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Details of Europaeum activities are given in Annex A at the back of this pamphlet.

**A EUROPAEUM LECTURE
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**The Commission
and the
European
Parliament after**

Nice

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“Almost every conceivable Community policy, rule or enactment is the result of a conflict of interest between Members, and has features in it representing a compromise”.

Sir Con O’Neill, Britain’s Entry into the European Community (Frank Cass, 2000)

The Role of the Commission and the European Parliament – after Nice

Introduction

The role and functions of the European Commission were a major item on the agenda of the Intergovernmental Conference and were incorporated in the new Treaty of Nice. Various proposals have been made which seek to balance the role of the Commission as a political college, mediating the interests of the Member States and expressing a collective political will, and its functions as a decision-making body in the European Union. There have been debates on the optimum number of commissioners and whether some of its responsibilities should be devolved to other bodies, and whether its powers should be extended to include Common Foreign and Security Policy (CFSP) or Justice and Home Affairs issues (JHA). The public debate in Britain has been bedevilled by widespread ignorance about the real purpose of the Commission, exacerbated by the demonising of “Brussels” by the British press. As the Amsterdam Treaty foresaw, the prospect of enlargement to embrace the countries of Central and Eastern Europe makes it necessary to review the operation of the EU institutions. Reform however, can only succeed if it is based on an understanding of why the Commission was set up in the first place, and due recognition that its role is central to the proper functioning of the EU. The prejudice that disfigures so much of the public debate does not constitute a case for changing the composition and functions of this unique institution.

The Commission's functions

When the statesmen who were drafting the original European Community Treaties saw that they needed an institution which was both independent and represented all the Member States, they realised that it could also perform a number of other tasks which had to be done by an autonomous institution. These tasks do not necessarily need to be carried out by a policy-initiating body, but there are clear advantages in having all of them done by the same institution.

The European Commission has six basic functions, each of which needs to be performed by an autonomous institution independent of the Member States. In some cases the Commission acts with the European Parliament and the Council of Ministers: others are tasks for the Commission alone, depending on the legal base in the Treaties or in primary EU legislation.

- (1) The Commission alone makes proposals for Community policies and legislative measures.¹ It must do this in the interests of the European Community² as a whole, including the interests of those who are in the minority, so the Parliament and the Council can only discuss proposals that take reasonable account of minority interests. This crucial safeguard for minority interests is necessary to make majority voting acceptable.
- (2) When the Commission negotiates on behalf of the Community with non-members, it acts on instructions from the Council, based on the Commission's proposals. It negotiates in the interests of the Community as a whole, safeguarding minority interests as far as possible.
- (3) Under Community competition rules, the Commission takes decisions on state aids, measures designed to protect state-owned companies, and on other aspects of competition law. Competition policy must be administered by an institution that is clearly independent of the Member States, and in whose impartiality all

interested parties can have confidence.

- (4) The Commission brings proceedings against Member States in the European Court of Justice when this is necessary to get them to carry out their treaty obligations. This must be done with vigilance and impartially, treating all Member States alike, so that the benefits of EU membership are available to all its citizens.
- (5) In disputes between Member States, the Commission acts as adviser and arbiter assisting them to fulfil their obligations under EU law and reconcile their conflicting interests. To be effective it must be independent and impartial.
- (6) The Commission also administers some Community funds, choosing consultants and approving projects. For this purpose also it must be independent, so that none of the states gets more favourable treatment.

In fulfilling these functions the Commission is obliged to act in the interests of the Community as a whole, and not in the interests of whichever Member States happen to be in the majority on a particular issue. It must be fully representative and equally independent of all Member States.

The checks and balances to which the Commission is subject differ according to the function: whenever its actions have legal effects it is subject to legal controls through the European Court of Justice, and it is accountable politically to the European Parliament. But it is the Council and Parliament, not the Commission that adopt legislation.

Why the Commission?

New tasks often need new tools, and new inventions often need to be explained. To appreciate the role of the European Commission, it is necessary to understand what the task was, why the tool was designed as it was, and what were the constraints.

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When the European Community was set up, it was understood that if it were to be effective, majority voting would be needed. Every government involved knew it would sometimes be in a minority, so how could they be sure that their interests would not be swept aside, but would be reconciled as far as possible with those of the majority? This was the problem that the European Commission was set up to resolve by acting as an independent, disinterested mediator proposing ways of reconciling divergent interests.

A mediator must be impartial between the parties to the discussion. When a decision is adopted by a majority vote, the mediator's proposals must reconcile the interests of the minority with those of the majority, as far as possible. The first rule is that the parties may only discuss proposals made by the mediator, and should not discuss competing, and possibly one-sided, suggestions made by those in the majority. The second rule is that the mediator's proposals may only be amended by unanimous vote. Provided that the mediator body does its best to make proposals that safeguard the interests of the minority, a mediator-based system will make majority voting acceptable, even when the interests of the parties diverge substantially.

The mediator body must be independent of all interested parties, not influenced by some parties more than others. It must also be sufficiently representative of all the parties so that special problems or interests are all taken into account. Otherwise the mediator will inevitably be suspected of favouritism when it makes a proposal that appears to tilt towards one side or the other.

This is the rationale for the role and design of the European Commission. Once it had been agreed to have some majority voting, a structure was needed that would make majority voting³ acceptable to potential minorities. Every Member State was, and is, a potential minority sometimes. Following the two rules mentioned above, only the Commission makes legislative proposals, and these can only be

amended by unanimity. The Commission is independent from the Member States and other institutions, and its proposals must be designed to reflect the interests of the Community as a whole, i.e. reconciling divergent interests as far as possible. To ensure the Commission's independence, the Treaty provided that the members of the Commission would be appointed by Member States and removed as a body by a separate institution – the European Parliament. To ensure that the Commission was entirely free to design its proposals independently and safeguard the interests of minorities, it was provided that the Commission must not accept instructions from any other national or supra-national authority.

This is the “Community system”, in contrast to intergovernmentalism. These principles need re-stating because they are habitually overlooked. Even the Commission itself sometimes seems to have forgotten them.

A unique institution

The Commission acts as a mediator when a new measure or policy needs to be adopted. The Commission never enacts legislation. This is the responsibility of the Council and the Parliament, acting on the basis of a Commission proposal.

In other words, the Commission is not a government, nor a civil service. It is neither a secretariat for the Council of Ministers, or the European Parliament. Nor does it act as a committee of representatives of the Member States. It has no power to impose legislation or create new obligations. This can only be done by the Parliament and the Council acting together. When the Commission acts alone, its only power is to apply rules that the other institutions have adopted, or which are enshrined in the Treaties. The belief that the Commission is all-powerful is rooted in ignorance and prejudice.

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One unsatisfactory aspect of the present situation is that many people, including some MEPs, do not understand how the institutional balance works. This certainly applies to lobbyists and journalists, who perhaps have their own reasons for not understanding. The Parliament is involved in legislation and policy-making but should not try to influence the Commission when it is required to act independently.

It is important to stress that although only the Commission can initiate proposals to be adopted by the European Parliament and Council of Ministers, it is expected to develop new policies. It was never intended merely to wait for instructions, even from heads of government. Its job is to try to create a consensus on the best policy for the EU as a whole. The Commission must take a single coherent view that is more comprehensive than the individual views of Member States. Unless the Commission makes suggestions, intergovernmental meetings, at any level, would only be in a position to consider ideas emanating from the national interest of one or more Member States. National politicians, including heads of government, are not best placed to consider issues from the collective point of view. The Commission's role is to reflect the common interest and put forward the best available solution, not simply the common denominator of different national interests.

Of course, the Commission does not invent new initiatives in a vacuum: it discusses ideas with the other institutions, governments and other interested parties, both before and after they become formal proposals. Its job is not merely to take up an existing consensus, but to identify new needs and to propose long-term responses, without being influenced by national interests or short-term political calculation.

Commission and Parliament

There is one striking feature of the present relationship that flows from the Commission's policy-proposing role. The European Parliament

is handicapped. It is a Parliament that cannot initiate legislation. This is an unusual situation that needs to be understood.

The European Parliament, like any other Parliament, acts by a simple majority of MEPs. There is no institutional or procedural mechanism that can oblige it to take minority interests into account, although in practice it no doubt attempts to do so. If the Parliament was free both to initiate and (in partnership with the Council) to adopt legislation, a Member State which was in a minority on the issue could be outvoted in both institutions. The only safeguard for the minority interest is the Commission, with its political duty to propose only measures in the interests of the Community as a whole. (The European Court of Justice can be asked to rule that a legislative proposal is contrary to the Treaties, but judicial review cannot deal with political problems.)

The European Parliament is a consensus-building institution, and its members try to be aware of different national sensitivities, but each MEP is answerable to one constituency only, and the Parliament can only act by majority. There can be no mechanisms to enable the Parliament to reconcile divergent interests satisfactorily, without the intervention of the Commission.

The Commission and the Treaties

There are several other important consequences of the present Treaty provisions on the role of the Commission.

The Co-decision Procedure, which requires Parliament and Council to reach agreement on a legislative text, allows a Commission proposal to be changed by majority vote in the Council without the Commission's consent, although it must be consulted.⁴ This means that if a qualified majority in the Council agrees with a majority in the Parliament, the legislation is adopted even if the Commission does not consider that minority interests have been adequately safeguarded. The

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more legislation that is adopted by co-decision, the more important this anomaly will appear.

Secondly, the Commission does not have the exclusive right to propose measures for the second and third pillars of the Maastricht Treaty – Common Foreign and Security Policy (CFSP) and, at least for the time being, Justice and Home Affairs (JHA). This means that the safeguards inherent in the Commission's role in policy-making and legislation do not apply. This is primarily because unanimity was to be the rule for these two areas. It was accepted that sometimes there would be no unanimous agreement, and therefore no EU action.

CFSP is a special case. It does not involve legislation. The view was taken that the Community method was not appropriate for forming a consensus on political actions from which some members might wish to stand aside. The prospect of a role for the Commission in CFSP was complicated by the existence of NATO and the WEU, which have different institutions and a different membership.

JHA also involves reconciling political views and attitudes, as opposed to economic interests. Some of those involved in the Maastricht negotiations did not understand the reasons for the Commission's role, and there was probably an element of institutional jealousy. National governments have been reluctant to extend the EU's powers, and some Member States regard justice and home affairs as more politically sensitive than economic issues. So far the second and third pillars have produced little in the way of concrete results, which suggests that the EU works more efficiently when the Commission performs its mediating role.

In the third place, co-operation between groups of Member States takes place outside the EU's institutional system. Examples are the arrangements for the single currency, the euro, which was envisaged in the most recent treaties, and the Schengen agreements on passport

controls, which were not. This may not matter much because a Member State that does not want to take part in these arrangements need not do so. Future arrangements for closer co-operation are subject to the provisions of the Amsterdam Treaty, and now the Nice Treaty. These give the Commission its normal role in the Community sphere, as distinct from CFSP and JHA.

Parliamentary Supervision

The independence of the Commission is based on Treaty provisions which until now have said that Commissioners are nominated by agreement between Member State governments, and approved “as a body” by the European Parliament. They must resign *en bloc* if the Parliament adopts a motion of censure by a two-thirds majority of votes cast. In the performance of their duties Commissioners must not take instructions from any government “or from any other body” (Art. 213). If any individual member of the Commission no longer fulfils the conditions required for performing his duties, or has been guilty of serious misconduct, the Court of Justice, on the application of either the Council or the Commission (but not the Parliament) may compulsorily retire him.

The Commission’s independence is rooted in the fact that its members are not appointed and removed by the same bodies. The Parliament may dismiss the whole Commission, for policy or political reasons, but may not force out individual Commissioners or give the Commission “instructions”. Incapacity or misconduct by an individual Commissioner is a judicial matter, to be decided by the Court of Justice. It is not a political matter to be dealt with by the Parliament. A political majority in Parliament would not remove a Commission of a different complexion unless the MEPs were sure that the governments of the Member States would appoint a new Commission with a different political balance. If instead of the present system the Commission

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was both appointed and removed by the Parliament, the Parliamentary majority would be too powerful and would prevent the Commission from providing an effective safeguard for minority interests. Similarly, if a majority of MEPs had power to give the Commission binding instructions, it would be prevented from performing its role as a mediator on policy issues; there would be no safeguards for the minority.

This may be frustrating for those MEPs who do not understand the reasons for the Treaty provisions, but it is necessary. If Parliament could give the Commission instructions, there would be no point in having a Commission.

Where competition policy is concerned, instructions from the Parliament would be incompatible with the Commission's independence in exercising its powers and would involve the Parliament in making decisions on evidence it had not seen and arguments it had not heard. The European Parliament is not a court of law. It would clearly be improper for the Parliament to give instructions to the Commission on such issues as illegal state aids and mergers, or prevent it from bringing Member States before the European Court of Justice.

A democratic deficit?

It is said that the role of the Commission is undemocratic: the Commission is a kind of government with limited powers, and should be subject to democratic control. In fact the Commission is not any kind of government, and the Commission **is** subject to some democratic control:⁵ the European Parliament may censure the Commission and, if it achieves a two-thirds majority, remove it from office. In any case, the Commission can only propose new policies: it is the Parliament and national governments, which are democratically elected, that adopt them. As far as the Commission's powers to apply existing rules are concerned, it is subject to judicial control. As long as the Commission has not been dismissed, Parliament must allow it to apply the existing

rules as it was set up to do, and to apply them in the way which provides the safeguards which the Commission was set up to provide. The independence of the Commissioners is functional and practical: it was not invented to make Commissioners important, but to protect the interests of smaller Member States, and even of large Member States when they happen to be in a minority. No one complains that judges are not elected, or because regulators are not subject to parliamentary instructions.

If commissioners were to be elected by national bodies, they would inevitably campaign by promising to defend national interests, whereas their job is to reconcile them with other interests, without showing favouritism. If Commissioners were elected by the European Parliament, on the basis of one commissioner from each Member State, most of the MEPs would be choosing people without being aware of their respective merits.

Is the Commission really necessary?

As far as initiating policy and drafting legislation is concerned, there are only three alternatives to the present system of checks and balances.

- All decisions would require unanimity in the Council:

This was broadly the system that prevailed before the Single European Act. This is the traditional intergovernmental system, the cause of the euro-sclerosis that almost brought the Community to a standstill. Qualified majority voting (QMV) in the Council made it possible to create the single market, whereas the unanimity requirement has made it extremely difficult to implement JHA effectively. This would, of course, be even worse after enlargement of the Union.

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- Safeguards for minorities would be abandoned (Yorkshire and Devon do not need specific safeguards in the UK Parliament.):

This would depend on the EU becoming so homogenous, and those participating in Council and Parliament decisions so similar in outlook, that there would be no risk of the interests of any Member State being overridden. This is not the case now, and will be even less so after enlargement has taken place.

- A mediator institution would be empowered to authorise or block measures drafted by other bodies:

This approach would have a number of practical disadvantages, and would not work in any respect better than the present system. The most important disadvantage is that the mediator would no longer play a constructive policy-forming role based on the general Community interest, but would have a negative role, raising objections as opposed to seeking solutions. The mediator would be a veto-wielding body, not a think-tank, and would be seen as obstructive even when it had right on its side. This would make it difficult to attract members of the right calibre.

In theory, some of the Commission's functions that involve applying existing rules rather than proposing new policies could be carried out by some other institution set up for the purpose, provided that it was equally independent and impartial. It is not clear however that anything useful would be achieved, except that the different roles of the two institutions would be easier to understand. Dividing up the Commission's functions would weaken the European institutions.

Changes made by the Treaty of Nice

At present the larger Member States nominate two Commissioners. The Amsterdam Treaty provided that, following the next enlargement of the EU, the Commission should be composed of one member from

each Member State, provided that the system of voting in the Council was changed. In effect, the larger states agreed to give up their second Commissioner in return for more votes in the Council.

The Treaty of Nice provides that with effect from January 2005, the weighting of votes of the Member States is to be altered to give more voting power to the larger Member States. Two new requirements have been added: in addition to a qualified majority of 170 votes out of a total of 237, the majority must include at least 62% of the total population of the EU, and must include a majority of the Member States.

When the EU reaches 27 Member States, the number of members of the Commission are to be less than the number of Member States; the exact number will be decided at some future date. The members of the Commission are to be chosen according to a system of rotation, not yet designed, intended to treat all Member States equally, and so that each Commission reflects the demographic and geographical range of all the Member States.

In addition, the rules concerning the President of the Commission were altered. The President is to be individually approved by the Parliament. He is given power to require the resignation of a member of the Commission, with the “collective approval” of the (other) members of the Commission. The other members of the Commission are to be appointed by qualified majority of the Council.

It must be said at once that this proposed change in the numbers of Commissioners is a serious mistake, in at least two respects:

- (1) It will add a new layer of complexity to an institutional structure which is already a patchwork quilt of illogical compromises, far from the clarity and relative simplicity of the Commission as independent and representative mediator

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- (2) It would make the Commission, for the first time, less than fully representative. At any one time there will always be at least one Member State in a position to say that, unlike the other Member States, it is not in any sense “represented” in the Commission – and that it therefore does not want to accept what the Commission has done.

In addition the position of the President has been strengthened by ensuring that he has the support of the Parliament, but at the cost of reducing his independence.

Surprisingly, the Commission itself underestimated the need for it to be fully representative of all the Member States. The Commission had suggested⁶ that one commissioner per Member State would lead to an expanded college which would have to be differently organised by modifying the present strict rules for collective decision-making based on the equal status of all commissioners. The Commission proposed “a system of rotation that would treat all Member States equally” because “what gives the Commission its cohesiveness and legitimacy is its operation as a collective body”. However, the Commission recognised that one commissioner from each Member State meant that citizens “more easily understand the role the Commission plays in integration”.

This indecisive statement understated the arguments for one commissioner from each Member State, and overestimated the objections. The Commission needs to be representative of the European Union as a whole, so that it can make acceptable proposals in the interests of all concerned. The suggestion emphasises the Commission’s less important executive function rather than its policy-forming/mediating and decision-making roles. The Member State governments have always considered that, although the commissioner they have nominated does not represent them, it is important that the standpoint of each Member State should be understood by at least one member of the Commission

at all times. Since each Member State has now agreed that there would be no commissioner of its nationality for certain periods,⁷ the effect will almost certainly be to weaken the Commission.

When an institution does not know its own *raison d'être*, there is a risk that others will believe that it no longer has one. The Commission did not say that there would not be enough real jobs for 25 or more commissioners: as the EU becomes more active in the CFSP and JHA areas, there is plenty to do. The Commission's concern was only about its internal decision-making procedures. This is not a strong enough reason for the change which is envisaged.

The arguments for having one commissioner from each Member State are most compelling in relation to the Commission's legislative role, but the need for independence applies equally to the other functions. The Commission's decisions on state aids are often important and controversial. If, for example, the Commission took a decision prohibiting an important merger or preventing a Member State from granting an important state aid at a time when there was no member of the Commission from that state, the decision would certainly be challenged. MEPs from that state might try to persuade the European Parliament to interfere with the Commission's exercise of its functions, which would be wholly inappropriate. For the Commission's own decisions to be accepted, it must be both independent and adequately representative.

The future debate

Somewhat optimistically disregarding the difficulties of devising a satisfactory and effective Commission with fewer Commissioners than Member States, the Nice Treaty calls for a debate on, in particular:

- How to delimit the respective powers of the EU and the Member States, reflecting the principle of subsidiarity
- The status of the Charter of Fundamental Rights
- A simplification of the Treaties
- The role of national parliaments
- Improving the “democratic legitimacy and transparency” of the Union

But these are not the only improvements that need to be discussed. This list suggests that the Nice Council failed to realise that it had not resolved the most important institutional questions.

Before considering any structural or institutional changes it is essential to understand why the EC was designed as it was, and what tasks the Commission needs to perform. Some of the suggestions that have been made would do more harm than good, throwing out the baby with the bath water. The implications of reforms that would eliminate safeguards or alter the system of checks and balances must be properly addressed.

Apart from the question of the number of commissioners, other possible institutional and structural improvements that should have been considered in Nice are:

- (1) The Commission could be given the sole right to propose JHA measures and a more prominent role in CFSP. (It would need to recruit additional staff with the expertise to do this.)
- (2) The co-decision procedure could be modified so that the Commission’s proposals would be altered only by unanimity in

the Council, or with the Commission's agreement. This would be important when co-decision is extended in combination with majority voting in the Council.

These two improvements are very important. They were not even discussed in Nice.

- (3) Members of the Commission might be nominated by two or three national governments, rather than by only one as at present. This would tend to improve the quality and strengthen the independence of commissioners.
- (4) Parliament could be given the power to ask the Court of Justice to remove an individual commissioner for incapacity or misconduct. Such a procedure would have to protect individuals from being made scapegoats for unpopular decisions on matters such as state aids. Commission decisions are taken collectively, and it could not be misconduct to enforce Community law.
- (5) The Commission might refuse to try to carry out tasks for which governments have not provided the necessary resources. It should strictly limit the number of national civil servants on secondment to it, so as not to erode its independence.

The European Parliament's natural desire to expand its power and influence must not be allowed to undermine the Commission's role or prejudice its impartiality and independence as the "guardian of the Treaties". The reasons for establishing the Commission in the first place must always be kept in mind.

Adapting the Commission for its different tasks

The six different functions the Commission performs, which were outlined at the beginning of this paper, do not all require the same internal administrative structure. The need for all significant Commission proposals and decisions to be taken by a body which is

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both representative and independent makes it necessary that such matters are decided collectively, and not delegated to individuals or groups of commissioners. The individual portfolios are for administrative convenience and efficiency. Commissioners are not like ministers in national governments; each has one vote in all Commission decisions.

Some portfolios are clearly linked to others, and it has been suggested that there would be advantages if there were groups of commissioners with related areas of responsibility, perhaps with a commission vice president at the head of each group. It is not impossible to reconcile some such system with both the equal status of commissioners and their collective responsibility.

Such a reform would not require any change to the treaties: a statement from the Commission to the effect that the status of commissioners was not affected by the new administrative structure would be all that was needed. This would not be analogous with national governments that have ministers and “junior ministers”. It would be more like the distinction between executive directors of a company, concerned with day-to-day operations, and non-executives concerned with strategy and policy, but each having one vote.

Flexibility and “enhanced co-operation”

There has been much discussion about the possibility that groups of Member States may wish to integrate further and faster than their partners are prepared to contemplate. Such arrangements already exist in the Schengen agreements on removing passport controls and Economic and Monetary Union. There are provisions in the Treaty of Nice that allow enhanced co-operation, provided that a minimum of eight Member States take part, and that a series of conditions are fulfilled. In the first pillar, non-participating States no longer have a veto. The differences between the three “pillars” of EU activity were

increased by the Nice Treaty provisions. Some issues arise that affect both the Commission and the European Parliament.

In order to assure Member States which do not take part initially that they can join later, if they so wished, it is essential that neither the original decision to establish the co-operation nor subsequent decisions taken by participants have the effect of making it impossible or unreasonably difficult for non-participants to join later. For first pillar, (EC) issues, this is ensured by saying that closer co-operation must be on the basis of a proposal from the Commission and with the assent of the Parliament (Article 11). For the CFSP and JHA pillars, the rights of non-participating states may not be sufficiently protected, because the Commission is only asked to give its opinion on the proposal for closer co-operation. Its agreement is not necessary, as its exclusive right to propose measures does not apply. In addition, the second and third pillars have no provision for the Commission to give an opinion on decisions taken by participants within the framework of enhanced co-operation, so there is no safeguard for the interests of non-participants. This is more serious than it might appear, because the Court of Justice has no jurisdiction over CFSP, which is non-justiciable in practice. As non-participants' veto rights have ended, the role of the Commission in safeguarding their interests is crucial in first pillar issues.

Secondly the relevant Treaty Articles provide that the enhanced co-operation may not affect the powers, rights, and obligations of non-participating Member States. For EC matters, the participating States could be brought before the Court of Justice under Articles 226 or 227 if they infringed this rule. It is not clear how far decisions taken under enhanced co-operation would themselves be open to judicial review. The situation is less satisfactory for CFSP and JHA.

A third unsatisfactory feature of the provisions is that, outside the EC sphere, the European Parliament is merely informed or consulted on the enhanced co-operation. This would matter less if the Commission

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were able to safeguard the interests of the minority effectively, but as already mentioned that does not seem to be the case.

It is of course true that similar issues can arise already as a result of closer co-operation, outside the provisions of the Treaty. In such circumstances, the question would arise whether, if the arrangements were made after the Amsterdam Treaty came into force, they would be automatically illegal if they did not comply with the Treaty.

It is important to stress that the issues that arise in respect of CFSP and JHA are not merely technical. The second and third pillars contain immense scope for joint action that would not be subject to effective control by the EU institutions or the non-participating Member States. It could be difficult to keep co-operation in these areas wholly separate from economic questions or from affecting the interests of non-participants. Enhanced co-operation would be particularly undesirable if it were to spawn new institutions, as some have suggested. There are enough complications with Mr Solana's role as High Representative overlapping with that of the Commission as well as the existence of NATO and the WEU.

The roles of the Commission and Parliament will be crucial, because only they can ensure that enhanced co-operation does not develop in such a way that the non-participating states will never be able to join. The views of the Commission and Parliament could be ambivalent if they supported the proposal for enhanced co-operation in principle when they were also obliged to ensure that it did not permanently exclude non-participants. The Commission in particular is likely to find itself in difficulties, because its duty to help a "core" group of Member States to co-operate more closely may not be easy to reconcile with its duty to the EU as a whole.

A constitution to limit the Union's powers?

The German regions (Länder) have been demanding that the European Union adopt a constitution that would place limits on the further transfer of powers reserved to the states as opposed to the Federal German Government. It is this demand that led to the first question on the Nice Treaty agenda for debate. But it is doubtful if the Community has yet reached the stage in its development when such limitations would be appropriate. In any case, these moves have been attacked by British euro-sceptics on the grounds that any form of EU constitution would be a step on the road towards a super state. It is ironic that those euro-sceptics who would normally be expected to support any measures to prevent further concessions of sovereignty should be opposed to a "constitution" irrespective of what it actually contains. The Germans, who already have a written constitution, have understood correctly that this is an effective method of defining and safeguarding regional and federal powers from encroachments from the centre. Euro-sceptics wrongly believe it is a means of transferring more powers to Brussels.

The need for clear thinking

The European Community is not perfect, and it needs to adapt to the new circumstances created by the probable accession of so many more Member States. Many suggestions for reform have been made, and are still being made. A number of these have not been thought through, and some of them are vague or confused, or prompted by prejudice rather than reason.

Proposals for change must reflect the following considerations:

- They must reflect a proper understanding that the existing institutions were designed to provide safeguards for minorities. These will be even more important in the context of an enlarged European Union.

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- They must be capable of clear and precise explanation, and their advantages and disadvantages must be objectively set out. Satisfactory simplification cannot be achieved without better understanding of the unique nature of the EU as a constitutional grouping of states. The independence of the Commission is a crucial feature of the institutional structure. The Commission is not a government, nor is the EU a traditional intergovernmental organisation. Still less does it aspire to be a superstate
- Those who advocate more power for the European Parliament must explain what the effects would be for small states. There is a widespread impression that the Parliament and in particular the larger Member States are trying to dominate the European institutions, and to weaken or remove the safeguards for minorities that are an essential feature of the Community institutions. A Parliamentary majority does not necessarily respect the interests of minorities, and this is a problem that will become more obvious as the number of smaller Member States increases. The more small states become members, the more the Commission's independence and representative character will be needed. Otherwise small States will not feel comfortable within the Union.

Questions about the role of the Commission

The principal question discussed here is the role of the Commission as set out in the Treaties. A number of things need to be said:

- There must be one policy-proposing body that is both independent and representative. The three alternatives mentioned above are not serious possibilities and would certainly not be viable after enlargement;
- Each of the Commission's six tasks needs to be carried out done by an autonomous institution of the Union. None of these tasks could be abandoned or left to an intergovernmental forum.

- Accordingly, if any powers were to be removed from the Commission, it would be necessary to set up a new institution to carry them out. There is no reason why they should not continue to be carried out by a single institution, although different legal and political considerations apply to the Commission's different powers, and this causes confusion.
- The role of all-purpose executive that has been thrust on the Commission in recent years cannot be carried out with the existing resources and staff. The more work the Commission undertakes without increasing its manpower, the less satisfactorily it will do the work that it was set up to do. Seconding national civil servants to the Commission will not resolve the problem.

The second question is what steps need to be taken by the Commission to recover its self-confidence and ability to function effectively.

- Above all there needs to be a clearer understanding of why the Commission was established in the Treaties. There is no need for a new job description or mission statement, but an urgent need to remind people what the Commission is for and why it must be independent. Election as opposed to appointment is not an option.
- If the Commission no longer includes one Commissioner from each Member State, it will be significantly weakened. Different issues would arise if a new and separate institution were set up to carry out some of its tasks.
- The Commission's main problem is that it is under-resourced for the work that it has been given to do. If this can be resolved, the Commission can be expected to perform satisfactorily.
- The quality and status of commissioners needs to be enhanced. One way to do that would be to require each commissioner to be nominated by two or more Member States, not merely by one.

What is the best institutional or structural arrangement for achieving the right balance between the collective interests of the European Union as a whole and the interests of a minority, whether a single Member State, a region or a special interest?

- The EU deals with this in two ways. It has an independent and representative Commission as a mediator and policy-initiating body, and it has several other institutions (the Economic and Social Committee, and the Committee of the Regions), as well as the European Parliament and the Council of Ministers, in which a satisfactory consensus can be achieved. In this context, the role of the Commission is crucial.
- Greater understanding of the need to balance collective and minority interests would be helpful, but there is no reason to institute additional procedural arrangements. There is certainly no case for setting up another European institution to act as a watchdog and supervise those that are there already. It is better to improve the institutions that exist rather than inventing new ones unnecessarily. The EU is complex enough as it is.
- In many situations an acceptable balance can be achieved without too much difficulty. However, there must be underlying procedural or institutional rules on which the parties can fall back if no agreed solution can be found, and these rules, even if they are not often used, must be seen to be fair and reasonably effective. If the Commission ceased to be independent and representative, there would be no satisfactory safeguard.
- Solutions are found because the only proposals that can be discussed come from an impartial source, the Commission, which can be relied on when appropriate to modify its proposal.

The conclusion is that the existing system is sound, and should be strengthened rather than altered. But it can only be improved if we are all prepared to understand it.

The situation after Nice

The results of the Nice conference are generally regarded as unsatisfactory.⁸ Indeed, there is some doubt about whether the Treaty will be ratified. The principal criticisms, insofar as they are relevant to this paper, are in brief as follows:

- The EU Treaties were made very much more complex, and much less coherent and intelligible, in particular in relation to qualified majorities, closer co-operation, and the future appointment of the Commission. This was not merely a question of drafting, but of conception. In particular, there is now a grossly excessive number of different legislative procedures.
- Nothing was done to correct the “democratic deficit” of the EU institutions, in particular in JHA and CFSP. Since the Maastricht Treaty, the EU deals with issues too important to be left to Ministers and officials without effective democratic control.
- Majority voting, needed to prevent deadlocks after enlargement, was not significantly extended (and was made more complex and rather more difficult).
- The voting power of the larger Member States was increased (which was in principle reasonable) and the powers of the Commission were in practice reduced (which was not).
- Nothing was done to correct the defects in the EU structure that existed before the Nice conference, in particular the fact that a Commission proposal is not needed for most JHA and CFSP measures, and that many of those measures are not subject to judicial review.
- Turkey is nowhere mentioned as a future Member State.

In other words, apart from settling the votes of the new Member States, the Treaty of Nice did not make the improvements that were clearly needed to prepare for enlargement, and did make changes some of

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which were undesirable in themselves, and all of which were undesirable in the over-complicated way in which they were drawn up. Instead, it altered the EU structures so as to give more powers to large Member States.

The Commission made a serious and perhaps irreversible error by proposing, before the Nice conference, that it should no longer be composed of at least one nominee of each Member State. This was bad for the Commission, but even more serious for the smaller Member States, which need a strong and effective Commission.

There was, in Nice, a striking absence of leadership. The French authorities did not seem to have a clear policy on the most important issues. The Commission had already failed to offer leadership. The fact that another intergovernmental conference was immediately recognised as necessary, and that it is to be preceded by a debate the proposed agenda for which omits most of the important institutional issues, illustrates the lack of both consensus and sense of direction.

The history of Nice shows a drift towards intergovernmentalism and away from the “Community system” of checks and balances. This is worrying for several reasons:

- An intergovernmental system is less democratic than the Community system, because the European Parliament and national parliaments have less influence, and because Council discussions (in effect, the discussions of one chamber of a bicameral legislature, but conducted as a diplomatic negotiation) are in secret.
- An intergovernmental system is less acceptable to the smaller Member States, because it deprives them of the safeguards which the Community system, and in particular the role of the Commission, have provided. An intergovernmental structure in

the EU would be unacceptable in the long run to a majority of the Member States.

- An intergovernmental system in which measures do not need to be proposed by a mediator Commission can be taken over at any time by two or three large Member States. It therefore leaves even a large Member State in a vulnerable position on any issue on which it is in a minority. This is so in particular because of the Nice Treaty provisions that allow closer co-operation between any group of eight Member States, on conditions which may not satisfactorily protect the interests of non-participating States.
- An intergovernmental structure inevitably gives most power to the largest Member State. So an intergovernmental system, whatever the details, is a step away from a guarantee of a “European Germany” rather than a “German Europe”, whether the other large Member States realise this or not, and even though there is no sign that Germany would take advantage of this.

No doubt there will be a debate. Apart from the fact that the official agenda suggested in Nice is defective, public discussion has so far been ill-informed about the rationale for the Community institutions, and even intelligent analysis is rarely accompanied by constructive suggestions. If the European Union is going to move forwards instead of backwards in the next few years, we need to begin by understanding more clearly what we have got.

In particular, the negotiations in Nice proved, if further proof was needed, that negotiations not based on clearly understood institutional principles inevitably lead to over-complicated, illogical compromises which, if they come into force, will give rise to endless irritation, controversy and frustration in the future.

Notes

- 1 The present paper discusses and develops ideas already published in Temple Lang and Gallagher, *The Role of the Commission and Qualified Majority Voting* (Institute of European Affairs, Dublin, occasional paper No 7, 1995) and Temple Lang, *Is there a rational European Constitution now?* (Oxford, 1998): see Laffan (ed.) *Constitution Building in the European Union* (Institute of European Affairs, Dublin, 1996): Pernice, *Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-making revisited?*, 36 *Common Market Law Review* (1999), 703-750. All these were, of course, published before the short *Report on the Institutional Implications of Enlargement* (published October 18, 1999), written by Mr Dehaene, Lord Simon and Dr von Weizsäcker, and the Commission's document *Adapting the Institutions to make a success of enlargement* (Bull. E.U. Supplement 2/2000).
- 2 The Treaty of Rome, 1957, established the European Economic Community (EEC) which was re-styled European Community (EC) following the Merger Treaty, 1965. The Treaty of European Union concluded at Maastricht in 1992 established a European Union (EU) based on three distinct pillars, European Community, Common Foreign and Security Policy and Cooperation in the Fields of Justice and Home Affairs. Whereas the Commission retained its full powers over matters contained in the EC pillar it had only a consultative status in the other two. In this pamphlet the term Community is used whenever the subject matter relates to the first pillar, EU is used when it refers to the generality of the European Union.
- 3 We are now used to the principle of majority voting, and we discuss in what areas it should apply. In 1957 majority voting in international institutions was virtually unknown. It is understandable that at the time member states were cautious, and limited the areas in which majority voting would initially apply. Nobody then knew how successfully the different interests of Member States could be reconciled. The EC needed to develop as far as possible by consensus, and the Commission was there to help to produce consensus. The fact that majority voting was limited to a small number of subjects implies nothing about the Member States' confidence in the future Commission as a mediator.

- 4 Article 251
- 5 On the general question of whether the Community is democratic enough, See Siedentop, *Democracy in Europe* (Penguin, 2000).
- 6 Adapting the Institutions to make a success of enlargement, op. cit., pp. 10-12.
- 7 If there were 20 Commissioners and 25 Member States, and commissioners were appointed for 5 years at a time as at present, each Member State would be without a commissioner for 5 years at a time, every 15 years, that is, for 25% of the time. It is hard to imagine this being acceptable, in particular to the large Member States.
- 8 See in particular the *Note de synthèse* by Professor Franklin Dehousse for the *colloque* of the Belgian Senate on the Treaty of Nice in March 2001. I am grateful to Rolf Gustavsson of *Svenska Dagbladet* for drawing my attention to this authoritative assessment.

The Europaeum Record

I. Academic Conferences

1993 Oxford ‘Are European Elites Losing Touch with their Peoples?’

1994 Oxford ‘Europe and America after the Cold War: the end of the West’

1995 Bonn ‘The integration of East Central Europe into the European Union’

1996 Geneva ‘Defining the Projecting Europe’s Identity: Issues and Trade-Offs’ at Geneva

1997 Paris I ‘Europe and Money’

1998 Leiden ‘Human rights, with particular reference to plight of immigrants and immigration policy in Europe’

2000 Bonn ‘The Implications of the new Knowledge and Technology’ at Bonn

2001 Berlin (projected) ‘Borderless Education: Challenges for the new Europe’

II. Student Summer Schools

1994 Leiden ‘Concepts of Europe’

1995 Bologna ‘The Problem of Political leadership between History and Social Science’

1996 Bologna ‘The Civic Nation and the Ethnic Nation’

1998 Budapest ‘Risk Policy Analysis’

1998 Oxford ‘Human Rights’

1999 Paris I ‘NATO and European Defence’

2000 Bologna ‘European Policy and Enlargement’

2000 Oxford ‘Church as Politeia: the political self-understanding of Christianity’

2001 Oxford ‘Human Rights and the movement of people: Meeting the Challenges of Racism, Migration and Displacement.’

III. Joint Teaching, Courses and Programmes

- 1992- Oxford** *European Law Studies* involving joint teaching and study, and student exchanges linking Oxford, Leiden and Sienna.
- 1999- Paris** *Economics of European Integration* Europaeum module for undergraduates and graduates.
- 1999- Bologna** *Political Cultures and European Political Systems* joint programme linked to Oxford and Leiden.
- 2000- Geneva** *International Refugee Law* joint teaching Programme linked to Oxford.
- 2001- Bonn** *Ecumenical Studies in Protestant Theology* joint programme to be linked to all Europaeum institutions, beginning with Prague.
- 2002- Leiden** *Leadership Programme in European Business Cultures* to be linked to Oxford and European industry.

□ In 1997 academics representing all the Europaeum partners in the fields of *European Political Thought*, *Economics of Integration*, and *European Modern History* met at Oxford, Paris and Bologna respectively, and agreed strategies to promote international academic collaborations.

□ New academic networks are being developed in Economics, History, Politics and Theology, to promote collaborative teaching and mobility of graduate research students. Other initiatives aim to link academic in the fields of Classics, History of Science and Environmental Science.

□ The Europaeum played the key role in the creation at Oxford of the Centre for European Politics and Society, and also in the creation of the Oxford Institute of European and Comparative Law, and a number of fellowships, most recently the Bertelsmann Europaeum Visiting Professorship in Jewish History and Politics.

IV. Scholarship Programmes

□ The **Europaeum Scholarships in Jewish Studies** provide up to six places each year for Europaeum graduate students to spend a year in Oxford studying for the Diploma in Jewish Studies at the Oxford Centre for Hebrew and Jewish Studies.

□ The **Oxford-Geneva Bursary Scheme** provides bursaries for student exchanges between Oxford and the Graduate Institute of International Studies, together with other collaborative activities including joint teaching and Europaeum Lectures.

Other linked scholarship schemes include the Artal, Thyssen, Kravis and Scatchard awards, all tenable at Oxford.

V. Research and Communications Network

The **Europaeum Research and Communications Network**, facilitating collaborative research and teaching over the internet, was established in autumn 2000.

The network allows continuous discussion through online forums. Each *Theme Group* seminar within the forums will be led by an Academic Director and moderated by a Supervising Editor. Informal discussion outside, and between, the Theme Groups can also take place. New Theme Groups may be created on demand, to include further subject areas.

Those participating in the forum system benefit from the prodigious database capacities of the network, which can store personal files, and references, articles and notes on each academic theme, building up academic records and sources. Documents placed on the network may be accessed and worked upon remotely, and can be made 'public' for other participants to comment or discuss. Such international collaboration promotes Europe-wide awareness and encourages the development of new perspectives.

VI. Joint Research Projects and Support

□ A **Research Directory** of interests of staff involved in European Studies in partner institutions is accessible on the Europaeum internet site encouraging academic collaboration.

□ The **Europaeum Project on the Future of European Universities**, supported by DaimlerChrysler Services AG, a three-year investigation into the impact of new technology and the “Knowledge Revolution” was initiated in autumn 2000, with a first international conference in Berlin in December 2001.

□ A **Joint Research Project** on ‘*Party System Change*’ involving members of several Europaeum universities was launched in Oxford in 1997, and in 2000 an international research project linked all Europaeum partners to look at the origins and aftermath of the Kosovo crisis.

□ The **Europaeum Research Project Groups** scheme encourages collaborative research across the association. The following five groups received awards in 2000: The Churches and the Family; European Monetary Integration; The Kosovo Stability Pact; International Intervention; and European identity.

VII. Mobility Programmes

□ The **Europaeum Visiting Professors Scheme** supports the movement of academics from one partner institution to another, including the hosting of a Europaeum Visiting Professor each year at each institution.

□ The Europaeum supports individual academics and students from member institutions participating in selected European events and activities, including conferences, seminars and summer schools.

The Europaeum Members

Oxford

The University of Oxford, comprising 39 Colleges and 6 Private Halls, dates its foundation officially to 1249, though teaching at Oxford is known to date back to 1096, and the first overseas scholar arrived in 1190.

Vice-chancellor: Dr. Colin Lucas
Management Committee representative:
Mrs Beverly Potts
International Office
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Wellington Square
GB-OXFORD OX1 2JD

Leiden

Universiteit Leiden founded in 1575 by the States of Holland, as a reward for the town's brave resistance against the Spanish, at the behest of William of Orange.

Rector: Professor William Waagenar
Management Committee representative:
Dr. Joost van Asten
Director of International Relations
University Office
Universiteit Leiden
Postbus 9500
NL-2300 RA Leiden

Bonn

Rheinische Friedrich-Wilhelms-Universität Bonn founded in 1818 by Kaiser Friedrich Wilhelm III, preceded by an Academy established in 1777.

Rector: Professor Klaus Borchard,
Management Committee representative:
Dr. Hartmut Ihne
Director, ZEF/ZEI
Rheinische Friedrich-Wilhelms-Universität Bonn
Regina-Pacis-Weg 3
D-53113 BONN

Bologna

Università degli studi di Bologna officially constituted in 1158 by Emperor Frederick I Barbarossa, though independent teaching dates back to 1088.

Rector: Professor Pier Ugo Calzolari

Management Committee representative:

Professor Paolo Pombeni
Dipartimento di Politica, Istituzioni, Storia
Università degli studi di Bologna
Strada Maggiore 45
I-40125 BOLOGNA

Geneva

The Graduate Institute of International Studies founded in 1927, associated to, but not part of, the University of Geneva.

Director: Professor Peter Tschopp

Managemt Committee representative:

Professor Daniel Warner
Secretary-General
Graduate Institute of International Studies
132, Rue de Lausanne
P.O. Box 36
CH-1211 Genève 21

Paris

Université Paris I Panthéon-Sorbonne founded in the 12th Century, and formally constituted by Papal Bull in 1215, was briefly suppressed by the French Revolution between 1793 and 1808, and reconstituted in 1890.

Rector: Professor Michel Kaplan

Management Committee representative:

Professor Robert Frank
Institut Pierre Renouvin
1, rue Victor Cousin
F-75005 PARIS

Prague

Charles University, Prague, founded in 1348, was divided into Czech and German institutions by the Vienna government in 1882. These operated in parallel until 1939, when the Czech institution was closed by Nazi occupation. After 1945, the German institution was abolished and the Czech Charles University revived.

Rector: Professor Ivan Wilhelm,

Management Committee representative:

Dr. Tomáš Jelinek
Chancellor and Head of the Rector's Office
Univerzita Karlova V Praze
Ovocny trh 3/5
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The Europaeum Lectures

Europaeum Lectures have been a part of the consortium's work since its foundation in 1992. The Europaeum now aims to publish key lectures in this series of pamphlets, examining the key issues confronting Europe today.

The series has recently included the following Lectures:

❑ **October 2000, Prague**

Dr. David Robertson of Oxford on "*A common Constitutional Law for Europe: Questions of National Autonomy versus Universal Rights*"

❑ **November 2000, Oxford**

Dr John Temple-Lang of the European Commission on "*The Commission and the European Parliament – an uncertain relationship*"

❑ **February 2001, Geneva**

Professor Ian Brownlie CBE QC of Oxford on "*International Law and the use of force by states*"

❑ **May 2001, Oxford**

Professor Philippe Burrin of Geneva on "*Strands on Nazi Anti-semitism*"

Future lectures are planned for Paris in June 2001 and Geneva early in 2002.

To order further copies of this pamphlet, or request copies of others in the series, please contact the Europaeum Secretariat at the address on the back cover.