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THE INSTITUTIONAL ARCHITECTURE OF THE EUROPEAN UNION: A THIRD FRANCO-GERMAN WAY?

Renaud DEHOUSSE, Andreas MAURER, Jean NESTOR, Jean-Louis QUERMONNE and Joachim SCHILD.

Personal remarks of Jacques Delors

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THE AUTHORS

Pr. Renaud DEHOUSSE is scientific consultant at Notre Europe and a Jean Monnet Professor at IEP, Paris.

Dr. Andreas MAURER a researcher for the European integration research group at SWP.

Jean NESTOR is Vice President of Notre Europe.

Prof. Jean-Louis QUERMONNE is emeritus professor at IEP Grenoble and Paris, and administrator at Notre Europe.

Dr. Joachim SCHILD is a researcher for the European integration research group at SWP.

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INTRODUCTION

On 22 January 2003, France and Germany celebrated the 40th anniversary of the Elysée Treaty, expressing thereby their strong commitment to revive the co-operation between the two countries after the elections of 2002. The three preceding months had been marked by an impressive series of bilateral initiatives. On 24 October 2002, an informal agreement between the two Heads of State allowed the release of the delicate dossier regarding the financial package for the enlarged Union until 2006 and opened the door to an early conclusion of the enlargement negotiations. Then, the two countries deposited four contributions on the secretariat of the European Convention on the Future of the Union. These contributions focused on CFSP and ESDP, Justice and Home affairs, economic governance, and finally the institutional architecture of the European Union. Lastly, the celebration of the 40th anniversary of the Treaty provided the occasion for a joint statement, significantly entitled "Franco-German friendship at the service of a common responsibility for Europe".

More than 50 years after the beginnings of European integration, this statement was clearly to mean that with the years of reconciliation having been accomplished, the ultimate horizon of a revival of the bilateral relations could be only that of the political construction of Europe. This involved the conclusion of the Agenda 2000 dossier in early 1999 as well as the completion of the Treaty of Nice in 2000. The two negotiations clearly left the feeling that Europe had run out of breath, that the heads of state and government had failed to imagine the challenges ahead, to agree on some kind of a creative compromise and finally, for some, on the necessary instruments for assuming collective *leadership*.

The paradox is that this revival of the engine of European integration, although somewhat expected everywhere across Europe, did not contribute to the reuniting of Europe on the basis of a joint integration project. On the contrary, it seems that the Franco-German 'rélance' – in addition to the Iraq crisis – has mainly caused a new division between the EU countries concerning the main institutional and organisational outline of the EU's system. The very enthusiasm of the revival of the Paris-Berlin tandem may explain – or justify – only partly the reactions of rejection. In addition, one can plainly argue that the negative reception of the Franco-German contributions is as much linked to deeper factors, such as the transformation of the international system or the increased heterogeneity of the enlarged Union.

The relevance of the Franco-German engine and its capacity to push its partners towards their assent to the bilateral positions are thus questioned – and highly disputed at the practical level – at the very moment of its revival. Rather than a theoretical analysis, we therefore suggest an analytical scheme aimed at shedding some light on the potential dynamics of Europe. Thus we will focus on the likely effects and the future of the related proposals made to the Convention.

The reflection on the contribution to institutional architecture is necessary, for numerous reasons. First because this proposal affects the most decisive question for the success of the Convention, that upon which the Nice psychodrama hinged until the last moments of the negotiations: It directly concerns the horizon assigned to the revival of Franco-German co-operation. Secondly, because this contribution is symptomatic for the tradition of this co-operation: Instead of imposing a single and unified vision upon the other partners, Franco-German proposals have traditionally aimed at a synthesis of opposing and extreme positions on a given theme in relation to EU integration – the federalist versus the intergovernmental visions – that mirror the assumed field of reasonable disagreement. It thus leaves a wide room of manoeuvre for further and more profound debates regarding the consistency and the substantial improvement of the proposals. Finally and probably owing to its rather open character, the contribution as such was rather welcomed and only moderately criticised by those who perceived the paper as an 'aggressive' or 'ignorant' opposite to their previous positions.

Puzzled about the possible posterity of this proposal, about its capacity to aggregate the contributions of other partners and thus to structure the constitutional debate, we would like to provide a well-founded illumination of its substance.

I - THE FRANCO-GERMAN PROPOSALS ON INSTITUTIONAL ARCHITECTURE: KEY CONTRIBUTIONS AND ELEMENTS

The document of 15 January comprises proposals of a very varied nature, reflecting the consensus which emerged within the Convention on a number of points, for example:

- the substitution of the multiplicity of the existing treaties with a single and easy-to-read Constitution, which also aims to repeal the baroque puzzle of the EU's legal foundations;
- the single legal personality of the Union;
- the formal removal of the "pillars";
- the insertion of the Charter of Fundamental Rights into the Constitution;
- a better repartition of competencies between the Union and its Member States, thus combining transparency and readability of the Constitution with the flexibility allowing the further development of the EU's legal bases;
- the establishment, in legislative matters, of a direct correlation between the vote by qualified majority in the Council of Ministers and the co-decison procedure with the European Parliament;
- the definition of the functions of the European Council around two principal roles: to formulate, in co-operation with the Commission, the major political and strategic guidelines of the Union, and to define the main principles of the EU's common foreign, security and defence policies;
- the attempt to distinguish the legislative functions of the Council of Ministers, that is of its operational or executive tasks.

Other elements of the Franco-German contribution clearly exceed the consensus already achieved within the Convention until January 2003. This is true for the idea of a Congress bringing together delegates from the national parliaments and the European Parliament, for the idea of a double political responsibility of the Commission vis-à-vis the European Parliament and the European Council, as well as for the extension of the competencies of the European Parliament with a view to co-decide in all issue areas over the EU's own resources. In other fields, the Franco-German proposals remain below the already achieved consensus level of the Convention. Thus, both countries do not envisage applying the co-decison procedure as a general rule for almost all the legislative acts.

But the two key elements of the joint proposal which touch most directly the institutional architecture of the European Union and which might induce the most serious consequences undeniably are:

- the choice of a bipolar structure regarding the 'government' of the Union; and
- the institutional architecture and the procedures within the field of external action of the Union.

1. The bipolar structure of the EU's government

It rests on two offices:

- the President of the Commission, whose procedure of designation is reversed in relation to the current treaties: s/he is first elected by the European Parliament "by a qualified majority of its members" (leaving the door open to a "consensual" designation involving the assent of several political groups of Parliament), and then confirmed by a qualified majority of the European Council by. "The President of the Commission constitutes his college, taking into account the geographical and demographic balances". Consequently, not all Member States will necessarily be represented within the college. The President of the Commission has the possibility of arranging his/her college by designating Commissioners each with sectoral portfolios and others "assigned functions or specific mission agents". Of course, the overall mechanism should respect a "balanced rotation system". The President of the Commission would keep the right to give political guidance to the work of the Commission ("Richtlinienkompetenz"). Lastly, the Commission would be "politically responsible both before the European Parliament and the European Council".
- the elected Presidency of the European Council is an entirely new institution, which exercises its full-time functions throughout the President's mandate. S/he thus is not chosen from the members of the European Council, since they do not have such an availability. The duration of his or her mandate should be five years or two and a half renewable years. S/he is elected by the European Council by qualified majority. The Presidency's role is to give "continuity, stability and visibility to the management of the European Council". To this end, the President chairs and manages the meetings, "takes care of the implementation of the decisions", and "represents the Union on the international scene".

2. The specific institutional mechanism for external actions of the Union

The most visible innovation is the creation of the post of a "European Minister of Foreign Affairs (EMFA)", who congregates the functions of the Council's High Representative for CFSP and of the Commissioner responsible for Foreign Affairs 'under the same hat.' Appointed by the European Council by qualified majority, "in agreement with the President of the Commission", the EMFA:

- takes part in the college as the Council's High Representative for CFSP and as a Member of the Commission endowed with a special statute. S/he will not form part of the investiture procedure of the Commission by the European Parliament.
- has a "formal right to take initiatives as regards CFSP and chairs the Council of Ministers responsible for Foreign Affairs and for defence".
- has at his/her disposal a "European diplomatic service" associating the Directorate-General for Foreign Affairs of the Commission with a new unit for foreign policy issues. The latter would be made up around the existing services for foreign affairs of the Secretariat-General of the Council, themselves supported "by officials sent by the Member States and the Commission".

Regarding procedures, the originality of the Franco-German proposal is to be found in the passage specifying a vote by qualified majority on CFSP issues as a general rule, except for cases which affect security and defence.

II - THE GREY AREAS OF A COMPROMISE BY ADDITION

The Franco-German contribution can be read as an "agreement not to disagree", issued at the most difficult stage of the work of the Convention with regard to institutional reform. This involves less a summarising compromise between two institutional designs, which are not easily reconcilable – one federal, the other intergovernmental. The contribution should be understood as a compromise by addition, some kind of juxtaposition of elements from each of these two traditions. In addition, the views defended by both governments do not always simply correspond to the "federal model" on the German side or to the "intergovernmental model" on the French side.[1] Admittedly, this compromise by addition proposes elements, which can serve as a basis for the later proceedings in the Convention. However, these elements do not facilitate an interpretation entailing a precise overall vision on the future relations between the EU's institutions. Hence, one can easily distinguish a number of grey areas which remain to be clarified.

1. Institutionalised Competition at the Top of the EU's system?

The German government consented to the "ABC" idea (i.e. supported by Mr Aznar, Mr Blair and Mr Chirac) for a full-time Chair of the European Council. But it ensured that the Chair's role does not interfere too much with that of the President of the Commission and of the new European Minister for Foreign Affairs. Thus, the Chair of the European Council is to represent the Union on the international scene. As a result of the joint paper's drafting process, the function of representation is subject to a triple limitation: First, the Chair seems limited to the "meetings of the Heads of State and of government" (and therefore exerted under the scrutiny of at least certain representatives of the Member States), since "the daily operation of CFSP is allocated to the European Minister for Foreign Affairs". Secondly, its function is exercised "without prejudice to the competencies of the Commission and of its President". Thirdly, the Chair's principal task will be to organise the European Council, to facilitate its work and conclusions, and to focus on the common strategies regarding CFSP.

1 Regarding the respective positions of both countries within the Convention, cf. Joachim Schild, La France, l'Allemagne et le débat sur l'avenir constitutionnel de l'Union européenne, in: Allemagne d'aujourd'hui, No. 162, October-December 2002, pp. 284-300; Jean-Louis Quermonne, La France et la constitution européenne, forthcoming in the same journal.

This triple limitation should offer safeguards for certain opposing actors against an assumed presidential or intergovernmental drift regarding the implementation of Foreign Policies of the Union. However, one may ask whether this very drift is not the raison d'être of the idea of a permanent European Council presidency and of its support by France. The Franco-German contribution does not answer this question.

The majority of the commentators focused on the proposed choice for a bipolar structure and highlighted the risk of an inherent institutional conflict between the two constituent units. Hence these conflicts could take various shapes, short- and long-term: it is perfectly conceivable that both presidents/chairs would be deadlocked by an almost daily war over influence and capacities, especially at the beginning of their mandates, when the EU has to define the roles and functions of both bodies in the EU's 'living constitution', implementing the assertions made by the Constitution. However, such a daily competition on the basis of a zero-sum-game between the two bodies might be resolved. The ultimate precondition would be to clarify beforehand some of the key instruments and procedures to avoid a structural conflict. In the long run, any institution which is designed to represent the European executive centre of gravity will raise the question of which body has "to execute" i.e. to operationalise Europe within the very meaning of 'the exercise of political leadership'? Very many in Germany would answer without hesitating: the Commission.[2] However, after the creation of a President of the European Council and the strengthening of its weight in the institutional system of the EU, a development of the EU into a purely federal direction, where the Commission would exclusively fulfil the executive or governmental functions, seems practically excluded.

That is also why the idea of a central, or even increased role of the European Council within the "real government" of an enlarged Union is accepted. In this context, the decision for a permanent presidency of the European Council and therefore for some kind of structured bipolarism could be seen as moving into the right direction: Hence, it would have at least the advantage of clarity and honesty by institutionalising the EU's constitutive tension between

2 The red-green coalition in its coalition agreement as well as Chancellor Schröder in his general policy statement at the beginning of the new legislative period stressed the importance that the government attaches to the strengthening of the executive role of a politically responsible Commission before the European Parliament; See the coalition agreement "Erneuerung – Gerechtigkeit – Nachhaltigkeit", p. 78 (available at: www.gruene-fraktion.de/rsvgn/rs_datei/0,_985,_00.pdf); as well as the statement of Chancellor Schroeder of 29 October 2002 before the Bundestag, at: http://www.amb-allemagne.fr/actualites/grands_themes/actualite.asp).

the two sources of its legitimacy: the European states and the citizens. Moreover, it would clearly reflect the 'spirit' of the introductory remarks of the Franco-German contribution, which referred to the formula of the "Federation of Nation States". To admit this clear tension rather than obfuscating it within a function of a double head[3] of the Commission's and the European Council's President has at least the advantage of transparency, and possibly of effectiveness while forcing the Constitution's implementing actors to specify the relations between both heads of the Union.

The basic idea of strengthening the European Council within the EU's system is not a French idea, which might encounter a categorical refusal on the German side: Note that is was Chancellor Schröder who underlined, in a joint letter with Tony Blair, that "the role of leadership of the European Council will become increasingly important" in an enlarged Union.[4] And it is not coincidental that the chancellor overthrew the reservation of his Foreign Minister with respect to the French proposal for a bipolar structure.[5] The proposed solution clearly represents advantages from the point of view of the Heads of States and government (especially those of the larger countries), at least as long as they are able to control their future Chair.

2. The new method of investiture: Will it strengthen or weaken the Commission?

The new President of the European Council would be required to co-exist with a President of the Commission henceforth elected by the European Parliament and confirmed by the European Council. Both the German government and its parliament advocated on several occasions this inversion of the investiture procedure's order – and thereby of the political weight of the investing bodies to the benefit of the European Parliament.[6] According to the

3 See the proposal by Pierre Lequiller 'Un seul président pour l'Union', in *Le Figaro*, 4 September 2002, p. 13 as well as its contribution to the Convention: " Un président pour l'Europe", CONV 320/02, Brussels, 7 October 2002 (http://register.consilium.eu.int/pdf/fr/02/cv00/00320f2.pdf). The idea met a favorable echo on the part of the German Minister for Foreign Affairs, Mr Fischer, see "Streit ums Copyright", in: Der Spiegel, 6 January 2003, p. 55.

4 See the joint letter of Tony Blair and Gerhard Schröder to the Presidency of the Council, Berlin/London, 25 February 2002.

5 See "Fischer wollte mehr", in: Frankfurter Allgemeine Zeitung, 16 January 2003, p. 3.

6 See the coalition agreement of the red-green government (footnote 1) as well as the two parliamentary motions: Deutscher Bundestag, 14 Wahlperiode, Drucksache 14/9047: Antrag der Fraktionen SPD und Bündnis/Die Grünen: Reform durch Verfassung: Für eine demokratische, solidarische und handlungsfähige Europäische Union (15 May 2002) as well as: Deutscher Bundestag, 14 Wahlperiode, Drucksache 14/8489, Antrag der Abg. P. Hintze u.a. und der Fraktion der CDU/CSU: Notwendige Reformen für die zukünftige EU: Forderungen an den Konvent (12 March 2002).

German view, the proposed mechanism will result in a strengthening of the Commission's political weight and legitimacy. Accordingly, the new procedure would make it possible to confer increased executive powers to the Commission, for example through the introduction of some kind of delegated legislative powers for the Commission (on the basis of a European law, adopted jointly be the European Parliament and the Council), as well as by radically simplifying the comitology procedures. However, neither the German actors nor the Franco-German proposal clarify the details and consequences of such an increased role of the Commission.

The influence of the French government's thinking regarding the future role of the Commission is visible on two points:

- the idea of a double political responsibility of the Commission vis-à-vis the European Parliament as well as towards the European Council (an idea introduced by the Commission itself)[7]; and
- the need of a qualified majority within the European Parliament (i.e. actually 324 MEP's) and within the European Council to elect and to confirm the President of the Commission. The motives behind this idea are clear: The proposed quora would guarantee broad support for the Commission and the college's political independence in relation to the political groups and majorities of the European Parliament and with respect to the national governments.

Overall, one needs to translate the idea of a constitutive tension between the two sources of the EU's legitimacy, that of a Union of the citizens and that of a Union of the states, into an original institutional scheme. The idea of subordinating the Commission to a double political control mechanism could provide a more stable basis to the daily business of the latter vis - à -

7 See the Communication of the European Commission, transmitted by Mr Barnier and Mr Vitorino, Members of the Commission: "For a European Union - Peace, Freedom, Solidarity – Communication of the Commission on the institutional architecture", CONV 448/02, Brussels, 5 December 2002, p. 19, at: http://register.consilium.eu.int/pdf/fr/02/cv00/00448f2.pdf.

vis an increasingly powerful and politicised Parliament. However, this institutional scheme also involves a risk of institutional blockade: What would be the consequences, if the European Council would withdraw its confidence from the Commission while the European Parliament would reconfirm the entire college by a confidence vote?

A second risk is connected with the inversion of the roles of Parliament and of the European Council within the process of investiture of the Commission's President. The requirement of a "qualified majority" in the European Parliament, seems, at first sight, to rule out any evolution of the Union towards a federal and parliament-politicised system. Hence numerous German actors proposed the transformation, in the long run, of the relationship between the Commission and the European Parliament according to the model of parliamentary majority. Given these wishes, one may ask whether the requirement for a strengthened majority, in Parliament as well as in the European Council, does not guarantee both a multinational and a multipartisan membership of the Commission. The effect would be the construction of some kind of palisade against the Commission's "politicisation", to prevent the college against partisan dependency – and therefore captivity – of the political majority at the time of the European elections. Hence, it is precisely the Commission's independence which has enabled it to perform as a catalyst and moderating institution regarding the existing, sometimes hidden tensions and mistrusts among Member States - a role which of course is at the root of the Commission's considerable powers. Based on this reasoning, the Commission has executed and might raise again its political importance through the expansion of the Union towards 25 and even more Member States.

At the same time, the strengthening of the Commission's legitimacy from two different sources discards the intergovernmentalist idea of transforming the Commission into a simple implementing instrument of the (European) Council and of limiting its functions to some administrative-secretarial tasks..

But there is a second factor which might call into question the independence of the Commission: The risk of losing its collegial character and thereby its representativity. Since the Maastricht Treaty, the strengthening of the Commission President's authority has been used to compensate the centrifugal pressures within the College due to the increasing number of Commissioners. The linkage between the universal suffrage and the Commission's President through his/her election by the European Parliament could contribute to the weakening of the overall college's authority. Such an invested – strengthened – President will

naturally not be very inclined to conceive his/her role as a simple 'primus inter pares'. Instead s/he will be tempted to see the College as his or her personal selection – and thus subject to his/her confidence – of agents sharing a single political commitment. In the extreme case, the President might instrumentalise his/her selection as some kind of gratuity package offered to the EP's groups in exchange for their principle support for the Commission's overall mandate. Anyway, a hierarchical principle would replace the actual principle of collegiality. The - sometimes visible - tendencies towards unilateralism in Romano Prodi's actions (e.g. his statement on the stability pact, his constitutional *Penelope* project) will be strengthened. How, under these conditions, could the Commission still hope to perform his/her function of a mediator and confidence facilitator between the Member States?

There is also a certain incompatibility between the aim of safeguarding the independent and collegial character of the Commission on the one hand, and that of the strengthening the link between the European elections and the investiture of the college and its President on the other hand.

3. The European Council and the Council of Ministers

The setting up of a permanent Chair in the European Council may certainly improve consistency, continuity and the visibility of the debates of the European Council. However, it also creates new problems of consistency – between the operation of the European Council on the one hand and that of the various Council of Ministers constellations on the other.[8] The problem of consistency and of the transversal co-ordination of the Council's formats thus changes to some extent the level. It is all the more true as, according to the Franco-German proposal, the presidencies of the various Council formats would no longer be assumed by a single country. But given that, to date, the General Affairs Council (GAC) can no longer manage the co-ordination of the activities of the sectoral Councils effectively, how should it fulfil this function tomorrow vis-à-vis competition from the European Council on the one hand and the sectoral Councils with different presidencies on the other ?

The relevant part of the Franco-German text establishes a distinction between the legislative role of the Council of Ministers – generally acting in co-decison with the European

8 Regarding the options for reforming the system of the Council of Ministers, see Andreas Maurer, Auf dem Weg zur Staatenkammer. Die Reform of the Ministerrats der EU, Berlin, Stiftung Wissenschaft und Politik, (S 6, February 2003, 44 p.), on the Internet: http://www.swp-berlin.org/pdf/ap/S06_03.pdf http://www.swp-berlin.org/pdf/ap/S06_03.pdf.

Parliament – and its "increased operational responsibilities – in particular as regarding police and legal co-operation in penal matters and regarding CFSP – which necessitates a stable leadership". The introduction of a clear distinction between the legislative and the executive functions of the Council corresponds to a German claim. It transcends the aim of making the daily business of the EU more transparent for the citizens. But it risks, as a by-product, the institutionalisation and perpetuation of a dividing line between the actual Community field - which would correspond to the legislative work - and an intergovernmental field, dealt with by the Councils having "executive" tasks: the Economic and Financial Affairs Council (ECOFIN), Eurogroup, Justice and Home Affairs (JHA) Council and the Council of Foreign Affairs. Indeed, the distinction between legislative and "executive" Councils is far from clear, the JHA Council and more specifically ECOFIN also have a very heavy legislative agenda.

According the Franco-German paper, the "executive" Councils would be subject to individual and more permanent presidencies: the Council for Foreign Affairs would be chaired by the future Minister for European Affairs, while ECOFIN, the Eurogroup and the JHA Council would "elect their chairs for two years among their members". The so-called legislative Councils would keep their rotating presidencies. The GAC, on the other hand, would be chaired by the Secretary-General of the Council.

4. The Secretary-General of the Council – An ambiguous role

The creation of this new figure in the Community field is surprising, to say the least. At a political level, the function of the Secretary-General would be elevated. This appears incongruous insofar as the distinction between executive and legislative functions of the Council seems to militate for the maintenance of a rotating presidency of the GAC, which would then co-ordinate the deliberations and decision-making processes of the various legislative Councils. Overall, this proposal raises a number of questions:

- Is it possible to cumulate the function of the Council's Secretary-General with the presidency of one of its principal formats?
- From where would a senior official draw legitimacy and the authority to occupy the highly political function of co-ordination of the proceedings of the specialised Councils, especially from the point of view of a strengthened transversal co-ordination function within the GAC?

- Is it conceivable that a Council's senior official ensures some kind of 'parliamentary' co-ordination in codecison and that s/he co-presides the meetings of the conciliation committee with a member of Parliament?
- Would the Secretary-General not become a key figure at the service of the European Council's President, which would ensure the implementation and the legislative monitoring of the decisions of the European Council vis-à-vis the Council, thus giving very broad interpretation to its mission "of taking care of the implementation of the European Council's decisions"?

The proposed role would correspond perfectly with the 'chiraquienne' vision. In his principal speech on European policy during the presidential campaign of 2002[9], the candidate Chirac, developing his vision of the role of a President of the European Council, proposed that s/he "should rest on the Council of Ministers" as a principal Chairman, and that this role "could, under the authority of the President of the Union, be served by the Secretary-General".[10]

5. Parliamentary scrutiny: the European Parliament and national parliaments

The most visible German mark on the joint paper is to be found in the formula of a European Parliament, which "exercises the legislative power jointly with the Council". Moreover, the Parliament should "generally" be provided with the right of co-decison in those cases in which the Convention and the IGC move from unanimity to qualified majority voting in the Council. This linkage between the Council's reform and the extension of the scope of

9 See Jacques Chirac, speech in Strasbourg on 6 March 2002, http://www.chiracaveclafrance.net/PDFArticle/Strasbourg.pdf.

10 The Spanish-British contribution on the institutions of the Union has the merit of coming clean on this question by envisaging that the President of the European Council also chairs the GAC, See Contribution by Mrs Ana Palacio and Mr Peter Hain, members of the Convention: 'The Union institutions, CONV 591/03, Brussels, on 28 February 2003, p. 3. This proposal was also put forward by Dominique de Villepin in his speech to the Senate on 12 November 2002, See Debate on Europe, Intervention of the Foreign Minister, to the Senate, in: www.doc.diplomatie.fr.

application of the co-decison procedure could confirm the exclusion of the European Parliament from all fields in which the Council already decides by qualified majority without having to enter into co-decison with the Parliament. This indirect restriction would be applicable to 41 (sic!) specific competencies listed in the Treaty of Nice (see Table 1 in Appendix)! According to the logic of the Franco-German proposal, the extension of the powers of the European Parliament should depend on the reform of the voting procedures in the Council.[11] The contribution thus largely ignores the proposals issued by the German government and Parliament which aim at extending the scope of co-decison to all acts of a legislative nature – a key proposal already defended during the IGC of Amsterdam.[12]

The German government did not succeed in extending the co-decison procedure to the budgetary procedure of the actual treaty. Instead, the joint contribution simply asks to rationalise and simplify the budgetary procedure. On the other hand, the French government could introduce its idea that the European Parliament be granted with the right to levy a European tax. However, the wording by which Germany and France wish a "reflection to start on the conditions according to which the European Parliament could rule on all or part of the budget revenues, without increasing the overall fiscal burden" reflects at the same time
- the German fears of an overall increase of the EU's expenditure and, consequently, of the tax burden in the Federal Republic, and
- the French fears of a full 'communitarisation' of the EU's agricultural expenditure.

On the German side, some kind of budgetary federalism at the level of expenditure co-exists with a specific kind of intergovernmentalism at the level of the EU's financial resources . As regards the French side, one can easily identify the opposite positions: an intergovernmental approach regarding expenditure (i . e . maintaining the distinction between " compulsory

11 If co-decision between the European Parliament and the Council would not become the general rule for legislative matters, the link between the extension of the QMV in the Council and the extension of the scope of application of the co-decision procedure could make it more difficult to extent the scope of application of QMV to new fields, see Andreas Maurer, The European Parliament: Win-Sets of a Less Invited Guest, in: Finn Laursen (ed.), The Amsterdam Treaty. National Preference Formation, Interstate Bargaining and Outcome, Odense University Press 2002, pp. 405-450.

12 See Deutsch-Italienische Gemeinsame Erklärung von Bundesaussenminister Klaus Kinkel und Aussenministerin Susanna Agnelli, Porto Santo Stefano, 15 July 1995, in: Bulletin des Presse- und Informationsamtes der Bundesregierung, No 60, p. 587; Beschlussempfehlung und Bericht des Ausschusses für die Angelegenheiten der Europäischen Union zu dem Gesetzentwurf der Bundesregierung (Drs. 13/9339): "Entwurf eines Gesetzes zum Vertrag von Amsterdam vom 2. Oktober 1997", Deutscher Bundestag, Drucksache No. 13/9913, 13 February 1998, p. 25.

expenditure" – primarily for the CAP – and "non-compulsory expenditure" in the Community's budget) co-exists with a more federalist approach regarding the income side of the EU's budget. Apparently, the economic and financial interests might modify the two sides towards an overall approach to European policy making in general. A compromise by addition of perfectly contradictory claims can be found in the paragraph on the roles of national parliaments and their association to the future European polity. The FRG subscribes to the French idea of creating a Congress whose composition is not specified and whose task would be restricted to the annual debate on the state of the Union. But to satisfy German reservations, which want neither a complication of the institutional system of the Union nor a creation of a competitor to the European Parliament, both governments agreed to establish this Congress "without creating new institutions"..., a solution resembling the squaring of the circle...

6. The external action of the Union

One of the major innovations of the Franco-German proposal is to be found in the envisaged voting procedures for CFSP. Apart from decisions having direct implications for security and defence, both countries argue for a recourse to the vote by qualified majority as a general rule for the Council. If a Member State opposes on grounds of its national interest, it will certainly have the possibility of moving the decision towards the European Council. However, in the end, the European Council would be entitled to decide by qualified majority. This would involve a qualitative leap forward, even if the dividing line between the respective fields of qualified majority votes and unanimity decisions depends much more on political practice than from a constitutional text.

Both countries did not want to amalgamate the missions of the Council's High Representative for CFSP and that of the Commissioner responsible for Foreign Affairs. Instead, they propose a single person exerting both authorities in order to improve the co-ordination and the consistency of the Union's action within the first and the second pillars and to empower the Union to speak "with one voice" in its foreign policy. Both governments thereby re-state the key elements of a German proposal submitted to the Convention's Working Group No. VII on

"External Action" by the then State Secretary Gunter Pleuger.[13] The selected approach leaves the question open of knowing whether or not, in the (very) long run, the Union's Foreign policies will pertain to the field of the Council or of the Commission. Nevertheless, the suggested choice of this compromise formula does not facilitate financial savings regarding the exact definition of responsibilities and competencies of both institutions on the subject matter.

The new Foreign Minister, who will chair the Council of Ministers for Foreign Affairs, would have a formal right of initiative as regards CFSP, a right which s/he also obtains through the full membership in the Commission's college's Community field. One may wonder whether this accumulation of functions – chairing the Council's sessions and initiating CFSP policies within the Commission - does not induce new dangers. Note that in other proposals, this fusion of roles was strictly opposed regarding the Commission. The latter, on the other hand, will lose any initiative power as a collegiate body (which Article 22.1 TEU actually grants to it) regarding CFSP.

The paradox that stipulates the EMFA participating 'es qualité' within a Commission, which itself does not take any decision as a collegiate body in CFSP issues can only be explained by the political will to transfer all means for the Union's external action to a single hand. All therefore depends on the statute of this hybrid institution.

The EMFA should be appointed by the European Council by qualified majority in agreement with the President of the Commission. –On the other hand, nothing has been said about the approval of this nomination by the European Parliament, and on the EMFA's accountability towards the EP concerning its function of a Commissioner. Finally, if the accountability and the chameleon like multi-functionality of the EMFA should be a matter of defining the office's "special statute" within the Commission, the Franco-German paper fails to indicate whether the EMFA should perform as a Commission Vice-President or not.

The EMFA innovation thus appears as the product of two perfectly contradictory political interests: that of reunifying into one single hand all the instruments of the Union's external action and that of establishing a clear boundary between the actions of the Commission and

13 See Convention, Working Group VII "External Action", WD 17, "Double hat", by Gunter Pleuger, temporary member of the Convention, of 5 November 2002; see also the final report of the Working Group VII: "External Action of the Union", CONV 459/02, WG VII 17, Brussels, 16 December 2002.

the CFSP. Such a contradiction will possibly generate bureaucratic tensions among all the entities concerned:

- between the President of the European Council instructed to represent the Union on the international scene, who may thus tend to develop his/her own administration to visibly play an active role in the Union's external action, and the EMFA who is not directly attached to this evolving administration, but is in charge of the "daily operation of CFSP" - a distinction which is everything but clear.
- between the President of the Commission whose competencies in Foreign Affairs are reaffirmed and a Commissioner who takes part in the debates only for a limited part of his/her portfolio, with administrative means allocated in addition toa statute which escapes the Commission's legal bases.
- between the EMFA and the other Members of the Commission having responsibilities in external policy making (trade, development co-operation, external aspects of the internal EU policies).
- between the EMFA and his/her national counterparts, of whom s/he chairs the meetings while having a right of initiative.
- between this EMFA and the Secretary-General of the Council. Evidently, the latter, having at the same time a strengthened administration in CFSP matters and the power of arbitration regarding Community business as the Chair of the GAC is not in a very clear hierarchical situation with respect to the EMFA.

III - AN UNSTABLE BALANCE BETWEEN AN INTERGOVERNMENTAL TENDENCY AND A FEDERAL VISION.

The Franco-German contribution on institutional architecture does not answer all the questions discussed within the Convention. It thus leaves many answers up to the members of the Convention.

Given the joint contribution, both its key elements and its inaccuracies and gaps, one can imagine radically opposed developments of the politico-institutional system of the Union. An almost caricature-like scenario would depict a compromise possible with two modelsone "intergovernmental" and the other "federal".

1. The "intergovernmental" scenario

This model would be built from the European Council and its President according to the following lines, none of which is contradictory to the letter of the Franco-German text:

The European Council would be the key to the institutional system of the European Union (see Figure 1 in the Appendix). Its functions would go well beyond its current ones and consist of laying down the main directions of the Union, adopting the common strategies in foreign policy matters and exercising the constituent power on a European scale. It would constitute a call-back authority in the event of persistent conflicts at the level of the Council of Ministers. Consequently, it would assume a more important legislative role. Its President would have a specific role of political initiative – at the internal level as well as externally. S/he would choose the Secretary-General of the Council, in order to co-ordinate the work at the level of the European Council as well as to control the operation of his/her mandates at the level of the Council of Ministers. S/he would master the deliberations of the "executive" Councils with their three elected presidents (which would be e.g. its Vice-Presidents). Finally, s/he would obtain a powerful administration – partly at the expense of the Commission – and would make the EMFA an executive body – clearly inspired by the division of the executive functions of the French Fifth Republic.

The Council of Ministers would have its executive/operational responsibilities strengthened, particularly regarding JHA, CFSP and the open co-ordination of the economic policies of the Member States. The unanimity rule would be maintained in a large number of fields, and qualified majority votes would be still subject to the triple-check according to the provisions of the Treaty of Nice.

The nomination of *the European Minister for Foreign Affairs* by the European Council, the ministers' responsibility with respect to the Council and the exclusion of CFSP from the Commission's competencies would radically change the college's functioning. This EMFA would be clearly subordinated to the "super-president". Under the latter's mandate, the EMFA could steer the financial and administrative resources, which to date are at the disposal of the Commission's budget allocated for the external action of the Union.

The Commission would be "sandwiched" between the European Council, the Council and the European Parliament. Its role would be increasingly limited to administrative functions and to the management of the internal market. It would be stripped of its functions of political leadership because of:

- the increased political role of the President of the European Council and of its administration, and
- the multi-annual strategic programs of the European Council and the annual operational Council programs, framing strictly the Commission's monopoly of initiative.

The European Parliament would be restricted to a subordinate position with respect to the Council. Its only jurisdiction would be the non-agricultural parts of the Community's expenditure. Its legislative rights would suffer from numerous exceptions. In addition, the MEPs would compete with a Congress, made up of national MP's, which would get some of the European Parliament's traditional functions: the annual debate on "the state of the Union", the vote on the fundamental guidelines of the Union, the assent to any modification of the Union's competencies (Art. 308 TEC), an almost-decisive implication regarding the control of the principle of subsidiarity (possibility by obtaining a right to veto legislative drafts of the Commission), and, in future, the assent to the appointment of the President of the Commission.

2. The "federal" scenario

But the Franco-German proposals can just as well lead to a strengthening of the supranational character of the political system of the EU, or even to a "federal drift". This system of a federal nature would be built from *the European Parliament* (cf. Figure 2 in the Appendix).

The Parliament would have an equally powerful arsenal at its disposal as the Council in the legislative process and in budgetary matters. The co-decison procedure would be generalised and would apply to all acts with a legislative character, the co-operation procedure being suppressed. In budgetary matters, Parliament would have the right to decide on all expenditures of the Union including agriculture. It would have a joint decision right on the multi-annual programming of the expenditure of the Union. The idea of a Congress would be abandoned, or replaced by temporary conventions.

At the level of *the Council of Ministers*, a clear distinction between legislative and executive functions with public debates of the legislative Councils and the publication of its minutes would increase transparency in the public's eyes. The principle of rotating presidencies would be maintained, including the GAC, possibly in the form of group-presidencies which would ensure better continuity of the latter's proceedings. Only the "Council for CFSP/ESDP" would be endowed with a stable, i.e. permanent, chair in order to guarantee continuity and visibility. It would be clearly separated from the GAC. The latter would have the vocation to transform itself, in the long run, into a parliamentary Chamber of the States. The CFSP/ESDP Council would be chaired by the *EMFA*, who would also occupy the post of a Vice-President within the Commission and would be fully accountable before Parliament. The functions of *the European Council* could be limited, thanks to a clear improvement of the operation and of co-ordination within the Council, particularly by the GAC, to the definition of the main political guidelines of the Union and of common strategies in foreign policy matters. It would adopt the triannual strategic program, as decided in Seville, on a proposal of the Commission after consultation of the European Parliament. Its potential and incrementally developed role of some kind of a 'Umbrella and Super-Arbitrage Council' in the event of disagreement between different Council formats would be abandoned. The role of *the President of the European Council* inside the EU would be limited to that of a "chair". Regarding foreign policy, s/he would represent the Union only at the international level when the Heads of States and government meet, acting on the basis of the main principles of foreign policy defined by the European Council or on the basis of a precise mandate defined by the Council of Ministers.

The office would fulfil its functions without prejudice to the competencies of the Commission and of the latter's President, acknowledging that the daily operation of CFSP would be allocated to the EMFA. The Council President would not have a specific administrative machinery beyond a small cabinet of personal collaborators. And s/he would not have any role as regards political initiatives at the expense of those exerted today by the Commission. *The President of the Commission* would be elected by a majority of the members of the European Parliament and would be confirmed by the European Council. The President could define the format of the Commission, regarding the number of Commissioners, their portfolios and the resulting structure and by taking into account certain geographical and demographic balances. The entire Commission would then be subject to the assent of the European Parliament. The executive role of the Commission would be definitely strengthened: it would have an important regulatory power delegated on the basis of European laws[14] with a right of "call-back" for the legislator, i.e. the European Parliament and the Council. The comitology procedures would be radically simplified by concentrating the mechanism on the functions and roles of the advisory committees.

3. A synthesis or a separation of the Community and the intergovernmental fields?

The coexistence of the two distinct models within the joint contribution of 15 January illustrates the caricature and the eminently unstable character of the Franco-German Compromise. The key question is how the resulting weaknesses can be reduced. The answer requires an effort of clarification of the causes of this instability, and a reflection on the relevance of the remedies. The instability of the Franco-German Compromise is due to the fact that it was obtained by a "collage-composing" process of two contradictory visions – by assembling federalist and intergovernmental visions within one single document. The effects of this effort are especially visible in the proposed instruments for the Union's foreign policy: Evidently, the interest to maintain a repartition between the first and the second pillars contradicts the idea of an EMFA, who would be supposed to straddle both pillars.

Overall, there would be two strategies to surpass the inherent instability of the Franco-German compromise. The basic choice needs to be made regarding the maintenance or the

14 That is what the Praesidium of the Convention proposes in its project for Article 27 of the Constitution, See CONV 571/03, Brussels, 26 February 2003.

dissolution of the institutional difference between the Community field and the intergovernmental field.

1) Separating the supranational logic from the intergovernmental games. As for the first model, the separation between the actual Community and intergovernmental scopes of action corresponds largely to the distinction made between the legislative and the executive/operative fields of the EU institutions. The French Foreign Minister therefore argued for a clear division between two poles:
- "the first one which constitutes the basis of European integration, has to incorporate all those fields which involve an area without frontiers: the internal market and the policies which accompany it".
- the second pole, entitled "shared sovereignty", would include the CFSP/ESDP and police and penal co-operation.[15]

For the "first pole", the Community method would apply entirely: exclusive initiative right for the Commission, co-decison between Parliament and Council governed by the majority rule, a role of "guardian of the Treaties" for the Commission and of judicial control for the European Court. The institutional triangle of the Commission, the European Parliament and the Council would thus be reinforced equally. Within the Community field, the President of the European Council would be restricted to its role of a 'chair' for a European Council limited to define the general strategic orientations for the legislative work of the triangle.

As for those fields that will not pass (or not yet) into the Community domain (CFSP/ESDP, OMC, Police and Legal co-operation in penal matters), the European Council's Chair would play a key role: s/he would be responsible to facilitate compromise decisions between different national positions. Consequently, the division of functions and workload between the Chair of the European Council and the President of the Commission would reach more clarity: the risk of subordinating the Commission to the European Council and of limiting the Commission's role to some administrative functions at the expense of its political one's would be reduced.

The German government seems to subscribe to the idea that CFSP/ESDP, as well as the co-ordination of the macro-economic policies of the Member States, would remain for a certain

15 See the speech on Europe of the Foreign Minister, Marseilles, on 2 December 2002, in: www.doc.diplomatie.fr.

time – at least until the next Convention in 2010 – within the intergovernmental field. On the other hand, the idea that police and legal co-operation in penal affairs could develop without parliamentary control and especially without judicial control by the Court does not appear to be acceptable to Schröder, the red-green coalition and the majority of that government's ministers. However, nothing would prevent the Convention from introducing elements of supranationality into the "shared sovereignty pole" – in order to improve the capacity to act of the Union. That is exactly what France and Germany suggest for the CFSP when pleading for decisions by qualified majority.

The 'separation' approach is situated within the path of the Maastricht Treaty, which stipulates the fundamental legal distinction between the second (CFSP) and third (JHA) pillars from the first Community pillar. Following this path would mean that each of the two partners and their protagonists might remain faithful to their original institutional vision, because both the intergovernmental and the Community poles would be reinforced. The approach clearly features the merit of an unsentimental transparency regarding the 'realistic' options for transferring elements of the Union's intergovernmental pillars – namely concerning CFSP and ESDP – to the Community fields of competence. Hence, the latest months of the Iraq crisis rigorously illustrated the limits of wishful talk and window dressing under the shadow of 'real' challenges andruptures.

2) The problems of synthesis. Another way would seek a genuine synthesis between the intergovernmental and the supranational dimensions in the exercise of the European governmental function - an approach which suggests a conceptual leap forward. The Union remains a hybrid political system, half-way between the federal model and the traditional confederate solutions. Consequently, the challenge consists primarily in specifying the contours of a formula to enable the Union's institutions to function alongside their respective national counterparts. Instead of exhausting itself by tracing an artificially clear borderline between the "management of the federal modes of governance" and the fields that remain intergovernmental, the synthesis approach - that some have described as "intergovernmental federalism"[16] -, would seek to provide the European political system with a double legitimacy. This hybrid legitimacy would remain to be asserted both by the European Council (inter-state legitimacy) and by the European Parliament (parliamentary legitimacy).

16 See Mauritius Croisat/Jean-Louis Quermonne, *Europe et federalisme*, 2nd éd., Paris, Montchrestien 1999.

Accordingly, the Commission, engine of the system, can only act in an effective way, if it has the confidence of the Member States and of the Parliament. The concept thus implies that the Commission's college remains subject to a double investiture and double control. The double legitimacy – initially conceptualised through the Maastricht and Amsterdam provisions on the Commission's investiture - constitutes the principal difference with the EU's federal systems. Unlike within the EU's system, the national federation's components are not associated in a direct way with the nomination of their highest executive body. A way of ensuring this balance between the European Parliament and the Member States would be to entrust the European Council with the responsibility to propose, in view of the results of the European elections, a presidential candidate of the Commission. The latter, if it is invested by Parliament, would take into account geographical and politically necessary balances when assembling its team. Similarly – following the Franco-German proposal - one could assure this balance by subordinating the European Parliament's election of the Commission's President to the confirmation by the European Council.

The advantage of this double legitimacy basis of the Commission would be to make its intervention more legitimate in sensitive fields for the Member States, since it would be required to remain accountable to the Council or to the European Council. Naturally, it would be illusory to think that all the policies of the Union would be managed according to a single master plan. Hence, the EU's Member states establish and work on a clear distinction between policy-making in the fields of e.g. social or environmental affairs on the one hand, and defence policy on the other. Consequently: If it is reasonable to designate one person responsible for CFSP matters - whatever the title - to the Commission, nothing would prevent the EU's actors from envisaging special clauses in order to specify the differences between this person and the other Members of the Commission. This new 'CFSP-Janus' could then also become individually accountable to the Heads of State and Government. And nothing would forbid the EU to extend the same formula to other executive functions of the European Union, for example to JHA or to the co-ordination of the macro-economic policies. This solution would guarantee the participation of the Member States in the government of the EU.

This kind of option, located half-way between the traditional positions of France and Germany, would force both governments and those hiding behind real concessions: France giving up the vision that foreign policy remains in the hands of national governments, and Germany abandoning the ideal of parliamentary federalism as the alpha and the omega of the EU's construction. This kind of clarification would lead to gains both in comprehensiveness

and in stability as well as to some considerable losses in attractiveness for many other partners – at least if the room of manoeuvre appears more and more narrow and doubtful...

CONCLUSIONS

At the end of this examination, it is difficult not to stress the paradoxical character of the Franco-German contribution of last 15 January.

The two solutions are far from being perfect. The Franco-German text defines an unstable balance. Any modification risks reinforcing parts of its content, certainly not into the direction of original positions of both partners, but rather into its federal-Community oriented stereotype for Germany, or into the sovereignty-intergovernmental one for France.

The paradox is that this unstable balance is probably the basis and strength of a compromise. On the one hand, because it gives broad space to amendment and improvement with a view to make the Union's architecture more consistent. On the other hand, because the contingency of the Franco-German ambiguity allows a range of alternatives, which define the corridor of a possible compromise between the various projects in the Convention. Finally, because this fundamental ambiguity in fact mirrors the fundamental cleavages separating the Convention's members, federalists and souverainists, non-neutrals and neutrals, representatives of large and small countries, etc. This instability is a distinct reflection of the European Union and its politico-institutional system, which itself is subject to a permanent search for constitution-building in the absence of clarity regarding its "finalité".

More than a completed compromise, the joint text of 15 January represents a "tool to reach a compromise", likely to lead to a range of joint solutions. That is why we suggest the Franco-German tandem to play a central role in the debate on the institutional reform for an enlarged Union.. To satisfy oneself by praising the imperfection and openness of the January 2003 contribution would risk being received as a sterile – and naive – reflection of the ivory tower. That is why we thought to offer some kind a tool-kit for the reading and further development of the text. Its decisive element remains the choice to be made between the maintenance of a "tight compartment" system, intended to protect state sovereignty as regards foreign policy, and an attempt to synthesise the key elements of the EU's double legitimacy. That is all the more important, since the EU's legitimacy rests on both the legislative and the executive powers and the related institutions. Although we acknowledge the imperfection of our proposal, the 'tool-kit' would have achieved our aims, if it facilitates the emergence of some

compromises between the antagonistic positions flowering and growing within the Convention.

Already today, we must note that numerous contributions after the Franco-German proposals made abundant references to them. If the outlined development continues, and if the document of 15 January provides the basis of a balanced compromise, one will reassume the debate about the very meaning and surplus of the role of the Franco-German tandem in an enlarged and more heterogeneous Union: a laboratory for ideas and projects or the source of a bilateral hegemony that many governments and parliaments fear.

THE FRANCO-GERMAN PROPOSALS :
PERSONAL REMARKS OF JACQUES DELORS

I am happy with the publication of this analysis of the Franco-German proposals, which I find very stimulating. They should by their nature further the reflection and the dialogue on the incredibly complex issue of the institutions. These are not, as I have often said, a miracle cure, but their reform is essential to allow the European Union to combine efficiency, accessibility, transparency and democracy.

I will therefore add only three remarks:

1. It is unquestionable that the Franco-German text is more of a compromise by addition than a compromise born of an, admittedly difficult, attempt at synthesis.

2. The text neglects, whether deliberately or not, to mention the question of the modality of votes in the Council of Ministers, a subject which everyone remembers was one of the main points of disagreement between Germany and France during the preparation and the conclusion of the Treaty of Nice.

3. The presentation of two extreme scenarios is very clever and is intended to aid its comprehension and its achievement. But, personally, I believe that the intergovernmental scenario is prevalent in the Franco-German paper and the federal scenario is not. It requires only to look at the number of points in the Franco-German proposal which would have to be changed to arrive at, if not a federal scenario, at least a scenario preserving the community method and maintaining a constructive interaction between this and the intergovernmental approach. That is the real compromise to be found.

APPENDIX

Table 1: Decision making powers of the European Parliament and of the Council since the Treaty of Nice became effective

Participation of the EP	Unanimity in the Council	QMV in the Council	Simple majority in the Council	Special majorities, other than the QMV	Total
Consultation	***38 EC***	29 EC	2 EC	2 EC	71 EC
	4 EU	1 EU	1 EU	1 EU	7 EU
Co-operation	0	4 EC	0	0	4 EC
Codecison	4 EC	41 EC	0	0	45 EC
Assent	6 EC	4 EC	0		10 EC
	1 EU			5 EU	6 EU
Information	0	9 EC	0	1 EC	10 EC
				3 EU	3 EU
Parliamentary	20 EC	41 EC	5 EC	7 EC	71 EC
exclusion	9 EU	8 EU	4 EU	6 EU	27 EU
Total (⊘)	68 EC	128 EC	7 EC	8 EC	211 EC
	14 EU	9 EU	5 EU	15 EU	43 EU

Source: Andreas Maurer, Der Vertrag von Nizza: Analyse im Lichte der Vertragsfortbildungen seit 1952, Köln 2001, in: http://www.uni-koeln.de/wiso-fak/powi/wessels/texte/Nizza-AM.pdf.

Figure 1: The "intergovernmental" scenario

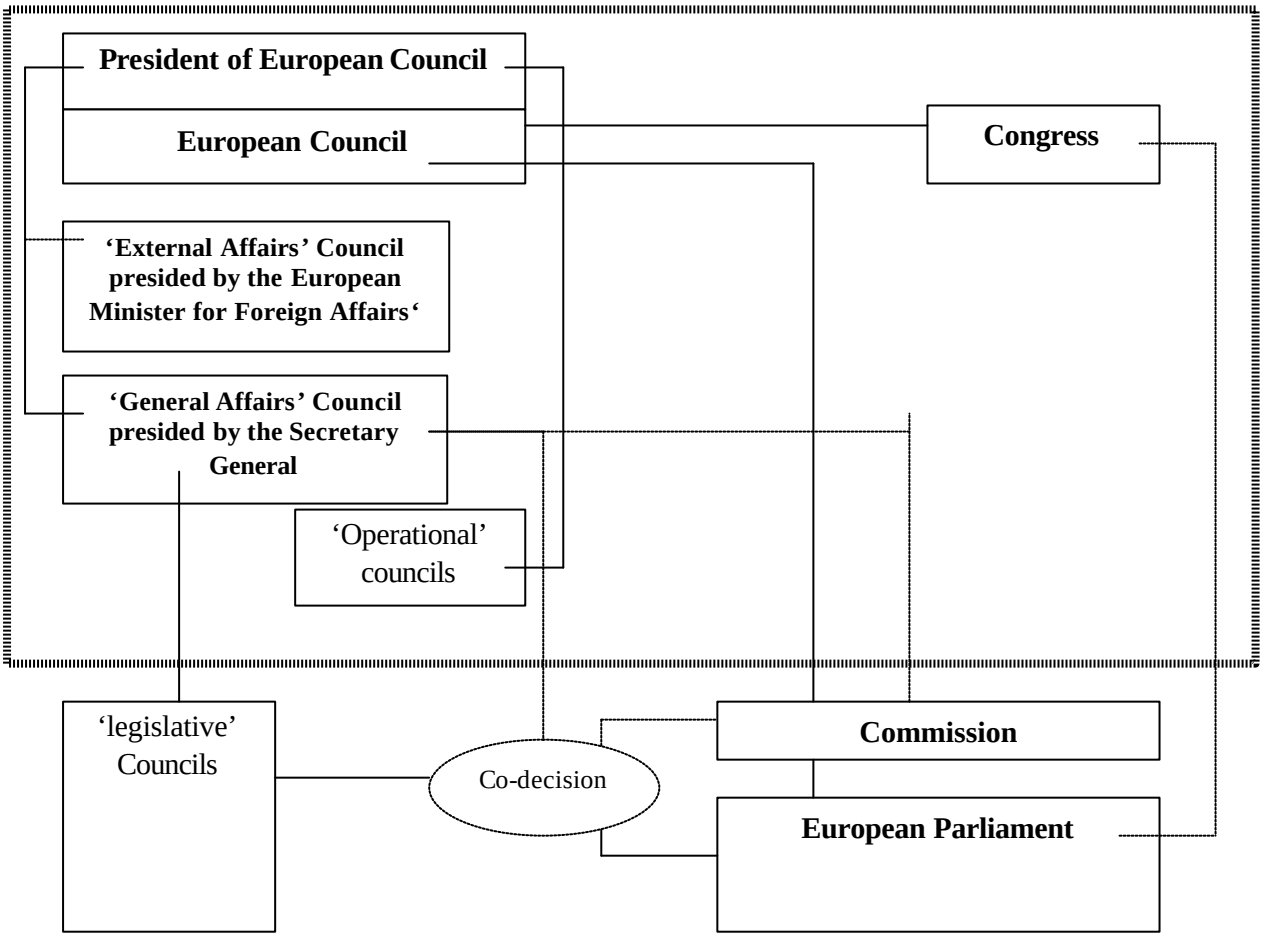
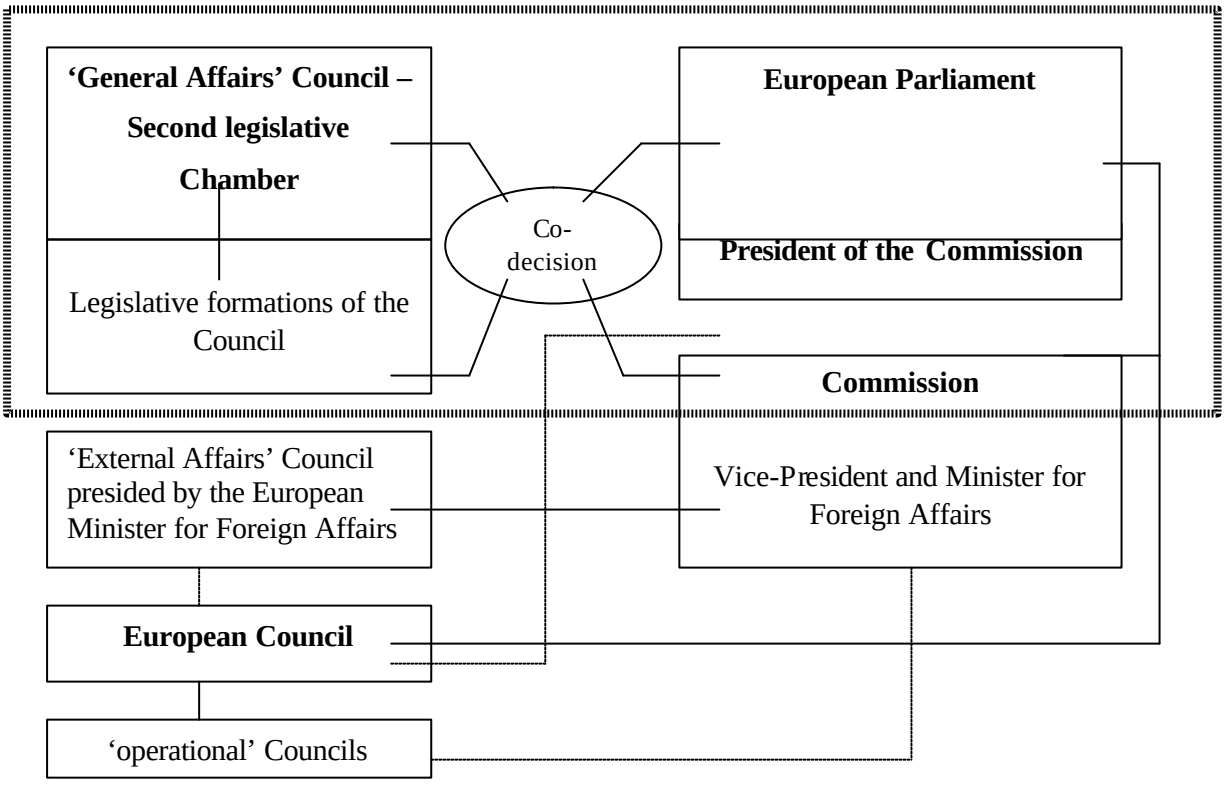


Figure 2 : The "federal" scénario



Légende: ----- member

——— Co-ordination/control/presidence

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