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GUEST EDITORIAL: NICE – AFTERMATH

The Nice meeting of the European Council brought out three distinct documents: the draft of a Treaty amending both the EU and EC Treaties, including a Protocol on Enlargement, a European Charter of Fundamental Rights which was solemnly "proclaimed", and a Declaration on the Future of the Union to be inserted into the Final Act. The first two documents are open to the criticism of amateurishness, as I will clarify below; the last is an attempt to prejudge extremely sensitive issues in a long-term perspective. The results of the Nice meeting have been reported under two characteristic press headlines: "Way now wide open for enlargement of the European Union" and "A disaster for the French Presidency". Both are true, but the situation requires a more extensive analysis.

I shall do this concentrating on three issues: a discussion of some typical examples of legal *bricolage* in the Nice documents, to use the title of an editorial published by *Le Monde* on 31 December 2000; next, a description of the real shifts of power operated by the same; and finally some glimpses of the future, In doing this, I shall try my best to avoid deceptive political language such as *deepening*, or *federalism*, or *refondation*, a Gallicism meaning the *mise-à-plat* of everything existing and a new beginning, with the promise of some bright new *constitution*, or even better, a *federation of nation-States*, a meaningless slogan with a built-in *contradictio in adiecto*. The key word appearing on all sides is *subsidiarity*, an un-English expression introduced by Jacques Delors to soothe Mrs Thatcher's temper. This word means nothing other than a systematic repatriation of Community competence and powers, as I have explained in my contribution to the 1994 Ulrich Everling *Festschrift*. My warning seems unheeded and, in the meantime, the virtues of Delors' passwords have been tried out in the debris of Yugoslavia, from Bosnia to Kosovo and back to Montenegro, to be served now again by the co-habitants in the French Government to their bemused partners as a panacea for all Europe.

1. Legal *bricolage* in the Nice Treaty

According to the Oxford Dictionary, bricolage *is* a truly English word, and denotes constructions made of phoney material. Bricolage has indeed attained its climax in the Nice documents, which constitute a patchwork of incoherent additions to the provisions of the EU and EC Treaties.

The first example offered to the reader is an addition to Article 7 of the EU Treaty, containing a belated *Anti-Haider* clause. This clause allows the European Council to issue recommendations whenever there is a "clear risk of a serious breach by a Member State" of the principles of democracy, human rights and the rule of law. Such action may be preceded by a report of "independent persons", recalling the precedent of the Wise Men who helped to whitewash Austria of Haider's untimely actions. An addition to Article 46 of the same Treaty allows for control by the Court in such cases, but only on "purely" procedural provisions, thus cutting off a priori any temptation to establish a bridge from procedure to substance. The wisdom of Heads of State and Governments cannot be questioned.

Next comes a long drawn-out series of provisions on *enhanced cooperation*, which are complicated to such an extreme that one may doubt whether they will ever be put into operation. As they stand now, these clauses are at least a warning to those Member States whose efforts were so far to hold back any attempts at developing the system, a point to which I shall revert. This series is followed by a highly obscure provision, which permits the Council, meeting in the composition of Heads of State or Governments, to amend the provisions of Article 10 paragraph 2 of the *Statute of the European Central Bank*. No indications are given as to the object or purpose of possible amendments, but it is whispered by insiders that this is a hidden "American Fed" clause, which may permit a limitation of the national central bank governors' voting rights in case their species were to outgrow the European Central Bank's own Directorate. This self-enabling clause raises serious doubts of a constitutional character, so it may well lead to discussion in national Parliaments or, later on, in judicial proceedings arising out of its application.

The most startling provisions in the whole are to be found in the extremely complicated amendments introduced into Article 133 (ex 113) EC on *trade policy* – no need to stress that this is a key provision in the whole structure. These amendments are a direct consequence of Opinion 1/94 of the Court of Justice (see this *Review*, vol. 36, 1999, 387–405). The general tendency consists in tightening at all stages the control of individual Member States (as distinct from the Council) over the EC's trade policy, by curtailing the Commission's mandate as a common negotiator, by replacing majority voting by unanimity in quite a number of circumstances, by broadening the re-entry of Member States into the treaty-making process, by systematically giving priority to internal rules over international commitments – a tendency manifestly inspired by the legislation of the US Congress implementing the WTO Agreements –, and by defining a superprotective regime for "cultural services". This whole operation, while it fortunately permits at last the extension of the EC's trade policy to services and commercial aspects of intellectual property rights, looks like an attempt to alter ex post the normal play of the

WTO rules by unilateral action. Presumably the primary effect of the new version of Article 133 will be to paralyse the decisional process inside the EC and thus hamper a flexible defence of the Community's trade interests.

Another controversial series of clauses copes with the problem raised by the *Commission's numeric exuberance* in the perspective of enlargement. In order to hide the real problem, the matter has been expertly drawn up in elements spread over Article 214 EC and the successive paragraphs of Article 4 of the Protocol on Enlargement, in such a way that nationals of certain Member States will ultimately be "kicked out" by rotation. This is to take place in a remote future, when the actors of the Nice drama have disappeared for good from the political scene, so nobody will bear any responsibility. Second thoughts will then be required before putting into motion this hazardous merry-go-round, which will never lead to a satisfactory composition of the Commission. In this writer's opinion, the executive of the Community should basically be conceived of as a restricted body, composed of few highly qualified and expert members, selected with a view to the performance of coherently defined blocks, not shreds of executive tasks. Taking for granted that the President will be appointed by some form of common agreement between the Council and the Parliament, it should be open to all Member States to present suitable candidates on a competitive basis, and to the President to make his choice freely among them, the sole rule being that he may not take more than one member from the same Member State. Such a procedure would put an end to the present system, where posts tend to be filled all too often according to narrowly partisan standards at the level of national, not European politics.

On the occasion of the Nice summit, the Presidents of the three political institutions of the EU signed a *Charter of Fundamental Rights* prepared by a "Convention" composed of persons who, like themselves, lacked any representative qualification for this particular purpose. The Charter's content is to a large extent not much more than a shorthand remake of the European Convention on Human Rights, enriched by some "economic", "social" and "administrative" rights, which have nothing intrinsically fundamental to them. While gleaning their inspiration from other organisations' documents and professing their intention to ensure in all matters a "high degree of protection" in the Union, the drafters of the Charter have avoided some sensitive issues relating to the protection of individuals against the excesses of uncontrolled societal actors like the political parties, the trade unions, the press and other mass media, Doing this would have required some imagination much courage. Thus, no mention is made of the "negative freedom of association", such as Compulsory affiliation to trade unions and closed-shop practices. In this respect, attention must also be drawn to the fact that, in contrast with the ECHR, the rights have been declared throughout *sic and simpliciter*, without

any reference to public interest, to limits resulting from other people's rights and freedoms, or to responsibility possibly arising out of the exercise of such rights as the freedom of the press or the freedom to go on strike. True, there is a general reservation relating to such matters in Article 52 of the Charter, but the purpose of this clause is to limit any restrictions to the free exercise of such rights, *not* to protect individuals aggrieved by their excessive use.

The true meaning of this rhetorical exercise must be assessed under the angle of Article 5 1, which is apparently aimed at putting straight the systematic confusion made by the drafters between the possible addressees of the Charter's provisions, namely the Union, the Community and the Member States. According to this Article, the provisions of the Charter are addressed "to the institutions and bodies of the Union, with due regard to the principle of subsidiarity, and to the Member States only when they are implementing Union law". This quotation shows that even by the broadest stretch of imagination, most of the substantive provisions of the Charter have no possible connection with any of their possible addressees. It is well known that the institutions and bodies of the "Union" have no decisional powers of their own. "Union law" is therefore a largely fictitious category, certainly contained at intergovernmental level, of no possible concern for the persons the Charter claims to protect. The Charter cannot be considered as a source of EC law, either, because the Community is a legal entity distinct from the Union. The Court of Justice has been denied any jurisdiction in the field of so-called "Union law", apart from the infinitesimal hypotheses mentioned in Article 46 TEU.

As announced in the Nice Declaration the next step will be to give some legal "status" to this spurious document, which eventually might become part of the existing Treaties or of some European "constitution" and, as such, even have precedence over the national constitutions of the Member States as well as the ECHR. Parliamentary approval of the "Final Act" of the Nice Conference – which, like a Russian doll, will include this Declaration – is bound to be the first step on this fatal way. For the time being, the Charter has been parked in the non-committing C series of the Official Journal (2000, p. C 364/1). This author hopes it will remain there.

2. Nice *Realpolitik*: some significant power shifts

The entry into force of the Nice Treaty will bring about a series of highly significant shifts in the distribution of powers in the EC. For a realistic vision of these transfers, the reader must proceed to a complicated mental operation: first merge the charts indicating the voting power of Member States, old and new, appearing in the Protocol on Enlargement; then combine the consolidated

chart with the distribution of the seats in the European Parliament and with the population figures (the latter not revealed in any official document), to be able finally to make out the position of each of the Member States – large, intermediate and small – in the new structure.

A first feature is the drastically enlarged range of *the voting power* between large and small Member States, though some preference is retained for the smaller States in relation to the population figures. The matter can best be visualized from the point of view of the Netherlands, which finds itself placed in a midway position, with about one vote for each million of population. From this vantage point, the larger Members have less voting power per million, the smaller ones have more. This is a fair deal, about which nobody can seriously complain.

A second shift, which will be felt to its full extent only after enlargement, will go from *Western Europe to Mitteleuropa*, with Germany in a central position. In this respect, the Nice Conference was a true disaster for France, by rendering manifest the end of fifty years of French leadership in European affairs.

Speaking of shifts of influence, one should however not overlook the relative improvement of possibilities for enhanced co-operation. In spite of their verbose clumsiness, these provisions may offer at least a defence against *European free-riders,* to characterize those States which claim the full advantages of membership – economic, financial, participation in the common institutions, access to information and shares in staff – while blocking by all means the advance and the consolidation of the system. Any veto on their part on reinforced co-operation seems now to be ruled out for good. The Monetary Union is an advanced model of such schemes, as we shall see.

Another minor shift of power must be noted for the sake of completeness, between the *Court of Justice and the Court of First Instance*. The longstanding lament of the Court about overburdening has borne its fruit, insofar as the CFI has now been vested with a whole range of new powers. Its status has been reinforced symbolically by its introduction, alongside with other "judicial panels", into Article 220 (ex 164). This provision has thereby lost some of its classic glamour, centred as it was formerly on the task of the Court: to ensure that the law is observed in the application and the interpretation of the Treaty. Now the accent has been displaced to questions of status and it will no doubt gravitationally glide to the paraphernalia thereof.

3. Some glimpses of an uncertain future

The implementation of the new provisions introduced by the Nice Treaty will open an area of new alliances inside the Union system.

There will be a de facto *directory* of the larger Member States, taking account cumulatively of their voting power in the Council, the distribution of seats in the European Parliament and the population figures. This state of affairs (apart from the grossly inflated Parliament in absolute numbers), will grudgingly be accepted, given the fact that this directory will be fairly balanced in itself, The larger States will tend to muster clientèles around themselves, and smaller States will be bound to draw together more closely to defend their identities and interests. They will, quite naturally, insist on minimum guarantees of their statehood, namely (a) unqualified membership of the Council; (b) some residual unanimity clauses, in matters located at the fringe of the central tasks of the EC, like taxes and social legislation; (c) full accountability of the Commission to the Council, not only to the Parliament; (d), last but not least, the integrity of their sovereign capacity as Contracting Parties of the constitutive Treaties, against the unwarranted action of future "conventions" of any sort.

Considering the loosening of the general system by the enlargement offered on deservedly generous terms to a considerable number of Eastern and Southern European States, the *EURO-Group* may well grow into the role of a genuine "Community core". The only complement truly necessary for the rounding off of this inner circle will be the accession of the UK. The currencies of the remaining outsiders, like Denmark and Sweden, are bound to be pegged to the EURO, and the same will be true even for the sacrosanct Swiss Franc. In addition, the solidarity postulated for the defence of the common currency will further the completion of the economic union, insofar as the care for the soundness of the "fundamentals" as defined first in the Maastricht criteria, then worked out in the Stability and Growth Pact and finally condensed into the Monetary provisions of the EC Treaty, coincide ideally with the definition of an economic union. Indeed, the monetary union creates an irresistible pressure towards a co-ordination of the whole range of national policies that matter for the strength of any currency. In order to maintain the attractiveness of accession for outsiders it should be made clear to everybody that participation in the decisional process of the EURO-Group must be reserved to those who are prepared to share in full the responsibilities of the system. No room may be given to mere onlookers.

This leads to a further argument of fundamental importance. Member States as well as the Commission should put an end to the prevailing demagogy of major and minor European statesmen in the matter of enlargement, by adhering strictly to the criteria concerted at the Copenhagen European Council of 1993 (Conclusions of the Presidency, point 1.13, *EC Bulletin*, 6, 1993), conceived as a *double barrier* for admission into the European system. Admission to the EU depends on the requirement of a consolidated democratic regime, with respect for the rule of law and for fundamental rights. Admission to the

EC is made dependent furthermore on the capacity to assume, to their full extent, the duties of membership and the capacity of sustaining competition on a free market. These conditions are cumulative. In other words, EU and EC must be visualized as concentric circles, each having its specific conditions of access. The same is true a fortiori for the inner circle of Monetary Union. Thus, in spite of the semantic confusion inherent in the EU Treaty, the European complex must be visualized upon analysis as a concentric, *three-orbit system*, each one of these orbits having its own specific characteristics and conditions for access. Copernicus can be satisfied even after the Nice carnival.

4. A straightforward conclusion

It is to be recalled that from its beginning the EC had a well-balanced, basically quadripartite, institutional structure based on separation of powers, operating in the framework of a clearly structured legislative system for the attainment of the Community's objectives. The full effect of the provisions of the constitutive treaties was guaranteed by Article 10 (formerly 5) EC – a reflection, in the Community law sphere, of international treaty law as codified in the Vienna Convention. This basic scheme is perfectly adaptable to the enlarged Community. Too much of it has already been given up in the utopian pursuit of political goals, which would have been much better served by methods of simple intergovernmental co-operation in the outer Copernican circle, instead of being forcibly introduced into the inner circles of economic and monetary integration. We should therefore resist, to the best of our forces, the return to intergovernmental methods in the inner circles of the Community spheres and, more so, to the re-nationalization of Community powers under whatever guise, such as "subsidiarity" (which since its clamorous introduction has not brought anything constructive), creation of new unanimity requirements as shown by the example of Article 133, the false talk about advancing on the way to federalism (an inherently ambiguous word), or the myth of rewriting the treaties, or making a European "constitution". In the present circumstances, these catchwords are nothing but attempts at escaping from the binding force of the treaties and from the *bona fide* implementation of their provisions. The solution of the substantive issues facing Europe calls for a restoration of the system at its centre, with a return to the patient work of the regular institutions, not for diversion into false projections at its periphery.

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