Strasbourg, 21 April 1999

CDL-INF (99) 7
Or. Fr.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(**VENICE COMMISSION**)

CONSTITUTIONAL LAW AND EUROPEAN INTEGRATION

Consolidated Report
by Mr Armando TOLEDANO LAREDO
adopted by the Commission
at its 37th meeting, December 1998

I. Introduction

The requirements for membership of the European Union have changed over the years, reflecting the development of a European identity, achievement of the aims of the founding treaties and the contribution of the new treaties, as well as a greater awareness of the need to protect human rights and fundamental freedoms and, with it, greater insistence on democratic values.

Admittedly, there was never any doubt about the democratic nature of the founding states of the three European Communities, which had irreproachable constitutions and had emphasised their commitment to freedom and to its protection in the preambles to the founding treaties, not to mention the very specific human-rights provisions in the actual body of the treaties on matters such as non-discrimination and equality between men and women. But that was as far as it went.

Initial developments in this area were the work of the Court of Justice of the European Communities, which developed Community law as a distinctive system, establishing that nationals of member states were no less the subjects of that law than the member states themselves and as such had rights (including human rights) and duties which the Court had to uphold (1).

For their part, the Heads of State and Government declared in 1972 that democracy constituted the very basis of the Communities (2), going on to outline a European identity consisting of representative democracy, the rule of law, social justice and respect for human rights (3) and to publish a joint declaration of the European Parliament, the Council and the Commission (4), which laid due emphasis on respect for the fundamental rights contained in the member states' constitutions and in the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The declaration on democracy issued by the Copenhagen European Council (5) affirmed that respect for, and protection of, representative democracy and human rights in every member state were ***essential elements*** of Community membership; this was to be reiterated and expanded in the preamble to the Single European Act of February 1986, and subsequently in the Treaty on European Union of 7 February 1992 (6).

All of this was taken one stage further by the Treaty of Amsterdam of 2 October 1997 (7), currently in the process of being ratified, which - having solemnly affirmed these principles - provides that, in the event of a serious and persistent breach by a member state of liberty, democracy, respect for human rights and fundamental freedoms or the rule of law, the Council may decide to suspend certain rights of that state, including voting rights, whereas its obligations continue to be binding.

With regard to enlargement of the Community, initially the treaties simply provided (8) that any European state could apply for Community membership and that admission conditions had to be agreed between the member states and the applicant state. No explicit reference was made to the democratic nature of applicant states, but after the military takeover in 1967 the association agreement between the Community and Greece was frozen and stayed so until 1974, and this, together with the March 1981 declaration issued by the Maastricht European Council concerning the incident the previous week in which Colonel Tejero had entered the Spanish Cortes with a gun, was a clear signal that any state aspiring to membership must be European and democratic.

In the light of these developments, membership criteria were drawn up for the countries of central and eastern Europe by the Copenhagen European Council in June 1993. They may be summed up as follows:

a. the candidate country must be European;

b. it must possess stable institutions that guarantee respect for democratic principles, the rule of law, human rights and protection of minorities;

c. it must have a proper market economy;

d. it must be able to withstand the pressures of Union competition and Union market forces;

e. it must be able to fulfil the obligations that it accepts and satisfy the economic and political requirements laid down;

In addition to these explicit requirements, there is the ***implicit requirement*** of membership of the Council of Europe and of the European Convention for the Protection of Human Rights and Fundamental Freedoms, to quote the European Commission message to the Council and the European Parliament in 1995 (9).

Apart from the requirements that members should be European and democratic, the admission criteria have been framed in applicant countries' own interests because if the economy of a new member state were fragile it could easily be swamped by the "four freedoms" (free movement of persons, goods, capital and services), the free play of competition with tight control on state aid, and the application of the whole gamut of Community rules and regulations.

That is why - with the European Union's help - candidate countries must bring their systems into line with those of the Union, as they are already doing by applying the so-called Europe Agreements, which are agreements of association with the Community designed specifically for countries aspiring to membership and include the establishment of free trade areas based on asymmetrical concessions in the candidate country's favour. The negotiations initiated on 30 and 31 March 1998 with the first group of central and east

European countries applying for membership are expected to result in more comprehensive assistance.

Clearly all this is a result of the way that European integration has developed since it began almost half a century ago. The ECSC, founded by six countries as an organisation of the coal and steel sector, and then the three Communities, have developed steadily, gradually achieving their aims, assuming new responsibilities, expanding in four stages to a membership of 15 countries and becoming the European Union, which is currently preparing for consolidation and further enlargement.

While the European Union is obviously an international organisation, the Community legal system introduced by the European treaties cannot be considered merely as a system of treaty-based international law. In its current stage of development, the European Union is a unique organisation for regional integration which, as well as pursuing economic and monetary cohesion, has other political and general aims.

The European Union has a Parliament, directly elected by universal suffrage, a Court of Justice of established authority whose decisions are binding, and an independent Community legal system applying both to the member states and their nationals. In addition to their various nationalities, the latter also enjoy European citizenship - a new status that confers advantages both within and beyond the borders of the Community.

In addition, the European Union possesses its own resources, levies taxes and has just taken the final decisions on the adoption and introduction of a single currency**, the euro**.

II. The questionnaire and replies

1. The questionnaire on "Constitutional Law and European Integration" - which set out to identify changes made in the legal systems of European Union member states in order to bring them into line with the new realities of membership - attracted replies from 13 countries.

The exercise is undoubtedly useful both to the member states and to countries that have applied for membership or hope to do so. The former can make instructive and worthwhile comparisons, while the latter gain a valuable source of information for the process of constitutional review in which they must engage in order to establish a firm and problem-free basis for building a relationship between their various national legal systems and that of the Community.

The questionnaire brings to an end the first phase of the Venice Commission's work, during which it has provided advice and guidance to central and eastern European countries in the process of marking their new-found freedom by adopting constitutions more imbued with democratic principles. It also signals the start of a new phase in which the Commission, at the request of some of those countries, will assist them as they move towards membership of the major modern international organisations.

2. The replies throw light on two divisions among European Union member states, the first between the monistic and dualistic schools of thought and the second between unitary and federal systems.

The monism/dualism split - with two-thirds of the member states in the first camp and the remainder in the second - highlights the difficulty for the dualistic countries of fitting into a Community characterised by the monist solution adopted by the European Court of Justice. This difficulty arises daily since Community regulations are directly applicable, some provisions of directives have direct effect, and Community law takes precedence in the event of a conflict between Community and national law, especially where the national law pre-dates the Community provision. This explains why countries in the dualist camp have been obliged to make revisions not necessitated by their dealings hitherto with public international law, to treat Community legislation differently from all their previous international agreements, or else to fudge the issue by declaring that they espouse dualism in principle but monism in practice.

The few member states with long-standing or newly-introduced federal systems have (unlike the unitary states) to involve both state and infra-state bodies, to varying degrees, in the Community process. For the countries concerned, this means taking steps to ensure that Community procedures are implemented smoothly and without delay, while giving both federal and federate bodies their proper role.

This second division distinguishes federal from unitary states, but the picture varies considerably depending, on the one hand, on the particular constitutions of the federal countries and, on the other, on the degree to which the unitary states are centralised.

III. Constitutional revision

Section I of the questionnaire, on constitutional revision(s), requires some introductory comment to facilitate an overall assessment of the replies received. The first European treaty, establishing the European Coal and Steel Community (ECSC), did not entail constitutional revision in the six founding member states. It was only when the treaty began to be implemented, and particularly when it was followed by other treaties, that the advisability, or in some cases the necessity, of constitutional revision was made apparent by the unique nature of the new Community and the extent of its impact in practice. A number of the founding member states - for which the Treaty on European Union may be seen as the turning point - embarked on the task, some more quickly than others, while those more recent members that did not make the necessary changes when they joined have been following the trend.

The first enlargement, in 1973, had obvious constitutional repercussions, notably for Denmark and Ireland. The second, in 1981, did not affect the Greek Constitution. The third enlargement coincided with the Single European Act (SEA) of 1986 with the result that Spain and Portugal, which had been involved in the SEA negotiations, were prepared in advance. The fourth enlargement, in 1995, brought Austria, Finland and Sweden into a

Community that had by now become the European Union, and the constitutional impact was therefore more direct.

In the case of the Treaty of Amsterdam, national ratification procedures are taking their course and it would be premature to discuss constitutional revisions the nature of which is not yet officially known.

IV. European integration and the different powers

1. Section II of the questionnaire concerns state authorities required to participate in the Union's law-making and decision-making processes – processes involving, to varying degrees, the European Parliament, the Council of Ministers and the European Commission.

It should be noted at the outset that, since the Treaty on European Union, these bodies have all operated under the umbrella of the European Union, exercising powers that vary depending on whether they relate to the First - specifically Community - Pillar or to the two other - intergovernmental - Pillars, namely the Common Foreign and Security Policy (CFSP) and justice and home affairs co-operation.

In intergovernmental as opposed to Community matters, the Commission has only a restricted right of initiative, the European Parliament's powers are limited and the Court of Justice has very narrow jurisdiction.

Thus the same institutions are developing within the common framework of the European Union but the powers that they exercise there and the procedures that they follow are specific to each of the three Pillars.

2. In contrast with the original system, under which the European Parliamentary Assembly comprised delegates of the national parliaments, the European Parliament has, since 1979, been directly elected by universal suffrage of the citizens of the Community (10). It therefore comprises "representatives of the peoples of the states brought together in the Community", a formula that serves to emphasise its autonomy, where appropriate, while allowing scope for contact with national parliaments and meetings between members of the national parliaments and MEPs, some of whom are in fact MPs in their own countries.

The European Commission, on the other hand, is composed of members "whose independence is beyond doubt" and who "shall neither seek nor take instructions from any government or from any other body". This rules out participation by national authorities in the Commission's decision-making process.

The Council of Ministers is made up of the member states' representatives and is thus the Community's intergovernmental organ. It was originally intended that each government should send one representative to the Council. However, in recognition of the fact that some member states have federal structures, Article 146 of the Treaty on European Union now provides that "The Council shall consist of a representative of each member state at ministerial level, authorised to commit the government of that member

state". The words "at ministerial level" do not mean that the representative must be a member of central government.

It is clear from these observations that in the institutional configuration of the Community the only forum for national participation in European Union decision-making and law-making is the Council of Ministers. Consequently, only representatives of member states' executive bodies participate, at different levels, in decision-making and preparing legislation within the Council.

Virtually all the replies to this part of the questionnaire reflected a strengthening of the role of executive, as opposed to legislative, bodies - and this would seem logical in the scenario outlined above.

3. That said, it should be pointed out on the one hand that while the Community legal system is independent, it is not alien to the national legal systems of the member states, and on the other hand that primary Community legislation and, to an even greater extent, subordinate Community legislation - the everyday legal instruments adopted by the Community institutions to implement the provisions of the treaties that embody the Community's primary legislation - are intended for application throughout the European Union and are directed at both the member states and their nationals.

Without considering all these instruments in detail, it is essential to note that *regulations* have general application, are binding in their entirety and directly applicable in all the member states, while *directives* are binding on the member states as to the result to be achieved but leave it to national authorities to decide by what formal and other means the result is to be achieved within the time limit. Consequently, as soon as Community regulations come into force, they are part of the positive law of the Community as a whole, while directives - or, strictly speaking, certain provisions of directives - may be given direct effect by a decision of the Court of Justice of the Communities even if they have not been transposed into national legal systems within the set time.

These specific features of Community law demand scrupulously detailed preparation and an ongoing, structured dialogue between the European Commission and the member states - both at official level and with organisations, specialists and independent experts - as soon as the Commission starts drafting proposals. Once proposals have been submitted to the Council and Parliament, the dialogue takes place in committees and Council working groups as well as in hearings organised by the Commission.

For the same reasons, dialogue must also take place within the member states so that legislative and executive authorities can exchange views and, under the terms of each country's constitution, prepare the position that it will adopt in the Council of Ministers.

Ultimately this twin-track activity produces legislative instruments that reflect the economic and social realities of the whole Community. It goes without saying that flexible and efficient mechanisms are needed to ensure that the process moves with the required speed.

V. European integration and the different levels of state structure

1. Section III of the questionnaire refers to powers transferred to the European Union by its member states and to the respective roles of the central state and infra-state entities in the Union's law-making and decision-making processes.

With regard to the first part of the question, it seems clear that, irrespective of the constitutional structures of the states concerned, virtually all the powers transferred to the Community were previously assigned to central government and only a small proportion were assigned wholly or partially to infra-state entities. Moreover, it tends to be among the second that we find parallel, rather than exclusively Community, powers.

2. The second part of the question would appear to be addressed only to the federal states and highly decentralised unitary states.

As explained above, it is the federal or central governments that participate in decision-making and law-making within the European institutions. In the case of a federal government, and where the matter concerned is the responsibility of a federate entity, a ministerial-level representative of that entity may take part in the process, but will do so as a representative of the member state.

3. In all aspects of preliminary national procedure, national constitutional provisions will obviously apply.

As for the implementation of Community law in each member state, this will be the task - the state having overall responsibility - of those bodies that apply national legislation in the relevant field.

4. A consensus emerged from the replies that, within the member states, European integration had had the practical effect of strengthening central government vis-à-vis the infra-state entities.

VI. European integration and fundamental rights

1. For the sake of simplicity, the questions in Section IV may be summed up as relating to the smooth application of Community rules throughout the European Union and the fundamental principle of non-discrimination between nationals and citizens of other member states on grounds of nationality - the rule being that the latter must be accorded the same treatment as the former.

Community rules on the equality of the sexes have undoubtedly had an impact on national legal systems, first through the recognition by the Court of Justice that Article 119 of the Treaty Establishing the European Community had direct effect, and subsequently through the transposition of directives adopted in this area. The European Commission's continuing vigilance has, of course, also played a part here.

2. Generally speaking, the replies indicate that amendments to basic constitutional or legal provisions have not been necessary except in relation to access to certain public-service jobs and to the right to vote and stand in European Parliament and municipal elections.

3. In the area of fundamental rights and general principles of law, the line pursued by the Court of Justice of the Communities is - as the Court has repeatedly affirmed - entirely compatible with that of the member states' higher national courts.

The Treaty of Amsterdam represented a step forward inasmuch as paragraph 1 of Article 6 (ex Article F) decrees that: "The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the member states."

VII. Relationship between Community law and domestic law

1. Except in the cases of some new member states, the replies to Section V of the questionnaire may be deemed generally positive with regard to recognition of the primacy of Community law and its direct enforceability by the courts.

This receptive attitude surely owes something to the preliminary ruling procedure under Article 177 of the EEC Treaty, which allows - or in some cases requires - national courts to seek a preliminary ruling by the Court of Justice on the interpretation of Community law and its validity if a Community legislative provision is at issue in a case before the national court.

Over the years, this procedure has generated and promoted particularly fruitful dialogue between the Community court and the national courts - which, by virtue of the fact that they ultimately have to rule on the matters at issue and apply Community law, are also Community courts.

2. With regard to the relationship between Community law and national law, most of the replies received indicate that, with reference to the relationship between classical international treaty law and domestic law, Community law is accorded a special position.

It is explained in the questionnaire that Community law means the legal apparatus of the Community, including its primary and secondary law as well as international treaties that it has concluded and instruments adopted by the joint bodies established under such treaties.

VIII. Conclusion

The present report contains references to the Community treaties and to the case law of the Court of Justice whose major contribution to European integration is universally recognised. An extract from Point 21 of Opinion 1/91 of 14 December 1991 serves to illustrate its role:

"The EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law. As the Court of Justice has consistently held, the Community treaties established a new legal order for the benefit of which the states have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only member states but also their nationals […]. The essential characteristics of the Community legal order which has thus been established are in particular its primacy over the law of the member states and the direct effect of a whole series of provisions which are applicable to their nationals and to the member states themselves."

These few pithy sentences indicate the line that member states have taken, or should take, on constitutional matters in order to fulfil the obligations entailed by European Union membership and ensure that they and their nationals derive full benefit from the European integration that is being developed - as Mr La Pergola has put it - between sovereign legal systems evolving in a context of transnational enjoyment of constitutionally guaranteed rights and freedoms.

NOTES

(1) In particular, see the judgments VAN GEND and LOOS no. 26/62, COSTA/ENEL no. 6/64, STAUDER no. 29/69, INTERNATIONALE HANDELSGESELSCHAFT no. 11/70, NOLD no. 4/73, RUTILI no. 36/75 and MAIZENA GmbH no. 139/79.
(2) Paris Summit of 1972.
(3) Copenhagen Summit of 1973.
(4) Joint declaration by the three institutions of 5 April 1977.
(5) 8 April 1978.
(6) See the preamble, Article F § 2 and Article 8.
(7) See Articles F and F1.
(8) See Articles 98 ECSC, 237 EEC and 205 EEAC.
(9) Message from the Commission to the Council and the European Parliament on "The European Union and the External Dimension of Human Rights Policy", doc. COM (95) 567 of 22.11.1995, § 23.
(10) The next European Parliament election by direct universal suffrage is scheduled for June 1999. This will be the fifth direct election.

APPENDIX

SUMMARY OF THE REPLIES TO THE QUESTIONNAIRE

I. European integration and constitutional revision(s)

1. *Is there a general or specific constitutional basis regarding the possibility of acceding to the European Union?*
2. *Did accession to the European Union require a constitutional revision?*
3. *Did the revision of treaties of primary law or the adoption of other acts require one or more constitutional revision(s)?*

A. Overall basis in respect of international law and constitutional amendments in general

Austria:

The Constitution contains a general provision on the conclusion of international treaties.

Belgium:

Regarding accession to an international organisation, Article 34 of the Constitution states that:

"The exercise of given powers may be conferred by a treaty or by a law on institutions coming under international public law".

Denmark:

Powers may be delegated to international authorities set up by mutual agreement with other states by a law adopted by a five-sixths majority of the Folketing or by a referendum called by the government if the majority required to pass an ordinary bill in the Folketing is obtained (1953).

Greece:

By means of a treaty or an agreement, certain powers established by the Constitution may be conferred on the institutions of international organisations. The law ratifying the treaty or agreement must be adopted by a 3/5 majority of the parliament.

Italy:

A provision of the constitution states that Italy agrees, on equal conditions with other states, to limitations of sovereignty necessary for a system to ensure peace and justice between Nations. Though this provision was adopted with a view to Italy's accession to

the United Nations, the emphasis placed on limitations of sovereignty made it possible for Italy to join the European Communities and the European Union and ratify the amending treaties.

Netherlands:

The Constitution provides that legislative, executive and judicial powers may be conferred on international institutions by means of treaties. Under a provision introduced in 1953 with a view to the Netherlands' accession to the European Defence Community, any provisions of a treaty that conflict with the Constitution or give rise to conflicts with it must be approved by both Chambers of the States General by a 2/3 majority.

Portugal:

According to the Constitution, "norms emanating from the competent bodies of international organisations of which Portugal is a member enter into force directly in the domestic legal system, unless the treaties establishing them provide otherwise".

Sweden:

The Constitution provides that the government can enter into agreements with international organisations.

B. Specific constitutional basis with respect to the European Communities or the European Union and specific constitutional amendments

Austria:

A number of constitutional provisions have been amended or added to adapt Austrian legislation to the requirements of European Union law. The amendments are designed in particular to ensure that the various State bodies can take part in the Union's decision-making processes. The treaty of accession was submitted to a referendum.

Belgium:

A constitutional amendment on the possibility of extending political rights to foreigners was made necessary by the adoption of the Treaty of Maastricht.

Finland:

Constitutional amendments were adopted to cater for Finland's accession to the European Economic Area and the European Union. They related in particular to the granting of powers in European matters to the parliament as, in principle, international relations are the responsibility of the president. Moreover, accession to the European Union was carried out according to a procedure similar to that applicable to constitutional amendments, the new provisions being referred to as "exceptions to the Constitution".

France:

A constitutional amendment was made to enable France to accede to the Treaty of Maastricht. It states that the Republic shall participate in the European Communities and the European Union. Furthermore, in accordance with the case-law of the Constitutional Court, transfers of sovereignty to the Communities – unlike limitations of sovereignty – have given rise to constitutional amendments (in respect of monetary union, the crossing of external borders and the right of European Union citizens to vote in and stand for municipal elections). A second constitutional revision was carried out following the Treaty of Amsterdam, which specified that France agrees to transfer sovereignty to the extent required by the principle of free movement in the European area adopted by the new treaty.

Germany:

The Constitution allows sovereign powers to be transferred with the consent of the Bundesrat. The establishment of the European Union as well as amendments to its statutory foundations and comparable regulations which amend or supplement the content of the Basic Law, or make such amendments or supplements possible, are subject to the procedure for amendments to the Basic Law (amendment introduced in anticipation of the ratification of the Treaty on European Union).

The constitutional provision in question was introduced on accession to the European Union. On the same occasion, specific amendments were introduced on the transfer of functions from the Bundesbank to the European Central Bank and the political rights of European Union citizens.

Ireland:

Successive constitutional amendments have been made to allow for accession to the European Communities, the ratification of the Single European Act and accession to the European Union. Moreover, the Constitution provides that no provision of the Constitution may invalidate national measures to implement European Union law.

Portugal:

Under a constitutional amendment adopted in 1982, all legal rules established by the competent bodies of international organisations of which Portugal is a member enter directly into force in domestic law if they derive from the constituting treaties concerned. In connection with the ratification of the Treaty of Maastricht, a 1992 amendment provides for the possibility of jointly exercising powers necessary for the construction of the European Union. It also amended a number of constitutional provisions, in particular those relating to the right to vote and stand in elections.

Spain:

The Constitution provides that the conclusion of treaties, under which powers derived

from the Constitution are transferred to an international organisation or institution, may be authorised by an implementing Act. This provision was adopted in anticipation of Spain's accession to the European Communities. The Constitution was also amended in respect of the right to vote and stand in municipal elections prior to ratification of the Treaty of Maastricht.

Sweden:

A specific provision deals with the possibility of transferring decision-making powers to the European Communities.

II. European integration and the different powers

1. *What is the participation of different State bodies in the law-making and decision-making processes of the European Union?*

   a. within European institutions?
   b. in preliminary national procedure?

2. *What is the participation of different State bodies (executive, legislative, judicial) in the implementation of European law?*

3. *To what extent has accession to the European Union influenced the balance of powers at national level?*

The executive bodies of all the member States play a major role in the law-making and decision-making processes of the European Union through their participation in the Council of the Union which tends to bolster their position compared to the other powers, particularly the legislature. Otherwise, the distribution of powers between the different State authorities in the implementation of European law is much the same as for domestic law.

Nonetheless, the following characteristics may be highlighted:

Austria:

Members of government who participate in the decision-making process within a body of the Union must, as a rule, act in conformity with the opinions and the instructions of Parliament, or with those of regions or communities where the matter falls in domestic law within the competence of one of these bodies.

Belgium:

Proposals for Community law are submitted to the Federal Chambers and the Councils of the (linguistic) Communities and the Regions for their opinion. There is also a Committee on the European Union, which is made up of members of the Chamber of Representatives and the Senate and Belgian members of the European Parliament and issues regular reports.

Denmark:

During preliminary national procedure, important questions are referred to the European Affairs Committee of the Folketing prior to government negotiations with the Union. The Committee approves the basis for negotiations submitted to it by the minister who will be representing Denmark in the Council.

Finland:

The government informs the Grand Committee of the parliament (and, in cases of matters concerning the Union's common foreign and security policy, the Foreign Affairs Committee) of all matters which would fall within the competence of the parliament were it not for the Union, and the progress made on these matters. The relevant committee may give its opinion.

France:

A constitutional provision pursuant to the Treaty of Maastricht requires the government to submit proposals for Community acts involving provisions of a legislative nature to the National Assembly and the Senate as soon as they have been conveyed to the Council of the Union. Many parliamentarians call for an extension of this rule to any proposal for Community acts whatever their nature.

Germany:

- The government informs the Bundestag and the Bundesrat about European affairs.

- The government must provide the Bundestag with an opportunity to comment on a draft legislative act before it is approved by the Federal Government in the Council of Ministers. The Bundestag's opinion must act as the basis of the government's position during negotiations. The Bundesrat's opinion also has to be taken into account on numerous occasions.

Ireland:

The parliament's Joint Committee on Foreign Affairs and European Affairs Committee give consultative opinions on proposed European Union law; these are not binding.

Italy:

- The government must inform the parliament of the draft legislation and adopted laws of the European Union.

- Every six months, the government is required to present the parliament with a report on its approach to various European policies and its options concerning the

programme of activities submitted by the member State currently chairing the Council of the Union.

- The parliament now has the role of guiding, advising and monitoring the government with regard to European policies.

Netherlands:

The Second Chamber of the States General has set up a Standing Parliamentary Committee for European Community Affairs which works in consultation with the government at the stage prior to decision-making by the European institutions.

Portugal:

The Government always intervenes in the preliminary procedure. It is the role of the Assembly of the Republic to express its opinion on matters being discussed within the European Union which have an effect on the scope of its legislative powers. The President of the Republic promulgates laws or decrees of application of community law, can use his right of veto or petition the Constitutional Court.

Spain:

A joint committee of the two chambers of parliament supervises government activity within the European Union, keeps track of the Union's legislative proposals and prepares opinions on the subject.

III. European integration and the different levels of State structure

At the outset, it should be noted that the following are unitary states and so it is only their central governments which are directly involved in European affairs: Denmark, Finland (except for the province of Åland), France, Greece, Ireland, Netherlands, Portugal (except the autonomous provinces of Madeira and the Azores), and Sweden.

Of course, the regional authorities of all the member States are represented on the Committee of the Regions. They may also have agencies in Brussels.

1. *Which of the powers transferred to the European Union were previously attributed to the central State [government] and which were attributed to infra-state entities?*

As stated in the contributions and in the report it is difficult to give an accurate reply to this question and therefore to include it in this summary.

2. *What are the respective roles of the central State [government] and the entities in the law-making and decision-making processes of the European Union?*

   a. within the institutions of the Union?
   b. in preliminary national procedure?

3. What are the respective roles of the central State and the entities in the implementation of European law?

Austria:

Cf. Internal distribution of powers.

Belgium:

a. Conclusion of European Community treaties: These are joint treaties. All the interested parties (State, Communities, Regions) must enter into a co-operation agreement on the subject.

b. Belgian participation in the Council of the European Union: Belgium is represented by the relevant authorities (on a rota basis for the Communities and Regions). Ongoing co-ordination is organised by the Ministry of Foreign Affairs.

Germany:

Generally speaking, central government acts at Union level. Exceptions may be made, particularly when it is the exclusive legislative powers of the *Länder* which are primarily at issue. If this is the case, a representative of the *Länder* appointed by the Bundesrat sits on the Council of the Union.

Italy:

Most European matters are the responsibility of the central government.

Nonetheless,

- the regions can have direct contacts with the European Union;

- in principle, the regions are empowered to implement Community rules in areas of regional jurisdiction.

Portugal:

According to a constitutional revision of 1997, community directives can be incorporated into the domestic legal system in the form of a law or a decree. This excludes the possibility for the Assemblies or Governments of the autonomous regions of the Azores and Madeira to carry out incorporation.

Spain:

- Representatives of the autonomous communities may join some of the

committees and working groups assisting the Commission;

- sector-based conferences enable the autonomous communities to participate in European Community affairs at national level;
- Community law is enforced by the body with responsibility in the area concerned, according to the distribution of powers at national level. This often implies co-operation between the State and the autonomous communities.

4. On the basis of the replies to questions III.1 to III.3, can European integration be considered to strengthen the central State vis-à-vis the entities, or vice versa?

Austria:

Central government powers tend to be strengthened.

Belgium:

A centralising influence: the power of the State to take measures on behalf of the Communities and the Regions.

A decentralising influence: the representation of the State at Community level.

Germany:

European integration mostly has a centralising influence even though the *Länder* have a role – albeit limited – in the European Union's decision-making processes.

Italy:

The centralising trend is particularly manifest in the fact that the central government is entitled to adopt uniform national legislation implementing Community law in an area of regional jurisdiction if it can invoke the need to protect general interests. Consequently, the (ordinary) regions should only, as a rule, have the right to adopt implementing provisions of Community law when the central State recognises that general interests are not at stake.

Spain:

There is a trend in both directions, but the crucial role of the State executive in the European Union decision-making process means that central government carries a special weight.

IV. European integration and fundamental rights

This section will cover cases in which European Union law has had a major impact on national law.

1. Has the assertion of the four freedoms of the European internal market (free movement of

goods, persons, services and capital) led to a modification, or an adaptation, of the principles applicable to the domestic internal market, in particular concerning economic freedom?

Austria:

As problems relating to the four freedoms of the European internal market fall in principle within the competence of the Federation, several federal laws have been revised in order to adapt them to the requirements of European Union law; moreover, this process has not yet been completed.

Belgium:

Community law has directly influenced the legal definition of the Belgian internal market and hence the Belgian economic constitution. Legislation and case-law have established that Belgian economic union implies inter alia that the four freedoms guaranteed by Community law shall be respected.

Greece:

It is no longer required to be a Greek national in relation to invitations to tender.

Ireland:

The European Community Treaty has led to the opening up of a market which was formerly heavily protected.

Italy:

The rules of the European internal market radically altered the principles applicable in the Italian internal market.

Portugal:

The ideological principles of socialism have been removed from the economic constitution and the nationalised industries have been privatised.

Spain:

The assertion of the internal market has led to widespread liberalisation of the various economic sectors and given other members of the Union access to the Spanish national market putting an end to the former protectionist system.

2.a. Has the prohibition of discrimination on the grounds of nationality led to a modification of constitutional provisions or fundamental legislative provisions (in particular regarding access to real property)?

Austria:

There have been changes to the laws on property transactions.

Belgium:

Certain forms of discrimination in respect of access to civil service posts and registration fees for national training colleges and universities have been done away with.

Denmark:

The only major change relates to access to real property intended to serve as a permanent place of residence.

Finland:

In 1995, most of the provisions of the Finnish constitution on fundamental rights, which used to apply solely to Finnish nationals, were extended to everyone, regardless of nationality, under the influence of the European Convention on Human Rights and Community law. In particular, certain restrictions on access to real property and company shares were removed.

Spain:

All restrictions on foreign investments were removed. The law on the civil service was amended to remove restrictions on access which were contrary to Community law.

Germany:

The main changes relate to access to the civil service.

Greece:

The law was amended to enable European Union citizens to acquire real property in frontier regions.

Ireland:

The legislation under which the acquisition of agricultural land by foreigners was subject to official authorisation no longer applies to citizens of the European Union.

Sweden:

Newspaper ownership is no longer restricted to Swedish nationals.

b. Have Community rules on the equality of the sexes led to a modification of constitutional provisions or fundamental legislative provisions?

Austria:

As existing constitutional laws already guaranteed sexual equality, no specific modification was necessary.

Belgium:

The equality of the sexes has been established as a constitutional law by legislation, case-law and an interpretation of the Constitution in compliance with international and Community law.

Finland:

Community case-law on equality between women and men in the area of pension rights has had a major impact on national law.

Ireland:

The transposition of Community directives on equality of the sexes has made it necessary to adopt a number of national laws in the area.

Netherlands:

Some important statutory provisions, particularly relating to pensions, have been amended.

3. Has the application of fundamental rights and general principles of law by the Court of Justice of the Communities exerted an influence at domestic level?

Germany:

National law is interpreted in accordance with Community law. In its so-called "as-long-as" decision II ("*Solange II*"), the Constitutional Court decided that it would no longer rule on the constitutionality of secondary Community legislation, as long as the Court of the European Communities ensured a substantially similar protection of fundamental rights to that provided by the Basic Law.

Spain:

The Constitution expressly provides that the fundamental rights guaranteed therein should be interpreted in accordance with international law. In particular, the Constitutional Court has interpreted these rights in accordance with Community law.

However, the influence of the case-law of the Court of Justice has been felt, particularly with regard to the general principles of Community law such as legitimate expectation.

4. What influence has the adoption of provisions on European citizenship had on domestic

law?

Belgium:

The extension of the right to vote in local elections to citizens of other member States has given rise to a debate on whether this right should be extended to all foreigners.

Finland:

The minimum time of residence required of foreigners before they can vote in municipal elections no longer applies to European Union citizens.

France:

France has accepted the idea that European citizens form an intermediate category between French nationals and foreign nationals and that they have a privileged status compared to other foreigners, particularly with regard to political rights at local level – under certain conditions. European citizens are excluded from functions and participation that bring into question the exercise of French sovereignty: European citizens cannot become mayors or deputy mayors or participate in the designation of senator electors or the election of senators.

Germany:

The main changes are in respect of the political rights of European Union citizens in municipal and European elections.

Portugal:

The Constitution has been amended making it possible, subject to reciprocity, for foreigners in general to vote in municipal elections and European Union citizens to vote in elections to the European Parliament.

Spain:

The only major change is that European Union citizens have been granted political rights.

V. Relationship between Community law and domestic law

1. Have domestic bodies, in particular the courts, easily accepted:

a. the immediate validity of Community law in the legal system of member States?
b. direct applicability of Community law?
c. the primacy of Community law over domestic law?

Austria:

No particular problem arises, but domestic bodies must get used to the fact that

European Union law has a much greater scope than classical international law.

Belgium:

The general recognition of the immediate validity of international law under the domestic legal system has meant that there has been no problem with the direct applicability of regulations and even directives. The pre-eminence of Community law was also easily accepted, although there are still some doubts over the relationship between Community law and the Constitution.

Denmark:

The Danish authorities, including the courts, have accepted all the fundamental principles of Community law.

Finland:

The same applies as for Denmark.

France:

Legal doctrine now accepts the pre-eminence of Community law over domestic legislation, even retrospectively. However, the process has only been a gradual one: the *Conseil d'Etat* has now accepted the principle along with the Court of Cassation.

Germany:

The Constitutional Court accepts the immediate validity, the direct applicability and the pre-eminence of Community law. However, the Constitutional Court does consider it its right, in accordance with the aforementioned "*Solange II*" decision, to examine whether the European institutions have remained within the bounds of their sovereign rights. If not, then this may prompt it to enter into conflict with the Court of Justice of the Communities.

Greece:

These principles have been accepted without any reservations.

Ireland:

These principles are now expressly recognised following the constitutional amendments required by Ireland's accession to the Communities and the subsequent treaties.

Italy:

The Italian courts readily accepted these principles but it was only after long consideration that the Constitutional Court accepted that ordinary judges could rule that national law did not comply with a Community law. In addition, ordinary judges

must apply domestic law which is contrary to community law only if the Constitutional Court has recognised the existence of a conflict between community law and the fundamental principles or rights and freedoms guaranteed by the Italian Constitution. The Constitutional Court is competent to decide whether European treaties cause such a conflict and – in the affirmative – declare that the ordinary law implementing the contested legal rule is unconstitutional.

Netherlands:

The answer is in the affirmative.

Portugal:

These principles have been acknowledged, particularly following the constitutional amendment of 1982. However, prevailing doctrine holds that constitutional law ranks higher than Community law.

Spain:

These principles were readily accepted. Though the matter has never been decided in an actual case, the Constitutional Court does not regard itself as competent to rule on the constitutionality of secondary Community law whereas it may rule on primary law.

Sweden:

Under the law on accession to the European Union and according to subsequent practice, pre-eminence of Community law is acknowledged along with the other two principles.

2. *a. According to domestic law, what is the place of classic international law (either conventions or customs) in the hierarchy of norms?*

   b. Is the relationship between Community law (primary law, secondary law, international treaties concluded by the Community) and domestic law treated differently from the relationship between classic international law and domestic law?

Austria:

General international law and, allowing for exceptions, international convention law form part of domestic law. Depending on their content, the rules of convention law are treated as ordinary laws or constitutional laws.

Generally speaking, the relationship between Community law and domestic law is treated in the same way as that between international law and domestic law.

Belgium:

No major differences have emerged as yet but case-law does seem to be more prepared

to assert the pre-eminence of Community law over the Constitution than vice-versa.

Denmark:

Denmark has a dualistic approach to the relations between international law and domestic law but recognises the direct effect and the pre-eminence of Community law. Hence, there is a major difference in the approach to the relationship between international law and domestic law on the one hand and Community law and domestic law on the other.

Finland:

The ratification of international treaties is authorised by the parliament at the same time as it adopts the law incorporating them into domestic law. Most frequently, this incorporation takes place at legislative level but it can be at constitutional level as has been the case with Community law. It is in this respect that Community law is treated differently from most other international treaties. Customary international law has the same status as customary domestic law.

France:

Under French law, international acts rank higher than domestic law but lower than the Constitution. The Constitutional Council has never examined the conformity of a law with a treaty. In respect of community law, a distinction should be made between primary and secondary legislation. To apply in France a piece of primary legislation which has been declared contrary to the Constitution, the Constitution must be revised. Regulations apply directly in the national legal system, while directives must be transposed in national legislation, which can be challenged on the basis of constitutionality.

Germany:

The general rules of international law form part of federal German law, ranking higher than normal legislation but lower than the Constitution. Once they have been approved, international treaties have the rank of statutory legislation. Community law, on the other hand, is treated as a separate legal order whose pre-eminence over domestic law is recognised although it is considered subordinate to the Constitution.

Greece:

General international law and treaties form an integral part of domestic law and are considered superior to the latter but subordinate to the Constitution. Community law is not treated fundamentally differently, though its immediate validity and direct applicability distinguish it from classic international law.

Ireland:

Ireland has a dualistic approach to the relationship between international law and domestic law. Community law has a special position because of the specific

constitutional amendments adopted on accession to the Communities and amended in line with the changes to the founding treaties.

Italy:

While general international law ranks higher than domestic law according to the Italian constitution, the same does not apply to international treaties. These are incorporated into Italian law by ordinary laws which have no pre-eminence over other laws. It goes without saying that the status of Community law is different because its pre-eminence is acknowledged.

Netherlands:

The pre-eminence of international law is acknowledged in general terms in the Constitution. Accordingly, there is no difference in the relationship between domestic law and classic international law on the one hand and Community law on the other, except that the pre-eminence of Community law is founded on Community law itself and not on the Constitution.

Portugal:

International convention law ranks higher than domestic legislation but lower than the Constitution. The question of the pre-eminence of general international law over the Constitution is the subject of a doctrinal debate. Therefore the status of Community law is not really any different from that of classic international law under Portuguese law.

Spain:

The pre-eminence of international law over domestic law is acknowledged. Community law is not really treated any differently except that the Constitutional Court refuses to rule on the constitutionality of secondary Community law.

Sweden:

International treaties must be incorporated into Swedish law to be applicable in Sweden. Community law, on the other hand, has immediate legal force.