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The Coming of Europe

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It is an honor and a pleasure that the organizers of this symposium have asked me to deliver the introductory address in the Symposium on the European Community in Evolution.

Looking at the course the Community has travelled since the Spaak Committee report of April 4, 1976 and the negotiation of the Treaty of Rome, signed on March 28, 1957, one may say in the famous words of a cigarette ad: "You have come a long way, Baby."

January 1, 1993 marked a particularly important mile-stone in the path of integration traversed by the twelve nations forming the European Community: the completion of the single market, which in the words of the Single European Act of 1986 constitutes an area without internal frontiers.[1] The Single European Act mandated the establishment of the internal market during a period ending on December 31, 1992 and reformed the powers and legislative procedures of the Treaty of Rome to facilitate the achievement of this aim. In particular, it inserted a new Article 100A into the Treaty empowering the Council to take the necessary measures for harmonization by qualified majority[2] and devised a new legislative procedure for that purpose, strengthening the role of the Parliament in the process.[3] The Single European Act followed a long period of "Eurosclerosis" and was spark-plugged by the European Council for the purpose of bringing the White Paper of the Commission on Completing the Internal Market, submitted to the European Council (Milan, June 28-29, 1985),[4] to fruition. This paper, the blue-print for further action, listed the measures that in the opinion of the Commission were necessary to remove

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1. Single European Act, art. 13, ch. II, § I, adding art. 8A to the EEC Treaty. For the text of the Single European Act see BULL. EC (Supp. Feb. 1986).

2. Single European Act, art. 18, ch. II, § I (adding art. 100A to the EEC Treaty).

3. Single European Act, art. 6, ch. II, § I (providing for the cooperation procedure).

4. Completing the Internal Market: White Paper from the Commission to the European Council, COM(85)310 final [hereinafter White Paper].

the existing physical, technical, and fiscal barriers to the unification of a market of (then) 320 million consumers. The White Paper recognized the need for a new approach, combining mutual recognition of national legislation where aiming at the same result, and harmonization where divergences are intolerable:[5] in other words, recognition of the subsidiarity of community action.

What appeared like a dream in 1985, became reality or at least substantial reality on January 1, 1993. The Council had enacted 282 measures (mostly directives) to transform the common market into a single market and to permit the enterprises and consumers to benefit from the economies of scale and serial production. While the transmutation of the directives into national legislation is in some member states a time consuming process, the ratio of implementation of the member states, as of December 8, 1992, ranged from 95.9 percent in Denmark to 72.8 percent in Italy.[6] Without listing all the fields in which the Community institutions have eliminated compartmentalization of the internal market, it should be stressed that the pervasiveness of the "Europaization" of law affects trade in goods as well as in services and affects all aspects of economic and social law including banking and insurance, corporate structures, protection of workers against failures of enterprises, protection of health against hazardous activities or products, and protection of intellectual property. The range of areas involved is demonstrated by a collection of seventeen articles published on different subjects by the Europäische Zeitschrift für Wirtschaftsrecht, in its January 1993 issue, under the collective title Der Europäische Binnenmarkt. These articles included contributions by high-ranking Community and national government officials, leading practitioners and representatives of industry and labor.[7] Great credit for the timely achievement of the legal texture of the single market is due to the European Court of Justice, which developed pioneering principles governing the effect of untransposed directives provided they rested on the proper legal basis.[8]

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5. *Id.* at 61-73.

6. *Viewpoint* (Commerzbank report on German business and finance), ECONOMIST, Jan. 30, 1993, at 56.

7. Although trying to avoid invidious comparison, I would like to mention especially M. Bangemann, Das Binnenmarktprogramm als Erfolgskonzept, EuZW 1993, 7, P.M. Schnidhuber-G. Hitzler, Binnenmarkt und Subsidiaritäts-prinzip, *id.* at 8, and J.W. Möllemann, Die Vollendung des EG.-Binnenmarktes. *Id.* at 12.

8. For the rights of individuals under untransposed directives, see, *e.g.*, Case 8/81, Becker v. Finanzamt Münster-Innenstadt, 1982 E.C.R. 53; Cases C-19/90, C-20/90, Karella and Karellas v. Ypourgo viomechanias, energeias & technologias and Organismo Anasyg-

The Court greatly enhanced the acceptability of the supremacy of Community law by developing a body of principles protecting basic civil rights against encroachment by acts of Community authorities, including those of a normative character. Although the Community as such is not a party to the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Court has incorporated the Convention's prescriptions into the fabric of the general principles of Community law. The recognition of this development has prompted the European Commission on Human Rights, in a case against the Federal Republic of Germany, based on the claim that the federal Minister of Justice had enforced a fine illegally imposed by the Commission on complainant, to decide that the complaint was inadmissible *ratione materiae* because the European Court of Justice guaranteed that the fundamental rights received an adequate protection.[9]

The transfer by the member states of important governmental powers to the European Community, however, should not create the picture of a state-like supernational entity. The Community possesses neither the character nor the fiscal resources of a true government. A look at the Community budget for the fiscal year 1993[10] confirms this statement. The Community's own resources for that year amount to slightly more than 65 billion ecus, composed of the revenues from sugar and isoglucose levies, agricultural levies, customs duties, value added tax (VAT) shares, and contributions based on Gross National Product (GNP).[11] Of these resources, almost sixty percent were consumed by the financing of the Common Agricultural Policy (CAP).[12]

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9. M & Co. v. RFA, App. No. 13258/87, 19 Eur. Comm'n H.R. Dec. & Rep. 135 (1990).

10. Declaration of the President of the European Parliament, 1993 O.J. (L 31) 1-2.

11. *See* Table 5, Summary of Financing Expenditure, 1993 O.J. (L 31) 119. The resources, totalling 65,064,911,276 ecus, resulted from the following items:

Sugar and isoglucose levies 1,104,750,000;

Agricultural levies 1,134,601,923;

Customs duties 13,118,580,000;

VAT 35,677,077,486;

Contribution based on GNP 14,029,901,867.

12. The expenditures of the European Agricultural Guidance and Guarantee Fund, Guarantee Section are budgeted at 34,943,000,000 ecus. The expenditures of the European Agricultural Guidance and Guarantee Fund, Guidance Section are budgeted at 3,003,400,000 ecus. In addition, the European Fisheries Guidance Fund is to receive

In reality, therefore, the Community is an integration mechanism rather than a fledgling European nation, although it plays an important role in international economic relations.

Although the CAP was thought by many to be the Achilles' heel of the EEC, the agreement on its reform, reached on May 25, 1992,[13] seemed to have alleviated some of the principal objections. Thus, it was only logical that the European leaders felt in the beginning of 1992 that the time had come to take further steps to advance European integration and to establish a European Union, uniting the peoples of Europe by even stronger ties. The Treaty of Maastricht, formalizing this idea, was signed on February 7, 1992.[14] At the same time, prompted by the change in the political structure of Europe, it was felt that the single market should be more closely linked to the European Free Trade Association (EFTA) countries by means of a treaty to that effect. Since the draft of the original treaty on the establishment of a European Economic Area (EEA) was faulted by the E.C.J.,[15] a revised treaty was negotiated and, upon approval by the court,[16] signed by the contracting parties on May 2, 1992.[17] On that same day, the EFTA states signed an agreement on the establishment of a Surveillance Authority and a Court of Justice.[18] The aim of this agreement was to create a homogeneous EEA, encompassing the territory of the European Community and the territories of the seven EFTA nations (Austria, Finland, Iceland, Liechtenstein, Norway, Sweden, and Switzerland). Since most of these nations were candidates for accession to the Communities, the EEA was viewed as a transitional step.

But the year 1992, which had been heralded as "pivotal"[19] and propitious, turned into an *annus terribilis*, a harbinger of disappoint-

341,100,000 ecus. Finally, other expenditures in the agricultural sector total 230,800,000 ecus. *See* budget items, Subsection B1 and Subsection B2, Chapters 10, 11, 23, 51, and 90. It must not be overlooked, however, that the total outlay of 38,518,300,000 ecus for the CAP (including fisheries) generates resources in the amount of 2,239,352,000 ecus, with the result that the CAP consumes roughly 58% of other resources.

13. BULL. EC 6-1992, point 1.3.140.

14. The text of the Maastricht Treaty is published by the Office for Official Publications of the European Communities, 1992.

15. Opinion 1/91, Re the Draft Treaty Relating to the Creation of the European Economic Area, 1991 O.J. (C 110) 1.

16. Opinion 1/92, Re the Draft Treaty Relating to the Creation of the European Economic Area, 1992 O.J. (C 136) 1.

17. For the text, see 63 C.M.L.R. 14, part 859 (1992).

18. For the text, see 15 Commercial Laws of Eur., part 10, at 277 (1992).

19. *Delors, 1992: A Pivotal Year*, (address by Jacques Delors, President of the Commission to the European Parliament) BULL. EC (Supp. Jan. 1992).

ment and disillusionment, if not dissolution. On June 2, 1992, the Danish people voted against the Maastricht Treaty. Then, Black Wednesday (September 16) brought a break-up of the European Monetary System, with the exit from it of the British pound and the Italian lira, followed by devaluations of the Spanish peseta, the Portuguese escudo and, early in 1993, of the Irish punt, accompanied by necessary realignments of the central rates, thus dimming the prospects of a Monetary Union, as provided in the Treaty of Maastricht. The last of these discouraging events in 1992 was the Swiss referendum on December 6, blocking the Swiss from joining the EEA and creating a black hole in the blue firmament of eighteen stars.

Yet, too much was at stake, and efforts were under way to salvage the European Union as well as the EEA. At its meeting at Edinburgh on December 11 and 12, 1992, the European Council decided to alleviate the fears of the Danish voters without renegotiation or change in the text of the treaty.[20] The treaty itself furnished the key to the door by embracing the principle of subsidiarity[21] and democratizing the legislative procedures.[22] The conclusions reached at the Edinburgh Summit with respect to the Maastricht Treaty included "guidelines for subsidiarity" and procedures for action of the Community institutions in the area of subsidiarity[23] as well as special arrangements for Denmark. These arrangements reaffirmed the exemption of Denmark from participation in the third stage of economic and monetary union contained in the "Protocol on certain provisions relating to Denmark" attached to the Maastricht Treaty[24] and declared expressly that Denmark was not obligated to become a member of the Western European Union or to participate in the elaboration and implementation of decisions and actions of the Union which have defense implications.[25]

20. The conclusions reached at the Edinburgh Summit are published in "European Council in Edinburgh — 11 and 12 December — Conclusions of the Presidency," Accession No. 61116, DOC/92/8, Dec. 13, 1992. For summaries, see D.J. Scheffer, *Salvaging Maastricht at the Edinburgh Summit*, INT'L PRACTITIONER'S NOTEBOOK, No. 56, at 10 (1993); Nguyen Van Truong, *Le cas Danois devant le Conseil Européen d'Edinbourg de Dècembre 1992*, LES PETITES AFFICHES, No. 18, at 23 (1993).

21. Maastricht Treaty, art. 6B(5), inserting art. 3b into the Treaty establishing the EEC.

22. Maastricht Treaty, art. 6B(46), (61), repealing art. 149 and inserting new arts. 189a, 189b and 189c, providing for a new legislative procedure with a stronger role for the European Parliament, the so-called co-decision procedure.

23. The European Council's conclusions relating to the principle of subsidiarity clarify many questions raised by the growing literature on the subject and confirm the Court's power to assure compliance.

24. Protocol Nr. 8 on Denmark.

25. See the relevant quotations in Scheffer, *supra* note 20.

Likewise, it was decided to proceed with the ratification of the EEA Treaty after deletion of the references to Switzerland.

It may be concluded, therefore, that the "Europaization" of Europe will not unravel[26] but proceed perhaps at a slower pace. The nation state will remain the corner-stone[27] and play the central role in the execution of the policies and measures taken on the European level.[28]

POSTSCRIPT

Since the delivery of the manuscript of this address to the editors, the entry into force of the Maastricht Treaty, after ratification by all member states, became reality on November 1, 1993. Gradually all legal obstacles to the Union vanished. In France, the Constitutional Council, by decision of September 2, 1992, held that the amendment of the Constitution by constitutional law number 92-554 of June 25, 1992, permitted ratification of the treaty. The proposed ratification law was approved by referendum on September 20, 1992, by a procedure not open to challenge in the Constitutional Council, as was held by a decision of September 23, 1992. Denmark's second plebiscite taking place on May 18, 1993, resulted in a clear vote of approval. In Germany, the Basic Law was amended, with the observance of the requisite formalities, by a statute of December 21, 1992, so as to permit participation in the European Union, and the ratification law was enacted a few days later (BG Bl 1992 I 2086; BG Bl 1992 II 1251). Both laws were upheld against constitutional challenge by a judgment of the Federal Constitutional Court of October 12, 1993. The United Kingdom deposited its instrument of ratification on August 2, 1993. Thus the enlargement of the Union is the next step to be taken.

26. Maastricht Treaty, tit. I, art. C (safeguarding the *acquis communautaire*).

27. *See* Maastricht Treaty, tit. I, art. F (mandating respect for national identities of member states).

28. See the thoughtful analysis of Professor Werner von Simson, *Die künftige Rolle des Staates in der EG*, Europarecht, Beiheft 1/1992, at 37, warning that solidarity must precede absorption.