VARIABLE GEOMETRY OR CONCENTRIC CIRCLES: PATTERNS FOR THE EUROPEAN UNION

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I. INTRODUCTION

ONCE upon a time, a Professor of European Institutions, at least if a lawyer by training, could simply assert that the European Communities are based on the rule of law, that they create institutions with autonomous powers, which are able to issue legislation binding as law throughout every member State of the Community, and that they create courts which have power to exercise judicial control over a complex network of relationships between the Community institutions, the member States and private citizens. While these statements are still true, however, they must now be placed in a rather more complex context. Furthermore, there is a contrast between on the one hand the intensification (to borrow a word from the Common Agricultural Policy) of certain fundamentals of the EC legal order in the recent case law of the European Court, and on the other hand attempts by member States to escape this through non-EC forms of co-operation in the framework of the European Union, the development of the idea that not all the rules of the EC Treaty apply to all the member States, and the entry by the majority of the member States into a separate Treaty, the Schengen Agreement, dealing with matters which might be thought to fall under the EC Treaty or the Home Affairs and Justice pillar of the Treaty on European Union—all of which might generically be referred to as variable geometry. In the other direction, it may be observed that large amounts of substantive EC law, and some of the major underlying concepts, have been accepted by the EFTA States (except Switzerland) under the European Economic Area Agreement, and to a more limited and conditional extent by the Central and Eastern European countries in their Europe Agreements with the European Communities—the concentric circles of the title. Given that the question of what is now politely called "flexibility" has apparently been raised by the French and German governments in the current Intergovernmental Conference (IGC), the purpose of this article is to see whether any discernible pattern

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is emerging from this apparent diversity, and to consider, given the title of my chair, the consequences for EC and EU institutions, notably the European Court of Justice.

II. COMMONALITY AND CO-OPERATION

BEGINNING with the intensification of fundamentals of the Community legal order, it is now clear that substantive Community rules have to be interpreted so as to have the same effect in every member State, as was held in Case 81/87 *R.* v. *H.M. Treasury, ex p. Daily Mail.*[1] This involved an attempt by an English-registered company to move its central management and control to the Netherlands, which as a matter of company law was perfectly feasible under both systems. However, the UK Treasury wished to subject the move to certain conditions which the *Daily Mail* claimed to restrict its freedom of establishment under the EC Treaty. On a reference to the European Court, somewhat broader issues were nevertheless canvassed: it was pointed out that companies exist only by virtue of national legislation and that the Treaty rules on freedom of establishment did not overcome the national law problems as to retention of legal personality on the transfer of the registered office or real head office to another member State, so that they did not confer a right to transfer central management and control to another member State. Hence there is no Community law right for a company to move its primary establishment, so that a company incorporated under a system, such as the French, which requires the "*siège réel*" to remain in the State of incorporation, will not be able to take advantage of primary establishment.

Similarly, Community law must be valid or invalid for the whole Community. Although only Article 41 of the ECSC Treaty gives the Court *exclusive* jurisdiction to consider the validity of Community legislation at issue before national courts, Article 177 of the EC Treaty being silent on the point, the ECSC rule on validity was extended to the EC Treaty in Case 314/85 *Foto-Frost.*[2] It was held that under the EC Treaty also only the European Court may declare Community legislation invalid, since it must be valid or invalid for the Community as a whole, not just within one national jurisdiction. It must also be given the same interpretation throughout the Community, so that a national court bound on points of law by the judgments of superior courts may still make a reference on an EC point already determined at the national level by such a superior court. The Court accepted this view in Case 166/73 *Rheinmühlen* v. *Einfuhr- und voratsstelle Getreide*,[3] stating that "a rule of national law

1. [1988] E.C.R. 5483.
2. [1987] E.C.R. 4199; [1988] 3 C.M.L.R. 57.
3. [1974] E.C.R. 33; [1974] 1 C.M.L.R. 523.

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whereby a court is bound on points of law by the rulings of a superior court cannot deprive the inferior courts of their power to refer to the Court questions of interpretation of Community law involving such ruling". A decision of a superior national court on the interpretation of Community law is therefore not even binding on the lower courts in the same legal system,[4] let alone elsewhere in the Community.

At the level of the Community institutions, it is clear that they must use their powers in the interests of the Community as a whole rather than in the interests of a particular member State. In Case 250/84 *Eridania*[5] it was held justifiable to base the quotas on historical production (the method also used, by way of comparison, for steel-production quotas under the ECSC Treaty) rather than current consumption, so that it was lawful to allocate to Italian producers a quota which was lower than Italian consumption; therefore, necessarily, opening the way to imports from other member States. Perhaps of wider significance are Cases 351 and 360/85 *Fabrique de Fer de Charleroi* v. *Commission*,[6] where a Commission Decision under the ECSC steel quota system was annulled in so far as it gave exceptional treatment to the one and only Danish steel producer. It was held that the Commission was under a duty to exercise its powers in the interests of the Community as a whole, and it was therefore a misuse of those powers to enact rules which benefited one particular member State.

More generally, under Article 5 of the EC Treaty, member States are to take all appropriate measures to ensure fulfilment of the obligations arising out of the Treaty or resulting from action taken by the institutions of the Community, and to facilitate the achievement of the Community's tasks. They are furthermore to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty.

This has not been used uniquely *against* member States—in Case C-2/88 Imm. *Zwartveld*[7] it was used to order the Commission to deliver certain documents requested by a Dutch judge to that judge, and to authorise its officials to give evidence before him. Nor has it been used only by the European Court of Justice—this technique has been used by the Commission in the agricultural sector to fill the void when the Council has failed to exercise its legislative powers by the time it should have done, and came particularly to light in the context of the cereal market in 1985. There, faced with the Council's failure to adopt a regulation on cereal prices based on a Commission proposal which would have led to price reductions even in nominal terms, and where therefore it would have been

4. In the sense that they remain free to make a further reference on the same point.
5. [1986] E.C.R. 117.
6. [1987] E.C.R. 3639.
7. [1990] E.C.R. I-3365.

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undesirable to allow the previous year's higher prices to be continued, the Commission enacted its own decision, and subsequently its own regulation[8] applying what is called "precautionary measures" (in other words, fixing lower prices) in the cereals market. In so doing the Commission claimed to act on the basis of Articles 5 and 155 of the Treaty, presumably invoking Article 5 on the basis that the failure of member States meeting in Council to fix the cereal prices in due time constituted a breach of their duties under Article 5 to take all appropriate measures to ensure fulfilment of the obligations resulting from the action taken by the institutions of the Community.

This concept has even been used to create a kind of reference for a preliminary ruling from national courts to the Commission in the context of the EC competition rules. In Case C-234/89 *Delimitis* v. *Henninger Bräu*[9] it was suggested that it is always open to a national court to seek information from the Commission as to the state of any procedure the Commission may have set in motion and as to the likelihood of its giving an official ruling on the agreement under Regulation No.17. In particular, it was stated that the national court "may contact the Commission where the concrete application of Article 85(1) and Article 86 raises particular difficulties, in order to obtain the economic and legal information which that institution can supply to it", given that under Article 5 "the Commission is bound by a duty of sincere cooperation" with the national judicial authorities. This matter was taken up by the Commission itself in its notice on co-operation between national courts and the Commission in applying Articles 85 and 86.[10] The Commission there suggested that national courts could consult it on its "customary practice" in relation to the Community law at issue, in particular with regard to the questions of the effect on trade between member States and the extent to which the restrictions on competition resulting from the practices specified in Articles 85 and 86 may be regarded as appreciable. Similarly, in the context of the notification of State aids under Article 93(3) of the EC Treaty, which also falls within the chapter of the Treaty concerned with rules on competition, the European Court has held[11] that, where the national court entertains doubts as to whether the measures at issue should be categorised as State aid, it may seek clarification from the Commission. The Commission itself has issued a notice on co-operation between national courts and the Commission in the field of State aids,[12] in which it encourages national

8. Commission Reg.2124/85 (1985) O.J. L198/31.
9. [1991] E.C.R. I-935.
10. (1993) O.J. C39/6.
11. Case C-39/94 *SFEI* v. *La Poste* (11 July 1996).
12. (1995) O.J. C312/8.

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courts to make contact with it when they encounter difficulties in the application of Article 93(3) of the EC Treaty.

Conversely, the use of Article 5 can be seen to be of increasing importance in the legal relationship between Community institutions and member States and in the legal duties of member States. Thus when, in the *Hurd* case,[13] the question of the national taxation of a teacher at a European School arose, the Court held that, while it had no jurisdiction to interpret the agreement between the member States establishing the European Schools (a clear example of co-operation outside the EC Treaty framework), nevertheless by virtue of Article 5 a member State could not use its tax system in such a way as to harm the Community budget. In the early days of the Community the parallel Article 86 of the Coal and Steel Treaty had been used in Case 6/60 *Humblet*,[14] where it was held that no account could be taken of an official's Community income in calculating the rate of tax on his national income, to require higher rate tax to be repaid.

Article 5 has even been used to enforce obligations arising under acts of a type not defined in the Treaty adopted in an EC context. In Case 141/78 *France* v. *UK*[15] it was held that the member States must in enacting new fisheries measures comply with the requirements of the "Resolution" adopted by the Council at The Hague in November 1976 pending implementation of a Community fisheries policy, on the grounds that that Resolution made specific the duties of co-operation imposed on member States under Article 5 of the EC Treaty. Annex VI to that Resolution required a member State taking unilateral fisheries measures to consult the Commission and seek its approval, and the United Kingdom was held to be in breach of its Treaty obligations by bringing into force the Fishing Nets (North-East Atlantic) Order 1977 without so doing.

The use of Article 5 has been of particular importance with regard to the interpretation of legislation which is not directly effective, and to the award of damages for breaches of legislation which was not directly effective by member States. On the question of interpretation, the Court held in two references from German courts, Case 14/83 *Von Colson and Kamaan* v. *Lord Nordrhein-Westfalen*[16] and Case 79/83 *Harz* v. *Deutsche Tradax*,[17] that the obligation imposed on a member State under Article 189 of the EC treaty to achieve the result sought by a directive, taken with the general obligation under Article 5 of the Treaty to take all appropriate

13. Case 44/84, [1986] E.C.R. 298; [1986] 2 C.M.L.R. 1.
14. [1960] E.C.R. 1125.
15. [1979] E.C.R. 2923.
16. [1984] E.C.R. 1891.
17. [1984] E.C.R. 1921.

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measures to fulfil Treaty obligations, applied to all national authorities, including judicial authorities within the limits of their competence. Hence, when applying national legislation, in particular in these cases legislation implementing Directive 76/207, national courts *must* interpret this legislation in the light of the text and the objectives of the directives, an obligation which in some instances might obviate the need to show that the relevant provisions of the directive are capable of producing direct effects if there exists national legislation purporting to implement the directive. At first sight, this ruling on the interpretation of national law in the light of Community law appeared to be of value only where a member State had adopted legislation purporting to implement a directive but was of little assistance where the member State had simply failed to act in time, where the claimant would have to fall back on the concept of direct effect. However, in Case C-106/89 *Marleasing* v. *Comercial Internacional de Alimentacion*[18] it was made clear that the duty of a national court to interpret national law in accordance with the terms of a directive extended to all relevant national legislation, irrespective of whether it was adopted after the directive so as to give effect to it.

The matter has now been taken a stage further: it was established in Cases C-6 and 9/90 *Francovich* v. *Italy*[19] that there are circumstances under which a member State may be liable in damages for harm caused by its failure to implement a directive even where the provisions of the directive do not give rise to directly effective rights against the State. Italy had failed to give effect to Council Directive 80/987 on the protection of employees in the event of the insolvency of their employer, and the Italian government was therefore sued for damages by a number of people who had been employed by firms which had become insolvent and who had not received the payments guaranteed to them under the Directive. On the question of direct effect, the Court held that, while it was clear that the Directive imposed a guarantee of payment and how much was to be paid, it was not clear that the State itself was the debtor against which the guarantee could be enforced. Nevertheless, the Court went on to hold that the full effect of Community law rules could be undermined if individuals whose rights were harmed by a member State breaching Community law could not obtain damages, and reparation was indispensable where the full effect of Community law depended on the action of member States, as is the case with directives. As in the case law on interpretation, the Court invoked the principle of Community solidarity in Article 5 of the EC Treaty, stating that it imposed an obligation on the member States to wipe out the illegal consequences of a breach of Community law. It concluded that there was a liability to pay damages to compensate for the harm

18. [1990] E.C.R. I-4135.
19. [1991] E.C.R. I-5357.

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caused by failure to implement a directive subject to three conditions: the directive should require rights to be conferred on individuals, the content of these rights should be identifiable from the provisions of the directive, and there should be a causal link between the obligation imposed on the member State and the harm suffered by the applicant.

However, while it would appear that a total failure to implement a directive will always constitute a sufficiently serious breach[20] of Community law for the member State to incur liability, the same will not necessarily be true where the member State does implement a directive, but the implementation is incorrect or based on a wrong interpretation of the directive. In such a case, account is to be taken of the clarity and precision of the rule breached. Thus when the United Kingdom incorrectly implemented a provision described by the European Court as imprecisely worded, and reasonably capable of bearing the interpretation given to it in good faith by the United Kingdom, at a time when no guidance was available from case law of the Court as to the interpretation of the provision at issue, such incorrect implementation could not be regarded as a breach of Community law sufficiently serious to give rise to liability in damages.

III. NON-COMMUNITY CO-OPERATION

THIS may be contrasted with the development of non-Community co-operation between the member States. The Maastricht Treaty had the stated aim[21] of creating a "European Union" founded on the European Communities "supplemented by the policies and forms of cooperation established by this Treaty". The basic theory therefore appears to be that the Communities are a part of the Union, but that there are aspects of the activity of the Union which fall outside the competence of the Communities; in other words, the widening of the scope of co-operation between the governments of the member States was not necessarily accompanied by a correlative widening of the powers of the Community or by a deepening of its institutional structure.

The Union is often therefore described as resting on three pillars, the central (and strongest) of which is constituted by the Community treaties, flanked by the rather more slender pillars of the provisions on a Common Foreign and Security Policy and those on co-operation in the fields of justice and home affairs. However, in terms of Article C of the Treaty on European Union, the Union is served by a single institutional framework which is intended to "ensure the consistency and the continuity of the activities carried out in order to attain its objectives while respecting and building upon the *acquis communautaire*". While therefore the same insti-

20. Case C-392/93 *R.* v. *H.M. Treasury ex p. British Telecommunications plc* (26 Mar. 1996), ECJ.
21. Art.A.

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tutions are in principle involved in the activities of the Union and of all three Communities, their functions nevertheless differ as between the Community and the non-Community activities of the Union, and as between the three Communities.

Before attempting to analyse the concept of the "Union", it should be remembered that the Maastricht Treaty resulted from separate draft treaties respectively on political union and on economic and monetary union, and that different solutions were adopted with regard to the achievement of those "unions". The provisions relating to economic and monetary union take the form of amendments to the EC Treaty and therefore form an integral part of Community law;[22] on the other hand, in the context of the provisions relating to political union, a distinction was made between those matters which constituted amendments to the existing Community treaties, and those which fell outside the scope of the Communities, notably the provisions on a Common Foreign and Security Policy and those on co-operation in the fields of justice and home affairs. It should be said at the outset, however, that the terminological distinction is not always maintained: it is somewhat blurred, for example, in the context of citizenship of the *Union*, which is inserted into the *Community* Treaty in Articles 8 and 8a to 8e.

Following the example of the exclusion of the political co-operation provisions of the Single European Act from the jurisdiction of the European Court, Article L of the Maastricht Treaty similarly defines the provisions of that Treaty subject to the jurisdiction of the Court in such a way as to exclude those on foreign and security policy and those on home affairs and justice (with one minor exception). Whilst at first sight this takes these areas outside the scope of enforceable Community law, it may be wondered how total the exclusion is.

To take a simple example, joint action decided as a matter of Union foreign policy may be reflected in measures adopted by the Community: this is envisaged in the second paragraph of Article C of the Maastricht Treaty, which provides that "the Union shall in particular ensure the consistency of its external activities as a whole in the context of its external relations, security, economic and development policies". To this is linked Article 228a of the EC Treaty, the effect of which is that where it is provided, in a common position or in a joint action adopted according to the provisions of the Treaty on European Union relating to the Common Foreign and Security Policy, for an action by the Community to interrupt or to reduce, in part or completely, economic relations with one or more third countries, the Council is empowered to take the necessary urgent mea-

22. In particular, Arts.102a to 109m of the EC Treaty.

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sures as a matter of Community law. Thus, to take a clear example, the policy of imposing sanctions on Serbia and Montenegro was implemented at Community level by legislation adopted under Article 228a of the EC Treaty. Indeed, even before the entry into force of this provision, such measures had been adopted under Article 113 of the EC Treaty as a matter of common commercial policy.[23] Such measures produce their normal effects under Community law and are subject to the normal judicial remedies of Community law, irrespective of their political genesis.

Furthermore, it should not be forgotten that, whatever may be said in the Maastricht Treaty, the European Court held in its *Opinion 1/91*[24] on the European Economic Area Agreement that, having regard to the treaties then in force, the *Community* already had the objective of achieving European Union. How this might be reconciled with the terms of the Maastricht text goes beyond the scope of this article, but it gives rise to the thought that it might even be legitimate for the Community (given the political will) to legislate in this area using the general power of Article 235 of the EC Treaty, which allows the Council, in the absence of more specific powers, to enact legislation which is necessary to achieve the objectives of the Community.

It will be clear from what has been said above that the functions of Community and Union cannot be kept totally separate. However, a particular feature of the provisions on co-operation in the fields of justice and home affairs is that they expressly envisage that certain matters may be transferred to Community competence. The matters regarded as being of common interest under this title are listed in Article K.1 under nine headings: asylum policy; rules governing the crossing by persons of the external borders of the member States; immigration policy and policy regarding nationals of third countries; combating drug addiction; combating fraud on an international scale; judicial co-operation in civil matters; judicial co-operation in criminal matters; customs co-operation; and, lastly, police co-operation for the purposes of preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crime, in connection with the organisation of a Union-wide system for exchanging information within a European Police Office (Europol).

The first three of these are clearly concerned with the treatment of third-country nationals, and it is therefore of interest to note that the question of visa policy, which might be thought to be implicit in the second and third objectives mentioned above, will fall within the scope of Community competence by virtue of Article 100c of the EC Treaty introduced by the Maastricht Treaty. Furthermore, by virtue of Article K.9, "the Council, acting unanimously on the initiative of the Commission or a Member

23. See Council Regs.3300/91 (1991) O.J. L315/1 and 1432/92 (1992) O.J. L151/4.
24. [1991] E.C.R. I-6079; [1992] 1 C.M.L.R. 245.

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State, may decide to apply Article 100c of the Treaty establishing the European Community to action in areas referred to in Article K.1(1) to (6)", although it is envisaged that such a decision would require national ratification.

However, of the three areas excluded from potential transfer to the Community, it might be argued that customs co-operation was already implicit in the concept of the customs union (which has existed since 1968). Furthermore, in the field of crime connected with Community assets, the Court has made it clear as a matter of Community law both that member States must use their criminal law if necessary to enforce Community law[25] and that the Commission must co-operate with the member States (e.g. by allowing its officials to give evidence) when they are trying to enforce Community law.[26]

Be that as it may, this is an area where the dividing line between Community activity and Union activity could change. While in the context of the current IGC there would appear to have been some disagreement in the Reflection Group on the matter, the Commission proposes that what it regards as the shortcomings of the Treaty in the fields of justice and home affairs—notably its ineffectiveness and the absence of democratic and judicial review—be remedied by setting clear objectives and providing for appropriate instruments and methods, and that the best way of attaining all these objectives would be to transfer justice and home affairs to the Community framework, with the exception of judicial co-operation in criminal matters and police co-operation.

On the other hand, the UK government in its White Paper on the IGC appears to be of the opinion that:

> the Third Pillar has achieved a good deal in its first two years of operation. Apart from signature of four important Conventions (on Simplified Extradition Procedures, Fraud against the Financial Interests of the Community, a European Police Office (Europol) and a Customs Information System), there is now closer practical cooperation between the police, immigration and customs authorities of Member States than ever before.[27]

Unfortunately, the UK White Paper fails to mention that one reason the Europol Convention had failed to come into force would appear to be because of a dispute between the United Kingdom and the other member States over whether the European Court should be given jurisdiction with regard to that Convention.

25. Case 68/88 *Commission* v. *Greece* [1989] E.C.R. 2965.
26. Case C-2/88 *Zwartveld* [1990] E.C.R. I-3365.
27. Text as downloaded from the Internet.

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IV. DIFFERENTIAL TREATMENT IN THE EC TREATY

WHILE the Community institutions may be under a duty to use their powers in the interests of the Community as a whole rather than in the interests of individual member States, the Treaties have from the outset contained provisions giving special treatment to some member States for some purposes, such as the Protocols to the original EEC Treaty on Luxembourg Agriculture or German Internal Trade.

However, the Maastricht Treaty clearly envisages situations where the 15 member States do not necessarily participate to the same extent in every policy or activity. In particular, it provides for fewer than 15 member States to act together in the areas of monetary union and social policy, and to that extent may be regarded as having already introduced the concept of a "two-speed" or "variable geometry" Community.

The discussion of social legislation in the context of Community law is hardly novel: the first substantive legislation under the EEC Treaty was that on social security for migrant workers, adopted in 1958.[28] Nevertheless, the reluctance of the United Kingdom to see an extension of the Community's social competence is well known, and, in the context of discussion of a Community of less than all its members, the Maastricht Protocol on Social Policy does, of course, purport to allow 14 (originally 11) member States to act together through the Community institutions. It may be doubted how far this adds any substantive rather than procedural elements: the Protocol on Social Policy refers to continuing "along the path laid down in the 1989 Social Charter" (also signed by 11 member States). That Charter declared expressly that its implementation "must not entail an extension of the Community's powers as defined by the Treaties", and listed in detail the existing provisions which could be used.

Legislation has in fact been issued under general Treaty powers which expressly states that it is intended to implement the Social Charter, such as Directive 91/533[29] on contracts of employment, which, since it was made under Article 100, which requires unanimity in the Council, must at the least not have been opposed by the UK minister. This pattern was repeated in Council Directive 92/56 on collective redundancies,[30] which contains detailed extracts from three paragraphs of the Social Charter in its recitals, but which were again made under Article 100, and therefore unanimously.

The present author remains of the opinion that most of the Social Policy Protocol may be achieved under the previous (and continuing) Treaty provisions, whether specific or general, and even the UK government in unsuccessfully challenging the Working Hours Directive in Case C-84/94

28. Council Regs.3 and 4/58 (J.O. 1958 pp.561 and 597).
29. (1991) O.J. L288/32.
30. (1992) O.J. L231/26.

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UK v. *Council*[31] argued not that it fell outside normal Community competence but that it should have been adopted under Articles 100 and 235 (which require unanimity in the Council) rather than Article 118a. One exception is that the Protocol permits national legislation which discriminates positively in favour of women, whereas it has been held that this is not possible under the existing Equal Treatment Directive.[32] On the other hand, the first legislation to be adopted under the Protocol, Council Directive 94/45 on European Works Councils,[33] has been applied by many of the firms affected to their UK workforce in the same way as it applies to their workforce in other EU States. Indeed, it may be argued that the situation of the United Kingdom does not amount to an opt-out: the EC Treaty has always, as indicated above, contained provisions on social policy which became binding on the United Kingdom on its accession; these provisions were developed further by the Single European Act 1987, by which the United Kingdom is fully bound, notably by the addition of Articles 118a (on the basis of which the Working Hours Directive was adopted) and 118b. It may be suggested that the nature and legal consequences of these provisions have not been altered by the fact that under the Social Protocol the other 14 member States have been given permission to use Community machinery to give effect to an alternative set of provisions which were originally intended to replace the social policy section of the Treaty, but did not in the end do so.

With regard to the United Kingdom's special treatment in the context of economic and monetary union—which is only triggered when and if it gives notice that it does not intend to participate in the third stage[34]—it is sometimes forgotten that the former EEC Treaty from the outset required, under the original Articles 103 and 105, co-ordination of economic policy and exchange rate policy, and in *Opinion 1/91*[35] the European Court also suggested that the attainment of economic and monetary union was *already* a Community objective even before the Maastricht Treaty had been signed; it should therefore hardly be a surprise that the ECU has been defined in a series of regulations enacted under Article 235. Furthermore, legislation expressly intended to give effect to the first stage of economic and monetary union had already been enacted, following the decision of the European Council in Madrid in June 1989 that that stage should begin on 1 July 1990. Attention might particularly be drawn to Council Decision 90/141 on the attainment of progressive convergence of economic policies and performance during stage one of EMU,[36] and

31. 12 Nov. 1996.
32. Case C-450/93 *Kalanke* v. *Freie Hansestadt Bremen* [1995] E.C.R. I-3051.
33. (1994) O.J. L254/64.
34. Protocol 11, para.2.
35. [1991] E.C.R. I-6079.
36. (1990) O.J. L78/23.

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Council Decision 90/142 amending the previous legislation on the Committee of Governors of the Central Banks of the Member States of the European Community.[37]

In the case of monetary union, differentiation arises not just from the special treatment accorded to the United Kingdom and Denmark in the Protocols relating to those countries but also from the fact that it was appreciated that not all member States would meet the rather strict criteria for economic convergence laid down as the precondition for participation in the monetary union; such States are referred to as "Member States with a derogation",[38] and would, *inter alia*, be excluded from the decision-making process on certain matters.[39] Such States (including Denmark and the United Kingdom if they do not join the third stage when it eventually begins) are not fully involved in the institutional structure of the European Central Bank (ECB) or of the System of Central Banks (ESCB), and are not bound by all its acts. In one sense, the status of a member State with a derogation is the obverse of a finding that other member States fulfil the conditions for the adoption of a single currency. The status of a member State with a derogation is, however, envisaged as being transitional rather than permanent.

One of the fundamental differences between the proposals of the Delors Committee and the text adopted in the Maastricht Treaty is that Delors recommended that the European Central Bank should come into being in the second stage of economic and monetary union, whereas the Treaty provided for an interim body, the European Monetary Institute, to operate during the second stage. The reason for this may be found in the structure of the European Central Bank. Article 109a provides that the Executive Board of the ECB shall comprise the president, the vice-president and *four* other members. The president, the vice-president and the other members of the Executive Board are to be appointed from among persons of recognised standing and professional experience in monetary or banking matters by common accord of the governments of the member States without a derogation at the level of heads of State or of government. It is therefore clear that the Executive Board of the ECB need not be representative even of all the participating member States. Indeed, it is provided that if there are member States with a derogation, the number of members of the Executive Board may be smaller than provided for in Article 11.1 of the Statute of the ESCB (a president, a vice-president and four others), but in no circumstances may it be less than four. On this basis it would be difficult to envisage all member States being involved during the second stage, only for some of them to drop out

37. (1990) O.J. L78/25.
38. Art.109k of the EC Treaty as amended by the Maastricht Treaty.
39. Art.109k(5).

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because they could not participate in the third stage; hence the European Monetary Institute.

It is also clear that there may be "common" policies which apply only to participant States. The need (or hope) for an exchange rate policy is envisaged in Article 109 of the EC Treaty as introduced by the Maastricht amendments; it should, however, be emphasised that this provision will enter into force only at the beginning of the third stage[40] and that it will not apply to member States with a derogation[41] or to the United Kingdom if it decides not to participate.[42] Article 109(1) operates by way of derogation from Article 228, which sets out the general procedure for the negotiation of international agreements between the Community and non-member States or international organisations; it empowers the Council to conclude formal agreements on an exchange rate system for the ECU in relation to non-Community currencies—which seems to contemplate a return to something like the former IMF system—and lays down a special procedure for this to be achieved. The Council is required to act unanimously on a recommendation from the European Central Bank or from the Commission (which indicates that the power of initiative in this area is as much, if not more, with the ECB as with the Commission) after consulting the ECB in an endeavour to reach a consensus consistent with the objective of price stability, and after consulting the European Parliament. The procedure for negotiation is laid down in Article 109(3), which provides that where agreements concerning monetary or foreign exchange regime matters need to be negotiated by the Community with one or more States or international organisations, the Council, acting by a qualified majority[43] on a recommendation from the Commission and after consulting the ECB, shall decide the arrangements for the negotiation and for the conclusion of such agreements. It is stated that these arrangements must ensure that the Community expresses a single position, and that the Commission must be "fully associated" with the negotiations. The implication of this is that, whereas negotiations under the general Article 228 are conducted by the Commission, the same is not necessarily the case under Article 109, and the negotiations could, for example, be entrusted to the ECB. It is, however, clearly laid down that agreements concluded in accordance with Article 109(3) are to be binding on the institutions of the Community, on the ECB and on member States (but, of course, only those participating in monetary union).

40. Art.109e(3).
41. Art.109k(3) and (4).
42. UK Protocol, Art.5.
43. Though it will be recalled that under Art.109(1) it needs to act unanimously to conclude the resultant agreement.

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What, however, the Treaty fails to deal with is the question of an exchange rate mechanism in relations between member States which participate in economic and monetary union and those which do not. This is of particular importance in so far as the status of a member State with a derogation is envisaged as being transitional rather than permanent. Under Article 109k(2), at least once every two years, or at the request of a member State with a derogation, the Commission and the European Central Bank must report to the Council in accordance with the procedure laid down in Article 109j(1). After consulting the European Parliament and after discussion in the Council, meeting in the composition of the Heads of State or of Government, the Council shall, acting by a qualified majority on a proposal from the Commission, decide which member States with a derogation fulfil the necessary conditions on the basis of the convergence criteria set out in Article 109j(1), and abrogate the derogations of the member States concerned. It may be submitted that this reference to Article 109j(1) may create problems, because two of the criteria for convergence laid down in that provision relate to the exchange rate mechanism of the European Monetary System, and if the ECU had in fact by then become the single currency of a number of member States, that exchange rate mechanism simply could not operate; rather, it would appear that the currency of a member State with a derogation would have to stay in a defined relationship with the ECU as a foreign currency in order to qualify for admission to the third stage. It would appear that the European Monetary Institute has prepared a draft framework for that relationship (a European Monetary System Mark II)[44] and that the principles underlying such a mechanism were agreed by the European Council at its meeting in Dublin in December 1996.[45]

After the special treatment of the United Kingdom and Denmark in the Maastricht Treaty, the question has to be asked whether this sets a precedent for the IGC. In principle, the Reflection Group[46] appears to be against special treatment:

> The Group rejects any formula which could lead to an à la carte Europe. As regards the guidelines to allow flexibility, there is a large majority view sharing the following criteria:
> — flexibility should be allowed only when it serves the Union's objectives and if all other solutions have been ruled out and on a case-by-case basis;

44. Report of the EMI to the informal ECOFIN Council, Verona, 12–13 Apr. 1996.
45. Reuters European Community Report, 16 Dec. 1996.
46. Reflection Group comprising representatives of the foreign ministers of the member States, and of the President of the Commission, and two representatives of the European Parliament, established in June 1995 in anticipation of the opening of the IGC.

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- differences in the degree of integration should be temporary;
- no-one who so desires and fulfils the necessary conditions previously adopted by all can be excluded from full participation in a given action or common policy;
- provision should be made for ad hoc measures to assist those who want to take part in a given action or policy but are temporarily unable to do so;
- when allowing flexibility the necessary adjustments have to be made to maintain the "acquis", and a common basis should be preserved to prevent any sort of retreat from common principles and objectives;
- a single institutional framework has to be respected, irrespective of the structure of the Treaty.[47]

The Reflection Group also points out that several members, while agreeing with most of the above, stressed that such flexible arrangements in the Union should be possible only when agreed by all, as in the past. On the other hand, it is recorded that there were also some members who believed that, whereas such arrangements should in principle be temporary, they need not always be so, especially where they do not concern "core disciplines" of the Community.

V. SEPARATE TREATIES

FROM the outset, the EC Treaty has expressly recognised in Article 220 that the member States may enter into separate treaties which are nevertheless connected with the development of the Community, and in the context of the European Union, the Third Pillar provisions envisage a similar situation.[48] While the European Court has taken a broad view of the acts of the Community institutions which it may interpret under Article 177 of the EC Treaty, it has consistently held that it does not have any inherent jurisdiction to interpret other treaties or agreements entered into between the governments of the member States. Thus in Case 44/84 *Hurd*[49] the Court held that it had no jurisdiction to interpret the agreement between the member States establishing the European Schools, even though it could, in the context of the national taxation of a teacher at a European School, interpret Article 5 of the EC Treaty so as to hold that a member State could not use its tax system in such a way as to harm the Community budget.

Jurisdiction to give preliminary rulings may, however, be conferred on the European Court by the express terms of agreements between the member States (as under the Convention for the European Patent for the Common Market 1975)[50] or by specific protocols to such agreements, as

47. Text as downloaded from the Internet.
48. Art.K3(2)(c).
49. *Supra* n.13.
50. Which, however, is not yet in force.

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under the Brussels Convention on Jurisdiction and the Enforcement of Civil and Commercial Judgments or the Rome Convention on the Law Applicable to Contractual Obligations. The Protocols to the Brussels and Rome Conventions provide only for preliminary rulings on questions of interpretation, and make no provision for questions of validity, being concerned only with treaties rather than with secondary legislation. On the other hand, the Patents Convention, while allowing only for the interpretation of the Convention itself, does allow questions to be referred as to the validity and interpretation of provisions enacted in implementation of the Convention, to the extent to which they are not national provisions.[51]

The Protocols and the Convention are also very specific as to the material to which references for preliminary rulings may relate. The Protocol on the interpretation of the Brussels Convention as amended allows more specifically, as might be expected, for the interpretation of that Convention and the Protocol annexed to it, for the interpretation of the interpretation Protocol itself, and for the interpretation of the successive conventions on the accession of new member States to these instruments. The Protocols on the interpretation of the Rome Convention similarly allow for the interpretation of that Convention, for the interpretation of the interpretation Protocol itself, and for the interpretation of conventions on the accession of new member States to these instruments. The Patents Convention allows for references not only on the interpretation of that Convention but also of the provisions of the earlier European Patent Convention[52] which are binding upon every Community patent: in this context it may be observed that in its *Opinion 1/94*[53] on the competence of the Community to conclude the Uruguay Round Agreements, the European Court described the European Patent Convention as intergovernmental in origin and not a Community act.[54] The Court would therefore be given power, albeit only at the request of a court in a member State, to interpret provisions which result neither from a Community act nor a treaty between the member States alone.

The availability under other conventions of a remedy developed in particular under Article 177 of the EC Treaty has led on occasion to the adoption under those conventions of concepts developed under the EC Treaty. Thus, for example, the concept of the primacy of EC law is reflected under the Brussels Convention in Case 288/82 *Duijnstee*,[55] where it was held that, on a matter governed by the Convention, divergent national rules quite simply could not be applied.

51. Art.73(1)(b).
52. The signatories of which are not limited to the member States of the European Union.
53. [1994] E.C.R. I-5267.
54. Para.103.
55. [1983] E.C.R. 3663; [1985] 1 C.M.L.R. 220.

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More generally, it will not have escaped attention that on many of the issues before the IGC the United Kingdom has taken a different stance from that of the majority of other member States. More worrying from the point of view of a UK academic is the fact that the UK policy of non-co-operation in the BSE crisis in June 1996 appears to have given rise to speculation as to the extent to which the other member States could make arrangements between themselves without the United Kingdom. In principle, it may be suggested that there is nothing to prevent 14 (or fewer) member States entering into a treaty between themselves on matters outside or additional to the existing Treaties—indeed the Maastricht Treaty itself, as mentioned above, envisages fewer than 15 member States acting together in the "new" areas of monetary union and social policy.

The example could also be taken, however, of the Schengen Agreement on the elimination of border controls, to which the United Kingdom is not a party. This agreement was negotiated in June 1985 (i.e. before the adoption of the Single European Act) between Germany, France and the Benelux countries, and has been acceded to by other member States of the Union: Italy, Spain, Portugal, Greece and Austria. In Luxembourg on 19 December 1996, agreements were signed for the accession of Denmark, Sweden and Finland and Association Protocols were agreed for Norway and Iceland, which are members of the European Economic Area but not of the European Union.[56] On the other hand, two EU members, the United Kingdom and Ireland, which have their own common travel area, will not be participants. Without entering into the substantive details of the agreement or of the 1990 convention for its application, which has now entered into force—albeit with its own variable geometry in that, while seven members including France have abolished passport checks at airports for travel between those countries,[57] France maintains land border checks with Belgium and Luxembourg[58]—it may be noted that it sets out rules for crossing the signatory States' frontiers not just for their own citizens but also for citizens of all EC member States.[59] Furthermore, the Convention of Application distinguishes between treatment at the internal and external borders of the signatory States,[60] systematic checking being required at the latter as the price for the freedom to cross the former. Since the external frontiers of a Schengen State may be with another Community State, this poses a possible conflict with Article 7a of the EC Treaty requiring the *Community* to be an area without internal frontiers.

56. Agence Europe, 21 Dec. 1996.
57. Though it was also agreed at the Luxembourg meeting in December 1996 that controls could be eliminated at the borders of Italy, Greece and Austria in October 1997.
58. Reuter European Community Report, 15 Oct. 1996.
59. Art.1.
60. Convention, Arts.2–4.

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Furthermore, the Schengen Agreement indicates matters on which the signatory States are to take common initiatives at the *Community* level, such as VAT harmonisation,[61] and it requires the development of common policies by its participants in areas such as visas for citizens of non-member States of the Community[62]—a matter which is brought expressly into Community competence by the Maastricht Treaty under Article 100c, providing that "the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, shall determine the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States".

There are indeed a number of other matters dealt with under the Schengen Agreement which would appear to fall within the Maastricht "Provisions on Cooperation in the Fields of Justice and Home Affairs".[63] These include common rules on asylum[64] (where there is a further overlap with the Dublin Convention of 15 June 1990 between the member States of the Community,[65] though it would appear that the Schengen provision will lapse when and if the Dublin Convention enters into force), mutual assistance in police and security matters,[66] judicial co-operation in criminal matters,[67] and co-operation in the fight against drugs,[68] as well as the creation of a Schengen Information System.[69]

It may be wondered both whether it is actually open to a group of member States to enter into an agreement on a matter which would appear to fall within Community competence (at least following the entry into force of the Maastricht Treaty) and how far this is an indicator of things to come if some member States persist in endeavouring to block the common initiatives of others.

On the other hand, and rather more positively, it should also be observed that in the context of the IGC, some members of the Reflection Group, and the Commission, have suggested that the content of the Schengen Agreement should be incorporated into the EC Treaty.

61. Art.21.
62. Arts.7 and 20; Convention, Arts.9–27.
63. Arts.K to K9.
64. Convention, Arts.29 *et seq.*
65. See Blanc, "Schengen: Le chemin de la libre circulation en Europe" (1991) Revue du Marché Commun 722, 723.
66. Convention, Arts.39 *et seq.*; this mutual assistance extends to cross-border surveillance for certain offences (Art.40) and pursuit across frontiers for the same offences and e.g. after serious road accidents (Art.41). Pursuing officers would be permitted to carry arms for their "legitimate defence".
67. Convention, Arts.48 *et seq.*
68. Convention, Arts.70–76.
69. Convention, Arts.92–119.

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VI. PARALLEL TREATIES

WHILE, as a result of referendum in late 1994, Norway decided not to join the Union, it remains a member, with Iceland and (from May 1995) Liechtenstein, of the European Economic Area (EEA). By virtue of the Treaty establishing the EEA,[70] those countries in effect participate in the single market of the European Community with regard to the free movement of goods, persons, services and capital, and apply the bulk of the Community's economic and social legislation, but they do not directly participate in the Community's institutional structure.

The participants to this agreement effectively agree to accept and apply the rules of the EC Treaty and secondary legislation in the areas of the free movement of goods, persons, services and capital, competition (including State aids) and related "horizontal provisions" including social policy, consumer protection, environmental protection, statistics and company law, and to co-operate outside the four freedoms in areas such as research and technological development and education. If this can be regarded as representing the core of Community activity, it clearly goes beyond a glorified free trade area. Indeed the EEA members apply some rules not applied by one EU member. Council Directive 94/45 on European Works Councils, adopted under the Social Protocol and therefore not binding as such on the United Kingdom, has been incorporated into the scope of the EEA Agreement by decision of the EEA Joint Committee of 22 June 1995.[71] The situation has therefore arisen in which Norway, which voted not to join the European Union, is applying EC legislation which is not binding as such on the United Kingdom, a member of the European Union.

The EEA Agreement also introduces institutional linkages, particularly at the level of the European Court. The amendment of Article 20 of the EC Statute of the European Court of Justice by Council Decision 94/993 has introduced a totally new concept by giving a right (albeit limited) to a non-Community institution and to certain non-Community States to submit observations on a reference to the European Court. These rights are given to the EFTA Surveillance Authority and the States, other than the EC member States, which are parties to the Agreement on the European Economic Area (the EEA States), and may be seen as falling within the framework of institutional co-operation under the EEA Agreement: indeed, under Article 97 of the Rules of Procedure of the EFTA Court of Justice, it is conversely provided that a request from a

70. Which entered into force in Jan. 1994.
71. (1996) O.J. L140/52.

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court in an EFTA State for the EFTA Court to give an advisory opinion (the equivalent of a reference for a preliminary ruling) should be communicated to the Community member States and to the EC Commission.

The status given by the amended Article 20 to the EFTA Surveillance Authority and the EEA States falls between that of the Commission and the EC member States on the one hand and the Council, Parliament and Monetary Institute on the other: like the former, they are to receive notification of all references made to the Court, but they are entitled to submit observations only "where one of the fields of application of [the EEA] Agreement is concerned". The "field of application" of the EEA Agreement presumably extends beyond the interpretation of the Agreement itself to all those provisions of EC law which are applicable in EEA States.

Quite apart from the fact that the EFTA Surveillance Authority and the EFTA EEA States may be able to submit observations in cases referred to the European Court from courts in the Community where one of the fields of application of the EEA Agreement is concerned, that Agreement also envisages the possibility of references to the European Court from courts in EFTA States party to the EEA Agreement, though it would appear that no EFTA State has yet taken advantage of this possibility, and of requests for interpretation from contracting parties involved in disputes which have not been resolved by the EEA Joint Committee within three months.

In both cases the reference to the European Court may be made only where the question relates to provisions which are identical in substance to provisions of Community law (though Article 111 on requests by contracting parties refers only to the EC and ECSC Treaties and not the Euratom Treaty). In this light, the power of an EFTA court to make a reference may be seen as an extension of the European Court's case law set out in Case C-355/89 *DHSS (Isle of Man)* v. *Barr*.[72] There, although a court in the Isle of Man was not a court or tribunal "of" a member State within the terms of Article 177, it was held that in order to ensure the uniform application of, in that case, Protocol No.3 to the 1972 Act of Accession, a court or tribunal in the Isle of Man must be regarded as a court or tribunal able to refer questions under Article 177. Similarly, it has been seen that while the Court will not consider concepts of national law,[73] it has been willing to interpret Community acts where what was at issue before the national court was not the Community act as such but national legislation which made reference to or used the language of the Community act.[74] It is therefore perhaps not as innovative as it might appear

72. [1991] E.C.R. I-3479; [1991] 3 C.M.L.R. 325.
73. Case 125/84 *Continental Irish Meat* [1985] E.C.R. 3441; [1985] 3 C.M.L.R. 713.
74. Cases C-294/88 and C-194/89 *Dzodzi* [1990] E.C.R. I-3763 and Case 231/89 *Gmorzynska-Bscher* [1990] E.C.R. I-4003.

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that the European Court should be given power to give preliminary rulings at the request of courts in EFTA States.

In its *Opinion 1/91*[75] on the compatibility of the original draft of the EEA Agreement with the EC Treaty, the Court accepted that there was nothing in the EC Treaty to prevent an international agreement conferring upon it jurisdiction to interpret the provisions of that agreement for the purposes of its application in non-member States, and that there was no objection in principle to the EFTA States being given the choice whether to authorise their courts or tribunals to make such a reference or to the fact that there might be no obligation on the part of courts of last instance to make such a reference. However, the draft of the EEA Agreement which was the subject of *Opinion 1/91* provided for the European Court only to "express itself" on the question referred, and the Court held that for it to have power only to give a non-binding opinion would change the nature of its functions under the EC Treaty, which it defined as being that of a court whose judgments are binding. It therefore found that version incompatible with EC law.

On the other hand, the final version allows the European Court to "decide" such matters. Nevertheless, the machinery envisaged in Article 107 of and Protocol 34 to the EEA Agreement will become operative for the courts and tribunals of an EFTA State party to the EEA only if and when that State decides to provide for its use.

The requests for interpretation from contracting parties involved in a dispute may also be seen to have analogies with procedures already established in earlier agreements, in this case the power of the "competent authorities" under the Protocols to the Brussels and Rome Conventions to refer matters on which there are differences of judicial interpretation. However, in this case the trigger is not necessarily differences of judicial interpretation but a failure to reach agreement in due time in the EEA Joint Committee.

The procedure envisaged, including notification of the request or reference and the submission of observations, is effectively that provided for in relation to references under the Community Treaties, except that in the case of requests from contracting parties the President is to prescribe a period within which the contracting parties and the other persons on whom the request has been served may submit written observations, so that there is no automatic two-month period, and the "reasoned decision" on the request is to be given in closed session.

Following the rejection by the European Court in its *Opinion 1/91*[76] of the judicial system established by the first version of the Agreement establishing the European Economic Area, including the power for it to give a

75. [1991] E.C.R. I-6079; [1992] 1 C.M.L.R. 245.
76. *Ibid.*

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non-binding opinion on the interpretation of the Agreement at the request of a court in an EFTA State member of the EEA, the EFTA States agreed, when the second version received the European Court's approval,[77] to set up their own court with power, *inter alia*, to give such advisory opinions. Despite this difference, the system is remarkably similar to that of references for preliminary rulings, although there is no power to raise questions of validity, since the requests must relate to the EEA Agreement itself; furthermore, there is no obligation on courts and tribunals against whose decisions there is no judicial remedy under national law to request an opinion, and indeed the power to request an opinion may be limited to such courts. On the other hand, it may be submitted that Article 96(4) of the Rules of Procedure represents an improvement over the system under the EC Treaty in that it provides expressly for the EFTA Court to ask the national court for clarification, which may prove to be a method of avoiding problems of admissibility.

While this provision may not be identical in substance to Article 177 of the EC Treaty and Article 41 of the ECSC Treaty and therefore not subject to the express obligation to follow or take account of the case law of the European Court under Article 6 of the EEA Agreement and Article 3(2) of the EFTA Court Agreement,[78] considerable reference was made to that case law in the EFTA Court's judgment on the first request for an advisory opinion in Decision E-1/94 *Restamark*.[79] The request was there submitted by the Tullilautakunta (the Finnish Customs Authority Appeals Committee), and there was considerable discussion as to whether this body had sufficient independence to be regarded as a court or tribunal in the light of the judgment of the European Court in Case C-24/92 *Corbiau*;[80] the EFTA Court concluded that, since it had compulsory jurisdiction, applied the rule of law, was independent and was bound by rules of adversarial procedure, it was to be considered a tribunal, even though the Finnish and Norwegian governments and the EFTA Surveillance Authority had submitted otherwise.

Furthermore, on the substance, which involved Article 16 of the EEA Agreement on State monopolies (the equivalent of Article 37 of the EC Treaty), the EFTA Court applied the EC concept of direct effect,[81] holding that, in the case of conflict between implemented EEA rules and

77. *Opinion 1/92* [1992] E.C.R. I-2821.

78. For further discussion see Kronenberger, "Some Questions Raised by the *Restamark* Judgment" (1996) 45 I.C.L.Q. 198.

79. [1995] 1 C.M.L.R. 161.

80. [1993] E.C.R. I-1277.

81. Even though in *Opinion 1/91*, *supra* n.68, at paras.27 and 28, the ECJ appears to have doubted whether the EFTA States were obliged to accept this concept, and that of the primacy of EC law (which, it may be submitted, is inherent in the concept of direct effect).

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national statutory provisions, individuals and economic operators must be entitled to invoke and claim at the national level any rights which could be derived from provisions of the EEA Agreement.

Since Article 3 of the EEA Agreement imposes an obligation to ensure the fulfilment of the Agreement similar in terms to Article 5 of the EC Treaty, it may also be wondered whether a liability in damages may arise if that obligation is breached.

The Europe Agreements with Eastern and Central European countries fall into two main groups. Those with the Baltic States (Estonia, Latvia and Lithuania) contain provisions on the free movement of goods (with special provisions for agriculture and fisheries), capital movements and current payments, and competition including State aids, and create an appropriate institutional structure. Those with the other seven countries (Bulgaria, Czech Republic, Hungary, Poland, Romania, the Slovak Republic and Slovenia) also contain provisions corresponding to the other EC freedoms, and provide for economic, cultural and financial co-operation and political dialogue. In general, the Treaty freedoms reproduced in these agreements are subject to varying transitional arrangements (except for the free movement of goods in the case of Estonia) and limited in scope, e.g. the right to seek employment is limited to those who are already lawfully employed in the territory of the State concerned. Of broader interest to the lawyer are the provisions in the seven wider agreements which recognise that "an important condition" or "the major precondition" of the economic integration of the States concerned into the Community is the approximation of their existing and future legislation to that of the Community. This obligation is stated to extend to customs law, company law, banking law, company accounts and taxes, intellectual property, protection of workers at the workplace, financial services, rules on competition, protection of health and life of humans, animals and plants, consumer protection, indirect taxation, technical rules and standards, nuclear law and regulation, transport and the environment. If these can be regarded as a statement of the core of Community activities, then even the outer ring of these concentric circles may be regarded as going beyond simple free trade.

VII. INSTITUTIONAL CONSEQUENCES

VARIABLE participation within a single treaty, and linkages between separate treaties, outlined above, raise the question of how far a single institutional structure may operate at all levels. The Council of Ministers varies from its basic composition under the Social Protocol and in the third stage of economic and monetary union; in both those cases it contains or will contain representatives only of the participant governments. On the other hand it enjoys enhanced powers under the non-Community pillars of the

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Union. The Commission, Parliament and Court of Justice do not vary in their composition, but the Commission and the Parliament have reduced roles under the non-Community pillars. At first sight the Court of Justice has no role under those pillars except by agreement between the member States, but it has been seen that it does have a role under separate treaties between the member States and under the EEA Agreement. The Court of Auditors would appear to have a role wherever expenditure is set against the Community budget (which may occur under the non-Community pillars). However, the European Central Bank would appear to fall between two stools: its Executive Board is not meant to be representative of all the participants, yet only nationals of participants may be appointed to it. This raises the more general issue of representation at the Community level, which is of particular importance in the context of variable geometry.

The interests of the member States at the Community level are most directly represented in the Council of Ministers, defined in Article 146 of the EC Treaty as consisting of a representative of each member State at ministerial level, authorised to commit the government of that member State. No one has seriously suggested that a member State should not be represented in the Council, yet because of its directly representational nature it is the body which is required to vary its membership in the context of the Social Protocol and economic and monetary union.

Since 1979 the European Parliament has been elected directly by the citizens of the Community, albeit not by uniform methods. The seats are nevertheless allocated to each member State in a way which is not directly proportionate to population but which gives the bigger member States more seats than the smaller ones. Until German reunification the range went from six seats for Luxembourg to 81 each for Germany, France, the United Kingdom and Italy. Following the reunification of Germany, however, it was agreed to recognise the demographic consequences at least to some extent: the number of seats for Germany was raised to 99 (an increase of 18 seats), but the seats for the other three big States were raised by six each to 87, making a total of 18 additional seats between those States. The consequence overall therefore was to increase the relative representation of the big member States as compared to the smaller ones, but also to ensure that the increase for Germany was balanced by an increase for the other big States, thus showing that the balancing of political weight was as important as (if not more important than) the representation of additional population. However, in the context of the Social Protocol or the third stage of economic and monetary union, the situation will arise where representatives of the citizens of member States which do not participate in those policy areas will be involved in the legislative process in relation to Community acts which will not apply in the area they represent. It might simply be observed that this is not an unfamiliar problem in the United Kingdom and is of particular importance in the context of

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the establishment of a separate Scottish Parliament.[82] It may also be observed, however, that while the Social Protocol provisions make use of co-operation between Parliament and Council under Article 189c of the EC Treaty they do not refer to co-decision between Parliament and Council under Article 189b.

The question whether the same institutions can act at all levels and for different combinations of participant States arises most clearly where the institution is not necessarily meant to be representative. While the members of the Commission must neither seek nor take instructions from any government or from any other body, only nationals of member States may be members of the Commission, and the Commission must, under the Treaty in its present version, include at least one national of each of the member States but may not include more than two members having the nationality of the same State. In practice there are currently 20 commissioners, two from each of the big countries (which for this purpose include Spain) and one from each of the other member States. One of the matters which will clearly be raised at the IGC is whether the number of commissioners should be reduced to one per State, and ideas have been floated of grouping some of the smaller countries together to have a rotating commissioner between them, which essentially is the system used for selecting advocates-general before the Court (other than those who come from the four big countries). The Reflection Group recognised two alternative views:

> one view within the Group is to retain the present system for the future, reinforcing its collegiality and consistency as required. This option would allow all members to have at least one Commissioner. Another view is to ensure that greater collegiality and consistency be attained by reducing the Commissioners to a lesser number than Member States and enhancing their independence.[83]

The Commission itself takes the view[84] that, in the context of enlargement, the number of its members should be reduced to one per member State. On the other hand, the United Kingdom suggests that:

> With further enlargements, however, it may not be appropriate to retain the present system. The IGC will consider how to achieve an acceptable balance. Among other options it has been suggested, for example, that large Member States might always appoint one Commissioner, while smaller Member States did not always enjoy this privilege; there might be a two-tier

82. And on the day on which the lecture on which this article is based was delivered (1 Nov. 1996) the point was given particular significance by the decision of the Ulster Unionists as to how they would vote in the UK Parliament on gun control legislation which would not apply in Northern Ireland.

83. Text as downloaded from the Internet.

84. In its Opinion on the IGC of 28 Feb. 1996 at para. 42.

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> Commission, with voting and non-voting members; or one in which not all Commissioners were given specific portfolio responsibilities.[85]

If the membership of the Commission is finally to be determined by its functional needs rather than (indirect) national representation, then it clearly should be able to function at all levels, and it may be submitted that given the legal duties of its members that should be the situation and is the situation where variable geometry has so far been envisaged.

With regard to membership of the European Court, the Treaty is not specific as to the representation of each member State; it states merely that the judges and advocates-general are to be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognised competence. However, the current Court of 15 judges is composed of one from each member State, and until the enlargement of the Court shortly after Greek accession, if one took the judges and advocates-general together, there were always two members of the Court from the big member States. However, since then there has been more of a trend towards meeting the Court's manpower needs, as exemplified in the number of advocates-general (in principle eight but currently nine) rather than proportionate representation of the member States.

In the case of the Court of First Instance, the Treaty provisions merely require that its members should be chosen from persons whose independence is beyond doubt and who possess the ability required for appointment to judicial office, and in its initial proposals on the matter the European Court suggested that the Court of First Instance could be a small body with, for example, five judges. However, the Council eventually decided on the creation of a body with 12 judges (which turned out to have one judge from each member State), and it has been enlarged to 15 following the 1995 accessions, with its three new members coming from each of the three new Member States.

As the Commission points out, however, the prospect of seeing some 60 judges at the Court of Justice and the Court of First Instance is a good ground for examining the consequences. In its report to the Reflection Group, the Court stressed how important it was for all the various national legal systems to be represented. However, it also pointed out that:

> any significant increase in the number of Judges might mean that the plenary session of the Court would cross the invisible boundary between a collegiate court and a deliberative assembly. Moreover, as the great major-

85. Text as downloaded from the Internet.

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> ity of cases would be heard by chambers, this increase could pose a threat to the consistency of the case-law.[86]

The Commission similarly agreed with the Court's view that the judges' term of office could be extended, while becoming non-renewable, stating that such a reform would reinforce even more firmly the judges' independence. In the Reflection Group a majority of representatives similarly thought that the term of office of judges should be extended to nine years, with no possibility of reappointment.

With regard to the consequences of future enlargement of the Union, however, some members took the view that the number of judges should be fewer than the member States in order to ensure efficiency and consistency. Other members of the Reflection Group took the line that all States should have a judge at the Court so that all legal systems of member States are represented. A middle course put forward was that, for the purposes of national participation, not only judges should count but advocates-general as well. It remains to be seen which of these alternatives will find favour. Be that as it may, the reality is that both Courts now normally sit in chambers, rather than as full courts, and following the Maastricht amendments this is the case even in actions involving member States: recent examples may be found of enforcement actions against member States being decided by just three judges.[87]

In the context of concentric circles, it has already been observed that the Court has a role under the EEA Agreement. In the context of variable geometry, however, it is at the level of the Court of Justice and of the Court of First Instance that serious issues arise which do not so far appear to have been addressed in the Treaty texts or in the published documentation in relation to the IGC. Put very simply, can member States which do not participate in a particular area of joint activity, and their citizens, exercise EC judicial remedies in relation to acts adopted in that area?

With regard to actions for annulment, the established situation is that in so far as rights of action are conferred upon them by the substantive Treaty provisions, and with regard to the acts susceptible to challenge under the provisions, no real problems of *locus standi* would appear to arise with regard to actions for annulment brought by member States, the Council or the Commission. Indeed, in Case 166/78 *Italy* v. *Council*[88] it was held that Italy was not barred from seeking the annulment of a Council regulation by the fact that its representative at the relevant Council meeting had voted in favour of that regulation; the implication appears to be that, within its express limits, the right of action conferred upon member States to seek the annulment of a Community act is unconditional. It is

86. Text as cited by the Commission in its Report of 28 Feb. 1996 at para. 43.
87. Case C-117/95 *Commission* v. *Italy* (26 Sept. 1996).
88. [1979] E.C.R. 2575, 2596.

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also clear that the member States and these institutions do not have to show that they have an interest in bringing the proceedings,[89] although it would appear that like other litigants[90] they need to show that they have an interest in the grounds for annulment that they put forward, i.e. that the alleged breach would have made a difference to the outcome.[91]

On the other hand, it may be observed that a government, even the government of an area falling within the Community, which is not that of a member State as such, is treated on the same basis as a natural or legal person, as happened to the government of Gibraltar in Case C-298/89 *Gibraltar* v. *Council*,[92] i.e. it has to show that the act at issue is of direct and individual concern to it. Does a non-participant government therefore have an absolute right to bring an action for annulment, or does it have to show direct and individual concern?

A related problem has in fact already arisen in the context of references for preliminary rulings, under the 1971 Protocol on the interpretation by the Court of the 1968 Judgments Convention, where the Court took an approach not mentioned in the Treaty texts. The background is that the first reference under that Protocol, Case 12/76 *Tessili Como* v. *Dunlop*,[93] was heard in 1976, before the member States which had joined the Community in 1973 had signed the Accession Convention to the Brussels Convention, which occurred in 1978 (and was eventually introduced into the legal systems of the United Kingdom by the Civil Jurisdiction and Judgments Act 1982). At the outset, it may be observed that the bench included Lord Mackenzie Stuart.[94] In the course of the proceedings the question arose as to whether the United Kingdom and Ireland could exercise the right to submit observations with regard to the interpretation of a convention to which they were not parties. The answer given by the European Court was that, under the 1972 Act of Accession, the new member States were *legally obliged* (emphasis added) to accede to the 1968 Convention, and that they therefore had an interest in expressing their views when the Court was called upon to interpret a convention to which they were required to become parties.

If this test were to be applied more generally, in particular in the context of direct actions for annulment, it would produce some interesting results in the current areas of variable geometry. In the context of economic and

89. E.g. Case 45/86 *Commission* v. *Council* [1987] E.C.R. 1493.
90. See Case 90/74 *Deboeck* v. *Commission* [1975] E.C.R. 1123.
91. Case 259/87 *France* v. *Commission* [1987] E.C.R. 4393.
92. [1993] E.C.R. I-3605.
93. [1976] E.C.R. 1473.
94. Though Advocate-General Warner did not give an opinion in such a case until Case 143/78 *De Cavel* v. *De Cavel* [1979] E.C.R. 1055, which was heard (if not registered) after the Accession Convention had been signed.

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monetary union, the "Member States with a derogation" remain bound by the obligation to achieve that objective and therefore would be able to challenge acts of Community institutions representing the participant States and ostensibly binding only on those States. On the other hand, if the United Kingdom gives notice that it will not participate, it will not be subject to the basic Treaty obligation, and under the Court's test would not be able to exercise its special rights as a member State but would, rather, be left to show direct and individual concern. The same would presumably be the case with regard to acts adopted under the Social Protocol. It may, however, be submitted that it would be preferable if the matter were to be settled in an express provision of a revised EC Treaty.

With regard to private actions for annulment, it may be suggested that the requirement to show direct and individual concern circumvents the problem: there is a long history of actions for annulment being brought by applicants who are neither citizens of nor resident in a member State.[95] However, could a UK court faced with a dispute relating to the way a UK employer has voluntarily given effect to the European Works Council Directive adopted under the Social Protocol make a reference as to its interpretation? To the extent that the Directive is to be regarded as a Community act and the court is a court or tribunal of a member State, it may be suggested that this question should be answered in the affirmative. While the analogy is not perfect, there are a number of instances where the Court has been willing to interpret Community acts where what was at issue before the national court was not the Community act as such but national legislation which made reference to or used the language of the Community act.[96]

VIII. CONCLUSIONS

WHILE the complexities described above may well increase rather than diminish, a number of general observations may be made. The first is that, in some areas, the deepest level of European (meaning EC-law-based) integration is not necessarily coterminous with membership of the European Union. In the context of social policy and the concept of an area without internal frontiers, certain members of the EEA appear to be prepared to go further than at least one member of the Union. In any event it may be suggested that the core of EC law goes far beyond simple free trade.

While the idea of concentric circles of EU States, EEA States and States with Europe Agreements puts those who participate at different levels into neat categories with their own institutional arrangements, it should

95. See, to take a couple of random examples, Case 60/81 *IBM* v. *Commission* [1981] E.C.R. 2639 or Case C-49/88 *Al-Jubail Fertiliser* v. *Council* [1991] E.C.R. I-3187.

96. Cases C-294/88 and C-194/89, and Case 231/89, *supra* n.74.

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not be thought that these circles themselves are non-variable.[97] Austria, Finland and Sweden have already moved from free trade agreements to the EEA and then to the Union, and seven of the States with a Europe Agreement—Bulgaria, the Czech Republic, Hungary, Poland, Romania, Slovakia and Slovenia—have also entered into free trade agreements with the EFTA countries,[98] possibly with a view to acceding to EFTA and then to the EEA.

Within the Union, it may be suggested that variable geometry represents a method by which member States which wish to move to activities or policies in which other member States do not wish to participate may do so within the same Treaty framework, and despite its complexities it is to that extent preferable to the development of separate treaties such as Schengen, with their potential for overlap and conflict. On the other hand, it has been suggested in the context of judicial remedies that there are a number of consequential details which require attention.

At the institutional level, this differential integration is most directly reflected in the body in which member States as such are represented, the Council of Ministers. If a lawyer might make such a comment, it may be suggested that bodies whose composition varies are likely to lose influence as against those which operate in the same composition in the whole range of their activities. On the other hand, the European Court of Justice, despite its current "demonisation" by some national politicians, has been given a role in a number of separate agreements between the member States, and in the EEA Agreement with non-member States; furthermore, it has applied the fundamental concept of primacy in the context of such separate agreements, and has seen the concept of direct effect (and intrinsically of primacy) followed by the EFTA Court in the context of the EEA. It may be asserted that the rule of law remains at the heart of the European Community and the systems which have now been built around it.

97. Or indeed that they are the only examples of close relationships with non-member States. Attention may be drawn in particular to the customs union with Turkey and Cyprus.
98. Reuter European Community Reports, 23 and 28 Feb. 1995.

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