

# Historical insights into the centralisation of the European federalism

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## Abstract:

In this paper, we assess the European institutional integration that took place in the 50s and 60s. During a first stage, European integration was explicitly and obviously political, aimed at establishing a European Political Community. Then, the project was abandoned in the mid-1950s and political integration stopped. At that time, the institutions of the Union took the form of a confederation. In a second stage, because of the failure of the European political community, a legal process of integration driven by the European Court of Justice, took place. This second stage of unification in Europe has been more centralising and has in effect led to a federalisation of the European institutional structure. The centralising trend was thus early initiated, at least as soon as political integration was replaced by legal integration.

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### 1. Introduction

This paper proposes a positive assessment of the European institutions and their evolution during the 50s and 60s. This stretch of time remains deeply influenced by the Second World War, a stringent turning point into the organisation of collective action in Europe. Before that, nation states had demonstrated their inability, to say the least, to provide the collective institutions that could guarantee Pareto improvements over the Hobbesian state of nature. Awful events then prompted a series of individual reflections and actions that would have concrete translations in future institutions, in particular through the beginning of the process of integration in Europe. As soon as in the early 1950s, attempts were made to give birth to a European political community – in 1953, a *Draft Treaty establishing a European Political Community* was submitted to the member states of the European Coal and Steel Community (ECSC). Would it be the beginning of a new era of peaceful political integration?

In this paper, we adopt a historical perspective on the process that has led to the European institutional integration. We argue that during a first stage, European integration was explicitly and obviously political and the purpose was to build a European Political Community (EPC). Then, the project was abandoned in the mid-1950s and political integration stopped. At that time, the political institutions of the Union took the form of a confederation. Then, once this point was reached, and because of the failure of the EPC, legal integration began, driven by the European Court of Justice (ECJ). This second stage of unification in Europe has been significantly centralising and has led to a federalisation of the European institutional structure. Therefore, our argument is that, although explicit and politically driven integration stopped in the early fifties after giving birth to a confederation, institutional integration nonetheless continued under the influence of the judiciary. As a consequence, a gap opened and widened between the initial outcome of political integration – a decentralised confederation – and the political product of legal integration – a rather centralised federation. In fact, the ECJ has not only contributed

to transform the political structure of the European Union; it has also modified the nature of European democracy, turning a political regime, in which decisions have to be made by elected officials, into a legal regime, where judges and courts are granted (and even grant themselves) the right to make political decisions in the sense that those decisions and their implementation convey quasi constitutional consequences, as we will evidence it later.

In many of its aspects, the centralisation and federalisation of the European institutions has already been thoroughly analysed in a public choice perspective (see for instance Vaubel, 1996, 1997; Salmon, 2003). More specifically, the role of the ECJ has also been evidenced by political scientists, in particular its judicial activism (see for instance Alter, 1998; Garrett et alii, 1998). Our perspective nonetheless differs from the previous ones in that we assess the political role of the Court beyond its judicial part. We show how its actions and decisions progressively shaped the institutional structure of the Union, thereby playing a leading part which could have been that of elected politicians.

Our demonstration rests on the organisation of historical evidence in an economic framework. We do it through direct analysis and quotation of court cases, draft treaties and declarations. We first stress the ambiguities and hesitations that characterise the initial steps of the process of political integration in Europe as to what the status of the Union should be – a federation or a confederation – which nonetheless leads to the establishment of a confederation (section 2). These hesitations and ambiguities do not only feature the debates and discussions. They also are at the core of the institutional structure thereby designed. Thus, built primarily as a confederation, the European Union also contains federal characteristics. From this perspective, the presence of a supranational Court of Justice is particularly significant. Its presence and the way it has been devised by its promoters were potentially federal and indeed were a factor of centralisation (section 3). In other words, we analyse a process of political integration led by a juridical institution, the ECJ.

## **2. The political integration process and the (hesitant) establishment of a confederation**

The few years separating the first attempts at the end of the second World War to build a “supranational” organisation in Europe from the rejection of the Draft Treaty establishing a European Political Community in 1953-1954 can be considered as forming a long and informal “constitutional convention”, in the sense that the many moves, successful trials and failures were explicitly aimed at creating a politically unified Europe. There indeed was a shared belief that collective action was important and common institutions necessary to reach this goal. However, although perceived as decisive, the creation of a ‘supranational political’ organisation in Europe (2.1) had to face different opinions as to the form this polity should take. It thus appears that while many argued in favour of a federation, others were favourable to a less exacting form of regime, namely a confederation. Hesitations and ambiguities, or maybe diplomatic cautiousness, characterise the major political treaties that were issued in the early 1950s (2.2). The political integration process eventually led to the creation of a political community organised as a confederation (2.3).

### ***2.1 Collective action through a supranational political community***

In the mid-1940s, European nations had to face the particularly dramatic consequences and sequels of the Second World War. The conflict had raised specific and new problems and also revived old issues. There were social or political problems to solve – overcoming the moral consequences of the conflict, promoting peace or facing the threat of the Soviet Union – as well as huge economic difficulties to surmount – rebuilding the economic capacities the war had destroyed and promoting growth, productivity and exchange. Of course, these problems were perceived as complementary. More precisely, many were convinced that a political common organisation was necessary to deal with the economic, political, social and moral difficulties born out of the recent conflict. Indeed, the European nations were facing common challenges that would require some kind of collective action and also the capacity to display a cohesive political strategy. The international role of Europe as an identifiable player was then linked to the possible melting of at least some of the nations into a unified political entity entailed with some strategic capacity. It then seemed necessary to give birth to a Europe powerful enough to play a world political

role (see for instance Forsyth, 1967). Added to the necessity to go beyond nationalism and its plagues, the choice was then made to create a “supra-national” political community rather than an international organisation.

This objective was put to the forefront of the diplomatic agenda at the end of the 1940s. For instance, Marshall, when presenting his plan, linked the American economic aid to the capacity for Europe to organise itself as a political community:

*It is already evident that, before the United States government can proceed much further in its efforts to alleviate the situation and help start the European world on its way to recovery, there must be some agreement among the countries of Europe as to the requirements of the situation and the part those countries themselves will take in order to give proper effect to whatever action might be undertaken by this government (Marshall, 5 June 1947).*

Similarly, the political resolution of the Hague Congress (7<sup>th</sup>-11<sup>th</sup> July 1948) claims “that it is the urgent duty of the nations of Europe to create an economic and political union in order to assure security and social progress”. Undoubtedly more important is the proposal by Maurice Schuman to actually give birth to the ECSC in May 1950. The French government thus proposes that the “pooling of Franco-German coal and steel production should immediately provide for the setting up of common foundations for economic development” (Schuman, 1950). However, and Schuman is explicit about it, the establishment of a European Economic Community is only a first step:

*“Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity. The coming together of the nations of Europe requires the elimination of the age-old opposition of France and Germany. Any action taken must in the first place concern these two countries” (Schuman, 1950)*

More precisely it is once again stressed that economic integration is viewed only as an intermediate objective or a means “set up to advance political objectives” (Kitzinger, 1960: 24), as is indicated by the preamble of this economic Treaty which is considered as “entirely political” (ibid.). In other words, the establishment of the ECSC in April 1951 is a means to reach a more important objective, the building of a European political community. Thus, this is no surprise to see that only one year after the ratification of the ECSC Treaty, in 1952, two other complementary political treaties are discussed and drafted. The treaty establishing the European Defence Community (EDC) and the Draft Treaty establishing a European Political Community (EPC) are designed as the basis for political integration.

The Treaty establishing the EDC goes a step further than the ECSC Treaty. It intends to create “*a military community, consisting of common institutions, common armed forces and a common budget*” (Kunz, 1954: 276-277). In other words, the EDC treaty represents the first genuine (and explicitly institutionalised) attempt to go beyond economic integration and to move towards a political Community in Europe. With regard to the supranational dimension of the European political integration, the EDC treaty is more precise than the ECSC treaty. Although this dimension already appears in the ECSC Treaty, the supra-national character of the European Community “*is more pronounced in the very wording of the European Defence Community treaty*” (Kunz, 1954: 277). Its preamble speaks of a “*supranational organisation*” and of the “*formation of a United Europe*”, while the preamble of the Coal and Steel Treaty speaks only of “*an organised and vital Europe*”. The supra-national character is also strongly underlined in article 1 – that reads “*the present Treaty sets up a European community of a supranational character*” – and article 20, §2.

Then, after the establishment of an economic community and the proposed creation of a common army, the next and second part of the European project consists in the design of an integrated political structure. Hence, in 1952, whilst the EDC Treaty has not yet been ratified, the six members of the ECSC decide to elaborate a Treaty tellingly named the Draft Treaty establishing a European Political Community. Almost forgotten nowadays and rarely (to say the least) mentioned in the writings about the origins of the European Community, this Draft Treaty is nonetheless of the utmost importance to understand the official position in the 1950s about the nature of the future European political structure.

In 1953, Paul-Henri Spaak presents it as filling the gap between the ECSC and the EDC treaties. He argues that the Schuman plan and the creation of the European army are stages to be completed in order to go farther towards “*setting up a Political Community of a supra-national character*” (Spaak, 1953: 150). Heinrich von Brentano claims similar views. The idea of a supranational and unified political entity seems sufficiently well accepted to be incorporated in official documents. But what institutional form will the idea take?

## 2.2 *Which political structure to sustain collective action? Hesitations between a confederation and a federation*

That federating a nation (like the USA) quite differs from federating nations is an obvious statement, but what derives from it is less so (Josselin and Marciano, 2004). Once an agreement on the idea of a supranational unified political entity is reached, there “remains” to define the nature of the regime that has to be chosen by the different member states of the Community. The task is difficult in at least two respects. On the one hand, the already established institutions are perceived as experimental, a new type of international political institution “*whose supranational powers mark a basic departure from the conception of all previous international organisations*” (Bebr, 1953: 1). This institutional innovation implies difficulties to define what political form the organisation should take. On the other hand, there are strong disagreements and divergences between those who are convinced that the federal solution is immediately adequate, and others who argue that a decentralised confederation would be enough, not to mention those who insist that it may be too soon to choose between the two options.

The idea of a federal European Union dates back to the early 1940s. Clear statements were then made as to what the European Union should be. In 1941, the *Ventotene Memorandum* towards a freer and united Europe is written in prison by Altiero Spinelli. Two years later, Jean Monnet stresses that “*Leur prospérité et les développements sociaux indispensables sont impossibles, à moins que les Etats d'Europe se forment en une Fédération ou une 'entité européenne' qui en fasse une unité économique commune*” [*their prosperity and essential social development are unlikely unless the states of Europe form a Federation or 'European entity' bringing them into a united economic community*] (Monnet, 1943; our translation). In practice, discussions regarding which route should be taken undergo acceleration with Robert Schuman's proposal for the creation of a Franco-German coal and steel pool. Thus, the 1950 Schumann Plan includes many references to the necessary federalisation of the European Union. For instance: “*The pooling of coal and steel production should immediately provide for the setting up of common foundations for economic development as a first step in the Federation of Europe, and will change the destinies of those regions which have long been devoted to the manufacture of munitions of war, of which they have been the most constant victims*” (Schuman declaration;

emphasis added). Along the same line and a bit later the same year (26 July 1950), the German Bundestag virtually unanimously (against only four communist votes) passes a resolution in favour of a European federal pact that would create a supranational federal authority. Therefore, federalism and supranationality are viewed as two complementary features, foundation stones and necessary conditions of the future European community.

Facing the “federalists” are those who prefer to structure the supranational European community as a rather loose and decentralised “association of nations”. The EDC treaty and the EPC Draft Treaty thus display diplomatic hesitations about the nature of the regime of the future European community. Commentators noted that the ad hoc Assembly “*went as far in the direction of federalism its members thought consonant with acceptance by the governments*” (Karp, 1954: 185). In other words, the two major European political treaties of the early 1950s carefully avoid choosing between federalism and confederalism. The president of the ad hoc assembly in charge of drafting the Treaty establishing the EPC, Paul-Henry Spaak more specifically claims that there will not be any choice between a confederation and a federation. When presenting the Draft Treaty, he insists that “*the Europe we are proposing you to create is neither federal nor confederal*” (Draft Treaty, 1953: 149). Similarly, Heinrich von Brentano, Chairman of the Constitutional Committee that drafted the Statute for the ad hoc Assembly, argues that “*The European Community ... will be neither a Confederation nor a Federal State*” (Draft Treaty, 1953: 48). Von Brentano is even more precise when he explains why he refuses to choose between a confederation and a federation. He thus claims that Political Community “*is to be such that it will be able to take on a more and more precise form ... until it develops by a natural process into a real Federal state or a Confederation*” (Draft Treaty: 51). In the meantime, Von Brentano nonetheless argues that the European institutions are set up “*in such a way that they would constitute genuinely European organizations carrying out their tasks in the greatest possible independence of national influences*” (Draft Treaty, 1953: 50). Clearly, it appears that the promoters of a confederation, contrary to the defenders of a federation, refuse to engage in too binding a structure.

Therefore, hesitations and ambiguities are noticeable in the debates around the establishment of the European Political Community. The general purpose implies the willingness and necessity to choose a specific political regime, but this is contradicted

by the cautious claims made by, among others, Spaak and Brentano. However, despite what official discourses reveal about hesitations and a first stage of indecision, the choice goes to a political confederation.

### ***2.3 The choice: the European community as a political confederation***

From the perspective of economic theory, the use of an agency relation helps understand which features characterise a confederation (2.3.1) and helps explain why we argue that the first steps of the European political integration process indeed lead towards a confederation rather than towards a federation. The choice of a political confederation is exemplified by the agency relation that will now structure the fledgling union (2.3.2). The way prerogatives are assigned among the various institutions, some already existing, some created, confirms it (2.3.3).

#### 2.3.1 A confederate agency relationship

The two forms of federalism, confederate and federal, differ with regard to three major elements: the nature of the principals and agents, the prerogatives assigned among the different levels and finally the way assignment proceeds and changes. Then, following conventional wisdom on the subject, we propose to define a confederation as an association of sovereign states in which bargaining leads to ascribing certain tasks to the upper or central institutions. This means that this form of federalism can be best described by an agency relationship that takes place between the states, or institutions located on the same level, and the central institutions of the confederation. Citizens are not part of the agency relationship because they are only nationals of the states that are represented in the central institutions. The confederate agency relationship only connects sovereign states, as the principals, and the common institutions, their agents. Typically then, and this is a second important feature of confederations, the common institutions benefit from the delegation of few and limited prerogatives because the local jurisdictions retain most of the sovereign power. Thus, a confederate constitution is most of the time limited to very few provisions about the needs that necessarily require a certain amount of collective action because and when they cannot be satisfied locally and individually, by each jurisdiction – for instance, the provision of pure public goods such as defence or legal rules. Hence, as a consequence, a third and most important characteristic is that prerogatives are never

granted once and for all; the assignment and reassignment of tasks to the central institutions is subject to frequent and repeated debates and negotiations between local jurisdictions. As a consequence, because its functioning rests on ongoing negotiations, a confederation displays a greater capacity than any other regime to face fluctuating objectives. As a counterpart, the same procedure makes enforcement problematic and costly; responsiveness and plasticity may sometimes have to be paid in terms of free-riding, transaction costs, wars of attrition... and thus instability.

### 2.3.2 The agency structure: who are the principals? Who are the agents?

The first step in the classification of the European Political union as a confederation consists in the identification of the principals and the agents among the citizens, the member states and the European institutions. Of particular significance is the way the first treaties have been designed. The latter were not conceived as a constitution and not written by an autonomous and original constituent power dedicated to this task. Admittedly, ratification procedures by the national legislatures could be interpreted as constituent acts. In this perspective, the treaties could be seen as forming the body of a constitution, and thereby European citizens could be considered as the source of power. National legislatures would be the vehicle of this sovereignty. In economic terms, the citizens of the member states would be the principals; the institutions of the Community would directly be their agents and by no means those of the states. The Treaties would have elaborated a federation. However, claiming that ratification does amount to exercising a real constituent power is somewhat farfetched. In fact, the early stages of the integration process only concern the agency contract established between the states and the supranational institutions. Not only nothing is said about the agency relationship that links the nation states to their own citizens but also the latter are not involved in the building of the European institutions. Only “indirectly” democratic (Mancini and Keeling, 1994), the resulting institutions indeed correspond to a confederation.

Typically, the Council of Europe in 1949 “involves” the citizens as weakly or remotely as possible, under the form of a *Consultative* Assembly gathering appointees from national parliaments. As its name unmistakably indicates, it benefits from no power and is subordinated to the decision-making entity, the Committee of Ministers. Moreover, although Schuman and Monnet are explicit about federalism, the Council

of Europe adopts a “division” of power that contradicts the federal demands for a democratically elected assembly which would participate in political decision-making. A few years later, the ECSC Treaty is revealingly built in the names of the Heads of States. Citizens are thus excluded from the process and the focus is put upon the relationship between the member states and the European “institutions”.

The citizens left apart, the focus is put on the respective roles of the member states and the European institutions. It appears that the former occupy the position of the principals while the latter are their agents. Despite the ambiguities noted earlier, the Draft Treaty indeed seems to opt for a confederation. Accordingly, the future European Political Community is to respect “*the powers and competence which the governments of our countries have hitherto kept under their own control ... [and] does not entail any fresh transfers of sovereignty*” (Draft Treaty). Thus, the proposed political structure can be considered as confederate in that it rests on a partial and limited transfer of sovereignty from the member states to the future European institutions. The member states remain the masters of the new constitutional device that is being built; and the European institutions act on behalf and under the control of the Member states. In the terms of the agency theory, the latter as principals delegate very limited tasks to the European supranational institutions, their agents.

### 2.3.3 The process of assignment of prerogatives

The process through which prerogatives are assigned and reassigned to the different players helps complete the description of the agency setting upon which the European institutional framework rests. Once again, the first political steps were quite clear about the confederate nature of this process. Thus, when presenting the Draft Treaty, Spaak insists that the structure envisaged for the emerging political organisation stands “*Between the two extremes, represented on the one hand by a purely inter-governmental system, linking states which retain their entire sovereignty and on the other by a Constitution which would immediately pool most of the activities of our States*” (Spaak, 1953: 150). This statement could be interpreted as another instance of the repeated hesitations about the political structure of the European political community. We rather argue that it illuminates the fact that the gathering of the ECSC member states in a political community will be on a confederate basis. No prerogatives are to be transferred on a permanent basis to the future central

institutions. Moreover, any transfer must result from debates, bargaining and negotiations between the principals, that is to say, the member states. Most political documents in Europe mainly came out through diplomatic bargaining during intergovernmental conferences. These processes do not only reinforce the absence of the citizens; they above all show that the extent of the prerogatives or competences granted to the central institutions is delineated treaty after treaty, intergovernmental conference after intergovernmental conference by the member states.

That assignment and re-assignment of prerogatives to the European institutions result from bargaining is a clear illustration of a confederate setting. When member states prove to be inefficient in dealing with a specific problem, they bargain with each other in order to define which tasks are to be delegated to the central institutions. Of course, the confederate setting of bargaining would not be complete if member states did not have veto power. Such is the case in the earlier stages of the European integration process. Bargaining is indeed the procedure followed for the “pooling” of national economic activities within the ECSC; each member state was supposedly unable to reach by itself an objective that was assumed to be collectively achievable. However, as we have suggested it, even if bargaining does promote flexibility, it does not provide any guarantee as to the effectiveness of the result. From this perspective, the failure of the treaty establishing the ECD provides a good example of the difficulties to reach a collective agreement. The treaty is drafted in 1952 but it is ratified by only four out of six countries (Italy and France reject it) and is thus abandoned. Moreover, the political process of European integration stops, after having nonetheless contributed to the establishment of European institutions under the form of a supranational organization mostly based on the principles of a confederation. In fact, the many hesitations between a confederation and a federation that we have analysed in the preceding paragraphs have permeated through the institutions and the European institutions do not present themselves as plainly confederate, they also contain federal elements. These federal components added to the end of the process of political integration are at the origin of the centralisation process that is going to characterise the European legal integration process since the end of the 1950s. This is the process we describe in the next section.

### 3. From political to legal integration: the political role of the ECJ

The failure of the ECD could have been viewed as the outcome of the normal functioning of a political union organised as a confederation. On the contrary, the rejection of the EDC treaty, and the subsequent collapse of the European Political Community, were viewed as a sign of the necessity to initiate a second and complementary way to unite the different European nations: A legal integration process is then initiated (3.1), that ends up in transforming the institutional structure of the European Union. More precisely, and this is the point we defend in this section, the ECJ has performed a legal modification of the political structure of the European Union (3.2.), in particular through a change in the nature of the legal rules used across the member states (3.3). By doing so, the Court smoothly changes its own role, from agent to principal (3.4).

#### 3.1 *The postponed process of political integration*

The process of integration of the European nations within a single political entity had been conceived to rest upon two pillars, the EPC and the ECD treaties. As soon as one of them collapses, the whole objective is threatened. Thus, after the rejection of the ECD treaty in 1952, the other and related part of the European political project, namely the Draft Treaty disappears. As a consequence, the political innovations proposed by the Draft Treaty are not put into practice. Now, these provisions were partly federal and centralising – for instance, the Draft Treaty attempted to involve citizens in the functioning of the EPC through a Parliament in which one of the two chambers was formed by directly elected representatives. “*The supranational Community possesses one of the attributes of a State: its Parliament will consist of a directly elected Peoples' Chamber, and of an indirectly-elected Senate which is to guarantee co-operation, on a basis of equality, between the peoples of the individual national States*” (Draft Treaty: 50). The failure of the European political integration will leave the citizens out of the decision-making procedures that will shape the European institutions during the second half of the twentieth century. Decisions were made through political intergovernmental conferences. The European political organisation remained under the form it had reached in 1952, as a confederation.

This does not mean that the political objective is forgotten and abandoned. In the view of many political leaders of the time, the establishment of a political community

in Europe is simply postponed. European integration remains aimed at ultimately creating a political union among the member states of the ECSC. However, if political integration remains an objective, it nonetheless has to be achieved through different and indirect means. This is exactly what is expressed during the Messina meeting held in June 1955. There, the six member states of the ECSC “*drew the lessons of the struggle over the European Defence Community. The next attack could not be too directly political (...) Here was the indispensable tactical move without which there could be no further progress toward political union*” (Kitzinger, 1960: 25).

The meeting held in Messina, and the conversations among foreign ministers of the members states of the ECSC, reveal that the diplomatic actions led by Spaak, Beyen and other “Beneluxers” along with Monnet and Schuman succeeded in convincing other European leaders that economic integration had to be favoured and substituted (even if temporarily) to direct political integration (see Laurent, 1970). Economic integration is viewed as a means to reach a political goal, an intermediary and temporary objective: “*The objectives of the treaties establishing the Communities are economic, but their aim is political*” (Lagrange, 1967: 709). Economic unification is then put in the forefront and pushed further with regard to the ECSC treaty, as is officially acknowledged by the creation of a European Economic Community by the 1957 Treaty of Rome (Issing, 2000; Maes, 2005). In theory, the establishment of an economic community does not however represent a “centralising” threat to the political organisation of the European Communities, essentially because the creation of a common market and the promotion of free trade do not contradict the decentralised nature of the European confederation; “*true free trade and supranational experimentation went hand in hand*” (Laurent, 1970: 375).

By contrast, the process of legal integration which takes place and develops since the mid-1950s is much more important from the perspective of the evolution of the European political structure. Although “*the European Communities have been constructed as a legal community*” since their origins (Schermers, 1974: 445), legal integration remains largely implicit, commonly viewed as a “technical means” underlying the correct functioning of the Communities. Furthermore, being federal and centralising, the development of a legal order contradicts the confederate and decentralised nature of the European political institutions. Therefore, beyond the lack of checks and balances (due to the weakness of the Parliament, for instance), the

possible collusion between the different branches of the European government or the role of too strong and important a bureaucracy (Salmon, 2003), we argue that these two elements are responsible for the centralisation and federalisation of the European Union. The European Court of Justice has been a driving force behind European integration (see Weiler, 1991; Schermers, 1991). Its role “*has undoubtedly been more important than had been foreseen; and, above all, it has been considerably different from that which had been visualized originally*” (Lagrange, 1961: 416).

### ***3.2 The existence of a Court of Justice or how to trigger an “institutional irreversibility effect”***

Undoubtedly, the sole existence of a Court of Justice does not suffice to transform a confederation into a federation. In fact, and although surprising it may be in a confederation, a supranational Court of Justice remains legitimate if viewed as an agent with strictly delineated competences. Now, this is exactly the purpose for which the Court is created: to be an agent the behaviour of which “*respected the Member States' status as sovereign nations*” (Lenaerts, 1988: 93). That the domain of competences of the Court is limited results from the fact that “*most of the principles relating to the Court and its jurisdiction in the Treaty of Rome were taken from public international law*” (Delaney, 2003: 3). The Court is thus in the position of an agent to which the sovereign member states, acting as confederate principals, explicitly delegate some limited and defined tasks – namely to interpret and control legislation proposed by the Commission and enacted by Council and Parliament. In other words, the Court was then envisaged as a means to check the other components of the European government on behalf of the Member states. This specific role is even acknowledged by the Court itself. Maurice Lagrange, then Advocate General, for instance states in 1957 that “[*t*]he Treaty [*ECSC treaty*] is based upon delegation, with the consent of the Member States, of sovereignty to supranational institutions for a strictly defined purpose [...] The legal principle underlying the Treaty is a principle of limited authority” (joint cases 7/56 \& 3-7/57, Dineke Algera et al. v. Common Assembly of the European Steel and Coal Community, 1957, E.C.R 69: 82). A few years later, the same Lagrange also notes, “*the Court appears as an internal judicial organ, the activity of which, within the field of its competence, aims at the smooth functioning of the Community legal order*” (1961: 402).

However, to have a clearer vision of the precise status of the Court of Justice and to understand why it indeed provides the ground for future federalisation and centralisation in Europe, one has refer to the model that guided the promoters of such a Court. Then, the perspective of an agent with limited competences has to be complemented with the model of the French Council of State under which the Court has been elaborated. Commentators have stressed how “*pervasive ... impact of the French administrative law was*” (Koopmans, 1991: 500) and how this “*reveals itself in the text of the treaty*” (ibid.). This was not ignored by the promoters of the treaties. On the contrary, the debt to the French system of administrative justice is clearly acknowledged by one of the French authors of the Rome Treaty, namely Lagrange himself (see Monnet, 1976: 412-413). Lagrange thus writes in his 1964 discourse, when leaving the Court after 12 years spent in Luxembourg, that the Court “*was evidently inspired by the example of the French Council of State*” (Lagrange, 1964). Earlier, still advocate general, Lagrange had stressed that the role of the Court and the way this institution is supposed to exercise its powers can easily be compared to that of the French *Conseil d’État*. In particular, two of the procedures actually used by the Court are similar to what exists in French administrative law, namely the appeal for annulment and the plenary appeal. The first procedure is similar to what is known in France as the *recours pour excès de pouvoir* [ultra vires appeal against abuse of power] instituted before the *Conseil d’Etat* of France” (Lagrange, 1961: 403; see also 1967: 712); the second one, “*borrowed from the French administrative law*” (Lagrange, 1967: 712), corresponds to the *recours de pleine juridiction*. As a consequence, this is no surprise if “*when interpreting the ground for annulment in the early years, the Court always remained very close to the case law of the French Conseil d’État*” (Koopmans, 1991, p. 500). In other words, the European Court of Justice may be considered, even if only partially, as an “administrative tribunal”. This is how Lagrange interprets the decision made in *Groupement des Hauts Fourneaux et Aciéries Belges et al.*, Dec. Nos. 8 to 13/57, June 21, 1958, 4 ECR 223). Rendering its decision, the Court is assumed to have “*employed one of the most efficient tools of administrative tribunals ... This case illustrates the role of the Court ... as an administrative tribunal deciding in economic matters*” (Lagrange, 1961: 413). From the perspective of a French legal scholar, this claim bears a very specific meaning: the way the Court makes its legal decisions reveals a “dualist” legal system, in which special courts are granted with the right to judge the behaviours of the State (Josselin

and Marciano, 2005). Then, as a first consequence, the European “state” – that is the European institutions – do not stand on the same level as the nation states and have to be controlled and judged through different procedure and by a different jurisdiction than the member states. Furthermore, as a second effect, the European Court of Justice necessarily occupies a particular position. Like in France, where administrative tribunals are at the same time within the administration and in charge of the control of the administration, the Court of Justice is both ‘inside’ and ‘outside’ the central European institutions; it does not simply stands on the same level as the other political entities that form the central European institutions. In other words, in Europe, the ECJ is designed as more than a confederate Court. This design breeds a kind of institutional irreversibility effect, as we will explain now.

Any process of delegation is associated with risks of moral hazard and wrongly shaped incentive mechanisms. Delegation in the field of law conveys more than that. Unless law is strictly customary, judges and courts are in capacity to modify their own set of competencies. The implementation of these competencies may reflect upon the initial prerogatives of the principals. When the object of delegation is the making of law, the very process of delegation triggers an irreversibility effect that can be interpreted as a constitutional dilemma. This institutional irreversibility effect will be further evidenced as centralisation and integration concurrently develop.

### ***3.3 A specific definition of legal rules***

Integration is built on and develops through specific rules. From this perspective, one of the most important innovation of the Rome Treaty consists in the creation of “directives” – these rules “*that do not require national implementing measures but are binding on the states and their citizens as soon as they enter into force*” (Mancini, 1991: 181). Regulations are thus rules that the European institutions, the agents, are legally able to provide without the assent of the member states, their principals. The existence of ‘regulations’ is also particularly significant of the way rules are envisaged by the Treaty. Regulations are ‘European rules’ and can thus be considered as supranational public goods, which obviously differs from the conception of rules in a confederation. In a confederation, decentralisation implies that rules are considered as local rather than supranational public goods. Now, if it is acknowledged that certain European rules are federal rules, it is then necessary to envisage the existence of

federal Court of Justice not only to provide but also to enforce these rules. Therefore, article 189 corresponds to a federal conception of rules and is particularly consistent with the existence of a federal Court of Justice. That the Treaty of Rome acknowledges the existence of these very specific rules thus means that there indeed exist rules that apply directly and uniformly within each member country of the Union, and secondly that state legislatures and judiciaries are only part of this legal order. The existence of such rules as ‘regulations’ evidences the (at least implicit) hierarchy between national and supra-national rules. This is clearly acknowledged by the Court itself in 1960, in *Humblet v. Belgium*:

*“If the Court rules in a judgment that a legislative or administrative measure adopted by the authorities of a Member State is contrary to Community law, that Member State is obliged, by virtue of Article 86 of the ESCS Treaty, to rescind the measure in question and to make reparation for any unlawful consequences which may have ensued. This obligation is evident from the Treaty and from the protocol which have the force of law in the member states following their ratification and which take precedence over national law”*

(Case 6/60, E.C.R., 559: 569; emphasis added).

In other words, regulations are the first stones of a European “common legal order”, the establishment of which is usually associated with cases such as *Van Gend & Loos v. Nederlandse Administratie der Belastingen* (case 26/62, 1963) or *Flaminio Costa v. E.N.E.L.* (Case 6/64, 1964), in which the doctrines of the direct effect and supremacy were explicitly stated. In fact, these landmark cases serve to make more visible the already existence of a legal order common to the different member states and identified by rules susceptible of being applied in all these countries.

The Court is particularly aware of the privilege of being a federal court – although the political structure is that of a confederation. In 1956, Lagrange clearly argues that the Court is a federal rather than a confederate Court of Justice:

*“One could, no doubt, make the point that our Court is not an international court but the court of a Community created by six States on a model which is more closely related to a federal than to an international organisation, and that although the treaty which the Court has the task of applying was concluded in the form of an international treaty, and although it unquestionably is one, it is nevertheless from a material point of view the charter of the Community, since the rules of law which derive from it constitute the internal law of that Community”*

(Fédération Charbonnière de Belgique v High Authority of the European Coal and Steel Community, Case 8-55, Judgment of the Court of 16 July 1956).

In other words, the premises of the federalisation of rules can be traced back to the 1950s and 1960s. Granted with the capacity to define its own set of prerogatives, the ECJ will soon take advantage of it.

#### ***3.4. How an agent begins to behave as a principal***

As was said before, to consider that the judiciary is or should be granted with the capacity to make law, that is to say, with the right to go beyond the interpretation and enforcement of *existing* rules, necessarily leads to a kind of irreversible shift of power from the (political) principal to the (legal) agent. This statement is quite early exemplified in the European case by the role of the ECJ. The latter played a decisive role in transferring power from the Member states to the central institutions. To illustrate this evolution, one may refer to the creation by the ECSC Treaty of the High Authority. The latter benefits from compelling prerogatives. It is thus stated that its members “*shall exercise their function in complete independence in the general interest of their communities. In the fulfilment of their duties, they shall neither solicit nor accept instructions from any government or from any organisation*” (Art. 9, § 5; emphasis added). In other words, this institution is one of the obvious centralising and federal features of the ECSC. This feature will then be developed by many judgments made by the Court. Among them, let us mention those that reinforce the necessary “independence” of the High Authority and its capacity to impose decisions to the principals. For instance, in a judgment of the Court of 29 November 1956, the Court claims that: “*It results from [...] the Treaty that the High Authority enjoys a certain independence in determining the implementing measures necessary for the attainment of the objectives referred to in the Treaty*” (Fédération Charbonnière de Belgique v. High Authority of the European Coal and Steel Community, Case 8-55, Judgment of the Court of 29 November 1956). Then, a few years later, in a judgment of the Court of 13 June 1958, one may read:

*“The power of the High Authority to authorize or itself to make the financial arrangements mentioned in article 53 of the Treaty gives it the right to entrust certain powers to such bodies subject to conditions to be determined by it and subject to its supervision. However, in the light of Article 53, such delegation of powers are only legitimate if the High Authority recognizes them ‘to be*

*necessary for the performance of the tasks set out in article 3 and compatible with this Treaty, and in particular with article 65”* (Meroni & Co., Industrie Metallurgiche, SpA v. High Authority of the European Coal and Steel Community; Case 9-56).

This last judicial decision is particularly important. It does not only state that the High Authority can choose its own agents but also implies that this capacity to act as a principal is not subject to the control of the member states: it rather depends on the legitimacy that the Court itself attributes to the High Authority. In other words, this judicial decision is important in that it undoubtedly is political. An “*important contribution to the legal science*” (1961: 411), as Lagrange rather modestly names what many would certainly have considered as a form of abuse of power, this judgement indeed reveals that the Court does not hesitate to interfere into a debate about “*a constitutional problem of the greatest magnitude*” (Lagrange, 1967: 723). It constitutes “*a decision which, in applying to the Community a theory about the delegation of powers, influences directly the balance of powers established by the Treaty*” (Lagrange, 1961: 411). From the perspective of our theoretical framework, this decision means that the European institutions are not only in the position to delineate the set of their own competencies but also to define some of those of the member states. The legal European institutions are then in capacity to displace their initial political principals.

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