School Of Law

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NEW STORIES ON THE EUROPEAN UNION'S DEMOCRATIC DEFICIT

BY

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Dedication

Στην Οικογένειά μου

This Thesis is dedicated with very much love to my family and particularly to my parents who taught me that education is such a wonderful thing.

My mum, Amalia, thanks with all my heart for teaching me to always keep my hopes high, hold my head up and never let anything to get me down.

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CONTENTS

TITLE ..... *I*

DEDICATION ..... *II*

ABBREVIATIONS ..... *VIII*

ABSTRACT ..... *XIII*

ACKNOWLEDGMENTS ..... *XV*

CHAPTER ONE **1**

GENERAL INTRODUCTION **1**

CHAPTER TWO **14**

THE NATURE AND GOVERNANCE OF THE EUROPEAN UNION **14**

1. INTRODUCTION 14
2. THE NATURE OF THE EUROPEAN UNION 16
   2.1. Introduction *16*
   2.2. Description of the Euro-polity *19*
3. EU: A SYSTEM OF GOVERNANCE 22
   3.1. Introduction *22*
   3.2. Reasons for analysing the Union's system of governance *24*
   3.3. Theories of European Integration *25*
   3.4. The notion of multi-level governance *27*
      3.4.1. Multi-level governance in vertical terms 28
      3.4.2. Multi-level governance in horizontal terms 30
      3.4.3. Policies and levels 31
      3.4.4. Advantages and disadvantages of the EU multi-level governance system 35
4. ENVIRONMENTAL GROUPS 39
   4.1. Introduction *39*
   4.2. Used terminology *41*
   4.3. Targets and environmental interest groups *42*
5. THE EVOLUTION OF EU BIODIVERSITY 43
   5.1. Introduction *43*
   5.2. The Wild Birds Directive *43*
      5.2.1. Proposals and British environmental lobbying 44
   5.3. The Habitats Directive *47*
      5.3.1. Lobbying and implementation of the Habitats Directive in the UK 50
6. EU LAND USE PLANNING POLICY 51
   6.1. Introduction *51*
   6.2. The Environmental Impact Assessment Directive *51*
      6.2.1. Policy actors 51
   6.3. Developing Strategic Environmental Assessment *56*
      6.3.1. The scope of the SEA Directive in a few words 58
7. PROCESSES TO IMPACT OUTCOMES 59
   7.1. Introduction *59*
   7.2. Who were the targets in the case study? *59*
   7.3. How did the groups seek and gain access to EU policy-makers? *62*
   7.4. Why did the groups contact national and EU level policy-makers? *64*
8. CONCLUSION 65

CHAPTER THREE 67

THE "NO-DEMOS THESIS" 67

1. INTRODUCTION 67
2. THE BACKGROUND TO THE "NO-DEMOS THESIS" 69
   2.1. The implications of the Court's decision *71*
3. THE "NO-DEMOS THESIS" 71
   3.1. The case of the EU *75*
4. WEILER'S ANALYSIS TO THE "NO-DEMOS THESIS" 77
   4.1 Introduction *77*
   4.2. Objections *78*
      4.2.1. 'The state of affairs' in Germany 79
   4.3. Specific suggestions *81*
      4.3.1. The views of multiple demoi 83
      4.3.2. The problem of double or multiple loyalty 85
   4.4. Concluding remarks *87*
5. THE AUTHOR'S CRITIQUE OF THE "NO-DEMOS THESIS" 92
   5.1. The sense of political identity *92*
   5.2. The idea of ethnic uniformity *93*
   5.3. The separation of demos from nation *96*
      5.3.1. Proposition for a participatory demos 97
   5.4. In search of a European demos *99*
      5.4.1. The development of a European political identity 103
         5.4.1.2. The construction and *status* of EU citizenship 103
         5.4.1.3. More cited examples 106
         5.4.1.4. The breakthrough of the *Martínez Sala* Case 107
   5.5. An overall assessment *112*
   5.6. A civic-value driven European demos *112*
      5.6.1. The one demos system of the EU 116
6. CONCLUSION 120

CHAPTER FOUR 121

EU CIVIL SOCIETY AND CHANNELS OF POLITICAL PARTICIPATION 121

1. INTRODUCTION 121
2. INDIVIDUAL OPPORTUNITY STRUCTURES FOR EU CITIZENS' 123
PARTICIPATION 123
   2.1. Introduction *123*
   2.2. Policy-Polity, Direct-Indirect opportunity structures in the EU *124*
3. COLLECTIVE OPPORTUNITY STRUCTURES FOR EU CITIZENS' 134
PARTICIPATION 134
   3.1. The Civil Dialogue on Europe *134*
      3.1.1. Definition of NGO 136
      3.1.2. The Civil Dialogue in the EU Trade Policy 141
   3.2. The ESC: An organised European civil society *145*
      3.2.1. ESC: Proposals for a future composition 148
   3.3. Problems of definition *150*
      3.3.1. EU Institutions and public interest associations: A tricky relationship 152
4. CONCLUSION 156

CHAPTER FIVE 158

FROM CIVIL DIALOGUE TO SOCIAL DIALOGUE: 158

THE ROLE OF SOCIAL PARTNERS IN THE DECISION-MAKING 158

1. INTRODUCTION 158
2. SOCIAL PARTNERS AND TITLE XI 161
   2.1. Introduction *161*
   2.2. The social partners' participation in the social policy area *161*
   2.3. The workability of the Social Dialogue *164*
3. THE FIRST CASE: THE PARENTAL LEAVE AGREEMENT 165

3.1. Introduction *165*
3.2. Social Partners and decision-making *166*
3.3. Evaluation of the contents of the Agreement *166*
3.4. Concluding remarks *170*
4. THE SECOND CASE: THE PART-TIME WORK AGREEMENT 170
4.1. Introduction *170*
4.2. The scope of the agreement *171*
4.3. The prescriptions of the Agreement *172*
4.4. Social partners and decision-making *173*
4.5. Evaluation of the contents of the Agreement *174*
4.6. Concluding remarks *175*
5. THE THIRD CASE: THE FIXED-TERM WORK AGREEMENT 177
5.1. Introduction *177*
5.2. The scope of the Agreement *177*
5.3. General evaluation *178*
5.4. The results *179*
6. SOCIAL PARTNERS AND TITLE VIII 180
6.1. Introduction *180*
6.2. The Employment Chapter *182*
6.3. The non-institutionalisation of social partners: An issue of hypotheses *186*
6.4. Social partners and National Action Plans: An overview (1998-2001) *188*
6.4.1. Introduction 188
6.4.2. Improving Employability (Guidelines 1-8) 189
6.4.2.1. Training Policy 189
6.4.2.2. Lifelong learning 190
6.4.2.3. Integration of disadvantaged groups in the labour market (Guideline 9) 190
6.4.3. Developing Entrepreneurship and Job Creation 191
6.4.3.1. Regional policies (Guideline 12) 191
6.4.3.2. Tele-sector (Guideline 13) 191
6.4.4. Strengthening Equal Opportunities Policies for Men and Women 192
6.4.4.1. Combating gender discrimination (Guideline 20) 192
6.4.4.2. Reconciling family life and career (Guideline 21) 192
6.5. Employment Guidelines 2001 ..... *192*
6.6. Why is the role of the social partners so important in the Employment policy? *195*
7. DEFINING THE ROLE OF THE SOCIAL PARTNERS 197
7.1. Introduction *197*
7.2. Social partners: Quasi-Legislators *197*
8. SOCIAL PARTNERS AND PROBLEMS OF LEGITIMACY 201
8.1. THE ISSUE OF REPRESENTATIVITY *201*
8.1.1. Introduction 201
8.1.2. The plea for substantive legitimacy 201
8.1.3. Representative organisations and negotiations 202
8.1.4. The *UEAPME* challenge 203
8.1.5. The lack of *locus standi* in the context of representativity 204
8.1.5.1. Solutions to address the social partners' lack of *locus standi* 206
8.1.6. The representative *status* 207
8.1.6.1. The Commission 207
8.1.6.2. The social partners' organisations 208
8.1.6.3. The jurisprudence of the CFI 210
8.1.6.4. Suggestions for the future 212
9. SOCIAL PARTNERS AND PROBLEMS OF DEMOCRACY 215
9.1. THE ROLE OF THE EP *215*
9.1.1. Introduction 215
9.1.2. Defining the problem 215
9.1.3. Positive approaches of the problem 217
10. CONCLUSION 220

CHAPTER SIX **221**

LEGITIMACY AND THE ON-GOING PROCESS OF **221**

EUROPEAN CONSTITUTIONALISM **221**

1. INTRODUCTION 221

2. DEFINING A CONSTITUTION 223
2.1. Introduction *223*
2.2. Reasons for definition *224*
2.3. Definitions and meanings *227*
3. CONSTITUTIONAL DEBATE WITHIN THE EU 227
3.1. Introduction *227*
3.2. The case for a written European constitution *227*
3.3. The case against a written European constitution *234*
4. THE AUTHOR'S CRITIQUE OF THE DEBATE ON A EUROPEAN CONSTITUTION 237
4.1. Elements of a top-down EU constitutionalism *237*
4.1.1. Constitutional principles 238
4.1.2. THE JURISPRUDENCE OF THE ECJ 244
4.1.2.1. Introduction 244
4.2. Four waves of constitutionalisation *245*
4.3. Concluding remarks *249*
4.4. Multi-level Constitutionalism and European integration *249*
5. THE CHARTER OF FUNDAMENTAL RIGHTS 251
5.1. Introduction *251*
5.2. Constitutionalism and Charter: Building the methodology *252*
5.2.1. Section 1: Democratic Legitimacy and the Convention 253
5.2.1.1. Composition 254
5.2.1.2. Working Methods 255
5.2.1.3. The decision-making process 256
5.2.1.4. The Convention and constitutional development 257
5.2.1.5. Concluding remarks 262
5.2.2. Section 2: The Charter against the judicial human rights protection 262
5.2.3. Section 3: *Rationae materiae* and *rationae personae* of the Charter 266
5.2.4. Section 4: The relationship between the Charter and the ECHR 269
5.2.5. Section 5 The Charter as a component of an EU Multi-level Constitution 275
5.2.5.1. What holds for the future? 279
6. CONCLUSION 281

CHAPTER SEVEN **283**

CONSTITUTIONAL DEBATE AND THE EU: **283**

CONSTRUCTING ACCOUNTABILITY **283**

1. INTRODUCTION 283
2. THE FALL AND RENEWAL OF THE COMMISSION 285
2.1. Introduction *285*
2.2. The motion of censure *285*
2.3. The CIE and its composition *286*
2.3.1. The CIE's assigned tasks 287
2.4. The sources for the allegations of fraud and mismanagement *288*
3. THE ROLE OF THE EP 290
3.1. Introduction *290*
3.2. The Commission's resignation *290*
3.3. The censure motion *290*
3.4. Reasons to violate norms, rules and laws in the EU *291*
3.5. The success of the EP *293*
4. THE RECOMMENDATIONS OF THE CIE 294
4.1. Introduction *294*
4.2. The CIE's new principles upon recommendations *299*
5. THE FUTURE DIRECTION AND STRUCTURE OF EU 'GOVERNANCE' 301
5.1. Introduction *301*
5.2. The four alternatives of constitutional responsibility *302*
5.3. An individual parliamentary accountability: Is it really hard to be achieved? *308*
5.3.1. Introduction 308
5.3.2. National constitutional laws and models of political responsibility 308
5.3.3. Building a working model of European accountability 309
6. CONCLUSION 311

CHAPTER EIGHT 313

DEVELOPING A EUROPEAN CULTURE OF TRANSPARENCY AND OPENNESS 313

1. INTRODUCTION 313
2. DEFINITIONS 315
3. ACCESS TO DOCUMENTS IN CONSTITUTIONAL TERMS 316
   3.1. Introduction *316*
   3.2. From the Code of Conduct to the new Regulation *317*
      3.2.1. Developments: Positive and negative 318
   3.3. The 'original' approach of the Courts *321*
      3.3.1. Concluding remarks 326
4. OPENNESS: A NEVER ENDED PROCESS 327
   4.1. Introduction *327*
   4.2. (1) EU Ombudsman: Promoting a culture of openness and awareness *327*
      4.2.1. (a) Recommendations 328
         4.2.1.2. (b) The power of coercion in public access 331
   4.3. (2) Community Courts and their latest approach: A fundamental principle *334*
   4.4. (3) From Courts to Charter: A fundamental principle with constitutional status *338*
5. CONCLUSION 341

CHAPTER NINE 342

GENERAL CONCLUSION 342

BIBLIOGRAPHY 353

TABLE OF CASES *399*

ANNEX I *403*

ANNEX II *404*

ABBREVIATIONS

AEGEE	Associations Généraux des Etudiants de l' Europe
AEL	Academy of European Law
Art(s).	Article(s)
AT	Amsterdam Treaty
C	The C series 'Information and Notices'
CAP	Common Agriculture Policy
CEC	Confédération Européenne des Cadres
CEEP	European Centre of Enterprises with Public Participation
CEU	Central European University
CFDT	Confédération Française Démocratique du Travail
CFI	Court of First Instance
CFSP	Common Foreign and Security Policy
Charter	Charter of Fundamental Rights of the European Union
CIE	Committee of Independent Experts
CMLR	Common Market Law Reports
CMLRev	Common Market Law Review
COM	Commission of the European Communities
COR	Committee of the Regions
COSAC	Conference of European Affairs Committees of the Parliaments of the European Union
CPNT	Chasse, Pêche, nature et traditions
CPRE	Council for the Protection of Rural England

DETR	Department of Environment of Transport and the Regions
DG	Directorate General of the EC Commission
DoE	Secretary of State for the Environment
DTI	Department of Trade and Industry
EC	European Community
ECB	European Central Bank
ECHO	European Community Humanitarian Office
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
ECPT	European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
ECT	Treaty establishing the European Community
EE	Environmental Evaluation
EEA	European Economic Area
EEB	European Environmental Bureau
EEC	European Economic Community
EES	European Employment Strategy
EHRR	European Human Rights Reports
EIA	Environmental Impact Assessment
EISs	Environmental Impact Statements
ELRev	European Law Review
EMU	European Monetary Union

EP	European Parliament
ERA	Academy of European Law
ERTA	European Road Transport Agreement
ESC(ECOSOC)	Economic and Social Committee
ETS	European Treaty Series
ETUC	European Confederation of Trade Unions
EU	European Union
EUI	European University Institute
EU Ombudsman	European Ombudsman
Europol	European Police Office
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services
ICCPR	International Covenant of Civil and Political Rights
ICESCR	International Covenant of Economic, Social and Cultural Rights
IGC(s)	Intergovernmental Conference(s)
IRLR	Industrial Relations Law Reports
JEF	Young European Federalists
L	The L series 'Legislation'
MAFF	Ministry of Agriculture, Fisheries and Food
MEP(s)	Member(s) of European Parliament
MJECL	Maastricht Journal of European and Comparative Law
NATO	North Atlantic Treaty Organisation
NAPs	National Action Plans
NCC	Nature Conservancy Council

N(E)APs	National Employment Action Plans
NGOs	Non-Governmental Organisations
No.	Number
OCM	Open Method of Co-ordination
OJ	Official Journal
OSCE	Organisation for Security and Co-operation in Europe
OSCPs	Opportunity Structures for Citizens' Participation
PPP	Plan, Programme or Policy
QMV	Qualified Majority Voting
RSPB	Royal Society for the Protection of Birds
SACs	Special Areas of Conservation
SEA	Single European Act
SEA	Strategic Environmental Assessment
SMEs	Small and Medium Size Enterprises
SMUs	Small and Medium Size Undertakings
SPA	Social Policy Agreement
SPAs	Social Protection Areas
SSSIs	Sites of Special Scientific Interest
TCNs	Third Country Nationals
TEU	Treaty on European Union
TRIPS	Trade Related Intellectual Property Rights
UACES	University Association of Contemporary European Studies
UDHR	Universal Declaration of Human Rights

UEAPME	European Association of Craft, Small and Medium-sized Enterprises
UK	United Kingdom
UN	United Nations
UNICE	Union of Industrial and Employers' Confederations of Europe
UNPO	Unrepresented Nations and Peoples Organisation
USA	United States of America
WEU	Western European Union
White Paper	White Paper on European Governance COM (2001) 428
WTO	World Trade Organisation
WWF	World Wildlife Fund

ABSTRACT

The term 'democratic deficit' often masks an unjustified presupposition that the EU should follow similar democratic practices to those found in national arenas. Attempts to replicate national democratic Institutions tend to lead to unsatisfactory solutions at the EU level. A legitimate and democratic Union may involve innovations for which there are no precedents in national experiences of democratic politics.

In effect, this Thesis, "New Stories on the European Union's democratic deficit" reviews a range of theoretical discussions on democracy, legitimacy and European integration and suggests how these might be useful in framing practical proposals for institutional change at the EU level. These proposals envisage at the future direction and development of the EU towards a substantially democratic and legitimate Euro-polity under the conceptual and theoretical framework of a *meta*-national democracy.

The term *meta*-national suggests from the very beginning that the EU is not a State or a Super-State, and consequently its democratic dimensions should be judged at a different level, the European one. Under this concept, the Thesis further proceeds with analysing the fundamental issues of a growing democracy which consists of:

1) a system of *multi-level* governance, and not a government;
2) an autochthonous civic-value driven demos;
3) channels of civic and political participation at all levels, individual and collective;
4) elements of EU constitutionalism;
5) an on-going process of accountability;
6) a constructive process of transparency and openness.

This is only an indicative list of the many elements that can be generally attributed to the Union's continuing and growing democracy. They have

particularly been selected as they involve recent changes and are currently supported by the White Paper on European Governance which in setting in motion a reform process responds to the author's expectations developed under the theoretical framework of a *meta*-national democracy.

Finally, under that same conceptual framework, the Thesis comes to the conclusion that the EU is democratic and enjoys legitimacy. By opening up the policy-making process to enable more people and civil society organisations to become actively involved in the shaping and delivering of EU policies, it offers real opportunities for deliberation and participation. Patterns of access and interwoven levels indicate the existence of a system of multi-level governance which in turn embraces the notion of a 'polity'. It promotes a new understanding of a European demos (a politically organised people) which is not based on ethno-national and cultural affinities but rather on commonly shared civic values. In terms of assuring a high degree of popular legitimacy, it provides for a Bill of Rights and Fundamental Freedoms which neatly combines the constitutional structure, based in the founding Treaties and the national constitutions of the EU Member States. It elevates openness and transparency to fundamental principles of Community law, yet, being of a nascent constitutional character. Lastly, it promotes greater accountability and responsibility for those involved in the legislative and executive processes of the EU policy- making.

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CHAPTER ONE

GENERAL INTRODUCTION

Since the ratification of the Maastricht Treaty, academics and politicians have constantly assessed the Union's democratic deficit and its seemingly inherent inability of transforming itself into a legitimate and democratic polity. In more specific terms, the European democratic deficiency is assessed against the following criteria:

- Limited parliamentary control over decision-making;[1]
- Secrecy in the activities, decisions and the reasons given by the Community Institutions, including the Commission Committees;
- Dominance of the executive, far removed from the citizens of the EU;
- No access to documents and in general, no access to information;
- Crucial role of the (unelected) Commission;
- No government accountable via electoral process;
- No mass-membership of European-wide political parties;
- No European mass media;
- No European demos;
- The absence of a European Constitution.

Although these above notions may seem anachronistic or simplistic in character and make the European Union ("EU") to appear doomed regarding its democratic

[1] Both at the European and national parliament level.

potential compared to a Nation-State, they have come to dominate European political discourse.

The new stories as set out in the Title of the present Thesis come to express something that is arguably different: The EU is capable of becoming more democratic and legitimate in the future when seen within its own dynamic legal and political space.

To achieve this aim, the author of this Thesis reviewed a range of theoretical discussions of legitimacy, democracy and European integration. With reference to national political systems, the term 'democracy' reflects not a difference in meanings so much as a difference in conceptions that fall within the agreed meaning, "government or rule by the people".[2] Within the context of this Thesis, however, democracy is conceived as certainly "rule by and in the interests of the demos, of the common people". However, an essential part of this rule includes two requirements: First, that every person has a "rough equal influence over the government", which is dependent not only on the practice "one person, one vote", but also upon programs for the redistribution of economic power. Second, that "individual rights and liberties are protected". "Individuals should be free and equal in the determination of the conditions of their own lives. They should enjoy equal rights, and accordingly share equal obligations in the specification of the framework, which generates and limits the opportunities available to them, so long as they do not apply this framework to refuse the rights of others (the so-called principle of democratic autonomy)".[3]

[2] Eliott, F. and Summerskill, M. (1964) *A Dictionary of Politics*, Harmondsworth: Penguin, (4th edition), 89.
[3] Held, D. (1987) *Models of Democracy*, Cambridge: Polity Press, (1st edition), 271.

The enactment of this principle calls for a process of double democratisation. This involves the acceptance of both the axiom that the division between "State" and "civil society" must be a central feature of democratic life and that the power to make decisions must be free of "illegitimate constraints" imposed by the private flows of capital. It also makes us to think what should be the forms and limits of State action and what should be the forms and limits of civil society. In other words, how State Institutions might become more accountable (the creation of accountable Institutions), and in what ways might individual activities become democratically ordered (a reordering of civil societies).

In many countries the need to democratise political Institutions has been focused on questions of reforming the process whereby party leaders are selected and also of changing electoral rules. Other issues which are commonly raised have to do with the public funding of elections for all parties meeting a minimum level of support, a more equitable distribution of media time, the abolition of regulations concerning State secrecy, the defence and enhancement of local government powers against centralised State decisions. All these are very important issues but none of them will make the "polity" more democratic unless another fundamental problem is confronted. How can the requirements of democratic public life such as open debate, access to power centres, general political participation be reconciled with those political Institutions whose task is to uphold the rule of law, mediate disputes and negotiate among conflicting interests? Every State requires democratisation, but also the development and protection of independent powers if democracy is to maintain a shape and form that respects and enforces through the appropriate channels the rights and obligations of all citizens.

In many countries, constitutions (written and unwritten) are regarded to be the way that can make requirements of both a "sovereign State" and a "sovereign people" be met. The limits to government's power are explicitly defined in constitutions and bill of rights, complemented by enhanced channels of communication and deliberation, which are subject to public scrutiny, parliamentary review and judicial process. Such a constitution and bill of rights enhance the ability of citizens to take action against the State in order to redress unreasonable encroachment upon their liberties. It also helps to tip the scales from State to parliament and from parliament to citizens. A national legal system thus becomes empowered by specifying the rights that can be fought for by individuals, groups and movements as well as by providing an effective and informed "participation".

Attempts to create European democratic Institutions compared with national experiences of democratic politics are, however, inadequate to capture the mechanics and peculiarities of the EU as a new legal and political system on its own right.

The EU as it will be argued throughout this Thesis is a complex network of Institutions for regulating common affairs, not really unitary and self-contained as a political unit. In other words, it is not a "State" that based on a national sovereignty, "common identity", "definite constitutionality", a taxation system as the motive power for its economy, and a fixed territory may claim the monopoly of the "legitimate" use of physical force in the enforcement of its order. On the contrary, it is about an emerging "polity" in a complex system of "governance" where the Community and the Member States work together in order to achieve economic, political and social integration. To this effect, the extent to which the EU is legitimate

and democratic might entail innovations for which there are not precedents in national experiences of democratic politics. To democratise the EU beyond the level of the State, this Thesis applies the notion of a "meta-national democracy".

The intellectual roots of the Union's meta-national democracy are not to be found in the NeoKantian theory which emphasises meta-theories as *a priori* theories that are transcendental. The paradigm here is rooted in the praxis of the EU whereas the term "meta" comes from the Greek word "μετά" which means after or above the State.

Meta-national democracy comes to describe both the normative and functional quality of European Governance within a "polity in formation"[4] that can be assessed against the following democratic standards and principles of democratic legitimacy:

1) Full and equal enjoyment of European citizenship contingent upon the equal representation in political decision-making positions.[5]

2) Institutionalisation of political rights, for example the right to consultation of civil society, leading to a direct, effective, efficient, accessible, multi-level participation.

3) A strengthened electoral system, including also the strengthening of the role of the EP sector specific.

[4] Schmitter, P. (2001) "Symposium: Mountain or Molehill? – A Critical Appraisal of the Commission White Paper on Governance: What is there to legitimize in the European Union ... and how might this be accomplished?", *Harvard Jean Monnet Working Paper* No. 6/01
< URL http://www.jeanmonnetprogram.org/papers/01/011401.html >.

[5] This is a criterion launched by the Social Platform. In preparing its contribution to the Convention of Europe, the Social Platform calls for "parity democracy" to be enshrined within a new Treaty Article. Parity democracy emerges from the duality of human kind, equally composed of women and men, with the direct consequence that citizenship is premised upon an equal participation and representation of men and women in politics. Platform of European Social NGOs, "Contribution to the Convention on the Future of Europe", 15 April 2002, SP/04/2002, pp. 3, 6.

4) Coherence regarding human rights.

5) Solidarity among European citizens through communication and deliberation.

6) Transparent decision-making and legitimate access to Community documents.

7) Necessary correspondence between acts of governance and the equally-weighted felt interests of citizens with respect to those acts. This is meant to meet criteria of congruence (those affected by decisions should also be responsible for them) and accountabillity (the decision-makers should be held responsbible by the citizenry and dismiss the incompetent rulers). However, there should be an approximation: little congruence will lead to lack of legitimacy, while "too much" is held to reduce the efficiency in a large polity as in the EU.[6]

The Union's meta-national democracy is not another theory which aims to engage into the "battle of theories" which has often led to a series of zero-sum notions of EU bargaining, coupled with unjustified confidence of how the EU system actually works and towards what it develops. Rather, it is an exercise in concept – building both as part of a wider evolution of systemic explanation (or model building), and as a platform from which a set of realities might emerge.

Such a set of realities embrace the fact that the EU is an unprecendented experiment in the peaceful and voluntary creation of a large-scale polity out of previously independent ones. It is, therefore, singularly difficult for "us", its citizens/subjects to compare this *objet politique non-identifié* ("this political non-identified object") with anything we have experienced before. No doubt, there exists a temptation to apply the

[6] Eriksen, E. (2001) "Symposium: Mountain or Molehill? – A Critical Appraisal of the Commission White Paper on Governance: Governance or Democracy? The White Paper on European Governance", under Title "Direct Legitimation?", *Harvard Jean Monnet Working Paper* No. 6/01 < URL http://www.jeanmonnetprogram.org/papers/01/011201.html >.

standards that we are already using to evaluate our respective national authorities, but eventually we may learn to use other normative expectations with regard to Union's behaviour and benefits.[7]

Espousing the above idea, the author proceeds with analysing some of the parameters of the new theory encompassed in the following elements:

a) A system of multi-level governance, not a government;
b) An 'autochthonous' civic-value driven demos;
c) Channels of civil and political participation, individually and collectively;
d) Elements of EU constitutionalism, complemented by a Bill of Rights and Fundamental Freedoms;
e) An on-going process of political accountability;
f) A constructive process of openness and transparency.

In examining the workings of the EU as a system of governance, the author will conceive the EU as a polity which according to the White Paper on European Governance ("White Paper") produces rules and has processes that affect the way in which powers are exercised at the EU level.[8] In order to support the view of a system of governance layered at local, regional, national and European levels, that is, a system of multi-level governance, the author shall consider the adoption and implementation of two strands of EU environmental policy in the UK, namely biodiversity and land use planning policy. In both cases, it will be asserted that

[7] Schmitter, P. *loc. cit. supra* note 4, p. 2.
[8] European Commission, *European Governance - A White Paper*, COM (2001) 428, 25 July 2001, p. 8.

national environmental groups influenced EU actors in the decision-making process. In matching the discursive shift from 'government' to 'governance' in the EU, the author's new theory will also propose a conceptual shift from an ethno-culturally defined demos to one that is driven by civic-values. The claim for a European people who are not divorced from their national and ethnic identities, yet united around shared civic values, will be based on the one hand on the notion of citizenship rights and on the other on institutional avenues for political participation in producing legitimate decision-making. Individual and collective opportunity structures for citizens' participation will be realised and three categories of legitimacy, *input*, *output* and *social* will be defined.

To tighten up the argument that the Union's legitimacy today depends on involvement and participation, the author will further proceed with examples of individual and collective *input* in the EU decision-making processes. In terms of collective participation, two case studies will be put forward. The first one will concentrate on two real examples of how civil society organisations become engaged by EU Institutions. These are:

1. The Civil Dialogue in the field of the World Trade Organisation ("WTO") negotiations.

2. The Civil Society as organised in the Economic and Social Committee ("ESC").

It will then be argued that both of these examples provide us with some insights which in turn could be important for the processing of legitimacy and redressing the

relationship between the EU Institutions and civil society (organisations), these are also being incorporated into the White Paper.[9]

The second case study will analyse the role of trade unions and employers' organisations, that is to say, the social partners in the development and implementation of European social and employment policies. This can also be considered an excellent working example of political participation. Firstly, it offers a real chance to get management and labour actively involved in achieving the Union's objectives in these two fields. Secondly, it reveals substantial problems of legitimacy and democracy both addressed under the theory of *meta*-national democracy. With regard to the problem of legitimacy, the social partners' representation comes to the fore while problems of democracy occur in the social policy agenda when the representative organ of the 'peoples of Europe' (the European Parliament) is marginalised.

Regarding the notions of an *input* and *social* legitimacy surrounding the debate on a European Constitution, an assessment will be made on the drawing up of the Charter of Fundamental Rights and Freedoms of the European Union ("Charter"). Following this, reflections will then be made on the European Convention of Human Rights ("ECHR") and the Charter as competing *meta*-national mechanisms for the notion of Human Rights protection. In treating European integration as an open-ended process of constitution making, the Charter, an embodiment of rights and freedoms, will complement the existing constitutional structure found in the Treaty provisions and the jurisprudence of the European Court of Justice ("ECJ"). Equally, it will complete

[9] White Paper *loc. cit. supra* note 8, pp. 14-15.

the actual and potential role of constitutional ideas and practices such as the model of multi-level constitutionalism that holds the EU "as a unity in substance and a coherent institutional system".[10]

Moreover, to prove that there is an on-going process of political accountability and responsibility of the EU Institutions, the author will deal with the crisis of the Commission in March 1999. The role of the European Parliament ("EP") in this affair of 'misleading management', preceding the Report by an external advisory Committee will lead to the conclusion that the power of the EP has significantly increased and has opened the way towards reforms and future patterns of accountability in the EU. Reflections on such reforms are also made in the White Paper suggesting that accountability, together with openness, participation, effectiveness and coherence, should be one of the principles that currently underpin good 'governance' in the EU.

The scandal in the Commission is particularly telling on the issue of transparency and openness in the EU since without an informed EP and consequently an informed citizenry no real accountability is possible. Yet, as this whole Thesis is based on the notion of optimism and change under the concept of a *meta*-national democracy, it will be proposed that a fundamental principle of public access to documents have been gradually constructed in the Community legal order. To reinforce the argument put forward by this Thesis, reference will be made to:

[10] Pernice, I. (1999) "Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?", 36 *Common Market Law Review*, p. 703 at 706.

1) Soft law instruments such as the internal Rules of Procedure of the Council and the Commission regarding public access to their documents;
2) The new Regulation regarding public access to EP, Council and Commission documents;
3) The case-law of both Community Courts;
4) The Reports of the European ("EU") Ombudsman.

In line with the provisions of the Charter and the constitutional ideas and practices in the EU, it will be urged that the time is ripe for both Community Courts to promote openness into a fundamental principle of constitutional *status*.

Having completed the discussion concerning openness at the highest level of the Union's political system, the last Chapter of this Thesis will draw on the conclusions and suggestions, reached throughout this Thesis. Chapter Nine will argue that the EU is not necessarily completely deficient in what is currently regarded as a model of democracy at the national level and that it also has both the capabilities and potential to become more democratic in its future developments.

Although the author has undertaken considerable research, this Thesis is by no means exhaustive in the use of her references and analysis as each Chapter has the potential to become a Thesis of its own. The issues which have been selected under the new theory are only an indication of the many that could have been addressed as regards the first pillar and are chosen on the basis that they involve long-running discussions about constitutional and institutional reforms, as presently reinforced in the White Paper. Taken it thus from here, the theory could well be expanded and developed into

other areas. For example, how to resolve the conflict that arises in the context of delegating powers to the ECJ and the Commission with the desire to enhance legitimacy and accountability in the EU. How to make legitimate and accountable the European Central Bank ("ECB") vis-à-vis the EP's subcommittee on monetary affairs that has developed *ipso facto* over the last two years. How to establish and monitor a precise delimitation of powers between the EU and the Member States, reflecting the principle of subsidiarity. How to make more transparent the work of natural administrators when implementing European law. In relation to the characteristics of a multi-level governance system and participation, we could examine the decision-making under the second and third pillar in which the initiative has been retained by a plurality of actors. So long as there are no aims, States, EP, Planning Committee, Military Committee, Political and Security Committee, Policy Planning and Early Warning Unit to monitor and access options are all involved at different degrees according to different issues. As regards Justice and Home Affairs, we could examine the judicial co-operation in civil matters where national and local police forces, agencies, customs authorities, Council, Commission and Europol collaborate. Additionally, we could analyse the drugs' sector looking at the co-ordination between the Commission, Council (especially, the Horizontal Drug Group), COREPER, the European Monitoring Centre for Drugs and Drugs Addiction ("EMCDDA") based in Lisbon that runs the Reitox network, and a global information system of drugs in Europe which links EMCDDA to fifteen (15) 'focal points'.

Issues of legitimacy and transparency in the work of the Commission Committees have also not been covered in a specific detail for two reasons. First, because there has been a sizeable proportion of literature focusing on the Committees' activities.

Second, it becomes a delicate matter to deal with them since the White Paper calls for their abolition and replacement by "autonomous regulatory agencies".[11] Nor the role of national parliaments and membership of European wide political parties have been covered in great detail. In explaining why, the author wanted to highlight the role and functions of the 'above' said 'powerless' EP within the context of the new theory. Considering her legal background and that being law, she wanted to delve only a little into politics and the political science aspects.

[11] White Paper *loc. cit. supra* note 8, p. 24.

CHAPTER TWO

THE NATURE AND GOVERNANCE OF THE EUROPEAN UNION

1. INTRODUCTION

The term of democratic deficit has strong business-economic connotations: surplus/deficit. In the context of the EU it is more than a matter of definition. It entails something more than merely spelling out which aspects of the EU, as described in the Introduction to this Thesis, fail to adhere to conventional conceptions of national democracy. The question of democratic deficit as the White Paper also implicitly suggests has direct bearings on what type of polity the EU is, and what the EU aspires to be.[1]

The unsettled nature of the "European project"[2] in six major dimensions - geographical boundaries, functional scope, integration theories, institutional balance and decision rules, constitutional order and demos - should not deter us from attempting to draw the various strands of the integration process together so as to characterise the EU.

[1] European Commission, *European Governance - A White Paper*, COM (2001) 428, 25 July 2001, p. 7.

[2] See generally Bañkowski, Z. and Christodoulis, E. (1998) "The European Union as an Essentially Contested Project", 4 *European Law Journal* 4, 341-354.

The purpose of this Chapter, therefore, is first to analyse the nature of the emerging European system, and second to explore what type of regime or system of governance best suits it which will deliver the democratic goods on which political legitimacy rests.

In examining *who* or *what* determines European political integration, examples will be taken from the adoption and implementation of EU biodiversity and land use planning policies in the UK. The cases will reveal that national (mainly UK-based) and trans-national groups (mainly Brussels-based) have successfully gained access to EU Institutions so as to produce desirable policy outcomes. We will thus conclude that such patterns of 'access' and 'accomplished targeting' indicate the existence of a system of *multi-level governance* in which interest groups are purposefully engaged during all phases of the policy making cycle.

"The author" has chosen EU environmental policy as a case in point for two reasons. First, to get a variation of policies-examples throughout this Thesis. Second, to show that the Union's political system might begin with the market, but does not necessarily end there.

2. THE NATURE OF THE EUROPEAN UNION

2.1. Introduction

The frequent qualification of the EU as an Institution "*sui generis*",[3] "*regional regime*",[4] "*concordance system*",[5] "*quasi-state*",[6] "*regulatory state*",[7] "*Staatenverbund*"[8] (association of States), "*confederal consociation*",[9] "*post-modern*",[10] "*condominio*",[11] "*federal union*",[12] "*unusual international*

[3] Hauser, H. and Müller, A. (1995) "Legitimacy: The Missing Link for Explaining EU - Institution building", 50 *Aussenwirtschaft* 17, p. 17 at 18. On the *sui generis* nature of the EU see also the *Van Gend en Loos* decision, p. 12 (Case C- 26/62 *Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1, [1963] CMRL 105) where the Court held: "The conclusion to be drawn from this is that 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. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the Institutions of the Community".

[4] Hoffman, S. (1982) "Reflections on the Nation-State in Western Europe today", 21 *Journal of Common Market Studies* 1/2, p. 21 at 35. See generally Wallace, W. (1983) "Less than a federation – More than a Regime: The Community as a Political System" in: Wallace, H. Wallace, W. and Webb, C. (eds.) (1983) *Policy-Making in the European Community,* Chichester: John Wiley, (2nd edition), 403-436. *Inter alia* see Wallace, H. and Wallace, W. (eds.) (2000) *Policy-Making in the European Union*, Oxford: Oxford University Press, (4th edition), 69.

[5] Puchala, D. (1972) "Of Blind Men, Elephants and International Integration", 10 *Journal of Common Market Studies* 1, p. 267 at 277-284.

[6] Wallace, W. (1996) "Government Without Statehood" in: Wallace, H. and Wallace, W. (eds.) (1996) *Policy-Making in the European Union,* Oxford: Oxford University Press, (3rd edition), 439-460, at 451.

[7] See generally Majone, G. 1994 "The Rise of the Regulatory State in Europe", 17 *West European Politics* 1, 77-101.

[8] Joerges, C. (1997) "States Without a Market? Comments on the German Constitutional Court's Maastricht - Judgment and a Plea for Interdisciplinary Discourses", 1 *European Integration online Papers (EIoP)* 20, p. 5 < URL http://www.eiop.or.at/texte/1997-020.htm >.

[9] See generally Chryssochoou, D. (1994) "Democracy and Symbiosis in the European Union: Towards a Confederal Consociation?", 17 *West European Politics* 4, 1-14.

[10] See generally Caporaso, J. (1996) "The European Union and Forms of State: Westphalian, Regulatory or Post-Modern", 34 *Journal of Common Market Studies* 1, 29-52.

[11] Schmitter, P, (1996) "If the Nation-State were to wither away in Europe, What Might Replace It?" in: Gustavsson, S. and Lewin, L. (eds.) (1996) *The Future of the Nation-State: Essays on Cultural Pluralism and Political Integration*, Stockholm: Nerenius & Santérus, 211-244, at 222, 226.

[12] Hoskyns, C. and Newman, M. (eds.) (2000) *Democratising the European Union: Issues for the Twenty-first Century,* Manchester: Manchester University Press, 7-8.

organisation"[13] and so on,[14] reflects the difficulties which political science or political debates encounter on how to pin down the Union.

In order to comprehend these difficulties, it would be useful to consider the political climate in which the early manifestations of integration theory arose.[15] This, not only because different theoretical perspectives privilege certain elements of the account over others, but also because the immediate post-war period in Western Europe represents a moment when theory and practice merged. Two of the early perspectives considered in this section – *federalism* and *functionalism* – offer an excellent example of such overlap: That is, the arrangement to delegate power to a higher form of government, which could secure peace and efficient performance of tasks. The third, *transactionalism*, grew out of a conscious effort by socio-political scientists to bring about the formal separation of theory from practice where a sense of community *among* States would be a function of the level of communication *between* States. *Neo-functionalism* on the other hand adopted a more pluralist perspective according to which sovereign States may be persuaded in the interests of economic welfare to relinquish control over certain policy areas. That action would take

[13] Villes, S. (2001) "The Path to Unity" in: Guttman, R. (ed.) *Europe in the New Century: Visions of an Emerging Superpower*, London: Lynne Rienner, 15-27, at 15.
[14] For more characterisations see Chryssochoou, D. (1999) "Eurogovernance: Theories and Approaches to the EU" in: Carr, F. and Massey, A. (eds.) (1999) *Public Policy in the new Europe: Eurogovernance in Theory and Practice*, Cheltenham: Edward Elgar, 3-26, at 4.
[15] Rosamond, B. (2000) *Theories of European Integration*, Basingstoke: Macmillan, 1-96; Craig, P. and De Búrca, G. (1998) *EU Law: Text, Cases and Materials*, Oxford: Oxford University Press, (2nd edition), 5-6.

place where it could be easily proven that benefits would flow if a common approach to problem solving was taken.

Neo-functional integration saw integration as a process based on "spillover". The spillover hypothesis sustained that the integration of the coal and steel sectors of a group of industrialised West European countries would yield substantial benefits for key economic actors. But the full integration of coal and steel sectors would not be accomplished without integration in cognate sectors of the economy. Thus spillover referred to the way in which the creation and deepening of integration in one economic sector would create pressures for further economic integration within and beyond that sector, and greater authoritative capacity at the EU level.

The assumptions and spillover predictions of *neo-functionalism* were in turn challenged by what has been described as the *intergovernmentalist* phase of the Community in the 1970s. During that period the supranational EC Institutions appeared to lose initiative and influence whereas the interests of individual Member States – most clearly symbolised by the so-called Luxembourg veto – dominated the process. In that context, the arguments of *neo-functionalism* were challenged by *liberal intergovernmentalism* which presented States rather than supranational Institutions as the key actors in the integration process, seeking essentially to pursue their own respective preferences and to protect their sphere of power. This theory was also applied to the renewed dynamism and deepening of the integration process in the 1980s with the signature of the

Single European Act ("SEA") and the Intergovernmental Conferences ("IGCs") of the early 1990s leading to the Maastricht Treaty.

Yet, the supranational – intergovernmental dichotomy which underpins the debate between what have been the two major theories – *neo-functionalism* and *liberal intergovernmentalism* – has been substantially questioned by a growing body of literature on the phenomenon of the EU as a system of multi-level governance.[16] Unlike the emphasis of earlier theories, this body of work concentrates less on explaining the dynamics of *integration* occuring in the EU context, and more on examining the *nature, actors and Institutions* which are involved at different levels in law-making and policy-making within the new political entity.

2.2. Description of the Euro-polity

The EU represents a new type of polity.[17] The term 'polity' refers to a "system of institutionalised rule capable of producing authoritative political decisions,

[16] See generally Grande, E. (1996) "The State and Interest Groups in a Framework of Multi-level Decision-Making", 3 *Journal of European Public Policy* 3, 313-338; Marks, G. (1993) "Structural Policy and Multi-level Governance in the European Community" in: Cafruny, A. and Rosenthal, G. (eds) (1993) *The State of the European Community*, Longman: New York, 391-410; Smith, A. (1997) "Studying Multi-level Governance: Examples from French Translations of the Structural Funds", 75 *Public Administration*, 711-729; Scharpf, F. (1994) "Community and Autonomy: Multi-level Policy-Making in the European Union", 1 *Journal of European Public Policy*, 219-242; Marks, G. Hoogue, L. and Blank, K. (1996) "European Integration since the 1980s: State-centric Versus Multi-level Governance", 34 *Journal of Common Market Studies* 4, 341-378.

[17] See generally Lindberg, L. and Scheingold, S. (1970) *Europe's Would-Be Polity: Patterns of Change in the European Community*, Englewood Cliffs, NJ: Prentice Hall; *Inter alia* see generally O' Neill, M. "Between Regime and Republic: The Polity Problem in the European Union", Paper presented to UACES Workshops on *The State of the Art: Theoretical Approaches to the EU in the Post-Amsterdam Era*, Aston University, Birmingham, 6-7 May 1999 (*mimeo*).

that is, political legitimacy, over a given population".[18] However, it is still not clear where a regime crosses a polity and where a polity moves towards a State.

The EU is composed of national, sub-nationals and Community Institutions which are constituted in relation to each other. West European national Institutions and the EU Institutions are so closely interwoven that they can no longer be conceived as separate political systems. Some analysts term this "the new governance agenda", which means that governing is no longer exclusively statal, that the relationship between State and non-State actors is non-hierarchical and the key governance function is "regulation" of social and political risk, instead of resource "redistribution".[19] The congruence between territoriality and functional competence, underlying hierarchically ordered State power, have also being broken down.[20] Although many still consider the nation to be the only legitimate basis for democratic deliberation,[21] nationhood no longer supplies the socio-cultural glue political integration required to operate with the unconditional assent of the people living in a given territory.[22] This

[18] Chryssochoou, D."Metatheorising the European Union", Paper presented to UACES Workshops on *The State of the Art: Theoretical Approaches to the EU in the Post-Amsterdam Era,* Aston University, Birmingham, 6-7 May 1999, p. 2 (*mimeo*).
[19] See Zürn, M. (2000) "Democratic Governance Beyond the Nation-State: The EU and Other International Institutions", 6 *European Journal of International Relations* 2, p. 183 at 185; Benz, A. and Eberlein, B. "Regions in European Governance: The Logic of Multi-Level Interaction", *Working Paper RSC*, No. 98/31, p. 1 < http://www.iue.it/RSC/WP-Texts/98_31.html >; Jachtenfuchs, M. (1995) "Theoretical Perspectives on European Governance", 1 *European Law Journal* 2, p. 115 at 120-121, 123-125, 127, 129-130; Hix, S. (1998) "The Study of the European Union II: The 'New Governance' agenda and its Rival", 5 *Journal of European Public Policy* 1, p. 39.
[20] Bellamy, R. and Castiglione, D. (2000) "The Uses of Democracy: Reflections on the European Democratic Deficit" in: Eriksen, E. and Fossum, J. (eds.) (2000) *Democracy in the European Union: Integration through Deliberation?,* London: Routledge, 65-84, at 68.
[21] Wind, M. (2001) "Symposium: Mountain or Molehill? – A Critical Appraisal of the Commission White Paper on Governance: The Commission White Paper Bridging the Gap between the Governed and the Governing?" under Title "Conclusion", *Harvard Jean Monnet Working Paper* No. 6/01 < URL http://www.jeanmonnetprogram.org/papers/01/012401.html >.
[22] Bellamy, R. and Castiglione, D. *loc. cit. supra* note 20.

will be better understood in Chapter Three when contemplating a European demos in civic terms. Additionally, what is also interesting is that the EU does not have a "monopoly on the legitimate use of coercion".[23] The power of coercion, through police and security forces, is shared at the internal level with the national governments of the Member States whereas at the external level with the Parliamentary Assembly of the Western European Union ("WEU") and the North Atlantic Treaty Organisation ("NATO").

At face value, the centrality of governments in the system makes the EU seem like other international organisations such as the United Nations ("UN") and the Organisation for Security and Co-operation in Europe ("OSCE"). But, in the EU, governments do not have a monopoly on political demands.

Although Nation-States remain dominant players, particularly in the policy-setting decisions of the European Council, the problem of defining and implementing EU policies, they have been removed from "authoritative allocation and mediation from above to the role of partner and mediator".[24] They sit alongside the supra-national Institutions of the European Commission, Parliament, the ECJ, the European Central Bank ("ECB") and a complex network of private groups. Supra-national Institutions develop rules that are considered superior to national law and employ servants that possess autonomy from national governments in that they have authoritative powers that directly affect national administrations and societies.

[23] Weber, M. (ed.) (1978) *Economy and Society - Volume I*, New York: Bedminster, 54-56.
[24] Kohler-Koch, B. (1996) "Catching up with Change: The Transformation of Governance in the European Union", 3 *Journal of European Public Policy* 3, p. 359 at 371.

3. EU: A SYSTEM OF GOVERNANCE

3.1. Introduction

Another descriptive element on the character of this polity is the 'governance' term which although used in various and somewhat ambiguous ways it has eventually come to be defined in the White Paper as the "rules, processes and behaviour that affect the way in which powers are exercised at European level...".[25] According to this concept, 'governance' seems to emphasise three major points. The first point is that we should stop relying on the State as the institutional form and hierarchical centre of society. The second point is that the idea of 'governance above the State' does not mean that the State is reconstituted on a higher (international) level, whilst the third point underlines change: change away from a traditional State-centred conceptualisation of political systems with one centre of an accumulated legitimate authority. With reference to the EU such a centre of authority is non-existent. All the EU Institutions regard themselves as capable of 'ruling' and in consequence of this the constitutional distinction between legislative and executive powers is blurred. Legislative power is in fact shared out between the Parliament, the Commission and the Council of Ministers whereas the Parliament's powers of consultation and co-decision procedures depend on the subject matter of the proposed legislation. Additionally, hundreds of Committees which were originally constructed to control delegation of powers from the Council to the Commission are also in operation.

[25] White Paper *loc. cit. supra* note 1, p. 8.

With regard to the existing relationships between the above EU Institutions, however, the Prodi White Paper amounts more to a revolution (a reversal of conditions) than to a reform (a suggested improvement by removing faults or abuses).[26] If enacted, the proposals "would evolve the Commission into a super-ministry that decides policy".[27]

In specific terms, but still lacking in detail, the proposals call the Commission to acquire an executive responsibility whereas the Council and the EP should focus more on defining the essential elements of policy and controlling the way in which those policies are executed.[28] In this perspective, the Commission appears to have committed itself to withdraw proposals where inter-institutional bargaining undermines the principles of proportionality, subsidiarity and/or the proposal's objectives, and to push the Council and the EP to speed up the legislative process.[29]

On the other hand, with a view to the Union's 700 management and regulatory committees, it is further suggested that these should be replaced by 'autonomous'[30] regulatory agencies. "Such agencies should be granted the power to take individual decisions in application of regulatory measures",[31] the White Paper says.

[26] Pritchard, "The Prodi Plan: More a Revolution than a Reform", *The Daily Telegraph*, 28 July 2001, 19.
[27] *Ibid.*
[28] White Paper *loc. cit. supra* note 1, p. 6.
[29] *Idem.*, 22-23.
[30] The assertion of autonomy appears to be rather illusionary since according to the White Paper agencies must be subject to an effective system of Commission's supervision and control: *loc. cit. supra* note 1, p. 24.
[31] *Ibid.*

The White Paper might highlight a tangible Europe that is in full development.[32] Yet, the proposed division of powers which turns the Commission into a genuine European executive and asks the Council and the EP to have an equal role in supervising the way in which the Commission exercises its executive role rather brings Europe backwards in two perspectives. It creates a centre of an accumulated authority akin to that of a Nation-State but still deficient in legitimacy. As a result, it does not develop a 'European model of dividing powers between the legislature and the executive', but rather copies national democracies, in particular some democratic federation which consists of an executive answering to a strengthened federal parliament and buttressed by a Supreme Court.[33]

3.2. Reasons for analysing the Union's system of governance

Having completed the criticisms on the White Paper regarding the delicate question of the balance of power between the EU Institutions, the examination of the workings of the EU, as a system of governance, is important for a number of reasons. First, it enables us to see in more depth the workings of the policy process inside the Institutions of the EU; therefore it allows us to appreciate the polity we are dealing with. Second, it helps us to identify the diversity of players available to take control and thus realise who or what drives EU integration. Or, more fundamentally, address the question of

[32] *Idem.*, 34.

[33] Börzel, T. and Risse, T. (2000) "Who is Afraid of a European Federation? How to Constitutionalise a Multi-level Governance System" in: Joerges, C. Mény, Y. and Weiler, J. (eds.) (2000) *What Kind of Constitution for What of Polity? - Responses to Joschka Fischer*, Florence, Italy: RSC, European University Institute, 45-59, at 52-58.

organisational structure, that is, who works with whom, and in what way, to produce authoritative rules in the course of European integration.[34]

3.3. Theories of European Integration

From intergovernmentalists,[35] the response to this question is that Member States and their central administrations work together to determine EU integration, guided by national economic objectives, assisted by EU Institutions playing an ancillary role, via historical making events, for example, the various Treaties and other Acts. Such theorists hold that interest groups are marginal to European integration, as they have little or no direct involvement in EU policy making at the supra-national/inter-national level. Therefore they rely on Member State national executives to aggregate their demands and act as their interlocutors in the EU arena.[36]

A number of opposing views, commonly pluralistic in their approach, contest the intergovernmentalist account. By contrast, historical institutionalists[37] contend that Member States do not fully control integration. Gaps emerge in Member State control, in the form of unintended consequences, because politicians have short time horizons, State preferences are not fixed and bringing about a policy reform, for example, Structural Funds, Common

[34] Egeberg, M. (2001) "An Organisational Approach to European Integration: Outline of a Complementary Perspective", *Arena Working Papers* WP 01/18, p. 5: < URL http://www.arena.uio.no/ >.

[35] See generally Moravcsik, A. (1991) "Negotiating the Single European Act: National Interests and Conventional Statecraft in the European Community", 45 *International Organisation*, 19-56.

[36] Moravcsik, A. (1993) "Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach", 31 *Journal of Common Market Studies* 4, p. 473 at 507.

[37] See generally Pierson, P. (1998) "The Path to European Integration: A Historical-Institutionalist Analysis" in: Sandholtz, W. and Stone Sweet, A. (eds.) (1998) *European Integration and Supranational Governance*, New York: Oxford University Press, 27-58.

Agriculture Policy ("CAP"), generates massive sunk costs. In other words, EU policy-making is complex. Both the voting and amendment rules are unanimity ones under the consultation procedure while under co-operation, the voting rule is a qualified majority and the amendment rule is unanimity, thus making it difficult to amend a Commission proposal. Under these circumstances, therefore, it would not be surprising to see the Commission exercising considerable agenda power in order to push through far-reaching proposals, thus widening any gaps in State control.

Some of these contentions echo arguments formulated by the early neofunctionalists, who suggest that EU policy is significantly shaped by the Commission, yet encouraged and supported by Member States and trans-national interest groups, with the latter transferring their loyalty, political activities and expectations to a new regional centre.[38] In a similar vein, the policy networks analysis promotes the idea that interest groups form webs of relatively stable and on-going relationships which mobilise and pool dispersed resources so that collective action, on a non-hierarchical level, can be orchestrated towards the solution of a common policy. On balance, this is actually close to the perspective in this Thesis which under the concept of a *meta*-national democracy puts emphasis on understanding the EU as a system of multi-level governance.

[38] Laffan, B. (1997) "The European Union: A Distinctive Model of Internationalisation?", 1 *European Integration online Papers (EIoP)* 18, p. 3: < URL http://www.eiop.or.at/eiop/texte/1997-018.htm >.

3.4. The notion of multi-level governance

The central notion of the multi-level governance literature is that within the emerging Euro-polity, "... political arenas are interconnected rather than nested...The clear separation between domestic and international politics...is blurred...States...share, rather than ... [exercise] control over many activities that take place in their respective territories".[39] The point here is that although the main political arenas of the Nation-State and Brussels are still there in a formal sense, for example, as 'government structures' relating to territories, the possibilities of governments for unilateral control are limited. Hence, there is a growing gap between 'government' in the Weberian sense of formal State structures endowed with legitimate and unchallenged authority over a territorially defined society,[40] and 'governance' in the sense of validating institutional decisions as emanating from right processes.[41] While State authority in the former sense has remained largely unchallenged through the integration process, State authority in the latter sense has increasingly been eroded due to the rigorous involvement of supra-national, national, local and regional actors. The notion of multi-level governance, therefore, seems to mirror a *meta*-national forum where there is "no centre of accumulated

[39] Marks, G. Hooghe, L. Blank, K. (1996) "European Integration and the State", in: Klaus, A. (ed.) (1996) *Der Nationlstaat am Ende des 20. Jahrhunderts: Beiträge im Rahmen der Berner Vortragsreihe: "Die Schweiz im Prozess der Globalisierung"*, Bern/Stuttgart/Wien, 91-126, at 96 as quoted in: Conzelmann, T. (1998) "'Europeanisation' of Regional Development Policies? Linking the Multi-level Governance Approach with Theories of Policy Learning and Policy Change", 2 *European Integration online Papers (EIoP)* 4, p. 1:
< URL http://eiop.or.at/eiop/texte/1998-004a.htm >.

[40] Gerth, H. and Mills, C. (eds.) (1948) *From Max Weber: Essays in Sociology*, London: Routledge, 78.

[41] Franck, T. (1999) "Democracy, Legitimacy and the Rule of Law: Linkages", *Social Science Research Network Electronic Library*, p. 1:
< URL http://papers.ssrn.com/paper.taf?abstract_id=201054 >.

authority.[42] Instead, variable combinations of governments on multiple layers of authority – European, national, and sub-national – form policy networks for collaboration. The relations are characterised by mutual interdependence on each others' resources, not by competition for scarce resources".[43] This arrangement has also been endorsed by the White Paper where it is claimed that the Union's legitimacy depends on involvement and participation. This consequently suggests that "the linear model of dispensing policies from above must be replaced by a virtuous circle, based on feedback, networks and involvement from policy creation to implementation at all levels".[44]

3.4.1. Multi-level governance in vertical terms

In vertical terms, the EU cannot function without power sharing with other levels of government. The sharing of power with national governments is most obviously expressed through the Council of Ministers, the European Council and a large array of intergovernmental committees across all three pillars of the EU. This sharing of power takes place not only at the policy-making stage but also in the informal advisory contacts between national civil servants and the Commission in the pre-legislative phase. It also occurs in the guise of

[42] Herein lies the success of multi-level governance in the EU. Otherwise, as the White Paper indicates multi-level interactions in the Euro-polity can become zero-sum confrontations in which the Commission tries to maximise its role in legislation and implementation through EU regulatory agencies at the expense of Member States: Scharpf, F. (2001) European Governance: Common Diversity vs. The Challenge of Diversity, *Harvard Jean Monnet Working Paper* No. 7/01, p. 13
< URL http://www.jeanmonnetprogram.org/papers/01/010701.html >.

[43] Hoogue, L. (ed.) (1996) *Cohesion Policy and European Integration: Building Multi-Level Governance,* Oxford: Oxford University Press, 18.

[44] White Paper *loc. cit. supra* note 1, p. 11.

implementation or execution policy Committees,[45] yet, being of a doubtful existence as the White Paper suggests.

It could be argued that the broad involvement of national civil servants is a 'watchdog exercise', or "Trojan horses"[46] in the Commission's own backyard. However, both the Commission and the national side consider that the early and continuous *engrenage* or interlocking of all relevant actors is an important element for calculable joint management of the EU's policy cycle. If any major element is to be made responsible for the often vigorously criticised bureaucratisation of the 'Brussels monster', it is this intrinsic set-up of multi-level administrative interpenetrating.[47] In any case, this bureaucracy is not an accidental product of personal mismanagement or just another example of Parkinson's law which assumes – together with the economic theory of bureaucracies – that such an expansion is just for the personal profit of the servants involved.[48] This trend is an ultimately unavoidable result of the intensive propensity of national politicians and civil servants towards comprehensive participation in preparing, making, implementing and controlling EU decisions that affect them directly.

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[45] Joerges, C. and Vos, E. (eds.) (1999) *EU Committees: Social Regulation, Law and Politics,* Oxford: Hart, 32.

[46] See generally Ciavarini, A. (1985) "Les Experts Nationaux, Cheveaux de Troie or Partenaires Indispensables?" in: Jamar, J. and Wessels, W. (eds.) (1985) *The Community Bureaucracies at the Crossroads,* Bruges: De Tempel, 99-105.

[47] See generally Trondal, J. (1999) "Integration Through Participation - Introductory Notes to the Study of Administrative Integration", 3 *European Integration online Papers (EIoP)* 4: < URL http://www.eiop.or.at/texte/1999-004.htm >.

[48] Vaubel, R. (1994) "The Political Economy of Centralisation and the European Community", 81 *Public Choice*, p. 151 at 168, 174.

Moreover, as scholars working on EU structural funds will attest, multi-level governance extends even below national governments to include regions and local authorities.[49] They are also involved in the power sharing, although there is a lively debate as to whether sub-national governments have really been empowered in determining structural policy, or are merely competing for the available funding.[50] The structural funds, for example, have led to the creation of sizeable constituency of regional officials in the Community's underdeveloped regions, who would presumably resist any retrenchment of the funds. In the wealthier Member States of the north, however, the political importance of these groups, interested in the amount of EC funding they receive, is minimal, placing little if any political pressure on their governments to support their funding applications when they come up for renewal.

3.4.2. Multi-level governance in horizontal terms

In horizontal terms, the EU is also engaged in power sharing. EU governance is not just about vigorous, supra-national EC Institutions as the "new institutionalism"[51] theory argues. On the contrary, the Institutions are mediating

[49] See Bache, I. (1998) *The Politics of European Union Regional Policy: Multi-Level Governance or Flexible Gatekeeping?*, Sheffield: Sheffield Academic Press; Evans, A. (1999) *The E. U. Structural Funds*, Oxford: Oxford University Press; Marks, G. (1991) "Structural Policy in the European Community" in: Sbragia, A. (ed.) (1991) *Euro-politics: Institutions and Policymaking in the new European Community*, Washington, DC: Brookings Institution, 191-224; Long, T. (1995) "Shaping Public Policy in the European Union: A Case Study of Structural Funds", 2 *Journal of European Public Policy* 4, 672-679.

[50] The White Paper also brings that debate to the fore. In effect, it takes the stand that regions, cities and localities are not merely competing for the available funding but are also responsible for implementing EU policies from agricultural and structural funding to environmental standards. In all cases, however, better partnerships across the various levels should be built: *loc. cit. supra* note 1, p. 12.

[51] Armstrong, K. and Bulmer, S. (eds.) (1998) *The Governance of the Single European Market*, Manchester: Manchester University Press, 50-53.

diverse political forces coming from some thousands non-profit interest groups and NGOs, from socio-economic interest groups organised at the EU level through the ESC, both mentioned in Chapter Four, from individual firms, and – more diffusely – from wider political sources, media and public opinion.

3.4.3. Policies and levels

The form of creating and using channels of access and influence are numerous and diversified according to the policy field in question, the public instruments employed and the procedures used. At the meso-level, the different policy areas such as justice and home affairs, employment, social policy and environmental policy may be distinguished one from another on the basis of the style of governance which predominates in that area, for example, inter-governmental co-operation, supra-nationalism and/or pluralism. Moving down a level to the micro-level, it is suggested that within each policy area, more particularised individual governance regimes concerning particular issues co-exist. Governance regimes are constructed around particular policies or issues, and "each reflect one admixture of rules, procedures and norms (the so-called Institutions) embedded in the systemic context".[52] The norms must be "shared" by the actors, both those who rule and those who are ruled. This implies, that they must know who they are and what their respective roles are (institutional concept). Individual governance regimes are thus identified as the set of Institutions which shape the interaction between institutional actors and

[52] Hunt, J. "Interdisciplinary Approaches to EC Decision-Making: Law, Politics and the Multi-levelled 'Governance Regime'", Paper presented to UACES Workshops on *The State of the Art: Theoretical Approaches to the EU in the Post-Amsterdam Era*, Aston University, Birmingham, 6-7 May 1999, p. 5 (*mimeo*).

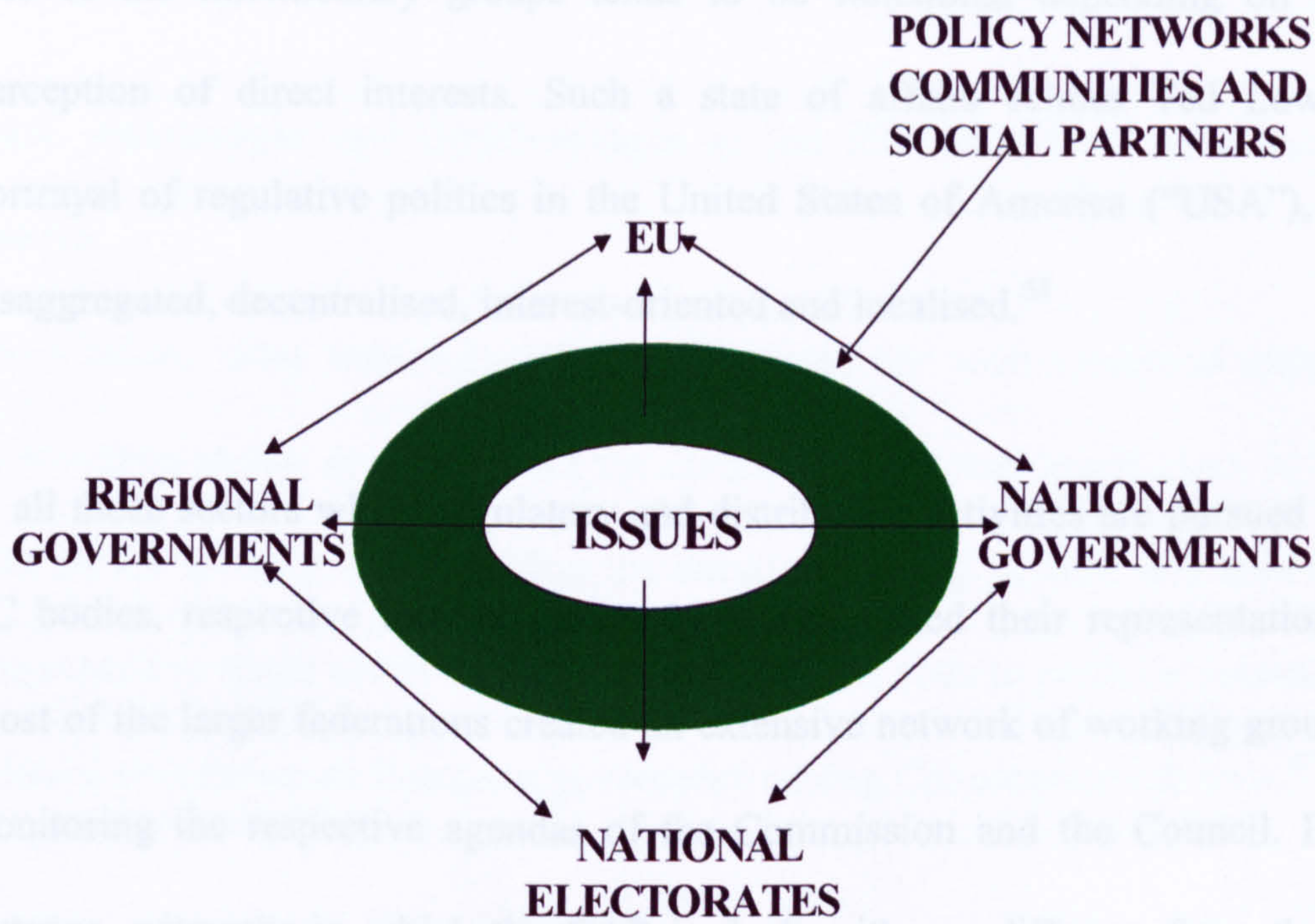
regulate their activities.[53] The institutional concept also implies that the exercise of authority is "systemic", that is, embedded in a fragmented collectivity of functional systems and sub-systems of society, yet sufficiently interdependent and mutually trustful so that all relevant actors (national, sub-national and European) would lose if no policy solution were found.

These actors and Institutions are situated at different levels within the super (history-making), national (policy-setting) and sub-national systems (policy-shaping),[54] but are linked to the extent that they participate in the same regime. Conceived of in this way, the governance regime template allows the multi-level nature of EU governance to be captured (see diagram 2.1 below).

[53] Armstrong, K. (1995) "Regulating the Free Movement of Goods: Institutions and Institutional Actors", in: Shaw, J. and More, G. (eds.) (1995) *New Legal Dynamics of European Union*, Oxford: Clarendon Press, 165-191, at 167.
[54] Peterson, J. and Bomberg, E. (eds.) (1999) *Decision-Making in the European Union*, Houndmills: Macmillan, 9.

Diagram 2.1. INTERCONNED EUROPE

A SINGLE, MULTI-LEVEL POLITY? -



Source: David Earnshaw and Josephine Wood.

"Lobbying in the New Millennium: New Approaches, New Themes", Paper Presented to UACES conference on *Persuasion, Advocacy and Influence in the EU*, University of Reading, 27 January 2001 (*mimeo*).

Certain policy fields of the EU are of no – or lesser interest – to intermediary groups especially where 'public goods' are produced, such as in the Common Foreign and Security Policy and in Justice and Home Affairs. On the contrary,

the interest becomes high when it comes to market integration. In this area, it tends to be the best-organised interest groups in Brussels together with interests represented by national governments that shape the policy 'hot debates' conducted in EU Institutions. Thus on the one hand, the regulatory character of policy encourages the development of insider groups; on the other hand, the role of the intermediary groups tends to be functional depending on the perception of direct interests. Such a state of affairs echoes Ted Lowi's portrayal of regulative politics in the United States of America ("USA"), as disaggregated, decentralised, interest-oriented and localised.[55]

In all those sectors where regulatory and distributive activities are pursued by EC bodies, respective interest groups have established their representations. Most of the larger federations created an extensive network of working groups monitoring the respective agendas of the Commission and the Council. For instance, networks in which the CAP is dealt with are different from those concerned with monetary union policy. Participation of those groups in the policy cycle also involves the issue of relative power. The capacity to link several circles on different levels of the EU system, for example, is one aspect of the influence of persons and groups. The value of each player within this multi-level network, thus, depends on how this person can effectively master support in all relevant arenas, for instance, back home as well as in the Brussels buildings; the game must be played at more than one level and in more than one circle. In this way, the emerging interest in policy networks can be also

[55] See generally Lowi, T. (1972) "Four Systems of Policy, Politics and Choice, 32 *Public Administration Review* 4, 298-310.

understood as a reaction to the critique of multi-level governance for predominantly focusing on the multi-level aspect, for example relations between the territorial levels of government, neglecting on the other hand relations between the public and private spheres. Policy networks are therefore perceived to offer a solution "to put governance back into multi-level governance".[56]

3.4.4. Advantages and disadvantages of the EU multi-level governance system

Nevertheless, many empirical studies have argued that such a political setting, as described above, does not make the distinctions between levels clear, is too eclectic for actually understanding the decision-making process and also too fragmented to shape actors' political orientations, or even to produce consistent political orientation on European governance among Commission officials.[57]

Even though this holds true in some respects, it is not suggested that the multi-level governance system is too complicated to be democratic. The EU is a dynamic system and is undergoing deep changes - with regard to its range and scope of operations, its institutional apparatus, its effects on the Member

[56] Smith, A. (1996) "Putting the Governance Back into Multi-Level Governance: Examples from French Translations of the Structural Funds" Paper presented at the ECPR Joint Sessions of Workshops in Oslo, 29 March - 3 April 1996 as quoted in: Börzel, T. (1997) "What's So Special About Policy Networks? - An Exploration of the Concept and Its Usefulness in Studying European Governance", 1 *European Integration online Papers (EIoP)* 16, p. 10: < URL http://www.eiop.or.at/eiop/texte/1997-016.htm >.

[57] Hoogue, L. (1997) "Serving 'Europe - Political Orientations of Senior Commission Officials", 1 *European Integration online Papers (EIoP)* 8, p. 4: < URL http://eiop.or.at/eiop/texte/1997-008a.htm >; See also Peterson, J. and Bomberg, E. *op. cit. supra* note 54, pp. 5-6, 9.

States,[58] and its commitment to democracy and legitimacy. Since the breakdown of the so-called 'permissive consensus' in the early 1990s, the EU has increased its commitment to democracy and legitimacy.[59] The basic principles of good governance pertaining to openness, participation, accountability, effectiveness and coherence offer prospects for democratising this trans-national governance structure.[60] By being applied to all levels of governance – global, European, national, regional and local – the above principles become the rules of conduct for institutional interactions, interest accommodation (or strategic group activity) and the inclusion of non-governmental actors in processes of meta-national policy-making.[61]

Furthermore, if a deeper integration through *deliberation* is to achieved, expert-based decision-making is not on its own illegitimate and threatening to Euro-democracy. Well-informed problem-solving and efficient decision-making are also part of good governance. Preferences should not only be stated but must also be justified by arguments; arguments that can be supported by scientific evidence have thus the best chance of convincing the parties.

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[58] See, for example, European Convention CONV 21/02, OJ 2 "Description of the current system for the delimitation of competence between the European Union and the Member States".

[59] Eriksen, E. and Fossum, J. (2001) "Multi-level or Democratic Governance in the EU: Institutionalised Deliberations and the Question of Democracy in the European Union", Paper prepared for the workshop on Constitutionalism and Transnational Governance, EUI, Florence: Italy, 30 November-1 December 2001, p. 3:
< URL http://www.iue.it/LAW/joerges/transnationalism/documents/Eriksen-Fossum.pdf >.

[60] White Paper *loc. cit. supra* note 1, p. 10.

[61] Neyer, J. (2001) "Discource and Order – On the Conditions of Governance in Non-Hierarchial Multi-Level Systems", *Arena Working Paper* 01/19, p. 3
< URL http://www.arena.uio.no/publications/wp02_9.htm >; See also Eriksen, E. and Fossum, J. *supra* note 59, pp. 6-7, 10, 12.

As far as the consensus-seeking is concerned, this might be cumbersome and costly in time, but it is "the way" of lending legitimacy to political policy-making in fragmented systems of decision-making lacking a collective identity. It is a way of "managing interdependence"[62] by accommodating difference and of ensuring willingness to comply with actions decided in common. Multi-level governance cannot but be dependent on consensus building or generalised reciprocity to prevent any deadlock, and so participants are likely to adopt a more moderate political orientation. In fact, interlocking in a multi-level governance system induces Commission officials, pivotal in channelling decisions, to converge towards median orientations on European governance. Progress in a non-hierarchical interlocked system is usually most likely if the system is responsive to affected actors, and senior Commission officials as professional employees can be particularly sensitive to these incentives. This does not imply, however, that they should not be expected to identify new areas of European collaboration and come up with innovative solutions which requires autonomous thinking.

As for the argument that it becomes problematic to develop a comprehensive and thorough analysis of the decision-making process, there are two explanations. First, the tiers or levels of EU governance are increasingly interdependent. "They all share the responsibility for problem solving but neither (level) has adequate authority and policy instruments to tackle the

[62] Papadopoulos, Y. (2000) "Modern Deliberative Forms of Multi-level Governance: Responsiveness and Democratic Accountability in Complex Environments", Paper presented at the XVIIIth International Political Science Association (IPSA) World Congress on special session *Accountability, Transparency and Publicity*, Québec: Canada, 1-5 August 2000, p. 3 < URL http://www-ssp.unil.ch/~IEPI/PCHPP/PDFpapado/dipsa.pdf >.

challenges they face".[63] Second, that scholars of the European Union have the ambition to link different policies, different levels of analysis and different intellectual traditions.[64]

Here the ambition is more modest. The author will employ the aforementioned analytical ideas and theoretical frameworks, focusing on only one sector. The remainder of the Chapter will be centred on the EU environmental policy and its detailed processes of interest articulation as part of policy-formulation, so as to show that in a complex and "loosely coupled system",[65] there is considerable room for processes:

Preferences x Institutions = to impact outcomes.[66]

Certainly, it might appear that this is not enough to make predictions and draw conclusions from one area only. Yet, it is the only way to indicate the existence of a system of multi-level governance in which interest groups are purposefully engaged during all phases of policy-making cycle. In this sense, "Brussels" is like Washington where corporations and/or local governments occupy a dominant position with respect to interest representation.[67] However, the EU

[63] O'Neill, M. *loc. cit. supra* note 17, p. 5 (*mimeo*).
[64] Andersen, S. and Eliassen, K. (eds.) (2001) *Making Policy in Europe*, London: Sage, (2nd edition), 16.
[65] Laffan, B. *loc. cit. supra* note 38, p. 6.
[66] Hinich, M. and Mungen, C. (1997) *Analytical Politics*, Cambridge: Cambridge University Press, 17 as quoted in: Hix, S. (1999) *The Political System of the European Union*, New York: St. Martin's Press, 13.
[67] See generally Salisbury, R. (1984) "Interest Representation: The Dominance of Institutions", 78 *American Political Science Review*, 64-76; See also, Jillson, C. (1999) *American Government: Political Change and Institutional Development*, Orlando: Hartcourt Brace, 167-205.

policy-making is not only pluralist, meaning that "in theory"[68] at least interest groups are free to form and compete at multiple points for equal access to the political process. The EU is more like national European systems such as those of UK, France and Germany where representation is mainly pluralist, but there is also some institutionalised relation between certain actors (mainly labour) and government.

In this Chapter, therefore, as well as in Chapter Five, following an analysis of social partners' involvement in Employment and Social Policies, we will assume that there is a mixture of representational styles at the EU level. That is why the policy-making is not always the same, and consesquently there may be substantial differences between policy sectors in the way policies are formulated and implemented.

4. ENVIRONMENTAL GROUPS

4.1. Introduction

Building on the earlier scholarship which concerned itself with interest groups in EU integration, attention is to be drawn to the contribution of environmental

[68] Perfect pluralism never really exists. First, in most societies one type of social division tends to dominate all others, so that the side of the divide which is numerically, economically or political most powerful will dominate the political process. Second, even where there are cross-cutting social divisions, opposing groups rarely have equal access to power. This is a product of the so-called 'logic of collective action': where there are motives to join a group that seeks benefits for only those members of the group ('private interests'), and no intention to join a group that seeks benefits for the whole society ('public interests'). With public interest, people can simply 'free ride': reap the benefits of higher environmental protection,for instance, without helping an envrionmentalist group lobby government. Consequently, private interests, such as individual firms and industrial lobbies, are more able to organise than 'sparce interests', like labour unions, consumer groups, or civil rights movements. The result is unequal access to political power, the capture of State officials by groups with the most resources, and *outputs* that benefit special interests at the expense of society. See Hix, S. (1999) *The Political System of the European Union*, New York: St. Martin's Press, 189.

groups, in particular to four legislative measures that form the basis of two intertwined strands of EU environmental policy. These groups and aspects of biodiversity and land use planning have been selected for a number of reasons. First, whilst a considerable body of research addresses the subject of lobbying in the EU,[69] a sizeable proportion of the literature focuses on the activities of private interests in the market, namely industrial or business associations.[70] Euro-groups associated with the environment have not yet been subject to much academic research. The last section of this Chapter thus attempts to redress firstly that imbalance by developing on others' work that have examined public interests, including environmental groups.[71] Secondly, whereas previous studies have examined the actors involved in the development of the Union's environmental *acquis* (1972-1986), the chosen

[69] See generally Grant, W. (1993) "Pressure Groups and the European Community" in: Mazey, S. and Richardson, J. (eds.) (1993) *Lobbying in the European Community*, Oxford: Oxford University Press, 27-45; Grenwood, J. Grote, J. and Ronit, K. (eds.) (1992) *Organised Interests and the European Community*, London: Sage; McLaughlin, A. Jordan, G. and Maloney, W. (1993) "Corporate Lobbying in the European Community", 31 *Journal of Common Market Studies* 2, 191-212; McLaughlin, A. and Greenwood, J. (1995) "The Management of Interest Representation in the European Union", 33 *Journal of Common Market Studies* 1, 143-156; Greenwood, J. Strangward, L. and Stancich, L. (1999) "The Capacities of Euro Groups in the Integration Process", 47 *Political Studies* 1, 127-138.

[70] See generally Pedler, R. and Van Schendelen, M. (eds.) (1994) Lobbying the European Union. Companies, Trade Associations and Issue Groups, Aldershot: Dartmouth; Benett, R. (1997) "The Impact of European Economic Integration on Business Associations: The UK Case", 20 *West European Politics* 3, 61-90; Green-Cowles, M. (1995) "Setting the Agenda for the New Europe: the ERT and the EC 1992", 33 *Journal of Common Market Studies* 4, 501-526; *Inter alia* Green-Cowles, M. (1998) "The Changing Architecture of Big Business" in: Greenwood, J. and Aspinwall, M. (eds.) (1998) *Collective Action in the European Union: Interests and the new Politics of Associability*, London: Routledge, 108-125; Grant, W. and Sargent, J. (eds.) (1987) *Business and Politics in Britain*, Basingstoke: Macmillan.

[71] See generally Greeenwood, J. (1997) *Representing Interests in the European Union*, Basingstoke: Macmillan; Long, T. (1998) "The Environmental Lobby" in: Lowe, P. and Ward, S. (eds.) (1998) *British Environmental Policy and Europe: Politics and Policy in Transition*, London: Routledge, 105-118; Webster, R. (1998) "Environmental Collective Action: Stable Patterns of Co-operation and Issue Alliances at the European level" in: Greenwood, J. and Aspinwall, M. (eds.) (1998) *Collective Action in the European Union*, London: Routledge, 176-195.

policy areas have not been appraised to date and the existing literature greatly underplays the role of interest groups in policy formation.[72]

4.2. Used terminology

To discuss the activities of the environmental groups, the terms 'access' and 'accomplished targeting' are used. The term 'access' indicates contact between interest groups and policy-makers, sought by the former which might take a variety of forms, for example, written correspondence, transmission of briefing papers, face-to-face meetings, telecommunication exchanges. It can also encompass those actions on the part of the interest groups designed to 'convince' policy-makers of the merits of a particular policy line, for example the use of lobbying. The term 'accomplished targeting', on the other hand, refers to the successful attainment of objectives - from the point of view of the group. For instance, the successful achievement of a particular direction and/or the adoption of sought-after piece legislation at the EU or national level are good examples of such targeting. At this stage, it is important to make two observations. Firstly, access does not guarantee accomplished targeting. Secondly, the relationship between access and accomplished targeting is not necessarily sequential. For example, where interest groups are deficient in structural power, they form alliances with the contact groups. In doing so, we acknowledge that some actors do not necessarily need access to achieve their objectives.

[72] See generally Golub, J. (1996) "British Sovereignty and the Development of EC Environmental Policy", 5 *Environmental Politics* 4, 700-728.

4.3. Targets and environmental interest groups

There are several potential targets for environmental groups according to their organisational resources, namely funds, qualified staff, offices in close geographical proximity to policy-makers, knowledge, the nature of group's track record (reputation for effectiveness or ineffectiveness, for field-level project work or policy activities, for providing reliable information) and *status*. A group can be an 'insider' when it is directly affected by EU Directives and Regulations like the French hunting lobby, "Chasse, Pêche, nature et traditions" ("CPNT")[73] or an 'outsider' like Greenpeace in the adoption and implementation of the Habitats and the Wild Birds Directives that are studied below.

Bearing in mind the relationship between potential targets and sufficient resources, liberal intergovernmentalism theory, as referred to above, would seem to suggest that national central government departments should be targeted. Pluralist accounts, on the other hand, for example neofunctionalism and multi-level governance, would expect groups to seek out EU level officials. Ward and Lowe's account lends support to the pluralist approach, in so far as 60% of their respondents regarded "the European Union as a more influential force in environmental policy than national government".[74]

[73] Avramovic, P. "Taking Preferences Further: A Liberal Critique of Moravicsik's Intergovernmentalism", Paper presented to the Fourth UACES Research Conference, University of Sheffield, 8-10 September 1999, pp. 7-9 (*mimeo*).
[74] Greenwood, J. (1997) *op. cit. supra* note 71, p. 92.

5. THE EVOLUTION OF EU BIODIVERSITY

5.1. Introduction

At the EU level, biodiversity policy comprises an array of different statutes, covering subjects as diverse as forestry protection and seals. However, the two most important tools of EU biodiversity are Directive 79/409/EEC on the conservation of wild birds[75] and Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora.[76]

5.2. The Wild Birds Directive

The founding Treaties of the EU contained no direct references to nature conservation, nor to any other aspect of environmental policy, because it was not considered to be a suitable area for Community competence.[77] Therefore, it was not until the Single European Act ("SEA") came into force in the late 1980s, that the European Union acquired a solid legal foundation for nature protection or biodiversity policy. Yet, from the early 1970s, the EU had begun to establish environmental principles and programmes. A broad range of political support for the Birds Directive can be dated from that period.

By the 1970s there was a general belief that species and habitats had to be protected.[78] This had resulted in the signing and adoption of some important

[75] Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds [OJ 1979, No. L 103/1 as last amended by Directive 97/49/EC OJ 1997, No. L 223/9].
[76] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild flora and fauna [OJ 1992, No. L 206/7 as last amended by Directive 97/62/EC OJ 1997, No. L 305/42].
[77] Dixon, J. (1998) "Nature Conservation" in: Lowe, P. and Ward, S. (eds.) (1998) *British Environmental Policy and Europe: Politics and Policy in Transition*, London: Routledge, 214-231, at 223.
[78] Haigh, N. (2000) *Manual of Environmental Policy*, London: Cartermill, 9.9-1.

international conventions which were to provide the necessary impetus for EU level action. In particular, these were the Ramsar Convention (1971) on the conservation of the World's wetland habitats and the Bern and Bonn Conventions on the Conservation of European Wildlife and Natural Habitats and on the protection of migratory birds and mammals (1979).

5.2.1. Proposals and British environmental lobbying

The first EU level proposal to include an undertaking to protect birds and certain other species was the First Action Programme[79] which exploited Article 2 of the Treaty of Rome 1957 that refers to a harmonious economic development and improvement of quality of life. The signing of this programme signalled the endorsement by the Member States of species protection.

Among the sources of pressure for nature conservation measures were the public, who were infuriated with slaughters of migratory birds, and interest groups like "Save our Migratory Birds" petitioned the EP which resulted in a Resolution in February 1975. This Resolution led in turn to Commission proposals, although this was not the Commission's first involvement in the policy area. Since the 1970s the Commission had already undertaken a number of studies, consulted national experts and reminded Member States of their obligations to comply with the 1950 Paris Convention on Birds and the 1971 Ramsar Convention.[80]

[79] First Action Programme on the Environment 1973-1976 [OJ 1973, No. C 112/40].
[80] Wils, W. (1994) "The Birds Directive 15 Years Later: A Survey of the Case Law and a Comparison with the Habitats Directive", 6 *Journal of Environmental Law* 2, p. 219 at 219.

As a result of the broad support for protection measures on bird conservation, the Directive was proposed in December 1976[81] but was not adopted until April 1979. This eighteen month delay was largely the consequence of opposition from the French and Italian governments. Having adopted the Birds Directive, in due course there were a number of technical adaptations related to the enlargement of the EU (to include Greece, Spain and Portugal). Of much greater importance, nonetheless, was the amendment to the Birds Directive introduced via the Habitats Directive in the early 1990s.[82]

The Birds Directive places a duty upon the Member States to maintain the populations of wild birds at a level which corresponds to ecological, scientific, cultural, economic and recreational grounds.[83] It prohibits any deliberate killing or capture of birds by any method, deliberate destruction of or damage to nests, eggs, breeding and rearing sites, and the keeping of birds whose hunting or capture is prohibited.[84]

Additionally, under the Birds' Directive Member States were required to designate their own Special Protection Areas ("SPAs") and to notify the Commission of these sites by April 1981.[85] Despite this deadline, the Birds Directive lacked a strict timetable for compliance (unlike the Habitats

[81] Proposal for a Council Directive on bird conservation [OJ 1977, No. C 24/3].
[82] Wils, W. *loc. cit. supra* note 80, pp. 220-221.
[83] Council Directive 79/409/EEC *loc. cit. supra* note 75, Art. 2.
[84] *Idem.*, Art. 5.
[85] *Idem.*, Arts. 4, 18.

Directive) and the result was that some Member States (for example, France, Netherlands, and Italy) failed to comply with this obligation.[86]

In the UK, formal compliance with that obligation was achieved through a number of pieces of legislation. These included: a) the National Parks and Access to the Countryside Act (1949), b) the Countryside Act (1968), c) the Countryside (Scotland) Act (1967), and d) the Wildlife and Countryside Act (1981). Under UK procedures, SPAs were classified by the Secretary of State for Environment ("DoE"), on the recommendation of the Nature Conservancy Council ("NCC") and would normally have already been notified as Sites of Special Scientific Interest ("SSSIs").[87]

With respect to the incorrect implementation of the Directive, the Commission responded to the growing concerns over the failure to implement by initiating infringement proceedings against every single Member State.[88] Two of the most important cases upon which the ECJ ruled in the early 1990s were *Commission v. Germany*[89] with Britain intervening (so-called *Leybucht Dykes*) and *Commission v. Spain*.[90] Crucially, the Court's decisions in these two cases

[86] Note Cases: C-166/97 *Commission v. France* [1999] ECR I - 1719, para. 15; C-96/98 *Commission v. France* [1999] ECR I - 8531, para. 16; C-374/98 *Commission v. France* judgment of 7 December 2000, para. 30 (not yet reported); C-3/96 *Commission v. Netherlands* [1998] ECR I - 3031, paras. 30, 63; C-334/89 *Commission v. Italy* [1991] ECR I - 93, para. 10.
[87] Note, however, that SSSIs are voluntary agreements between statutory bodies and specific landowners, therefore they are not covered by any specific law, except those laws relating to endangered species on the CITES list. There are numerous examples of finest wildlife sites being wilfully destroyed by farmers and landowners ever since their adoption; in general, SSSIs have always been pretty ineffective in the protection and conservancy of flora and fauna.
[88] Note Cases: C-247/85 *Commission v. Belgium* [1987] ECR 3029; C-262/85 *Commission v. Italy* [1987] ECR 3073; C-159/99 *Commission v. Italy* [2001] ECR I - 4007; C-38/99 *Commission v. France* judgment of 7 December 2000 (not yet reported).
[89] Case C-57/89 *Commission v. Germany* [1991] ECR I - 883.
[90] Case C-355/90 *Commission v. Spain* [1993] ECR I - 4221.

appeared to elevate ecological considerations over economic or recreational ones during the designation and development of protected sites. Employing the same principles, the ECJ also ruled against the UK government who had excluded an area of land from a SPA in order to allow development of a nearby port. The case known as *Lappel Bank*[91] drew information submitted by the Royal Society for the Protection of Birds ("RSPB"), a UK conservation-environmental group.

5.3. The Habitats Directive

In common with the Birds Directive, the Habitats Directive was the product of the efforts of more than one political actor. Governments signalled their recognition of the link between migratory species and habitats[92] in the Third Environmental Action Programme.[93] National and transnational conservation organisations continued to campaign for increased protection mechanisms,[94] and in actual terms they pushed the EU to fully implement the provisions of the Bern Convention via EU legislation. Once again, the Commission, the Parliament and the Court of Justice played a significant role in developing the Directive.

The Habitats Directive was proposed in September 1988[95] but was not finally adopted until 1992 due to Member States' objections. In fact, one source of

[91] Case C-44/95 *Regina v. Secretary of State for the Environment, ex parte: Royal Society for the Protection of Birds* [1996] ECR I - 3805, [1997] 2 WLR 123.
[92] Haigh, N. *op. cit. supra* note 78, p. 9.9-6.
[93] Third Action Programme on the Environment 1982-1986 [OJ 1983, No. C 46/3].
[94] See *supra* note 92, p. 9.9-7. See also Dixon, J. *loc. cit. supra* note 77, p. 224.
[95] Proposals for a Council Directive on natural habitats and wild fauna and flora conservation [OJ 1988, No. C 247/3 and OJ 1990, No. C 195/1].

delay was the UK, which led a determined campaign to reverse the effects of the *Leybucht Dykes* decision. This case was in progress as Habitats Directive was being negotiated and when the ECJ decision was announced in February 1991 it took the UK government by surprise. In addition to the British resistance to the proposed habitats legislation, Spain also raised objections. In fact, negotiations foundered over the issue of providing financial assistance to it and to other countries where the Directive would have had the greatest economic impact.

The UK Government's successful campaign to re-establish Member State discretion over protected sites, resulted in the inclusion of a number of crucial Articles in the final version of the Habitats Directive. Articles 6 (4) and 7 of the Habitats Directive replaced Article 4 (4) of the Birds Directive, thus appearing to make the former a rather weak piece of species protection legislation. In this context, the Habitats Directive and the subsequent amended Birds Directive appeared to give Member States great flexibility or autonomy in respect of the protected sites, for example to use economic reasons so as to allow damage to sites.

Under Article 3 of the Habitats Directive, the protection of plant and animal species and their habitats is to be achieved by fusing SPAs with a new class of areas called Special Areas of Conservation ("SACs") that form a pan-European system of protected areas called *Natura 2000*. Member States are required to avoid deterioration of these sites and to carry out appropriate assessments of any plans or projects that might destroy the areas.

As with its predecessor, the correct transposition of the Habitats Directive has also been problematic. Despite the inclusion of a strict but quite generous, ten-year implementation timetable, with the first composite implementation report to be made on 5th June 2002, the Commission again has been very busy on issuing warnings and initiating infringement proceedings against a majority of the Member States. For instance, in December 1997, the Commission initiated infringement proceedings against several Member States, including the UK, for failure to notify the Institution of their complete lists of proposed SACs.[96] Also based on the complaints registered in 1998 by broad categories, bearing in mind, however, that they often raise more than one problem, it was found that one in every two complaints was concerned with nature conservation; yet, not involving Britain this time.[97] In the years 1999 and 2000 the Commission warned that where implementation of the Birds and Habitats Directive is particularly poor, failure to meet their commitments may jeopardise their chance of receiving regional funding under the Structural Funds.[98] To the same effect, the EP in January 2001 called on the Commission to carry out a detailed examination of the implementation and observance of Community environmental legislation in all Member States' works and projects requiring Community funding as it considered that the Habitats Directive has shown problems and excessive delays in its enforcement and transposition.[99]

[96] Haigh, N. *op.cit. supra* note 78, p. 9.9-11.
[97] European Commission, *Environment Chapter of the Sixteenth Annual Report on Monitoring the Application of Community Law (1998)*, COM (1999) 301, 18 June 1999, p. 8.
[98] See *supra* note 96.
[99] European Parliament, *Resolution on the Satisfactory Implementation of Environment Directives*, B5-0038/2001, 17 January 2001, p.1.

5.3.1. Lobbying and implementation of the Habitats Directive in the UK

In the UK, the Habitats Directive was enacted via the Conservation (Natural Habitats, Etc.) Regulations of 1994 but these have been termed as "minimalist".[100] They engraft on to the existing systems of sites of special scientific interest ("SSSIs") and town planning, and only adding extra controls where necessary. When it comes to the protection of marine SACs and SPAs the position is even clearer. The Regulations do address the issue of marine sites, but do not provide an absolute framework for protection. That is why legal challenges have been mounted against the UK Government for failing to adequately protect marine sites. For example, in 1999, Greenpeace gave evidence against the UK Government,[101] arguing that all future oil licensing by the Department of Trade and Industry ("DTI") is illegal until the Directive is properly applied to oil licensing in the north east Atlantic and that the Directive should be applied to the 200-mile limit since the UK claims exclusive economic rights up to this distance. The High Court confirmed that the Habitats Directive has to be applied to the continental shelf and to waters up to the 200-mile fishing limit before new offshore oil or gas exploration licenses can be granted.[102] The judgment thus represents a significant extension of the Directive's reach, since no country has designated conservation sites beyond the 12-mile national territorial limit. It also suggests that the Department of Environment of Transport and the Regions ("DETR") will have to take

[100] Ball, S. (1997) "Has the UK Government Implemented the Habitats Directive Properly?" in: Holder, J, (ed.) *The Impact of EC Environmental Law in the United Kingdom*, Chichester: John Wiley, 215-227, at 215-216.
[101] *R v. Secretary of State for Trade and Industry ex parte Greenpeace*, (High Court, Queen's Bench Division, Maurice Kay J, 5 November 1999).
[102] Jans, J. (2000) "The Habitats Directive", 12 *Journal of Environmental Law* 3, p. 385 at 386-387. See also Haigh, N. *op. cit. supra* note 78, p. 9.9-12.

additional steps to ensure the protection of cold-water coral during hydrocarbons exploration as well as checking that whales and dolphins are not disturbed.

6. EU LAND USE PLANNING POLICY

6.1. Introduction

The core of EU land use planning policy comprises one adopted measure, the Environmental Impact Assessment (EIA Directive 85/337/EEC),[103] and another one, which, at the time of writing this Chapter of the Thesis, has reached a political agreement and deals with the Strategic Environmental Assessment ("SEA").

6.2. The Environmental Impact Assessment Directive

By the time the EU adopted an EIA Directive in 1985, some States were already experienced at undertaking on their own, domestic assessments (for example, West Germany and France since 1976 and the Netherlands since 1981)[104] but for the rest, EIA was a novelty.[105]

6.2.1. Policy actors

In common with the biodiversity Directives mentioned above, a number of policy actors contributed to the evolution of the Directive. These included the Commission which had begun preparing the ground in the mid-1970s by commissioning a series of expert reports. The European Environmental Bureau

[103] Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment [OJ 1985, No. L 175/40 as amended by Directive 97/11/EC OJ 1997, No. L 73/5].
[104] Wood, C. (ed.) (1995) *Environmental Impact Assessment*, Harlow, Longman, 3.
[105] *Idem.*, 31.

("EEB") and the European Council for environmental law tried to crystallise opinion by holding an information-sharing seminar in 1975 for national experts and Commission officials.[106] On the basis of these discussions, the Commission began drafting a formal proposal during 1977 and 1978. Nevertheless, almost from the start, progress was slow because the proposal represented the Union's first intrusion into national land use planning practices. In fact, it is reported that the proposal went through 20 different drafts before being published in 1980.[107]

Once again the UK Government together with the Danes presented a significant obstacle. During the drafting stages, important changes were made so as to accommodate British and Danish objections. Nonetheless, the final draft still contained a number of elements that the British opposed such as a long list of projects in Annex I where EIA was made mandatory, provisions for Commission co-ordination of the Annex II thresholds (Article 2 of the 85/337 Directive) and a requirement to consider additional project sites where appropriate (Article 2 of the amending 97/11 Directive).

The EIA Directive is a piece of horizontal environmental legislation. Legislation may be classified as "horizontal"[108] when it relates to general

[106] Sheate, W. (1997) "From EIA to SEA: Sustainability and Decision-Making" in: Holder, J. (1997) *The Impact of EC Environmental Law in the UK*, Chichester, John Wiley, 267-285, at 270.
[107] Wood, C. *op. cit. supra* note 104, p. 33.
[108] European Commission, DG Environment Publications (2000) *"Guide to the Approximation of European Union Environmental Legislation - Part 2: Overview of EU environmental legislation - Introduction and Horizontal Legislation"*: < URL http://europa.eu.int/comm/environment/guide/part2a.htm >.

environmental management issues rather than to specific sectors, products or types of emissions. It concerns the collection and assessment of information on the environment and on the wide range of human activities which impact on the environment. In particular, it requires that, before governmental approval can be granted, certain development projects must be subject to a process in which potential environmental effects are assessed. Thus, on the one hand, Annex I of the EIA Directive lists 9 types of projects which must receive an environmental assessment, although exemptions in exceptional circumstances can be made (Article 2 (3)). Annex II, on the other hand, includes 13 categories of development projects covering 80 separate types of project, which require an EA where States consider that "their characteristics so require".[109] Article 4 (2) requires Member States either to specify *a priori* certain types of projects that will fall under Annex II, or establish the criteria and thresholds to determine which apply. In the UK the test depends on "the likely significance"[110] of the project's environmental effects.

The UK Government had considered itself to lead in this sphere of legislation and thought that the EU law would only formalise or rather duplicate what the UK was already doing as part of a well established land use planning process, dating back to 1948. Initially, formal compliance with the EIA Directive in the UK was attempted through secondary legislation, the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988, which was adopted under the European Communities Act 1972. When this failed,

[109] Council Directive 85/337/EEC *loc. cit. supra* note 103, Art. 4 (2).
[110] Wood, C. *op. cit. supra* note 104, p. 120.

however, to produce adequate compliance with the strict terms of the Directive inasmuch as it did not cover developments like agriculture and forestry, the UK was obliged to introduce the 1991 Planning and Compensation Act, relying on over 40 Regulations.[111]

Likewise biodiversity policy rulings by the ECJ have played an important role in giving the EIA Directive greater legal and political sharpness. The rulings which stemmed from continuing disagreements about the interpretation of the Directive between the Commission and the Member States[112] have proved that States cannot be discretionary in its implementation as they might have thought in the first place. Being the first to be dealt with, the most remarkable among the ECJ cases were *Commission v. Germany*[113] (supported by the UK) and *Commission v. Belgium*[114] (supported by Germany). The first case addressed concerns surrounding Annexes I and II. Germany argued that Annex I did not apply to a modification of an existing project. The ECJ, however, held that:

> "That project was required to undergo an assessment of its effects on the environment irrespective of whether it is a separate construction, is added to pre-existing construction or

[111] Zetter, J. (1997) "Environmental Impact Assessment: Has It Had an Impact?" in: Holder, J. (1997) *The Impact of EC Environmental Law in the UK*, Chichester: John Wiley, 257-266, at 259-260.
[112] Note Cases C-392/96 *Commission v. Ireland* [1999] ECR I - 5901; C- 230/00 *Commission v. Belgium* [2001] ECR I - 4591.
[113] Case C-431/92 *Commission v. Germany* [1995] ECR I - 2189.
[114] Case C-133/94 *Commission v. Belgium* [1996] ECR I - 2323.

> even has close functional links with a pre-existing construction".[115]

In the latter case, the Commission felt that Belgium with Germany had adopted a narrow interpretation of the applicability of Annex I. The Court agreed with the Commission ruling that Member States should consider projects on a case by-case basis and they should not establish generic thresholds or criteria for exempting in advance certain projects in Annex II from EIA.[116]

Concerning its impact on the UK, the EIA Directive instigated far more Environmental Assessments of developing projects than anyone expected, particularly in relation to activities under Annex II which the UK government wanted to apply with caution.[117] Between 1988 and the end of 1993, over 1000 Environmental Impact Statements ("EISs") were produced under EU law - of which less than 10 per cent related to projects falling within Annex I and over 300 outside it, thus indicating the tremendous interest in EIA generated by the Directive.[118] The growing popularity of EIA among statutory consultants, developers, environmentalists and local planning officers has led it to being formally applied to projects which are outside the ambit of EU rules.[119] Interestingly, the UK's tepid enthusiasm for the EIA has grown considerably in

[115] C-431/92 *loc. cit. supra* note 113, paras. 35-36.
[116] C-133/94 *loc. cit. supra* note 114, paras. 41-44.
[117] See generally Wood, C. and Jones, C. (1991) *Monitoring Environmental Assessment and Planning*, London: HMSO.
[118] Wood, C. *op. cit. supra* note 104, p. 53.
[119] See *supra* note 117, pp. 26-28.

the period since 1988 as the warnings of excessive legal actions and delays have failed to materialise.[120]

6.3. Developing Strategic Environmental Assessment

The idea of Strategic Environmental Assessment ("SEA") is nothing new in the EU. Actually, it has been one of the Commission's political goals for almost as long as the Community has developed an environmental policy. In the late 1970s, it was first recommended to the Commission and there were plans to introduce it in the Commission's 1980 draft EIA proposal. However, it was only with the fourth Action Programme on the Environment (1987)[121] that the Member States and the Commission formally committed themselves to promoting SEA. In particular, environmental groups, agencies and the EP have always been enthusiastic campaigners of SEA, but the Commission has always had to treat carefully the issue in order to win over the Member States' support to its way of thinking.

By the 1990s the political context had become more encouraging to having a SEA. Many Member States, including the UK, began to experiment with national level systems of SEA (for example, France, and Italy) and Environmental Evaluation ("EE") which is less stringent than SEA to reconcile needs of conservation and economic development (the so-called environmental sustainability)[122]- an emerging *leitmotif* in the EU environmental policy. The

[120] Haigh, N. (ed.) (1989) *EEC Environmental Policy and Britain*, Longman: Harlow, (2nd revised edition), 353.
[121] Fourth Action Programme on the Environment 1987-1992 [OJ 1987, No. C 328/6].
[122] Therivel, R. Wilson, E. Thompson, S. Heaney, D. and Pritchard, D. (eds.) (1992) *Strategic Environmental Assessment*, London: Earthscan, 123.

Commission was then able to use the prospect of inconsistent national SEA and EE systems as a justification for proposing SEA at the European level, though not without much delay and patient negotiation. Early drafts were under discussion within the Commission in 1990 and implied that SEA would be applied to just about all policies, plans and programmes that give rise to development.

In December 1992, the UK Government used a subsidiarity debate (veto power) to formally suspend the SEA proposal. Nonetheless, this set back did not deter the Commission from making efforts to extend SEA by other means, such as the structural funding process, in certain Directives such as those addressing habitats[123] and also in the construction of roads.[124] Following broad discussions with Member States the Commission finally issued a formal SEA proposal in 1996[125] and requires an environmental assessment of all plans and programmes that are adopted as a part of the town and country planning decision-making process, but not as originally suggested, of policies. Its scope was also narrowed down to land use planning decisions like local development plans and waste local plans, Article 2(a). Other changes were made to appease further Member States and included greater discretion and flexibility so as to tailor the Directive to fit in with national circumstances (Articles 3, 4, 6 of the original text and Recitals 2, 7 of the amended text).

[123] *Idem.*, 52-53.
[124] Sheate, W. *loc. cit. supra* note 106, pp. 279-281.
[125] Proposal for a Council Directive on the assessment of the effects of certain plans and programmes on the environment, [COM/96/511 final as amended by COM/99/73, OJ 1997, No. C 129/14 and OJ 1999, No. C 83/13].

Since then, however, the proposal remained in limbo as a succession of Council Presidencies, including the UK's, ignored it. Interestingly, during its Presidency in 1998, the UK Government turned away from SEA and opted instead to push for a strategy on integration of environment into other policies via the intergovernmental route at the Cardiff European Council (June 1998). In 1999, first the Finnish and then the German Presidencies, took stock of progress and reaffirmed the commitment to sustainable development and integration which gave the SEA proposal much needed shot in the arm.[126] By 1999, even the UK Government was said to be broadly in favour of the proposal as it stood. Hence, environment Ministers reached a political agreement on the text in December 1999[127] and formally adopted the SEA Directive in June 2001.[128]

6.3.1. The scope of the SEA Directive in a few words

Although the EIA Directive requires an environmental impact assessment to be carried out before the development consent is given for projects likely to have significant effects on the environment, it does not require an assessment to be carried out before the adoption of the plans and programmes which set the framework for such development consent decisions. The purpose thus of the SEA Directive is to remedy this shortcoming by supplementing the EIA Directive with requirements for town and country plans and programmes to be

[126] European Commission, DG Environment (2001) *"Environmental Integration"*: < URL http://europa.eu.int/comm/enveco/integration/integration.htm >.

[127] Common Position formally adopted by the Council with a view to the adoption of a Directive of the European Parliament and of the Council on the assessment of the effects of certain plans and programmes on the environment, Brussels 20 March 2000: http://europa.eu.int/comm/environment/eia/sea-legalcontext.htm.

[128] Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment [OJ, 2001 No. L 197/30].

assessed.[129] The public and environmental authorities can give their opinion[130] and all results contained in an environmental report are integrated and taken into account in the course of the planning procedure.[131] After the adoption of the plan, programme or even policy ("PPP") the public should be informed about the decision and the way in which it was made.[132] In the case of possible transboundary significant effects the affected Member States and its public should be informed and have the opportunity to make comments, which are also integrated into the national decision-making process.[133]

7. PROCESSES TO IMPACT OUTCOMES

7.1. Introduction

Sketching the evolution of EU environmental policy was a prerequisite for understanding the processes of interest articulation as part of policy formation. There now follows an examination of the activities of the environmental groups in exerting influence over the adoption and correct implementation of the EU biodiversity and land use planning policy. Questions such as which policy-makers (*who*) the groups sought to access, *how* they achieved this, and *why* they did so will be examined.

7.2. Who were the targets in the case study?

The empirical evidence shows that the UK environmental groups successfully gained access to all levels of governance: national, sub-national and European.

[129] *Idem.*, Arts. 1, 3.
[130] *Idem.*, Art. 6.
[131] *Idem.*, Art. 12 (2).
[132] *Idem.*, Art. 9.
[133] *Idem.*, Art. 7.

Thus, they confirmed that contact with national officials was extremely important, as was their relationship with EU Institutions.

At the national level (within the UK Government), the DETR was considered to be the most important target, but access was also sought to Ministry of Agriculture, Fisheries and Food ("MAFF"), the DTI and the territorial offices within the UK such as the Scottish Office.[134] At the sub-national level (local and regional), voluntary organisations such as the "British Ecological Society" and "British Trust for Ornithology" built up their support in public opinion and successfully developed themselves as truly mass movements.

At the EU level, the British conservation groups prioritised their activities and tended to make efforts to establish and maintain relations with the European Commission rather than other EU Institutions such as the Council of Ministers.[135] Within the Commission, the Directorate General ("DG") of Environment was the most sought after target, although some resources were expended in developing relations with the DGs of Agriculture, Fisheries, Transport, the EU budget and Regional Policy. In addition, groups such as "Save our Migratory Birds" selectively sought access to particular MEPs within the EP. The groups tended to pursue those MEPs who had shown a personal

[134] Fairbass, J. and Jordan, A. (2001) "Shaping EU Environmental Policy: Access and Leverage?", Paper presented to UACES Conference on *Persuasion, Advocacy and Influence in the EU*, University of Reading, 26-27 January 2001, p. 16 (*mimeo*). This is part of an on-going project on the 'Europeanisation of the UK Government of the Environment' undertaken at the Centre for Social and Economic Research on the Global Environment (CSERGE). Details can be found on the Internet at: < URL http://www.uea.ac.uk/env/cserge/ >.

[135] Sharp, R. (1998) "Responding to Europeanisation: A Governmental Perspective" in: Lowe, P. and Ward, S. (1998) (eds.) *British Environmental Policy and Europe. Politics and Policy in Transition*, London: Routledge, 33-56, at 36, 38, 42.

commitment to environmental issues or who played a significant role of the Parliament Committee on the Environment, Public Health and Consumer Policy. The environmental groups contacted less the ESC. The purpose of lobbying was to limit any threat to their interests or preferences.[136]

Moreover, for several of the environmental groups, access to the ECJ has played an important role in shaping EU biodiversity and land use planning. Groups like the RSPB, Greenpeace-UK supported the Commission and put duties on their Ministers to properly implement the Birds, Habitats and/or EIA Directives, thus exposing them to action in the UK courts as well as the European Court of Justice when failed to do so. For both of them, the decision to take legal action, via the ECJ, was a matter of strategy due to the degree of commitment of resources required by such an action. Although European integration opens up political opportunities as will be argued in Chapter Four, engagement in European *fora* is costly in both time and money. Additionally, for the RSPB a 'cost-benefit analysis' was conducted before it had recourse to the ECJ over the *Lappel Bank*. That was, to bind the UK Government to respect its obligations in the event there was a State backlash, for example, the UK Government's vigorous campaign to dilute the Habitats Directive after the *Leybucht Dykes* ruling.[137]

[136] Fairbass, J. and Jordan, A. *loc. cit. supra* note 134.
[137] Sharp, R. *loc. cit. supra* note 135, pp. 38-39.

To what extent is the strategy of exploiting EU Institutions and legislation successful to discipline the UK Government, Reynolds refers to that in respect of the EIA Directive.

> "There have been more complaints to the European Commission about the failure to implement the [EIA] Directive than any other piece of European legislation. This is partly because EIA is a new process, providing many new 'hooks' on which compliance can be judged, and partly because its timing and importance opened many campaigners' eyes generally to the opportunities presented by lobbying in Europe".[138]

7.3. How did the groups seek and gain access to EU policy-makers?

The UK based groups sought and gained access to EU policy-makers via three possible routes. The direct route which as suggested by the title is one in which the interest group establishes direct contact with EU policy-makers. The national route, by which the demands and policy objectives are conveyed to the EU level of governance via national government officials as the ones that are mentioned above: and the European route under which the national groups use European groupings to transmit their arguments to the EU level.

[138] Reynolds, F. (1998) "Environmental Planning" in: Lowe, P. and Ward, S. (1998) (eds.) *British Environmental Policy and Europe: Politics and Policy in Transition*, London: Routledge, 232-243, at 241.

The established direct contact with EU officials, operated via trans-national groupings, for example, "Friends of the Earth", and they did place some value on their lobbying of the national executive. Smaller UK based groups which are relatively poorly financed and equipped such as the "Marine Conservation Society" have worked to influence biodiversity policy via a wider UK grouping namely "Wildlife and Countryside Link". At the national-EU level interface, the RSPB worked with, and through, the Brussels-based "BirdLife International". The RSPB was also member of a more heterogeneous grouping lobbying for biodiversity protection which consisted of the Council for the Protection of Rural England ("CPRE"), World Wildlife Fund ("WWF") and Wildlife Trust.[139] WWF's Brussels offices which host the European Habitats Forum tried to lever some of the considerable sums of EC aid money to be spent on conservation and development projects.

In any case, however, the actual pattern of activities tended to reflect the importance of the policy stages, for example, policy stage would determine access target and the need for contact. Yet, since Directives are very difficult to undo, environmental groups tried to participate in the policy process at the very beginning. The RSPB, for instance, established close relations with the Commission for the initiation of the Birds and Habitats Directives.

Furthermore, at the EU level the groups have succeeded in acquiring a reputation for supplying reliable information, and this has led the Commission to seeking the groups' advice and data. For example, by supplying

[139] Fairbass, J. and Jordan, A. *loc. cit. supra* note 134, p. 18.

implementation failure data to the Commission, several ECJ court cases have produced favourable outcomes from the point of view of the environmentalists without this meaning that the relationship between the groups and EU Institutions is free from conflict.

7.4. Why did the groups contact national and EU level policy-makers?

Groups have continued to seek access to national policy-makers because they recognise the value of the latter as important determinants of EU policy (at the policy decision stage of the policy cycle in the Council of Ministers). Nevertheless, they regarded their access to EU Institutions more valuable under certain conditions. Such circumstances included the Commission's receptive attitude to environmental interests, its calling for data and its need to secure political support for its agenda especially in the face of policy blockages through the use of the veto power and/or implementation failure. When the UK Government obstructed the development of biodiversity and land use planning policy, the environmental groups sought and gained contact to EU Institutions that were prepared to pursue policy objectives that accorded with their own. For instance, by monitoring implementation at the national level, and reporting implementation deficiencies or failure to the Commission at the same time, the groups found that legal action could result that would compel non-compliant States to conform with the Directives. In this way, therefore, by establishing coalitions with EU level policy-makers, the UK groups achieved more favourable outcomes than those realised by relying on their relations with national bodies.

8. CONCLUSION

The Chapter has demonstrated that the EU does not evolve into a State or into other statal parameter. The disagreements among scholars about the Union's nature, value and finalité prove that standards such as those of territoriality, power of coercion, sovereignty, formal constitutions and unique identities (analysed in Chapters Three and Six respectively) cannot comprehend the democratic legitimacy of a polity that has none of the above. Consequently, analysts and policy-makers who have assessed the democratic implications of the EU by means of terminology or standards directly employed from the national context should revise their views.

The issues we analysed in this Chapter and will be followed in the subsequent Chapters including the 'formula' we presented of 'governance' are thus crucial in our understanding of the EU as a polity being *meta*-national in character and *meta*-State in form.

In this polity, States are no longer the exclusive, privileged actors of the classic international relations 'paradigm'. Domestic actors are also directly engaged with trans-national policy networks that open alternative avenues for domestic lobbies, prompting them to by-pass and/or press governments on behalf of extra-national sectoral interests.

While conceptualising the co-existence of government, group interests and supra-national aspirations in the shaping of European environmental policy as the basis for interaction, thus representing the inter-penetration of many

discrete levels of EU 'governance', we can conclude that environmental groups were not marginal to the integration process. They, in combination with EU Institutions, were able to make a significant contribution to the development of biodiversity and land-use planning policies, to the extent that the policy outcomes achieved were unexpected by and unwelcome to Member States, in particular the UK. Quite clearly the access that environmental groups secured, especially to European policy-makers, produced a sizeable degree of successful attainment of their objectives-interests over the environmental policy development.

CHAPTER THREE

THE "NO-DEMOS THESIS"

1. INTRODUCTION

Chapter Two argued that the European Union offers crucial insights into the gradual shift from a Weberian form of modern 'government' towards the institutionalisation of post-Weberian 'governance'.[1] It also argued that the emerging multi-level polity of a non-hierarchical interconnected Europe raises the question of which are exactly the new Institutions of governance that exist beyond the Nation-State, and what do they imply for the functioning (rules of the game) and legitimacy (democratic processes) of the political order they refer to.[2]

In this Chapter, the *discursive* shift from 'government' to 'governance' will be matched by a *conceptual* shift from an ethno-culturally defined to a civic, value driven demos.[3] As a consequence, this different concept will endow quite different policy prescriptions concerning the way in which the EU is democratising itself within the new theoretical framework.

[1] See Chapter Two of this Thesis, Section 2.2. pp. 19-21.
[2] See Chapter Two of this Thesis, Sections 3.4.3. and 3.4.4. pp. 31-39.
[3] In this Thesis, demos has been written in the same style as it appeared in the titles of journals and internet papers of Weiler's work.

To show that it is possible to picture a demos at the EU level, our discussion will adopt two dimensions. The first is the judgment of the German Constitutional Court[4] which foreclosed any prospect for democracy in the EU. The second one is the seminal work provided by Joseph Weiler, particularly his critique on the "No-Demos Thesis" contained in the above decision.[5]

[4] Ruling of the Federal Constitutional Court, Second Division, 12 October 1993, 2 BvR 2134/92, 2 BvR 2159/92, *Manfred Brunner and others v. The European Union Treaty*, [1994] 1 CMLR 57.

[5] See generally Weiler, J. (1995) "Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision", 1 *European Law Journal* 3, 219-258; Weiler, J. Haltern, U. and Mayer, F. (1995) "European Democracy and Its Critique" in: Hayward, J. (ed.) (1995) *The Crisis of Representation in Europe*, London: Frank Cass, 4-39; Weiler, J. "Legitimacy and Democracy of Union Governance" in: Geoffrey, E. Pijpers, A. (eds.) (1997) *The Politics of European Treaty Reform. The 1996 Intergovernmental Conference and Beyond,* London: Pinter, 249-287; Weiler, J. (ed.) (1999) *The Constitution of Europe: "Do the New Clothes Have an Emperor" and Other Essays on European Integration,* 324-357. Weiler, J. (1995) "The State 'über alles': Demos, Telos and the German Maastricht Decision", *Harvard Jean Monnet Working Paper* No. 6/95
< URL http://www.jeanmonnetprogram.org/papers/95/9506ind.html >.

2. THE BACKGROUND TO THE "NO-DEMOS THESIS"

It has been a number of years since the drama over the ratification of the Treaty of Maastricht took place. The practical outcome or approval of the twelve Member States has become an uneventful historical event, taking into account the 'welcome' national debates and the hard-fought campaigns surrounding the ratification of the Treaty on European Union. Among the other Member States, for example, Denmark, France, and the UK, as it will be stated in Chapter Four, Germany was also seen as a great opponent to further development of the EU. It was the last of the twelve Member States to ratify the Maastricht Treaty and could do so only after its Constitutional Court had ruled in October 1993 that ratification was not incompatible with the German Constitution.[6] In that case, the German Court might have rejected individuals' constitutional complaints,[7] but its ruling is remarkable for the observations it made on the EC Treaty concerning democracy, legitimacy and identity.

In particular, the Federal Constitutional Court declared:

> "The democratic principle does not prevent Germany from becoming a member of a community of States (organised at a supra-national basis). But it is a pre-condition for membership

[6] Ruling *loc. cit. supra* note 4, p. 63.

[7] The complainants claimed that the Act of 21 December 1992 amending the German Constitution and the Act of Accession to the European Union Treaty of 28 December 1992 infringed their constitutional rights and equivalent guarantees under Articles 1(1), 2(1), 5(1), 9(1) in conjunction with 21(1) second sentence, 12(1), 14(1), 38(1) and 20(4) in conjunction with 93(1), no. 4, of the 'Basic Law'.

that a legitimation and an influence proceeding from the people is also secured inside the federation of States".[8]

At the same time, it also held:

"...With the building-up of the functions and powers of the Community, it becomes increasingly necessary to allow the national parliaments to be accompanied by a representation of the peoples of the Member States through a European Parliament as the source of a supplementary democratic support for the policies of the European Union. With the establishment of Union citizenship by the Maastricht Treaty, a legal bond is formed between the nationals of the individual Member States which is intended to be lasting and which, although it does not have a tightness comparable to the common nationality of a single State, provides a legally binding expression of the degree of *de facto* community already in existence [(...Article 8b(1) and (2) of the EC Treaty)]. The influence flowing from the citizens of the Union can eventually become a part of the democratic legitimation of the European Institutions to the extent that the conditions necessary for this purpose are fulfilled on the part of the peoples of the European Union".[9]

[8] Ruling *loc. cit. supra* note 4, para. 38 (b).
[9] *Idem.*, para. 40.

2.1. The implications of the Court's decision

What the Federal Constitutional Court implied, therefore, was that there cannot be democracy at European level on its own. There is no European people (a European demos) but peoples, and consequently national parliaments represent their national peoples at both European and national levels. As a consequence, democracy in the EU is not guaranteed through the EP which in this context plays a supporting or supplementary role to that of the national parliaments but it is guaranteed only through the latter as long as peoples are sufficiently involved in the EU decision-making.

To support its claim for the absence of a European people, the German Court contended that the introduction of the Union citizenship does not entail any sense of European political identity between the Member States' nationals. Union citizenship is not as tight as State citizenship, grounded upon ethno-cultural ties and nationality laws, and consequently it is not capable of forming one people in both subjective and objective terms and is thus, incapable of giving legitimate effect in the decisions taken at the supra-national level.

3. THE "NO-DEMOS THESIS"

Challenged by the Court's scepticism about the potential for democratisation in the European Union, Weiler dubs the opinion of the German judges as the "No-Demos Thesis".[10] He points out that any discussion of democracy definitely presupposes the existence of some underlying demos:

[10] See *supra* note 5 wherever the term of "No-Demos Thesis" applies.

> "Let us assume today that democratic government and governance would be necessary conditions for an objective determination of the legitimacy of a polity. There would, however, be a condition precedent to such legitimacy - namely the existence of a demos for which and by whom the democratic structure and process is to take place. Much democratic theory presupposes a polity (usually a State) and almost all theories presuppose a demos. Democracy, in a loose sense, is about the many permutations of exercise of power by and for the demos. Indeed, the existence of a demos is not a semantic condition for democracy".[11]

When it comes to democracy at national level there is only one problem to address: Who is the demos? Yet, when it comes to democracy at the EU level, there are far too many considerations. For example, is it possible to talk of a European demos when it is known that the Union consists of different peoples, and accordingly of fifteen different demoi? Can there be democratisation at the EU level without there being a trans-national notion of a European people? Can there be a European demos around which, by which, for which, a democracy may be established? In what terms is this demos to be defined and how could it fit into a political theory?

[11] Weiler, J. (1997) *loc. cit. supra* note 5, p. 250. See also Weiler, J. Haltern, U. and Mayer, F. *loc. cit. supra* note 5, p. 5.

In response to all these concerns, Weiler tries to find a solution, and that is the reason why his critique is important to this analysis. His starting point is to take issue with the conception of the demos according to the German positive law, notably the one that relates to citizenship and articulates the conditions of membership in the German polity. On this view:

> "The people of a polity, the Volk, its demos, is a concept which has a subjective - socio-psychological - component which is rooted in objective, organic conditions. Both the subjective and objective can be observed empirically in a way which would enable us, on the basis of observation and analysis, to determine that, for example there is no European Volk.
>
> The subjective manifestations of peoplehood, of the demos, are to be found in a sense of social cohesion, shared destiny and collective identity which, in turn, result in (and deserve) loyalty. These subjective manifestations have thus both a descriptive and also normative element".[12]

A demos in this sense is therefore perceived not so much in civic terms as in ethno-national ones. Only a people who share a common ethnic origin, and consequently a common religion, common history, common language,

[12] Weiler, J. (1995) *loc. cit. supra* note 5, pp. 225-226.

common cultural habits and sensibilities can qualify for becoming a demos.[13] Of course, these factors are not the only ones in capturing the essence of Volk (people). An insistence on a relatively high degree of homogeneity, measured by the above ethno-cultural criteria, and allusions to some mystical or spiritual elements are also critical elements to this discourse.

The Volk, thus defined, pre-dates historically, precedes politically the modern State and is not even torn asunder in the split of the State itself. Speaking of the German Court's ruling, Germany, for instance, could not have emerged if there were not a German Volk. It is on this basis that the compelling case for German (re)unification, that is, unification of the State and reunification of the people on 3rd October 1990 rested. As for the word nation, it is just a simple appellation of the pre-existing Volk that was invented by modern political theorists and international lawyers. Subsequently, it is the Volk/nation which is understood in this ethno-national meaning and is seen as the basis for the modern State and the creation of statehood, thus asserting that nations 'belong' to States and States cannot exist without nations.[14]

Additionally, the nation and its members, the Volk, constitute the polity for the purposes of accepting the discipline of a democratic majoritarian government within the State. This suggests that the minority, however this term is defined,[15] will/should accept the binding effect (legitimacy) of a majority

[13] Although this is an acceptable opinion, most European Member States will not fulfil all of these requirements. Belgium and Italy have more than one language and Germany has more than one religion.
[14] See generally Tivey, L. (ed.) (1981) *The Nation-State: The Formation of Modern Politics*, Oxford: Robertson, 5-6.
[15] A minority can be defined in terms of number as well as in terms of power and rights.

decision as both the majority and a minority are part and parcel of the same Volk. Thus it appears that nationality or ethnic origin is the main instrument that constitutes the State, hence the Nation-State, and which in turn constitutes its political boundaries.

The political boundaries of a State do not only signify a political independence and territorial integrity, but also the very democratic nature of the polity itself. To realise this, just think that a national parliament, for instance, is an Institution of democracy not only because it provides a mechanism for representation and majority voting, but also because it represents the Volk/nation, from which it derives its authority and legitimacy of decision-making. In this respect, nationality is a defining feature for democracy since the majority rule is only legitimate as long as Germans rule Germans within the Volk.

3.1. The case of the EU

Turning to the EU, the German judges and especially Paul Kirchhof who is widely reputed to be the principal architect of the Maastricht Decision implicitly argued that there is no European demos based on the above organic cultural and national criteria. Neither the objective conditions nor their component subjective elements exist. The establishment of long-term peaceful relations with a thickening economic and social context should not be confused with the bonds of peoplehood and nationality forged by language, history, religion and the rest.

Although theorists and academics detect two versions, the 'soft' and the 'hard' to the "No-Demos Thesis",[16] the German Constitutional Court appears to have adopted the hard one.[17] It cannot recognise any other democratic principle at European level, apart from the one that is expressed at national-State level as follows:

> "If the peoples of the individual States provide democratic legitimation through the agency of their national parliaments (as at present) limits are then set by virtue of the democratic principle to the extension of the European Communities' functions and powers. Each of the peoples of the individual States is the starting point for a State power relating to that people. The States need sufficiently important spheres of activity of their own in which the people of each can develop and articulate itself in a process of political will-formation which it legitimates and controls, in order thus to give legal expression to what binds the people together (to a greater or lesser degree of homogeneity) spiritually, socially and politically".[18]

No matter which version we are in favour of, 'soft' or 'hard, the consequences of the "No-Demos Thesis" for the European construct are immense. Given that

[16] Weiler, J. (1995) *loc. cit. supra* note 5, pp. 229-230. Whereas the 'soft' version suggests that there is no demos now, yet, the possibility for the future is not precluded *a priori*, the 'hard' version not only dismisses the possibility of forming a demos at European level as objectively unrealistic, but also as undesirable.
[17] Ruling *loc. cit. supra* note 4, para. 51.
[18] *Idem.*, para. 44.

democracy does not exist in vacuum, but it is premised on the existence of a demos, an absent European demos leads to the untenable situation that the Union is inherently incapable of transforming itself into a democratic polity. European integration might have involved a certain transfer of State functions to the Union but this has not been accompanied by a redrawing of political boundaries which can occur only if, and can be ascertained only when a European people (demos) can be said to exist. Since this, it is argued, has not occurred, the Union and its Institutions can have neither the authority nor the legitimacy of a Demos-'cratic State'. On this view, a Parliament, without a demos, is conceptually impossible, practically despotic and unrealistic. Finally, as long as nationality enmeshes with legitimacy and democracy in a way that only the majority rule made within a demos is legitimate, then any majoritarian rule at the supra-national level does not have any legitimate effect on the Germans, Danes, British, French and so on. Thus to give them a vote in the EP is an ice cold comfort as it is for the Danes, Austrians or Italians in the Bundestag (*the Lower House* of the German Parliament).

4. WEILER'S ANALYSIS TO THE "NO-DEMOS THESIS"

4.1 Introduction

In his critique, Weiler does not challenge the ethno-cultural concept of Volk as such, but it is the way of thinking which bestows legitimate rule-making and democratic authority on a polity only in Volkish terms. He also challenges the concomitant notion that the only way to think of a polity and its demos is in terms of Staat (State), Volk (nation), and Staatsangehörigkeit (statehood based on nationality). Finally, he opposes the implicit view in the decision that the

focus should be (re)allocated towards transforming the Euro-polity into some statal form, for example, a federation of States[19] instead of starting to imagine a people at the European level. To achieve these aims, he raises the following objections.

4.2. Objections

His first objection has two strands. The first strand, less compelling, argues that there is some European sense of social cohesion, shared identity and collective self-determination which ends in loyalty and which bestows potential authority and democratic legitimacy on European Institutions. This is not about an identity defined in organic-cultural terms as it might be proved weak, but rather an identity in civic terms.

The second strand, picking up from the first objection, argues that peoplehood and national identity have to a large degree been products of a historical accident, social construction, deconstruction and reconstruction, than the organic ethno-cultural view would concede. Thus, even in the EU it would not be impossible to overcome its supposed lack of European peoplehood and identity by using methods of social engineering.[20]

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[19] Ruling *loc. cit. supra* note 4, paras. 38 (b), 39 (b.1), 43, 46.

[20] Recall the case of the USA. In a letter to Ernest de Chabrol of June 9, 1831, Alexis de Tocquenville writes how American society "...formed of all the nations of the world...*people* having different languages, beliefs, opinions: in a word, a society without roots, without memories" could turn into *one people*. His answer, it seems, was that nations could be based on an adherence to values such as those like democracy, self-government, equality, etc. found in the American constitution: Boesche, R. (ed.) (1985) *Selected Letters on Politics and Society/Alexis de Tocquenville,* Berkeley: University of California Press, 38. However, the major objection to the feasibility of building a common European nation is the absence of vital threats and the democratic Constitutions of the existing national regimes: Bauböck, R. (1997) "Citizenship and National Identities in the European Union" *Harvard Jean Monnet Working Paper* No. 97/4, p. 2 under Title 'Three Conceptions of a European Political Identity' < URL http://www.jeanmonnetprogram.org/papers/97/97-04--4.html >.

The second objection is related to the notion of membership which is conceived only in organic-cultural terms. According to the German constitutional tradition, there is a strong current that insists on the unity of Volk-Nation-State-Citizenship.[21] Being part of the German polity is normally the condition for attaining German citizenship. And, in turn, citizenship in this tradition is only understood in statal terms.

4.2.1. 'The state of affairs' in Germany

The concept of the German State is built into the very term of Staatsangehörigkeit. If there is statehood, meaning to be identified with the State, citizenship is premised. That is why the naturalisation process in Germany[22] - other than through marriage or adoption, does not only imply accepting civic obligations and duties towards the State but also of demonstrating a "voluntary and lasting orientation towards Germany".[23]

[21] The German citizenship law is governed primarily and historically by the basic principle of *ius sanguinis* (the law of blood group) saying that only descendants of German citizens can obtain German citizenship (Citizenship Law from 22 July 1913 (*Reichs- und Staatsangehörigkeitsgesetz* - RuStAG)). The *ius sanguinis* concept as opposed to the concept of *ius soli* (the law of origin) reflects a negative attitude towards immigration and an underlying concept of citizenship. It was very carefully chosen in 1913 in order to promote and maintain the ethnic tradition of the German Nation-State whereas others could become German citizens only on an exceptional basis, after discretionary investigation of their suitability. Under the new reforms of the German Nationality Act, however, the principle of *ius soli* has recently been introduced in German citizenship legislation. Thus since 1st January 2000 German citizenship is attributed to a child born in Germany of foreign parents if at least one of the parents has continuously and legally resided eight years in Germany. At the same time, the acquisition of German citizenship by descent, has been restricted by the new law: if a child is born outside Germany to a German citizen who was born outside Germany and who has habitual residence outside Germany, and if the child has not been registered with the German Embassy or Consulate within one year of its birth the child will not acquire German citizenship by birth.

[22] The naturalisation process as a possibility to receive German citizenship besides birth requires a minimum of eight years' residence and a very secure residence status since the 1st January 2000, language proficiency, payment of a fee, renunciation of the applicant's previous nationality and the existence of a public interest with regard to stateless persons.

[23] "Even if the naturalisation of a foreigner is seen to be in the public interest, the guidelines specify that he or she was expected to *demonstrate a 'voluntary and lasting orientation towards Germany'*" (Naturalisation Guidelines (*Einbürgerungsrichtlinien*), para. 3.1).

Even though in practice the number of discretionary naturalisations and "as-of-right" naturalisations is rather high since 1990[24] - with many variations among the Länder (federal States)[25] - in principle, Germany still continues to insist on the avoidance of dual nationality as the only technique to prevent other cultures from gaining parity with the indigenous German culture.[26] The basic principle that is maintained in the new citizenship law of 2000, the naturalisation guidelines and sections 85 and 86 of the Foreigners Act (*Ausländergesetz*) giving a special right to naturalisation to long settled immigrants and their children is that multiple nationality can only be accepted in hardship cases.

Germany is not the only State whose membership philosophy is so perceived. However, the conflation of the State, Volk/nation and citizenship is neither necessary conceptually, nor practised universally, nor even desirable. There are quite a few States where mere birth in the State creates actual citizenship or at

[24] Whereas in 1990 naturalisations that were dependent on the discretionary power of the administration and naturalisations to long-term residents in Germany amounted to 20,237 (0,4%) and 81,140 (1,5%) respectively, in 1997 these numbers increased considerably to 39,162 (0,5%) and 239,500 (3,3%) in that order: Devynck, A. Citizenship and Naturalisation in France and Germany, Workshop "Citizenship in a Historical Perspective", ECPR Conference, Copenhagen, Denmark, 14-19 April 2000, p. 19 (Table 2). See also, Coleman D. "Migration to Europe: A Critique of the new Establishment Consensus", Workshop on Demographic and Cultural Specificity and Integration of Migrants, 10-11 November 2000, Bingen, Germany, p. 13 (Table 3) where data from OECD 1999 shows a cumulative naturalisation of 101,4 in 1990 and 271,8 in 1997.

[25] According to a survey by the "Financial Times of Deutschland", the new citizenship law, which has been in force since 1st January 2000, has only led to an increased number of naturalisations in some areas of Germany: numbers have risen in the cities of Cologne, Hamburg, Munich and Frankfurt. By contrast, there has even been a decrease in naturalisations in cities like Berlin, Duisburg and Stuggart. This is mainly caused by the fact that many foreign nationals do not think they will be able to pass the obligatory German language test. Furthermore, especially Turkish nationals are reluctant to give up their Turkish citizenship. Other changes in the law which have made it easier for children that are younger than ten years to be naturalised, so-called "children naturalisations", did hardly produce the expected effect: EMFS Migration Report 2000, December 2000, p. 3:
< URL http://www.uni-bamberg.de/~ba6ef3/ddez00_e.htm >.

[26] Green, S. (2001) "Citizenship Policy in Germany: The Case of Ethnicity over Residence" in: Hansen, R. and Weil, P. (eds.) (2001) *Towards a European Nationality: Citizenship, Immigration and Nationality Law in the EU*, Basingstoke: Palgrave, 24-51, at 25, 35-39, 41.

least entitlement to citizenship without requiring to become a national in an ethno-cultural sense, for example, Ireland, Canada, UK, and South Africa. There are other States where citizenship, as a commitment to the constitutional values and the civic duties of the polity, is the condition of naturalisation, whereas nationality, in organic-cultural terms, is considered to be a kind of religion or a matter of individual preference, for example, the USA. Finally, there are States, like Germany for instance, with a strong ethno-cultural identity which, nonetheless, allows citizenship not only to individuals with other nationalities, who do not belong to the majority demos, but to minorities with strong, and even competing ethno-cultural identities (for example, Israel).

Since the combinations are plenty, the Court could reconsider its opinion on whether citizenship should still be conflated with being a member of the Volk in the organic national-cultural sense, and whether the only conceivable demos is one the members of which are citizen-nationals, hence the State. The German judges could also determine whether such an understanding of a German polity and demos could fit into Europe, which is exactly the point.

4.3. Specific suggestions

In respect of these issues, Weiler suggests that searching for a demos at the supra-national level should not necessarily be mandated in the organic cultural homogenous terms. Other understanding(s) of demos or demoi can exist too which might lead to different conceptualisations and democratic potentialities for the EU. He thus conceives of a European demos which is encapsulated in "a coming together on the basis of shared values, a shared understanding of

rights and societal duties and shared rational, intellectual culture which transcend organic-national differences".[27]

His conception of a "supra-national civic, value driven demos"[28] is very much empowered by the fact that the EU is not trying to be a (super)-State, and accordingly create a demos (one European people) in statal terms. On the other hand, however, the introduction of citizenship in [Article 8 EC] which was constructed on the prototypes of national citizenship could be regarded as a step in the drive towards a statal vision of Europe.

Nevertheless, the concept behind this provision is a decoupling of nationality/Volk from citizenship[29] and the formation of a polity the demos of which, its membership is understood in civic and political terms rather than in ethno-cultural ones. The Union belongs to citizens who by definition do not share the same nationality. The very substance of membership, and thus of the demos, is premised on a commitment to shared values, duties and rights of a European civic society covering discrete areas of public life, and in general, on a commitment to membership in a polity which privileges diversity, national identities and ethno-cultural divergencies.[30] Living in unity but within diversity

[27] Weiler, J. (1997) *loc. cit. supra* note 5, p. 263.
[28] Craig, P. and De Búrca, G. (eds.) (1999) *The Evolution of EU Law,* Oxford: Oxford University Press, 29.
[29] However, this is not a full decoupling. On the one hand, Member States are free to define their own conditions of membership and these may continue to be defined in Volkish terms. On the other hand, the gateway to European citizenship passes through Member State nationality laws. It is interesting to note, however, that after the Lisbon Summit (March 2000) the gateway to citizenship is seen in economic participation terms: Szyszczak, E. (2001) "The New Paradigm for Social Policy: A Virtuous Circle?", 38 *Common Market Law Review*, p. 1125 at 1125. In this discourse, attempts to grant third country nationals ("TCNs") rights and obligations comparable to those of EU citizens are included. Although this is a positive step concerning the legal *status* of TCNs, it still falls short of granting them denizenship (the right to free movement) or citizenship.
[30] See Arts. 151 [Title IX - Culture] and 12 EC.

underlies the supra-national character of the European construct. A construct wherein Nation-States may preserve their values and virtues and individuals can follow ethical norms as an authentic part of their identities.

In this respect, the conceptualisation of a European demos is not based on real or imaginary trans-European cultural affinities, shared histories nor on the construction of European 'national myths' of the type that constitute the identity of an organic nation. What there are instead, is a demos in civic terms and fifteen different organic cultural demoi (a political system of co-existing multiple demoi).[31]

4.3.1. The views of multiple demoi

Weiler goes even further by suggesting that there are different views of multiple demoi. As a matter of fact, he proposes three. The first one is what he would call the "concentric circles"[32] view. On this approach one feels as belonging or being part simultaneously to two or more demoi albeit at different levels of intensity. Say, for instance, Germany and Europe; or Scotland, Britain and Europe. Yet, the problem with this view is that European citizenship is to be understood in statal terms like national citizenship as long as the level of intensity is measured against national and cultural criteria. The second view of multiple demoi invites individuals to see themselves as members of two interchangeable demoi, but based on different subjective factors of identification. For instance, an individual can be a British national in the strong sense of organic-cultural identification and sense of belonging. But also be a

[31] Weiler, J. (1999) *op. cit. supra* note 5, pp. 344-348.
[32] *Idem.*, 344.

European citizen in terms of one's European affinities to shared values which transcend the ethno-national and cultural diversity. But, this view, too, has its problems. For example, it is not clear how this matrix of values would be qualitatively different from the common organic and cultural values that are constitutionally practised in most European Nation-States. Member States are signatories to the ECHR, and thus to varying, of course, degrees, share in those 'European values'. The third view - which he prefers most - is taken from the application of "variable geometry"[33] as a model of European integration. This approach invites individuals to see themselves as belonging simultaneously to two demoi, based, critically, on different subjective factors of identification. The invitation is to embrace again the national element in the strong sense of an organic-cultural identification and belongingess, and (to embrace) the European one in terms of European trans-national affinities to shared values which transcend the ethno-national and cultural diversity. Yet, there are some critical differences to put forward between the two senses, that is, national and European. On the one hand, one can be an Irish without being Catholic or Protestant. On the other hand, one can be Catholic or Protestant without being Irish. In the model of European citizenship, however, the concepts of Member State nationality and European citizenship are interdependent.[34] Consequently, one cannot both conceptually and psychologically, be a European citizen without being a Member State national.[35] The second critical difference of this model of multiple demoi is related to the values that were appraised by the

[33] *Idem.*, 346.
[34] See *supra* note 29.
[35] This then embraces the notion of a single demos based upon nationality. A clear illustration is to be found in case C-192/99 *R v. Secretary of State for the Home Department ex parte Kaur* [2001] ECR I - 1237 where the UK denied EU citizenship *status* because of a lack of a strong affiliation to the country.

second view. Here, the matrix of values is not simply a material commitment to human rights, social cohesion, and other such values that would hardly differentiate it from the modern, welfare, and constitutionally democratic Western State. In essence, it has a second important civilisatory dimension, called "constitutional tolerance".[36]

The principle of civic constitutional tolerance in the EU is the acceptance by the Member State nationals that in a range of areas of public life, one will accept democratic legitimacy and authority of decisions adopted by fellow European citizens. Thus in these areas preference will be given to choices made by the outward-reaching, in civic terms, demos, rather than by the inward-reaching, organic one.

4.3.2. The problem of double or multiple loyalty

Nevertheless, the issue of double or multiple citizenship (national and European) evokes the problem of double or multiple loyalty. The insistence on denying the *status* of a demos to the EU may derive from the fear that some flattened Euro-culture will come to replace the deep, well-articulated, and genuine national version of the same. It may also derive from the belief that double or more loyalties cannot co-exist, and therefore either one or more loyalties have to be compromised.

This fear of the possibility of a double loyalty culture within the EU is a legitimate concern. However, this concern has to be put in context. There is no

[36] Weiler, J. (2000) "Why Should Europe be a Democracy: The Corruption of Political Culture and the Principle of Constitutional Tolerance" in: Snyder, F. (ed.) (2000) *The Europeanisation of Law: The Legal Effects of European Integration*, Oxford: Hart, 213-218, at 218.

historical incident which indicates that loyalty by citizens of Nation-States to an 'organisation' is greater than the loyalty towards their State. One may talk about the possibility of certain cultures, for example, political and economic of an 'organisation' overwhelming or even replacing those of Member States in the long run. However, this does not mean that individual citizens of such Member States are more loyal to the 'organisation' and its Institutions. What seems to aptly describe the scenario is that citizens are irrevocably committed to those civic values as may be embodied by the custom of their States or the 'organisation'.

As for the belief that double or more loyalties cannot co-exist, "this more than groundless". The organic national-cultural identities as cognitive entities are not so weak or fragile as to be risked by the spectre of the aforementioned civic loyalty to Europe due to their strong attachment to the Nation-States. Hence, the opposite is most likely to happen.

Additionally, it may be proposed that the political aversion to double or more loyalties, like the multiple citizenship, lies in a normative approach which wants national self-identity - identified with the State and its organs - to rest very deeply in the souls of individuals. Such a claim based on the ideology of nationalism helps in forming one nation with a common fate and destiny. It is one's fate to be born into a national identity and it is one's destiny to preserve that identity and to realise its potentialities.

4.4. Concluding remarks

The European construct that has been presented allows for a European demos in civic terms co-existing side by side with national organic and cultural ones. What is suggested is something different than simple American Republicanism transferred to Europe.

The Revolutionary generation's concept of Republicanism contained certain imperatives like the ones of pursuing peace, thus eschewing the blood – drenched rivalries of the Old World, achieving economic and intellectual independence and the making of a State-constitution that would equalise access to government.[37]

The ratification of the American Constitution, completed on the 1st of June 1788, brought to an end the era in which the Americans won their independence and created a nation. It remained to build an American character committed to the new order which as Michael Lienesch states was "to create a psychology to perpepuate their government".[38]

Out of a growing sense of national identity, Americans had sought national liberty, and accordingly nationhood. As Jack Pole writes: "American unity began as a means rather than an end. The aim in view was liberty in the widest sense, liberty from a form of rule that leading colonials felt to be increasingly

[37] Higginbotham, D. (1987) "The American Republic in a Wider World" in: Greene, J. (ed.) (1987) *The American Revolution: Its Character and Limits*, New York: New York University Press, 164-170.
[38] Lienesch, M. (1988) *New Order of the Ages: Time, the Constitution, and the Making of Modern Political Thought*, Princeton, N. J. : Princeton University Press, 176.

out of sympathy with their own interests, oppressive, and humiliating. But they also sought liberty to fulfill their increasingly ambitious aims for the expansion of territorial settlement and commerce, and political unity proved no less valuable as an instrument of these aims than the original act of national liberation".[39]

Unlike Americanism which was after all about an indivisible, nation building, under God, the "European project"[40] is very much committed to a unity of many while striving for solidarity, prosperity, social cohesion and peace among the Member States.

> "The very existence of a Europe of individuals with individual identities, a Europe of nations with the boundaries created by distinct national identities and a Europe of States with the differently distinct Statal boundaries, which forces one both to acknowledge difference and to reach across in the deeply committed way which membership of the Community entails is what makes the European post-war experiment so special and, arguably, worth preserving even if it does not have quite the power and quite the constitutional clarity as a State would".[41]

[39] Pole, J. (1977) The Idea of Union, Alexandria, Va.: Bicentennial Council of the Thirteen Original States Fund, 143 as quoted in: Ward, H. (1995) *The American Revolution: Nationhood achieved 1763-1788*, New York: St. Martin's Press, 371.
[40] See generally Bańkowski, Z. and Christodoulis, E. (1998) "The European Union as an Essentially Contested Project", 4 *European Law Journal* 4, 341-354.
[41] Weiler, J. (1998) "Europe: The Case Against the Case for Statehood", 4 *European Law Journal* 1, p. 43 at 62.

What is more, nationals of the Member States are invited to regard themselves as associating themselves as citizens in this European civic polity. The Treaties would have to be perceived not only as an agreement among States, a Union of States, but as a 'social contract' among the nationals of those States - ratified in accordance with the democratic constitutional requirements in all Member States.

On the one hand, it is accepted that in that polity an overarching national and cultural identity displacing those of the Member States does not exist. Although there are shared political and cultural traditions such as 'Greco-Roman law, political philosophy, parliamentary Institutions, Judeo-Christian ethics for the original conception of Western Europe, 'Renaissance humanism, and romanticism and classicism', it is suggested that Europe is 'not yet' an organic national-cultural demos. On the other hand, however, the construct of a demos in civic terms depends on a shift of consciousness which will not happen if one insists that the only way to understand demos is in Volkish terms.

The occurrence of a shift of consciousness is possible, if this challenge is taken up seriously by both the Community Institutions and the Member States. From a purely theoretical point of view, it is coherent to believe that the centralisation and personalisation of European politics would favour civic consciousness and participation. Politicising the EU, and creating a clear deliberation of European issues, which would generate public interest, is not so much a question of Institutions as a problem of political attitudes. As long as

the Commission, which initiates policies, considers itself to be a body designed to bypass political conflicts and forge compromise *before* links with the public are created and political deliberation takes place, the politisation of the EU will remain difficult.[42] Additionally, the suggestions made by the White Paper are not enough towards this direction. They are only designed to stimulate the involvement of active citizens and groups in some precise procedures rather than to enhance the general level of civic consciousness and participation. True, some proposals have been made to encourage the clarification of European issues, for example, why an institutional reform is needed and the debate on the future of the EU, but they generally remain rather vague and long-term prospects.[43] At the national level, there is little doubt that the Member States can (and should) be blamed for their role in turning their citizens into relunctant Europeans – at least, if we focus on the Nordic countries, UK and perhaps even Ireland. A lot of popular resentment towards the EU and its Institutions can thus be traced to national politicians themselves, who, in recent years, have been very busy reassuring the voters that the EU is not (and never will be) anything but "ordinary international politics" among entirely independent governments. Hence, lack of confidence in the EU has a lot to do with the lack of trust in national politicians, who have handed down promises about the development of the EU, which, clearly could not be kept.[44]

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[42] Magnette, P. (2001) "Symposium: Mountain or Molehill? – A Critical Approach of the Commission White Paper on Governance: European Governance and Civic Participation: Can the European Union be politicised?", *Harvard Jean Monnet Working Paper* No. 6/01, p. 1 under Title "A Limited Conception of Participation":
< URL http://www.jeanmonnetprogram.org/papers/01/010901.html >.

[43] See *supra* note 42 under Title "Conclusions (summary)".

[44] Wind, M. (2001) "Symposium: Mountain or Molehill? – A Critical Appraisal of the Commission White Paper on Governance: The Commission White Paper Bridging the Gap between the Governed and the Governing?", *Harvard Jean Monnet Working Paper* No. 6/01, p. 2 under Title "What kind of Polity?":
< URL http://www.jeanmonnetprogram.org/papers/01/012401.html >.

Furthermore, ethnos/nation should be separated from demos. The decoupling of nation/Volk from demos and demos from State, in whole or in part, does not require any denigration of the virtues of nationality such as belongingness, social cohesion, and cultural and human richness that may be found in developing the national ethos. It only questions whether nationality in the organic sense, as a perceived guarantor of homogeneity of the polity must be the exclusive condition for entitling to full political and civic membership of that polity.

The special virtue of a contemporaneous membership in organic national-cultural demoi and in a supra-national one driven by civic values is in the effect such double membership may have for destiny and belonging among the Member States and their nationals. A fate and destiny which nationalism continues to offer but which can so easily degenerate to racist movements, intolerance, xenophobia and even war. The sense of feeling to two or more demoi, however, creates solidarity and makes people realise that no polity should legitimately claim to be above the others.[45] For this reason, the politically fractured self and double identity that multiple citizenship involves must be celebrated rather than be rejected with aversion.

Finally, as regards democratisation at the EU level, the German Constitutional Court appears to be in a No-Win situation. Even if further empowerment of the EP over the decisional process, especially at the expense of the national

[45] Weiler, J. (1995) *loc. cit. supra* note 5, p. 24 (*Harvard Jean Monnet Working Paper*).

Institutions was allowed, there is an undermining of the "No-Demos" theory implicitly illustrated in the Court's judgment. As it was suggested above, absent of a demos, the EP cannot enjoy independent authority or legitimacy as a rule making body in the polity. At the same time, if there is no further empowerment, then it is difficult to ever resolve the democratic malaise of the EU since it is submitted that whilst democratisation at the EU level is not sufficient, it is at least a necessary condition to redress the democratic deficit.

5. THE AUTHOR'S CRITIQUE OF THE "NO-DEMOS THESIS"

5.1. The sense of political identity

If democracy is conceived as "a responsive rule"[46] according to the "related principles of *popular control* and *political equality*",[47] any political system that claims to be democratic should meet the following conditions:

1. Political leaders and power to be authorised by the people.
2. The continuous flow of decisions to be made in a manner that is representative of the people's needs and values.
3. The rulers to be accountable to the people who should be the ultimate judges of their performance.[48]

As it can be seen, there is one general condition that cross-cuts all of these. That is, any political system should correspond to a felt sense of political

[46] May, J. (1978) "Defining Democracy: A Bid for Coherence and Consensus", 26 *Political Studies* 1, p.1 at 1, 3-4.
[47] Beetham, D. (ed.) (1994) *Defining and Measuring Democracy*, London: Sage, 28.
[48] Beetham, D. and Lord, C. (eds.) (1998) *Legitimacy and the European Union*, Harlow: Longman, 6-9.

identity. For, no political process, be it so perfect in its institutional construction, can function as a democracy unless its people feel themselves to be part of a group willing and able to engage itself in democratic discourse and binding decision-making. A democratic superstructure may be perfectly constructed as a procedural apparatus and yet be completely lacking in legitimacy because elements of its membership dispute the right of others to join in the making of decisions that bind the group as a whole. In this setting thus, the development of democratic politics always includes two parallel and related components: the evolution of the institutional structures (procedures) and the development of a feeling of belonging (members).[49]

5.2. The idea of ethnic uniformity

Taking this fact into account, the Federal Constitutional Court was right to doubt the democratic nature of the EU as to the existence or not of a European demos. Nevertheless, it was not right to preclude democracy or even democratisation at the EU level according to its own concept of the nature of the Euro-polity and the criteria of membership therein. In fact, it was mistaken to demand a European demos based on the "tired old ideas" of an ethno-culturally homogenous Volk (people) as the exclusive basis for democratic authority and legitimate rule making.

The German judges' concern for such a *polis* seems to be reminiscent of the Athenian democracy that flourished in the mid-fourth century B.C. We can recall that the Athenians cherished the belief that they were an autochthonous

[49] See generally Weiner, A. and Sala, V. (1997) "Constitution-making and Citizenship Practice - Bridging the Democracy Gap in the EU?", 35 *Journal of Common Market Studies* 4, 595-614; Weiler, J. (1997) "To be a European Citizen: Eros and Civilisation", 4 *Journal of European Public Policy* 4, 495-519.

people, a people who had always occupied Attike and had not, like the rest of the Greeks, dispossessed earlier occupants. As Sinclair describes:

> "...They had not been collected, like most nations, from every quarter, and had not settled in a foreign land after driving out others, but they were born of the soil, and possessed in one and the same country their mother and fatherland. They were the first and the only people in that time to drive out the ruling cliques in their State and to establish a democracy, believing the liberty of all to be the strongest bond of harmony".[50]

It was due to these feelings of pride and superiority that the demos embodied in the popular assembly[51] was only open to all adult males of citizen birth, and that the Athenian people used to impose restrictions on admission to citizenship. Following practices that would ensure ethno, national and cultural homogeneity, the Athenians created the exclusive and small-scale character of their *polis* which led Athens to become a direct democracy.[52]

However, since that time, matters have changed. In the 21st Century, it is out of question to dream of small-scale and direct democracies. On the contrary, what is likely to occur, and for individuals to witness, is the growth of large-scale and representative democracies that appear to accommodate the needs of all.

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[50] Sinclair, R. (ed.) *Democracy and Participation in Athens,* 1988, Cambridge: Cambridge University Press, 14.
[51] Herodotos, one of the greatest Greek historian analysts, declared that the rule of the multitude or *people* (plethos) had the fairest name of all - *isonomia* (*Ibid.*, p. 17).
[52] See *supra* note 50.

Indeed, the existence of many ethnic minorities and the opening of borders to labour migrants in the 1950s and late 1960s led to most of the wealthy capitalist countries of Western Europe becoming densely populated.

Germany is certainly one of these. Its current demographic development is such that, *ceteris paribus*, the foreign population has been predicted to rise to almost 17 per cent by the year 2030.[53] In 1996 over 105,000 non-German children were born in the country accounting for 13.3 per cent of all live births which indicates a considerably higher birth rate than that of the indigenous population.[54] With such numbers, sizeable national minorities were formed: in 1997 there were over 2.1 million Turkish nationals, accounting for 28.6 per cent of the total, while EU nationals numbered over 1.8 million.[55]

By discussing the issue of national minorities and immigration, the author's argument is that modern societies have expanded so much as to become ethno, national and cultural heterogeneous.[56] Given that large numbers of people inside and outside Europe are in a state of constant mobility, the once exclusive character of the polities have disappeared. Modern societies are more multi-cultural, multi-ethnic and multi-lingual than ever before, and thus the idea of ethnic uniformity as the best method of maintaining the purity of a Volk cannot actually apply to modern States.

[53] Green, S. *loc. cit. supra* note 26, p. 29.
[54] *Ibid.*
[55] *Idem.*, p. 27.
[56] Homogeneity can only be measured with reference to the original values of a given society, which remains unaltered by the subsequent multi-culturalism.

In essence, the continuing pressures of migration in Germany have already kept the issue of citizenship and naturalisation policy at the forefront of a constant political debate. While there is general consensus that the existing legislation needs to be updated and extended, opinions are divided as to the direction such reform should take. Meanwhile, since the number of foreigners in Germany continues to increase and the proportion of voters among the tax-paying, resident population is gradually decreasing, important questions are raised for the long-term democratic legitimacy of the political system.

5.3. The separation of demos from nation

The authors of the Maastricht judgment and their fellow travellers in German Constitutional Law certainly did not lack sagacity. They were aware that the *Staatsvolk* (the people of the State) which they regarded as the only basis for democratic authority and legitimate law making according to Article 20 of the German Basic Law might be understood in an old fashion way.[57] That is, 'a natural whole' having an origin and a destiny of its own. However, they appear to be confused with the terms of nation/Volk and demos. On the one hand, they conceive of demos as a community in thickly homogenous organic-cultural terms.[58] In their opinion, nationality in the organic sense should be the exclusive condition of full political and civic membership of that community. On the other hand, they strip the *Staatsvolk* of any organic connotation by

[57] Art. 20 Basic Law [Basic Principles of State order, Right to resist] reads as follows: (1) The Federal Republic of Germany is a democratic and social federal State. (2) All State authority emanates from the people. It is being exercised by the people through elections and voting and by specific organs of the legislature, the executive power, and the judiciary. (3) Legislation is subject to the constitutional order; the executive and the judiciary are bound by law and justice. (4) All Germans have the right to resist any person seeking to abolish this constitutional order, should no other remedy be possible.

[58] Ruling *loc. cit. supra* note 4, para. 51.

highlighting the pre-legal conditions which can make it a mundane community of political animals endowed with interests as often divergent as convergent.[59]

The contention, then, is that demos and nation are two different notions and should be separated. Demos should refer to membership of the political community whereas nation/ethnos should refer to membership of the cultural community.[60] The process of demos formation should be related to a situation wherein the members of a civil society develop a common awareness about the way in which public affairs should be handled rather than be conflated with the "art of nation building".[61]

5.3.1. Proposition for a participatory demos

Whereas nation building suggests an architectural, mechanical or artificial model which can take the form of a process of inventing or even imagining a nation where one does not exist, the conceptualisation of demos should be motivated by a desire to replace an improper or even undemocratic form of governance. That is to say a form of governance whereby citizens do not identify themselves with the nation as a whole, but with the State's political Institutions instead. In turn, who is going to be a member of that civic polity (citizen) should not only be premised on nationality laws, and in general in

[59] *Idem.*, paras. 41-42.
[60] Delanty, G. (1998) "Social Theory and European Transformation: Is there a European Society?", 3 *Sociological Research Online (Papers)* 1, pp. 4-5:
< URL http://www.socresonline.org.uk/socresonline/3/1/1.html >.
[61] Chryssochoou, D. (ed.) (1998) *Democracy in the European Union*, London: Tauris Academic Studies, 89.

ethno, national and cultural terms but also on residence criteria (the so-called residential citizenship).[62]

By redefining citizenship, from membership of the State on the grounds of nationality to participation,[63] we can avoid paradoxical situations. People who reside in the territory of a modern State on a permanent basis and contribute to its economy and prosperity will no longer be denied access to social and political life of that State. They will also be considered citizens like the nationals of that State who live far away from their country and be effectively involved in its political decision-making. Of course, the quality of citizen involvement in the political life of that State will be dependent on the existence, or not, of institutional avenues available to them in order to direct their claims and interests to those who actually govern. But then who is to determine, and how, what channels of communication are best suited for articulating public needs and demands that no single democratic answer exists 'as such' is obvious.

The making of such demos whose citizens irrespective of ethno-national origins exercise effective control through formal or informal means over the government - proposed for both national and European levels - will not suggest any fusion or merger of pre-existing communities into a larger unit ruled by

[62] Bauböck, R. (1997) "Citizenship and National Identities in the European Union" *Harvard Jean Monnet Working Paper* No. 97/04, p. 2 under Title "Dynamics of Inclusion in Liberal Citizenship" < URL http://www.jeanmonnetprogram.org/papers/97/97-04--4.html >.

[63] Gawert also expresses the same idea. For him, citizenship should have as its reference point the problem of societal self-organisation and at its core the political rights of participation and communication. Therefore, he conceives of citizenship as "the legal Institution via which individual member of a nation takes part as an active agent in the concrete nexus of State actions" as quoted in: Habermas, J. (1992) "Citizenship and National Identity: Some reflections on the future of Europe", Special Section: Citizenship, Democracy and National Identity, 12 *Praxis International* 1, p. 1 at 5.

one supreme centre of decision-making. The sentiments of democratic consciousness among citizens will not entail any loss of national identity and subculture in the name of the demos. True enough, a group consciousness is necessary, but one based on adherence to democratic ideas, values and principles, rather than one based on a consciousness of sameness and commonality, a sense of common origins, religious and ethno-cultural ties and feelings of belonging to one State.

To establish such a civic demos is not as difficult as it might appear at first sight. The White Paper's propositions for "better involvement" in the Union's decision-making process might trigger a Europeanisation of identities and it might activate trans-national intermediary organisations to contribute to the evolution of a European public space. Involvement, not just in consultation with EU Institutions but also in the activities of European networks, would transport the idea of a legitimate polity that is different from the concept of the modern State. However, this will only occur when we give up the idea that the State is the one and only blueprint for the political organisation of a society.[64]

5.4. In search of a European demos

The discussion now moves to another level of analysis as proffered by the members of the German Constitutional Court and which brings us to the heart of the problem. That is, whether there is or can be democracy in the EU.[65]

[64] Kohler–Koch, B. (2001) "Symposium: Mountain or Molehill? – A Critical Appraisal of the Commission White Paper on Governance: The Commission White Paper and the Improvement of European Governance", *Harvard Jean Monnet Working Paper* No. 6/01, p. 2 under Title "European Governance put in a new Perspective"; See also Magnette, P. *loc. cit. supra* note 42.
[65] Ruling *loc. cit. supra* note 4, paras. 37-38, 40-44.

Although the German judges said 'no' by being based on national standards, they made us think that the so-called Union democratic deficit should be regarded as two problems and not as one.[66] If the Union is to evolve into a political system that deserves to be called 'democracy', such a qualitative leap is not to be achieved merely either by granting the EP full co-decision powers with the Council of Ministers, or by the enactment of central legislation concerning the polity's democratic reorientation, or even by further constitutional amendments to the original Treaties. No matter how important these lines of democratic pursuit are, they will all fall short if they are not accompanied by the development of fellow-feelings among the peoples of the EU and the transformation of the latter into a politically-responsible community (demos). On the one hand, this approves of Weiler's argument that the "No-Demos Thesis" aggravates the democratic malaise in the EU, and therefore brings the German Court into a No-Win situation. On the other hand, however, it can be argued that the concept of demos in ethno-culturally homogenous terms challenges both scholars and European lawyers to think about 'who is governed?' in the EU, and consequently having to try and figure out whether there could be some demos at the EU level.[67]

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[66] Majone, G. (1998) "Europe's Democratic Deficit: The Question of Standards", 4 *European Law Journal* 1, p. 5 at 14. See also Chryssochoou, D. *op. cit. supra* note 61, pp. 4, 15.

[67] With reference to the EU, Kohler-Koch, for example, has proposed that the demos might be simply "the idea of a European society that is willing across all divergence of opinion and interests to live under common rule" as quoted in: Shaw, J. (ed.) (2000) *Law of the European Union*, Basingstoke: Palgrave, (3rd edition), 188. On the other hand, Lars-Erik Cederman has adopted a perspective of "bounded integration". Such a view tries to problematize the European demos rather than accepting or denying its existence from the outset: Cederman, L. (2001) "Nationalism and Bounded Integration: What It Would to Construct a European Demos", *EUI Working Papers* RSC No. 2000/34 < URL http://www.iue.it/RSC/WP-Texts/00_34.pdf >.

If there is, or can be some demos, at the EU level, a proposition is analysed below, it will certainly not be defined in Volkish terms. Although the Union might possess considerable State-like qualities, for example, rule of law, bureaucracy, citizenship and under debate constitutionality and legitimacy, in regulating the relations among peoples and States, it is not a would-be (nation) State, still less State. As it was suggested in Chapter Two of this Thesis, the European Union does not need to support a monopoly of violence, nor systems of taxation, expenditure and redistribution. Nor does it need to be sovereign in the classic sense of the nation-State. If the Union tries to spill the blood of its population, dig deep into the taxpayer's pocket, function as the final rule-making body in all areas of policy or even impose uniform set of rules in all matters, it is argued that it will not last long. It might once have been claimed that one of the 'virtues' of the State is that "it is responsible for determining the rules that govern all other power relations"[68] without itself being subject to any higher authority. But this does not hold true of the EU, if we consider two issues. First, that the Court of Justice has already kept a close eye on Community Competence. The Opinion 2/94 relating to the accession of the Communities to the European Convention of Human Rights[69] and the case *Germany v. Parliament and Council* (Tobacco Advertising)[70] can apply here. Second, that its supremacy is not comprehensive in relation to all social relationships but sector specific and even then, those who are bound by its rules

[68] Beetham, D. (ed.) (1991) *The Legitimation of Power*, Basingstoke: Macmillan, 121-123.
[69] Opinion 2/94 *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] ECR I - 1759, [1996] 2 CMLR 265, para. 27.
[70] Case C-376/98 *Germany v. Parliament and Council* [2000] ECR I - 8419, para. 83; For recent comments on the case see Hervey, T. (2001) "Up in Smoke? Community (Anti)-Tobacco Law and Policy", 26 *European Law Review* 2, 101-125.

have participation in their making,[71] as well as the scope to negotiate arrangements for their enforcement.[72]

Moreover, a demos model in organic cultural terms, if it were ever conceivable, would no provide a great survival capacity. It would be a great obstacle to the future of the European Union which cannot afford to create the impression of being a tightly bound political system. Externally, it will have to leave itself open to perspective enlargements; and in its internal affairs, it will almost certainly have to practise various forms of flexible integration and variable geometry. In turn, both of these forms preclude any sense of identity based on a uniform application of law and entitlements across the Union's territory and citizenry of its political system.

However, as it has already been noticed, a sense of shared political identity is dramatically important to the formation of a democratic political system. Members of a democracy have to feel that they belong together in order to accept the decisions of some kind of majority as collectively binding on them. To claim therefore that there is or can be a demos/a European people who can legitimately carry out policies, we have to find out whether the contemporary

[71] Note Cases: C-29/69 *Stauder v. Stadt Ulm* [1969] ECR 419, [1970] CMLR 112 and C-4/73 *Nold KG v. Commission* [1974] ECR 491. Both of these arose out of a concern that a provision of Community legislation infringed fundamental rights. Given the absence of explicit fundamental rights protection in the Treaty of Rome, the individuals involved in the above cases made the ECJ seriously committed to the protection of fundamental rights as part of the Community legal order. Since then, therefore, it has been unacceptable for the Community to fail to show respect for the protection of fundamental rights.

[72] Note Art. 30 EC. Member States are able to negotiate the enforcement of rules with regard to the elimination of quantitative restrictions on the grounds of: "public morality, public policy, public security, the protection of health and life of humans, animals or plants, the protection of national treasures possessing artistic, historical or archaeological value, the protection of industrial and commercial property".

Union is underpinned by a shared political identity and if it is, whether it is of a kind likely to conceive of another demos in non-organic and cultural terms.

5.4.1. The development of a European political identity

As far as the first question-problem is concerned, the author argues that there is a process of constructing a sense of European identity based on the following elements:

1. The concept of European citizenship;

2. The formation of a European civil society in which full and open participation by all should be ensured within the Union's institutional arrangements;[73]

3. A common political culture of rights as it is illustrated in the Charter adopted by the Nice Council in December 2000.[74]

5.4.1.2. The construction and *status* of EU citizenship

Indeed, the defensiveness for a feeling of belonging together can be firstly realised from the construction and *status* of European citizenship [Article 8 EC]. Apart from supporting arguments that a *status* of membership must be universal (we are all equal) but also capable of recognising differentiation (we are all different), citizenship implies belongingness. It comprises not only the bonds that link a person and the Nation-State/polity/civic society in which he/she lives, but also his/her relationship with others who live in the same

[73] See Chapter Four of this Thesis.
[74] See Chapter Six of this Thesis.

dimensions of time and space. Thus the task in respect of any attempt to apply citizenship ideas at the EU level is not just to show that citizens are connected to the system of multi-level governance outlined in Chapter Two, by sets of rights and duties, but also to identify what might hold them together in terms of a non-nationalistic cultural identity[75] or a sense of civic obligation.

Since the capacity of a State to define its own nationals is regarded as a component of sovereignty[76] it was not surprising that when drafting the citizenship provisions the Member States would choose to make Member State nationality the gateway to Union citizenship, thus knocking-out third country nationals ("TCNs").[77]

The consequential knock-on effects for TCNs who legally reside in the Union territory is that they became second-class citizens by being excluded from benefiting from the EU citizenship, and the rights which it confers. They can only benefit from the 'right to limited circulation', and not of a free movement of persons (Articles 39-42 EC) upon which other rights are based, for example, the right to residence, to work and to travel. They have no political rights, as in

[75] The main motivation behind moves towards a common cultural policy and construction of a common identity in the EU appears to be the view that differences in culture and identity reduce the level of support for further European integration, rather than to build a European supernationalism: Field, H. "A Common Cultural Policy and Identity", Paper presented to the fourth UACES Research Conference, University of Sheffield, 8-10 September 1999, pp. 3, 10 (*mimeo*). Whether there is a basis for a common European culture still remains one of the most controversial issues in the debate about the future of the European Union.

[76] The position needs to be viewed in the light of Case C-369/90 *Mario Vicente Micheletti and others v. Delegación del Gobierno en Cantabria* [1992] ECR I - 4239 which effectively restricted the right of Spain to apply its own legislation on dual nationality.

[77] See generally Kostakopoulou, T. (2001) "Invisible Citizens? Long-term Resident Third-Country Nationals in the EU and their Struggle for Recognition" in: Bellamy, R. and Warleigh, A. (eds.) (2001) *Citizenship and Governance in the European Union*, London: Continuum, 180-205.

most Member States these are withheld.[78] TCNs who are entitled to entry and residence rights by virtue of national laws governing family reunion or by virtue of EU law are also excluded.[79] Last to be excluded are those benefiting from the Court's of Justice interpretation of the free movement of services provisions which allow for a form of free movement for TCNs moving as employees of a service provider[80] or those benefiting from international agreements linking the EU and its Member States with third countries, some of which grant limited residence rights.[81]

Based on this evidence, it seems that a prerequisite for eligibility to EU citizenship is the acquisition of national citizenship. Non-Europeans must acquire the nationality of the host State in order to be entitled to EU citizenship and citizenship rights. To this effect, it is not a coincidence that the EU has been criticised for personally taking care only of its citizens or of being characterised as a "fortress"[82] depicting the idea of a powerful and wealthy medieval fortress that protected its own integrity, membership and wealth.

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[78] Only Ireland, Denmark and the Netherlands have introduced voting rights in local elections for all non-EU nationals under specific conditions (age, residence) whereas in the rest of the Member States such an arrangement it is out of question.

[79] See Arts. 39-54 EC and Art. 10 of the Council Regulation 1612/68/EEC on freedom of movement for workers within the Community [OJ 1968, No. L 257/2 as later amended by Regulations 312/76, OJ 1976, No. L 39/2 and 2434/92, OJ 1992, No. L 245/1].

[80] Note Case C-43/93 *Raymond Vander Elst v. Office des Migrations Internationales* [1994] ECR I - 3803.

[81] Note Cases C-171/95 *Recep Tetik v. Land Berlin* [1997] ECR I - 329; C-1/97 *Mehmet Birden v. Stadtgemeinde Bremen* [1998] ECR I - 7747; C-262/96 *Sema Sürül v. Bundesanstalt für Arbeit* [1999] ECR I - 2685; C-340/97 *Ömer Nazli, Caglar Nazli and Melike Nazli v. Stadt Nürnberg* [2000] ECR I - 957; C-329/97 *Sezgin Ergat v. Stadt Ulm* [2000] ECR I - 1487.

[82] See generally Geddess, A (ed.) (1999) *Immigration and European Integration: Towards Fortress Europe?*, New York: Manchester University Press; Moylan, D. (ed.) (1989) *Bricks in the Wall: Or, How to Build "Fortress Europe" While Denying Intentions of Doing So*, London: Adam Smith Institute; Lindberg-Clausen, C. "An Ever Closer Union Within Fortress Europe? Bringing Neofunctionalism Back In", Paper presented to the fourth UACES Research Conference, University of Sheffield, 8-10 September 1999 (*mimeo*).

5.4.1.3. More cited examples

Another example for developing a sense of European identity can be built upon an approach to citizenship which looks, not at the formal rights under the Treaty identified as specifically 'citizenship related', but rather undertakes an audit from the perspective of asking what are the practical consequences of EU membership. This could involve looking at a very large part of EU law through the lens of citizenship. What follows is but a brief sketch.

- EU-nationals travel across the internal Community borders and remain in the territory of a Member State for work (market citizenship), short staying or travelling onward without being required to obtain a visa from the Member State or States in whose territory the right is exercised.

- They are assured of their rights to housing,[83] to access to employment, including training in vocational schools and retraining centres, remuneration, social and tax advantages,[84] to family reunification[85] (social citizenship), to join trade unions, to be eligible for workers' representatives' bodies in the undertakings of any Member State where they work and also for administration and management posts of trade unions[86] (industrial citizenship).

[83] Council Regulation 1612/68/EEC *loc. cit. supra* note 79, Art. 9.
[84] *Idem.*, Arts. 1-9.
[85] *Idem.*, Art. 10(1), under the conditions established in Art. 10(3). Note too the Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions in respect of the movement and residence within the Community for workers and members of their families [OJ 1968, No. L 257/13 as later amended by Council Directive 73/373, No. L 2/1]. *Inter alia* see Case C-249/86 *Commission v. Germany* [1989] ECR 1263 where the Court restrictively interpreted the conditions for family reunion, but still in manner that protects the Community worker and his or her family.
[86] *Idem.*, Art. 8.

- They are assured of their rights to free establishment in another Member State in order to pursue activities as self-employed persons, providers or recipients of services.[87]

- They cross the internal borders of the Union for work without being required to have work permits and without the need of renewing them.

- They address the ECJ to protect welfare benefits that are associated to the right of free movement and the right to non-discrimination in Article 12 EC (welfare citizenship).

Characteristic examples that are worth of being mentioned here as demonstrations of protecting social rights while moving around the Union, is the *Martínez Sala* case.[88]

5.4.1.4. The breakthrough of the *Martínez Sala* Case

The question arose whether *Martínez Sala*, a Spanish citizen, resident in Germany and dependent upon social welfare, is similarly situated, for the purposes of applying a non-discrimination test, to a German national worker drawing a child-raising allowance. Non-nationals like *Martínez Sala* are entitled to receive this benefit provided they are in a possession of a residence entitlement.

[87] Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services [OJ 1973, No. L 172/14].
[88] Case C-85/96 *María Martínez Sala v. Freistaat Bayern* [1998] ECR I - 2691.

The applicant attempted to challenge the German policy on social benefits by appealing against the decision of the Bundessozialgericht (Federal Social Court). Hence, the German Court put a number of questions to the ECJ under Article 234 EC.

> The Court held that a Spanish national who was long-term resident in Germany, although not clear on what legal basis her residence in that country could be deduced, could rely upon the non-discrimination principle of Article 12 EC as the basis for applying for the benefit.[89] To defend the claim for equality of treatment the Court invoked the Union citizenship. Herein lies the contribution of the case, notably [Article 8 EC] which attaches to the citizen the rights and duties existing under the EC Treaty. Thus *Martínez Sala* could ask for equal treatment, the Court found, even if she was solely dependent upon welfare and could bring herself within the personal scope of Community law by no other means than that she was a Union citizen lawfully resident in another Member State.[90] Concerning the material condition, whether the benefit she claimed fell within the scope of EU law, the Court responded positively.[91]

By employing a novel combination of the principles of *rationae materiae* and *rationae personae* to bring the type of humanitarian issue which the case itself in reality involves, the ECJ firstly restricted the Member States'freedom to limit any rights of residence in each individual case where a particular migrant

[89] *Idem.*, paras. 54-55, 62.
[90] *Idem.*, paras. 63-65.
[91] *Idem.*, para. 57.

has become a burden upon the State. So what in practice will now occur is that conditions placed on benefits by Member States will be subject to scrutiny under the proportionality test since most of them will be indirectly rather than directly discriminatory and will therefore require objective justification.

Secondly, it gave "something close to a universal non-discrimination right including access to all manner of welfare benefits"[92] as a consequence of the creation of the figure of the Union citizen. No longer thus, it appears, are those benefits only going to be available to those able to point to a particular economic or family *status* protected under EU law. *Martínez Sala* has a significant impact, therefore, upon the welfare sovereignty of the Member States and mandates, in fact, that the community of concern and engagement by reference to which citizens of the host Member State must define themselves is, in certain welfare respects all those other EU nationals who have equal access to welfare benefits. In that respect, perhaps, the Court has gone significantly outside the confines of market citizenship in its early construction of the citizenship provisions.[93]

In a negative way to what the *Martínez Sala* suggested upon the extension of Union citizenship, more cases allowed the Court to steer social rights away from the purely economic concerns of market integration.[94] In *Uecker and*

[92] Fries, S. and Shaw, J. (1998) "Citizenship of the Union: First Steps in the European Court of Justice", 4 *European Public Law* 4, p. 533 at 536.
[93] Note Cases C-53/81 *Levin v. Staatssecretaris van Justitie* [1982] ECR 1035, [1982] 2 CMLR 454; C-139/85 *Kempf v. Staatssecretaris van Justitie* [1986] ECR 1741, [1987] 1 CMLR 764; C-149/79 *Commission v. Belgium* [1980] ECR 3881, [1981] 2 CMLR 413.
[94] See generally, Moebius, I. and Szyszczak, E. (1998) "Of Raising Pigs and Children", 18 *Yearbook of European Law*, 125-156.

Jacquet,[95] for instance, a case which dealt with the right to equal treatment in relation to free movement of persons, the Court suggested that Union citizenship, established in [Article 8 EC], is not intended to extend the material scope of the freedom of movement rules.

> "[...] a member of the family of a worker who is a national of a Member State cannot rely on Community law to challenge the validity of a limitation on the duration of his or her contract of employment within that same State when the worker in question has never exercised the right to freedom of movement within the Community".[96]

Consequently, the Union citizenship provision cannot be the legal basis for extending Community rights to situations regarded as purely internal to a Member State.[97]

Horst and Bickel[98] also revealed the citizenship potential of the principle of non-discrimination on the basis of nationality found in Article 12 EC. There, the Court provided an expansive link between the exercise of free movement rights and the right to equal treatment in criminal procedural rights in the host State.

[95] Joined Cases C-64/96 and C-65/96 *Land Nordrhein - Westfalen/Uecker and Jacquet/Land Nordrhein - Westfalen* [1997] ECR I - 3171.
[96] *Idem.*, para. 19.
[97] *Idem.*, paras. 16, 23.
[98] Case C-274/96 *Bickel and Franz* [1998] ECR I - 7637.

> [...] the exercise of the right to move and reside freely in another Member State is enhanced if the citizens of the Union are able to use a given language to communicate with the administrative and judicial authorities of a State on the same footing as its nationals. Consequently, persons ... in exercising that right in another Member State, are in principle entitled, pursuant to [Article 6 of the Treaty], to treatment no less favourable than that accorded to nationals of the host State so far as concerns the use of languages which are spoken there".[99]

Horst and Bickel and *Martínez Sala* thus show that once the *ratio materiae* falls within the scope of application of the EC Treaty, a Union citizen derives legal rights which must be delivered on the basis of non-discrimination when compared with the treatment of nationals of the host State. This allows for a measure of national sovereignty as well as competition between States in terms of enforcement of their laws, although as Maduro points out, this may be a complex exercise.[100] "The principle of national treatment dependent upon the principle of non-discrimination determines that nationals of other Member States should be treated the same as home nationals, which does not mean that they should be subject to the same rules. In reality, equal treatment may mean different treatment".[101]

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[99] *Idem.*, para. 16.
[100] Szyszczak, E. *loc. cit. supra* note 29, p. 1157.
[101] Maduro, M. "The Scope of European Remedies: The Case of Purely Internal Situations and Reverse Discrimination" in: Kilpatrick, C., Novitz, T., and Skidmore, P. (eds.) (2000) *The Future of Remedies in Europe*, Oxford: Hart, 117-140, at 129.

5.5. An overall assessment

The aforementioned examples originating from the *status* and construction of Union citizenship could not suggest that 'top-down' strategies make Member State nationals feel European or relate to each other as such. After all, whether the *meta*-national polity is very much or very little 'European' does not only depend on the structural/institutional breadth, which has just been discussed, but also on a 'socio-psychological' one. To this direction, the development of a European dimension to education as well as the encouragement of mobility in students and teachers in programmes such as ERASMUS and youth exchanges, joint projects such as Euronews, 'bottom-up' movements among the masses concerning European issues and the circulation of a single currency might have a role to play.[102]

5.6. A civic-value driven European demos

Having established that a sense of European identity is constructed upon citizenship and having already attested that shared ethno-national and cultural affiliation is an implausible and undesirable basis for European identity, the foregoing paragraphs would seem to open the possibility of building a European polity around shared civic values.[103]

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[102] Mangkhala, S. "Constructivism and the Formation of European Identity", Paper presented to *UACES 30th Anniversary Conference and Fifth Research Conference*, Central European University, Budapest, Hungary, 6-8 April 2000, p. 14 (*mimeo*).

[103] Mouffe expresses the same idea in quite different wording. She argued that "if Europe is not to be defined exclusively in terms of economic agreements and reduced to a common market, the definition of a common political identity must be at the head of the agenda and this requires addressing the question of citizenship. European citizenship cannot be understood solely in terms of a legal *status* and set of rights, important as these are. It must mean identifying with a set of political values and principles which are constitutive of modern democracy": Mouffe, C. (ed.) (1992) *Dimensions of Radical Democracy*, London: Verso, 8.

The idea of a European demos in civic terms has already been launched and developed by many contributions to the literature.[104] No matter how they characterise the European demos, whether that is trans-national,[105] supra-national,[106] or post-national,[107] characterisations which the author does not oppose, the present Thesis brings about the notion of 'autochthonia'. Thus, it proposes that the demos who starts to emerge at the EU level is autochthonous because it is not restricted to the national patterns of the past.[108] It accommodates the need for preservation of cultures and national identities; in general the need for diversity within the unity.[109]

Ethno-cultural homogeneity might have been once an important ladder to nationhood; and in turn, ethnically defined nationhood might have been a useful ladder to liberal democracy. Recall what Schmitt once said:

[104] Smith, H. (1996) "New Thinking in Politics and International Relations", *Kent Papers and International Relations,* No. S2, Series 5, University of Kent, p. 20 at 24-25; Howe, P. (1995) "A Community of Europeans: The Requisite Underpinnings", 33 *Journal of Common Market Studies* 1, p. 27 at 27-46; Lord, C. (ed.) (1998) *Democracy in the European Union,* Sheffield: Sheffield Academic Press, 115-124; Chalmers, D. and Szyszczak, E. (1998) *European Union Law, Volume two - Towards a European Polity?,* Aldershot: Ashgate, 83.

[105] Chryssochoou, D. (1996) "When 'Demos' met 'Cracy': Prospects for Democracy in the European Union", *Leicester University Discussion Papers in European Politics,* No EP96/2, p. 1 at 4-13.

[106] Weiler, J. (1995) *loc. cit. supra* note 5, p. 24. See also Craig, P. and De Búrca, G. *op. cit. supra* note 30.

[107] Curtin, D. (ed.) (1997) *Post-national Democracy - The European Union in Search of a Political Philosophy,* The Hague: Kluwer Law International, 51-53.

[108] The word 'autochthonous' here has the meaning of being something different from what has been experienced at national level and therefore, is to be valued as something very special on its own.

[109] In fact, this need for preservation of cultural diversity is prompting great debates on whether implementing, or not, a European Cultural Charter, in addition to the Social Charter. "The aims of a Cultural Charter would be to protect minority cultures, without transgressing human rights, and to encourage a well-balanced network of European cultural relations, which would mellow the increasingly radical character of cultural conflicts, particularly in socially unstable parts of Europe": Garcia, S. (ed.) (1993) *European Identity and the Search for Legitimacy,* London: Pinter, 27.

> "Democracy requires...first homogeneity and second - if the need arises - elimination or eradication of heterogeneity".[110]

But, none of these elements are important ladders to Union's democracy since the EU does not aim to develop a (super)-State and thus become a 'cultural hegemon'. In fact, cultural hegemony in the EU is very difficult to be achieved, some say impossible, due to its multi-level governance which was examined in Chapter Two. Multi-level governance implies millions and millions of multiple loyalties and identities at the individual level, distributing therefore a degree of legitimacy to each: citizens who define themselves as consumers, workers, wage earners, students, Catholic, Protestant in some contexts; German, British, French in others, and European in perhaps the broadest political context, for example to pay a match ticket in Euros[111] and to join a common European army under a European flag and a European commander.[112] Thus in such a multi-level polity, the European demos in civic terms comes out as the new framework of unity out of diverse identities (cognitive entities), loyalties and cultures. It comes as a desire to democratically shape the common fate of a plurality of highly interrelated peoples, without endangering the existence of that plurality. "A many turned into one without ceasing to be many".[113] In this sense, the European demos neither destroys the subcultures that are joined together to form it, nor breaks the European society into a cluster of warring

[110] Schmitt, C. (ed.) (1988) *The Crisis of Parliamentary Democracy,* Cambridge, Mass: MIT Press, 9.
[111] Barber, L. (2001) "Europe in the New Century: A Scenario" in: Guttman, R. (ed.) (2001) *Europe in the New Century: Visions of an Emerging Superpower*, London: Lynne Rienner, 7-13, at 12.
[112] Dale, R. (2001) "Differing Views on a United Europe" in: Guttman, R. (ed.) (2001) *Europe in the New Century: Visions of an Emerging Superpower*, London: Lynne Rienner, 29-42, at 41.
[113] Chryssochoou, D. *op. cit. supra* note 61, p. 93.

nationalities. This is what the author would call the oxymoron of the European demos. It represents a segmentary-type model of belonging just by respecting different ethno-national identities and cultures as well as a cohesive and solid one (model of belonging) just because it respects them.

Indeed, if there is anything good about the EU, it is that it tries, through popular political sentiments and civic values, to bring divided or conflicting loyalties to a balanced co-existence. The values to which member publics converge are universalised to the Union's Institutions. The preservation of peace,[114] the protection of human and political rights,[115] the suppression of social problems, for example, drug trafficking and organised crime,[116] the combat against racism,[117] the tackling of high unemployment rates,[118] prosperity[119] and a combination of a market economy[120] with a highly

[114] The guarantee of lasting peace in Europe is regarded as very important by a significant proportion of the young. Eurobarometer 47, November 1997.

[115] 55% of European citizens call for a common European Union action concerning immigration policy, and 54% would like to see European Union rules on political asylum. Eurobarometer 47, November 1997.

[116] 65% of European citizens fear an increase in drug trafficking and organised crime and seven in ten people want the Union to take action against drug trafficking. Eurobarometer 47, November 1997.

[117] With 1997 designated as the "European Year Against Racism", the Eurobarometer results show that only a minority of European citizens feels that people from countries outside the European Union, who want to work in the Member States, should be accepted without restrictions. Eurobarometer 48, March 1998.

[118] The public is unanimous (92%) that the fight against unemployment should be a priority for the European Union and 70% feel that increased co-operation in the field of employment policy between the Member States should be a priority for combating unemployment. Eurobarometer 48, March 1998.

[119] Eight in ten Europeans were satisfied with the life they led and their expectations for the year 2000 were very optimistic. Eurobarometer 52, April 2000. Especially for the young people of the European Union, Europe signifies above all the hope of a better future in economic and employment terms and the ability to travel within the Union without formality. Eurobarometer 47, November 1997.

[120] After a slight drop in the spring of 1997, support for the European Monetary Union (EMU) and the single currency, the Euro, has returned to being 55%, whilst 37% are against it. Eurobarometer 54, February 2001.

developed system of social security are some of the values that can be decoupled from the particularities of the Nation-State.

5.6.1. The one demos system of the EU

The decoupling of nationality and citizenship in the EU might lead to a thinking of co-existing multiple demoi (fifteen national and one European)[121] as Weiler recommends. However, his analysis as to the three views of multiple demoi is complicated. The distinction between the in-reaching and out-reaching sense creates confusion whether one stops to feel part of 'Europe' in the in-reaching sense. 'Europe' is an idea subject to evolution through time and space. As such it is subjective or intersubjective: that is, like other ideas, it is an abstract of thinking minds, either of individuals or amongst them, and therefore it is hard to suggest that the 'European' element stops to exist in the in-reaching sense. Given that the 'European' element can transcend identities and loyalties, it could be further proposed that the EU should not be seen as a political system of multiple demoi but as a political system of one demos. In this perspective, the conceived European demos in civic terms would be imagined as a framework within which all the other ethno-national and cultural demoi are included but without losing their integrity. Individuals would enjoy moving between identities and loyalties, as the situation requires.[122] A stronger sense of belonging to the more immediate communities, for example, national

[121] See *supra* note 31.

[122] For the individual, or at any rate for most individuals, identity is somewhat 'situational or dimensional', if not always optional. That is to say, individuals usually identify themselves and identified by others in different ways according to situations in which they find themselves: Smith, A. (1992) "National Identity and the Idea of European Unity", 68 *International Affairs* 1, p. 55 at 59.

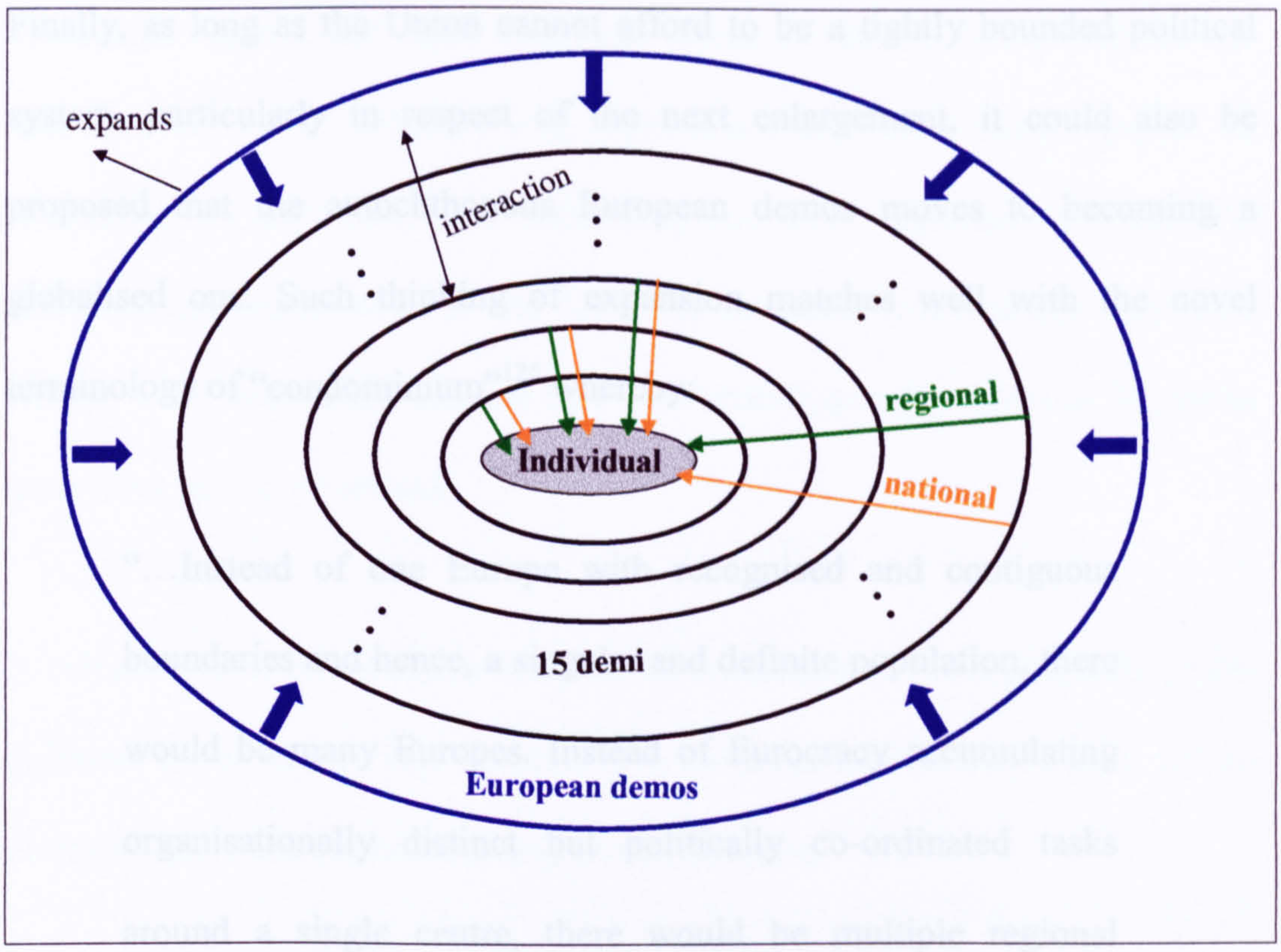
or regional, would not imply a rejection of a European political community".[123] Schematically it could be regarded as a spider's web or "a shelter"[124] encompassing the national demoi and their corresponding identities.

Undoubtedly, this reminds us of what Etzioni had in his mind when he wrote that:

> "Communities are best viewed as if they were Chinese nesting boxes, in which less encompassing communities (families, neighbourhoods) are nested within more encompassing ones (local villages and towns), which in turn are situated within still-more encompassing communities, the national and the cross-national ones (such as the budding European Community)"[125] (see diagram 3.1 below).

[123] Reif, K. (1993) "Cultural Convergence and Cultural Diversity as Factors in European Identity" in: Garcia, S. (ed.) (1993) *European Identity and the Search for Legitimacy*, London: Pinter, 131-153, at 138.
[124] Laffan, B. (1996) "The Politics of Identity and Political Order in Europe", 34 *Journal of Common Market Studies* 1, p. 81 at 100.
[125] Etzioni, A. (ed.) (1995) *The Spirit of Community: Rights, Responsibilities and the Communitarian Agenda*, London: Fontana, 32.

Diagram 3.1: Symbolic representation of the autochthonous European demos



Source: The Author © 2001 Katerina - Marina Kyrieri

[The blue circle symbolises the cross-national European demos in civic terms, whereas the black ones, including the dots, symbolise the fifteen ethno, national and cultural demoi. The orange, green and blue arrows symbolise the concentric national, regional and European identities respectively. The notion of concentric circles, foresees a situation in which there are multiple identities whose degrees vary from the highest at the most local and immediate level to the lowest at the most distant one, namely the European level. Individuals may move between them and consequently be identified in different ways according

to dimensions in which they act, but the European element does not stop to erode the chosen identities: that is, interaction].

Finally, as long as the Union cannot afford to be a tightly bounded political system, particularly in respect of the next enlargement, it could also be proposed that the autochthonous European demos moves to becoming a globalised one. Such thinking of expansion matches well with the novel terminology of "condominium"[126] whereby:

> "...Instead of one Europe with recognised and contiguous boundaries and hence, a singular and definite population, there would be many Europes. Instead of Eurocracy accumulating organisationally distinct but politically co-ordinated tasks around a single centre, there would be multiple regional Institutions acting with relative autonomy in order to solve common problems and produce public goods".[127]

[126] Schmitter, P. (1996) "If the Nation-State were to wither away in Europe, What Might Replace It?" in: Gustavsson, S. and Lewin, L. (eds.) (1996) *The Future of the Nation-State: Essays on Cultural Pluralism and Political Integration*, Stockholm: Nerenius & Santérus, 211-244, 222, 226.
[127] *Idem.*, 226.

6. CONCLUSION

Within the conceptual framework of *meta*-national democracy, the issue of an absent European demos which is included in the long list of the Union's democratic deficit has been revisited. Ideas of ethnic uniformity as the guarantor of social cohesion and thus democracy have been rejected. A decoupling of nationality and citizenship has been regarded as necessary. Ethno-cultural solidarities as the basis for an under construction European identity have been dismissed and new understandings of a demos at European level have been put forward.

A demos in civic terms which sharpens an awareness of the multiplicity of the different forms of life that co-exist in a multi-cultural society (unity within diversity) has been but the first step in this direction.

Yet, it would be wrong to suggest that the EU is capable of transforming itself into a democratic polity if the Union's legitimacy were not founded on a redefined concept of citizenship and identity. That is, a citizenship which is neither exclusionary nor linked to nationality or ethnic ties but which is defined inclusively by reference to political and civic participation, one of the White Paper's principles that underpin good 'governance' in the EU.[128]

[128] European Commission, *European Governance - A White Paper*, COM (2001) 428, 25 July 2001, pp. 3, 10, 13, 15-17.

CHAPTER FOUR

EUROPEAN CIVIL SOCIETY AND CHANNELS OF POLITICAL PARTICIPATION

1. INTRODUCTION

Chapter Three tried to recast the Union's democratic deficit as defined by the German Constitutional Court. Based on Weiler's critique, the so-called "No-Demos" Thesis, it was argued that at both national and European level a demos should be a community of citizens irrespective of ethnic, cultural origins, linked to each other by strong democratic values and principles. Secondly, that the process of demos formation should be related to a situation wherein the members of a European civil society develop a common awareness about the way in which public affairs are handled. To this end, citizenship is redefined from membership of the State on the grounds of nationality to participation. This redefinition does not create a two-class demos considering that in modern democracies most citizens do not actively participate in politics, apart from elections, and even then the turnout is very low. Rather, it preserves 'the ideal of the active citizen'. It requires that people be recognised as having the right and opportunity to participate in public affairs. However, it is one thing to recognise one's right, quite another to say that everyone must, irrespective of political preferences, actually participate in public life. Participation should be regarded neither as a necessity nor as an obligation. It has been argued that one

of the most important negative liberties established since the end of the ancient world is "freedom from politics",[1] and that such a liberty is still an essential part of both European and national democracies.

In respect of the claim that the Union is underpinned by a European political identity based on political participation (Chapter Three, p. 104), this Chapter will deal with opportunity structures for political involvement at two levels: first, individually and second, collectively. By discussing different ideas to engage European civil society, this will help to support the claim for a European politically organised people and, in general, for democracy in the EU. In particular, the focus will be initially on possible policy and polity-related, direct and indirect EU channels of individual political participation. Then, attention will be drawn on the forms of collective political participation, and in particular on the work of the Commission and the ESC.

This is not an exhaustive study of all the structures, proposals and opinions that have been tabled so far. In the author's opinion the chosen examples suffice to illustrate the main ideas and to discuss their theoretical implications with regard to their primary goal, that is, to render European politics more legitimate.

[1] Arendt, H. (1963) *On Revolution*, London: Faber, 284.

2. INDIVIDUAL OPPORTUNITY STRUCTURES FOR EU CITIZENS' PARTICIPATION

2.1. Introduction

The Union's legitimacy gap has become a matter of serious political concern. Following the genuine crisis over the near-failure to secure ratification of the Maastricht Treaty and the Irish rejection of Nice (8 June 2001), the Union legitimacy is officially perceived as something that needs to be redressed. Thus measures which forge a stronger connection between the citizen and the European political entity are vital.

In the context of this Thesis, the Union's legitimacy will be framed within three categories, all referred to in the White Paper.[2] The first category is *output* legitimacy directed at providing efficient solutions that cannot be materialised solely at national level,[3] for example, interest groups and NGOs. *Input* legitimacy constitutes the second category and aims to maximise equal, direct and effective citizen influence on European policy-making,[4] for example, the social partners in the Social Policy-making.[5] Additionally, a political entity is in need of somewhat broader foundations of legitimacy, a common identity, a consciousness of belonging and a deeper-going, but less constructed agreement with the political regime in general. Schimmelfennig, in his excellent overview

[2] European Commission, *European Governance - A White Paper*, COM (2001) 428, 25 July 2001, pp. 7-8, 10-11, 13-17.
[3] Schimmelfennig, F. (1996) "Legitimate Rule in the European Union: The Academic Debate", *Tübinger: Arbeitspapiere zur Internationalen Politik und Friedensforschung* No. 27, p. 12 < URL http://www.uni-tuebingen/de/uni/spi/taps/tap27.htm >. *Inter alia* for an overall assessment on *inputs* and *outputs*, see generally Scharpf, F. (1996) "Democratic Policy in Europe", 2 *European Law Journal* 2, 136-155; Smismans, S. (2000) "The European Economic and Social Committee: Towards Deliberative Democracy", 4 *European Integration online Papers (EIoP)* 12, pp. 2, 13-14 < URL http://eiop.or.at/eiop/texte/2000-012.htm >.
[4] *Idem.*, 12-13.
[5] See Chapter Five of this Thesis.

of the academic debate on legitimate rule in the EU, frames this category as *social* legitimacy.[6] This is dependent on the degree of social homogeneity, the strength of civil society organisations - in terms of staff and funding - involved in the policy-making and the existence of a collective identity among citizens that was discussed in Chapter Three.

In order to highlight that there may be several possible channels of political participation for European citizens, individually and collectively, the author has borrowed the term "political opportunity structures for citizens' participation ("OSCPs") as found in Western democratic systems.[7] Here, the notion and theory of political opportunity structure aims to describe and explain the conditions in which European people engage in a process that leads up to EU decision-making.

2.2. Policy-Polity, Direct-Indirect opportunity structures in the EU

Concentrating on the situation at the EU level, it may be observed that voting for the EP might be considered a polity-related and direct OSPC. It should be noted at this point that the distinction between direct and indirect OSPCs makes sense with regard to polity and policy-related channels. While national elections influence directly the composition of a political system, primaries within parties do so only in an indirect manner. In such a context, voting at

[6] Schimmelfennig, F. *loc. cit. supra* note 3, p. 5.

[7] See generally Kriesi, H. Koopmans, R. Duyvendak, J. and Giugni, M. (1992) "New Social Movements and Political Opportunities in Western Europe", 22 *European Journal of Political Research* 2, 219-244. See also Nentwich, M. (1996) "Opportunity Structures for Citizens' Participation: The Case of European Union", *European Integration online Papers (EIoP)* 1, p. 3 < URL http://eiop.or.at/eiop/texte/1996-001a.htm >.

national elections might be regarded as an act of indirect participation in the Euro-polity. In fact, it is the channel by which public opinion impacts on EC policy via Member State governments, the Council of Ministers and the European Council, and through COSAC[8] and the national parliaments. The Commission's White Paper is remarkable for what it says as for the future role of the national parliaments: in particular, to become more active in stimulating public debates on the future of Europe and its policies.[9] COSAC, on the other hand, an Institution that is rarely heard of even in the White Paper, can also pave the way towards a deeper European integration. So far, it has made significant contributions to the Lisbon Summit (May 2000) on employment, economic reforms and social cohesion. On the drawing up of the EU Charter, it asked the Convention responsible for the drafting to take the opinion of applicant countries and of their parliaments into account. It expressed strong support for the enlargement process of the EU and urged the governments participating in the Nice Intergovernmental Conference ("IGC") 2000 to proceed with their work in order to make it possible to start early the ratification procedures of the Treaty amendments. It appealed to voters to participate in the fifth direct elections to the EP in June 1999. Meeting in Hague, in June 1997, it made a declaration on developing a culture of transparency. And, in its conclusions adopted in Dublin, October 1996, it further suggested that the flow of information from the EU Institutions to the national parliaments should be improved and that national parliaments should

[8] COSAC (founded in 1989) is the Conference of European Affairs Committees of the Parliaments of the European Union and consists in a biannual meeting of the organs in national parliaments responsible for European affairs with a delegation from the European Parliament. Its role in the European decision-making process has been recognised formally by a Protocol added to the Amsterdam Treaty.

[9] White Paper *loc. cit. supra* note 2, pp. 17, 30.

have control over the decisions of their respective Governments.[10] Concerns which the White Paper replicates in a similar way.

Returning to voting at national elections, this can also be listed among the policy-related Euro-OSCPs since the composition of the national legislature influences considerably the transposition and implementation of legislative acts of the Union. At this point, we should recall the implementation of the Working Time Directive[11] in the UK.

Throughout the years of 1980s and 1990s, successive Conservative Governments not only repealed the majority of provisions regulating working time practices but also challenged the choice of legal base [Article 118a EC] which required a qualified majority for the Directive to be adopted.[12]. During the premiership of John Major, the UK contested the validity of the Directive by arguing before the ECJ that it was not a health and safety but an employment law matter and was therefore social legislation.[13] Hence, because it opted out of the Social Chapter of the Maastricht Treaty, the UK was not required to adopt such legislation. When the Labour party became government, the picture changed, and it was not until 1 October 1998 that the Working Time Directive Regulations 1998 came into force.

[10] See Conference of European Affairs Committees of the Parliaments of the European Union (COSAC): "Decisions and Texts adopted by the COSAC"
< URL wysiwyg://2/http://www.europarl.eu.int/natparl/cosac/texts_en.htm >.
[11] Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time [OJ 1993, No. L 307/18].
[12] See generally Anderson, P. and Weymouth, A. (eds.) (1999) *Insulting the Public? The British Press and the European Union*, London: Longman, 133-137.
[13] Case C-84/94 *UK v. Council* [1996] ECR I - 5755, para. 10.

National voting is also a control mechanism. This means that a strong political mandate at the national level may induce a government to hold a particular view on a European issue and consequently veto decisions in the Council of Ministers. For instance, take the case of EMU ("European Monetary Union") with respect to the UK. The UK citizen has an interest not to scrap the pound as such action would increase inflation, interest rates, unemployment and would risk its pension schemes, economic stability and inward investments mostly from the USA. He/she thus forms communities and pressure groups at local, regional, national and European levels such as "Britain in Europe" and the "European Movement" or simply becomes a member of some of them. When the time of national elections arrives, he/she induces his/her government to say 'No' to EMU by exercising their right to vote. If the government ever tries to go against the public preference or the national political mandate and vote in favour of the EMU in the Council of Ministers, this might endanger its election to a second term in office and lose in general its public support.[14] Such a *rationale* forced Tony Blair to announce that "a referendum on abolishing the pound will not be held until two years after the next election".[15] As a result, labour's timidity has been rewarded with opinion polls which show majorities against entry to the Euro-zone so large (67% in March 2001)[16] and persistent that many now doubt whether a referendum is winnable at all.

[14] Shrimsley, "Blair sets deadline for scrapping the pound", *Electronic Telegraph,* 17 January 2000, 1.
[15] Murphy, "Blair pledge on vote fudges Euro policy", *Electronic Telegraph,* 16 January 2000, 1.
[16] Keep the Pound Polls, (March 2001):
< URL http://www.keepthepound.org.uk/polls/polls_index.html >.

To illustrate what we have already proposed the following diagram might be useful (see diagram 4.1).

Diagram 4.1. National voting and UK Membership of the EMU

1. Government + Policy for a Monetary Union = EMU + UK Membership
2. Government - Policy for a Monetary Union = EMU - UK Membership
3. Government + Policy for a Monetary Union + People's support = EMU + UK Membership + Government in Power
4. Government + Policy for a Monetary Union - People's support = EMU + UK Membership - Power for the Government

Source: The Author

Furthermore, the right of EU citizens to file petitions to the EP and apply to the EU Ombudsman should also be considered as active agenda-settings and control mechanisms. The Petitions Committee established by the EP all too often finds that what Member States consider expedient takes precedence over the rights accorded to citizens by the TEU. It so happens that, when the national authorities or Institutions are found to be guilty of aberrations, citizens are quite unable in practice to exercise their rights and are left quite helpless in the jaws of a lion. The Petitions Committee, therefore, speaks out against the failings of the authorities that deny citizens, for example, the right of mobility. Accordingly, it is calling on the Commission to insist that governments remove such impediments and bring national laws into line with Community law. The EU Ombudsman, makes sure through recommendations that Commission and

other EU Institutions properly implement Codes of Conduct and avoid acts of maladministration in their activities that could infringe individual rights, for example, the right to good administration and right of access to documents. More details on its role will be set out in Chapter Eight on the issue of transparency.

On enhancing the role and increasing the effectiveness of the EU Ombudsman and of the Petition's Committee of the EP, the White Paper suggests that these should be complemented by creating networks of similar existing bodies in the Member States capable of dealing with disputes involving citizens and EU issues. Such a proposal, the White Paper further affirms, will improve people's knowledge of the extent and limits of their rights under Community law and help them find which Member State authorities can resolve problems.[17]

In assessing additional means of political participation, referenda create a direct link between the EU citizen's *input* and the policy outcome. The referendum OSCP has been frequently used to confirm accession to the EU or to govern the direction of integration through the ratification of new Treaties.

National constitutional referenda are significant determinants of the future direction of European integration as long as they are not imposed upon the States arbitrarily by supra-national executives in order to promote their interests. For example, in relation to Ireland's ratification of the Nice Treaty, the President of the Commission, Mr Romano Prodi, indicated that he wanted

[17] White Paper *loc. cit. supra* note 2, p. 25.

the Irish government to put the Treaty to the people again before the end of 2002 after loosing the first referendum.[18]

Such predetermined referenda, however, are unlikely to constitute engines for future reforms in the EU. This is because concerns over legitimacy and the democratic deficit of the EU will become more intense to the extent that it appears that Member States are 'coerced' on how and when to hold a referendum.

So far, there have been twenty-four referenda (including Ireland's 'No' Vote on the Nice Treaty) since the first one was held in France, in April 1972. More are expected to take place in highly selective ways to determine specific aspects of the European agreement such as the UK joining the EMU. Denmark has already voted 'No' to EMU on 28 September 2000.[19]

It is interesting to note at this stage, however, that in recurring and televised political debates in the UK, it has been raised whether it is constitutionally democratic to hold a referendum on joining the Euro-zone or not. It may be that there are no constitutional requirements for holding such a referendum; yet, most of the democratic practices in the UK are embedded in their

[18] See RTÉ News Interactive: Referenda News 8/6/2001, "Prodi wants second referendum on Nice Treaty" < URL http://www.rte.ie/news/features/referenda/news/ref0608a.html >; Telegraph 23/6/2001, "Prodi tells Dublin to think again on Nice referendum" < URL http://www.no-euro.com/article.cfm?IDNO=262; Sunday Mail 10/6/2001, "Ireland EU vote not so Nice for Cyprus?" < URL http://www.cyprus-mail.com/June/10 >.

[19] See generally Miller, V. (2000) "The Danish Referendum on Economic and Monetary Union", International Affairs and Defence Section, *House of Commons Research Paper* 00/78, 29 September 2000 < URL http://www.parliament.uk/commons/lib/research/rp2000/rp00-078.pdf >.

traditions. Therefore, the absence of formal constitutional provisions does not *ipso facto* prevent referenda from being held.

Following the Danish 'No' Vote in 1992, *EU Treaty referenda* have made a great impact either directly on Brussels or on influencing the nature of the relationship of the EU to the people of Europe, or on the capacity to acquire a trans-national mobility and wreak havoc in other Member States.

The referendum result in Denmark had immediate effect on the ratification processes in at least four Member States where the process was still open as it was engaged with domestic political issues.[20]

In France, President Mitterand announced his own Maastricht referendum while at the same time it was realised that defeat in the referendum, on top of the Danish 'No' Vote, would signal the end of the EU as currently constructed. Whereas with a Danish 'No' Vote the EU could conceivably carry on, a French rejection was an altogether more serious matter. In the end, however, the referendum passed with a 51 per cent majority (the so-called French *petit oui*), around half a million voters, on a turnout of 70 per cent.[21]

In the UK, the Danish 'No' Vote caused the Prime Minister John Major enormous problems and marked the beginning of an immensely difficult period in his premiership. Political enemies who were not on the Opposition benches

[20] Most of those Member States, where there was no impact, had completed the process by 2 June 1992.
[21] Criddle, B. (1993) "The French Referendum on the Maastricht Treaty September 1992", 46 *Parliamentary Affairs* 2, p. 228 at 228.

but were rather the Conservative Eurosceptics within his own party compelled him towards a negative response. Also, the European Communities (Amendment) Bill faced a slow and acrimonious path through the House of Commons. This saga not only seriously weakened Mr Major's authority and leadership but it showed that, on few, rare issues the executive can be constrained and restrained by the legislature. However, this only applies on occasions when the government cannot rely on the full support of its own backbenchers.

The Danish 'No' Vote also directly affected the Irish referendum campaign. The 'No' campaigners capitalised on the Danish result hoping to encourage Irish waverers to vote 'No' following the precedent now set. Leaders of the Danish 'No' campaign went to Ireland while Brussels continued to provide documentary assistance of help to the 'Yes' campaign.[22] However, the result was not different from that of 1987 referendum which ratified the SEA ("Single European Act").

In Germany the Maastricht Treaty also ran into ratification difficulties greatly assisted by the confusion that the Danish 'No' had wrought on Europe and the changed international climate. Two problems arose, the first being public pressure to make the third stage of EMU and the single currency subject to the approval of two-thirds majority of both the Bundestag (the *Lower House* of the German Parliament) and Bundestrat (the *Upper House* of the German Parliament). The second was that several Länder (federal States) claimed that

[22] Similarly British politicians went to Denmark to assist in campaigning against the ratification of the Amsterdam Treaty.

the Federal Government had negotiated some of their rights, and "fortified by the Danish 'No' they threatened to veto ratification in the Bundestrat".[23] The final challenge to the Treaty was through the Constitutional Court.[24]

In terms of the impact on the EU's relationship with its Citizens, the Danish 'No' and the French *petit oui* exposed the façade of public support to be as fragile as sceptics had always considered it to be. Given the growing popular concern over the legitimacy and democratic deficits, the referenda proved to be unfortunate developments for any future EU integration and regretted by many of the European elites. They did however force the Union to address her democratic deficits, forge links to the public and confront directly its lack of public support by launching the idea of EU citizenship and the concept of subsidiarity, the Birmingham Declaration on "A Community Close to its Citizens"[25] and the enforcement of a wider consultation with the Institutions. By the time of the Amsterdam Treaty referenda in 1998, the world was thus an entirely different place than that of the summer of 1992 since the EU had already won the support of many of its citizens.

[23] Nicoll, W. and Salmon, T. (eds.) (1994) *Understanding the New European Community*, New York: Harvester Wheatsheaf, 227-228.
[24] See Chapter Three of this Thesis.
[25] See *Birmingham Declaration: A Community Close to its Citizens*, 16 October 1992 in: Corbett, R. (ed.) (1993) *The Treaty of Maastricht From Conception to Ratification: A Comprehensive Reference Guide*, Harlow: Longman, 491.

3. COLLECTIVE OPPORTUNITY STRUCTURES FOR EU CITIZENS' PARTICIPATION

3.1. The Civil Dialogue on Europe

Collectively now, European citizens enjoy more institutional devices for being involved in the policy making process, under the Commission's project on European Governance. Indeed, since the beginning of the 1990s, the Commission's internal think tank, the Forward Studies Unit, has been undertaking intensive research in the field of European Governance. Hence, by May 1999 it produced a report "on improving the effectiveness and legitimacy of EU governance",[26] which predisposed us for the launching of the White Paper.

The 1999 report on effectiveness and legitimacy of EU Governance states that:

> "The entire policy process from the framing of problems through the formulation of policy, its implementation, evaluation and revision needs to be opened up and liberated [...] - civil society needs to be engaged in and by European action".[27]

To this effect, the report proposes a new style of governance, clearly depicted in the White Paper, which without going into detail implies decentralisation of

[26] European Commission, Forward Studies Unit, Lebessis/Paterson, *Improving the Effectiveness and Legitimacy of EU Governance - A Review of the Genval Workshop, 21-22 May 1999 and a Possible Reform Agenda for the Commission*, Forward Studies Unit, CdP (99) 750.

[27] *Idem.*, 11-12. See also White Paper *loc. cit. supra* note 2, pp. 11-19, 30.

EU policies and the establishment of mechanisms to tackle fragmentation. The groundbreaking part of the concept, however, concerns the re-orientation of the administrative working methods. The Commission should not operate as a technocratic body that sets the general policy preferences and translates these into detailed programmes, drafts, etc. but rather as an administration that enables all groups affected by a policy to participate at every stage policy process and takes into account "pluralistic scientific expertise".[28]

The report furthermore highlights that the relationship between

> "Europe and the citizen [...] can no longer be a paternalistic relationship but rather must be one of partnership".[29]

But this seems to be possible only in the field of collective representation, for example, in co-ordination with organised groups, and not with regard to individual citizens since the entire text leaves the latter question open.

At the same time, however, it is suggested that as long as representation is either too broadly based (territorial representation) or too narrowly based (functional representation), more innovative means and channels of representation should be generated.

At the international level, a number of Non-Governmental Organisations ("NGOs") and campaigning groups have been recognised as having a

[28] Report *loc. cit. supra* note 26, p.15.
[29] *Idem.*, 12.

legitimate role to play in protecting group interests in litigation. But arguments have been made that such groups are élites, that they are undemocratic and not fully representative. What is their political legitimacy? Who voted for them? Do they have the legitimacy to speak for the entire population? Who decides whether they do or not, the executive?[30]

In an effort not to replicate such privileged *status* at the EU level and facilate the Europeanisation of civil society,[31] the Commission strives at the moment and in particular under the White Paper for a newly defined partnership with NGOs.

3.1.1. Definition of NGO

It is not an easy task to find a common definition of the term 'non-governmental organisation' as the NGO-sector is extremely diverse, heterogeneous, and populated by organisations with hugely varied goals, structures and motivations. Nevertheless, inspired by the list of common features of voluntary organisations proposed by the Commission in its Communication "*Promoting the Role of Voluntary organisations and*

[30] In response to these problems, Harlow has made a powerful call for recognising the particular roles which law and the political process play in a system of governance based upon the separation of powers, arguing that law and politics have distinctive roles to play in ensuring modern forms of democracy. "...Courts can legitimate the political lobbying of campaigning groups at the same time as the campaigners legitimate ever deeper forays into the realm of policy and politics". See Harlow, C. (2002) "Public Law and Popular Justice", 65 *Modern Law Review* 1, p. 1 at 17. Similarly, some time ago, and drawing upon the American experience, Fuller argued that where there is polycentric decision-making with a wide range of interests at stake such disputes are unsuited to litigation relying upon adjudication between competing interests because complex repurcussions might arise in other policy areas where interested parties are not represented. See Fuller, L. (1978) "The Forms and Limits of Adjudication", 92 *Harvard Law Review*, p. 353 at 398.

[31] See generally Warleigh A. (2001) "'Europeanizing' Civil Society: NGOs as Agents of Political Socialization", 39 *Journal of Common Market Studies* 4, 619-639.

Foundations in Europe",[32] the term "NGO" can be used as shorthand to refer to a range of organisations that:

- are *not created to generate personal profit*;
- are *voluntary*;
- are *distinguished from informal or ad hoc groups by having some degree of formal or institutional existence*;
- are *independent*, in respect of government and other public authorities and of political parties or commercial organisations.

In the discussion paper on the relationship with NGOs as well as in the White Paper, the Commission tries to adopt a new stance towards the question of which role civil society organisations should play in European politics.[33] There are sections within both papers that can provide an answer to this.

According to the Commission, NGOs play an important role in giving voice to the concerns of citizens and delivering services that meet people's needs.[34] Hence, they should be regularly and systematically consulted and they should be provided with the necessary funds.[35] Timely consultation with all stakeholders should take place before the Commission proposes legislation in order to improve policy design and to increase efficacy. There is nothing to suggest that they should be involved in the implementation process.[36]

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[32] COM (1997) 241 final, 6 June 1997.
[33] Commission Discussion Paper, *The Commission and Non-Governmental Organisations: Building a Stronger Parternship*, COM (2000) 11 final, 18 January 2000.
[34] White Paper *loc. cit. supra* note 2, p. 14.
[35] See *supra* note 33, pp. 7, 13-14.
[36] *Idem.*, 5.

Furthermore, NGOs do not have to register, as the Commission does not recognise that they have an official consultative *status*. One reason given for instance in the Commission's Communication on "*An open and structured dialogue between the Commission and Special Interest Groups*"[37] is that "the Commission has always wanted to maintain a dialogue which is as open as possible without having to enforce an accreditation system".[38]

Unlike the dialogue with the social partners in social policy, education, vocational training and youth, there is still a lack of predictability about when or whether consultation will take place and in what form (formal or informal). For the time being, this is a matter largely left to each Commission Directorate ("DG") or Parliamentary Committee or Council Presidency.

The informal consultation, however, should not be seen as a minimal role for the NGOs but rather as a problem of adopting a system of consultation which is in-between the institutionalised on the one hand and a 'loose' or 'relaxed' system on the other. The institutionalised system refers to a legal basis in the Treaty for consultation or dialogue with clear rules as to procedures and competencies whereas the 'loose' system just ascribes to consultation but leaves open the question of means for attaining it.

Under the White Paper, the Commission is striving for that means as to achieve formal consultation. Its efforts revolve around two commitments. The first commitment is to create a culture of consultation underpinned by a code of

[37] COM (1992) [OJ 1993, No. C 63/2].
[38] *Idem.*, 3.

conduct that sets minimum standards, focusing on what to consult on, when, whom and how to consult. Those standards are considered to create fair conditions for citizen participation in European politics and robust public debate. They are assumed to reduce the risk of the policy-makers just listening to one side of the argument or of particular groups getting privileged access on the basis of sectoral interests or nationality. They are also expected to improve the representativity of civil society organisations and structure their debate with the EU Institutions.[39] The second commitment is to develop more extensive partnership arrangements where consultative practices are already well established. Such planning, the Commission assures, entails additional consultations compared to the minimum standards.[40]

In addition, the new governance approach of the Commission has been lately paralleled by the desire to increasingly institutionalise 'civic competence'. That is, "the institutional capacity of citizens as social equals to enter the realm of political influence and sustain a vital public sphere".[41] The coupling of 'civic' and 'competence' does not exemplify any category mistake but rather acts as an invitation to empower EU citizens to engage in the management of public affairs. Particularly with regard to the preparation of policy initiatives, the White Paper is replete with such invitations when it makes promises of more communication, wider involvement, participation and consultation. To this effect, Sharpf's criticism of the White Paper - that a process of a 'civic' 'governance' in the EU is out of question - seems a bit too harsh. "One cannot

[39] White Paper *loc. cit. supra* note 2, p. 17.
[40] *Ibid.*
[41] Chryssochoou, D. (2001) "In Defence of the Civic: The Search for a European *Res* Publica", *Arena Working Papers* WP 01/12, p. 5 < URL http://www.arena.uio.no/ >.

but wonder", he argues, "what would happen if the Commission's invitations were in fact taken seriously by most or even by many of the 'civil society' actors all over Europe to whom they seem to be addressed". And, he further contends, "since not a word is lost on the practicalities of Europe-wide participation, one might wonder about the seriousness of the invitation itself".[42]

As much as it is legitimate to wonder about the seriousness of the 'invitation' enshrined in the White Paper and its superfluousness in the light of the 'practicalities of Europe-wide participation', the significance of the civic process in the EU cannot be overemphasised. Yet, this does not entail that the White Paper cannot be seen as the beginning of a soft law approach which provides for an institutional face to a central task of legitimate public life, that of encouraging civic participation and responsible 'government'.

The prospects of institutionalising a full-working *meta*-national civic order are quite good if we take into account that some DGs already follow formal consultative mechanisms with respect to NGOs. This already happens in fields such as trade and development, employment and social affairs[43] and has recently been proposed for fisheries.[44] This arrangement is rendered into organising their co-operation with them within a more regularised framework that has eventually been dubbed 'Civil Dialogue'.

[42] Sharpf, F. (2001) "European Governance: Common Concerns vs. The Challenge of Diversity", *Harvard Jean Monnet Working Paper* No. 7/01, p. 12:
< URL http://www.jeanmonnetprogram.org/papers/01/010701.html >.
[43] Visit < URL http://europa.eu.int/comm/secretariat_general/sgc/ong/en/u_links.htm >.
[44] European Commission, *Green Paper: The Future of Common Fisheries Policy*, Volume I, COM (2001) 135 final, 20 March 2001, pp. 12-13.

As we will observe through the example of DG Trade's dialogue in the field of WTO negotiations, this type of organisation-administration relationship differs significantly from the envisaged institutionalised representation of civil society organisations in the ESC. In the first case, an approach which was meant to co-opt NGOs and to increase efficiency has developed the potential to alter the nature of European politics and cause them to be more legitimate and democratic. In the second case, however, there are important caveats with reference to the concepts of civil society and representation, and only if these are duly taken into consideration, changing the composition of the ESC might have a major impact.

3.1.2. The Civil Dialogue in the EU Trade Policy

The Civil Dialogue in the field of the WTO negotiations had been initiated in 1998 by the then Commissioner Leon Brittan. At its origin were the first demonstrations against obstacles to a liberalised world trade at the beginning of the decade as well as the increasing interest of NGOs in this area. This development can somewhat be explained by the success of the General Agreement on Tariffs and Trade ("GATT") itself. So long as the classical impediments to free trade had been dramatically reduced, the States' protectionism was to be expressed in other fields, such as environmental issues and services. Consequently, the international negotiations on free trade came to include questions of technical barriers and services, for example, the General Agreement on Trade in Services ("GATS"). This eventually led to a significant politicisation of international trade agreements.

As far the Commission's approach to dealing with NGOs is concerned, this was originally more like a public relations effort rather than a dialogue which offered a real chance to discuss and exchange views on trade and services issues. By holding meetings twice a year, during which more than 200 participants could listen to a 20-minute speech by the Commissioner, people were reassured that there was nothing to worry about sustainable development, involving sustainable trade. However, since the inception of a "Dialogue on Europe"[45] the organisation concerned with discussion meetings between members of the public and European decision-makers, there was an internal debate in the Commission on how this could be changed. Even though different models of how to engage civil society are currently under discussion, and therefore no final format has been recommended as at the present, today's Civil Dialogue looks quite differently:

> "The objective of this dialogue is to develop a confident working relationship between all interested stakeholders in the trade policy field. The dialogue is open to EU stakeholders [...]. The process is designed to focus successively on issues where in a finite period of work we can get better mutual understanding of concerns and better contacts between the key players; the choice of subjects is therefore a function of these needs and not of relative importance of the very many issues on the trade policy agenda".[46]

[45] European Commission, *Dialogue on Europe: Questions and Answers on Dialogue on Europe*, < URL http://europa.eu.int/comm/igc2000/dialogue/index_en.htm >, 18 January 2001.
[46] European Commission, *Towards Sustainable Trade*, Process Guidelines: < URL http://www.europa.eu.int/comm/trade/csc/dcs_proc.htm >, 15 January 2001.

Hence, in addition to general meetings, a contact group as well as four issue groups have been established. The contact group's task is to facilitate DG Trade's work in the dialogue, to make sufficient information available to both sides of the dialogue and the wider NGO 'constituency' (periphery), and to co-ordinate the running of the issue groups. The latter are hardly comparable to the classic type of Brussels Committees, for example, advisory, management, regulatory and policy-making/implementation Committees, where national representatives do not actually deliberate but only produce policy outcomes (opinions) within short time limits.

During the year 2000, the four issue groups were dealing with subjects of Trade and Health, Trade in Services, Trade in Agriculture and Environment and Sustainable Development. From February 2001, a new set of groups was established in order to cover Investment, Competition, Trade Related Intellectual Property Rights ("TRIPS"), and WTO Reform and Transparency.

Several mechanisms guarantee that the work of the issue groups meets the requirements of transparency. The proposed agendas are made available on the Internet at least 20 working days before the meeting; participating groups have the possibility to make their positions public before the meeting; and the outcome, a *compte rendu* in the format of a report gets published as well.

The general meetings have been maintained but transformed into occasions to discuss wide-ranging issues of trade policy, to present the issue groups' work and to raise questions related to the organisation of the dialogue. As to

representation, their 'constituencies' select the contact group members whereas DG Trade does not intervene in this.

The participation in the issue groups is open to everybody who registers with DG Trade. The registration form is a once-off exercise and is also available on the Internet. It is really short and does not place any administrative burden on the prospective participant. Hence, no accreditation of NGOs takes place, and the only prerequisite consists in making the represented interest explicit so as private interest representatives do not give their claims more weight by adopting the 'disguise' of a NGO.

DG representatives also meet separately with those NGOs that refuse to participate in the dialogue for ideological reasons as part of DG Trade's policy to reach the broader public. It is in this context of broad participation and open access that the Directorate undertakes efforts to listen to the views of interested citizens by organising Internet chats and specific *fora* and that a pilot project for funding has been set up accompanying the new round of issue groups.

Overall, it appears that a good deal of the international trade policy process has indeed been "opened up and liberated from the shadowy world".[47] What at first place had been dominated by an elitist-paternalistic approach soon turned into a creative mechanism to engage civil society organisations. Certainly, it is in the Commission's interest to organise such a dialogue, to feed as much expertise as possible into the policy process, and thereby to enhance efficiency.

[47] Commission Discussion Paper *loc. cit. supra* note 33, p. 12.

Nevertheless, this kind of dialogue does not only increase *output* legitimacy but has significant ramifications in the *input* side too as over time positions from outside can influence, and partly even alter, the point of view of the Commission. This in turn helps to generate a European public that accepts opportunities granted by the Commission as to participate in the trade policy-making.

3.2. The ESC: An organised European civil society

The visions of new European governance also affect the ESC where they take quite a different shape. In 15-16 October 1999 the ESC held the First Convention on Civil Society organised at European Level in order to discuss in detail its opinion issued on the contribution of civil society organisations to European integration.[48] Since Europe's remoteness to European citizens has been identified as one of the main obstacles to surmounting problems of legitimacy, it is surely worthwhile for an Institution attempting to act as the 'bridge' between Europe and its citizens. Of course, such efforts could at the same time increase considerably the Institution's political weight. The latter has never been great for a variety of reasons. For example, the Institution has been criticised for drafting Opinions which are often too general and vague due to the search for consensus, for intervening in the policy process late, after the Commission has drafted its legislative proposal and for having weak contacts with other EU Institutions, especially the Council.[49] Moreover, the strengthening of the social dialogue in the Social Policy Agreement and the

[48] Economic and Social Committee, Opinion on *The role and Contribution of Civil Society Organisations in the Building of Europe*, [OJ 1999, No. C 329/30].
[49] Smismans, S. (1999) "An Economic and Social Committee for the Citizen, or a Citizen for the Economic and Social Committee?", 5 *European Public Law* 4, p. 557 at 560.

creation of the Committee of the Regions ("COR") has further limited the Institution's political weight. On this issue, the Commission in its White Paper has already recommended that the ESC should be more active by developing opinions and exploratory reports in order to help shape policies at a much earlier stage than at present. Working arrangements between the Commission and ESC, similar to those under discussion with the COR, should be finalised to give effect to a more pro-active role.[50]

The building of a closer relationship between the Committee and the civil society has been greatly pointed out by Anne-Marie Sigmund, President of Group III.[51] The rules of Procedure of the ESC structure the Committee into three groups (though this was not foreseen in [Article 196 EC]. Group I represents national employers organisations while group II represents national trade unions. Group III is composed of other diverse national socio-economic categories but outside the traditional sector of industrial production, for example, consumer, environmental interests, social economy, Small and Medium Enterprises, agriculture, liberal professions and crafts.

Drawing on a rich theoretical background, the President of Group III has tried to demonstrate that civil society organisations play a key role in European democracy as also the White Paper asserts.[52] According to her approach, they represent individual citizens and thus function as mediators. They stand for

[50] White Paper *loc. cit. supra* note 2, p. 15.
[51] Economic and Social Committee, *First Convention on Civil Society Organised at European Level: Speech by President of the Various Interest Group of the European Economic and Social Committee Anne-Marie Sigmund*, 15-16 October 1999: < URL http://www.ces.eu.int/en/acs/SCO_speeches_EN.htm >.
[52] See *supra* note 34.

transparency, public awareness, democratic autonomy, a real opportunity for European people to establish themselves in their capacity of being European citizens, plurality, communication and participation. They also stand for 'vertical' subsidiarity since preference to action is relinquished to the lowest level. They finally stand for solidarity in the sense that the members of civil society know that rights are always linked with duties and act in awareness of their responsibility to society. In the end, Sigmund concludes that the link between European democracy, civil society organisations and the ESC is to be determined as follows:

> "The citizens of Europe are in search of a new social contract, which is based on the Rousseau concept of self-determination, and does not look on the sovereignty of the people as the transfer of power from top to bottom [...]. The representatives of civil society organisations, and the Economic and Social Committee *as their legitimate representative*, have the opportunity but also the duty to influence this development"[53] [emphasis added by the author].

Although the Committee does not see itself as the exclusive voice of civil society, it nonetheless tries in concrete terms to become *that central actor* in this field and to function *as the main intermediary* between the other EU Institutions and civil society organisations. For example, in its Opinion on the participation of NGOs in the WTO negotiations, the ESC proposes the creation

[53] ESC Speech *loc. cit. supra* note 51, p. 4 [emphasis added by the author].

of an internal WTO Committee that would serve as a hub between the WTO, the Commission's services and the European NGOs concerned.[54] Yet, it is noteworthy that the document does not even mention DG Trade's civil dialogue, and therefore does not deal with the question how the relationship between individual associations and the ESC as their self-appointed *legitimate representative* should be conceived. At this stage, the recent plans to alter the composition of the ESC might give us some clues.

3.2.1. ESC: Proposals for a future composition

The Commission had proposed a new formula on the calling of the last IGC in Nice. This would have taken into consideration the changed institutional environment, and in particular the fact that the EP has evolved into a co-legislator in areas of Common Foreign and Security Policy ("CFSP"), Justice and Home Affairs (Article 24 TEU), Visas, Asylum, Immigration (Article 67 EC), on provisions of Community Financial Assistance (Article 100 EC), and on measures necessary for the rapid introduction of the ECU/EURO (Article 123(4) EC). As a corollary of the EP's extensive powers, the ESC could mainly act as a "relay vis-à-vis civil society"[55] thus its legislative function being one of minor importance. In concrete terms, this would have implied a change in Articles 257[56] and 258 EC.[57] The Commission has suggested to replace the

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[54] Economic and Social Committee, Avis sur *La Transparence et la Participation de la Société Civile aux 'Négociations du Millénaire' dans le Cadre de l' Organisation Mondial du Commerce*, CES 946/99, 20 October 1999, p. 6.

[55] European Commission, *Adapting the Institutions to Make Success of Enlargement: Commission Opinion in Accordance with Article 48 of the Treaty on European Union on the Calling of a Conference of Representatives of the Governments of the Member States to amend the Treaties*, COM (2000) 34 final, 26 January 2000, p. 18.

[56] Art. 257 reads as follows: "An Economic and Social Committee is hereby established. It shall have advisory *status*. The Committee shall consist of representatives of the various categories of economic and social activity, in particular, representatives of producers, farmers, carriers, workers, dealers, craftsmen, professional occupations and representatives of the general public".

enumeration of professions in Article 257 by the term 'civil society', so that the Nice Treaty would simply stipulate that "the Committee shall consist of representatives of the various categories of civil society".[58] Furthermore, that the distribution of seats by Member State would have been abolished, so that the ESC would become "more representative of the various components of civil society of the European Union as a whole and of its different geographical aspects".[59]

Despite the fact that none of these ideas were adopted in the IGC 2000, it is conceivable that they will remain on the table for the IGCs to come. In this case, the implementation of the Commission's vision, even though it would mainly affect Group III (Various Interests), leaving the other two Groups, Employers (I) and Workers (II) intact, could have far-reaching consequences.

It would confer upon the Committee a potentially powerful competence to be representative of *European civil society* as a whole, and not only of its national components. Indeed, an altered composition could enable the ESC to really function as 'relay vis-à-vis civil society'. However, the question remains whether this is desirable.

[57] Art. 258 reads as follows: "The number of members of the Economic and Social Committee shall be as follows [...]. The members of the Committee shall be appointed by the Council, acting unanimously, for four years. Their appointments shall be renewable. The members of the Committee may not be bound by any mandatory instructions. They shall be completely independent in the performance of their duties, in the general interest of the Community. The Council, acting by a qualified majority, shall determine the allowances of members of the Committee".
[58] COM (2000) 34 final *loc. cit. supra* note 55.
[59] *Ibid.*

At this point, two important caveats should be mentioned. The one concerns problems of definition and the second questions the very nature of NGOs and their relationship to EU Institutions.

3.3. Problems of definition

As long as the notion of civil society is used as a broad and sometimes rather catchy concept, the problem of definition becomes more and more relevant, as it is the answer to the question that defines who is 'in' and who is 'out'. In essence, we get a very diffuse picture of 'what is civil society' if we only compare the four definitions inherent in the Commission's IGC proposal (a), those of Sigmund's speech (b), a self-definition given by a NGO (c), and of the already discussed Commission Forward Studies Unit (d).

The Commission's suggested reformulation of Article 257 EC which the White Paper appears to have endorsed replaces an enumeration ranging from producers, farmers, carriers, workers, dealers, craftsmen and professional occupations to representatives of the general public with the term civil society.[60] Consequently, all members of the ESC including the employers' and workers' groups would be defined as representatives of civil society (a).

For the purpose of the First Convention organised by the ESC, Sigmund has defined civil society organisations as "structures whose members serve the public interest through discussion and function as mediators between public authorities and the citizen".[61] Thus such a definition embraces employer's

[60] See *supra* note 34.
[61] See *supra* note 51.

associations and trade unions, all other representative social and economic organisations, NGOs, community-based organisations and religious associations (b). Whereas this definition is certainly more precise and inclusive than the one in the Commission's proposal, they both could be replaced by some sort of 'intermediary organisations'.

The definition becomes much more restricted from the NGO standpoint as exemplified, for example, by the "Permanent Forum of Civil Society", a very active organisation promoting civic issues on the European stage, for instance, the drafting of a European Citizens' Charter on November 26, 1996. Thus, according to the latter's definition, economic organisations or even co-operatives cannot become members. The same applies to charities, socio-cultural and sports organisations. By contrast, the European Confederation of Trade Unions ("ETUC") is a member, as are also organisations representing the "New Social Movements", such as associations promoting de-colonisation,[62] consumer protection, public health as well as the anti-nuclear, the students' or the women's movement.[63]

Finally, the least compelling definition can be inferred from the Commission's Forward Studies Unit report (d). In most cases, it would be more appropriate to

[62] For example, the modern Commonwealth, the NGO sub-committee on Racism, Racial Discrimination, Apartheid and De-colonisation, Timorese and Gibraltarian political associations, the Unpresented Nations and Peoples Organisation ("UNPO"), the Committee for the de-colonisation of Palestine.

[63] Dastoli, V. (1999) "L' Europe entre Démocratie Virtuelle et Citoyenneté Participative: L' Expérience du Forum Permanent de la Société Civile" in: Boual, J. (ed.) (1999) *Vers une Société Civile Européenne,* La Tour d' Aigues: Editions de l' Aube, 146-166, at 149.

replace the term civil society with either 'society', people who share laws, organisations, and customs,[64] in contrast to State, or simply with 'consumer'.[65]

Bearing this in mind, the many definitions that float around in the Community intellectual space, it can be commonly agreed that civil society and civil society organisations are not clearly defined terms. On the contrary, as Deirdre Curtin suggests "civil society is used as a convenient short-hand term to refer to non-governmental organisations, networks etc. which organise to assert interests outside State-based and controlled political Institutions, by distilling and transmitting such interests to the public sphere".[66] Sometimes they are even used in a mutually exclusive way which can be easily seen if one compares definitions (a), (b) with (c); the first two include all socio-economic organisations whereas the third excludes all economic ones categorically. Additionally, the confusion gets even worse when civil society is equated with 'citizen' and 'consumer', and thereby any particular meaning of civil society is ignored.

3.3.1. EU Institutions and public interest associations: A tricky relationship

The second caveat, as important as the first one, originates from the changing structures of civil society organisations themselves. What makes them valuable contributors to politics is their ability to feed civic perspectives into the policy process through the means of networking and channelling. To achieve this,

[64] Report *loc. cit. supra* note 26, p. 9.
[65] *Idem.*, 16.
[66] Curtin, D. (1999) Academy of European Law (ed.) *'Civil Society' and the European Union: Opening Spaces for Deliberative Democracy?*, Collected Courses of the Academy of European Law, Volume VII, Book 1, The Hague: Kluwer Law International, 207.

however, they need to be as close as possible to the people they represent. Two points should be evoked at this stage. First that the public interest can only be generated by the *input* of various groups and may not exclusively be defined by those who rightfully claim to speak on behalf of the public interest. Second that organisations least connected with EU Institutions are expected to be close enough to their 'clientele'.

Even though civil society organisations might have their finger on the pulse of society, they are not representative *strictu sensu*. A consumer organisation, for example, speaks for consumer interests, but it does not represent consumers as employers' organisation represents its constituency. Indeed, it would be very desirable to see civil society organisations as representative as the Commission endorsed in its proposal prior to the IGC in Nice and therefore suggested the amendment of the founding Treaties. Yet, what makes these organisations so rich in variety and scope, what makes them vivid and their claims so notable, is due to the very fact that they are not representative ('the paradox of non-representation'). And also, that they are not entirely formalised but have a more or less flexible organisational structure which the White Paper seeks to abrogate while creating a culture of consultation.[67] Certainly, there are highly organised groups like the Young European Federalists ("JEF") and the Associations Généraux des Etudiants de l' Europe ("AEGEE") which has an impressive membership all over Europe but these are exceptions to the rule.

[67] See *supra* note 39.

The ESC discussed these problems at some length in an Opinion on the Commission's discussion paper on the relationship between NGOs and the Commission. There, it states:

> "Whether or not NGOs are representative can not be established exclusively on the basis of the number of members whom they represent. The judgment must also take account of the ability of such bodies to put forward constructive proposals and to bring specialist knowledge to the process of democratic opinion-forming and decision-making".[68]

This is a very good argument which should be recalled when analysing the representativity of social partners in the *UEAPME* case.

Furthermore, it is true that the more the EU Institutions will count on civil society organisations to provide links to the citizenry and therefore help boost up the EU legitimacy, the more they will demand them to be representative of interests that are in turn defined by the Institutions. Nevertheless, it should not be forgotten that the relationship between EU Institutions and civic organisations is a tricky one, especially if the latter become more and more dependent on funding and power resources provided by the former. Almost since the inception of the then European Economic Community, the Commission has created or helped to build up a whole bunch of civil society

[68] Economic and Social Committee on the Commission discussion paper *The Commission and Non-Governmental Organisations: Building a Stronger Partnership*, COM (2000) 11 final, CES 811/2000, 13 July 2000, p. 4, para. 2.2.4.

organisations, some of which get important core and project funds from the Commission, if they are not supported entirely by it.[69] The attempts to involve NGOs in such an institutionalised context can therefore be heavily criticised in this perspective. On the one hand, the profound financial dependence on the Commission itself might render an open and unprejudiced debate about the content of European integration impossible. On the other hand, efforts of this kind might lead to the creation of an 'artificial' civil society by the EU Institutions.

Taking thus into account what has been said about civil society representation, the strength of an Institution like the ESC might not lie in a rigid institutionalisation of representative civil society organisations. Rather, it should be built around its capacity to generate technical experience, issue opinions, assemble groups and individuals and, in general, provide a forum for discussion.

[69] Venables, T. "ECAS and NGOs: Overview of the last 10 years", Paper presented at the Conference on *Persuasion, Advocacy and Influence in the European Union,* University of Reading, 26-27 January 2001, pp. 7-8 (*mimeo*).

4. CONCLUSION

The idea that has been put forward is that no common civic identity as analysed in Chapter Three may come into being unless all actors in European 'governance' see themselves as part of a polity-building exercise that has to evolve from the lower level 'upwards'. Likewise, such an identity must be built upon an ethos of participation.[70]

A participatory ethics of European 'governance' has been argued to lie on both individual and collective opportunity structures which if combined and reinforced can actually build a strong, enlarged, legitimate, and thus political Union.

The references to national voting and referenda were enough to address criticisms of the kind that the EU remains dependent on only an indirect legitimation of its decisions through the 'horizontal' co-operation of democratically elected national governments in the Council of Ministers and the European Council.[71]

Representation is surely one of the central topics of the current debate on EU legitimacy. Collective types of representation like the ones that were examined here such as civil society organisations and the ESC become overall dominant as they offer access channels which enable the political expression of the

[70] See the Opinion of the Economic and Social Committee on *Organised Civil Society and European Governance: The Committee's Contribution to the drafting of the White Paper*, CES 535/2001, 25 April 2001, pp. 2, 4-5.
[71] Scharpf, F. *loc. cit. supra* note 3, p. 138.

citizen in his or her multiple identities, particularly in civic demos-oriented polity.

Yet, this should not insinuate that individual representation should be underestimated or that new channels of representation cannot be found and be efficiently activated. The Commission's dialogue in the field of WTO negotiations is one example of how this could be done.

Finally we should reiterate what has already been proposed in Chapter Two: the very nature of the multi-level governance structures of the EU argue against any concentration of consultative interest representation at any one focal point in the policy-making process. The engine of European integration requires a combination of actors who form coalitions, bargain, socially network, discuss, and intensively negotiate in order to adopt European public policies. In this respect, then, it appears that the idea of a system of *engrenage* as was envisaged by Jean Monnet has not vanished but on the contrary still plays an important role in its main function of providing relatively smooth policy-making in the EU.

CHAPTER FIVE

FROM CIVIL DIALOGUE TO SOCIAL DIALOGUE: THE ROLE OF SOCIAL PARTNERS IN THE DECISION-MAKING

"Over the past few years, ... the social dialogue was not an end in itself - it also gave more legitimacy to the social and economic policies, which were being put in place at European level".

European Commission, *Communication Concerning the Development of the Social Dialogue at Community Level*, COM (1996) 448 final, 18 September, para.14.

1. INTRODUCTION

As shown in Chapter Four, the Commission has been involved in a permanent dialogue with the civil society in order to produce regulatory measures. Thus, spaces for decision-making are opened up to actors which are not formally recognised in the EC/TEU.[1]

[1] There is no legal problem in the fact that NGOs and other actors are not mentioned in the Treaties but it only shows that they have not yet achieved an "official" *status* in an EU democratic process, which is oriented towards direct participation and pluralism.

The creation of a Civil Dialogue between NGOs, EU Institutions and an organised civil society and the ideas for a new European governance which imply institutionalisation of a 'civic competence', decentralisation and re-orientation of the administrative working methods are all great complements to the existing Social Dialogue.

The Social Dialogue has two main ingredients. First, it consists of consultation between the Commission and representative organisations of employers and workers, and second, of the mechanism contained in Article 139 EC.[2] The latter puts into motion a new and special form of European-level collective bargaining[3] between representative organisations of workers and employers (the so-called social partners) leading to agreements which can be transformed into binding EU legislation through a Council decision.

Following the themes developed in the previous Chapter concerning channels for political participation in the EU decision-making process, Chapter Five

[2] Art. 139 (ex Art. 118b) reads as follows: "1. Should management and labour so desire, the dialogue between them at Community level may lead to contractual relations, including agreements. 2. Agreements concluded at Community level shall be implemented either in accordance with the procedures and practices specific to management and labour and the Member States or, in matters covered by Article 137, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission. The Council shall act by qualified majority, except where the agreement in question contains one or more provisions relating to one of the areas referred to in Article 137(3), in which case it shall act unanimously".

[3] Yet, this is not collective bargaining in the real sense of the term. Firstly, because social partners are regarded as sectoral identities and not as collective identities. Secondly, because bargaining in the ordinary way means an agreement, made between two people or groups, to do something in return for something else, whereas here the meaning is something concerning consultation, negotiation (deliberation) and joint opinion that opens a process for EU legislation. Thirdly, there is no right to strike for the unions because of the absence of any economic pressure: Wedderburn, L. (1997) "Consultation and Collective Bargaining in Europe: Success or Ideology?", 26 *Industrial Law Journal* 1, p. 1 at 11; Bercusson, B. (1992) "Maastricht: A Fundamental Change in European Labour Law", 23 *Industrial Relations Journal* 3, p. 177 at 185; Fredman, S. (1998) "Social Law in the European Union: The Impact of the Law-making Process" in Craig, P. and Harlow, C. (eds.) (1998) *Lawmaking in the European Union,* London: Kluwer Law International, 386-411, at 408-409.

will be exclusively concerned with the second aspect of the Social Dialogue. In particular, it will try to explore if and how the social partners are involved in producing Community legislation. Moreover, it will elucidate their potential and actual capabilities to shape the on-going process of integration by making their own contributions to decision making.

To attain this objective, we will concentrate on a description of the different decision-making procedures under Title VIII on Employment and Title XI on Social Policy, Education, Vocational Training and Youth which were introduced into the mainstream of Community law following the Treaty of Amsterdam.

The role of the social partners in the EU legislative process is worth looking at because it not only provides a novel alternative to parliamentary mechanisms, that is, the notion of citizens' involvement through directly elected organs, but it is also associated with democratic and legitimate issues under the concept of a *meta*-national democracy.

2. SOCIAL PARTNERS AND TITLE XI

2.1. Introduction

With respect to social policy, the incorporation of the social partners in the legislative process and in the implementation of Community law can be easily traced in the provisions of the Social Policy Agreement ("SPA"). The SPA contained in Title XI, Articles 136-145 EC, provides for their participation from the very start of any initiative in the social policy arena.[4]

2.2. The social partners' participation in the social policy area

On the basis of the above Agreement, the Commission began to shape and formalise a general frame of reference for a two-step consultation procedure.[5] Thus, when formulating proposals in the social policy field, the Commission must consult the social partners twice:

- First, prior to submitting any proposal, on the possible direction of Community action (Article 138(2) EC);

- Second, and more specifically, on the content of the planned proposal (Article 138(3) EC).

At stage two of the consultation process, when the Commission considers that Community action is advisable, the social partners should forward an opinion or recommendation on its proposal. In addition, they may decide to inform the

[4] See also European Commission, *European Governance - A White Paper*, COM (2001) 428, 25 July 2001, p. 14.
[5] European Commission, *Commission Communication on the Application of the Agreement on Social Policy*, COM (1993) 600 final, 14 December 1993, paras. 16, 19, 29.

Commission that they wish to attempt to reach a European-level agreement on the issue. Thus, they have the ability to substitute the Commission's proposal by "bargaining in the shadow of law".[6] In case they do reach an agreement, the social partners are unlikely to use the voluntary path allowed by Article 139(1) EC, that is, implementation by collective agreements in the different jurisdiction, since no State is under any obligation to amend national legislation in force in order to facilitate their implementation.[7] Alternatively they will ask the Commission to propose a binding instrument to the Council, usually a Directive, but in the same terms as their agreement, so long as it is a matter covered by Article 137 EC.

If, on the other side, management and labour do not reach any agreement, it is the Commission which takes up the legislative process following the co-decision procedure of Article 251 EC, thus bringing the EP into the legislative process. Nevertheless, it should be pointed out that even where the social partners have reached an agreement the Commission still has the right to decide on a case by case basis whether to suspend legislative action depending on the nature and complexity of the subject.[8]

During the negotiations or bargaining, the Commission postpones its own

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[6] It has been argued that European representatives of management and labour under the provisions of the SPA are "bargaining in the shadow of the law" as they might feel compelled to negotiate rather than face the unknown content of Community action: Bercusson, B. *loc. cit. supra* note 3.

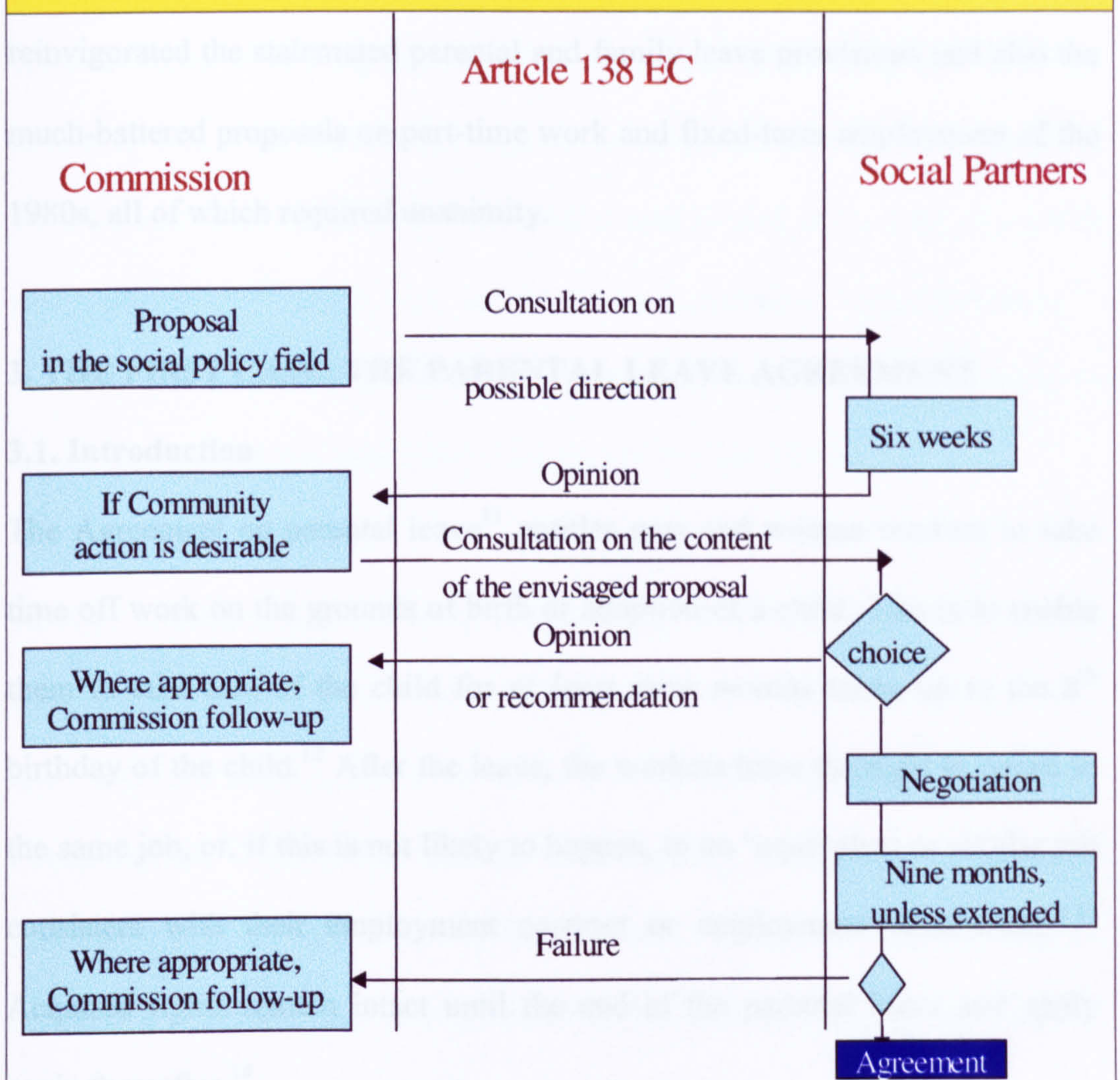
[7] Declaration 2 on Art. 4 (2) of the SPA.

[8] The suspension of legislative action can take place when an agreement, in light of its content, is not valid under Community law and when the representativity of the parties engaged in the negotiations is not fulfilled: European Commission, *Commission Communication Concerning the Development of the Social Dialogue at Community Level*, COM (1996) 448 final, 18 September 1996, para. 71.

initiative. Time frames of six weeks, for example, for the first phase of consultation[9] and nine months for the second phase of consultation and negotiation,[10] are indicated as safeguard measures in order to avoid deliberate delays of the process. However, longer periods can be mutually agreed (see diagram 5.1 below).

[9] It is a working practice. However, it is officially recognised at the *Commission Communication Adapting and Promoting the Social Dialogue at Community Level*, COM (1998) 322, 20 March 1998, p. 9. *Inter alia* see *supra* note 6, para. 65; European Parliament, *Resolution on the Application of the Agreement on Social Policy* [OJ 1994, No. C 205/86, A3-0269/94, para. 6].
[10] Art. 138(4) EC.

Diagram 5.1. Illustration of the Implementation of Article 138 EC



Source: European Commission (2000) *Industrial Relations in Europe*, Luxembourg: Office for Official Publications of the European Communities, 12.

2.3. The workability of the Social Dialogue

Despite doubts expressed by observers as to its workability, the Social Dialogue has entered a lively phase. This is largely because the Commission

has used the opportunity to revitalise social policy proposals that are mired in the legislative process. Being channelled into the Social Dialogue reinvigorated the stalemated parental and family leave provisions and also the much-battered proposals on part-time work and fixed-term employment of the 1980s, all of which required unanimity.

3. THE FIRST CASE: THE PARENTAL LEAVE AGREEMENT

3.1. Introduction

The Agreement on parental leave[11] entitles men and women workers to take time off work on the grounds of birth or adoption of a child. This is to enable them to take care of the child for *at least three months* taken up to the 8th birthday of the child.[12] After the leave, the workers have the right to return to the same job, or, if this is not likely to happen, to an "equivalent or similar job consistent with their employment contract or employment relationship".[13] Acquired rights remain intact until the end of the parental leave and apply again thereafter.[14]

The Agreement sets out only minimum standards and leaves to Member States and national social partners the establishment of the conditions for access and the modalities of application of the right to parental leave. It seems therefore that *devolution* was the best solution to suppress any disagreements in the Council of Ministers and between labour and industry.

[11] Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and ETUC [OJ 1996, No. L 145/4].
[12] *Idem.*, Clause 2 (1).
[13] *Idem.*, Clause 2 (5).
[14] *Idem.*, Clause 2 (6).

3.2. Social Partners and decision-making

The pivotal role of the social partners is constantly reiterated. In the general considerations of the Agreement, it is stated that social partners are "best placed to find solutions that correspond to the needs of both employers and workers and shall therefore be conferred a special role in its implementation and application".[15] In this way, underlined by a cluster of "appropriateness"[16] issues, a specific pattern of 'functional subsidiarity' has been put forward as to regulation, not only at the EU level but also at the national one.

Another innovative aspect related to subsidiarity is the fact that the framework Agreement explicitly allows for further agreements at the EU level, adapting and complementing its provisions with a view to taking into account particular circumstances.[17] Therefore, the decision-making process is envisaged to proceed in both horizontal and vertical 'chutes' falling from the *meta-* to the *national* and *sub-national* arenas, and from *the cross-sectoral* to the *sectoral* and possibly even *enterprise level.* In this circuit, the social partners are expected to be the decisive actors at all levels.[18]

3.3. Evaluation of the contents of the Agreement

Evaluating the content of the Agreement and its reformist potential in terms of gender equality is crucial. The general considerations of the text reveal that

[15] *Idem.*, General Considerations, para. 13.
[16] De Bùrca, G. (1999) "Reappraising Subsidiarity's Significance After Amsterdam", *Harvard Jean Monnet Working Paper* No 7/99, pp. 7-8:
< URL http://www.jeanmonnetprogram.org/papers/papers99.html >.
[17] Council Directive 96/34/EC *loc. cit. supra* note 11, Clause 4 (3).
[18] This enhances the notion of an EU *multi-level system of governance* and consequently of an EU *multi-level regulatory system.*

parental leave is considered to be an important means of reconciling work and family life and promoting equal opportunities and treatment between men and women. The European social partners thus assumed that men should also have an equal share of family responsibilities and be encouraged by means of awareness programmes to take parental leave.

By concluding an agreement, submitting a proposal, and passing a Directive that sets minimum requirements for a right to parental leave (so-called framework Directive in the White Paper),[19] the social partners, the Commission as well as the Council created a level playing field of a principle[20] granting individual social protection.[21]

It is worth noting this, given that no such statutory right existed in Ireland, Belgium and Luxembourg whereas in the UK, Italy, Sweden, Greece and Germany, the agreement resulted in improvements of the existing national legislation and of working relations.[22] In Greece, for example, the 2639/1998 Act increased the maximum age of children from 2,5 years to 3,5 years for parents to take leave and abolished the requirement that the undertaking or service has to be larger than 100 employees. It also increased the parental

[19] According to the White Paper so-called "framework directives" should be used more often. This sort of texts are less heavy handed, offer greater flexibility as to their implementation, and tend to be agreed more quickly by Council and the EP: *loc. cit. supra* note 4, p. 20.
[20] Council Directive 96/34/EC *loc. cit. supra* note 11, Clause 2 (2).
[21] Note Cases: C-333/97 *Susanne Lewen v. Lothar Denda* [1999] ECR I - 7243 (Equal pay for male and female workers - Entitlement to a Christmas bonus - Application of Clause 2 (6) of Directive 96/34/EC); C-249/97 *Gabriele Gruber v. Silhouette International Schmied GmbH & Co. KG* [1999] ECR I - 5295 (Equal pay for men and women - Entitlement to termination payments for both male and female employees when exercising their right to parental leave - Example of indirect discrimination).
[22] European Commission (1999) *Monitoring, Implementation and Application of Community Equality Law: General Report 1997 and 1998 of the Report of the Legal Experts' Group on Equal Treatment of Men and Women*, DG of Employment & Social Affairs, 122-123, < URL http://www.europa.eu.int/comm/dgs/employment_social/publicat/equ-opp/experts.pdf >.

leave from 3 to 3,5 months and expressly provides that any termination of the employment relationship due to taking up parental leave is null and void.

Furthermore, the Agreement constitutes an innovation particularly its provisions on lowering the age for parental leave whereas the possibility for part-time leave is a new option for Greece, Italy, Portugal and Spain and for leave in a fragmented fashion for Austria, Norway and the Netherlands.[23]

Moreover, to address criticisms of the kind that the agreed minimum standards were low, it is important to keep in mind that even the original Commission proposal had not suggested far-reaching standards. The evidence of a direct comparison of the Commission's original proposal and the collective agreement suggests that the agreement actually did not fall far behind the 1983 Commission draft (see Table 5.1 below).

[23] Falkner, G. (ed.) (1998) *EU Social Policy in the 1990s*, London: Routledge, 122.

5.1. Table comparing the Commission's 1983 Proposal and the social partner Agreement		
Subject	**Commission Proposal**	**Social Partner Agreement**
Forms of leave	Parental, family reasons	Parental, *force majeure*
Qualifications to the right	Period of work up to 1 year	Period of work up to 1 year
Length of parental leave	Min. 3 months and up to 3rd child's birthday	Min. 3 months and up to 8th child's birthday
Time off for other reasons	Unspecified	Unspecified
Social security benefits during leave	Upheld	Optional
Pay	Upheld during leave for family reasons, and optional during parental leave	Optional in both cases
Individual right	Yes	'in principle' yes
Source: Falkner, G. (ed.) (1998) *Social Policy in the 1990s*, London: Routledge, 123.		

3.4. Concluding remarks

With this first substantive collective agreement a taboo was broken as to the workability of the Social Dialogue and a pedagogical effect that there is a possible win-win situation under the Social Agreement was put into place.[24]

The signing of the Parental Leave Directive and its adoption in the Social Council of June 1996 were much celebrated events and served to underline the great symbolic value of the new procedures which opened up the conventional route for EU social policy.

4. THE SECOND CASE: THE PART-TIME WORK AGREEMENT

4.1. Introduction

The success of the new law-making procedure on a peripheral issue to the social partners becomes more apparent with the conclusion of a second agreement on part-time work[25] which by contrast is at the heart of the debates on deregulation/(re)-regulation versus worker security in the wider sense.

The agreement which forms the basis of the Council Directive 97/81/EC[26] aims to eliminate discrimination against part-time workers and to improve the

[24] See generally Schmidt, M. (1997) "Parental Leave: Contested Procedure, Creditable Results", 13 *International Journal of Comparative Labour Law and Industrial Relations* 2, 113-126.

[25] Many of the new employment opportunities have been for part-time or temporary workers or for those prepared to accept unsocial hours of employment. Between 1983 and 1994, 82 per cent of the new jobs created in the European Union were for part-time workers: Rubery, J. Smith, M. and Fagan, C. (1998) "National Working Time Regimes and Equal Opportunities", 4 *Feminist Economics* 1, 71-101.

[26] Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC - Annex: Framework agreement on part-time work [OJ 1998, No. L 14/9].

quality of part-time work. It also seeks to facilitate the development of part-time work on a voluntary basis and "contribute to the flexible organisation of working time in a manner that takes account of the needs of employers and workers".[27]

4.2. The scope of the agreement

The scope of the agreement is intentionally limited to part-time workers who have an employment contract or employment relationship, thus, excluding the self-employed. This was the employers' preferred option.[28] It is a concession to labour; yet in the preamble the signatory parties voice "their intention ... to consider the need for similar agreements relating to other forms of flexible work".[29]

The agreement's preamble also underlines the contribution of the framework agreement to the overall European strategy on employment following the Luxembourg Council (12-13 December 1997) and the importance of part-time work in this strategy.[30] Social partners have given priority attention to this form of work because of its supposed merits as a means of reducing unemployment as well as of its benefits for workers and employers alike. For workers it may offer the chance of a better balance between working life and family responsibilities, training, leisure or civic activities. It can also make it

[27] *Idem.*, Clause 1 (b).
[28] From the outset, UNICE had rejected the trade union's desire to negotiate on all forms of 'atypical employment' at the same time, because of what it perceived to be the divergent issues pertaining to each form of non-standard employment. However, the scope of any agreement as well as the balance between the need for flexibility and the principle for non-discrimination evoked considerable discussion.
[29] Council Directive 97/81/EC *loc. cit. supra* note 26, Annex: Preamble, first paragraph.
[30] This shows the complementarity of the social and employment policies: Szyszczak, E. (2000) "The Evolving European Employment Strategy" in Shaw, J. (ed.) (2000) *Social Law and Policy in an Evolving European Union*, Oxford: Hart, 197-220, at 203.

easier for workers progressively to enter the labour market or retire from employment. From the employers' perspective, it can permit not only greater flexibility in responding to market requirements, for example by increasing capacity utilisation or extending opening hours, but also productivity gains. Finally, for policy-makers confronting high-levels of unemployment, the growth of part-time work may reduce the number of job seekers or, at least, the number of people registered as such. It can lower politically sensitive unemployment rates without requiring an increase in the total number of hours worked. Nevertheless, no thresholds to further restricting the number of part-timers covered by the agreement were formulated at the EU level.[31]

4.3. The prescriptions of the Agreement

The prescriptions of the part-time agreement are the same minimum as in the parental leave agreement and concern *employment conditions* only. There is no definition of this term in the agreement and considerations of social security are consequently excluded. The signatories deemed that "matters concerning statutory social security are for the decision by the Member States".[32] Nevertheless, the social partners reminded the Social Council of the Dublin Employment Declaration of December 1996, wherein the Council promised:

> "To make social security systems more employment-friendly by 'developing social protection systems capable of adapting to new patterns of work and of providing appropriate

[31] International Labour Organisation ("ILO") (1997) "Perspectives - Part-time work: Solution or Trap?", 136 *International Labour Review* 4, p. 1:
< URL http://www.ilo.org/public/english/support/publ/revue/persp/97-4.htm >.
[32] Council Directive 97/81 *loc. cit. supra* note 26, Annex: Preamble, second paragraph.

> protection to people engaged in such work".[33] The social partners thus assumed that "effect should be given to this declaration".[34]

Moreover, the principle *of non-discrimination*[35] is not unconditional. It provides that part-time workers shall not be treated in a less favourable manner than comparable full-time workers shall, solely because they work part-time "unless different treatment is justified on objective grounds".[36] Additionally, the principle of "*pro-rata-temporis* shall apply where it is appropriate".[37] The fact that neither the objective grounds which may legitimate unequal treatment nor the criteria for applying the *pro-rata-temporis* principle are specified, leaves significant leeway to Member States and/or national social partners. In any case, however, there is ample scope for judicial activism on the part of the ECJ which might in the end have to interpret the standards set by employers and trade unions.

4.4. Social partners and decision-making

In short, it appears that the low substantive standards agreed on were accepted by trade unions in exchange for a greater involvement of the social partners at all layers of the European multi-level polity. This may be considered a trading off of women's interests, as the overwhelming majority are part-timers, against

[33] *Idem.*, third paragraph.
[34] *Ibid.*
[35] *Idem.*, Clause 4.
[36] *Idem.*, Clause 4 (1).
[37] *Idem.*, Clause 4 (2).

organisational self-interests of the ETUC and its member organisations, national and European.[38]

The multi-faceted role for the national social partners is foreseen in the Agreement and in particular in the specification of details during the implementation and in the periodical review of certain aspects. Member States and/or national social partners may for "objective reasons, exclude wholly or partly from the terms of this agreement part-time workers who work on a casual basis".[39] Also, when "justified by objective reasons... Member States... and/or national social partners may, where appropriate, make access to particular conditions of employment subject to a period of service, time worked or earnings qualification".[40]

Both variants of exclusion form the scope of the principle of *non-discrimination* should according to the agreement be reviewed periodically so as Member States and/or national social partners establish that the objective reasons for making them remain valid in every case.[41]

4.5. Evaluation of the contents of the Agreement

Concerning its contents, the parental leave agreement allowed for different provisions only "as long as the minimum requirements provided for in the

[38] At the beginning of the 1990s, 28 per cent of all women and 4 per cent of all men in employment in the Union worked part-time: European Commission (2000) *Draft Joint Employment Report 2000 - Part I: The European Union, Part II: The Member States*, DG of Employment and Social Affairs, Manuscript, Luxembourg: Office for Official Publications of the European Communities, 17; also in COM (2000) 551 final, VOLUME I, 6 September 2000.
[39] Council Directive 97/81/EC *loc. cit. supra* note 26, Clause 2 (2).
[40] *Idem.*, Clause 4 (4).
[41] *Idem.*, Clause 5 (1) (a) and (b).

present agreement are complied with".[42] The part-time deal, on the other hand, departs from this approach into a somewhat unclear direction. Again, the implementation of the agreement "shall not constitute valid grounds to reduce the general level of protection afforded to workers in the field of this agreement".[43] Nevertheless, this does not prejudice the right of Member States and/or national social partners, analysed above "to develop *different* legislative, regulatory or contractual provisions, in the light of the changing circumstances".[44] Additionally, it does not prejudice the application of opportunities of part-time work "as long as the principle of non-discrimination is complied with".[45] Because the principle of non-discrimination is subject to conditions which are not specified in the agreement itself *Euro-level activity* and *devolution* have an even more far-reaching quality in the second collective agreement.[46]

4.6. Concluding remarks

The social partners were mindful of the importance of their agreement. Not only from the point of view of improving the image of a form of employment increasingly seen as a solution to the employment crisis, but also with regard to the political standing of the European social partners and the decision-making process under the SPA. It is important to consider the timing of the accord, coming, as it did, on the eve of the conclusion of the IGC of June 1997, and the debate surrounding the inclusion of the Social Policy Protocol in

[42] Council Directive 96/34/EC *loc. cit. supra* note 11, Clause 4 (2).
[43] Council Directive 97/81/EC *loc. cit. supra* note 26, Clause 6 (2).
[44] *Ibid.*
[45] *Ibid.*
[46] Falkner, G. *op. cit. supra* note 23, p. 145.

the Amsterdam Treaty. The events surrounding the *Renault Vilvoorde* affair[47] (April 1997) which called for a constructive response from the social partners can also be seen to have been of some importance, as the agreement could be regarded as improving the somewhat dented image of the European social dimension. All these factors were certainly at the back of the minds of the negotiators keen to impress on the Commission and the Council of Ministers the ability of the social partners to reach a useful compromise. Given all the failed attempts to legislate for equal rights for part-time workers for over a decade, it appears that the flexible nature of the social partners' agreement was an unavoidable option.

The analysis that proceeded reveals that, in fact, the part-time agreement consolidates the contractual relations at the EU level by being less heavy-handed. It merely outlines the procedures to be followed (*procedural*) rather than the substance (*substantial*) characterised by specific standards or unconditional rights.[48] Thus it leaves the Member States and/or national social partners to fill in the technical detail via implementing national rules. Additionally, a new feature as opposed to the parental leave case, is that a review process takes place not only at the EU level but also at the lower levels where barriers to part-time work as well as the presence of objective reasons for exemptions have to be reviewed periodically.[49] Once again, this implies

[47] In the wake of Renault's announcement of the closure of its plant at Vilvoorde, the EU was blamed for a lack of specific strategy for the European car industry. Padraig Flynn, the Commissioner responsible for Industrial Relations, called Member State governments and EU Institutions, in co-operation with social partners, to take tough measures in order to protect the interests of employees in the event of large-scale redundancies, business transfers and relocation. Mass demonstrations demanding EU action to defend jobs took place in Brussels whereas at the same time Belgian and French Courts condemned the actions of Renault.
[48] Falkner, G. *op. cit. supra* note 23, p. 143.
[49] *Ibid.*

that the proper implementation at the Euro-level and further improvement of the terms of the agreement at the national level is, to a large extent, contingent on the amount of effort that the trade unions and employers are committed to deploy to that effect.

5. THE THIRD CASE: THE FIXED-TERM WORK AGREEMENT

5.1. Introduction

Bearing in mind the social partners' intention to negotiate on other forms of non-standard work, it came as no surprise that two years later they approved the terms of another agreement on fixed-term work.[50]

5.2. The scope of the Agreement

This framework agreement also implemented through a Council Directive[51] under Article 139(2) EC had a twofold aim. The first was to improve the quality of fixed-term work by ensuring the application of the principle of *non-discrimination* between fixed-term and permanent workers.[52] This is particularly important if we consider the recent dispute between *BECTU* and the *Secretary of State for Trade and Industry* relating to the entitlement to annual paid leave.[53] There, the ECJ by combining funding, employment, health safety and working time issues considered that fixed-term and permanent workers should be treated equally so long as the right to annual

[50] See generally Weiss, M. (1999) "The Framework Agreement on Fixed-term Work: A German Point of View", 15 *International Journal of Comparative Labour Law and Industrial Relations* 2, 97-103.
[51] Council Directive 99/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP - Annex: Framework agreement on fixed-term work [OJ 1999, No. L 175/43].
[52] *Idem.*, Clause 4.
[53] Case C-173/99 *Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU) v. Secretary of State for Trade and Industry* [2001] ECR I - 4881.

paid leave is a fundamental social right and therefore should be granted to every worker.[54]

The second aim, also apparent in the above case,[55] was to establish minimum requirements that can prevent abuse arising from the use through renewals of successive fixed-term employment contracts or relationships.[56] This is particularly important in respect of the reasons for which employers prefer fixed-term contracts to open-ended ones: a) short-term funding, b) desire for flexibility over stuffing levels and c) advantages of control; it is easier not to replace them than to discipline or dismiss staff or make them redundant. Nevertheless, there should be a sort of balance between the employer's flexibility to conclude definite or indefinite work contracts and the worker's security as part of the modernisation of working conditions within the European Employment Strategy ("EES").

5.3. General evaluation

Like the part-time agreement, the fixed-term agreement is also characterised by *process law* rather than by unconditional rights. It seems again that both sides of industry UNICE/CEEP welcome that. As a consequence of their agreement, social partners will be involved in relevant policy-making processes on all layers of the EU multi-level governance. The features of exclusion of social security rights, exemptions on the scope of the principle of *non-discrimination* and a periodic review of the objective grounds that can justify exemptions are also applicable here. The only new element is in respect

[54] *Idem.*, paras. 43, 47-48, 51-53.
[55] *Idem.*, paras. 63-64.
[56] Council Directive 99/70 *loc. cit. supra* note 51, Clause 1.

of information and consultation upon industrial issues. Member States and/or national social partners shall make sure that fixed-term workers are informed and consulted by their employers in accordance with national law, collective agreements or practice.[57]

5.4. The results

The assessment of the above agreements acknowledges that had it not been for the collective bargaining of the EU cross-sectoral social partners, the Union would not have successfully moved towards the protection of workers in general, as in the case of parental leave, and part-time and fixed-term workers in particular.[58] Whereas the Commission and the Council of Ministers failed to provide workers with equal opportunities and balance employers' and employees' interests, the social partners succeeded.

By concluding framework agreements, the social partners firstly offered a pragmatic solution to overcoming the European social policy "regulatory dilemma",[59] that is to regulate in the name of integration while respecting striking labour and social diversities within the Union concerning historical, legal, institutional and ideological traditions.

Secondly, they responded adequately to the challenge that Europe is constantly facing, (for example, the attempt to link social justice with growth), and thus,

[57] *Idem.*, Clause 7.
[58] At the time of writing, June 2001, there are on-going discussions on temporary agency work, lifelong learning, skills' development and the operation for an Observatory on change.
[59] Lo Faro, A. (ed.) (2000) *Regulating Social Europe: Reality and Myth of Collective Bargaining in the EC Legal Order*, Oxford: Hart, 21. *Inter alia* see Dølvik, J. (ed.) (1997) *Redrawing Boundaries of Solidarity? ETUC, Social Dialogue and the Europeanisation of Trade Unions in the 1990s*, Oslo: Arena; Fafo, 112-115, 453.

fulfilled the Commission's high expectations for further political and economic integration.

6. SOCIAL PARTNERS AND TITLE VIII

6.1. Introduction

The fundamental role of the social partners in formulating public policies is increasingly visible at national level too. Collective bargaining has continued in Member States on the issues of employment creation and adapting the operational rules of the labour market under the auspices of the EES.

The processes for involving social partner concertation are further enhanced in the spirit of "a new open method of co-ordination"[60] ("OCM") and pluralism. The open method of co-ordination, as outlined by the Portuguese Presidency, extended by the Spring Stockholm European Council (23-24 March 2001) and espoused by the White Paper[61] is composed of four elements:

1) Fixed guidelines set for the Union with short, medium, and long term goals;

2) Quantitative and qualitative indicators and benchmarks;

3) European guidelines translated into national and regional policies and targets; and

[60] Lisbon European Council, Presidency Conclusions (23-24 March 2000), para. 7: < URL http://europa.eu.int/council/off/conclu/index.htm >.
[61] White Paper *loc. cit. supra* note 4, p. 21.

4) Periodic monitoring, evaluation, and peer review, organised as a mutual learning process.[62]

OCM is considered to be a pragmatic effort by the EU to find a "Third Way"[63] between the traditionally conflicting imperatives of economic efficiency and equality, and between the extremes of European harmonisation and national autonomy. Tipping that balance is what Sabel calls "experimentalism",[64] and which in turn transforms the EU into a new form of post-regulatory governance. In such a context thus, there is a preference for procedures or standards with wide allowances for variation rather than detailed rules, for intensive consultation to set and modify standards, for standards that are wholly or partly voluntary, and for adjustment over time in response to feedback (Council Recommendations).[65]

Under this new form of governance, social partners are invited to be involved at all levels in order to tackle the explicit interdependencies between social protection, labour law, employment and broader economic policies while promoting a high level of employment.

[62] ECSA Review Fora (2000) "The Lisbon Council and the Future of European Economic Governance, 13 *ECSA Review* 3, p. 3 < URL http://ecsa.org/lisbonforum.html >.
[63] See generally Kenner, J. (1999) "The EC Employment Title and the 'Third Way': Making Soft Law Work?", 15 *The International Journal of Comparative Labour Law and Industrial Relations* 1, 33-60.
[64] Sabel, C. and Gerstenberg, O. "Democratic Experimentalism and its Constitution", Paper presented to the Academy of European Law - Eleventh Session: *The Law of the European Union*, European University Institute: Florence, Italy, 3-14 July 2000, p. 2 (*mimeo*).
[65] See *supra* note 62, p. 7.

6.2. The Employment Chapter

The war on unemployment as part of a medium- and long-term vision of European society is incorporated in the Employment Title, Articles 125-130 EC. Its principal themes are those of consensus, in the form of non-binding soft laws, shared responsibility and a decentralising conception of subsidiarity in which the Community enables and the Member States deliver. For instance, Article 126(2) places responsibility on the Member States, who "shall regard promoting employment as a matter of common concern".[66] In addition, the Community's task, under Article 127(1), shall be to "contribute to a high level of employment" by supporting and, if necessary, *complementing action* at national level. This shared ownership of the strategy is especially explicit in Article 125 EC whereby: "Member States and the Community shall... work towards developing a co-ordinated strategy for employment and particularly for promoting a skilled, trained and adaptable workforce and labour markets responsive to economic change...".

The Employment Title also attempts to reconcile potentially conflicting policy themes. It addresses widely shared anxieties about the imbalance of priorities between economic matters, like the EMU convergence criteria,[67] and the pursuit of social and employment objectives. It is in this perspective therefore that Article 126(1) requires that employment and labour market policies shall be consistent with the broad Economic Guidelines adopted by the Community on an annual basis.

[66] However, the implementation and scrutiny of the EES based on Council Recommendations for 2000 reveals a less than strict adherence to the wording of Art. 126(2) EC.
[67] Price stability, government finances, exchange rates and long-term interest rates: Art. 121 EC.

However, the core provisions are to be found in Articles 128(1)-(5) (known as the "Luxembourg process"[68]) where it is clearly stated that the Economic Guidelines will be supplemented by annual Employment Guidelines to be implemented by Member States.[69] Employment conditions in the Member States are to be considered by the European Council on the basis of an annual Joint Report from the Commission and the Council.[70] Even though the Guidelines are formulated by way of a proposal from the Commission in the customary way, the proposal itself is based on conclusions reached by the European Council.[71] The role of the EP is merely consultative. Once the Guidelines have been issued, concerning four pillars, employability, entrepreneurship, adaptability and equal opportunities between men and women, each State must produce a National (Employment) Action Plan ("NEAP or NAP"), setting out the principal measures taken to comply with them.[72] Any examination of these plans and any other evidence is a matter for the Council and not for the Commission. On the correct implementation of these plans there is an interface with the Council and the Employment Committee[73] whose both opinions must be taken into account. At this stage, there is no input from the EP. While the Council may move to qualified majority voting on a proposal from the Commission they are only empowered

[68] The Employment Title was brought into practical effect at the Extraordinary European Council on Employment in Luxembourg (20 - 21 November 1997), some eighteen months in advance of Amsterdam Treaty ratification. It actually allowed early implementation in 1998 of the provisions of the future Article 128 EC on co-ordination of Member States' employment policies. Process is a form of governance which signifies the importance of the inter-governmental decision-making in shaping public policies and outlines legitimacy.
[69] Paras. 3, 13 of the Luxembourg Presidency Conclusions:
< URL http://europa.eu.int/comm/employment_social/elm/summit/en/papers/conclu.htm >.
[70] Art. 128(1) EC.
[71] Art. 128(2) EC.
[72] Art. 128(3) EC.
[73] The Standing Committee on Employment was set up in 1970. This is a tripartite consultative body consisting of the Council, the Commission and representatives of the social partners. It underwent a major reform in 1999 in order to improve its functioning.

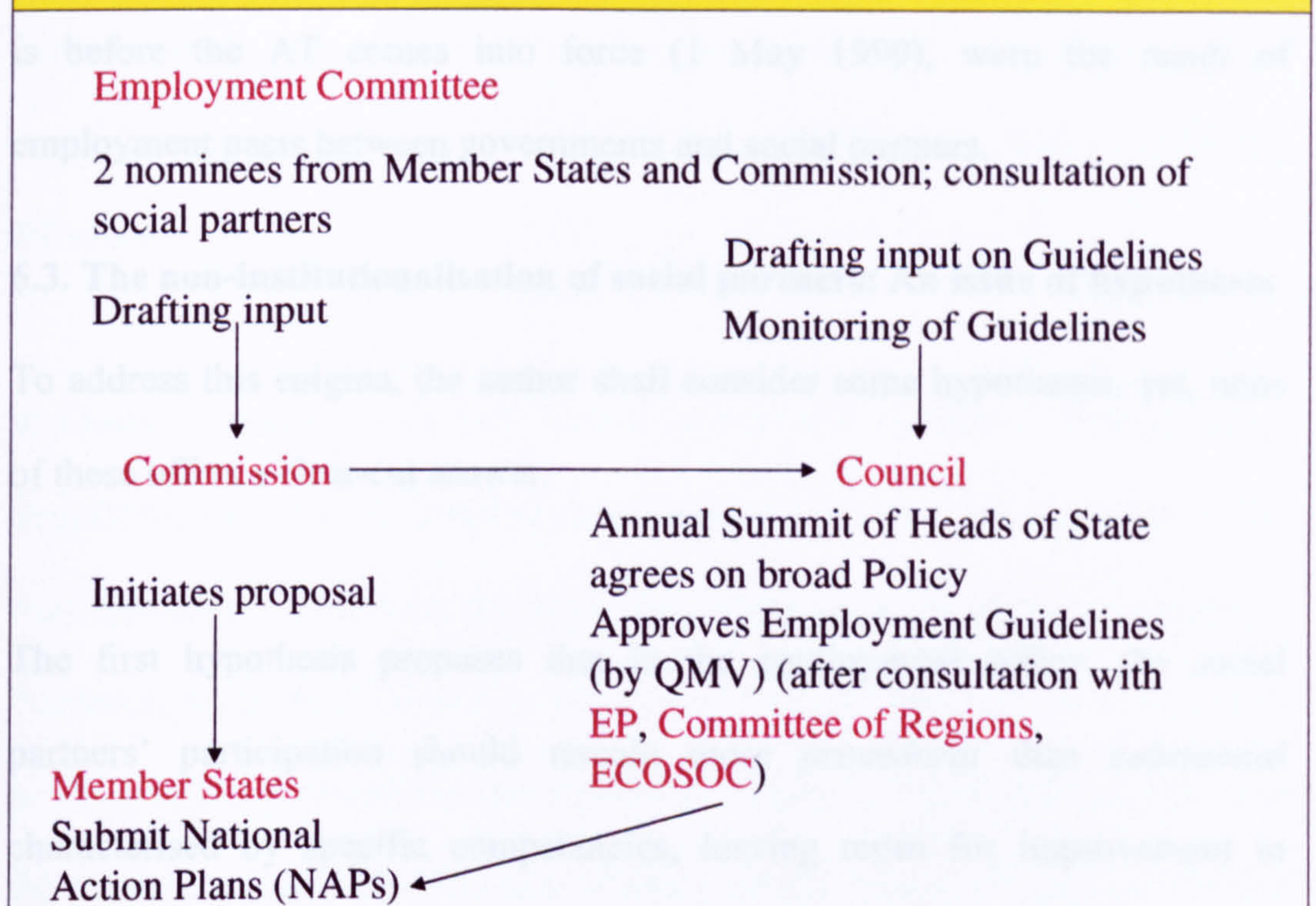
to adopt non-binding recommendations.[74] The cycle is completed by the next Joint Report to the European Council on the implementation of the Guidelines and the employment situation in the Community.[75] By the end of 2000, the Luxembourg Process had completed three full cycles.

With regard to the institutional arrangements for the cross-sectoral European social partners' participation in the EES, there is no explicit reference as in the Social Policy provisions. Social partners have 'a voice' only under the 'umbrella' of the Standing Committee on Employment (see diagram 5.2 below).[76]

The Committee must consult management and labour "where appropriate"[77] while having a drafting input, including monitoring, on Employment Guidelines.

[74] Art. 128(4) EC.
[75] Art. 128(5) EC.
[76] Yet, it is highly expected that their role will become more formal in due course considering that the Commission already calls for the institutionalisation of the OCM as a part of a general process to promote 'civic governance' in the EU: White Paper *loc. cit. supra* note 4, pp. 21-22.
[77] Art. 130 EC.

5.2. Diagram of Institutional Arrangements for the European Employment Strategy (EES)



Source: adapted and updated from Bogai (1998, Arbeitsmarktpolitik in der Europäischen Union, *WSI Mitteilungen,* 12, p. 852 as quoted in: Milner, S "Employment Policies in the European Union and the European Social Model: Towards a New Orthodoxy?", Paper Presented at *The UACES 30th Anniversary Conference and 5th Research Conference,* CEU: Budapest, Hungary, 6-8 April 2000, pp. 6-7 (*mimeo*).

The social partners might have welcomed the Council Decision 1999/207/EC[78] that the Standing Committee on Employment should be a forum for continuous

[78] Council Decision 1999/207/EC of 9 March 1999 reforming the Standing Committee on Employment and repealing Decision 70/352/EEC [OJ 1999, No. L 72/33].

dialogue and consultation between the Council, Commission and themselves on the co-ordinated Employment Strategy.[79] However, it is still *bizarre* why they never became 'Institutions', as explicitly mentioned in the Amsterdam Treaty ("AT"), particularly if one considers that most of the 1998 NAPs, that is before the AT comes into force (1 May 1999), were the result of employment pacts between governments and social partners.

6.3. The non-institutionalisation of social partners: An issue of hypotheses

To address this enigma, the author shall consider some hypotheses, yet, none of these offers a clear-cut answer.

The first hypothesis proposes that in the employment policy, the social partners' participation should remain more *procedural* than *substantial* characterised by specific competencies, leaving room for improvement in establishing effective partnerships in support of national strategies.[80]

Although this hypothesis appears to be convincing at first sight, it can be easily observed that after the Lisbon Summit there is a tendency from the Community Institutions to frame the social partners' competencies. Asked to bargain in modernising work organisation and develop policies particularly in improving employability, encouraging adaptability of businesses and their

[79] *Idem.*, para. 8.
[80] European Commission (2000) *Employment Policies in the EU and in the Member States: Joint Report 1999*, DG of Employment of Social Affairs, Manuscript, Luxembourg: Office for Official Publications of the European Communities, 13.

employees and strengthening equal opportunities between men and women are some examples of this trend.[81]

In relation to the first one, the second type of hypothesis advocates that social partners should be used only as "regulatory techniques"[82] or "instruments"[83] of a regulatory capability in order to bypass the Union's above regulatory dilemma.

In essence, there are two facts which support this statement. Firstly, in the Standing Committee on Employment, the social partners are consulted where it is appropriate. However, the term of appropriateness is no further defined. Secondly, when the Community regulators (Commission and Council) fail to proceed with legislation, the social partners take over. Recall, for example, that the Council adopted the European Works Council Directive[84] and the Burden of Proof Directive[85] following a failure of the social partners to reach an agreement. Vice versa, they used the social partners when Commission proposals on parental leave and part-time work fell flat. On the other hand, the

[81] Council Decision of 19 January 2001 on *Guidelines for Member States' employment policies for the year 2001* (COM 2001/63/EC) [OJ 2001, No. L 22/18].
[82] Lo Faro, A. *op. cit. supra* note 59, pp. 146-154.
[83] Keller, B. and Sörries, B. (1998) "The Sectoral Social Dialogue and European Social Policy: More Fantasy, Fewer Facts", 4 *European Journal of Industrial Relations* 3, p. 331 at 331.
[84] Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees [OJ 1994, No. L 254/64]. At the time of writing this Thesis, June 2001, there are on-going discussions for its revision.
[85] Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex [OJ 1997, No. L 14/6 as later amended by Council Directive 98/52/EC of 13 July 1998 on the extension of Directive 97/80/EC on the burden of proof in cases of discrimination based on sex in the United Kingdom of Great Britain and Northern Ireland [OJ 1998, No L. 205/66].

Council has legislated on sexual harassment[86] and is about to legislate on national-level information and consultation several years after the collapse of negotiations between the social partners on these issues.[87]

Nevertheless, what could possibly prompt the institutionalisation of the social partners in social policy and not in employment, even though collective bargaining functions as a "a regulatory resource"[88] in both ways, is the existence of different needs. In social policy, the need is to make sure that legislative harmonisation will take place 'at all costs'. That is why collective bargaining has usefully facilitated progress on occasions where agreement in the Council was doubtful. In employment policy, however, the need is just to build the conditions for full employment through a balanced and mutually reinforcing policy mix of economic reforms, labour law and social cohesion.[89]

6.4. Social partners and National Action Plans: An overview (1998-2001)

6.4.1. Introduction

Despite the non-institutionalised participation of management and labour in the Employment legislative activities of the EU, the Commission[90] as well as

[86] Commission proposal for amending Directive 76/207/EC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [OJ 1976, No. L 39/40], COM (2000) 334 final, 7 June 2000; Amended proposal for a Directive of the European Parliament and of the Council amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, COM (2001) 321 final, 7 June 2001.
[87] Proposal for a Council Directive establishing a general framework for informing and consulting employees in the European Community, COM (1998) 612, 17 November 1998.
[88] Lo Faro, A. *op. cit. supra* note 59, p.132.
[89] See generally Szyszczak, E. (2001) "The New Paradigm for Social Policy: A Virtuous Circle?", 38 *Common Market Law Review*, 1125-1170.
[90] COM (1996) 448 final *loc. cit. supra* note 6, para. 4; COM (1998) 322 *loc. cit. supra* note 7, pp. 2-3, 12; *Inter alia* see *Commission Communication to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions - Acting*

the Council[91] have been keen to get the social partners involved in deliberating and implementing the Employment Guidelines.[92]

6.4.2. Improving Employability (Guidelines 1-8)

6.4.2.1. Training Policy

Under the employability pillar, one of the most important fields of intervention is training policy. Social partners participate in the establishment of information systems on labour market and companies' needs in Sweden, Finland and Portugal, and the funding of a national vocational training programme in Greece. In Germany, they are involved in ensuring easy access for training for older workers. In Luxembourg, they play an important role in the continuing training of workers or enterprise-based training courses for young people or adults and have adopted a framework law on continuing vocational training. Finally, in France they have been consulted on an individual right to training which can be transferred from one business to

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Locally for Employment: A Local Dimension for the European Employment Strategy, COM (2000) 196 final, 7 April 2000, para. 3.1.5.; Commission Communication on *Modernising the organisation of work - A positive approach to change*, COM (1998) 592 final, 9 November 1998, paras. 5-6.

[91] Florence European Council (21-22 June 1996), paras. 1-3; Extraordinary European Council on Employment (Luxembourg, 20-21 November 1997), paras. 7, 18, 22; Cardiff European Council (15-16 June 1998), para. 8;Vienna European Council (11-12 December 1998), para. 29; Cologne European Council (3-4 June 1999), paras. 8,11; Helsinki European Council (10-11 December 1999), para. 39; Extraordinary European Council (Lisbon, 23-24 March 2000), para. 28.

[92] Main sources:
< URL http://www.europa.eu.int/comm/employment_social/empl&esf/index_en.htm >
< http://europa.eu.int/comm/employment_social/empl&esf/ees_en.htm >
NAP on Employment 2001:
< http://europa.eu.int/comm/employment_social/news/2001/may/naps2001_en.html >
2000 NEAP < http://europa.eu.int/comm/employment_social/empl&esf/naps00/naps_en.htm >
1999 NEAP < http://europa.eu.int/comm/employment_social/empl&esf/naps99/naps_en.htm >
1998 NEAP < http://europa.eu.int/comm/employment_social/empl&esf/naps/naps_en.htm >
Commission Communication, *From Guidelines to Action: The National Action Plans for Employment* COM (1998) 316:
< http://europa.eu.int/comm/employment_social/empl&esf/naps/commen.pdf >
Backgound Report (1998) Guidelines to Action: The National Action Plans for Employment < http://europa.eu.int/comm/employment_social/empl&esf/naps/reporten.pdf >.

another and from one sector of activity to another and which is guaranteed collectively, for the benefit of all employees and job seekers.

6.4.2.2. Lifelong learning

In conjunction with the social partners again, national governments undertake to explore new ways for lifelong learning, as in Austria, France, Denmark and Portugal, or create more positive conditions for lifelong training, Spain. The Belgian National Framework Agreement 1999-2000 is an example of comprehensive commitments by the social partners on a wide range of issues including lifelong learning. In Netherlands, the social partners have a first responsibility for lifelong learning through sector training funds and they are also directly involved in solving the sector bottlenecks that arise due to skills' shortages. In Ireland, they contribute to the modernisation of apprenticeship systems whereas in the UK social partners have an important role in promoting workplace learning through initiatives like the "Union Learning Fund" and the "Partnership Fund" in order to tackle basic skill levels and helping address low labour productivity.

6.4.2.3. Integration of disadvantaged groups in the labour market (Guideline 9)

Among the policies mentioned in NAPs, those which can most effectively address the problem of integration of ethnic minorities are: awareness-raising of employers, a more consistent involvement of the social partners, and an increased role of the organisations representing the ethnic minorities, as well as those dealing with anti-discrimination. Mainstreaming, that is, taking into account the needs of the ethnic minorities within the framework of the

measures and activities planned for other pillars, is considered by Ireland, Sweden, Finland, the UK and Netherlands. Particularly, in the UK, a joint action was taken at Ford by the managers to fight racism within the company. Elsewhere, initiatives to integrate minorities are taking place in Denmark. The aim of many collective agreements is to put ethnic equality on the same footing as gender equality. In a draft proposal, the unions said that they would train and educate their shop stewards to help them absorb people from ethnic minorities into the labour market.

6.4.3. Developing Entrepreneurship and Job Creation

6.4.3.1. Regional policies (Guideline 12)

The involvement of the social partners in regional policies varies in the different Member States. In Italy and Spain, for instance, the social partners continue to work with regional Governments through specific pacts. The Swedish regional growth agreements which aim at better aligning the overall policy activities with needs of and conditions for business at regional level is another example of these broad partnerships. Issues, related to knowledge growth and the promotion of lifelong learning, have been important ingredients of the agreements.

6.4.3.2. Tele-sector (Guideline 13)

Another focus for the attention of governments and the social partners has been tele-working and distance work. The liberalisation of the tele-sector in Denmark and Sweden has led to huge investments in the development of communication services which are used in connection with IT-based services and electronic trade. In both those countries, governments and social partners

have taken a number of initiatives in order to create a solid foundation for future employment based on the use of Information Technology. Some of these include the drawing up of action plans on how to integrate IT in concrete education programmes, the revision of the legislation on distance work in Sweden and the Danish government's practice of abolishing tax on home-based tele-work stations paid by the employer.

6.4.4. Strengthening Equal Opportunities Policies for Men and Women

6.4.4.1. Combating gender discrimination (Guideline 20)

Furthermore, to desegregate the labour market in Finland, the NAP of 2000 introduces a major initiative "Equal Labour Markets", where the social partners play a key role. In Ireland too, partnerships aim at social inclusion and equality dimensions.

6.4.4.2. Reconciling family life and career (Guideline 21)

Additionally, in Luxembourg the social partners play an important role in improving the position of women on the Luxembourg labour market in terms of parental leave and childcare.

6.5. Employment Guidelines 2001

Several of the Employment Guidelines for 2001 recognise that the social partners are critical players to their implementation. This is particularly so in relation to Guidelines under the Adaptability and Equal Opportunities Pillars relating to working time and leave arrangements. Guidelines 13 and 14, on the modernisation of work for example, invite the social partners to negotiate and implement at all appropriate levels agreements to modernise work and allow

work to adapt to structural change. Flexible contracts, with management security, are encouraged alongside new forms of work such as part-time work and career breaks. These are some of the new areas where the *quality* of jobs should be enhanced. In the same context, the social partners are invited to co-operate with the Member States to improve the regulatory framework by reducing barriers to employment and modernised work organisation and by applying health and safety legislation while modernising labour law with a balanced approach to flexibility and security.[93]

The social partners are nonetheless also critical of Guideline 6 with regard to lifelong learning and Guideline 10, job creation at the local level and in the social economy. Their role is additionally recognised in two new areas. First, Guideline 6, on active policies to develop job matching and combat labour shortages, *invites* the social partners, where appropriate, to work with the Member States to create jobs and to prevent bottlenecks in order to improve the functioning of the labour market, including the promotion of mobility.[94] Secondly, Guideline 9 *allows* the Member States to involve the social partners in tackling undeclared work.[95]

Furthermore, in the Commission's proposal for the Employment Guidelines 2001, a new dimension to the role of the social partners is unveiled. The social partners

> "...are invited to *develop*, in accordance with their national

[93] Council Decision 2001 *loc. cit. supra* note 78, p. 24.
[94] *Idem.*, 22.
[95] *Idem.*, 23.

traditions and practices, their own process of implementing the guidelines for which they have the key responsibility, *identify* the issues upon which they will negotiate, and *report* regularly on progress as well as the impact of their actions on employment and labour market functioning. The Social Partners at European level are invited to define their own contribution and to monitor, encourage and support efforts undertaken at national level".[96]

The role of reporting is addressed in the Adaptability Pillar and in particular under Guideline 13 in 2001 which in essence gives full autonomy to the social partners as to its implementation.

The social partners are invited

"– within the context of the Luxembourg process, to report annually on which aspects of the modernisation of the organisation of work have been covered by the negotiations as well as the status of their implementation and impact on employment and labour market functioning".[97]

The task of reporting has two consequences upon the social partners. First, it creates a new dimension to the EES. In specific terms, it puts into motion a

[96] *Idem.*, Annex - The Employment Guidelines for 2001: Horizontal Objectives - Building Conditions for Full Employment in a Knowledge-based Society, Objective C, p. 20.
[97] *Ibid.*, (Guideline 13 in 2001).

process (reporting) within a process (full employment) - whereby the social partners are called upon to develop and report on actions that fall within their autonomous remit, based on the overall objectives defined by the Employment Guidelines.

Secondly, the Commission implicitly argues that a *synergy* between the national and European social partners is built up. Thus, at the national level the social partners can define the benchmarks and areas upon which best practices and systems are to be found and evaluated, and develop areas where new action in various forms, negotiations, partnerships, framework agreements, and territorial pacts, can be launched. At the EU level, the social partners can monitor and consolidate contributions from the national level social partners. Consistently, they are viewed as being in a position to give advice to the national level social partners with respect to their input into NAPs.

6.6. Why is the role of the social partners so important in the Employment policy?

To further assess the contribution of the social partners to the production of EU level decisions, the question which needs to be addressed is why the role of the social partners is so important in implementing the Employment Guidelines.

The answer is that the shaping and implementing of employment policies is a question of managing change. That is what the EU policy-makers (Commission and Council) are actually facing; the need to strike a balance between flexibility for enterprises and security for workers.

The cited examples can easily convince us that the social partners are best placed to strike that balance through consensus building and empowerment. The more they can do together in their bilateral social dialogue, through negotiations, agreements and joint initiatives, the better the outcome. That is what the third pillar, adaptability for Member States' employment policies for the year 2001, is about. It is an invitation to the social partners to take responsibility for the modernisation of the organisation of work, for lifelong learning, for the re-organisation of working time and many other workplace-related issues.

Under the new process, labelled the "open method of co-ordination", the social partners are also needed for the shaping of public policies, from the economic framework to tax and benefit systems and active labour market and social protection policies.

Whereas before the Lisbon Summit, the social partners were in practice lobbying the Heads of State during lunchtime breaks as non-institutionalised actors and thus participated in a rather informal way, under the new form of 'governance' the social partners are promoted as dynamic official legislators who can carry on a democratic process. The invitations to make reports, to develop benchmarks and indicators, to support statistical databases to measure progress in actions for which they are responsible and the Commission's Recommendations (2000) to the Member States which singled out the

insufficiency of commitments taken by the social partners, can be used to back up this assertion.[98]

7. DEFINING THE ROLE OF THE SOCIAL PARTNERS

7.1. Introduction

Even though under both procedures the use of the social partners enhances the quality of the EU decision-making in terms of an *input* legitimacy,[99] it is still regrettable that the social partners are regarded as only "regulatory techniques",[100] a term that equates them with *quasi* - not yet complete - *legislators*.

7.2. Social partners: Quasi-Legislators

Under Title VIII the social partners do not have real competence to regulate internally. As discussed above, by prescribing the necessary measures to be taken in order to improve employability and by instructing them to arrange partnerships on specific issues, the Council encroaches upon their autonomy to freely associate and consequently to regulate independently their own national labour markets. To tighten up this argument, the concept of 'co-operative subsidiarity' might be of some help.

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[98] European Commission, *Recommendation for a Council Recommendation on the Implementation of Member States' Employment Policies*, COM (2000) 549 final, 6 September 2000 < URL http://europa.eu.int/eur-lex/en/com/pdf/2000/com2000_0549en01.pdf >. See also Council Recommendation of 19 January 2001 on *The Implementation of Member States' Employment Policies* (COM 2001/64/EC) [OJ 2001, No. L 22/27]: < URL http://www.europa.eu.int/comm/employment_social/empl&esf/ees_en.htm >.

[99] See Chapter Four of this Thesis, Section 2.1. pp. 124-125.

[100] See *supra* note 82.

By the term 'co-operative subsidiarity', we mean the 'pooling' and 'mixing' of European (the European cross-sectoral social partners), national (Member States) and sub-national (the national social partners) competencies with Community competencies (Council). In an arrangement of co-operative subsidiarity, each level should operate in co-ordination with the other level and all levels should share in the responsibility for problem solving. This is implicitly affirmed in the new chapter of the EES for 2001 which identifies a number of key horizontal objectives and principles and states that "the achievement of these objectives requires simultaneous efforts by the Community and the Member States".[101] By applying, therefore, the principle of co-operative subsidiarity to the European employment policy it does not have to be decided whether the Community *or* the Member States and the social partners should act. They all act: yet, according to the Council's mandates concerning means and measures to be taken in order to achieve the employment objectives such as negotiations and conclusion of agreements on explicit issues.

Additionally, the social partners' capacity to regulate particularly in developing entrepreneurship, in job matching and encouraging adaptability hinges upon the Member States' capacities in view of their lack of efficiency, or resources, their underdeveloped social security schemes and other economic reasons.

[101] European Commission, *Proposal for a Council Decision on Guidelines for Member States' Employment Policies for the year 2001*, COM (2000) 548 final, 2000/0225 (CNS), 6 September 2000, p. 8 < http://130.104.105.148/Bede/EBED302000/com2000_0548en01.pdf >. See also *supra* note 81, p. 20.

At the same time, it hinges upon the Community's commands for job creation and its consistency with the economic guidelines set out to underpin EMU, for example in wage bargaining.[102] Both points which were highlighted at the Essen Summit (11-12 December 1994) and then reiterated at the Madrid European Summit (15-16 December 1995) were also adopted at a Social Dialogue Summit (21 October 1995). Thus it comes as no surprise to hear the social partners announcing that:

> "It is in particular important to ensure that the Economic and Monetary Union goes together with an active employment strategy and that the economic guidelines exercise and the Essen employment process should be seen as a whole".[103]

Furthermore, under Title XI, their capacity to regulate hinges upon the Community's commitment to legislate. As neither collective labour law, nor organisational will and capacity to develop voluntary European collective bargaining have been established, the central Social Dialogue is completely dependent on the Community's capacity and commitment to bring European social policy forward. In the absence of any will by the employers to engage in voluntary relations and in the absence of industrial rights to negotiate at the EU level, the fuel to the engine is the Community's legislative initiatives.[104] In

[102] European Commission (2000) *Industrial Relations in Europe*, Manuscript, Luxembourg: Office for Official Publications of the European Communities, 52-55.
[103] As quoted by Dølvik, J. "The ETUC and Development of Social Dialogue and European Negotiations after Maastricht, *Arena Working Paper* No. 97/2, p. 33: < URL http://www.arena.uio.no >.
[104] Yet, even in the absence of conflictual means at the EU level, the chance of reaching a framework agreement is highly dependent on the character of the legislative proposal, thus placing again the Commission and the Council in a decisive role.

this context, the idea that legislative abstention from concluding voluntary agreements must be regarded as a value in itself, that is, functional to the development of an autonomous collective bargaining, is negated.[105]

Another weakness of the current bargaining system is the genuine lack of autonomy on the part of the social partners.[106] From the outset, their agenda is curtailed by the existing limitations of Community competencies. The possibility offered in the EC Treaty for the social partners to make agreements on areas beyond the Community jurisdiction have limited value given the fact that they cannot be implemented by way of a Council decision (Article 139(2) EC). Yet, even in those areas within the competence of the Community, it could be submitted that the autonomy which underpins the agreements reached is later compromised by the intervention of the EU Institutions. That is, the Commission as a guarantor of the legality of the agreement's individual clauses, and the Council as the only body able to confer binding force on the agreements. Equally, the interventionist approach of the Commission, itself, might reflect latent concerns about the strength and representativeness of the European social partners. More autonomy could increase their importance and consequently could lead to their institutional growth. These matters are discussed in the next section.

[105] Lo Faro, A. *op. cit. supra* note 59, p. 94.
[106] *Idem.*, p. 106; Bell, M. (2001) "Book Review: A. Lo Faro, Regulating Social Europe: Reality and Myth of Collective Bargaining, Oxford: Hart", (*mimeo*): Review Article to be published in the forthcoming issue of 2001 MJCEL.

8. SOCIAL PARTNERS AND PROBLEMS OF LEGITIMACY

8.1. THE ISSUE OF REPRESENTATIVITY

8.1.1. Introduction

The incorporation of the SPA into the Treaties has been a great step towards a full recognition of the crucial role to be played by the social partners in shaping European Social Policy. Nevertheless, it should not be underestimated that their participation raises important questions of democratic legitimacy in respect of representativeness.

8.1.2. The plea for substantive legitimacy

Even though in Community law there exists no explicit provision requiring that the management and labour organisations participation in the legislative process under Articles 138-139 should be representative, this requirement can however be distilled from a general demand for "substantive legitimacy".[107] This is a necessary supplement to the notion of democratic legitimation which should be attached to the exercise of State power. It requires that State measures capture the 'actual' will of the people in the sense that citizens recognise their own interests within the legislative measures. In fact, the degree of attention which decision-makers pay to diverse opinions is a yardstick against which individuals may measure the extent to which their will is represented in the final decision.

Turning the argument to the EU level, the Commission partly fulfils the requirement of substantive legitimacy. On the one hand, it might consult a

[107] Britz, G. and Schmidt, M. (2000) "The Institutionalised Participation of Management and Labour in the Legislative Activities of the European Community: A Challenge to the Principle of Democracy under Community Law", 6 *European Law Journal* 1, p. 45 at 66.

number of European workers and employers organisations on any new social policy proposal, including a whole range of cross-industry advisory committees, sectoral level joint committees, informal working parties at sectoral level or inter-professional level and the like. On the other hand, however, it clearly prefers collective negotiations that lead to final agreements to be conducted by a small but workable group of Euro-associations only.

8.1.3. Representative organisations and negotiations

In its 1993 Communication,[108] the Commission published the criteria[109] for becoming a social dialogue partner. It selected a number of organisations, which fulfilled these criteria. On the workers side, for instance the ETUC ("European Trade Union Confederation"), CEC ("Confédération Européenne des Cadres") and Eurocadres. On the employers side, the UNICE ("Union of Industrial and Employers' Confederations of Europe") and CEEP ("European Centre of Public Enterprises"), UEAPME/EUROPMI ("European Association of Craft, Small and Medium – Sized Enterprises") for small and medium size enterprises (SMEs), EUROCOMMERCE (for SMEs), and EUROCHAMBRES. The list which is under constant review developed gradually and now consists of about 44 organisations.[110]

[108] COM (1993) 600 final *loc. cit. supra* note 5, para. 24.
[109] The criteria are three. 1) Social dialogue partners must be cross-industry or relate to specific sectors or categories and be organised at European level. 2) They must consist of organisations which are themselves an integral and recognised part of Member State social partners structures and with the capacity to negotiate agreements, and which are representative of all Member States, as far as possible. 3) They must have adequate structures to ensure their effective participation in the consultative process.
[110] COM (1998) 322 *loc. cit. supra* note 9, Annex I.

Even though these parties have been consulted on every proposal, so far, they have not played a part in the actual negotiation procedures. So far, only UNICE, CEEP and ETUC have participated in the negotiations on the agreements on parental leave, part-time and fixed-term work, including the failed attempt to conclude an agreement on the European Works Council. For its part, the Commission has maintained that it cannot select the negotiators and leaves it to the good will and co-operation of the social partners to decide.[111] That was the central point of *UEAPME's* challenge of the parental leave Directive. *UEAPME's* complaint was that although it fulfilled the conditions for becoming a partner in the negotiations, it had been systematically disregarded at all stages, even though it did participate in the earlier stage of consultations. Thus, its members did not feel represented by the signatory parties, although they were bound by the agreement.

8.1.4. The *UEAPME* challenge

To express the disappointment for exclusion in the negotiating procedures, *UEAPME* decided to get legal redress before the Court of First Instance ("CFI").[112] Although the main issue at stake was that of representativity,[113] from a legal technical point of view *UEAPME* had no choice but to ask the Court to test the Directive against the EC Treaty. On the basis of [Article 173

[111] COM (1996) 448 final *loc. cit. supra* note 8, para. 70; COM (1998) 322 *loc. cit. supra* note 9, p. 12.
[112] Case T-135/96 *European Association of Craft, Small and Medium-Sized Enterprises v. Council* [1998] ECR II - 2335.
[113] *Idem.*, para. 58. In relation to representativity, see Opinion of Advocate General Jacobs delivered on 28 January 1999, Case C-67/96 *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751, para. 73; *Inter alia* note Cases C-382/92 *Commission v. United Kingdom* [1994] ECR I - 2435, paras. 29-30, and C-383/92 *Commission v. United Kingdom* [1994] ECR I - 2479, paras. 26-27.

EC] it submitted that clause 2(3)(f) of the Council Directive fails to satisfy the requirements of Article 137(2) EC. First, because medium-sized undertakings are not mentioned. Second, because an obligation to "avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-size undertakings" had become a possibility. Based on these grounds, *UEAPME* requested the CFI either to annul the Directive, or, alternatively, to annul it solely with respect to its application to the SMEs referred in the relevant provision of the SPA. The organisation pleaded breaches of the principles of equality, subsidiarity and proportionality, as well as an infringement of the principle of *patere legem quam ipse fecisti* ("to accept the law which one by himself/herself has made") in that the Commission had recognised *UEAPME* as a representative organisation. No matter how well prepared the arguments were, *UEAPME* lost the case. The Court dismissed the application for annulment as inadmissible since [Article 173(4) EC] in its strict wording did not empower claimants like the *UEAPME* to file such an application.[114]

8.1.5. The lack of *locus standi* in the context of representativity

Although the social partners are elevated to the role of *political and institutional actors*[115] in the EU decision-making process, their powers have not been extended by a parallel extension of the rules governing their right of action under Article 230 EC. Yet, since the EU is claimed to be based on the rule of law[116] as emphatically stated in Chapter Six, it should include a general

[114] Similar dismissal of application because of inadmissibility was also judged in another Court action provoked in the mid-1970s. Note Case C-66/76 *CFDT v. Council* [1977] ECR 305.
[115] Szyszczak, E. (2000) *EC Labour Law*, London: Longman, 3.
[116] Stated by the ECJ in Case C-294/83 *Parti Ecologiste 'Les Verts' v. European Parliament* [1986] ECR 1339, para. 23.

principle according to which any person or Institution holding a right under Community law must also be capable to protect it by his own right of action and instituted in his own name.[117]

In the *UEAPME* case, the Court must have been uneasy with the situation of inadmissibility or lack of *locus standi*, given the offered considerations in the judgment.[118] It must have felt that a Council Directive based on a social agreement with an alleged insufficiently representative basis, should be at least open to a legal attack by the social partners concerned. Yet, it decided otherwise as it deemed that it is not the Commission who actually chooses its negotiators.[119]

The issue of inadmissibility is not new going back to a case initiated by the EP.[120] Until 1992, the EP was also deprived of the right to bring an action for annulment of a Council decision under the relevant Article. However, in a landmark judgment of the ECJ, it recognised the EP's *locus standi.* It thus stated that:

> "An action for annulment brought by the Parliament against an act of the Council or the Commission is admissible provided that the action seeks only to safeguard its prerogatives and it is founded only on submissions alleging their infringement".[121]

[117] Note Case C-70/88 *European Parliament v. Council* [1990] ECR I - 2041, paras. 7, 23, 25-26.
[118] T-135/96 *loc. cit. supra* note 112, para. 62 et seq.
[119] *Idem.*, paras. 75-79.
[120] See *supra* note 117.
[121] *Idem.*, para. 27.

This remarkable decision to protect the institutional balance was later codified by the Maastricht Treaty in Article 230(3) EC. It comes as no surprise therefore that the provision explicitly entitles the EP to bring an action before the ECJ for the purpose of protecting its prerogatives.

8.1.5.1. Solutions to address the social partners' lack of *locus standi*

The striking similarities between the position of the EP before 1992 and the present position of the European social partners make us realise that the EP construction of a right to annulment should also apply to cases concerning the social partners. Thus as Franssen and Jacobs argue all the organisations of management and labour should have the possibility in the first place to bring a legal challenge against their exclusion from the negotiations on agreements if such agreements are turned into EU legislation.[122] In all events, the organisations which are already recognised by the Commission in its 1993 Communication as being representative enough to be consulted should have access to the Court. For the rest of the organisations that comply with these criteria but are not recognised by the Commission, the Court should submit the complaining organisation to a simple test of the Commission's three criteria on representativity to determine whether the organisation is admissable or not. Subsequent case law will then increasingly clarify which organisations are entitled to secure, in the best way, the necessary legitimacy of agreements forming the basis of EU law.[123]

[122] Franssen, E. and Jacobs, A. (1998) "The Question of Representativity in the European Social Dialogue", 35 *Common Market Law Review* 4, p. 1295 at 1308.
[123] *Ibid.*

Additionally, it could be wise to adapt the text of the Treaties as in the case of the EP in order to insert the words "management and labour" into Article 230(3) EC. By combining their role with an enhanced right of legal action, management and labour could become under the new theory real actors in the formulation of European social policy and at the same time defeat problems of legitimacy over implemented agreements.[124]

8.1.6. The representative *status*

The problem of dubious foundations of legitimacy, and in particular of substantive legitimacy, becomes serious when under the new notion of a *meta-*national democracy, only a handful of organisations play a powerful role in building the European social dimension.[125]

Three sources are responsible for curtailing substantive legitimacy. The Commission - though hard to attest that it had designated by decree a monopoly *status* for a few interest groups - the social partners' organisations which are not representative *strictu sensu* just as the civil society organisations, discussed in Chapter Four, and the jurisprudence of the CFI.

8.1.6.1. The Commission

As far as the first source is concerned, the Commission was convinced that UNICE/CEEP and ETUC were representative when striking their deals on parental leave and atypical work. In its explanatory memoranda accompanying

[124] *Idem.*, p. 1312.
[125] For a parallelism to the American model of exclusive representation see generally, Summers, C. (1998) "Exclusive Representation: A Comparative Inquiry Into A 'Unique' American Principle" in Engels, C. and Weiss, M. (eds.) (1998) *Labour Law and Industrial Relations at the Turn of the Century: Liber Amicorum in Honour of Professor Roger Blanpain*, The Hague: Kluwer Law International, 568-591.

its proposals for Council Directives, the Commission explicitly stated that the three organisations that had concluded the Agreements "...fulfil the conditions of representativeness".[126] They were classified as the only cross-sectoral federations with a general purpose fulfilling the conditions mentioned in the Commission Communication on the application of the Social Agreement. Thus the claim that the Commission has no control over the social partners' access to the post-consultation negotiation stage is clearly a falsification.[127]

The main reason for the Commission to support an oligopolistic approach of collective negotiations lies on the beneficial effect of negotiation economy (the less the actors, the more the chances for compromise).[128] The same strategic move also extends to its relations with NGOs. When discussing its relationship with them, the Commission submitted that whether or not NGOs are representative should not only be based on the number of members whom they represent, but also on the ability of such bodies to bring specialist knowledge and open the route for decision-making.[129]

8.1.6.2. The social partners' organisations

With regard to the second source, the question is whether they represent a majority of workers and employers in Europe. Other European federations, apart from *UEAPME*, have argued that they are as representative as these

[126] Commission Communication, *Proposal for a Council Directive on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC*, COM (1996) 26 final, 31 January 1996, para. 14; Commission Communication, *Proposal for a Council Directive on the framework agreement on part-time work concluded by UNICE, CEEP and the ETUC*, COM (1997) 392 final, 28 July 1997, para. 19.
[127] Lo Faro, A. *op. cit. supra* note 59, p. 111.
[128] Falkner, G. *op. cit. supra* note 23, p.167.
[129] See Chapter Four of this Thesis, Section 3.3.1. pp. 152-155.

three, so there is no reason not to recognise them fully as social partners in the negotiation procedures. Additionally, it may be safely assumed that UNICE/CEEP and ETUC may be the most representative of all organisations, but still they do not represent the majority of employers and workers in Europe due to the worldwide collapse in union membership.[130]

A second question related to the representative *status* of the three negotiating parties concerns their 'internal' mandate. There are a number of consultations of national members of the organisations but it is not yet clear how the decision to go ahead is taken, for example, a simple majority, qualified majority, or unanimity. With reference in particular to the ETUC whose members are not only organisations established in the EU, it decides through a carefully considered but rather complicated double procedure which can be based on two principles. The majority of its member organisations should reach an agreement and a qualified majority of those organisations should be established in the Community territory.[131] The puzzle is that there is no

[130] Although in autumn 2000 union membership among those in employment was 7,3 million, a small increase of around 63,000 members (0,9%) from 1999, it is statistically accepted that since 1990s' there has been a decrease in membership of 1,5 million, a fall over the ten year period (2000) of 17, 1%. In 1997, it was reported that membership fell to less than 20% of workers in 48 out of 92 countries surveyed. In France, it was 9,1%. In Britain, 33% of workers were union members. Germany followed closely with 29% of workers in unions. Spain had 19% whereas the Nordic countries easily retained the lead with 79% of union membership for Finland and 91% for Sweden. The fall in union membership has been steeper for males than for females. Male union density was 43,0% in 1990 and 29,9% in 2000, wheareas female density was 32,0% in 1990 and 28,9% in 2000. See Sneade, A. Employment Relations Directorate, Department of Trade and Industry "Trade Union Membership 1999-2000: An Analysis of Data from the Certification Officer and the Labour Force Survey", pp. 433, 43 < URL: http://www.dti.gov.uk/er/emar/trade.htm >; See also Ebbinghaus, B. and Visser, J. (1998) "When Institutions Matter: Union Growth and Decline in Western Europe 1990-95", *Working Papers, Arbeitsbereich* I/Nr. 30, Mannheim:
< URL http://mzes.uni-mannheim.de/publications/wp/wp1-30.pdf >. Schmidt, M. (1999) "Representativity - A Claim Not Satisfied: The Social Partners' Role in the EC Law - Making Procedure for Social Policy", 15 *The International Journal of Comparative Labour Law and Industrial Relations* 3, p. 259 at 265.

[131] ETUC Internal Rules of Procedure, paras.6-7 and Art. 19 of the ETUC Constitution < URL http://www.etuc.org >.

requirement of unanimity. But even if there were such a requirement, still only a fraction of workers in Europe would be represented in this law making procedure considering the low membership rate.

8.1.6.3. The jurisprudence of the CFI

In its judgment in the *UEAPME* case, the CFI did not shrink from dealing with the material aspects of the representativity issue. On the contrary, it stated that the essential thing is whether the "...signatories, taken together, are sufficiently representative"[132] to justify the Council turning a social agreement into a Directive. If agreements of European social partners' organisations do not cover a substantial part of the workers and employers of the EU, they will lack as suggested in advance the necessary legitimacy, and so will any EU legislation implementing these agreements.

Even though it considered that the subject matter of parental leave was an all-industry agreement covering all types of working relations, the CFI opted for a representation-based model rather than a participatory or an industrial relations one.[133] It thus held that the various signatory parties should represent all categories of workers and enterprises at the EU level (para. 94). To confirm this it developed some criteria on the employers' side representativeness. Firstly, it established that the cumulative representativity of UNICE/CEEP of the contested agreement was sufficient (para. 96). Secondly, it pointed out that

[132] T-135/96 *loc. cit. supra* note 112, para. 90.
[133] See generally Bernard, N. (2000) "Legitimising EU Law: Is the Social Dialogue the Way Forward? Some Reflections Around the UEAPME Case" in Shaw, J. (ed.) (2000) *Social Law and Policy in an Evolving European Union*, Oxford: Hart, 279-302.

the number of SMEs represented by *UEAPME* could not be decisive since the parental leave is granted to workers and therefore could hardly affect these SMEs (para. 102). Thirdly, it stated that among the SMEs represented by *UEAPME* in the 14 Member States concerned by the Agreement, "... a third, ... perhaps as many as two-thirds... of those SMUs are also affiliated to one of the organisations represented by UNICE" (para.103).

Nevertheless, the CFI expressed no view at all on whether or not the Commission criteria were appropriate to their intended purpose and therefore questions of this kind remain unanswered:

1) Can an inter-professional agreement bind the civil service sector, as UNICE/CEEP represent only employers in industry?

2) If the employers' world is split along non-sectorial but policy lines, how is the representativity of the organisations to be measured? By counting the numbers of enterprises, the numbers of all the staff of the enterprises, or the numbers of the staff of the enterprises represented by the signatory parties on the trade union side?

3) What are the consequences of the Court's points for the trade union's side? If one has to count members, is the ETUC really representative, bearing in mind the low figures of unionisation in many European countries?

Although it is remarkable that the CFI ventured to develop criteria of representativity itself, yet, its attempt was purely confined to verifying whether the Commission criteria had been applied correctly:

> "It follows that the Commission and the Council ... properly took the view that the collective representativity of the signatories to the framework agreement was sufficient...".[134]

So even after the *UEAPME* judgment, the question of representativeness of collective industrial organisations at Community level remains at square one.

8.1.6.4. Suggestions for the future

Since the problem of representativity is only new in appearance, but not in substance,[135] the remainder of this section proposes that it should be handled with care and prudence by taking it seriously and establishing proper procedures.

The establishment of a Study Group, consisting of experts from both national and European level, as proposed by the Commission in its latest Communication[136] might be the start of such approach. A Committee of "Wise Persons"[137] could do the fine work needed, of thoroughly examining the representativity of every organisation protesting against its exclusion from the negotiations. Their work would consist of fact-finding, developing and

[134] T-135/96 *loc. cit. supra* note 112, para. 110.
[135] Case C-66/76 *Confédération française démocratique du travail (CFDT) v. Council* [1977] ECR 305.
[136] COM (1998) 322 *loc. cit. supra* note 9, p. 19.
[137] Franssen, E. and Jacobs, A. *loc. cit. supra* note 122, p. 1311.

refining the Commission's criteria. If the Committee does this work well, it would significantly lighten the task of the Commission and the Council in checking the representativeness of the parties of the agreements which are offered to them for implementation by means of Directives. It would also relieve the CFI of the task of developing criteria of its own and the latter could claim responsibility for accepting or correcting the criteria developed by the Committee of experts.

In respect of the procedures, any request by management and labour to have an agreement implemented by a Council decision should be published in the Official Journal of the EU accommodating thus needs for transparency and openness. Organisations which oppose such implementation can lodge a complaint within a short period of time, for example, two or three months, of its publication, by sending a letter to the Commission where they would express their views. The Commission asks the advice of the Committee of experts who will hear both the claimant and the signatory parties involved and make further investigations if necessary. Taking into account the proposals of the Committee, the Commission decides on the complaint before sending the agreement to the Council to become part of EU law. Only then can organisations start proceedings before the CFI. For its part, the CFI can take the opinion of the Committee of experts into account but it can nevertheless deviate from this advice in its judgment.[138]

[138] *Ibid.*

In no way would the outcome of such proceedings impinge on the autonomy of the social partners in the European Social Dialogue. They are free to select their negotiating parties as they desire and will remain as such. As for the agreements which are not concluded by the necessary minimum of representative organisations and therefore cannot be fit for implementation by a Council decision, they can still be implemented in accordance with the processes and practices specific to management and labour and the Member States.[139]

Notwithstanding the fact that the chance has been lost in respect of the approved text of the Nice Treaty, it might still be wise to amend the text of the Treaties just as in the case of admissibility, so that their provisions are less ambiguous on the matter of representativity.[140] This could be done by inserting the words *"provided they are representative under the Commission's criteria for becoming a social dialogue partner"*[141] following the words "management and labour" in Article 138(4) EC, and after the words "signatory parties" in Article 139(2) EC. Such an amendment would be more than useful to stop fringing representative organisations of management and labour eager to conquer a place at the bargaining tables of the Social Dialogue.

[139] *Ibid.*
[140] *Idem.*, 1312.
[141] *Ibid.*

9. SOCIAL PARTNERS AND PROBLEMS OF DEMOCRACY

9.1. THE ROLE OF THE EP

9.1.1. Introduction

Equally serious to the issue of legitimacy that arises in the context of representativity, is the extent to which the public (Commission/Council) and private (labour and management) constellation appears to bypass other important democratic Institutions in particular the EP.

Indeed, the legislative procedure established by Articles 138-139 EC is also very sensitive with regard to democratic prerequisites, that is the democratic fundamental principle, explicitly recognised in Article 6(1) TEU, that the European people must share in the exercise of power through a representative assembly.

9.1.2. Defining the problem

When recalling the social policy provisions, it is observed that once management and labour have reached an agreement, the Commission needs to put the agreement before the Council[142] which then has to decide either by a qualified majority voting or unanimity whether to turn this into EU legislation.[143] As for the EP, however, it does not play a formal role at all in the early stages; yet the Commission keeps it informed throughout the process.[144]

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[142] Weiss called this the 'waitress' function of the Commission: Weiss, M. (1992) "The Significance of Maastricht for European Community Social Policy", 8 *International Journal for Comparative Labour Law and Industrial Relations* 1, p. 3 at 12.
[143] Arts. 137(2) and 139(2) EC.
[144] The Commission's policy is to inform the EP whether or not it is formally obliged to do so. COM (1993) 600 final *loc. cit. supra* note 5, p. 27.

Notwithstanding its support for the conclusion of the discussed agreements,[145] the EP has expressed its dissatisfaction when it passed a resolution calling for an interinstitutional agreement with the Commission and the Council on joint arrangements for implementing social partner agreements.[146]

In addition, its influence is also weak in respect of the social Directives adopted unanimously (Article 137(3) EC). Under this procedure, the EP can be consulted and the Council without further consequences can disregard its opinion.[147] The reason for its mere consultation lies on the slim probability that Directives will be adopted unanimously which seems to suggest that in the unlikely event that the Council is unanimous, there is no place for any stronger parliamentary influence. However, this is an irrational approach considering that the EP represents the European people, and therefore it should have an enhanced role in any type of decision-making, irrespective of the Council's position in the voting procedures.

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[145] European Parliament, *Resolution on the Application of the Agreement on Social Policy* [OJ 1994, No. C 205/86, A3-0269/94, paras. A and H] where it stated: "Whereas *the European social dialogue and an enhanced role for the social partners constitute an essential condition for the achievement of the social dimension of the internal market in parallel to economic integration; whereas the social partner's extensive right to be consulted in the decision-making process provides the Community with an opportunity to shape the European welfare scene* in a way, which is close to current practice and the citizen".

[146] European Parliament, *Resolution on the New Social Dimension of the Treaty on European Union* [OJ 1994, No. C 77/30, A3-0091/94, para. 9] where it stated: "... *that the Council and the Commission should conclude with the European Parliament, in the framework of an inter-institutional agreement, a code of good conduct to strengthen its rights in the legislative procedure and give it a right of initiative enabling it, if an agreement by management and labour is rejected, to request the Commission to initiate the legislative procedure* at an early date".

[147] There are no further consequences as long as the Council waits until it has actually received the EP's advisory opinion according to the Draft Protocol on the Role of National Parliaments. Article I.1 reads that all Commission documents "shall be promptly forwarded to national parliaments (...)". And then, Art. I.3 adds that a six-week period shall elapse between making the proposal available in all languages and the date when it is placed on the Council agenda. Thus the wording suggests an absolute obligation, confirming the obligation to consult the EP. *Inter alia* note Case C-138/79 *Roquette Frères v. Council* [1980] ECR 3333.

9.1.3. Positive approaches of the problem

Even though the whole set of the above circumstances indicates that the EP does not have any influence in an area of direct interest to Europe's citizens, this is not entirely true. The EP has a formal role to play, but it is rather unclear, it is not great but neither is it marginalized, due to the complex, non-hierarchical, interlocking and evolutionary legal phenomena such as the decision-making procedures in social policy and the involvement of the social partners in producing EU legislation.[148]

To elaborate, however, on the role of the EP, it should be first noted that it is informed and consulted even if the social partners have 'hijacked' a Commission's proposal. The effect of a rejection by the social partners of a Commission's proposal may enhance the role for the EP. Since the Commission can continue with the proposal and bring it to the Council, the EP and ESC for consideration, the EP might grab this chance 'to throw a spanner into the works' of the social partners' dominant position in social policy law making. Although this appears to be unlikely in view of the EP's resolution on the role of the social partners,[149] it may however occur, when in the opinion of the EP the requirement of representativeness is not fulfilled.[150]

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[148] In the wider context of the EU, rather the ESC risks marginalisation due to the strengthening of the Social Dialogue in the SPA and the creation of the COR. Recall the many initiatives that the ESC took in early 1990s in order to respond to its difficult situation: Smismans, S. (1999) "An Economic and Social Committee for the Citizen, or a Citizen for the Economic and Social Committee?", 5 *European Public Law* 1, p. 557 at 558, 560-561.

[149] European Parliament, *Resolution on the Role of the Social Partners in the Labour Market* [OJ 1986, No. C 322/51, A2-144/86].

[150] Betten, L. (1998) "The Democratic Deficit of Participatory Democracy in Community Social Policy", 23 *European Law Review*, p. 20 at 30.

Furthermore, apart from being informed about each Commission proposal, the EP can take over when a proposal falling under Article 137(1) EC goes through the institutional channels of co-decision procedure (Article 251 EC) - hence when the social partners are unable to agree. By applying thus the co-decision procedure, the EP gets on a par with the Council. The Council cannot any longer adopt a proposal against the Parliament's will and also the Parliament cannot vice-versa approve a proposal against the Council's will.

Additionally, the study of theories of European integration and especially the policy-networks analysis as suggested in Chapter Two (pp. 19-20, 25-26) puts 'governance back into the pattern of multi-level governance', can offer a richer insight into the dynamics of the relationship between the EP and the social partners.

Bearing in mind that a governance in networks is characterised by co-operation instead of competition between all relevant actors, in no way should it be considered that the Commission uses the EP as a 'threat' against the social partners in case the latter do not conclude an agreement. This is so because a corporatist community policy for social policy has evolved which the Commission would not like to jeopardise. The term corporatism has two meanings here. First, it provides the social partners a historically new co-regulating role.[151] Second, it induces the central social partners to undertake institutional reforms which imply stronger Europeanisation and more binding

[151] Dølvik, J. *op. cit. supra* note 59, p. 453. See also Roberts, I. and Springer, B. (eds.) (2001) *Social Policy in the European Union: Between Harmonisation & National Autonomy*, London: Lynne Riener, 52-53.

co-operation among the affiliated organisations in the shaping of public policy.[152]

Under this new co-regulating role, the social partners are invited to network with the EP in terms of interests. A policy network as a typology of interest intermediation[153] can be a valuable analytical tool to connote the structural relationship, interdependency and dynamism between the public (EP) and the private (the social partners) actors in politics and social policy-making.[154] The network concept therefore draws attention to their linkage or co-operation so as to dispose of the same interests, to represent the European people at the workplace, and implicitly suggests that the roles of the two Institutions are regarded as complementary and overlapping, rather than threatening and clashing.

[152] Falkner, G. *op. cit. supra* note 23, pp. 34-35.
[153] A model of interest intermediation implies an institutional arrangement whereby policy is worked out through an interaction between EU Institutions and the leadership of a limited number of industrial corporations on the one hand and labour unions on the other. Under this arrangement the corporate organisations are granted a deliberate representational monopoly within their respective areas of interest in exchange for submitting themselves to certain limits imposed in this instance by the Commission: Etzioni-Halevy, E. (1983) *Bureaucracy and Democracy: A Political Dilemma*, London: Routledge, 63.
[154] See *supra* note 152, pp. 43-52.

10. CONCLUSION

The incorporation of the SPA into the Treaties and the invitation to have the social partners involved in developing and implementing the Employment Guidelines have been a great step towards enhancing forms of *input*, *output* and *social* legitimacy as discussed in Chapter Four.

In terms of substantive legitimacy, the Chapter gave an optimistic outlook under the theoretical framework of a *meta*-national democracy. It explored the potential of the *UEAPME* decision to legitimate developments in the EU Social Dialogue and outlined how some initiatives, for example, the Committee of wise persons and the structuring of group based interest representation, can contribute to further increasing this type of representation.

Finally, in respect of democracy, the Chapter proposed that the role of the social partners as *quasi* - not yet complete - legislators does not weaken the role of the EP. It was said in this context that a policy network as a typology of interest intermediation is a valuable analytical tool to revel into the relationship between the EP and the social partners in the social policy area. The Chapter concluded that neither the EP nor the social partners is considered to be a 'threat' to each other.

CHAPTER SIX

LEGITIMACY AND THE ON-GOING PROCESS OF EUROPEAN CONSTITUTIONALISM

1. INTRODUCTION

Alongside discussions about the multi-sided political legitimacy, the multi-dimensional nature of a 'Constitution for the European Union' has become a hotly debated issue. During the process of European integration, academic lawyers cannot even agree as to whether the EU has a constitution, let alone whether it needs one.

Some argue that the founding Treaties and their various amendments might amount to a constitution; that is, an international treaty-based constitution, if the EU is to be seen as an international organisation.[1] Others believe that the EU does not have, and therefore does not need a constitution in order to establish a legitimate federal European State, a sort of United States of Europe.[2] Meanwhile, a third approach suggests that the EU already possesses a

[1] De Witte, B. (1996) "International Agreement or European Constitution?" in: Winter, J. et al. (eds.) (1996) *Reforming the Treaty on European Union*, The Hague, Netherlands: T.M.C. Asser Institut, 3-25, at 4-5, 11-14, 18, 21. See also Curtin, D. and Dekker, I. (1999) " The EU as a 'Layered' International Organisation: Institutional Unity in Disguise" in: Craig, P. and De Búrca, G. (eds.) (1999) *The Evolution of EU Law*, Oxford: Oxford University Press, 83-136.

[2] See generally Lenaerts, K. (1990) "Constitutionalism and the many faces of federalism", 38 *American Journal of Comparative Law*, 205-263; Koopmans, T. (1992) "Federalism: The wrong debate", 29 *Common Market Law Review*, 1047-1052; Fischer, T. and Neff, S. (1995) "Some American Thoughts about European "Federalism"", 44 *International and Comparative Law Quarterly*, 904-915; *Inter alia*, Börzel, T. and Risse, T. (2000) "Who is Afraid of a European Federation? How to Constitutionalise a Multi-level Governance System", *Harvard Jean Monnet Working Paper* No. 7/2000:

significant degree of legally regulated public power independently of its constituent States and to that extent it has its own species of constitutional law. Most of this law is to be found in the provisions of the EC Treaty after Amsterdam and in the jurisprudence of the ECJ.[3]

In this Chapter, the author attempts to unravel some of the reasoning behind these divergent positions which addresses the issue of democratic political legitimacy.

However, after describing the key elements of the EU constitutional debate which would hopefully reveal some of the tensions and dissatisfactions with the current situation in terms of constitution making, the author will proceed with a suggestion. By trying to give the EU a constitution which traditionally implies fixity and consistency at national level, the legitimacy of the Union will not be enhanced. This will rather happen by identifying the ever-shifting terrain of multi-level polity with the idea of a dynamic constitutional process. The concept of a multi-level constitutionalism and the drafting and adoption of the Charter in the Nice Council (7 December 2000) are but the first steps in this direction.

< URL http://www.jeanmonnetprogram.org/papers/00/00f0101 >; Weale, A. (1995) "Democratic Legitimacy and the Constitution of Europe" in: Bellamy, R. Bufacchi, V. and Castiglione, D. (eds.) (1995) *Democracy and Constitutional Culture in the Union of Europe*, London, Lothian: Foundation Press, 81-94; Siedentrop, L. (2000) *Democracy in Europe*, Allen Lane: The Penguin Press, 231.

[3] See generally Hix, S. (ed.) (1999) *The Political System of the European Union*, New York: St. Martin's Press, 99-129; Stone-Sweet, A. (1995) "Constitutional Dialogues in the European Community", *EUI Working Paper RSC* No. 95/38; Shaw, J. (2000) *Law of the European Union*, Basingstoke: Palgrave, (3rd edition), 179-209.

2. DEFINING A CONSTITUTION

2.1. Introduction

The discourse on EU constitutionalism or *meta*-constitutionalism - the idea to restrain and empower not only the individual through the rule of law but also to restrain and empower any other authoritative polity beyond the State such as the EU[4] - presupposes that constitutions are not exclusively attributes of States. Secondly it demands a certain definitional effort, principally in order to justify the use of the much-loaded terminology of constitution, constitutional law, and constitutionality[5] in relation to the EU.

2.2. Reasons for definition

At first sight, the question of definition may seem to be a simple one. However, it is worth considering whether people ruminate on constitutional matters, if for no other reason than to confirm that our definition of a constitution has not changed. Constitutions are living, working entities that span both the legal and political spheres of society. In turn, both spheres exist to serve society. Equally, society develops and progresses with each age as do the law and politics in order to continue to serve society best. This means that the nature of constitutions may also change. Europe is an example of a society changing and progressing. Therefore, when considering the constitutional 'government' in the EU, an issue which is integral to any account of how this multi-level polity

[4] Walker, N. (1996) "European Constitutionalism and European Integration", *Public Law*, p. 266 at 270. See also Walker, N. (2000) "Flexibility within a Metaconstitutional Frame: Reflections on the Future of Legal Authority in Europe", *Harvard Jean Monnet Working Paper* No. 12/99 < URL http://www.jeanmonnetprogram.org/papers/99/991201.html >.

[5] The loyalty to the terms of an existing constitution, whatever they are: (Walker, N. (1996) *supra* note 4, p. 269).

in fact operates and is legitimised, it is worthwhile considering 'what a constitution is' and if the definition has changed in a European context.

2.3. Definitions and meanings

When discussing constitutions, there is often confusion as to whether a country can be said to have a constitution in the absence of a single legal document. Indeed, definitions may vary depending on the legal tradition, of which one is a part. The more pragmatic common law tradition recognises that the existence of a constitution does not depend upon that constitution being contained in a single, written document, for example, the UK, though ironically, the archetypal example of a written constitution comes from a common law country, the USA. However, those from a codified tradition, the majority of Western Europeans and the academics writing about such matters in a European context, tend to require a written legal document.[6] That is why when defining a constitution one should tend not to say what a constitution *is*, but what a constitution *does*.

As the fundamental law of a Nation or a State, a constitution is supposed to rationalise and explicate the sovereign power of the State. Hence, its objective is to authorise, organise, legitimise and limit sovereign power. This, as a result, tends to create a sphere of societal autonomy and individual freedom and integrate individuals into the political system. That process ends with the transformation of passive subjects into citizens able to participate internally in the polity that they make up.[7]

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[6] Grimm, D. (1995) "Does Europe Need a Constitution?" 1 *European Law Journal* 3, p. 282 at 289.
[7] Preuss, U. (1996) "Prospects of a Constitution for Europe", 3 *Constellations* 2, p. 209 at 213.

In the post-Reformation Europe of the 17th Century, Divine Right could no longer be claimed as the basis for the authority of law. Constitutionalism addressed the issue of how to legitimise State authority and legally bind State power, when it was the State that made the law. Positive law was divided into two sets of norms: (a) those concerning Institutions and the exercise of power, and (b) those concerning the relationships and conduct of individuals.[8]

Based on this law, a constitution, whatever its form, written or unwritten, performs four functions. First, it describes the Institutions of government and their functions. In some way, it portrays the State structure or government regime it seeks to provide legitimacy for. Second, it defines the inter-relationship between the Institutions of government, for example administration, legislature and courts. Third, it sets out the relationship between the government and the citizens, usually including a list of rights for the individual and guarantees for their protection. Fourth, it offers a series of checks and balances in order to limit the State's power to coerce.[9]

The existence of the above elements is, admittedly, not necessary for a constitution. Nevertheless, "a document not showing any desire for legal bindings or excepting major bearers of governmental functions or expressions of public power from regulatory intervention would no longer be termed a constitution, but a case of semi or spurious constitutionalism".[10]

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[8] Grimm, D. *loc. cit. supra* note 6, p. 286.
[9] See generally Alivizatou, N. (1981) *Introduction to the Hellenic Constitutional History*, Volume A, Athens: Sakkoula.
[10] See *supra* note 8, p. 287.

In addition to the constitution's normative elements, there are symbolic elements aimed at creating social integration. In that context, discussions of constitutions and constitutionalism tend to be closely linked to notions about identity, especially political identity, loyalty, and citizenship.[11] In this sense, a successful constitution sets out a society's covenant about its members' co-existence and the resolution of disputes between its members and its government. It joins together people with different beliefs and concerns and enables them to live in a condition approaching harmony by providing for the resolution of their disputes, be they political or legal. This can be done in both contexts. Either in a legal context where the constitution is the providence of the lawyers enforced by the courts as the supreme law of the nation as in the classic examples of America, France, and later Germany. Or, in a political context, where the constitution is observed and protected (if at all) by those in parliament as in the UK.[12]

Empirically, there is nothing to suggest that one form of constitution is better than the other. Yet, written constitutions have been more popular than unwritten ones considering the fact that very few countries since the Enlightenment practice unwritten constitution. Certainly, there must be some reasons for this such as the separation of powers, clarity and visibility of individuals' rights, the preservation of cultural diversity and elimination of ethnic tensions with particular reference to newly emergent African States from

[11] Abromeit, H. and Hitzel-Cassagnes, T. (1999) "Constitutional Change and Contractual Revision: Principles and Procedures", 5 *European Law Journal* 1, p. 23 at 29.
[12] Whilst the basis of English law is determined by Parliament, the law itself supersedes the authority of the Parliament. In essence, the UK Constitution is contained with the laws of the UK and not the political structure.

colonisation.[13] The section below examines whether some of these reasons may or may not exist at the EU level for adopting a written constitution mode.

3. CONSTITUTIONAL DEBATE WITHIN THE EU

3.1. Introduction

The constitutional debate at the EU level has received a strong impulse from the experiences of the Danish referendum, in which the Treaty of Maastricht was rejected[14] and the challenge which emerged out of the decision of the German Constitutional Court in the *Brunner* case.[15] Consequently, it has become a European public issue since then.

3.2. The case for a written European Constitution

A number of reasons may explain why a written constitution has become an appealing notion for debate. First, the production of a complex patchwork of rules and regulations, already hard enough for legal experts to understand but almost incomprehensible to laypersons, have led to complexity and lack of clarity with regard to the Treaties.[16] The shear volume of the primary

[13] The surge in the number of States adopting the written constitution mode is best illustrated by newly emergent African States from colonisation. The need to clearly specify powers, functions and the authorities of new African leaders was very crucial motivation for these States to adopt the written constitution mode. Thus, States, such as Ghana, Nigeria, Gambia, and so on which had been colonies of Britain decided to adopt the written constitution mode. This mode can also be illustrated in the growth of international documents setting out basic rights such as the International Covenant of Civil and Political Rights ("ICCPR"), the International Covenant of Economic, Social and Cultural Rights ("ICESCR"), the Universal Declaration of Human Rights ("UDHR"), the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("ECPT") and other more.

[14] See Chapter Four of this Thesis, Section 2.1. pp. 115-117.

[15] Ruling of the Federal Constitutional Court, Second Division, 12 October 1993, 2 BvR 2134/92, 2 BvR 2159/92, *Manfred Brunner and others v. The European Union Treaty*, [1994] 1 CMLR 57.

[16] Amato, G. (1995) "Distribution of Powers" in *EUI Working Paper Robert Schuman Centre* No. 95/9, *A Constitution for the European Union? Proceedings of a Conference, 12-13 May 1994, Organised by the Robert Schuman Centre with the Patronage of the European Parliament*, 85-88, at 88.

Community and European Union law consisting of over one thousand Articles, some interwoven others possessing parallel applicability, contained in more than twelve constitutionally relevant documents (Protocols), result in a legal and political system that is difficult for the public to understand.[17] The bulk of the provisions of the primary law are purely of a 'technical nature' and of sectoral significance appertaining to commercial, administrative and procedural law.[18] Thus, the actual constitutional core, for example the rights, allocation of competencies and institutional balance, of the Treaties is buried. Also, large parts of the Amsterdam Treaty ("AT") are outdated, for example EC Treaty provisions on the transitional periods for the customs union, internal market, and EC 1992, and therefore should be replaced by simpler principles.[19] Additionally, and in order to make visible the trans-national citizenship rights and preserve the common civic values and principles, a clearer, understandable European constitution could serve an educative role, strengthening "European identity",[20] and could promote support for EU law by the "citizens of the Union".[21]

Moreover, in considering the constitution's content, the call for an improved delimitation of the competencies between the Community and its Member States is postulated. Only recently, the judgment of the ECJ in *Tanja Kreil*[22] attracted major frustration in Germany on the basis of the allocation of

[17] Dorau, C. and Jacobi, P. (2000) "The Debate Over a 'European Constitution': Is It Solely a German Concern?", 6 *European Public Law* 3, p. 413 at 419.
[18] *Idem.*, 420.
[19] See for example, Art. 14 EC.
[20] See Preamble to the TEU, ninth indent.
[21] See Art. 17(2) EC.
[22] Case C-285/98 *Tanja Kreil v. Bundesrepublic Deutschland* [2000] ECR I - 69.

competencies. The Court had applied the Directive on equal treatment for men and women in order to enforce equal access to the German armed forces (weapon electronics) though the defence policy remains within the Member States' sphere of sovereignty.[23] In doing so, it held that:

> "The Directive precludes the application of national provisions, such as those of German law, which impose a general exclusion of women from military posts involving the use of arms and which allow them access only to the medical and military-music services".[24]

The German *Bundesländer* (federal States) have in particular called for an enumeration of competencies such as those contained in the *Grundgesetz* (Basic Law) defining the competencies between the *Bundesrepublik* (Federal Republic) and the *Länder* (States).[25] Such an enumeration could well provide an example for more clarity and transparency in earmarking competence at the EU level between the Community and its Member States.

The third reason for the deeply felt need for a concise and intelligible European constitution is the further strengthening of the EP. The same demand has also

[23] Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [OJ 1976, No. L 39/40].
[24] C-285/98 *loc. cit. supra* note 22, para. 32.
[25] See Arts. 30 [Competencies of Federation and States], 83 [Competencies of Federation and States], 84 [State execution and Government supervision], 85 [Execution by the States as agents of the Federation], 91b [Cooperation of Federation and States], 105 [Legislative powers], 109 [Budget management in the Federation and the States], 115c [Extension of legislative powers of the Federation] Basic Law.

been put forward by the EP itself in its Resolution on the Constitution of the European Union in 1994 where it suggested that:

> "The laws of the Union shall be made by the European Parliament and by the Council. Legislative initiative in respect of constitutional laws shall lie with the European Parliament, the Commission, the Council or a Member State".[26]

Even though EU citizens are greatly affected by Community decisions and are subject to its legal norms, the EP that they directly elect has only a slight influence on these decisions. Although listed first among the EU Institutions, it nonetheless has the least weight. The double-headed executive that is, the Commission and Council determines EU decisions including those of a legislative nature and the EP by and large only participates in the decision-making process by either exercising 'veto' powers or giving its assent and delivering no binding-advisory opinions.

The lack of parliamentary legislation at the EU level - linked to an indirect democratic legitimacy - and the inadequate transparency and parliamentary accountability of EU decision-making processes recalling the events of March 1999 reveal the necessity for a fundamental reorganisation and reorientation of the legal basis of the EU.

[26] European Parliament, *Resolution on the Constitution of the European Union - Annex: Draft Constitution of the European Union*, A3-0064/94 [OJ 1994, No. C 61/155], p. 163.

Even though both transparency and accountability have long been key themes and problems in the European constitutional scholarship, none has been clearly accorded the legal *status* of a general and justiciable principle of Community law which the ECJ would claim to protect. On the contrary, they are only administrative values that the EU Institutions purport to uphold as duly attested in the White Paper, despite using the term 'principle'.[27] Or, they are simply expressions which refer to the collection of various relevant Treaty provisions and institutional rules and practices.

Usually, it is assumed that a written constitution enhances the transparency of public authority which in turn is likely to increase its acceptance. In the case of the EU, however, the existing 'Constitutional order'[28] is still lacking some central element of transparent and unequivocal rules regarding the relationship between the EU Institutions, the Member States and the Union's citizens'. The White Paper aims to fill in that gap. To this effect, it is thus realised that the Institutions should work in a more open way,[29] otherwise it is implicitly suggested that the opaqueness of the Union's legal structure may undermine the legitimacy of the Union at large.[30]

Without doubt, the Charter adopted at the Nice European Council of December 2000 is regarded to be critical to induce a culture for transparency, visibility and clarity explications. Only a person who knows his/her rights can claim, and

[27] European Commission, *European Governance - A White Paper*, COM (2001) 428, 25 July 2001, p. 10.
[28] Put in quotation to express doubt.
[29] See *supra* note 27.
[30] Preuss, U. *loc. cit. supra* note 7, p. 209.

make use of them. A charter of fundamental rights is also the manifestation of a European 'community of values' and therefore could have a legitimising effect for the whole Union. However, the law making processes of the EU, for example, in the closed Council meetings, are devoid of transparency or democratic legitimacy and they are too complex for a Union of fifteen or more Members. It might be the case that the national parliaments can review the negotiating positions of their governments before the meetings of the Council of Ministers. Having said that, the discretionary regulatory powers of the specialised Councils such as those on agriculture or transport have often operated as an invitation to promote protectionist group interests, for example, those of farmers and other import-competing producers without adequate regard to the *general interest* of consumers.[31] Additionally, due to their sectoral focus and the inadequate political and budgetary checks and balances they have favoured wasteful protectionism.[32]

Considering the relations between the EU Institutions, we should recall that the EP had it adopted a draft Constitution for the EU in order to increase among other things "the efficacy, transparency and democratic vocation of its Institutions".[33] To this end, it urged for more democracy and transparency which would be open both within itself and within the national parliaments and public opinion.[34]

[31] Petersmann, E. (1995) "Proposals for a New Constitution for the European Union: Building-Blocks for a Constitutional Theory and Constitutional Law of the EU", 32 *Common Market Law Review*, p. 1123 at 1125-1126.
[32] *Ibid.*
[33] EP Resolution *loc. cit. supra* note 26, p. 157.
[34] *Idem.*, 156.

An institutional reform of the Community is also imperative. The crisis of the European Commission in spring 1999 which eventually culminated in the collective resignation of all Commissioners has illustrated that Europe is struggling because of the outdated existing legal and political 'constitution' than of its corruption.[35] It has become evident that the legal structure and the transparency of the decision-making process in the EU have to be improved through an institutional reform instigated by a written constitution.

Furthermore, faced with the challenges of the Union's forthcoming enlargement by several applicants from East and Central Europe, the necessity for reforming the Institutions and resolving the question of the ability of the Union to enlarge has grown even stronger. Enlargement without reforming both Institutions and institutional processes is bound to lead to a 'watering-down' of the EU. We might remember that the institutional equipment of the EC (formerly: EEC) was devised for no more than six Member States. The enlarged Community, however, will soon extend from Portugal in the West to Poland and probably the Baltic States in the East, thus covering a vast heterogeneity of political systems, economic structures, and cultural legacies.[36]

The last reason for a constitutional document is the obvious expansion in the Community's power that many EU citizens suspect is not being matched by an equal increase in legitimation through their consent. This belief is confirmed by the gap between fairly elaborate devices of democratic legitimation in the several national Member States and the advancing exodus of the latter's

[35] Dorau, C. and Jacobi, P. *loc. cit. supra* note 17, p. 415.
[36] Preuss, U. *loc. cit. supra* note 7, p. 209.

powers to organs of the supra-national Community. Thus, according to some estimates, around 80 per cent of the legal regulations in the economic domains of the Member States originate from the Community and hence are beyond their control.[37] Whilst the national governments subject to rigid and demanding requirements of democratic legitimation find their public authority ever more emptied, the powers of the Community are steadily increasing without a parallel rise in the requirements for their legitimation.[38] This equally implies that the loss of opportunities for democratic participation on the Member State level is not compensated by a like gain at the EU level. A European constitution is thus rightly expected to cure this evil.[39]

3.3. The case against a written European Constitution

Not everyone shares this expectation. The opposite point of view, therefore, argues that the EU has a constitution 'in practice', embodied in the founding Treaties, albeit not a traditional written constitution in the historical sense.

They claim that there are many kinds of danger in trying to give the EU a constitution of a different kind from the treaty-based constitution which currently underpins it. First, drafting a constitution can restrict or attempt to restrict a historically specific set of social relations into some political structure which then limits and curtails future choices about the EU. The issue is not just the traditional political science question as to whether a flexible rather than a rigid constitution is preferable but how to conceptualise a constitution for a

[37] *Idem.*, 210.
[38] *Ibid.*
[39] *Ibid.*

dynamic legal space in which the traditional notion of a constitution in any of its forms may be losing its relevance.[40]

Second, there seems little doubt that, if 'giving the EU a constitution' means replicating the model of a representative parliamentary democracy that exists in the Member States, the limitations of that form of democracy are likely to be greatly exacerbated at the EU level. Each member of the EP may well come to 'represent' around 700,000 EU citizens and without the reinvigoration of existing democratic mechanisms and the invention of new participatory forms, the gap between representatives and represented may become unbearably large. Thus modelling European parliamentary politics on national parliamentary practice in Western Europe is not a solution.[41] What could instead be proposed is to amend the Treaties so as to extend the powers of the EP over the appointment or dismissal of the Commission and make the co-decision procedure a general requirement.[42] Propositions of this type would actually supplement the White Paper's proposals to turn the Commission into 'a genuine European executive'.[43]

The advantage of a directly elected chief executive is evident. There would be a single office holder of strategic importance that the electorate could hold accountable for the performance of the EU. Nevertheless, it is still questionable

[40] Kuper, R. (2000) "Democratisation: A Constitutionalizing Process" in: Newman, M. and Hoskyns, C. (eds.) (2000) *Democratising the European Union*, Manchester: Manchester University Press, 156-173, at 160.
[41] *Ibid.*
[42] Lord, C. (2000) "Legitimacy, Democracy and the EU: When Abstract Questions Become Practical Policy Problems", *Policy Paper* 03/00, p. 14:
< URL http://www.one-europe.ac.uk/pdf/P3Lord.PDF >.
[43] White Paper *loc. cit. supra* note 27, pp. 6, 29-30.

whether the public or Member States are yet prepared to invest so much democratic legitimacy in the hands of one supranationally elected office-holder. This difficulty may be lessened to the extent it is still necessary for the Commission to function within a complex balance of powers in which the final decisions remained with the Member States.[44]

Third is the issue of flexibility. It would seem somewhat unsuitable to take a fixed catalogue of competencies through similar constitutional processes that, say, exist in Germany and use that as a model for the EU. That would jeopardise the flexible nature of the Euro-polity which in essence helps to reduce the Union's legitimation problems, for example, countries adopt policies at different speeds and possibilities for participation vary markedly across issue areas.[45] What would instead be preferable is to rely on the existing objectives and tasks as set forth in the Treaties and combine the allocation of positive competence to the Community with negative elements precluding Community action. The negative preclusive elements would in particular lay down limits for the Community which the ECJ would have to observe.[46]

Finally, as long as the call for a constitution is linked up with the argument to make the Union's goals and structures more transparent for EU citizens, this could be accomplished by separating the Treaty elements from the numerous regulations that have crept into the Treaties. In addition, nothing seems to come out of adopting a different form of constitution because this simply conceals a

[44] Lord, C. *loc. cit. supra* note 42, p. 16.
[45] *Idem.*, 12.
[46] Dorau, C. and Jacobi, P. *loc. cit. supra* note 17, p. 422.

different way of applying institutional reforms to the EU.

EU Institutional reforms are necessary, particularly if we consider that the next enlargement is threatening to strain organisational structure and decision procedures to the limits of their capacity. Yet, these can also be achieved by amending the Treaties, the example of Nice applies here, without having to turn them into a constitution based on a national pattern.[47]

4. THE AUTHOR'S CRITIQUE OF THE DEBATE ON A EUROPEAN CONSTITUTION

4.1. Elements of a top-down EU constitutionalism

While the Union has no formal written constitution akin to many national constitutions as it was suggested previously, nonetheless, there exists a set of basic ground rules which govern the exercise of the many governmental functions and powers, which have been ascribed to the EU and its Institutions. The EU also operates these ground rules on the basis of a number of key constitutional principles which in turn are based upon recognisable 'constitutional' value systems and anchored into the constitutional heritages of the Member States.[48] However, it is not claimed here that the EU constitutional framework is complete.

[47] Grimm, D. *loc. cit. supra* note 6, p. 298.
[48] Shaw, J. (2000) "Process and Constitutional Discourse in the European Union", 27 *Journal of Law and Society* 1, p. 4 at 11.

4.1.1. Constitutional principles

(a) Democracy

The most notable example of these principles is to be found in Article 6(1) TEU which declares that the Member States' systems of government are "...founded on the principles of ... democracy".

In a democratic system, government action cannot exist unless it is founded upon, and representing the will of the people in relation to the procedures laid down in the constitution. Consistently, Article 48 TEU provides for the ratification of each amendment to the Treaty by all the Member States "according to their respective constitutional requirements". The Irish 'No' to the Nice Treaty (8 June 2001) is a characteristic example of this practice.[49] Whereas, Treaty amendments are not in accordance with provisions of national constitutions, constitutional amendments are necessary in some Member States, for example, France and Germany, as a precondition for ratification.[50] Such national procedures firstly guarantee that the process of European integration receives, at least indirectly, a specific degree of legitimacy from the Nation-States. Secondly, that the founding Treaties as well as each amendment agreed by the governments appear as the direct expression of the common will of the European people.

[49] However, the practice to ratify Treaties according to the respective national constitutional requirements works well as long as the EU in developing a multi-level constitution respects national constitutions: see Chapter Four of this Thesis, Section 2.2. pp. 130-131 in relation to Section 4.4. of this Chapter pp. 250-252.

[50] Pernice, I. (2000) "Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?", 36 *Common Market Law Review*, p. 703 at 717.

(b) The Rule of Law[51]

The oldest and most prominent attempt to justify the European enterprise (polity) in pursuance of the legitimacy theory is the idea of a "Community governed by law".[52] Law, has acquired within the European constitutional system, not only a functional property in terms of guaranteeing legality in all its dimensions but also a stronger ideological function in expressing what some have grandly termed the "identity and universality of Europe".[53]

In addition to the very general statement about the rule of law in Article 6(1) TEU, central to the second group of provisions dealing with this principle is Article 220 EC which provides that:

> "The Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed".

Building on this, the ECJ binds the Member States to the rule of law,[54] and in particular through the path of Article 10 EC. The Article establishes Member States' loyalty to the Treaties they have signed up, their duty to comply with Treaty-derived obligations and sets up the Commission's primary and

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[51] According to Arnull the concept relates to the mechanics of the system rather than the content of the rules it produces: Arnull, T. (2001) "The Rule of Law in the European Union", Paper presented to a two-day interdisciplinary conference *Legitimacy and Accountability in the European Union After Nice*, Birmingham University, 5-6 July 2001 (mimeo).
[52] Obradovic, D. (1996) "Policy Legitimacy and the European Union", 34 *Journal of Common Market Studies* 2, p. 191 at 196.
[53] *Idem.*, 197.
[54] Note Case C-294/83 *Parti Ecologiste 'Les Verts' v. Parliament* [1986] ECR 1339, [1987] 2 CMLR 343, para. 23 where the Court emphasised that the Community "is a Community based on the rule of law, inasmuch as neither its Member States nor its Institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty".

centralised powers of enforcement of EU law against non-conforming Member States in Articles 226 and 228 EC.

Nevertheless, like the direct effect and remedies' principles as announced in *Van Gend en Loos*[55] and *Bonifaci*,[56] the rule of law, in the sense of binding Member States to the law they have created, has lost its unitary effect by being enforced in a decentralised way.[57] First, through the Court's evolutionary case law on the relationship between EU and national law, particularly the case law on direct effect and supremacy. Second, through the more recent obligation imposed on national authorities to make good the loss (the provision of remedies) caused in certain circumstances by a failure to apply or properly enforce EU law in breach of a Treaty obligation.[58]

Vis-à-vis the other EU Institutions, the rule of law is instantiated in the provisions on judicial review by the ECJ regarding the acts and omissions of the Institutions. Depending on its findings, the Court might approve the annulment of unlawful acts, sanction upon unlawful failures to act, and bind the Community to a principle of tort liability for certain limited types of loss (Articles 230-233, 235 and 288 EC).

[55] Case C-26/62 *Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1, [1963] CMLR 105.
[56] Joined Cases C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci and others v. Italian Republic* [1991] ECR I - 5357, [1993] 2 CMLR 66.
[57] Shaw, J. *loc. cit. supra* note 48, p. 16.
[58] See generally De Witte, B. (1999) "Direct Effect, Supremacy and the Nature of the Legal Order" in: Craig, P. and De Búrca, G. (eds.) (1999) *The Evolution of EU Law*, Oxford: Oxford University Press, 177-214.

(c) Procedural guarantees

The third group of principles brings together guarantees of procedural law. In particular, guarantees that organise the internal operation of the Institutions (Articles 189-248 EC) as well as their legal and political functioning within the system of the Treaties. There are also norms which govern the exercise of power within the EU, that is the allocation of competencies. Included here are those provisions that grant specific or general competencies to the Community, for example, Articles 2, 3, 14, 149-152, 310 EC, and its various Institutions, for example, 15, 37-38, 93-111, 138-145, 300-302 EC, and the limitation exercise of such competencies, for example, Articles 5, 16, 103 EC.

For the policing of many of these limits, account should be given to the Court's powers of judicial review which allow it both to ensure that the correct Institutions participate in the decision-making according to correct procedures and to annul an act based upon an insufficient or incorrect legal basis.[59] In *Germany v. European Parliament and the Council*,[60] for instance, a case that was concerned with the annulment of the tobacco advertising Directive,[61] the Court argued:

[59] Note Case C-45/86 *Commission v. Council* (*Generalised Tariff Preferences*) [1987] ECR 1493, para. 11 where the Court emphasised: "...the choice of the legal basis for a measure may not depend simply on an Institution's conviction as to the objective pursued but must be based on objective factors which are amenable to judicial review".
[60] Case C-376/98 *Germany v. European Parliament and the Council* [2000] ECR I - 2247.
[61] Directive 98/43/EC of the European Parliament and of the Council of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products [OJ 1992, No. L 213/9].

"Other articles of the Treaty may not, however, be used as a legal basis in order to circumvent the express exclusion of harmonisation laid down in [Article 129(4) of the Treaty]".[62]

Having examined the legal base for the establishment and functioning of the internal market, it must be held that:

"The Community legislature cannot rely on the need to eliminate obstacles to the free movement of advertising media and the freedom to provide services in order to adopt the Directive on the basis of [Article 100a]..."[63]

The third group of principles also includes general concepts such as:

a) the principle of limited powers, or *pouvoirs attribués* itself (Article 5(1) EC for the whole Community, and Article 7 EC so far as it pertains to each individual Institution),

b) the notion of implied powers (Article 308 EC, and the Court's case law on implied powers),[64]

[62] C-376/98 *loc cit. supra* note 60, para. 79; [Art. 129(4)] (now Art. 152(4)) reads as follows: "The Council acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee and the Committee of the Regions, shall contribute to the achievement of the objectives referred to in the Article through adopting: (c) incentive measures designed to protect and improve human health, excluding any harmonisation of the laws and regulations of the Member States.
[63] *Idem.*, para. 114.
[64] Note Cases: C-281/85 *Germany v. Commission* [1987] ECR 3203; C-22/70 *Commission v. Council* [1971] ECR 263; C-3, 4, 6/76 *Cornelis Kramer and others* [1976] ECR 1279.

c) the principles of subsidiarity, though used as a double-edged sword, and proportionality (Article 5 EC, second and third paragraphs),

d) the alleged legal and political principle of institutional balance assured through the mechanics of parliamentary oversight versus the Commission's independence (for example, Articles 251 and 272-280 EC) and through a number of inter-institutional agreements. Although these are more akin to political declarations, they do not entirely lack legal effects in the sense of being binding on the Institutions[65] internally and of generating legitimate external expectations on the part of the Member States.[66]

(d) Consent, Utility and Efficiency

In the constitutional framework of the EU, three more principles of legitimacy co-exist: consent, utility and efficiency which are not mutually exclusive.[67] The utility principle focuses on the perception that the Union gains its legitimacy through an appeal to its economic welfare. An emphasis, however, on the material rewards of Union co-operation is insufficient to guarantee sustained legitimacy. When the going gets tough, whether through strains in the economy or political conflicts, material needs become harder to satisfy and support becomes more conditional. To this effect, the utilitarian pattern exists as long as the EU citizens accept the policy because of support for its substantive content, for example, policies of internal market, employment and environment.[68] If not, disagreement with the policy content results in citizens'

[65] Note Case C-25/94 *Commission v. Council* (*FAO*) [1996] ECR I - 1469.
[66] Shaw, J. *loc. cit. supra* note 3, pp. 247, 288.
[67] Preuss, U. *loc. cit. supra* note 7, p. 219.
[68] Obradovic, D. *loc. cit. supra* note 52, p. 200.

withdrawing their support from the Euro-polity, the process of enlargement and EMU need to be recalled here. Yet, it is still very difficult to empirically measure legitimacy by means of surveys and opinion polls, as it is too unwieldy and complex a concept to be tackled in such a frontal assault.[69]

4.1.2. THE JURISPRUDENCE OF THE ECJ

4.1.2.1. Introduction

The move towards a European constitutional settlement was additionally set in motion as a doctrine of the ECJ over a period of careful and gradual reappraisals of the original Treaties.[70] To that extent the ECJ became part of the existing constitutional legal order.

More specifically, what is innovative - what is constitutional - about the Court's jurisprudence is that it has wisely rewritten the Treaties and in doing so it has required national judges to apply EC law as if it were an integral part of the national legal order.[71] To put it differently, it has transformed a set of legal arrangements binding upon sovereign States into a vertically integrated legal regime conferring judicially enforceable rights and obligations on all legal persons and entities, public and private, within EC territory, that being a catalyst in the so-called process of constitutionalisation.[72]

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[69] *Ibid.*

[70] See generally Chalmers, D. (1998) *European Union Law - Volume One: Law and EU Government*, Aldershot: Dartmouth, 271-335.

[71] Whether it was legitimate for the ECJ to usurp powers of the EU by interpreting Treaty provisions in a way that exceeded the original intent of contracting governments can only be judged in the light of cultivating a set of values able to sustain the new political order.

[72] Sweet, A. *loc. cit. supra* note 3, p. 1.

The process of constitutionalisation has both a tremendous symbolic value and enormous formal and socio-political implications for the Community. For it not only challenges traditional assumptions about Nation-State sovereignty but also makes the aggressive claim that at least within the area of its jurisdiction, ultimate political authority lies with the EC/EU.

4.2. Four waves of constitutionalisation

There have been at least four significant waves of constitutionalisation. In the first wave, the Court secured the constitutional character of the Treaties. In its Opinion No.1/91,[73] the Court noted, firstly, that the Community Treaty is much more ambitious than an international agreement setting up a free trade area by emphasising that:

> "...The EEC Treaty aims to achieve economic integration leading to the establishment of an internal market and economic and monetary union" (para. 17).

At the same time, it stressed that the ultimate objective of the Community is not only socio-economic but also political:

> "...The objective of all the Community Treaties is to contribute together to making concrete progress towards European unity" (para. 17).

[73] Opinion 1/91 of 14 December on the *Draft Agreement on a European Economic Area* [1991] ECR I - 6079, [1992] 1 CMLR 245.

The Court showed, thirdly, that the Community Treaty is radically different in nature from other international agreements:

> "The EEA is to be established on the basis of an international Treaty which ... merely creates rights and obligations as between the Contracting Parties and provides for no transfer of sovereign rights to the intergovernmental Institutions which it sets up. ... The EEC Treaty, albeit concluded in the form of an international agreement, nonetheless constitutes the constitutional charter of a Community based on the rule of law. ... The Community treaties established a new legal order for the benefit of which the States have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only Member States but also their nationals" (para. 20).

In the second wave, the constitutional 'boom' concerned the relationship between EC law and national law and the introduction of fundamental principles although they were not contained in the founding Treaties. To this effect, the ECJ laid down the rule that in *any* conflict between an EC legal norm and a norm of national law, the EC law must be given primacy (*the doctrine of supremacy*).[74] Actually, according to the ECJ, every EC norm, from the moment it enters into force, "renders automatically inapplicable any conflicting provision of ... national law" (para. 17).[75]

[74] Case C-6/64 *Costa v. Enel* [1964] ECR 585, [1964] CMLR 425.
[75] Case C-106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal* [1978] ECR 629, [1978] 3 CMLR 263.

Since Community law is to take precedence over national law in cases of conflict, then, logically, the Court had to develop rules to determine when a conflict exists. In *Commission v. Council*,[76] for instance, the Court alleged that such a conflict might arise in areas like the conclusion of a European Road Transport Agreement ("ERTA") where the competence of the Community is exclusive (para. 30). Subsequently, for the sake of the unity of the Common Market and the uniform application of Community law, the Member States are held to have lost their power to act independently (para. 31) (*the doctrine of pre-emption*).

In respect of the *doctrine of direct effect* the Court established that provisions of EC law could confer on individuals rights that public authorities must respect and national courts must protect.[77] In essence, the ECJ found that Treaty provisions and directives were directly effective and strengthened the applicability of regulations. Hence, individuals and companies are empowered to sue Member-State governments or other public authorities for either not conforming to obligations contained in the Treaties or regulations, or for not properly transposing directives' provisions into national law. The jurisprudence of supremacy inhibits national authorities from relying on domestic law to justify their failure to comply with EC law and requires national judges to resolve conflicts between Community and national law in favour of the former.[78] The ECJ thus constituted a Community legal order which based on a

[76] Case C-22/70 *Commission v. Council* [1971] ECR 263, [1971] CMLR 335.
[77] C-26/62 *loc. cit. supra* note 55, p. 16.
[78] C-6/64 *loc. cit. supra* note 74, p. 593.

sophisticated monism forbids the use of traditional dualist solutions to conflicts between national and Community law such as the *lex posteriori* doctrine.[79]

In the third wave of constitutionalisation, the ECJ supplied national judges with enhanced means of guaranteeing the effectiveness of Community law. In *Van Colson* and *Kamann*,[80] a case of discrimination regarding access to employment, the Court established *the doctrine of indirect effect* according to which national judges must interpret, in essence, rewrite the national law in the light of the wording and the purpose of Community law (para. 26). Once national law has been so constructed, EC law can be applicable too in legal disputes between private persons.

Finally, the ECJ has buttressed the argument that individuals may derive rights from EC law which national authorities and Courts must respect, by finding that there is a general principle of State liability (*the doctrine of governmental liability*).[81] According to this doctrine, a national court can hold a Member State liable for damages caused to individuals, due to the failure on the part of the Member State to correctly implement or apply a directive. In this sense, the national court may order the Member State to compensate the individual for his/her losses (paras. 44-46).

[79] Sweet, A. (1997) "The European Court and the National Courts: A Statistical Analysis of Preliminary References, 1961-95", *Harvard Jean Monnet Working Paper* No. 14/97, p. 1 under Title "Theories and Debates", < URL http://www.jeanmonnetprogram.org/papers/97/97-14-html >.
[80] Case C-14/83 *Von Colson and Kamann v. Land Nordrhein - Westfalen* [1984] ECR 1891, [1986] 2 CMLR 430.
[81] Cases C-6/90 and C-9/90 *loc. cit. supra* note 56.

4.3. Concluding remarks

In summary, it appears that the Court construed the constitutional principles of EC/EU law at two levels. At level one, it announced that EC law penetrates into the national legal orders and is a superior source of law within those orders.

Its jurisprudence of supremacy *envisages* a working type of relationship between the European and national courts.[82] As a matter of fact, it *imagines* a quite effective partnership in the construction of a constitutional Community. In that relationship, national judges become Community judges whenever they resolve disputes administered by EC law.

At level two, it developed a number of techniques for ensuring that EC/EU law can be enforced such as justiciability (direct effect), responsibility (State liability), interpretation (indirect effect) and pre-emption.

4.4. Multi-level Constitutionalism and European integration

Although the Court has contributed to the Union's constitution in a motionless way, meaning that it is not going any further than the announced constitutional principles-doctrines, European integration is not a static project. In contrast, it is a dynamic process, as already maintained in many parts of this Thesis, and multi-level constitutional in the making.[83]

[82] Sweet, A. *loc. cit. supra* note 79, p. 4.
[83] Pernice, I. *loc. cit. supra* note 50, p. 709.

The advantage of the term 'model of multi-level constitutionalism', as the author contends in this section, is that it treats European integration as an open-ended process of constitution making instead of a sequence of international Treaties which establish and develop an organisation of international co-operation.[84] In other words, it highlights the actual and potential role of constitutional ideas and practices holding the EU together. In evaluating the EU, the point is to develop a perspective which

> "views the Member States' constitutions and the Treaties constituting the European Union, despite their formal distinction, as a unity in substance and as a coherent institutional system, within which competence for action, public authority or ... the power to exercise sovereign rights is divided among two or more levels".[85]

The fact that the EU is formally based on international Treaties neither prohibits considering its foundations as constitutional, nor compels one to adopt a dualist approach as to the relation between Community and national law.[86] As to what happens to the primacy of EC/EU law in such a system, this appears to have been decided through a common decision of the peoples of the Member States, expressed in the Amsterdam Protocol on the application of the principles of subsidiarity and proportionality.[87] It is confirmed there that these

[84] *Idem.*, 707.
[85] *Idem.*, 706.
[86] *Idem.*, 710.
[87] *Idem.*, 719.

principles do not affect the Court's case law regarding the relationship between national and Community law.[88]

As the wording implicitly states, this new notion creates a multi-level political arrangement based on a holistic constitutional system of delegated, reserved and/or shared powers between relatively autonomous, yet interrelated structures of government and 'governance' through the policy networks. Their interactions aim to preserve the integrity of the segments while leading to a living, pluralist and organic political order at the EU level which "builds itself from the grounds upwards".[89]

The polity building exercise that has to evolve from the lower level 'upwards' is plainly depicted in the drafting process of the Charter[90] which in effect harness the democratic ethos of those who form the 'constituent power' of the Euro-polity.

5. THE CHARTER OF FUNDAMENTAL RIGHTS

5.1. Introduction

The call for a deeper and wider debate about the future development of the EU prior to the Treaty revision process of 2004 which was announced in the Declaration on the Future of the Union adopted at Nice suggests that the

[88] See Protocol on the Application of the Principles of Subsidiarity and Proportionality, para. 2.
[89] Burgess, M. (1993) "The European Tradition of Federalism: Christian Democracy and Federalism" in Burgess, M. and Gagnon, A. (eds.) (1993) *Comparative Federalism and Federation: Competing Traditions and Future Directions*, New York: Harvester Wheatsheaf, 138-153, at 149.
[90] Charter of Fundamental Rights of the European Union [OJ 2000, No. C 364/1].

traditional IGC process may not survive long.[91] The appeal to a more visible, deliberative and inclusive method of polity building commenced by the drafting of the Charter has instead taken hold.

To the extent that we adhere to a democratic concept of a European constitution, the Charter also functions as a catalyst of exchanging ideas on the constitutionalisation of the founding Treaties.[92] Its symbolic value is three-fold. First, it enhances the visibility of the rights enshrined into Community law which consequently opens up to democratic scrutiny. Second, it tilts the balance of power in favour of the political process away from the judicial one. Once the Charter enumerates a given right, the ECJ would not be able to deny its fundamental character. Finally, by rendering explicit the rights that Europeans mutually recognise each other, it supplements the concept of a European multi-level constitution.[93]

5.2. Constitutionalism and Charter: Building the methodology

In determining how the Charter might complement the notion of a multi-level *meta*-national constitution, section 2 analyses the place of the Charter in the legal background of fundamental rights protection in the EU. That analysis should give some insight in the specific nature and potentiality of the Charter to contribute to European constitutionalisation. Section 3 explores in generic

[91] Treaty of Nice, declaration 23 on the Future of the Union, European Council of Nice 07-11/12/2000, para. 6.

[92] For a general assessment on the impact of the Charter on the *de facto* constitution of the EU, see Engel, C. (2001) "The European Charter of Fundamental Rights: A Changed Political Opportunity Structure and its Normative Consequences", 7 *European Law Journal* 2, 151-170.

[93] European Parliament, *Resolution on the Drafting of a European Union Charter of Fundamental Rights* [(C5-0058/1999 - 1999/2064(COS)), [A5-0064/2000 of 16 March 2000], point V states: "whereas the Charter of Fundamental Rights should be regarded as a basic component of the necessary process of equipping the European Union with a constitution".

terms the contents *rationae materiae* and *rationae personae* of the Charter which should clarify its aims and scope. This will inevitably lead to the question of the relation between the Charter and other competing supra-national mechanisms for human rights protection, in particular the ECHR. Section 4 explores whether the Charter confirms, enhances or replaces the existing protection of fundamental rights in the EU legal order whereas Section 5 examines in relevance to the above whether it could be seen as first step towards a genuine European constitution independently of its legal *status*.

5.2.1. Section 1: Democratic Legitimacy and the Convention

Even though discussion of the desirability of a Charter or otherwise EU Bill of Rights is far from new considering the many *Sage* reports or working group proposals,[94] the origin of this particular initiative lies with the German Presidency in the first half of 1999.[95] The stated purpose, as eventually reflected in the preamble, was to strengthen the protection of fundamental rights in the EU, not by changing the rights as such, but by making them more visible to the EU citizens.

Thus the drafting of a European bill or Charter was not an ordinary policy initiative, as it did not aim primarily - or at all - at the policy-maker or the lawyer, but largely at the citizen. In fact, this visibility or "showcase"[96]

[94] See Report of the Expert Group on Fundamental Rights, *Affirming Fundamental Rights in the European Union: Time to Act*, chaired by Prof. Spiros Simitis, European Commission, DG of Employment, Industrial Relations and Social Affairs, February 1999: < URL http://europa.eu.int/comm/employment_social/fundamri/expertgroup/report_en.pdf>.

[95] See European Council Conclusions from Cologne, Annex IV, "Decision on the drawing up of a Charter of Fundamental Rights of the European Union", (3-4 June 1999): < URL http://europa.eu.int/council/off/conclu/june99/june99_en.pdf >.

[96] Lord Lester of Herne Hill, (2000) "Introduction" in: Feus, K. (ed.) (2000) *An EU Charter of Fundamental Rights: Text and Commentaries*, London: Federal Trust, 3-11, at 5.

exercise, a terminology used by members of the UK government, was a way of pronouncing and confirming what the EU already claimed to have done in the area of human rights. Alternatively, it could be seen that it was a way of declaring its commitments to a public process which would help to support a degree of popular legitimacy still contested and questioned in the Euro-polity.

As far as the *Convention* process itself is concerned, it is significant to note that this was an unprecedented forum in the history of the EU. Both in terms of its composition, its decision-making processes as well as its openness to *input* from a broadly based civil society, it compares very favourably with the secretive horse-trading among Ministers which has traditionally characterised Intergovernmental Conferences.

5.2.1.1. Composition

The very novelty, including the apparent lack of an existing legal basis, of the process has generated interest, given its comparatively broad representative composition.

The composition of the drafting body, what became known as the *Convention*, was specified to include representatives of personal, national, and European constituencies. More specifically, the Member State governments (1), the Commission {one} (2), the European Parliament (3), and national parliaments (4), bringing the number to 62 in total. Additionally, observer *status* was given to two representatives of the Court of Justice and two of the Council of Europe, one of which was to be drawn from the European Court of Human Rights ("ECtHR"). The Convention and its drafting group called 'Praesidium',

comprising Members from each of the four categories of representatives and the President of the Convention, was assisted by a Secretariat staffed by the Legal Service of the Council.

5.2.1.2. Working Methods

In addition to the significantly representative nature of the body's composition, the working method was expressly prescribed in a way which immediately contrasts with other constitutional processes within the EU - if indeed this process of drafting the Charter can be termed a constitutional one.[97] Thus on this occasion, the European Council in Tampere specified that:

> "Hearings held by the Convention and documents submitted at such hearings should, according to the mandate, "in principle" be public during and after the process".[98]

This procedure has been followed throughout. The website on the Europa server has been useful for containing information on the various draft texts, records of the Convention's meetings and in general for making the process to be followed reasonably closely from outside. Similarly, the European Council indicated that certain other EU Institutions which were not involved in the Convention - the ESC, the COR and the EU Ombudsman - should be invited to

[97] It is interesting to note that while the Charter process could hardly be characterised as a moment of constitutional baptism for the EU, some aspects of its functioning might be seen as prototypical for a European constitutional development as it will be asserted below.

[98] See point B (ii) of Annex to the European Council Conclusions from Tampere, "Composition, Method of Work and Practical Arrangements for the Body", (15-16 October 1999), < URL http://europa.eu.int/council/off/conclu/oct99/oct99_en.htm#annex >. The "in principle" reservation and the fact that only documents submitted at hearings of the Convention would be covered by this transparency provision is, however, problematic.

give their views systematically.[99] A draft had to be ready within one year for the European Council in Nice in December 2000.[100]

Along the way, NGOs, independent experts and the applicant countries for Union membership were also invited to give their views.[101] Notwithstanding this exclusion of representatives of civil society from formal involvement in the drafting process and in particular from membership of the Convention, a number of well-attended hearings took place. Also a vast number of submissions, including amendments, and representations were made by a wide range of organisations and interests, therefore testifying to the actual and potential vibrancy of a European civil society.[102]

5.2.1.3. The decision-making process

Indeed, the very choice of procedures ensured an almost unprecedented momentum for the initiative which would make it very difficult for any effective opposition to emerge as long as the final product was not patently unacceptable in some respects. Having said that, over one thousand amendments were submitted and successive drafts of the Praesidium which set out with the ECHR provisions as a baseline were based on an attempt to represent some kind of compromise between the different views.[103] Further, some eight or nine rights which did not form part of the list originally drawn up

[99] *Idem.*, point iv.
[100] See Nice European Council (7-9 December 2000): Presidency Conclusions: < URL http://europa.eu.int/council/off/conclu/dec2000 >.
[101] Tampere European Council Conclusions *loc. cit. supra* note 98, points v and vi.
[102] Shaw, J. (2000) "Process and Constitutional Discourse in the European Union", 27 *Journal of Law and Society* 1, p. 4 at 36 where she suggests that allowing for this dialogue with non-governmental interests "dramatically opens upon the dialogic potential" of the process.
[103] Draft Charter of Fundamental Rights of the European Union, 20 September 2000, CHARTE 4477/00, COM (2000) 559 final, para. 4.

by the Praesidium, for example, the right to equality before the law, the protection of intellectual property and children's rights, were included in the latest draft.[104] It was agreed that there would not be any numerical voting but rather an attempt to proceed by *consensus* in order to finalise a draft Charter in a relatively short space of time but also to overcome complicated issues and divergent opinions. Thus it came as no surprise that the final draft was approved with the "almost unanimous agreement of the Convention's members".[105] Guy Braibant, representative of the French Government to the Convention suggested that the Convention's mechanism of *consensus* could serve for other European projects such as the Union's constitutional development.[106]

5.2.1.4. The Convention and constitutional development

The significant features of the aforementioned drafting process and the symbolism of a 'Convention' of this kind have readily been seized upon as a possible model for European constitutional processes in the future, and particularly with a view to reforming the much-criticised IGC procedure.[107]

In particular, since the conclusion of the Charter, the Commission has been supporting the elaboration of some version of the convention method as part of

[104] *Idem.*, para. 20 < URL http://db.consilium.eu.int/df/default.asp?lang=en >.
[105] See translation of the letter sent to President Chirac by former President Herzog upon completion of the Convention's proceedings, 5 October 2000, CHARTE 4960/00.
[106] See "How the Charter was drawn up - Sound bites": < URL http://europa.eu.int/comm/justice_home/unit/charte/en/charter03.html >, p. 3. This idea was also approved by de Búrca in her ELRev Article: De Búrca, G. (2001) "The Drafting of the European Union Charter of Fundamental Rights", 26 *European Law Review* 2, p. 126 at 138.
[107] See generally Vitorino, A. (2001) "The Convention as a Model for European Constitutionalisation" in *Walter Hallstein - Institute for European Constitutional Law Paper (WHI)*, Humblot - University of Berlin < URL http://www.whi-berlin.de/vitorino.htm >.

a re-fashioned Treaty-revision mechanism, if not quite as an alternative, then at least, as a substantial adjunct to and improvement of the IGC process. Nevertheless, it seems that several of the Member States are much less supportive of such a process. Despite their calling for a 'deeper and wider debate on the future of the EU leading up to the 2004 IGC, the Member State governments clearly seek not to lose their pivotal role in the treaty-making process and therefore in the core processes of European constitutional development and change.[108]

However, the outpouring of praise and support for the idea of a convention-type deliberative body which entails the benefits of openness and participation runs the risk of idealising and placing excessive faith in the Charter process and the desirability of its application to future constitutional tasks and procedures, for example, the national ratification process. A number of criticisms have already been voiced, including many by NGOs which made submissions or sought to be engaged in the Charter process[109] but also by participants in the procedure[110] and academic observers.

Olivier de Schutter, for example, has pointed to the various shortcomings in the Convention process, in particular those affecting the civil society

[108] See the Report on the Debate on the Future of the European Union: Report from the Presidency to the European Council at Götenborg (16 June 2001), paras. 51, 54 and 57: < URL http://ue.eu.int/en/Info/eurocouncil/index.htm >.
[109] See for example the comments made to the House of Lords, Select Committee on European Union, *Eighth Report: EU Charter of Fundamental Rights, Part 3: EVIDENCE The content of the Charter A HIGH LEVEL OF PROTECTION*, paras. 83-86 : < URL http:www.parliament.the-stationery-office.co.uk/pa/ld99900/ldselect/ldeucom/67/6701.htm >.
[110] See Opinion of the COR on the 'Process of drawing up a Charter of Fundamental Rights of the European Union' [OJ 2000, No. C. 156/1, paras. 3.1 and 4.1].

organisations.[111] In the first place, he argues that some degree of organisation of civil society is necessary if a diffuse right to make views known is to be facilitated. A right to participate or even, less ambitiously, a right to reply would be more feasible if relevant actors within the civil society could be identified. Representativity and competence/or expertise could be some of the grounds for such identification, whereas an organisation promoted in a specific way would enable them to become more directly participative, rather than simply a multitude of different voices raised. Secondly, he argues that a preliminary document setting out and defining the key issues in advance should be drawn up. The absence of such a document during the Charter-drafting process seemed to amplify the imbalance of knowledge among non-experts, lawyers for example, and supposed 'expertise' amongst the Convention participants. In the absence of changes of this kind, he concludes, the participation of civil society will remain no more than a 'weak right to be heard' rather than a fuller consultative role, if not ultimately a 'seat at the table'.

For her part, Deirdre Curtin expresses the same ideas.[112] Firstly, she suggests that the role of organised civil society should become more formal. Although the Charter initiative may have been aimed at the citizen, and a virtue made of the openness and novel nature of the process, this was not a genuinely

[111] De Schutter, O. "La 'Convention': Un Instrument au Service de l' art de Gouverner dans l' Union Européenne?", Paper presented to the *Arena Workshop on the Charter of Rights as a Constitution-making vehicle*, Oslo, 8-9 June 2001, pp. 4-9: < URL http://www.arena.uio.no/events/charterrights.html >.

[112] Curtin, D. "Democratic Legitimacy and the Convention: The "Cunning of Reason?", Paper presented to a one-day conference *The European Union Charter of Fundamental Rights: Context and Possibilities*, University of Notre Dame, London Law Centre, 29 June 2001, pp. 1-2 (*mimeo*).

participatory process but one which, albeit deliberative in nature, was to be composed only of institutional representatives from national and European levels. Secondly, she wonders whether the Council Secretariat should be allowed to assume such a pivotal role in terms of back up legal, technical and administrative support or should the Convention be given its own (temporary) support drawing from different interests and expertise. Thirdly, a technical preparation should take place in advance of the convening of the Convention whilst the role of experts in that process and during the various stages of discussion and drafting should be defined.

Furthermore, the issue of a fuller participation of an organised European citizenry is related to the question of how the Convention actual operated in practice. Since the plenary operated without voting, 'consensus' had to be reached, and this obviously gave the drafting group (the Praesidium of five assisted by the legal secretariat) a considerable margin of discretion.[113] Even if most of the proceedings, hearings, and plenaries were held openly, the drafting group did not operate so openly. So, apart from the explanatory memorandum ultimately produced by the secretariat, it is difficult to resolve why particular drafts were accepted or rejected at different stages. Moreover, although the plenary sessions did not vote, voting did take place within the various delegations, for example, of national parliamentarians and European parliamentarians. Nevertheless, the quality of deliberation was considerably

[113] De Búrca *loc. cit. supra* note 106, p. 133; Liisberg, J. (2001) "Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law? - Article 53 of the Charter: A Fountain of Law or Just an Inkblot? *Harvard Jean Monnet Working Paper* No. 4/01, under Title "Consultations Between Secretariat and Commission Behind Closed Doors" < URL http://www.jeanmonnetprogram.org/papers/01/010401.html >.

lower in the delegations and particularly in the later stages where decisions had to be made rather than in the Convention plenary. Where power was at stake and the requirement to produce a text existed, the differences within the delegations became polarised and decision-making was characterised much more by closed bargaining and less by open deliberation.[114]

It also became apparent that the institutional discussions of the possibility of adapting the Charter method to future EU constitutional processes instigate the development of a model of direct democracy at the EU level. Thus a further phase of structured reflection including a broad and open preparatory 'forum', instead of a 'Convention method', has already started to be launched.[115]

Certainly, whether the term 'forum' reflects a governmental desire to distinguish a reformed IGC procedure involving a wider number of participants from the particular type of procedure used for drafting the Charter, or whether it reflects something else is not clear. Nevertheless, it suggests something different from a 'Convention'. Whereas a 'Convention' implies the power to take some kind of decision, to produce significant *output* at the end of deliberation, the term 'forum' implies a space for debating and discussing. In other words it may be described as an 'entity' which is not mandated or empowered by the Council of Ministers to adopt decisions.

[114] Schönlau, J. "Drafting Europe's Value Foundation: Deliberation and Arm-twisting in Formulating the Preamble to the EU Charter of Fundamental Rights" (*mimeo*) as quoted in: De Búrca, G. "European Constitutionalism and the Charter", Paper presented to a one-day conference *The European Union Charter of Fundamental Rights: Context and Possibilities*, University of Notre Dame, London Law Centre, 29 June 2001, p. 7 (*mimeo*).
[115] Curtin, D. *loc. cit. supra* note 112.

5.2.1.5. Concluding remarks

The combination of the weakness' which emerged within the Charter-drafting process itself and the evident intention of the Member States in the European Council to keep down any stronger form of popular participation does not give cause for sufficient complacency about the Union's democratic legitimacy. Nevertheless, it should not be forgotten that the very act of a new forum of this kind (Convention) is suggestive of the potential for newer and more experimental forms of a 'bottom-up' than an 'top-down' constitutional development in the EU.

5.2.2. Section 2: The Charter against the judicial human rights protection

Internally, the EU is keen to highlight its commitment to fundamental rights. Although the original Treaties did not contain a general commitment upholding fundamental rights, there was some recognition of specific rights in a more economic context in the Treaty of Rome. The prohibition of discrimination on grounds of nationality,[116] the right of free movement of workers and rights of establishment for nationals of Member States,[117] for equal pay without discrimination on the grounds of sex[118] and improved workers' conditions and standards of livings were some of them.[119]

More recently, the Amsterdam Treaty added a set of procedural guarantees and introduced some provisions designed to further the protection of fundamental

[116] [Art. 6 EC] (see Annex II).
[117] [Arts. 48-58 EC] (see Annex II).
[118] [Art. 119 EC] (see Annex II).
[119] [Arts. 117-122 EC] (see Annex II).

rights, for example, (Articles 6(1), 6(2), 7, 46(d) TEU, 3(2) EC, 136 EC and 141(4) EC).

The inclusion of references to fundamental rights followed sustained pressure over a number of years from the EU Institutions who were aware of the potential impact that the Community, and later the Union, could have on the issue of fundamental rights.

Until the Maastricht and Amsterdam Treaties, the protection of fundamental rights was largely developed on a *sporadic* basis by the ECJ. Its recognition of fundamental rights was initially triggered by a legal challenge to the "supremacy of Community law from Member States which felt that Community legislation was encroaching upon important rights protected under national law".[120] From 1969 and onwards, the ECJ has recognised that fundamental rights form an integral part of the general principles of Community law, the observance of which it ensures.[121]

Considering the fact that the EU is not only a common market[122] but has wider political, economic or social perspectives which should be accommodated within a pluralistic system, the Court has continued within the framework of a multi-level constitutionalism to highlight the importance of fundamental rights. In particular, it has indicated that it draws inspiration from the constitutional traditions common to the Member States so "it would annul any Community

[120] Craig, P. and De Búrca, G. (eds.) (1998) *EU law, Text, Cases and Materials*, Oxford: Oxford University Press, (2nd edition), 298.
[121] Note Case C-29/69 *Stauder v. Stadt Ulm* [1969] ECR 419, para. 7, [1970] CMLR 112.
[122] Opinion 1/91 *loc. cit. supra* note 73, para. 20.

measures which are incompatible with the fundamental rights recognised by the constitutions of those States".[123] Additionally, the ECJ has declared that "international treaties for the protection of human rights to which the Member States have collaborated or of which they are signatories can supply guidelines which should be followed within the framework of Community law".[124]

The ECJ has also held, firstly, that its powers of review extended to the acts of Member States[125] and secondly, that Member States must respect fundamental rights when they implement Community law or rely on derogations provided for under the Treaty.[126] References to the ECHR followed in subsequent cases.[127] Equally, both Community Courts have lately issued a number of judgments with human rights implications.[128] Finally, from *Krombach v. Bamberski* (a case concerning recognition of foreign judgments) it could be argued that whenever the Court reviews the legality of a normative act, it

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[123] Note Cases C-4/73 *Nold KG v. Commission* [1974] ECR 491, para. 13, second indent; C-11/70 *Internationale Handelsgesellschaft v. Einfuhr- und Vorratstelle für Getreide und Futtermittel* [1970] ECR 1125, para. 3, [1972] CMLR 255.

[124] Note Case C-44/79 *Hauer v. Land Rheinland-Pflaz* [1979] ECR 3727, para. 15, [1980] 3 CMLR 42.

[125] Note Case C-5/88 *Wachauf v. Bundesamt für Ernährung und Forstwirtschaft* (Federal Republic of Germany) [1989] ECR 2609, para. 19, [1991] 1 CMLR 328.

[126] Note Case C-260/89 *Elliniki Radiophonia Tileorasi (ERT) v. Dimotiki Etairia Pliroforissis (DEP)* [1991] ECR I - 2925, para. 43, [1994] 4 CMLR 540.

[127] Note Case C-13/94 *P v. S and Cornwall County Council* [1996] ECR I - 2143, paras. 16, 19, IRLR 347.

[128] Note Cases C-17/98 *Emesa Sugar (Free Zone) NV v. Aruba* [2000] ECR I - 675, paras. 16-19 (Art. 6 ECHR: Right to a fair trial); C-361/00 P (R) *Cho Yang Shipping v. Commission*, Order of 15 December 2000 (not yet reported), on appeal from the order of the Court of First Instance in Case T-191/98 RII, [2000] ECR II - 2551, paras. 84-85, 92 (Art. 6 ECHR in competition law); C-65/98 *Eyüp v. Landesgeschaftsstelle des Arbeitsmarrktservice Vorarlberg* [2000] ECR I - 4747, paras. 32-34 (Art. 8 ECHR: Right to respect for private and family life - Definition of 'family'); C-329/97 *Ergat v. Stadt Ulm* [2000] ECR I - 1487, paras. 65, 67 (Art. 8 ECHR: Family reunion); T-82/99 *Cwik v. Commission*, [2000] ECR IA-155; II-713, paras. 50-51, 57-58 (Art. 10 ECHR: Freedom of Expression); C-274/99 P *Bernard Connolly v. Commission*, [2001] ECR I - 1611, paras. 29-41, 46, 49, 51, 64 (Art. 10 ECHR: Staff Regulations): note also Opinion of the A.G. Ruiz-Jarabo Colomer, paras. 4-28; C-369/98 *R v. Minister of Agriculture, Fisheries and Food ex parte Fisher*, [2000] ECR I - 6751, paras. 1-2 of the Court's ruling (Implicit application of Art. 10 ECHR); T-30/99 *Bocchi Foods v. Commission*, [2001] ECR II - 943, paras. 74-83 (Art. 14 ECHR: Prohibition of Discrimination - Right to property and to carry on business).

would submit that act to the test whether human rights or fundamental freedoms have been infringed.[129]

The absence of a catalogue of fundamental rights and the fact that the protection of these rights must be deduced from the case law certainly makes it difficult to assess the rights of individuals under Community law.

Furthermore, as the Court cannot produce a systematic set of rules for the protection of human rights, it might be difficult for a party to assess whether or not it is worthwhile to raise such a question in the context of Community law litigation.

The difficulties inherent in the fact that the Community Courts can deal with the protection of human rights only if the question in issue arises in the context of Community law cannot be overcome without a fundamental redefinition of the objectives of the Community and the competence of the Community Courts.

In order to overcome the absence of a systematic protection of human rights many aspirational political initiatives took place. The EP adopted a Declaration of fundamental rights and fundamental freedoms[130] and eleven of the then

[129] Note Case C-7/98 *Krombach v. Bamberski* [2000] ECR I - 1935, paras. 37-38.
[130] European Parliament, *Resolution on Adopting the Declaration of Fundamental Rights and Freedoms* [OJ 1989, No. C 120/51, A2-3/89].

twelve EU Member States signed the Community Charter of the Fundamental Social Rights of Workers.[131]

Despite these advances which had been made within the EU to promote awareness of fundamental rights the EU still lacked a codified system of rights protection.

The question of accession was then pursued in 1994 when the Council of Ministers asked for the Court's opinion on the issue whether the Community could accede to the ECHR without, however, amending the Treaty. That question was answered in the negative.[132]

In the light of such a negative environment, many interested parties such as the Council and the Parliament and representatives of the civil society, were later prompted to renew their calls for a single Charter of fundamental rights in the run-up to the negotiations of the AT. In that context, the European Council of Cologne made its request to draw up a Charter.[133]

5.2.3. Section 3: *Rationae materiae* and *rationae personae* of the Charter

The Preamble of the Charter reaffirms that the Union is founded on a vast range of constitutional principles: indivisible, universal values of human

[131] The UK did not sign the Community Charter on 9 December 1989. Yet, by ratifying the AT and by adopting SPA Directives such as the work-councils, parental leave, part-time work and burden of proof in sex discrimination cases which were re-issued using the old [Art. 100 EC], it agreed to last.

[132] Opinion 2/94, *Accession by the Community to the European Convention for the protection of Human Rights and Fundamental Freedoms* [1996] ECR I - 1579, [1996] 2 CMLR 265, para. 35.

[133] See *supra* note 95.

dignity, freedom, equality and solidarity, democracy and the rule of law. It also places the individual at the heart of its activities, by creating an area of justice and security and by the establishment of Union citizenship.[134]

In terms of *rationae personae*, the Charter protects both EU citizens and non-EU citizens who find themselves in a situation linked to Community law against actions taken by the Community Institutions and Member States' authorities as long as the latter act within the framework of Community law. The Charter also makes reference to its stated purpose which it proclaims is to "strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible".[135] The Charter is thus a "fairly predictable document"[136] insofar as it comprises civil and political rights, newer forms of such rights which take account of scientific, technological and eugenic developments, social and economic rights and other rights, which are common to both categories, for example Article 47. *Rationae materiae*, therefore, the Charter appears to contain more fundamental rights than the ECJ has so far effectively guaranteed, yet still less than the Court of Justice could guarantee on the basis of Article 6(2)[137] in combination with Article 46(d) TEU which provide for a more expansive human rights protection within the EU. There are two reasons which can justify this. First, to the extent that the Charter contains fundamental rights which are based on EC or EU Treaty, for example, Article

[134] Charter *loc. cit. supra* note 90 - Preamble.
[135] *Ibid.*
[136] See Scottish Parliament European Committee, 2nd Report, 2001 "Report into the EU Charter of Fundamental Rights", p. 23.
[137] Including an outline of ECHR system for derogations (see Art. 18).

45(1) on freedom of movement and residence, these rights shall be exercised under the conditions and within the limits defined by those Treaties (Article 52(2)). However, this is not the case if by doing so the level of protection of fundamental rights stated in Member States' constitutional traditions or a number of international human standards would be threatened (Article 53). Second, insofar as the Charter contains rights which are not based in the EC or EU Treaty,[138] these rights can offer legal protection only to the extent that they present a nexus with Union law.[139]

The new concept of "Union law"[140] indicates that the Charter covers the entire range of Union activities, including the sensitive questions of second and third pillars. With due regard to the principle of subsidiarity, the Charter does not establish new powers or tasks for the Community or the Union. Nevertheless, as the *Charter is not part of the constitution* of a *federal entity*,[141] it might be surprising to find a number of provisions concerning subject matters, for example family life,[142] death penalty,[143] or education[144] that fall outside the present competencies of the Union. The answer to this challenge, however, is that such provisions are the expression of common values against which the

[138] For example, a number of grounds on which discrimination is prohibited by virtue of Art. 21(1) of the Charter are not listed in [Art. 6a EC] (colour, social origin, genetic features, language, political and any other opinion, membership of a national minority, property and birth).
[139] See Art. 51(1) of the Charter: Scope.
[140] *Ibid.*
[141] See Chapter Two of this Thesis, Section 3.1. p. 24.
[142] See Art. 9 of the Charter: Right to marry and right to found a family.
[143] See Art. 2(2) of the Charter: Right to life.
[144] See Art. 14 of the Charter: Right to education.

EU Institutions and Member States could not make a stand even if they do not have to implement them.[145]

In any case, the Charter does not replace the protection of fundamental rights at present offered by the Court of Justice. Rather, it constitutes a compilation of the main tenets of the case law of the Court whereas beyond that it consolidates citizens' identity in enshrining the common inheritance as regards fundamental rights just as other European catalogues of rights do (for example, the ECHR).[146]

5.2.4. Section 4: The relationship between the Charter and the ECHR

Since 1974 all Members of the EU have been Contracting Parties to the ECHR of 1950, under the auspices of the Council of Europe.[147] The ECHR and the case law from the European Court of Human Rights ("ECtHR") have served as important points of reference, both in the case law of the ECJ[148] and for the Convention drawing up the Charter. It is not a coincidence that the Charter contains rights stated in the ECHR, but mostly without taking over their

[145] Editorial Comments, (2001) "The EU Charter of Fundamental Rights still under Discussion", 38 *Common Market Law Review* 1, p. 1 at 4.

[146] The analysis of this Thesis is restricted to the relation between the Charter and the ECHR because of the specific place of this Convention in the EU legal order (see Arts. 6(2) TEU and 52(3) of the Charter).

[147] See ETS No. 5. The ECHR was adopted in 1950 and entered into force in 1953. France joined the ECHR, as the last Member of the Communities, in 1974. On the ECHR, see generally Harris, D. O'Boyle, M. and Warbrick, C. (eds.) (1995) *Law of the European Convention on Human Rights*, London: Butterworths.

[148] Note Joined Cases C-60 and 61/84 *Cinéthèque SA and others v. Fédération nationale des cinémas français* [1985] ECR 2605, [1986] 1 CMLR 365, paras. 25-26; C-12/86 *Demirel v. Stadt Schwäbisch Gmünd* [1987] ECR 3719, [1989] 1 CMLR 421, para 28; *Inter alia* note the Opinion of A.G. Capotorti in Case C-149/77 *Gabrielle Defrenne v. Société anonyme belge de navigation aérienne* [1978] ECR 1365, pp. 1385-1386, and C- 260/89 *loc. cit. supra* note 126, para. 42.

wording: (a) the ECHR restrictions are mostly excluded,[149] and (b) in some cases the scope of the right was widened[150] or reduced.[151]

Whatever the formulation of a fundamental right in the Charter, if it corresponds to a right guaranteed by the ECHR, the latter serves, by virtue of Article 52(3), as a minimum in determining the meaning and scope of the right in question. In this sense, the Charter, as part of Union law, might provide more extensive protection than the ECHR, not a narrower one.[152] Under Article 52(3) also, the exercise of the rights contained in the Charter which correspond to a right guaranteed by the ECHR may be subjected to limitations by a competent legislative authority, that is the national courts and the ECJ, to the extent authorised by the ECHR. At all times, however, these limitations must satisfy the strict conditions of Article 52(1) of the Charter, namely the principles of proportionality and the rule of law.

Furthermore, according to Article 52(2) of the Charter, rights which are based on EU or EC Treaty need to be exercised under the conditions and within the limits defined by EU or EC Treaty. If the application of Article 52(2) of the Charter leads to a higher level of protection of fundamental rights regarding their meaning and scope than that offered by the ECHR, the latter catalogue does not affect the content of the Charter right.[153] If, by contrast, the

[149] Compare, for example, the absolute formulation of the right to life in Art. 2(2) of the Charter to Art. 2(2) of the ECHR which describes the circumstances in which a deprivation of life is not regarded as a violation of that fundamental right.
[150] Compare, for example, Art. 49 of the Charter (Principles of legality and proportionality of criminal offences and penalties) to Art. 7 of the ECHR (No punishment without law).
[151] Compared to Art. 5(2)-5(5) of the ECHR, Art. 6 *junctis* Articles 47-50 of the Charter does not mention any rights of the people who are arrested or detained.
[152] See the last sentence of Art. 52(3) of the Charter.
[153] *Ibid.*

application of Article 52(2) of the Charter leads to a lower level of protection of fundamental rights than that offered by the ECHR, it conflicts with Article 52(3) of the Charter. In such case, Article 53 of the Charter applies, ruling in favour of the ECHR. Indeed, according to this provision, the Charter cannot "be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised by", among others, the ECHR. Consequently, rights contained in the Charter, corresponding to rights guaranteed by the ECHR and based on the Treaties are to be exercised under the conditions and within the limits defined by the Treaties so long as these limitations do not interfere with the meaning and scope of the ECHR rights.

By way of concluding this section, it can be stated that the Charter mainly attests the role of the ECHR in the EU legal order. Almost all fundamental rights are covered in the Charter. Where the text of the Charter departs from that of the ECHR, it can never be at the expense of the level of protection offered by the ECHR as it was maintained above. It follows that the Charter cannot firstly be qualified as a substitute for the ECHR in the EU legal order. This Convention continues to inspire the ECJ while developing the general principles of Community law. Secondly, it is not an alternative for accession of the EU/EC to the ECHR.

Even a legally binding Charter could not form an obstacle to the accession of the EU/EC as an entity of States to the ECHR.[154] By analogy with the national level, it is not inconsistent for a *meta*-national legal order to have its own

[154] On the *status* of the Charter, see *infra* section 5: The Charter as a Component of an EU Multi-level Constitution.

catalogue of fundamental rights and at the same time to adhere to an international mechanism for human rights protection like the ECHR. As a matter of fact, we are already in a pluralistic setting on what concerns the protection of fundamental rights in the EU. The competencies of national constitutional courts, the ECtHR and the ECJ are overlapping within the field of application of Union law regarding fundamental rights.[155] Therefore, a pluralism of sources and institutional mechanisms could be endorsed at the EU level.

Such an accession to the ECHR, after the adoption of the Charter, would surely add something to the present system of protection of fundamental rights in the EU. Theoretically, three reasons can be invoked for the EU/EC acceding to the ECHR:

1) The ECHR would offer a broader protection *rationae materiae.*

2) It would offer a broader protection and/or *rationae personae.*

3) It would contribute to a uniform interpretation of fundamental rights in the EU.[156]

[155] Menéndez, A. (2001) "Chartering Europe: The Charter of Fundamental Rights of the European Union", *Arena Working Paper* 2001/03, p. 14 < URL http://www.arena.uio.no/ >.
[156] Yet, according to the author's opinion, for defining the jurisdiction of the ECtHR and the ECJ an inter-institutional agreement between the Council of Europe and the EU would still be necessary.

As far as the first two reasons are concerned, these are not very convincing since the ECHR is *rationae materiae* and *personae* covered by the existing system of protection of fundamental rights in the EU. Furthermore, the Charter constitutes *rationae materiae* a partial, considering the issues of interpretation,[157] and *rationae personae* a full confirmation of this state of the law.[158] The main reason then remains for the EU/EC to accede to the ECHR is to enhance the uniform protection of fundamental rights in the EU.[159]

> "The duplication of protection systems runs the risk of weakening the overall protection offered and undermining legal certainty in this field. The adoption, of one system of protection for the Union countries and another for non- Union countries, whether they can be candidates or not, calls into question the consolidation of democracy and the rule of law in Central and Eastern Europe on the basis of common minimum standards guaranteed by a system of collective enforcement. The Strasbourg system exists, has proved itself over several decades, and is evolving and will continue to evolve. There should be no double standards, no Europe of two, three or four

[157] See *supra* section 3: *Rationae materiae* and *rationae personae* of the Charter.

[158] Apart from the 'citizens' rights', (which with the exception of the right to good administration (Art. 41)) - are all reserved for special categories of people, only Art. 15 (Freedom to choose an occupation and right to engage in work) distinguishes between EU citizens and citizens from third States. Moreover, to address criticisms that the Charter has failed to adhere to the principle of universality by ascribing fewer rights to non-citizens of the EU than the EU citizens, these should be seen in the perspective of redefining Union citizenship based on nationality towards citizenship based on participation. See Chapter Three of this Thesis, Section 5.3.1. pp. 97-99.

[159] See generally Russell-Johnston, L. "The ECHR and the EU Charter: Competing Supranational Mechanisms for Human Rights Protection?" in: Feus, K. (ed.) (2000) *An EU Charter of Fundamental Rights: Texts and Commentaries*, London: Federal Trust, 53-56.

speeds" (Speech delivered by judge Wildhaber, President of the European Court of Human Rights, 7 March 2000).[160]

Beyond that, the key to accession is to solve two problems currently faced by the EU in protecting fundamental rights and for which the Charter provides no solution. Explicitly:

1) The possible divergence of interpretation of the ECHR by the ECJ and the ECtHR[161] as both have jurisdiction, thus creating a situation of *forum shopping*,[162]

2) The absence of a procedure of direct external scrutiny by the ECtHR of the compatibility of acts of EU Institutions with the ECHR. At present such scrutiny might take place only indirectly in a case brought against an EU Member State[163] whereas a formal external control would have a uniformity effect on the way in which rights guaranteed by the ECHR are interpreted in relation to the Member States and the Union itself.[164]

[160] See Appendix to the Reply from the Committee of Ministers adopted at the 711th meeting of the Ministers' Deputies (31st May 2000) to Recommendation 1439 (2000) on the Charter of Fundamental Rights of the European Union, "Intervention made before the Ministers' Deputies", Rapporteur Group on relations between the Council of Europe and the European Union (GR - EU), p. 2.
[161] Note existing diverging interpretations in: C-374/87 *Orkem v. Commission* [1989] ECR 3283, [1991] 4 CMLR 502; *Funke v. France* [1993] 16 EHRR 297; Series A, No. 256-A (1993).
[162] Note *Matthews v. United Kingdom* [1999] 28 EHRR 361; *Pafitis and Others v. Greece* [1999] 27 EHRR 566; C-159/90 *Society for the Protection of Unborn Children Ireland Ltd (SPUC) v. Stephen Grogan and others* [1991] ECR I - 4685, [1991] 3 CMLR 849.
[163] Note *Matthews v. United Kingdom supra* note 157; *Pafitis and Others v. Greece supra* note 157.
[164] See *supra* note 160, p. 4.

5.2.5. Section 5: The Charter as a component of an EU Multi-level Constitution

Even though representatives of the Member States decided not to give the Charter formal constitutional rank by inserting it into the Treaties on which the Union is founded or by referring to it in Article 6(2) TEU, the Charter still serves as a supplement to a European multi-level constitution. It evokes, as shown above, the foundational values, principles and rights which the EU Member States have in common while respecting and protecting the diversity of constituent cultures, traditions and identities within the context of a civic-demos oriented relationship between the EU and its citizens.[165]

On top, it is constructed as an invitation to engage into constitution making on the side of citizens. By rendering clear the rights that citizens can make use, especially political ones, they might give themselves a political constitution. Filling petitions against the EU when an infringement takes place, for example, might signal the beginning of such a process. It also states that it does not confer any new competencies or tasks on the EU.[166] Such a language is obviously of constitutional character. It further becomes a political aspiration for exerting influence on future policies. This is particularly evident to the Commission's new approach to immigration where it states that the Charter may have an auditing effect.

"The Charter ... could provide a reference for the development

[165] See Chapter Three of this Thesis, Section 5.6. pp. 112-116.
[166] See Preamble of the Charter, fifth indent.

> of the concept of civic citizenship in a particular Member State ... for third country nationals. Enabling migrants to acquire such citizenship after a minimum period of years might be of a sufficient guarantee for many migrants to settle successfully into society or be a first step in the process of acquiring the nationality of the Member State concerned".[167]

Moreover, in its search for fundamental rights as they result from the constitutional traditions common to the Member States, the Court is inspired by the Charter so as to confirm that the fundamental rights, that it guarantees as general principles of Community law, are acceptable in the national legal orders. In its recent case law thus, *(BECTU) v. Secretary of State for Trade and Industry*[168] which concerned a worker's entitlement to annual paid leave the Advocate General ("A.G.") Tizzano concluded that the "Charter provides us with the most reliable and definitive confirmation of the fact that the right to paid annual leave constitutes a fundamental right".[169] Although the Court was more cautious in its approach, given that the reference document was the 1989 Social Charter of Workers Relations, it was nevertheless more emphatic on the *status* of the right to annual paid leave which made Advocate General Tizzano to declare that:

[167] European Commission, *Communication form the Commission to the Council and the European Parliament on a Community Immigration Policy*, COM (2000) 757 final, 22 November 2000, pp. 19-20.
[168] Case C-173/99 *Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU) v. Secretary of State for Trade and Industry* [2001] ECR I - 4881.
[169] *Ibid.*, Opinion of A.G. Tizzano delivered on 8 February 2001, para. 28.

"The entitlement of every worker to paid annual leave must be regarded as a particularly important principle of Community social law from which there can be no derogations and whose implementation by the competent national authorities must be confined within the limits expressly laid down by Directive 93/104".[170]

It would appear from the Court's dictum, therefore, that it recognises the right as having become a customary Community law,[171] law which no derogation can be permitted and which national law cannot seek to restrain.

While the Court was firstly inspired by the Charter as to the hierarchy of the above right in the Community legal order, it then used the Charter as a teleological tool for human rights protection where it has been concerned about interpreting and/or affirming fundamental rights. The method of introducing the Charter as such a tool has been adopted in subsequent cases. In *Mannesmannröhren-Werke AG. v. Commission*,[172] for example, a case which dealt with the right to refuse to provide answers that imply admission of an infringement of competition rules, the CFI recognised that the Charter could serve as an aid to interpretation of Community law and to that extent influence the development of case law.[173] Nevertheless, it did not use it as *a wholly*

[170] C-173/99 *loc. cit. supra* note 168, para. 43.
[171] Customary Community law can be defined as the *corpus* of legal norms that have been generally accepted as binding on members of a given community, and from which no derogation can be entertained. The validation of customary Community law, whenever such right be a contested issue, depends on the pronouncement of the Court of Justice.
[172] Case T-112/98 *Mannesmannröhren-Werke AG v. Commission* [2001] ECR II - 729.
[173] *Idem.*, para. 76 in relation to para. 15.

independent ground for challenging the validity of the contested Commission decision because the act was adopted before the Charter was proclaimed, that is 7 December 2000. This position, however, still remains inconsistent with the Advocate-Generals' views for two other cases which refer to annulment actions on appeal to the ECJ, and so inevitably relate to measures adopted well before the Charter was agreed.[174]

The most profound opinion, yet, on the Charter as a process, which could result in a multi-level constitution for the EU has come from Advocate General Léger in the appealed case *Council v. Heidi Hautala*,[175] concerning access to documents. There, the Advocate General has vigorously pronounced that:

> "The clearly-expressed wish of the authors of the Charter not to endow it with binding legal force should not be overlooked. However, aside from any consideration regarding its legislative scope, the nature of the rights set down in the Charter of Fundamental Rights precludes it from being regarded as a mere list of purely moral principles without consequences. [...] The Charter has undeniably placed the rights, which form its subject matter at the highest level of values common to the Member States (para. 80).

[174] Opinion of A.G. Mischo in Joined Cases C-122/99 P and C-125/99 P *D v. Council*, [2001] ECR I - 4319, para. 97; Opinion of A.G. Jacobs in Case C-270/99 P *Z v. European Parliament*, delivered on 22 March 2001, para. 40 (pending case).
[175] Opinion of A.G. Léger in Case C-353/99 P *Council v. Heidi Hautala* delivered on 10 July 2001 (pending case).

> The sources of those rights, listed in the preamble to the Charter, are for the most part endowed with binding force within the Member States and the European Union (para. 82). As the solemnity of its form and the procedure which led to its adoption would give one to assume, the Charter was intended to constitute a privileged instrument for identifying fundamental rights. It is a source of guidance as to the true nature of the Community rules of positive law" (para. 83).

5.2.5.1. What holds for the future?

The cases that have just been mentioned including the opinions of Advocate Generals clearly suggest that the Charter is no longer a mere proclamation. Community Courts are indeed inspired by the Charter as to how they will interpret fundamental rights in the EU legal order. With reference to future developments, the author's estimation would be that the Community Courts would easily overcome the obstacle of non-bindness, simply by using the Charter as mere confirmation rather than legal basis of their rulings on fundamental rights issues.[176] It is well known that Courts are perfectly capable of playing with those notions. In other words, it is relatively easy for the Courts to characterise an element of law as mere confirmation of the Court's reasoning, whereas that element can be effectively the basis for the Court's decision, if we consider the above suggestions regarding the *BECTU* case. In regard to this perspective, therefore, the EU will gradually throw itself into

[176] Piet Eeckhout expresses the same idea: Eeckhout, P. (2000) "The Proposed EU Charter: Some Reflections on Its Effects in the Legal Systems of the EU and of its Member States" in: Feus, K. (ed.) (2000) *An EU Charter of Fundamental Rights: Texts and Commentaries*, London: Federal Trust, 97-110, at 104-105.

constitutionalism through soft law, based principally on the Courts' jurisprudence.[177]

[177] This view was also endorsed by Heidi Hautala, Finnish MEP. Interview with the author (Academy of European Law (ERA): Trier, Germany, 12 July 2001).

6. CONCLUSION

Chapter Six has argued for an on-going process of EU constitutionalism. It has suggested that within the theory of a *meta*-national democracy functional constitution building and polity formation within and in relation to the EU should continue alongside any conceptual, theoretical and normative debate about the European Union's legitimate deficiencies.[178] In connection with this, it has put forward a model of a European multi-level constitution.

The perspective of a European multi-level constitution viewed the Member States' constitutions and the Treaties constituting the EU, as a unity in substance and as a coherent institutional system, within which competence for action is divided among two or more levels. The issue was not about linking the different levels of 'governance' but rather about creating avenues of participation and communication among the distinct ethno-nationally and culturally demoi in the affairs of the Euro-polity.

In that respect, the drafting of the Charter completes the picture. To the extent that we adhere to a democratic concept of a *meta*-national multi-level constitution, the legitimacy credit required for writing the fundamental law of Europe can only be satisfied by direct legitimacy inputs. It was quite clear that a process like that experimented for the Convention is far more democratic than an ordinary IGC but still far from the normative ideal type.

[178] Craig, P. (2001) "Constitutions, Constitutionalism and the European Union", 7 *European Law Journal* 2, p. 125 at 150.

In addition to claims for an *input* legitimacy, the Charter was also said to reinforce *social* legitimacy. By institutionalising fundamental rights within the EU, it strengthens the credibility of commitments undertaken by the member polities to protect fundamental rights of all persons residing within their territory and makes their overriding importance and relevance more visible to the EU citizens.

CHAPTER SEVEN

CONSTITUTIONAL DEBATE AND THE EU: CONSTRUCTING ACCOUNTABILITY

"It is not a crisis...quite the contrary...it is the best thing that has happened to the course of European unity in many years...For the first time, democracy is breaking through at the European level...The resignation of the Commission...looks similar to the fall of a European national government that has lost its parliamentary majority".[1]

1. INTRODUCTION

In the debate for a written European Constitution, the issues of democratic accountability and transparency also come to the fore.

As the European integration project grows and becomes more deeply ingrained, affecting many aspects of our lives, EU citizens need to be assured by means of a constitutional text that they have a right to know how and why decisions are made and implemented (i.e. the right to have rights in the Euro-polity).

[1] Reginald Dale in the "International Herald Tribune" (19 March 1999) as quoted in Piris, J. (2000) "Does the European Union have a Constitution? Does it Need One?", under Title "How Could the Constitutional Charter of the European Union be transformed into a Constitution like that of a State and does this look feasible?" *Harvard Jean Monnet Working Paper* No. 5/2000, p. 1 < URL http://www.jeanmonnetprogram.org/papers/00/000501-03.html >.

Linked to this is the ability to require the Community administration to give an account of actions taken in the name of public interest. These are very important points if one cogitates that in the EU political system there is 'no government' which is accountable via an electoral process and both the Commission and the Council are using practices which are far from transparent or amenable to opening their documents to the EU citizens.

It might be the case that in the collective exercise of political leadership in the Council, the governments can claim legitimacy indirectly via national general elections. However, the legitimacy of the political leadership role of the Commission is more problematic, as this has already been proved in the recent allegations of 1999 for fraud, financial mismanagement, nepotism and cover-up which indisputably revealed the unaccountable and undemocratic character of the EU.

To restore the real parameters of these issues, however, this Chapter will give a new perspective, and in order to achieve this, it will move into two directions. First, it will maintain that this institutional crisis which has thrown Brussels into deep confusion and challenged a culture of complacency and a lack of accountability proves to be an excellent opportunity to improve democracy in the EU. Second, by introducing two models of *individual* and *joint responsibility*, it will outline a set of mechanisms that could increase the accountability of the Commission to the EP, and so favour improved powers in the latter as necessary for its political legitimacy.

2. THE FALL AND RENEWAL OF THE COMMISSION

2.1. Introduction

Following the publication of a report by a Committee of Independent Experts ("CIE") on 15 March 1999,[2] the Santer Commission imploded in ignominy and mass resignation. It was the most dramatic week in the forty-two year history of the European Community. This unprecedented act left the EU without its 'executive' confronting a number of important issues: the negotiations on enlargement to the East, the future financing of the Union, *the Agenda 2000* programme[3] and the trade dispute with the USA over bananas.

From a practical standpoint, the Commission would have to be re-appointed in order for the EU to continue to function and in the meantime the Santer Commission would continue in a caretaker role in accordance with Article 201 EC.

2.2. The motion of censure

The Commission was subjected to a motion of censure over allegations of fraud in January 1999, but Members of the European Parliament ("MEPs") voted against dismissing the entire body of Commissioners. In fact, the Commission survived the motion of censure by a margin of only 293 votes to 232 (i.e. with fewer than half the MEPs voting in favour of the Commission).[4]

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[2] Committee of Independent Experts, *First Report on Allegations regarding Fraud, Mismanagement and Nepotism in the European Commission*, 15 March 1999; Main sources: < URL http://www.europarl.eu.int/dg3/experts/en/default.htm >
< URL http://www.europarl.eu.int/dg3/experts/default_en.htm >
< URL http://www.europarl.eu.int/dg3/experts/report1_en.htm >.

[3] In particular, the reform of the Common Agriculture Policy.

[4] Tomkins, A. (1999) "Responsibility and Resignation in the European Commission", 62 *Modern Law Review*, p. 744 at 746.

The price of survival was the Commission's reluctant agreement to the establishment of a special CIE to examine independently the allegations which had been made and to report back to the Parliament within two months.[5] Thus, a subsequent EP resolution called for a committee of independent experts to look into specific allegations of financial mismanagement,[6] the conclusions of which Mr Santer pledged to respect.

2.3. The CIE and its composition

A five-member CIE, the so-called "Committee of the Wise (men)"[7] was designated by Parliament's Conference of Presidents; the leaders of the political groups attending a meeting on 27 January 1999. This followed consultations with the Commission and was in accordance with the Resolution of 14 January 1999, adopted by the EP by 319 votes to 157, with 54 abstentions.[8] Out of the five people who were appointed to the Committee, only three acted as auditors whereas the rest were lawyers and former members of the European Commission and Court of Human Rights and the European Court of Justice respectively.

The choice for such a Convention was appropriate in terms of moral ethos. The Committee might have the aim to arrive at an independent, authoritative and final view as to the allegations that had already been made in Parliament and

[5] See summary of the parliamentary debate held on 11-01-99 on the 1996 budget discharge - The Motion of Censure < URL http://www.europarl.eu.int/dg3/experts/en/n9901112.htm >.
[6] European Parliament, *Resolution of 14 January 1999 on Improving the Financial Management of the Commission*, B4-0065, 0109 and 0110/99: < URL http://www.europarl.eu.int/dg3/experts/en/reso14en.htm >.
[7] House of Commons Library (1999) "The resignation of the European Commission", 99 *Research Paper* 32, p. 13 < URL http://www.parliament.uk >.
[8] *Ibid.*

elsewhere. However, at the same time, it had a general interest in protecting the rights of the Commissioners individually though it was not an investigative Committee in the sense of it doing its own detective work.[9]

2.3.1. The CIE's assigned tasks

The primary task of the Committee, as defined in the terms of reference laid down by Parliament at its sitting of 14 January, was to seek

> "to establish to what extent the Commission, as a body, or Commissioners individually, bear specific responsibility for the recent examples of fraud, mismanagement or nepotism raised in Parliamentary discussions, or in the allegations, which have arisen in those discussions".[10]

The Committee began its report by defining those primary terms. Thus, fraud was taken to mean "intentional acts or omissions tending to harm the financial interests of the Communities",[11] including the misappropriation of funds. Mismanagement was said to be a broader concept and encompassed "serious or persistent infringements of the principles of sound administration, and, in particular, applied to acts or omissions allowing or encouraging fraud or irregularities to occur or persist".[12] Nepotism was used to refer to "favouritism shown to relatives or friends, especially in appointments to desirable positions

[9] The Committee had no formal investigative powers at all. It derived its authority solely from the agreement of the Parliament and the Commission, and saw itself as a non-Community temporary advisory committee operating by consent.
[10] See the full text of the terms of reference at:
< URL http://www.europarl.eu.int/dg3/experts/en/mandaten.htm >.
[11] CIE First Report *loc. cit. supra* note 2, para. 1.4.2.
[12] *Idem.*, para. 1.4.3.

which are not based on merit or justice".[13] The Committee accordingly examined six specific cases: tourism, the Mediterranean programmes,[14] the European Community Humanitarian Office ("ECHO"), the Leonardo da Vinci programme,[15] the Commission Security Office, nuclear safety, and specific allegations of favouritism.

2.4. The sources for the allegations of fraud and mismanagement

Allegations of fraud and mismanagement against the Commission had been the topic of great concern for some considerable time. They came to light from different sources. Newspaper reports revealed instances of fraud in the Common Agricultural Policy. MEPs found instances of mismanagement of certain Community policies such as tourism. The EP threatened to freeze ten percent of the Commissioners' salaries, given the Commission's painfully slow rate of response to such allegations.[16]

By the end of the 1990s, the Commission's own anti-fraud unit, known as UCLAF,[17] disclosed in greater details the ways in which Community funds were being misused, for example, the Commission's humanitarian aid budget for the years 1993-1995. In its report for the financial year 1997, the European Court of Auditors ("ECA") also found instances where money had been wasted, lost, embezzled or unspent, for example in the case of repairing and making safe the nuclear power plants of the old Soviet bloc. It further

[13] *Idem.*, para. 1.4.4.
[14] Programmes for strengthening political and economic co-operation with the Southern Mediterranean countries.
[15] A five-year vocational training programme.
[16] Tomkins, A. *loc. cit. supra* note 4, p. 744.
[17] Unité de Co-ordination de la Lutte Anti-Fraude.

complained of the Commission's "inaccurate or incomplete disclosure in the financial statements of fixed assets, debtors, cash and off balance sheet commitments".[18]

Another source of information on many of the above allegations was a report by Paul van Buitenen, one of the Commission's internal auditors. He passed to the EP and the ECA a dossier in which he brought a number of charges against senior Commission officials for attempting to suppress investigations into fraud. He further made a number of claims that officials in the Commission were in the habit of awarding lucrative contracts to family contacts and associates. The most famous example of nepotism became the case of the French Commissioner Edith Cresson's dentist who was appointed to the position of a 'visiting scientist' in the Commission.[19]

On the basis of a number of cases of fraud and malfunctioning, it appeared that the Commission was never accountable due to the absence of an effective scrutiny mechanism. It had never been accountable or asked for an explanation of actions taken and, where appropriate, to take political responsibility for such actions, in other words to be judged, and remedy mistakes. As UCLAF intimated in 1998 many of the instances of financial mismanagement did not come to light previously because the Commission had not kept the ECA properly informed.[20]

[18] The quotations are taken from the ECA's Information Note on the Annual Report of the ECA concerning Financial Year 1997 < URL http://www.eca.eu.int/EN/menu/htm >.
[19] CIE First Report *loc. cit. supra* note 2, paras. 8.1.2-8.1.36.
[20] House of Commons Library *loc. cit. supra* note 7, p. 11.

3. THE ROLE OF THE EP

3.1. Introduction

The role of the EP in this affair of 'misleading management', followed by the *en masse* resignation of the Commission following the report by the CIE, was considerable. An examination of the censure motion and Commission's resignation may well demonstrate the increasing ability of the EP to control and push the Commission to act more effectively from now on.

3.2. The Commission's resignation

The resignation of the Santer Commission did not destroy the EU as was initially asserted, but rather improved both the political legitimacy and supra-national role of the EP. Its success to use all the procedures that it had at its disposal, (Articles 193, 201 and 215 EC, including Rules 32 and 33 of its Rules of Procedure) and bring to an end its crusade against fraud by employing an external advisory committee (CIE) has two-fold aims. First, it shows that the pre-March 1999 European Commission represented a closed, secret, non-transparent and, ultimately unaccountable Institution in the EU political system, and, second, it supports the argument for an increased accountability of the Commission to the EP, and subsequently, to the European public which it directly represents.

3.3. The censure motion

Furthermore, it can be suggested that the 1999 censure vote and the resignation of the entire Commission marks the most serious blow to the credibility of the institutional architecture of the Community since as early as 1958 in the light of the following observations. First, the censure motion which for a long time

had been considered one of the central features of the EP - Commission relationship was never implemented completely by the EP before 1999, and has been thriftily tabled since 1979.[21] Second, the prosecution of fraud and corruption on a pan-European base is difficult to be achieved in terms of both ways and means.

3.4. Reasons to violate norms, rules and laws in the EU

At this stage it might be important to recognise and outline some of the main reasons that can lead public representatives to violate norms, rules and laws through the means of illegal transactions and operations.

Firstly, there is a fundamental problem in the Community's internal institutional arrangement. In particular, the weakness of a true representative body (for example, the EP) to legislate and implement necessary institutional controls over the activity of bureaucrats.

Secondly, the problem of Commission mismanagement, discovered and validated by an independent Committee, is closely connected to the collective nature of responsibility within the Commission. While the structure and general activity of the Commission presupposes the reflection of views of individual members of the Commission, in terms of policy-making and policy-implementation, the environment of broad and barely-identified collective responsibility contributes greatly to the problem of the Commission's lack of

[21] Muntean, A. (2000) "The European Parliament's Political Legitimacy and the Commission's 'Misleading Management': Towards a 'Parliamentarian' European Union?", 4 *European Integration online Papers (EIoP)* 5, p. 10 < URL http://eiop.or.at/eiop/texte/2000-005.htm >.

accountability and legitimacy. Indeed, in the Committee's view, the Commissioners did not have sufficient control over their section of the administration. There were no cases found in which Commissioners were directly or personally involved in fraudulent activities. Only protestations by the Commissioners that they were unaware of the problems which were later brought to light and were

> "tantamount to an admission of a loss of control by the political authorities over the Administration that they are supposedly running".[22]

Additionally, there were some

> "instances found where the Commissioners or the Commission as a whole bore some responsibility for instances of fraud, irregularities or mismanagement in their services or areas of special responsibility".[23]

Thirdly, the whole bureaucratic system of the Commission itself greatly contributed to the resignation of the Institution in March 1999. Undoubtedly, it was isolated from the public as a whole and operated in a rather self-created culture of silence and internal solidarity against any attempt of external

[22] CIE First Report *loc. cit. supra* note 2, para. 9.2.2.
[23] *Idem.*, para. 9.2.3.

scrutiny, particularly the scrutiny of the EP.[24] In this context, the resignation of the Commission was in some way a reaction to the public's demand for a more transparent, publicly accessible and openly effective European Commission; in other words a kind of 'public-face accountability'.

3.5. The success of the EP

The crisis also showed that the EP was actually successful in securing accountability. It obtained the technical experience to investigate, vote and ultimately force the resignation of individual Commissioners, including the Commission President. It was for the first time able to scrutinise and exercise strong administrative sanctions against another European Institution. This is particularly important due to the fact that the powers of the EP increased, not only in the legislative domain through the co-decision procedure (Article 251 EC), but also in the area of exercising effective control and keeping the bureaucratic body accountable for its actions.[25]

Additionally, it demonstrated its ability to hold accountable and control individual Commissioners rather than the entire body. This factor is worth mentioning because the issue of individual responsibility which involves the ability to consider some members of the Commission culpable in misleading activities and fraud had not been previously addressed. It was only afterwards that this issue was reappraised in the administrative environment of the Prodi Commission.

[24] For example, it never informed the EP of the inadequacies in resources - especially staff - in order to launch and undertake the MED programmes and ECHO policies: CEI First Report *loc. cit. supra* note 2, paras. 9.2.5-9.4.6.
[25] Muntean, A. *loc. cit. supra* note 21, p. 5.

4. THE RECOMMENDATIONS OF THE CIE

4.1. Introduction

In the light of fraud and financial irregularities, the CIE suggested a number of recommendations aimed at resolving particular weaknesses found in the Commission's codes of conduct, including the Staff Regulations.[26] Its exercise was based on the premise that it was not possible to legislate for a culture of integrity, responsibility and accountability, but that it was possible to take action to nudge an organisational culture into a positive direction by identifying its core values.

The Committee's recommendations concerned three main subject areas (para.7.1.5):

- *Standards of personal conduct* that apply to Commissioners, their cabinets, director generals and the officials working under them.

- *The chain of responsibility* from the Commission President, through the Commission itself to individual Commissioners and their cabinets, thence to the senior levels of the hierarchy and the officials and other agents below them.

[26] Committee of Independent Experts, *Second Report on Reform of the Commission - Analysis of Current Practice and Proposals for Tackling Mismanagement, Irregularities and Fraud*, Volume Two (2), Chapter 7: Integrity, responsibility and accountability in European political and administrative life, paras 7.16.1-7.16.19, 10 September 1999:
Main sources: < URL http://www.europarl.eu.int/dg3/experts/en/default.htm >
< URL http://www.europarl.eu.int/dg3/experts/default_en.htm >
< URL http://www.europarl.eu.int/dg3/experts/pdf/rep2-2en.pdf >.

- *Institutional accountability* of the Commission, Commissioners and officials vis-à-vis other democratic Institutions of the EU, mainly the EP, both positively (in terms of giving account) and negatively (in terms of being held to account).

With regard to the first area, the Committee considered that the Codes of Conduct, as elaborated by the Commission, remain insufficient and are not yet backed up by the necessary legal framework (para.7.16.1). It therefore suggested that the Code of Conduct for Commissioners should redefine the concept of collective responsibility so as to encompass not only a prohibition on calling into question decisions adopted by the college, but also the right and the obligation of each Commissioner to inform the others (para.7.16.2).

Additionally, every Commissioner must ensure that his/her *cabinet* is multi-national in character and rules must be introduced in order to exclude any unduly favourable treatment of his/her *cabinet* members at the end of their service (para.7.16.3). Full transparency and elimination of the possibility of favouritism based on personal relationships must be ensured (para.7.16.4). Commissioners are also required to carry out their duties with complete political neutrality and not use any undue influence in order to favour fellow nationals or wider national interests as they can become in serious breach of their obligation of independence, and therefore be subject to appropriate sanctions (para.7.16.5).

Furthermore, an independent standing "Committee on Standards in Public Life" should be established in order to formulate, supervise and, where necessary, provide advice on ethics and standards of conduct in the EU Institutions (para.7.16.9). All Commission staff should undergo professional training aimed at raising awareness of ethical issues and providing guidance on how to deal with practical situations as they arise (para.7.16.10). Finally, the rights and obligations of officials to report instances of suspected criminal acts and other reprehensible behaviour to the appropriate authorities outside the Commission, should be created in the Staff Regulations and the necessary mechanisms put in place (para.7.6.8-11).

In respect of the second area issues, the Committee deemed that the attribution of responsibilities and chain of delegation between the Commission, single Commissioners and the departments are ill-defined and ill-understood by those concerned. Thus, it proposed that each Commissioner should be responsible for both policy formulation and the implementation of policy by his/her department(s). Only in this manner, will the Commissioner be answerable to the Commission as a whole for the actions of the department(s), and held accountable to the EP. As for the officials in the departments, they shall answer to the director-generals which shall in turn be accountable to the competent Commissioner (para.7.16.11).

Moreover, the Secretary General should be regarded as the prime interface between the political and administrative levels of the Commission. In all circumstances, he/she should ensure that decisions of the Commission are

effectively followed up by the administration (para.7.16.12). As far as the members of *cabinets* are concerned, these should not be permitted to speak on behalf of their Commissioners. The primary function of cabinets is to provide information and to facilitate communication both vertically (between the Commissioner and the services) and horizontally (between Commissioners). In no way should the *cabinet* prevent direct communication with the Commissioner but rather stimulate such communication (para.7.16.13).

Also, with respect to the third subject matter, the Committee believed that the concepts of political responsibility and accountability remain unclear and the mechanisms for their practical application inadequate. To this end, it recommended that the Commission should be under a constitutional duty to be accountable to the EP. It should be fully open with Parliament and provide it with complete, accurate and truthful information and documentation so as to carry out its institutional role, as for example in the discharge procedure.[27] Once acts and decisions have been taken, they should be made as publicly known as possible, including the processes by which the Commission arrived at those. Access to information and documentation should only be refused in exceptional circumstances and in accordance with procedures agreed between the Institutions (para.7.16.14).

[27] Mr Blak, EP Rapporteur on the 1999 General Discharge has suggested that in recent years the discharge procedure have become an informal vote of confidence in the European Commission. The present Commission has been very co-operative and more open than the Santer Commission. EP Rapporteurs have received more information and documentation than even before in the history of the discharge procedure: Press Release 27/03/2001: EP/1999 Discharge < URL http://www.europarl.eu.int/pes/Es/News/press/prelease/prs02678.htm >.

As for the enforcement of the individual political responsibility of Commissioners, it was recommended that this should be a matter for the Commission's President. Yet, in any case, the President should be empowered to dismiss individual Commissioners, modify their responsibilities and take any other measure in respect of the composition, organisation of the Commission that he/she deems necessary in order to enforce political responsibility. Successively, the President of the Commission shall be accountable to the EP for any action or inaction (para.7.16.15).

A further recommendation was that any Commissioner who knowingly misleads Parliament, or omits to correct at his/her earliest convenience inadvertently erroneous information provided to the EP should be expected to offer his/her resignation from the Commission. In the absence of such an offer, only the President of the Commission can take appropriate action (7.16.16).

Although the management of Community programmes, and in particular all questions of financial management are the sole responsibility of the Commission, the latter should be able to refuse to assume new tasks for which administrative tasks are not available and cannot be provided through redeployment. That is why Council and Parliament should be bound by the principle of budgetary discipline to take into account the resource requirements attached to any policy initiative before they make a request from the Commission (para.7.16.18).

4.2. The CIE's new principles upon recommendations

Upon a closer examination of the above recommendations, it is very obvious that the work of the Committee makes us think of new principles, the future direction and structure of 'governance' in the EU. Such a new principle is the notion of 'ethical responsibility'.

While the founding Treaties are not wholly silent on the question of responsibility, they are rather terse. Article 213(2) EC provides that:

> "The Members of the Commission, shall, in the general interest of the Community, be completely independent in the performance of their duties...They shall refrain from any action incompatible with their duties".

Article 216 EC further provides that:

> "If any Member of the Commission no longer fulfils the conditions required for the performance of his duties or if he has been guilty of serious misconduct, the ECJ may, on application by the Council or the Commission, compulsorily retire him".

It is notable in both circumstances that the EP has no standing at all to bring such an application. However, this is not to say that the EP has no power. Article 201 EC provides, for example, that:

> "If a motion of censure on the activities of the Commission is tabled before the EP [and] ...is carried out by a two-thirds majority of the votes cast, representing a majority of the Members of the EP, the Members of the Commission shall resign as a body".

Hence, it is clear that the Treaties envisage both a 'legal responsibility' which is owed by the Commission to the ECJ, and a 'political responsibility' which the Commission owes to the EP.

Nevertheless, the events of March 1999 fit uncomfortably into any category. There was no legal action, and no motion of censure was adopted in Parliament. Does this then exhaust the Commission's responsibilities?

The answer from the CIE was in the negative. In an important passage of its first report, the Committee stated that:

> "Reprehensible conduct of the Commission as a body, or of Commissioners individually [...] obviously involves the responsibility of the Commission as a whole, or of individual Commissioners".[28]

This responsibility, as the Committee later explained, dealt with 'ethical responsibility', or "responsibility for not behaving in accordance with proper

[28] CIE First Report *loc. cit. supra* note 2, para. 1.6.2.

standards in public life".[29] This 'ethical responsibility' was thus regarded by the Committee to exist *in addition to the Treaty obligations of legal and political responsibility* which the Commission owes to the ECJ and the EP respectively. To this effect, the work of the Committee marks a peculiarly great moment in the continuing construction of a multi-level European Constitution, as discussed in Chapter Six. What the Committee was reaching for in its first report, and further elaborated in its second one, was the generation of principles of constitutional responsibility. Principles, in other words, that transcend and underpin the narrower Treaty-based obligations provided for in Articles 201, 213 and 216 EC.

5. THE FUTURE DIRECTION AND STRUCTURE OF EUROPEAN 'GOVERNANCE'

5.1. Introduction

Generating principles - or at least expectations - of responsibility is but the first step in the establishment of an open, efficient, accountable and thus democratic European Commission. A central issue is, however, to identify to whom any obligations of constitutional responsibility should be owed under the new theoretical framework of this Thesis. Four principal alternatives have been suggested with a view to the future direction and structure of 'governance' in the EU.

[29] *Ibid.*

5.2. The four alternatives of constitutional responsibility

a) to the European Parliament,

b) to the European Court of Justice,

c) to some newly elected *ad hoc* body, and

d) to the Commission's President.[30]

The above are not mutually exclusive alternatives. Hence, some combination might be thought to be a better solution.

As for the first alternative, making the Commissioners individually and collectively responsible to the EP, there is a daunting challenge to be encountered. This proposal requires very wide and sweeping constitutional and operational changes which may lead to the fusion of powers between the Commissioners and the Parliamentarians. While this is the system that features prominently in the British constitutional order, this does not mean to say that this model can be transposed to the EU level. On the contrary, if this system works well, as it does in Britain, Germany and Denmark where cabinet ministers do not have to be members of the Parliament, although most of them are, it is because there is a huge mixture in terms of personnel in governments. In Britain, for instance, every member of the executive (all 120 ministers) is also a member of one of the two Houses of Parliament. The separation of constitutional power is fused. A hereditary peer cannot sit in the House of Commons but may serve as a government minister in the House of Lords. Conversely, an individual, not directly elected to the House of Commons, may

[30] Tomkins, A. *loc. cit. supra* note 4, pp. 760-762.

serve as a government minister and be chosen by the Prime Minister to serve at Cabinet level.

Apparently, this is not the case in the EU, and any development of the constitutional principles of responsibility in the UK will have to be viewed in this context of fusion rather than separation of powers. Yet, even if we are ready to develop straightforward constitutional principles taken from pre-existing norms and practices at the national level, we must be aware that the emergent European order should remain exactly European and not a British 'mark-two model'.

As to the second alternative, some might suggest that the reason why the Commission is insufficiently effective in its consideration of fraud, mismanagement and favouritism is that it does not have to account in law for its administrative behaviour. If there were some well-organised or more sophisticated system of administrative law and of legal responsibility, there would be less concern about the Commission running amok. However, this argument should be challenged.

Having the ECJ enforce a Code of Good Administrative Behaviour,[31] or Standards in Public Life, would be a backward-looking step for a number of reasons. First, because access to the Court is difficult and expensive and matters of *locus standi* should be dealt with as well. Second, these are issues of

[31] ANNEX, 'Annex' - *Code of Good Administrative Behaviour for the Staff of the European Commission in their Relations with the Public*, Commission Decision of 17 October 2000 amending its Rules of Procedure (2000/633/EC, ECSC, Euratom) [OJ 2000, No. L 267/63] < URL http://europa.eu.int/comm/secretariat/_general/code/_docs/code_en.pdf >.

essentially political and administrative nature, rather than strictly legal ones, and therefore they call for administrative regulation away from the relatively narrow confines of the ECJ. Third, the problems of public administration which the cases investigated by the CIE illustrate are situations where judicial mechanisms tend not to be so effective at reviewing. In essence, the problems on which the Committee focused were associated mainly with powers of *dominium* inside the Commission (i.e. financial and human resources and the granting of contracts) rather than with powers of *imperium,* the notion of rule making. Nevertheless, judicial review as a technique of administrative law is based on an image of reviewing powers of *imperium,* for example, the legality of Commission decisions which intend to produce legal effects vis-à-vis third parties, rather than of *dominium*).[32] Such a review is, therefore, not in a prime position to lead the charge in holding the Commission responsible for the way in which the attribution of powers between the Commission, single Commissioners and the departments were exercised.

The third alternative is to develop an *ad hoc body* in order to monitor or supervise good administrative behaviour. This proposition was also included in the recommendations of the CIE in its second report (Recommendation 81, para.7.7.1-5) with regard to the Committee on Standards in Public Life. It certainly makes more sense in the broader context of EU public administration than enhancing the role of the EP would undertake. Yet, however attractive it looks, it has still not taken shape.[33] The problem to establish such a Committee

[32] See Art. 230 EC.

[33] Note that the target date for an inter-institutional agreement, December 2000 has already passed: European Commission, *Reforming the Commission - A White Paper (Part II), Action Plan, Vol. II,* COM (2000) 200 final, 1 March 2000, p. 3.

via an inter-institutional agreement might lie in the fact that the details for creation would need to be carefully worked out. For instance, who would appoint such a Committee; who would refer matters to the Committee; to whom would the Committee report; how would such a body relate to the existing Institutions (Court of Auditors and EU Ombudsman), also entrusted to secure accountability in the EU, and so on. Definitely, these issues are of detail rather than principle, but still need to be addressed as they bring considerable legal and operational changes in the EU 'governance'.

All of which leads to the final alternative: namely, to make the Commissioners responsible to the Commission's President who could perhaps then himself/herself be responsible to the EP not only upon appointment, but also during the course of his/her tenancy. In many ways, this model would reflect the practice - if not the theory - of contemporary British government. Yet, as the European "constitutional" power between the Commission and the Parliament is not fused but rather shared, it might be impractical to envision the EP copying the UK tradition of ministerial responsibility with each Commissioner being called to give an oral account every four weeks or so. However, it is less unlikely, perhaps, to imagine a scenario by which the Commission President is called to give an oral account to each parliamentary plenary session. An hour, for example, could be set aside during each such plenary during which time the President might be asked a number of questions of particular interest to MEPs about current events in the Commission.

It might well be argued that making Commissioners responsible only to their President without adding any element of external control is not likely to go far enough in securing a sufficiently accountable Commission. Nevertheless, if the President were forced to place his/her political neck on the block every month or so in Strasbourg that might encourage him/her to institute closer checks and controls within the Commission. And, in fact, it would make sure that never again would a Commission President be placed in the awkward position that Mr Santer found himself while trying to defend Mme Cresson.

The above proposal should not be seen as over-centralising the executive decision-making structures in the Commission as the academic observer, Adam Tomkins, is afraid of.[34] Rather, it should be regarded as an effective and sufficient exercise of the White Paper's 'good governance' which is based on ensuring both individual and collective accountability.[35] Indeed, this is a very strong argument if one considers that before the resignation crisis the Commission has only been accountable to the EP as a *collegium*, thus entailing the fall of the whole body for the faults and omissions of some Commissioners.

Even if after the resignation it becomes clearer that censorship of individuals is essential, we can hardly find another way to achieve this at the EU level. The Commission is not a government in a traditional sense. It is rather a form of an executive legislature which has specific supra-national powers in specific policy areas. It is at the same time not a separate executive authority in the EU

[34] Tomkins, A. *loc. cit. supra* note 4, p. 761.
[35] European Commission, *European Governance - A White Paper*, COM (2001) 428, 25 July 2001, pp. 10, 31-34.

system of 'governance', though it tends to become one under the White Paper,[36] but rather a 'second executive' which shares governmental responsibilities with the Council of Ministers and legislative ones with the EP.[37] Consequently, a common democratic scheme in which government or members of a government are accountable to the parliament cannot be adequately applied to the EU system.[38]

Furthermore, the fear of centralising the executive decision-making structures in the Commission is not real. With regard to the new Treaty provisions of Nice (Article 217 EC) the powers of the President, for example the right to hire, fire and reshuffle, are not untrammelled. If the President requests the resignation of individual Commissioners or wants to appoint Vice-Presidents, he/she should, firstly, get the collective approval of the Commission who would have to ensure that the request for resignation is not based on a simple difference of views. Thus the authority of the Commission President is not unlimited. Additionally, the Article provides that the allocation of responsibilities amongst the Members of the Commission is not a matter of who has the power to do so, but is rather an issue of good administration, and in particular, of resources and internal organisation.

[36] *Idem.*, 34; See also Chapter Two of this Thesis, Section 3.1. p. 24.
[37] Muntean, A. *loc. cit. supra* note 21, pp. 9-10.
[38] *Ibid.*

5.3. An individual parliamentary accountability: Is it really hard to be achieved?

5.3.1. Introduction

Certainly, an individual accountability for the Commissioners to the Commission's President who will in turn be responsible to the EP can be seen to be greater progress in enhancing the democratic dimension of the Commission. However, within the theory of a *meta*-national democracy, there is an opportunity to push things even further.

5.3.2. National constitutional laws and models of political responsibility

If we look at the national constitutional laws of the EU Member States, we will observe that there are two models of responsibility. The first model is that of *ministerial responsibility* adopted, for example, by Ireland, France and the UK. It provides that ministers are responsible to their National Assemblies for the acts carried out by commission or omission within their competence. If there is a motion of censure against them they should resign whereas the Prime Minister and the other members of the Government remain in office.[39] The second model is that of *joint responsibility* which, for example, Italy, Greece and Portugal use in their respective systems. It states that if a Prime Minister resigns from office because of an impeachment, then the other members of the Government shall be deemed to have resigned from office too. Conversely, if a Minister no longer enjoys the confidence of the national Parliament he/she should be dismissed. Thus it offers both individual and collective censurability.

[39] The resignation of Michael Haseltine and Leon Brittan over the 'Westland Affair' in 1986 can be recalled.

5.3.3. Building a working model of European accountability

Transposing the practice into the theory, the author's suggestion is that such a model of joint responsibility could well exist at the EU level through some form of inter-institutional agreement. For example, Commissioners would be directly responsible to the EP for their acts or omissions within their sphere of competence.[40] Consequently, the EP would retain control of the Commissioners and be able to take action if and when the need arose. In addition, if a motion of censure were to take place against the Commission President, the Commission would have to resign *en masse* because of the principle of 'collegiality'[41] which is intended to produce discipline in support of the decisions taken.

The proposition for parliamentary accountability, whereby the Commissioners are responsible both individually and collectively to the EP in such a context, appears to endorse quite successfully what accountability should mean in today's world. In other words,

> "Rulers (in this case, Commissioners individually + Commission (EC) as a whole) should be liable to be required to give an account or explanation of actions to the people (EP), who should be the ultimate judges of their performance. Where appropriate, they should suffer the consequences, take the

[40] Such proposals to overcome the problems of bureaucratic Europe by means of a directly elected Parliament to which the Commission would be responsible are not new and rather date back to 1970s: see Petland, C. (1973) *International Theory and European Integration*, London: Faber and Faber, 182-183.

[41] Spence, D. (2000) "Plus Ça Change, Plus C'est la Même Chose? Attempting to Reform the European Commission", 7 *Journal of European Public Policy* 1, p. 1 at 6-10.

blame or undertake to make amendments if it should appear that errors have been made. In this sense, accountability is closely related to responsibility, transparency, answerability and responsiveness, terms which are often used interchangeably".[42]

[42] The definition of accountability is a synthesis of the meanings that have been found in the literature: Lord, C. (1998) *Democracy in the European Union*, Sheffield: Sheffield Academic Press, 15; Oliver, D. (1991) *Government in the United Kingdom: The Search for Accountability, Effectiveness and Citizenship*, Milton Keynes: Open University Press, 22, 28.

6. CONCLUSION

The resignation of the EC in 1999 due to 'misleading management' not only emphasised that the power of the EP has significantly increased, but also that immediate action should be taken so as to reinforce the political and democratic dimensions of the EU. Thus, innovations upon innovations have been proposed in order to improve the situation regarding the Commission's internal composition and external accountability; thus showing that the issue of accountability at the EU level is an open-ended process.

As part of this process, President Prodi, together with his new team of Commissioners, has started to launch an internal reorganisation and a reformation of the Commission and its departments based on the recommendations of the CIE. According to the Action Plan set out in the White Paper on the Reform of the Commission,[43] the old system of regulation and supra-national policy making which represented an environment that was very difficult to monitor and supervise on a regular basis belongs to the past. Areas such as budget and money transfer, structural funds allocation, and auditing procedures which also represented particular difficulties in identifying the transparency of Commission's activities have come under the rigid scrutiny of the newly-established Planning and Co-ordination group on Internal Audit.[44]

[43] European Commission, *Reforming the Commission - A White Paper (Part I), Vol. I*, COM (2000) 200 final/2; and *Reforming the Commission - A White Paper - Part II, Action Plan, Vol. II*, COM (2000) 200 final, 1 March 2000.

[44] Olivier de Schutter, Notis Lebessis and John Paterson criticise the reforms of financial management and the changes to human resources policy for failing to represent the maximum to be put in place in an organisation with the position and responsibility of the Commission. Yet, they seem to forget that the Commission did not have even this 'bare minimum' before the resignation crisis of 1999: De Schutter, O. (eds.) (2001) *'Cahiers' of the Forward Studies Unit: Governance in the European Union*, Luxembourg: Office for Official Publications of the European Communities, 263-264:
< URL http://europa.eu.int/comm/cdp/cahiers/resume/gouvernance_en.pdf >.

At the same time, an independent office ("OLAF") to fight fraud in the EU has been created based on the agreement concluded between the EP and Commission.[45] Thus, administrative arrangements to fight the lack of strong responsibility held by the Commission were also introduced in order to improve the environment of responsibility in the EP - Commission relationship and overall in the EU.

These are all important and progressive moves which show that it is not possible to legislate for a culture of integrity, responsibility and accountability, if hearts and minds are not the crux of any discussion of an organisational culture. Above all, they live up to our expectations that the accountability of the Commission and individual Commissioners will be less murky and facelless. The individual accountability of the Commissioners to the President - already constitutionally codified in the Nice Treaty - is but the first level of the Commission's accountability, followed by the President's accountability to the EP, and final accountability of the latter to the European people. If this chain of accountability is actively followed, it will greatly increase the chances of the EP to hold the Commission more accountable and responsible for all its actions.

[45] See the inter-institutional agreement of 25 May 1999 between the EP, the Council and the Commission relating to internal investigations conducted by OLAF [OJ 1999, No. L 136/15); see also European Commission, *Report by the European Anti-Fraud Office (OLAF), First Report on Operational Activities, 1 June 1999 - 31 May 2000*, 23 May 2000, p. 8.

CHAPTER EIGHT

DEVELOPING A EUROPEAN CULTURE OF TRANSPARENCY AND OPENNESS

1. INTRODUCTION

The case study of financial mismanagement in the European Commission reveals how the power of the EP significantly increased in 1999 giving the EP a legitimate basis in keeping the Commissioners responsible and accountable for their actions. It also demonstrates that the old-style of bureaucracy can no longer exercise its administrative powers on the *meta*-national level without external scrutiny from the *meta*-national legislature. If the Commission is willing to play a significant and important role in the European 'governance', it has to undergo some form of reorganisation and reform of its internal and external effectiveness to increase its accountability.

It also stresses that an unaccountable, "secretive, bureaucratic regime cannot possibly be as credible as a liberal transparent regime when claiming to have established a People's Europe".[1] From the standpoint of openness to the European populace at large, the present situation is also defective.

[1] Davis, R. (1999) "Public Access to Community Documents: A Fundamental Human Right?", 3 *European Integration online Papers (EIoP)* 8, p. 1: < URL http://eiop.or.at/texte/1999-008a.htm >.

Yet, the real significance of a substantive development, of a notion concerning the fundamental principle of openness in EU decision-making, is not unthinkable for the foreseeable future as this Chapter sets out to suggest and explore. Since the democratisation of the EU is an on-going process,[2] the same, or similar, approach to legitimacy will ensure that it is not too long before the Community Courts recognise public access as an intrical, or important, part of the general principles of Community law.

[2] Although a theme running through this Thesis, this has been particularly noted on the issues of constitutionalism and accountability, see Chapters Six and Seven of this Thesis.

2. Definitions

As with any broad political concept, there is a realised need to define from the very beginning what transparency and openness actually mean, so as to avoid any danger of these becoming empty words, liable to take on only the meanings that their practitioners want to apply.

When perceived in a liberal democratic polity, transparency is often regarded as a *three-dimensional* concept:

a) access to information,
b) access to the thinking behind decisions,
c) opening of the decision-making process to non-governmental participation.[3]

However, the Chapter only concentrates on the first dimension which is the minimalist approach to transparency. Therefore, any system lacking in this could hardly be described as transparent. Firstly, it signifies that information can be easily obtained from whatever source and understood. Secondly, it involves the comprehensibility of decision-making procedures, for example, who makes decisions, when and where, the publishing of documents in a language which is understood by the individual seeking the information, and the cost of the access procedure.[4]

[3] O'Neill, M. (1998) "The Right of Access to Community-Held Documentation as a General Principle of EC Law", 4 *European Public Law* 3, p. 403 at 404.
[4] *Ibid.*

On the other hand, openness describes the citizen's right of access to documents. It is defined as the possibility for everyone to acquire knowledge of a government's activities in two ways. First, by granting access to the *fora* where decisions are taken. Second, by making available information carriers, for example documents, visual and/or audio instruments, by which these decisions are recorded and which provide an insight into the preparation of these decisions.[5]

Notwithstanding their difference in concept, it is still hard to actually distinguish between these due to an essential and indispensable link:

> The right of access to documents = openness and the provision of information by the Institutions = transparency.

That link is a very simple one. Only if the right of access to documents is finally established, and defended, is there any guarantee that the information made available will not be partial, limited, or tailored to the Institutions' perspective.

3. ACCESS TO DOCUMENTS IN CONSTITUTIONAL TERMS

3.1. Introduction

However, within the EU, this is not the case. In constitutional terms, as primarily maintained in Chapter Six on the debate for a written European

[5] Curtin, D. and Meijers, H. (1999) "The principle of open government in Schengen and the European Union: Democratic Retrogression?", 32 *Common Market Law Review* p. 391 at 393.

Constitution, none of the above principles has been established in order to acquire the *status* of a general Community principle that the Courts would claim to uphold. They are only administrative values that the EU Institutions purport to accept. As such just before the proclamation of the Charter[6] and the coming into force of the new Regulation regarding public access to the EP, Council and Commission documents,[7] they were mentioned in the various Treaty provisions,[8] Institutional rules, practices, resolutions,[9] and inter-institutional declarations.[10]

3.2. From the Code of Conduct[11] to the new Regulation

Prior to the adoption of the new Regulation, the legal context of 'openness', basically preserved in Article 255 EC, had found its expression in the validity, or effect, of the internal pre-existing Rules of Procedure of the Council[12] and the Commission regarding public access to their documents.[13]

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[6] See Art. 42 of the Charter.

[7] Council Regulation 1049/2001/EC of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [OJ 2001, No. L. 145/43].

[8] See for example, Arts. 207 (third paragraph), 255, 286, 287 EC and Art. 1 TEU.

[9] European Parliament, *Resolution on the Compulsory Publishing of Information by the European Community* [OJ 1984, No. C 172/176]. This was followed by two similar Resolutions: 1) *Resolution on the Compulsory Publishing of Information by the European Community* [OJ 1988, No. C 49/174], 2) *Resolution on the Transparency of Community Legislation* [OJ 1994, No. C 205/514]. *Inter alia, Resolution on Democracy, Transparency and Subsidiarity and the Inter-institutional Agreement on Procedures for Implementing the Principle of Subsidiarity* [OJ 1993, C 329/132, A3-0356/93].

[10] Declaration of the European Parliament's delegation concerning *Democracy, Transparency and Subsidiarity* [OJ 1993, C 329/142]; The European Council's Declarations on 16 October 1992 entitled "A Community Close to its Citizens", (Bull. EC 10-1992, p. 9) and on 12 December 1992, (Bull. EC 12-1992, p. 7). *Inter alia*, Declaration (No. 17) on *The Right of Access to Information Annexed to the Final Act of the Treaty on European Union* signed at Maastricht on 7 February 1992 [OJ, 1992 No. C 191/95].

[11] Council and Commission Code of Conduct (97/730/EC) of 6 December 1993 [OJ 1993, No. L 340/41, and in corrigendum in OJ 1994, No. L 23/34].

[12] Council Decision 93/731/EC of 20 December 1993 on public access to Council documents [OJ 1993, No. L 340/43 as last amended by Council Decision 2000/527/EC on the improvement of information on the Council's legislative activities and the public register of Council documents, OJ 2000, No. L 212/9].

[13] Commission Decision 94/90/ECSC, EC, Euratom of 8 February 1994 on public access to Commission documents [OJ 1994, No. L 46/58 as amended by Decision 96/567/ECSC, EC, Euratom].

3.2.1. Developments: Positive and negative

a) Positive

With the new Regulation there are both positive and negative developments. Firstly, in respect of the positive ones:[14]

1) *A common set of rules* has been established among the Institutions.

2) The scope has been widened. Any legal or natural person can request documents which the Institutions have either *drawn up* - except: Council documents on security and defence policy - or have *received*, including 'sensitive' documents as these are defined in Article 9.[15]

3) The *exceptions of Article 4(2)* for the protection of commercial interests, court proceedings, legal advice and inspections, investigations and audits *do not apply as long as there is an overriding public interest in disclosure.*[16]

4) *Partial release is not prohibited* if only parts of a document are covered by an exception.[17]

5) Each Institution should provide for *public registers* on documents on the Web and *direct access* to documents, in particular legislative documents.[18]

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[14] See generally European Commission, Secretariat General - Directorate B SG.B.2: Transparency, Access to Documents, Relations with Civil Society, *Information Memo*, 11 June 2001, Brussels, SG.B/VJ/pdf/D(2001)350245:
< URL http://www.europa.eu.int/comm/secretariat_general/sgc/acc_doc/en/index.htm#1 >.
[15] Council Regulation 1049/2001/EC *loc. cit. supra* note 7, Arts. 2, 3.
[16] *Idem.*, Art. 4(2).
[17] *Idem.*, Art. 4(6).
[18] *Idem.*, Arts. 11, 12.

6) Future improvements are on their way such as the establishment of an inter-institutional at two levels, civil servant and political or higher level Committee to examine best practice,[19] measures on internal organisation of the Institutions[20] and publication of annual reports.[21]

7) Legitimate expectations are given for either extending or leading to concrete new Regulations for other European bodies.[22]

b) Negative

With respect to the negative developments, the new Regulation still treats the right of access to documents more as a right to good administration rather than an 'in principle' absolute fundamental right.[23] The Regulation does 'not' set out a presumption in favour of access in all areas. Or, subject individual documents to explicit scrutiny as to the applicability of an exemption protecting justified interests. On the contrary, it lists several categories of documents that 'shall' not be released in any circumstances. By being accepted as an administrative right, it is open to third parties and/or the EU Institutions to refuse to release third-party and/or internal documents according to the 'exceptions' in Article 4 *juncto* to Article 9 of the Regulation. Short time limits for processing initial applications, that is 15 or 30 working days for 'very large documents', have been invented in the event of a total or partial refusal for

[19] *Idem.*, Art. 15(2).
[20] *Idem.*, Art. 18(1).
[21] *Idem.*, Art. 17(2).
[22] The EU Ombudsman, *Annual Report 2000*, "Rules on Public Access to Documents held by Europol, p. 195 < URL http://www.euro-ombudsman.eu.int/report/en/default.htm >.
[23] This is implicitly suggested in Art. 15(1) of the Regulation (*loc. cit. supra* note 7).

disclosure.[24] Whereas in the light of a possible clash between the right to privacy and the right to access, the former prevails,[25] thus assuring the recognition of a fundamental right as a constitutional principle of Community law.[26]

Furthermore, it is not a coincidence that the new code of access to EU documents has been heavily criticised for striving to create the so-called 'space to think' for officials (civil servants) and permanently deny access to innumerable documents.[27] The 'space to think' for officials is apparently more important than the people's right to know. But there is another problem with the 'space to think' for officials. It would also give them the 'space to act'.[28] Many of the documents hidden by this current 'rule' would concern the implementation of measures - the practice that flows from the policies, and as a result officials would become unaccountable for their actions. Democracy is not just about information and participation in policy-making, it is also crucially about the various ways such policies are put into practice, that is "as openly as possible and as closely as possible to the citizen".[29] To this effect, the White Paper urges both the EU Institutions and the Member States to create a

[24] *Idem.*, Art. 7(2), (3).
[25] *Idem.*, Art. 4(1)(b).
[26] See Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [OJ 1995, No. L 281/31], para. 10 which states: "Whereas the object of the national laws on the processing of personal data is to protect fundamental rights and freedoms, notably *the right to privacy*, which is *recognised* both in Article 8 of the European Convention for the Protection of Fundamental Rights and Freedoms and *in the general principles of Community law*".
[27] Bunyan, T. Curtin, D. White, A. (2000) "Essays for An Open Europe", Paper presented to *The Citizen's Right of Access to Documents in the EU*, Academy of European Law (ERA), Trier: Germany, 12-13 July 2001, p. 5 "Space to Think also means space to act" (*mimeo*). Also available at: < URL http://www.statewatch.org >.
[28] *Ibid.*
[29] See Preamble of the 1049/2001 Regulation, first indent.

"viable communicative space"[30] wherein the general public is informed on European issues.[31] This new challenge for co-operation on information and communication policy in the EU[32] is an occasion to reinforce and rethink the Union's emerging commitment to a policy of openness, transparency and accountability, and a strategic tool of generating a sense of belonging to Europe.

3.3. The 'original' approach of the Courts

In addition, the role of the Community Courts is not less exiguous than the new Regulation on the question of the nature of access to information. In essence, before the new Regulation was accepted, both Courts had been rather concerned with implementing the measures of the old Code of Conduct concerning public access to Community documentation rather than with recognising a formal constitutional right. Some of the Courts' responses to the challenges brought in the *Carvel v. Council*,[33] *Netherlands v. Council*,[34] and *Bavarian Lager Co. v. Commission*[35] suffice to confirm this claim.

The first case concerned a journalist's request for access to a number of Council documents, in particular, preparatory reports, minutes and voting records which were refused essentially on the ground of the confidentiality of

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[30] Cederman, L. (2000) "Nationalism and Bounded Integration: What It Would Take to Construct a European Demos", *EUI Working Paper RSC* No. 2000/34, p. 23: < URL http://www.iue.it/RSC/WP-Texts/00_34.pdf >.

[31] European Commission, *European Governance - A White Paper*, COM (2001) 428, 25 July 2001, pp. 11-12.

[32] European Commission, *Communication from the Commission to the Council, European Parliament, Economic and Social Committee, the Committee of the Regions*, COM (2001) 354 final, 27 June 2001.

[33] Case T-194/94 *Carvel and Guardian Newspapers v. Council* [1995] ECR II - 2765.

[34] Case C-58/94 *Netherlands v. Council* [1996] ECR I - 2169.

[35] Case T-309/97 *Bavarian Lager Co. v. Commission* [1999] ECR II - 3217.

the Council's deliberations.

The applicant spoke of a fundamental principle of Community law of access to the documents of the EU Institutions.[36] The CFI, however, like the Court of Justice later, did not address the matter at this level of analysis. It merely pointed out that:

> "Decision 93/731 [...] is the only legislative measure, which deals with public access to documents",[37]

and in this sense remained steady on interpreting and applying the Council's rules of Procedure. Nonetheless, it failed to remember that these rules were not drafted in an open and public debate with the participation of other Community Institutions or the citizens of the EU,[38] and therefore, the Council had the control of the legal space in which claims about access to information are made.

The same approach was also endorsed in the second case. Both the EP and the Netherlands argued that the principle of openness of the legislative process was an essential requirement of democracy, and that the right of access to information was an internationally recognised fundamental human right.[39] But

[36] T-194/94 *loc. cit. supra* note 33, para. 36.
[37] *Idem.*, para. 62.
[38] The principal plea in law forwarded by the Dutch government as an intervening party in support of Carvel's proceedings' against the Council was that the subject-matter of the 1993 Decision and the Council's own Rules of Procedure go beyond simple matters of the internal procedural litigation of the Council and concern issues which directly affect the citizens of the EU: see *supra* note 33, para. 36 on admissibility.
[39] C-58/94 *loc. cit. supra* note 34, paras. 29-36.

the Court found again that the right of access was fulfilled through the Council's 1993 decision. In fact, it referred approvingly to the progressive affirmation of that right on the part of the Council, and rejected the Dutch's government's argument that such a fundamental right should not be dealt with purely as a matter of the Council's own internal rules of procedure.[40]

As regards the third case, the applicants, in dispute with the UK Government over monopolies in the brewery industry asked for a copy of documentation leading up to a "reasoned opinion" made under Article 226 EC. The Commission argued both that the document was internal, and that it was covered by the implementation of Community law exception, that is the protection of the public interest. After lip service to "the principle of the widest possible access for citizens to information", found in the Code of Conduct annexed to the Commission and Council Decisions concerning public access to documents, the CFI took a firmly instrumentalist line, upholding the Commission's viewpoint on the following ground:

> "Member States are entitled to expect confidentiality during investigations which may lead to an infringement procedure. [...] The disclosure of documents relating to the investigations stage could undermine the proper conduct of the infringement procedure. [...] The safeguarding of that objective warrants, under the heading of protection of the public interest, the refusal of access to a preparatory document relating to the

[40] *Idem.*, paras. 37-43.

> investigation stage of the procedure under [Article 169] of the Treaty".[41]

In subsequent cases, this exception in the *public interest* has tended to be construed broadly by the Institutions in question. In practice, they have accepted that the defence of the public interest is not limited to the list between brackets in the Decisions, but that these are merely examples of the public interest and that the public interest may embrace more.

The same question arises in the context of the new Regulation too. Indeed, it does not expressly suggest if the list of 'derogations' in Articles 4 and 9 is either exhaustive or inclusive, and thus the fear of interpreting and applying the exceptions in a broad manner both by the Courts and the Institutions is very much eminent.

In applying the public interest exception in the *Carlsen* case,[42] for example, the Council argued against disclosure of the opinions of its Legal Service on the grounds that the public interest in the maintenance of *legal certainty and the stability of Community law* could be damaged.[43] Neither of these grounds was actually mentioned in the relevant Access Decision or the Code of Conduct as interests which could be invoked under the heading of public interest. The CFI, however, approved of the reasoning of the Council by pointing out that the list of interests mentioned between brackets are simply specific examples of public

[41] T-309/97 *loc. cit. supra* note 35, para. 46.
[42] Case T-610/97 *Carlsen and others v. Council* [1998] ECR II - 485.
[43] *Idem.*, para. 1.

interest, but that access may also be denied under the *general notion* of public interest.[44]

Another example of a wide interpretation of "public interest" exception has been cases where any aspect of the administration of justice is at stake. For instance, in *Van der Wal*[45] the CFI upheld the Commission's refusal to give access on the basis that granting access would create a conflict, or better imply a violation of the fundamental right to a fair hearing under Article 6 of the ECHR.[46] The documents in question were not internal legal opinions but contained the Commission's official opinion on the application of [Articles 85 and 86 EC] concerning competition and customary practices. But because they had been produced at the request of a national Court for use in national Court proceedings, the fundamental right to a fair hearing in the view of the CFI took precedence over the citizen's right of access.[47]

WWF UK[48] and *Interporc*[49] also concerned access to Commission documents but again the Court was willing to whittle down any constitutional concept of transparency and openness by suggesting that the Code of Conduct was capable of regulating and even conferring rights on individuals.[50] In this context, therefore, it annulled the decisions of the Commission refusing access to its documents, 'not directly' on the ground of having infringed individuals'

[44] *Idem.*, para. 2.
[45] Case T-83/96 *Gerard van der Wal v. Commission* [1998] ECR II - 545.
[46] *Idem.*, paras. 45-49.
[47] See *supra* note 45, paras. 50-51.
[48] Case T-105/95 *World Wildlife Fund (WWF) v. Commission* [1997] ECR II - 313, [1997] 2 CMLR 55.
[49] Case T-124/96 *Interporc Im-und Export GmbH v. Commission* [1998] ECR II - 231.
[50] See *supra* note 48, para. 54. See also *supra* note 49, para. 66.

right of access to Community-held information, but rather because of the insufficiency of the reasons given by the Commission for such refusal.[51]

The Court also scrupulously avoided the plea of a breach of the fundamental principle of public access to Community documents in *Svenska Journalistförbundet v. Council*[52] and *Hautala v. Council*.[53] Although the CFI seemed to consider the right of information in fundamental terms,[54] it did not elevate this to the *status* of an explicit general principle of Community law, presumably in line with its view of the highly specific and voluntary nature of the principle as assumed by the Institutions.

3.3.1. Concluding remarks

From the above judgments, it can be concluded that access to documents is a limited procedural right the extent of which was to be 'moulded' by the EU Institutions.

Although the Court(s) did not transform the right into a general principle in a legal sense, yet, *Carvel* and the other cases highlighted the full individual value of the right, encouraging, in the decisions, to perceive its possible evolution into a principle of administrative law.

In essence, the principle of public access to Community documents was mostly viewed as a voluntarily assumed specific principle of administrative law - this,

[51] See *supra* note 48, paras. 64, 72, 74, 77-78. See also *supra* note 49, paras. 55-57.
[52] Case T-174/95 *Svenska Journalistförbundet v. Council* [1998] ECR II - 2289.
[53] Case T-14/98 *Heidi Hautala v. Council* [1999] ECR II - 2489.
[54] See *supra* note 52, para. 66. See also *supra* note 53, para. 83.

however, has changed in the light of the new Regulation, - which had gradually through the medium of case-law, acquired some procedural flesh and substance. That flesh and substance had not been in terms of an elaboration on the nature of the principle itself or its putative primordial *status* within the relevant legal hierarchy. Rather, it had only taken the form of judicial elaboration of the exceptions to refuse access and the correct procedures to be followed once the Commission or the Council had assumed a specific obligation in that regard. Allegedly, it is not expected that even with a view to the new Regulation the Courts will act differently except other than to judicially develop its exceptions.

4. OPENNESS: A NEVER ENDED PROCESS

4.1. Introduction

In spite of a low level of support for openness, as a constitutional principle within the EU legal order, a Community-wide understanding of the importance of public access as a fundamental right has progressively materialised in the recent years.

4.2. (1) EU Ombudsman: Promoting a culture of openness and awareness

First, the EU Ombudsman has made the first step. In general terms, it has had a great role and impact in access to Community documentation and the transparency of the EU decision-making. In specific terms, it has changed, through recommendations and its powers of coercion, the voluntary assumed principle of access to Community documents into a compulsory principle of administrative law.

4.2.1. (a) Recommendations

Working under both aims and with the view of setting a good example to other EU Institutions, bodies and agencies, the EU Ombudsman set out in his first Annual Report of 1995[55] to act as openly as possible and has adopted implementing provisions on public access to its documents. In June 1996 we see the EU Ombudsman launching with his own-initiative an inquiry into public access to documents of the EU Institutions and bodies with the exception of the Council and the Commission which had already adopted such rules. Recalling the case-law of the Court of Justice in *Netherlands v. Council*,[56] the EU Ombudsman came to the conclusion that, in relation to requests for access to documents, Community Institutions and bodies have a legal obligation to take appropriate measures to act in conformity with the interests of good administration. The EU Ombudsman assumed too that the adoption of such rules promotes transparency and good relations between citizens and the Community Institutions, bodies and agencies in several ways:

a) The process of adopting rules requires the Institution, body or agency to examine, for each class of documents, whether confidentiality is necessary or not.

b) The above process itself encourages a higher degree of openness.

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[55] The EU Ombudsman, *Report for the year 1995*, at:
< URL http://www.euro-ombudsman.eu.int/report/en/default.htm >.

[56] See *supra* note 34, para. 37 which states: "So long as the Community legislature has not adopted general rules on the right of public access to documents held by the Community Institutions, *the Institutions must take measures as to the processing of such requests by virtue of their power of internal organisation*, which authorises them to take appropriate measures *in order to ensure their internal operation in conformity with the interests of good administration*".

c) If rules are adopted and made publicly available, citizens who request documents can know their rights.

d) Clear rules can promote good administration as they can also be subject to public scrutiny and debate and help officials to deal accurately and promptly with public requests for documents.

Bearing in mind the Court's suggestion, the Union's commitment to transparency [Article 191a EC] and the existence of a single institutional framework for the EU, the EU Ombudsman concluded:

> "Failure to adopt and make easily available to the public rules governing public access to documents could constitute an instance of maladministration".[57]

He thus urged - through the mechanism of making draft recommendations - fifteen Community Institutions and bodies to adopt such rules for all documents not already covered by existing legal provisions allowing access or requiring confidentiality and make them easily available to the public. It was not until April 1999, that the EU Ombudsman launched a further own-initiative inquiry (OI/1/99/IJH) addressing four more EU bodies (the European Central Bank, the European Agency for Safety and Health at Work, the Community Plant Variety Office and the European Police Office ("Europol") which were not yet operational during the earlier enquiry. So far, only the ECJ has not

[57] EU Ombudsman Decision and Recommendation in the own initiative inquiry into public access to documents (616/PUBAC/F/IJH) of 20 December 1996.

drawn-up rules, claiming that it has an extreme difficulty in establishing a clear separation between documents which relate to its judicial role and those which do not. Lastly, in its special report, addressed to the EP in April 2000, the EU Ombudsman suggested that the Institution which democratically represents EU citizens should consider using the procedure referred to in [Article 192(2) EC] in order to initiate the adoption of a European administrative law. He thus concluded the report by making the following recommendation:

> "In order to achieve rules of good administrative behaviour, which apply equally to all Community Institutions and bodies in their relations with the public, the Ombudsman recommends the enactment of a European administrative law, applicable to all the Community Institutions and bodies. This law could take the form of a Regulation".[58]

Yet, so far, no other Institution or, body has adopted a Code of good administrative behaviour apart from the Commission.[59]

Taking this fact into account, one might then argue that the achievements of the EU Ombudsman by his own-initiative inquiry into public access to Community held-information are not so impressive after all. Consequently, he did not make any recommendation concerning the substance of the rules to be adopted and

[58] The EU Ombudsman, *Annual Report 2000*, p. 207:
< URL http://www.euro-ombudsman.eu.int/report/en/default.htm >.
[59] ANNEX, *'Annex' - Code of Good Administrative Behaviour for Staff of the European Commission in their relations with the public*, Commission Decision of 17 October 2000 amending its Rules of Procedure (2000/633/EC, ECSC, Euratom) [OJ 2000, No. L 267/63]:
< URL http://europa.eu.int/comm/secretariat/_general/code/_docs/code_en.pdf >.

conversely, he only advised that the adoption of rules on public access to documents should be as identical as possible for all European Institutions and bodies. Nothing in detail was ever specified.

Even if it is so, were it was not for the EU Ombudsman, public access to documents would still lie on the goodwill and voluntarism of the EU Institutions, bodies, centres and agencies. By drafting, however, recommendations and making inquiries, the EU Ombudsman appears to make two points.

1) Even those Institutions and bodies for which there is no positive *right* of access to documents must have *rules* about such access.

2) Where rules of access to documents are established, *uniformity* is necessary in order to secure more effectively the right.

4.2.1.2. (b) The power of coercion in public access

In the case where a request of access to documents is refused, either the new adopted Regulation or the rules on public access to documents for the rest of the Institutions allow EU and non-EU citizens to complain to the EU Ombudsman. For the EU Ombudsman, the issue is to investigate whether the refusal of access constitutes maladministration. For example, whether the Institution in question has properly applied its rules on public access or the new Regulation in the future, and whether it has acted within the limits of its legal authority in exercising any discretionary power. Once the EU Ombudsman

considers that an Institution has wrongly applied the rules, he can call on the Institution to reconsider the matter, this time applying the rules correctly.

This procedure of pursuing a complaint within the EU Ombudsman shows that some of the deficiencies in the internal rules of the Institutions may well be dealt with internally within that Institution. However, the author predicts that under the current dispensation the EU Ombudsman will have the power to remedy deficiencies that may arise from the new Regulation. This assertion is due to the fact that the EU Ombudsman may only make recommendations which are not legally binding.

Additionally, lodging complaints to the EU Ombudsman demonstrates that any natural or legal person is provided with a relatively informal, inexpensive and less-time consuming alternative to judicial review when challenging refusals of the Institutions to provide access to a requested document.

An example of the EU Ombudsman's powers of coercion in public access is illustrated by one of the six complaints in the *Statewatch* case.[60] There, the EU Ombudsman held that the Council was wrong not to consider a British journalist's application for access to agendas of the "Senior Level Group" and the "EU - US Task Force". The Council rejected the application on the grounds that the agendas in question were not prepared under 'the sole responsibility' of the Irish Presidency (July - December 1996), but 'jointly' by the Presidency, the Commission and the US authorities. The EU Ombudsman recommended

[60] Case 1056/25.11.96/STATEWATCH/UK/IJH against the Council of the European Union.

that the Council must also apply its rules on public access to documents which it had co-authored. The EU Ombudsman's decision therefore meant that the Council would have to reconsider the application of the complainant and apply the rules correctly. As a result of the EU Ombudsman's investigation, the Council has already changed its practice and has made available the timetable of meetings in the field of Justice and Home Affairs planned under each Presidency. It has also accepted that the Presidency is not 'another Institution' within the meaning of Article 2(2) of the formerly Decision 93/731/EC. As a result, the public is being empowered to apply to the Council for access to documents that a Member State has written in its capacity as Presidency of the Council.

The Council has been further pushed to make available a list of all measures that it has approved in the field of Justice and Home Affairs and keep a registry of its documents in general.[61] Advocating that "a basic principle of good administrative behaviour is that a public authority should maintain adequate records",[62] the EU Ombudsman has already asked the Commission to create a public register of documents.[63] This has not been fulfilled, as yet. However, there is much expectation that the respective 'authorities' will soon comply with this, considering the provision of Article 11 of the new Regulation.

[61] Decision of the EU Ombudsman on complaint:
1055/25.11.96/STATEWATCH/UK/IJH against the Council of the European Union.
[62] *Ibid.*
[63] Decision of the EU Ombudsman on complaint 633/97/PD against the European Commission.

4.3. (2) Community Courts and their latest approach: A fundamental principle

Whereas the EU Ombudsman prepared the ground for promoting a culture of openness and an awareness of public access to documents within the EU Institutions, the Community Courts went a step further. As a matter of fact, they recognised an individual's right to access to documents as a general principle of Community law.

In *Interporc II v. Commission*,[64] a case which dealt with the interpretation of the exception based on protection of the public interest (court proceedings), the CFI noted:

> "Decision 94/90 was adopted with the objective of making the Community more open, the transparency of the decision-making process being a means of strengthening the democratic nature of the Institutions and the public's confidence in the administration.[65] Exceptions must be interpreted strictly, in order not to frustrate the application of the general principle of giving the public the widest possible access to documents held by the Commission".[66]

[64] Case T-92/98 *Interporc v. Commission* [1999] ECR II - 3521.
[65] *Idem.*, para. 39.
[66] *Idem.*, para. 38.

Consistently, in *JT's Corporation Ltd v. Commission*,[67] which concerned the reading of the exception based on protection of the public interest (inspection and investigation tasks), the Court reaffirmed:

> "Application of the general principle of conferring on the public the widest possible access to documents held by the Commission should not be thwarted".[68]

Repeatedly, in *Hautala v. Council*[69] and *Aldo Kuijer v. Council*,[70] the CFI, while analysing public interest (international relations) exceptions, not only lifted the right to access to documents to that of a general principle, but also suggested that partial access to Community documentation should become a principle on its own.[71] In this context thus stated:

> "[...] Article 4(1) of Decision 93/731 must be interpreted in the light of the principle of the right to information and the principle of proportionality.[72] It follows that the Council is obliged to examine whether partial access should be granted to the information not covered by the exceptions".[73]

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[67] Case T-123/99 *JT's Corporation Ltd v. Commission* [2000] ECR II - 3269.
[68] *Idem.*, para. 33.
[69] See *supra* note 53.
[70] Case T-188/98 *Aldo Kuijer v. Council* [2000] ECR II - 1959.
[71] In the recent Case T-204/99 *Olli Mattila v. Council and Commission* judgment of 12 July 2001 (not yet reported), however, the ECJ did not find that the defendant Institutions infringed the principle of proportionality by failing to grant partial access to the documents at issue: see paras. 72-75.
[72] Note Case C-222/84 *Johnston v. Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, [1986] 3 CMLR 53, para. 38 where the Court stated that: "[...] the principle of proportionality requires that 'derogations remain within the limits of what is appropriate and necessary for achieving the aim in view".
[73] T-14/98 *loc cit. supra* note 53, para. 87. See also *supra* note 70, para. 54.

In view of the above findings, it therefore appears that the CFI has adopted a less cautious and somewhat hesitant behaviour by not trying to avoid pleas of breaches of a fundamental right of access to Community documents. It clarified the scope and legal *status* of the Commission and Council rules in the light of the existence of a general principle of public access in Community law, and accordingly annulled Commission and Council decisions insofar as they refuse such access.

The ECJ, for its part, also adopted the same stance, yet in a less unequivocal style than the CFI. In the appeal against the judgment of the CFI, in the case of *Van der Wal v. Commission*,[74] seeking to have that judgment set aside, the ECJ did not avoid the need to examine in detail the reasons why access had been refused. Based on its findings, it concluded that the scope of decision 94/90 is to provide for the widest public access possible and therefore any exception to that right of access must be interpreted and applied strictly.[75] Hence, the CFI erred in law, with the result that the plea alleging infringement of the 94/90 Commission decision in terms of access to documents was well founded.[76]

To complete the picture, a landmark statement on the right to access to documents as a fundamental principle of Community law has come from Advocate General Léger while delivering his opinion in the appeal of *Hautala*

[74] Joined Cases C-174/98 P and C-189/98 P, *Kingdom of the Netherlands and Gerard van der Val v. Commission* [2000] ECR I - 1 appealing the judgment of the Court of First Instance (Fourth Chamber) of 19 March 1998 in Case T-83/96 *Van der Wal v. Commission* [1998] ECR II - 545.
[75] *Idem.*, para. 27.
[76] *Idem.*, para. 30.

v. Council,[77] a case which involved the interpretation of public interest exception (international relations). There, he emphatically pronounced as follows:

> "[...] The right of partial access is required by both the wording and the context of Decision 93/731. They add that the latter should be interpreted and applied in accordance with the general principles of Community law, which include the right to information. Entitlement to partial access to documents follows directly from the fundamental principle of Community law that European Union citizens should be granted the widest possible access to documents of the European Institutions".[78]

He further proclaims:

> "Examination of the case-law reveals, however, that the convergence of the constitutional traditions of the Member States may suffice in order to establish the existence of one of those principles without the need to obtain confirmation of its existence or content by referring to international rules".[79]

He finally concludes:

[77] Opinion of A.G. Léger in Case C-353/99 P *Council v. Heidi Hautala and Others* delivered on 10 July 2001 (pending case).
[78] *Idem.*, para. 35.
[79] *Idem.*, para. 68.

> "Since the right of access to documents, being a fundamental principle, should be understood in the broad sense, Article 4(1) should be interpreted as requiring the Council to consider granting partial access to information not covered by exceptions".[80]

The view of the Advocate General thus marks a landmark in the history of the EU for the protection of this right by explicitly suggesting that the right to access to documents is a fundamental principle of Community law that should be observed in a broad manner.

4.4. (3) From the Courts to the Charter: A fundamental principle with a constitutional *status*

In order to confirm the principle of access to documents at Community level and define its *status* and content, the Advocate General as maintained in the previous Chapter on constitutionalism seized the opportunity to refer to the Charter.[81] In particular, to Article 42[82] which provides for a next generation 'fundamental civil right':[83]

> "Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to European Parliament, Council and Commission documents".

[80] *Idem.*, para. 117.
[81] [2000] OJ C 364/1.
[82] C-353/99 *loc. cit. supra* note 77, paras. 51, 73.
[83] *Idem.*, para. 78; See also the Opinion of A.G. Tesauro in Case C-58/94 *Netherlands v. Council* [1996] ECR I - 2169, para. 16.

Based on this provision, he then added:

"Classification of the right of access to documents as a fundamental right constitutes a further stage in the process of recognising that principle and establishing its ranking within the Community legal order".[84]

Indeed, in the process of recognising that principle and establishing its position within the Union's legal order, the Charter has become the *locus classicus*. Bearing in mind that it serves as a supplement to a European multi-level Constitution and is inspired by national constitutional traditions and laws,[85] the Charter might promote the public access into a constitutional fundamental principle and as such should be placed at the highest level of that system.[86]

Having said that, however, this does not entail that a general right to access will be unlimited. As the Court made clear in *Nold v. Commission*[87] and subsequent cases[88] fundamental rights of this kind "should, if necessary, be subject to certain limits justified by the overall objectives pursued by the

[84] C-353/99 *loc. cit. supra* note 77, para. 79.
[85] For recent comments on the legal *status* of the Charter see De Witte, B. (2001) "The Legal Status of the Charter: Vital Question or Non-Issue?", 8 *Maastricht Journal of European and Comparative Law* 1, 81-89.
[86] It should be remembered that that principle was constitutionally enshrined by the adoption of Article 255 EC, if one of course recognises the constitutional character of the Treaties. However, the difference between the Treaty provision and the Charter is that under the latter the right to access to documents is no longer moulded out of the internal Rules of Procedure of the Community Institutions.
[87] Case C-4/73 *Nold KG v. Commission* [1974] ECR 491.
[88] Note Cases C-44/79 *Hauer v. Land Rheinland - Pfalz* [1979] ECR 3727, [1980] 3 CMLR 542, paras. 23, 32; C-62/90 *Commission v. Germany* [1992] ECR I - 2575, para. 23; C-404/92 *P X v. Commission* [1994] ECR I - 4737, paras. 17-18; C-84/95 *Bosphorus v. Minister for Transport, Energy and Communications and others* [1996] ECR I - 3953, para. 21; C-293/97 *The Queen v. Minister of Agriculture, Fisheries and Food, ex parte Standley and others* [1999] ECR I - 2603, paras. 54-58.

Community, on condition that the substance of these rights is left untouched".[89] Therefore the Community Courts will be bound, not only to uphold the general principle, but also to ensure the existence of effective and reasonable exceptions to protect the overall interests of the Community and its Institutions.

Advocate General made the same comment when he evaluated the 'absolute' form of the right to access to documents in the Charter and the new Regulation:

> "Its content is to be defined in the regulation to be adopted under Article 255(2) EC, which is currently being negotiated, and the future decisions of the Court of Justice".[90]

This, then, suggests that the right to public access lies for the moment on a 'dormant seat'. In other words, the extent to which that right will blossom, despite the non-binding effect of the Charter,[91] will depend on how much the Community Courts are prepared to adhere to the provisions of the Charter in the judicial process, and following this to construe restrictively any exceptions.

Yet, even if the Courts do not mention the Charter as such in their future judgments, this fact does not stop them from characterising that element of law as a mere confirmation of their reasoning, whereas that Charter element was effectively the basis of the Court's decision.[92]

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[89] C-4/73 *loc. cit. supra* note 87, para. 14.
[90] C-353/99 *loc. cit. supra* note 77, paras. 74, 106.
[91] De Witte, B. *loc. cit. supra* note 85.
[92] See Chapter Six of this Thesis, Section 5.2.5.1. pp. 279-280 on the idea of constitutionalism through soft law.

5. CONCLUSION

Overall, this Chapter of the Thesis has focused upon developments towards a greater access to information and has suggested that recognition of a fundamental principle of public access to Community documentation has been gradually established. The exceptions to the public's access to documents, as laid down in the internal rules or the new Regulation of the EU Institutions, must be construed or interpreted in a manner which will make it not impossible to attain the objective of openness.

To this effect, the EU Ombudsman's inquiries into the public access to documents and his decisions on individual complaints of maladministration, have provided an efficient and cost-effective recourse for both EU and non-EU citizens.

Whereas the EU Ombudsman predisposed us for a more open and transparent 'state of mind', the Advocate Generals and Courts took over by explicitly recognising, in recent years, the existence of a fundamental principle of Community law.

Now it remains to see if, in the light of the Charter's provisions and the statements in the White Paper, the Courts will seize the opportunity of taking the next step of making the process more open, transparent and the Community administration more accountable. That is, to promote public access to Community documents into a fundamental principle of constitutional *status*.

CHAPTER NINE

GENERAL CONCLUSION

As Lord has explained, the issue with the European Union's democratic deficit is that each person writing about it tends to identify one basic problem:

> "The implication is plain: find some means of solving the specific problem that concerns the author in question and the democratic deficit will disappear. But what if all [these issues] form an interconnected complex? What if they relate to certain common difficulties of developing democratic politics in a political system which is both new and trans-national? What if we take the view that it is equally important to analyse the shape of such democratic politics that do exist in the European Union as it is to probe the system for gaps, not least because it may be impossible to understand the one without the other?"[1]

So, as Lord suggests, it may be just as important to make a record of those aspects of democratic practice which *do* exist, as it is to point out the self-evident gaps.

This Thesis has been a move in that direction. The EU is a new political system and it is difficult to compare it with existing political systems. New theories are

[1] Lord, C. (1998) *Democracy in the European Union*, Sheffield: Sheffield Academic Press, 11.

needed to understand the extent to which the EU is legitimate and democratic. This is where the new theory of *meta*-national democracy fits into the broad argument concerning the democratic deficit within the EU.

By applying the concept of *meta*-national democracy, this Thesis has tried to develop democratic *theories* for which there are no precedents in national experiences, *and*, to offer a wide variety of solutions, suggestions and new ideas to overcome legitimate and democratic inadequacies.

The term *meta*-national has suggested that the EU should not be viewed as a static project, one, in which citizens define their relation to their State. It might be that the core of any definition of the modern State goes back to Max Weber's body that successfully monopolises the means of legitimate force over a territorial area. The EU is not a State in that sense but is a unique and dynamic system of non-hierarchical, regulatory, heterogeneous (a hybrid mix of State and non-State actors) governance, embracing the notion of a polity.

Most of these qualifications became apparent through the notion of an EU multi-level governance system, endorsed also in the White Paper which opens the road for a plurality of authorities, organisations, Institutions, agencies, networks to perform at all levels, held together by shared values and objectives.[2]

[2] European Commission, *European Governance - A White Paper*, COM (2001) 428, 25 July 2001, pp. 12-15, 21.

Even though multi-level governance might have its weaknesses as an analytical category, it nonetheless captures something of the emerging reality of decision-making in this modern interdependent Euro-polity.[3] It alerts us to the need to disentangle the various levels of governance, decision-making and power, and identify the relevant constituencies as the case studies in this Thesis have showed in order to find representative forms and processes of involvement appropriate at each and every level.

The case study on environmental policy is particularly revealing. The adoption and implementation of two strands of EU environmental policy in the UK, namely biodiversity and land use planning policy, disclosed the activities of interest groups who can successfully shape the course of European political integration. In essence, they proved that national groups (mainly UK-based) and trans-national groups (mainly Brussels-based) have successfully gained access to the EU Institutions, a strategy designed to improve their *output* close to their interests, having previously been kept at the margin in national political arenas. We firstly concluded that such patterns of access and targeting (successful attainment of the objectives from the group's point of view) indicate the existence of a system of multi-level environmental governance in which interest groups are purposefully engaged during all phases of the policy making cycle. Secondly, that the surveyed environmental groups have contributed significantly to the development of EU environmental policy and have supported supra-national actors (the Commission, the Council and the

[3] See Chapter Two of this Thesis, Section 3.4.4. pp. 35-38.

ECJ) in extending the *acquis* further and faster than EU Member States (the UK included) would have expected.

In elaborating the theory of *meta*-national democracy, it has been further argued that like any other modern polity that aspires to democratic shared rule, the EU has to be underpinned by a political identity that is strong enough to carry the weight of its democratic politics. Starting from Weiler's critique which coined the judges' ruling in the *Brunner* decision as the "No-Demos Thesis", Chapter Three has claimed for the existence of a workable community at the EU level, based primarily on citizenship rights.

The democratic potential of Union citizenship has been based on a two-fold assertion. Firstly, that the establishment of a *meta*-national system of political rights can advance integrative popular sentiments, motivating greater democratic participation. Secondly, that it strengthens the bonds of belonging to a rising active polity, facilitating the process of positive EU awareness-formation at the grassroots. For such measures to build on the occurrence of a *meta*-national civic identity there is a need to detach Union citizenship from the nationality requirement, and to place it on an independent sphere of civic entitlements.[4]

Such an analysis of a civic European identity by no means has presupposed that a demos will actually emerge at the EU level. To this effect, a more civic-

[4] For recent comments on Union citizenship as an autonomous concept of Community law see generally Reich, N. (2001) "Union Citizenship - Metaphor or Source of Rights?", 7 *European Law Journal* 1, 4-23.

value, demos-oriented process of EU polity building was undertaken. In this perspective, there was a need to define demos as a political community participating meaningfully in the processes by which people define and implement values, priorities and policies. Similarly, there was also a need to discover a normative process to transform a plurality of demoi into an expanding pluralistic demos. Such a demos is not restricted to the national patterns from the past. It is autochthonous and schematically is seen as a spider's web that encompasses without suppressing then all national and cultural demoi however these are defined. To this extent, it is flexible enough to accommodate high levels of segmented diversity, yet solid enough to stand firm against the multiplicity of the different forms of life that co-exist in the Union's multi-cultural society.[5]

The question to ask then is whether Union citizenship would simply entail a re-arrangement of existing civic entitlements for the constituent demoi or contribute to an effective civic competence based on the power of a new, multi-layered civic contract between peoples, States, central authorities and EU Institutions.[6]

The White Paper in supporting the notion of an EU multi-level governance system answers this question in the affirmative. By calling on participation, coherence, effectiveness, and greater responsibility for all those involved in

[5] For recent comments see generally Fossum, J. (2001) "Identity Politics in the European Union", *Arena Working Papers* WP 01/17:
< URL http://www.arena.uio.no/publications/wp01_17.htm >.
[6] Chryssochoou, D. "Democracy and Integration After Amsterdam", *Sixth Biennial ECSA-USA Conference*, Pittsbourgh, Pennsylvania, 2-5 June 1999, p. 10 (*mimeo*).

developing and implementing EU policies at whatever level, the White Paper affirms that the distribution of civic competence should pass through, rather than go beyond, the capacity of citizens to determine the political functions of their polity.[7] For, what additionally remains vital to contemporary European democratic politics is the existence, explicitly or not, of a civic contract between 'governors' and 'governed'. An arrangement of this type hopefully appears to have materialised within the White Paper while at the same time seeking for a better involvement of the civil society, thus, postulating the opening up of a space for an "active dialogic participation"[8] within the EU decision-making processes.

Institutional avenues of political participation such as voting at national and EU level, referenda, filling petitions and addressing complaints to the EU Ombudsman, have implied in Chapter Four a 'bottom-up' approach to the construction of a Union closer to its people and less bureaucratically dominated. Additionally, the emergence of a civil society/citizen association at the EU level, even if still very much in its infancy, in terms of definition, internal organisation and representation, has a potentially significant role in rendering European politics more legitimate.

In terms of a 'deeper' discussion of the putative role for civil society within the institutional framework of the EU, Chapter Five has attempted to operationalize the discussion by focusing on the regulatory tasks assigned to

[7] See *supra* note 2.
[8] See Curtin, D. (1999) Academy of European Law (ed.) *'Civil Society' and the European Union: Opening Spaces for Deliberative Democracy*, Collected Courses of the Academy of European Law, Volume II, Book 1, The Hague: Kluwer Law International, 191.

the social partners. By pronouncing that the social partners participating in the Social Dialogue can conclude agreements, Article 139 EC introduces some corporatist characteristics into the existing Union decision-taking practice. What we essentially have found was decision-making by a limited number of private actors, replacing the public arena, that is, the EP to a not insignificant extent. Yet, the theory of *meta*-national democracy makes the suggestion that the very nature of the multi-level governance structures of the EU assert against any concentration of consultative interest representation at any one focal point in the policy-making process.

As for the enhancement of forms of substantive legitimacy of social policy legislation within the EU, the wide-ranging representation of participating associations is desirable. In view of the inherent deficits within the notion of representativity, the Council and the Commission must examine whether such deficits have an undue effect upon the results of negotiations. If this is the case, they must, for political reasons, be called upon to deploy their right to reject to implement an agreement. The Commission and the Council should, above all, pay attention to the protection of the under-represented interests within negotiations.

Furthermore, management and labour negotiations have been affirmed in the field of employment which, by employing labour market regulation, is considered to be complementary to social policy. The use of the social partners in this area has been proved to be the best 'tool' to strike a balance between issues of flexibility and employment protection rights. Considering the

institutionalists' perspective that Institutions do indeed matter, we highlighted that the social partners' involvement takes place within and through the framework of a governance structure: the so-called 'open-method of co-ordination' which facilitates such a discursive process.

From this case study we concluded that the Union is concerned with improving the quality of its legislation. Policies at the EU level can no longer be effective (*output* legitimacy) unless they are prepared, implemented at the most appropriate level (*input* legitimacy) and enforced in a proportionate manner. We also became aware of the fact that passing legislation on employment is a part of a broader socio-political concern, that is, to offer employment to all.[9] Consequently, a combination of formal rules with other non-binding policy tools such as recommendations, guidelines, or even regulation within partnership arrangements is proved to be vital.

In relation to concepts of political power, Chapter Six has sought to identify under the new theory a frame of reference which links ideas about integration as a process (and in particular the legal dimensions of that process) with constitutionalism.

In this perspective, it has been suggested that it would be unwise to square the shifting terrain of multi-level, non-homogenous, interlocking communities, with the idea of a constitution that presents a high degree of coherence, consistency or completeness. Far more reasonable is a view of an on-going

[9] Goetschy, J. (1999) "The European Employment Strategy: Genesis and Development", 5 *European Journal of Industrial Relations* 2, p. 117 at 135.

constitutional process that goes hand in hand with the European integration project involving the process of polity formation.[10]

Indeed, the institutional and constitutional processes of European polity formation demand to be understood on their own terms, but in a way which still respects the institutional and constitutional diversity of the Member States. The model of multi-level constitutionalism matching the form of mutli-level governance appears to satisfy such an assertion. Seen in the light of multi-level constitutionalism thus, it has been proposed that the founding Treaties must be seen as a passage towards the progressive 'constitution' of legitimate Institutions and powers at the EU level which are complementary to the national constitutions.

The Charter supplements that picture of multi-level constitutionalism by signalling that the legitimacy of the EU is to be unconditionally based on the aspiration to effectively protect and promote individual fundamental rights. By rendering the rights of EU citizens explicit, the Charter reinforces a sense of belonging to a political community, (*social* legitimacy). Additionally, it invites them to engage into constitution making by making use of such rights.

The body drafting the Charter, the Convention, established a novel, experimental, relatively deliberative and open forum for constitutional debate,

[10] See generally Joerges, C. Mény, Y. and Weiler, J. (eds.) (2000) *What Kind of Constitution for What Kind of Polity? - Responses to Joschka Fischer*, Florence, Italy: RSC European University Institute: < URL http://www.jeanmonnetprogram.org/papers/00/symp.html >.

contrasting quite starkly with the traditional State-dominated IGC processes of tough bargaining and closed diplomacy as the means for Treaty change in the EU. There were many limitations to the Charter process; the ambiguity of its aims, the suggestion of superficiality implicit in the showcasing idea, the exclusion of civil society representatives from substantive involvement and the strong position of the drafting group. Yet, the very act of the opening up of a new forum of this kind was suggestive of the potential for newer and more experimental forms of constitutional development in the EU.

Significant developments were also suggested concerning accountability. The case study of institutional crisis in the Commission in spring 1999 illustrated that the power of the EP considerably increased, giving the EP a legitimate basis to keep the Commissioners responsible and accountable for their actions. It further revealed that it is not possible to legislate for a culture of integrity, responsibility and accountability as announced in the White Paper[11] if hearts and minds are not the crux of any discussion of an organisational culture. To that end, Chapter Seven reaches a complementary function to the White Paper's mere suggestions[12] since it introduces some set of parliamentary mechanisms that could improve both confidence and openness in the Commission Institution.

In arguing that transparency and openness are two additional key elements in the democratisation process of the EU, Chapter Eight concluded that a wide understanding of the importance of public access as fundamental right has

[11] White Paper *loc. cit. supra* note 2, pp. 10, 32.
[12] *Idem.*, 6, 29-31, 33-34.

progressively materialised in the recent years. The EU Ombudsman firstly promoted a culture of openness and awareness and later the Community Courts took over by recognising a general principle of Community law.

The real significance of a development of the notion of a fundamental principle of public access has been the fact that it enables both EU and non-EU citizens to actively participate in the political process, thus, breaking down the link with European citizenship and nationality. This aspect has been not just part of a discourse on the standards of 'good administration' nor indeed of a discourse on an emerging European political citizenship truly supplementary to that at the national level. It has also been part of relieving the 'European Union's democratic deficit'. In essence, it has been about changing the mystical culture of the EU into a culture of openness, of an informed public and responsible and accountable Institutions. If the EU is claimed to be democratic under the new theory, it should be quite easy to understand - citizens have a right to know how and why decisions are made and implemented. Without freedom of information, access to documents, there is no accountability and without accountability there is no democracy.

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Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie, Case C-67/96 [1999] ECR I - 5751 203
Amministrazione delle Finanze dello Stato v. Simmenthal, Case C-106/77 [1978] ECR 629... 246
Andrea Francovich and Danila Bonifaci and others v. Italian Republic, Joined Cases C-6/90 and C-9/90 [1991] ECR I - 5357 ..... 240, 248

Bernard Connolly v. Commission, Case C-274/99 P[2001] ECR I - 1611 264
Bavarian Lager Co. v. Commission, Case T-309/97 [1999] ECR II - 3217 ..... 321, 324
Bickel and Franz, Case C-274/96 [1998] ECR I – 7637 ..... 110, 111
Bosphorus v. Minister for Transport, Energy and Communications and others, Case C-84/95 [1996] ECR I – 3953 339
Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU) v. Secretary of State for Trade and Industry, Case C-173/99 [2001] ECR I - 4881 ..... 177, 178, 276, 277

Carvel and Guardian Newspapers v. Council, Case T-194/94 [1995] ECR II – 2765 ..... 321, 322
Cho Yang Shipping v. Commission, Case C-361/00 P [2000] (not yet reported) 264
Cinéthèque SA and others v. Fédération nationale des cinémas français, Joined Cases C-60 and 61/84 [1985] ECR 2605 269
Confédération française démocratique du travail (CFDT) v. Council, Case C-66/76 [1977] ECR 305 ..... 204, 212
Commission v. Council, Case C-22/70 [1971] ECR 263 247
Commission v. Council, (*Generalised Tariff Preferences*) Case C-45/86 [1987] ECR 1493... 241
Commission v. Council, (*FAO*) Case C-25/94 [1996] ECR I - 1469 243
Commission v. United Kingdom, Case C-382/92 [1994] ECR I - 2435 203
Commission v. Belgium, Case C-247/85 [1987] ECR 3029 46
Commission v. Italy, Case C-262/85 [1987] ECR 3073 46
Commission v. Italy, Case C-159/99 [2001] ECR I - 4007 46
Commission v. France, Case C-38/99 (not yet reported) 46
Commission v. Germany, Case C-57/89 [1991] ECR I 883 46
Commission v. Spain, Case C-355/90 [1993] ECR I - 4221 46
Commission v. France, Case C-166/97 [1999] ECR I - 1719 46
Commission v. France, Case C-96/98 [1999] ECR I - 8531 46
Commission v. France, Case C-374/98 (not yet reported) 46
Commission v. Netherlands, Case C-3/96 [1998] ECR I - 3031 46
Commission v. United Kingdom, Case C-383/92 [1994] ECR I - 2479 203
Commission v. Italy, Case C-334/89 [1991] ECR I - 93 46
Commission v. Germany, Case C-62/90 [1992] ECR I - 2575 339
Commission v. Ireland, Case C-392/96 [1999] ECR I - 5901 54
Commission v. Belgium, Case C-230/00 [2001] ECR I - 4591 54
Commission v. Germany, Case C-431/92 [1995] ECR I - 2189 ..... 54, 55
Commission v. Belgium, Case C-133/94 [1996] ECR I - 2323 ..... 54, 55
Commission v. Germany, Case C-249/86 [1989] ECR 1263 106
Commission v. Belgium, Case C-149/79 [1980] ECR 3881 109
Cornelis Kramer and others, Case C-3, 4, 6/76 [1976] ECR I - 1279 242
Costa v. Enel, Case C-6/64 [1964] ECR 585 ..... 246, 247
Council v. Heidi Hautala and others, Case C-353/99 P (pending case) 278, 337, 338, 339, 340

D v. Council, Joined Cases C-122/99 P and C-125/99 [2001] ECR I - 4319 278
Demirel v. Stadt Schwäbisch Gmünd, Case C-12/86 [1987] ECR 3719 269
Draft Agreement on a European Economic Area, Opinion 1/91 of 14 December [1991] ECR I - 6079 ..... 245, 263

Elliniki Radiophonia Tileorasi (ERT) v. Dimotiki Etairia Pliroforissis (DEP), Case C-260/89 [1991] ECR I - 2925 ..... 264, 269

Ergat v. Stadt Ulm, Case C-329/97 [2000] ECR I - 148 ..... 105, 264
Emesa Sugar (Free Zone) NV v. Aruba, Case C-17/98 [2000] ECR I - 675 264
European Parliament v. Council, Case C-70/88 [1990] ECR I - 2041 205
Eyüp v. Landesgeschaftsstelle des Arbeitsmarrktservice Vorarlberg, Case C-65/98 [2000] ECR I - 4747 264

Gabrielle Defrenne v. Société anonyme belge de navigation aérienne, Case C-149/77 [1978] ECR 1365 269
Gabriele Gruber v. Silhouette International Schmied GmbH & Co. KG, Case C-249/97 [1999] ECR I - 5295 167
Germany v. Commission, Case C-281/85 [1987] ECR 3203 242
Germany v. Parliament and Council, Case C-376/98 [2000] ECR I - 8419 ..... 101, 241, 242

Hauer v. Land Rheinland-Pflaz, Case C-44/79 [1979] ECR 3727 ..... 264, 339

Internationale Handelsgesellschaft v. Einfuhr- und Vorratstelle für Getreide und Futtermittel, Case C-11/70 [1970] ECR 1125 264

Johnston v. Chief Constable of the Royal Ulster Constabulary, Case C-222/84 [1986] ECR 1651 335

Kempf v. Staatssecretaris van Justitie, C-139/85 [1986] ECR 1741 109
Kingdom of the Netherlands and Gerard van der Val v. Commission, Joined Cases C-174/98 P and C-189/98 P [2000] ECR I - 1 336
Krombach v. Bamberski, Case C-7/98 [2000] ECR I - 1935 265

Land Nordrhein – Westfalen/Uecker and Jacquet/Land Nordrhein – Westfalen, Joined Cases C-64/96 and C-65/96 [1997] ECR I – 3171 110
Levin v. Staatssecretaris van Justitie, Case C-53/81 [1982] ECR 1035 109

Maria Martinez Sala v. Freistaat Bayern Case C-85/96 [1998] ECR I - 2691 ..... 107, 108
Mario Vincente Michelleti and others v. Delegación del Gobierno en Cantabria, Case C-369/90 [1992] ECR I - 4239 104
Mehmet Birden v. Stadtgemeinde Bremen, Case C-1/97 [1998] ECR I - 7747 105

Netherlands v. Council, Case C-58/94 [1996] ECR I 2169 ..... 321, 322, 323, 338
Nold KG v. Commission, Case C-4/73 [1974] ECR 491 ..... 264, 339, 340

Ömer Nazli, Caglar Nazli and Melike Nazli v. Stadt Nürnberg, Case C-340/97 [2000] ECR I - 957 105
Orkem v. Commission, Case C-374/87 [1989] ECR 3283 274

P v. S and Cornwall County Council, Case C-13/94 [1996] ECR I - 2143 264
P X v. Commission, Case C-404/92 [1994] ECR I - 4737 339
Parti Ecologiste 'Les Verts' v. European Parliament, Case C-294/83 [1986] ECR 1339 ..... 204, 239

R v. Minister of Agriculture, Fisheries and Food ex parte Fisher, Case C-369/98 [2000] ECR I -6751 264
R v. Secretary of State for the Home Department ex parte Kaur, Case C-192/99 [2001] ECR I - 1237 84
Raymond Vander Elst v. Office des Migrations Internationales, Case C-43/93 [1994] ECR I - 3803 105
Recep Tetik v. Land Berlin, Case C-171/95 [1997] ECR I - 329 105
Regina v. Secretary of State for the Environment, ex parte: Royal Society for the Protection of Birds, Case C-44/95 [1996] ECR I - 3805 47
Roquette Frères v. Council, Case C-138/79 [1980] ECR 3333 216

Sema Sürül v. Bundesanstalt für Arbeit, Case C-262/96 [1999] ECR I - 26 105

Society for the Protection of Unborn Children Ireland Ltd (SPUC) v. Stephen Grogan and 274

others, Case C-159/90 [1991] ECR I - 4685.....
Stauder v.Stadt Ulm, Case C-29/69 [1969] ECR 419..... 102, 263
Susanne Lewen v. Lothar Denda, Case C-333/97 [1999] ECR I - 7243..... 167

Tanja Kreil v. Bundesrepublic Deutschland, Case C-285/98 [2000] ECR I - 69..... 228, 229
The Queen v. Minister of Agriculture, Fisheries and Food, ex parte Standley and others, Case C-293/97 [1999] ECR I - 2603..... 339

UK v. Council, Case C-84/94 [1996] ECR I - 5755..... 126

Van Gend en Loos v. Nederlandse Administratie der Belastingen, Case C-26/62 [1963] ECR 1..... 16, 240, 247
Von Colson and Kamann v. Land Nordrhein - Westfalen, Case C-14/83 [1984] ECR 1891... 248

Wachauf v. Bundesamt für Ernährung und Forstwirtschaft (Federal Republic of Germany), Case C-5/88 [1989] ECR - 2609..... 264

Z v. European Parliament Case C-270/99 P (pending case)..... 278

B: Cases before the European Court of First Instance

Aldo Kuijer v. Council, Case T-188/98 [2000] ECR II - 1959..... 335

Bocchi Foods v. Commission, Case T-30/99 [2001] ECR II - 943..... 264

Carlsen and others v. Council, Case T-610/97 [1998] ECR II – 485..... 324, 325
Cwik v. Commission, T-82/99 [2000] ECR IA-155; II-713..... 264

European Association of Craft, Small and Medium-Sized Enterprises v. Council, Case T-135/96 [1998] ECR II - 2335..... 203, 205, 210, 212

Gerard van der Wal v. Commission, Case T-83/96 [1998] ECR II - 545..... 325, 336

Heidi Hautala v. Council, Case T-14/98 [1999] ECR II - 2489..... 326, 335

Interporc Im-und Export GmbH v. Commission, Case T-124/96 [1998] ECR II - 231..... 325, 326
Interporc v. Commission, Case T-92/98 [1999] ECR II - 3521..... 334

JT's Corporation Ltd v. Commission, Case T-123/99 [2000] ECR II - 3269..... 335

Mannesmannröhren-Werke AG v. Commission, Case T-112/98 [2001] ECR II - 729..... 277

Olli Mattila v. Council and Commission, Case T-204/99 (not yet reported)..... 335

RII, Case T-191/98 [2000] ECR II - 2551..... 264

Svenska Journalistförbundet v. Council, Case T-174/95 [1998] ECR II - 2289..... 326

World Wildlife Fund (WWF) v. Commission, Case T-105/95 [1997] ECR II - 313..... 325, 326

C: Cases before the European Court of Human Rights

Funke v. France, [1993] 16 EHRR 297..... 274
Matthews v. United Kingdom, [1999] 28 EHRR 361..... 274
Pafitis and Others v. Greece, [1999] 27 EHRR 566..... 274

Federal Constitutional Court

Ruling of the Federal Constitutional Court, Second Division, 12 October 1993, 2 BvR 2134/92, 2 BvR 2159/92, *Manfred Brunner and others v. The European Union Treaty*, [1994] 1 CMLR 57..... 68, 69, 70, 76, 78, 96, 97, 99, 227

High Court

R v. Secretary of State for Trade and Industry ex parte Greenpeace, Queen's Bench Division, Maurice Kay J, 5 November 1999..... 50

ANNEX I

A NOTE ON RESEARCH

The research for this Thesis was completed at the end of July 2001.

ANNEX II

A NOTE ON CITATION

In this Thesis, I refer to the post-Amsterdam numbering of Treaty Articles. Articles in brackets correspond to the old EC Treaty numbering. A table of equivalence photocopied from Foster, N. *EC Legislation*, London: Blackstone, 10th ed., 1999 is included in the Annex.

TEXT BOUND INTO

THE SPINE

Done at Maastricht on the seventh day of February in the year one thousand nine hundred and ninety two.

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ANNEX

Tables of equivalences referred to in Article 12 of the Treaty of Amsterdam

A. Treaty on European Union

Previous numbering	New numbering
Title I	Title I
Article A	Article 1
Article B	Article 2
Article C	Article 3
Article D	Article 4
Article E	Article 5
Article F	Article 6
Article F.1(*)	Article 7
Title II	Title II
Article G	Article 8
Title III	Title III
Article H	Article 9
Title IV	Title IV
Article I	Article 10
Title V(***)	Title V
Article J.1	Article 11
Article J.2	Article 12
Article J.3	Article 13
Article J.4	Article 14
Article J.5	Article 15
Article J.6	Article 16
Article J.7	Article 17
Article J.8	Article 18
Article J.9	Article 19
Article J.10	Article 20
Article J.11	Article 21
Article J.12	Article 22
Article J.13	Article 23
Article J.14	Article 24
Article J.15	Article 25
Article J.16	Article 26
Article J.17	Article 27
Article J.18	Article 28
Title VI(***)	Title VI
Article K.1	Article 29
Article K.2	Article 30
Article K.3	Article 31
Article K.4	Article 32
Article K.5	Article 33
Article K.6	Article 34
Article K.7	Article 35
Article K.8	Article 36
Article K.9	Article 37
Article K.10	Article 38
Article K.11	Article 39
Article K.12	Article 40
Article K.13	Article 41
Article K.14	Article 42

Note

(*) New Article introduced by the Treaty of Amsterdam.

(***) Title restructured by the Treaty of Amsterdam.

Previous numbering	New numbering
Title VIa(**)	Title VII
Article K.15(*)	Article 43
Article K.16(*)	Article 44
Article K.17(*)	Article 45
Title VII	Title VIII
Article L	Article 46
Article M	Article 47
Article N	Article 48
Article O	Article 49
Article P	Article 50
Article Q	Article 51
Article R	Article 52
Article S	Article 53

Note
(*) New Article introduced by the Treaty of Amsterdam.
(**) New Title introduced by the Treaty of Amsterdam.

B. Treaty establishing the European Community

Previous numbering	New numbering
Part One	Part One
Article 1	Article 1
Article 2	Article 2
Article 3	Article 3
Article 3a	Article 4
Article 3b	Article 5
Article 3c(*)	Article 6
Article 4	Article 7
Article 4a	Article 8
Article 4b	Article 9
Article 5	Article 10
Article 5a(*)	Article 11
Article 6	Article 12
Article 6a(*)	Article 13
Article 7 (repealed)	—
Article 7a	Article 14
Article 7b (repealed)	—
Article 7c	Article 15
Article 7d(*)	Article 16
Part Two	Part Two
Article 8	Article 17
Article 8a	Article 18
Article 8b	Article 19
Article 8c	Article 20
Article 8d	Article 21
Article 8e	Article 22
Part Three	Part Three
Title I	Title I
Article 9	Article 23
Article 10	Article 24
Article 11 (repealed)	—

Note
(*) New Article introduced by the Treaty of Amsterdam.

Previous numbering	New numbering
Chapter 1	Chapter 1
Section 1 (deleted)	—
Article 12	Article 25
Article 13 (repealed)	—
Article 14 (repealed)	—
Article 15 (repealed)	—
Article 16 (repealed)	—
Article 17 (repealed)	—
Section 2 (deleted)	—
Article 18 (repealed)	—
Article 19 (repealed)	—
Article 20 (repealed)	—
Article 21 (repealed)	—
Article 22 (repealed)	—
Article 23 (repealed)	—
Article 24 (repealed)	—
Article 25 (repealed)	—
Article 26 (repealed)	—
Article 27 (repealed)	—
Article 28	Article 26
Article 29	Article 27
Chapter 2	Chapter 2
Article 30	Article 28
Article 31 (repealed)	—
Article 32 (repealed)	—
Article 33 (repealed)	—
Article 34	Article 29
Article 35 (repealed)	—
Article 36	Article 30
Article 37	Article 31
Title II	Title II
Article 38	Article 32
Article 39	Article 33
Article 40	Article 34
Article 41	Article 35
Article 42	Article 36
Article 43	Article 37
Article 44 (repealed)	—
Article 45 (repealed)	—
Article 46	Article 38
Article 47 (repealed)	—
Title III	Title III
Chapter 1	Chapter 1
Article 48	Article 39
Article 49	Article 40
Article 50	Article 41
Article 51	Article 42
Chapter 2	Chapter 2
Article 52	Article 43
Article 53 (repealed)	—
Article 54	Article 44
Article 55	Article 45
Article 56	Article 46
Article 57	Article 47
Article 58	Article 48

Previous numbering	New numbering
Chapter 3	Chapter 3
Article 59	Article 49
Article 60	Article 50
Article 61	Article 51
Article 62 (repealed)	—
Article 63	Article 52
Article 64	Article 53
Article 65	Article 54
Article 66	Article 55
Chapter 4	Chapter 4
Article 67 (repealed)	—
Article 68 (repealed)	—
Article 69 (repealed)	—
Article 70 (repealed)	—
Article 71 (repealed)	—
Article 72 (repealed)	—
Article 73 (repealed)	—
Article 73a (repealed)	—
Article 73b	Article 56
Article 73c	Article 57
Article 73d	Article 58
Article 73e (repealed)	—
Article 73f	Article 59
Article 73g	Article 60
Article 73h (repealed)	—
Title IIIa(**)	Title IV
Article 73i(*)	Article 61
Article 73j(*)	Article 62
Article 73k(*)	Article 63
Article 73l(*)	Article 64
Article 73m(*)	Article 65
Article 73n(*)	Article 66
Article 73o(*)	Article 67
Article 73p(*)	Article 68
Article 73q(*)	Article 69
Title IV	Title V
Article 74	Article 70
Article 75	Article 71
Article 76	Article 72
Article 77	Article 73
Article 78	Article 74
Article 79	Article 75
Article 80	Article 76
Article 81	Article 77
Article 82	Article 78
Article 83	Article 79
Article 84	Article 80
Title V Chapter 1 Section 1	Title VI Chapter 1 Section 1
Article 85	Article 81
Article 86	Article 82
Article 87	Article 83
Article 88	Article 84

Note
(*) New Article introduced by the Treaty of Amsterdam.
(**) New Title introduced by the Treaty of Amsterdam.

Previous numbering	New numbering
Article 89	Article 85
Article 90	Article 86
Section 2 (deleted)	—
Article 91 (repealed)	—
Section 3	Section 2
Article 92	Article 87
Article 93	Article 88
Article 94	Article 89
Article 95	Article 90
Article 96	Article 91
Article 97 (repealed)	—
Article 98	Article 92
Article 99	Article 93
Article 100	Article 94
Article 100a	Article 95
Article 100b (repealed)	—
Article 100c (repealed)	—
Article 100d (repealed)	—
Article 101	Article 96
Article 102	Article 97
Title VI Chapter 1	Title VII Chapter 1
Article 102a	Article 98
Article 103	Article 99
Article 103a	Article 100
Article 104	Article 101
Article 104a	Article 102
Article 104b	Article 103
Article 104c	Article 104
Chapter 2	Chapter 2
Article 105	Article 105
Article 105a	Article 106
Article 106	Article 107
Article 107	Article 108
Article 108	Article 109
Article 108a	Article 110
Article 109	Article 111
Chapter 3	Chapter 3
Article 109a	Article 112
Article 109b	Article 113
Article 109c	Article 114
Article 109d	Article 115
Chapter 4	Chapter 4
Article 109e	Article 116
Article 109f	Article 117
Article 109g	Article 118
Article 109h	Article 119
Article 109i	Article 120
Article 109j	Article 121
Article 109k	Article 122
Article 109l	Article 123
Article 109m	Article 124

Previous numbering	New numbering
Title VIa(**)	Title VIII
Article 109n(*)	Article 125
Article 109o(*)	Article 126
Article 109p(*)	Article 127
Article 109q(*)	Article 128
Article 109r(*)	Article 129
Article 109s(*)	Article 130
Title VII	Title IX
Article 110	Article 131
Article 111 (repealed)	—
Article 112	Article 132
Article 113	Article 133
Article 114 (repealed)	—
Article 115	Article 134
Title VIIa(**)	Title X
Article 116(*)	Article 135
Title VIII Chapter 1(***)	Title XI Chapter 1
Article 117	Article 136
Article 118	Article 137
Article 118a	Article 138
Article 118b	Article 139
Article 118c	Article 140
Article 119	Article 141
Article 119a	Article 142
Article 120	Article 143
Article 121	Article 144
Article 122	Article 145
Chapter 2	Chapter 2
Article 123	Article 146
Article 124	Article 147
Article 125	Article 148
Chapter 3	Chapter 3
Article 126	Article 149
Article 127	Article 150
Title IX	Title XII
Article 128	Article 151
Title X	Title XIII
Article 129	Article 152
Title XI	Title XIV
Article 129a	Article 153
Title XII	Title XV
Article 129b	Article 154
Article 129c	Article 155
Article 129d	Article 156
Title XIII	Title XVI
Article 130	Article 157

Note
(*) New Article introduced by the Treaty of Amsterdam.
(**) New Title introduced by the Treaty of Amsterdam.
(***) Chapter 1 restructured by the Treaty of Amsterdam.

Previous numbering	New numbering
Title XIV	Title XVII
Article 130a	Article 158
Article 130b	Article 159
Article 130c	Article 160
Article 130d	Article 161
Article 130e	Article 162
Title XV	Title XVIII
Article 130f	Article 163
Article 130g	Article 164
Article 130h	Article 165
Article 130i	Article 166
Article 130j	Article 167
Article 130k	Article 168
Article 130l	Article 169
Article 130m	Article 170
Article 130n	Article 171
Article 130o	Article 172
Article 130p	Article 173
Article 130q (repealed)	—
Title XVI	Title XIX
Article 130r	Article 174
Article 130s	Article 175
Article 130t	Article 176
Title XVII	Title XX
Article 130u	Article 177
Article 130v	Article 178
Article 130w	Article 179
Article 130x	Article 180
Article 130y	Article 181
Part Four	Part Four
Article 131	Article 182
Article 132	Article 183
Article 133	Article 184
Article 134	Article 185
Article 135	Article 186
Article 136	Article 187
Article 136a	Article 188
Part Five Title I Chapter 1 Section 1	Part Five Title I Chapter 1 Section 1
Article 137	Article 189
Article 138	Article 190
Article 138a	Article 191
Article 138b	Article 192
Article 138c	Article 193
Article 138d	Article 194
Article 138e	Article 195
Article 139	Article 196
Article 140	Article 197
Article 141	Article 198
Article 142	Article 199
Article 143	Article 200
Article 144	Article 201

Previous numbering	New numbering
Section 2	Section 2
Article 145	Article 202
Article 146	Article 203
Article 147	Article 204
Article 148	Article 205
Article 149 (repealed)	—
Article 150	Article 206
Article 151	Article 207
Article 152	Article 208
Article 153	Article 209
Article 154	Article 210
Section 3	Section 3
Article 155	Article 211
Article 156	Article 212
Article 157	Article 213
Article 158	Article 214
Article 159	Article 215
Article 160	Article 216
Article 161	Article 217
Article 162	Article 218
Article 163	Article 219
Section 4	Section 4
Article 164	Article 220
Article 165	Article 221
Article 166	Article 222
Article 167	Article 223
Article 168	Article 224
Article 168a	Article 225
Article 169	Article 226
Article 170	Article 227
Article 171	Article 228
Article 172	Article 229
Article 173	Article 230
Article 174	Article 231
Article 175	Article 232
Article 176	Article 233
Article 177	Article 234
Article 178	Article 235
Article 179	Article 236
Article 180	Article 237
Article 181	Article 238
Article 182	Article 239
Article 183	Article 240
Article 184	Article 241
Article 185	Article 242
Article 186	Article 243
Article 187	Article 244
Article 188	Article 245
Section 5	Section 5
Article 188a	Article 246
Article 188b	Article 247
Article 188c	Article 248

Previous numbering	New numbering
Chapter 2	Chapter 2
Article 189	Article 249
Article 189a	Article 250
Article 189b	Article 251
Article 189c	Article 252
Article 190	Article 253
Article 191	Article 254
Article 191a(*)	Article 255
Article 192	Article 256
Chapter 3	Chapter 3
Article 193	Article 257
Article 194	Article 258
Article 195	Article 259
Article 196	Article 260
Article 197	Article 261
Article 198	Article 262
Chapter 4	Chapter 4
Article 198a	Article 263
Article 198b	Article 264
Article 198c	Article 265
Chapter 5	Chapter 5
Article 198d	Article 266
Article 198e	Article 267
Title II	Title II
Article 199	Article 268
Article 200 (repealed)	—
Article 201	Article 269
Article 201a	Article 270
Article 202	Article 271
Article 203	Article 272
Article 204	Article 273
Article 205	Article 274
Article 205a	Article 275
Article 206	Article 276
Article 206a (repealed)	—
Article 207	Article 277
Article 208	Article 278
Article 209	Article 279
Article 209a	Article 280
Part Six	Part Six
Article 210	Article 281
Article 211	Article 282
Article 212(*)	Article 283
Article 213	Article 284
Article 213a(*)	Article 285
Article 213b(*)	Article 286
Article 214	Article 287
Article 215	Article 288
Article 216	Article 289
Article 217	Article 290
Article 218(*)	Article 291
Article 219	Article 292
Article 220	Article 293

Note
(*) New Article introduced by the Treaty of Amsterdam.