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# Legitimate Diversity: the New Challenge of European Integration

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## **Legitimate Diversity: the New Challenge of European Integration**

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# Legitimate Diversity: The New Challenge of European Integration

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## 1. The Deadlock of Present Constitutional Debates

The public debate over a European Constitution, fueled by frustration over the meager outcomes of the Nice Summit, seems headed for deadlock before it has really begun. That was, perhaps, inevitable after Joschka Fischer (2000), in his Humboldt-University speech, had asked for no less than agreement on the Union's institutional *finalité* as a democratic federal state. Once the issue was raised in these terms, the lineup was predictable. Support could be expected from the European Parliament and, in more guarded form, from the Benelux countries and from Italy — to which Gerhard Schröder, speaking for the German social democrats and in particular the Länder, added a *ceterum-censeo* on the need for constitutional limitations on the powers of the Union (SPD 2001). Equally predictably, fundamental opposition was voiced in the United Kingdom and in Scandinavia, whereas it was not clear for a while whether France would side with the defenders of national sovereignty or would finally conclude that its long-term aspirations to creating a European “world power” did depend on federal institutions. As it turned out, President Chirac's response in Berlin (Chirac 2000) dodged the choice among institutional *finalités* by reasserting the pragmatic priority of enhanced cooperation among a “pioneer group” of countries willing to move further and faster toward an unspecified goal of European integration. A year later, finally, prime minister Jospin (2001) reversed the order of discussion. Agreement on common European purposes and substantive European *projets* should precede and guide the construction of institutional blueprints. He left no doubt, however, that the German vision of a

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European federal state was not acceptable, and that a Union understood as a “federation of nation states”, while requiring institutional reforms to strengthen effectiveness and accountability, would continue to rely on the institutional “triangle” of Council, Commission and Parliament.

There are good pragmatic and theoretical reasons for following Jospin’s recommendation on the order of the debate. Discussions on a constitutional *finalité* in the abstract are fraught with almost insuperable misunderstandings: What the Germans mean when they say “federalism” is not what the French understand<sup>1</sup> — or what the British seem to hear. The same would be true of other key concepts as well, all of which have their meanings defined in the specific constitutional traditions of member states — whose differences are perhaps appreciated by specialists in comparative government but cannot be communicated in wider public debates. Moreover, Jospin’s recommendation also has history on its side. On every occasion — from the creation of the EEC to the Single Market and the Monetary Union — all major institutional innovations in Europe were preceded, facilitated and justified by agreement on the substantive policy goals for whose achievement they were thought to be necessary and acceptable.

This historical practice finds its theoretical justification in the fact that there is only one institutional form of European integration that could be debated and evaluated without reference to specific substantive policy problems or goals, namely the constitution of an all-purpose democratic state. If this form were attainable and desirable — and there are indeed supporters of this vision, including political philosophers, members of the European Parliament, and perhaps Joschka Fischer speaking as a private citizen — one would still need to discuss the relative advantages and trade-offs between the federal or unitary, presidential or parliamentary, majoritarian or consensual characteristics of the future European state (Lijphart 1999), but one would not primarily need to discuss projects or purposes. These could and should be safely left to future democratic processes, empowered and constrained by the new constitution.

It seems safe to predict, however, even at this early stage of the constitutional debate, that most of the actors representing “the peoples of Europe” in the current round

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<sup>1</sup> At a recent Franco-German conference, Michel Albert, surely one of the best-informed friends Germany has in France, praised the ECB as the model institution of a federal Europe. In Germany, by contrast, everybody would consider the similar powers of the *Bundesbank* as an instance of extremely centralized governance lacking all the characteristics of German-type cooperative federalism.

of institutional reform are not, or at any rate not yet, willing to create an all-purpose European state. If that is so, the debate must be about reforms of present EU institutions — with the consequence that it will be, explicitly or implicitly, governed by the “form-follows-function” logic recommended by Lionel Jospin and practiced in the past by Jacques Delors and Jean Monnet alike. Present institutions have allowed and legitimated the creation of the Single Market and Monetary Union, and proposals for change need to be justified as being necessary and legitimate for dealing with new challenges. Hence the constitutional debate ought to be about the additional goals we wish to achieve or, more urgently, the manifest challenges that we must confront, and about why present European institutions should be inadequate for realizing these aspirations. It is only on this basis that one should expect agreement on institutional reforms that can be justified at this historical juncture in the process of European integration.

Since agreement on goals is less likely than agreement on the existence of manifest challenges, my analysis will focus on the latter. I will try to show that the European Union is indeed facing major challenges in policy areas where effective responses are hard to achieve or even impossible within the present institutional framework of the Union. The most important among these seem to be

- the challenges of a Common Foreign and Security Policy that have become manifest in the Balkans and after September 11 2001;
- the challenges arising from Eastern enlargement; and
- the challenges to the internal order of member states that arise from the successful completion of the internal market and the monetary union.

However, before discussing the nature of these challenges and the demands that they are making on the problem-solving capacity of existing EU institutions, it will be necessary to provide a brief overview of the functioning of these institutions. In order to simplify, my focus will not be on institutional structures as such, but on three more abstract modes of policy making<sup>2</sup>, for which I will use the labels “intergovernmental negotiations”, “joint-decision making” and “supranational centralization” (Scharpf 2001). It will then be possible to discuss the new challenges with regard to the strengths and limitations of these modes of policy making.

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<sup>2</sup> I use the term “mode” to characterize the combination of rules defining rights of participation and the applicable decision rules.

## 2. The Plurality of European Governing Modes

Like the political systems of nation states<sup>3</sup>, the European Union operates differently in different policy areas. However, as European governing institutions are being created by the member states, the initial mode in all policy areas must be *intergovernmental agreement*. It is the governments of member states who must decide that certain policy choices, that otherwise would be exercised autonomously within the political systems of member states, should be transferred to the European level. In the same process, governments must also decide in which institutional mode these European policies should be chosen. They may do so themselves through “intergovernmental agreements”; they may move matters into the “joint-decision” mode involving the Commission, the Council and the European Parliament; or they may directly empower the Commission, the European Court of Justice or the European Central Bank to make binding policy choices without any further participation of member governments.<sup>4</sup> These modes differ in their capacity to achieve effective policy choices in the face of conflicts of interest among member states, and by empowering different actors, they will affect the policy outcomes that are likely to be achieved (Héritier 2001).<sup>5</sup> They also differ with regard to the range of choices that could be legitimately taken.<sup>6</sup>

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<sup>3</sup> In Germany, for instance, the characteristic governing mode for many policy areas is a form of joint-decision system involving the federal government and its parliamentary majority in negotiations with the Länder; in other policy areas, however, the Länder have no policy making role and the government is instead involved in “neo-corporatist” negotiations with peak associations; in still other policy areas, the mode of governing is straightforwardly majoritarian; and given the large roles of the Constitutional Court and of the Bundesbank important policy choices are also made in a centralized mode.

<sup>4</sup> A (rational-choice) theory that would explain these choices of governing modes would have to simultaneously consider the pressure of problems that could not be resolved by purely national action and the anticipated problems that national governments would have to cope with if European policy choices should violate important national interests or politically salient constituency preferences. These anticipated problems could be represented by three basic game-theoretic constellations — the Prisoner’s Dilemma, the Battle of the Sexes and a game in which common interests are dominated by conflict over the choice of a solution.

<sup>5</sup> Even though Adrienne Héritier explicitly refers only to decision rules, her distinctions are parallel to the three modes of policy making discussed here. Focusing on the field of utilities regulation, she shows how the choice among the three modes affects the relative weight given to market-liberalizing and social-cohesion concerns in European regulations of public services..

<sup>6</sup> Héritier (2001) also shows that while policy areas are institutionally associated with a given mode (e.g., competition → supranational-hierarchical mode, internal-market → joint-decision mode) specific policy initiatives may be plausibly launched under one or the other institutional mode — which implies that the choice of mode may itself become the object of a strategic game.

### *2.1. Supranational Centralization*

Under European conditions, the establishment of the supranational-centralized mode is a two-step or three-step process. At bottom, there must be an intergovernmental agreement on the Europeanization of the policy area. This agreement may also formulate a basic policy choice and then delegate its further specification and enforcement to a supranational institution which is allowed to exercise its discretion without the participation of national governments. The clearest example of a two-step establishment of the supranational-centralized mode is provided by the authority of the European Central Bank over European monetary policy. Its mandate to “maintain price stability” (Art. 105 TEC) was defined through Treaty negotiations, and in carrying out this mandate the Bank is more insulated against the influence of EMU member governments than is or was true of any national central bank, including the German Bundesbank.

The same two-step structure is in place in all other policy areas where the Treaties include directly applicable prohibitions and obligations addressed to member states or corresponding rights of individuals and firms. In this case, the power of the Commission to initiate treaty infringement proceedings against individual member states and the power of the European Court of Justice to issue formally binding and enforceable interpretations of these Treaty obligations could only be reversed through unanimously adopted and ratified amendments of the text of the Treaties. In practice, therefore, the power of Treaty interpretation has created a capacity for supranational-centralized policy-making in areas where Treaty provisions are directly applicable.

With few exceptions (one of which is the injunction against gender discrimination in employment relations), these conditions apply in policy areas promoting economic integration and market liberalization. Here, once the basic commitment was agreed-upon, the interest constellation could indeed be construed as a symmetrical Prisoner’s Dilemma: All member states would be better off if the commitment were carried out in good faith, but all would also be exposed to the free-riding temptations of protectionist practices. If that was anticipated, delegating the power of enforcement to supranational actors, the Commission and the Court, would indeed be legitimated by the enlightened self-interest of member states (Moravcsik 1998). If this conceptual frame was accepted, it would be entirely acceptable that individual decisions could conflict

with the short-term interests of national governments (Burley and Mattli 1993). It also implied, however, that the politically uncontrolled evolution of European competition law would lead to judicial interpretations of Treaty commitments that could, and often did, go beyond the original intent of the treaty-making governments (Scharpf 1999).

To a lesser extent, the same policy-making power also exists in the context of a three-step structure — where intergovernmental agreement in the Treaties has created a European competence, but left the definition of substantive policy choices to directives and regulations adopted in joint-decision processes involving the Commission, the Council and, increasingly, the Parliament. In the enforcement of these more specific rules of “secondary” European law, discretionary interpretation by the Commission and the Court is more narrowly circumscribed, but since such interpretations could only be politically corrected upon a legislative initiative from the Commission and with the agreement of at least a qualified majority of Council votes, the capacity for supranational-centralized policy making exists here as well.

It is these centralized enforcement powers of the Commission and the Court that account for the progress of economic integration in the periods of political stagnation in the 1970s and early 1980s, and they also account for the rapid advancement and radicalization of market-liberalizing policies once the basic political commitments had been agreed upon in the Single European Act of 1986. Moreover, these enforcement powers could also be employed strategically by the Commission to induce reluctant governments to agree on additional legislation that would again advance economic liberalization (S. Schmidt, 1998). Hence governments intent on protecting public services and infrastructure functions against the injunctions of undistorted competition have so far not succeeded in promoting Treaty revisions that would impose legally effective limitations on market liberalization.

## *2.2. Joint-Decision Making*

The normal mode of policy-making in the “first pillar” of the European Community has the characteristics of joint-decision-making involving supranational actors as well as national governments. It takes the form either of “directives” that need to be transposed into national law by the legislative processes of member states, or of “regulations” that take direct effect. Both need to be adopted, on the initiative of the Commis-



sion, by the Council of Ministers acting increasingly under rules of qualified-majority voting, and by the European Parliament whose role was strengthened through the increasing use of co-decision procedures.<sup>7</sup> In preparing its initiatives, the Commission consults a wide range of interest associations, firms, non-governmental organizations and expert committees. Similarly in preparing its common position, the Council relies on the Committee of Permanent Representatives (COREPER) and large numbers of specialized committees representing the governments of member states. As the role of the European Parliament has been strengthened, specialized EP committees and negotiations between these and Council committees have also increased in importance. Moreover, if directives need to be “implemented” through more detailed regulations, this is generally delegated to the Commission, acting in “Comitology” procedures involving, again, civil servants and experts nominated by member governments.

Taken together, these institutional arrangements provide so many veto positions, and so many access points for interest groups, that the actual policies produced by joint-decision processes are unlikely to violate status-quo interests that have high political salience in member states or that are represented by well-organized interest groups. At the same time, however, the central role of the Commission, and the commitment of “Europeanized” national representatives in COREPER and in Comitology committees generally ensure that conflicting initial positions are not taken at face value, and that opportunities for creative “win-win” solutions or mutually acceptable compromises are actively explored. As a consequence, agreement is reached more frequently than one would expect on the basis of a static analysis of postulated national interests, and it may also be assumed that these outcomes are generally legitimated by a broad consensus among the parties involved (Eichener 2000).

By the same token, however, the multi-actor negotiations required here tend to be not only complex but quite intransparent — which is easily criticized as violating norms of democratic accountability. A more relevant line of criticism points out that the joint-decision mode, like all multiple-veto systems (Tsebelis 1995), has a systematic bias favoring status-quo interests over political preferences that could only be satisfied by substantial changes of the status quo. Moreover, consensus seeking processes are

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<sup>7</sup> Héritier (2001) has shown how the empowerment of the Parliament has strengthened social-cohesion concerns in the regulation of liberalized public utilities.

slow, and if they are successful the resulting legislation is likely to be either at the lowest common denominator or encumbered by excessive detail.<sup>8</sup> In other words, the problem-solving effectiveness of the joint-decision mode is limited in policy areas where conflicts of interest have high political salience in the constituencies of member governments, and in general the efficiency of policies that can be adopted leaves much to be desired.

### *2.3. Intergovernmental Agreement*

The mode of intergovernmental agreement is not limited to the foundational functions of allowing the Europeanization of public policy in areas that were hitherto under autonomous national control — either through explicit Treaty revisions or through unanimous agreement in the Council under the “necessary-and-proper” clause of Art. 308 (ex 235) TEC. It also applies in policy areas where governments have recognized a need for European action but where, in the view of at least some of them, the likelihood or the potential (economic or political) costs of decisions going against their own preferences is thought to be so high that they cannot accept qualified-majority voting in the Council. Thus, the unanimity rules has so far been maintained in the fields of tax harmonization, budget decisions, and a range of social-policy areas. If reservations are even stronger, governments will also want to avoid being put on the spot by the Commission’s monopoly of legislative initiatives or having to negotiate over compromises with the European Parliament, and they will seek to disable the supranational interpretative and enforcement powers of the Commission and the Court. These have been the conditions characterizing intergovernmental policy making in the second and third “pillars” of the Treaty of European Union dealing with “Common Foreign and Security Policy” and “Justice and Home Affairs”, even though some of the latter competencies on visas, asylums and immigration are in the process of coming under first-pillar rules (Arts. 61-69 TEC). In recent years, finally, the European Council has increasingly come to circumvent the Commission’s monopoly of legislative initiatives by

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<sup>8</sup> Both possibilities are entirely plausible in multi-veto systems: Low-regulation countries having no interest in common European solutions may veto all rules providing higher levels of protection. By contrast, high-regulation countries with an interest in a common solution may still use the veto threat to ensure that their own particular set of rules is included in it.

defining items on the European policy agenda in its Summit meetings which then have to be worked out through legislation or ad-hoc intergovernmental arrangements.

In all these instances, national governments have a veto — which they may employ in the bloody-minded defense of narrowly-defined and short-term national (or economic) self-interest or with a view to either common European interests or to the longer-term benefits expected from closer cooperation and policy coordination. In any case, however, the outcomes of negotiations in the intergovernmental mode tend to have higher political visibility than is generally true of European policies adopted in the supranational or joint-decision modes — which also means that they are more likely to be scrutinized by national opposition parties and the media, and that governments must generally be able and willing to publicly defend their support in terms of the (enlightened) self-interest of national constituencies. As a consequence, intergovernmental agreements are supported by the legitimacy of the governments that conclude them, but their problem-solving effectiveness is more narrowly restricted to solutions that do not violate the intense preferences of national constituencies.

### **3. New Policy Challenges**

The European institutions we have, it is fair to say, have helped member states to achieve a degree of market integration, economic interaction and internal mobility that has gone far beyond the original aspirations of the governments that had concluded the Treaty of Rome. In doing so, they have also contributed to the unprecedented period of peace that Western Europe has enjoyed over the last half-century. As European integration has succeeded in removing economic boundaries among member states, it has also reduced the political salience of national boundaries to a degree that war among member states has become unthinkable. In achieving these outcomes, European integration has relied on modes of governing which, though not always very efficient, have been adequate to their specific tasks, and whose legitimacy, though not “democratic” in the sense of constitutional democracies at the national level, is supported by normative arguments that are convincing for the functions that are in fact performed.

It should also have become clear, however, that both the effectiveness and the legitimacy of these governing modes are limited, and that one could not and should not

expect that in their present shape they could cope with an unspecified range of new challenges. Thus, if the present constitutional debate is to be pragmatically meaningful, it ought to focus on these limitations — and thus on the question whether the foreseeable challenges to the Union and its member states could or could not be met within the present institutional framework of the Union.

### *3.1. Common Security Capabilities (CFSP and ESDP)*

The most serious challenge is also the one about whose possible resolution I know the least. In the postwar decades, the twin problems of European security — “keeping the Russians out and the Germans down” — were resolved by the NATO alliance under the hegemonic leadership of the United States. With the end of the Cold War, the Soviet threat evaporated while the German threat, if it existed, had dissolved in the process of European integration. However, as Communist rule disintegrated, suppressed ethnic and religious conflicts re-emerged not only in the successor states of the Soviet Union but also closer to the EU, in the former Yugoslavia and its Balkan neighbors — and while they did not constitute an immediate military threat to Western Europe, it was clear that EU member states would be morally and practically affected by escalating violence and genocide in the own “back yard”, by waves of refugees, and by conflicts among their immigrant populations. There was no question that maintaining or re-establishing peace and order in the Balkans was in the immediate and urgent self-interest of EU member states.

While NATO eventually did get involved in Bosnia and in Kosovo, it also became clear that America had turned into a very reluctant hegemon in areas of the world where its own security and economic interests were not directly at stake. At the same time, however, the Balkans interventions revealed that European countries, in spite of long-standing attempts to coordinate their foreign policies, were still working at cross purposes and could not agree on common strategies that would have allowed them to intervene jointly at a time when this could still have staved off the escalation of conflict. Even more important was the recognition that, individually and jointly, they lacked the reconnaissance and logistic capabilities as well as the trained intervention forces and the specialized weaponry that would allow them to engage on their own in peace-

making missions if the United States were not willing to assume the leading role and to carry the major burden of actual operations.

In the meantime, European countries have strengthened the intergovernmental institutions for coordinating their Common Foreign and Security Policy (Hoffmann 2000) and they appointed Javier Solana as High Representative (HR-CFSP). In addition, they are in the process of building common military capabilities that would allow either autonomous action or more co-equal cooperation with the United States. Thus, at Helsinki they agreed to create the institutional infrastructure of a European Security and Defense Policy (ESDP) which also includes the commitment of all EU member states (with an opt-out for Denmark) to contribute national contingents to a European Rapid Reaction Force (ERRF). In the process, governments also seem to have achieved a remarkable convergence of cognitive and normative orientations — apparently assisted through intense and frequent “transgovernmental” interactions of the military and foreign-policy staffs and elites of the participating governments (Howorth 2000; 2001).

Nevertheless, as the aftermath of September 11 and the war in Afghanistan has shown, the United States continues to act by its own insights; the military and diplomatic responses of its European allies are determined nationally and in bilateral coordination with the U.S. government; and common European forces are not yet a factor that matters internationally. Moreover, the creation of ERRF has been delayed by financial squeezes and by the difficulties of combining the diverse offers of national contributions into an effective military capability. At the same time, political agreement on common strategies is impeded by the extremely high salience of military commitments in national politics — particularly in countries with a neutralist tradition or with significant segments of public opinion or of governing parties committed to pacifism. In any case, however, the deployment of national contingents in military action is so closely associated with core notions of national sovereignty and democratic accountability that all attempts at coordinated action are likely to remain contingent on time-consuming national deliberations.

In short, while coordination has been improved, CFSP and ESDP are still stuck in the intergovernmental mode which, in the absence of vigorous American leadership, will continue to prevent those rapid European responses which, in the crises of the past decade, might have averted the escalation of conflict and the later need for more mas-

sive interventions. At the same time, however, given the diversity of the international and military positions of its members, it seems unlikely that the EU as a whole could move CFSP/ESDP into the joint-decision mode, where national decisions might be replaced by Commission initiatives and qualified-majority votes in the (still to be created) Council of Defense Ministers. Needless to say, an effectively supranational-centralized solution which — in analogy to the creation of the European Monetary Union — would eliminate the control of national governments and national parliaments over the deployment of ERRF forces, seems completely out of the question.

### *3.2. Eastern Enlargement*

The prospect of moving from the present fifteen to perhaps twenty-seven EU member states during the present decade is confronting the European polity with severe challenges. The most obvious problems of voting rules in the Council and of the size of the Commission were addressed at the Nice Summit in a not very convincing fashion. In fact, it has been shown that, compared to present QMV rules, the Nice Treaty will even increase the threshold of reaching majority decisions in the enlarged Council (Tsebelis and Yatağan 2001). However, what matters more in this regard is the dramatic increase in the economic, social, political-cultural and political-institutional heterogeneity among EU member states that Eastern enlargement will bring about. This will obviously affect the capacity of the EU to adopt new policies in the intergovernmental and joint-decision modes — a problem to which I will return in the next section. But it will also affect existing policies.

As I pointed out above, the application and enforcement of existing EU law is carried out, in the supranational-centralized mode, by the Commission and the European Court of Justice (and by the courts of member states when they apply the preliminary rulings of the ECJ in ordinary legal proceedings). Even though the power to interpret the law will often shade over into policy making, the Commission and the Court will normally remain within the frame of understandings that were shared among the governments that participated in the adoption of European rules — which also suggests that EU law and its interpretation will by and large reflect the generalized interests of the countries that were members at the time of its adoption. Since the massive expansion of

the *acquis communautaire* through the Single European Act did occur only after Southern enlargement, and since the later accessions of Finland, Sweden and Austria involved countries that were, by and large, similar to the original member states, the enforcement of the *acquis* has so far not been considered particularly problematic. But that is likely to change with the accession of Central and Eastern European countries — whose governments had no voice in the accumulation of the existing mass of European law, and whose conditions and interests differ fundamentally from those of the countries that had shaped its content over more than four decades (Holzinger and Knöpfel 2000; Müller et al. 1999).

The potential problems are illustrated by the experience of German unification, when the complete *acquis* of West German law and practices were imposed in one full sweep — with the consequence that existing East German industries were more or less wiped out and that mass unemployment, social disintegration and political alienation still persist in Eastern Germany in spite of financial transfers amounting to five or six percent of West German GDP annually. It is of course true that by the time of their entry into the EU, Central and East European accession countries will have had a longer period of capitalist and democratic transformation than was true of the GDR. It is also true that in the accession negotiations the Commission may agree to postpone full application of some requirements for specified transition periods. There is no question, however, that the complete and uniform *acquis* will have to be accepted in principle before accession is allowed, and that it will then be enforced the usual supranational-centralized procedures.

The consequences could be destabilizing in one of two ways. The most likely outcome — under the counter pressures of political commitments to early enlargement and the formal rigidity of the Commission's negotiating stance — would be accession agreements containing unfeasible commitments to the uniform *acquis* that are formulated with the tacit complicity of Commission representatives with the expectation that lax implementation will be tolerated. But since the gap between what is legally required and what is economically affordable and politically feasible will be glaring, the resultant implementation deficits cannot go unnoticed. In the accession countries, the cynicism toward EU law would infect the nascent respect for the rule of law in general; and as firms and interest groups in the present member states become aware of illegal competi-

tive advantages that accession countries are gaining through the lax implementation of EU rules, the legitimacy of strict implementation may be undermined in the “old” member states as well.

In the less likely scenario, the Commission would not tolerate lax implementation and would use its considerable sanctioning powers to force governments in the accession states to stick to the letter of the agreements they had to sign. In that case, rules designed for highly competitive Western social-market economies with stable democracies would be enforced in economically backward and politically fragile Central and Eastern European countries with outcomes that could be as destabilizing as those in some developing countries that were forced by the IMF and the World Bank to cut budget deficits and welfare spending at the height of an economic crisis in order to qualify for international loans. In contrast to East Germany, where the political repercussions of imposed “Westernization” were buffered not only by massive transfer payments from West Germany, but also by the integration of political elites into the strong institutions of the Federal Republic, the attempt to rigidly enforce the European *acquis* in Central and Eastern Europe could delegitimize not only European integration but the democratic regimes of new member states as well.

If these equally unpromising scenarios are to be avoided, the Union needs to find legitimate ways to differentiate the rules that are in fact applied in member states whose economic, social and institutional circumstances would render the uniform application of uniform European rules either impossible or fraught with unacceptable risks. Under the circumstances, this differentiation cannot be left to the discretion of the Commission and to ECJ judgments in the individual case, where the absence of general standards and the lack of transparency would encourage special pleading and provoke suspicions of favoritism and corruption. At the same time, however, the formulation of general but differentiated standards in the legislative process could turn out to be extremely difficult — and might be counterproductive in policy areas where the salient differences among countries cannot be validly represented by quantifiable indicators, and where it would not be enough to respond to such differences by adopting legislation with quantitatively differing requirements for member states in different categories. At bottom, however, these difficulties differ only in degree from the problems that the EU must also face



among its present member states when the seriousness of the challenges discussed immediately below is fully appreciated.

### *3.3. Safeguarding European Welfare States*

European integration has succeeded beyond expectations in widening and deepening the internal market and in creating the monetary union. But as these economic goals are being realized, the capacity of national governments to influence the course of their national economies and to shape their social orders has been greatly reduced. Thus monetary union has not only deprived member states of the ability to respond to economic problems with a revaluation of the currency, but it has also created conditions under which European monetary policy — which necessarily must respond to conditions in the Euro Zone at large — will no longer fit, and hence contributes to the destabilization of, national economies with below-average or above-average rates of inflation and economic growth. Yet while the inevitable misfit of ECB monetary policy increases the need for compensatory strategies at the national level, national governments find themselves severely constrained in their choice of fiscal-policy by the conditions of the Stability Pact — which will punish countries suffering from slow growth, but can do nothing to discipline the governments of overheating and highly inflationary economies (Enderlein 2000).

Similarly, European liberalization and deregulation policies have eliminated the possibility of using public-sector industries as an employment buffer; they no longer allow public utilities and the regulation of financial services to be used as tools of regional and sectoral industrial policy; and European competition policy has largely disabled the use of state aids and public procurement for such purposes. At the same time, European integration has removed all legal barriers to the free mobility of goods, services, capital and workers. EU citizens have the right to reside anywhere within the territory of EU member states, and the Treaties impose very narrow limits on the ability of member states to discriminate in favor of their own nationals.

In short, compared to their repertoire of policy choices two or three decades ago, national governments have lost most of their former capacity to influence growth and employment in their economies — most, that is, except for the supply-side options of

further deregulation and tax cuts which are perfectly acceptable under EU law. At the same time, governments face strong economic incentives to resort to these supply-side strategies in order to attract or retain mobile firms and investments that are threatening to seek locations with lower production costs and higher post-tax incomes from capital. By the same token, unions find themselves compelled to accept lower wages or less attractive employment conditions in order to save existing jobs. Conversely, generous welfare states are also tempted to reduce the availability of tax-financed social transfers and social services in order avoid the immigration of potential welfare clients.

Taken together, these pressures and temptations are in conflict with the political aspirations and commitments of countries which, in the postwar decades, had adopted a wide range of market-correcting and redistributive policies, creating “social market economies” in which the effects of the capitalist mode of production were moderated through regulations of production and employment conditions, and in which the unequal distribution effects of capitalist economies were modified through public transfers and services financed through progressive taxation. As long as economic boundaries were under national control, such policies could be entirely compatible with vigorous economic development since capital owners could only choose among national investment opportunities, whereas firms were generally able to shift the costs of regulation and taxation onto captive national consumers. In the absence of tight economic constraints, therefore, politics mattered and governments and unions were within wide limits free to opt for large or small welfare states and for tightly regulated or flexible labor markets. With the removal of economic boundaries, however, these political choices have become comparative advantages or handicaps in the Europe-wide competition for investments, production, and employment.

If these pressures and temptations are not yet fully manifest in the policies of European welfare states, that is largely due to political resistance against the adjustments that would be required by economic self-interest. But political resistance must often be paid for in terms of lower rates of economic growth and lower rates of employment (Scharpf and Schmidt 2000). Another reason are simultaneous efforts to increase the productivity of labor and capital. To the extent that countries succeed here, unit labor costs may be reduced without reducing wages or social-security contributions, and pre-tax profits may rise sufficiently to neutralize the effect of business taxes on

post-tax rates of return. However, if other countries follow suit, these advantages will again be competed away and, in any case, the accelerated rise of labor productivity is not generally associated with a complementary increase of demand in product markets and may thus contribute to the general decline of employment rates in the industrial and service sectors that are exposed to international competition (Scharpf 2000).

It is no surprise, therefore, that countries and interest groups that have come to rely on extensive regulations of the economy and generous welfare state transfers and services are now turning to the European Union to demand the protection, or creation, of a “European Social Model” that would assume the functions that nation states can no longer perform in the way they had done before the completion of the internal market and monetary union. In the abstract, these are highly plausible demands. Before European economic integration had its way, both market-making and market-correcting policies had their place at the national level, where competition law had no higher status than the legislation governing postal services or subsidies to stagnant regions or sectors. If the respective policies were seen to be in conflict, their relative importance had to be determined by political processes, rather than by the constitutional precedence of market making over market correcting concerns. At the European level, moreover, the much maligned Common Agricultural Policy has demonstrated that it is possible to achieve a similar symmetry of free-trade and social-protection policies. Moreover, the successful harmonization of health and safety regulations of foodstuffs, consumer goods and machinery has demonstrated that European institutions are also capable of re-regulating liberalized product markets (Eichener 2000). So why not also combine the policies creating and liberalizing European markets for goods, services and capital with the European harmonization of market-correcting social regulations and taxes?

Economically, that would indeed be feasible. While there is presently much public commotion about the destabilizing consequences of “globalization”, the fact is that the world economy is much less integrated, and hence much less constraining, than is the internal market. At the same time, the European Union is much less dependent on imports and exports than its member states, and with the creation of the monetary union it has become much less vulnerable to the vicissitudes of international capital markets. In abstract economic theory, therefore, macroeconomic management, industrial policy and the social regulation and taxation of business activities, which have become eco-

nomically constrained at the national level, would still be economically feasible policy options for the European Union. This, in fact, had been the promise of the “Social Dimension” which Jacques Delors had associated with the internal market initiative and, again, with the creation of the monetary union. Unfortunately, however, this promise was not, and could not be fulfilled within the present institutional framework of the European polity.

#### **4. The European Dilemma: Consensus and Uniformity**

Why is it that the new challenges discussed above cannot be met effectively within the institutional and policy framework of the European Union? The short answer is that European policy has in the past had to satisfy two implicit requirements — uniformity and broad consensus — and that effective policy responses to the new challenges discussed here would not be able to satisfy both of these requirements at the same time.

The requirement that European policy must take the form of *uniform* rules applying equally across all member states is implicit in market integration, and it is also implicit in the idea of European law: the perfectly unified market demands uniform product standards to eliminate non-tariff barriers, uniform process regulations to create a “level playing field”, and uniform competition rules to prevent discrimination. And even if, in the absence of compelling economic reasons, differences among national legal systems need to be pragmatically tolerated for the time being, that tolerance does not extend to European law — whose very *raison d’être* is to not only to overcome and remove national obstacles to free trade, but also to create a unified European legal order.<sup>9</sup>

There have, of course, been inevitable compromises. Accession countries had to be granted periods of grace before the uniform *acquis* would fully apply in all policy areas; not all member states have yet become part of the monetary union or of the “Schengen area”; and political opt-outs had to be accepted in other policy fields as well.

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<sup>9</sup> Since legal integration was able to proceed so much faster than political integration (Weiler 1981), one may also suspect that insisting on the unity of European law has come to be a symbolic substitute for the political unification of Europe.

But these are considered exceptions that cannot invalidate the commitment to common rules for all member states — and while structural funds are of course not available in all regions of the Union, the rules governing their availability are the same everywhere. In principle, therefore, European policy, whether adopted in the supranational-hierarchical mode, in the joint-decision mode or in the intergovernmental mode is meant to be uniform throughout the territory of the Union's member states.

The requirement of *consensus-based* policy making applies obviously to decisions that have to be reached in the intergovernmental mode, and in practice it applies also in the joint-decision mode, even if the Council decides by qualified majority. Formally, it does not apply in the supranational-centralized mode. As I have pointed out above, however, the delegation of supranational powers is generally premised on a pre-existing intergovernmental agreement on the purposes that are to be achieved. In any case, however, none of the new challenges would or could be dealt with in the supranational-hierarchical mode under present institutional conditions. Instead, such policies would have to be adopted either by intergovernmental agreement or in the joint-decision mode, where they indeed depend on broad consensus.

In the field of European security policy, uniform policies would be highly desirable from a problem-solving perspective. For the reasons discussed above, however, it is most unlikely that consensus could be reached on solutions that would ensure effective and speedy military action in a field where agreement is impeded by considerations of national sovereignty and by the high political salience of issues of war and peace in the light of divergent historical legacies and normative orientations. Conversely, it seems that with regard to Eastern enlargement, only uniform policies could find the agreement of all present member states — which would then rule out the needed adjustment of the *acquis communautaire* to radically different economic and social conditions in Central and Eastern European accession states. If there are solutions here, they would have to be found in the context of social policy problems arising from economic integration for the present member states as well. These will be my major concern here.

Consensus and uniformity worked well for the basic commitment to economic integration, and it also worked, under the political and economic conditions of the mid-1980s, for the commitment to liberalization and for the harmonization of product standards which, at least in principle, had the support of consumers and producers in all

member states. Consensus does not work quite so well for the regulation of production processes. Since rules protecting the environment, work safety and employment conditions may increase production costs and prices, they are not generally supported by consumer organizations, and while producers in high-regulation countries will support harmonization at high levels of protection to ensure “a level playing field”, they are likely to be opposed by producers in low-regulation countries. As a consequence, European regulations of production processes will generally be in the nature of minimum standards that must be acceptable to all countries. By comparison, however, consensus on process regulations is still easier to achieve than agreement on European policies in the core areas of the welfare state and in the harmonization of taxes on business profits and capital incomes.

One reason is that regulatory and tax competition will not necessarily hurt all member states. For instance, small countries may in fact increase their total revenue by attracting mobile capital through lower tax rates, whereas large countries could not follow suit without accepting major revenue losses (Dehejia and Genschel 1999). Of more general importance are differences in economic development. Thus, the provision of social transfers and of public social services at the level that is considered appropriate in the Scandinavian countries could simply not be afforded by less rich member states like Greece, Spain or Portugal, let alone in the candidate countries on the threshold of Eastern enlargement. If that were all, however, and if uniformity could be defined in relative terms, it might still be possible to agree on standards reflecting differences in the ability-to-pay of member states at different stages of economic development. Yet even though Britain and Sweden may be similarly wealthy, they could still not agree on common European policies regarding the welfare-state or industrial-relations.

That is because European welfare states have come to define widely differing dividing lines between the functions the state is expected to perform and those that are left to private provision, either in the family or by the market (Esping-Andersen 1990; Scharpf and Schmidt 2000). They all provide social assistance to the needy, but in Scandinavia and on the European continent, the state also provides earnings-related social insurance that is meant to secure the standard of living of average-income families in the case of unemployment, sickness, disability and in old age. In Britain and other Anglo-Saxon welfare states, by contrast, workers with average or higher incomes

have learned to rely on private provisions for these eventualities. Moreover, only the Scandinavian welfare states are providing universal and high-quality social services freeing wives and mothers from family duties while at the same time providing the public-sector jobs that have raised female participation in the labor market to record levels. In Anglo-Saxon, Continental and Southern-European countries, by contrast, these services are left to be provided in the family or by the market. Differences of similar significance are also characteristic of the industrial-relations institutions of EU member states (Crouch 1993; Ebbinghaus and Visser 2000).

These structural differences are not merely of a technical nature but have high political salience. They correspond to fundamentally differing welfare-state aspirations which can be roughly equated with the historical dominance of “liberal”, “christian democratic” and “social democratic” political parties and social philosophies (Esping-Andersen 1990). Moreover, and perhaps more important: Citizens in all countries have come to base their life plans on the continuation of existing systems of social protection and taxation, and any attempts to replace these with qualitatively different European solutions would mobilize fierce opposition. Voters in Britain simply could not accept the high levels of taxation that sustain the generous Swedish welfare state; Swedish families could not live with the low level of social and educational services provided in Germany; and German doctors and patients would unite in protest against any moves toward a British-style National Health System. There is, in short, no single “European social model” on which harmonization could converge (Ferrera, Hemerijck and Rhodes 2000).

National governments, accountable to their national constituencies, thus could not possibly agree on common European solutions for the core functions of the welfare state. That need not prevent the adoption of minimum European standards on social and workers’ rights either through Council directives or through agreements reached in the “Social Dialogue” of the peak-level organizations of capital and labor (Leibfried and Pierson 1995; Falkner 1998). But since such standards must be acceptable to all member states, they must not only be economically viable in the less wealthy countries, but also compatible with existing industrial-relations and welfare-state institutions. It is no surprise, therefore that only very undemanding regulations have been able to pass this dual test (Streeck 1995; 1997) — which also implies that while they may be useful in raising

minimal levels of social protection in Anglo-Saxon and Southern countries, they will not do much to relieve the competitive pressures on more advanced Continental and Scandinavian welfare states.

## **5. Subsidiarity or Imposed Uniformity?**

If effective solutions are blocked by the high consensus requirements of European policy-making, it seems plausible to consider two extreme institutional responses: the one would avoid Europeanization and let member states deal with the problems; the other would call for institutional reforms that allow European solutions to be imposed in the face of opposition. By and large, German contributions to the current constitutional debate are characterized by various combinations of both of these ideas. For the problems discussed here, however, neither of these radical solutions is likely to be appropriate.

### *5.1. Subsidiarity*

The principle of “subsidiarity” as defined in Art. 5, II TEC combines two conditions: European action is allowed only if it is true that “the objectives of the proposed action cannot be sufficiently achieved by the Member States” and if it is also true that these objectives can “be better achieved by the Community”. Subsidiarity provides no guidance, however, if the first condition should be true and the second one false — which is precisely the situation encountered by the new challenges discussed here.

In two of these instances, it seems clear that Europeanization is nevertheless the only logically possible solution: In spite of all the difficulties of a Common Foreign and Security Policy, there is no question that its objectives could not be achieved by autonomous national action. Similarly, if there is a need for adjusting the *acquis* in the process of Eastern enlargement, the Union could not possibly leave the definition of such rules to the accession states acting individually. It is thus only with regard to the challenges of protecting European welfare states that subsidiarity is considered a serious option. For libertarian authors, subsidiarity appears as a normatively preferred solution because it will ensure the constitutional superiority of economic liberties guaranteed by



the Treaties over all welfare-state policies adopted at national level (Mestmäcker 1994). By a different line of normative reasoning, subsidiarity is also advocated by Giandomenico Majone (1994) who considers the European Community a regulatory state whose rules are legitimated by efficiency criteria. Since redistributive welfare-state policies could not be so legitimated, it follows that they must remain subject to the political choices of democratically accountable national governments.

On positive, rather than normative grounds, the impact of economic internationalization on the survival of national welfare states has become the subject of a large and controversial theoretical and empirical literature (Sinn 1993; Tanzi 1995; Garrett 1998; Swank 1998; Scharpf and Schmidt 2000; Pierson 2001; Huber and Stephens 2001). It is fair to conclude that these studies by and large tend to emphasize the path-dependent resistance of welfare state regimes to the downward pressures of economic competition. Moreover, comparative case studies have been able to identify instances of successful policy learning and creative adjustment which have enabled some countries to maintain or achieve international competitiveness and high levels of employment without sacrificing their social-policy aspirations (Hemerijck and Schludi 2000; Scharpf 2000; Huber and Stephens 2001).<sup>10</sup> In the light of such findings, it is also suggested that left-of-center parties and unions should stop wasting their time with futile efforts at Europeanization and should instead concentrate on creating structures of “competitive solidarity” at national level.

It should be noted, however, that particularly successful countries usually had the benefit of favorable economic or institutional preconditions, and that there are in fact more countries that are stuck in economic difficulties or that had to impose significant cutbacks on welfare-state transfers and services and to accept a considerable increase in social inequality and insecurity. Moreover, most of the studies cited look at the longer-term effects of “globalization”, rather than at the more recent impact of the completion of the internal market and the monetary union in Europe. In any case, purely national solutions in the European Union will always be constrained by the constitutional asymmetry between European and national law. As long as it is not possible to recreate the full tool set of economic and social policies that national governments could

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<sup>10</sup> Similar differences have been observed with regard to the impact of European liberalization policies on national regulations of *service-public* sectors (Héritier et al. 2001).

use in the postwar decades, the policy options that remain open at the national level will often be too tightly constrained to allow effective solutions.

Such doubts also apply to demands by the French government and the German Länder for Treaty revisions that would impose explicit limitations on European competencies in order to protect the *service-public* and infrastructure functions and the industrial-policy options of national and subnational governments (Lyon-Caen, Antoine and Véronique Champeil-Desplats 2001; Franßen-de la Cerda and Hammer 2001; SPD 2001; CDU/CSU 2001). From the perspective developed here, the implications of such demands are at best ambivalent. Even if they could be adopted against the opposition of Britain, the Netherlands and other successful liberalizers, it is hard to see how they could effectively relieve the legal constraints of internal market rules which, after all, constitute the undisputed core of the European *acquis*. At any rate, they surely could not allow national restrictions on the free movement of goods, services and capital, and hence they could still not protect market-correcting national policies against the *economic* pressures of regulatory and tax competition. At the same time, however, attempts to limit European competencies might well succeed in establishing legal roadblocks against the still feeble efforts to establish or strengthen European capabilities in just those fields of environmental, social and employment policy where purely national solutions are no longer sufficient. National autonomy, in other words, can no longer ensure the success of market-correcting policies. What would be needed, instead, are European solutions which (similar to the CAP model) complement economic integration by the Europeanization of market-correcting functions.

## 5.2. *Imposed Solutions*

If such European solutions are blocked by a lack of consensus, it may then appear plausible to turn to institutional reforms that will reduce the number of veto positions. This, after all, was how the Single European Act ensured the success of the internal-market program by introducing qualified-majority voting in the Council. The same idea is implied in Joschka Fischer's (2000) vision of the EU as a democratic federal state — in which, presumably, simple majorities in both chambers of the legislature would suffice for European policy choices. On a less political, technocratic level, similar hopes have also inspired the seemingly more moderate call for a “revitalization of

the Community Method” in the Commission’s recent “White Paper on European Governance” (COM 2001/428). According to the Commission, that revitalization would call for the following changes of governing practices:

- Council and Parliament should limit their involvement in primary European legislation to the definition of “essential elements (basic rights and obligations, conditions to implement them), leaving the executive to fill in the technical detail via implementing ‘secondary’ rules” (p. 20).
- In defining the substance of these secondary rules, the Commission should be autonomous, monitored by Council and Parliament, to be sure, but no longer encumbered by the involvement of regulatory and management “Comitology” committees (p. 31).
- In order to expedite legislation further, the Council “should vote as soon as a qualified majority seems possible rather than pursuing discussions in the search for unanimity” (p. 22).
- Moreover, to protect its monopoly of legislative initiatives against the effect of consensus-seeking negotiations, “the Commission has committed itself to withdraw proposals where inter-institutional bargaining undermines ... the proposal’s objectives” (p. 22).

Taken together, these proposals would reduce the range of issues that need to be settled through intergovernmental and inter-institutional negotiations, allowing “non-essential” issues to be resolved unilaterally by the Commission. There is no question that such decision rules would have worked well for the harmonization of product standards under the Single European Act of 1986, where the shared interest in the efficiencies of the larger market were seen to outweigh the interest in maintaining national diversity. But what if existing national solutions should have high political salience for national constituencies? Think of efforts to reform national pension systems, where “technical details” could have a significant impact on the life chances of individuals and hence are the object of fierce battles among interest groups and political parties, capable of provoking violent protests that could jeopardize a government’s survival. Under such conditions, national diversity could not be treated as being illegitimate, but is itself part of the legitimating structure of beliefs and practices supporting the multilevel European polity. Where that is true, the attempt to override legitimate diversity by imposing uniform European solutions through the “Community method” and majority votes in the Council could blow the Union apart.

The Commission does not seem to aware of the inherent limits of majority voting in the EU. Asserting that it “is time to recognize that the Union has moved from a diplomatic to a democratic process” (p. 29), it seems to assume that the Union could operate as a majoritarian democracy in which minority positions could be legitimately ignored. However, the Union is not (yet) itself a unified democratic polity, and its voters do not (yet) constitute an integrated “body politic” with Europe-wide public debates, Europe-wide party competition, and effective political accountability. Instead, Europe still depends on the democratic legitimacy of its member states (Lepsius 2000; Weiler 2000). Voting by qualified majority has become a pragmatically useful device for speeding up Council decisions in constellations where the divergence of policy preferences does not have high political salience in national constituencies. When that is not the case, however, member governments have very good practical and normative reasons to invest time and effort in the search for consensual solutions. For the time being, at any rate, European policy must be consensual if it is to be legitimate.

Given the diversity of economic conditions, political cultures, institutional structures, policy legacies and public attention among Member states, it seems inevitable that many policy choices below the level of “essential principles” will have high political salience and might be totally unacceptable in one country or another. At present, these pitfalls are avoided by the search for consensual solutions that avoid incompatibilities with specific national constraints in elaborate intergovernmental negotiations that take place in the preparatory phase before a Council decision as well as in the implementation phase. The Commission’s proposals would short-circuit these consensus-seeking mechanisms of the joint-decision mode without being able to create a substitute basis of legitimation.

The White Paper is of course right in suggesting that the outcomes of consensus-building procedures in the intergovernmental and joint-decision modes leave much to be desired if judged by efficiency criteria. Decision processes are cumbersome and slow, and if they are not blocked altogether, their outcomes will often remain at the level of the lowest common denominator or will be characterized by excessively constraining detail and red tape. It is easy to sympathize, therefore, with the desire of the Commission to liberate itself and European policy from these procedural straightjackets. But in policy areas characterized by the legitimate divergence of politically salient national

preferences, the solution proposed by the White Paper, which would essentially replace consensus-seeking procedures with majority votes plus unilateral powers of the Commission, could not be imposed against the governments of member states, and would not be normatively acceptable if it were. If the European Union is to cope successfully with the challenges of legitimate diversity, it cannot be through the imposition of uniform solutions. Instead, there is a need for governing modes that are able to accommodate diversity while dealing effectively with the problems that can only be resolved at the European level.

## **6. Coping with the Challenges of Legitimate Diversity**

If the diversity of national economic conditions, institutions and preferences has sufficiently high political salience to prevent agreement on uniform European policies, and if strictly national policies cannot provide effective responses to urgent problems, there could logically exist two types of solutions: centralized European capabilities that will reduce political salience at national levels, and differentiated European policies that are able to accommodate divergent national problems and preferences.

### *6.1. Reducing Political Salience*

The logic of the first option has an illustration in the field of product regulations where there have been immense difficulties in establishing a common European regime of pharmaceuticals licensing through either “mutual recognition” or through the harmonization of national licensing procedures. By contrast, the establishment of a centralized European agency and of centralized procedures for granting Europe-wide licenses for research-based new pharmaceuticals was remarkably consensual and highly effective (Feick 2001). The reason seems to have been that this was an add-on solution that required no changes in existing national organizations and procedures and that did not challenge peculiar national preferences (e.g. for homeopathic medicines). Similarly, the allocation of European funds for economic development is less controversial than would be attempts to coordinate national programs of development aid; and conversely, pre-

sent attempts to coordinate national R&D programs in a “European Research Area” will be more difficult to achieve than were past agreements on European Framework Programs.

The question is whether the logic of such solutions could also be helpful in coping with the new challenges discussed here. A potential candidate could be the creation of common European security capabilities. Apparently, present efforts to strengthen common planning and decision-making institutions are quite promising (Howorth 2001). But on general grounds, it seems unlikely that the present difficulties could be fully resolved as long as the issue is one of European control over the deployment of national forces. But would considerations of national sovereignty and divergent national preferences have the same political salience if the object of European decisions were not contingents of the national armed forces seconded to a joint venture, but an organizationally separate rapid reaction force, recruited as a European volunteer army and financed entirely from the EU budget (and perhaps from the revenues of a European tax on capital interest)? Of course, such a European force would be small in comparison to the sum total of national forces, and its equipment, training methods, command structure and logistics would have to be closely coordinated with those of the armed forces of EU member states and with NATO. But its size and technical capabilities could be sufficient for carrying out small peace-keeping or peace-making missions without having to depend on the active involvement of national forces — whose existence as a fleet in being would nevertheless add depth and credibility to its operations.

If this genuinely European capacity for military action were in existence, national governments would still have to take political responsibility for specific mandates. But one should expect that agreement on these would have to overcome fewer national reservations. At the same time, the implementation of such mandates could to a larger extent be delegated to a supranational command structure. Whether such a solution would find political support, I cannot know. All I can say is that its basic elements do not seem to be ruled out by what is generally known about policy making in the institutional framework of the multilevel European polity.

## 6.2. Closer Cooperation?

With regard to the other challenges discussed here, however, centralized capabilities could hardly provide effective solutions.<sup>11</sup> What would be needed, instead, are forms of “differentiated integration” that are able to accommodate divergent national conditions and preferences. One solution might be provided by (a revised version of) the provisions on “closer cooperation” in Title VII of the Treaty of European Union. Under Art. 44 TEU, groups of member states could make use of the full range of EC decisions, adopted and enforced through the usual EC procedures — apart from the fact that voting in the Council is restricted to the participating member states.

Using these options, high-tax countries could harmonize rates of profit taxes at least among themselves; highly industrialized countries could jointly adopt more stringent environmental regulations than would be acceptable for less developed member states; and Southern and Eastern member states could agree on common standards for systems of means-tested basic income support. By the same token, countries financing health care through compulsory health insurance could harmonize their regulations for the licensing and remuneration of service providers, countries considering the partial privatization of public pension systems could harmonize their regulations of investment options, countries wishing to maintain efficient and affordable public transport could jointly regulate the competition among public and private providers, and the same could be done by countries committed to the support of public-service television.

The main beneficiaries of closer cooperation would be groups of countries with similar economic or institutional conditions or political preferences that could then adopt common solutions on which Europe-wide agreement would be impossible. Even more important: The rules so adopted would have the force of European law in the vertical as well as the horizontal dimension. *Vertically*, they would be binding on national and subnational policy makers, with the effect of removing temptations for regulatory and tax competition among the members of the respective groups. Whether such agreements would be economically attractive or counterproductive is a question that

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<sup>11</sup> For social policy, that would imply that national welfare state functions are not merely harmonized but replaced (or at least supplemented) by transfers and services financed by the European Union — which would presuppose a degree of solidaristic redistribution among member states that goes far beyond anything achieved or envisaged through the use of cohesion funds.

governments would have to consider in light of the fact that economic competition tends to be most acute among countries at similar levels of economic development. What would matter more in many cases, however, is the *horizontal* effect. Since the regulations so adopted would be European law, they would stand on the same constitutional level as all other rules of European law. In that regard, therefore, the symmetry of market-making and market-correcting rules that characterizes Common Agricultural Policy could also apply in public-transport policy or in health-care policy.

So why were the statements in the preceding paragraph all phrased in the conditional mode? The reason is that in the Treaty of Amsterdam, conditions were circumscribed so narrowly that there are no present examples of closer cooperation.<sup>12</sup> For one thing, closer cooperation was allowed only for groups whose membership includes “at least a majority of Member States” (Art. 43 (1, d) TEU). Moreover, according to Art 11 (2, para 1) TEC, the decision to allow closer cooperation depended on a vote of the Council “acting by qualified majority on a proposal of the Commission”, and according to Art. 11 (2, para 2) TEC that decision could be prevented by the opposition of single member state invoking “important and stated reasons of national policy”. These extremely restrictive conditions would be marginally liberalized if the Treaty of Nice is ratified, but the requirement that a minimum of eight member states must participate would still exclude most of the potential examples suggested above. In addition, the Treaty of Amsterdam ruled out agreements that would “affect the ‘*acquis communautaire*’ and the measures adopted under the other provisions of the... Treaties” (Art. 43 (1, e) TEU) or that would “constitute a discrimination or a restriction of trade between Member States and ... distort the conditions of competition between the latter (Art. 11 (1, e) TEC).

Why this seeming hostility against closer cooperation? One reason, surely, is the fierce defense of the *acquis* by the Commission — and the dominance of economic integration and liberalization discourses within the Commission. But why should governments — which could overrule the Commission in the process of Treaty reform — share that aversion? The answer, I suggest, is a case of unfortunate “framing”. Regard-

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<sup>12</sup> It would be more correct to say that examples which do in fact exist did not come about under the rules governing “closer cooperation”. monetary union has become the most important one of these examples, but the “Schengen Area”, even after it was brought under the Treaty, also does not include all EU member states, and the same is true of ESDP.



less of the variety of terms that have been used since the early 1970s — “variable speed”, “variable geometry”, “concentric circles”, “two tiers”, “core” or most recently, “pioneer group” — the notion of differentiated integration has typically been associated with the image of greater or lesser progress along a single dimension from less to more integration (Ehlermann 1984; 1998; Giering 1997; Walker 1998; Búrca and Scott 2000). The idea was that an “avant-garde” of member states that were able and willing to move ahead should be allowed to do so — which immediately suggested that all others would find themselves in the rear guard and might be relegated to second-class citizenship in Europe. Given the decades of misunderstandings and apprehensions associated with this discussion, it was not really surprising that the extremely restrictive rules adopted at the Amsterdam Summit were not significantly liberalized at the Nice Summit.

The framing of this discussion is doubly unfortunate because it not only fore-closes a useful institutional innovation but also stands in the way of the more fundamental recognition that the defensive Europeanization of the market-correcting achievements and aspirations of European welfare states can only succeed if integration is allowed to proceed along multiple dimensions. That implies not merely that differences in the state of economic development should play a legitimate role in the definition and enforcement of the *acquis*. It means also that it is wrong to think of the “European Social Model” that is on the agenda since the Lisbon Summit as a single goal. Thus it makes no sense to consider either the Scandinavian or the Anglo-Saxon model of the welfare state to be the avant-garde with which others ought to catch up. Instead, the defensive Europeanization of social policy should allow both groups of countries to maintain and develop their own solutions in response to their specific understandings of social solidarity; it should allow the Bismarckian welfare states on the European continent to seek common solutions to their common problems; and it should support the accession states of Central and Eastern Europe in developing economically and politically viable institutions of social protection without being required to adopt a uniform European blueprint (Müller 1999; Müller et al. 1999). The same considerations apply to environmental policy as well (Holzinger and Knöpfel 2000).

While applying only to (variable) subsets of member states, closer cooperation would still have all the characteristics of European legislation. Thus, the Commission would remain in control of legislative initiatives, the legislative role of Parliament (or of

subsets of the Parliament) would be maintained, member states could be outvoted in the Council, and the directives and regulations adopted would be interpreted and enforced as European law by the Commission and the Court. In other words, through controlled diversification, closer cooperation would facilitate the further Europeanization of public policy, rather than its progressive re-nationalization. For just that reason, however, closer cooperation might also be too rigid a solution in policy areas where it would be premature to move from national autonomy to coordination through hard and fast European law.

### 6.3. *Open Method of Coordination?*

Such rigidities are avoided by the “open method of coordination” which — *avant la lettre* — was established in the Maastricht Treaty for the coordination of economic policies of member states (Arts. 98 and 99 TEC) and applied to employment policies in the Amsterdam Treaty (Arts. 125-130 TEC). Without amending the Treaty, the Lisbon Summit then introduced the generic label and proceeded to apply it to a few industrial and social-policy goals. The method implies that member governments should agree to define certain policy purposes or problems as matters of “common concern”, whereas the actual choice of effective policies should remain a national responsibility. Its core is an iterative procedure, beginning with a report from the Commission to the European Council which is followed by guidelines of the Council based on a proposal from the Commission. In response to these guidelines, member governments will present annual “national action plans” and reports on measures taken —which will then be evaluated in the light of comparative “benchmarks” by the Commission and a permanent committee of senior civil servants. These evaluations will feed into the next iteration of annual reports and guidelines, but they may also lead to the adoption of specific recommendations of the Council addressed to individual member states. However, “the harmonization of the laws and regulations of Member States” is explicitly excluded from the measures the Council could adopt (Art. 129 TEC).

It is too early to evaluate the effectiveness of the open method of coordination, but its potential and its limitations seem to be quite clear. Since member states remain in control of their own policy choices, they also remain capable of responding to the diver-

sity of national economic and institutional conditions and of national preferences. Nevertheless, the open method of coordination will require national governments to focus on jointly defined problems and policy goals, and to consider their own policy choices in relation to this problem. Moreover, by exposing their actual performance to comparative benchmarking, peer review and public scrutiny, open coordination could provide favorable conditions for “learning by monitoring” (Sabel 1995; Visser and Hemerijck 2001), and it may also contribute to shaming governments out of “beggar-my-neighbor” strategies that would be self-defeating if everybody did adopt them.

It is clear, however, that all of these beneficial effects depend crucially on the willingness of actors that are in fact in control of national policy choices to get involved in processes of European coordination which, eventually, will not have binding force. If that is the case, European recommendations may be used as powerful arguments in national policy discussions; if not, national action plans may simply reflect business as usual and the unfortunate liaison officers attending innumerable rounds of meetings in Brussels may take the blame for national policies on which they have no influence. Yet even if policy learning at the national level is effective, the fact remains that the policies so adopted — while they may improve the quality of national adjustment strategies — cannot create European law and thus will do nothing to reduce the impact of the internal market and monetary union on national policy domains or to alleviate the legal and economic constraints under which national policy makers are laboring.

#### *6.4. Framework Directives plus Open Coordination?*

In its White Paper on European Governance, the Commission appears to be quite unenthusiastic about the open method of coordination and it also insists that it “should not be used when legislative action under the Community method is possible” (p. 22). That, however, might just be what is needed to increase its effectiveness. Let us assume that Council and Parliament would heed the White Paper’s injunction to reduce legislation to “essential elements”, but that — instead of delegating the formulation of more specific regulations to the Commission and Comitology processes — implementation would be left to member states. Without more, that would correspond to the model of “framework directives”, which the White Paper suggests should be used more often (p.

20). If they are not often used in present practice, the reason could be mutual distrust among member governments who might doubt each other's good faith in carrying out burdensome legislative mandates or in resisting the temptations of protectionist beggar-my-neighbor practices.

But what if framework directives were coupled with the open method of coordination? Then member states would have to describe their measures and report on their effects, while their performance would be monitored and compared by the Commission and evaluated by peer review and by the Council. If evaluation should reveal general problems, the framework legislation could be amended and tightened. With regard to specific implementation deficits in individual countries, moreover, the Council could not merely issue recommendations but adopt legally binding decisions or authorize<sup>13</sup> the Commission to initiate the usual infringement proceedings. In other words: Member states would retain considerable discretion in shaping the substantive and procedural content of framework directives to suit specific local conditions and preferences. Yet if they should abuse this discretion in the political judgment of their peers in the Council, more centralized sanctions and enforcement procedures would still be available as a "fleet in being".

As the monitoring added by open coordination could make framework directives more acceptable to the Commission and to mutually distrustful member states, so the effectiveness of open coordination would be increased if its procedures are embedded in the context of framework directives which, like all other directives, have the quality of European law. Thus, in the *vertical* dimension, their implementation is not left to the discretion of national governments, and actors in charge of national policy choices in the respective sectors cannot afford to simply ignore agreements at the European level. By the same token, the substance of legal obligations will help to overcome domestic opposition against the policy choices required by good-faith implementation. Even more important, in the present context, is the fact that in the *horizontal* dimension the policies so adopted would also have the status of European law and hence would not be asym-

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<sup>13</sup> The flexibility of Open Coordination might be lost if the Commission could automatically resort to infringement proceedings whenever it saw the uniformity of European law threatened by differentiated national solutions. Thus it would seem desirable to require the special authorization by a majority in the Council.

metrically constrained by the market-making policies adopted at the same constitutional level.

Differentiation could of course be taken one step further if framework directives and open coordination could be applied in the context of “closer cooperation” discussed above. In that case, the advantages of legally binding directives could be maintained, but these would be targeted with greater precision to the characteristic problems or policy goals of groups of member states — which would also greatly effectuate processes of policy learning from mutually relevant experiences.

## **7. Summary and Conclusions**

European public policy has succeeded in its economic goals of integrating the internal market and creating the monetary union. But it is now confronted with critical challenges which cannot be effectively resolved within the Union’s present governing modes. While these governing modes differ from one another, they share two essential requirements: effective European policy depends on high levels of consensus among member governments, and it must, at least in principle, provide for uniform rules across all member states. By and large, these requirements could be simultaneously satisfied in the policy processes that brought about economic integration. That is no longer true of the present set of new challenges — among which I have discussed the need for rapid peace-keeping and peace-making interventions in conflicts affecting common European security, the need to facilitate the economic, social and political development of accession states in Central and Eastern Europe, and the need for protecting the plurality of “European social models” against the constraints and pressures of integrated markets. In each of these areas, I have tried to show, the dual conditions of broad consensus and uniform policy cannot be satisfied at the same time.

The dilemma is caused by the high significance of what I call “legitimate diversity”. Given the commitment to economic integration, the defense of national diversity was tainted by the brush of illegitimate protectionism. By contrast, policy initiatives addressed to the new challenges are confronted with policy conflicts which are rooted in fundamental differences of economic and institutional conditions, policy legacies and normative orientations that have high political salience in the constituencies of member

states. Under institutional conditions requiring of broad consensus, member governments could not agree to uniform European solutions without undermining their own democratic legitimacy.

I have also tried to show that two seemingly obvious escape routes from the dilemma are not in fact viable. Moving from consensus-based governing modes to majoritarian decisions in the Council and in Parliament or to the empowerment of the Commission would exceed the outer limits of European legitimacy. The Union is not now, and will not soon be a majoritarian democracy, and the Commission is not a democratically accountable government. Voting by qualified majority in the Council and delegation to the Commission are acceptable tools for increasing efficiency in policy areas where national differences do not have high political salience. Where that is not the case, governments would not and should not abdicate their responsibility for policy choices in which, ultimately, their own legitimacy will be at stake.

But if uniform European solutions cannot be legitimately imposed on dissenting member states, the alternative of renouncing Europeanization altogether by invoking the principle of “subsidiarity” could not resolve the dilemma either because it would not allow effective responses to the challenges discussed. In the field of foreign and security policy, it seems clear enough that in the absence of Europeanization national governments may continue to work at cross-purposes unless they find themselves coordinated by hegemonic American leadership. With regard to the challenges of Eastern enlargement, it should also be clear that even if the rigid enforcement of the uniform *acquis* should spell disaster, its definition also could not be left to each of the accession states acting on its own.

With regard to the welfare state, finally, it is true that some countries have been remarkably successful in adjusting to economic internationalization without abandoning their commitments to full employment and social protection. But others were forced to choose between economic competitiveness and their social aspirations, and still others failed on both counts (Scharpf and Schmidt 2000). In any case, however, the heroic commitment to “competitive solidarity” at the national level (Streeck 2000) may be fighting a losing battle if it must not only cope with the competitive pressures of international product and capital markets but also with the constitutionalized constraints of dogmatic liberalism in European competition law. Thus, the Scandinavian welfare states

may indeed be economically viable. But it is at least unclear how they could survive if their public-sector monopolies in providing universal social services had to be liberalized and exposed to the “undistorted” competition of commercial providers. In short: If the problems of European welfare states were to be resolved by the subsidiarity principle, decentralization could not be restricted to market-correcting policies but would have to include market-making competencies as well — which I consider a most unlikely condition.

In other words, the seemingly easy escapes from the dilemma — majority rule or subsidiarity — would sacrifice either legitimacy or problem-solving effectiveness. In the field of European security policy, the political salience of divergent national preferences could conceivably be reduced if European decisions were not about the deployment of *national* military forces but rather about the creation of completely centralized European capabilities. In general, however, effective solutions are unlikely to be found as long as it is assumed that the Europeanization of public policy must take the form of uniform rules applied in all member states of the Union.

If the present constitutional debate is to be useful, therefore, it ought to be about new modes of European governing that will allow effectively Europeanized responses to the new challenges facing the Union which are also able to accommodate legitimate national diversity. At the end of the paper, I have discussed two such options, “closer cooperation” and the “open method of coordination”, which already have a base in the present Treaties. I suggested that the considerable potential of closer cooperation cannot be realized unless the restrictive conditions of its adoption are relaxed beyond what was achieved in the Nice Treaty. The open method of coordination may, in its present form, stimulate policy learning at the national level, but it could not achieve the legal and political effectiveness of Europeanized policy solutions. It might be promising, therefore, to consider open coordination in combination with “framework directives” that are legally binding but leave the specification of more detailed substantive and procedural rules to national governments.

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