

5-1993

Implications of the Single European Act on European Community Law-Making: A Modest Step Forward

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Barbara C. Potter, Implications of the Single European Act on European Community Law-Making: A Modest Step Forward, 26 *Vanderbilt Law Review* 249 (2021)

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Implications of the Single European Act on European Community Law-Making: A Modest Step Forward

Barbara Campbell Potter*

ABSTRACT

In this Article, Ms. Campbell Potter discusses the interaction of the European Community (EC) institutions and the effect the Single European Act (SEA) will have on EC law-making. Specifically, the author notes that the SEA provisions for expanded use of the qualified majority vote and the new cooperation procedure for passage of legislation have changed the balance of power among EC institutions and should facilitate enactment of EC legislation. Ms. Campbell Potter believes that the SEA will continue to be successful as long as Member States do not recklessly invoke "vital national interest" veto powers and as long as the EC institutions maintain a proper balance between efficiency and democracy.

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I. INTRODUCTION

The establishment of an internal market in the European Community (the EC or the Community) has gained so much attention that 1992 has been described as a "set of numbers that has become a word."¹ The treaty establishing the European Economic Community (the EEC Treaty)² created the EC in 1957.³ Its ultimate goal was the establishment of a common market among the Member States that comprise the Community.⁴ The momentum for this movement toward a common market lost speed in the 1970s, when Member States sought refuge in various protectionist measures from the recession.⁵ The movement, however,

1. Emil J. Kirchner & Constantin Stefanou, *Institutional Implications of European Integration*, 9 ST. LOUIS U. PUB. L. REV. 61, 61 (1990) (citing statement by Richard Balfe, British Labor MEP, at Association for Contemporary European Studies meeting, Britain and European Union on the Eve of Euro-elections (Oct. 3, 1989)).

2. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, Mar. 25, 1957, 298 U.N.T.S. 11 (entered into force Jan. 1, 1958) [hereinafter EEC Treaty].

3. The EEC is only one component of the European Community. The other two components are the European Coal and Steel Community (ECSC), created by the signing of the TREATY ESTABLISHING THE EUROPEAN COAL AND STEEL COMMUNITY, Apr. 18, 1951, 261 U.N.T.S. 140 (effective July 25, 1952) and the European Atomic Energy Community (EURATOM), created by the TREATY ESTABLISHING THE EUROPEAN ATOMIC ENERGY COMMUNITY, March 25, 1957, 298 U.N.T.S. 167 (effective Jan. 1, 1958). Pursuant to the TREATY ESTABLISHING A SINGLE COUNCIL AND A SINGLE COMMISSION OF THE EUROPEAN COMMUNITIES, 10 J.O. COMM. EUR. (No. 152) 2 (1967) [hereinafter Merger Treaty], which was signed on April 8, 1965 and effective July 1, 1967, the three Communities share common institutions of the Parliament, the Council, the Commission, and the European Court of Justice.

4. The current members of the Community, or Member States, include Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain and the United Kingdom. ANDREW W. COX, A MODERN COMPANION TO THE EUROPEAN COMMUNITY 12 (1992).

5. See COMPLETING THE INTERNAL MARKET: WHITE PAPER FROM THE COMMIS-

regained momentum when the Commission of the European Communities (the Commission)⁶ published a document known as the White Paper of 1985.⁷

The Commission, knowing that the declaration of the goal of an internal market is far from realizing such a market, set forth in the White Paper a roadmap for achieving this goal. The White Paper contained some 300 pieces of legislation to be adopted within the Community by December 31, 1992.⁸ The goal of the White Paper tracked that of the internal market itself: to eliminate physical, technical, and fiscal barriers to the movement of persons, goods, services, and capital between and among Member States of the EC.⁹ In short, the White Paper resembled a "How To," nuts and bolts type of manual. It was a result-oriented, instructional document designed to achieve Europe 1992.

The number of proposals and the nature of the law-making process alone, however, made the ambitious goal of 1992 border on the impossible. To further exacerbate the situation, much of the EC legislation required unanimous agreement by the Council of Ministers of the European Communities (the Council).¹⁰

Recognizing the sentiment that it is hard to conceive of a better recipe for inertia than unanimity,¹¹ the Member States signed the Single European Act (the SEA or the Act) of 1986, effective July 1, 1987.¹² One of the purposes of the Act is to establish a European internal market by December 31, 1992.¹³ The SEA defines "internal market" as "an area without frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of [the EEC Treaty]."¹⁴

The mechanism by which to achieve such a sweeping goal was, in

SION TO THE EUROPEAN COUNCIL, COM (85) 310 final at 3, para. 6-7 [hereinafter White Paper].

6. See *infra* note 20 and accompanying text.

7. White Paper, *supra* note 5.

8. Greg Myles, *Opportunity or Threat: Guide to 1992*, 9 ST. LOUIS U. PUB. L. REV. 39, 40 (1990); see also White Paper, *supra* note 5.

9. White Paper, *supra* note 5.

10. See *infra* note 20 and accompanying text.

11. A. Campbell, *The Single European Act and the Implications*, 35 INT'L. & COMP. L.Q. 932, 935 (1986) (citing *Vedel Report*, Bulletin of the European Communities, Supplement 4/72, 26; H.L. Select Committee on the European Communities, 14th Report, H.L. 226, 1984-85, at xix).

12. *Single European Act*, 1987 O.J. (L 169) 1, reprinted in 25 I.L.M. 506 (1986) [hereinafter SEA].

13. *Id.* art. 13; see also EEC Treaty, *supra* note 2, art. 8A.

14. SEA, *supra* note 12, art. 13.

large part, institutional reform in the European Community that displaced the former constitutional balance among the Community organs with a new and innovative one. The EC achieved this reform through two notable features. First, only a qualified majority vote is now required for many matters connected with the internal market. Secondly, it introduced the novel cooperation procedure for the passage of EC legislation.

This Article discusses the law-making process in the working organs of the European Community, comparing the process before and after the SEA. The institutional reform in the wake of the SEA, though modest, has made EC law-making more democratic and legitimate in the constitutional sense. Consequently, it should serve to further the goal of economic integration in 1992.

II. THE EUROPEAN COMMUNITY INSTITUTIONS

A. *General Background*

The European Community is composed of twelve Member States.¹⁵ It is not itself a state. Instead, the EC is a "supranational" organization.¹⁶ It achieves this quality because, unlike other international organizations, it can adopt legislative measures by less than unanimous vote,¹⁷ and such legislation can directly bind both Member States and individuals.¹⁸ While the Member States have retained their sovereignty in many areas, they have transferred much of it to the institutions of the EC.¹⁹ The EC derives its increased competence at the expense of the Member States.

The institutions of the European Community are (1) the Council of European Communities (the Council), (2) the Commission of the European Communities (the Commission), (3) the European Parliament (the Parliament), and (4) the Court of Justice of the European Communities (the Court or the ECJ).²⁰ The first three of these organs form the legislative triangle of the EC. When studying the operations and interaction of the Council, the Commission, and the Parliament, one must resist the temptation to align them with the organs comprising the tripartite sys-

15. See Cox, *supra* note 4.

16. Trevor C. Hartley, *Federalism, Courts and the Legal System: The Emerging Constitution of the European Community*, 34 AM. J. COMP. L. 229, 229 (1986).

17. See *infra* note 25 and accompanying text.

18. See *infra* notes 36 & 57 and accompanying text.

19. Kathryn Good, *Institutional Reform Under the Single European Act*, 3 AM. U. J. INT'L L. & POL'Y 299, 302 (1988).

20. See Merger Treaty, *supra* note 3.

tem of the United States. The comparison is both illusory and inaccurate, at best, since these EC organs often share a function which, under the United States system, is assigned to one branch of government to the exclusion of the others.

There is an inherent tension between two of these institutions—the Commission and the Council. The Commission is charged with representing the interests of the European Community as a whole. To that end, each member of the Commission is supposed to operate independently of the interests of its respective national government.²¹ The Council, on the other hand, is composed of representatives of the governments of the individual Member States. Their loyalties lie explicitly with their respective Member States, and they are bound to abide by their Member States' instructions.²² The tension lies in the fact that a pro-European stance often comes at the expense of the sovereignty of the individual Member States.

The Parliament forms the last leg of this triangle. The Parliament, which since 1979 is the only body directly elected by the citizens of the EC,²³ is generally regarded as the institution with the least influence in the law-making process. Its role is advisory and consultative only.²⁴ As discussed later, its influence has increased somewhat with the introduction of the new cooperation procedure. The remainder of this section will contain a more detailed description of the nature and functions of each of the four Community institutions.

B. *The Council*

The Council is the organ of the EC that makes policy and law-making decisions, either by a simple majority, a qualified majority, or a unanimous vote.²⁵ It shares, along with the Commission, the executive function in EC law-making. However, the Council has no power of initiative. This means that the Council can only act on proposals issued by the Commission.²⁶ As mentioned previously, the twelve people who com-

21. AUDREY WINTER ET AL., *EUROPE WITHOUT FRONTIERS: A LAWYER'S GUIDE* 26 (BNA 1989) [hereinafter *EUROPE WITHOUT FRONTIERS*].

22. *Id.* at 28.

23. *Id.* at 31.

24. EEC Treaty, *supra* note 2, art. 137. See also Darrel S. Lew, Note, *The EEC Legislative Process: An Evolving Balance*, 27 COLUM. J. TRANSNAT'L L. 679, 683 (1989).

25. EEC Treaty, *supra* note 2, art. 148. The provisions of the EEC Treaty themselves state the type of vote required for the various decisions of the Council.

26. EEC Treaty, *supra* note 2, art. 149.

prise the Council represent the interests of their respective Member States.

C. *The Commission*

The Commission is composed of seventeen persons chosen on the grounds of general competence, and it performs an executive function.²⁷ Commonly regarded as the "guardian of the treaties,"²⁸ the Commission is vested with the duty of ensuring the enforcement of the EC treaties.²⁹ Further, the Commission is the organ that initiates all legislation to be adopted by the Council.³⁰ The Commission is the voice of the European Community as a whole. Its vantage point is strictly pro-European. Its members must act independently of the peculiar interests of their respective national governments.

D. *The Parliament*

The Parliament is composed of 518 persons directly elected by the citizens of the Member States.³¹ The Parliament plays a consultative, advisory role and lacks the legislative powers of the United States Congress or the parliaments of the Member States. As will be explained below, however, the SEA increased Parliament's influence on the EC law-making process. Parliament's only real powers, however, both before and after the SEA, are its ability to dismiss the Commission and to reject the annual budget.³² While these two powers are formidable ones, they are also politically charged enough that the Parliament would not exercise them on a whim. Therefore, these powers are not that meaningful on a day-to-day working basis.

E. *The European Court of Justice*

The ECJ is composed of thirteen judges and is based in Luxembourg.³³ Six Advocates General assist the Court in the interpretation and application of the Community treaties. The Advocates General issue pre-

27. EUROPE WITHOUT FRONTIERS, *supra* note 21, at 26.

28. See, e.g., KPMG, THE COMPANY GUIDE FOR BUSINESS IN EUROPE 7 (1989).

29. EEC Treaty, *supra* note 2, art. 155.

30. *Id.*

31. EUROPE WITHOUT FRONTIERS, *supra* note 21, at 31 (citing Act Concerning the Election of the Representatives of the Assembly by Direct Universal Suffrage, art. 3, in *European Communities*, 1 TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES 959 (1987)).

32. See EUROPE WITHOUT FRONTIERS, *supra* note 21, at 33.

33. EEC Treaty, *supra* note 2, art. 165.

liminary, nonbinding opinions. The Court considers these opinions carefully when it finally makes a ruling on a case.³⁴

The ECJ is charged with ensuring "that in the interpretation and application of this [EEC] Treaty the law is observed."³⁵ While the drafters of the Community treaties may have conceptualized a rather modest role for the ECJ vis-à-vis the other organs in this constitutional scheme, the ECJ has never assumed such a role. Instead, the Court has taken a bold stance in pioneering new ground in Community matters. Its activist approach in interpreting the EEC Treaty has contributed greatly to the integrationist effort. It has fashioned the doctrines of direct effect, supremacy, and preemption of EC law into cornerstones of the legal system.

These three doctrines have shaped EC law considerably. The doctrine of direct effect states that Community law can directly confer rights on private citizens that national courts of the Member States must recognize.³⁶ Further, the Court has made plain that, in the case of a conflict between Community law and the national law of a Member State, Community law is supreme and will prevail over national law.³⁷ Finally, there are areas where Community law will preempt national action, even where the Community has not yet asserted itself.³⁸ These constitutional doctrines, as in the United States, help ensure uniformity of Community law in its application to Member States and their citizens. With regard to supremacy, Community law is supreme over national law, whether that national law is adopted after, or before, the corresponding Community law.³⁹

Much credit in the formulation of EC law, then, must be accredited to the ECJ. It transformed its contemplated role of a reactive judiciary into a vigorous and proactive one. The ECJ "has not hesitated to remodel the law even where this has entailed adopting a solution different from that envisaged in the Treaties."⁴⁰ In this way, its doctrines have advanced significantly the integrationist movement in the EC.

34. *Id.* art. 166.

35. *Id.* art. 164.

36. Hartley, *supra* note 16, at 234.

37. Case 6/64, *Costa v. ENEL*, E.C.R. 585 (1964).

38. Joined Cases 21-24/72 *International Fruit*, E.C.R. 1219 (1972).

39. John Temple Lang, *European Community Constitutional Law: The Division of Powers Between the Community and the Member States*, 39 N. IR. LEGAL Q. 209, 212 (1988).

40. Hartley, *supra* note 16, at 247.

III. INSTITUTIONAL CHANGES IN THE WAKE OF THE SEA

A. *General Background*

The system of law-making within the European Community has always been one of intricacy, principally because of the inherent tension between the Member States' desire to retain national sovereignty and the necessity of relinquishing some sovereignty in order to advance the goals of the EC. This intricacy is heightened further by the institutional changes made under the SEA. These changes strike a balance between retention and relinquishment of sovereignty on the part of Member States. The SEA's middle ground position is to link institutional changes closely and directly to efficient law-making techniques.⁴¹

This section first explores the changes the SEA has announced for the ECJ. It then examines the two most notable changes of the SEA in the EC law-making process: the expanded use of the qualified majority vote within the Council and the new cooperation procedure for the passage of EC legislation.

B. *The European Court of Justice*

The least controversial institutional change of the SEA involves the ECJ. As discussed previously, the modest role of the ECJ envisioned by the drafters of the EC treaties has never inhibited the ECJ from playing a very active role in the progressive development of EC law. Indeed, the danger for the Court was a serious backlog of cases, not unfamiliar to United States lawyers. This danger caused pressure to mount. The SEA sought to alleviate this pressure by authorizing the Council, at the Court's request, to vote unanimously to create a court of first instance that is inferior to the ECJ.⁴² This two-tiered judicial system has now been implemented, with the Court of First Instance being established by a Council Decision on October 24, 1988.⁴³

The Court of First Instance is designed primarily to determine factual issues.⁴⁴ Its decisions on legal issues are subject to appeal as of right to

41. Kirchner & Stefanou, *supra* note 1, at 67 n.28.

42. EEC Treaty, *supra* note 2, art. 168A, added by SEA, *supra* note 12, art. 11. See also George A. Bermann, *The Single European Act: A New Constitution for the Community?*, 27 COLUM. J. TRANSNAT'L L. 529, 567 (1989).

43. Council Decision 88/591, 1988 O.J. (L 319) 1 (establishing a court of first instance of the European Communities).

44. Bermann, *supra* note 42, at 567-68.

the ECJ.⁴⁵ Additionally, actions initiated by Member States, actions initiated by any of the EC institutions, and actions requesting preliminary rulings are within the sole jurisdiction of the ECJ.⁴⁶

The ECJ has long announced its need to remove certain matters from its competence in order to manage its critical responsibilities adequately.⁴⁷ While this institutional change of the SEA is not regarded as radical, it is important in that it relieves the congestion of the ECJ's docket. It further liberates the Court to maintain its proactive stance in the integrationist movement through its shaping of EC law.

C. *The Expanded Use of the Qualified Majority Vote*

A central focus of the SEA is the completion of the European internal market by December 31, 1992.⁴⁸ Eliminating the unanimity requirement for many matters facilitates the realization of this goal. Therefore, the SEA adopted a qualified majority vote⁴⁹ of the Council for many matters connected with the completion of the internal market.⁵⁰

A strict system of unanimity would render the Council's law-making function completely impotent. Application of the unanimity requirement allowed a dissenting Member State to block legislation indefinitely until substantial compromises favoring its position were made.⁵¹ This de facto veto power unduly slowed and politicized the process of achieving the creation of an internal market. One author characterizes the products of unanimity as "package deals" that are "inherently sub-optimal" because they produce a lowest common denominator result.⁵²

The SEA addressed the problems associated with unanimity by including the qualified majority provision of article 100A, in derogation of

45. *Id.* at 568.

46. *Id.*

47. Finbarr Murphy, *The Single European Act—II*, 20 IR. JURIST 239, 241 (1985).

48. *See supra* note 13 and accompanying text.

49. SEA, *supra* note 12, art. 148(2). This article defines voting by a qualified majority. The SEA requires 54 out of a total of 76 votes for the Council to approve a proposal by the Commission by a qualified majority vote. *Id.* Qualified majority voting, generally, refers to a voting system in which the votes of Member States are accorded different numerical weight, such that the interests of the larger Member States are prevented from always predominating, since several small Member States must vote on the proposal to secure its passage. In the European Community, the twelve Member States' votes are weighted as follows: Belgium (5); Denmark (3); Germany (10); Greece (5); Spain (8); France (10); the Republic of Ireland (3); Italy (10); Luxembourg (2); the Netherlands (5); Portugal (5), and; the United Kingdom (10). Hartley, *supra* note 16, at 679-80, n.6.

50. Bermann, *supra* note 42, at 538.

51. *Id.*

52. Kirchner & Stefanou, *supra* note 1, at 64.

article 100 of the EEC Treaty. This change serves as a means to accomplish the Treaty's stated objective of article 8A,⁵³ which reiterates the goal of the internal market. Absent article 100A, an internal European market could not be established any time near the December 31, 1992 target date.⁵⁴ Article 100A, then, replaces the requirement of unanimity with that of a qualified majority vote for many matters relating to the internal market.⁵⁵ Significantly, article 100A, a derogation from article 100 of the EEC Treaty, speaks to the adoption of "measures" by the Council. This language is far broader than that of article 100 itself, which requires the Council to adopt "directives."⁵⁶

The difference between the use of the terms "measures" and "directives" is far-reaching. Pursuant to article 189 of the EEC Treaty, there are five possible measures the Council and Commission can adopt: (1) regulations (binding and directly applicable in all Member States without the necessity of national implementation); (2) directives (binding as to the result to be achieved, but left to each Member State as to the form and method of implementation of that result); (3) decisions (binding on those to whom they are addressed); (4) recommendations (nonbinding); and (5) opinions (nonbinding).⁵⁷ Article 100A gives the Council full leeway to implement "measures" relating to the internal market and not just "directives." While a regulation has the advantage of being automatically binding and directly applicable without the necessity of implementation by each of the twelve Member States, the directive has gained

53. SEA, *supra* note 12.

54. Article 100A provides in part:

By way of derogation from Article 100 and save where otherwise provided in this Treaty, the following provisions shall apply for the achievement of the objectives set out in Article 8A. The Council shall, *acting on a qualified majority* on a proposal from the Commission in co-operation with the European Parliament and after consulting the Economic and Social Committee, adopt the *measures* for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

EEC Treaty, *supra* note 2, art. 100A, added by SEA, *supra* note 12, art. 18 (emphasis added).

55. *Id.* The provisions allowing for the qualified majority vote concern the alteration or suspension of duties, the right of establishment, restrictions on the right to provide services, the movement of capital, sea and air transport, research and technological development, the health and safety of workers, and certain matters concerning the environment. Campbell, *supra* note 11, at 934.

56. EEC Treaty, *supra* note 2, art. 100.

57. EEC Treaty, *supra* note 2, art. 189. See also EUROPE WITHOUT FRONTIERS, *supra* note 21, at 41.

increasing popularity in the EC. This is because the new approach to integration is one of mutual recognition of national standards of Member States, as opposed to strict harmonization of them.⁵⁸ Mutual recognition alleviates the severe political and logistical problems of harmonization and calls on Member States to recognize each other's national standards, assuming some acceptable threshold is met.⁵⁹ At first glance, it appears that article 100A provides tremendous impetus for the realization of Europe 1992. A closer look, however, reveals that the scope of article 100A is not all-encompassing. Specifically excluded from it are the fields of fiscal matters, the free movement of persons, and the treatment of employees.⁶⁰ Unanimous vote by the Council is still required for legislation concerning these matters.

Additionally, this closer look reveals the "retrograde step" of article 100A.⁶¹ The EEC Treaty, unamended by the SEA, required only a simple majority vote by the Council for many matters that now require a qualified majority vote.⁶² This change represents a backward step for the realization of Europe 1992, since it requires a higher threshold of approval in the Council for many matters under the post-SEA scheme.

Even for matters that require only a qualified majority vote, two mechanisms exist in the SEA to diffuse its impact.⁶³ First, article 100A(5) of the SEA provides a safeguard allowing Member States to protect their vital interests by deviating from harmonization measures.⁶⁴ Member States can only invoke this safeguard provisionally and for the purpose of protecting certain noneconomic national interests.⁶⁵ These noneconomic interests are those referred to in article 36 of the EEC Treaty.⁶⁶ Any invocation of article 100A(5) by a Member State is subject

58. Bermann, *supra* note 42, at 540.

59. *See id.* at 539-40.

60. *Id.* at 547-48.

61. J.A. Usher, *The Institutions of the European Communities After the Single European Act*, 19 BRACON L.J. 64, 64 (1987).

62. *Id.*

63. Hans-Joachim Glaesner, *The Single European Act: Attempt at an Appraisal*, 10 FORDHAM INT'L L.J. 446, 461-62 (1987).

64. SEA, *supra* note 12, art. 100A(5).

65. *Id.*

66. EEC Treaty, *supra*, note 2. Article 36 of the EEC Treaty provides:

The provisions of Articles 30 to 34 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary dis-

to "a Community control procedure."⁶⁷

This safeguard of article 100A(5), however, is regarded as rather benign compared to a similar device introduced by the SEA, the derogation provision of article 100A(4).⁶⁸ Article 100A(4) allows Member States to derogate from harmonization measures adopted by a qualified majority vote by applying "national provisions on grounds of major needs referred to in article 36, or relating to the protection of the environment or the working environment."⁶⁹ Article 100A(4) does require notice to the Commission for its use. This requirement is little consolation, however, given that this article allows unilateral derogation by Member States.⁷⁰ They can decide for themselves, at least in the first instance, whether they can deviate from EC harmonization measures.⁷¹

Presumably, due to similar grounds for the safeguard of article 100A(5) and the derogation of article 100A(4), respectively, a Member State cannot invoke the more drastic device of article 100A(4) if the Community act provides for an article 100A(5) safeguard.⁷² The inclusion of these two mechanisms in the SEA were probably necessary evils to gain support for the increased use of the qualified majority vote called for in that Act.⁷³ Nonetheless, they remain a looming threat to the goal of integration by providing ample opportunity for Member States to couch a discriminatory restriction under the auspices of either device.

Further, while the SEA gives the goal of 1992 a tremendous boost via the expanded use of the qualified majority vote, one must bear in mind that many EC matters remain expressly subject to the unanimous vote of the Council. This leaves open the possibility of circumvention of the role of the qualified majority rule because the line of demarcation between the article 100 unanimity rule and the article 100A qualified majority vote is unclear.⁷⁴ That is, if the passage of a proposed regulation is distasteful enough to one or more Member States, they may attempt to ground its legal basis in an article 100 matter. In this way, they retain the ability to block passage of the proposed legislation pursuant to the unanimity rule. Conversely, those in favor of a proposed measure that is properly decided under the unanimity rule may seek to couch it in terms

crimination or a disguised restriction on trade between Member States.

67. SEA, *supra* note 12, art. 100A(5).

68. SEA, *supra* note 12, art. 100A(4).

69. *Id.*

70. Glaesner, *supra* note 63, at 462.

71. Bermann, *supra* note 42, at 543.

72. Glaesner, *supra* note 63, at 462.

73. Bermann, *supra* note 42, at 545.

74. Usher, *supra* note 61, at 65.

of an article 100A matter, thereby necessitating a qualified majority vote only. The fruitful ground for debate is apparent. In instances where this matter cannot be agreed upon, the ECJ should determine the proper legal basis of the matter, as it is entrusted with ensuring the correct legal interpretation of the EEC Treaty.⁷⁵

One other glitch may potentially dilute the ability of the qualified majority rule to further the establishment of a European internal market. This glitch is that the SEA failed to address, explicitly or implicitly, what is known as the Luxembourg Accord of February 1966 (the Luxembourg Accord or the Accord).⁷⁶ The Luxembourg Accord is not a treaty. Instead, the Luxembourg Accord is a gentleman's agreement that involves a mechanism tantamount to a veto. Member States were allowed to reserve the right to veto legislation which they viewed as affecting their "vital national interests."⁷⁷ Further, the Accord says that if a Member State regards a Commission proposal as threatening to its vital national interests, the proposal cannot be adopted "until unanimous agreement is reached" in the Council.⁷⁸ This mechanism applies even where the Council may ordinarily adopt the measure by a qualified majority vote.

There is no question that the Luxembourg Accord was an overt reaction to the introduction of the qualified majority vote into the EC law-making process in the first instance.⁷⁹ Any discussion of it is conspicuously absent in the SEA. The question of the vitality of the Luxembourg Accord after the SEA is, therefore, still an open one. One could argue, certainly, that articles 100A(4) and (5) approximate codification of this gentlemen's agreement.⁸⁰ There is little doubt, then, that "vital national interests" may be on the rise as a convenient escape hatch from the expanded use of the qualified majority vote under the SEA.

D. *The New Cooperation Procedure*

1. General Background

The European Community's legislative process is best understood in the context of an institutional interplay among the Commission, the

75. EEC Treaty, *supra* note 2, art. 164. See also Good, *supra* note 19, at 318.

76. Peter Sutherland, *The Dawn of a United Europe: An Introduction to 1992 and Beyond*, 9 ST. LOUIS U. PUB. L. REV. 1, 5 (1990).

77. Lew, *supra* note 24, at 688.

78. *Id.*

79. *Id.*

80. See notes 63-71 and accompanying text.

Council, and the Parliament on any particular proposal. The Commission is the only organ with the right of initiative, that is, the right to propose legislation. The Council is the body with the power to make decisions, which the Commission then implements.⁸¹ The rôle of the Parliament is limited to consulting and advising only, though such consultation and advice may carry more weight under the SEA's new scheme.⁸²

One of the most important changes brought about by the SEA is its overt alteration of the constitutional balance that the drafters of the EEC Treaty crafted for EC law-making. In short, the SEA gives the Parliament more influence in the legislative process.⁸³ The SEA accomplished this result by augmenting its power and elevating its status to one approaching co-legislator by increasing its level of participation in the EC law-making process.⁸⁴ The means of achieving this heightened status for the Parliament is known as the new cooperation procedure, embodied in article 149 of the EEC Treaty, as amended by article 7 of the SEA.⁸⁵

In order to fully comprehend and appreciate the expanded role of the Parliament, one must be familiar with its former role and the system that the new cooperation procedure replaced—in part, the consultation procedure. Under the consultation system and before the SEA, the Parliament “represented little more than a ‘shop-window’ display of western parliamentarism.”⁸⁶

2. The Consultation Procedure: The Parliament as Bystander

Under the older consultation procedure, the Commission drafts and sends a proposal to the Council.⁸⁷ Government officials and private parties interested in the matter then engage in informal consultations. The proposal then passes from the Commission to the Council upon a majority vote in the Commission.⁸⁸ It is then formally referred to the Council, as well as published in the Official Journal of the European Communities as a Commission Document.⁸⁹

81. Lew, *supra* note 24, at 683.

82. *Id.*

83. Good, *supra* note 19, at 300-01.

84. Lew, *supra* note 24, at 693.

85. EEC Treaty, *supra* note 2, art. 149, as amended by SEA, *supra* note 12, arts. 6 and 7. Article 6 of the SEA introduces the new cooperation procedure and Article 7 of the SEA sets forth the actual steps of that procedure. *Id.*

86. Kirchner & Stefanou, *supra* note 1, at 62.

87. EUROPE WITHOUT FRONTIERS, *supra* note 21, at 42.

88. *Id.*

89. *Id.*

The Council then, proposal in hand, requests opinions from the Parliament and the Economic and Social Committee (the ECOSOC).⁹⁰ The Parliament then refers the proposal to the appropriate committee, which then produces a draft opinion on behalf of the full Parliament.⁹¹ The proposal is then put to the full Parliament for a vote, the result being called a "resolution."⁹² The process is essentially repeated in the ECOSOC.⁹³

The Council, having the opinions of both the Parliament and the ECOSOC, refers the proposal to a working party, which reviews the proposal and submits it to the Committee of Permanent Representatives (the COREPER).⁹⁴ Next, COREPER submits the proposal to the full Council under a "fast-track" procedure allowing adoption without debate, if the working party agrees on the proposal.⁹⁵ If it does not, the proposal is submitted to the Council pursuant to a slower procedure that requires debate.⁹⁶ Upon the Council's adoption of the proposal, it becomes law.⁹⁷

3. The New Cooperation Procedure: The Second Reading

Before describing the new cooperation procedure of the SEA, it is important to note the scope of that procedure. Article 6 of the SEA lists the provisions of the EEC Treaty to which the new procedure applies.⁹⁸ It is clear that the new cooperation procedure does not fully replace the consultation method. Use of the new cooperation procedure is, however,

90. The Economic and Social Committee (the ECOSOC) is a Brussels-based Committee whose members represent a wide range of professionals, labor groups and the general public. *Id.* at 39.

91. *Id.*

92. *Id.* at 43.

93. *Id.*

94. The Committee of Permanent Representatives (COREPER) is comprised of resident representatives of Member States. Its purpose is to ensure that Member States retain a great deal of control over the working process of the Council. *Id.* at 29.

95. *Id.*

96. *Id.*

97. *Id.*

98. These provisions include article 7 of the EEC Treaty, concerning discrimination based on nationality; article 49 of the EEC Treaty, providing for the freedom of movement of workers; and, articles 54(2), 56(2), and 57 of the EEC Treaty, authorizing the freedom of establishment. The new cooperation procedure also extends to many new articles of the EEC Treaty, added by the SEA. These new articles include articles 100A and 100B, concerning approximation and harmonization of laws; article 118A, addressing improvements in work environments; and article 130Q, addressing research and technological development. Good, *supra* note 19, at 312-13.

mandated in a number of important areas affecting the completion of the European internal market. As will soon become clear, use of the procedure in those areas affords the Parliament considerably enhanced power in the law-making process.

The new cooperation procedure nearly parallels the consultation procedure, up to the point of the so called "second reading."⁹⁹ That is to say, the two procedures are functionally identical until the step in the process where Parliament gets a second look at the proposal. The cooperation procedure can be divided into five steps:

(1) As to matters upon which the Council and Parliament are obliged under the SEA to cooperate,¹⁰⁰ the Council (having received a proposal from the Commission) forwards the proposal to the Parliament, which adopts an opinion regarding the proposal. The Parliament then sends the proposal back to the Council. The Council may then, by a qualified majority, preliminarily adopt what is termed a "common position." The Council then explains its "common position" to the Parliament.

(2) If the Parliament approves the "common position" within three months or does not act upon it at all (such acquiescence constituting approval), the Council will then adopt conclusively the proposal according to its "common position."

(3) Alternatively, during this same three month period, the Parliament may, by absolute majority, either reject or propose amendments to the Council's "common position."

(4) If the Parliament rejects the measure, the Council must vote unanimously to adopt the measure. Alternatively, if the Parliament suggests amendments to the proposal, then the Commission must reexamine the Council's "common position" in light of those amendments. After such consideration, the Commission once again forwards the proposal to the Council. The Commission has one month to consider and indicate which, if any, of the proposed amendments it is unwilling to accept.

(5) The Council then has three months to do one of four things: (i) adopt the Commission's reexamined proposal by a qualified majority; (ii) adopt by unanimous vote the Parliament's amendments, which were rejected by the Commission; (iii) otherwise amend the reexamined proposal of the Commission, by unanimous vote; or, (iv) fail to act altogether, thereby causing the proposal to lapse.¹⁰¹

Parliament's review of the Commission's proposal (steps (2) or (3),

99. EUROPE WITHOUT FRONTIERS, *supra* note 21, at 44.

100. *See supra* note 98.

101. Murphy, *supra* note 47, at 242-43.

above) is called the "first reading."¹⁰² No time limit is imposed upon the Parliament to complete this first reading.¹⁰³ Similarly, there is no time limit imposed upon the Council to issue its "common position."¹⁰⁴ If anywhere, it is here where delay tactics will be employed.

It is between steps (3) and (4) above that the new cooperation procedure ceases to resemble the consultation method. Now, in lieu of adopting a definitive text for the proposal, the Council initiates what is termed the "second reading" of the Parliament by transmitting its "common position" to Parliament for consideration anew.¹⁰⁵

It is at this juncture that *la navette* (the shuttle) begins.¹⁰⁶ Proposals are shuttled, and influence wielded, among the Parliament, the Commission, and, lastly, the Council. Unlike the "first reading," all three organs are now subject to strict time limits during the "second reading."¹⁰⁷

For matters to which it pertains, the new cooperation procedure facilitates increased interplay among the Commission, the Council, and the Parliament. This new scheme allows Parliament to assume a more active role in EC law-making than it had previously, when the consultation procedure was the only available legislative method.

IV. IMPLICATIONS OF THE SINGLE EUROPEAN ACT ON THE LAW-MAKING PROCESS WITHIN THE EUROPEAN COMMUNITY

The changes in EC law-making after the SEA, although modest, should not be underestimated as having achieved no advancement at all toward Europe 1992. To the contrary, the law-making process is now far less static than before. It requires a heightened interaction among its key players. This section explores the implications of the SEA on this process.

The creation in the SEA of the Court of First Instance¹⁰⁸ does not have far-reaching constitutional implications on the EC law-making process, although it does serve an important purpose. By design, the Court of First Instance was created to facilitate judicial administration in the European Court of Justice. It neither enlarges nor diminishes the competence of the ECJ. The Court of First Instance simply removes certain matters from the ECJ in the first instance. Presumably, this benign fea-

102. EUROPE WITHOUT FRONTIERS, *supra* note 21, at 44.

103. *Id.*

104. *Id.*

105. Bermann, *supra* note 42, at 578.

106. EUROPE WITHOUT FRONTIERS, *supra* note 21, at 44.

107. Usher, *supra* note 61, at 67.

108. See *supra* notes 42-46 and accompanying text.

ture of the SEA will serve its purpose of freeing what was becoming a clogged court system at the Community level.

The more profound constitutional changes of the SEA in the EC law-making process flow from the expanded use of the qualified majority vote and the new cooperation procedure. The SEA embodies a clever combination of the goals of institutional reform and economic integration in 1992.

The expanded use of the qualified majority vote under the SEA is significant. As discussed, though, the safeguard and derogation mechanisms of the SEA in this regard can impede the goal of Europe 1992.¹⁰⁹ Their use must be closely scrutinized to reduce the potential for abuse. The SEA, however, has caused several new legal issues to be subject to the qualified majority vote. Many issues that were once subject to the unanimity rule may now be decided by a qualified majority vote because they directly effect the establishment and operation of a European internal market. Consequently, many measures that faced the prospect of failure because of a Member State's ability to destroy consensus will now enjoy a greater likelihood of success.

This enhanced chance for success heightens institutional interplay between the Commission and the Council. The Commission, which represents the EC at large, will now have a strong incentive to work alongside the Council, which represents the interests of individual Member States. After all, the two organs now have a common interest in achieving a qualified majority vote. Depending on one's view, this will be either a good or bad result. This increased dialogue is a desirable result to the extent that the goal of economic integration would otherwise be thwarted due to the inability or unwillingness of the Commission and the Council to produce a successful measure. The interplay between the Council and the Commission presumably will ensure greater harmony between the interests of the Member States and those of the Community itself, if only because a formidable incentive exists for each to understand the other's viewpoint.

Perhaps the negative feature of the expanded use of the qualified majority vote, however, is that it overtly politicizes the process further. The Commission is now on the fence between holding firmly to a position that aligns with the view of Parliament and surrendering to political compromise to achieve a favorable decision by the Council. This feature, however, is inherent in any system of law-making governed by something other than autocratic rule.

109. See *supra* notes 63-73 and accompanying text.

The effects of the increased use of the qualified majority vote are also felt in the Commission in another way. Although the EEC Treaty scheme vests the sole responsibility of drafting and initiating legislative proposals in the Commission, the Commission must ultimately appeal to the Council, as the voting organ, for final approval. This dynamic requires the Commission to temper its integrationist impulses by considering the interests and possible objections of individual Member States.¹¹⁰ A net result is to increase the Council's indirect influence on the Commission. This new interaction should assist the EC in attaining its goal of an internal market, albeit a tardy one given the ambitious goal of its completion by the end of 1992.

Additionally, expanded use of the qualified majority vote affects significantly the EC's constitutional scheme in another way. The qualified majority vote reduces dramatically the opportunity of Member States to block adoption of a wide variety of proposals. This means that fewer proposals will be adopted that contain provisions fostering the interests of the Member State. This is true notwithstanding the Luxembourg Accord since "vital national interests" must be demonstrated for unanimity to be required.

Of equal significance in the EC is the new cooperation procedure under the SEA. Despite its unsavory characterization of "Byzantine complexity,"¹¹¹ it has elevated Parliament's status in the EC law-making scheme. The post-SEA Parliament is no longer a mere onlooker in the EC law-making process. Because of the new cooperation procedure, Parliament is an active participant with influence that counts.

Under the new cooperation procedure, the second reading¹¹² is far more than just another bureaucratic layer in the legislative process. In fact, the second reading is a political turning point. If the Parliament at the second reading rejects a proposal, only a unanimous vote of the Council can overturn this rejection. Therefore, Parliament need only obtain the support of just one Member State to block adoption of the proposal. Consequently, the Commission and the Council must give Parliament more than the lip service historically given. The Commission must now be cognizant of including in its proposal any modification suggested by Parliament in its first reading.¹¹³ In addition, the Council must solicit Parliament's opinion and take it into full account, so as to avoid rejection

110. Bermann, *supra* note 42, at 568.

111. Usher, *supra* note 61, at 67.

112. See *supra* notes 99-105 and accompanying text.

113. Lew, *supra* note 24, at 695.

of its "common position."¹¹⁴

Some may discount Parliament's newfound power because it is only permitted "to accept or reject a package negotiated by others."¹¹⁵ In reality, however, Parliament's announced viewpoint will be considered carefully from the onset of any negotiation between the Commission and the Council. The fact that the new cooperation procedure provides no opportunity for direct dialogue between Parliament and the Council does not change this result.¹¹⁶ Although the new cooperation procedure of the SEA does not formally confer law-making status upon Parliament like that held by the Council, it functionally produces such a result.

Further, with Parliament's increased leverage in many matters, it has strong incentive to scrutinize carefully the legal basis the Commission chooses for a given proposal.¹¹⁷ That legal basis will dictate which legislative procedure shall ensue for that proposal, the consultation procedure or the new cooperation procedure. Presumably, Parliament will feel shortchanged if the proposed legal basis deviates from the proper legal basis that will now require the new cooperation procedure.

Although the new cooperation procedure politicizes further a process that is highly political to begin with by inviting more compromise, it likewise makes it a more democratic one. This new method of EC law-making injects democracy and legitimacy into the legal process by enhancing Parliament's role because it is the only EC organ directly elected by the citizens of the Member States. The drafters of the SEA, by affording Parliament increased participation in the EC law-making process, apparently sought to encourage awareness of, and support for, the Community integrationist effort on the part of its citizenry.¹¹⁸ This idea recognizes the interests of the people of the European Community, thereby further solidifying support for the movement itself. The actual role that Parliament plays is a testament to the fact that such recognition by the SEA is more than a mere symbolic token.

V. CONCLUSION

A focal point of the Single European Act is to create an internal market within the European Community. The institutional reforms of the SEA substantially advanced this goal. By expanding the use of the qualified majority vote and implementing the new cooperation procedure, the

114. *Id.* at 696.

115. Kirchner & Stefanou, *supra* note 1, at 71.

116. EUROPE WITHOUT FRONTIERS, *supra* note 21, at 45.

117. Lew, *supra* note 24, at 696.

118. Good, *supra* note 19, at 314.

SEA has and will continue to further its goals of the EEC Treaty. Expanded use of the qualified majority vote for key integrative matters will assist in accomplishing Europe 1992. Such an expansion, however, was not created for efficiency's sake alone. Instead, the SEA carefully calculates a balance in EC law-making between its tandem goals of efficiency and democracy in that process. It does this by tempering the liberating features of a qualified majority vote with an involved and interactive process among the EC organs that form the legislative triangle.

The SEA moderates the legislative fast track caused by increased qualified majority voting with the reins of the new cooperation procedure. This procedure vests in Parliament, the only EC organ directly elected by Member States' citizenry, tremendous influence in the EC law-making process. Consequently, by indirectly involving each Member States' citizens, the legislative process becomes a more legitimate process. This fact alone should serve to deepen the commitment by all concerned to create the European Union¹¹⁹ envisioned by the drafters of the EEC Treaty.

119. Murphy, *supra* note 47, at 240.

