Centre for Policy Studies

NICE AND AFTER

THE EU TREATY AND ASSOCIATED ISSUES

Brian Hindley

THE AUTHOR

Brian Hindley is a consultant on trade-policy matters to a number of international organisations and companies. He is Emeritus Reader in Trade Policy Economics at the London School of Economics, and, in the past two years, has also lectured at SciencesPo in Paris, LUISS in Rome, and at the University of Amsterdam Law School. His recent publications include "New institutions for transatlantic trade?", *International Affairs*, January, 1999; "Is the Millennium Round worth reviving*?", Zeitschrift für Wirtschaftspolitik*, March 2000; and "Internationalization of Financial Services: a Trade-Policy Perspective" in Stijn Claessens and Marion Jansen (eds), *The Internationalization of Financial Services*, Kluwer Law International for the WTO and the World Bank, London, 2000.

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Centre for Policy Studies

57 Tufton Street, London SW1P 3QL

Tel: 020 7222 4488 Fax: 020 7222 4388

e-mail: mail@cps.org.uk
website: www.cps.org.uk

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CHAPTER ONE
WHAT IS THE TREATY OF NICE?

Before the Irish referendum on the Treaty of Nice, on 7 June 2001, ratification of the Treaty was universally held to be an essential precondition for enlargement of the EU. Commissioners, MEPs, and members of the governments of EU member states, including that of Britain, all asserted this "truth".

Then the Irish voted No. The vote threatened the Treaty, which must be ratified by all EU members to come into force. If the conventional wisdom could be believed, therefore, the Irish vote threatened EU enlargement.

Almost immediately, however, a new tune emerged. Romano Prodi, President of the Commission, for example, expressed his hope that the Irish would think again. But, he told *The Irish Times*:

> Legally, ratification of the Nice Treaty is not necessary for enlargement. It's without any problem up to 20 members, and those beyond 20 members have only to put in the accession agreement some notes of change, some clause. But legally, it's not necessary. This doesn't mean the Irish referendum is not important. But from this specific point of view, enlargement is possible without Nice.[1]

[1] Interview in *The Irish Times*, 21 June 2001. Not everyone was singing from the same hymn-sheet as Mr Prodi, however, and not everyone wanted Mr Prodi to sing from it. *The Financial Times* (23 June 2001) carried the headline: "Mr Prodi leaves a trail of confusion over Nice". The gist of the story was that Mr Prodi, by observing that the Treaty of Nice was not essential to enlargement, "threw into disarray a carefully contrived strategy of EU member states to pressure Irish voters to reverse their shock rejection of the treaty". Alternatively put, Mr Prodi, by asserting what the report calls a "legal truth", disrupted an agreement by the governments of the EU member states to mislead Irish voters.

So enlargement can go ahead without the Treaty of Nice. What, then, is the point of the Treaty?

The outcome of the negotiations at Nice is a complicated set of documents. They include:

- the Treaty itself, in the form of revisions of the existing treaties;
- seven annexes to the Treaty, three of which deal with the numbers of votes of each existing and candidate country in the Council during and after enlargement, numbers of seats in the European Parliament, and so on; and,
- the Presidency Conclusions of the Nice European Council, which deal with a variety of subjects. Among the headings in this document are:
  - The Charter of Fundamental Rights;
  - The Common European Security and Defence policy;
  - A new impetus for an Economic and Social Europe;
  - A Citizens' Europe.

In addition, seven documents are annexed to the Presidency Conclusions. They include a "European social agenda" and a "Declaration on the specific characteristics of sport and its social function in Europe, of which account should be taken in formulating common policies".

Examination of these documents makes clear that the bulk of the Nice Treaty has nothing to do with enlargement.

As examination of these documents makes clear, the bulk of the business at Nice had nothing directly to do with enlargement. The material that is directly relevant to enlargement lies in the Treaty annexes that deal with the allocation of votes in the EU institutions. Existing members clearly had to agree upon these numbers before enlargement could proceed. But, as a rough indication of relative importance, the annexes detailing the process for enlargement account for about 5% of the contents of the Treaty and the Presidency Conclusions.

Agreement on numbers having been reached, moreover, the necessary changes can take place without the Treaty of Nice. As Mr Prodi says, the changes to voting numbers can be incorporated in the Treaties of Accession of new members, and can acquire legal force through that route, without ratification of the Treaty of Nice.

It is therefore misleading to claim that Nice was primarily about enlargement. Indeed, the grandiose ambitions that some countries harboured for the summit would have taken it even further from that subject. In particular, the French and German governments seem to have wished to include as annexes to the Treaty a "Charter of Fundamental Rights" and material relating to the Common European Security and Defence policy. In the event, these documents appear merely in the form of approving reports in the Presidency Conclusions.

To discuss in a short publication all of the material listed above is impossible. Moreover, with the future of the Treaty in doubt, it is more useful to focus on those parts of it that bear the clearest messages for the future of the EU, even if the Treaty itself sinks.

CHAPTER TWO
VOTES AND VETOES

The institutions of the EU, it was said before Nice, could hardly cope with the 15 existing member states. With 12 new members, the institutions would be overwhelmed. Enlargement therefore required reform.

EU membership implies possession of votes in the Council, through which flows all important EU business. An essential element of reform, therefore, was the number of votes to be allocated to each new member.

EU membership implies possession of votes in the Council. An essential element of reform is the number of votes to be allocated to each member.

The Council, however, does not typically decide by simple majorities, but by the more complex system of Qualified Majority Voting (QMV). Addition of new votes requires changes in the rules for qualified majorities.

Table 1 summarises the outcomes of the negotiation with respect to these issues.

TABLE ONE: COUNCIL VOTES PER MEMBER STATE

	Column 1 Number of votes now	Column 2 % of all votes now	Column 3 Number on 1 Jan 2005 if no accession	Column 4 % on 1 Jan 2005 if no accession	Column 5 Numbers of votes after accession	Column 6 % after accession of all candidates	Column 7 % of population if no accession	Column 8 % of population after accession
Germany	10	11.49	29	12.24	29	8.41	21.80	17.05
UK	10	11.49	29	12.24	29	8.41	15.77	12.30
France	10	11.49	29	12.24	29	8.41	15.72	12.26
Italy	10	11.49	29	12.24	29	8.41	15.35	11.97
Spain	8	9.20	27	11.39	27	7.83	10.50	8.19
Poland	-	-	-	-	27	7.83	-	8.00
Romania	-	-	-	-	14	4.06	-	4.68
Netherlands	5	5.75	13	5.49	13	3.77	4.21	3.28
Greece	5	5.75	12	5.06	12	3.48	2.80	2.18
Czech Republic	-	-	-	-	12	3.48	-	2.14
Belgium	5	5.75	12	5.06	12	3.48	2.71	2.12
Hungary	-	-	-	-	12	3.48	-	2.10
Portugal	5	5.75	12	5.06	12	3.48	2.66	2.08
Sweden	4	4.6	10	4.22	10	2.90	2.37	1.85
Bulgaria	-	-	-	-	10	2.90	-	1.70
Austria	4	4.6	10	4.22	10	2.90	2.16	1.68
Slovakia	-	-	-	-	7	2.03	-	1.12
Denmark	3	3.45	7	2.95	7	2.03	1.41	1.10
Finland	3	3.45	7	2.95	7	2.03	1.39	1.08
Ireland	3	3.45	7	2.95	7	2.03	0.99	0.76
Lithuania	-	-	-	-	7	2.03	-	0.07
Latvia	-	-	-	-	4	1.16	-	0.05
Slovenia	-	-	-	-	4	1.16	-	0.04
Estonia	-	-	-	-	4	1.16	-	0.03
Cyprus	-	-	-	-	4	1.16	-	0.02
Luxembourg	2	2.30	4	1.69	4	1.16	0.01	0.01
Malta	-	-	-	-	3	0.87	-	0.01
Total	**87**[a]	**100**	**237**[b]	**100**	**345**[c]	**100**	**100**	**100**[d]

a. 62 votes are currently required to adopt a proposal. If the proposal is from a source other than the Commission, they must be cast by at least ten members.

b. After 1 January 2005, in the absence of accession, 170 votes will be required to adopt a proposal. If the proposal is from the Commission, the votes must be cast by a majority of members. In other cases, the votes must be cast by at least two thirds of the members.

c. After the accession of all new members, 258 votes will be required to adopt a proposal. When the proposal comes from the Commission, these votes must be cast by a majority of members. In other cases, they must be cast by two thirds of the members.

d. When a decision has been adopted by QMV in the Council, "a member of the Council may request verification that the Member States constituting the qualified majority represent at least 62% of the total population of the Union". If votes in favour represent less than 62%, "the decision in question shall not be adopted". Source for population data: *The Economist*, 16 December 2001.

e. Rules (a), (b) and (c) are stated in Annex II to the Treaty of Nice and appear to be unconditional. Annex III, however, says that "When all the candidate countries … have acceded, the blocking minority will rise from 88 to 91 votes". What this means is not clear: the two Annexes seem to contradict one another. What happens if a proposal receives 257 votes? By rule (c) in Annex II, it has been rejected. Annex III, though, says that the number of votes cast against (88) is not sufficient to block.

VOTES

The negotiation over the allocations of votes seem to have been an ill-tempered affair, complicated by the wish of Germany to acquire more votes. The German government argued that its larger post-reunification population should be reflected in more German votes in the Council. The French government, in particular, was unwilling to accept that Germany should have more votes in the Council than France. The French view prevailed.

The larger states as a whole, however, increased their voting weight. That may be seen from a comparison of column 2 of Table 1 with column 4. At the moment, the five largest members have 55.16% of the votes in the Council. The distribution of votes agreed at Nice will give them, before accession, 60.35%.

Germany's wish for more weight in EU decision-making, though not reflected in German votes relative to other large countries, is acknowledged in the rules for qualified majority voting.

Germany's wish for more weight in EU decision making, though not reflected in German votes relative to those of France, Britain and Italy, is acknowledged in the rules for qualified majorities. If the Treaty is ratified, the new rules come into effect on 1 January 2005. After that date, three conditions must be met for the Council to accept a proposal. They are that the proposal is supported by:

a. 170 votes or more (258 after accession of the 12 candidates);

b. a majority of member states if the proposal is from the Commission, two thirds of member states in other cases;

c. member states representing at least 62% of the total population of the Union.

Rules similar to (a) and (b) have a long history. Rule (c), however, has no such pedigree. It is a concession to German demands for more weight in the voting structure.

THE 62 PER CENT RULE

Germany has the largest population in the EU, existing or enlarged. What count of population will be used in applications of rule (c) is not yet publicly known. But widely quoted figures (as cited, for example, in *The Economist* of 16 December 2000) give Germany 22% of the total population of the existing EU, and 17% after accession of the 12 candidates. Britain, France and Italy each have between 15% and 16% of the population of the existing EU, and each will have about 12% of the enlarged EU. Spain has 10.5% of the population of the existing EU, and will have just over 8% of the enlarged EU; as will Poland, whose population is similar to that of Spain. On these figures, the total population of all of the small states in the current EU – that is, all members except Germany, Britain, France, Italy and Spain – is less than that of Germany (78.1 million against 82 million).

The 62% rule gives Germany more power to block proposals than other large member states. After 1 January 2005, if no candidates have acceded, Germany will be able to block proposals if it can ally with one other large state (France, Italy or the UK), or, perhaps, depending on the exact figures of population used, one large state and one other state. Such a coalition could not block a proposal under rules (a) or (b), but would make up more than the 38% of total population needed to block under the 62% rule.

The 62% rule gives Germany more power to block proposals than any other member state... The 62% rule benefits Germany and only Germany.

After 1 January 2005, but before accession, large states other than Germany will need to ally with two other large states, so long as one of them is not Germany, to block proposals under the 62% rule. Such a coalition, however, has no need of the 62% rule – three large states have enough votes to block a proposal under rule (a), without recourse to the 62% rule.[2]

After accession, three large countries will not have enough votes to block a proposal by themselves, but, if one of them is Germany, and only if one of them is Germany, they will be able to block the proposal under the 62% rule. To block under the 62% rule, Germany will need support from other member states with a combined population of 100 million. Any two of Britain, France and Italy will provide that, but not any other pair of partners.

Three large countries without Germany, however, will not be able to block a proposal, and will need the support of at least one smaller state. Alternatively, two of Britain, France or Italy plus Spain and Poland will be able to block under the 62% rule. These coalitions, however, do not need the 62% rule – they have enough votes to block without recourse to the 62% rule.

The 62% rule benefits Germany and only Germany. To say this is not to object to the rule: Germany does have a population that is larger than that of other member states, and a case can be made for acknowledging that fact in EU voting. That this is the purpose of the 62% rule, however, should be clearly stated.

DID NICE CREATE TOO MUCH BLOCKING POWER?

The new voting rules, however, seem badly designed to achieve their stated purpose of making an enlarged EU "governable". Blocking minorities seem too easy to construct.

[2] The small states between them have about 20% of the total EU population. A large state that can collect the support of many of the smaller ones, however, can block a proposal on the majority rule (b) – again, it will not need to invoke the 62% rule.

This is neatly formalised by Baldwin et al, 2001.[3] They calculate the number of alliances of member states with sufficient votes, numbers and population to accept a proposal. This number is then expressed as a percentage of all possible alliances. Currently, this figure is 7.8%. It rises to 8.2% on the basis of the Nice agreement before any accessions. But if all 12 new members are admitted, the figure falls to 2.1%. The Nice rules, after enlargement, seem to facilitate the formation of blocking coalitions.

The Nice rules seem to facilitate the formation of blocking coalitions: currently 7.8% of all the possible alliances of member states have the power to accept a proposal. After enlargement this proportion falls to 2.1%…

The EU is not now notable for rapid decision making. There is a real possibility, though, that enlargement on the basis of the Treaty of Nice will lead to paralysis.

A paralysed EU, of course, will seem quite desirable to the considerable number of observers who do not think that the EU should be making nearly as many decisions as it does. A problem, though, is that the inability of the EU to make decisions does not imply that the decisions will be repatriated to the member states – more likely, it simply implies an absence of decisions. That situation is not obviously desirable from any perspective.

…so there is a real possibility that enlargement on the basis of the Treaty of Nice will lead to paralysis.

VETOES

When the Council must act unanimously to accept a proposal, any member state can block acceptance – there is a national veto. At Nice, it was agreed that in 39 cases in which unanimity had previously been required,[4] the Council should henceforth decide by QMV, either by the Council acting alone (under Article 205 TEC) or by co-determination (the Council acting with the European Parliament under Article 251 TEC). Appendix 1 lists decisions from which the Treaty would remove national vetoes. Appendix 2 lists those which would remain.

Many of the decisions for which national vetoes would be eliminated by the Treaty seem not to be of major importance. If the Deputy Secretary-General of

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[3] Richard Baldwin, Erik Berglöf, Francesco Giavazzi and Mika Widgrén, *Nice Try: should the Treaty of Nice be ratified?*, CEPR, 2001.

[4] Thirty nine is the number usually cited. In fact, different numbers could be given. The principal problem is that one article sometimes covers a number of decisions. Removal of the veto from that article, therefore, could be counted as one – the article – or as several: the different decisions within the article. Nothing very much seems to hang on the precise number.

the General-Secretariat of the Council is appointed by QMV, the sky seems unlikely to fall. But other changes may be more important.

The Commission and the Parliament both have a poor record in financial matters. It may therefore be significant that appointments to the Court of Auditors, the rules of that Court, the financial regulations for the EU budget and the rules governing financial controllers, which have all been subject to unanimity, will no longer be.

A COMMUNITY INDUSTRIAL POLICY?

It is on items that have been shifted from unanimity in the Council to co-determination, however, that the impact of the elimination of the veto is most likely to be felt. "Co-determination" means that the Council of Ministers cannot by itself accept a proposal. Article 251 TEC gives the European Parliament the power to reject proposals subject to co-determination.

Alternatively, the Parliament can suggest amendments. If the Commission accepts these, the Council can accept the amended proposal by QMV. If the Commission rejects the Parliament's amendments, the Council can accept them only if it is unanimous in that acceptance. Co-determination therefore provides the Parliament with a substantial voice in the determination of policy, especially when it co-operates with the Commission.

Article 157 is a charter for industrial meddlers. It provides almost infinite scope for intervention in industry.

One area that the Treaty of Nice commits to co-determination that was previously subject to a national veto is industrial policy. Article 157(1) says that:

> The Community and the Member States shall ensure that the conditions necessary for the competitiveness of the Community's industry exist.
>
> For that purpose, in accordance with a system of open and competitive markets, their action shall be aimed at:
>
> - speeding up the adjustment of industry to structural changes;
> - encouraging an environment favourable to initiative and to the development of undertakings throughout the Community, particularly small and medium-sized undertakings;
> - encouraging an environment favourable to co-operation between undertakings;
> - fostering better exploitation of the industrial potential of policies of innovation, research and technological development.

Article 157 is a charter for industrial meddlers. Its loose words provide almost infinite scope for intervention in industry.

Now that Article 157 is subject to co-determination, this potential will more easily be realised. The Prime Minister of France, Lionel Jospin, has already called for a "Community industrial policy", and it seems likely that he will get

one. Removing the national veto in this area is likely to be expensive, both in terms of the taxes required to support subsidies to declining industries, and in terms of reduced industrial efficiency.

CULTURAL AND AUDIO-VISUAL SERVICES

Not all of the changes in veto powers entail withdrawal of vetoes. Article 135(6) says that:

> …agreements relating to trade in cultural and audio-visual services, educational services, and social and human health services, shall continue to fall within the shared competency of the Community and the Member States. Consequently, in addition to a Community decision taken in accordance with the relevant provisions of Article 300 [which prescribes that requirements for the Community will conclude "agreements between one or more States or international organisations"], the negotiation of such agreements shall require the common accord of the Member States. Agreements thus negotiated shall be concluded jointly by the Community and the Member States.

This provision was desired by the French government, which tends to be paranoid about what it regards as the threat posed to French culture by Hollywood. It does mean that other aspects of trade agreements can become subject to QMV – though it is difficult to forecast what that will mean in an EU containing several protectionist member states. It also means, however, that the Community, *de facto*, is committed to resist liberalisation of audio-visual services for the foreseeable future.

ENHANCED CO-OPERATION

The Treaty of Amsterdam (Title VII) incorporated the idea of "closer co-operation", under which a sub-group of member states can pursue policies not followed by the rest. That Treaty (Article 11(2) TEC), however, allowed other members to veto the formation of such a co-operating sub-group. The Treaty of Nice removes that veto.

The Nice Treaty removes the right of veto over "enhanced co-operation".

Under the Treaty of Nice, a minimum of eight member states are needed to engage in enhanced co-operation [clause A(g)], whereas the existing Treaty requires "at least a majority". The co-operation must be a last resort "when it has been established in the Council that the objectives of such co-operation cannot be attained within a reasonable period by applying the relevant provision of the Treaties" [clause B]. It must be "… open to all the Member States" [clause A(j)], and it shall "…not affect the competences, rights and obligations of those Member States which do not participate therein" [clause A(h)]. The object of enhanced co-operation must "remain within the limits of

the powers of the Union or of the European Community and … not cover areas falling within the exclusive competence of the Community." [clause A(d)].

Specific conditions are laid down for co-operations under Title V ("Common Foreign and Security Policy") [clauses J – M]. Clause J, however, makes it explicit that the co-operation "shall not relate to matters having military or defence implications". Specific conditions also apply to co-operations under Title VI ("Police and Judicial Co-operation in Criminal Matters") (clauses N-P).

Newspaper reports have suggested that enhanced co-operation is an engine of further integration that in some way threatens British interests, or that may force unwanted integration upon us. Perhaps that is so, especially in the light of the increased blocking power discussed earlier, but it seems unlikely.

The requirement that it be established that the objectives of the co-operation "cannot be attained within a reasonable period" by normal methods implies that the objective either lacks a qualified majority in the Council, or is subject to a national veto. Even if a project of enhanced co-operation goes forward, therefore, its supporters are in a minority (or, to be more precise, a qualified minority).

It is always possible, of course, that a co-operation will succeed, and, as a consequence, recruit new members. In that event, a qualified majority in the Council in favour of extending the co-operation to all members might emerge. In the absence of a national veto, Britain would have to accept that. That, though, is implicit in QMV. To object to experiments by small groups of member states on the basis that they might succeed would be churlish.

BREACH OF FUNDAMENTAL RIGHTS

Another veto that the Treaty of Nice would remove concerns breaches of fundamental rights by a member state. The existing Treaty allows the Council to "determine the existence of a serious and persistent breach … of principles mentioned in Article 6(1) …". Article 6(1) says (in its entirety) that:

> The Union is founded on the principles of liberty, democracy and respect for human rights and fundamental freedoms, and the rule of law, principles of which are common to Member States.

This determination however, required unanimity. Article 7 TEU, was modified at Nice to allow action in the event of a *risk* of a breach. This Article 7 as modified at Nice says that:

> On a reasoned proposal by one third of the Member States, by the European parliament or the Commission, the Council, acting by a majority of four-fifths of its members after obtaining the assent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the principles mentioned in Article 6(1), and address appropriate recommendations to that State.

Thus, while determination of the *existence* of a serious breach still requires unanimity, determination that there is a *risk* of a serious breach does not – and allows warning shots to be fired. The meeting at Nice also, in the Charter of

Fundamental Rights, discussed in the next chapter, provides the European Court of Justice with a more detailed standard of fundamental rights.

When a state is determined to be in breach of fundamental rights, it may be punished. Article 7(2) says that:

> …the Council, acting by qualified majority, may decide to suspend certain of the rights deriving from the application of this Treaty… including the voting rights of the government of that Member State in the Council.

GROUNDS FOR REGRET?

If the Treaty of Nice fails, should we be sorry?

If the failure creates a barrier to enlargement, that would certainly be a cause for regret. British governments have pressed for eastward enlargement since the fall of the Soviet Union, and enlargement is an issue on which principle and self-interest happily point in the same direction. But, as noted in the introduction, the Treaty is probably not necessary for enlargement.

For the rest, it is difficult to see that a failure to ratify would provide anyone with substantial grounds for regret. The Treaty of Nice is not a vast step. It moves in a federalist direction, but not very far; so that even federalists should find its loss supportable. From a federalist standpoint, moreover, the two most important documents discussed at Nice were the Charter of Fundamental Rights (CFR) and the Presidency report on the Rapid Reaction Force (RRF). But neither of these were incorporated into the Treaty, so a failure to ratify it will have only small effects on the status of either.

GROUNDS FOR REJOICING?

Would the demise of the Treaty, then, bring grounds for rejoicing? British Eurosceptics would be pleased that the national veto has been preserved in the 39 cases in which the Treaty would have removed it. But no vital national interest seems to require retention of most of these vetoes. In any case, one IGC having agreed to remove them, it will probably be easy to remove them at another. Any rejoicing at the preservation of national vetoes, therefore, should be restrained.

For the rest, leaving aside the RRF and CFR, the fact that federalists would have only small grounds to regret the failure of the Treaty implies that Eurosceptics would have only small grounds for rejoicing. Of course, the mere fact that EU processes have been disrupted may please some Eurosceptics. The disruption, though, is unlikely to be either large or prolonged.

SALAMI SLICING

In large part, these retrospectively small effects reflect the success of EU "salami-slicing" tactics – of making each step in the progress of the EU small enough that objections to that step as such are difficult to mount. "Why object to this?", say the powers-that-be, "when you've already given up all of that" – and they point to the mass of the *acquis communautaire*.

It is a fair question. What it should say to Eurosceptics is that opposition to EU integration must be founded in a principled case, and that the case must cover an entire aspect of the EU process: for example, all of the actions that have taken the EU so far beyond the single market.

CHAPTER THREE
CHARTER OF FUNDAMENTAL RIGHTS[5]

The Charter of Fundamental Rights is generally regarded as a German initiative, but has much support elsewhere, especially in France, Italy, and the Benelux countries. Lionel Jospin, for example, the Prime Minister of France, in his speech on the future of the EU of 28 May 2001, expressed the hope that the CFR would be "an integral part of the pact uniting the nations of Europe".

The CFR is the product of a "convention", established at the 1999 Cologne summit, and chaired by Roman Herzog, a former president of Germany. It had 61 other members: one representative of each head of a member state; 16 from the European Parliament; and two from each of the 15 national parliaments.

Supporters of the CFR intended it to be annexed to the Nice Treaty. That, however, proved to be an annex too far, at least at Nice. Instead, the "Presidency Conclusions" of the Nice IGC note that the Presidency:

> …welcomes the joint proclamation, by the Council, the European Parliament and the Commission, of the Charter of Fundamental Rights, combining in a single text the civil, political, economic, social and societal rights hitherto laid down in a variety of international, European or national sources.
>
> The European Council would like to see the Charter of Fundamental Rights disseminated as widely as possible amongst the Union's citizens… the question of the Charter's force will be considered later.

[5] The version of the Charter discussed here is the one forwarded to the European Council for its meeting at Biarritz, 13-14 October, 2000.

A document that is annexed to the Treaty of Nice, moreover, "Declaration on the Future of the European Union", firmly places the CFR on the agenda of the next IGC, to be held in 2004. That the "Charter's force" will be considered later is therefore certain.

The British government opposed the inclusion of the CFR in the Nice Treaty. That might have been for reasons of principle or it might have been that Mr Blair did not want the CFR to become an issue during the general election campaign. In any event, the British government will be under pressure to give the CFR formal standing in the 2004 IGC.

Proponents attach great importance to the CFR. The EU commissioner for justice and home affairs, Antonio Vitorino, for example, has said that:

"The Charter will mark a definitive change in the Community which will move it away from the essentially economic raison d'être of its origins to become a full political union"

– Antonio Vitorino, EU commissioner for justice and home affairs, May 2000.

> The drawing-up of the Charter is an extremely important issue for the European Union, because, if it is brought off successfully, it will mark a definitive change in the Community, which will move away from the essentially economic raison d'être of its origins to become a full political Union.[6]

Inspection of the CFR itself does little to explain these hopes and enthusiasms. Viewed as a constitutional document, the CFR lacks clarity, fails to inspire, and frequently trembles on the brink of the banal (Article 29, for example, gives "Everyone … the right of access to a free placement service").

WHAT IS THE PURPOSE OF THE CFR?

M Jospin's enthusiasm towards the CFR, and Commissioner Vitorino's views on its impact on the character of the EU, give rise to an expectation of a document that breaks new ground. The authors of the CFR, though, insist that it is intended merely to make existing rights more visible. The Preamble to the CFR says that:

> …it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter.

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[6] Antonio Vitorino in a speech, "The Charter of Fundamental Rights as a foundation for the Area of Freedom, Security and Justice", delivered to the General Assembly of the Association of Amnesty International, Lisbon, 13 May 2000.

This position is given substance by an explicit rejection of the idea that the CFR creates any new rights. Article 51.2 says:

> This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.

Despite Article 51.2, however, it is not credible that the CFR has as its purpose merely an enhancement of the visibility of what already exists. Were that the aim, it would be better achieved by a series of handbooks, setting out particular classes of existing rights.

Nor could a mere publicity exercise, aimed at making existing rights 'more visible', explain the enthusiasm of the German government, Lionel Jospin and Commissioner Vitorino, or the pressures to include the CFR in the Treaty. Major governments would surely not insist, four years ahead of time, that the agenda of the 2004 IGC should include discussion of a simple publicity exercise.[7]

THE CFR AND NATIONAL LAW

The claim that the CFR is merely a reaffirmation of existing rights is not the only difficulty in assessing its purpose. Article 9 of the CFR, for example, says, in its entirety, that:

> The right to marry and the right to found a family shall be guaranteed *in accordance with the national laws governing the exercise of these rights* (emphasis added).

Similar examples giving guarantees "in accordance with national laws" appear in Article 10.2 (the right to conscientious objection); Article 14.3 (the right to found educational establishments); Article 35 (health care); and Article 36 (access to services of general economic interest).[8]

But what is the point of a guarantee by the EU of a right "in accordance with national laws"? Why is it necessary or useful for the EU to do this? What is guaranteed?

One possible answer is that some persons in the Community want the Community to have the power to intervene in, say, the determination of the scope of the right to marry and to found a family. If the CFR were appended to the Treaty, would it provide a basis for Community intervention in national marriage laws?

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[7] The notable cluster of thought-free clichés ("in the light of changes in society, social progress and scientific and technological developments") in the passage quoted above is worth noting. Such language is useful only as a smokescreen, and suggests that the authors of the CFR are conscious of the implausibility of the claim that the CFR is just a publicity exercise, and are seeking to distract attention from it.

[8] Other articles mention national law and practice but also Community law. Examples are Article 16 (the right to conduct a business); Article 27 (workers' right to information and consultation); Article 28 (right of collective bargaining and action); Article 30 (protection in the event of unjustified dismissal); and Article 34 (social security and social assistance).

Suppose, for example, that Country A adopts a law that bans persons with Aids from marrying and starting a family. The merits of such legislation are not the point here. The issue is how such a national law would be affected by the guarantee in Article 9 of the CFR, were the CFR appended to the Treaty.

There is a powerful argument that it would have no effect at all. In the first place, the CFR guarantee of the right to marry is "in accordance with national laws". Therefore, the government of Country A would argue, the guarantee is subject to conditions imposed by national law. Moreover, as we have seen, Article 51.2 says that the CFR "… does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties". That must mean, the government of Country A would argue, that the Community cannot act on the basis of the CFR alone – Community action must have some alternative legal base to the CFR, and if there is no such alternative, then the Community has no right to intervene.

Why should a member state accept that the ECJ has the final word on whether, in areas such as marriage, the right to conscientious objection, the founding of educational establishments, health care, or access to services of general economic interest, competence lies with the member states or the Community?

The Commission might argue, however, that although the CFR guarantees a right in accordance with national law, the power of member states cannot extend to changing national law in such a way as to remove or reduce the right that is guaranteed. It could be said that the CFR guaranteed the right to marry according to the national law as it existed at the time the CFR was appended, not to any and every modification that a member state might make in its national laws after that.

Moreover, the Commission might say, rebutting the argument of the government of Country A, Article 29 of the CFR must mean *something*. Otherwise, why would it be appended to the Treaty? The argument of the government of Country A implies that Article 29 is meaningless, and that the argument must therefore be wrong.

To eyes unpractised in Community law, the government of Country A might seem to have the stronger case. The arguments, though, would be weighed by the European Court of Justice (ECJ). There is no guarantee that the arguments of the member state would prevail before that body.

The more immediate and important issue, however, does not depend on the detail of legal argument. It is that there is no good reason to change the current situation, in which the Community has no standing in national laws regarding marriage (or the right to conscientious objection; the founding of educational

establishments; health care; or access to services of general economic interest). Perhaps the ECJ would rule that the CFR gives the Community no powers in these areas. But why should a member state accept the creation of circumstances in which the ECJ has the final word – or any word – on whether, in these areas, competence lies with the member states or the Community?

CONTENT

The content of the CFR reflects social-democratic orthodoxy. That is, of course, the current political complexion of the governments of most member states.

DISCRIMINATION

Article 21 prohibits:

> …discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation.

This list is for the most part unobjectionable (though "genetic features" seems problematic – given that sex, race and colour are already accounted for, what is intended by its inclusion?).[9]

There is, though, a distinct oddity in the CFR approach to discrimination. It arises because doing away with discrimination is not enough for the CFR. Article 23 says:

> Equality between men and women must be ensured in all areas, including employment, work and pay… the principal of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.

So there *can* be discrimination for good causes!

Why, though, is gender the only good cause so recognised? The case for affirmative action to counter racial discrimination seems at least as strong as the case for action to counter gender discrimination. Yet the CFR expressly permits affirmative action when gender is at issue (Article 23), but expressly bans it when race is at issue (Article 21). It is a surprising oversight. It leaves the convention – and the EU – open to accusations of racism.

LABOUR AND PROPERTY

Consistent with its social-democratic cast, the CFR sets forth many rights for workers, but deals with the protection of property in only one, heavily circumscribed, article. Thus:

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[9] The CFR, though, is a legal document. Language is important, and the aim of Article 21 could surely have been better realised. The concept of "discrimination" is not cut-and-dried. When combined with this list of characteristics, it raises countless possibilities of legal action, and opens many opportunities for judicial decisions whose consequences for the Community will be bad.

> Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests (Article 12).
>
> Everyone has the right to education and to have access to vocational and continuing training (Article 14).
>
> Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Community law and national laws and practices (Article 27).
>
> Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflict, to take collective action to defend their interests, including strike action (Article 28).
>
> Every worker has the right to protection against unjustified dismissal … (Article 30).
>
> Every worker has the right to working conditions which respect his or her health, safety and dignity (Article 31.1).
>
> Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave (Article 31.2).

Article 34, moreover:

> …recognises and respects the entitlement to social security benefits and social services, providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment.

By comparison, Article 17, dealing with property, is anaemic:

> Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law insofar as is necessary for the general interest.

In the provisions dealing with the labour market, the flexible words – "unjustified" dismissal, for example, or the provision of working conditions that "protect dignity" – are open to interpretations that expand the protection offered. Indeed, they have the potential to expand them to an almost unlimited extent. In Article 17, interpretation of the flexible words – "the public interest', "the general interest" – is likely to contract the protection that is ostensibly offered.

LOCKING IN SOCIAL DEMOCRACY

Annexing the CFR to the Treaty would have the effect of locking in the provisions of the CFR. Perhaps these provisions are, as the CFR says, already embodied in other legislation. But an Annex to the Treaty is more difficult to change than other legislation. It seems likely that this is the real intention behind the CFR.

It is perfectly proper that *day-to-day* Community legislation should reflect the left-leaning, social-democratic orthodoxies that inspire most of the parties currently ruling the countries of the EU. That is the democratic process.

Different issues arise if one party uses a constitution in an effort to make it more difficult for other parties to pursue their alternative legislative goals.

Different issues arise, though, if one party or group of parties uses a treaty or a constitution to make it more difficult for other parties to pursue their alternative legislative goals. That is to put the constitution at the centre of partisan strife. An effective constitution, though, gains its force by expressing principles that are widely accepted and non-partisan.

The CFR makes little effort to conform to this principle. Moreover, Article 54 makes it even more difficult to change the CFR. Article 54 says:

> Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in this Charter or at their limitation to a greater extent than is provided for herein.

Many provisions of the CFR are open to reasoned disagreement, as will be clear from the foregoing discussion. Another example is the prohibition on the extradition to the United States of persons who have fled to Europe after committing multiple murders in the United States (Article 19.2). Many Europeans might feel quite strongly that such persons should be returned to the US.

In the light of Article 54, however, a European who believed that might nevertheless deem it sensible to desist from public argument to that effect. Such a public argument could surely be construed by the authorities as an "act aimed at the destruction of rights recognised in the Charter", as specified in Article 54. But Article 54 then trumps Article 11, which appears to protect "freedom of expression" and "freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers". A person openly advocating the return to the US of persons who have committed multiple murders in the US therefore could not rely on the protection of Article 11. Nor could anyone openly opposing any provision of the Charter. What might happen to such heretics? We must wait and see.

CONCLUDING COMMENT

There is an obvious tension between the claim that the CFR is no more than a declaration of existing rights and the proposition that it is in some way fundamental to the future of the Union. Whatever it is intended to be, however, the CFR as it stands has no obvious merits. It serves no useful purpose; or, if it does serve a useful purpose for some persons or institutions, that purpose is covert, which alone should be a sufficient ground for rejecting it. Its words are dangerously loose and its effects dangerously unpredictable. It should not be given formal standing in Community legislation.

CHAPTER FOUR
AN EU ARMY?

Earlier IGCs created the authority for an EU "Rapid Reaction Force" (RRF). At Nice, the European Council received and approved a "Presidency Report on European Security and Defence Policy" (hereafter, "report") which discusses, among other things, how the RRF will relate to Nato.

The report has aroused controversy because it visualises an RRF command structure independent of Nato, and therefore potentially competitive with Nato. In the view of many knowledgeable commentators, it poses a threat to Nato.

The RRF raises another important question: is it the forerunner of a European army? An EU with a military capability will be different in character – perhaps very different – from an EU that is solely an economic power.

The RRF itself cannot properly be described as a European army. The forces that the RRF will deploy in an emergency remain at other times under the control of the member states. EU member states have made commitments to provide troops to the RRF in case of emergency, in order to fulfil the range of 'Petersburg tasks' i.e. humanitarian efforts, peace-keeping and crisis management, which includes 'peacemaking'. The EU as such has no military force that it can deploy independently of the member states. The RRF, though, if it goes ahead, will provide the EU with an embryonic command structure.

Serious thinking about the EU must always go beyond the current state of play. EU initiatives are rarely intended to be a final word. They are intended to set up a dynamic that will move the situation onwards. That dynamic is the proper target of analysis of EU initiatives. Before turning to that, however, the plans for the RRF are briefly set out.

COMMITMENTS

> In the field of military capabilities… the Member States set themselves the headline goal of being able by 2003 to deploy within 60 days and sustain for at least one year forces up to corps level (60,000 persons). These forces should be militarily self-sustaining with necessary command, control, logistics, other combat support services and additionally, as appropriate, air and naval elements." (Report, Annex I, para 2).

The actual contributions are set out in the 'Force Catalogue' and:

> …constitute a pool of more than 100,000 persons and approximately 400 combat aircraft and 100 vessels, making it fully possible to satisfy the needs identified to carry out the different types of crisis management missions within the headline goal. (Annex I, p.8).

The "fully possible" of the last quotation, however, apparently calls for careful interpretation:

> As regards the strategic air and naval transport capabilities, improvements are necessary to guarantee that the Union is able to respond, in any scenario, to the requirements of a demanding operation at the top of the Petersburg range … (Annex I pp. 8-9).

RELATIONS WITH NATO

That the report visualises a separate command structure for the RRF cannot be doubted. It says, for example, that:

> It remains essential to the credibility and effectiveness of the European security and defence policy that the Union's military capabilities for crisis management be reinforced so that the Union is in a position to intervene with or without recourse to Nato assets. (Report, Annex I, p.8).

In addition:

> … the entire chain of command [of the RRF] must remain under the political control and strategic direction of the EU throughout the operation … the operation commander will report on the conduct of the operation to EU bodies only (Report, Annex VII, final paragraph).

The report makes it easy to see why some think that EU plans threaten Nato. One paragraph manages to encapsulate two of the principal problems:

> As regards the Member States concerned, Nato remains the basis of the collective security of its members and will continue to play an important role in crisis management. The development of the European Defence and Security Policy (EDSP) will contribute to the vitality of the renewed transatlantic link. This development will also lead to a genuine strategic partnership between the EU and Nato in the management of crises with due regard for the two organisations' decision-making autonomy. (Report, p.1).

The first problem lies in the words "an important role in crisis management".[10] "An important role" is not necessarily a central or crucial role. The words suggest the possibility that an organisation other than Nato might be dominant in crisis management. This alternative dominant organisation, presumably, is the EU.

That raises the second problem. Under these circumstances, what will be the nature of the "genuine strategic partnership between the EU and Nato"? Nato has been successful for 50 years in large part *because* it contained a dominant power, the US, with a clear idea of what needed to be done. A "partnership" in which the EU jostles Nato, and the US, in a contest for parity or dominance would be a different organisation. An organisation beset by such competition probably could not survive.

An editorial in *The Financial Times* says that Donald Rumsfeld, the new defence secretary in the US "… is a strong advocate of Nato in which, he says, 'everybody talks to each other in front of each other.' "[11] Mr Rumsfeld is saying that Nato meetings at which the EU and/or the EU member states arrived with a pre-agreed position would not be acceptable to the US.[12] How could it be?

Recent evidence suggests that the EU members of Nato do not add very much value to what the US brings to Nato.[13] The report acknowledges the need of the EU for Nato capacities:

> In the emergency phase of a crisis … the [European Military] staff may call on external planning sources, in particular the guaranteed access to Nato planning capabilities, to analyse and refine these options. (Annex VII, p.30).
>
> The EU would reiterate the importance which it attaches to being able, when necessary, to make use of the assured access to Nato's planning capabilities and to count on the availability of Nato's assets and capabilities as envisaged in the Communiqué from the Washington Summit. (p.4).

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[10] The "important role" of Nato might be contrasted with "… the *primary responsibility* of the UN Security Council for maintaining peace and international security" (emphasis added).

[11] *The Financial Times*, 6 February 2001.

[12] Article 19 TEU says that "Member States shall co-ordinate their action in international organisations and at international conferences. They shall uphold the common position in such fora."

[13] Interview in *The Financial Times* with Dietrich von Kyaw, outgoing German ambassador to the European Union, 5 August 1999:

> 'What Kosovo has shown is that we – the French, the Brits and the Germans, whoever – are all, at maximum, second rate. Not as far as numerical strength is concerned. Not as far as courage is concerned. But if we are not careful, we Europeans will become the Hessians [18th century German mercenaries] of the Americans.'

Europe is therefore right to develop a security and defence identity:

> 'We must be ready in case the Americans are not interested to fight a European war. We never have a guarantee against neo-isolationist developments. Nobody knows how Congress will decide. Nobody knows what sort of US president we might have.'

The second of these passages speaks of "assured access" to Nato (for which read US) assets, but sounds more like a plea for access. That is because the EU is trying to stretch a point. The Washington Communiqué guaranteed the EU access to Nato assets for operations conducted in the framework of Nato. The EU, though, is now seeking EU access to Nato assets for operations conducted by the EU outside the Nato framework.

President Bush said that Mr Blair had assured him that "the European defence would no way undermine Nato… that there would be a joint command, that the planning would take place within Nato". The report quite clearly says otherwise.

President Bush said on the occasion of Mr Blair's visit to Washington that Mr Blair had assured him that:

> the European defence would no way undermine Nato … that there would be a joint command, that the planning would take place within Nato.[14]

The report quite clearly says otherwise, as the passages quoted above demonstrate. Moreover, the British government, in the shape of the then Foreign Secretary, Robin Cook, has accepted the report. Mr Cook said in Nice that the Report, "… buttons down exactly what we have decided here".[15]

The testimony of the military points firmly in the same direction. It was reported earlier this year that:

> General Jean-Pierre Kelche, the French Chief of Staff, has testified to the Asemblée Nationale that Annex I [of the Presidency report] was deliberately worded to rule out 'any interpretation that would give Nato a decision-making priority in the reaction to crises.[16]

In April, the Finnish commander-designate of the RRF said that the "RRF will not bow to Nato."

In a similar vein, the Finnish commander-designate of the RRF is as saying that the RRF "will not bow to Nato". General Gustav Hagglund "described the planned 60,000-strong force as an important symbol of EU identity, similar to the euro and the flag", and he continued:

> We are not talking about a subsidiary of Nato. This is an independent body. We are talking about co-operation with Nato.[17]

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14 *The Financial Times*, 26 February 2001.
15 *The Times*, 18 January 2001.
16 *The Times*, 18 January 2001.
17 *The Times*, 12 April 2001.

Under US pressure, however, Mr Blair has backed away from the idea that there might be operations in which "the entire chain of command must remain under the political control and strategic direction of the EU throughout the operation". *The Financial Times* noted the nature of the compromise:

> To avoid duplication with Nato, the EU will not have any operational planning capacity of its own. Nevertheless, it has set up structures in Brussels including a political and security committee, a military committee, and a 130-strong military staff to offer strategic plans and advice on potential EU military operations.[18]

Perhaps this fudge will satisfy Mr Bush. If he can live with it, the advocates of an autonomous EU defence capability certainly should be able to.

WHAT IS THE RRF FOR?

Advocates of the RRF seem to have difficulty in explaining its purpose. One argument is that Europe should provide more resources for its own defence. Lord Robertson, for example, the secretary-general of Nato, says that:

> … Europe has to make a greater contribution within Nato. For many years, the US has been calling on Europe to develop its defence capabilities, to 'balance the burdens' more fairly. The Kosovo air campaign is a case in point. The US had to bear a disproportionate share of the burden… This imbalance of capabilities is neither fair, nor politically sustainable over the long term.[19]

This is true. But it makes a case for greater investment in defence by European nations, not for the RRF, which merely diverts existing forces. In fact, European defence expenditure continues to fall. The International Institute of Strategic Studies reports that:

> European defence spending is falling by 5 per cent per annum in constant dollar terms, even though the aim of the European Union's defence initiative is to boost capabilities …[20]

The report gives the official rationale for the RRF:

> In developing this autonomous capacity to take decisions and, where Nato as a whole is not engaged, to launch and conduct EU-led military operations in response to international crises, the European Union will be able to carry out the full range of Petersburg tasks as defined in the Treaty of European Union: humanitarian and rescue tasks, peace-keeping tasks and tasks of combat forces in crisis management, including peacemaking.

"Where Nato as a whole is not engaged" can be translated as "Where the United States is not engaged". These more accurate words, however, still do not fully define the position visualised by the report. If the US is not engaged, it might be because it is not interested, or thinks it is someone else's business, or because it is

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18 *The Financial Times*, 30 April 2001.
19 *The Financial Times*, 7 March 2001.
20 *The Financial Times*, 17 May 2001.

actively opposed to engagement. At the moment – though not necessarily in the future – it is difficult to visualise the EU proceeding with a military operation that the US opposes. The operation to be imagined, therefore, is one that the US does not oppose, but in which it does not wish to become actively involved.

The number of such operations seems unlikely to be large, and advocates of the RRF have produced remarkably few examples. Lord Hurd provides one:

> There is much discussion over the kind of operation that the EU might undertake without America… One example is the rapid evacuation of European citizens from a crisis-hit North African country.[21]

Presumably Lord Hurd is citing the best that "much discussion" has come up with. If so, however, it is remarkably unconvincing. Why would the EU need "to deploy within 60 days and sustain for at least one year forces up to corps level (60,000 persons)" in order to rapidly evacuate European citizens from North Africa? Can the EU really think that the US would deny the use of Nato planning abilities and assets to rescue Europeans at risk in North Africa?

It is not a good example. Its very irrelevance, however, strongly suggests that the official rationale for the RRF is not the real reason for the proposed force.[22]

That the EU wants an army is not an offence. Lack of candour about the issue is.

A PRECURSOR OF A EUROPEAN ARMY?

The report is emphatic that creation of the RRF "… does not involve the establishment of a European army." (p.1). Later it states that "… the Member States have decided to develop more effective military capabilities. This process, without unnecessary duplication, does not involve the establishment of a European army." (p.7). The RRF is not a European army, but it seems clear that it is intended to be the first step in that direction.

The lack of any obvious urgent need – or of any need that advocates of the RRF are willing or able to articulate – strongly suggests the possibility of hidden motives. The proposed separate command structure points in the same direction.

That some people in the EU want an EU army is not an offence. Lack of candour about the issue is.

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21 Writing in *The Financial Times*, 18 February 2000.

22 Other examples have followed the attempts of Mr Blair to distance himself from an independent RRF, and to deliberately play down the role of the RRF. Thus, for example, Geoff Hoon (Secretary of State for Defence), said in *The Financial Times* (26 February 2001) that the RRF could act autonomously:

> '…only in relation to low-level humanitarian peacekeeping operations.'

Admiral Sir Michael Boyce, Chief of Defence Staff, is reported as saying (*The Financial Times*, 23 March 2001):

> 'An EU force would not take on war-fighting operations, and could only embark on the smallest roles, such as flood relief, without Nato support".

FEDERAL VOCATION: FEDERAL ARMY

Some – mainly in the US -- view the EU as an international organisation, somehow on a par with the World Bank, the IMF or the WTO. Some, in Europe as well as in the US, think it *ought* to be an international organisation, on a par with the World Bank, the IMF or the WTO – primarily economic arrangements which have no need of a military force. But that view of the EU is wrong. It is not an international organisation: it is, like it or not, a nascent state.

There is nothing untoward or improper about the EU trying to create a military capability for itself, if it can obtain the consent of its member states. An additional step is needed to arrive at the proposition that the EU ought to have an army. But those currently at the helm of the EU think that the EU has "a federal vocation". They believe that the EU should be a state. They presumably believe, therefore, that the EU should have an army.[23] As General Hagglund said, an army is a central symbol of statehood. Those who think that the EU has a federal vocation must want an army for that reason alone. But a military capacity is also a component of an effective foreign policy, and European federalists will want an effective EU army for that purpose as well.

Acknowledgement that the EU is metamorphosing into a state implies the probable future existence of an EU army. The question is how the EU will get from here to there, and what it will break in its transit.

Seen from this point of view, the EU's problem is to create an effective military force without provoking a withdrawal of US forces from Europe before the EU is confident that it can defend itself against any plausible threat. The RRF is best viewed as an attempt to start this process.

CONCLUDING COMMENT

The RRF does not make sense except as the precursor of a European army. The general question raised by the RRF, therefore, is whether the EU should possess its own military force. This question can not, though, be sensibly answered with a simple "yes" or "no".

There will be broad agreement that western Europe should in principle be able to defend itself without relying on the United States. That, though, does not make a case for the EU to become a military power – a strengthening of the military forces of the member states provides a viable alternative.

To say that the nations of western Europe should be able to defend themselves without US help, moreover, is not to say that western Europe should break away from the alliance with the US. Events or domestic politics might cause the US to withdraw its military forces from Europe, and it is clearly desirable from a western European perspective that Europeans should be able to defend themselves if that happens. Sensible western European policy, though, would also try to facilitate a continuing US military presence in Europe.

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[23] Headline in *The Financial Times* 10 May 1999: "Prodi says common EU army 'logical'". On 22 September 2000, *The Financial Times* stated that: "Guy Verhofstadt, Belgium's prime minister, yesterday called for creation of a European Union army 'in the relatively short term' ".

A continuing US presence, however, will be more easily achieved in the absence of an EU army. Nato can survive as a US hegemony. It almost certainly cannot withstand an attempt by the EU to co-ordinate the policies towards Nato of EU member states that are also members of Nato.

The US would have good reason to view such an EU policy as a challenge to US leadership. In the light of the disparity of forces between the US and its European allies, moreover, the US would be entitled to regard it as an impertinent and unwarranted challenge.

The EU talks about "genuine partnership" with the US in military matters. Genuine partnership, though, requires that partners of similar wealth and population contribute similar military forces. It will be a long time before the contributions to Nato of the EU member states that are members of Nato match those of the US.

The taste for symbols of the EU and its supporters is such that they are sometimes willing to settle for the symbol without the substance. In some matters that foible can be indulged without great harm. In military matters, it cannot be. What is ultimately at issue in military matters is European freedom. To jeopardise European freedom for the sake of a mere symbol of European unity would be a potentially disastrous misjudgement.

CHAPTER FIVE
THE END OF THE AFFAIR?

The Treaty of Nice schedules a "constitutional conference" for 2004, which will take place whether or not the Treaty is ratified. The conference, though, is not the only important EU matter scheduled for 2004 or thereabouts. That is also when the first batch of candidate countries is due to be admitted to the EU.

These events are not independent of one another. When the candidates become members, they will have votes, and they will be able to resist pressure to shuffle them along the path towards a federal destiny. They probably will resist such pressure.

For federalists that is a major problem. If they wait until after enlargement to try to complete the journey to federation, the journey may never be completed. Federalists therefore want it to be completed – or as much of the route as possible covered – *before* enlargement. The likely resistance to federalism of the new members also means that enlargement is likely to become a weapon in the struggle to achieve federation.

The potential clash between enlargement and federalism is acknowledged in paragraph 8 of the "Declaration on the future of the EU", annexed to the Treaty:

> The Conference of Member States shall not constitute any form of obstacle or precondition to the enlargement process. Moreover, those candidate countries which have concluded accession negotiations with the Union shall be invited to participate in the Conference. Those candidate States which have not concluded their accession negotiations shall be invited as observers.

That sounds amiable, but should be treated with scepticism. Some existing member states, most notably Germany, but not only Germany, are anxious to create a federal Europe. Other existing member states, most notably Britain, but not only Britain, want to avoid one. Enlargement is inevitably a piece in that game. If enlargement goes ahead without an agreement on a federal Europe, some believe that the British view will have won the day.

Would that it were so easy! Successive British governments have thought they could avoid deepening by insisting on widening – enlargement. Successive continental governments have insisted that deepening should precede enlargement, or, at least, should go hand in hand with it. Why should they abandon that position now?

More likely, member states seeking a federal EU will block enlargement (a blockage that their electorates will support) unless other member states concede ground on federalism. "Federalism", however, can take many forms – there must be a parallel debate about what form of federalism the EU is to adopt. These are unlikely to be relaxed and happy discussions.

Marx commented about Napoleon III that his very plasticity allowed all classes and types to reinvent him in their own image.

> Just because he was nothing, he could signify anything.[24]

The EU shares this characteristic. Everyone can imagine a future EU that accommodates his or her particular hopes and interests. The French imagine a future EU that will project the glory of France; the Germans an EU that will submerge the nations who are its members and allow Germans to present themselves as leading Europeans. The British visualise a free-trading EU with flexible labour markets; others see the EU as a means of defending "the European social model" against the "market anarchy" of the Anglo-Saxon model.

Because enlargement creates something like an end-game, future disagreements will be bitter. Their great merit, however, is that they will shed light on who wants what from "Europe". By 2005, everything should be much clearer.

It is the mutual inconsistency of these ideas, not their merits, that is relevant here. Political alliances built on disparate dreams and clashing ambitions are likely at some point to face severe problems. Indeed, the current *froideur* between the governments of France and Germany is due precisely to the fact that the Germans have become more specific about what they want from "Europe" – and (of course) it is incompatible with what the French want.

There is much more of this to come, and, because enlargement creates something like an end-game, the consequent disagreements will be bitter. Their great merit, however, is that they will shed light on who wants what from "Europe". By 2004, everything should be much clearer.

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[24] Quoted by Robert Skidelsky, *New York Review of Books*, 16 November 2000.

APPENDIX I
NATIONAL VETOES REMOVED BY THE TREATY OF NICE

UNANIMITY UNDER EXISTING TREATY, BUT QMV UNDER TREATY OF NICE

TREATY OF EUROPEAN UNION

Article 23 TEU

Appointment of foreign policy special representative.

TREATY ESTABLISHING THE EUROPEAN COMMUNITY

Article 62(2)(a) TEC
Procedures for checks at external borders.

Article 100(1) and (2) TEC
Emergency aid and emergency financial assistance to member states.

Article 111(4) TEC
International representation of the Commission in areas of monetary union.

Article 123(4) TEC
Measures for introducing the European currency.

Article 161 TEC
Rules for structural and cohesion funds.

Article 181(a) TEC
Economic and technical co-operation with third countries.

Article 190(5) TEC
MEPs statute (though taxation of MEPs still subject to unanimity).

Article 191 TEC
Regulations for European political parties.

Article 207(2) TEC
Appointment of Secretary-General of the General-Secretariat of the Council.

Article 214(2) TEC
Appointment of the Commission President.

Article 214(2) TEC
Selection of the list of members of the Commission.

Article 215 TEC
Appointment of a new member of the Commission.

Article 223 TEC
Rules of procedure of the Court of Justice.

Article 224 TEC
Rules of procedure of the Court of First Instance.

Article 225a TEC
Rules of procedure of the judicial panels.

Article 247 TEC
Members of the Court of Auditors.

Article 248 TEC
Rules of procedure of the Court of Auditors.

Article 258 TEC
Members of the Economic and Social committee.

Article 263 TEC
Members of the Committee of the Regions.

Article 279 TEC
Financial regulations of the EU budget and rules governing financial controllers.

UNANIMITY UNDER EXISTING TREATY BUT CO-DECISION WITH EUROPEAN PARLIAMENT UNDER TREATY OF NICE

TREATY OF EUROPEAN UNION

Article 24 TEU
Agreements on CFSP and on police and judicial co-operation

TREATY ESTABLISHING THE EUROPEAN COMMUNITY

Article 11(2) TEC
Measures to allow member states to co-operate in justice and home affairs.

Article 13 TEC
Anti-discrimination measures.

Article 18 TEC
Measures to enable freer movement within the EC.

Article 62(3) TEC
Conditions of travel by non-EU nationals.

Article 63 (1a, 1b) TEC
Implementing common rules on asylum.

Article 63 (1c, 1d) TEC
Implementing rules between EU countries for receiving refugees.

Article 63 (2a) TEC
Implementing rules on standards for protecting refugees.

Article 63 (3b) TEC
Measures to deal with illegal immigration.

Article 65 TEC
Cross-border exchange of documents.

Article 133 TEC
International agreements in trade in services and intellectual property.

Article 157 TEC
Industrial policy.

Article 159 TEC
Actions for social and economic cohesion outside the structural funds.

APPENDIX II
COUNCIL DECISIONS SUBJECT TO NATIONAL VETOES AFTER THE TREATY OF NICE

TREATY OF EUROPEAN UNION

Article 7.1 TEU
Determination of serious breach of fundamental rights by a member state.

Article 23 TEU
All decisions under Title V (Provisions on a Common Foreign and Security Policy) *except*:

r. When adopting joint actions, common positions or taking any other decision on the basis of a common strategy
s. When adopting any decision implementing a joint action or common position
t. When appointing a special representative in accordance with Article 18(5)

Even with respect to decisions under the excepted headings, a member of the Council may declare that it opposes a decision "for important and stated reasons of national policy"; and the issue then requires unanimous assent.

Article 24(2) TEU
International agreements on issues for which unanimity is required for internal decisions.

Article 28 TEU
Operational expenditure under CFSP not to be charged to EC budget or apportioned according to GNP.

Article 34 TEU
Measures to promote co-operation on Police and Judicial Matters.

Article 38 TEU
As Article 24.

Article 40(2) TEU
A member of the Council may declare that it opposes a co-operation on police and judicial matters between a sub-set of member states "for important and stated reasons of national policy", and the question must be resolved by unanimity.

Articles 41 TEU
Operational expenditures on police and judicial matters not to be charged to the EC budget.

Article 42 TEU
Actions under Article 29 TEU to fall under Title IV TEC.

Article 48 TEU
Amendments to Treaty.

Article 49 TEU
Applications by non-members of the EU to become members.

TREATY ESTABLISHING THE EUROPEAN COMMUNITY

Article 13 TEC
Action to combat discrimination. (Except, under Article 13.2, when the Council adopts Community incentive measures to support such action).

Article 18.3 TEC
Provisions on passports, identity cards, residence permits and provisions on social security and social protection.

Article 19 TEC
Arrangements for citizens of the Union who reside in a member state other than that of which they are nationals to vote and stand as a candidate at municipal elections in their state of residence. Arrangements for such persons to vote and stand as a candidate in elections to the European Parliament in their state of residence.

Article 22 TEC

Provisions to strengthen or add to rights of citizenship of the Union.

Article 42 TEC
Measures in the field of social security necessary to provide freedom of movement for workers.

Article 47 TEC
Co-ordination of the provisions of the member states concerning self-employed persons (when at least one member state must change its national law – otherwise by QMV).

Article 57 TEC
Measures "which constitute a step back in Community law as regards the liberalisation of the movement of capital to or from third countries".

Article 67 TEC
Adoption of QMV in matters relating to visas, asylum, immigration and other policies relating to the free movement of persons (i.e. Articles 62, 63 and 65).

Article 71(2) TEC
Provisions relating to the regulation of transport when the principles of regulation "would be liable to have a serious effect on the standard of living and employment in certain areas and on the operation of transport facilities".

Article 88 TEC
Deciding that a state aid is compatible with the common market.

Article 93 TEC
Provisions for the harmonisation of turnover taxes, excise duties and other forms of indirect taxation.

Article 94 TEC
Directives for the approximation of laws, regulations or administrative procedures of the member states.
Article 95 (1), however, provides for QMV when approximation has as its object "the establishment and functioning of the internal market". Article 95(2) says that Article 95(1) shall not apply to "fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons".

Article 104.14 TEC
Replacement of protocol on excessive deficits.

Article 105.6 TEC
Tasks of the ECB.

Article 107.5 TEC
Amendments on proposals by the Commission to the statutes of the ECB.

Article 111.1 TEC
Decisions concerning the ERM.

Article 112.2(b) TEC
Appointment of the ECB's executive board.

Article 117.1 (and 7) TEC
Transitional provisions for the European Monetary Institute.

Article 123.5 TEC
Institutional provisions relating to EMU.

Article 133(5) TEC
"… the Council shall act unanimously when negotiating and concluding an agreement

- in trade in services or commercial aspects of intellectual property
- where that agreement includes provisions for which unanimity is required for the adoption of internal rules or where it relates to a field in which the Community has not yet exercised the powers conferred upon it by the Treaty by adopting internal rules".

Article 133(6) TEC
"… agreements relating to cultural and audio-visual services, educational services, and social and human health services shall continue to fall within the shared competence of the Community and its Member States. Consequently, in addition to a Community decision … the negotiation of such agreements shall require the common accord of the Member States".

Article 133(7) TEC
Extension of paragraphs 1-4 of Article 133 to international negotiations and agreements on intellectual property.

Article 137(2)(b) TEC
Directives regarding:

c. social security and social protection of workers;
d. protection of workers where their employment contract is terminated;
f. representation and collective defence of the interests of workers and employers, including co-determination;
g. conditions of employment for third-country nationals legally residing in Community territory.

Article 151(5) TEC
Adoption of recommendations on promoting the diversity of cultures.

Article 161 TEC
Defining "the tasks, priority objectives and the organisation of the Structural Funds".

Article 175(2) TEC
Adoption of specified types of measures with respect to the environment.

Article 181a TEC
Association agreements referred to in Article 310 and for the agreements to be concluded with the States which are candidates for accession to the Union.

Article 186 TEC
Freedom of movement of workers.

Article 187 TEC
Rules and procedures for the association of the countries and territories with the Community.

Article 190(4) TEC
Provisions for electoral procedure to European parliament.

Article 190(5) TEC
Provisions for taxation of MEPs or former MEPs.

Article 202 TEC
Principles and rules for the conduct of the Council.

Article 203 TEC
Order in which Member States hold the presidency.

Article 213 TEC
Number of members of the Commission.

Article 215 TEC
Decisions not to fill a vacancy for a Commissioner.

Article 222 TEC
Increasing the number of ECJ advocates-general.

Article 223 TEC
Appointment of judges and Advocate-Generals of the ECJ.

Article 224 TEC
Appointments of judges of the Court of First Instance.

Article 225a TEC
Creation of judicial panels to hear and determine at first instance certain classes of action pr proceeding.

Article 229a TEC
Conferment of jurisdiction on the ECJ in disputes relating to the creation of Community industrial property rights.

Article 223 TEC
Amendment of the Statute of the Court of Justice.

Article 245 TEC
Amendment to ECJ statute.

Article 250(1) TEC
Amendment to a proposal of the Commission.

Article 251(3) TEC
Acceptance of amendments by the European Parliament that the Commission has rejected.

Article 252(c) TEC
Overriding a rejection by the Parliament of a common position of the Council.

Article 266 TEC
Amending the statute of the European Investment Bank.

Article 269 TEC
Provisions relating to the system of own resources of the Community.

Article 279 TEC
Financial regulations and procedures regarding the budget.

Article 289 TEC
Location of the institutions of the EU.

Article 290 TEC
Rules governing the languages of the institutions of the Community.

Article 296(2) TEC
Changes in a list of products for which member states consider measures necessary for their essential interests and security and which are "connected with the production of or trade in arms, munitions and war material".

Article 300 TEC
Agreements between the Community and one or more States or international organisations when the agreement covers a field for which unanimity is required for the adoption of internal rules.

Article 304 TEC
Co-operation with OECD.

Article 308
Measures necessary for the operation of the common market that the Treaty has failed to provide.

Article 309
Sanctions against states in breach of fundamental rights.

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– Patience Wheatcroft in *The Times*

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