

## THE EC BETWEEN FEDERALISM AND CONFEDERALISM

### Definition of federation and confederation

Both in a federation and in a confederation sovereignty is delegated to a central body.

A confederation is a form of union between sovereign states in which the states cooperate to promote matters of mutual interest mainly in the areas of defence and foreign policy. Examples are the Dutch Republic (1568-1795), the Confederation of the Rhine (1806-1813), the German Confederation (1815-1866) and the United States between 1777 and 1787.

A federation is a form of union between states which are alleged to have delegated their sovereignty to a central body. However, this is contradicted in jurisprudence. In the case *McCulloch versus Maryland*, the Supreme Court of the United States stated: 'In America, the powers of sovereignty are divided between the government of the Union and those of the states. They are each sovereign, with respect to the objects committed to the other'.

Sovereignty does not seem to be a good criterion to define the difference between a federation and a confederation. For all depends on what is meant by sovereignty. If sovereignty is given the significance under international law, i.e. that it is the highest authority in inter-state relations, excluding all others, then the states in a confederation have no sovereignty either.

The difference between a federation and a confederation is more likely to be found in the direct exercise of authority of the central bodies of the (con)federation. In a confederation, the central bodies exercise authority over the states of the confederation, whereas in a federation the central bodies may exercise direct authority over the individual citizens. This depends, of course, on the degree in which the central bodies have been vested with the power of authority.

The extent of authority vested in the central bodies in federations may greatly differ. Hereafter, by way of an example, the federal structure and the division of power between federal bodies and bodies of federal states of two federations will be described: the Federal Republic of Germany (FRG) and the United States of America (USA). Then, on that basis the present and future political structure of the EC and the member-states position therein shall be further elaborated.

## FEDERAL REPUBLIC OF GERMANY

### Federal Constitution

In May 1949, a Constitutional Assembly of representatives from the German federal states (Länder), occupied by the Western allies adopted the text of a Basic Law for a federation (Bundesrepublik) comprising eleven federal states. After the Basic Law had been submitted for approval to the Parliaments of the federal states (Landtag), the Basic Law entered into force on 24 May 1949. Article 23 provided the possibility for other regions to join the German Federal Republic. On 3 October 1990 the five former East-German federal states, which had ceased to exist as such in 1952, joined the BRD.

Apart from an enumeration of fundamental rights, the Constitution (Basic law) also contains provisions for the organization of the federal structure of the BRD and for the functioning of the federal state institutions. Constitutional standards and principles prevail over federal and federal states' (Länder) legislation. The Constitutional Court (Bundesverfassungsgericht), the members of which are elected by the Bundestag and the Bundesrat, i.e. has the duty to examine federal legislation and legislation of the Länder for compatibility with the Constitution.

### Federal form of Government.

The people's representation of the federation consists of a Bundestag, directly elected through a system of proportional representation (on the basis of lists submitted per Land) linked to a system of voting for individual people (at district level), and a Bundesrat, consisting of members of the governments of the Länder. The number of representatives of each Land in the Bundesrat depends on the number of its inhabitants; each land has a minimum three and a maximum of five representatives.

The main powers of the Bundestag are the choice of the Federal Chancellor (leader of the Government) and the control over the Federal Government of Germany. Both the Chancellor and the Ministers of the Government can be called to account. Furthermore, the Bundestag is the main legislative body. In many cases, however, the approval of the Bundesrat is required. Next to the Bundestag, the Bundesrat and the Federal Government have the right of initiative. In case of a difference in opinion between the Bundestag and the Bundesrat on bills, a committee of conciliation (Vermittlungsausschuss), comprising eleven members of the Bundesrat (one for each Land) and eleven members of the Bundestag, seeks a compromise.

A Bundesversammlung, consisting of delegates from the Bundestag and an equal number of members, elected by the Parliaments of the Länder, elects a Federal President for a period of office of five years. Apart from the ordinary representational incumbencies of a Head of State, the President has little or no political powers significance.

#### Government system of the Länder

Already shortly after the Second World War, in the various Länder constitutional assemblies drafted constitutions which were subsequently submitted to the people. If these constitutions of the Länder contain provisions which deviate from the Constitution of the BRD, they are declared null and void. Socio-economic provisions in particular after often outdated. The Länder do have the scope to structure their society in certain domains (e.g. culture and education) on the basis of constitutional provisions. With the exception of Bavaria, the Parliaments of the Länder have one single House, called Landtag. The way in which the relationship between the Parliament of the Land and its Government (lead by a Prime Minister) is organised, is on the whole quite similar. However, the political position of the Prime Ministers varies: his position is either similar to the one of the Federal Chancellor (the power to nominate and dismiss Ministers/Members of the Cabinet) or he is the primus inter pares (the first among equals) in a Cabinet which decides by a majority vote. Most Länder have a Constitutional Court with varying powers.

#### Relationship federation - Länder

The Constitution guarantees the federal structure of the BRD. Formally speaking, the Länder have legislative powers in all fields which are not reserved to the Federation by the Constitution. The Constitution provides a list of the powers which belong exclusively to the Federation. Among them: foreign affairs, defence, civil defence, nationality and finance. Moreover, there are areas in which both the Federation and the Länder have legislative authority (e.g. criminal law, social security, labour law and the environment). The Federation has authority in these areas in as far as there is a need for legislation on federal level for reasons of effectivity, uniformity or common interests. In practice this construction of competing legislative powers boils down to an exclusive power of authority of the Federation. Next to this, the Federation also has the power of basic law (global rules further to be filled in by legislation of the Länder). This in fact restricts the legislative power of the Länder to the areas of culture, police and local authority matters.

As far as the administration is concerned, however, the powers of the Länder reach further than those of the Federation. Federal government is only exercised in a limited number of areas, reiterated in the Constitution (foreign service, fiscal sector, railways, armed forces, guarding of the frontiers etc.) Länder have the power to levy taxes. Furthermore, part of the tax revenues of the Federation (income tax, corporate tax, VAT) is directed to the Länder.

In the course of the years, the significance of the Länder as independent entities has been weakened because of the centralization process of the Federation. One could in fact speak of a "centralized federalism". Through the Bundesrat the Länder can exert influence on federal legislation, but in the course of time this representative body has begun to function strongly on a party-political basis. In the administration field too, the Federation has in practice succeeded in gaining the upperhand over the Länder. Thus, the granting of federal subsidies under specific conditions provides the Federation with the opportunity to steer a kinds of public works in the Länder.

## UNITED STATES

### Constitution

After the 13 former British colonies on the East Coast of North-America initially founded in 1777 a confederation, based on the Articles of Confederation, in 1787 the Convention of Philadelphia adopted the Constitution of the United States of America. Some ten Amendments, added to the Constitution in 1791, enumerate the fundamental rights of the citizens. The Constitution is not only a federal constitution, but also a Treaty between the States which delegated part of their sovereign powers to the federation.

The Tenth Amendment reads as follows : "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. This means that the enumeration of the federal powers in the Constitution is limitative. The States have e.g. the power to organize their political structure and their own civil and criminal law system.

### Federal Government system

Separation of the powers is a basic principle in the Constitution not only between federation and States, but first and foremost between the three federal powers. At federal level, the legislative power is vested in the Congress of the United States. Congress comprises two Houses, the House of Representatives and the Senate. The number of representatives in the House is based on the number of inhabitants of the various States.

In order to do justice to the principle of equality of the States, regardless their size or number of inhabitants, two senators are elected from each State. The Senate is deemed to be more important than the House of Representatives. Treaties need only the approval (by a two-third majority) of the Senate and the appointment of the main federal senior civil servants must be confirmed by the Senate. In both Houses, members can submit draft bills. If because of amendments, the text of the draft bill is no longer the same in both Houses, a committee comprising members of both Houses, is to seek compromise on an identical text. Furthermore, Congress has the right of budget.

The President, who is both Head of State and Head of Government, has the constitutional power to lead the administration, foreign affairs and the armed forces. The President and the Ministers appointed by him are not bound to account to Congress. The President has the right to veto laws, adopted by Congress, which can only be undone by a two-third majority in both Houses.

Otherwise, the strict separation between the legislative and the executive is subject to erosion because of the growing importance of the two traditional political parties (Republicans and Democrats). Congress also tends to use to an increasing extent its right of initiative and its budgetary right to check public administration and to gain information, through hearings, on abuse of the executive.

The members of the federal supreme court (Supreme Court of the United States), like all other federal officials, are appointed by the President. The Supreme Court does not only deal with appeals against the decisions of lower federal courts, but also with appeals against decisions of courts of justice of the various States which are allegedly contradictory to federal legislation. Furthermore, the Supreme Court is competent to examine legislation and administration of both the Federation and the States (including the various constitutions) for compatibility with the federal Constitution.

#### Relationship Union - States

In the past two centuries, federal power has gained importance in comparison with the States' power. One of the reasons is the extension of the federation from the initial 13 to the present 50, the new States mainly having been created by the expansion of the territory of the existing federation.

The strong increase of immigration too plays an important role. The immigrants consider themselves first and foremost as citizens of the Union, to which they display greater loyalty than to the State. Except for the civil war between the confederated States and the federated States, within the union there have been no conflicts among the States for ethnic or nationalistic reasons.

Finally, dominance of the federal power increased because since the economic crisis of the thirties, projects initiated by the States have to an increasing extent been financed by federal funds

## THE EUROPEAN COMMUNITIES AND FEDERALISM

### European Union

Since the creation of the European Economic Community in 1958, the EC has been more than a mere confederation of nations, but until today it has not yet grown into a federation. The EC could be characterized as federal on the basis of a number of powers delegated to the EC, in particular in the economic sector (policy on competition, market planning and commercial policy). However, in most policy sectors, decisions are made on an inter-governmental basis, thus rather characterizing the EC as having a confederal institutional structure.

Even before the Rome Treaty was concluded, there was talk of pursuing a European federation, and the term 'European Union' was used. The Preamble to the Treaty states the objective: "to lay the foundations of an ever closer union among the peoples of Europe". In the Single European Act of 1986, the efforts towards a European Union are laid down in the Preamble: "Moved by the will ... to transform relations as a whole among their States into a European Union ..." and "Resolved to implement this European Union ....". It strikes that in the European Act "Europe of the peoples" has been replaced by "Europe of the States".

Until today, however, consensus has not been reached on the definition of the European Union and the implications of such a Union. There seems to be consensus on the premise that the European Union must form a new institutional structure for a further integrating Europe, for which the existing European Communities (ECSC, EEC, EURATOM) are too restricted a framework. In the European Union the acquis communautaire (the achievements of the EC) should be linked to the acquis politique: EPC, EMS and other forms of cooperation between the EC Member-States outside the Treaties. In the most far-reaching version, the Treaty for a European Union, should become a Constitution for a federal Europe, based on efficient and democratic decision procedures and on a separation of the legislative, the executive and the judiciary.

### Union versus federation

At the European Council of June 1990 in Dublin, the Heads of Government of the EC decided to convene two inter-governmental conferences (IGC's) in December 1990 on respectively the Political Union (EPU) and the Economic and Monetary Union (EMU) to 'transform the relations between the Member-States as a whole into a European Union, invested with the necessary means of action.

The activities in these IGC's should be organized in such a manner that the Member-States would be able to ratify the results before the end of 1992.

The present outlook is that the Treaty on the Union will consist mainly of provisions to modify the Treaties establishing the three European Communities (notably the Treaty establishing the European Economic Community), supplemented with provisions concerning a common foreign and defence policy on the one hand and on cooperation on internal affairs and justice on the other hand.

The consolidated text of the Treaty of the Union, submitted on 18 June 1991 by the Luxembourg Presidency to the delegations to the IGC's, also contained several 'common provisions'. Although Article A of these common provisions opens with the phrase "By this Treaty the High Contracting Parties establish among themselves a Union", but ends as follows : 'This Treaty marks a new stage in a process leading gradually to a Union with a federal goal'.

Establishing the Union by the Member-States acceptance of the Treaty on the Union, does not mean the achievement of a federation but is merely the conclusion of a stage on the road towards the ultimate objective: 'a Union with a federal goal'. So, Article A again only expresses the will in the long term to come to a federation.

According to the Luxembourg Presidency's proposals, the modified EEC-Treaty will include more policy sectors in the community's decision-making. However, foreign policy and defence and cooperation in the field of internal affairs and justice remain excluded. It is precisely in these areas that a federal power in a federation has its main competencies.

Because of the separate discussion of EMU and EPU, progress in the IGC-EPU may stagnate, while within the IGC-EMU agreements are being concluded on a central monetary policy and on coordination at community level of the economic policy. In practice, these decisions may lead to a transfer of powers to the Community of such importance that the autonomy of policy of the member-States in the macro-economic, social and fiscal sector and with regard to their national budget will be limited to a farreaching extent, without, however, being formally balanced by a federal political structure. Then, the economic, federal reality is not in conformity with the confederal structure which the EC has on paper. This may result in both the national Parliaments and the European Parliament being curtailed in their actual legislative powers and in their capacity to exercise effective democratic control.

The Draft-Treaty on the Union makes no mention of a separation between the executive and the legislative at community level and the Council (i.e. the Member-States) remains the main legislative power of the Community. The powers granted to the pre-eminently 'federal' bodies of the Community (Commission and Parliament) will not be extended substantially; only in certain areas, laid down in the Treaty, can they exercise direct authority on the individual citizens in the Community.

Once the Treaty establishing the Union has entered into force, the EC will be more than a confederation, but certainly not yet a federation.