

EDITORIAL COMMENTS

Post-Maastricht

“Game, set and match”, was what the UK Prime Minister said on the night of Tuesday, 10 December 1991, at Maastricht. That sounds rather ominous for the Community. However, the *Financial Times* of 12 December 1991, qualifies the “Maastricht Treaty” as “indeed the biggest milestone in the Community’s 34-year history”. Moreover, the reactions of the heads of State and other heads of government by no means echoed defeat. Each and every one of them showed signs of satisfaction. That might imply that a global compromise was reached, of an acceptable nature.

Indeed, the Franco-German deal of an Economic and Monetary Union coupled with a common foreign and security policy was struck, albeit that the latter was stripped of any Community approach. The United Kingdom obtained its opting-out clause for the third phase of the Monetary Union, and forced the other eleven to opt out in order to opt up on matters of social policy. (Deleting the F.word, federal, was not really a point of substance). Whether the victory proclaimed on social policy is a real one, remains to be seen. True, the eleven opted out: but they did this together with the EC institutions, minus the UK when it comes to voting on these issues within the Council of Ministers. So who is actually opting out? The Dutch were, of course, deprived of a unitary structure for the European Union, and of an overall increase of powers for the European Parliament. But they were apparently deeply satisfied with the soft landing of Maastricht, after the turmoil of refusal that met their draft Treaty at the end of September. The Greeks finally

got away with being admitted to the WEU, and the Danes obtained a Protocol forcing the Germans to continue renting their holiday houses in Jutland instead of buying them. And finally there was the new Cohesion Fund for the southern Member States (and Ireland).

And the European Community, did it win or lose in the battle of Maastricht? Considering the immediate reaction of the European Parliament, which was not able to make up its mind, the answer seems not to be obvious. However, the Parliament's confusion could also be seen as a token of substantial progress of the Community at Maastricht, notwithstanding only a partial satisfaction of Parliament's demands on the increase of its powers. Indeed the balance-sheet of Maastricht for the Community is complex and mixed: a leap forward, with solid legal structures being set up for Monetary Union (but how weak the instruments to forge economic convergence!). Compared with the fate of the Werner Plan of the seventies, and the extremely meagre result of the Single European Act on this issue (a reference in brackets in the heading of Chapter I of the Title on Economic Policy), progress appears immense. The European Parliament sees its powers substantially increased. This is also true of the democratic legitimacy of Community decision-making. Parliament gets a right to veto Community legislation in the new co-decision procedure, which will apply notably for all the important legal bases related to the internal market (e.g. Article 100A). It will have more grip on the European Commission, because of the procedure of "double investiture", and the equal duration of the mandate of Commissioners and Members of Parliament. All this will inevitably change the relationship between the institutions, particularly between Council and Parliament. Efficiency of decision-making, particularly in the complex co-decision procedure, might suffer. Finally, with the new substantive elements of the Union itself – Community citizenship, common foreign and security policy, cooperation on justice and home affairs – typically federal elements are brought within the ambit of the Union. Nevertheless, apart from the first one, the method chosen is far from federalist, and mainly intergovernmental.

Whether the various new Community competences (education, culture, public health, Trans-European networks, industrial policy, consumer protection) add much to the actual scope of Community powers

including Article 235 EEC, appears doubtful. They will however certainly create problems of delimitation and trigger litigation between institutions.

In evaluating the outcome of Maastricht as far as *Political Union* is concerned, it must not be forgotten that this far-reaching constitutional reform of the European Communities has been brought about in an extremely short period of time, particularly when compared with the length of time needed for constitutional reform on the national level. It was only in mid-1990 that Kohl and Mitterand launched their joint initiative in the context of the process of German unification. When the negotiations officially started in Rome, in December 1990, ideas were still fairly vague. No more than a list of themes was submitted to the Conference.

The contents of the Treaty of Maastricht will be analysed in forthcoming issues of the CML Rev. One preliminary observation may already now be made on the fairly hybrid structure of the European Union as it emerged from Maastricht.

The Union consists of three pillars: the European Communities, the common foreign and security policy *of the Union and its Member States* and the cooperation *of the Member States* on justice and home affairs. The three form a composite whole. Common provisions of the Union Treaty spell out the Union's objectives and fundamental principles it has to abide by, such as subsidiarity, human rights and democracy. In order to realize its objectives and actions, the Union disposes of a "single institutional framework". That the Union constitutes a whole, is further confirmed by the final provisions, laying down global procedures for amending the Treaties of the Union and for accession of new Members to the Union. Becoming a member of only one or some of its constituent parts is excluded.

However, this does not at all mean, to put it bluntly, that the Union is a merger of the European Communities and European political cooperation. The Union itself does not have, at least not explicitly according to the Union Treaty, legal personality. The European Communities maintain their own legal personality and remain institutionally largely independent of the Union, apart from the aforementioned common and final provisions of the Union Treaty. The Communities are a

separate compartment within the Union, well sealed off from the other parts ("without prejudice to Community competences", maintenance and development of the "acquis communautaire"). There are links between the Communities and both the other pillars, but these allow for one-way traffic only. Substantive elements might be transferred to the Community, but never leave the Community compartment. That is extremely important, of course, the Community method being of a fundamentally different nature because of the roles of the more supranational institutions (i.e. Commission, Parliament and the Court) compared with the basically intergovernmental method of the other pillars.

The single institutional framework, proclaimed by the Union Treaty, is single insofar as the intergovernmental pillars do not have institutions of their own. The only real institution of the Union as a whole is the European Council. Apart from that, the EC institutions have been graciously put at the disposal of the other pillars, but in a far weaker position as far as Commission and Parliament are concerned, and with the Court being carefully excluded from this generous loan. This is more an institutional "géométrie variable" than a single framework. So it will be the Council of *the European Communities* that will enact the common foreign and security policy of *the Union* (which has no legal personality). By *Council* decision common actions, legally binding upon Member States, may be established. The administrative costs involved will be charged to the *Community* budget, the operational costs might be so.

The European Union envisaged in the Single European Act of 1986 was, in comparison with the Maastricht structure, of an attractive simplicity: the Communities on the one hand, the intergovernmentally structured European political cooperation on the other, each strictly separated from the other. The Union of Maastricht reveals a much more complex structure. The Communities are now bound in a Union whose objectives and principles they have to respect, while the other pillars are tinged with some elements of the Community method (but carefully leaving aside the really supranational elements of Court, Parliament and Commission). European Union after Maastricht looks like a house which is half-built, a work in progress, suddenly abandoned by its builders. It has a kind of Gaudi structure.

All this is not without risk for the future of the *Community*. The optimistic view would be that the current structure of the Union is no more than an interim arrangement, awaiting a unitary structure extending the communautarian method, possibly with some adaptations, to the two other pillars and integrating them with the Community. Indeed, the Maastricht Treaty gives some cautious indications in that direction: first of all, and most importantly, the fact that EMU has not been made a separate pillar but is fully integrated into the Community compartment; the walling-off of the Community compartment, with one way “passerelles” (bridges) linking it with the other pillars; the rendez-vous commitment to reconsider the Union Treaty in 1996, with a view to a “vocation communautaire” (but how much more vaguely expressed in the final wording of article B, last indent, than in the last Presidency’s proposal). However, one could also fear that the intergovernmental method which the Council is free to practise on matters of the second and third pillar, will pollute the decision-making process of the Community itself or affect the scope or use of potential Community competences. An ominous sign here is the way in which the scope of Article 100 EEC in the field of free movement of persons seems now to be reduced by the clear language of the substantive clauses of the third pillar.

One thing is sure: Maastricht has made the Community/Union structure even more “*sui generis*” than it already was. Equally sure is that the real match to which the UK Prime Minister referred at Maastricht, the one between the communautarian and the intergovernmental approach, is far from over.