now in opposition in the German Bundestag, which presented a new bill about unilateral direct elections.² Among the reasons given as justification for this bill is the statement that the unilateral introduction of direct elections in the Federal Republic would be an incentive for direct elections in other member states as well. While this bill is signed by, among others, Mr Schröder, Foreign Minister in 1965, and Mr Burgbacher, who had both argued against the 1964 bill, the spokesman of the Social Democratic Party, now in power, insisted that the objections to the former bill were equally valid with regard to the new proposal.³

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So it may be seen that for one reason or the other it is the parties in power which object to direct elections on the national level, while the parties in opposition are in favour of them.⁴ Up to 1969 a reasonable explanation for this phenomenon may have been the fear of the national politicians in power of making de Gaulle angry if they did anything but object; however, one must ask whether today there are not different reasons. One such explanation could be that progress is not really wanted, but is possibly feared by the national executives. Direct elections to the European Parliament seem an appropriate means for putting a process into motion which would eventually give the Parliament more powers in the process of decision making. Such powers would necessarily be taken from the Council, and therefore from the national executives which are represented in the Council by members of national cabinets. Though the introduction of c o m m o n direct elections throughout the Community still seems to be blocked by France, the French government would not draw the consequences of the unilateral introduction of direct elections in the other member states, as Mr Pompidou has clearly hinted.⁵ So there is no understandable reason why unilateral elections should not be introduced in the other member states, save

1. This reason was imputed by Mr Mommer in the discussion on the proposal on May 20, 1965; see Steno Berichte, vol. 58, 185. session of May 20, 1965, p. 9300 D.

2. BT-Drs. VI/3072 of January 27, 1972.

3. See Mr Apel, himself a "European", Steno Berichte, 175. session from March 2, 1972, p. 10144 A.

4. For details on what party presented a law bill on unilateral direct elections in each particular case cf. Harald Knuth, op.cit., pp. 50-55; Proposition de Loi No. 1558 of Luxembourg, with later information on new national moves in the member states on pp. 1 f..

5. Mr Pompidou declared in his Press Conference of January 21, 1971, loc.cit., ^{every} member state could appoint its members to the European Parliament in any way compatible with the Treaty.

that the national executives fear loss of powers. Such elections would give a chance at least for pushing forward the consolidation of the European Parliament's position; and they would in any event make the European cause popular. Popular interest is missing now, but it could become a decisive force of its own. Obviously this is not wanted by the parties in power in the member states.

b.

Independence from the Member Governments

According to our federal theory, independence must refer to the relationship of the individual member of the central parliament to the constituent government - including the constituent parliament -, as well as to the operations of the central parliament. The latter relationship is not an essential problem in the context of this investigation.

An important means of affording personal independence are the immunities bestowed upon the members of the European Parliament. According to the Protocol on the Privileges and Immunities of the European Communities of April 8, 1965¹, the members of the European Parliament are not subject to prosecution for statements made in pursuance of their functions as European parliamentarians; and they are not subject to any prosecution at all either during the sessions of the European Parliament, or on the way to and from such sessions. The parliamentarians also enjoy privileges with regard to transportation on the way to and from the sessions, in order to ensure their participation in the latter (Art. 9, 10 and 8). All this comes close to the privileges and immunities granted to members of national parliaments.² In contrast, the Statute of the Council of Europe provides only for the exemption of its members from prosecution for statements made in the Consultative Assembly and its committees, leaving the establishment of further immunities to an additional agreement between the member states³, which has not yet been concluded.

Furthermore, notice again must be taken also of Art. 137 of the EEC-Treaty, which provides that the European Parliament shall consist of representatives of the people of the member states. This stipulates the independence of the European parliamentarians from anyone other than those peoples. That means that

1. BGBI, 1965, part II, pp. 1482 - 1493.

2. Cf., for instance, Art. 46 of the German Grundgesetz (constitution).

3. Art. 40 of the Statute.

they shall not be subject to instruction by anyone, including their domestic parliaments. 1

Though this statement seems rather theoretical, it gets some endorsement in Art. 34 of the Rules of Procedure of the European Parliament. According to this provision there exists only an individual right of vote for each member, excluding the transfer of votes. Transfer of votes is typical of an international assembly. The members of such an assembly are national delegates, usually representing their executives, as is the case, for instance, with the UN-General Assembly. To secure representation of the national executive in any event requires the power of vote transfer to other national delegates. Strictly speaking it is the member state which has the vote. In contrast, the exclusion of such transfer is the natural consequence of direct representation of the people by the very members of a parliament whom the people have elected. So the exclusion of vote transfer in the European Parliament seems an essential step towards its independence. In this context it is interesting that even the Statute of the Council of Europe still provides for a deputy for each member of the Consultative Assembly, ² even though this Assembly is - as the European Parliament - composed of members of the national parliaments, not of national officials delegated by their executives.

The independence of the members of the European Parliament from voting instructions has been postulated in much stronger terms by the European Parliament in Article 6 of its draft convention on direct elections which expressly prohibits the delegates from taking any directives with regard to their voting.

Of similar importance is the fact that the European Parliament has organized itself, from the beginning, not on the basis of nationality, but according to party groupings which transcend national bonds. ³ So the members are sitting in party groups ⁴ which include the respective party members from all states, and each group has its own (party) officer, secretariat, caucus room and library.

1. Alting von Geusau, European Organizations ..., pp. 156 and 233.

2. Art. 25, section b, of the Statute.

3. Heidelberg, op. cit., p. 432.

4. Roy Pryce, op. cit., p. 39.

These party groups "act as nominating and electing agents" for the officers of the Parliament, meet in their caucuses during debates and before votes, and present the achieved group position in the debates by an official party spokesman. ¹ Accordingly the Rules of Procedure of the Parliament recognize the political factions which are to be presented in the presidency and the committees, ² and the Parliament seems most concerned about ensuring that the factions are justly represented in these organs. ³ But the predominance in the European Parliament of the European party groups rather than national groups suggests that the single member is more dependent upon the European rather than the national level of his party group.

There are, however, also indications pointing to the dependence of the members of the European Parliament on the national parliaments. In the first place, such dependence is based on the powers of the national parliaments to appoint members to the European Parliament. This gives the former the choice to select those delegates which adhere more to the national interest than to European tasks. The Dependence of the European parliamentarians may be seen also in the fact that even the term of appointment is left to the national parliaments. However, one must notice that such dependence is not upon the national parliaments proper, but upon the party groups in the national parliaments. This is due to the fact that the parliaments of the member states have developed the convention of appointing delegates to the European Parliament from the ranks of both the parties in power and those in opposition; and that this is done according to the relative strength of the parties in the domestic parliaments. ⁴ This means, that the national parliaments as such have not many powers with regard to the appointment of the members to the European Parliament, but that those powers rest with the party groups in the national parliaments.

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1. Leon N. Lingberg, The Political Dynamics of European Economic Integration, p. 89.
 2. Art. 5, 7, 36 and 37 of the Rules.
 3. Altig von Geusau, op. cit., p. 156.
 4. Ernst Wohlfahrt in Wohlfahrt - Everling-Glaesner-Sprung, Die Europaeische Wirtschaftsgemeinschaft, p. 434, note 1 to Art. 138 of the EEC-Treaty.

Though dependence upon the national parliamentary party groups also seems not to be in line with the federal principle, such dependence is not the same as dependence on the national parliament as a whole; for, even in case of direct elections to the European Parliament there would be national party groups acting as nominating bodies for European candidates, though not parliamentary party groups.

Another fact indicating personal dependence is that the European parliamentarians also must be members of their respective national parliaments (Art. 138 EEC-Treaty). This means that the European mandate can be achieved only through a national mandate. Therefore again a member of the European Parliament will take care to conform with his domestic parliamentary party group. This also, however, creates dependence only upon the latter, not upon the national parliaments proper.

Some dependence upon the national groups is evident even in the structure of the European Parliament. In its Rules of Procedure it has provided for appropriate representation in the committees not only of the European factions, but also of the different nationalities.¹ The actual composition of the committees also seems to follow strictly those national lines.²

To sum up it may be said that the European Parliament and its members have achieved a significant degree of independence from the national level of government. As far as dependence still exists, it is mainly upon the national parliamentary party groups, rather than upon national executives or parliaments. While real independence can be ensured only by means of direct elections, even under such elections would still remain some reliance on national nominating bodies. So it may be concluded that there exists independence which is not so far from what is required by the federal theory. There is more independence than that held by the Consultative Assembly of the Council of Europe and its members. And this degree of independence is higher than that obtaining in the Assembly of the Western European Union to which Britain, and before 1958 also France, had delegated several times even members of their respective national cabinets, who in practice were bound to directives from their executives. 3

1. Art. 37, par. 2 of the Rules.

2. Heidelberg, op. cit., p. 433 reports about fixed numbers in all committees for each member state.

3. Alting von Geusau, op. cit., footnote 12 on p. 233.

c.

Legislative Powers
of the European Parliament

aa.

Means of Community Legislation

As regards the legislative power in the Community, there does exist a power to operate directly upon the people by means of passing law which shall be directly binding. To give an example, the EEC-Treaty provides for "rules" to be passed for the purpose of preventing discrimination, within the spheres covered by the Treaty, for reasons of nationality.¹ Or, as another instance, regulations may be passed establishing, throughout the Community, common market organizations for agricultural products (Art. 40, par. (2) and Art. 43, par (2) and (3) of the EEC-Treaty).

To look for the legislative power, however, one cannot rely on the terms used in those provisions of the Treaty which deal with the different objectives of Community activities. To that extent the Treaty is only concerned to bestow on the respective organs the powers of action deemed necessary. Because it was thought expedient to keep those powers broad and flexible, the Treaty normally does not confine each of the authorized organs to particular forms of action, but gives them the choice between different forms of action which the Treaty itself provides for in Article 189. Especially, the Treaty does not, as a rule, restrict a Community organ either to passing general rules of law only, or alternatively solely to executive measures. An express distinction between these two kinds of action and their clear reference to a particular Community organ is missing.

The forms of action offered by Article 189 (and the choice between them, which is left almost completely to the discretion of the organs holding powers of action), are what are called regulations, directives, decisions, recommendations and opinions. With regulations and directives the Treaty grants means of action which can have the effect of legislation.² As such, in continental meaning, is understood the passing of law which, independently ruling upon a general issue, has direct binding effect and general application. The definition of regulations

1. Art. 7, par. 2, of the Treaty.

2. So Ophüls, Quellen und Aufbau des Europaeischen Gemeinschaftsrechts, NJW 1963, pp. 1699 f., says, the general rules provided for in the Treaty correspond to the national forms of law enactment.

as given by the Treaty is in accord with this definition: the regulations establish rules of law which have general application, are binding in every respect and directly applicable in each member state.¹ To be sure, regulations also may be passed for the purpose of the mere execution of another general rule of law. Such regulations would not be acts of legislation in the narrow sense of the word, but they would be a means of the administration of law. However, regulations may serve also for independent ruling on a general issue. This is true, for instance, of the regulations establishing common market organizations for agricultural products: the Community did have the choice of organizing the agricultural policy absolutely differently.² So such regulations are means of legislation.

However, the essential features of legislation can also be found in directives: these shall be binding on the member states with regard to the objectives to be achieved, but they leave the decision, as to the methods of pursuing the aims, to the discretion of the states.³ Directives are a legislative means peculiar to the federal system: they give the central government the means to set general material rules of law, while relieving the central government of the necessity of interfering with the different organizational structures of the member states, which would be in contradiction to the federal principle. This is what is done also in the EEC by means of directives.⁴

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1. Art. 189, par. 2. Therefore Peter Hay, Federalism and Supranational Organizations, pp. 103 f., states that the direct effect which the regulations shall have in the member states "resembles that of a domestic statute". Also the subject matter of regulations require "their classification as legislation". Further literature in footnotes 11 and 12, ibid.
 2. Cf. Art. 40, par. (2) of the EEC-Treaty.
 3. Art. 189, par. 3, of the Treaty.
 4. Principally they are the same institution as the "general rules" (Rahmenvorschriften) in the German constitution. See Art. 75 of the Grundgesetz of the Federal Republic of Germany. So also Ophüls, Quellen und Aufbau, NJW, p. 1700 footnote 21. According to the European Court of Justice, legal case 9/70, decision of October 6, 1970, Die öffentliche Verwaltung, 1971, pp. 310-312, directives sometimes even can have effect directly in favour of the people.

There are also other means of action apart from the account in Article 189, but which have an impact on the issue of Community legislation. These are amendments of the EEC-Treaty; the conclusion by the Community of its own international treaties; and the passing of the budget. It is obvious that the conclusion of international treaties by the Community and the amendment of the EEC-Treaty both change the general law, because they establish new rights and obligations with regard to the Community. But the same is also true with regard to the establishment of the Community budget: it authorizes expenditures which otherwise would be without a legal basis; and it fixes the amounts of the contributions of the member states to the Community budget, creating obligations of the states and giving respective claims to the Community. To be sure, the relative p r o p o r t i o n which each member state has to pay is already established by the Treaty itself; ¹ however, the absolute amount of the contribution is fixed only by the establishment of the amount of the budget on which that proportion is applied.

Of these means by which general rules of law can be established in the Community, it is only the regulations through which the EEC operates directly upon the people. Nevertheless it seems expedient not to exclude from consideration the directives, Treaty amendments, international Community treaties, and the budget. Such an exclusion would be artificial in the face of the fact that the Treaty lacks a clear overall restriction to particular forms of activities where it grants powers of action. From the provisions granting such powers too often one cannot foresee what form of action the respective organs will take, in particular, whether they will pass regulations or directives. So, for instance, Art. 49 gives the Council the power to put into effect, by means of "directives or regulations", the freedom of movement of workers. But much more, all the means mentioned are closely related to each other in that all of them establish general rules of law in the Community.

Activities of the European Parliament in any of these forms of action therefore would be indications generally of the stage which the Parliament has achieved in development towards becoming a legislative organ, even though not all of them can be called legislation in the original sense of that word. Particularly, it was the control over the budget which representative organs achieved first in the development of democratic parliamentarism. The same may very well become true with the European Parliament, as it is its control over the Community budget which has become the most disputed item with regard to its powers.

1. Art. 200 of the Treaty.

bb.

The Role of the European Parliament in the
Legislative Process

To be sure, the power to enact law in the Community is given to the Council of Ministers in the first place. The role of the European Parliament in the process of law enactment is restricted mostly to deliberations and recommendations.¹ However, although generally the final decision rests with the Council, in many fields the Council is not legally in the position to pass legislation without prior consultation with the European Parliament.

This is true, again to give examples, both with the mentioned "rules" by which to prevent discrimination on reasons of nationality; and with the regulations on the common agricultural policy.² Also an amendment of the timetable for the elimination of the internal customs duties of the Community, established by the Treaty,³ could not be passed by the Council without consultation with the European Parliament in advance.⁴ This seems especially important since this amendment is in effect, though not in form, an amendment of the Treaty. The prerequisite of advance consultation furthermore, is established with regard to another act which in effect also means a Treaty amendment. Insofar as the Treaty has not provided for powers of action necessary for the achievement of its aims, the Council may enact appropriate legislation - after consultation with the European Parliament (Art. 235.) And to quote further examples, consultation with the European Parliament was required before the passing of the statute of service for officials and "the conditions of employment for other employees of the Community".⁵ Advance consultation is also required with regard to

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1. Art. 137 reads: "The Assembly ... shall exercise the powers of deliberations and of control which are conferred upon it by this Treaty".
 2. Art. 7, par. 2; and 43, par. (2).
 3. Art. 14, par. 7.
 4. Art. 14, par. 2 and 3.
 5. Art. 212

association agreements with third states;¹ and for regular Treaty amendments in which, however, the Council itself has only the right of participation while the right of decision is reserved directly to the member states.²

However in other fields, activities of the Council, which in their nature are very close to legislation, do not require the cooperation of the European Parliament at all, even in fields of considerable importance. Thus the Treaty did not provide in any way for the Parliament to participate in the confirmation by the Council that the objectives of the first stage of the transition period had in fact been achieved.³ This confirmation, however, was a prerequisite for the transition of the Community to the second stage; and that transition, in turn, had the legal consequence that eighteen months later internal customs duties were reduced automatically by at least ten per cent⁴. Moreover, the European Parliament did not participate in the decision of the Council about the extension or curtailment of the second and third stages of the transition period⁵; and the Council may also grant exceptions from the common external customs tariff to member states without any cooperation by the Parliament.⁶

1. Art. 238.

2. Art. 236. For further examples of advance consultation with the European Parliament see Ernst Wohlfahrt in Wohlfahrt-Everling-Glaesner-Sprung, Die Europaeische Wirtschaftsgemeinschaft, pp. 431 f., note 2 to Art. 137; Lindberg, op.cit., appendix A on pp. 311 f.

3. Art. 8, par. 3.

4. Art. 14, par. (2), lit. b, and par. (3).

5. Art. 8, par. 5.

6. Art. 28. For further examples see Ernst Wohlfahrt in Wohlfahrt-Everling-Glaesner-Sprung, op.cit., pp. 431 f., note 2 to Art. 137.

The powers of the European Parliament are somewhat stronger with regard to the procedure for establishing the annual budget than in the rest of the legislative process. Over a period of time, however, that process has seen some changes.

In the Coal and Steel Community the budget was established by the so-called Committee of Presidents.

In this Committee sat the Presidents of the four main Community organs: the Common Assembly, later the European Parliament; the European Court of Justice; the High Authority; and the Council. This Committee decided on the adoption of the budget by unanimous vote. That meant, the budget could not be adopted against the votes of the Presidents of the three genuine Community organs - Parliament, the Court and the High Authority.¹

The budget procedure peculiar to the ECSC was replaced by Art. 21 of the merger agreement² which came into force on July 1, 1967. Since then the system already in force for the EEC and Euratom since 1958 has applied to all three Communities. In this later procedure a preliminary draft budget is compiled by the Commission, from which the draft budget evolves through decision by the Council. The European Parliament may propose amendments to this draft budget within one month. If it fails to do so, or if it approves the draft, the budget shall be considered as adopted. Proposed amendments can be rejected by the Council which accordingly has the final decision on the adoption of the budget.³

The budget procedure has been changed again by the "Treaty Amending Certain Budgetary Provisions in the Treaties Establishing the European Communities and in the Treaty Establishing a Single Council and a Single Commission of the European Communities" of April 22, 1970, which came into force on

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1. The stipulations on the budget procedure in the ECSC were contained in Art. 78, par. 3, old version, of the ECSC-Treaty. On the procedure cf. P.H.J.M. Houben, op. cit. (note 2 on p. 32, supra) p. 59.
 2. See footnote 1 on p. 2.
 3. Art. 203, especially par. (2) to (4), of the EEC-Treaty before its amendment in 1970/71.
 4. AB1. 1971, No. L 2, pp. 1-11; for the coming in force see p. 12.

January 1, 1971.¹ This treaty is related to a resolution of the Council of April 21, 1970, providing for the Communities to raise their own revenues.² According to the resolution all levies on imports of agricultural products from third countries go directly into the Community budget, beginning in 1971. Duties on industrial imports according to the terms of the common customs tariff will also be transferred gradually to the Community; they will go fully into the Community budget beginning in 1975, while 10 per cent will be refunded to the member states, because they will be collecting the duties. By 1975 the Community will also participate in the value added tax, but may not claim more than 1 per cent of it.³

In this own-revenue-system the European Parliament is given some more participation in the decision on the budget than it used to have. The changes with regard to the budget procedure for the period up to 1975 are only technical. Commencing that year the European Parliament, however, will have the final decision on the administrative budget. That is to say, the Parliament will have the final say on the amounts which may be spent for Community services; that is the Community organs and their staffs. With the rest of the budget the system will stay roughly the same as at present.

Even the new powers to be given to the Parliament in 1975 will be very restricted. The administrative budget presently amounts to only about three to four per cent of the whole budget,⁴ while most of the revenues are spent on

1. ABl. 1971, No. L 2, pp. 1-11; for the coming in force see p. 12.

2. ABl. 1970, No. L. 94, pp. 19-22.

3. For a description of this system cf. Rudolf Morawitz, Die Eigenen Mittel der Gemeinschaft, 4 Europarecht 1970 pp. 237 - 240, passim. Morawitz points also to the fact that the direct revenue system gets full application only in 1978, while up to then there will still be a system of financial adjustment between the member states.

4. Andreas Sattler, Die Entwicklung der Europäischen Gemeinschaften von ihrer Gründung bis zum Ende der EWG-Übergangszeit, Jahrbuch des Öffentlichen Rechts der Gegenwart, 1970, p. 126, reports that the other expenditures of the budget amount to ninety seven per cent. According to personal information the administrative budget would make about four per cent of the whole budget.

the agricultural policies, with lesser but still important sums devoted to social retraining, development aid etc. Even with regard to the administrative budget, however, the European Parliament will be restricted by limits on increases in the amount of the budget, the limits to be fixed by the Commission.

The strongest power given to the European Parliament is its right to force the resignation of the Commission by a two thirds majority vote on a motion of censure.¹ In the context of federal features however the main impact of this power is its importance for the position of the Commission as executive of the Community; but this power is not related to the legislative powers proper, although it is normally held by the legislature in a parliamentary democracy. Therefore, the power of the European Parliament to force the resignation of the Commission will be examined in the context of the Commission.

cc.

Moves to Improve the Legislative Powers
of the European Parliament

Plans and moves to increase the legislative function of the European Parliament started actually before its establishment. It is interesting to note that, following the well-known pattern of parliamentary development, most proposals were essentially concerned to increase Parliamentary control of the budget.

Already the report from April 21, 1956, by the heads of the national delegations to the Intergovernmental Committee (Spaak-Committee), which had been set up at the Messina-Conference almost one year earlier for the working out of the EEC-Treaty and the Euratom-Treaty, had recommended that the Parliament should have the powers either to adopt the several draft budgets of the different Community organs, or to reject them and have new proposals presented.² Referring to this report the Common Assembly of the European Coal and Steel Community resolved only a few weeks later in

1. Art. 144 of the EEC-Treaty

2. See Regierungsausschuss, eingesetzt von der Konferenz von Messina, Bericht der Delegationsleiter an die Aussenminister, p. 29.

somewhat general terms "that an effective democratic control must be exercised" by the parliament¹ to be created. However, the governments of the "Six" obviously were afraid of bestowing an institution not under their full control with legislative powers.² The result was that the powers of the European Parliament lagged behind the powers of the Common Assembly of the ECSC in several matters. So, for instance, the European Parliament has only the right of being c o n s u l t e d before the Council bestows new powers on an organ of the Common Market.³ On the other hand the conferring of additional powers upon the High Authority of the ECSC - now the common Commission in so far as it refers to the ECSC-Treaty - depends on c o n f i r m a t i o n by the Parliament with a three quarters majority.

When the European Parliament was established, the bulk of its members joined those pushing towards more legislative powers for it in order to transform it gradually into a federal parliament.⁵ In May 1960 the European Parliament emphasized "the urgent need for an extension of its competences", especially as regards "a certain legislative power" as well as political control and control over the budget.⁶ About three years later the European Parliament defined its attitude in a new resolution. According to this it wanted a say in the appointment of all members to the two Commissions and to the High Authority of the Coal and Steel Community, as well as in the

1. Resolution of May 11, 1956, in Europa: Dokumente zur Frage der Europäischen Einigung, vol. 3, p. 1245 to 1248.
Translation into English by this author.

2. This is generally noted by Hans A. Schmitt, The Path to European Union, p. 128.

3. Art. 235 of the EEC-Treaty.

4. Art. 95, par. 3 and 4, of the ECSC-Treaty.

5. Lindberg, op. cit., p. 88.

6. Resolution of May 17, 1960, in Europa: Dokumente ..., vol. 3, p. 1401. Translation into English by this author.

appointment of the judges to the European Court of Justice; the consultations between the Council and the Parliament should be extended to important Community issues on which presently there is no legal obligation for it to be consulted.

Furthermore, only by means of unanimous vote should the Council be permitted a deviation from parliamentary opinions adopted by a two thirds majority:

the coming into force of international agreements of the Community should be dependent upon ratification by the Parliament; and the budget should be subject to adoption by the Parliament as soon as it is covered from the Community's own resources.¹

In a later resolution of May 1964, the Parliament proposed that deviations from its budget proposals should be possible only by means of unanimous vote in the Council in matters covered by Community revenues, and by means of qualified majority vote in other matters.²

The postulates for an extension of the powers of the European Parliament were frequently endorsed by the Commission,³ which was concerned especially with having control over the budget bestowed upon the Parliament. The most important proposals on this issue were submitted to the Council by the Commission on March 31, 1965, as contained in the then new plan for common market organizations in agricultural products.⁴

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1. Resolution of June 27, 1963, as reported in International Organization, vol. 18, summer 1964, in chapter: Summary of Activities, page 636; and in European Economic Community, Commission, Seventh General Report ..., p. 298. There is a slight divergence between both accounts as to additional consultations. That part of the resolution referring to budgetary powers of the European Parliament is reprinted in: Die Eigenmittel der Europäischen Gemeinschaften und die Haushaltsbefugnisse des Europäischen Parlaments: Dokumentensammlung, p. 60.
 2. Resolution of May 12, 1964, in Die Eigenmittel ..., p. 70-72. See No. 1, 6 of the resolution.
 3. European Economic Community, Commission, Seventh General Report ..., p. 295.
 4. Vorschläge der EWG-Kommission an den Rat Betreffend die Finanzierung der Gemeinsamen Agrarpolitik, die eigenen Einnahmen der Europäischen Wirtschaftsgemeinschaft sowie die Stärkung der Befugnisse des Europäischen Parlaments, reprinted in Die Eigenmittel der Europäischen Gemeinschaften ..., pp. 76-86. For the proposals as amended by proposals of the European Parliament, see also AB1., 1965, No. 96, pp. 1663 to 1669.

The development leading to the submission of the said plan was as follows: on January 14, 1962, the Council had adopted a plan for common market organizations in different agricultural products, covering the time from July 1962 until June 30, 1965. The system of financing these common organizations was embedded in the Council regulation No. 25 of April 4, 1962.¹ This regulation established the European Agricultural Guidance and Guarantee Fund. As its name indicates, it has two divisions. The function of the guarantee division is to buy surplus farm products in the Community and to pay subsidies for exports of farm products to third countries. The function of the guidance division is to aid in the development of the agricultural structure of the member states. The share of the Fund in the expenditures for export subsidies and for intervention purchases had been one sixth for the period running from summer 1962 to summer 1963. The remainder was to be paid by the respective member state. The Fund's share was increasing by one additional sixth each year. In 1964/65 eighty per cent of the needs of the Fund were still raised by contributions of the member states according to a fixed percentage rate, while the last twenty per cent had to be paid by the states according to the relation of their respective shares in agricultural imports from outside countries. The January 1962 agreement provided also for levies on agricultural imports from outside countries, the amount of the levies being roughly equivalent to the difference between the import price and the Community price. These levies were paid into the national budgets, but were supposed later to be paid directly into the Fund to replace the national contributions.²

As the main part of the arrangement relevant to this subject was to be valid only for the time until June 30, 1965, the Commission submitted the said proposals of March 1965 to cover the rest of the transition period. According to these proposals all levies on agricultural imports should have gone into the Fund commencing with July 1, 1967, and since then all expenditures for agricultural export subsidies and for surplus purchases should be paid from the Fund.

1. ABJ, 1962, p. 991.

2. Regulation No. 25; cf. also Facts on File, 1965, p. 251. f..

The plan was linked to a proposal to have a percentage of all customs duties on industrial imports from non-member states paid directly into the Community budget, beginning on July 1, 1967; and by 1972 the whole amount of all such duties should have been paid directly to the Community. By that time also all contributions of the member states to the Community budget were to be substituted by the Community's own revenues.¹

Such a plan raises the question of parliamentary control over the Community budget, because direct revenues of the Community would not be subject to control by the national parliaments. Accordingly the Commission's proposal envisaged for the European Parliament the right to amend the draft budget. Such amendment would have been subject to rejection only by concurring resolution of the Commission and the Council, with four members of the latter voting in favour of the resolution. Alternatively rejection could have been effected by a Council resolution taken by five members out of the six, not requiring the concurrence of the Commission.²

As the then French Foreign Minister, Couve de Murville, declared before the French National Assembly in June 1965, the French government had found this proposal unacceptable, due to the independent powers for the European Parliament which it involved.³ Since no agreement could be achieved in the Council meeting of June 28 to 30, 1965, France boycotted the meetings from early July 1965 up to January 1966.

It seems important that the Commission submitted, a few weeks after the adjournment of the end-June Council meeting, new proposals to the member governments in which it deferred its quest for the introduction of the Community's own revenues to the beginning of 1970, and in which it made no proposal on budgetary control by the European Parliament.⁴

1. Cf. the proposals of March 31, 1965, note 4, p. 53, supra; see especially the opinion given for the proposals. Cf. also Facts on File 1965, p. 252.

2. Ibid. Cf. especially proposal No. III, under 4.

3. For Excerpts of the speech of Mr. Couve de Murville see Facts on File, 1965, p. 252. f..

4. The new proposals were submitted to the six member governments on July 22 and presented to the Council in its session from July 26; Facts on File 1965, p. 275. For a reprint of the parts on own revenues and on the European Parliament see Die Eigenmittel der Europäischen Gemeinschaften ..., p. 101.

When in 1966, after the crisis, the Council came to new decisions on agricultural policies, it disapproved of direct revenues for the Community. All needs of the Agricultural Fund were to be contributed by the member states, although the proportional contributions of the latter were to be related to their respective levies on agricultural imports from third countries. Needs exceeding ninety per cent of all levies in the Community had to be contributed according to a rigid proportion fixed by regulation.¹

In July 1969 the European Parliament again demanded the introduction of revenues proper to the Community. At the same time the Parliament insisted that such a measure must be linked to full control over the budget by Parliament². Later the same month the Commission submitted to the Council a new proposal on revenues proper to the Community. In a statement added to this proposal the Commission declared that the budgetary powers of the European Parliament should be extended at the same time as the adoption of the new proposal, while beginning in 1974 the Parliament's legislative powers should also be increased. Nevertheless the Commission did not provide for either power in the proposal itself.³ The European Parliament therefore resolved once more, in October 1969, that the Community's own revenues must be linked to their control by Parliament; and that such control would be given only if the budget could not

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1. Art. 11 of regulation No. 130/66/EEC of September 21, 1966, ABl. 1966, pp. 2965-2969.
 2. Resolution of July 2, 1969, reprinted in Die Eigenmittel ..., pp. 128 f.. See particularly Nos. 3 and 7 of the resolution.
 3. Cf. Vorschläge der Kommission der Europäischen Gemeinschaften an den Rat of July 16, 1969, including the statement and two proposals, in Europäisches Parlament, Sitzungsdokumente 1969 - 1970, Document No. 99; cf. also report by Mr. Furler to the European Parliament on the proposals, ibid., Document No. 102.

be adopted against the will of the Parliament.¹ Following this resolution the Commission submitted to the Council additional proposals providing for genuine budgetary powers by the Parliament.²

According to the additional proposals the draft budget - no more only a preliminary draft budget - would have had to be compiled by the Commission and submitted to the European Parliament and the Council at the same time. Within a month the former could have passed amendments. During the first phase in this new procedure, there should have been a gradual introduction of revenues proper to the Community. The Council would have had a veto against the Parliament's amendments: in case of disagreement between the two organs the issue would have had to be referred to a conciliatory committee, composed of the Presidents of the four main Community organs (Parliament, Council, Commission and Court). If no agreement had been achieved through mediation by that committee, the Council could have rejected the Parliament's amendments by means of a unanimous vote, ^{or} if the Commission had concurred in the Council's opinion by means of a majority of four Council members. In a second phase, starting in 1974 in which all Community expenditures were to be covered exclusively by its own revenues, the final decision was to rest with the Parliament. In this phase the Council could only have proposed changes to the amendments of the European Parliament. In the absence of any agreement achieved through the conciliatory committee, the Parliament could have rejected the Council's proposals by a two third's majority vote, including half the members of the Parliament.

Against these proposals, the Treaty later concluded on April 22, 1970, reserves the budgetary decision to the Council. The Parliament holds a position a little stronger than it held before, but only with regard to the administrative budget. In the meeting of April 22, 1970, the Council conceded, for the rest, only a promise to

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1. Resolution from October 7, 1969, Die Eigenmittel ..., p. 135.
 2. Ergänzungsvorschläge der Kommission of October 30, 1969, Die Eigenmittel ..., pp. 135-138.

examine later proposals which the Commission had said it would submit within two years, on budgetary and legislative powers for the European Parliament.¹ The latter had passed, in the meantime, several resolutions endorsing its claim for full budgetary powers.² The European Commission had asked in the fall of 1971 reputed political scientists and constitutional lawyers in the Community (Vedel Commission) to help in the preparation of the new proposals. A draft is due to be submitted to the European Commission by April 1972.

So it may be concluded that the member states did not agree to genuine budgetary powers for the European Parliament, but gave it only such a low degree of power that it almost looks like deception of the public. One has to wait for the proposals and opinions of the Vedel Commission, and also to see whether the next summit meeting of the EEC due in October this year will bring about a change. Scepticism seems appropriate.

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1. This statement is not reprinted with the Treaty of April 22, 1970, in ABL, 1971, No. L 2. But it is reprinted as an annex to the Treaty in the official print for the German Bundestag; Verhandlungen des Deutschen Bundestages, Anlagen zu den Stenographischen Berichten, Drucksache VI/879; see No. IV on p. 34. The Declaration is also found in Die Eigenmittel ..., p. 174.
 2. Cf. resolutions of December 10, 1969; February 3; and March 11, 1970; and Aide-memoire by President Scelba of the European Parliament to the Council of April 19, 1970, in Die Eigenmittel ..., pp. 147 - 149; 163 f.; 167 f.; and 172 f..

d.

Summary and Evaluation of the Criteria Established Before for a Federal

Legislative Body with Regard to the European Parliament

The investigation so far has shown that the European Parliament meets the criteria of a federal legislature only to a very limited extent. According to the established criteria the federal parliament should represent the people of the whole union, and accordingly should evolve from direct elections by the very people which it represents; the parliament as a whole, and its individual members, should be independent of the constituent governments; and it should hold its own legislative powers to operate directly on the people. A second chamber, in which the constituent states are represented, may participate in federal legislation, but such chamber may not hold the main powers of legislation.

Of these criteria it is that of independence from the constituent governments which the European Parliament meets most. This refers primarily to the independence of the individual member, which in consequence bestows independence on the European Parliament as a body. Independence of the individual member is due, on the one hand, to the immunities and privileges bestowed on the members, which come close to the rights normally bestowed on national parliamentarians. On the other hand the degree of independence actually achieved results from the practice that it is the party groups in domestic parliaments, not the parliaments themselves, which nominate the European delegates. Accordingly dependence on the national level, as far as it exists, is primarily on the parties. Such dependence would be maintained even in case of direct elections throughout the Community, because even in unitarian states it is the regional and local party organisations which act as nominating agents. The difference from the present situation would be, of course, that in the case of direct elections in the Community dependence would not be on the parliamentary party groups, but on the general national party organizations which would act as nominating agents.

Additional means of ensuring a high degree of independence from the national governments are the absence of vote transfer, the fact that the members of the European Parliament do not have deputies, and the fact that no members may be appointed by the national executives. All this is in contrast, for example, to the situation in the Consultative Assembly of the Council of Europe. Furthermore, instructions to the European delegates are not allowed. And even if they were, the only way of issuing them would be through the parliamentary party groups, not

through the domestic parliaments. Finally, independence from the national parliaments is emphasized by the fact that the European Parliament also has organized itself according to party groupings, across national lines.

Full independence, however, would be achieved only by direct elections throughout the Community. Direct elections have been resisted by France, and therefore there has been no decision by the Council, although the European Parliament presented a proposal on direct elections as long ago as 1960, and has again pressed for direct elections several times since 1969. Also attempts to introduce direct elections unilaterally at national level have failed so far in all member states. Generally it has been the opposition parties in the national parliaments which have presented draft legislation on unilateral direct elections, while the parties in power have rejected them. This has even led on occasion to the party in power using arguments against direct elections which formerly had been used against them when they were in opposition. Up to early 1969 a reasonable explanation of this phenomenon might have been, to some degree at least, the fear of what President de Gaulle would have done if unilateral direct elections had been introduced. Since that time the only reason for the parties in power to reject direct elections seems to be their fear of loss of influence: the present French Government has hinted at its indifference to the question of unilateral direct elections.

So in the Community direct representation does not exist. But there is indirect representation, because the members of the European Parliament must be members of their respective national parliaments. They are voted into the latter by national electorates, save in some instances of appointed or co-opted members of second chambers.

As regards the legislative powers for operating directly on the people, these are given not to the European Parliament, but to the Council which is the body representing the national executives. While in a federation such a body may participate in legislation, it is in clear contradiction to the federal principle for it alone to hold almost all the legislative powers. It is for this reason that it is necessary to state that the European Parliament is still only in the very early stages of development into a legislative body which might be compared to a federal legislature.

This conclusion must be drawn because the European Parliament only has the right to be consulted about proposals already submitted by the Commission to the Council. The European Parliament may give its opinion on such proposals, and it has actually proposed amendments to formal law proposals. However, the Parliament cannot force legislation which it deems expedient, nor can it prevent legislation of which it disapproves. There even exist fields under the jurisdiction of the Community in which the Council may pass law without previously consulting the European Parliament. The latter's powers are somewhat stronger in the budget procedure. However, even in that field the final decision rests with the Council, while the Parliament cannot force or reject a budget; it has not even the powers to make the passing of the budget dependent on the Parliament agreeing^{with} the Council. The only progress which has been achieved is that commencing with 1975 the European Parliament itself will have the right to enact that part of the budget which provides for the means necessary for Community services (the administrative budget). However, besides the fact that this covers only about three to four per cent of the whole budget, even in this field there are actual restrictions on the Parliament's power of discretion. According to these the Parliament may not go beyond certain limits fixed by the Commission; and on the other hand, it must meet the financial requirements of maintaining an essential Community staff.

From all this it may be concluded that the European Parliament bears in it the seeds of becoming, one day, the representative chamber in a federal parliament. However, the features of such a chamber are present in the European Parliament only to a limited extent, and they have hardly been allowed to develop significantly. So it really needs great improvements to make the European Parliament into what may be regarded as a federal legislative body.

2.

The Economic and Social Committee and the Interest-Groups in the Legislative Process

Apart from the European Parliament no other body in the Community can lay any real claim to represent the European people. But many constitutions provide that the representative body is not the only legislative chamber. Thus one cannot terminate an analysis of the stage reached in a federalizing process, simply by establishing that the other criteria of a federal legislature are not present in the relevant representative organ, or as the case may be, in the body that is supposed to develop into one. There is a significant difference between, on the one hand, the simple affirmation that such a body has no legislative powers, and, on the other hand, a situation which permits one to add that these same powers are vested in another organ. In the latter case, the federalizing process is further developed, even if the characteristic of representation of the people is missing.

It has already been said that in the Community the main law making powers are vested in the Council. But before investigating the latter's role as a legislative body, it seems expedient to turn to the Economic and Social Committee. The inclusion of this body is suggested because in it there seem to be represented economic and social interests; and a constitution may quite well provide for such additional chamber in a legislature.

Such a constitutional position as a ~~future~~ legislative chamber is suggested for the Economic and Social Committee by Gerda Zellentin. In her conclusion she already refers to the Committee first as an Economic Parliament, and shortly afterwards as an Economic Council - characterized by "direct representation of the great social associations", themselves directly representing the people. So the Committee would represent the "economic people" in a system of "représentation à second degré". Institutionally the Committee and the European Parliament would be on the same level. Moreover, the Economic and Social Committee would have direct participation in Community legislation, thus having much greater political influence than the European Parliament, and also bringing about more democratic features in the Community than the Parliament. The Committee would be going to constitute the "fourth power". Its role necessarily would increase as long as no directly elected parliament stood against it, particularly because of the constant transfer of national powers to the Community, without the preservation of parliamentary control. This development also would be helped by the coming enlargement of the Community, especially because of the great importance of British economic associations. ¹

1. Gerda Zellentin, Der Wirtschafts- und Sozialausschuss der EWG und Euratom: Interessenrepräsentation auf übernationaler Ebene, pp. 189-192. Today the situation, as regards the regional extension of the Community, is the same as when Zellentin wrote her book, however being more advanced.

Zellentin's judgement is based on a great overestimation of the Economic and Social Committee's structure and role. The Committee has much less representative qualification than the European Parliament. The members of the latter at least generally emerge from direct elections to their national parliaments, in which accordingly they represent the national people. So there is indirect representation of the people in the European Parliament, the mediator being the national parliaments.

In contrast, the members of the Committee represent only economic and social associations; they cannot even represent all such groups. It is true that there shall be fair representation "of the various categories of economic and social life, in particular representatives of producers, agriculturists, transport operators, workers, merchants, artisans, the liberal professions, and of the general interest" (Art. 193, Par. 2, of the Treaty). But there are much fewer seats available in the Committee than there are associations in principle eligible to them. So, for instance, in the Federal Republic of Germany more than fifty top organizations presented claims for representation when the Committee was established, while there were only 24 seats for German associations. The overall picture is the same throughout the Community. It rests with the national executives to determine which associations shall be represented. In the next stage, the candidates of the respective associations are not chosen originally in elections within those associations, but are nominated by their chairmen or top officers. Again in the next stage the national executives reserve the right to choose among those nominated, and to present their own nominees. Then the formal decision is taken by the European Council of Ministers by unanimous vote. In fact each national government presents a list containing twice as many candidates as there are seats apportioned to it (Art. 195, par. (1) of the Treaty). Among those candidates, according to an agreement of the member states, the Council appoints the candidates nominated by each member state as their first choice.¹ Because of this system it cannot be said that representation of all eligible associations exists - not to speak of representation of the people -, nor could one say that each member of the Committee represents an association. Nor could one say that those members of the Committee representing associations had a democratic mandate even only for their association. Therefore, the Economic and Social Committee is not a representative body at all.

1. Cf. the description by Gerda Zellentin, op. cit., pp. 35 - 68, including the system of selection in all six member states, and on Community level.

As regards the issue of independence, the EEC-Treaty stipulates that the Committee members shall be appointed in their personal capacity, and that they shall not be bound to instruction. Actually, there is little independence for the members. They are members of the great national associations which nominate them to serve the formers' interests in the Committee. If they were to resist their instructions, there would be no question of re-nomination after the termination of their four years' membership of the Committee. However, while such dependence is in contradiction to the requirements imposed on the representative body of a federal parliament, it does not seem contrary to the function of a body as economic and social council, that is as a second or third chamber. Nevertheless, one must note that the described system of appointment also brings about some dependence on the national executives, *not only on the associations represented.*

The main element in Gerda Zellentin's over-estimation of the Committee concerns her judgement of its position. Constitutionally the Committee is not at the same level as the European Parliament. It is not an organ of the Community according to the enumeration in Art. 4, par. 1 of the Treaty, which lists only the European Parliament, the Council of Ministers, the Commission and the Court of Justice.¹ Hence, the Committee is not called a council but a committee. But what is more important, the Committee participates much less in the process of law enactment in the Community than the European Parliament. It shall be consulted by the Council in several fields with regard to the establishment of "programs" and of general policies,² and with regard to the passing of regulations or directives. The actual number of instances where advance consultation for the purpose of the enactment of regulations or directives is provided for,

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1. So also Ernst Wohlfahrt in Wohlfahrt-Everling-Glaesner-Sprung, Die Europäische Wirtschaftsgemeinschaft, preliminary remark to Art. 137, note 10, on p. 427.
 2. See, for instance, Articles 43, par. (2); 54, par. (1); 63, par. (1); and 126, lit. b, on new tasks for the European Social Fund.

however, is smaller than the number for the European Parliament¹. In addition, the Committee has no right to initiate a bill² and, also in contrast to the position of the European Parliament, it holds no powers of control over the European Commission. Nor, unlike the Parliament, does it have powers to hear the Council or to present questions to it. Therefore, the Committee meets much less the criteria of a legislative chamber than the European Parliament.³

1. For such consultation of the Committee see Art. 54, par. (2); 63, par. (2); 100; and 128. For consultation in instances where the form of law enactment is not spelled out see Art. 75, par. (1); 79, par. (3); 121; 126, lit. a and b; and 127. Art. 43, par. (2) provides for the consultation of the Committee by the Commission before the latter submits proposals to the Council for regulations or directives.
2. At another place Zellentin reports of intentions of the Committee to achieve the right of legislative initiative. Those have not been successful. Gerda Zellentin, *Willensbildung und Interessenrepräsentation im Wirtschafts- und Sozialausschuss der Europäischen Gemeinschaften, in Formen der Willensbildung in den Europäischen Organisationen*, p. 109.
3. So also Karlheinz Neunreither, *Wirtschaftsverbände im Prozess der Europäischen Integration, in Politische Dimensionen der Europäischen Gemeinschaftsbildung*, pp. 419-421. The biased judgement of Zellentin seems to stem from the fact that she relied very much on information from the members of the Committee; this is proven throughout her book *Der Wirtschafts- und Sozialausschuss ...*; see also her later paper *Willensbildung und Interessenrepräsentation ...*, where she repeatedly quotes the Committee as source of information, pp. 111-113 and 125. The members of the Committee, however, obviously like to think of the Committee as an economic parliament; see Neunreither, *op. cit.*, p. 421.

The Council seems to disregard the Committee's resolutions, if it deems it expedient, as it does with the resolutions of the European Parliament. As an example, reference may be made to the fact that in the fall of 1969 the Committee also gave an opinion on the proposal of the European Commission on budgetary powers for the European Parliament. The Committee insisted that the introduction of the Community's own revenues should be linked to the introduction of budgetary powers for the European Parliament from 1971 on; furthermore the Community's own revenues should be linked to genuine legislative powers of the Parliament; and the revenues should be linked to the direct election of the European Parliament.¹ As has been mentioned earlier, the Treaty from April 22, 1970 later conceded only limited budgetary powers to the European Parliament, and only as from January 1, 1975. Direct elections are not being introduced, and no legislative powers are being conferred on the European Parliament.

The Council may in fact easily disregard the Committee's advice, because in practice there is established a very elaborate system of acquiring advice directly from the great economic and social associations. This is done long before an official proposal of the European Commission is transferred to the Committee for an opinion. Most national associations have joined in European unions. These have their representatives in Brussels. The latter have established very close contacts with the members of the European Commission and, what seems more important, with its staff. Those contacts in turn are also sought by the respective officials themselves who often participate in formal and informal meetings of the different unions of associations. From the officials, the representatives of the unions get early notice of the preparation by the Commission of new proposals on regulations and directives to be passed by the Council. Therefore the representatives can, and do, present the advice of their unions in good time, often including their own proposals. Many formal and informal discussions take place before an official proposal is set up by the European Commission. Such official proposals often betray the unions' influence. In turn, the Commission often succeeds in asserting its influence on the unions. As regards the unions of agricultural

1. Cf. the Committee's resolution of November 26, 1969, in ABL. 1969, No. C. 19, pp. 23 - 28; here in No. VI, on p. 27.

associations, many of them have even been established under the influence of Mr. Mansholt, the Commissioner for agriculture. Later they have, in turn, often backed Mansholt against the Council. The closest contact seems to exist between the two directorates general of the Commission competent for social affairs and for agriculture, on the one hand, and the respective unions on the other, including trade unions and employers' associations.¹

The European unions of national economic and social associations have only little direct influence on the C o u n c i l, as the latter keeps its consultations secret. However, after the presentation of an official proposal by the Commission the deliberations are referred, for the purpose of preparing a Council decision, to committees composed of officials from the national ministries. Their consultations can be influenced through the national executives. For that purpose the "lobby" now is referred back to the national level. This means, that it is no more the European unions of associations, but the national associations themselves who take up action bringing influence to bear. It does happen that at this level the influence is not consistent with the influence the European unions had been exerting on the Commission. The national associations may follow their divergent goals which they could not achieve in their respective union.²

This system of incorporating the "lobby" directly in the legislative process explains why there is not much place left for the Economic and Social Committee for asserting influence. When the Commission's proposal is presented for the final vote in the Council, common agreement has generally been

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1. For a detailed description cf. Karlheinz Neunreither, op. cit., pp. 410-415 and 426 f.. A brief description is found in Erich Wirsing, Aufgaben und Stellung der Kommission in der Verfassungsstruktur der EWG, in Formen der Willensbildung in den Europäischen Organisationen, pp. 54 and 55.
 2. For additional information on what influence the different national associations, particularly in Belgium, France and Germany, tried to exercise in the issue of the Community crisis 1965/66, cf. Karlheinz Neunreither, op. cit., pp. 430 - 436.

achieved by the national officials; this has been under the influence of pressure groups at the national level, and under the earlier influence of the European unions on the Commission.¹

From all of this it must be concluded, against Zellentin's contentions, that the Economic and Social Committee bears far fewer seeds of a coming federal parliament of the European Communities than the European Parliament. Besides the fact that the Committee might be designed to become, some time in the future, only a chamber of the representatives of economic and social interests, but not a representative body, it also presently holds even less powers in the process of law enactment in the Community than the European Parliament.

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1. Cf. Karlheinz Neunreither, op. cit., pp. 415 f., 420 f., 424 and 426. Fro the general attitude towards further European integration taken by the different economic and social circles in the single member states and for the general line of influence exerted by them on the national governments cf. Political Forces in the WEU Countries and European Questions, Report Submitted on Behalf of the General Affaires Committee by Mr. Kahn-Ackermann to the Western European Assembly, in Assembly of Western European Union, Proceedings, Fourteenth Ordinary Session, Second Part, February 1969, III, Assembly Documents, Document No. 460, on pp. 35 - 37 (Belgium), 43 - 46 (France), 54 - 56 (Germany), 61 f. (Italy), 65 f. (Luxembourg) and p. 70 f. (Netherlands).

3.

The Council of Ministers as Legislative Body:

The Question of Independence

It is obvious that the Council has no representative qualification in the sense of the federal theory, for it is the members of the national executives who sit in the Council. As regards one of the two other criteria for a federal legislature, the answer is in the affirmative: it has already been said that there exists legislation in the Community, and that it is the Council which holds the main legislative powers. The fact that those powers are given to a body not representing the European people, but representing the executives of the constituent states, suggests that the Community's legislation has only reached a low stage in the development of "federal" legislation. A final judgment, however, will be possible only after an investigation of the third criterion for a federal legislature, namely independence from the constituent governments: if it turned out that the legislative powers were held by a body which does not represent the people but the national executives, and which was also fully dependent upon the latter, one would have to say that law enactment in the Community was at the lowest possible stage of legislation, indicating at best simply the very first step from international agreements to legislation.

There is no point in trying to argue that the Council exists independently from the national executives, because by law the Council members are members of the national cabinets (Art. 2 of the merger agreement).

This dependence in its composition upon the national executives implies, that the Council in its activities is also dependent upon the executive branches of the national governments: each Council member, as a delegate from his national executive, is subject to instructions from the latter, which for political reasons he cannot disregard. It is for this reason that a Council member not infrequently gives his affirmative vote only ad referendum to a decision arrived at by compromise during a Council meeting, which means that later, after consultation with his national cabinet, he either confirms or withdraws his vote.¹

1. Cf. the written answer by the Council of January 17, 1969, No. 1, to question No. 248/68 in the European Parliament, ABl. 1969, No. C 14, pp. 12 f..

Nevertheless, there is one essential aspect which needs closer examination. It is the question whether the Council as a whole is dependent on all or only a majority of the national executives. An international conference is more or less equally dependent upon all represented governments at the same time, because of the requirement of unanimity, which gives each party a veto against the conference's resolutions.¹ In contrast, the EEC-Treaty foresees not only the unanimity vote, but the majority vote as well. The following investigation therefore must centre around the majority vote. However, the investigation will apply only to the activities of the Council proper. One must exclude several activities formally or by implication ascribed to the Council, but which correctly are not Council activities. This refers to activities exercised by the "Representatives of the Member States Assembled in the Council", to activities of the Council members under the label of "Representatives of the Member States", and to activities under the label "Conference of the Representatives of the Member States". Under these labels, the Council members meet as an international conference, concluding international agreements which refer to the Community, but which deal with subjects for which the Council has no powers of legislation.² Under the second label the members of the Council agreed upon the provisional headquarters of the Communities,³ while under the third label they appoint the members of the Commission and the judges of the

1. The unanimity requirement is the rule. Exceptions are largely only apparent. The UN and the ILO, for instance, have hardly real decision powers. ILO conventions, for example, are subject to national acceptance or rejection. For more details see Ophüls, *Die Mehrheitsbeschlüsse der Räte in den Europäischen Gemeinschaften*, 1 Europarecht 1966, pp. 199 f..
2. So also the European Commission in its answer of April 17, 1968, to question No. 336 in the European Parliament, ABl. 1968, No. C 38, p. 5. The same opinion has also been stated by the "Report on the Legal Activities of the Member States acting together and on those Legal Activities of the Council which are not provided for in the Constituent Treaties of the Communities", given on behalf of the Legal Committee of the European Parliament by Mr. Burger, Europäisches Parlament, Sitzungsdokumente 1968 - 1969, Document No. 215, March 12, 1969; see p. 9, left. Cf. also Joseph H. Kaiser, *Die im Rat Vereinigten Vertreter der Regierungen der Mitgliedstaaten*, Festschrift für Carl Friedrich Ophüls, p. 117, above, and p. 118, under No. 4. For a list of the rest of the "resolutions" by the "Representatives ..." see ABl., loc.cit.. As important examples see "Resolution" of May 12, 1960, on the Accelerated Realization of the Purposes of the Treaty, ABl. 1960, No. 58, p. 1217; "Resolution" of May 15, 1962, on the Additional Accelerated Realization of the Purposes of the Treaty, ABl. 1962, No. 41, p. 1284. For their qualification as international agreements see Leon N. Lindberg, op.cit., p. 78, and Alting von Geusau, op.cit., p. 133.
3. Beschluss der Vertreter der Regierungen der Mitgliedstaaten über die Vorläufige Unterbringung Bestimmter Organe und Dienststellen der Gemeinschaften, ABl. 1967, No. 152, p. 18.

Court.¹

As international conferences, aiming at common agreement, these activities of course are subject to the unanimity rule. Their exclusion from the majority rule is without relevance to the issue of Community legislation. They are related to the Council only because of the identity of the members who meet in either instance, but they are outside the Council activities proper, which are the subject here.

The impact of the majority vote in the Council proper upon the issue of dependence has a legal side as well as a political one.

a.

The Legal Aspect

Legally the Council is not dependent upon all governments at the same time with regard to a decision which comes under the majority rule. Because the individual delegate has no veto against a majority decision, this decision may be carried in the Council against his vote and against the instructions given to him by his national executive. Therefore, though the Council still needs the consent of a majority of the governments, the majority rule can mean for the Council an important departure from the nature of an international conference. This, of course, would hardly apply if the majority rule referred to only a very small number of unimportant activities, but only if it had an essential impact on the whole range of law enactment by the Council.

Art. 148, par. (1), of the Treaty establishes the principle that Council decisions may be taken by a majority of the Council members where the Treaty does not provide for a different vote. This majority would be carried by four

1. See Art. 167, par. 1, of the EEC-Treaty, and Art. 11 of the merger agreement. For the appointments to the Commission as of July 1, 1967, for example, see ABl. 1967, No. 152, p. 21. For earlier appointments see the list in Joseph H. Kaiser, op.cit., pp. 108-114. Kaiser thinks the "Conference" a particular Community organ which has developed through customary law; see pp. 117 and 124. For a general discussion of the problem of "resolutions" by the "Representatives of the Member States Assembled in the Council" cf. Heinz Wagner, Grundbegriffe des Beschlussrechts der Europäischen Gemeinschaften, pp. 224-241. See also the resolution of the European Parliament of May 8, 1969 ABl. 1969, No. C 63, pp. 18-20, which declares all the three forms mentioned in this paper to be international agreements; see particularly lit. d of the resolution.

out of six votes (simple majority).¹ It applies, for instance, to the enactment of regulations on the free movement of labour.² Other decisions may be taken by qualified majority, which consists of twelve out of seventeen votes. For decisions coming under this last rule, the votes of the member states are weighted. In addition, in matters not proposed by the Commission, this vote must include four countries and therefore cannot be taken against the Benelux countries combined. For yet other decisions, there is the unanimity requirement.³

Actually, a simple majority vote, which would seem to be the general rule, hardly occurs. Almost all Treaty provisions on the different objectives of Community activities establish a particular voting requirement which deviates from the simple majority. At the beginning of the transition period, the requirement of unanimity vote clearly dominated. It is to be found in twelve Treaty provisions giving powers to pass regulations or directives.⁴ In contrast, only two provisions could be traced giving powers for the enactment of regulations or directives by simple majority during the same space of time, that is the beginning of the transition period.⁵ In addition, there were five Treaty provisions authorizing the enactment of directives or regulations which, right from the beginning, required only qualified majority.⁶

However, in most instances in which, at the beginning, unanimity was required for law enactment, the requirement has been changed to a mere qualified majority in the course of the transition period. While this change took place in one instance as early as three years after the coming into force of the Treaty,⁷ further changes occurred in four instances, and partly in a fifth one, just one year later, that is

1. Ernst Wohlfahrth, op.cit., note 2 to Art. 148, p. 447.

2. Art. 49.

3. See Art. 148.

4. For powers to pass directives see Articles 54, par. (2); 56, par. (2); 57, par. (1) and (2); 63, par. (2); 69 in connection with 67; 70, par. (1); 100, par. (1); 101, par. (2); and 112, par. (1), 2. Authorisation for the alternative passing of regulations, directives or even decisions in Art. 43, par. (2), 3 as regards agricultural policies. Authorization for regulations or directives in Art. 87, par. (1), 1 in the field of competition.

5. Art. 49 on free movement of labour, and Art. 213 on titles of the Commission for information.

6. There are four Articles for powers to pass directives in this group: Art. 14, par. (5); Art. 21, par. (1); Art. 103, par. (3); and Art. 108, par. (2). Art. 94 gives powers to pass (so-called executive) regulations with a view to the relationship of national aides and competition.

7. See Art. 87, par. (1), 2.

with the transition to the second stage.¹ In three more instances, and partly in a fourth one, the same change took place with the transition to the third stage.² This finally leaves the unanimity requirement in existence in two cases, and partly in two more, out of the mentioned group of twelve at the beginning of the transition period.

This account includes only those articles of the Treaty which expressly say to what form of law enactment - regulation or directive, or both - they give authorization. There are other articles which leave the choice between several forms of action to the Council.³ Among these, there were, at the beginning of the transition period, in addition to those already mentioned, sixteen Treaty provisions which required a unanimous vote for law enactment by the Council.⁴ Against this, fourteen Treaty provisions in this group could be traced requiring only qualified majority.⁵ In four instances, the unanimity requirement has been altered since to a requirement for a

1. The four cases refer to Articles 54, par. (2); 57, par. (1); 63, par. (2); and 101, par. 2, while the partial change concerns Art. 57, par. (2).
2. These changes concern Articles 43, par. (2), 3; 69 in connection with 67; and 112, par. (1), 2. The partial change concerns Art. 56, par. (2).
3. In addition there is a third group giving powers for executive activities (eg the appointment of public comptrollers; Art. 206, par. (1)); or for Treaty amendments resp. quasi amendments which should be compared to constitutional amendments, but not to normal legislation because they require action also by the constituent members; s. Art. 201, par. (3), on the substitution of the Community's own resources for the contributions of the member states. This third group is not included in this evaluation, but it is in a similar account by Ophüls, *op.cit.*, pp. 212-220, who presents a different figure. Admittedly, a distinction of this third group from the provisions giving powers to law enactment often is difficult. Ophüls also includes both the ECSC-Treaty and the Euratom-Treaty. It is interesting that his figure does not disprove the foregoing evaluation in principle. For after the transition period, he speaks of about 100 provisions requiring a majority vote and almost 50 provisions a unanimous vote, all three Communities counted together; s. p. 193.
4. See Articles 14, par. (7) (changing of the timetable for the elimination of internal customs duties); 28; 33, par. (8); 44, par. (3), 1 and 4; 45, par. 3; 51; 75, par. (1) and (3) (par. (3) refers to a part of the cases ruled upon in par. (1), so that both should be counted together); 76; 84, par. (2); 99, par. 2; 103, par. (2); 111, par. (1) and (3); 235; 237, par. (1); 238, par. (2); and Article 8, par. (3), 2. Art. 8, par. (5) is not included, because a decision on the extension of the 2nd and 3rd stages of the transition period has not been necessary; there was an automatic transition.
5. See Articles 7, par. (2); 21, par. (2); 25, par. (1), 1; 43, par. (3); 44, par. (4), 3; 44, par. (6); 55, par. (2); 70, par. (2), 2; 98; 108, par. (3), 2; 109, par. (3); 127; 203, par. (3) and (4), 2; and Art. 8 of the Association Convention from 1957.

qualified majority vote.¹

Of course, a mere comparison of the numbers of Treaty provisions authorizing the passing of Community law either by unanimous or by majority vote does not allow by itself for a final judgment on the legal importance of majority vote in the Council. In particular, a Treaty provision may give powers to enact law just once, while under another provision law may be passed several times, even within a short period.

However, an evaluation as regards s i g n i f i c a n c e also shows that the voting requirement of mere qualified majority covers law enactment activities of the Council in important fields. To be sure, activities referring to a Treaty amendment, which is beyond the scope of normal legislation in the same way as constitutional amendments are, require unanimity. This includes also quasi amendments of the Treaty such as for instance the conferring of additional powers upon a Community organ which are not already provided for by the Treaty itself.² However, another power which comes close to the amending power is dependent only on qualified majority. The Treaty postulates freedom of establishment throughout the Community; nevertheless, the Council may except particular professional branches from the freedom of establishment by a qualified majority vote (Art.55, par.2). Much more

1. Articles 33, par. (8); 44, par. (5); 75, par. (1); 111, par. (1) and (3). Art. 8, par. (3), 2 and 4, for a decision by majority vote on the transition to the second stage after six years, is not included in this account of changes in voting requirements, because the transition was actually effected by unanimous vote after four years only.

2. Art. 235.

important, however, is the fact that the Council may also adopt the annual budget by qualified majority.¹ As has been mentioned, when adopting the budget, the Council fixes automatically the amount which each member state, by law, must contribute to the Community.² This seems a very essential power, and one which is exercised annually. Another example relates to the common agricultural policy. Council regulations in this field may also be passed by qualified majority since the beginning of the third stage of the transition period; this subject became of vital importance for the existence of the Community during its 1965/66 crisis. Numerous regulations had to be passed to establish common markets in the different agricultural sectors.³ The expenditures for the common agricultural markets cover the main part of the budget.

1. Art. 203, par. (3) and par. (4), 2.
2. Art. 203 in connection with Art. 200. The situation will change somewhat with the gradual introduction of the Community's own revenues.
3. See Articles 43, par. (2), 3, and 44, par. (5). The main regulations establishing common agricultural markets are as follows: No. 23/EEC on fruits and vegetables of April 4, 1962, ABl. No. 30, 1962, p. 965; No. 136/66/EEC on fats of September 22, 1966, ABl. No. 172, 1966, p. 3025; No. 120/67/EEC on cereals of June 13, 1967, ABl. No. 117, 1967, p. 2269; No. 121/67/EEC on pigmeat of June 13, 1967, ABl. No. 117, 1967, p. 2283; No. 122/67/EEC on eggs of June 13, 1967, ABl. No. 117, 1967, p. 2293; No. 359/67/EEC on rice of July 25, 1967, ABl. No. 174, 1967, p. 1; No. 1009/67/EEC on sugar of December 18, 1967, ABl. No. 308, 1967, p. 1; No. 804/68/EEC on milk and milk products of June 27, 1968, ABl. No. L 148, 1968, p. 13; No. 805/68/EEC on beef of June 28, 1968, ABl. No. L 148, 1968, p. 24; No. 24/EEC of April 4, 1962, ABl. 1962, p. 989, and regulation No. 816/70/EEC of April 22/28, 1970, ABl. No. L 99, 1970, pp. 1-19, both on wine; and regulation No. 727/70/EEC on tobacco of April 21, 1970, ABl. No. L 94, 1970, p. 1. Most of these regulations have replaced earlier ones; each has been amended several times. In addition, there have been several regulations executing all principal regulations.

So, for all these reasons, it may be concluded that legally speaking an important part of Community law may be passed by majority vote in the Council. This situation has been improved with the advance of the Community through the transition period. This is not to deny the dependence of the single Council member upon his national executive. But it does show that the Council legally does not need the agreement of all member governments at the same time in an important number, and even in important instances, of law enactment.

b.

The Political Aspect

The practice of the majority vote, however, has been handled differently from the legal possibilities it offers. From the beginning, "decisions" have been negotiated in the Council rather than taken. For this purpose the Council makes use of a very elaborate system of preparatory consultation and negotiation in the Committee of Permanent Representatives and in several working groups of national experts, both of which prepare the Council decisions.¹

1. For a description of that system of preparatory consultations and negotiations cf. Emil Noel, Der Ausschuss der Ständigen Vertreter, 2 Europarecht 1967, pp. 36-38, under Nos. 25 to 28; pp. 42 f., No. 36; and pp. 45-51, Nos. 40 to 49. Cf. also Leon N. Lindberg, op.cit. pp. 53 f. and 77-86; Alting von Geusau, op.cit., p. 135.

The Council members themselves have tried in their final decisions to achieve a maximum consensus, and have been reluctant to overrule each other.¹ In January 1966 one observer reported that, up to that time, majority decisions had been taken only once or twice a year; the annual budget had been adopted twice by majority vote, once against the French representative, in the second instance against the Italian member.²

Additional statutory unanimity requirements have even been newly introduced, in the merger agreement and in an additional protocol, both dated April 1965. It is true that one of these instances relates to the Coal and Steel Community. According to the 1965 merger agreement, the rules of procedure for ECSC-litigation, which must be passed by the European Court of Justice, are subject to confirmation by the Council by unanimous vote.³ The second unanimity requirement was introduced in the April 1965 agreements for the passing of regulations on social conditions for the Community staff and on superannuation for former members

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1. This has been observed for the first years of the EEC by Leon N. Lindberg, op.cit., pp. 76 f.; and by Alting von Geusau, op.cit., pp. 211 and 240.
 2. Professor Furler before the German Bundestag on January 27, 1966; Steno-Berichte, 17th session of January 27, 1966, p. 680, A, vol. 60.
 3. See Art. 8, par. (3) c and d, of the merger agreement (footnote 1, p. 2, supra) amending Art. 20, par. 3, and Art. 28, par. (5), respectively Art. 44 of the Statute of the Court of the ECSC of April 8, 1951, EGBl. 1952, II, p. 482. For confirmation of the Court's rules of procedure for EEC-litigation, the unanimity requirement had been established as early as 1957; cf. Art. 188, par. (2), of the EEC-Treaty.

of the Commission.¹ Though no important matters were concerned, the 1965 agreement shows a new inclination of the member states against majority vote.

By the beginning of 1966, the majority vote was to become of particular importance. By then, with the automatic transition to the third stage of the transition period of the Community (Art. 8 of the EEC-Treaty), such important matters as agricultural and commercial policies were legally to come under the majority rule,² in addition to those subjects already under that rule. As is well-known, the common agricultural policy is of considerable importance to France, which has the largest agricultural production in the Community and which therefore is the greatest beneficiary of the system of guaranteed agricultural prices. As early as the end of 1961, France had made its favourable vote for the transition to the second stage of the transition period dependent on agreement to introduce that agricultural system. At that time, the decision on the transition to the second stage had to be taken by unanimous vote. Now, when the end of the second stage was approaching, France became afraid that the other members might take advantage of the

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1. For the latter see Art. 34 of the merger agreement. For the former see Art. 15 of the Protocol on Privileges and Immunities for the European Communities, also of April 8, 1965, ABL 1967, No. 152, pp. 13-16.
 2. Art. 43, par. (2), 3; and 44, par. (5), for agricultural market organisations. Art. 111, No. 3; and Art. 112, par. (1), 2, for common commercial policies. See Dennis Thompson, The European Economic Community After the 1965 Crisis, 16 The International and Comparative Law Quarterly 1967, p. 7.

increasing number of subjects coming under the majority vote rule, against the interests of France. Among such national interests France regarded the maintenance of the guaranteed agricultural price system and its extension to additional agricultural products as important. So, during the EEC-crisis in 1965/66, one of the conditions upon which President de Gaulle made the return of France to the Council dependent was that no Council decision should be taken against the vital interests of a member state, leaving it to that state itself to decide whether its vital interests were at stake.¹

Already during the course of the crisis, the other five member states yielded to French pressure by determining to take decisions only in the form of written procedure during the time of the French absence. France could participate in this without losing face over its boycotting of the Council meetings. France, however, restricted its cooperation to matters regarded as continuation of existing administration, refusing to participate in new decisions.² Obviously it was a hint to France as well as the expression of Germany's own intentions when, just before the end of the crisis, Mr Schröder, the then German Foreign

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1. Cf. Neunter Gesamtbericht über die Tätigkeit der Gemeinschaft (1. April 1965 - 31. März 1966), issued by the EEC-Commission, p. 25; cf. also the report given by Gerhard Schröder, then Foreign Minister, to the German Bundestag, Steno-Berichte, 17th session of January 27, 1966, on p. 674, B to D; Dennis Thompson, op.cit., p.4
 2. Neunter Gesamtbericht ..., pp. 25-27; cf. also par. (4), 2, of the Council resolution of November 30, 1965, ibid., p. 29. Furthermore cf. Dennis Thompson, op.cit., p. 3. For the increase in the number of decisions taken in written procedure in the second half of 1965 cf. Emile Noel, op.cit., p. 50.

Minister, publicly declared that, in matters of basic importance to a member state, solutions should always be found which did not harm that state's interests.¹ De Gaulle had restricted his demands to the safeguarding of vital interests. Shortly before, Mr Spaak had proposed having three readings in the Council on bills of vital interests to a member state, giving an opportunity for thorough discussion; thereafter, however, a decision should be taken by majority vote in matters coming under that rule if common agreement were not achieved.²

In the Council resolution of January 29, 1966, which ended the crisis, the extreme points of view - the French nationalist standpoint on the one side and the supranational view of some other member states on the other - seemed to have met. The parties agreed that in matters legally coming under the majority rule and in which "very important interests of one or more partners are at stake, the members of the Council will endeavour ... to reach solutions which can be adopted by all the members of the Council." The French delegation, on its own, made the additional declaration "that where very important interests are at stake the discussion must be continued until unanimous agreement is reached". Following this, however, the Council stated "that there is a divergence of views on what should be done in the event of a failure to reach complete agreement".³

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1. Steno-Berichte, 17th session of January 27, 1966, p. 675, C, vol. 60.
 2. This proposal by Mr Spaak was reported by Professor Furler to the German Bundestag; Steno-Berichte, 17th session of January 27, 1966, p. 680, C, vol. 60.
 3. Quotation of the English version according to Dennis Thompson, op. cit., p. 5. For the German text see 21 Europa Archiv 1966, vol. 2, p. D 85; Neunter Gesamtbericht ..., pp. 31 f..

Thus there was a yielding to French demands insofar as the parties must make serious efforts to come to a unanimous decision in matters of very important interest to a member state. The agreement even goes beyond the French requirement, inasmuch as the latter only refers to the smaller group of matters of vital interest. However, there was no agreement excluding the majority vote in cases where serious efforts remained without result. To this extent, therefore, the former legal position was maintained. Yet the dissenting French point of view was written into the minutes, and severe consequences would have to be reckoned with from France if her "very important interests" were disregarded in a majority vote.

In fact, refraining from overruling another member could have important advantages. It could make for a good climate, and thus for smooth co-operation in the Council. In this way, difficult problems might be coped with much more easily than if mutual distrust were present.

On the other hand, permanent avoidance of majority voting in matters declared to be of very important interest to a member state ought to lead, in the long run, to such avoidance becoming customary law! The following of a practice for a long time, and the belief that this practice should be followed, would establish it in law, and every member state would be able to rely on it.¹ The establishment of such

1. So S.A. Dickschat, Die Rechtlich Wertung der Erklärungen des Ministerrats der Europäischen Wirtschaftsgemeinschaft vom 29. Januar, 1966, 13 Archiv des Völkerrechts 1967, p. 427; obviously also Hermann Mosler, National- und Gemeinschaftsinteressen im Verfahren des EWG-Ministerrats: Die Beschlüsse der Ausserordentlichen Tagung des EWG-Rates in Luxemburg vom 29. Januar 1966, 26 Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht 1966, p. 26; for English summary of the article see pp. 30-32.

new law would turn the supranational character of the EEC back to its starting point politically as well as legally, reversing the federalizing process.

As early as January 29, 1966, the Council had expressly resolved to take only unanimous decisions on the following subjects: financing of the agricultural policy; amendments to the common market organisations for fruit and vegetables; the establishment of new common markets for sugar and fats; and the fixing of prices for milk, beef, rice, sugar and oil.¹ One can assume that the respective regulations have since been passed by unanimous vote. However, these regulations established no general new rule on the unanimity requirement. Up to the end of 1965 those subjects could have been ruled upon only by unanimous vote in any event. Since by that time decisions in those fields were being prevented through the crisis, the resolution a little later to still take them only by unanimous vote merely meant "stopping the clock",² a practice already known from the transition to the second stage.

Besides these regulations, majority votes have been reported on the annual budget and on unimportant matters.³ In principle, however, there is no public record on voting in the Council. It has not been possible so far, therefore, to establish in fact whether a customary law excluding the majority vote in matters of very important interest to a member state has been emerging. However,

1. Neunter Gesamtbericht ..., p. 32, under No. 14.

2. As Schröder said before the German Bundestag, Steno-Berichte, 17th session of January 27, 1966, p. 675, C, vol. 60.

3. Professor Furler to the German Bundestag, Steno-Berichte, 239th session of June 17, 1969, p. 13290, A, vol. 70.

a report is worth noting in the White Paper on British entry into the Common Market of July 1971, which reads:

On a question where a Government considers that vital national interests are involved, it is established that the decision should be unanimous. ... All the countries concerned recognise that an attempt to impose a majority view in a case where one or more members considered their vital interests to be at stake would imperil the very fabric of the Community.¹

This report seems to be based on official information from the existing Community members. So one must assume that at least in matters of vital interest to a member state they had not taken majority decisions since 1966, and that they did not intend to do so in the future, even after the admission of Great Britain, Ireland, Denmark and Norway. Nevertheless, the possibility of conflicting interests will naturally be greater among ten than among only six members. Some day, therefore, a majority decision may have to be taken against very important or even vital interests of a member state. Only the outcome of such a situation will bring about a final clarification.

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1. White Paper (footnote 4 on p. 27, supra.), Nos. 29 and 30, on p. 8. A similar statement was made by Mr. Rippon at the Congress of the Conservative Party of Great Britain on October 13, 1971 in Brighton; see Süddeutsche Zeitung of October 14, 1971.

c.

Resume:

Dependence on the National Governments

Legally there is no doubt that the Council has the capacity to pass legislation. This is due to the fact that by the Treaty the Council has been given powers to establish Community law by means of passing regulations which shall have direct application and be directly binding upon the people; and by means of passing directives and establishing the annual budget. Such law may legally be passed in numerous and important subjects by the Council on a majority vote. This means that to this extent the Council is not dependent legally upon all member governments at the same time.

P o l i t i c a l l y the Council has not made much use of the majority vote from the beginning, but has tried almost always to come to a negotiated agreement. When the subject matters legally coming under the majority rule increased in number and importance with the transition to the third stage of the transition period of the EEC, France succeeded in preventing the Council from making use of the majority vote in important matters. Even though the other five resisted French demands for a formal outlawing of the majority vote, they have apparently applied it very seldom, and have never apparently applied a majority vote when vital interests of a member state were at stake. This has become possible because of the pressures which France has been able to employ, as well as because other member states obviously have been as eager to avoid majority decisions on important matters being taken against them. From the statement by Mr. Schröder, one may assume that this applies to the Federal Republic of Germany, while Spaak's proposal for three readings in the Council looks more like a genuine attempt at compromise.

By refraining from the majority vote, the Council has made itself even more dependent politically upon the member governments than the Council legally depends upon them. This would in time remould the Council from a Community organ into a mere international conference, making its law enactment resemble international treaties, but not legislation. It seems

that such a development is not far away.

Should this situation continue, it would in the end lead to the disintegration of the Community. Of course, today one cannot just carry on from where the development was stopped by the crisis of 1965/66. But further integration seems possible only if the unanimous vote is in fact restricted to the issues for which the Treaty already provides for it. This means making use of the majority vote even in important matters.

4.

The Commission in the Legislative Process:

Some Remarks

The Commission, too, is involved in the process of establishing Community law. Nevertheless, the Commission needs no investigation with regard to the issue of the development of future federal legislation in the Community.

A very great deal of Commission activities are concerned with its enacting of executive regulations. The Council, under Art. 155 of the Treaty, has often given the Commission powers to pass subsidiary law for the implementation of law emanating from the Council.¹ Thus, for instance, the Council itself has established common markets for the different agricultural products by means of basic regulations,² while it has conferred upon the Commission the obligation of fixing, almost daily, the actual prices for all the various products by means of executive regulations. However, the passing of executive regulations is not legislation in the sense of this investigation, but means the exercise of administrative powers, which generally are held by the executive branches of government. Therefore the Commission's executive regulations shall be referred to only in the context of administrative powers.

Few Treaty provisions give powers directly to the Commission to enact directives³ and other rules of law, the particular form of the latter not being spelled out.⁴ However in spite of the fact that the Treaty confers some powers immediately on the Commission,

1. Cf. Erich Wirsing, 'Aufgaben und Stellung der Kommission in der Verfassungsstruktur der Europäischen Wirtschaftsgemeinschaft, 19 Europa Archiv, 1964, p. 86.
2. Cf. the enumeration of the respective Council regulations in footnote 3 on p. 75, *supra*.
3. See Articles 13, par. (2); 33, par. (7); 45, par. (2); 90, par. (3); and 97.
4. Cf. Art. 10, par. (2), which gives powers of action in two separate fields; Art 22; and Art. 91, par. (2).

the powers so received are not for independent law making, but again only for executive law. This is shown by the respective Treaty provisions themselves which already give specific rules on particular matters, and only need to be technically executed.¹ In contrast, Treaty provisions giving powers to the Council generally authorise the latter to rule fully upon a subject on which the Treaty itself at most gives just broad guidelines. For this reason, the powers to pass directives and other rules of law which are conferred upon the Commission directly by the Treaty also relate only to the question of administrative powers in the Community.

A third form of the Commission's participation in Community law is by its proposals of law to be passed by the Council. Most Council regulations and directives are dependent upon formal Commission proposals², without which the Council cannot pass law in the respective fields.³ It is true that this dependence gives the Commission a strong legal position. Nevertheless, the right to propose bills is again a power typically held by executive branches of national governments. Though, for instance, in the German federal constitution such power is not as strong as that given to the Commission, in matters of the budget the German executive may prevent certain acts of parliamentary legislation in a way similar to the way the Commission could prevent Council regulations. Thus the Commission's right to propose legislation does not relate to the issue of Community legislation, but to that of the presence of an executive in the Community.

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1. See for instance, Regulation No. 8 of March 11, 1960, ABL. 1960, p. 585, which presents the technical details on re-imports of commodities brought from one member state to another, the material provisions on which are contained already in Art. 91, par. (2).
 2. Cf. the account by Lindberg, op. cit., pp. 303-305 for regulations and directives, and p. 307 for "other actions". For Council actions which do not depend on a formal Commission proposal see Art. 28; Art. 75, par. (3), in connection with Art. 189; and Art. 108, par. (2). For other Council actions see Lindberg, op. cit., Appendix A, pp. 301 f..
 3. See Art. 148, par. (2), 1st indent, and Art. 149, par. (1). Cf. also Wirsing, op. cit., p. 81; Wohlfahrt, op. cit., note 1 to Art. 152 on pp. 455 f..

5.

Conclusion

Summarising the whole chapter on the legislature, it may be concluded that there is no organ existing in the European Economic Community which really represents the European people. The European Parliament was designed to become such an organ, but attempts to introduce direct elections for its members have so far failed. The independence of the European Parliament on the other hand has developed much farther. Inasmuch as there exists dependence, it is mainly on the party groups in the national parliaments, and not on the parliaments themselves. This is still against the federal principle, but it is much less so than dependence on the national parliaments as a whole, or upon the national executives, would be. Thirdly the European Parliament has no legislative powers of its own, although the first beginnings of such powers may be found in its participation in legislative acts passed by the Council. This participation is strongest in the budget procedure; however even in this field it is absolutely underdeveloped.

There do exist legislative powers in the Community, and they are almost fully vested in the Council. Though the latter is composed of members of national cabinets, it is somewhat ^{more} than being a mere international conference. This is due to the fact that the Council may enact law which is directly binding on the people. This is what makes such law enactment legislation. In contrast, an international conference concludes agreements which only become binding upon the people after their transformation into domestic law through national legislation. However, the legislative powers in the Community must be regarded as being at the lowest level of developing federal legislative powers. This conclusion is based on the fact that only the directly binding effect of law enacted by the Council can qualify this law enactment as legislation, while in all other respects the Council resembles an international conference. This refers to the Council's composition as well as to its actual dependence on the national executives. Especially in its political structure, the Council has remained much behind its legal possibilities, not making use even of that low degree of

independence which has been granted to it by the respective treaties.

The actual situation, as regards the exercise of legislative powers in the Community, is the reverse of that in a federation. In a federation the legislative powers will be held by the representative body, while a second chamber representing the constituent executives may have participation in federal legislation. In the Community, almost all legislative powers are given to the chamber representing the constituent executives, while the European Parliament, which is designed to become a representative chamber, only holds low participation. What is more, this participation is even less, for example, than the participation of the German Bundesrat - the chamber representing the provincial executives - in the Federal Republic of Germany. In Germany, bills are first introduced in the Bundesrat, which may give its opinion on them. Afterwards the bills are transmitted to the Bundestag, the lower chamber, which passes the bills. Next, the Bundesrat still has the chance to raise objections, and the bill is enacted in law only if the Bundestag, once more in action, rejects these objections by an absolute majority. There are other bills which even cannot at all be enacted in law against the Bundesrat's veto. In contrast, the participation of the European Parliament - even though it is supposed to become the representative body - is restricted to the small powers which the Bundesrat holds in its first debate of the bills, namely to express an opinion. The European Parliament has no powers, as the Bundesrat has, to later raise objections. Under no circumstances does the European Parliament have the right of veto with regard to any bill.

So the situation in the Community is at best only at the very beginning of development towards a federal legislature. What is needed most is to give the European Parliament genuine legislative powers. As long as it does not even hold the power of objection, one can only speak of it as a mock parliament.

C.

The Executive

There is no provision in the EEC-Treaty which expressly gives an administrative power to the Community. However, as has been seen, the Treaty gives the Community powers to rule on certain matters. It does not restrict the Community to ruling exclusively either by legislative or administrative means. Thus normally the Treaty confers on the Community the powers both of legislation and administration.

This is endorsed by Art. 155 of the Treaty, according to which the Council may make the Commission competent to implement rules laid down by the Council. This proves that the powers of the Community include both the competence to establish general rules, that is to enact law, and the competence to execute these same rules. This latter competence proves that the Community also has administrative powers.

Art. 155 shows also that, within its own sphere of competence, the Council may confer administrative powers on the Commission - but that equally it may reserve such powers to itself. Now it is well known that the Council is already overburdened, because its members' activity as Community legislators is only incidental to their main occupation as national ministers. For this reason at least the Council is not in a position to administer its own laws, and therefore, in the light of the Community's structure, one would expect these powers to be given to the Commission.

In fact the resemblance of the Commission to a federal executive emerged from the prior survey of the political structure of the EEC. The effect of the survey was to suggest that, of all the Community organs, the Commission may have gone farthest on the way towards becoming a federal constitutional body. According to the features of a federal executive, a closer examination of this development must be concerned with the establishment of the Commission and its democratic responsibility; with the question of the Commission's independence from national governments; and with the question of administrative powers in the Community, in particular to what extent these are given to the Commission.

1.

The Commission as an Administrative Body:
Its Establishment and Parliamentary Responsibility

a.

Establishment: The System and its Development

It has already been mentioned that the Commission is established by the member governments, and not, as the federal principle would suggest, by the European Parliament.

Originally the rules for the appointment of the EEC-Commissioners were laid down in the EEC-Treaty. According to Article 158 the members of the Commission were to be appointed, for a term of four years, "by the Governments of Member States acting in common agreement". The President and the Vice-Presidents were to be appointed for a term of two years from among the members of the Commission according to the same procedure (Art. 161). The term of office, both of the members and the Presidents, was to be renewable. Actually all members - except those who had left the Commission for personal reasons - were reappointed in March 1962.¹ Moreover the President and the Vice-Presidents were reappointed repeatedly until the establishment of the single Commission for all three Communities in July 1967.²

Formally the body responsible for each appointment was the so-called "Conference of Representatives of the Governments of Member States".³ In practice, however, it was the cabinets of member states who appointed "their" members. Although the EEC-Treaty only said that at least one member, but not more than two, should be nationals of the same state (Art. 157, par. (1), 4), in reality two seats in the Commission were allotted to France,

1. Cf. ABL., 1962, p. 382.

2. Cf. ABL., 1960, p. 143; 1962, p. 382; 1964, p. 535.

3. See the resolutions referred to in footnote 2, *supra*.

Germany and Italy, and one seat to each of the three Benelux countries. Accordingly, the respective national executives made their selection among their own nationals. The other member states had in fact no saying in this - except for the possibility of a veto. In practice a veto has been generally avoided by common compromise.¹

This system of appointment in the EEC demonstrated a more limited development in the federalizing process compared with the treaty provisions for the establishment of the High Authority of the Coal and Steel Community. There, only eight members were appointed by the national executives, while the ninth was coopted by the other eight. Moreover, six years after the ECSC had started work the eight members of the High Authority could be appointed by means of a five - sixths majority vote in the Council. Thereafter every two years one third of the members was appointed by the national executives, while after that time the remaining members were co-opted by the others (Art. 10 of the ECSC-Treaty).²

On April 8, 1965, the member states agreed upon the formerly cited merger agreement³ which brought about the amalgamation of the High Authority of the Coal and Steel Community and the Commissions both of the EEC and Euratom. Many provisions about these bodies originally in the three treaties establishing the European Communities were replaced by the new agreement. The discussion on the new agreement, which was supposed to be a further step in European unification,⁴ had been going on since 1959. Many of the issues had been controversial.⁵ During the negotiations on

1. Cf. Roy Pryce, op. cit., p. 34.

2. On the actual performance of this system cf. P.H.J.M. Houben, The Merger of the Executives of the European Communities, 3 CMR Rev 1965/66, p. 44, who also reports that the remaining members had appointed only such new members as had been stated to be acceptable to the national executives.

3. Cf. footnote 1 on p. 2, supra.

4. Cf. the preamble of the merger agreement. Cf. also Houben, op. cit., p. 47.

5. On the history of the merger agreement and its controversial issues cf. Houben, op. cit., pp. 39-47; Hartmut Stange, Die Fusion der Europäischen Gemeinschaften: Untersuchungen auf den Gebieten des Wettbewerbs, Verkehrs, Aussenhandels, der Energie und Finanzen, pp. 1-4; Robert Knöpfle, Organisation und Arbeitsweise der Gemeinsamen Kommission der Europäischen Gemeinschaften, 3 Europarecht 1968, p. 35; EEC - Commission, Seventh General Report on the Activities of the Communities (1 April 1963 - 31 March 1964), pp. 293 f..

this agreement the contracting parties had to choose between the system of appointment under the Coal and Steel Treaty, and that under the treaties on the EEC and Euratom. They chose the latter (Art. 11 of the merger agreement). This means that there is no cooptation, and all nine members are appointed by the national executives.

It has been said that France did not agree to the merger before her partners accepted a "gentlemen's agreement", according to which the reappointment of the President and the Vice-Presidents of the Commission - which legally remained possible (Art. 14, par. (1) of the merger agreement) - should be excluded.¹ This meant, and still means, a system of rotation in the presidency. Actually in July 1967 none of the Presidents of the former two Commissions and the High Authority, but Mr. Jean Rey, and after the end of his three year term Mr. Franco Maria Malfatti, became President of the new Commission. As regards the Vice-Presidents, however, Mr. Mansholt maintained his position in 1967 and 1970, and Mr. Barre in 1970. An early victim of the rotation system was Professor Hallstein, the first President of the EEC-Commission, whom the German government wanted to become President of the new common Commission. De Gaulle, however, stood out against this appointment because of Hallstein's supranational European attitude. On January 29, 1966, at the Luxembourg compromise which ended the 1965/66 crisis, the foreign ministers were still unable to solve the problem, but they did decide not to ratify the merger treaty until agreement had been reached on this issue. It was not until May 1967 at the summit conference in Rome that the new German government, based on the grand coalition, yielded to France. So the new Commission was appointed, and it assumed office on July 6 the same year.²

1. Robert Knöpfle, op. cit., p. 37.

2. Robert Knöpfle, op. cit., p. 30, footnote 3; von Stempel, Die Römische Konferenz der EWG-Mitgliedstaaten, in Bulletin, No. 59 from June 6, 1967, pp. 506 f.. For the taking up of office cf. Introduction to Erster Gesamtbericht der Kommission über die Tätigkeit der Europäischen Gemeinschaften 1967, of Feb. 12, 1968, in 23 Europa Archiv 1968, pp. D 146- 150, under No. I.

b.

Parliamentary Responsibility?

Unlike the right of establishment, the Treaty gives the power of political control over the Commission to the European Parliament, not to the national executives or the Council.

According to Art. 144 of the EEC-Treaty the European Parliament can force the resignation of the whole Commission by means of a vote of censure carried by a two thirds majority, although it cannot force the resignation of an individual member. To acquire the information necessary for the exercise of political control the Parliament may put questions to the Commission, which the latter must answer.¹ The Commission must also send annual reports about its activities to the Parliament which the Parliament then discusses in public session.² Furthermore, the Parliament has succeeded in establishing the convention that newly appointed Presidents of the Commission present their proposed policy in a speech to it, while other members appear before it as soon as possible after their appointment.³

However, a vote of censure has yet to be taken. This seems due mainly to the fact that the European Parliament only has the power to vote a Commission out of office, but no power to replace it. Therefore the Parliament might easily find itself in a situation where the national governments either reappoint the same members,⁴ or a new Commission even less "European".

1. Art. 140, par.(3) of the EEC-Treaty.

2. Art. 143 of the EEC-Treaty.

3. Roy Pryce, op.cit., footnote 2 on p. 72 for the time before the merger. This convention was already established by the Common Assembly with regard to the High Authority; cf. Hans Schmitt, op. cit., p. 128. It is still upheld.

4. Concerning this possibility see Franz Heidelberg, Parliamentary Control and Political Groups in the Three European Regional Communities, 26 Law and Contemporary Problems 1961, p. 433.

For this reason there had already been moves in the Common Assembly of the Coal and Steel Community to extend parliamentary influence to the establishment of the High Authority, and similar moves have been made by the European Parliament. However, the Common Assembly achieved only the informal advance consultation of its leading members by the national governments before the appointment of a new President of the High Authority.¹

The reality of impotence of the European Parliament with regard to political control over the Commission was proved by the so-called "Wieland Europa" case in the fall of 1971. Under this pseudonym, Ralf Dahrendorf, a German member of the Commission, had published a newspaper article in July 1971 which, while it contained some constructive ideas, seemed chiefly opposed to further unification along federal lines. One of Dahrendorf's demands was that all elements of a future European executive be eliminated from the European Commission.² The Christian Democratic party group in the European Parliament put questions on this subject to the Commission, and their chairman, Mr. Luecker (German), is said to have intended to move a vote of censure. The President of the Commission, the Italian Christian Democrat, Malfatti, who would have been dismissed along with the other members, is reported to have prevented the motion by hinting to Mr. Luecker that co-operation in the party group would be endangered, as well as his re-election as chairman. It seems also that Malfatti was requested to put pressure on Luecker by the German chancellor. Brandt wanted to prevent stress on the Social Democratic / Liberal coalition in Bonn - Dahrendorf being a leading member of the liberal party.³ Eventually, there was only a discussion on the floor, but no motion of censure.

1. Hans Schmitt, op.cit., p. 128. It could not be established whether such advance-consultation was continued with regard to the EEC- and the Euratom - Commissions, and with regard to the Common Commission.

2. The article "Ein neues Ziel für Europa" by "Wieland Europa" was published in Die Zeit of July 16, 1971.

3. Cf. Welt am Sonntag of Oct. 17, 1971, "Wie Dahrendorf gerettet wurde".

This case shows that it is politically impossible for the European Parliament to vote the Commission out of office, although legally it could do so. A vote of censure would be possible only in a system of responsible government (parliamentary responsibility). This would imply the right to appoint the executive, and in such a system the executive would have to rely on a majority in parliament. As to the present situation in the Community however, the Commission needs no majority in the Parliament, because it depends only on national governments for its appointment, and because it is composed of members of the governing parties in the national parliaments. This means, that most European parties will be represented in the Commission. For this reason hardly any party group in the European Parliament can be interested in a vote of censure, because the national element in such a group which has a member in the Commission would oppose it.

So, for practical purposes, one may say that the Commission is hardly responsible at all to the European Parliament.

c.

Resume

The system of appointing the members to the Commission by the national executives is typical of a league of states,¹ but not of a federation. Its introduction in the EEC was a retrograde step in the federalizing process, as compared with the stage already reached in the ECSC where half of the members were appointed by the others. The subsequent agreement on the EEC system for the appointment of the common Commission, operative since 1967, also eliminated the advanced system in the ECSC,

1. So generally for such system Carl Friedrich, Federalism, National and International, p. 26.

bringing about an approximation to the lower level of the EEC and Euratom in the federalizing process.

However, this diminishing presence of federal features relates almost exclusively to the legal situation. In practice there was only a small change, as the members of the High Authority habitually co-opted only new members who had been stated to be acceptable to the national executives.¹

The system of rotation in the presidency was an additional means of diminishing the Commission's position. Two years seem just sufficient time for a new President to become fully acquainted with his office and to learn how to handle it effectively. The public for their part need this time to get to know his name. If ever a President succeeded in that time in establishing for himself a strong position as head of the Commission, he would already be at the end of his term of office. This means the office has lost its attractiveness and will not attract strong political personalities. Or else the presidency will just be used for the preparation of a national career, as seems to have been the case with the last President, Mr. Malfatti. But a Commission without a strong President will not be strong.

As regards the question of political control over the Commission, legally this has been given to the European Parliament, which seems in line with the federal principle. However, although the Parliament has the right to pass a vote of censure, politically it can-not make use of it. This is because the Parliament does not participate in the appointment of the Commission. So the national governments, which alone hold these powers, could reappoint the very members who had just been forced out of office; or new members even more inclined to frustrate the Parliament's intentions. The mere formal right to pass a vote of censure as it exists in the European Communities does not therefore create responsible government.

All of this is to say that the appointment of the Commission by the national governments, and the fact that the Commission is effectively not responsible to the Parliament contradicts the federal principle, if the Commission is to be regarded as the Community's executive.

1. See footnote 2, p.92 , supra

2.

Independence of the Commission from the

National Governments?

In spite of the appointment of the Commission by the national governments the relevant treaty provisions stipulate the Commission's independence. According to Article 10 par. (2) of the merger agreement, which is identical to the former Article 157 par. (2) of the EEC-Treaty, it is unlawful for a member of the Commission to seek or accept instructions from a national executive; the latter is not allowed to exercise influence on the members of the Commission in the performance of their duties.

a.

Personal Dependence

The postulate of such independence is supported by the fact that neither the national executives nor the Council can prematurely terminate the tenure of office of a member of the Commission, or of the Commission as a whole. To be sure, it is possible to remove a member who has committed a serious offense or who no longer meets the requirements for the performance of his duties.¹ The latter alternative, being rather vague, could easily per se give rise to political abuse. However, it is not the member governments or the Council, but the Court of Justice which decides whether the conditions required for removal are present - albeit only if asked to do so by the Council or the Commission. This seems to exclude political abuse, and in reality there has not yet been any such attempt.

1. Art. 13 of the merger agreement.

Nevertheless, contrary to the treaty stipulations personal dependence of the members of the Commission upon the national executives does exist. This is due to the members' appointment by the latter. It takes a strong personality to resist national pressure, as a member knows that resistance might - and indeed almost certainly would - preclude his reappointment.

There are three known instances of not re-appointing Presidents because of their resistance to national pressures. The examples refer back to the three forerunners of the present Commission, and accordingly to the time when the rotation system had not yet been introduced for the presidency. The example of Professor Hallstein has already been mentioned. It may be added that he and the other members of the EEC-Commission were hoping to achieve European political unification by making the economic integration of the member states irreversible.¹ It was by their devotion to the European cause, and in particular by their proposal of March 31, 1965 which would have provided the Community with its own revenues and parliamentary control over the budget, that they attracted de Gaulle's hostility. The eventual yielding of the new German government to de Gaulle was embedded in a "compromise" providing for Hallstein's appointment as President of the new common Commission for six months; this Hallstein refused.

The earliest of the three examples of dropping a President concerns the ECSC and the coal crisis in 1959. To cope with this, the High Authority had imposed, under Article 58 of the ECSC-Treaty, rigid restrictions upon coal production in the Community and upon coal imports.² This decision was scarcely popular: Italy wanted to secure its supplies of cheap US coal; Germany disapproved of the implied public management of economic affairs; and France distrusted the supranational impact of a decision which transferred the means of action from the national governments to the High Authority.³ Nevertheless the High Authority had taken its decision at a time when its term of office had expired, and the succession was open.⁴ The three big member states defeated the

1. Lindberg, op.cit., p. 69.

2. Cf. The Economist of April 25, 1959, p. 346

3. The Economist of May 23, 1959, pp. 715 f..

4. Cf. Michael Cardozo, Diplomats in International Co-Operation, p. 109.

decision; and later a new man, namely Mr. Malvestiti, was appointed President of the High Authority.¹

The third instance refers to the Euratom - Commission. Its president, Hirsch (French), had attracted the hostility of his national government. After his tenure of office, which ended with the year 1961, the French government replaced him by another French nominee, Pierre Chatenet.²

In all three instances one can witness a strong devotion by the respective President and his colleagues to the European cause. They did not care that their period of office had already been terminated, or was close to termination. But all three instances demonstrate as well that power still rests with the member states. Their attitude to re-appointment has stiffened even as regards the "gentlemen's agreement" never to re-appoint a President. Obviously, this agreement is a result of their experience with the European devotion which a President of the said European bodies seems to develop almost automatically.

1. EEC, Commission, Third General Report..., p. 53.

2. Roy Pryce, op.cit., p. 34.

b.

The Dependence of the Commission as a Whole
on the National Executives

Legally the Commission has an important influence on activities of the Council. This relates mainly to Commission proposals for laws to be passed by the Council.

As it has already been mentioned, only a small number of laws may be passed by the Council without the cooperation of the Commission,¹ while most Council regulations and directives depend upon Commission proposals.² A proposal is, in these instances, a prerequisite for Council action. In most fields without a formal proposal by the Commission the Council cannot pass a law.³ It is for this reason that in 1967 for instance, the Council passed 185 regulations and 12 directives based on Commission proposals, while it passed only 4 regulations and no directives without corresponding proposals.⁴

However, in these matters not only does the enactment of law by the Council depend on the presentation by the Commission of a proposal as such, the substance of the law to be passed also depends largely on the contents of the proposals. For, in these instances the Council may pass a law which differs from the Commission's proposal only by unanimous vote (Art. 149, par. (1)). If the Council does not arrive at unanimity it may only adopt the proposal as presented, wholly reject it -

1. See the account in footnote 2 on p. 87, supra.

2. Cf. the account by Lindberg, op.cit., pp. 303 to 305 for regulations and directives, and p. 307 for "other actions".

3. See footnote 3, p. 87, supra.

4. For this and for a further account cf. Rolf Remus, Kommission und Rat im Willensbildungsprozess der EWG, table between pp. 154 and 155.

which may be done by simple majority¹ - or take no vote at all. In the latter two instances a deadlock would occur if the Commission did not submit a new proposal, or an amendment to its original one. The Commission may submit such an amendment before a Council decision is taken on the original proposal (Art. 149, par. (2)).

Neither the Council nor the Commission can really afford a deadlock since the Treaty gives only broad guidelines for the establishment of an economic union, with the consequence that the building of such a union needs constant legislation. Hence it is in the Council's own interests not just to reject a proposal of which it disapproves, but to ensure agreement with the Commission. However, it is also in the Commission's interests to present those proposals which have a realistic chance of obtaining the consent of the Council.

In fact it had been said that the Council has often agreed on new regulations strongly influenced by the Commission.² Generally, however, it seems to be the Commission which bends to the Council's intentions. So for instance, as has already been mentioned, the EEC-Commission submitted, just three weeks after the adjournment sine die of the Council meeting of June 30, 1965, a new proposal on the financing of agricultural policies, dropping for the time being all their previous demands for the Community to have its own revenues, and for parliamentary control over the budget.³ President Hallstein later explained to the European Parliament, that the Treaty provisions implied that the Commission could and should change its proposal if in the ensuing discussion it learned that

1. Simple majority requirement for the rejection follows from Art. 148, par. (1); so also Erich Wirsing, op.cit., (footnote 1 on p. 86, *supra*), p. 81. Gino Lörcher, Der Abschluss völkerrechtlicher Verträge nach dem Recht der drei Europäischen Gemeinschaften, p. 116.

2. Professor Furler to the German Bundestag, Steno-Berichte, vol. 60, 17th session of January 27, 1966, p. 680, B.

3. Cf. p. 55, *supra*, and footnote 4 on p. 55. Cf. also Dennis Thompson, op.cit., (footnote 2 on p. 78, *supra*), p. 3.

the proposal was not consistent with the Council's intentions.¹

There has even been established an elaborate system for negotiating even the Commission's initial proposal, in which the member states have the decisive influence. After the ensuing formal presentation of the proposal there is again generally further negotiation with the member states, and mostly the Commission has to give in once more. It is therefore the case that not only the Commission's members personally but also the Commission as a whole depends in its activities very strongly on the member states.

The system of advance "consultation", and of negotiation after the submission of formal proposals, works through the Committee of Permanent Representatives of the Member States, and through working groups of specialists, composed of officials from the national ministries.

The establishment of the Committee of Permanent Representatives originally had its legal basis in Art. 151 of the EEC-Treaty, which said that the Council in its rules of procedure "may provide for the establishment of a committee composed of representatives of Member States". This Committee was actually established by a resolution of the Council of January 25, 1958, and it began work the same day. That was almost immediately after the entering into force of the EEC-Treaty on January 1, 1958. The members of the Committee were the heads of the diplomatic missions to the EEC of the member states. The tasks of the Committee were laid down in Art. 16 of the rules of procedure of the Council; it had no powers of decision.² In 1965 a provision on the Committee was expressly included in the merger agreement. According to its Art. 4 the Committee shall prepare the Council's work and execute other tasks conferred on it by the Council.

Before the preparation of a formal proposal the Commission consults with the Committee of Permanent Representatives to get to know the opinion of the

1. Walter Hallstein, Die Agrarfinanzierung ist nicht der Gegenstand der Krise, speech given to the European Parliament on October 20, 1965, on the discussion of the Eighth General Report of the Commission; in Europäische Hefte, No. 22, December 1965, pp. 35-41.

2. For details cf. Emile Noel, op. cit., (footnote 1 on p. 76, *supra*), pp. 33 f..

national executives on the matter in hand. The Committee in turn refers the subject to the said working groups, which engage in informal consultations and, after their conclusion, refer the matter back to the Committee. A representative of the Commission participates in all these consultations.¹ Eventually the Commission prepares its proposal, generally taking account of the opinions expressed in the foregoing consultations. After presentation of the formal proposal the Council sends it to the Committee for them to consider. In most instances the Committee again transfers the - now official - proposal to the working groups where the national officials then negotiate on instructions. Regarding proposals, including amendments, where common agreement is achieved at least in the final discussion in the Committee, the Council takes an affirmative vote without debate. Other proposals are subject to discussion in the Council. According to the way in which such discussions develop the Commission often presents amendments which have sometimes been prepared in advance on the basis of the Commission's experience in the earlier negotiations.²

Thus, through the established Committee procedure the national executives have the decisive influence on the Commission's formal proposals. So in reality the Council does not depend much on the Commission's proposals, but the Commission is dependent upon the national executives in the presentation of its proposals.

1. Dusan Sidjanski, Some Remarks on Siotis Article, 3 Journal of Common Market Studies, Oct. 1964, p. 58.

2. For a good description of the whole system cf. Heinz Wagner, op. cit. (footnote 1 on p. 71, supra), pp. 205 f.; for more details, but a less clear survey, cf. Emile Noel, op. cit., pp. 47-52 (Nos. 43-50). On the pattern of advance consultation cf. Leon N. Lindberg, op. cit., (footnote 1 on p. 42, supra), pp. 53 f. and 77-86; F.A.M. Alting von Geusau, op. cit., (footnote 4 on p. 32, supra), p. 135. On negotiations on formal proposals cf. Paul Reuter, op. cit. (footnote 2 on p. 32, supra), pp. 389 f..

c.

Resumé and Possible Development

As we have seen, the merger agreement - and formerly the EEC-Treaty - stipulates the independence of the Commission and its members from the national executives. To this end the individual member of the Commission may not seek or accept instructions from his national executive, while the latter is not allowed to influence members of the Commission in the performance of their duties.

In spite of these statutory stipulations the Commission's members personally are dependent on the national executives, as is the Commission as a whole in its operations.

Personal dependence exists because it is the national governments who appoint the members of the Commission. So it is left to them to appoint new members at least every four years. This cannot be compared to the appointment of a new government in a parliamentary democracy after the election of a new parliament. In that system it is up to the party leaders to present their policies to the electorate, which may or may not be convinced. In contrast, the system in the EEC makes the Commission's members follow the policies of the national executives. It is just this that is contrary to the federal principle, which allows only dependence on a federal legislative body or on the electorate.

In its operations also, the Commission as a whole is dependent on the national executives, in spite of its right to propose legislation. This follows from the fact that the Commission cannot risk a legislative deadlock in the Community, and that the national executives have the stronger position. So the latter have established the system of advance consultation on intended Commission proposals through the Committee of Permanent Representatives, and working groups of national officials. By means of this device, which is repeated in almost the same way after the formal presentation of a proposal, the national executives exert a decisive influence on the substantive issues.

One might assume that the situation could change when the four candidate states eventually join the Community. This seems so because the present system means that in the end all the national executives must arrive at common agreement. This would not be so easy with ten member states as with the present six. Then the Commission might automatically be given more weight as a mediator, thereby strengthening its independence. However, the practice up to now seems to suggest a different development, namely an increase in advance consultation, and in national negotiations on presented formal proposals. Such a development could have the very reverse effect of further diminishing the Commission's role, because there would then be even more emphasis on the member states. Eventually this might even lead practically to substituting drafts by the Committee of Permanent Representatives, as pre-arranged in the working groups, for formal Commission proposals. The danger of such a development has been seen already by a critic of the present situation.¹ It would be the natural consequence of Mr. Pompidou's demands for a new political secretariat, and of his denying the Commission the role of the future European executive, a role which he claims for the Council, which would then be composed of national ministers for European affairs.²

1. Emile Noel, op. cit., pp. 46f., Nos. 42 and 43, and p. 53, No. 52.

2. Cf. press conference by Mr. Pompidou of January 21, 1971, 26 Europa Archiv 1971, vol. 2, p. D 132.

3.

Administrative Powers of the Commission?

Powers normally held by a national executive are - in traditional continental understanding - the right of legislative initiative, and executive powers in the more narrow sense of administration. The former has just been examined in the context of the Commission's independence. In this investigation it has been shown that the Commission has a right of legislative initiative which legally goes beyond the same right as held by a national executive. Politically, however, it remains less than the right of legislative initiative as it usually exists at national level. There the executive presents law proposals which are subject to amendment only in the further legislative process. In contrast, the Commission has already to negotiate its proposal before presenting it.¹

As regards administrative powers, it is necessary to define them against legislative powers. By means of both of them, law is established. However, while legislation serves to enact law of general application, and while it can rule independently upon a subject, administration serves only to implement general rules of law; therefore it is surordinate to the latter. Administration may give effect to a general rule of law by means of a decision, applicable to, and establishing law against or in favour of, only a single person; or applicable to more persons involved in a single case. Or administration can implement a general rule of law by means of an executive regulation, which itself would have general application

1. The influence of pressure groups on the executive at either level is of course a different concern.

but be subordinated to another general rule of law which it implements. This subordination means that the executive regulation may not go beyond the limits established by the general legislative rule.

a.

Spheres of Administrative Powers in the Community

In a unitarian state, the executive branch of government would hold administrative powers in all fields of public affairs, with the possible exception that some administrative powers might be given to independent agencies, and some small administrative powers to the legislative and judicial branches. The general lines of administration would be established by the national executive directly, while the daily implementation of law would be delegated to subordinate administrative bodies which were subject to direction by the executive branch of government.

In a federation, the administrative powers would be divided between the central and the constituent governments. In principle, the administrative powers of the central executive could cover all spheres generally under federal jurisdiction. However, the constituent governments could also have general primary responsibility for the administration of law, including federal law, while the direct responsibility of the executive branch of the central government could be limited to only some fields of federal jurisdiction. This latter system applies, for example, in the Federal Republic of Germany. In such a system, however, the central government must have the means to exert influence on the constituent governments

with regard to the conduct of their administration of federal law.

Applying this system to the EEC, the administrative powers of the Commission can at most go as far as the general spheres of Community jurisdiction go. This means a "spatial" restriction of the administrative powers of the Commission to economic affairs, as far as covered by the Treaty. A second "spatial" restriction results from Art. 155, last hyphen, of the EEC-Treaty. As has already been mentioned, according to this provision the Council may confer upon the Commission the powers to execute the general rules of law passed by the Council, but also may reserve such powers of execution for itself. The administrative powers of the Commission, therefore, would not extend to all economic matters covered by the Treaty, but only to those already ruled upon by the Council, and only in so far as the Council had conferred powers of administration upon the Commission.

To this there exist, however, a few exceptions. Some administrative powers are given to the Commission directly by the Treaty. For instance, Art. 33 of the EEC-Treaty provided for the gradual abolition of quota-restrictions on interstate commerce within the Community. Par. (7) of Art. 33 gave powers to the Commission to fix the procedure, and details of the timetable, for this abolition, this to be done by means of directives.¹ In other instances the Commission has been given powers to pass "general rules"². The terms used by the Treaty in this context are the same as in the context of the conferring of legislative powers upon the Council. Therefore one might be tempted here also to think that the Commission has legislative powers. Nevertheless, the respective Treaty

1. For powers of the Commission to pass directives in other fields see Articles 13, par. (2); 45, par. (2); 90, par. (3); and 97.

2. Cf. Art. 10, par. (2), giving powers in two separate subject matters; Articles 22; and 91, par. (2).

provisions in fact only give powers of administration, if one accepts as line of distinction between legislation and administration the definition just given at the beginning of this chapter. The function of the said powers given to the Commission is restricted to the fixing of technical details for the implementation of other Treaty provisions which themselves already give specific rules on the respective subjects. Thus, for instance, there are already extensive stipulations in Art. 33 of the Treaty itself on the abolition of quota-restrictions; the fixing of the procedure and of details of the timetable helps their implementation only. Similarly, none of the other Treaty provisions authorizing the Commission to pass directives or "general rules" give powers to the Commission to rule independently upon a subject matter in respect of an essential issue.

All of this thus shows that the Commission can be given administrative powers by the Council, as authorized by the Treaty, and is also given administrative powers directly by the Treaty. However, most of the Treaty provisions giving administrative powers directly to the Commission related only to a short time during the transitional period of the Community; therefore there was not much opportunity for making use of them. One exception is the anti-dumping regulation, passed in 1960 by the Commission¹ under Art. 91. par. (2) of the Treaty, and which comes under the general heading of competition.

The main emphasis of the administrative powers actually wielded by the Commission - authorized either by the

1. Regulation No. 8 for the execution of Art. 91 par. (2) of the Treaty, as of March 11, 1960; ABL 1960, p. 597.

Council or directly by the Treaty - lies in the field of agricultural policy, and next in the field of competition, mainly the antitrust law.¹ The reason for such limitation of administrative activities is the concentration of the EEC's general activities on some fields, agriculture and competition being of main concern, while in other matters coming under the Treaty the Community is not so active. For instance, there are not yet any common policies on traffic, industry or foreign trade, although Commission and Council have undertaken to arrive at common policies in these fields.

b.

Administration of the Law of Competition

The main material Treaty provisions on competition are to be found in Art. 85 and 86 of the EEC-Treaty. According to Art. 85, agreements between commercial enterprises impeding, reducing or distorting competition in the Community, and which at the same time interfere with interstate commerce, are regarded as being incompatible with free competition. They are therefore prohibited. Certain agreements on the exclusive representation of an enterprise in a member state by another firm may be declared as being not against free competition. Art. 86 of the EEC-Treaty prohibits the abuse of a monopoly which an enterprise, or several enterprises combined, might hold in a particular economic field in the Community.

1. So also Robert Knöpfle, *op.cit.*, p. 55, footnote 79, who also refers to other fields, which are however covered by the treaties on the ECSC and Euratom. Cf. also Adrien Ries, *Die Rechtsfragen der Agrarpolitik, in Einführung in die Rechtsfragen der Europäischen Integration*, p. 156, footnote 2, who generally refers to the agricultural policy as the subject on which most Community law is enacted, by which term Ries includes administrative regulations.

In February 1962 the Council passed regulation No. 17¹, which rules on the enforcement of the law of competition. According to this regulation, and according to Art. 89 of the Treaty, it is the Commission which administers the law of competition. In particular, the Commission may forbid an enterprise to infringe free competition.² To help the Commission to apply this power, it may request any information necessary from the enterprise or trust involved, or from a member state; it may conduct relevant investigations on the premises of the said enterprise.³ The Commission may also make use of the competent national authorities for such an investigation. In such cases, the Commission controls the form and scope of the investigation.⁴ Furthermore, the Commission may impose penalties up to 5.000 European units of account (formerly one unit of account = one US dollar) for violations of the obligation to submit information with regard to competition. The Commission may also impose penalties up to 1.000.000 European units of account for the violation of free competition.⁵ In addition, the Commission may impose fines to compel the observance, in the future, of obligations imposed upon enterprises under regulation No. 17.⁶ On request the Commission may issue a statement that so far no action is intended against an enterprise, for the reason that no agreement is known which would violate free competition; or that a particular agreement on exclusive representation is not against free competition.⁷

1. ABl. 1962, pp. 204 ff. For amendments see regulation No. 59 of July 3, 1962, ABl. p. 1655, and regulation No. 118/63/EEC of November 11, 1963, ABl. p. 2696.

2. Art. 3 of regulation No. 17.

3. Art. 11 - 14 of regulation No. 17.

4. Art. 13 of regulation No. 17.

5. Art. 15 of regulation No. 17.

6. Art. 16 of regulation No. 17.

7. Art. 2 and 4 - 6 of regulation No. 17.

The Commission has in fact twice imposed fines upon trusts for the violation of free competition. Five times, it has issued decisions against trusts, stating that their practices ^{were} in violation of free competition. The Commission has issued nineteen single statements declaring agreements not to be in violation of free competition. And the Commission has had to handle a bulk of several ten thousands of demands for statements on agreements on exclusive representation, which were claimed by the enterprises concerned not to be in violation of free competition. In this context the Commission has passed an implementive regulation on the procedure for the issue of such statements.¹ Thus, the Commission has made use of single decisions as well as of the means of implementive regulation for the administration of the law of competition.²

One of the most instructive instances of procedure in exclusive representation is the case of "Grundig-Consten".³ In that case, the French firm Consten had agreed with Grundig, a German producer of radios, T.V.s etc., on the latter's exclusive representation in France by Consten. Another French firm, however, imported the relevant Grundig commodities, after buying from a German wholesale dealer. This second French firm sold the articles in France cheaper than Consten sold them. This led to civil litigation, and in March 1962 the "free" importer requested the annulling of the exclusive representation agreement by the Commission. After difficult

1. Regulation No. 27 of the Commission for the implementation of regulation No. 17, of May 3, 1962, ABl. pp. 1118 f.; the authorization to pass this implementive regulation had been given to the Commission by Art. 24 of regulation No. 17.

2. Bernhard Schloh, *Die Arbeitsweise der Gemeinschaften, in Einführung in die Rechtsfragen der Europäischen Integration*, p. 89; Alfred Gleiss, *Europäisches Wettbewerbsrecht*, *ibid.*, p. 262. Most facts are from personal information given by officials of the German Federal Ministry for Economics and Finance.

3. Decision of the Commission dated September 23, 1964, ABl. pp. 2545-2553.

investigation, a decision was taken by the Commission only two and a half years later, ruling against the agreement and denying its compatibility with free competition.¹

The "Grundig - Consten" case demonstrates the time-consuming activities in exclusive representation matters, the number of which easily could put the Commission out of operation. There is no body subordinate to the Commission for the administration of competition, because under the EEC-Treaty there are no powers for the establishment of subordinate administrative bodies which could hold their own powers of decision.² To be sure, some agencies have been set up without formal authorization by the Treaty; however, they are regarded as part of the Commission, which means that decisions in their field are deemed to be taken by the Commission.³

This leads to the question whether the Commission should not avail itself at least of the help of national anti-trust agencies. Such might seem appropriate, particularly as the Commission has issued some 10.000 decisions demanding the amendment of agreements not in line with free competition. Later the enterprises concerned informed the Commission that they had meanwhile amended those agreements. The Commission is sure that many of them are still not

1. This decision was later partly repealed by the European Court of Justice; cf. judgement of July 13, 1966, in Gerichtshof der Europäischen Gemeinschaften, Sammlung der Rechtsprechung des Gerichtshofs, vol. XII - 1, 1966, p.p. 320-400; sentence on p. 400.
2. Ulrich Everling, Zur Errichtung Nachgeordneter Behörden der Kommission der Europäischen Wirtschaftsgemeinschaft, in Zur Integration Europas, p. 38 and p. 42 f. where he reports that in the negotiations on the merger agreement in 1965 the German delegation had proposed an amendment to the Treaty in order to establish an anti-trust agency. The others did not agree.
3. For this and the enumeration of the "agencies" cf. Everling, op.cit., pp. 39 f. For the "delegation" of the power of decision to a member of the Commission, and from this to a high official of his office, which however implies that their decisions are decisions of the Commission, cf. also Knöpfle, op.cit., p. 41 and footnote 39.

compatible with free competition, but it does not have the means for reviewing all of them. Nevertheless, the Commission does not employ the help of national bodies because most member states have no anti-trust agency.¹ Therefore, the making use of such a body where it exists would put the enterprises concerned on a worse footing than enterprises in the other states.

Recognizing the problem of overloading the Commission, the Council has given it powers to exempt whole groups of agreements on exclusive representation from being against free competition.² On this authority the Commission passed implementive regulation No. 67/67/EEC,³ exempting about 25.000 exclusive representation agreements.

* * *

To sum up, it may be said that in the field of competition the European Commission holds the position of an anti-trust agency of the Community. It has been given powers both for single decisions and for implementive regulations. By means of both the Commission establishes implementive law against and in favour of business concerns. The Commission also may impose penalties and fines upon the latter which serve either as punishment for violations of the law of competition, or to compel its enforcement. So it may be concluded that in the field of competition the Commission operates directly upon the enterprises, and

1. Cf. Everling, op.cit., p. 43.

2. Council regulation No. 19/65/EEC of March 2, 1965, ABl. pp. 533 f.

3. ABl. 1967, pp. 849 f. This regulation is dated March 22, 1967.

that accordingly, there exist Community administrative powers in the field of competition.

There is no particular anti-trust agency subordinate to the Commission. Such, however, is no indispensable prerequisite for the existence of Community administrative powers in this field. It is sufficient that the respective powers are given to and exercised by the Commission.

To be sure, the Commission itself has not the means to enforce a fine which it has imposed on an enterprise. This must be collected by the member states. However, there is no report that such fines have been refused, or that the national authorities have refused to collect them. So in this field the national authorities can be employed as "borrowed agencies", which is in line with the existence of Community administration. In other areas of competition also the Commission may avail itself of national help, and for that purpose it may give instructions to the national bodies concerned. In practice, however, the Commission does not make use of this latter device, because only few member states have a national anti-trust agency.

There are not many powers left for the member states in the administration of the Community's law of competition. Some of the transitional powers of the member states (Art. 88 of the Treaty, Art. 9, par. (3) of regulation No. 17) terminated at the latest as soon as the Commission took over a case. There is also a Consultative Committee for the administration of the law of competition, made up of national officials.¹

1. Art. 10 of regulation No. 17; Art. 6 of regulation No. 19/65/EEC.

However, the opinions given by this Committee are not binding upon the Commission. There has also been no reported attempt by the Committee to force its opinion upon the Commission.¹ This seems due to the fact that most member states have no national anti-trust agency and therefore lack the experience and the means to exert influence. By its very nature too this Committee would not be in a position to interfere with the daily decisions to be taken by the Commission in single instances.

The Council itself has not retained administration of competition. It involves too much detailed work, which the Council could not afford because normally it meets once a month, and then has to be concerned with general policy guide lines in all spheres of Community activity.

All of this proves that, as far as competition is concerned, there exist administrative powers in the Community which are almost all exercised by the Commission. However, one has to be aware that competition is only a small field, and that its mere administration does not give much opportunity for establishing major executive guidelines.

c.

Administration of the Agricultural Policies
of the Community

The goal of the Community's agricultural policy is to secure high incomes for the Community's farmers. Generally this is not achieved by deficiency payments, but

1. Gleiss, op.cit., p. 262

by support of market prices. For this purpose there are measures which are employed on the internal Community market as well as at the Community borders.

The backbone of the supported market price is the establishment of the guide price, also called target price. For the Community's actions on the internal market an intervention price is used, which is fixed at a level between five and ten per cent below the guide price. In cases of a decrease of the actual price on the market below the intervention price, the national branches of the European Guidance and Guarantee Fund for Agriculture must buy the offered surplus products at the intervention price.

For measures at the Community's borders, a threshold price is established. It marks the level at which agricultural imports are allowed to enter the Community. The threshold price is derived from the guide price. The difference between both is supposed to cover the costs for transportation from the harbour to the place for which the guide price is fixed, including costs of marketing. The threshold price serves to bring the lower price of the world market to the Community level. For that purpose levies are imposed on imports which equal the difference between the lowest world market price and the threshold price, taking account however of the costs for delivery free harbour (cif - price).¹ Should the price on the world market sink, the levy would be raised, and vice versa. For exports, the Community pays refunds to bring the offer down to the world market price. This system is to secure a stable price in the Community by avoiding the price variations on the world market.

1. Cif = costs, insurance, freight.

There is one basic guide price in the Community for each agricultural product coming under the common market system. For cereals, the basic guide price is fixed for Duisburg, the place with the highest demand and the lowest supply. The threshold price for cereals is accordingly fixed for Rotterdam, the nearest port to Duisburg. For the purpose of regionalization, taking account of the needs for transportation etc., derived guide prices are fixed for other places in the Community, which means that there are also derived threshold prices and derived intervention prices.¹

Since 1968 there have been common market organizations for about 90 per cent of all agricultural products. The system of full price guarantee as just described applies to the main products, namely to cereals, rice, milk, sugar and olive oil; as regards oil seeds the system is reversed, which means that the Community price level is brought down to the world level by means of subsidies paid to the oil mills.² Only a partial price guarantee is established for beef, pigmeat, eggs, poultry, fruit and vegetables,³ for which there are

1. For a description of the whole system cf. Martin Happle, Die Rechtliche Grundstruktur der Agrarmarktorganisation, Einführung in die Rechtsfragen der Europäischen Integration, pp. 272-283; Giancarlo Olmi, Common Organisation of Agricultural Markets at the Stage of the Single Market 5 CMLRev. 1968, pp. 359-408, passim; for the system as established in 1962/64 p. 361, No. 2, to p. 367; for the system installed since 1966 cf. p. 369, No. II, to p. 395.
2. Cf. regulations Nos. 120/67/EEC, ABl. 1967, p. 2269; 359/67/EEC, ABl. 1967, No. 174, p. 1; 804/68/EEC, ABl. 1968, No. L 148, p. 13; 1009/67/EEC, ABl. 1967 No. 308, p. 1; 136/66/EEC, ABl. 1966, p. 3025; and Nos. 167/67/EEC, ABl. 1967, p. 2590 and 282/67/EEC, ABl. 1967, No. 151, p. 1, both for oil seeds, on which there are provisions also in regulation No. 136/66/EEC.
3. Cf. regulations Nos. 805/68/EEC, ABl. 1968, No. L 148, p. 24; 121/67/EEC, ABl. 1967, p. 2283; 122/67/EEC, ABl. p. 2293; 123/67/EEC, ABl. 1967, p. 2301; and No. 23/EEC, ABl. 1962, p. 965, as amended by regulation No. 1040/67/EEC, ABl. 1967, No. 314, p. 7, for fruit and vegetables.

levies on imports from non-member states, but no interventions on the internal market. For living plants and flowers, as well as for fats in general - save olive oil and oil from oil seeds - there is no price guarantee at all, but customs duties according to a common rigid customs tariff.¹

The establishment of the various prices, levies and refunds for the different agricultural products is a way of executing the respective basic regulations. The various amounts are fixed by means of implementive regulations.

The Council has reserved the right to establish what are regarded as the main policy prices, which are the guide prices and the basic intervention prices.² Most threshold prices, too, are established by the Council, as well as most derived intervention prices.³

Other prices which are also deemed important but must be changed more frequently, and policy prices of lesser importance are established in what is called the Management Committee procedure. In matters coming under this system decisions are taken by the Commission which, however, must consult in advance with the Management Committees. Such Committees have been set up for all agricultural products which come under a common market system. The Committees are composed of the competent officials of the national executives and meet

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1. Cf. regulation No. 234/68/EEC, ABL 1968, No. L 55, p. 1. The provisions on fats in general are contained in titles I and IV of regulation No. 136/66/EEC.
 2. Cf. Olmi, *op.cit.*, p. 402; for cereals cf. also regulation No. 120/67/EEC, Art. 2.
 3. For most threshold prices in cereals cf. Art. 5, par. (5); for derived intervention prices in cereals cf. Art. 4, par. (4) of regulation No. 120/67/EEC; cf. also Olmi, *op.cit.*, p. 403.

under the presidency of a member of the Commission. If the eventual decision of the Commission deviates from the advice given by the respective Committee, the Commission must refer the subject to the Council. By this the validity of the decision is not affected, but the Commission itself may, or may not, postpone the implementation of its decision. Postponement is possible for up to a month. Within a month too the Council may repeal the Commission's decision and decide in the place of the Commission.¹ The Management Committee for cereals meets every week, for it has to take account of the very frequent price variations on the world market for particular cereals. In the event of important and unforeseen variations between two meetings of the Committee, the Commission will take a decision without prior consultation of the Management Committee.²

The Management Committee procedure includes the establishment of such derived intervention prices and threshold prices as are not under the jurisdiction of the Council,³ as well as the determination of the level of refunds on exports and the determination of the means and procedure for interventions on the internal market. For the latter purpose, minimum quantities and quality requirements for the products to be bought by the Agricultural Fund are fixed using the Management Committee procedure. Special

1. Cf. Art. 25 and 26 of regulation No. 120/67/EEC; Olmi, op.cit., p. 404. For a thorough description of the system see Christoph Bertram, Decision Making in the EEC: The Management Committee Procedure, 5 CMLRev. 1967-68, p. 246, *passim*; Peter Schindler, The Problems of Decision Making by Way of the Management Committee Procedure in the European Economic Community, 8 CMLRev. 1970-71, p. 184, *passim*.

2. Cf. Olmi, op.cit., p. 405.

3. Cf. Art. 4, par. (4), a, and par. (6), and Art. 5, par. (3) and (6), of regulation No. 120/67/EEC; for other products cf. Olmi, op.cit., p. 405.

means are also fixed for avoiding a flux of products to one particular place.¹

The Commission alone, that is without consultation of a Committee, may take only technical decisions which leave no power of discretion. So one of the powers most often employed by the Commission is the fixing of the levies to be applied to imports from third countries. As those levies in principle are already determined by the threshold price on the one hand, and by the lowest world market price on the other, there is only a very low margin of technical appraisal left for the Commission. This includes the detection, after close observation of the lowest price on the world market, and the evaluation of freight and insurance costs. The levies for cereals are fixed daily by the Commission.²

* * *

This picture thus shows that in the agricultural policy the most important powers of implementation are reserved to the Council. In practice this means their reservation to the member states for, as has been seen earlier, it is the national interests which are represented in the Council. Also, such decisions which have to be taken too frequently to be exercised by the Council and which leave any power of discretion are not just given to the Commission, but are reserved to the Management Committee procedure. Again this means reservation to the member states.

1. Cf. Art. 7 and 8 of regulation No. 120/67/EEC. On refunds cf. Art. 12. Cf. also Olmi, loc.cit.
2. Cf. Olmi, op.cit., p. 405. If one checks the ABl., for instance No. L 11 from January 14, 1972, there are found 18 regulations by the Commission in all, 11 of which fix the levies on agricultural products, 8 of which relate only to cereals and rice.

It is reported that the different Committees only seldom object to implementive measures projected by the Commission.¹ This, however, seems to be due to the fact that the Commission keeps within a margin which it can assume to be tolerated by the Committees. This conclusion seems to be endorsed by the further fact that the Commission generally does not take a decision against the opinion expressed in a Committee.² The only deviation from such opinion which could be traced is regulation No. 156/65/EEC on prices for the different sorts of oranges.³ However, this regulation was passed by the Commission in November 1965, when the French were boycotting all Council meetings. Since for practical purposes the Council was hardly in normal operation at that time, the Commission did not need to fear a repeal of its implementive regulation. In addition, the regulation was favourable to Italy, which therefore would not have objected to it.

In short, the Commission only has means for decision which hardly give any powers of discretion. Therefore, as regards the agricultural policy, one may say that the Commission does hold powers of administration; but these are not powers for generally directing the administration according to its own general guidelines, as normally held by the executive branch of a central government. The Commission holds only the powers of a subordinate agency. It is subjected to direction by the national executive branches, and in particular by the Council as their organ in the Community.

1. Bernhard Schloh, op.cit. (footnote 2 on p. 113, *supra*), p. 87.

2. Bernhard Schloh, loc.cit.

3. ABl. 1965, p. 2941.

d.

Resumé: Most Administrative Powers still
with the Member States

Contrary to what one would assume at first glance, there is only a very low degree of executive powers to be found in the Community as vested in the Commission. This term is understood as meaning the powers normally held by the executive branch of government. It includes both the right of legislative initiative and the execution of law, which latter is generally referred to as administration. An overall assessment shows that both are only to a slim degree present in the Community.

Only from a formalistic legal point of view has the Commission been given strong powers of legislative initiative. This refers to the Treaty stipulations that most law enactment by the Council shall depend upon a proposal by the Commission. Actually the Council does not depend much in its legislative function upon the Commission. The unanimity requirement for deviations from Commission proposals is almost only academic because of the Council's practice of never taking majority decisions against important interests of a member state. Accordingly there is no problem for the Council in deviating from a Commission's proposal by means of a unanimous vote. Furthermore, not many proposals which are contrary to what all member states could agree to would come before the Council, because the member states have got the Commission to negotiate its proposals with them first. And, for the rest, the Commission will almost always submit amendments to the Council meetings at which a final decision is to be taken if, by this stage, no agreement has been reached.

In practice, therefore, the Commission's right of legislative initiative does not go beyond the corresponding powers of national executives; in fact, this right is more limited than such powers are at the national level. There the executive is less restricted in its law proposals; and in the further legislative process the national executive is also stronger because, generally, it is backed by a parliamentary majority.

As regards executive powers in the narrow sense of administration, the situation seems even worse. For one thing, there is only a very small sphere in which Community administration operates. This is due to the restriction of the Community's general activities to some fields only of policy; and it is due to the further limitation of administration in the Community to only some of these fields. For another thing, even in these narrow spheres the member states have retained most powers for deciding on the main issues. It is true that the Commission holds the position of an anti-trust agency of the Community and that the member states are not very active in the administration of the law of competition. However, there is not much importance in anti-trust decisions as compared with the powers of a national executive generally to direct the administration of the state. As regards the more important field of agricultural policies, the main administrative decisions are taken by the Council. This means their reservation to the member states. In addition, the rest of discretionary decisions can be taken by the Commission only through the Management Committee procedure, which again means their reservation to the member states.

To sum up, judging by the present situation the Commission can hardly be given credit for being the beginning of the executive branch of a future European central government. On the contrary, in part the Commission holds the position of a subordinate administrative agency, and in part might be seen as not much more than a secretariat to the Council. The latter refers to the Commission's role in law proposals.

IV

General Conclusion

A

The Federalizing Process Reversed

A general evaluation of the political development of Western Europe as a whole since World War II would find progress, a halt and a retrogression in the federalizing process. All run alongside each other. Progress would be found in a "spatial" extension, that is with regard to the increase in subjects coming under common jurisdiction. Retrogression and halt would refer to the development of the degree of federal features as found in the established Community bodies. In all there has been, however, some up and down.

The "spatial" extension relates both to the several organizations established, and to the actual extension of activities of those organizations in the course of time. Third there may be mentioned certain new common activities of the member states which formally come under no existing organization.

If one leaves aside the fruitless early attempts to establish a federation on a broad scale, that is including particularly the present members of the Council of Europe, the first organization established in the federalizing process of the "Six" was the Coal and Steel Community. Its spheres of competence are very limited. It covers coal and iron ore, including iron products.¹ The next two steps originally planned in

1. Cf. Annex 1 to the ECSC-Treaty.

the federalizing process failed. As a second step the European Defence Community had been planned. When its establishment seemed well under way, the parties undertook to set up, as a third step, a Political Community. It was to encompass the Coal and Steel Community and the Defence Community. In addition, national powers in the fields of foreign affairs and of economics were to be conferred upon the Political Community. Its competences were gradually to be extended until it became moulded into a European federation.¹

The Defence Community was defeated by the French National Assembly in August 1954. By this decision the Political Community was in effect also rejected. A main reason for the French attitude was the abstention of the British from the Defence Community, which meant leaving France almost alone in that organization vis-à-vis a resurgent Germany.²

Finally, the actual second and third steps in the federalizing process were the establishment of the EEC and of Euratom. As has been mentioned, the EEC covers the broadest fields of public activities.

After the establishment of the three Communities, the "spatial" extension concerned particularly the extension

1. U.W. Kitzinger, Europe: The Six and the Seven, International Organization, winter 1960, p. 24.
2. Eden, in The Memoirs of Sir Anthony Eden, Full Circle, p. 34, complains that Britain was "being made the whipping boy" in France for its troubles with the Defence Community. His several references to his discussions with French Foreign Minister Schumann, however, show clearly the French fear of being left alone with Germany in the EDC without a British counterbalance; see pp. 38, 40-44 and 82

of the activities of the EEC, while there has been hardly any such extension with regard to the ECSC and to Euratom. The EEC has moved gradually to cover those subject matters as are ascribed to it by the Treaty. This process is still continuing. As has been mentioned earlier, common policies have not yet been established in several fields coming under the Treaty, for instance in transport, industry and foreign trade. As regards the latter, however, from 1973 on only the Community, and no longer the single member states, will have the powers to conclude treaties with third countries. Corresponding endeavours with regard to transport and industry are under way. As another example, since spring 1969 the Council has been occupied with Commission proposals regarding common rules on pharmacy, both in industry and commerce. So the field of Community activities seems to be permanently being extended.

New common activities of the member states outside the jurisdiction of one of the three Communities refer especially to the Economic and Monetary Union, which will be complementary to the Common Market. This last spring, the competent national ministers eventually resolved to set the establishment of that Union into motion. In contrast to the case of the EEC, there is no formal treaty projecting the whole development or a definitely agreed upon goal for the Union; instead new decisions will be taken on further gradual progress after earlier stages have been completed. The member states have also agreed upon a system of permanent consultation in foreign affairs. The foreign ministers have been meeting twice a year since fall 1970, while a Political Committee, composed of the heads of the political divisions of each national ministry for foreign affairs, meets four times a year. The Committee prepares the

meetings of the foreign ministers. Subject of discussion are all matters of foreign policy. The goal is harmonization - but no binding resolutions.¹

Retrogression and stop in the development of federal features in the established Community bodies seem to be proven by the investigation of this paper. Actually, halt and retrogression started already before the establishment of the EEC. They may be seen in the fact that the High Authority of the Coal and Steel Community in practice did not use independently the power given to it by the ECSC-Treaty to co-opt half of the number of its members, but chose only persons stated to be acceptable to the national executives. Nor did the High Authority make use of its predominant role as the general decision-making body of the Coal and Steel Community, but subjected itself to the Council.

This actually diminished stage of development in the case of the High Authority served as model for the legal construction of the position of the EEC-Commission under the EEC-Treaty. This means that the suit for the Commission was formally tailored after the suit as it then actually existed for the High Authority. After that, however, the Commission's actual position too remained behind the legal construction provided for it. This is particularly true of the issue of independence, both of the single members, and of the Commission as a whole in its operations. The national executives exerted influence on "their" respective members from

1. Bericht der Außenminister an die Staats- bzw. Regierungschefs der Mitgliedstaaten der Europäischen Gemeinschaften, agreed upon on October 27, 1970 by the foreign ministers of the member states, Bulletin 1970, No. 150, pp. 1589-1591

the beginning by means of personal "consultations". As regards the Commission as a whole, its law proposals were also influenced from the beginning by the member states, through the Committee of Permanent Representatives. This means that the Commission never wielded powers of legislative initiative as strong as legally given to it. The member states did not allow the Commission to grow into its legal position. Almost the same may be said with regard to administrative powers.

While the Commission had still been given a comparatively strong legal position by the Treaty, the position of the European Parliament was weak legally as well. However, the Treaty projected a later strengthening of this position, subject to new decisions. In view of the different initial legal positions of the two bodies, the European Parliament was not denied by the member states the legal status immediately given to it by the Treaty, but it was denied the projected later increase. This refers particularly to the direct election of its members and to budgetary powers. As has been shown in the foregoing investigation, the budgetary powers given to the European Parliament with effect from 1975 are almost no powers at all.

As regards the Council, progress in the federalizing process should see a diminishing of its position. This is because, in contrast to the federal theory, the Council holds almost all the legislative powers. Actually, however, the status of the Council has increased. This is shown by the diminishing importance of the Commission's right to propose legislation which in practice and against the Treaty stipulations is no longer an indispensable prerequisite for Council legislation. Also, the legally provided gradual substitution of the majority

vote in the Council for the unanimity requirement would be a means of progress towards federation, because it would make Community legislation less dependent upon the single member government. However, the employment of the majority vote has been prevented.

Of the development of all three bodies, the retention of the initial status of the European Parliament means a halt to the federalizing process. Almost the same may be said with regard to the administrative powers of the Commission: at the beginning all administrative powers naturally rested with the member states, and the EEC-Treaty permitted either their reservation for the latter - directly or through the Council - or their transfer to the Commission. The Commission has been given only a few, mainly subordinate, administrative powers, so that the bulk is retained by the member states.

In contrast, the prevention of the majority vote in the Council might even be seen as retrogression, because the transition to majority vote had been legally fixed for exact times and stages of development. The denial of the Commission's right fully and independently to exercise the legislative initiative may be seen as retrogression, too, because this power was legally given to the Commission by the Treaty itself from the very beginning. The dismantling of the Commission's position in this respect becomes more visible after the 1965/66 crisis. Since then the Commission has apparently been forced to undertake increased pre-consultation on law proposals, and to present amendments to its proposals more readily. This must be seen in the context of giving the Council a stronger position in Community legislation than already provided for by the Treaty, which again means retrogression in the federalizing process. Such retrogression is

also found in the introduction of the rotation system in the presidency of the Commission. It has brought an increase in the dependence of the President upon the national executives, and therefore also an increase in the dependence of the Commission as a whole. The same result was achieved by the earlier mentioned "dismissal" of the Presidents of the three forerunners of the merged European Commission.

Relating the development of each particular item to an agent, the stopping of the federalizing process may generally be ascribed to all, or to a majority, of the national executives. An exception is the prevention of direct elections to the Parliament, which was effected by the French executive, that is by de Gaulle - and his attitude is still upheld by the present French government. As for the reduction of federal features, this may mainly be ascribed to de Gaulle. This is true for the rotation system, as well as for the dismissal of the Presidents of the three original executive bodies, as well as for the increase in pre-consultation and in the submission of amendments with regard to Commission proposals. Here one should recall Hallstein's statement in the fall of 1965 on amendments to Commission proposals, as well as the new Commission proposals on Community revenues, both of which followed the abrupt rejection by France of the earlier proposals in 1965. The fate of the majority vote can also be ascribed to de Gaulle, although apparently his attitude later became convenient to other member states.

Taking into account all three directions of development - that is on the one hand the extension to new fields of common activities, and on the other the stopping of the

development of federal features within the Community bodies, and the reversal of such developments - one seeks to find a line in the middle for a judgement on the whole federalizing process. This would seem to mean stating that the federalizing process had come to a halt. In actual fact, it may even be said that the federalizing process has been reversed. This conclusion is justified by the fact that much "spatial" extension of common activities has only brought about cooperation between the member states, but no further integration in the sense of the federalizing process. This is particularly true of the additional activities outside the existing organization, namely of the impulses given for an Economic and Monetary Union, and of the regular consultations on foreign policy. But even the real extension of the EEC's activities proper seems to have brought no important progress in federal development, in view of the decrease in independent powers at Community level. All in all, the decrease in federal features seems to weigh more heavy than the increase in common activities. This decrease means that even where integration has already been established, it is partly in the process of being replaced by cooperation between the national executives. Mere cooperation in the field of Community activities, however, means a clear departure from federalization.

B.

Prospects for Further Development

The reversion of the federalizing process means that there has been a turn towards a dismantling of the federal features achieved. Accordingly, federation is no longer the goal of the present political process in Western Europe. It also means that the functional approach in the federalizing process has not worked if this is understood to mean that economic integration in the end would automatically lead to federation.

A realistic appraisal of the process of economic integration can only lead to the conclusion that this process again and again forces new decisions about the next stage of development but that it does not automatically lead to political union. However, one day economic integration might grow so far that its further progress could be achieved only in political union. Rejection of political union then would mean also stopping further economic integration; it could even mean dissolving the economic integration achieved. Therefore, rejection of political union at such a stage would be difficult; however, it would still be possible.

Returning to the European scene, the actual reversal of the federalizing process is not to mean that federation will never come. But it means that it needs new political forces and new basic decisions to put the federalizing process into motion again. As economic integration is still in progress, some day this may quite well force a decision whether the member states should not accept political union too for the sake of economic advantage.

That is to say that through the advance in economic integration the decisive political forces might become motivated again to reverse the political process in Western Europe back towards federation. That incentive may one day come from the projected Monetary Union. This could strive for a common currency. Common currency would need a genuine decision-making body, with no member state having a veto. To accept such a device would in itself mean to accept federation, though only a functional federation because of its "spatial" limitation. However, such a decision-making body and the exclusion of a national veto might still be rejected, which would also be a rejection of federation. This would also imperil the common currency.

If one attempts to plot the coming development, it looks as if federation will not come in the foreseeable future. However, further economic integration seems likely. The next steps in this process will probably be decided upon at the European summit meeting in the fall of this year. It looks as if the development in the following years will roughly show the same picture. That is to say, there will be repeatedly new decisions on the continuation of economic integration. However, the political forces seem to remain dissipated. A long way has already been travelled since the mutual destruction in the two World Wars. The Communist threat is also no longer felt to be a danger. The announced European Conference on Security and Cooperation will additionally take from the Western European peoples the feeling of a need for common defence. Without this feeling of having a common enemy, the only possible federator left may be the interest in mutual economic advantage. So if there are no important political changes, a decision on whether to accept

federation for economic reasons may not be due before the last stage of the development leading to the projected Economic and Monetary Union. This is supposed to take up to another ten years. It seems not inconceivable that in the meantime, law harmonization, which is also one of the goals of the EEC, will be achieved to an essential degree. This could make the social structures of all the member states resemble each other more. A more harmonized European society would make for better pre-conditions for federation. So, if there are no essential unforeseen influences making for earlier federation, or impeding it, it seems not inconceivable that in about a decade a decision towards federation could be taken. It might also be rejected.