



ARTICLES

RE-CONCEPTUALIZING AUTHORITY AND LEGITIMACY IN THE EU

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THE LEGITIMACY OF THE EU IN HISTORICAL PERSPECTIVE: HISTORY OF A NEVER-ENDING QUEST

LISE RYE*

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ABSTRACT: This *Article* revisits the EU's foundational decade with the view to explain the idea of legitimacy as legality that made its mark on the Treaties of Paris (1951) and Rome (1957). To the architects of these Treaties, it was the Member States' decision to create a common market that justified the creation of supranational institutions in general and the powers of the European Commission in particular. While the mechanisms for legitimacy through democratic rule in the Treaty of Rome were weak, this Treaty nevertheless included the seeds for such rule, leading to the conclusion that the legacy of the Treaty of Rome in this matter is mixed.

KEYWORDS: common market – elitism – technocracy – legitimacy – Spaak – democratic rule.

I. INTRODUCTION

The period of permissive consensus is generally and across academic disciplines interpreted as a period where legitimacy, in a European context, was a non-issue.¹ This period thus contrasts sharply with the post-Maastricht period, where concerns about the

* Professor of Contemporary European History, Norwegian University of Science and Technology (NTNU), lise.rye@ntnu.no. This research was carried out as part of the RECONNECT project, which has received funding from the European Union's Horizon 2020 research and innovation programme under Grant Agreement no 770142. The information in this *Article* reflects only the Authors' views and the European Union is not liable for any use that may be made of it.

¹ F. LANGDAL, G. VON SYDOW, *Democracy, Legitimacy and Constitutionalism*, in *Scandinavian Studies in Law*, 2007, p. 351 *et seq.*

legitimacy of European integration became widespread.² Existing research explains the absence of politicization of European level politics in the period between the French National Assembly's 1954 rejection of the Treaty establishing the European Defense Community (EDC) and the 1991 Treaty on European Union with this period's focus on market integration. "The implications for most people (except perhaps for farmers) were limited or not transparent", Hooghe and Marks point out, in a highly cited article from 2009. Consequently, "Public opinion was quiescent".³ This *Article* shifts the focus from the general public to the political and administrative *élites* that prepared and negotiated the 1951 Treaty of Paris and the 1957 Treaty on the European Economic Community (henceforth the Treaty of Rome). The *Article's* point of departure is that ideas of legitimacy did inform the work leading up to the founding Treaties and that an idea of legitimacy as legality dominated this work. Drawing on the existing canon of historical literature and primary sources from the Historical Archives of the European Union, the purpose of the *Article* is to explain how the idea of legitimacy as legality developed and manifested itself in the institutional architectures and in the 1957 decision to authorize the Commission to negotiate trade deals with third countries.⁴

The following section discusses the introduction of supranationality in the Treaty of Paris, which from a perspective of popular participation set the European integration project off on the wrong foot. Turning to the Treaty of Rome, the third and fourth sections examine the work in the Intergovernmental Committee and the Intergovernmental Conference respectively. Historians have generally not been too preoccupied with the emergence of European-level institutions, leading to a situation where historical research has relied heavily on *memoirs*.⁵ Anne Borger-de Smedt's 2012 article into the basis for European law in the Treaties of the 1950s is a welcome exception to this trend. Borger-de Smedt investigates why the Treaties of Paris and Rome offered "sufficient legal basis for the European Court of Justice (ECJ) to build its constitutional interpretation", when they were "apparently designed to ensure the centrality of the Member-States."⁶ This *Article* concentrates on the role of the European Commission. Section three asks how the Treaty of Rome came to include this common institution with pow-

² A. FØLLESDAL, *Legitimacy Theories of the European Union*, in *ARENA Working Papers*, 2004, available at www.sv.uio.no.

³ L. HOOGHE, G. MARKS, *A Postfunctionalist Theory of European Integration: From Permissive Consensus to Constraining Dissensus*, in *British Journal of Political Science*, 2008, p. 5.

⁴ The archives consulted for this *Article* is the CM3/NEGO-fonds held by the Historical Archives of the European Union (HAEU). The CM3/NEGO fonds consist of 418 files, covering the period from the 1955 relaunch of European integration to the 1957 Treaties of Rome. I am thankful to my colleague at Copenhagen University, Morten Rasmussen, who generously lent me a digitalized version of these fonds.

⁵ K. SEIDEL, *The Process of Politics in Europe: The Rise of European Elites and Supranational Institutions*, London, New York: I.B. Tauris Publishers, pp. 2-3.

⁶ A. BOERGER-DE-SMEDT, *Negotiating the Foundations of European Law, 1950-57: The Legal History of the Treaties of Paris and Rome*, in *Contemporary European History*, 2012, p. 340.

ers of its own. The argument presented is that Paul-Henri Spaak's role in this matter was key. In making sure that all proposals could be traced back to the decisions of the participating governments, Spaak managed to keep the sovereignty conscious governments on board. Spaak also formulated the principles that informed the work in the Intergovernmental Committee, and that eventually led this Committee to propose four distinct institutions. Section four examines the negotiating parties' decision to grant the Commission the authority to negotiate trade deals with third countries, explaining how this was considered a necessary consequence of the move from sectoral to general integration. In both cases that the *Article* examines, the States' decision to create a common market justified the creation of supranational institutions, in general, and powers of the European Commission, in particular. In combination with the deliberate exclusion of mechanisms for legitimacy through democratic rule, this set the scene for the backlash that manifested itself against the EU legitimacy deficit from the 1990s onwards.

II. THE TREATY OF PARIS AND THE INTRODUCTION OF SUPRANATIONALITY

Historical research interprets the formulation of the 1951 Treaty of Paris as a tug-of-war between the advocates of a strong and independent High Authority and the champions of democratic control.⁷ In her fine empirical study of the basis for European law, Anne Borger-de Smedt demonstrates how this tug-of-war eventually ended in a pragmatic compromise.⁸ This compromise also constituted a first and important step in the establishment of an elitist culture where experts exerted significant power and where the mechanisms for popular participation and control were weak. In that sense, the Treaty represented a victory for the functionalist approach to European integration, and a setback for the competing, constitutional approach that other European federalists had advocated since the final years of World War II. With this Treaty, the signatories initiated a predominantly pragmatic and technocratic form of cooperation that paid little concern to citizens' participation. The Europe that took shape from the beginning of the 1950s was the Europe of Jean Monnet, not of Altiero Spinelli – Monnet's Italian contemporary, who conducted a life-long battle for a more democratic Europe.

The Treaty of Paris established an institutional architecture that reflected contemporary political, economic and social concerns and the personal experience of key actors. The centerpiece of this architecture was the High Authority – the mighty predecessor of today's European Commission and the brainchild of Jean Monnet.⁹ The historical literature traces Monnet's insistence on a powerful supranational institution to his positive experience with inter-allied executive committees during the World Wars, with eco-

⁷ A.S. MILWARD, *The Reconstruction of Western Europe 1945-51*, London: Routledge, 1984, p. 409.

⁸ A. BOERGER-DE-SMEDT, *Negotiating the Foundations of European Law, 1950-57*, cit., p. 347.

⁹ D. SPIERENBURG, R. POIDEVIN, *The History of the High Authority of the European Coal and Steel Community. Supranationality in Operation*, London: Weidenfeld & Nicolson, 1994, p. 10.

conomic planning in France after World War II, as well as to the role of transatlantic policy networks.¹⁰ The existing scholarly research argues that the legacy of the Monnet Plan that led to the creation of the European Coal and Steel Community (ECSC) was to establish the notion of a technocratic approach as well as a corporatist mode of operation.¹¹ On a more general level, the faith in experts, the elite-orientation and the delegation of authority to supranational institutions that would eventually characterize the ECSC was also a reaction against the mobilization of masses associated with totalitarianism and the failure of the more intergovernmental League of Nations to prevent World War II.¹²

The Schuman Plan envisaged a vague institutional structure, making no mention of either a council of ministers or an assembly. Its focus was on the new and supranational body – the High Authority –, while stressing that “appropriate measures” would be provided “for means of appeal against the decisions of the Authority”.¹³ At the opening of the Paris negotiations, it soon became clear that while the other delegations accepted the supranational institution in principle, they insisted on the need for political and judicial measures to limit and control its powers.¹⁴ Dirk Spierenburg, the head of the Dutch delegation, later recalled how Monnet, in his capacity as chair, tried to solve the institutional problems early, in restricted sessions with the heads of delegation.¹⁵ In these settings, Monnet argued the case of the High Authority, but he also introduced the creation of an assembly representing the national parliaments: “Independent of governments, its members would take decisions by majority voting and be accountable to an assembly representing the parliaments of the member countries. It would have

¹⁰ For a general introduction to the connection between Monnet’s international experience and his viewpoints on European institutions, see J. GILLINGHAM, *European Integration 1950-2003. Superstate or New Market Economy*, Cambridge: Cambridge University Press, 2003, pp. 20-21. For a thorough account of Monnet’s international experience during and between the world wars, see F. DÛCHENE, *Jean Monnet. The First Statesman of Interdependence*, New York: W.W. Norton & Company, 1994. On the role of the national delegations in the Paris negotiations, see J. GILLINGHAM, *Coal, Steel, and the Rebirth of Europe, 1945-1955*, Cambridge: Cambridge University Press, ch. 5. For an in-depth historical study of the role of transatlantic policy networks in the formulation of the Treaty of Paris, see B. LEUCHT, *Transatlantic Policy Networks and the Formation of Core Europe*, Portsmouth: University of Portsmouth, 2008.

¹¹ K. FEATHERSTONE, *Jean Monnet and the “Democratic Deficit” in the European Union*, in *Journal of Common Market Studies*, 1994, p. 150.

¹² On the Coal and Steel Community as a measure to prevent new conflict, see M. EILSTRUP-SANGIOVANNI, D. VERDIER, *European Integration as a Solution to War*, in *European Journal of International Relations*, 2005, p. 99 *et seq.*

¹³ The Schuman Declaration, 9 May 1950. The full text of the declaration is available at europa.eu.

¹⁴ A. BOERGER-DE-SMEDT, *Negotiating the Foundations of European Law*, cit., p. 342; A.S. MILWARD, *The Reconstruction of Western Europe 1945-51*, cit., p. 409.

¹⁵ D. SPIERENBURG, R. POIDEVIN, *The History of the High Authority of the European Coal and Steel Community*, cit., p. 14. The other heads of delegations were Walter Hallstein (West Germany), Maximilien Suetens (Belgium), Paolo Emilio Taviani (Italy) and Albert Wehrer (Luxembourg).

contacts with all interest groups through a series of advisory committees, and it would have its own resources, rather than depending on government subsidies".¹⁶

The literature on the ECSC negotiations seems to agree that France was responsible for adding the assembly, in the words of Alan S. Milward as a means to "blunt the technocratic edge of the Authority".¹⁷ Anne Boerger-de-Smedt traces this decision back to the French socialist politician, André Philip, "who had sternly condemned the lack of democratic supervision in the new organization".¹⁸ Confronted with concerns from the other delegations, most notably the Benelux countries, Monnet also agreed to demands for a council of ministers and a judicial body that could settle disputes. The Benelux countries wanted not only a certain level of governmental supervision, but also a clear definition of the powers of the High Authority.¹⁹ Along with West Germany, these countries also insisted on the introduction of a permanent court, if for somewhat different reasons. The Benelux countries argued the case for an international court that would not only review the legality of the High Authority's decisions but also assess, in its rulings, the socio-economic consequences within which this authority had acted. Bonn favored a court that also could act as a constitutional court. The result was, Boerger-de-Smedt concludes, a court that defies easy categorization: "More than an international Court, but not quite a constitutional Court either, it was mainly an administrative Court, empowered to ensure that the HA would act within the powers granted by the Treaty".²⁰

Overall, the architects of the first European community paid little concern to popular participation. The ECSC was designed to protect the peoples of Europe from their tendency to wage war. Five years after World War II, the prevailing opinion was that peace would be best served by a greater emphasis on technocracy. The political legitimacy of the new community was indirect – borrowed from the democratic Member States that chose to participate in it. This approach was not without its critics. Altiero Spinelli – a champion of the competing constitutional approach to European integration – was one of them. "Monnet has the great merit of having built Europe", he reportedly said, "and the great responsibility to have built it badly".²¹

¹⁶ D. SPIERENBURG, R. POIDEVIN, *The History of the High Authority of the European Coal and Steel Community*, cit., pp. 14-15.

¹⁷ A.S. MILWARD, *The Reconstruction of Western Europe 1945-51*, cit., p. 409.

¹⁸ A. BOERGER-DE-SMEDT, *Negotiating the Foundations of European Law*, cit., p. 341.

¹⁹ A.S. MILWARD, *The Reconstruction of Western Europe 1945-51*, cit., p. 409.

²⁰ A. BOERGER-DE-SMEDT, *Negotiating the Foundations of European Law*, cit., p. 346.

²¹ M. BURGESS, *Federalism and European Union*, London: Routledge, 1989, pp. 55-56, cited in K. FEATHERSTONE, *Jean Monnet and the "Democratic Deficit"*, cit., p. 150.

III. THE IDEA OF LEGITIMACY AS LEGALITY IN THE TREATY OF ROME

The 1955 decision to move from sectoral integration in two industries to a general common market triggered a revision of the institutional architecture that had been established with the Treaty of Paris. The decision to make the establishment of a common market their objective in economic policy was one of the outcomes of the Messina Conference in June that year, where the foreign ministers of the six ECSC Member States came together to discuss how to develop their cooperation. The decision to pursue European integration in the economic sphere, broke the impasse that had occurred the year before, when the French National Assembly rejected the plan for defense integration among the six, and thereby closed the door to the accompanying plan for foreign political cooperation. The shift to further economic integration was a way out of deadlock and a reflection of the fact that the small and highly trade-dependent Benelux countries had assumed the role as the drivers of European integration.²² To the architects of this Treaty, the end justified the means. It was the States' decision to establish a common market that legitimized the creation of supranational institutions.

By 1955, the idea of a European common market had already floated around for three years. Motivated by his own country's dependence on exports, and inspired by the experience of the Benelux Union, based on a customs union agreement dating back to 1944, Johan Willem Beyen, Dutch Minister of Foreign Affairs, had made two previous attempts to convince the members of the ECSC of the virtues of a general common market. From his own experience as an international banker and businessperson, Beyen also recognized that protectionism was an issue that was difficult to address at a national level and one that, consequently, required an international approach. French resistance had blocked Beyen's previous advances. This time, he allied with his Belgian colleague, Paul-Henri Spaak, who linked Beyen's vision to France's interest in atomic energy cooperation. Together with Joseph Beck, Luxembourg's Minister of Foreign Affairs, they formulated their proposal in a May 1955 memorandum that was presented to the French, German and Italian governments later that same month. At the Messina Conference in June that same year, the ECSC member states adopted a declaration identifying a common market as one of the ways in which to ensure progress in the uniting of Europe.

The decision to create a common market justified the creation of supranational institutions. The Benelux countries argued from the outset that the creation of a common market presupposed the establishment of a common institution, equipped with the au-

²² A.S. MILWARD, *The European Rescue of the Nation-State*, London: Routledge, 1992. On the key role of the Netherlands in the process leading up to the Treaties of Rome, see A.G. HARRYVAN, *In Pursuit of Influence. The Netherlands' European Policy during the Formative Years of the European Union*, Brussels: P.I.E. Peter Lang, 2009.

thority that the realization of this market would take.²³ Eventually, the Messina Declaration did not go that far. This declaration simply identified the study of “institutional agencies appropriate for the realization and operating of the common market” as one of the prerequisites for the said market.²⁴ The declaration gave no guidance on the authority to be invested in such agencies. It made no mention of the need for oversight through some kind of democratic apparatus. It merely established that intergovernmental conferences would be convened to draft the relevant Treaties, and that these conferences would be prepared by an Intergovernmental committee assisted by experts and under the leadership of “a political personality”.²⁵

That political personality was Paul-Henri Spaak, a member of the Belgian Socialist party and a holder of numerous ministerial positions. The Intergovernmental Committee included, in addition to Spaak, the heads of the six national delegations – four politicians, an ambassador and a university professor.²⁶ Finally, a representative of the British government also attended the Committee’s meetings. The Intergovernmental Committee convened for the first time on 9 July 1955. A Steering Committee comprising the heads of the national delegations and chaired by Spaak was immediately appointed to initiate, direct, coordinate and regularly monitor the work of the specialized committees. These included a committee on the common market, investments and social problems; a committee on conventional energy sources; a committee on nuclear energy; a committee on transport and public works plus several sub-committees. In accordance with the Messina Declaration, the Intergovernmental Committee would submit its report by 1 October 1955. The general assumption was that this deadline would be too tight. “The date of 1 October will probably come and go”, *Le Figaro* wrote the day after the constituent meeting.²⁷

Spaak played a central role in the process leading to the Treaty of Rome. This is not a controversial claim. According to Pierre-Henri Laurent, the work in the Intergovernmental Committee “remained under the near absolute control of the appointed president of the comité”.²⁸ Laurent commends Spaak for his handling of the institutional question, where the Benelux countries’ call for a joint institution with a proper authority

²³ Mémorandum des Pays Benelux aux six Pays de la CECA, undated, Historical Archives of the European Union (HAEU), CM3/NEGO 3.

²⁴ Résolution adoptée par les Ministres des Affaires étrangères des Etats membres de la CECA, réunis à Messine les 1^{er} et 2 juin 1955, HAEU CM3/NEGO 6.

²⁵ *Ibid.*

²⁶ The national delegations were led by Ambassador Ophüls (Germany), Baron Snoy (Belgium), Félix Gaillard (France), Ludovico Benvenuti (Italy), Lambert Schaus (Luxembourg) and Professor Verryn Stuart (the Netherlands). P.-H. SPAAK, *The Continuing Battle. Memoirs of a European 1936-1966*, London: Weidenfeld and Nicolson, 1971, p. 238.

²⁷ J.L., *La conférence de la relance européenne s'ouvre aujourd'hui à Bruxelles*, in *Le Figaro*, 10 July 1955, translation available at cvce.eu.

²⁸ P.H. LAURENT, *Paul-Henri Spaak and the Diplomatic Origins of the Common Market, 1955-56*, in *Political Science Quarterly*, 1970, p. 384.

collided with the positions of France and Germany, who insisted “on the elimination of the principle of supranationality from the language of the future”.²⁹ This raises the question of how the Treaty of Rome nevertheless came to include provisions for a common institution with powers of its own. Laurent argues that Spaak, in keeping with the Benelux countries’ position, “wanted an institution with power of its own and ability to act independently of the national governments”.³⁰ In what follows, I identify two moves made by Spaak that helped achieve this goal.

First, Spaak insisted on a strict division of labor between politicians and experts, making sure that all expert proposals had a basis in decisions made by the Member States. The point of departure for the Intergovernmental Committee’s work, was the decision to create a common market, as stated in the Messina Declaration. The Steering Committee developed its directives to the specialized committees on basis of the provisions of this declaration. The specialized Committees’ mandates were further restricted to a discussion of technical issues only. When presenting the Committee’s work to the foreign ministers of the six in Noordwijk in September 1955, Spaak argued that this would leave the experts the freedom to approach the technical issues without any a priori or doctrinal ideas. Their sole concern would be to identify the most effective solutions. The proposals for institutional structures should in turn follow from the experts’ technical recommendations. The experts in the specialized committees were explicitly instructed *not* to present proposals regarding the establishment of common institutions: “Ils ne doivent présenter de propositions en ce qui concerne l’établissement de certaines institutions que dans le cadre des solutions proposées et pour autant que ces solutions l’exigent. Ainsi, les propositions en matière institutionnelle devront-elles apparaître comme une conséquence des propositions techniques, les problèmes étant abordés sans aucun a priori et sans aucune idée doctrinale, mais uniquement avec le souci de l’efficacité à atteindre”.³¹ To the ministers gathering in Noordwijk, Spaak emphasized that more general statements remained the domain of the national politicians, as they were the ones with a link to the general public. He also took care to point out that the political responsibility resided with the director and, eventually, with the ministers.³²

Second, Spaak formulated four principles that supplemented the Messina Declaration and guided the work in the specialized committees. The first of these principles established that the handling of issues related to the common market could not be dependent on consensual or majoritarian decision-making. These issues included the monitoring of the application of Member States commitments and compliance with competition rules,

²⁹ *Ibid.*, p. 378.

³⁰ *Ibid.*, p. 388.

³¹ Projet de Procès-Verbal de la réunion des Ministres des Affaires Etrangères des Etat membres de la CECA, tenue à Noordwijk le 6 septembre 1955, HAEU CM3/NEGO 180, p. 9.

³² *Ibid.*, p. 10.

and the administration of safeguard clauses.³³ Spaak's notes to the heads of delegations give some insight into the reasoning behind this principle. A consensus-based system of decision-making implied the likelihood of vetoes and the risk that the law would disappear in interstate bargaining. Majoritarian decision-making could, in turn, pave the way for the emergence of interest coalitions. Consequently, Spaak wrote to the heads of delegation in October 1955 that "[...] la création d'un organe dote d'une autorité propre et d'une responsabilité commune apparaît indispensable".³⁴

The second principle established a distinction between general economic policy and the specific problems related to the functioning of the common market. The expectation was, Spaak explained to the heads of delegation, that the Member States would eventually harmonize their monetary, budgetary and social policies. Pending such harmonization, a distinction between general economic policy and the handling of problems related to the common market was necessary. The Member States would retain their competences in general economic policy. Given the impact that this policy would have on the common market, a certain level of coordination would nevertheless be required. Consequently, the Member States should confer upon the common institution the power to conduct studies and make proposals in economic policy.³⁵

The third principle stated the need for an appellate and dispute-settling institution. The need for a legal and binding mechanism caused little discussion, possibly because a common court with corresponding competences already existed in the ECSC. In the matter of this institution, Spaak merely pointed out that there was a need for a body where appeals against the decisions of the common institution could be addressed and that could settle disputes between the common institution and the Member States as well as disputes between Member States.

Finally, the fourth principle established that the responsibilities of the common institutions had to be clearly defined. If these principles were recognized, Spaak told the heads of delegations in November 1955, the parties would succeed in establishing an institution with decision-making powers in the areas of competition rules and safeguard clauses, and with the power to conduct studies and present proposals in economic policy in general.³⁶

A preoccupation with legitimacy accompanied the formulation of these principles. From Spaak's 1955 perspective, a common supranational institution was advantageous

³³ The concern with the administration of safeguard clauses reflected the position of the French government, which was the one of the Six that was less favorable to trade liberalization than its involvement in the creation of a common market could suggest. The French protectionist tradition was strong, and Paris was eager to maintain as many of its protective measures for as long as possible. L. RYE, *In Quest of Time, Protection and Approval: France and the Claims for Social Harmonization in the European Economic Community, 1955-56*, in *Journal of European Integration History*, 2002, p. 85 *et seq.*

³⁴ Note to the Heads of Delegation of 24 October 1955, HAEU CM3/NEGO 41.

³⁵ *Ibid.*

³⁶ *Ibid.*

not only because it would enable the members of the common market to avoid the pitfalls associated with consensus or majoritarian rule. The independent authority that he prescribed would also be in position to take legitimate decisions on behalf of the members of the common market, as this market was an area where the members had a shared responsibility, and where they, consequently, did not represent the specific interests of the national governments: "L'avantage immédiat d'un organisme commun est qu'il peut légitimement statuer à la majorité parce que ses membres ont une responsabilité commune, au lieu d'être les représentants individuels de gouvernements nationaux".³⁷

The historical evidence leaves no doubt about the impact that Spaak's four principles had on the Intergovernmental Committee's work and, subsequently, on the institutional architecture of the Treaty of Rome. As the minutes of the meetings in the Steering Committee demonstrate, the heads of the national delegations frequently returned to these principles in their discussions, and they never discarded them.³⁸ The principles thus appear in the Intergovernmental Committee's report of April 1956, commonly referred to as the Spaak Report. In this report, the four principles are rearranged, but easily recognizable. The principle that general economic policy is distinct from the specific problems related to the common market figures first. Then follows the principle that the running of a common market is incompatible with consensual or majoritarian decision-making, leading to the conclusion that the creation of this market demands the creation of an institution with a proper authority and a common responsibility. The third principle, as it appears in the Spaak Report, states that as the general economic policies of the Member States impact the common market decisively, a certain coordination between such policies and common market issues is necessary. When this is the case, the common institution may make proposals with a bearing on general economic policy, and the principle of unanimity may be departed from, "grâce à la garantie d'objectivité" that follows from the existence of a common institution. The fourth principle states the need for legal recourse and parliamentary control.³⁹ As stated in the Spaak Report, the Intergovernmental Committee's proposal to create four distinct institutions was based on these principles: "De ces principes ressort la nécessité d'établir quatre institutions distincts".⁴⁰

The collection of historical documents relating to the Rome Treaty negotiations include files on the history of each treaty article. The file pertaining to Art. 155, on the powers of the Commission, contain the minutes of a meeting between Spaak and the heads of the national delegations entitled "Problème des Institutions". The point of departure for this meeting was the four principles that then figured in the Spaak Report. At the opening

³⁷ *Ibid.*

³⁸ Document de travail No. 6, du 8 novembre 1955, Institutions, Comité intergouvernemental créé par la conférence de Messine, HAEU CM3/NEGO 30.

³⁹ Rapport des Chefs de Délégation aux Ministres des affaires étrangères du 21 Avril 1956, CM3/NEGO 91.

⁴⁰ *Ibid.*, p. 18.

of the meeting, Spaak encouraged those that disagreed with these principles, or who had comments relating to these principles, to make these known. In the following interventions, neither France nor Germany objected to the four principles. Both Paris and Bonn insisted, however, that the Council of Ministers should have a more influential role in the common market than what was the case in the Coal and Steel Community.⁴¹

IV. MECHANISMS FOR LEGITIMACY THROUGH DEMOCRATIC RULE IN THE TREATY OF ROME

One of the advances in the 1957 Treaty of Rome was the chapter on a common commercial policy. In contrast to the ECSC, which had no external powers, this chapter, *inter alia*, delegated authority to negotiate trade agreements from the Member States to the European Commission. This Treaty's Art. 113, section three, stated that: "Where agreements with third countries need to be negotiated, the Commission shall make recommendations to the Council, which shall authorize the Commission to open the necessary negotiations. The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it".⁴² Previous research explains the delegation of authority to the European Commission in the area of trade negotiations with two main factors. First, in insulating the policy-making process from domestic pressure, the assumption was that this would enable the promotion of a more liberal international trade order. Second, the expectation was that a single voice in trade policy would facilitate the conclusion of trade agreements with third countries and increase the Community's external influence.⁴³ The Treaty of Rome was, as Meunier and Nikolaidis state, "a revolutionary document" in the field of trade.⁴⁴ A refusal to introduce direct elections to the Assembly (European Parliament) accompanied the decision to authorize the Commission in trade. The idea of legitimacy as legality thus gained ground, while mechanisms for legitimacy through democratic rule were rejected, amplifying the elitist and technocratic nature of European integration.

To the Treaty's architects, the Commission's authority in trade negotiations was a necessary consequence of the decision to move from sectoral to general integration. The Intergovernmental Committee already by the autumn 1955 took the position that the negotiation of trade agreements had to become a matter for the Community. The Committee's starting-point was that the establishment of a common commercial policy followed logically from the decision to create a common market. The cooperation that

⁴¹ Réunion des Chefs de Délégation, *Problème des Institutions*, undated, CM3/NEGO 257.

⁴² Art. 113, section 3, of the Treaty of Rome.

⁴³ S. MEUNIER, K. NIKOLAÏDIS, *Who Speaks for Europe? The Delegation of Trade Authority in the EU*, in *Journal of Common Market Studies*, 1999, p. 480.

⁴⁴ *Ibid.*, p. 479.

had been established with the ECSC was deep, but at the same time limited, confined to two industries. The reduced scope of this cooperation had allowed for a certain autonomy on the part of the Member States, as trade in coal and steel were but two elements in a more comprehensive balance of payments. With the transition to a general common market, trade policy would become a matter of common concern. A November 1955 working document stated that just as the parties had acknowledged that the Community would have a common external policy, it would also be for the Community to negotiate common trade agreements.⁴⁵

The Intergovernmental Committee's next move in the process that eventually led to the adoption of Art. 113 was to propose a division of labor between intergovernmental and supranational institutions. From February 1956, the Committee worked on the assumption that there would be four institutions: a council of ministers, a commission (as an executive), a court of justice and an assembly. Spaak convened the heads of delegation in the middle of this month with the view to discussing procedures, competences and the workings of the different institutions.⁴⁶ The point of departure was the tasks that the establishment and operating of the common market required. The list of requirements was long. It included overseeing compliance with the obligations undertaken by the Member States; supervision of the companies' compliance with competition rules; the settling of conditions for the maintenance or elimination of subsidies or other measures with equivalent effect; the administration of exceptions and safeguard clauses; the removal of discrimination; the mending of trade distortions and the preparation – to the degree that this would be possible – of legal harmonization and the management of restructuring- and development funds.

The division of labor between the institutions that the Intergovernmental Committee put forward, empowered of the Commission in all matters pertaining to the common market. The Committee identified the Council as the governments' instrument for general political coordination and the organ for joint governmental decisions. The Council should, as a rule, make decisions based on unanimity. The committee substantiated this position with the argument that a majority of governments constituted no objective entity, only a coalition of interests. Unanimity would be of the essence in matters pertaining to harmonization of legislation; financial balance; employment and stabilization policy. However, and as touched upon in the previous section, decisions in these matters would also have a direct bearing on the workings of the common market. Consequently, the committee argued, to facilitate the functioning of the common market, it would be legitimate to entrust the Commission with the power to submit proposals on these matters to the Council. Occasionally, operating the common market would also demand a clarification of questions that were rooted in general economic

⁴⁵ Working document no. 7 of 30 November 1955, HAEU CM3/NEGO 31.

⁴⁶ Appendix to document no. 6 of 13 February 1956 on *Institutions*, HAEU CM3/NEGO 32.

policy but that were too essential to risk their blocking by veto. On such occasions, the parties could deviate from the principle of unanimity.⁴⁷

The Committee described the Commission as the organ entrusted with administration of the treaty. Importantly, the Committee also identified this institution as the one that would oversee the functioning and development of the common market. In some matters, the Commission would have decision-making authority. These were all matters that could affect the functioning of the common market including competition rules, subsidies and other dispositions with discriminatory effect, such as the use of safeguard clauses.⁴⁸

The Intergovernmental Committee submitted its report in April 1956. Spaak later compared this document to the Messina Declaration, pointing out the progress that had been achieved. "The ideas which had only been outlined vaguely at Messina were this time listed, defined and explained", Spaak wrote in his memoirs.⁴⁹ The report thus put the governments in a position, Spaak pointed out, where they could accurately assess the implications of a policy which they until then had endorsed in principle only. The foreign ministers of the Six adopted the report at their meeting in Venice in May 1956, after less than two hours of discussion.⁵⁰ The Intergovernmental Conference opened in Brussels the following month with the view to draft two Treaties based on the Spaak Committee's report, for the Common Market and Euratom respectively. Two groups were appointed to examine technical questions. Hans von der Groeben, a German diplomat, chaired the group for the common market. A drafting group was also set up, under the direction of Italian ambassador Roberto Ducci. Its task was to frame the conclusions of the Spaak Report in the form of articles that could serve as a basis of the first version of the Treaties. A committee of heads of delegations chaired by Spaak directed the process.

Within the framework of the Intergovernmental conference, the discussion on the authority of the various institutions continued. The fundamental problem was to establish procedures for the decision-making that the implementation of the treaty demanded. From the perspective of the conference, all other problems were subordinate to this. Mechanisms for consultation, representation and management would in any case be introduced in keeping with practice in all complex international organizations. The problem had two dimensions, namely the need to know who should take decisions, and the need to know who should control them. On the one hand, the treaty imposed specific obligations on its members. In such matters, it would be for the Member States to ensure implementation. On the other hand, the treaty included objectives that could not be realized by state obligations only. Consequently, the Conference established that it would be necessary to charge the community, and more precisely some of the com-

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ P.-H. SPAAK, *The Continuing Battle*, cit., p. 240.

⁵⁰ *Ibid.*

munity institutions, with the task to take some decisions.⁵¹ The conference also highlighted a new argument in favor of this position, namely that in a program that would cover many years, it was impossible to include all necessary decisions in one treaty. The countries would have to create common institutions, and to confer on these institutions the authority to take necessary decisions.⁵²

As had been the case in the Intergovernmental Committee, a key concern was the need to strike the balance between sovereignty and efficiency – between national interests on the one hand, and the demands that followed from the realization of the common market on the other.⁵³ Pierre Pescatore was the legal adviser to the Luxembourg Foreign Ministry and a member of the drafting group directed by Roberto Ducci. He later recalled how the negotiations took place in an atmosphere of urgency and prudence. On the one hand, there was an urgent need to “regroup in the face of a Soviet threat that was still very real”. On the other hand, there was the awareness of limits, following the EDC failure and the situation in France: “People had had enough, given the position of the State in France and the failure of the EDC, which had been attempted in a supranational spirit: the word was taboo”.⁵⁴

The question that remained was to establish which institutions should take which decisions. When approaching this question, the conference introduced the concept of “matters of essential interest for the member states”, distinguishing between matters of such interest and matters where the realization of treaty objectives was paramount.⁵⁵ The first category included significant treaty amendments, decisions that exceeded existing treaty obligations and matters of economic policy where the Member States remained accountable to the national parliaments. In such matters, the concern with the most efficient realization of treaty objectives would have to yield to the need to obtain consensus. The second category included issues where concern with the realization of treaty objectives was stronger, and where national interests were less at stake. In such matters, the Council of Ministers could take majority decisions, with the consent of the Commission. A State could thus be overruled, but only if the Commission gave a “European guarantee”.⁵⁶ Finally, the secretariat envisaged a third category, where the efficient realization of the common market was crucial, or where the interests of every Member State demanded an avoidance of vetoes or interest coalitions. In such matters,

⁵¹ Note du 11 October 1956, sur le système essentiel à prévoir dans le Traité sur le Marché commun européen, HAEU CM3/NEGO 185.

⁵² Draft note from the President of 12 October 1956, HAEU CM3/NEGO 185.

⁵³ Note du Secrétariat du 11 octobre 1956, HAEU CM3/NEGO 185.

⁵⁴ P. PESCATORE, in Centre virtuel de la connaissance sur l'Europe, *Interview with Pierre Pescatore: The international context at the time of the Val Duchesse negotiations*, 10 September 2003, cvce.eu.

⁵⁵ Note du Secrétariat du 11 October 1956, cit.

⁵⁶ *Ibid.*

the decision-making authority could reside in the Commission, on condition of this body's prior consulting with the Council.⁵⁷

From the end of November 1956, drafts of what would eventually become Arts 110-116 shuttled back and forth between the working group on the common market and the committee of heads of delegations. In the early drafts, the Commission was entrusted with the power to negotiate customs only.⁵⁸ This was still the case in a draft for the chapter on a common commercial policy tabled by the conference secretariat on 3 January 1957. This draft stated that there would be a common commercial policy and that the conclusion of trade agreements should be based on common principles.

A few days later, the Common Market group formulated a new draft for the same chapter. This version included a draft Art. 62 (later to become Art. 113) that granted the Commission the authority to negotiate agreements pertaining to the common commercial policy: "En vue de l'élaboration de la politique commerciale commune, la Commission soumet des propositions au Conseil. Les négociations sont conduites par la Commission en consultation avec un Comité désigné par le Conseil pour l'assister dans cette tâche, et dans le cadre des directives que le Conseil peut lui adresser. Les résultats des négociations sont soumis à l'approbation du Conseil, qui statue à la majorité qualifiée".⁵⁹

The archives consulted for this *Article* show that the new draft was the result of a meeting in the committee for heads of delegation at the end of December. In this meeting, Von der Groeben, the chair of the Common Market group, asked that Art. 62 should go back to his group for new examination. When re-examining it, the group should take into consideration the situation that would emerge if the Member States, at the end of the transition period, had not succeeded in harmonizing their liberalization vis-à-vis third countries. The group should further act in consideration of the fact that negotiations occurring within the framework of the Common Commercial Policy should follow the same procedure as the one provided for in tariff negotiations, on the understanding that this procedure should apply not only in tariff negotiations but in all other negotiations that the member states would conduct after the end of the transition period.⁶⁰

Shortly after the decision to authorize the Commission in trade negotiations, the ECSC countries rejected a proposal for direct elections to the Common Assembly. The proposal was tabled by Italy. When the foreign ministers of the ECSC countries met to settle outstanding issues in January/February 1957, Gaetano Martino reminded his colleagues of the fundamentally political nature of their endeavor. For the purpose of the political unification of Europe, the introduction of direct elections to the Common As-

⁵⁷ *Ibid.*

⁵⁸ Groupe du Marché Commun du 20 Novembre 1956, HAEU CM3/NEGO 244.

⁵⁹ Groupe du Marché Commun, Document de travail du 8 janvier 1957, concernant la politique commerciale commune, HAEU CM3/NEGO 244, p. 7.

⁶⁰ Comité des Chefs de Délégation, Projet de procès-verbal de la réunion du Comité des Chefs de Délégation tenue à Bruxelles les 19 et 20 décembre 1956, du 27 décembre 1956, HAEU CM3/NEGO 119.

sembly would, he argued, constitute a first step “dont l’effet psychologique sur l’opinion publique serait certain”.⁶¹ The proposal did not succeed. As the minutes of this meeting makes clear, the other ministers expressed the opinion that this would be premature: “il leur paraît premature de prévoir dès a present l’élection des membres de l’Assemblée au suffrage universel direct”.⁶²

That the national delegations disagreed on the provisions for a motion of censure against the Commission, suggest that they were guided by diverging ideas of legitimacy. Minutes from meetings of the national delegations show that “certaines délégations” argued that the Assembly, in order to ensure the stability of the Commission, only should be able to vote on a motion of censure once per year. The German, Italian and Dutch delegations argued in contrast to this that there should be no limits on the Assembly’s right to conduct such vote. When explaining his government’s position, Germany’s foreign minister, Heinrich von Brentano, made it clear that it was “essentiellement inspirée par le souci de renforcer l’influence de l’Assemblée”.⁶³ This position eventually prevailed, finding its way into the treaty in its Art. 144.

V. CONCLUDING REFLECTIONS

This *Article* set out to explain the idea of legitimacy as legality that informed the founding Treaties of the 1950s, searching for answers in the existing canon of historical literature and in the holdings of the Historical Archives of the European Union. The creation of the ECSC High Authority reflected contemporary concerns and the personal experience of Jean Monnet. Due to the insistence of other delegations, the creation of the High Authority was accompanied by other institutions that would somewhat balance its authority. Eventually, the ECSC institutional structure nevertheless stand out as technocratic and elitist, with little room for popular participation. A few years later, Paul-Henri Spaak formulated the principles that informed the institutional structure of what would eventually become the European Economic Community. From Spaak’s 1955 perspective, the European Commission was able to take legitimate decisions on behalf of the Member States in matters pertaining to the common market, because the Commission represented the Member States, and because it enabled their decision to create a common market.

Today, the 1950s may seem long gone and without obvious relevance for the union’s present-day challenges. The EU nevertheless builds on the institutional structure that emerged in this decade, and while this structure has developed considerably since then, it still reflects ideas that prevailed at the time and circumstances long since changed. The early history of the EU is thus important to the understanding of trends

⁶¹ Projet de procès-verbal de la Conférence des Ministres des Affaires Etrangères des Etats membres de la CECA, Bruxelles, 26-28 janvier et 4 février 1957, HAEU CM3/NEGO 96.

⁶² *Ibid.*

⁶³ *Ibid.*

that emerged in the 1990s. The existing historical research links the decreasing public support for the EU that manifested itself in this decade to the approach that marked the formulation of the founding Treaties of the 1950s. It was the legacy of Monnet's technocracy and elitism, the argument goes, to leave the Commission as a weak and fragile democratic entity. Moreover, so long as attempts to rectify the democratic deficit concentrated on the relationship between the Council and the European Parliament, an important part of the problem remained.⁶⁴ The EU policy-making machinery broke down, John Gillingham writes, "at the very time that regulations and directives implementing the Single European Act began to register in the lives of ordinary people".⁶⁵

Political scientists argue that democratization in the EU is the result of constitutional conflict between institutional actors. Strong actors in this system push, the argument goes, for further integration in order to increase efficiency without paying much attention to democratic legitimacy. Such behaviour leaves, in turn, room for weak actors, to question the legitimacy of integration and put normative pressure on the powerful actors. Democracy in the EU has normative origins, Frank Schimmelfennig argues, that differ from the economic or social origins of democracy highlighted in studies of the nation-state.⁶⁶ Historians tend to agree with this line of reasoning. Eirini Karamouzi and Emma De Angelis show how the process of identifying the EC with democracy started in the European Parliament, where MEPs "managed to turn the existence of their at the time near-powerless institution into a symbol of the Community's commitment to democracy".⁶⁷ While the Treaty of Rome established an institutional structure that was predominantly elitist and technocratic, this structure also contained the seeds of a more democratic EU.

⁶⁴ K. FEATHERSTONE, *Jean Monnet and the "Democratic Deficit"*, cit., p. 150.

⁶⁵ J. GILLINGHAM, *European Integration 1950-2003*, cit., p. 305.

⁶⁶ F. SCHIMMELFENNIG, *The Normative Origins of Democracy in the European Union: Toward a Transformationalist Theory of Democratization*, in *European Political Science Review*, 2010, p. 211 *et seq.*

⁶⁷ E. DE ANGELIS, E. KARAMOUZI, *Enlargement and the Historical Origins of the European Community's Democratic Identity, 1961-1978*, in *Contemporary European History*, 2016, p. 457.

