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EUROPE 1992: PAST, PRESENT AND FUTURE OF EUROPEAN COMMUNITY LAW

INTRODUCTION

DECEMBER 1992 marked the last day for the implementation of European Community legislation to create a geographical area without internal frontiers in which the free movement of goods, persons, capital and services is ensured. Immediately following the adoption of the *Single European Act* 1986 (hereafter referred to as 'SEA'),[1] several "outsiders" to the European integration programme - most notably, the USA, Japan and Australia - referred to the date set for the completion of the internal market in terms reflecting apprehension and perhaps even fear. One of the commonly used labels in this regard was that of a "fortress Europe": it was feared that a single European market would be brought about at a considerable cost to the Community's external trading partners. The Community itself has always denied that the post-1992 picture will show an unduly inward-looking Europe.[2] Whether that in fact results, of course, remains to be seen - although the stance adopted by the Community at the Uruguay Round of the GATT trade negotiations indicates that any *liberalisation* of Community policies regarding external trade (and particularly concerning the external effect of the Community's Common Agricultural Policy) is likely to be a slow process.

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1 OJ 1987 L 169/1. The Act entered into force on 1 July 1987. The full text can also be found in (1987) 2 CMLR 741.

2 "The 1992 Europe will not be a fortress Europe but a partnership Europe"; "1992: Europe - World Partner" *EC News*, No 28/88, as cited in Baker, "Europe 1992 - The Quiet Revolution" (1990) 22 *Case Western Reserve Journal of International Law* at 183 (opening sentence).

It must be emphasised that Europe 1992 is first and foremost an internal exercise. External economic implications notwithstanding, Europe 1992 stands for a renewed commitment by a Community of twice its original membership to speed up and intensify efforts to bring about a true common market within the spirit of the Treaty of Rome. The SEA is the legal-technical embodiment of this political commitment. The Act confirms that the establishment of a common market as well as the progressive approximation of the economic policies of the Member States, as originally envisaged in the Rome Treaty some 35 years ago, are still worth pursuing.

The purpose of this article is to review and analyse developments to date within the Community, and to indicate some possible directions for the future - particularly in the light of the recent Maastricht Treaty, signed on 7 February 1992 and currently in the process of being ratified by the various Member States. Whereas the main emphasis of the SEA is on achieving fuller economic unity, the more controversial Maastricht Treaty would significantly extend the process of European integration into areas of monetary and political union.[3] Both the SEA and the Maastricht Treaty indicate that EC law is constantly developing and increasingly important.

Three things must be stressed from the outset. First, EC law has its roots firmly in the civil law. All six original members belong to the same civil law family, and the notion of a code as the basis of a new legal order is essentially a civil law concept. Second, the internal dynamics of the Community itself mean that the code - the Treaty of Rome establishing the European Economic Community (EEC) - is the primary but not the sole source of legal development. Rather it is the manner in which the Treaty has been applied and extended in practice that has enabled the Community to evolve continuously. Third, a significant feature of the European Community, and one which distinguishes it from more traditional international institutions, is that it involves a transfer of national decision-making powers to the governing body. This is commonly described in

3 *Amendments to the EEC Treaty - Economic and Monetary Union*, Maastricht, 7 February 1992. (hereafter referred to as the 'Maastricht Treaty'). It must be noted that even these developments had already been signalled in the SEA: see 'The New Policy Areas' and 'The Move Towards Political Union' at pp238, 241 below.

terms of supranationality.[4] It will be argued that these features have had a profound effect on the development of EC law and will continue to do so.

As a practical matter this article will start with a discussion of the purpose of the European Community, and the means available to achieve this purpose. Historical and political considerations are important explanatory factors to make possible a full appreciation of the Treaty provisions themselves in this regard. Then follows a discussion of the achievements of the Community to date. Next the issue of Europe 1992 proper must be addressed. Matters that call for close attention are the SEA, including the "improvements" it makes to the relationship between the various Community institutions. Efforts towards the establishment of an Economic and Monetary Union (EMU) and the promotion of a European Political Union (EPU), the particular focus of the Maastricht Treaty, are addressed under a separate heading entitled "Problems and Prospects". Other challenges facing the Community both now and beyond 1992 include a further enlargement of the Community in the wake of recent developments in Eastern Europe and the former Soviet Union. Some brief comments about this "widening" (as opposed to "deepening") of the Community are made at the end of the article.

PURPOSE OF THE EUROPEAN COMMUNITY: MEANS TO ACHIEVE THIS PURPOSE

A discussion of the European Community may usefully start by focusing on the fundamental provisions of Article 2 of the Rome Treaty. Article 2 lists the objectives of the "European Economic Community" (as it was then called)[5] as follows:

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4 The label "supranational" is most appropriate in that it denotes a legal order that cannot be explained purely in terms of international or national law. For the occasional criticism of the term, see Dagtoglou, "The Legal Nature of the European Community", in Commission of the EC (ed), *Thirty Years of Community Law* (Office for Official Publications of the European Communities, Luxembourg 1981) The European Perspective Series, p37. A further discussion can be found below fn15 and accompanying text.

5 The Maastricht Treaty formalises the current use of the term "European Community"; Article 1 *Establishment of the European Economic Community*, Rome, 1 January 1958, 298 UNTS 11 (hereafter referred to as the 'Rome Treaty') as amended by Article G of the Maastricht Treaty.

1. A harmonious development of economic activities;

2. A continuous and balanced expansion;

3. An increase in stability;

4. An accelerated raising of the standard of living;

5. Closer relations between the Member States.

It has been observed that all but the last of these objectives are economic rather than political in nature.[6] Article 2 further lists two means by which to achieve the abovementioned objects. The first is the establishment of a common market, characterised by the free movement of goods, persons, services and capital.[7] The second is the progressive approximation of the economic policies of the Member States. It will be noted that the establishment of a "common" market, which signals a reference to the "internal" market some 30 years later in the SEA, is being described as a means and not an end of the Community.

Article 2 does not provide any real insights into what the European Community is all about. It is therefore necessary to take a somewhat broader approach by looking at the historical-political picture of the relevant time period. Mathijsen has said that "every institution is the product of a series of historical events, and at the same time reflects the convictions, hopes and concerns of those who were instrumental in establishing it".[8] The European Community is no exception and the generally preferred starting point for discussion is the end of World War II. Yalta 1945 and the "distribution" of the former German Reich among the Allied Forces did not produce the long-lasting stability many on the

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6 Kapteyn & Verloren Van Themaat, *Introduction to the Law of the European Communities After the Coming into Force of the Single European Act* (Kluwer Law and Taxation Publishers, Deventer, 2nd ed 1989) pp66ff. This publication contains some 927 pages. It is easily the most comprehensive and authoritative general textbook on the subject to date.

7 Under the Rome Treaty the "common market" extends to agriculture and trade in agricultural products; Article 38. This concept also includes transport by rail, road and inland waterway; Articles 74 and 84.

8 Mathijsen, *A Guide to European Community Law* (Sweet & Maxwell, London, 5th ed 1990) p5.

Continent had longed for. On the one hand there was growing fear of a Russian expansion. On the other hand there was the increasing dependence of a much weakened Western Europe on the USA in economic as well as military terms. The Marshall plan (1947) and the establishment of NATO (1949) were two major vehicles in "remedying" this situation. More important for the purposes of this article, however, is the consideration that against this general backdrop a whole range of proposals was launched to strengthen Europe, both in economic and political terms, and to create a Europe that could stand on its own vis-à-vis the USSR or the USA.

The first to call for "a kind of United States of Europe" was Winston Churchill. He did so during an address at Zurich University in 1946.[9] Of more direct relevance for European integration, though, was a proposal by Robert Schuman, the French foreign minister, in 1950. His proposal was to merge the heavy industries of both France and Germany. The Schuman plan (with Jean Monnet as its intellectual father) admittedly was not just motivated by a desire to sketch a new political structure for Europe. There was also a concern about Franco-German relations and the plan offered an opportunity to prevent a German threat to French security from ever happening again.[10] The resulting *European Coal and Steel Community (ECSC) Treaty* was signed in Paris in 1951. The Treaty places the entire coal and steel production of not only France and Germany, but also of the Benelux countries and Italy, under the supervision of a joint High Authority. The High Authority is an independent body of persons designated by the governments of the Member States. The Authority has its own financial resources via a levy on coal and steel production. Its powers are limited by comparison to those of the EEC which was established half a decade later in 1957. However, in terms of classical international law, the Treaty of Paris represents a breakthrough in that it provides for institutions with a supranational character.

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9 Strictly speaking, Churchill was not the first to call for a United States of Europe. Rather, there was the pioneering work of Count Coudenhove towards the establishment of a Pan-European Union as early as the end of World War I. See the informative account by Zurcher, *The Struggle to unite Europe 1940-1958* (Greenwood Press, Westport 1958)

10 Coal and steel represent two industries that played a major role in the building and strengthening Hitler's war arsenal.

The ECSC Treaty was an important landmark in the process of European integration. It differed from the Council of Europe (1949) which, perhaps because of its higher membership at the crucial stage of establishment, lacked the power to be much more than yet another inter-governmental organisation. Attempts in following years to build upon the success of the ECSC in the form of a European Defence Community failed. It has been suggested that a change in the international situation had lessened the urgency of the need for "closing the ranks".[11] Reference must also be made to the effectiveness of NATO in performing its functions. The establishment of the EEC was a logical extension of the concept of a common market for coal and steel to the global economy of the Community. The Rome Treaty can moreover be seen as an official acknowledgement that economic integration is a necessary prerequisite for political integration.

ACHIEVEMENTS OF THE COMMUNITY TO DATE

The Rome Treaty contained a timetable for the progressive establishment of the common market over a period of twelve years. This transitional period was divided into three stages of four years each. A set of actions to be initiated and carried through was assigned to each stage.[12] An essential foundation stone of the European Community was the establishment of a customs union.[13] It involved the abolition of internal trading barriers caused by the levying of customs duties or charges having equivalent effect. Unlike other free trading zones, for instance, EFTA and ANCERTA, the customs union also includes a common external tariff.[14]

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11 Reference can be made to the death of Stalin in 1953 and the end of the Korean war that same year. See Kapteyn & Verloren Van Themaat, *Introduction to the Law of the European Communities After the Coming into Force of the Single European Act* pp9ff.

12 Article 8 Rome Treaty.

13 Article 9 Rome Treaty.

14 The practical effect of the common external tariff is to reduce the need for at times speculative choices as to which Member State will be the point of entry for goods imported from outside the Community. Furthermore, once goods are within the Community, the principle of free movement applies as if the goods were internally produced.

The customs union was fully operative on 1 July 1968, that is, eighteen months ahead of the schedule laid down in the Treaty.[15]

The early success of the Community lies not just in the text of the Treaty itself but also in the pro-European stance of, in particular, two of the four main institutions of the Community - the Commission and the Court of Justice. Under the Treaty the formal legislative role of the Commission is limited to making proposals. In practice, however, its persuasiveness, its sensitivity to political reality as well as its sheer industriousness have made the Commission the prime mover in the law making process of the Community. Indeed, the adoption of the SEA - which alone triggered off well over two hundred draft Directives - can largely be attributed to its efforts. The Court of Justice has, in turn, promoted the supranational character of EC law from the very beginning. Thus, as early as 1963 in the *Van Gend en Loos* case it said:

> The Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields and the subjects of which comprise not only Member States but also their nationals.[16]

In the *Van Duyn* case the Court took the opportunity to extend the direct application of Community law beyond Regulations to cover Directives once the time period for national implementation of the latter has expired. The net result is that Member States cannot dodge their Community commitments, even in the case of laws not designed as binding in their entirety. Moreover, as held in *Van Duyn*, individual rights can be derived from Directives which the Treaty itself defines as binding only as to the "result to be achieved".[17] Finally, as demonstrated in *Costa-Enel,* once a

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15 Mathijsen, *A Guide to European Community Law* p9.

16 *Van Gend en Loos* Case 26/62 [1963] ECR 1 at 12.

17 Compare the definitions of Regulation and Directive in Article 189 of the Rome Treaty: "A regulation shall have general application. It shall be binding in its entirety and directly applicable to all Member States" whereas "a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods". Authority for the proposition that direct applicability is not the exclusive preserve of Regulations is *Van Duyn v Home Office* Case 41/74 [1974] ECR 1337.

supranational law has been enacted, Member States lose their power to impede its effect by adopting national laws governing the same or equivalent subject matter:

> [T]he law stemming from the Treaty, an independent source of law, could not because of its special and original nature, be overridden by domestic legal provisions, however, framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.[18]

European Community law is unique because the national authorities have no control over the application of legal entitlements created at Community level: a Member State cannot withdraw or amend these rights. More important perhaps, individual Member States have no control over the interpretation of these rights either: the Court of Justice has as its task a uniform application of the law throughout the Community, both directly and indirectly. An important vehicle at the Court's disposal in this respect is the preliminary ruling procedure as provided for in Article 177 of the Treaty. It involves a suspension of proceedings in the domestic court and the referral of questions of Community law to the Court of Justice for an interpretative ruling. Thus the purity of Community law is safeguarded even in instances where the ultimate application of that law is done in and by the courts of the Member States.

The Court of Justice has no doubt been helped by the active interest shown by legal scholars in giving direction to the issues and concepts introduced in the cases. A famous example is the distinction between "direct applicability" and "direct effect". The distinction was first discussed by Winter.[19] Although both expressions are used interchangeably by the Court, as explained by Toth,[20] the difference is between the implementation

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Earlier, more tentative steps to this effect were made in *Grad* Case 9/70 [1970] ECR 825 and *SACE* Case 33/70 [1970] ECR 1213.

18 *Costa-Enel* Case 6/64 [1964] ECR 585 at 594.

19 Winter, "Drect Applicability and Direct Effect: Two Distinct and Different Concepts in Community Law"(1972) 9 *CML Rev* 425. For a critical reaction by a member of the Court itself, see Pescatore, "The Doctrine of 'Direct Effect': An Infant Disease of Community Law" (1983) 8 *EL Rev* 155.

20 Toth, *The Oxford Encyclopaedia of European Community Law - Volume I: Institutional Law* (Oxford University Press, Oxford, 1990) p161.

of EC laws without national measures being taken and the individual rights derived from those laws. The first concerns the relationship between Community law and the Member States, whereas the second refers to the relationship between Community law and the nationals of the Member States. This close collaboration between *doctrine* and judiciary is reflective of the civil law origins of the Community. The privileged place occupied by academic commentators in the law making process is one of the traditional hallmarks of the civil law. Within the formal Court structure the role of the Advocates-General further enhances the relevance of scholarship, because of their own scholarly approach as well as of their review of legal materials that bear on the case at hand.[21]

More problematic has been the role of the Parliament and of the Council of Ministers. The role of the Parliament has been negligible. From its inception the Assembly (as the European Parliament was then known) has, in essence, exercised advisory functions only.[22] The introduction of direct elections in 1979 only marginally enhanced its status vis-à-vis other Community institutions or indeed the general public. Under the Treaty of Rome the requirement for the Council of Ministers to be disinterested in the sense of not letting the national interest of the various members prevail, is less express than the duty of members of the Commission in this regard.[23] Even so, it has been observed that a pure protection of national interests would contradict the responsibility of the Member States under the Treaty.[24]

Unfortunately, there are some areas in which national interests have played a major part. Notwithstanding that many of the Commission's proposals

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21 At present the Court of Justice is "assisted" by six Advocates General. Their assistance in essence consists of the delivery of an independent and reasoned opinion at the end of the oral procedure. See Lenz, "The Court of Justice of the European Communities" (1988) 2 *Legal Issues of European Integration* 1 at 4-5. The origins of the institution itself can be traced back to French administrative law. See Borgsmidt, "The Advocate General at the European Court of Justice: A Comparative Study" (1988) 13 *EL Rev* 106.

22 The only exception prior to the SEA was its power to decide upon the budget of the Community.

23 Article 5(2) Rome Treaty instructs Member States to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty.

24 Kapteyn & Verloren Van Themaat, *Introduction to the Law of the European Communities After the Coming into Force of the Single European Act* p104.

for the achievement of the common market have been carried through, a major disappointment to date has been the Common Agricultural Policy (CAP). The sheer expense that comes with over-production and subsidisation, as well as the intransigent attitude of Council members with respect to calls for agricultural reform both from within and outside the Community are well documented.[25] More recently, Britain's refusal to join the Exchange Rate and Intervention Mechanism (ERM) slowed down progress towards harmonisation in the area of economic and monetary reform. Eventually, Britain decided to join the ERM in October 1990.[26]

More fundamental perhaps - because it impinges directly upon the concept of supranationality - has been the Council's reluctance to submit to the Treaty requirements as regards qualified majority voting. It will be recalled that the Treaty of Rome envisaged the establishment of the common market in three stages. During the transitional period the rule of unanimity was progressively to be replaced by that of a qualified majority. The third stage of the transitional period began on 1 January 1966. It meant that matters of great political importance could henceforth be decided by qualified majority voting. Nevertheless, General De Gaulle insisted that the right to veto should be preserved whenever the "vital interests" of one or more Member States were at stake. The resulting crisis was settled in what has become known as the Luxembourg Accords 1966, representing in essence an agreement to disagree between France and the other Member States.[27] In practice, the Accords reinforced the tendency of the Council to decide by consensus even in matters of relative unimportance. This practice did not change in 1973, the additional complications in reaching unanimity among an extended membership notwithstanding. To some extent, a pragmatic solution was found in that abstentions came to replace the exercise of a veto right, especially after the latest enlargement of the

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25 In July 1991 the Community presented proposals to the Council of Ministers and the European Parliament for the future development of the CAP. In the foreword it is reflected that the CAP has arguably been too successful in ensuring sufficiency of food supply; Commission of the EC, "The Development and Future of the Common Agricultural Policy. Proposals of the Commission" *Green Europe* 2/91.

26 The withdrawal of the Pound and the Lira from the ERM in September 1992 is discussed elsewhere in this article: see 'Economic and Monetary Union' at p239 below.

27 Hartley, *The Foundation of European Community Law* (Oxford University Press, Oxford, 2nd ed 1988) p18.

Community to its current membership of twelve countries. But this was never a feasible solution where strong national interests are perceived to be at stake.[28]

A further disappointment as regards the Council of Ministers concerns its apparent inability or unwillingness to discuss the political dimension of the Community. Even though the ultimate goal of the Community has always been political,[29] a practice developed in the 1970s whereby such political issues are discussed in a so-called European Council in which the heads of state or of government participate. The net result has been that important issues (whether of a political or of a Community nature) tend to be introduced in two stages. First the European Council decides upon the general principles of each matter. Next the decision is carried through within the Council of Ministers. The policy making function of the Community thus risks escaping its own institutions, and answerability to any of the official Community bodies becomes non-existent.[30]

Following a most promising start, the European integration movement had virtually come to a halt by the close of the 1970s. The achievement of a customs union aside, the Treaty ideals of the four freedoms (goods, persons, services and capital) remained largely unfulfilled. In part an explanation for this loss of momentum must be sought in the deteriorating economic conditions after the first oil boycott hit Western Europe in 1973-

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28 The Council fixed agricultural prices by a qualified majority for the first time in the history of the Community in 1982. The United Kingdom, Denmark and Greece abstained; Kapteyn and Verloren Van Themaat, *Introduction to the Law of the European Communities After the Coming into Force of the Single European Act* pp249-250, who also discusses the subtle (but crucial) distinction between an abstention and a non-participation in the vote in the light of Article 148(3) Rome Treaty at p251.

29 Jorgenson (Head of the Delegation of the Commission of the European Communities to Australia and New Zealand), "The European Community and Australia" (Address at the University of Melbourne, 19 September 1991) p2 (mimeo).

30 Technically, the European Council is not an institution of the Community as it has no standing under the Rome Treaty. The SEA did not alter this situation. A general discussion can be found in Hartley, *The Foundation of European Community Law* p20. It must also be noted that under the Rome Treaty the right of initiative in Community matters belongs to the Commission. The European Council risks pre-empting this right: see 'Council of Ministers and Commission' at p232 below.

1974. But what also contributed to the lack of progress was the successful ideological crusade by some members of the Council - the Britain of Mrs Thatcher and, perhaps less well known, Denmark - against the perceived dictates of a bureaucracy in Brussels, particularly in areas such as agriculture as well as against anything which might be regarded as an enlargement of the Community's powers.

It is noteworthy that those same Member States appear to have become the prime obstacles to early implementation of the more recent Maastricht Treaty - Denmark because of a failure to accept the Treaty by referendum and Britain because of economic and political forces within the Major Government. However, nothing like the same internal animosity has been demonstrated towards the SEA, to be discussed next. By and large the SEA has been viewed as an overdue realisation of the internal market as envisaged in the Treaty of Rome.

THE SINGLE EUROPEAN ACT

In the mid-1980s the EC Commission developed a White Paper entitled "Completing the Internal Market".[31] Its proposals formed the basis for the adoption of the Single European Act which came into force on 1 July 1987. The SEA, its perhaps rather misleading title notwithstanding, is itself a treaty amending the Treaty of Rome.[32] The Act contains provisions for the completion of the internal market, which is a new label for the original notion of common market. It also changes some of the rules as regards the decision-making process of the Community. Ideally, these changes speed up the making of EC law and, possibly, will make the legislative process more democratic as well. The SEA formally includes a number of "new" policy areas in the scope of the EEC Treaty, drawing on existing practices including inter alia cooperation in economic and monetary policy (something to be further developed in the Maastricht Treaty). Finally, the SEA also addresses the issue of European Political Cooperation (EPC) without, however, amending the Rome Treaty in this regard (again to be built upon in the Maastricht Treaty).

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31 COM (85) 310.

32 The SEA also amends the ECSC and EURATOM treaties but most changes concern the EEC Treaty.

Completion of the Internal Market

The basic principle of the 1992 programme is the creation of an area without internal frontiers in which the free movement of goods, capital, services and people is ensured.[33] It will be recalled that the establishment of a common market is an original feature of the Rome Treaty.[34] It has been argued that the SEA obligation to establish an "internal market" encompasses less than the concept of a "common market".[35] In particular, the SEA leaves the areas of agriculture and transport other than by sea or air untouched (although the latter is picked up in the Maastricht Treaty under the broader heading of Trans-European Networks).[36] But otherwise the SEA concept of internal market can be treated as substantially equivalent to the earlier concept of common market.

The 1985 White Paper of the Commission contained a detailed analysis of barriers to the internal market that remain, grouped into physical,[37] technical[38] and fiscal[39] barriers. The SEA requires that the Community adopt measures towards the removal of these impediments to the free movement of goods, persons, capital and services by the end of 1992.[40] It appears that that deadline will be substantially met. The Commission

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33 Article 8a Rome Treaty as inserted by Article 13 SEA.

34 See 'Purpose of the European Community. Means to Achieve this Purpose' at p221 above.

35 Kapteyn & Verloren Van Themaat, *Introduction to the Law of the European Communities After the Coming into Force of the Single European Act* p102. See also the authorities listed in Dehousse, "1992 and Beyond: The Institutional Dimension of the Internal Market Programme" (1989) 1 *Legal Issues of European Integration* 109 at fn1.

36 Both areas are the subject of separate proposals: see text accompanying fn 68 and 69.

37 Physical barriers refer to a variety of customs and immigration obstacles at national borders, for instance, for the purposes of collecting VAT or of checking the identity and status of people crossing the border.

38 For instance, the continued struggle for the recognition of qualifications of professional people (lawyers, architects, etc).

39 Indirect taxes are the central focus of attention. Briefly, problems arise because of the existence of different types and rates in the Member States, especially VAT and excise duties. Much more detail about the physical, technical and fiscal barriers as identified in the White Paper can be found in Chance, *The CCH Guide to 1993, Changes in EEC Law* (CCH Editions Limited, Bicester, 1990).

40 Article 8a Rome Treaty as inserted by Article 13 SEA.

reported the adoption of 82% of its reform programme as of 1 April 1992.[41] Considering the slowness of progress prior to the SEA this is a remarkable achievement, an explanation for which can be found (at least in part) in the institutional reform of the SEA to be discussed next.

Institutional Reform

Most importantly, the SEA has changed some of the rules as regards the decision-making process of the Community. The aim is to facilitate reform in the substantive areas referred to above,[42] and to give greater legitimacy to Community decisions by enhancing the democratic element. The changes affect all four EC institutions.

Council of Ministers and Commission

In a sweeping statement the SEA requires decision-making in the Council towards completion of the internal market to take place by qualified majority voting. It follows that a number of decisions which previously were taken unanimously (at least in practice), can now go ahead, the disagreement of some individual Member States notwithstanding. Exceptions to the qualified majority rule, while not unimportant, are limited.[43] Of course, exclusions to the SEA itself also remain deprived of the benefit of majority voting - in particular, the CAP and road/rail transport. Any progress here has to be achieved by unanimity.

The powers of the Commission traditionally revolve around its monopoly of legislative initiative. It has been observed that the proposals from the Commission constitute not only the formal starting point, but also the

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41 "Completing the Internal Market: Progress to 1 April 1992" *EC Background* May 1992 (Canberra). Notwithstanding initial concern by the Commission regarding the delays incurred by the Member States in implementing the Directives adopted by the Council, the situation as at 10 March 1992 is that over 72% of the measures requiring national implementation, have been taken; see p6.

42 See 'Completion of the Internal Market' at p231 above.

43 Article 100a (1) and (2) Rome Treaty, as added by Article 18 SEA. The exceptions listed in Article 100 (a) (2) concern fiscal provisions, free movement of persons and the rights and interests of workers (other than health, safety, environmental protection and consumer protection).

substantive basis on which the Council of Ministers takes its decisions.[44] This follows from the consideration that, on the one hand, the Council may only amend a proposal by unanimous vote and, on the other hand, the Commission may amend or withdraw a proposal so long as the Council has not yet acted upon it.[45] The Commission's powers in this regard remain untouched by the SEA. The SEA simply adds that, in the case of any amendments proposed by Parliament under the cooperation procedure, to be discussed below,[46] the Commission's prerogative extends to deciding whether it will accept the amendments.[47]

The Maastricht Treaty would not fundamentally alter the power relationship between the Council and the Commission. However, it does introduce the new concept of "subsidiarity". This concept seeks to combine the need for effective decisions with a desire to decentralise the decision making process. Briefly, "subsidiarity" is defined by reference to the principle that Community action is only called for when and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States.[48] It therefore may affect both the Commission's right to initiate and the Council's right to formulate Community legislation. While the Maastricht Treaty would exclude areas which do not fall within the exclusive competence of the Community, the full scope of the principle of subsidiarity is yet to be determined. It is the one respect in which the Member States risk moving away from rather than towards a closer European union. The United Kingdom has already indicated a clear preference for a further strengthening of the principle.

Court of Justice and Court of First Instance

According to Lenaerts the *trias politica* or the doctrine of separation of powers must be understood in its functional rather than organic meaning in

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44 Kapteyn & Verloren Van Themaat, *Introduction to the Law of the European Communities After the Coming into Force of the Single European Act* p252.

45 Article 149(1), (3) Rome Treaty as replaced by Article 7 SEA.

46 See text accompanying fn64.

47 Article 149(2) Rome Treaty as replaced by Article 7 SEA. It would appear that the Commission's right of initiative thus remains largely intact. Unfortunately, the provisions of the SEA as regards the European Council are a cause of concern in this regard: see the comments above, fn30.

48 Article 3b Rome Treaty as inserted by Article G Maastricht Treaty.

order for it to be practicable in a European Community setting.[49] As regards the European Court this means that the Court is more than a mere judicial enforcement body. Rather from its inception the Court of Justice was instrumental in ensuring a uniform application of Community law in the Member States.[50] In addition, the early case law especially of the Court of Justice serves as a reminder of the active (legislative) role of the Court in promoting the cause of European integration. The much-celebrated cases in this respect of *Van Gend en Loos* and *Costa-Enel*, establishing the related principles of supremacy and direct effect of Community law, have already been discussed.[51]

It would appear that the Court of Justice has fallen victim to its own success. The case load of the Court has steadily risen over the years with the result of a marked lengthening in the duration of proceedings. By the end of the previous decade it took two years on average to obtain judgment in a direct action. Even more worrying was the average length of time to obtain a preliminary ruling: eighteen months in 1988 as compared to six months in 1975.[52] As it has been observed by Millett, it would be particularly harmful for the unity of the Community legal order if domestic courts and parties are deterred from seeking preliminary rulings because of the prospect of long delays.[53] The Court itself has made several proposals to improve the situation. A first proposal was to increase the number of judges and Advocates-General.[54] A second proposal suggested a more extensive use of chambers as opposed to having each case heard by the full

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49 Lenaerts, "Some Reflections on the Separation of Powers in the European Community" (1991) 28 *CML Rev* 12.

50 TMC Asser Institute, *Article 177 EEC: Experiences and Problems* (Elsevier Science Publishers, Amsterdam 1987).

51 See text accompanying fn16 and 18.

52 A rich source of statistical material is Millett, *The Court of First Instance of the European Communities* (Butterworths, London 1990) especially Chapter 1. See also Kennedy, "The Essential Minimum: The Establishment of the Court of First Instance" (1989) 14 *EL Rev* 7.

53 Millett, *The Court of First Instance of the European Communities* p3.

54 The practice has thus far been to appoint, by the common accord of the Member States, one judge from each Member State. Since the accession of Portugal and Spain in 1986 the Court consists of 12 judges plus 1. The 13th judge is necessary to ensure majority decisions, and is appointed in rotation by France, Germany, Italy, the United Kingdom and Spain.

court.[55] A further proposal was to establish another tribunal to take over the Court's jurisdiction at first instance in certain matters.[56] In the result the SEA has inserted a new Article 168a in the Rome Treaty empowering the Council of Ministers to establish what is now the Court of First Instance of the European Communities.[57]

The Court of First Instance is said not to constitute a new Community institution in its own right.[58] Rather, it is "attached" to the Court of Justice. Its seat is at the Court of Justice and no separate Advocates-General are to be appointed.[59] The jurisdiction of the new Court is exclusive in that it is not concurrent with that of the Court of Justice except for appeals on points of law. However, the range of issues that trigger the competence of the new Court has been narrowly defined to include, in essence, staff cases, competition cases and related damages claims. Noteworthy is that the Court of First Instance is not competent to deal with preliminary rulings.[60]

The practical usefulness of the Court of First Instance is that it decides cases that require a close examination of often complex facts. However, in terms of actual relief provided to the Court of Justice, the new Court reportedly has been a limited success only.[61] A recently published paper by

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55 The most important category of cases to be heard in plenary sessions concerns preliminary rulings. The other categories are cases brought before the Court by a Member State or by one of the Community institutions, in particular the Commission; Article 165(3) Rome Treaty.

56 The various proposals discussed above were the subject of a memorandum by the Court of Justice to the Council of Ministers in 1978; Millet, *The Court of First Instance of the European Communities* p3.

57 Article 11 SEA; Council Decision 88/591/ECSC, EEC, EURATOM O J 1988 L 319, 1, and corrected in O J 1989 C 215, 1. The decision is reproduced in Appendix II of Millett, *The Court of First Instance of the European Communities*.

58 Millet, *The Court of First Instance of the European Communities* p7.

59 Council Decision of 24 October 1988, as above fn 57, Articles 1 and 2.

60 Excluded also are actions brought by Member States and by Community institutions.

61 Millett comments that, as at 31 October 1989, the transfer of pending cases relieved the Court of Justice of some 150 cases but left three times as many still pending before the Court of Justice; Millett, *The Court of First Instance of the European Communities* p81. Compare the approving comments by Vandersanden, "A Desired Birth: The Court of First Instance of the European Communities" (1991) 21 *Ga J Int & Comp L* 51. The figures for 1991 confirm the relative importance of the

the Court of First Instance makes some proposals for further reform.[62] In the document it is noted that the current structure of the Court of Justice does not allow that Court to extend its capacity to hear and decide cases. On the other hand, it is pointed out that the Court of First Instance itself, once the initial running-in period has lapsed, will have excess capacity for dealing with cases. The Court of First Instance suggests the creation of a unitary and hierarchical system of courts. At the top would be a single constitutional court and court of last resort, that is, the Court of Justice. At the bottom could be several newly to be established courts with specialist jurisdiction (for example, to hear intellectual property cases). The Court of First Instance itself would occupy an intermediate level. Instead of its current role as a specialised and ancillary commercial court, the Court of First Instance wishes to be vested with a wide general jurisdiction, albeit subject in principle to review by the Court of Justice on points of law.[63] It is unlikely that a decision on these matters will be taken before 1996 when it is proposed to review the entire institutional structure of the Community.

The European Parliament

Under the SEA the traditional division of labour between the various Community institutions - consisting of a Commission that proposes, an Assembly that advises, and a Council that decides - remains fundamentally unaltered. However, in a number of instances matters can now go back to Parliament for a second reading after they have been before the Council. This so-called "cooperation procedure" applies to most (but not all) cases where decision-making by qualified majority replaces unanimity in the Council.[64]

Court of Justice vis-à-vis the Court of First Instance; Commission of the EC's, *XXVth General Report on the Activities of the European Communities* 1991 (Office for Official Publications of the European Communities, Luxembourg 1992) p371.

62 The document is discussed in Editorial Comments (1991) 28 *CML Rev* 5-10. The text of the discussion paper itself has been reproduced in "Reflections on the Future Development of the Community Judicial System" (1991) 16 *EL Rev* 175.

63 A further discussion of the issues can be found in Jacque & Weiler, "On the Road to European Union - A New Judicial Architecture: An Agenda for the Intergovernmental Conference" (1990) 27 *CML Rev* 185.

64 Article 149(2) Rome Treaty as replaced by Article 7 SEA.

In the past the Council was free to ignore the advice of Parliament as regards Commission proposals. This is still the case today. However, the cooperation procedure of the SEA requires that, if the Council does not intend to follow the opinion of Parliament, the Council henceforth must adopt a "common position" by a qualified majority. The Council must provide a full explanation of its reasons to Parliament.[65] Parliament has then a second occasion on which to consider the matter. While Parliament may elect not to do anything, it can decide to reject the common position or to propose amendments to it. An outright rejection of the common position can only be overruled by a unanimous Council decision. Proposed amendments to the common position are sent to the Commission first. The Commission is free to go along with Parliament's proposed amendments or to reject them. In this instance it is the rejection of the Commission's position that requires unanimity in the Council.

The Maastricht Treaty would introduce a new "co-decision" procedure to strengthen further the veto right of the European Parliament. Under this procedure a rejection of the common position could only be overcome by agreement between Parliament and the Council in a special conciliation committee set up for that purpose. That modification notwithstanding, the absence of any power to initiate legislation means that the European Parliament is still light years away from becoming a real decision-making force within the Community.

Concerns about the so-called democratic deficit of the Community have been expressed within some Member States during the process of ratifying the Maastricht Treaty. Of course, it should not be assumed too readily that an increase in apparent democracy would necessarily result in a better functioning Community. It is indeed arguable that the current entanglement of national and supra-national interests as can be found in the close working relationship (both de iure and de facto) between Council and

65 Strictly speaking it used to be that the Council could not be forced to state its reasons for not adopting the views expressed by Parliament. See Lenaerts, "Some Reflections on the Separation of Powers in the European Community" (1991) 28 *CML Rev* 11 at 21.

Commission is particularly suitable for the Community in its present stage of development.[66]

The "New" Policy Areas

The SEA formally includes several "new" policy areas in the Treaty, but in practice most of these existed already in one form or another. They are listed in the SEA as Cooperation in Economic and Monetary Policy (with an express reference to Economic and Monetary Union); Economic and Social Cohesion (specifically, the establishment of special funds to help redress imbalances between regions in terms of economic and social development); Research and Technological Development (for example, in the field of computers and information technology); and the Environment (inter alia, Community norms for the exhaust emissions of cars).[67]

The above list does not offer a complete overview of the Community's reform programme. In addition separate proposals are pending as regards agricultural and transport policies. The need for CAP reform was acknowledged most recently at the Council of Agricultural Ministers' meeting of 21 May 1992. As regards transport policy, the Commission, conscious of the infrastructure necessary for the successful function of the internal market, presented a "priority action programme" to the European Council meeting of December 1990 in Rome. The programme covers transport by air, rail, road and water. For instance, there are plans for the completion of a European high speed train network by 2010.[68] But the programme also pays attention to the areas of telecommunications (ie the development of a trans-European telecommunication network) as well as

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6 To borrow from Lenaerts, it would appear that proponents of greater influence for Parliaments narrowly focus on an organic as opposed to a functional division of powers.

7 It has been argued that the provisions dealing with the environmental policy of the Community raise as many questions and uncertainties as do the provisions concerning the internal market: Vandermeersch, "The Single European Act and the Environmental Policy of the European Economic Community" (1987) 12 *EL Rev* 407.

68 These plans involve the investment of some AUD 220 billion (9000 km of new lines to be constructed, 15000 km of existing lines to be improved); Jorgensen, "The European Community and Australia" (Address at the University of Melbourne, 19 September 1991) p5 (mimeo).

gas and electricity (the setting up of European electricity and national gas grids).[69]

The Maastricht Treaty would formalise the position of the "Trans-European Networks", making them part of a new Community policy. It would also add a range of additional policies to the list of new Community policies. These concern, in particular, Education, Vocational Training and Youth, Culture, Public Health, Consumer Protection and Industry.[70]

1992 AND BEYOND: PROBLEMS AND PROSPECTS

Economic and Monetary Union

Economic and Monetary Union (EMU) has been singled out for special attention in the Maastricht Treaty. The ultimate goals are both appealing and challenging. It will be recalled that the Treaty of Rome refers to the progressive approximation of the economic policies of the Member States as a means to achieving the objectives of the Community.[71] As early as 1962 the Commission argued that the customs union was bound to lead to an economic and monetary union if achievements so far attained were not to be jeopardised. That view is still largely held. Nevertheless, a great deal of work remains to be done before a full EMU can eventuate. So far the Community's achievement in the area of economic and monetary cooperation has centred around the establishment of the European Monetary System (EMS) in 1970 with an Exchange Rate and Intervention Mechanism (ERM) as its core element. By and large the EMS has proved to function satisfactorily notwithstanding the recent "suspension" of the British pound and Italian lira in September 1992.[72]

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69 Commission of the EC, "Trans-European Networks for a Community without Frontiers" (1991) 4 *European File* 10.

70 New Titles VIII-XIII of Part 3 (Community Policies).

71 See "Purpose of the European Community. Means to Achieve this Purpose" at p221 above. The Treaty allows for (and induces) coordination of the national economic and monetary policies of the Member States. However, it provides an inadequate legal basis for the development of the monetary union itself; Kapteyn & Verloren Van Themaat, *Introduction to the Law of the European Communities After the Coming into Force of the Single European Act* pp600-603.

72 A good overview can be found in McMahon, "Progress towards Economic and Monetary Union" in Commission of the EC (ed), *Thirty Years of Community Law*

In 1988 the Commission set up a Committee which subsequently became known as the Delors Committee.[73] The Committee published a report in which it is proposed to move towards EMU in three stages. The Delors approach was in essence approved by the Maastricht Treaty.

The first stage has already begun on 1 July 1990 and is characterised by a greater convergence of economic policies between the different Member States. The second stage, set down to begin in 1994, would be a period of transition where the ultimate responsibility for policy decisions would remain in the hands of the national governments. This stage would see the establishment of the European Monetary Institute (EMI) to monitor the functioning of the EMS; the strengthening of cooperation between the national central banks; and the commencement of technical preparation for the third stage.

Under the Maastricht Treaty the third and final stage of EMU may begin as early as 1997 and must begin no later than 1999. This stage requires a decision that a majority of Member States will irrevocably lock their exchange rates. The aim is to reach a culmination in the ultimate replacement of all national currencies by one single European currency (although there is no absolute requirement that all the Member States participate from the beginning). Also in the third stage, the EMI would be superseded by a European Central Bank which together with the national central banks would regulate the monetary policy of the Community.[74]

Economic and monetary union is one of the more controversial aspects of the Maastricht Treaty. Recent events (as regards in particular the British pound) have indicated that the process of moving towards a single

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(Office for Official Publications of the European Communities, Luxembourg 1981) p397. Readjustments of the central rates (parities) around which the currencies are permitted to fluctuate have become increasingly infrequent; two between 1984 and 1987 and none between 1987 and the time of writing (September 1992).

73 For a discussion, see Louis, "A Monetary Union for Tomorrow?" (1989) 26 *CML Rev* 301 at 311.

74 The special position of the United Kingdom and Denmark regarding the third stage of the EMU is acknowledged in separate Protocols. First, it is recognised that the United Kingdom will not be obliged to move to the final stage of the EMU without a separate decision to do so by its government and parliament. Second, it is taken into account that the Danish Constitution contains provisions which may necessitate a referendum prior to Denmark's participation in the final stage of the EMU.

European currency may be held back if there is insufficient ongoing support by key Member States.

The Move towards Political Union

As already indicated,[75] political union has always been the ultimate goal of the European Community. The SEA itself addresses the issue of political cooperation in its Title III. Moreover, at a special meeting in Rome in October 1990 the European Council confirmed - with reservations on the part of Britain - its commitment progressively to transform the Community into a full European union, inter alia by developing its political dimension. The debate as to the particular shape of any such union continues up to this day, although some indication of an answer can be found in the Maastricht Treaty.

The options are, in essence, a federal model and a more confederal blueprint. The first, as advocated by The Netherlands, involves a single structure for European union with some aspects of foreign policy to be assigned for decision making by qualified majority voting. The second model, as put forward by Luxembourg, does not favour an extension of qualified majority voting to political matters, and treats political union as separate from economic union. The need for a compromise was evident at the December 1991 conference which resulted in the Maastricht Treaty. The Maastricht Treaty records an agreement in principle to move towards developing a Common Foreign and Security Policy. However, this has been combined with an acceptance that, for the foreseeable future, decisions on these matters and other sensitive issues (in particular, immigration) will essentially continue to be made at the intergovernmental level. Of course, this does not preclude the Member States from agreeing to a more federal model at some later stage.[76]

A more immediate result of the trend towards political union is the creation of a new legal concept of "European citizenship" in the Maastricht Treaty. Such citizenship would attach to any "person holding the nationality of a

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75 See text accompanying fn29.

76 The Maastricht Treaty would leave some room for qualified majority voting in the Council both as regards the Common Foreign and Security Policy (Article J 3.2) and, even more cautiously, as regards Cooperation in the Fields of Justice and Home Affairs (Article K 4.3).

Member State". The express rights conferred are of a rather symbolic nature (for instance the right to petition the European Parliament and to receive diplomatic protection from embassies of other Member States in countries where the national's own country has no embassy). Provision is made for further rights to be conferred by unanimous vote of the Council.[77]

Issues of Enlargement

"Deepening" is the Community parlance for the process of accelerated integration through the completion of the single European market, economic and monetary union, the creation of a political union and the development of new common policies. The SEA and especially the Maastricht Treaty represent an understanding that this process of "deepening" has to be completed before the "widening" of the Community, that is its enlargement, can usefully be put on its agenda. A political discussion is presently underway within the Community as to when this process of widening should begin.[78] Already there is a considerable queue of aspiring members - perhaps one of the most obvious signs of the Community's success to date. However, only Austria and Sweden stand a serious chance of being offered full membership in the immediate future.[79]

In an address in Brussels in April 1991 Commission Vice-President Andriessen called for some creative thinking whereby the Community could offer the benefits of membership without weakening its drive towards further integration, and without subjecting the fragile structures of new market economies to excessive pressure.[80] In practical terms it follows from this that opening up the Community to new full members is only one

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77 Article 8e Rome Treaty as inserted by Article G Maastricht Treaty.

78 The Lisbon Summit of 26-27 June 1992 of the EC Heads of State and Government made clear that the beginning of enlargement negotiations and ratification of the Maastricht Treaty are politically linked. The interdependence of both issues had already been signalled by Vice-President Christophersen in early 1992; see (1992) 10/2 *EC News*.

79 Other applicants include Turkey, Cyprus and Malta. Finland formally applied for membership in March 1992. The application by Turkey has been rejected twice so far on the grounds of inadequate economic progress and a poor human rights record; Jorgensen, "The European Community and Australia" (Address at the University of Melbourne, 19 September 1991) (mimeo).

80 "Towards a Community of Twenty-Four" 1991 9/3 *EC New*.

option. At least two other dimensions to the enlargement issue can be discerned at present.

First, the Community in recent months has been negotiating with the EFTA countries about a formula which would extend the single European market to those nations. An agreement was reached at the end of October 1991 to include Norway, Sweden, Finland, Austria, Switzerland, Iceland and Liechtenstein in a so-called European Economic Area (EEA). However, that agreement was declared by the Court of Justice to be incompatible with the Treaty of Rome, particularly regarding its dispute resolution procedures.[81] After some renegotiation a revised agreement was signed, and is now open for ratification by the various countries concerned.[82] Once the EEA becomes fully operational, the four Community freedoms of goods, persons, capital and services will apply from the Arctic to the Mediterranean.

Second, as regards Central and Eastern Europe, the Commission has traditionally coordinated the efforts of the industrialised countries to support economic reconstruction through the PHARE group of twenty-four (which includes Australia and New Zealand). The programme of Community assistance was extended in 1991 to include the Baltic States and Albania. Moreover, Czechoslovakia, Hungary and Poland have been offered associate membership. On 16 December 1991, three so-called "Europe agreements" were signed.[83] These go beyond a traditional trade agreement without, however, conferring full membership rights (or obligations). Other countries may follow "once their conditions permit."[84]

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81 The Opinion of the European Court of Justice was issued in response to a request by the Commission under Article 228 of the Rome Treaty; Opinion 1/91, *OJ* 1992, C 110/01.

82 The revised agreement abandons the initial idea of having a joint EEA Court. Instead the EFTA countries will for their part establish an EFTA Court. This new agreement was approved by the Court of Justice in its Opinion 1/92, *OJ* 1992, C 136/1. For a discussion see Norberg, "The European Economic Area: The Legal Answers to a Dynamic and Homogeneous EEA" (1992) *European Business Law Review* 195.

83 *XXVth General Report on the Activities of the European Communities 1991* (Office for Official Publications of the European Communities, Luxembourg, 1992) p249.

84 The Commission's Vice-President is on record as having stressed that much remains to be done: "External Challenges of Europe" 1991 9/3 *EC News*.

CONCLUDING REMARKS

European integration is a dynamic process. That process started well before the signing of the Treaty of Rome in 1957. Indeed it was the ECSC Treaty of 1952 which formally signalled the beginning of economic unification for the European Community and established for the first time the principle of supranationality which makes the Community more than just an international body. But it was the Treaty of Rome which marked the beginning of the European Community as we now know it. It has taken some 35 years for the Rome Treaty's goal of a single European market to be finally realised with the adoption and implementation of the SEA. Effectively that Act closes the chapter on economic integration for the European Community. "Europe 1992" is the term which has come to symbolise the European Community's growth into a fully fledged economic union.

Europe 1992 also marks the beginning of a new stage in the process of European integration. The Maastricht Treaty signed in February 1992 would, if implemented in its present form, considerably expand the monetary and political dimensions of the Community. The current controversies regarding its ratification perhaps suggest that the Treaty has pushed to the limit the preparedness of some Member States and their constituents to see a fuller "Europeanisation" of the Community at this stage. But whatever its final outcome, the Maastricht Treaty serves to indicate that the process of European integration is unlikely to come to a halt with the deadline for implementation of the SEA in December 1992. Europe is slowly but inevitably coming of age.