THE IMPACT OF THE SINGLE ACT ON THE INSTITUTIONS

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At this early stage any assessment of the Single Act is bound to be a matter of personal impression. Professor Pescatore is pessimistic and he may be right. I believe that we can be optimistic - particularly about the effect of the Single Act on the institutions - if we start from different premises.

The Single Act as a legal instrument

Professor Pescatore sees the Single Act as a legal instrument on which the Member States can rely to water down the *acquis communautaire* and deprive key provisions of the Treaty of their binding effect. But we should be realistic about the merits of the Treaty itself as a legal instrument. We may have achieved something like a common market for goods, but we have not done so in other key areas, especially services. The existing Treaty has only taken us a certain distance. Even in relation to goods, the strict logic of Articles 30 and 36 has been complicated by the "mandatory requirements" or "rule of reason", and similar problems have arisen in applying the Treaty provisions on establishment and services. The reason lies, at least in part, in the priorities of politics today.

Environmental protection and consumer protection are new concerns

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which were of little political importance when the original Treaty was drafted. They have now become so important that no politician or government can afford to ignore them. The existing speed of Community legislation is too slow to respond to public pressures and, to an increasing extent, the Court has had to say that “in the existing state of Community law” Member States cannot be prevented from taking unilateral measures. For political as well as legal reasons the Court cannot by itself advance the process of economic, far less political, integration.

Those who expected to find in the Single Act a legal instrument which would enhance the powers of the Court and promote integration by the operation of law, must be disappointed by what we have got. But their disappointment should be less if they are prepared to see the Single Act, not as a legal instrument, but as a political manifesto.

The Single Act is a moral and political commitment on the part of all the Member States to make a reality of the internal market by 1992. That is not a commitment which could have been taken for granted. Nor, to be frank, is the aim of making a reality of the internal market an aim to which the more “progressive” Member States have always shown a whole-hearted commitment. The critical observer in the United Kingdom would point to the German attitude to the Handwerksordnung and financial services, the attitude of France, Germany and other States to air fares, and the persistent failure of some of the original Six to implement existing directives.

It has been said repeatedly, but it is none the less true, that the weakness of the Community has lain in a lack of political will, and the true test of the Single Act is whether we have a new political atmosphere in the Community today. It surely cannot be denied that there is a new political atmosphere and a willingness to make progress in areas where, without substantial progress, the idea of a free internal market is a sham. Before we lament the results of the Luxembourg Conference, we should ask ourselves what the atmosphere would be like if that Conference had failed.
The Single Act as the "price" for the Luxembourg Conference

Professor Pescatore says the Single Act is the price which the more progressive Member States have had to pay for insisting on the Luxembourg Conference. Again, this may be true. But it is fair to say, too, that the United Kingdom did not want the Conference and there is a genuine political problem for the United Kingdom and for some other Member States. Recently, a centre page article in the Times described the Single Act as "EEC Trickery that Thatcher must halt". When Professor Pescatore suggests that national parliaments should reject the Single Act, he will find an unlikely ally in the Spectator (a right-wing journal):

"On 1 July Britain takes over the presidency of the EEC. During our six months of office we could safeguard the sovereignty of the British Parliament, and also spare Europe a yet more unworkable bureaucracy, by taking any opportunity we can find to scupper the Single European Act".

If indeed there has been a price to pay, others have had a price to pay before. The cynic might say that we have been paying through the nose for the Common Agricultural Policy for years. I would ask our critics to go and look at some of the Scottish fishing communities and see the price they have paid for a Fisheries Policy which was cobbled together by the original Six so that it could be presented as part of the acquis communautaire in the negotiations for our accession. What is far more serious, that Fisheries Policy probably cost us the membership of Norway. We have all paid, and will continue to pay, a higher price for that in terms of European cohesion than is sometimes realised.

The Single Act and the institutional debate

It may seem heretical to say so, but I think it is a positive merit of the Single Act that it has, for the time being, set clear limits to the so-called institutional debate. We must now get used to the idea that the Treaty as amended by the Single Act is the version of the Treaty which most of
us will be teaching and applying for the rest of our working lives. Institutional theory may be of interest to institutional lawyers, but businessmen and citizens are more interested in results. The institutional debate was an obstacle to the achievement of concrete results because it was in many ways a destructive element in relations between the Community and the Member States and between the institutions of the Community themselves. It was, in a word, an alibi for inaction. So I for one will not be sorry to leave the prehistory of the Single Act to the archeologists.

The Single Act in the context of enlargement

The accession of Spain and Portugal has altered the balance of power within the Community in ways that could not have been predicted when the negotiations leading to accession began. The shift in the balance of power is not simply a shift towards the Mediterranean. Nor is it solely due to the fact that, as is now obvious, the new Member States are determined to play an active and positive role in the development of the Community. It is, I believe, more fundamental.

The other day a French engineer told me that, in his opinion, the countries of Northern Europe should beware of the economic challenge which will come from Southern Europe. The development of modern technology requires a quantum leap of imagination to which the economic, commercial and political infrastructure of Northern Europe can be as much of a hindrance as a help. His view was that the underdeveloped but climatically attractive areas of Southern Europe, unencumbered by the problems of decaying cities and declining industries, are ripe for investment in the technology of the future. What is more, having made the quantum leap from totalitarian government to parliamentary democracy, the new Member States are willing to think in new ways. At any rate, this French engineer said that he had never negotiated a contract more quickly or efficiently than he had done recently in Andalucia.

For these and other reasons, the era in which the future of the Community was arranged by cosy deals between Paris and Bonn (with London as gooseberry in a *ménage à trois*) is gone for good. The Member States — and particularly France, Germany and the United Kingdom —
are going to have to come to terms with new patterns of influence and alliances.

My conclusion is that what we have to consider today is the impact of the Single Act on the institutions in a totally new political climate. We should not be asking ourselves whether the Single Act offers a solution to the institutional problems of two years ago, because the problems will be new and, to a certain extent, unpredictable. The Single Act may be defective as a legal text, but it may, none the less, be of more value than the existing Treaty as an instrument of political leverage.

The Single Act as a political manifesto

Looking at the Single Act as a political manifesto, I believe its most significant feature is, as I have said, the commitment of all the Member States to substantial completion of the internal market by 1992. Other features of the Act are theoretically more interesting, and the commitment is, admittedly, a qualified commitment. But any formal commitment to complete the internal market within six years applies pressure at a vital point. It brings political pressure to bear on the internal working of the Council and on the relationship between the Community institutions and the bureaucracies of the Member States — what the House of Lords described as a Byzantine labyrinth of committees and working parties of experts. The politicians seem at last to have recognised that, without an improvement in the speed and methods of working, there is no prospect of completing the internal market before the Greek Kalends. Civil servants and experts respond to political pressure and, unless the pressure is relaxed, the machinery of decision-making will not be allowed to continue at its previous speed. I see this as crucial to our assessment of the new co-operation procedure between the Council, the Commission and Parliament.
The co-operation procedure

It has been suggested that a fatal flaw in the co-operation procedure introduced by the Single Act is that, although there are time limits for its later stages, there is no time limit within which the Council must reach its "common position". In the absence of a time limit, there will be no incentive for the committees and working parties to speed up their work. This is no doubt true. But the proposals submitted by the Commission to the Council are not all of equal importance or equal complexity. Indeed, it is difficult to see how any fixed time limit could reasonably have been imposed which could apply to them all without an escape clause which would be invoked almost every time and produce the same result as no time limit at all. In any case, the absence of time limits at the first stage does not seem to be fatal, for two reasons. First, there will be the political pressure which I have already mentioned. Second, the Council is not, at the first stage, being asked to reach a final decision but only a "common position".

If a politician is required to take a decision in the Council which will irrevocably change the law in his own country and which allows no opportunity for second thoughts, it is natural that he should want to be sure that he is not overlooking a vital point for which he can be criticised afterwards. If, on the other hand, he is only asked to go along with an interim decision, he may find it easier to accept the view of the majority in the belief that any problem can be sorted out later, or that the problem will simply go away. This will be all the easier if, as the Single Act provides, there remains the possibility of unilateral derogation from the effect of the legislation in question. So, at the stage when the Council is asked to reach its common position, the worried politician still has two possible fall-back positions. By contrast, the existing Treaty, whatever its other merits, calls for total commitment at a single stage of decision-making. It allows no opportunity for second thoughts. As a form of political mechanism, the Single Act seems to offer significant advantages, since it makes it easier to accept the principle of majority voting.

A similar consideration applies to the effect of the co-operation procedure on the Parliament. Under the existing Treaty, the opinion of the Parliament is sought once, and only once. It has been a frequent and rea-
sonable cause of complaint that the text on which the Parliament’s opinion is sought is out of date by the time the opinion is ready. The Parliament has only one formal opportunity to propose amendments to the text. Under the co-operation procedure, this opportunity will be given at the next-to-last stage. So, at the stage of giving its first opinion, the Parliament should be able to concentrate on the principles of the Commission’s proposal. It will not be necessary to spend too much time on pure points of drafting.

This can and should have two beneficial effects. If the Parliament’s first opinion concentrates on points of principle, it should be produced more quickly, and it can focus the points of difficulty without necessarily proposing a form of words to solve them. The Reports of the House of Lords Select Committee on the Communities are a possible model for the sort of opinion the Parliament should aim to produce at the first stage. Given efficient internal procedures, such Reports can be produced with surprising speed. It is also interesting to see how the House of Lords, which enjoys little power in the conventional sense, is increasing its power to influence opinion in a way that the more regimented House of Commons is not.

As regards the last stage of the co-operation procedure, the Single Act provides that, if the Council fails to act within three months of receiving the Commission’s re-examined proposal, that proposal shall be deemed not to have been adopted. This will put pressure on all the institutions. Where unanimity is still required, neither the Parliament nor the Commission can afford to insist on a proposal which stands no chance of unanimous acceptance by the Council. Even where voting by qualified majority is theoretically possible, it will take considerable determination on the part of the Presidency, and involve some political risk, to force through a proposal which is tenaciously opposed by one or more Member States. Indeed, the so-called Luxembourg Compromise is, in a sense, no more than a reflection of political reality. There is a limit beyond which the majority cannot go in imposing their will on the minority.

At the last stage of the co-operation procedure, the Commission and the Parliament will now be faced with a choice which they have not had to face before. They must choose between the success of a proposal in a form which the Council is prepared to accept, or the prospect of going
back to first base and starting all over again. The Council equally cannot afford, for political reasons, to allow any significant number of proposals to fall through its failure to reach a decision. The co-operation procedure therefore puts pressure on all the institutions to reach mutually acceptable decisions, and this in turn puts pressure on them to “co-operate” in the true sense of the word.

The opportunity for unilateral derogation, which offers a way out for the dissentient majority in the Council, may lead to a variable geometry Community, but there is a good deal of variable geometry within the United Kingdom itself, in the United States and in Switzerland, Canada and Australia. Variable geometry is not necessarily inconsistent with progress towards political union.

The impact of legislative proposals

If I am right in thinking that the Single Act will put pressure on all the institutions to reach mutually acceptable decisions, this must have an effect on the content of the proposals which the Commission submits to the Council. It seems to me, as a long-distance observer, that, in spite of the new approach to harmonisation, there are still traces of an almost theological dogmatism in the Commission’s proposals. An example of this is to be found in the Directive on Recognition of Higher Education Diplomas which is currently being considered by the House of Lords Committee.

In its evidence to the Committee one professional body reports, referring to discussions with Commission officials, that “The EEC regards the interchange of national professional titles – with all that is implied by it – as a hallmark of free movement in Europe”. That may explain why, instead of looking at “activities” as Reyners instructs us to do, the Commission’s draft has fallen into the old trap of looking at “professions” since that is the only way in which the right to use the professional title of the Host State can be made compulsory.

To achieve, in one brief directive, both the opening up of restricted activities and full admission to the profession in the Host State without

any preliminary harmonisation of training systems, is (I think) a step which the Member States will find it very difficult to take, and will certainly not take overnight. If the most we can aim for is substantial completion of the internal market by 1992, half a loaf would surely have been better than no bread.

My point is that, if the Council is to be kept under pressure to take decisions, the decisions it is asked to take must not raise too many difficulties. There must be some sacrifice of doctrinal purity if the machinery of decision-making in the Council is to run smoothly and fast.

To take another example, it would, I suggest, be futile to insist on the proposal that all major companies in the Community must have a two-tier board. There is no prospect of getting such a proposal through the Council without major political repercussions, or at any rate without considerable argument and delay. Moreover, it is not necessary to insist on this proposal, provided the instrument of the Directive is used properly.

In terms of the Treaty a Directive prescribes results, leaving form and method to the Member States. It is possible to achieve the same result without adopting identical methods. In Edinburgh, there are two investment trusts managed by the same company with roughly comparable purposes. One is a Dutch company and has a two-tier board; the other is a Scottish company with a single-tier board. Both of them work in practice in exactly the same way.

In order to have a common market we do not have to have a uniform market, as is demonstrated by the fact that Scotland has been part of a common market with England for almost 280 years without complete harmonisation of laws. The Commission must, I believe, abandon any lingering desire to achieve uniformity if the target of 1992 is to be met. What is needed above all is fast practical results.

The new competences

Although the provisions on Monetary Capacity, Social Policy, Economic and Social Cohesion, Research and Technological Development and Environment are vague and unsatisfactory, they remove a further alibi for inaction. The argument that these matters fall completely outside
Community competence can no longer be advanced, or at least not in the same way. Legal arguments about Community competence have delayed the progress of legislation both within the Commission and at the stage when Commission proposals reach the Council. The wording of the Single Act may not remove these problems as legal problems, but the fact that these new fields of activity have been brought explicitly within the scope of the Treaty makes it less likely that purely legal arguments will be pursued unless there are strong political reasons for objecting to a particular proposal.

**Political co-operation**

Article 2 and Article 30(3)(b) of the Single Act give the Commission unquestioned status in the European Council and in the process of Political Co-operation. It is said that the existence of a separate Secretariat for Political Co-operation will introduce an incoherence into the Community structure. Perhaps it will. Perhaps, too, the Commission will not have enormous influence as only one of thirteen. But it cannot diminish the Commission's influence that its right to be represented is formally recognised and it may enhance its influence if it can play an entirely independent political role in foreign relations and cannot be seen, as it is seen by some, merely as the “civil service” of the Community.

**The Commission’s powers of implementation**

The Single Act recognises that implementation of Community legislation should, in principle, be left to the Commission with the help of Advisory Committees. If (and it is, admittedly, a big “if”) the Council is prepared to give the Commission effective powers of implementation, this will have significant consequences both for its status and for its internal organisation and attitudes.

The Commission's powers of implementation in the field of competition show that such powers can, of themselves, confer an enhanced status. But it should be recognised that strong powers and enhanced status do not necessarily carry with them the right to a good reputation.
The lamentable delays which have been experienced by some complainants and applicants for exemption under Article 85(3) do not help to build confidence in the Commission as an implementing body.

If the Single Act has the effect of giving wider powers of implementation to the Commission, the Commission will have to organise itself in such a way as to exercise those powers effectively and expeditiously. Of course there are financial constraints and the Commission is acutely short of qualified manpower. But there is also a problem of attitude — the problem of doctrinal purity.

Part of the reason for the delay in competition decisions is an unwillingness to take any decision which might turn out to be wrong or be criticised as doctrinally unsound. In human terms that is understandable. But the confusion caused by "comfort letters" and other ways of avoiding decisions cannot be preferable to a willingness to take decisions even if they may later turn out to have been wrong. If the Commission is not more prepared to make mistakes, the machinery will simply seize up.

In terms of organisation, this probably means that there will have to be a greater delegation of power within the Commission coupled with more effective co-ordination between Directorates-General on issues of policy at a lower level. An incidental consequence of the Single Act may therefore be a move away from the highly "sectoral" organisation of the Commission.

The Court

The Single Act makes it possible for the Court to be relieved of a significant part of its case load. This should make it easier for the Court to find solutions to the legal conundrums which the Single Act appears to have created.

But there is one point relating to the Court on which the Single Act is not clear and on which a decision of principle will have to be made. It concerns the form of appeal to the Court of Justice from the new court of first instance. The French text uses the word "pourvoi" (the recours en cassation), the English text uses the words "right of appeal" and I understand that the Dutch text is ambiguous.
Even if the right of appeal is limited to points of law, it will be important to decide whether the function of the Court of Justice is purely one of cassation so that, if the appeal is successful, the case will go back to the lower court for rehearing, or whether the Court of Justice will enter a final judgment. There are obvious arguments in favour of the latter. But it should be recognised that complicated points of fact (for example, definition of the relevant market in competition cases) can arise as points of law. The Court of Justice will not be relieved of these problems if it is truly a court of appeal rather than a court of cassation.

The formal relationship between the Court in Luxembourg and the court of first instance calls for closer consideration than it seems to have been given so far.

Conclusion

The Luxembourg Conference was a calculated risk. The result may be less than perfect. But it is not disastrous. What would be disastrous would be an immediate reopening of the institutional debate and a failure to make the best of what we have got. There can be more than one alibi for inaction and those who believe in the Community ideal should not be responsible for providing it.