CURRENT DEVELOPMENTS

EUROPEAN COMMUNITY LAW

Edited by Joe McMahon*

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Following an outstanding, varied and enormously influential career as a lawyer in public service, in 1989 Karl Newman generously gave his experience and talents to the British Institute of International and Comparative Law, where he enlarged Current Developments within the *International and Comparative Law Quarterly* to include a new section on European Community Law. He retired in 1999 although his association with the Institute continued until his death.

Karl showed unfailing kindness and generosity to colleagues and friends and will be greatly missed.

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I. CONSTITUTIONAL ASPECTS

A. The Resignation of the Commission

The Commission resigned on 16th March 1999 shortly after the publication of the First Report of the Committee of Independent Experts.[1] The Committee had been created by common agreement between the European Parliament and the Commission in order to address the persistent allegations of fraud, mismanagement and nepotism levelled at the Commission.[2] The First Report investigated allegations of fraud against individual commissioners and the Commission as a

* This section covers at half-yearly intervals developments during the preceding two to three years in selected fields of the law of the European Union.

1. "First Report on Allegations regarding Fraud, Mismanagement and Nepotism in the European Commission", 15 March 1999.

2. See the European Parliament's resolution "on improving the financial management of the Commission", 14 Feb. 1999.

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whole.[3] Although most of the allegations of fraud against individual commissioners were discarded as unfounded, the Committee held the Commission responsible for a series of mismanagement, administrative irregularities and a general failure to oversee the work it had contracted out.[4] The conclusions of the report were damning and it became clear that resignation of the whole Commission was the only way forward. The events came at an all-time low for the Commission and will have lasting effects on the institution and its legitimacy.

On the other hand, the Second Report aimed at giving positive guidance on the reforms which needed to be undertaken to change the processes and culture of the Commission.[5] The present Commission headed by Romano Prodi undertook to tackle these problems. These have already resulted in the adoption of a number of documents and initiatives: the White Paper on "Reforming the Commission" was presented to the European Parliament on 1st March 2000.[6] Neil Kinnock hopes that the recommendations contained in the White Paper will be fully implemented by the second half of 2002. A number of internal measures have already been taken. For example, financial control has been reorganised into a new Financial Service, a separate Internal Audit service has been created, the "Activity Based Management" Programme has been introduced to help the Commission prioritise its projects and match the necessary resources and, finally, various staffing reforms have been announced to the European Parliament on 28th February.

B. The Treaty of Nice or facing the Institutional Implications of Enlargement

As soon as the Treaty of Amsterdam was signed, it was clear that another IGC would be needed to deal with a number of institutional issues, the so-called Amsterdam leftovers.[7] The IGC, which was convened by the Cologne European Council at the beginning of 2000, had a narrow but difficult agenda (especially since Member States could not resolve these questions during the Amsterdam negotiations).[8] It had to decide on the size and composition of the Commission, the weighting of votes in the Council, the extension of qualified majority voting, and any other institutional issues which might arise from the implementation of

3. The European Parliament's Conference of Presidents specified the Terms of Reference of the Committee in a note adopted on 27 Jan.1999 (see point 6 § 1 & 2): "The first report could 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 from those discussions".

4. The granting by Commissioner Cresson to a friend, Mr Berthelot, of two research contracts was found to be highly irregular and a clear example of favouritism, see pp. 123–130.

5. "Second report on Reform of the Commission, Analysis of Current Practice and Proposals for Tackling Mismanagement, Irregularities and Fraud", 10 Sept. 1999.

6. A number of codes of conduct were also adopted, see for instance: the "code of conduct for Commissioners" and the "code of good administrative behaviour for staff of the European Commission in their relations with the public".

7. See the Protocol on the institutions with the prospect of enlargement of the European Union, which was attached to the Treaty of Amsterdam.

8. Presidency conclusions for the Cologne European Council were delivered on 3 and 4 June 1999.

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the Treaty of Amsterdam.[9] It is generally believed that the negotiations, which were finalised in Nice, were moderately successful. A compromise was found on all the items of the agenda and enlargement negotiations will be able to proceed.

1. The composition and appointment of the Commission

As was required, the IGC tackled the composition of the Commission. One might feel that in fact the issue is not really settled but postponed. According to Article 4 of the protocol on the Enlargement of the European Union, Member States will have one Commissioner each from 2005, but when the European Union's membership reaches 27 Member States, the Member States entitled to a Commissioner will be selected according to a rotation system based on the principle of equality. It is left to the Council to adopt implementing measures by unanimity. As smaller Member States regard the presence of a Commissioner as an essential guarantee of their rights and interests in the Union, there was some dissatisfaction with the results of this negotiation.[10]

In addition, the Treaty of Nice makes important changes concerning the Commission's appointment process. In the new Article 214(2) EC, the Council takes the decision to nominate the President and draws the list for the other Commissioners by qualified majority and not by common accord.[11] This will facilitate the choice of Commission President and Commissioners in a much larger Union.[12]

Lastly, the role and status of the President has been reinforced in a new Article 217 EC. His leadership role in the Commission has been further emphasised: all Commissioners "work under his political guidance", he can reshuffle the Commissioners' portfolios and dismiss a Commissioner after seeking the approval of the whole college.[13] However, this will mean that overall responsibility for the Commission's administrative organisation, management efficiency and political direction will ultimately rest with the President.[14]

2. The number of MEPs

A maximum number of MEPs had already been fixed at 700 in the Treaty of Amsterdam. However, that was found impractical, so Article 189(2) was

9. The issue of closer co-operation was added at the Fiera European Council, 19–20 June 2000.

10. One might rightly wonder why there was such an attachment to the number 27. After all national Governments are much larger by comparison. The grading of portfolios and positions (by creating sub-commissioners for instance) might have offered another solution to this problem.

11. An agreement on the other Commissioners must still be reached between the Council and the nominee for President.

12. The choice of President has proved to be a problem before, at a time when the Union was much smaller. If this system had been in place at the time of the appointment of the 1995 Commission, Jean-Luc Dehaene would certainly have become President instead of Jacques Santerre.

13. If any problems arise as they have in the recent past, the President will have the necessary powers to tackle them.

14. This is at variance with the present model, which holds the Commission collectively responsible.

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amended and a new limit of 732 MEPs was adopted. It is already widely held that this number is insufficient and will have to be increased further.[15]

3. The re-weighting of the votes in the Council

The re-weighting of the votes in Council was regarded to be linked with the negotiations on the size of the European Commission, i.e. smaller Member States would accept a reduction in the relative importance of their votes in Council if larger Member States agreed to give up their second Commissioner. It was essential to negotiate the weighting of the votes as most of the applicant countries are small or medium size States and their accession would change the balance in the Council to the detriment of large Member States. Furthermore, in the past, the system had been adapted to allow for previous enlargements, but it had never changed the relative weight given to each Member State.

From the beginning, the Commission favoured a system of double simple majority, i.e. in order for a measure to be adopted it would need a simple majority of the Member States the population of which would represent a majority of the European Union's population. However, this simple system did not meet with the agreement of some Member States.[16] Instead, the system adopted at Nice is unnecessarily complicated,[17] mathematically inconsistent[18] and its application is delayed until 2005. The new weighting of Member States ranks from 3 to 29;[19] a qualified majority is secured in the present Union of 15 if 170 out of 237 votes are cast in favour and if they represent a majority of Member States.[20] Furthermore, a Member State can request a check to see whether the countries constituting the qualified majority represent 62 per cent of the total population of the European Union.[21]

15. For instance, the number of MEPs for the Czech Republic, 20, is much too small (see by comparison the number of Belgium MEPs).

16. Mainly France, because of the weight Germany would have in future Council negotiations.

17. The system is so complex that it will be necessary to use computer programmes during Council meetings to determine whether the thresholds are met.

18. See Arnull "Size matters" (2001) 26 E.L.Rev. 1.

19. See the following table for the distribution of the new total of 345 votes:

Votes	Member States
20	France, Germany, Italy and the United Kingdom
27	Poland and Spain
14	Romania
13	The Netherlands
12	Belgium, Czech Republic, Greece, Hungary and Portugal
10	Austria, Bulgaria and Sweden
7	Denmark, Finland, Ireland, Lithuania and Slovakia
4	Cyprus, Estonia, Latvia, Luxembourg and Slovenia
3	Malta

20. These figures will be adjusted with the various accessions but the percentage of votes will never exceed 73.4%. When all the candidate countries have acceded, the threshold will be 255 with a blocking minority of 91.

21. The German delegation was responsible for this extra requirement.

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4. The extension of qualified majority

From the early days of the EC, the aim has been to move from unanimity to qualified majority. At present, a majority of instruments is taken by qualified majority in conjunction with the co-decision procedure.[22] However, a number of important provisions still require unanimity and the Member States were aiming at reducing this number so as to facilitate the decision-making process in these areas. As a result of the Nice negotiations, 30 additional provisions require qualified majority voting.[23] Although the success on this point can be qualified as moderate,[24] some amendments represent a step in the right direction. For example, in the area of social policy, the decision-making is left unchanged but the Council can unanimously decide to move to qualified majority voting in order to promote social and economic cohesion.[25] Similarly, Article 161 EC, which determines the organisation and priorities of structural funds, has been amended to move to qualified majority from 2007 if certain conditions are met. Finally, concerning visas, asylum and immigration, Article 67 EC specifies that the Council can decide unanimously from 2004 to move to qualified majority and the co-decision procedure. Not surprisingly, however, the IGC failed to adopt any change in the area of taxation as most delegations felt that unanimity should remain the rule, especially when it came to the harmonisation of tax rates.

Lastly, it should be remembered that the Treaty of Nice moved to qualified majority for the appointment of a number of institutional actors: President of the Commission, Commissioners, members of the Court of Auditors, members of the Economic and Social Committee, members of the Committee of the Regions.

5. Enhanced co-operation

The Treaty of Amsterdam introduced the possibility for Member States to establish a closer co-operation in areas relevant to the first pillar and to police and judicial co-operation in criminal matters. However, the conditions were strict and each Member State had a right of veto. Consequently, the mechanism was never used. The looming prospect of enlargement makes these provisions topical and very desirable: a larger Union marked by economic, social and cultural differentiation needs an institutional structure to allow groups of Member States to co-operate further in specific policy areas from within the institutional framework of the European Union. Otherwise, this type of "enhanced co-operation" might take place outside the Treaties.[26] With a view to encouraging the use of the closer co-operation provisions, the Treaty of Nice has modified Article

22. The Treaty of Nice extended co-decision to seven provisions which will also now be subject to qualified majority (see Articles 13, 62, 63, 65, 157, 159, 191 EC).

23. For instance, Articles 100, 111(4), 123(4), 133(4) & (5), 161 EC etc.

24. The Commission was particularly dissatisfied with the results of the negotiations. It had wanted to simplify the decision-making process as a whole and had made appropriate recommendations: disappearance of the co-operation procedure, pairing of the co-decision procedure with qualified majority voting (see the new Article 18 EC), entire policies moving to qualified majority voting.

25. An exception is made for co-ordination of social security: Article 42 EC retains unanimity.

26. See the negotiations and adoption of the Schengen agreements.

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11 EC and Articles 40, 43 to 45 EU. The new provisions remove the right of veto and extend the field of enhanced co-operation to the area of foreign and security policy to implement a joint action or a common position.[27]

6. The Judicial structure

Although the question of the judicial structure of the European Union was not originally on the agenda of the IGC, the Court of Justice and the Court of First Instance, concerned by an ever increasing caseload and worried at the prospect of enlargement, drafted a discussion paper on the future of the judicial system of the European Union and submitted it to the Council in May 1999. In response, the Commission decided to set up a study group on the future of the judicial system of the European Communities chaired by Ole Due[28] and a report was produced in January 2000. Negotiations seemed to have progressed rapidly from there. In fact, an agreement on the amendments relating to the judicial system was achieved before the Nice summit took place. In their proposals the Court of Justice and the Court of First Instance "deliberately [left] to one side the question of the composition of the courts" to deal exclusively with amendments of procedural and jurisdictional nature which would improve the situation.[29]

The resulting changes are important and wide-ranging. First, the Court of First Instance is granted jurisdiction over all classes of actions, including preliminary rulings.[30] Secondly, it will be possible to create a number of judicial panels with jurisdiction over specific matters at first instance.[31] The decisions of the judicial panels would go on appeal on a point of law[32] to the Court of First Instance and exceptionally would be reviewed by the Court of Justice. Thirdly, the Court of Justice can now sit in a new formation: the Grand Chamber composed of 11 judges. Lastly, it is now possible for the Rules of Procedure of the Court of Justice and the Court of First Instance to be approved by a qualified majority in the Council. This should allow more flexibility and makes it easier to amend the Rules.

C. The Charter of Fundamental Rights of the European Union[33]

The decision to draft a Charter of Fundamental Rights of the European Union was adopted during the Cologne European Council while the Tampere European Council decided that the drafting would take place outside the standard IGC process.[34] A Convention of Member States representatives, a representative of the President of the Commission, MEPs and representatives of national

27. It cannot deal with matters which have military or defence implications however.
28. Former President of the European Court of Justice.
29. See "The contribution by the Court of Justice and the Court of First Instance to the Intergovernmental Conference".
30. However, a number of conditions are set up in Article 225 EC.
31. Staff cases will certainly be moved to a judicial panel.
32. Or on appeal on point of fact if it is provided for in the decision establishing the panel.
33. *Editor's note*, see also the contribution of Betten on the Charter in this issue.
34. Member States have been particularly concerned with human rights in view of the enlargement to the candidate countries and the events which took place in Austria. Again for this reason, the Treaty of Nice amended Article 7 TEU to create a mechanism to prevent infringements of fundamental rights.

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parliament, was convened with a mandate to draft a charter of rights for the European Union.

The result is extremely successful. The drafting of each right is particularly clear and although the Charter reflects a long tradition of human rights protection, it addresses contemporary issues. For instance, discrimination on the ground of genetic features is prohibited and the protection of the environment is to be "ensured in accordance with the principle of sustainable environment". Its legal status is a matter for debate: at Nice, the Member States refused to grant it legal effect and postponed this question until the next IGC.[35] However, a recent Advocate General's opinion has opened up the possibility for the Court of Justice to rely indirectly on the Charter since it reaffirms rights and principles included in other instruments which in turn have legal effect in the Community legal order.[36]

D. Towards a Constitutionalisation of the Treaties?

All that preceded tends to show a move toward a constitutionalisation of the Treaties. It is not surprising therefore that the European University Institute of Florence was asked by the President of the Commission to undertake a study of the reorganisation of the treaties and of the reform of the Treaties' amendment procedures, two necessary steps on the way to constitutionalisation. The EUI working group decided to tackle the two questions separately. The solution adopted by the working group for the reorganisation of the treaties requires that the present Treaties be divided into two texts: the Basic Treaty would contain provisions of a constitutional nature (institutions, citizenship, fundamental rights, enhanced co-operation) while the other provisions would be contained in a consolidated Treaty.[37] As for the amendment procedure of the treaties, the working group proposed that two main amendment procedures be adopted.[38] One would follow the IGC structure and would certainly apply to the Basic Treaty as described in their first report, while it is easy to imagine that the second procedure modelled on the Convention experience used for the drafting of the Charter on Fundamental Rights would apply to the consolidated Treaty.

For a long time now, there have been animated debates as to whether the adoption of a European Constitution provided the way forward for the Union. It appears that reality is about to make redundant these theoretical debates. Shouldn't we start addressing seriously the question as to whether we are faced with a Constitution, in everything but name? And if so how can this be related to national constitutions? These questions will be central to the next IGC if the

35. See the Declaration on the Future of the Union; it calls for another IGC in 2004.

36. See C–173/99 opinion of Advocate General Tizzano, 8 Feb. 2001, concerning the working time directive.

37. See European University Institute/Robert Schuman Centre for Advanced Studies *A Basic Treaty for the European Union—A study of the reorganisation of the Treaties*, Report submitted on 15 May 2000 to Mr Romano Prodi, President of the European Commission.

38. See European University Institute/Robert Schuman Centre for Advanced Studies *Reforming the Treaties' Amendment Procedures*, second Report on the reorganisation of the European Union Treaties submitted on 31 July 2000 to the European Commission.

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agenda contained in the Declaration of the future of the Union is really addressed.[39]

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39. The delimitations of power between the Union and the Member States, the status of the Charter on fundamental rights, the simplification of the Treaties and the role of national Parliaments are important constitutional issues not only for the European Union, but also for national constitutions.

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