

# I

## FEDERATIVE ASPECTS OF THE EUROPEAN COMMUNITY

by

DUSAN SIDJANSKI

### ARE THE EUROPEAN COMMUNITIES FEDERAL BODIES ?

#### I

#### PRINCIPAL DIFFERENCES BETWEEN THE EUROPEAN COMMUNITY AND A FEDERAL STATE

1. The fundamental aim of the Community<sup>1</sup> is to lay the foundations for European Union. The closer Union comes, the more will it influence present realities and the shape of political life in Europe. Certainly this influence is very little felt at present, firstly because it is exerted mainly in economic and technical matters, and secondly because, even within this limited field, it is still inhibited by the fact that many of the major areas of economic policy such as currency, budgets, planning and prices are still largely in the hands of member States. Yet the growth of the Community goes on with steady power, like enmeshed gear wheels drawing in the member States little by little. First it was a customs union, next an economic

---

<sup>1</sup> In this paper the European Community means the Three Communities—E.E.C., E.C.S.C. and Euratom. We believe this substitution is justified both by the importance of the E.E.C., with which we are here concerned, and by the agreement in principle to merge the economic executives and, in the longer term, the Communities themselves.

union, and now it is impelling them towards a unified monetary system. This process can be observed even in some unfavourable effects resulting from the pooling of national economies. For example, there is talk of inflation imported into Germany. Denied the use of the classical weapons against inflation owing to the elimination of economic frontiers between the member countries, Germany had no option but to propose that a common anti-inflationary policy should be put into effect. Moreover, it is a truism that in modern States economic considerations play a large part in shaping policy. Hence the trend towards community-wide solutions for the former cannot fail to influence the latter. This observation seems all the more relevant since the political aims of the European Communities are clearly perceptible in their structures; in form and function they resemble a State's machinery in embryo.

The European Community was built up pragmatically to suit the requirements or whims of history; but once in operation, it is helping to bring about a gradual change in political realities. For it is setting up new habits of cooperation and new techniques of decision, and probably giving rise to fresh attitudes and outlooks. Its impress will be all the sharper in that it may one day form part of a political unity embracing the whole of Europe. If this optimistic view is accepted, it becomes urgently necessary to reflect on the significance of this experience and to try to see to what extent the European Community contains elements of a federation. This means in other words estimating the likelihood of a federated Europe, whether or not this actually comes about. At all events, even if the pessimistic view be taken, it is of some interest to consider the structure and day-to-day practice of the European Community which, though partial and incomplete, is nevertheless leaving its mark on current political realities.

2. First the limitations of this analysis from the federalist viewpoint may be briefly indicated. It is obvious that at present the great majority of the most important powers are still reserved to member States; no proof is needed that constitutionally and in other ways they enjoy effective *autonomy*. Unlike the situation in firmly-established Federal States, where it is the autonomy of the member cantons or States which has to be vindicated, here it is the European Community which has to prove itself. Hence the best way of studying the Com-

munity is to try to bring out its characteristic features in an endeavour to discover how far it is invested with common powers which it exercises effectively and autonomously. In other words we are adopting a selective method and concentrating on the main machinery of the Community, leaving on one side its traditional aspects in so far as they can be considered as secondary.

What immediately strikes the observer about the European Community is the absence of a *supreme political authority*, notwithstanding the fact that its aim is avowedly a political one. For here the vital sectors which in a federal State come under the central authority are almost wholly withdrawn from the Community and given to the member States. This is true of foreign affairs, defence and important areas of economic and social life. Would it therefore be correct to conclude that the European Community does not have a political authority? Here the traditional distinction between *political process* and the *subjects of politics* should be borne in mind. By process is meant the power of ultimate decision and of having decisions put into effect; any subject can be submitted to this treatment. Clearly, in this sense the European Community does have a political content; there are many ways in which it regulates economic and technical affairs and watches over the application of common rules, which usually affect individuals directly without being filtered through the State channels of member countries. Within these strict limits it is legitimate to describe it as "a political union in economic and social affairs", provided it is made clear that its powers are limited, nearly always additional and seldom exclusive.

To take another aspect, there are certain subjects which are so to say essentially political, such as the external relations of the Community as a whole, or its defence. And it is noteworthy that the European Community has no responsibility or power in these fields, save incidentally. The common trade policy is one of the constituents of foreign policy. These illustrations show that the European Community is partial and limited to certain sectors, whereas a federal State—and even a confederation of States—are political entities from the outset; they have supreme political authority just like a unitary State, but in differing degrees and organized differently. For example, in a federal State any matter which is dealt with by the political process does not necessarily, as it would in a unitary State, thereby fall within the province of the central

authority. An example of this is education, which in Switzerland is reserved to the cantons. Moreover, matters within the competence of the central State are dealt with by a method which insures the participation of member States. This absence of an overall authority constitutes a *fundamental difference* between the European Community and the various kinds of federal State, or even a confederation of States. That is why the European Community is sometimes described as a "partial and functional federation" or an "economic federation".

It is from the overall authority of a federal State that its agencies derive such powers as they have of revising the Constitution, i.e. of modifying the distribution and the balance of powers. *Revision* is carried out as of right, but with strong guarantees of participation given to the cantons or member States. It is far otherwise with the European Community, in which revision is hedged about with the traditional maximum of safeguards for member countries; a fundamental change cannot be carried through without the consent of all its members. This requirement is only partially eased by the existence of a "minor revision" in the ESCC, an autonomous body which cannot be radically changed; or even by the conferring of a general mandate enabling the institutions to take steps to implement the aims of the economic community even where such powers have not been expressly provided<sup>1</sup>. Nevertheless, provision for unforeseen contingencies is a strong feature of the European treaties,

That is the second point on which the European Community differs markedly from a federal State, and the third is the absence of common diplomatic representation abroad<sup>2</sup>. A federal State which constitutes a political community thereby assumes responsibility for *external relations* in all fields of public life as well as in important areas such as the regulation of economic, commercial and sometimes of cultural relations. The European Community knows nothing of this, except in the commercial sphere. The establishment of the EEC's external tariff implies a common trade policy. Customs and commercial agreements with third countries are negotiated by

<sup>1</sup> E.E.C. Art. 235, E.C.S.C., Art. 95, para 1, Euratom, Art. 203.

<sup>2</sup> It may be recalled that as the European Community is only partial and not yet sufficiently integrated, it does not yet recognize a "community" nationality which is the mark of a federal State.

the Commission under directives from the Council and under the attentive eye of Committee III while negotiations are in progress. They are concluded by unanimous decision of the Council during the first two stages, and by a qualified majority thereafter. Agreements signed in this way by Community institutions are binding not only on the institutions themselves but also on member States. This completely autonomous external function is worthy of note; its acts do not require ratification by national parliaments. Nevertheless member countries are fully assured of a voice in such negotiations, since each has a seat on the Council of Ministers. Within this restricted but important sphere one of the characteristic features of a federal State is to be found—the centralization of external relations.

The reasons why governments delay the implementation of a common commercial policy involving the subordination of all the instruments and sectors of commercial policy to a common line of action and Community discipline are not far to seek. As President Hallstein remarked, "it was not insurmountable material difficulties which paralysed the work here. The basic problems are formidable but perfectly capable of solution. What the member States felt to be new and radical is rather the birth of a piece of common European foreign policy which the Treaty of Rome demands".<sup>1</sup> In other areas the European Community can point to some successes. Association agreements were concluded with Greece and Turkey using a more normal procedure, and a new association agreement with the African States and Madagascar has been signed. Furthermore, the Commission has entered into the Kennedy Round negotiations on behalf of the EEC under powers granted by the Council. In such ways the European Community is seeking to present a united front to the outside world. And this trend is confirmed by the rights of active and passive representation which the Commission has employed, at least to a certain extent, for there too, the Council has tempered its zeal. The European Community has received many diplomatic missions, but has itself accredited very few. Any urge to trespass on the foreign policy of member countries has been jealously held in check. This explains the lack of a common trade policy which is very evident just now, and the lack of a European policy towards the developing countries.

<sup>1</sup> Addressing the European Parliament at Strasbourg on 18 June 1964.

Finally, it is hardly necessary to recall that the European Community has *no army or police force*, and is thus largely dependent on member countries. In consequence, it cannot execute sanctions against a member country by force. In fact, sanctions can be applied only against individuals, whose own governments are responsible for carrying them out. The smooth working of the European Community depends ultimately on two main factors—the will of its members and their effective solidarity. “Will” in this sense means the resultant of internal forces and special interests as expressed in governmental action, especially as it affects Community affairs; its effects are conditioned by the strength of European solidarity, the integration of economic interests in proportion to the effective weight they carry, and the extent to which the political and economic pressures of the other members favour community solutions. The European Community, it has been said, is a machine for creating common attitudes. Thus its “power” appears as closely bound up with the overall political and economic equilibrium (though at present the former is somewhat disturbed) which is gradually being established between the members and the various social, national or community forces. That fundamentally is the problem of bringing to birth a true community, based on common agreement.

3. One of the most prominent characteristics of the European Community is the transfer to the Community of powers (both legislative, jurisdictional and executive) which in the special fields which the European Community covers, are greater in scope or intensity than those usually granted to international organizations. But like such organizations, the European Community has to act within a framework laid down in the treaties except, as already mentioned, in unforeseen circumstances. The exercise of these powers is entrusted to *common institutions* which, apart from the Councils, enjoy a very large degree of independence vis-à-vis member countries. The Community’s share of action is thus dwindling while at the same time the Councils are intervening more frequently and effectively; but these interventions are taking on an increasingly community flavour to the extent that decisions are taken by majority vote instead of unanimously. Acts of the common authority are both binding and immediate in their effect. Being binding and enforceable they impinge strongly on member countries and much more strongly on

the subjects of those countries, just as in federal States the federal authority and its acts directly affect individuals and groups without being filtered through State channels. These are the most commonly cited features; one may add that, seen from outside, the Community tends to wear the aspect of an undivided whole in certain of its activities. And these various traits are emphasized by the fact that the Rome Treaties provide for a long-term union.

The European Community is of course neither a federal State nor a confederation of States, and for our purpose it does not have to be made to fit into any existing category. We shall therefore confine ourselves to describing some characteristic aspects of the European Community, after which we shall ask the following questions: what are the federative elements in the institutions which effectively exercise community-wide powers, or in the supervisory or consultative bodies? What form does the machinery of decision, as shaped by practice, take? What effects do acts of community-wide scope have? These are questions which go to the heart of the problem, and this essay is built around them.

Before looking at the distribution and the exercise of the community-wide powers, we should notice that the institutional form of the European Community is not a faithful reproduction of the federalist pattern. Looked at from the federalist viewpoint, what do the community institutions represent? By and large they point towards a federal type of constitution. But their adaptation to practical requirements has been achieved at a certain cost in organizational neatness.

## II

### THE CENTRAL MACHINERY OF THE EUROPEAN COMMUNITY: THE COUNCIL-COMMISSION TANDEM

1. The economic executives (the Commissions and the High Authority)<sup>1</sup> constitute the dynamic nucleus, the hybrid European

<sup>1</sup> For a fuller treatment see Jean MEYNAUD and Dusan SIDJANSKI, *Présentation des dirigeants européens*, A. Giuffrè, Milan 1963 (extract from *Il Politico*, Pavia University 1963, 28th Year, No. 4, pp. 722-758). The term “Executive” does not lay down in advance the functions of the Commissions and of the High Authority, and still less does it imply that they are like executive arms of government. It simply indicates that the Commissions and the High Authority are primarily concerned with the tasks of execution, supervision and management.

element, at once political and technical. They are composed of 23 members whose numbers will be reduced to 9 or 14 after the merger; all the members have been nominated by agreement between the governments, and all are drawn from the ruling circles in their own countries; there are several former Ministers and high officials, and two trade unionist leaders, in the High Authority. Moreover, most of them have well known political affiliations and some have been leading members of their parties. The best represented are the largest political groupings within the Community, namely the Christian Democrats and Socialists. Nearly all of them have had a University education and enjoy the reputation of being very able men. In this way the Executives tend to provide a threefold representation, similar to that in the Federal Council in Switzerland—political forces, professional interests and member countries.

It may be recalled that not more than two members of any of the Executives ever come from the same member country, and that in principle large countries have two members and small ones, one member in the 9-member Executives. Furthermore, the Presidents of the three Executives are chosen from among the "big three". Similar care is taken to distribute the available offices among countries or cantons in international organizations and in the Swiss Confederation. Once they have been appointed for a four-year period, the independence of members of the executive vis-à-vis their governments is guaranteed and this independence, which is written into the treaties, has been confirmed in practice. On a number of occasions Commission members have acted or voted at variance with the immediate interests of the government of their country. During the debate on European planning President Hallstein, a Christian Democrat, riposted to Chancellor Erhard; his attitude on agricultural policy is far from identical with that of the German Government. This does not invariably happen however.<sup>1</sup>

<sup>1</sup> The Hirsch case is sometimes contrasted with the above examples. It is pertinent to note that President Hirsch was not recalled during his period of office but that the French government's candidate was appointed in his stead when the term of office of Commission members expired. The behaviour of the French government may have been "logical", but blame is clearly attributable to the partner countries for accepting it. As Commission members are appointed by common agreement between member countries, this acceptance has created

The executives are collegiate bodies, like the Swiss Federal Council, and no delegation of powers is allowed; authority must be exercised jointly, by majority voting. In practice, however, voting is seldom necessary since most decisions are taken by common agreement between the members, as in a national government. Sometimes, however, having the majority procedure in reserve makes it easier to reach a compromise and obtain the agreement of those holding minority views.

The following passage from Emile Noël's report gives an eye-witness account of this process: "A word or two may be added about the atmosphere within the Commission itself. Discussions take place as in a "cabinet" which, it is worth noting, has changed very little since it first met five and a half years ago. The majority of the Commission's members were already members in 1958, and some even played a direct part in negotiations which preceded the Rome Treaty, almost qualifying as "fathers of the Treaty"<sup>1</sup>. This long collaboration has developed a remarkable spirit of mutual understanding, confidence and unity within the Commission, a real cabinet spirit, which makes a deep impression on anyone who has the opportunity of seeing it at work. The members of the Commission differ very widely in professional origins, administrative experience, university training and political allegiance, to say nothing of character, and they have strongly marked personalities. Yet they form a closely-knit body such as is seldom seen either in administrative or political circles. It is this spirit which explains the fact that in its day-to-day work the Commission takes most of its decisions by mutual agreement"<sup>2</sup>.

Looked at from another viewpoint, this solidarity of the members is the counterpart of their collective responsibility towards the European Parliament. This responsibility, even though partly

---

a dangerous precedent, for, on the plea of reciprocity, will not every government in future be able to press the appointment of the candidate of its choice, or to "disqualify" a man whom it no longer finds acceptable?

<sup>1</sup> These remarks also apply to some of the high officials of the Commission (and similarly of the General Secretariat of the Councils) who took part in the drafting of the treaty. In this connection one sometimes hears of the "Val Duchesse group".

<sup>2</sup> Address to the Parliamentary Commission for the Association of Greece with the EEC, Brussels, June 1963.

national, reinforces their independence and compensates in part for the fact that the Executives are not accountable to member governments.

As in national systems, the Executives direct the Community's administration<sup>1</sup>. At the 30th September, 1963 this had a staff of more than 5,000, of which about 1,000 were administrators—517 in the Common Market Commission, 223 in the High Authority and 197 in the Euratom Commission, in addition to 689 research workers and administrators on the research and investment budget<sup>2</sup>. The nationality breakdown of this staff is as follows: 431 Germans, 364 French, 358 Italians, 229 Belgians, 53 Luxembourgers, 166 Dutch (i.e. 448 from Benelux countries) out of a total of 1,601 Grade A officials. By and large it is fair to say that this distribution is proportional neither to the contributions of member States nor to their economic importance. As in the weighting of the votes in the Council of the EEC or in representation in the Parliament of Europe, the "personality" of member States has been borne in mind with a consequent amendment of the proportions in favour of the smaller countries. This is paralleled in Switzerland, where minority regions or cantons are given more favourable treatment. It is also noticeable that strict proportionality is not practised among the large countries, Germany ranking highest. There is a similar distribution of senior officials (grades A1 and 2, corresponding to Directors-General and Directors) among member States. Of 141 such officials, 38 are French, 37 German, 23 Italian and 43 citizens of the Benelux countries.

In some respects this administration, with about 500 European Directors in the top echelons, shows certain resemblances to the Federal administration in Switzerland. Like the latter, it faces linguistic problems with the four official languages of the European Community. But there is one fundamental point of difference: the Swiss administration is working within a political community whose citizens and officials are perfectly aware of it. In the European Com-

<sup>1</sup> This administration is quite a complex one, for each institution has its own secretariat to help in carrying out its tasks. But undoubtedly the hub of the community's administration is to be found in the administrations of the Executives.

<sup>2</sup> For comparison with these figures, in 1959 the Swiss Confederation had a staff of 104,000 (68,971 officials, 18,740 of whom were working in the central administration).

munity, on the other hand, national governments and administrations keep a tight rein on the Community administration, which is still in its early years; notwithstanding the personnel regulations, European officials who have come from leading posts in their national administration often retain links with their parent administrations when they are no longer members of them<sup>1</sup>. Moreover, apart from some exceptions, it would be unrealistic to speak of a "European consciousness", though a Community allegiance does seem to exist. Nevertheless, there is no lack of esprit de corps among these staffs, notwithstanding the crisis which the breakdown of negotiations with Great Britain produced in the Community organs. Impetus is being maintained within the EEC by the rapidity with which the various stages have to be reached under the treaty, but the sense of adventure of the original team in the High Authority has given place to routine. These are no more than approximate judgements, since this "European nucleus" has never been the subject of a sociological study. In this connection the experience of federalism in Switzerland will be a useful touchstone, and one of the things it teaches us is that multiple loyalties—to the municipality, the canton and the confederation—are perfectly feasible. It gives practical proof of the fact that an administration made up of a diversified staff speaking several languages and differing widely in origins, mentality and customs, can still be efficient. It shows that an official can be at one and the same time a good Frenchman and a good European, and that the two are not mutually exclusive.

2. *The Councils of Ministers* through which national governments participate in the Community institutions act as counterweights to the supranational factors within the European Community. It has sometimes been suggested that this representation of nationalities is, or is expected to become, comparable with the Senate or the Chamber of States, but the comparison is inapt in more than one respect. Moreover the Council, which most closely resembles an international institution, is nevertheless different; both its highly political character and its importance are due to the fact that foreign ministers, ministers

<sup>1</sup> Competitive recruitment of new officials has been introduced. This procedure offers so many safeguards that it is paralysing the flow of young management material and putting a brake on the development of the Community.

in charge of departments, secretaries and under-secretaries of State serve on it<sup>1</sup>. 42 such representatives, 34 of whom are Ministers, normally take part in meetings of the Councils. From 1958 to 1962 the Ministers of the Six held more than 210 days of meetings, which represents about 18% of the working days shared between the Ministers who are members of national delegations. During 136 meetings held in the same period, only 78 senior officials or permanent representatives attended in place of their Ministers (37 for the ESCC)<sup>2</sup> out of 1,200 "participants" of ministerial level who were present. For most of the time it was the same Ministers who attended.

To these statistics should be added the many meetings outside the Council where European questions were dealt with, and this shows the intensity and importance of the work of the Council. For Ministers are very apt to stay away from international meetings which they do not consider as being very important. What is the exception in other international precincts is becoming common form in the European Community. This regular attendance and the joint fulfilment of responsibilities on the European scale are furthering understanding and even the creation of a limited form of united front, which is sometimes inescapable because it is laid down by the treaties anyway. Thus the Council which, under the provisions and procedures of the treaties, gives collective expression to the national wills of the States who are the main holders of political power, is increasingly motivated by a Community ethos.

This community character tends to become increasingly pronounced as unanimous decisions are abandoned in favour of a qualified or simple majority. The latter increases the efficiency of the organizations by providing better safeguards against stalemates caused by members taking a minority view. To what extent are unanimous

decisions and a qualified majority respectively used within the EEC?<sup>1</sup> According to some figures worked out by Pierre Wigny, unanimity is required in 48 cases, 14 of which will be changed to qualified majority voting at the end of the transition period. He has counted 32 cases of qualified or simple majority, to which should be added the 14 cases of qualified majority to strike a new balance at the end of the transition period—46 against 34. Savary, taking into account all the instruments, treaties and protocols, arrives at a different result; only 44 of the 58 cases of unanimous decision remain, and the 49 cases of qualified majority become 63, to which he adds the 9 cases of a simple majority. This gives 72 cases of majority against 44 or unanimity<sup>2</sup>. Of these, some are automatically extinguished—for example, the unanimous vote required for passing from the first stage to the second. In other cases too, where the essential reason for unanimity is the bringing in of community legislation, its use may become very rare. This, however, will not lessen its importance, for if it is desired to change or readapt this legislation, the same procedure will have to be used.

Another point should be noted; in addition to the numerical proportions we have noted, it is essential to bear in mind the qualitative importance of these cases. In this connection, only a qualitative typology and a case-by-case analysis would furnish valid conclusions. Even so the time factor and the changes in procedure would have to be taken into account. The unanimity rule applies under the treaty particularly to acts of political significance, numbering about twenty, and those which constitute additions or changes to the treaty, about twenty more, not counting those which will change to a qualified majority. In short, the authors of the treaty have given maximum guarantees to the national governments in certain important cases. But it should not be assumed that these will all remain subject to the unanimity rule. For example, a qualified majority will suffice later on for the approval of trade agreements.

Nevertheless, the distinction between these two procedures is becoming blurred in practice; as far as possible the Ministers try to

<sup>1</sup> In actual fact the Council is subdivided into "clubs" or special councils; the Council of foreign Ministers, the Council of Ministers of Agriculture, who have particularly close relations. Ministers of Agriculture, for instance, are more protectionist than their colleagues in the foreign Ministries.

<sup>2</sup> This happened mainly during ministerial crises. Distance and poor communications also have something to do with these replacements. For example, the Italian Ministers are more often replaced by permanent representatives in Luxembourg than in Brussels.

<sup>1</sup> A simple majority is the exception, but paradoxically it is more exacting than the weighted majority provided for in the treaty as long as there are only six members.

<sup>2</sup> P. WIGNY: *Un Témoignage sur la Communauté des Six*, Luxembourg 1957; National Assembly, Doc. No. 5266, *Savary's Report*.

secure everybody's agreement. At the present stage, when most of the power of government lies with member States, their agreement ensures that the decision will be better implemented. In the Council too the search for compromise is taking the place of voting. But there are safeguards against negotiation degenerating into bargaining, the result of which would represent the common denominator of resistances by governments. There is first the Treaty, which lays down the principles; then there is the Executive, which works out proposals to be submitted to the Council; after that there is the pressure of interdependence within the community, which links the various parts of the machinery of decision; a rejection by one State might lead to rejection by another. And lastly, where the Treaty sets time limits, governments are obliged to take a decision within the time allowed. That is why the Treaty of Rome has been defined as a calendar of decisions to be taken.

This time limit may be accompanied by the threat of a change from the unanimity rule to a qualified majority if the act has not been completed in time. An example of this is the *anti-trust* legislation which, however, was adopted by general agreement. Although the two procedures have in practice come closer together, the qualified majority still has its advantages; it facilitates a search for a compromise by conferring a position of strength on the majority group. Holders of minority views are more ready to agree when they know that a decision can be taken even though they oppose it. For their part, the majority are ready to make some concessions since they know that the more important a matter is, the more necessary is the agreement of all members for its execution. As things are now, every decision made by the Council takes full account of the diversity of national interests.

3. *Collaboration between Commission and Council.* Still considering the EEC we find that the Executive and the Council constitute the key machinery of joint action. It is these institutions which separately, or more often together, exercise the powers transferred to the European Community. Sometimes they associate the European Parliament and the Economic and Social Commission with their exercise of power. They themselves are subject to the jurisdictional oversight of the Court of justice, and furthermore the European Parliament has the task of exercising democratic control over the

Executive. Nevertheless the action of its various institutions does not fundamentally alter the distribution of normative and executive functions within the European Community. The fundamental question is still how the Executive and the Council divide the exercise of their functions between them. The Treaty lays down about 32 cases in which the Executive acts alone. This enumeration does not, of course, take into account the Council's power to lay other tasks upon it. In the majority of cases the Executive has a power of decision vis-à-vis States or individuals and professional bodies (17 cases). The confusion begins when it is noted that sometimes it lays down regulations (5) or directives (5) going beyond the scope of its executive functions; in this connection it may be remarked that the Swiss Confederation does not have a strict separation of powers; there too the Federal Council has certain powers of legislation which it exercises by means of enactments which are often extremely important. On the other hand the Executive too fulfils certain judicial functions when it takes cognizance of cases of breach of the anti-trust legislation and applies sanctions, which may amount to as much as one million dollars. It may also be recalled that its armoury of executive powers has been enlarged by the coming into force of the agricultural regulations, under which extensive powers have been transferred to it.<sup>1</sup>

The separation of normative and executive powers between the Commission and the Council is all the more difficult since these two institutions carry out their main tasks jointly. Moreover the Council also has some very important executive powers when it has to define a common internal or external policy for the Community. The problems of commercial or agricultural policy which are matters for governmental action are as much within the sphere of the Council as of the Commission. And these distinctions are all the more tenuous since in practice the Council never takes action without the agreement of the Commission. The main governmental machine is made up of the Commission and the Council working in concert.

The Council can act without a "proposal from the Commission" in about 50 cases of which only 21 give rise to mandatory acts—three regulations, one directive and 17 decisions, 7 of which have to be

<sup>1</sup> These institutional rules provide for appeal to the Council against certain decisions of the Executive.



unanimous<sup>1</sup>. These actions are mainly concerned with internal or political matters and a clear distinction cannot be traced between legislative and executive functions. In most cases, however, with the exception of administrative decisions, actions of the Council are based on a report or a draft, arising either from a recommendation or a decision of the Executive. In fact, collaboration between them is permanent, although it is not always so organized as when the Council is obliged under the Treaty to give its decision on a *formal proposal* of the Executive. Although this procedure, which associates the Executive and the Council formally, has been given general application by the Rome Treaties, it is the exception in the ESCC where it exists in the form of "notification of agreement" (*avis conforme*).

The EEC knows 76 cases in which the Commission has to exercise its right to propose. About 50 of these (30 regulations and 17 directives) are quasi-legislative. The executive function is represented by about 20 decisions. Here again there is a lack of clarity which renders a comparison with traditional forms of federal government difficult. Although the large majority of mandatory actions are legislative in nature, both the institutions also carry out some executive functions. For this reason it is essentially looking to the future to speak of the Council as if it were a Senate, the more so since in certain cases this "community senate" wields governmental powers. In this pragmatic structure, this system of compulsory collaboration between the guarantor of State interests and the guarantor of the community interests enables community decisions in the principal fields to be based firmly on proposals by the Executive.<sup>2</sup>

By this collaboration the Treaty has strengthened the negotiating power of the Executive, as some sort of counterweight to the power of the members. The Council can change such proposals only by

<sup>1</sup> L. LINDBERG: *The Political Dynamics of European Integration*. Stanford University Press, Stanford, California 1963, p. 300. Something should be said about the "weight" represented by these figures. The most important decisions, excepting for example that concerned with passing to the second stage, are taken by the Council and the Executive acting together.

<sup>2</sup> Moreover, a proposal relaxes the qualified majority, which consists of 12 votes out of 17; in other words when there is a proposal the measure can be passed if the three major powers agree, but if there is not a proposal the 12 votes must include a favourable vote by at least 4 members; this is a guarantee given to the smaller States.

unanimous agreement; paradoxically, unanimity here acts as a protection to the Executive by strengthening its powers of negotiation with the Council. The Executive also has another faithful ally in the Treaty with its outline provisions, the interpretation of which is entrusted to an independent institution—the Court. This is a judicious balance, but it adds to the difficulties of any clear comparison. At the risk of sacrificing accuracy and straining the analogy one might say that the Treaty strengthens the Executive's powers of initiative since it is not dealing, as in a federal State, with a bicameral legislature, one Chamber of which represents the voters of the federation as a whole whilst the other represents the national and other groups taken separately. By contrast, the community Executive has to face the representatives of the governments meeting in the Council. That is why care was taken to provide it with a few more strong cards, to enable it to negotiate with the Council without too much of an inferiority complex.

Another partner to this dialogue is the *Committee of Permanent Representatives*, which is part of the Council's sub-structure. It is no secret that the permanent representatives are closely associated with the process of arriving at decisions. Although they are the official representatives of member countries, these delegates (who have ambassadorial rank) and their aides really occupy an intermediate position between the Executive and the Council and between the community and governmental spheres. This polarity does not always make life comfortable for them; they tend in fact to advocate their national points of view when dealing with the Executive and the community point of view when dealing with their national governments. Their function requires them permanently to devote their full time and attention to community affairs.

Two facts are indicative of their importance; they have direct access to the heads of State or government of their countries, and they have staffs of qualified assistants; numbering about one hundred in all, they include 13 permanent representatives and deputies, 28 counsellors and deputies and about 50 secretaries and attachés. The *Committee of Permanent Representatives* operates within the ambit of the Community, centred on Brussels. It may with good reason be looked upon as an integral part of the institutional structure of the Community. Although owing allegiance to their countries, the national representatives nowadays play an important part, together

with the Council's secretariat, in discussing proposals by the Executive and in the negotiations and work preceding their adoption by the Council. This hybrid body strengthens the representation of member countries (if that were necessary) whilst at the same time integrating it more closely with the community machinery. Bodies of this type, which are found during the confederate or pre-federal phase of the formation of a federal State, will disappear when federation is achieved. Sometimes, indeed, the federal government does enter into direct consultations with member governments. But member States, or cantons in a federal State, play their part in the legislative or supervisory functions through their dual representation in the parliament.

### III

#### OTHER INSTITUTIONS

1. *Court of Justice.* In this bicephalous system the other institutions, with the exception of the Court, are reduced to a derivative or secondary role. In fact the Court of Justice has some points of similarity, within the limited framework of the Community, with a polyvalent federal court. Notwithstanding the "intergovernmental" origins of its judges, their impartiality is guaranteed by a number of provisions and above all by a long tradition. The Court oversees among other things the legality of acts of the institutions, and delivers judgments on conflicts of jurisdiction between member countries and the institutions and concerning breaches of the rules by a State or an institution. Matters may be brought before it by the Executive, a State, a person or a body corporate (within certain limits). The Court also functions as an administrative tribunal. But the essential feature would appear to be that it represents a mandatory or permanent jurisdiction watching over the balance of power and observance of the laws within the European Community. In keeping with this wide mandate, its activity is essentially varied; during the period from May 1962 to March 1963 it dealt with 23 cases concerning the EEC—two complaints by the Commission against member States alleging violation of the Treaty, 13 complaints concerning acts of the institutions, three of these being appeals by member States against decisions

of the Commission, 10 appeals by private organisations against rulings of the Council (6) and against decisions of the Commission (4)<sup>1</sup>. There is no recorded instance of a State disregarding decisions of the Court.

2. *European Parliament.* It is just as difficult accurately to describe the European Parliament in terms of known political institutions; it cannot be properly compared either to a Senate or a Chamber of Representatives. In truth the European Parliament is a hybrid institution which does not represent the people of Europe, or even the nations of Europe except at two or three removes. The fact that its members are nominated by national parliaments gives it some similarity to a certain type of Senate with members appointed by the legislatures of member countries. But this comparison is invalidated both by the distribution of its members and by the prospect of election by direct universal suffrage, which marks it out as the future parliament of the union<sup>2</sup>. Its practice points in the same direction, for from the outset its members have grouped up according to their political affinities and not according to their nationalities, thus forming the Christian-Democratic group (65), the Socialist group (35) and the very mixed group of Liberals and those of similar leanings, numbering 26. An exception is the unofficial group of the (15) UNR who, though not registered as such, are more homogeneous and disciplined than any other group<sup>3</sup>.

Although some regard is paid to the principle of distribution by nationalities, most of the work of the European Parliament is organized around the idea of political groupings, as for instance in the offices, the list of candidates for committees, spokesmen, and the part played in electing the President. For there is really a certain cohesion and discipline about these groups, even though national solidarity sometimes gets the better of it, as during the vote on the draft plan for elections, with the German Socialists abstaining in 1960, and in May 1962 when the Dutch Socialists came out against the control of freight rates; or again at the beginning of 1962 when all the Italian members except one voted against protective tariffs for

<sup>1</sup> 6th General Report, p. 316 (French).

<sup>2</sup> The draft plan for elections is also aimed at reestablishing a true representation of the political forces, by ceasing to exclude the extreme left, which is not represented in the European Parliament.

<sup>3</sup> 1963 figures.

energy supplies after Signor E. Mattei had visited the European Parliament. This also constitutes one of the rare occasions on which a pressure group attached so much importance to the voting in this assembly. Notwithstanding these defections, or this cleavage, the political groups form the nuclei of federal parties of the future, or of future federations of parties. The latter appears more probable, judging by experience in the United States and Switzerland.

Yet these outward attributes of a Parliament can do nothing to alter the present powerlessness of the European Parliament. By virtue of its right to pass a motion of censure it exercises permanently a general control over the executive, but this control is only theoretical. Since its power of censure is confined to the Executive, it leaves quite untouched the institution which, on the proposal of the Commission, holds the ultimate power of decision—the Council. The European Parliament can affect the Council only in so far as its censure of the Executive paralyses the central machinery of the European Community, the Executive - Council tandem. But in trying to move the Council it would damage the Executive; by forcing its members to resign it would expose them to the manoeuvres of governments which alone have the power to nominate new Commissioners, and would eliminate those who had erred by an excess of the European spirit. Thus the delicate balance between the Council and the Executive would be upset, to the detriment of the latter. This illustrates the absurdity of the present system of control, which the European Parliament is unwilling to use, endeavouring on the contrary to support the Executive. It is moreover interesting to note that this curious combination of federalism (diversity) and parliamentarianism (instability) is not found in the current practice of federal States. It does not exist either in Switzerland or the United States. In the Federal Republic of Germany it is ruled out by the rule of the legislature or of a durable coalition; and in the European Parliament it is excluded by the desire to support the Executive.

The European Parliament is compulsorily associated with the legislative process in 18 (BEC) and 11 (Euratom) cases foreseen by the Rome Treaties. From January 1958 to May 1963 it was consulted on 71 occasions, 15 of which were optional cases not mandatory under the Treaties. It has been very busy, with an average of 14 consultations a year. What weight is attached to its opinions? With a few exceptions, including the preparation of anti-trust legislation, neither

the Executive nor the Council (particularly the latter) has attached sufficient weight to its opinions to let them mould its decisions. It is therefore understandable that the members of parliament are asking for greater legislative and budgetary powers.

But is that any reason for demanding that the European Parliament should have a monopoly of legislative functions, as some of them do? That would be a mistake, since it would condition men's minds towards a unitary Europe, even if their feet are not already pointing along that road; in this unitary set-up a parliament which has more of the attributes of a House of Representatives than of a Senate would have legislative power. Thus it would reflect the majority vote of the people and would be democratic, but it would have no place for representation of member countries as such. All federal States have a bicameral system to ensure that both the people and the States are represented. No plans or claims regarding the future should lose sight of this necessary arrangement. Concrete expression could be given to it in the near future by a joint exercise of these functions by the Council (on the proposal of the Executive) and the European Parliament. It could be arranged that if the European Parliament did not approve a community law which the Council had adopted, the Council could not bring it into force except by a unanimous decision. However that may be, at present the task of the European Parliament is largely a consultative one, still further limited by the partial nature of the European Community.

3. *Economic and Social Committee.* As its name indicates, the Economic and Social Committee expresses at official level the part played by social forces in the organic activity of the European Community. Like its national prototypes—the Economic Council in France, Belgium and the Netherlands—the ESC provides machinery for representation of the various elements in economic and social life within a consultative body. As in the European Parliament, its members have formed three groups: first there is the *Employers' group*, the homogeneity of which is ensured by the presence of the large central organisations of member countries which are federated in the UNICE (Union of Industries in the European Community); secondly there is the *Workers' group*, somewhat out of balance through the absence of the French CGT (Confédération Générale du Travail) and the CGIL, though it is held together by the cooperation across

Europe of local organs of the Free Trade Unions and the Christian Trade Unions whose activities in the Economic and Social Committee are coordinated by two European trade union secretariats. In principle, voting discipline is required on important matters; thirdly there is the *mixed group*, the most disparate of the three, containing representatives of the "independents", liberal professions, banks, government organizations, etc., as well as cooperative and family associations.

The Economic and Social Committee has to be consulted in about 15 cases within the EEC framework (12 by the Council) and in 7 cases by the Euratom Commission. From 1958 to April 1963 the ESC had 45 requests for compulsory adjudication and 17 for advisory judgments, 9 of these requests being submitted by the EEC Commission. This was a considerable number of cases. But the most important question is what weight was attached to these judgments. At present they seem to be more highly regarded than those of the European Parliament, for on economic questions they reflect the opinion of the groups concerned.

What marks of federalism are to be found in the ESC? It is indeed arguable that there is as good a case for the participation of communities of interest in the decision-making process as for that of regional communities. One might even cite the original example of the constitution of Yugoslavia, in which the assembly is made up of a council of delegates from the citizens of the republics and the municipalities, together with an economic council, a council for education and culture, another for social affairs and a council of work communities. On the other hand, it may be argued that official representation should be given to powerful interests which are in any event able to exercise considerable pressure on the political machine; moreover, this association of professional bodies with the decision-making and executive process within either permanent or *ad hoc* committees is already an established practice in Swiss federalism. It is therefore something which is more or less clearly recognized both in centralized and federal States. In the ESC these federative aspects have to do both with representation of the categories in each nation and with the way in which employers' associations or trade unions take community-wide action, which is still confederate in pattern.

4. *Committees of experts.* The existence of a large number of committees of experts seems to reflect a similar tendency for technical

interests and skills to make their weight felt. There are many of these in the EEC. On the one hand there are permanent committees—the committee of national experts or representatives of national governments (the monetary committee and the committees on short-term and medium-term economic policy), the committee of experts or representatives of European or national professional bodies (agricultural committees) and lastly mixed committees (such as the welfare fund committee). Then there are the numerous *ad hoc commissions of national experts* or representatives of professional bodies called together by the Executive, as well as working groups of government experts convened by the Council<sup>1</sup>. This consultative machinery is strangely reminiscent of the workings of government in Switzerland.

From another aspect, the European Community is introducing some *new bodies* unknown to normal federalist thinking. For the Community came to birth at the height of the industrial era, in which the public sector has taken over increasing responsibility in the economic sphere; it is therefore creating new machinery unknown to the federal structures which were set up in the age of liberal economies. It has set up a welfare fund to cushion the risks of any unemployment brought about by community policies; it has established a European investment bank in an endeavour to overcome regional under-development. And it is also seeking to introduce planning on the European scale. In itself and *a priori*, this planning is neither federalist nor anti-federalist. Its character derives from the methods used in its framing and execution, and by the environment within which it works. Programming in Europe is at least as flexible and decentralized at the operational level as is planning in France, which leaves a considerable degree of autonomy to business firms<sup>2</sup>; it will be built up on the basis of national and regional plans. Thus representatives of the regions will have a say in formulating it, as will also representatives of nations or of group interests. At present it is confederate in structure, but its final form will depend upon whether the united Europe of the future is a federal or unitary State, and on the national and regional pressures exerted in the meantime.

<sup>1</sup> In three years (1960-1962) there were more than 1800 days of meetings convened by the Councils of the EEC, and Euratom and more than 3000 called by the EEC Commission.

<sup>2</sup> Experience shows that even in a State as centralised as France, planning gives a strong impetus towards decentralisation.

## IV

## THE DECISION-MAKING PROCESS

1. *Closed and open decisions.* The touchstone of any institution is the way in which it arrives at decisions and implements them. We must therefore see how the community machinery has been "run in" and how it works in practice. To simplify the illustration we shall describe only procedures within the EEC. Decisions fall broadly into two categories—*open* and *closed*.

By *closed* decisions are meant those which are the result of preparatory work and internal consideration within an official body. Only the leading officials take part in framing it. The typical example of such decisions is the reply to an armed attack, or many foreign policy decisions. *Open* decisions, on the other hand, are taken by the authorities after a series of consultations with groups affected by them. Usually this method of prior consultations is applied in the economic field where the authorities possess neither all the wisdom nor all the information needed for deciding upon a line of conduct, nor all the means whereby it may be implemented. Over a large part of the economic field, in fact, government needs the cooperation of all concerned in ensuring that its decisions are carried out. That is why it seeks from the start their cooperation in arriving at such decisions, in the hope that they will take a more active share in carrying them out.

Obviously, this distinction is not a rigid one. Apart from a few decisions, some of which are vital (such as the unleashing of nuclear war) most of them are mixed and represent a compromise between the two extremes. Moreover, even in the preparation of a single decision, a succession of *closed* and *open* phases is sometimes observable. But once preparation enters an *open* phase, the resulting decision can no longer belong to the *closed* type. Nor are the two types of decision confined to separate sectors of public concern; for example, both are observable in the economic field, in which certain decisions on monetary policy are always *closed*, so much so that when the Deutsche Mark and the Dutch florin were revalued there appears to have been no consultation even between the partners of Germany and the

Netherlands.<sup>1</sup> But by and large, economic decisions tend to be *open* rather than *closed* in countries with a mixed economy. In other words, *open* decisions will predominate in a Community which is basically economic and technical.

Examples of *closed* decisions are not lacking in the European Community. Thus, the common trade policy is worked out jointly by the Council (and hence the Committee of Permanent Representatives of the Commission) and Committee 111 when negotiations are in progress. In theory, the process of working out and implementing the trading policy takes place in a closed circuit, but this does not rule out pressure by interested groups or even veritable "hearings" such as were held to decide upon the exceptions list for the Kennedy Round. It would of course be replied that these "hearings" did not relate to policy matters but to particular questions such as procedures for applying it, or technical details. But where is the borderline between technical and policy questions in such cases? When the exceptions reach a certain level, do they not *ipso facto* enter the realm of political decision? Moreover, it is just as hard to distinguish between "hearings" and pressure or influence. Is not technical information the most favoured method of "pre-conditioning" whereby governmental decisions can be influenced? Another example, more tightly *closed*, is provided by the drafting of the Commission's memorandum on the failure of negotiations for a free trade area in 1959. This memorandum, in which the ideas of the Community were set out, laid down the trading policy of the Six. The 1962 programme of action also resulted from reflections within the Commission.

Cases of *closed* decision occur more frequently in the execution of Community rules. This is true for instance of decisions concerned with the oversight of trade agreements and cartels, actions intended to secure the due execution of disarmament measures, or decisions of the Commission allowing or refusing recourse to escape clauses. Budgetary decisions, and of course appeals, as well as actions of the Court of Justice also come into this category.

Thus it is clearly very difficult to posit a model of a decision-making process which would be applicable to all the actions of the European community, the more so since a series of basic regulations,

<sup>1</sup> This information was afterwards denied.

a great deal of creative and initiating activity in accordance with the principles laid down by the Treaty was required to get the Common Market under way.

Once the main instruments are working, this creative activity will tend to decrease whilst the function of applying them will increase. Naturally there are still some gaps to be filled, such as a policy for transport or social policy. But generally speaking activity will henceforth be centred rather on the tasks of implementation, management, examination and readjustment. This transformation seems to point towards an increase in the functions of the Executive. Conscious of the change in the Commission's favour, the Council has sought to prolong its control in the agricultural sector by setting up management committees. But this change does not always mean that *open* decisions have given way to *closed* ones; even in this field of application the Commission is sometimes assisted by consultative committees, such as that for the European Social Fund or the committees on agriculture, transport or freedom of movement.

As an example of an *open* decision, we shall outline the procedure for the preparation of acts which are universally applicable and binding; as was said earlier, these account for most of the activity of the Community since it began to function. Hence our model deals mainly with this series of governmental or *authoritative decisions*, and it therefore leaves aside the *powers of influence and persuasion* which the Commission has, particularly in regard to short-term economic activity, or transport. This does not mean that its behind-the-scenes role, comparable with that of international secretariats, is any the less important. Indeed, the experience of the ESCC shows that the most formidable powers provided for crisis situations have not been used, but that suggestions made to business firms have had an influence on policies for steel production. To allow for this power to influence, one would have to modify the position of the Executive vis-à-vis the Council and member countries from case to case. Its powers of negotiation, which in theory are less firmly grounded, will vary according to the current economic situation. It goes without saying that any general model must have a variable representing the changing situation.

2. *The Commission Stage.* These actions usually originate in the provisions of the Treaty or in an initiative of the Executive, though

they may also originate in a decision of the Court, an initiative of the Council or even one taken by a government or another group. The Treaty does not leave the working out of the common rules to chance or to the choice of the institutions. It lays down definite periods of time and an automatic calendar for the setting up of the Common Market. This obligation puts pressure on those responsible by obliging them to carry out their mandate within a predetermined period; it makes it harder to put off decisions, and as it were pre-conditions them. In fact the authors of the Treaty appear to have pinned their faith on the self-sustaining power of integration, the "demand for decisions" and the pressure of events.

*The preparatory phase* takes place at Commission level. Members of the Commission often lay down a policy as they see it in line with the ideas of the Rome Treaty and instruct one of the Directorates General to work out a draft. Sometimes this first step is preceded by a report drawn up by an independent expert. In any event, during the period of *preliminary studies* the Directorate General concerned makes use of the services of experts or groups of experts (such as University staffs or specialized institutes) as well as consulting the other Directorates concerned, or even doing the work jointly with them. During this phase it may also send out questionnaires to national government departments or organize meetings for contact and study, in which national or private experts representing European and national professional bodies may take part. By the use of such varied resources the Directorate General responsible assembles its facts and works out its ideas.

After this, there begins a fairly long period of *consultations*. Many meetings and contacts take place with representatives of UNICE and with European employers' federations and trade union organizations, but above all with *national experts*, who attend meetings convened by the Commission in their personal capacity. Though without official instructions, they nevertheless express the views of the national administrations whilst at the same time retaining a certain freedom of manoeuvre which enables them to play an active part in drafting or revising the texts prepared by the Directorate General. From 1960 to 1962, for instance, more than 3000 meeting/days representing some 2000 meetings of experts took place under the auspices of the EEC commission. It is well known that national experts play an extremely prominent part in this process; through these consultations

the Executive associates senior members of the national administrations officially with the preparation of its submissions. On the one hand these meetings enable it to get to know where the various administrations stand, to sense the temperature and estimate the margin of manoeuvre; and on the other hand they enable it to bring officials of different countries together for an exchange of views which leads to an atmosphere of collaboration. As a result, when these civil servants later have to deal with the matter in their official capacity they will not have the feeling that an outside organisation is imposing upon them opinions they do not share. Their task in fact will be comparable to that of the permanent representatives—to explain the Commission's point of view and that of their colleagues to their own governments and at the same time to defend the interests of their government at the community level. Thus full participation during the preparatory phase is ensured by this method, which involves a constant series of contacts between national and European officials and representatives of various interested groups.

At this point a comparison with the procedure followed in Switzerland is apposite<sup>1</sup>. There too consultation is one of the basic components of the legislative process. Apart from contacts between government departments and the calling in of experts and specialists, a twofold consultation takes place—by direct contact with professional bodies, or in committees of experts where independent experts sit side by side with the representatives of professional associations. Thus the latter have a share in preparing the legislation. The first draft is then sent to the cantonal authorities and the professional organizations for their written comments.

So there are some striking resemblances, but there is also a significant difference<sup>2</sup>. At the preparatory stage proper only professional organizations and independent experts take part in the drafting of the text; only later are the cantons asked to comment on the first draft which is the product of these initial labours. But in the European Community where the "cantons" still have a great deal more power, national experts play a fundamental and much more

decisive part than do professional organizations. It is true that in both Switzerland and the European Community provision is made for the participation of member countries at a later stage, either in the Council of States or more effectively in the Council of Ministers. But the federalist element is apparent even in the association or consultation of professional bodies. For the latter consult their members, who are organized into federations by sector of activity, which is functional federalism, or into cantonal sections, which is "political" or territorial federalism. A similar method is employed in the European professional organizations, though in them the national members retain a preponderating influence which gives a confederate flavour to action at the European level.

After this cycle of consultations, the Directorate General with the assistance of its legal section prepares a *first draft* containing a number of alternatives. This text is then examined by the departmental staff of the Commissioner responsible for it. Both he and those working with him have been in touch with the progress of the work in its earlier stages. From this examination will come the *draft* which he will submit to the Commission through the executive secretary. For an outside observer it is very difficult to form an accurate idea of the real procedure, particularly at this level. However, broadly speaking, if a draft is sent back to the Directorate General this can be taken to mean that members of the Executive were not in agreement or that it was difficult to obtain a majority. A similar interpretation might be put upon the repeated appearance of the same subject on the agenda of weekly meetings of the Commission. Such deductions however should be made with caution; in particular, the difficulties inherent in certain cases, as well as their political importance, should be borne in mind. As soon as agreement is reached or a vote taken, the proposal for transmission by the Executive to the Council is in existence. At this stage the Executive may enter into an exchange of views with one of the Commissions of the European Parliament or ask for the opinion of the Economic and Social Commission. This ends the phase of preparation at Commission level.

3. In the *second phase* the Council and the Committee of Permanent Representatives take up the examination; the European Parliament and the Economic and Social Commission are or may be called in in a

<sup>1</sup> Jean MEYNAUD and A. KORFF: *Les Organisations Professionnelles en Suisse*. Lausanne, Ed. Payot, 1963, pp. 277 and 85.

<sup>2</sup> In Switzerland there is an essential additional feature—the *referendum*. This enables dissatisfied minorities, whether groups, parties or citizens, to appeal to a direct popular vote.

consultative capacity. Representatives of the Commission take part in this process at all levels. It will be recalled that the Council can amend the proposal only by a unanimous decision and also that the Commission is entitled to modify its own proposal before the Council has taken a decision on it. In practice, even when no formal proposal is called for under the Treaty, the Council never acts without the agreement of the Commission. This sets the scene for the dialogue between Commission and Council, which in actual fact is more like a complex negotiation in which the Commission is one of the partners. Member countries have rights, and above all they have power, whereas the Commission relies mainly on the Treaty, its "proposal" and the mandate entrusted to it. Moreover, it almost invariably happens that the interests of some member countries coincide with those of the Commission—whose task is to express and defend the interests of the Community as a whole<sup>1</sup>—as for instance the interests of France and the Netherlands in agriculture, or those of Germany in the *anti-trust* legislation. They are then faithful allies of the Commission, supporting its efforts to arrive at community solutions.

As a general rule, the Council transmits the text of the proposal to the European Parliament and to the ESC for their opinions<sup>2</sup> and also to the CPR (Committee of Permanent Representatives) for study. It is at this level that the *Committee of Permanent Representatives* makes its important contribution, assisted by the General Secretariat of the Council in the task of examination and preparatory work. The CPR admittedly has no power of decision or initiation; in this respect it is completely subordinate to the Council. But in practice the procedure is more complex. The Permanent Representatives and their colleagues form a part of the Community machinery which, although having no specific powers, exerts an influence on decisions because it is always there on the spot. It is moreover worth recalling that, unlike the Ministers who meet only for a few days each month and devote only a relatively small part of their time to matters affecting

<sup>1</sup> It sometimes happens, usually in minor matters, that the Council takes a decision which is not in accordance with the Commission's wishes.

<sup>2</sup> These two institutions do not carry very much weight in the decision-making process. However, in certain cases, they have succeeded in persuading the Council to make some changes. At present, they play a marginal role in the procedure.

the European Community, the Permanent Representatives are full-time "European Leaders" who see each other daily in working meetings and at social gatherings.

Thus there is created a very close bond of shared work and friendship between the Permanent Representatives and their colleagues. Because they are constantly meeting one another and officials of the Commissions, and are constantly dealing with European affairs, they see things differently from officials who are more or less isolated in their capitals. Thus it is that, aware of the views of both sides, but more open to the arguments of the Commission, they act as interpreters of Community-wide interests to their national authorities, and at the same time defend their national interests in the European Community. It would be a mistake to believe that this makes them simply spokesmen of European interests. Usually they convey a better understanding of the problems as seen on the spot, and indicate the possible margins of negotiation or the majorities which are crystallizing out. Sometimes, if their country is in a minority of one, they endeavour to persuade their own government. Indeed, certain representatives earn the sobriquet of "Community men" from their colleagues in the national governments. Apart from these considerations, the attitude of the various Permanent Representatives is dependent on a number of factors including their personalities, their influence on their national governments and the control exercised by their government over its representatives.

Although they are sometimes called "Community men" the Permanent Representatives and their groups exhibit a strong tendency to try to modify the Commission's proposals. Both by the logic of the system and in practice, representatives of the Commission (though never Commissioners themselves) take part in the work at all levels. In this way the Commission is both kept informed of the progress of the work and is involved in the preliminary negotiation in which the ground is prepared for decisions of the Council. During this examination, agreement by the representative of the Commission facilitates the taking of the final decision, as we shall see. But sometimes, when the points of view of the Permanent Representatives and of the Community's representative are rather far apart (especially when the Permanent Representatives wish to make considerable changes and the Commission has given its representative strict instructions) they cease to give support to the Commission's point



of view. These cases usually occur when the Commission does not table a "formal proposal", which cannot be modified without its approval, or when all the Permanent Representatives agree to the changes which are to be introduced into the Commission's draft. Nevertheless on important matters it is seldom that the Six agree among themselves at the expense of the Commission's proposal and the Community interest. More often than not what takes place is a seven-sided "complex negotiation" rather than a simple dialogue between the Permanent Representatives on the one hand and the representative of the Commission on the other.

In order to carry out this important task the Committee of Permanent Representatives, assisted by the General Secretariat of the Council, calls in the aid of the *official national experts*, who are nearly always the same ones who have collaborated in their personal capacities with the Commission. The text is not new to them since they took part in preparing it, but at this stage they assume the dignity of official representatives. They are still among friends, but are more careful to defend their national positions. Some say that the official experts are inclined to make sharp attacks on the Commission's proposals. It would be interesting to discover how far they consider themselves free to try to weaken the texts which as individuals they helped to create—how far they are bound by pride of authorship. Clearly, in their official capacities they carry instructions emanating from their Governments which tend to restrict their freedom of choice. This goes far towards explaining their change of attitude towards the Commission's proposals.

This machinery is further complicated by the fact that all these activities of discussion and negotiation take place with the help of the administrative facilities of the Councils. It is this administration which provides the secretariat for meetings of the Permanent Representatives and groups of experts, takes the minutes and drafts the reports. What part does the General Secretariat of the Councils play in the process of decision? Some people believe that their role is purely a technical and secondary one, whilst others believe that it is a kind of Community grapevine whose behind-the-scenes effectiveness is considerable. In fact, this administration has undergone considerable development since the time when it consisted of the small nucleus of people working within the ESCC. It is just as plausible that in drafting minutes and notes the secretariat can infiltrate sugges-

tions indirectly by the way in which the texts are set out; it is not entitled to express a point of view or its own opinion. On the other hand, by assisting the President of the Council, of the Committee of Permanent Representatives and of the groups the secretariat has the opportunity of exercising some influence through the President. But this influence is purely informal and its extent will clearly depend largely upon the personality of the President and of the Permanent Representatives and the competence and personality of the senior officials in the secretariat.

In addition to the Committee of Permanent Representatives, certain autonomous committees have been set up by the Treaty or by the Council. Does the Committee of Permanent Representatives exercise any oversight over these Committees, as it does in theory over the groups of experts? Even this oversight appears to be becoming increasingly theoretical, if not impossible, where autonomous committees such as the Committee on Short Term Economic Policy, the Special Committee on Agriculture or Committee III are concerned. These committees, composed of senior national officials, pose a problem of precedence. How far can the Committee of Permanent Representatives really control their activities? The same question is pertinent to the highly technical tasks going beyond the real scope of the Committee of Permanent Representatives, to whose omnicompetence there are limits. It is inevitable that these conditions give rise to some competition between the various bodies which have grown up under the aegis of the Council.

It is in these bodies, and chiefly within the working groups and the Committee of Permanent Representatives, that the Commission's text would be remodelled. Broadly speaking, on a rough estimate, more than 80% of the work is done by the Committee of Permanent Representatives and other parts of the administration, and 20% by the Council. The latter of course fulfils what is essentially a political role of the first importance. It makes the major choices, acts as arbitrator and has the last say in formulating decisions. In policy matters, when there is unanimous agreement between the representatives of member countries and the Executive, the text is usually adopted by the Council without further ado. Following the practice in France, the draft decision is entered on list A, the contents of which are ratified by the Council without discussion. If anybody does not agree, particularly the representative of the Commission,

he is entitled to have the question brought before the Council on list B.

At this final stage, procedure becomes important and there is much manoeuvring, complicated by the fact that it sometimes relates to a number of different decisions. More often than not there are many late nights, followed by a package deal, a compromise or a general agreement suggested by the Commission. The various phases of negotiation form a unity which in actual fact derives from the fact that many different acts and provisions of the Community hang together. This interdependence became very clear during the last marathon on agriculture, or during the transition to the second stage early in 1962. On this point, the Treaty expressly states that certain objectives must all be realized before the passage from the first stage to the second. And this transition called for certain achievements in the fields of anti-trust legislation, agriculture and equal pay for equal work performed by men and women, besides which it contains a political condition establishing a parallelism between German industry and French agriculture. Counting upon this interdependence, France has demanded the adoption of a common agricultural policy whilst Germany has asked for anti-trust legislation based on prohibition. To this end, both these members gave determined support to the Commission's proposals. When general agreement was reached, it was not on the basis of the lowest common denominator as so often happens in international negotiations; it has a fairly pronounced "Community" bias, one important provision being new powers for the Executive in the field of agriculture.

To conclude, it is clearly evident that the mainspring of this machinery is collaboration between the Commission and the Council. Assisted by its administrative services, the Commission has responsibilities in management, control and execution; here, as part of its normative function it carries out a task of planning and of defending the interests of the Community as well as an outstandingly important role of conciliation and negotiation. The machinery of the Council is used to screen and filter the Commission's proposals and give the decisions their final form. Admittedly the Council may itself originate certain decisions, but in practice the Executive has something like a monopoly of initiating and creating. This results in a great difference in working methods between the two institutions. The Commission has no direct support from governments or peoples,

but it has a strong position guaranteed both by the Treaty and by the fact that it is the spokesman not of any special interest but of the Community as a whole and of all member countries. Moreover it is the Commission's texts which are used as a basis for discussions, and the importance of the first draft and the advantages which its author has are well known. Because of a number of factors working in support of the Commission, the latter does not have the appearance of an international secretariat, often compelled to settle for the lowest common denominator, but rather that of a seventh party to the discussions of the Six—one moreover which is the guardian of their common conscience. In fact, in these complex negotiations, the Commission, taking its stand on the Treaty, brings out the highest possible common European factor.

That, very much oversimplified, is how the Community makes decisions. We have deliberately taken the longest path—that of organic collaboration between the Council and the Executive. There are several variants to this model, including various kinds of voluntary collaboration between these two institutions. Thus according to the case under consideration, one phase or another will be shortened or the position of the Commission will be slightly different. For example, in the case of executive actions or even the modification of existing rules, the first phase at Commission level would be more concentrated. The period of preliminary study would be replaced by documentation and experience which already exist. When on the other hand the Commission is solely responsible for executing the decision, the entire phase of dialogue between it and the Council will be eliminated or replaced by a simple exchange of views and information. In cases where the Treaty does not make collaboration between the Commission and the Council mandatory, the arrangement is only slightly altered, for the Council has made a habit of associating the Commission with all its activities; this voluntary association is all the more natural since all initiatives come from the Commission; what does change is the way in which the Commission negotiates, slightly weakened as it is by not having the weapon of procedure as it does in formal collaboration. Nonetheless, in practice the Council avoids taking action contrary to the views of the Commission and generally seeks its agreement. This general practice does not rule out some tensions.

In this way, several variants can be obtained by taking into

consideration the various links which exist between the Commission and the Council, the nature and importance of their actions and the precise circumstances of each case. In other words, our model is intended as a general outline which varies according to these different factors. Nevertheless, these variations do not fundamentally change the process described, a process which is followed in the overwhelming majority of cases, and the most important ones, with which the organs of the Community have to deal.

The striking thing about this procedure is of course the secondary part played by the European Parliament and the Economic and Social Committee. Even when they are asked to give an opinion their influence is not very great. Paradoxically, it was when the anti-trust legislation was being prepared that the European Parliament, although not formally due to be consulted, played an active part owing to the ability and personality of its rapporteur. But apart from this, the European Parliament and the Committee appear to be kept out of the complex negotiation between the Commission and the Council. It is when normative functions or budgetary questions are involved that its exclusion is most to be regretted. Nevertheless, it would seem that by using its weapon of censure the European Parliament could make its views respected by the Commission. The latter usually keeps it informed when it is working on proposals, but not of any changes made to them during its negotiations with the Council. Thus the most important part of the decision-making process remains confined within the closed dialogue between the Commission and the Council, assisted by their committees and by experts.

## V

### CONCLUDING REMARKS

1. We would remind our readers of some other similarities between the European Community and a federal system. The most important thing after making decisions is to apply them. All the writers on this subject have emphasized that the rulings and decisions are not only *binding* but also *immediate*<sup>1</sup>. Just as in a federal State,

<sup>1</sup> No reference is made here to directives and other acts which, interesting though they may be, are still mediate.

these acts impinge directly on the citizens in the countries without any transformation or control by national authorities. There are something approaching 40 regulations<sup>1</sup> and more than 50 decisions. The Community's power bears directly upon individuals and corporate bodies, and can impose heavy penalties upon them, since acts which constitute a financial obligation upon persons other than States can be enforced at law. The same discrimination in favour of States is seen in decisions of the Court, which cannot be enforced. The power of the Community is exercised first on individuals and groups, against whom sanctions may be enforced by the appropriate arm of the national government following the method of functional duplication. Federalist techniques are written into the Treaty at many points. Fines of up to 1 million dollars can be imposed under the anti-trust legislation. As in every democratic regime, individuals and corporate bodies can appeal directly to the Court in respect of these obligations and sanctions. Thus the democratic balance between obligations and guarantees is restored.

What is the situation as far as States are concerned? In certain cases the Commission is entitled to authorize other member countries to take punitive action against a State which is in breach of Community rules; these are "controlled reprisals" by the Executive of the Community. This procedure has not been used often. But the central procedure consists essentially of an appeal to the Court, which is available both to the Commission and to any other member country against a State which does not meet its obligations. If this is the finding of the Court, the State is bound to take action in fulfilment of the Court's decision. But there is no Community-type enforceable sanction. In practice, except in a grave crisis, the collective pressure, amounting almost to coercion, which the Community can exercise stems from the close interdependence between the various committees and procedures, economies and decisions. If one member were to dissociate himself from framing or executing a common decision, this could set up a chain reaction which in the last resort would constitute a threat to the still fragile solidarity, and strike at the very existence, of the Community.

There is a certain limited sense in which the European Community forms a whole, the parts of which are both autonomous and bound

<sup>1</sup> These regulations can be divided into substantive and executive regulations.

up with one another, but at the present time the balance is tilted rather towards the autonomy of member countries and away from their solidarity.

2. This machinery is sustained by a vast process of integration in several economic and social fields,<sup>1</sup> and it is this movement which forms the Community's most stable foundation. Here we shall simply recall in closing one simple aspect of integration looked at from the viewpoint of federalism—the establishment of large numbers of professional groupings at Community level. According to the figures available there are more than 100 European Groupings representing various branches of industry, skilled trades and commerce involving some 550 national member organizations. The agricultural sector is entirely covered by about 120 European federations made up of more than 800 member organizations. These federations differ in size but they include some summit or centralized types such as the Committee of Agricultural Professional Organizations (COPA) or the Union of European Community Industries (UNICE) whose management committees are regularly attended by the Presidents and senior officials of the national central bodies. Over against this large number of employers' groups, there are two Trade Union organizations—The Free Trade Unions and the Christian Trade Unions.

This burgeoning of professional organizations is not confined to the Community. At the end of 1962 there were in Switzerland more than 1,000 national associations covering either the whole country or one region or industrial zone. Of this number about a dozen were front rank organizations, including the Association of Trade Unions, the Farmers' Union and the Union of Trade and Industry. As in the European Community, they grew up in response to real needs—including the need to ensure that the interests of their members were adequately defended at the seat of power. As in the European Community, their formation was encouraged or even suggested by the Executive, which needs to have as opposite numbers spokesmen at the national or community level. For example, the Swiss Confederation has for some time been subsidizing the principal central associa-

---

<sup>1</sup> We have described this in *Dimensions européennes de la science politique*. Paris, L.G.D.J., 1963, pp. 146-183.

tions to enable them to maintain permanent Secretariats. To take an example from the Community, the European Executive promoted the establishment of a European Consumers' Association. The Executive calls into being organized representation of various interests at Community level by the simple expedient of refusing to deal with national groupings. When they are formed, the dialogue begins.

Even now such groupings, as well as national pressure groups, are taking part in the decision-making process of the European Community. They are not yet so influential as their Swiss counterparts, for the forces of nationalism still predominate in the Community and action at European level smacks more of co-ordination and compromise than of common demands with united backing. But there is good reason for thinking that their powers of action and organization will grow as the powers of the Community are strengthened. Thus it is not entirely fanciful to visualize European integration as following in its own way the path traced by Swiss experience in this respect too. Yet it lacks the one thing needful—an overall political structure based upon an active European consciousness. Nevertheless, in its present state of development, partial and incomplete though it is, the Community has more than one of the marks of federalism. The decisive step has not yet been taken.