



VALUES IN THE TREATY ON EUROPEAN UNION

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## Abstract

This paper examines three areas of the Maastricht Treaty on European Union - first what is stated about European Union itself; second, how market order values are expressed and third, the treatment given in the text to civil order values.

One of the important unifying issues which runs through these three areas is the question of "hierarchy". In respect of the market order, Community rules prevail over the Member States; the problem in this area of the Treaty is that it reflects different views as to what type of market order should prevail. In respect of what is said about the Union and about values associated with the civil order there is an ambiguity and a tension in the Treaty between a view that a hierarchical system of values and law should extend beyond the strictly economic areas of the Treaty and a view that a hierarchical concept is inimical to decentralised processes in a European constitutional framework.

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### I. INTRODUCTION

This paper examines the values expressed in the Treaty on European Union. The text was agreed by the Heads of Government of the Member States of the European Community in December 1991 and expands and amends the earlier basic treaty text of the Community provided by the Treaty of Rome (1957) as itself amended by the Single European Act (1986).

As at this point of writing, the ratification process is not proceeding smoothly, with a referendum in Denmark having gone against the Treaty and with substantial reservations expressed elsewhere. It is unclear at this point whether the Treaty will eventually be ratified unchanged from the present text, or abandoned or possibly subject to an 'interpretative declaration' by the Member States. Whatever the outcome, the issues discussed in this paper will not go away. How to express the concept of 'Union', how to frame the market order and how to address questions pertaining to the civil order, are each a fundamental part of the debate about the constitutional framework for Europe and will remain so. The Maastricht text therefore provides an appropriate basis on which to analyze the issues involved.

The values to be discussed in the paper fall into three groups:

First, there is the expression given to European 'Union' which can be interpreted in both descriptive and normative form.

Second, there are the values relating to the market order.

Third, there is a group of values pertaining more generally to the concept of a civil society - for example certain rights of citizenship.

This paper describes the way in which these different groups of values are treated in the Treaty text, discusses the nature of the values involved and identifies the issues raised by the current manner of their expression.

For the purposes of this discussion the Treaty is taken as representing a snap shot of current views. This is a simplification since the Treaty incorporates views that have evolved over time and because it implies a degree of logical consistency that is a stage at least removed from the processes of political bargaining that have produced the Treaty and its predecessors.

The main conclusions are as follows:

First, there is lack of clarity about the normative interpretations that can be given to the references to European Union. From a normative perspective, this obfuscation needs to be addressed in future revisions to the treaty because the references to Union can otherwise be put to illiberal use in debate about fundamental values of the European order.

Secondly, there are conflicting elements in the expression given to the market order that reflect an ongoing debate about the character of the market order itself. This raises the prospect of conflict between the rules of the market order rather than the rules being able to provide a framework within which a market order can operate. The divergence of views about how to express market order values within the Treaty also reflects a debate about how to give legitimacy to the setting of rules within a new order such as the European Union.

Thirdly, the debate about the character of the market order and the attention given to the issue of the legitimacy of rules has led to a neglect of the importance to be attached to process and the institutional framework for a rule based market order as compared to an emphasis on end state objectives.

Finally, there is also the prospect of conflict between the other values expressed in the Treaty that are important to a civil order. The key aspect is whether the constitutional processes incorporated in the Treaty are likely to provide a secure framework for the realisation of the values expressed.

If there is a common thread underlying the shortcomings in the treatment of the different types of values in the Treaty on European Union it lies in the tension between the treaty as an expression of goals as compared with the treaty as an expression of process and a fundamental conflict between a concept of hierarchical rules for the constitutional order in Europe and a concept of competing jurisdictions consistent with a decentralised constitutional framework.

## II. EUROPEAN UNION AS 'IDEAL'

The new treaty base for the European Community is entitled 'Treaty on European Union' a change of more than symbolic importance from the titles of the previous treaty base, namely the 'Treaty Establishing the European Economic Community' and the 'Single European Act'. Article A of the new Treaty contains a number of references (discussed below) to the 'European Union'. The issue is what kinds of value judgements are involved.

### Union as Description

One interpretation of the use of the term 'European Union' is that it is intended simply as an empirical statement of fact to describe the contents of the new Treaty. In other words no value judgement at all is implied; the 'Union' is what the Treaty says it is - no more, no less. The first clause of Article A could be read to support this interpretation - "By this Treaty, the High Contracting Parties establish among themselves a European Union, hereinafter called the 'Union'".

A second interpretation is that the term 'European Union' is descriptive of a process. A process by which the Member States of the Community act collectively together. Again no value judgement is implied. Article A would also support this interpretation - "This Treaty marks a new stage in the process creating an ever closer Union among the peoples of Europe".

### Normative Interpretations

The three remaining possible interpretations all involve normative propositions. One is a normative proposition about processes - that all processes should promote Union. This has the implication that the processes chosen should themselves be evaluated with processes that promote Union being 'good' and processes that do not being 'bad'.

A second normative interpretation is that the phrase "ever closer Union" involves a commitment to an end state of 'union' which by implication has not yet been reached and thus by inference lies beyond anything in the current Treaty. The value statement is that there is an end state of 'union' (as yet not fully defined) that should be the goal for the Member States.

The final and strongest form of normative interpretations is that the goal of European Union should be regarded as an ideal overriding value and a value by which other values are themselves judged. If this were accepted it would mean that in a debate about rival values, the value to be attached to the European Union would override.

These possible empirical and normative interpretations of the 'Union' are summarised below:

- |             |   |  |
|-------------|---|--|
| Descriptive | { | - Union describes the Treaty;                          |
|             |   | - Union describes processes;                           |
| Normative   | { | - Processes should promote Union;                      |
|             | { | - An end state of Union should be the goal;            |
|             | { | - European 'Union' is an ideal value above all others. |

### The Role of the Normative Interpretations

What logical role do the values incorporated in the normative interpretations play? The first two normative statements given above are open to qualification and dispute by other assertions of values. Thus it could be argued that processes should promote Union as long as and only in so far as they meet other norms - for example those relevant to democratic processes such as transparency, accountability etc. Similarly, the end goal of Union might also only command contingent support depending on the type of Union envisaged - depending for example on the type of market and civil order to be achieved and the character of the constitutional arrangements made to secure them.

If it is accepted that the normative judgements about processes and end

states can be subject to challenge and qualification by the assertion of other values, it can be seen that one rationale for the attempt to establish the third normative proposition of 'Union' as a value above all others would be to remove from the debate certain competing values and qualifications.

One particular application of the desire of some who wish to establish the value to be attached to the Union as a value above all others is the ideal of a European civil and constitutional order that has priority in a system of political values above the values to be attached to the nation state in Europe.

#### 'Union' as a higher order value

The difficulty in accepting European Union as a higher order value above all others is the logical difficulty of validating this use in respect of certain competing values (for example in respect of the nation state) while limiting it in respect of other values (for example in respect of the nature of the civil and constitutional order in the Union). But clearly the intention of the Treaty is also to assert other values associated with a civil and constitutional order. For example Article F refers to 'fundamental rights' and the 'principles of democracy'. It seems therefore that the assertion of Union as a value above all others is a misuse of what is in other parts of the Treaty a qualified value.

The question still remains as to whether an assertion of 'Union' values can nevertheless be used to cut off arguments based on the value of the nation (member) state. The Treaty itself does not yet appear to support such a clear interpretation. One aspect inhibiting the assertion of the superiority of Union values is that the Union is itself a contract between the Member States (from which they



can withdraw) and in important respects has the character of what is traditionally viewed as an intergovernmental cooperation agreement. Furthermore, unlike traditional federal agreements there is not a delineation of 'state rights' which provides for an ordering of a political hierarchy. There is indeed a legal hierarchy in the sense that Community law prevails over the law of Member States in the areas to which Community law applies. But the area to which Community law and the jurisdiction of the Court of Justice applies is as yet a limited area and the extension is itself the subject of debate. Moreover, a proposal for a new category of Union law which had the intended effect of subordinating the law making institutions of Member States was rejected in the recent treaty negotiations. At the same time the Treaty on European Union strengthens the vires provisions of the Treaty base with the clause, "Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty" (Art.3b.third indent).

The nature of argument about 'Union' values as compared with the value to be attached to the Member State also needs to be treated with some care. Even if the European Union is accepted as a new and superior framework for political and civil association in Europe, there may still rest with the nation state important values relating to that union. For example, it might be argued that the framework of the nation state should be retained as far as possible in order to keep political exchange as close as possible to the people and their civic identities, as a buttress against over-centralisation, as a basis for competing jurisdictions and approaches to public policy and as an essential means for individuals and communities to exercise 'voice' and 'exit' within the union. In other words, the debate about the Union as compared with the nation state which may at first sight look to be a

simple assertion about the superiority of one value over another may, at a more fundamental level, represent instead an argument about the overall constitutional order within the Union and the values it should encapsulate<sup>1</sup>.

This discussion therefore suggests that the normative assertions that might be made about 'European Union' from the Treaty on European Union are values that are subject to qualification by other values and cannot in themselves bring an end to argument involving competing values.

There is little doubt that the Treaty could have been drafted so as to achieve greater clarity on the normative element behind the references to 'Union'. Future versions will no doubt have to incorporate clearer statements. This is not simply a point about the logic of value statements. From a normative perspective, the present lack of clarity means that the current text on European Union is open to misinterpretation and to abuse by being used to attempt to cut short arguments that refer to competing values. Unless clarified the references to 'Union' can be put to illiberal use.

### III. THE MARKET ORDER

#### Background

There are three main strands in the current debate about the market order in the European Union. There is first the free market tradition, secondly the neo liberal tradition of the social market and thirdly there is the etatist or dirigiste tradition. The latter, with its belief in the advantages of active intervention in the market order by a beneficent state, is the residuary legatee of socialism. The environmental movement in Europe is generally anti free market but is divided on

the question of the role of the state and does not seem to have developed a clear overall theory of market order to contribute to the debate. It does however influence the debate on the environment and the market order.

As a matter of historical record the relative strengths of these traditions have varied over time. The origins of the Economic Community were heavily influenced by dirigiste thinking; more recently the influence of free market and social market thinking has been heavier.

At this stage the relationship between the three main strands in the debate is best seen as one of shifting alliances. The neo liberal supporters of the social market order share a belief in the virtues of the free market but reject the concept that the free market can be relied on to evolve spontaneously and see instead the need for a constructed market order within which a free market can operate. This approach, together with a belief in the inter-dependence of economic, social and political structures, means that the social market tradition may find itself in partnership on some issues relating to the market order with the dirigiste tradition. Another way of looking at this relationship is to see the three main strands as in an unstable coalition with the neo liberals allying with one partner and then the other depending on the particular market rule involved.

Subject to the qualifications stated above, it is a fair generalisation to regard the dominant strain of thinking in Europe about the market order as centred on the concept of 'the social market'<sup>2</sup>. Broadly speaking the prevailing view is that while a system of free markets is the most effective (or least ineffective) way of generating wealth in society, its wealth creation benefits must be tempered by state intervention. The case for state intervention includes concerns about the

distributional effects of free markets (unequal outcomes); lack of fairness of process (unequal access to services or to opportunity); market imperfections (for example the tendency for markets to overshoot or to be short termist); market failures (for example the tendency to underprovide public goods or to fail to properly reflect externalities) and a view that in certain areas of economic activity, cooperation or nurturing may be superior to competition from home or abroad.

Supporters of the free (unqualified) market order respond to these critical perceptions by stressing the moral values consistent with a free market order, the imperfections and failures of government, and the systemic benefits to a civil society that flow from a free market that circumscribes the power and influence of government.

### The Treaty

The Treaty base for the European Union reflects the dominant strain of the 'social market' while attempting to synthesise the three different approaches to the market order. Thus, the basic concept of the Single Market is free market in its emphasis on the unimpeded flow of goods and services, the free flow of capital, the free movement of persons and the right of establishment within the Single Market area as well as in the rules of competition that have been adopted. The free market perspective receives some further support in the new Treaty which refers to "The framework of a system of open and competitive markets" (Title XIII) and notably in the new provisions on monetary union which state "The Member States and the Community shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources"

(Art.102 A).

Concurrent with these free market provisions, the Treaty on European Union retains the dirigiste features going back to the origins of the European Community that favour interventionism and managed markets. Arguably, some of the new additions to the Treaty extend this interventionist heritage to certain additional areas. Furthermore, the new Treaty also contains features that reflect an extension of social market values. Both these aspects are discussed further below.

As far as social market features are concerned, the previous Treaty base already contained a "Social policy" (Title III) which included provision for a social fund as well as a title on "Economic and social cohesion" (Title V). In the new Treaty the purposes of the Social Fund are widened, "to facilitate their (worker) adaptation to industrial change and to changes in production systems" and a new "Cohesion Fund" is established under the economic and social cohesion Title to facilitate redistributive programmes between the Member States. New Titles on public health, "Health protection requirements shall form a constituent part of the Community's other policies", education and culture can all be loosely seen as a form of recognition of a 'social dimension' to the Community. Finally and most important there is the agreement on the "Social Charter" concluded between the Member States with the current exception of the United Kingdom. This reads in part, "The Community and its Member States shall have as their objectives the promotion of employment, improved living and working conditions, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion".

Turning to the market interventionist traditions of the Community, it is

notable that the various treaties, including the Treaty on European Union, have never contained an unequivocal commitment to international free trade outside the common market area. Belief in the virtues of market regulation have found their strongest expression in the Common Agricultural Policy and to a lesser extent in the provisions of the original coal and steel community. Subsequently, the Single European Act added to the Treaty base a title on research and technological development (Title VI) which reflects a belief in the efficacy of government intervention and cooperation between enterprises in order to promote the "right kind" of research. The Single European Act also added a chapter on environmental policy (Title VII) reflecting, inter alia, a belief in the ability of governments "to ensure a prudent and rational utilization of natural resources".

The tension between the market interventionist heritage of the Community and its free market element is reflected within the scope of a single title in the industrial policy provisions of the new Treaty on European Union. Title XIV places this policy within the context of "a system of open and competitive markets" and states that "this title does not provide a basis for the introduction by the Community of any measure which may distort competition". At the same time the Title clearly embodies the view that government intervention is able to help "speeding up the adjustment of industry to structural changes" and "fostering better exploitation of the industrial potential of policies of innovation, research and technological development".

Table 1 attached shows the various economic titles contained in the Maastricht Treaty allocated according to the tradition to which they belong. In instances where a title (such as the CAP) stems predominantly from the dirigiste

tradition but at the same time is compatible with a different tradition (the social market tradition) the link is illustrated on the table with a connecting line.

### **The Potential for Conflict Between Rules**

At a purely practical level, the interplay in the Treaty base of the European Union between free market approaches to the market order, dirigiste views and policies that fit more comfortably within a social market view of market order, can be seen as setting up the conditions for an inevitable conflict between rules rather than the establishment of rules within which there is a market order. If this perspective were born out, there will be such tension arising for example, between rules on industrial policy and competition policy or between the CAP and external trade policy that a stable rule based market order will not emerge.

One way of viewing this potential conflict between the rules of the market order is to see it as a transitional problem. Some of those of a free market persuasion are confident that those rules that are not free market oriented will in fact succumb over time to the pressures of market forces. This way of viewing the issue tends to overlook the reaction of those of a dirigiste persuasion who will by contrast tend to react to conflict between rules by attempting to strengthen the regulatory and interventionist framework. This leads to a different scenario of continuing conflict over the rules of the market order. In these circumstances the attitude of neo liberals will likely remain the key swing factor in determining the outcome of debate on particular rules or their interpretation.

The potentially decisive role of the neo liberals in resolving actual cases of conflict between the rules of the market order may seem like a perfectly acceptable

practical arrangement. The degree of uncertainty introduced may seem no more than must in any event be allowed in order to accommodate the range of political exchange that takes place within a rule based system. But this uncertainty of outcome in the resolving of conflict between rules and the indeterminacy of the market order defeats one of the basic purposes of a rule based market order. This is to provide a known and stable base within which economic agents can take decisions and act. Moreover the lack of clarity provides a fertile territory for special interests to exploit in trying to influence the adoption of rules that favour their particular interests. It also gives room to the central bodies of the Community to act with discretionary authority and to indulge their own interest in building their regulatory and interventionist powers rather than being constrained to act within a system of rules. The potential for conflict between the rules of the market order is therefore a basic practical and theoretical flaw.

What underlies this basic flaw of the unpredictability of the market order in the European Union? Is it simply that the differences of views about the appropriate market order are, despite the collapse of socialism, in fact unbridgeable at this stage in the development of the European Union? There is an alternative or supplementary explanation. It centres on a debate about the legitimacy of rules for the market order.

### The Legitimacy of the Market Order

The qualifying adjective "social" in front of "market" is sometimes regarded as simply a public relations ploy to make the free market acceptable. This however trivialises an important question. The European Union is in the process of being set



up as a new form of political and civil order in Europe. Inevitably and desirably it must be a rule based order. This applies not only to the constitutional framework but also to the market order. The issue is what confers "legitimacy" on the establishment of new rules or rules in a new order. It was of course precisely this problem that confronted the German free market tradition in the postwar establishment of the German market order. It is not surprising therefore that Europe looks to this earlier experience in the legitimising of market rules.

There appear to be two key concepts in the neo liberal or social market theory of what it is that gives legitimacy to the setting of rules. The first (explored by Franz Bohm in his concept of what in English translation is referred to as "the private law society")<sup>3</sup> is the need for the rules to have the general acceptance of individuals and private associations in society. This is a view of consent not based on traditional contractarian theory that authority in a civil order gains legitimacy through providing end state guarantees (for example in providing external security or the means of enforcing domestic law and order) to which people consent. Neo liberal theory denies this way of establishing a dichotomy between the individual and the state. Rather it is a view that meaningful exchange in society simply cannot take place without the voluntary agreement of all participants to a transaction. 'When the sale and delivery of goods takes place, the agreement of everyone involved in the transaction between the buyer and the seller legitimises the transaction'<sup>4</sup>.

A second key concept is for rules to be inclusive of all in society. This is related partly to the need for rules to be acceptable to all (including those who may not be able to stand up to the risk taking and responsibilities in a free market order)

but in addition is based on the neo liberal view of the inter-dependence of economic, social and political systems, and to help avoid a perceived dynamic that in an entirely free market system, the gainers in a free market are likely over time to dominate constitutional and legal processes<sup>5</sup>. Rules therefore must have a social dimension. Sometimes this social dimension is seen as representing a normative element in the neo-liberal tradition (market rules should have a social dimension). In origin however, the theory was based on positive analysis of how a market order works.

This approach to the legitimacy of market order rules applies not only to the situation as it existed in post war Germany but was seen by social market theorists to apply by extension to the new European order. 'Within European integration, a synthesis of social balance and free scope for the action of market forces will also have to be sought'<sup>6</sup>. It is not a long leap to move from this line of thinking to Article B of the Treaty on European Union which states in its opening, 'The Union shall set itself the following objectives:- to promote economic and social progress'.

A rather different way of looking at neo liberal theory of market rules is to see it related to a particular view of individual freedom. According to this perspective, the value to be attached to the ability of the individual to exercise his 'autonomy' is more important than a view of individual liberty which stresses freedom from coercion. The value of 'autonomy' leads in turn to a view that government should have 'enabling' authority to help the individual exercise his autonomy<sup>7</sup>. However, this approach is subject to two difficulties. One is the problem of attempting to characterise the different aspects of individual freedom and to order one type of freedom over another. The second is the difficulty of

setting limits to the enabling authority of governments.

The neo-liberal approach to legitimacy tends to be applied in a highly simplified form by its advocates when it comes to a discussion of the contents of Europe's Treaties. Typically the logic might run - the economic rules of the Community must be generally acceptable in order to be workable; in order to be "acceptable" they must reflect a social dimension; therefore Community rules must contain a social element.

When expressed in this simplified form, the application of social market theory is open to several objections - who is to decide what is generally acceptable? Is there any simple dichotomy between what the market provides and a social component that has to be provided by collective action? Is there any logical necessity that a social element has to be incorporated at the Community level (rather than at the level of the Member State or below)? Each of these questions challenges the immediate applicability of any simplified social market theory to the rules of the Community. Nevertheless the more fundamental issues about legitimacy and acceptability remain.

### The Liberal Critique

The traditional liberal critique of the social market theory of rules is first that the inclusion of the social dimension in market rules opens the way for values of distributive justice that fail to acknowledge the values that can be achieved within a free market system and which will end by destroying the market order itself. It is a critique associated particularly with Hayek: "There is indeed much we can do to improve the framework within which the market will operate beneficially. But

we cannot in such a society make the distribution of incomes correspond to some standard of social or distributive justice, and attempts to do so are likely to destroy the market order".<sup>8</sup> The critique that social market rules will self destruct is a argument whose force is recognised by some German neo liberals themselves.<sup>9</sup>

The second traditional critique of social market theory is that by focusing on such end state objectives as social harmony or cohesion it gives inadequate attention to process. By legitimising a potentially open ended role for government but at the same time neglecting such processes as the growth of the state, social market rules lay the ground once again for the destruction of the market by the state<sup>10</sup>.

Before going on to discuss the issue of process and the related question of the institutional order, it is worth noting that neither of these two classic objections to social market theory addresses the issue of how to give legitimacy to a new market order. Yet this was a key question which the German neo liberals were attempting to answer. It is of crucial relevance once again in establishing the market order in the new European Union and expressing it in treaty form.

A free market view that rules are legitimised by evolution and not by acceptance of a conscious design (which must necessarily be imperfect) is undermined by the Hayekian acceptance of the need for rules to govern a free market order. Those rules themselves have to be legitimised. Neither does an evolutionist view address the practical situation where a new order is being established, as in post war Germany and once again in contemporary Europe, that a failure to put forward a view of market order will inevitably leave the field clear

for advocates of statist traditions of great destructiveness to liberal values. Thus arguments about the self destructive nature of the neo liberal market order have a hollow ring.

There is yet another contemporary example where new rules of market order are being established and that is in Central and Eastern Europe. In this context the importance of the general acceptance of the norms of a civil order and the shortcomings of "uncivil economic activity" have been stressed in a recent analysis.<sup>11</sup> It is a return to a key point of the neo liberals.

One important approach to the question of legitimising rules in society attempts a synthesis between rules as the product of custom or evolution, rules as an instrument for domination (or the coercive power of the state) and rules as an expression of moral standards as understood by human reason.<sup>12</sup> This synthesis does not settle the issue. It does however throw open to question several important neo-liberal assumptions. It leaves open for debate the question of what values should be incorporated as rules.<sup>13</sup> It also leaves open for debate the circumstances in which coercive rules are justified and, finally, it leaves open for analysis the way in which evolution is not just the product of individual choice or of the outcome of the action of individual economic agents but a process that can be profoundly influenced by institutional behaviour of those with an interest in domination. It is this process that is next discussed.

### Process

It was mentioned above that end state features of social market theory have left it exposed to the charge of neglecting process in the constitutional order. This

is not an entirely accurate characterisation since neo liberal theory has its genesis in observations about process and the fear that, left unstructured, market processes would lead in non liberal directions. Moreover, there are some aspects of process of importance in the context of Europe's constitutional order that neo liberals have emphasised from an early point - for example the principle of subsidiarity - defined as the need for decisions to be taken at the lowest level of authority as possible.

Nevertheless the criticism that social market theory does not give sufficient attention to the problems of process would seem to be valid. There are two related aspects. The first concerns the policy framework embodied in the market order that sets in train certain governmental and constitutional processes. The second concerns institutional behaviour within a framework of rules. Each aspect is outlined briefly below.

#### Process and the Policy Framework

As far as the policy framework is concerned, the social market tradition shares with the liberal tradition a concern to establish a strict competition law and a belief in the need for a monetary constitution that places the value of the currency outside the discretionary management of politicians. It has tended to neglect the fiscal order and has been less robust than the liberal tradition in respect of international free trade. At least some neo liberals appear to regard external trade as representing a simple analogy with the domestic market order and something to be managed by governments taking into account the social

implications<sup>14</sup>. It is in this respect and particularly in respect of the social dimension of the market rules for the domestic market order that government receives its authority to regulate and to intervene in the market. What this can lead to in terms of an ever increasing spiral of intervention, regulation and government spending is not addressed.

This imperfect treatment of governmental process is reflected in the Treaty on European Union. On the liberal side the Treaty contains a competition law whose imperfections in implementation stem from a different source discussed below. The Treaty also contains provisions for monetary union based in large part on the Bundesbank model of central bank independence which is intended to reduce the discretionary power of government in managing the union currency. Whether, in the circumstances of uncertainty as to whether or not the Member States constitute an optimum single currency area, this model needs to be supplemented by aspects of the so called "over-ride" model of central bank management which could introduce a greater measure of contract and transparency into the management of the currency is a separate issue.

The areas in the Treaty where process is not given sufficient attention is in respect of the fiscal constitution where there is a lack of adequate safeguards against ever growing expenditures at the Union level, in respect of external trade where the lack of a clear commitment to free trade has given undesirable discretionary authority and regulatory power to Community bodies and finally, in respect of the social dimension which feeds a process of central regulation running counter to the deregulation needed to reap the benefits of the Single Market. It is an over simplification to say that neo liberals, "have not extended their rule-

oriented perspective to government itself"<sup>15</sup>. It is however fair to say that the treatment has been highly inadequate and the consequences for the market and constitutional order flowing from the authority allowed for government not properly appreciated.

### **Institutions and Process**

Neo liberal theory has, in addition, totally neglected the questions that relate to the behaviour of government institutions and public bodies. This branch of constitutional economics is simply missing in the neo-liberal tradition. Government institutions seem to be regarded as benevolent<sup>16</sup>. This provides an important tangency to the dirigiste tradition in Europe.

In the context of the European Union this lacuna in respect of institutional behaviour is reflected notably in the failure to address the powers of the Commission which are incompatible with any free market order or decentralised constitutional order. The administration of competition policy illustrates the problem. The regulatory authority of the Commission is subject to political influences within the Commission and judicial processes distorted by the Commission's other concerns, for example, by industrial policy or its attitude to state aids. It also helps to explain the failure in the Treaty on European Union to grapple with the issue of the relationship between the European parliament and national parliaments which has to be seen in large part as a matter of incentive structures for centralised or decentralised governance.



#### IV. VALUES IN A CIVIL SOCIETY

##### The Treaty Provisions

The Treaty on European Union also expresses a third group of values which relate more generally to the values of a civil order. Most striking among these at first sight are the provisions on citizenship of the Union. After a general reference to "rights" and "duties", the Treaty refers to the rights of residence and movement (as currently qualified), the right to vote in elections to the European Parliament, the right to petition the European Parliament and the right of diplomatic protection.

In themselves these statements of rights are compatible with most views of a civil order<sup>17</sup>. There is however a different perspective which is involved. The citizenship provisions can be seen as part of an attempt to endow the Union with the characteristics of a state. This implies that the values to be attached to the rights of citizenship would be worth only as much, or as little, depending on the constitutional nature of that state. The most that can be said at this point is that the constitutional order of Europe is currently unstable and its eventual direction far from settled. Those in favour of a liberal constitutional order fear that it could go in directions that would be most inimical to the individual freedoms that seem implicit in benign notions of citizenship.

Leaving aside the provisions on citizenship there are features of the previous Treaties that are still retained as well as other new features of the latest Treaty that are important for designs of a civil order. Among the features of the previous Treaty base is Article 7 (Article 6 in the new Treaty) against discrimination on the grounds of nationality. This, together with Article 48 (relating to discrimination based on nationality in the labour market), is potentially of considerable importance

in view of ethnic tensions in Europe. Also important are the provisions of Article 119 on sex discrimination.

A further important feature of the Treaty is the reference in Article F to the European Convention on Human Rights which states that they will be respected "as general principles of Community law".

Finally, one of the two new "pillars" of the Maastricht Treaty deals with Home Affairs cooperation which could well involve issues relating to the civil order. It is to be noted in this context that cooperation under this Title is on an inter-governmental basis and does not involve the Court of Justice unless the Member States so decide. Each of these different aspects is summarised in Table 2 attached.

#### The Constitutional Purpose of Civil Order Values

Most societies try to express civil order values in their constitution - usually in the form of declarations about rights. They can serve three quite different purposes. First, they may represent what it is that the state exists to secure (for example defence against external aggression). Second, they may serve as an expression of social "identity" (values accepted by all as the signature of that society). Third, they may represent an attempt to put a ring fence around certain key or higher order values as a means to protect them against erosion by discretionary politics.

One traditional concern about the attempt to reflect such values in constitutional form is that instead of acting as a defence against government an expression of values may be interpreted as a licence for government. Generally

speaking the longer the list of rights the greater the danger. There is also a need to distinguish between values that can be exercised in society and those values that simply reflect aspirations (the right to an unpolluted environment). Again, the expression of aspirations tends to be a licence to governments. The Maastricht Treaty however, at this stage, gives rise not so much to these traditional concerns as to quite different questions, namely whether hierarchical jurisdiction is appropriate in Europe in relation to civil order values.

#### Hierarchical Jurisdiction

The Treaty refers to three different legal regimes - the law of Member States, the jurisdiction of the (Strasbourg) Court of Human Rights and the jurisdiction of the European Communities' Court of Justice (Luxembourg).

The basic issue is whether the Communities' Court of Justice is an appropriate Court for settling civil order questions. Since the rulings of the Court of Justice have superiority over the laws of the Member States, the use of the Court of Justice implies that a hierarchical concept of law applies in this area. But that is open to question. Insofar as civil order values reflect social identities, Europe is an area of overlapping identities in which the identification with Europe is only one and not necessarily the most strongly felt.

One response is to say that civil order values should, in future Treaty revisions, fall exclusively within the jurisdiction of Member States. This however means that commonality would only be coincidence and that conflicts cannot be resolved.

A second possible response would be to say that civil order issues should

remain with the Member State except to the extent that they involve fundamental rights of the sort involved in the Convention on Human Rights. The Court of Human Rights would remain as a Court to provide a degree of commonality. It has the advantage (compared with the Court of Justice) of invoking an appellate process so that issues may get resolved with the Member State, the appeal process itself may elucidate the nature of the dispute and there is emphasis on conciliation.

This approach would raise the question as to whether there can be a clear distinction between the rules of the economic order, the necessary approximation of laws to achieve the single market freedoms and the judicial enforcement under the Court of Justice necessary to implement them without crossing a line into civil order questions. The freedom of persons to move, for example, has run into questions relating to civil order issues in both England (in relation to immigration) and in Ireland in relation to abortion. US experience with the interstate commerce clause also illustrates how a jurisdiction relating to an economic freedom might be used in far reaching ways in relation to other values in society. A demarcation procedure would be needed to limit civil order questions to Member States and the Court of Human Rights while restricting the Court of Justice to questions relating to the exercise of powers by Community bodies (such as the Commission) and to questions relating to market order to the extent that they did not raise civil order questions.

### The Constitutional Dimension

The presence of written rights in the Treaty on European Union does not of

course guarantee that they will be observed. That depends on the attributes of the legal system and more generally on the quality of the constitutional order itself. Moreover, written constitutions may provide a framework for a free society but in the final analysis that freedom relies on the citizenry itself. Liberals believe a free market is an indispensable component of a free society not only because it acts as a check on government but also because it cultivates a climate of individual responsibility in which citizens are more likely to learn to value and uphold their freedoms.

From this perspective the risks to individual freedoms in the treaty on European Union do not come mainly from inadequate statements of rights. They stem from the uncertainties of the market order and the need to avoid centralisation in the Union. In addition to the important questions discussed above about the legal setting in which the Court of Justice operates and the Court's relationship both to competing systems of national and constitutional law and to the judicial processes of the European Convention on Human Rights, of fundamental importance is whether the Union is set on a direction of centralising power or whether a decentralised constitutional order in Europe can be established. The need to allow competing jurisdictions is not an issue about the nation state. It is an issue about keeping government close to the people, allowing for the expression of different preferences, encouraging a discovery process to operate in respect of the development of public policy and a means for allowing for "voice" and "exit" without geographical mobility within the Union<sup>18</sup> or exit from the union itself as the only means of expressing dissent.

These fundamental issues about the constitutional future of the European

Union are still open and hang in the balance. It is for liberals to argue their case and to work towards the kind of constitutional framework for the European Union that is most compatible with the market order and individual freedom. They are hampered in this task because there is not a single major issue relating to Europe's constitutional future on which liberals are agreed.

TABLE 1

MARKET RULES<sup>1</sup>

FREE MARKET

NEO-LIBERAL  
(Social Market)

DIRIGISTE

	----- ECSC (Energy Policy (t))
Free Internal Trade (a) -----	
	Common Commercial Policy (b) -----
The Single Market (c) -----	
	----- Common Ag & Fish Policy (e)
-----	Common Transportation Policy (f) -----
-----	Competition Policy (g)
-----	Approximation of Laws (h) -----
	European Social Fund (i) -----
	Economic & Social Cohesion*(j) -----
	----- Environmental Policy (k)
	----- Industrial Policy*(l)
	----- Research & Technology (m)
-----	Trans European Network*(n) -----
	Health Protection (o) -----
	Ed./Training/Culture*(p) -----
	----- Development Cooperation (q)
	Consumer Protection*(s) -----
	Social Charter* -----
-----	(ESCB)

<sup>1</sup>. As set out in Art. 3 of the Treaty on European Union.

\* New or new features at Maastricht

## THE COURTS AND THE CIVIL ORDER

### I. THE EC COURT OF JUSTICE

#### (i) MAASTRICHT Citizenship: Title II, Part 2

"Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby ..." (Art 8)

- Right to move and reside (qualified), 8a
- Right to vote and stand in municipal elections, 8b(1)
- Right to vote and stand in European Parliament, 8b(2)
- Right to petition the European Parliament, 8d
- Right to apply to Ombudsman, 8d.

#### (ii) TREATY OF ROME

- "Any discrimination on grounds of nationality shall be prohibited" (Art 7)
- "The abolition of any discrimination based on nationality between members of workers of the Member States as regards employment, remuneration and other conditions of work and employment." (Art 48(2))
- "Ensure ... the application of the principle that men and women should receive equal pay for equal work". (Art 119)

### II. EUROPEAN COURT ON HUMAN RIGHTS

"The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights....as general principles of Community Law." Maastricht: Title 1, Art F

### III. NATIONAL COURTS

Maastricht Title VI: Cooperation in Justice & Home Affairs



## NOTES

1. See for example, Vibert in Europe's Constitutional Future, (London: Institute of Economic Affairs, 1990).
2. See the discussion in 'The Social Market and the Constitution of Liberty', Gerard Radnitzky, in Britain's Constitutional Future, ed. Vibert, (London: Institute of Economic Affairs, 1991).
3. Privatgesellschaft in the German original.
4. See Franz Bohm, 'Signalling systems in a Society' in The Rule of Law in a Market Economy originally published in the 1966 Ordo yearbook Vol.17.and reprinted in Germany's Social Market Economy: Origins and Evolution ed. Peacock and Willgerodt (London: MacMillan for the Trade Policy Research Centre, 1989).
5. See Walter Eucken, 'Economic Structure and the Constitution' in What Kind of Economic and Social System, op.cit.
6. Alfred Muller Armack in 'The Meaning of the Social Market Economy', op cit.
7. John Gray, The Moral Foundations of Market Institutions, (London: Institute of Economic Affairs Health and Welfare Unit, 1992).
8. F.A. Hayek, 'Economic Freedom and Representative Government' in New Studies in Philosophy, Politics, Economics and the History of Ideas, (London: Routledge and Kegan Paul, 1978).
9. See Walter Hamm, 'The Welfare State at its Limit'. op cit.
10. Norman P Barry, 'Political and Economic Thought of German Neo Liberals'. op cit.

11. Professor Richard Rose, 'Towards a Civil Economy' in Journal of Democracy, (Washington DC: 1992).
12. See Harold J Berman, Law and Revolution, (Cambridge, Mass: Harvard University Press).
13. See for example the discussion in Anthony de Jasay, Choice, Contract, Consent: A Restatement of Liberalism (London: Institute of Economic Affairs, 1991).
14. Wilhelm Ropke, 'Interdependence of Domestic and International Economic Systems'. op cit.
15. Helmut Leipold, 'Neo-liberal Ordnungstheorie and Constitutional Economics' in Constitutional Political Economy, Vol.1, No.1. 1990.
16. Ibid, page 60.
17. There is however an absence of specific reference to property rights. In this respect there is a curious contrast with the Europe Agreements signed with central European countries which refer to "the protection of intellectual, industrial and commercial property rights" and "means of enforcing such rights". (See for example Article 66 in the Europe Agreement with Poland). The reference to the European Convention on Human Rights does not in itself cure the absence since the provisions of Article 8 confer rights in a highly attenuated form.
18. For this point see, Pierre Salmon, 'Decentralisation as an Incentive Scheme' in Oxford Review of Economic Policy, Vol.3, No.2. 1990.