

## THE POWER OF CO-DECISION OF THE EUROPEAN PARLIAMENT INTRODUCED BY THE MAASTRICHT TREATY

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During the debates leading up to the ratification of the so-called "Maastricht Treaty," officially known as the European Union Treaty, there were heated discussions about the supposed "democracy-gap" in the European Community. The Community was accused of secrecy, high-handedness, authoritarian behaviour and indifference towards the plight of its citizens. Are these citizens indeed left out or are they somehow represented and involved when decisions are taken which affect their future?

It seems that the best way to analyse these grave accusations and to answer those questions is by examining whether or not the "representatives" of the citizens, i.e., the members of the European Parliament (MEP's) do indeed participate in the legislative process of the European Community. Democracy being generally equated with the existence of a freely elected Parliament, it appears necessary to examine the powers of the European Parliament, whose members are indeed freely elected.

### I. PRELIMINARY REMARKS

It should be noted, in the first place, that the European Union Treaty, signed at Maastricht, The Netherlands, on February 7, 1992 (herein referred to as either the "Union" or "Maastricht" Treaty), has now been ratified by all twelve Member States<sup>1</sup> and shall enter into force on November 1, 1993.

The expression "power of co-decision" does not appear in the text of the Maastricht Treaty because the Member States of the European Community refused, for political reasons, to include it. The Treaty refers instead to the obscure and much less attractive words "procedure provided for in Article 189(b)." Nevertheless, this power is generally referred to as the "power of co-decision," an expression

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1. TREATY ON EUROPEAN UNION, Feb. 7, 1992. The articles mentioned in the footnotes refer to the EEC Treaty (TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY) as already modified by the Maastricht Treaty and now called "EC TREATY," unless otherwise indicated.

which, as shall be seen, conveys what really happens in a limited number of cases.

Even after ratification and entering into force of the Treaty, the exact meaning of the new texts shall remain a matter of speculation. As we all know, legal texts—and this is especially true for texts of a constitutional nature—only acquire their accepted meaning once they have been implemented, and interpreted by the courts. For all these reasons, the present analysis, however indispensable it might be, can only be a first approach.

## II. THE PRESENT POWERS OF THE EUROPEAN PARLIAMENT

To understand the significance of the power of co-decision introduced by the Maastricht Treaty, it is necessary to situate this power among the existing powers of the European Parliament. A brief summary of the rare cases in which the Parliament can presently take a decision is therefore indispensable. Indeed, the Maastricht Treaty has only added some powers to those which currently exist under the EEC Treaty as modified by the Single European Act (hereinafter SEA).<sup>2</sup> In certain cases, where the present texts provide for a simple "consultation"<sup>3</sup> of Parliament by the Council, the Maastricht Treaty provides for "co-operation" between Parliament and Council<sup>4</sup> and, in

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2. The Single European Act (O.J. EUR. COMM. L 169/1 (1987), Corrigendum, O.J. EUR. COMM. L 304/46 (1987), 25 I.L.M. 503 (1987) entered into force on 1 July 1987. Its objective was the completion of the Internal Market, i.e., an area without frontiers where goods, persons, services and capital would circulate freely. In order to achieve this, it strengthened the decision-making process by extending the qualified majority voting and the inclusion of Chapters on Economic and Social Cohesion, Research and Technological Development and Environment. It also provides for closer involvement of Parliament in the legislative procedure.

3. "Consultation" provides that Parliament is to be asked by the Council to give an Opinion on the proposal submitted to it by the Commission. And although the Council is in no way bound by this opinion, it is obliged, under penalty of annulability of its acts by the Court of Justice, to carry out this consultation. Furthermore, this opinion might induce the Commission to modify its proposal which the Council can then only modify with an unanimous vote.

4. The "Co-operation" procedure provides that after having consulted Parliament, the Council adopts a "common position" (rather than a definitive decision) which is then communicated to Parliament. The Council can either (i) approve the common position or take no decision, after which the Council adopts an act in accordance with its common position; or (ii) Parliament can propose amendments, in which case the Commission then reexamines its original proposal and transmits it to the Council for final decision; or (iii) Parliament can reject the common position of the Council, but the latter can then adopt its decision anyway. However, it may only do so with a unanimous vote. In other words, the Council can still act independently of Parliament.

other cases, this latter procedure is replaced by the power of "co-decision"<sup>5</sup> of the European Parliament.

What is the present situation and the history behind it? Right from the beginning, in 1952, when the European Coal and Steel Community (ECSC) Treaty entered into force, the "Assembly," as it was then formally called, had to be "consulted" by the Council of Ministers in most cases where the latter would legislate.<sup>6</sup>

The absence of such consultation has always been tantamount to violation of the law and opens the way for annulment of the Council's legislative act by the Court of Justice on the ground of "infringement of an essential procedural requirement."<sup>7</sup> That these are not empty words has been sufficiently demonstrated by a series of cases where Council acts have indeed been annulled by the Court.<sup>8</sup>

Of course, this is only a consultation from which Parliament formulates an "Opinion," which the Council can totally ignore if it so chooses. However, its impact may not be underestimated, especially when Parliament acts wisely. Indeed, the Commission, which initiates the legislative procedure with its "proposal," can always modify that proposal after having learned of Parliament's Opinion.<sup>9</sup> This modified proposal, like any other Commission proposal, can only be modified by the Council acting unanimously.<sup>10</sup> This procedure has been applied hundreds of times and confers upon Parliament real influence on the Community's legislative process.<sup>11</sup> Nevertheless, the influence depends on the willingness of the Commission to espouse the views of Parliament and it does not create a direct participation in the legislative activity of the Council which, after all, exercises the power of decision within the Community.

In 1987, the SEA introduced the "co-operation procedure"<sup>12</sup> which, in reality, is nothing more than a double consultation. And although, as shall be seen, Parliament has acquired, (upon the second reading) the possibility to reject the common position of the Council, the latter can nevertheless transpose this position into Community

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5. To be examined hereafter.

6. *See, e.g.*, ECSC Treaty, art. 21(3), art. 78(h).

7. TREATY ESTABLISHING THE EUROPEAN COAL AND STEEL COMMUNITY [ECSC Treaty], art. 33; *id.* EC TREATY, art. 173.

8. *See, e.g.*, Case 138/79, *Roquette Frères v. Council*, European Court Reports (E.C.R.) 1980, p. 3333.

9. EC TREATY, art. 149(3).

10. EC TREATY, art. 149(1).

11. *See* Case 6/54, *Government of the Kingdom of the Netherlands v. High Authority* [1954-56] E.C.R. 103, at 111. *See also* Bulletin of the European Community 9-1993, at 86. In each issue of the Bulletin there are indeed dozens of such instances.

12. EC TREATY, art. 149.3.

legislation with a unanimous vote. Since the last word here also rests with the Council, this procedure clearly does not allow Parliament to participate in the legislative process of the Community.<sup>13</sup>

Another novelty introduced by the SEA was the necessity for the Council to obtain the "assent" of the European Parliament before deciding on the accession to the Community of new Member States,<sup>14</sup> as well as at the conclusion of association agreements with third States, a Union of States or an international organization.<sup>15</sup> However, does this procedure constitute a participation of Parliament in the legislative process? Parliament does not take part in the discussions leading up to the decision, nor does it participate in the negotiations. This power should therefore be considered rather as a right of veto. Undeniably, this constitutes an important power for Parliament, but once again, it cannot be qualified as a participation in the legislative process of the Community.<sup>16</sup>

Of the three procedures examined above, which involve the European Parliament in the legislative process of the Community, none implies an actual co-decision on the part of Parliament.

There is, however, one procedure which has not yet been mentioned because it does not concern, strictly speaking, the legislative process. It does, however, confer upon Parliament a certain power to "co-decide" with the Council, or even to decide on its own. This procedure concerns the approval of the Community budget and was introduced into the EEC Treaty by the Treaty Modifying Certain Budgetary Provisions of the EEC Treaty and the Treaty Establishing a

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13. EC TREATY, arts. 75(a), 125. It should be noted however that the number of cases where this cooperation procedure applies has been slightly increased by the Maastricht Treaty.

14. EC TREATY, art. 237.

15. EC TREATY, art. 238.

16. Nonetheless, here also it should be noted that the Maastricht Treaty has increased the number of cases wherein the assent of Parliament must be obtained by the Council. This concerns future measures to be adopted by the Council, with a view toward facilitating the exercise by the citizens of the Union of the right to move and reside freely within the territory of the Member States (as set forth in EC TREATY, art. 8(a)(2)), the right of the Council to confer upon the European Central Bank (ECB) specific tasks concerning policies relating to the prudential supervision of credit and other financial institutions (as set forth in EC TREATY, art. 105(6)), the right of the Council to amend certain provisions of the Statute of the ECB (as set forth in EC TREATY, art. 106(5)), the definition by the Council of the tasks, priority objectives and the organization of the structural funds (as set forth in EC TREATY, art. 130(d)(1)), the setting up by the Council of a Cohesion Fund (as set forth in EC TREATY, art. 130(d)(2)), the laying down by the Council of the appropriate provisions, which it shall recommend to Member States for adoption, concerning the election by universal suffrage of the MEP's in accordance with a uniform procedure in all Member States (as set forth in EC TREATY, art. 138(3)), and, finally, the conclusion by the Council of certain international agreements (as set forth in EC TREATY, art. 228(3)).

Single Council and a Single Commission of the European Communities.<sup>17</sup> This, of course, constitutes an important power for the European Parliament. Indeed, it is generally accepted that the basic attributes which confer upon an elected assembly the nature of a "parliament" are: the control over the Executive, the power to legislate, and the power of the purse, i.e., the power to impose taxes. It can also be argued that the power of Parliament to approve, in certain cases, the Community budget does in fact give it, albeit indirectly, the power to impose taxes upon the Community citizens.<sup>18</sup>

However, as pointed out above, these budgetary powers are different from the power to legislate and, furthermore, they have not been modified by the Union Treaty.

The above-mentioned procedures—consultation, cooperation and assent—constitute the present power-framework of the European Parliament, to which the Maastricht Treaty has added the power of co-decision, thereby multiplying the procedures and singularly complicating the balance of powers within the Community.

### III. THE LEGISLATIVE CO-DECISION POWER OF PARLIAMENT

#### A. *The Procedure*

As noted earlier, the Treaty refers to the "procedure referred in Article 189(b)" to describe the power of co-decision. It is necessary to give at least a brief description of this lengthy and, at first sight, unnecessarily complicated procedure. It can be summarized as follows and is divided into three phases in order to provide for an easier understanding.

Phase One: (analogous to the existing consultation procedure)

- the Commission puts forward a proposal or draft;
- Parliament formulates an Opinion on the proposal;
- the Council agrees on a "common position."

Phase Two: (within a time-limit of three months)

- either Parliament approves or abstains, and the Council legislates;
- or Parliament rejects the common position and the latter shall be deemed not to have been adopted (possibly after the

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17. It was signed in Luxemburg on 22 April 1970 and entered into force on 1 January 1971.

18. See EC TREATY, art. 203.

Conciliation Committee<sup>19</sup> has been convened); this would then constitute the first case in which Parliament can definitively end the legislative procedure;

- or Parliament proposes amendments.<sup>20</sup>

Phase Three: (this phase starts when there are amendments)

- the Council accepts the amendments and the act is adopted;
- the Council does not adopt the amendments, and the Conciliation Committee is convened;
- if the Conciliation Committee adopts a joint text, Parliament and the Council have six weeks to approve the joint text. If one of the two fails to approve the proposed act, it shall be deemed not to have been adopted (the second case in which Parliament can end the legislative process);
- where the Conciliation Committee does not approve a joint text, the Council may confirm its initial common position and the act shall be finally adopted, unless Parliament rejects the act, in which case the act shall be deemed not to have been adopted (the third case in which Parliament can end the legislative process).

The main novelty is, of course, the creation of the Conciliation Committee. There, for the first time, representatives of the citizens of the Community meet—on an equal footing—with the legislative body of the Community, the Council. There Parliament shares the Council's power to legislate, and it is therefore correct in this case to speak of "co-decision" in the legislative field. It is interesting to note in this respect that Community acts which are enacted according to the co-decision procedure shall be designated as "acts of Parliament and Council," while presently there are only Council directives, regulations and decisions. There is no question yet of shifting this legislative power wholly from the Council to the European Parliament, but it seems that a first step has been taken on the road towards a more democratic decision-making system.

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19. Article 189(b)(2)(c) of the Union Treaty states that after Parliament has informed the Council that it intends to reject the common position, "The Council may convene a meeting of the Conciliation Committee referred to in paragraph 4 to explain further its position." After that Parliament can either confirm its rejection, or propose amendments.

20. The Conciliation Committee established by EC TREATY, art. 189(b)(4) is composed of the members of the Council (presently 12) and an equal number of representatives of the European Parliament. The Commission takes part in the Conciliation Committee's proceedings and takes all the necessary initiatives with a view to reconciling the positions of the European Parliament and the Council. "The Conciliation Committee was established by the Maastricht Treaty as a means of reconciling opposite views of what one can now consider as the two branches of the legislature, i.e., the Council and, since it was granted co-decision rights, Parliament."

The next and last question is how big a step? To answer that question it is necessary to examine the fields of application of the new power.

B. *Fields of Application of Parliament's Co-Decision Power*

Pursuant to the EEC Treaty, as modified by the Maastricht Treaty, the co-decision procedure shall apply in seven cases where presently the cooperation procedure applies, and in seven other instances where new powers were attributed to the Community by the Maastricht Treaty.

1. Instances Where Cooperation is Replaced by Co-Decision

a. "As soon as this Treaty enters into force, the Council shall, [acting in accordance with the procedure referred to in Article 189(b) of the Maastricht Treaty] issue directives or make regulations setting out the measures required to bring about, by progressive stages freedom of movement for workers . . . ."21

It may seem odd to confer new powers on the European Parliament in a field where all necessary measures were supposed to have been taken by the end of 1969, the date which marked the end of the Transitional Period.<sup>22</sup> It is true, of course, that this obligation was not complied with and that, therefore, a new date was set by the SEA, i.e., the end of 1992.<sup>23</sup> The question can thus be asked whether these new powers have been conferred upon the European Parliament because this second date might not be complied with either. The explanation probably stems from the fact that the establishment of the free movement of persons (be they workers or self-employed) is a never-ending process where new developments and improvements are always possible. From now on, legislation in this field shall be enacted by the Council and Parliament acting together.

b. The second field in which cooperation is transformed into co-decision concerns the freedom of establishment. In pursuance of the

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21. See EC TREATY, art. 49; TREATY ON EUROPEAN UNION, art. 189(b); the principle of free movement for workers is laid out in EC TREATY, arts. 48 and 49.

22. EC TREATY, art. 48(1), in conjunction with EC TREATY, art. 7(7), provides that "[S]ave for the exceptions and derogations provided for in this Treaty, the expiry of the transitional period shall constitute the latest date by which all the rules laid down must enter into force and all the measures required for establishing the Common Market must be implemented." As is well known, the free movement of goods, persons, services and capital is one of the main features of the Common Market.

23. "The Community shall adopt measures with the aim of progressively establishing the internal market, over a period expiring on 31 December 1992. . . . The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured . . ." EC TREATY, art. 7(a).

Treaty,<sup>24</sup> the Council has drawn up a general programme for the abolition of the existing restrictions on freedom of establishment within the Community. "In order to implement this programme or . . . in order to achieve a stage in attaining freedom of establishment as regards a particular activity, the Council shall [acting in accordance with the procedure referred to in Article 189(b) of the Maastricht Treaty] act by means of directives."<sup>25</sup>

Here the same comment applies as for the free movement of workers, although here the reference to a "particular activity" seems to imply quite specific legislation for which Parliament shall now be co-responsible with the Council.

c. In the field of the right of establishment, the "Council shall, [acting in accordance with procedure referred to in Article 189(b)] issue directives for the coordination of such provisions as, in each Member State, are a matter for regulation or administrative action."<sup>26</sup>

Once more this concerns a subject matter which should have been regulated long ago. In this case the procedure, which, according to the Treaty, was applicable from the end of the first stage of the Transitional Procedure, is retroactively modified and so it could be argued that all the legislation enacted since that time is therefore no longer in conformity with the Treaty provisions! Whatever the case, from now on the co-decision procedure applies here also.

d. "In order to make it easier for persons to take up and pursue activities as self-employed persons, the Council shall [acting in accordance with the procedure referred to in Article 189(b)] issue directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications."<sup>27</sup>

This provision concerns a matter of the highest importance for the free movement and the right of establishment of professionals, in which Parliament can now play a decisive role.

e. Council directives which touch upon amendments of existing principles, laid down by national law governing the professions with respect to training and conditions of access for natural persons, shall be enacted in accordance with the procedure referred to in Article 189(b).<sup>28</sup>

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24. EC TREATY, art. 54(1).

25. EC TREATY, art. 54(2); TREATY ON EUROPEAN UNION, art. 189(b).

26. EC TREATY, art. 56(2); TREATY ON EUROPEAN UNION, art. 189(b).

27. EC TREATY, art. 57(1); TREATY ON EUROPEAN UNION, art. 189(b).

28. EC TREATY, art. 57(2).



f. To establish the internal market, the Council needs to "adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market."<sup>29</sup>

It is a well-known fact that the internal market was to be established by December 31, 1992, even though it was clear that the Maastricht Treaty would not enter into force before that date. Thus, the question can be asked here as well, "What purpose is served by conferring upon Parliament powers relating to something that belongs to the past?" The answer is, of course, that the acts provided for in Article 100(a) concern not only the establishment, but also the functioning of the internal market. It can therefore be said that in this case, as in those mentioned above, the process is by no means completed. Undoubtedly, much remains to be done, and the role of Parliament can therefore be of prime importance in this extremely sensitive area.

g. Finally, there are provisions in force in Member States which will not be "harmonized," but rather will be "recognized as being equivalent to those applied by another Member State" in pursuance of a decision of the Council acting in accordance with the procedure referred to in Article 189(b).<sup>30</sup>

This matter is much more important than it may appear at first sight. Indeed, where differences among the laws and regulations of various Member States create or risk creating obstacles to the smooth functioning of the internal market, two solutions are provided for under the Treaty. The first and more obvious one is the "approximation" of the laws of the Member States. The result is a common legislation which applies uniformly in all the Member States. The procedure needed to achieve this approximation can be lengthy and politically hazardous. The Treaty, therefore, provides for another approach referred to as "mutual recognition." Under this second approach, the Member States recognize each other's differing legislation as equivalent to their own, and thus shall not require conformity with their own national rules for goods, persons, services and capital entering their territory from other Member States.

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29. EC TREATY, art. 100(a).

30. EC TREATY, art. 100(b)(1). This position has developed in the Community since the European Court of Justice interpreted article 30 of the EC Treaty in its now famous *Cassis de Dijon* case. Case 120/78 *Rewe-zentral ag v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*. 1979 E.C.R. 649. See also the Commissions Communication concerning the consequences of this judgment, OJ 1980 C 256/2.

Article 100(b) of the Treaty provides, *inter alia*, that the Council, acting in accordance with the provisions of Article 100(a), *i.e.*, the co-decision procedure, "may decide that the provisions in force in a Member State must be recognized as being equivalent to those applied by another Member State." The decisions of the Council in this respect are of capital importance for the functioning of the internal market, and the European Parliament is, under the Union Treaty, going to be associated with this work.

What conclusions can be drawn from this rapid analysis of the fields in which the powers of Parliament were "up-graded" from cooperation to co-decision by the Maastricht Treaty?

As has already been pointed out, the subjects which now come under the "co-legislative" power of Parliament are of fundamental importance for the future development of the Community, since they concern three fundamental freedoms, *i.e.*, the free movement of goods, and persons, and the right of establishment. Although much has already been done in those fields, future developments will be just as important, and Parliament shall be able to influence legislation in these fields to a much greater extent than before.

## 2. New Areas of Competence Conferred upon the Community and in which Parliament has the Power of Co-Decision

The Maastricht Treaty extended the areas in which the Community may exercise some competence, and in most of them the European Parliament was invested with the power of co-decision. There are seven new areas, which are set out below.

### a. Education, Vocational Training and Youth<sup>31</sup>

One objective is the development of "the European dimension in education, particularly through the teaching and dissemination of the languages of the Member States."<sup>32</sup> To contribute to the achievement of this objective, the Council and Parliament "shall adopt incentive measures, excluding any harmonization of the laws and regulations of the Member States."<sup>33</sup> The Treaty also provides for a vocational training policy implemented by the Council under the same procedure.<sup>34</sup>

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31. EC TREATY, art. 126.

32. EC TREATY, art. 126(2), first indent.

33. EC TREATY, art. 126(4), first indent.

34. EC TREATY, art. 127(4).

b. Culture

"The Community shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore."<sup>35</sup> To this end the Community shall encourage cooperation between Member States and, if necessary, support and supplement their action by adopting, in accordance with the procedure referred to in Article 189(b), incentive measures.<sup>36</sup>

c. Public Health

The objective here is to contribute towards ensuring a high level of human health protection.<sup>37</sup> To achieve this objective, the Council, acting in accordance with the procedure referred to in Article 189(b), shall adopt incentive measures, excluding any harmonization of the laws of the Member States.<sup>38</sup>

d. Consumer Protection

Here again, the Council shall, acting in accordance with the procedure referred to in Article 189(b), adopt specific actions which support and supplement the policies pursued by the Member States.<sup>39</sup>

e. Trans-European Networks

To enable citizens of the Union to derive full benefit from an area without frontiers, the Community shall contribute to the establishment and development of trans-European networks in the areas of transport, telecommunications and energy infrastructure.<sup>40</sup> To achieve those objectives, Parliament and Council shall establish a series of guidelines covering the objectives, priorities, and broad lines of measures envisaged.<sup>41</sup>

f. Research and Technological Development

"The Community shall have the objective of strengthening the scientific and technological bases of Community industry and encouraging it to become more competitive at international level."<sup>42</sup>

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35. EC TREATY, art. 128(1).

36. EC TREATY, art. 128(b), first indent.

37. EC TREATY, art. 129(1).

38. EC TREATY, art. 129(4), first indent.

39. EC TREATY, art. 129(a)(1) and (2).

40. EC TREATY, art. 129(b).

41. EC TREATY, art. 129(d).

42. EC TREATY, art. 130(f).

The Parliament and the Council shall adopt a multiannual framework program, setting out all the activities of the Community.<sup>43</sup>

g. Environment

To achieve some of the objectives defined in this section, the Treaty introduces the concept of "general action programmes setting out priority objectives to be attained." Those programmes shall be adopted by the Council acting together with Parliament in accordance with the procedure referred to in Article 189(b).<sup>44</sup>

After having very briefly mentioned the new areas of competence introduced by the Maastricht Treaty, attention must be drawn to the fact that the areas in which the co-decision procedure applies "may be widened . . . on the basis of a report to be submitted to the Council by the Commission by 1996 at the latest."<sup>45</sup> Since this would amount to a modification of the Treaty, the procedure provided for in the Union Treaty would apply.<sup>46</sup> Consequently, the areas examined above are not definitive and the role of the European Parliament might be further enhanced in the near future.

#### IV. CONCLUSIONS

With regard to the existing Community fields of competence where the procedure of cooperation was changed into one of co-decision, the conclusion was that these areas are of great importance for the future development of the Community and that much still had to be done to implement the ambitious objectives set by the Treaty. Parliament is now in a position to influence this development.

The situation is less favorable with regard to the new areas in which the Community can exercise some powers in pursuance of the modifications introduced in the EEC Treaty by the Union Treaty. While in the first areas Parliament will be called upon to make regulations, issue directives and take decisions together with the Council, the powers conferred upon the Community in the new fields of activity are not of a legislative nature. In three cases—Education, Culture and Health—the institutions shall "adopt incentive measures." The exact meaning of those words is not quite clear since the Treaty only defines them negatively: "excluding any harmonisation of the laws and regulations of the Member States."<sup>47</sup> This definition

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43. EC TREATY, art. 130(i)(1).

44. EC TREATY, art. 130(s).

45. EC TREATY, art. 189(b)(8).

46. TREATY ON EUROPEAN UNION, art. N(2).

47. EC TREATY, arts. 126(4), 128(5) and 129(4).