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Increased Differentiation or Stronger Uniformity*

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Increased Differentiation or Stronger Uniformity[1]

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I. INTRODUCTION

The overall answer to the question put to me is extremely simple: In the future the European Union will make more use of the technics of differentiated integration. The law of the European Union (whether adopted by the European Community in the framework of the "first pillar" or by the European Union in the context of the "second and the third pillar") will not be characterized by stronger uniformity. The traditional concept of differentiated integration, i. e. the pre-Maastricht concept, will of course survive. But as the Maastricht-Treaty has added at least two new and revolutionary forms of differentiation (the derogations for the UK and Denmark with respect to EMU and for the UK with respect to social policy), the next Intergovernmental Conference will (and should) open the door for more possibilities of non-traditional differentiation.

The difficult questions concern the scope and the modalities of differentiation: In what areas should non-traditional differentiation be allowed? In what institutional structures? Under what conditions? The following pages will try to give tentative answers to these highly sensitive and complex questions. The answers will reflect my training and professional experience as a lawyer; the political scientists among the readers might forgive me the shortcomings of such an approach.

II. CLARIFICATION OF CONCEPTS - TERMINOLOGY

The debate of our subject is made difficult by conceptual confusion: The terminology is not clear and needs to be clarified. In order to simplify matters I will follow the categorization used in a series of recent legal studies (in particular Quermonne, Charlemagne, Justus Lipsius, Dashwood) of our subject and exposed in detail in a not yet published thesis presented a few months ago at the College of Europe (Alexander Stubb, The Semantic Indigestion of Differentiated Integration: The Political Rethoric of the pre-1996 IGC Debate). More precisely I will use the term "differentiation" as the broadest, all embracing category which encompasses the three main sub- categories (1) "multi-speed", (2) " variable geometry" and (3) "à la carte".

A. Stubb presents these concepts and their multiple variants as follows:

Categorisation of *Differentiated* Integration

VARIABLES	*TIME*	*SPACE*	*MATTER*
MAIN CONCEPT	***Multi-Speed***	***Variable Geometry***	***A la Carte***
DEFINITION	Mode of differentiated integration according to which the pursuit of common objectives is driven by a *core* group of Member States which are both able and willing to go further, the underlying assumption being that the others will follow later.	Mode of *differentiated* integration which admits to unattainable differences within the integrative structure by allowing permanent or irreversible separation between a *hard core* and lesser developed integrative units.	Mode of *differentiated* integration whereby respective Member States are able *to pick-and-choose*, as from a *menu*, in which policy area they would like to participate, whilst at the same time holding only to a minimum number of common objectives.

VARIABLES	*TIME*	*SPACE*	*MATTER*
SUB/RELATED CONCEPTS & GENERAL JARGON	English *Two-Speed* *Step-by-Step* *Graduated* *Integration* *Differentiation* *Hard Core* *Variable Speed* Français *Plusieurs Vitesses* *Deux Vitesses* *Intégration* *Echelonnée* *Directoire* Deutsch *Abgestufte Integration* *Kern* *Harter Kern* *Fester Kern* *Kerneuropa* *Teilintegration*	English *Concentric Circles* *Two-Tier* *Multi-Tier* *Two-Level* *Multi-Level* *"Swing Wing"* *"Circles of Solidarity"* *Many Circles* *Imperial Circles* *Restrained Differentiation* *Multi-Track* *Two-Track* *Multi-Floor* *Two-Floor* *Structural Variability* Français *Cercles Concentriques* *Géométrie Variable* *Plusieurs Niveaux* *Plusieurs Etages* *Plusieurs Voies* *Variante Unionaire* *Deux niveaux* *Plusieurs Niveaux* *Noyau Dur* *Noyau Solide* *Directoire* *Différenciation Restreinte* *Avant Garde* Deutsch *Abgestufte Integration* *Harter/Fester Kern* *Kerneuropa*	English *Pick-and-Choose* *Overlapping Circles* *Opt-In* *Opt-Out* *Opt-Up* *Opt-Down* *Bits-and-Pieces* *Ad Libitum Integration* Français *A la Carte* *Ad Libitum* Deutsch *A la Carte* *Ad Libitum*

VARIABLES	*TIME*	*SPACE*	*MATTER*
EXAMPLES	EMU Harmonisation of VAT Articles : 7c, 36, 100, 115, 130t, Accession Agreements Transition Periods	AIRBUS ESA ARIANE JET Schengen Agreements EMS WEU EUREKA	UK & Social Charter UK & EMU Denmark & EMU Denmark & Defence Derogations ERDF ESPRIT Ireland & Abortion
NATURE OF CONCEPT	Supranational	Supranational/ Intergovernmental	Intergovernmental
MAIN USES IN CURRENT DEBATE	CDU/CSU Document Socialist "Reflections" Herman Report	CDU/CSU Document Edouard Balladur Alain Lamassoure	John Major
MAIN USE IN HISTORIC DEBATE	Willy Brandt (1974) Tindemans Report (1975) Dooge Commitee (1984)	Commissariat Général du Plan (1980) Jacques Delors (1980)	Ralf Dahredorf (1979) Margaret Thatcher
MAIN AUTHORS	Brandt Tindemans Lamers/Schäuble	Tardy Delors Lamers/Schäuble Maillet/Velo Quermonne	Ralf Dahrendorf John Major Margaret Thatcher

RELATION TO THEORY	Neofunctionalism Neofederalism Federalism	Neofunctionalism Neofederalism Federalism	Functionalism Realism Neorealism
POSITION ON INTEGRATION	Maximalist	Maximalist/ Minimalist	Minimalist

It is not necessary to discuss in detail A. Stubb's categorisation in the context of the present paper. My only observation concerns the distinction between "variable geometry" and "à la carte", more precisely the use of the variables **space** and **matter** with respect to these two concepts.

The main variable for the "multi-speed" concept is of course **time**. A. Stubb defines this concept as *"the mode of differentiated integration according to which the pursuit of common objectives is driven by a core group of Member States which are both able and willing to pursue some policy areas further, the underlying assumption being that the others will follow later. In other words, the multi-speed approach signifies integration in which Member countries maintain the same policies and actions, not simultaneously, but at different times. The vision is positive in that, although admitting differences, the Member States maintain the same objectives which will be reached by all members in due time".*

I have no problems with this definition.

For A. Stubb the main variable of the concept of "variable geometry" is **space**. He defines this concept as *"the mode which admits to unattainable differences within the integrative structure by allowing permanent or irreversible separation between a core of countries and lesser developed integrative units. A Europe differentiated by space goes further in institutionalising diversity than integration differentiated by time. Whereas integration differentiated by time defines and maintains common objectives and goals, integration differentiated by space takes a more negative approach in that it admits to unattainable differences within the integrative structure. Put simply, integration differentiated by space*

considers that European political and economic diversity makes common objectives both unrealistic and unattainable"

The main variable for the concept of "à la carte" is according to A. Stubb **matter**. His definition of this concept is short: *"By definition, the culinary metaphor of a Europe à la carte allows each Member State to pick and choose, as from a menu, in which policy area they would like to participate, whilst at the same time maintaining a minimum number of common objectives. This approach is focused on matter, i.e. specific policy areas".*

While I have no difficulties with the definitions as such, I find the reference to the variables, in particular the one to **space** for the concept of "variable geometry somewhat intriguing. Is not the decisive variable in both concepts **matter** (as opposed to **time** in the "multi-speed" concept)? Does not the decisive difference between the two concepts results from the degree to which differentiation according to subject **matter** is allowed? In the case of "variable geometry", the major part of Community activity and law is considered to be unaccessible to the use of differentiation by subject **matter**. In the case of "à la carte", the unaccessible area is very small or even non existent.

However, this nuance does not affect in any way the usefulness and practicability of A. Stubb's categorisation which I will follow in the course of this paper.

III. DIFFERENTIATION UNDER GENERAL PRINCIPLES OF COMMUNITY LAW

A The **"multi-speed" concept** is not per se incompatible with the fundamental principles of the Community's legal order. In this context it might be useful to recall the main elements of an analysis of the then existing limits of differentiation in secondary Community law published in 1984. In 1984 I reached the following conclusions:
1. Whether and to what extent differentiation of secondary Community law is allowed is a matter of interpretation.
2. Secondary Community law must conform to the general tasks of the Community and to the more specific objectives assigned to its different policies. Grabitz and Langeheine have shown that differentiation is not per se incompatible with these tasks and objectives.

3. Secondary Community law must conform to general principles of Community law. In essence, this means that differentiated applications must respect the principle of non-discrimination. Under existing Community law a fundamental distinction must be made between economic and social factors on the one hand and political phenomena on the other. Economic and social differences (both terms used in the widest sense) can in principle justify differentiation; purely political phenomena cannot. *"The fact that the British government...is opposed to joining the European monetary system would not be a valid argument for differentiation (provided the rules governing the EMS were* [secondary] *Community law). However, if the British pound were still in a special position compared to other currencies, a case could be made for a derogation in favour of the United Kingdom"*. The difference in treatment has to be proportionate to the differences in the factual (objective) situations.
4. Secondary Community law does not have to respect a separate general principle prohibiting distortions of competition.
5. Secondary Community law must be in conformity with the specific prohibitions enunciated by the Treaty in order to establish the common market.
6. There is no easy answer to the question whether rules which differentiate have to be limited in time and what are the ultimate deadlines. The two most important factors are the type of situation which justifies differentiation and the existence or absence of an obligation to act. While natural differences (like climate and distance) are likely to justify permanent differentiation, situations that are the product of historical development of human societies (differences of *taste* according to the terminology used by H. and W. Wallace) are more likely to call for only temporary differentiation. This is particularly so if they are at the root of differentiation in areas where the Community has a precise obligation to act in order to bring about a certain result.

If the "multi-speed" concept is compatible with fundamental Community law principles, it can be used in secondary Community legislation. If it goes beyond these limits, a special Treaty authorization is required.

My 1984 analysis did not examine the problem to what extent differentiation concepts can be used outside the Community's legal order. This question is addressed specifically for the regional unions between Belgium and Luxembourg, or between Belgium, Luxembourg and the

Netherlands by Article 233 EC Treaty. As a more general problem, it has to be analyzed under Article 5 EC Treaty.

B The concepts of **"variable geometry" and "à la carte"** are of course per se incompatible with general principles of the Community's legal order. They can only be used in secondary Community law if specifically authorized by the Treaty.

The use of these concepts in cooperation between Member States outside the Community's legal order is again a problem which has to be analyzed under Article 5 EC Treaty.

IV. THE EVOLUTION OF THE DIFFERENTIATED INTEGRATION SINCE THE SINGLE EUROPEAN ACT

A The Single European Act

1. The Single European Act (SEA) introduces the traditional concept of differentiation (i.e. the concept as established through interpretation of the existing Community's legal order) for the first time into primary Community law. Article 8c SEA (7c TEU) reads as follows :

> *When drawing up its proposals with a view to achieving the objectives set out in Article 7a, the Commission shall take into account the extent of the effort that certain economies showing differences in development will have to sustain during the period of establishment of the internal market and it may propose appropriate provisions.*
> *If these provisions take the form of derogations, they must be of a temporary nature and must cause the least possible disturbance to the functioning of the common market.*

Three elements are of particular interest in the present context:
1. Derogations must be of a temporary nature. This requirement seems at first sight to be more rigid than what has been said above about the problem of limited or unlimited duration of derogations. However, this contradiction disappears if one takes into account that Art 7a establishes the principle of the internal market.
2. Derogations must cause the least possible disturbance to the functioning of the common market. This requirement corresponds to the principles of proportionality and minimal interference with the normal functioning of the Community (i.e. due regard for the interests of the other Member States).

3. Derogations have to be proposed by the Commission. As the Council can amend Commission proposals only unanimously, this requirement is a limitation of the majority principle, which was massively extended by the SEA.

2. Article 100a (4) introduces for the first time the concept of "opting out". It reads as follows:

> *If, after the adoption of a harmonisation measure by the Council acting by a qualified majority, a Member State deems it necessary to apply national provisions on grounds of major needs referred to in Article 36, or relating to protection of the environment or the working environment,it shall notify the Commission of these provisions.*
> *The Commission shall confirm the provisions involved after having verified that they are not a means of arbitrary discrimination or a disguised restriction on trade between Member States.*
> *By way of derogation from the procedure laid down in Articles 169 and 170, the Commission or any Member State may bring the matter directly before the Court of Justice if it considers that another Member State is making improper use of the powers provided for in this article.*

Again three remarks are useful in our context:
1. Article 100a (4) was a price which had to be paid for the acceptance of the extension of the qualified majority principle in Article 100a (1). Not all Member States were satisfied that the indirect protection given through Article 100a (3) (which obliges the Commission, in its proposals concerning health, safety, environmental protection and consumer protection, to take as a base a high level of protection) would be sufficient.
2. Article 100a (4) second paragraph expresses again the principles of proportionality and due regard for the interests of the other Member States.
3. Article 100a (4) third paragraph shows the importance of judicial control, i. e. the fundamental role of the Court of Justice with respect to the limits of the "opting out" process.

3. Article 130k consolidates the Community practice of supplementary research programmes. It's first paragraph reads as follows:

> *In implementing the multiannual framework programme, supplementary programmes may be decided on involving the participation of certain Member States only, which shall finance them subject to possible Community participation.*

Article 130o last sentence adds:

Adoption of the supplementary programmes shall require the agreement of the Member States concerned.

The wording of this last provision suggests that the adoption of supplementary research programmes is a purely intergovernmental matter. It is therefor logical that their financing is left to the Member States concerned, unless the Community decides according to its normal procedures to participate.

4. The new Title on economic and social cohesion (Articles 130a to 130e) is of course a wonderful illustration of the traditional principles of differentiated integration. They demonstrate that uniformity in an already highly diversified Community (which grew to twelve Member States through the accession of Spain and Portugal in 1986) requires important financial efforts on behalf of the more prosperous Member States.

B The Treaty on European Union

1. General observations

While the SEA remains fundamentally attached to the traditional concept of differentiation - however with the important exception of Article 100a (4) - the TEU introduces for the first time massively the concept of "variable geometry" into the Community's legal order. Most observers would refer in this context not only to the Protocol and the Agreement on social policy which contain de facto a derogation for the United Kingdom (in spite of their different legal presentation) but also to the derogations for Denmark and the United Kingdom with respect to economic and monetary union.

From a strictly legal point of view, it might be arguable that these latter derogations are an extreme example of the "multi-speed" concept (of course incompatible with the traditional limits of differentiation), as economic and monetary union was in principle already agreed in the SEA (cf. the title preceding Article 102a) and as all Member States recognize in the Protocol on the transition to the third stage of economic and monetary union *"the irreversible character of the Community's movement to the third stage of economic and monetary union by signing the new Treaty provisions on economic and monetary union".*

However, in political reality we are rather confronted with a clear case of "variable geometry".

The situation is of course quite different for those Member States, other than Denmark and the United Kingdom, which do not fulfil the necessary conditions for the adoption of a single currency. Their case is a typical illustration of the traditional "multi-speed" concept. If economic and monetary union had not been established by Treaty amendment, but by secondary legislation, the derogation in favour of these Member States could have been enacted without a special authorization in the Treaty. What is remarkable about this derogation is the special institutional regime, i.e. the special rules about voting in the European Council and the Council, and the composition of the Governing Council and the Executive Board of the European Central Bank (ECB).

In order to measure the psychological impact of the introduction of the "variable geometry" concept into the EC Treaty, it is useful to quote a passage from a lecture given by E. Noël at the Academy of European Law in Florence in June 1994. According to this uniquely placed observer of the institutional developments of the European Community, "*une certaine différenciation avait déja obtenu droit de cité dans la Communauté, sous forme d'exception ou de dérogations plus ou moins durables. ...Il s'agissait toutefois, jusqu'ici, de dérogations "honteuses" que chacun s'employait à dissimuler et à minimiser. Dans l'Union européenne, la différentiation a été la base des compromis finals et elle porte sur des questions majeures.... Ainsi s'affirme la conception politique qu'il n'est pas possible de contraindre un pays de participer à l'ensemble des développements ou des renforcements de la Communauté, mais bien, par contre, aucun pays ne peut empêcher ses partenaires d'aller plus avant, s'ils y sont décidés".*

After our analysis of the SEA, it is useful to examine in some detail the provisions of the TEU in so far as they are relevant in the context of the present paper. Because of the number of these provisions and their extraordinary complexity (which they share of course with the TEU in general) the following presentation will concentrate on essentials.

2. Economic and Monetary Union - The derogations for Member States which do not fulfil the convergence criteria

The broad principles for the passage to the third stage are well known. Only those Member States which fulfil the convergence criteria set out in Article 109j (1) will pass to stage three. All others *"shall have a derogation"* (Article 109k (1)). The derogation can be abrogated at any time, once the convergence criteria are met ((Article 109k (2)). The scope of the

derogation is defined in Article 109k (3 and 4) and in the transitional provisions of the Protocol on the Statute of the European System of Central Banks and of the European Central Bank.

Even more striking than the conditions and the scope of the derogation are the institutional consequences. Article 109k(5) reads as follows:

> *The voting rights of Member States with a derogation shall be suspended for the Council decisions referred to in the Articles of this Treaty mentioned in paragraph 3. In that case, by way of derogation from Articles 148 and 189a (1), a qualified majority shall be defined as two thirds of the votes of the representatives of the Member States without a derogation weighted in accordance with Article 148 (2), and unanimity of those Member States shall be required for an act requiring unanimity.*

The Heads of State or Government of Member States with a derogation will not participate in the appointment of the members of the Executive Board of the ECB (i.e. the President, the Vice-President and four other members). These members can not be nationals of Member States with a derogation. In addition, the Governors of the national central banks of Member States with a derogation will not be members of the Governing Council of the ECB (Article 109k (3) juncto Article 43 Protocol on the Statute of the ESCB and the ECB, and Article 109a).

No other institutional derogations are provided for by the TEU with respect to Member States with a derogation. They are in particular full members of the General Council of the ECB, a specific body created for the purpose of ensuring monetary cooperation between participant and non-participant central banks (Articles 45 - 47 Protocol on the Statute of the ESCB and the ECB).

It is noteworthy that according to the already mentioned Protocol on the transition to the third stage of economic and monetary union *"all Member States shall, wether they fulfil the necessary conditions for the adoption of a single currency or not, respect the will for the Community to enter swiftly into the third stage, and therefore no Member State shall prevent the entering into the third stage".*

It is also noteworthy that Article 109 (1) provides for the conclusion of formal agreements on an exchange rate system for the ECU in relation to

non-Community currencies even though certain Member States may enjoy a derogation and will therefore not be bound by these agreements (Article 109k (4). This provision demonstrates that it is perfectly conceivable that the Community acts as an international legal personality without binding all its Member States.

3. Economic and Monetary Union - The special derogations for Denmark and the United Kingdom

As explained earlier, the special derogations for Denmark and the United Kingdom are of a totally different character than those for Member States which do not meet the convergence criteria: they are purely political. Nevertheless, they are not substantially different from the derogations for Member States which are willing but not able to participate in the third stage. This results clearly from the Protocol relating to Denmark, which assimilates the *"exemption"* for Denmark to a *"derogation"*. But the same is also true for the United Kingdom, though the Protocol relating to the UK obfuscates this through complicated language.

That Member States which are able but not willing are treated like those which are willing but not able is far from obvious. It would be perfectly defendable to reduce their institutional status even further. An illustration is given by the new Protocol on social policy.

4. The Protocol and the Agreement on social policy

As mentioned above the Protocol and the Agreement on social policy provide an even better example of "variable geometry" than the provisions on monetary union. It might be useful to recall that they were preceded by an exercise of "variable geometry" in the field of "soft law", i.e. the adoption of the Social Charter by 11 Heads of State and Government at the European Council in Strasbourg in December 1989.

According to the Protocol on social policy the Contracting Parties

> *1. Agree to authorize ... 11 Member States to have recourse to the institutions, procedures and mechanisms of the Treaty for the purposes of taking among themselves and applying as far as they are concerned the acts and decisions required for giving effect to the... Agreement* [among the 11 Member States].
> *2. The United Kingdom... shall not take part in the deliberations and the adoption by the Council of Commission proposals made on the basis of this Protocol and the ... Agreement.*

> *By way of derogation from Article 148 (2) of the Treaty, acts of the Council which are made pursuant to this Protocol and which must be adopted by qualified majority shall be deemed to be adopted if they have received at least 44* [since the last enlargement 52] *votes in favour. The unanimity of the members of the Council, with the exception of the United Kingdom... , shall be necessary for acts of the Council which must be adopted unanimously and for those amending the Commission proposal.*
> *Acts adopted by the Council and any financial consequences other than administrative costs entailed by the institutions shall not be applicable to the United Kingdom...*

The preamble of the Protocol specifies that the Protocol and the Agreement are *"without prejudice to the provisions of this Treaty, particularly those relating to social policy which constitute an integral part of the acquis communautaire".*

While the provisions on economic and monetary union grant an exemption to Denmark and the United Kingdom, the Protocol on social policy seems to provide a favour to the Member States other than the UK. This nuance - which was politically important for the UK - should not distract from the fact that in reality a derogation has been granted to the UK.

It is generally recognized that acts adopted under the Agreement are acts of the Community (as opposed to intergovernmental agreements among the participating Member States). It follows that the Court of Justice is competent to interpret and to appreciate the validity of these acts. It also follows (cf. our comments on Article 109 above) that the ERTA doctrine applies in so far as acts adopted under the Protocol and the Agreement are capable of generating an AETR effect. (It is however useful to remember that according to the opinion of the Court of Justice on Convention n° 170 of the International Labour Organization, minimum rules like those enacted according to Article 2 of the Agreement do not produce such an AETR effect).

The Agreement co-exists with the provisions of the Treaty on social policy. It does not only establish new explicit competences for the Community but facilitates also decision making in the Council by extending the possibility to adopt acts by qualified majority. It raises therefore the question of the relationship between the pre-existing powers (which require unanimity) and the new powers under the Agreement (which can be exercised by qualified majority). The answer has again to be found by interpretation. Taking into

account that the Protocol and the Agreement together constitute a derogation from fundamental Treaty principles, it is logical to give priority to the use of the normal Treaty rules and to allow the use of the Agreement only once it has become clear that progress under these normal rules is not possible.

It is useful to note that the Protocol dispenses the UK from any financial consequences other than administrative costs entailed for the institutions.This provision recalls the arrangements of the SEA on supplementary research programmes.

5. Comparison between the derogations for EMU and those for social policy

I have already mentioned the different construction of the derogations under the provisions for EMU and those for social policy. There are two other differences which are notable.

The derogation in favour of the UK in the Protocol on social policy excludes the UK not only from the adoption of Council acts, but also from the deliberations. This derogation goes therefore further than the derogations provided for by Article 109k (5) which only suspends the voting rights.

Article 109k (5) defines the qualified majority threshold *"as two thirds of the votes of the representatives of the Member States without a derogation, weighted in accordance with Article 148 (2)".* It does not establish a precise number of votes like the Protocol on social policy (initially 44 votes, now 52). In view of the uncertainty about the total number of votes of those Member States without a derogation, the reference to a precise figure would have been extremely difficult, if not impossible. It is however remarkable that a threshold of two thirds (i. e. 66,6 %) is lower than the percentage of the normal qualified majority which has always been slightly higher than 70%.

6. Concluding remark on differentiation in the "first pillar" of the TEU

The reader of the preceding pages might have wondered why I have analyzed in so much detail the provisions of the SEA and of the "first pillar" of the TEU which use the technics of differentiated integration. The answer is simple: these provisions demonstrate that it is perfectly possible to solve the difficult problems raised by the "multi-speed" and the "variable

geometry" concepts. Answers have indeed be found for the questions which I had identified in my 1984 analysis, i.e. *"(1) the type of Community activities open to 'two speed' operations; (2) the requirements as to the participating (and nonparticipating) Member States; (3) the decisionmaking process; (4) the financing of 'two speed' operations*; *and (5) the consequences of such operations on the external powers of the Community"*. The provisions of the TEU on EMU and social policy clearly prove that I was wrong *"to assume that the 'two speed' concept will never become the subject matter of a formal Treaty amendment"*.

7. The provisions on a common foreign and security policy and on cooperation in the fields of justice and home affairs

Having looked at the provisions on EMU and social policy, one would expect the provisions on common foreign and security policy and on cooperation in the fields of justice and home affairs ("second" and "third" pillar) of the TEU to have even more recourse to the concepts of differentiation. That is however not the case.

The Declaration on voting in the field of the common foreign and security policy notes that, *"with regard to Council decisions requiring unanimity, Member States will, to the extent possible, avoid preventing a unanimous decision where a qualified majority exists in favour of that decision"*. This reminds the reader of frequent declarations of the past which tried to facilitate a unanimous vote by appeals to abstention. Such appeals are however very different from differentiation in its various forms.

Article J3 (7) contains however a diplomatic worded opting out provision which reads as follows:

> *Should there be any major difficulties in implementing a joint action, a Member State shall refer them to the Council which shall discuss them and seek appropriate solutions. Such solution shall not run counter to the objectives of the joint action or impair its effectiveness.*

More important, though stating the obvious, is certainly Article J4 (5) dealing with security policy according to which

> *the provisions of this Article shall not prevent the development of closer cooperation between two or more Member States on a bilateral level, in the framework of WEU and the Atlantic Alliance, provided such*

cooperation does not run counter to or impede that provided for in this Title.

This provision has of course to be read in connection with the Declaration on Western European Union.

Article K7 contains almost the same provisions for the "third" pillar as Article J4 (5) for the "second".

The "Schengen Agreement" illustrates their practical importance.

What is the explanation of the parsimonious use of the concepts of differentiation in the "second" and "third" pillar? The answer results probably from the intergovernmental nature of these pillars. Express provisions on differentiation are indispensable for the highly structured and stringent legal order of the Community. They are of much less importance in the intergovernmental context of the CFSP and the CJHA.

C Practical experiences under the SEA and the TEU

While there is no lack of practical experience with the provisions of the SEA, the same can not be said with respect to the TEU. Preparations for the third stage of EMU have started, but are still in their beginning. The provisions of the Agreement on social policy have been used only once. The practical effects seem to show that an action decided by 11 Member States has much more implications "on the ground" for the UK than the British government would like to see.

If this first experience with the Agreement on social policy would be confirmed by other applications and their practical consequences, the Protocol and the Agreement might be judged more mildly in the future than when they were agreed in Maastricht. In this context it is useful to remember that certain provisions of the SEA, and in particular Article 100a (4), was considered by some eminent legal authorities as a major threat to the established legal order of the Community. Experience has clearly shown that they were wrong. In reality, Article 100a (4) has not become a serious danger for the "acquis communautaire".

These few (and clearly insufficient) remarks are not intended to minimize the dangers of using "variable geometry" and excessive "multi-speed"

concepts. They might however prevent critics of differentiation from over emphasising the risks which are attached to it.

It would in any case be very useful to take stock and to analyze the most important cases of differentiated integration which can been found in secondary Community law enacted during the last ten years. It would not be surprising if the traditional limits (which have been recalled above under III) had been applied more generously since the negotiations of the TEU in view of their considerable psychological effect on all those involved in the Community's law making process.

V. THE FUTURE

A Differentiation an instrument of last resort

1. Differentiation is not and should not be an end in itself (Lamers/Schäuble, Martens). It is a tool, a technic used to achieve certain substantive objectives. The provisions of the SEA and of the TEU illustrate this perfectly.

The concepts of open ended "multi-speed" or "variable geometry" had to be used in order to agree among the Twelve on EMU and on an extension of the already existing provisions on social policy (permitting to implement the 1989 Social Charter).

The same concepts had to be used in order to agree among the Twelve to substitute the qualified majority to the unanimity principle in Article 100a SEA (for the successful implementation of the internal market programme) and in certain provisions of the Agreement on social policy (again in view of the 1989 Social Charter).

Differentiation, and in particular its radical forms (open ended "multi-speed" and "variable geometry"), should therefore always be discussed in relation to substantive objectives, ideally in relation to goals which all Member States share in principle (H. and W. Wallace).

2. As differentiation in its radical forms derogates from fundamental principles of the Community's legal order, it should remain a solution of last resort (Dutch and Spanish governments, Guigou, Martin, Dehaene).

This principle is however easier to be stated than to be applied. This can easily be demonstrated by the provisions of the Agreement on social policy which substitute the qualified majority principle to the unanimity requirement. A Community policy which can be adopted on the basis of the qualified majority principle will have a different substantive quality than if this policy had to be agreed unanimously. In other words, there is a limit with respect to substance and quality which those Member States which pursue a certain objective may legitimately want to respect. Radical forms of differentiation may be the only way to achieve this.

Even more delicate is the relationship between differentiation and bargaining for "compensation". In the case of the new provisions on social policy this problem did not arise, as the UK was opposed to them in principle. In other situations, the opposing Member State might be willing to accept, provided a certain "price" is paid. Let us remember that this is just another technic which can be used in order to obtain unanimity. The daily working of the Council offers splendid examples for it.

H. and W. Wallace suggest that the recent vivid debate about new substantial applications of the "multi-speed" or "variable geometry" concepts are a sign of the diminishing disposition of the wealthier Member States (in particular Germany) to continue to act as the "paymasters" of the Community. That may very well be the case. Nobody can and will seriously contest that there is a close and legitimate relationship between differentiation, particularly in the form of the "multi-speed" concept, and solidarity (cohesion). The history of the Community provides numerous examples for this obvious and logical link. However, there may be objective and subjective limits to bargaining and compensation. Nobody will be able to define them in abstracto. They will only become apparent through the political process. Member States which feel that they need more "compensation" will refuse to agree to new substantial applications of the "multi-speed" or "variable geometry" concepts in the Treaty. Wether the same results can be achieved by mechanisms situated outside the Treaty is doubtful. The establishment and operation of such mechanisms are in any case the possible subject of judicial control (cf. Article 5 EC Treaty). Sufficient guaranties exist therefore to prevent an excessive use of the radical forms of differentiation to the detriment of Member States left behind and asking for (more) solidarity.

B Increased need for differentiation

1. There is general agreement that the need for differentiated integration has increased and will grow even further. The reasons are well known. The Community (since the TUE the European Union) has become larger and more diversified. The traditional fault lines between integration and cooperation are now situated inside the Union (H. and W. Wallace). Future enlargements to the East and the South will further increase the differences between the Member States, their regions etc.

At the same time, the activities of the Union have moved closer to the hard core of sovereignty and will continue to do so. In the case of EMU this is an uncontestable economical, political and legal fact which nobody will contest. In the case of the CFSP and the CJHA it might be more a matter of subjective feeling. But in the realm of politics, subjective feelings are an important part of the reality.
In addition, the consensus about certain objectives to be achieved through the Community/Union might have weakened (H. and W. Wallace). It has therefore become more difficult to progress - even among the existing 15 Member States - than in earlier years.

It is my firm conviction that increased recourse to differentiation is not only a necessity in view of further enlargements. The problem of deepening exists already within the Union of 15 Member States. The perspective of further enlargements highlights the problem but does not create it for the first time. The issues debated in this paper are therefore of immediate concern to the Community/Union and the forthcoming Intergovernmental Conference, whatever the timetable for further enlargements might be. That does not mean that the accession of Central and Eastern European countries does not raise special problems which require appropriate answers.

2. I have stressed earlier that differentiation (in particular its radical forms) should be discussed in relation to substantive objectives which Member States want to achieve. What are these objectives?

It is generally recognized that the first objective of this kind will probably be the economic component of EMU. Member States which will participate in the third stage might very well want to intensify their cooperation in order to overcome the weaknesses which characterize this aspect of the TEU. This objective is mentioned here without prejudging in any way the controversial discussions wether such cooperation might constitute the

nucleus of a more or less closed group of Member States which form the avantgarde of a "federal" Political Union (see infra C.).

There is also a large consensus that the intensification of cooperation in the field of security and defence is another candidate for an increased use of open ended "multi-speed" or "variable geometry" technics. In mentioning this objective at this stage, we want to make the same reserve as the preceding one with respect to the role which such an intensified cooperation might assume within the overall structure of the Union.

A third obvious candidate for an imaginative use of "multi-speed" or "variable geometry" technics is the area of foreign policy. However, it is interesting to note that this aspect of the "second pillar" is mentioned less often than defense and security. Perhaps because of the obvious limits which the international credibility of the Union imposes (Charlemagne, Justus Lipsius, H. and W. Wallace).

The recent debates about Europol and the role of the Court of Justice demonstrate that the "third pillar" - in so far as it remains outside the "first - would greatly benefit from "multi-speed" or - more likely - "variable geometry".
Finally, there remain certain activities of the "first pillar" which might be opened up to non conventional forms of differentiation. I will come back to them later (see infra E.).

C Increased use of differentiation in what overall structure?

1. Before we progress any further, it is useful to clarify one point which has remained until now implicit. In advocating an increased use of unconventional forms of differentiation, we have never mentioned the "à la carte" concept. We agree indeed with the quasi unanimity of all those who have expressed themselves on our subject that the "à la carte" concept has to be rejected (Commission, European Parliament, Guigou, Martin, Lamers/Schäuble, Charlemagne, Dashwood, Justus Lipsius, Ludlow, Noël).

2. The debate on structure has been triggered by the Lamers/ Schäuble paper. As the Maastricht negotiations have put an end to the earlier Community orthodoxy with respect to differentiation among lawyers and institutionalists, the Lamers/Schäuble paper has become the focal point of an intensive political debate. It is irrelevant in this respect that the critics

might not have read the paper (Stubb) or that the authors of the paper might not have been sufficiently clear. In any case, the paper has launched a most vivid controversy on the question whether there should be a hard core or not.

With one exception, everybody agrees that if there were to be a hard core, it should be open. The exception is C. Deubner who (in his recent book *Deutsche Europapolitik: Von Maastricht nach Kerneuropa?)* advocates in favour of a closed group which happens to coincide with the Lamers/Schäuble grouping. This might not be a pure coincidence, as C. Deubner had sent a draft of his book to political institutions and actors at the federal level in April 1994. In view of the overall public reaction to the Lamers/Schäuble paper, it is highly unlikely that C. Deubner's radical ideas will have a chance of being seriously considered; they have certainly no chance to be put in practice. But they are at the least thought provoking.

3. The notion of a pre-established hard core implies (even if the hard core is potentially open) that its members commit themselves to participate in all new and additional ventures. This is indeed the position of the Lamers/Schäuble paper and of C. Deubners underlying study. C. Deubner even goes a step further in excluding Member States which are not parties to the hard core from these new and additional ventures. While the first proposition is in essence hardly objectionable the second is of course incompatible with the open character of the group.

4. In the end, the fundamental question remains whether there should be a pre-established group (whatever may be his name) which - though open - takes formally the commitment to participate in all new activities which deepen integration and intensify cooperation among the Member States. The establishment of such a group would have at least two major advantages: It would guarantee coherence (advocated by E. Noël) and it would contribute to clarity and transparency. Both are desperately needed to bring the Union closer to the citizen.

5. The potential gain in clarity and transparency would be lost if a more pragmatic path were followed. Member States which are willing to advance on the road of integration and cooperation would not form a pre-established group, but would simply join as many circles as they want. It might very well appear that some of them participate de facto in all new and additional activities. The core group of Member States would emerge in this way

instead of being established by a prior political act which might be considered divisive and destructive (Dehaene).

In view of the reactions to the Lamers/Schäuble paper, it is likely that this pragmatic approach will be followed in practice. That the structure of the Union will not be clarified but on the contrary become even more difficult to understand - as differentiation generally increases complexity - will be (perhaps reluctantly) accepted.

6. If one opts for the pragmatic approach, the question of the focal point for intensified integration and cooperation looses its fundamental importance. The majority of participants in our debate sees this focal point in the participation in the third stage of EMU. Others plead in favour of a second pole of attraction in the field of security and defense (Catala/Almeline). It is not astonishing that the first group is close to those Member States which are likely to participate from the beginning in the third stage of EMU while the second group is not (or less).

D Increased use of differentiation within what institutions?

1. The problem of the pre-established group or the co-existence of several circles (in which the same Member States happen to be) is intimately linked to the question what institutions should be used for the intensified integration and cooperation among a limited number of countries.

2. For its closed hard core of Member States (formed around the third stage of EMU). C. Deubner has proposed a separate institutional structure, situated outside the Community/Union framework, and inspired by the Benelux organisation. The Lamers/Schäuble paper does not give any indication about the envisaged institutional framework through which the hard core countries would operate.

3. The institutional problem is less influenced by the open or closed nature of the group than by its pre- or non pre-established character. A pre-established group suggests much more the existence of a separate steering mechanism than the co-existence of several open circles.

4. The vast majority of opinions expressed on our subject plead in favour of institutional unity (Commission, European Parliament, Guigou, Martin,

Spanish government, Rühe, Charlemagne, Curtin, Justus Lipsius, Ludlow). Others require the use of common institutions as much as possible (Federal Trust). I fully share this view. The use of common institutions will maximize the benefits and minimize the dangers of differentiation. Separate bodies should only be set up if no common institutions exist (for instance because the task to be performed is totally new).

I would however not go as far as my friends from the Council's Secretariat who have expressed the view that "variable geometry" requires necessarily a single institutional framework (Charlemagne). The cooperation of certain Member States in the Schengen Agreement proves the contrary. I would also take a more nuanced position with respect to cooperation outside the Treaty, facilitated by a generalized Article 233, which Justus Lipsius qualifies as "néfaste". This cooperation has of course to be fully compatible with the Treaty and in particular with its Article 5.

5. It is useful to note that cooperation outside the common institutions has important consequences both for the democratic principle and for the rule of law. This is perfectly illustrated by the ongoing debates about the Schengen Agreement and Europol. A theoretical demonstration is provided by C. Deubner's institutional structure for the hard core: it would considerably strengthen the intergovernmental aspects of decisionmaking for the hard core countries.

6. The respect of the principle of institutional unity requires in the first place that Member States which want to intensify integration and cooperation among themselves accept to operate through common institutions. It requires however also that other, non participating Member States accept that common institutions may be used for the "multi-speed" or "variable geometry" operation. The best example for this technic is of course the Protocol and the Agreement on social policy. It should serve as a source of inspiration for the future (but not be copied, because of its rather insufficient drafting).

7. The respect of the principle of institutional unity could be facilitated if the overall institutional structure of the Community/Union would be reformed in the course of forthcoming IGC. Suggestions in this direction have been made by J. L. Bourlanges. It is however not advisable to link these two subjects. Each of them is so complicated and controversial that it is preferable deal with them separately.

E Increased use of differentiation in what fields?

Having mentioned already the broad objectives and fields in which Member States will probably want to progress, if necessary through increased use of "multi-speed" and "variable geometry" technics (supra B), it is useful to examine in more detail the areas which are candidates for operations of this kind.

1. The starting point is that the acquis communautaire has to be preserved (European Parliament, Martin, Santer, Spanish government). A good practical illustration of this principle is provided by the Protocol on social policy. That does not mean, however, that the existing policies and rules do not have to be reviewed and adapted to changing circumstances. They may even been slimmed down (H. and W. Wallace).

2. Beyond this first general principle, it is useful to stress that the common base has to be large, profound and strong (Justus Lipsius) in order to minimize the dangers of increased differentiation.

3. This means in concreto that the internal market and those policies and rules which are intimately linked to it should not be opened to non-conventional differentiation (Martin, Charlemagne, Curtin, Dashwood, Justus Lipsius, H. and W. Wallace).

Policies which are an indispensable part of the single market are (1) those parts of the common agricultural policy which guarantee the free movement of goods, (2) those parts of the common transport policy which assure the freedom to render services, (3) the common commercial policy and (4) the competition policy. A policy which is so intimately linked to the single market that it is politically impossible to separate it is (5) cohesion.

4. Whether the same applies to social policy is a matter of controversy. The Protocol and the Agreement on social policy seem to demonstrate that this area may be a subject for "variable geometry". But this derogation continues to be heavily criticized (Commission, European Parliament, Guigou, Martin). The best answer may lie in the middle. The internal market will not function without a minimum of social rules. But not all are so intimately linked to the single market that it could not work without them.

5. The situation is somewhat similar in the area of environmental protection. Rules adopted in view of the protection of the environment which relate to goods belong to the internal market. Provisions which have the same purpose but which are process related do not; they can become more easily the subject of non-conventional differentiation (H. and W. Wallace).

Intensified integration and cooperation between some Member States in the field of social or environmental policy can of course impose additional burdens on their economies. As the Protocol and the Agreement on social policy show, that is not necessarily an argument which will deter Member States to move forward in a smaller group. In this context it is useful to note that at least since the beginning of the eighties, the political sensitivity of Member States with respect to distortions of competition caused by different legislations has considerably decreased (cf. the discussions on "competition between rules" and the subsidiarily principle in Article 3b TEU).

6. The most important area for intensified integration and cooperation between certain Member States within the "first pillar" could however encompass the economic aspects of EMU (already mentioned supra III 2). It is not surprising that they are specifically referred to in the Lamers/Schäuble paper and by C. Deubner. They are probably the preferred area for innovative "multi-speed" and "variable geometry" applications in the mind of all those who see the third stage of EMU as the focal point for a smaller group of Member States. These economic aspects include in particular the fiscal and budgetary policies of the participating Member States.

7. Compared with these heavy weight activities, few people will care very much for marginal operations like civil protection, public health and tourism (Justus Lipsius).

8. While the areas for ambitious "multi-speed" and variable geometry" operations within the first pillar (except the economic aspects of EMU) are rather limited, the door seems to be wide open for such operations in the field of the CFSP. Decisionmaking within the "second pillar" could be facilitated considerably if the Member State which disagrees or abstains would not be obliged to participate in the common action (European Parliament, Guigou, Rothley, Rühe, Charlemagne, Curtin, Justus Lipsius).

This principle could of course be modulated in view of the status of the Member State which disagrees or abstains, the type of support it should nevertheless lend to the common action, etc. (Dashwood)

The only serious limit results from the international credibility of the Union (see already supra III 2). It might be particularly affected if the most concerned Member State does not participate in a given activity (H. and W. Wallace).

9. Similar considerations apply to the "third pillar". In this sector, care has however to be taken with respect to the internal market (Curtin). Activities carried out in the framework of the "third pillar" are often closely related to the free movement of people. This fundamental freedom belongs to the acquis communautaire which is not open to unconventional forms of "multi-speed" and "variable geometry" operations.

F Increased differentiation according to what additional general rules?

The preceding sections have allowed to establish a certain number of general rules which should be respected in all cases of differentiation, even in their most innovative, ambitious and radical forms. Three additional principles can be added to them.

1. In the first place, it is useful to mention the principle of non interference (Charlemagne, Justus Lipsius). It works of course in both directions. Member States which have agreed to intensify their cooperation have to respect fully their obligations under the common rules, and in particular the acquis communautaire. Member States who do not participate in new and additional activities should abstain from actions which affect this cooperation. A good illustration of the non-interference principle is provided by the Protocol on the transition to the third stage of economic and monetary union according to which *"all Member States shall, whether they fulfil the necessary conditions for the adoption of a single currency or not, respect the will for the Community to enter swiftly into the third stage, and therefore no Member State shall prevent the entering into the third stage"*(supra IV B 2).

2. Groups of Member States which have decided to intensify integration and cooperation among themselves should not only be theoretically open.

They should also be de facto accessible to non participating Member States. Member States which are not able but willing to join might need the help and support of their partners. The principle of solidarity among all Member States (stressed by the European Parliament, Guigou, Martin, Dehaene, the Spanish government, Charlemagne, Curtin, H. and W. Wallace) requires that such assistance is made available. It is useful to note that the term solidarity is used here in a wider sense than just financial assistance.

Member States which are called upon to help others can reasonably expect from the latter to take all appropriate steps to join the avantgarde as soon as possible. Like the principle of non-interference, the principle of solidarity (or due respect for the interests of other Member States) works therefore again in both directions.

3 The preceding sections have already given the opportunity to stress the importance of an independent arbiter who assures that the limits of differentiation are respected by both sides, i.e. those which want to progress more rapidly and those which stay behind (or opt out). This importance is underlined by the suggestions of P. Ludlow that the non-participating Member States should accept *"the majority's droit de regard including in the final analysis the right of their partners to define their own non-conformity as destabilising or unacceptable"* and that *"the Treaty should incorporate either in relation to specific areas where it is agreed that Member States can opt out or in articles that apply across the board detailed provisions to deal with unacceptable or destabilizing behaviour".* Whether the non-respect of these provisions should entail sanctions (Ludlow) or entitle Member States which are hurt by distortions of competition to compensatory measures (Charlemagne, Justus Lipsius) is a much more debatable matter.

It is obvious that within the existing institutional structure of the Community/Union, the above mentioned arbiter is the Court of Justice. The role of the Court should therefore by no means be weakened (Charlemagne, Justus Lipsius, H. and W. Wallace), but rather strengthened.

G The functioning of the institutions

The principle of institutional unity (supra D 4) pleads in favour of a maximal use of the existing institutions of the Community/Union. The TUE

provides ample illustrations how they can be used for ambitious "multi-speed" and "variable geometry" operations.

1. Nobody seems to contest the principle that *"those who opt out should ... have less than full rights in the institutions in relation to the business in which they do not intend to participate"* (Ludlow). For the Council this means that Member States which do not take part in a certain policy (like the third stage of EMU or the implementation of the 1989 Social Charter through the new social provisions) should not have the right to vote.

In the case of ad hoc arrangements, like the one described above (supra E 8) for the "second pillar", a negative vote or an abstention would entail the right to opt out, but would not hinder the adoption of a binding decision for the other Member States.

The provisions of the TEU on EMU and the Protocol on social policy demonstrate that there are different ways to establish the threshold for a qualified majority vote if some Member States do not participate in a certain activity. While the Protocol has fixed a new numerical threshold (initially 44, after enlargement 52), Article 109k (4) has established a special percentage of votes (two thirds). A third method would be to distribute the votes of the non-participating Member States proportionately among the participating countries. It is a matter for consideration in every individual case whether one or the other of these methods is chosen. Suffice it to say that they are not totally neutral, but that they may affect the weight of the votes of those Member States which take part in the voting process.

Member States which do not participate in a certain policy because they are unable, but which are willing to do so, should be entitled to take part in the deliberations preceding the adoption of decisions. On the contrary, in following the precedent of the Protocol on social policy, those which are not willing should in principle be excluded. This difference in treatment seems logical in view of the fundamentally different situation of the two categories of Member States. It has however not been clearly proposed by any of those authors who have examined this problem in detail (see in particular Charlemagne, Justus Lipsius).

2. More difficult than the Council is the European Parliament. As the pertinent provisions of the TUE have shown, no special rules have been laid down for the functioning of the EP in the context of radical "multi-speed" or

"variable geometry" operations. In view of the increased powers of the EP in the Community's legislative process, this absence of special rules is not obvious. Members of the EP are of course not representatives of any government. But they express the opinions of the citizens of their country of origin. And it is in the end this country which does not participate in a certain policy or which is not bound by certain decisions. I am therefore inclined to join those which consider that members of the EP elected in a country which does not participate in a certain policy or which is not bound by certain decisions should not take part in the voting process. All members should however be entitled to participate in the debates, whatever the status of their country of origin may be.

Whether this position is compatible with the EP's request that the EP as a whole should be responsible *"for exercising control over those Union policies which are pursued by a limited number of Member States on a temporary basis"* is a matter of interpretation, as it depends on the exact meaning of the word "control". The EP's request goes in any case further than J. L. Bourlanges who suggests to attribute the control function to ad hoc bodies composed exclusively of parliamentarians from the participating Member States.

3. No derogation from the general rules should be envisaged for the Commission.
On the contrary, the Commission is an extremely important institutional link between the different types of activities of the Community/Union, as it assures the necessary coherence between them (Bourlanges, H. and W. Wallace).

It is remarkable that the draft of a Constitution of the European Union presented to the European Parliament in 1994 (the Herman Report) proposes a different solution. According to this draft, members of the Commission from countries which do not participate in a certain activity would have to abstain, like members of the Council and the European Parliament (Article 46).

4. Even the Herman report does not propose to envisage special rules for the Court of Justice. As has been mentioned before, increased use of differentiation will not diminish but rather increase the need for an independent arbiter (supra F 3). The importance of the Court will therefore grow even further. It is useful to emphasise this point in view of the

excessive criticism voiced recently against the Court in certain circles, particularly in the UK.

H The effects on the budget and on the external powers of the Community

1. The provisions of the SEA for supplementary research programmes (Article 130k), of the Protocol on social policy and for the financing of the "second pillar" of the TEU establish a clear line for the financing of radical "multi-speed" and "variable geometry" operations. Administrative expenditure entailed for the institutions is to be charged to the Community budget. On the contrary, operational expenditure is to be financed by the participating Member States alone (Dashwood, Charlemagne, Justus Lipsius).

The principle of institutional unity pleads in favour of the use of the Community budget for the financing of even these operations. In order to exonerate the non-participating Member States, a refund mechanism has to be put in place. The refundable quote part of the relevant expenditure should be calculated according to the percentage key which is used for the so called "fourth" Community resource.

2. Whether open-ended "multi-speed" or "variable geometry" operations" have the well known ERTA-effect is a matter of debate. Those commentators who address the issue either deny this effect (Charlemagne, Dashwood) or express scepticism (Justus Lipsius). Article 109 TEU demonstrates however that it is perfectly conceivable that the Community acts as an independent legal person on the international level without committing all its Member States (supra IV B 2). I am therefore inclined to take a much more positive attitude. In order to avoid difficult problems of interpretation, it is advisable to address this question openly during the negotiating process.

I Special problems related to future enlargements

I have already mentioned earlier that increased recourse to differentiation is not only a necessity in view of further enlargements, but that the problem of deepening exists already today within the Union of 15 Member States. This paper will therefore not discuss the special problems which the accession of Central and Eastern European countries raise. For a variety of reasons,

these problems are of a special nature. They may require totally new solutions. They are probably more closely related to the accession process than to the general study on the increased use of differentiation within the Community/Union.

J The entry into force of a revised Treaty on European Union

At the end of this discussion of differentiation problems, it is useful to add that the IGC 1996 will have to address an issue of greater importance than any question examined so far, i.e. the provisions for the entry into force of the revised Treaty on European Union. Like others who have expressed their views on this point I believe that the principle of unanimity should be abandoned and that solutions like Article 82 of the Draft Treaty voted in February 1984 on the basis of the Spinelli report or Article 47 of the Herman report should be retained (European Parliament, Federal Trust, Lamers/Schäuble, Justus Lipsius, Ludlow). This is however an institutional problem which exceeds by far the limits of this paper. It will therefore not be examined in detail.

VI. CONCLUSION

The preceding considerations show that the time has come to define the possibilities of open-ended "multi-speed" and "variable geometry" operations in the Treaty (Federal Trust, Curtin, Lamers/Schäuble, Justus Lipsius). The experience of the last years and the discussions which have taken place over the last months have given politicians and experts enough material to draft the appropriate provisions which are to be put into the revised Treaty on European Union.

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