# Pierre Pescatore, The ECSC Treaty, origin and model of European unification

**Caption:** Contribution by Pierre Pescatore, former Judge of the Court of Justice of the European Communities, to a joint publication produced by the European Commission in 2002 on the occasion of the 50th anniversary of the European Coal and Steel Community (ECSC). In his text, Mr Pescatore explains, by means of a historical review of the founding Treaties, the principles and concepts which determined the structure of the ECSC and which subsequently provided the foundations of that of the European Economic Community (EEC).

**Source:** Commission européenne. CECA EKSF EGKS EKAX ECSC EHTY EKSG 1952-2002, Cinquante ans de Communauté européenne du charbon et de l'acier, trente-quatre témoignages. Luxembourg: Office des publications officielles des Communautés européennes, 2002. 287 p. ISBN 92-894-2072-3. "Le traité CECA, origine et modèle de l'unification européenne", auteur:Pescatore, Pierre, p. 181-188.



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## The ECSC Treaty, origin and model of European unification

**Pierre Pescatore**

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Pursuant to Article 97 thereof, the ECSC Treaty is concluded for a period of 50 years from its entry into force. At the time, this was regarded almost as an eternity. However, this eternity has now elapsed. The act that is about to come to an end is no longer quite what it was in the beginning. With the Merger Treaty, it lost its institutional identity. The industries to which it related, coal and steel, the backbone of the economy and the potential 'nerve centre' of war, now need state aid to survive. The specific rules created at the time will be merged in the common rules of the common market. What will remain of the Treaty of Paris, apart from a place in the history books?

Even after its expiry, the ECSC Treaty will continue, as an invisible force, to govern the functioning of the European Union and the conduct of its prime movers. Do the people running Europe realise that it was not they who invented the admirable mechanism of which they are currently pressing the control buttons? Those who created this structure and devised the principles according to which it functions were struggling at the time against enormous odds, the traces left by a war that had ended only recently and the shadow cast by a new omnipresent threat that obsessed them, known at the time as the 'Cold War'. That is what I shall endeavour to demonstrate below on the basis of history, words and things. As a lawyer, I am not indifferent to all this, history, words and things, because they reflect a normative process aimed at a future that is still far from complete.

### History

What follows is not based on theory but is drawn from the experience that I have acquired, thanks to the position that I occupied by chance as a result of my personal career path. I am looking not at how the ECSC Treaty itself came into being but at the circumstances under which the Treaty of Rome, the Treaty establishing the European Economic Community (EEC), was negotiated. Even after the Single Act, the Maastricht Treaty, the Amsterdam Treaty and the Nice Treaty, the Treaty of Rome remains the fundamental system underlying the commitments that bind us together. These negotiations formed part of a rather precise programme, partly positive and partly negative: first of all, the failure, which was still recent and keenly felt, of the European Defence Community (EDC) project and the project for a Political Community that had been constructed on this fragile basis; secondly, the resolve to take another, more realistic look at the European project, aiming henceforth to create an *economic* union; thirdly, the fact that, fortunately, despite the preceding disaster, the European Coal and Steel Community (ECSC) had survived intact. It was, therefore, not surprising that, at the time, the negotiators started out from this solid basis, and it is from that fixed point that I came to know and appreciate the ECSC Treaty, which I had played no part in drafting.

This initial asset comprised three factors whose value cannot be underestimated. Firstly, the Treaty of Paris was still binding on the partners. It was, therefore, only natural to take it as a model for the negotiations that were about to begin following the Messina and Venice Conferences. Secondly, quite a wealth of substantial institutional experience, four years to be precise, had been acquired from the functioning of the first Community — which resulted in a third determining factor, namely that, thanks to this initial activity, an organisational structure already existed that could provide logistic support for the setting up of the planned new structure. Although it is true that the High Authority viewed the opening of negotiations rather distantly and with some fear, because these negotiations threatened to call its rights and privileges into question, the interpenetration of the old and the new was perceptible at far lower but, therefore, more effective levels: experienced negotiators and experts, versed in the new approach based on 'integration', which differed greatly from the usual form of international bargaining; not forgetting the Council services, which were able, in no time at all, to provide the secretariat of the Intergovernmental Conference that, as we know, opened in autumn 1956.

After these words about the historical situation at the time, I should like to approach this issue at the level that

is most familiar to me as a lawyer, namely the history of the texts, old and new, in order to show the seeds that already existed in the Treaty of Paris, what was incorporated *mutatis mutandis* in the EEC Treaty and what had to be jettisoned at that stage and, finally, what has happened since then to this primary *acquis*. As a result of this analysis, I am deeply apprehensive to note the incapacity of the present governments, as reflected in the conclusions of the Laeken European Council, which sound more like a declaration of war against the existing Community than a political programme. To save time and to collect ideas, they have assigned the solution of our future problems to a learned assembly that has no legitimacy, no mandate and no responsibility, meeting at great cost under the title of European 'Convention'.

So much for history. Let us turn to words.

**Words**

To anyone interested in semantics and how ideas evolve, the terminology used following Robert Schuman's Declaration of 9 May 1951 is charged with meaning, promises and opportunities for future development. For instance, the Preamble to the Treaty of Paris refers to *creative* efforts, the contribution that an *organised and vital* Europe can make, the resolve to create, by establishing an economic community, the basis for *a broader and deeper community* and to lay the foundations for *institutions which will give direction to a destiny henceforward shared*. These will not seem like empty words to those who have the patience to read the substance of the Treaty that is destined to disappear and to consider how very much more structured and articulate it is than the nonsense resulting from later manifestations entitled: Single Act, Maastricht, Amsterdam and Nice.

**Things**

Having said that, let me now linger a little on legal matters. I shall follow the numerical order of the relevant articles in the ECSC Treaty, comparing in each case the past, present and future.

**The common market**

Pursuant to Article 1, the Community shall be 'founded upon a common market, common objectives and common institutions'. The concept of a 'common market' was to follow a hyperbolic path, from the ECSC to the EEC, which was to be its apogee, and from that to the Single Act, which was to mark its decline. In fact, in that Act, Member States replaced the common market with the introverted and protectionist notion of 'internal market'. Thanks to a marginal note, the achievement of this project was left to some distant future, so that people are still talking, more than 30 years after the expiry of the transitional EEC period, of the 'completion' of the internal market, which still does not cover such areas as the energy market, communications and financial services. The notion of 'common objectives', another key concept in the ECSC Treaty which is reiterated in the EEC Treaty, has been suspended since the development of the 'subsidiary' approach in the Maastricht and Amsterdam Treaties, until such time as the 'Convention' sets out the terms of a list of responsibilities that can define national and Community competences down to the very last detail. We are now light years away from the vision of the Treaty of Paris, which was based from the outset, as I shall show more clearly below, on the dual notion of 'object and purpose' set out in Article 31 of the Vienna Convention on the Law of Treaties. I do not think that this is mere chance or coincidence, since the same lawyer, Paul Reuter, was one of the authors of both the Treaty of Paris and the Vienna Convention.

**International capacity**

The second paragraph of Article 6 provides that 'in international relations, the Community shall enjoy the legal capacity it requires to perform its functions and attain its objectives.' During the negotiations on the EEC Treaty, it was proposed that this provision be retained as it stood, as the new Community was to assume far-reaching international powers, being responsible for the negotiation of trade agreements. However, the majority of negotiators at the time rejected this proposal. So all that remained in Article 210 of the EEC Treaty (now Article 281 of the EC Treaty) was the terse statement from the first paragraph of Article 6, that 'the Community shall have legal personality.' We know that the Court of Justice, in its well-known judgment on

the European agreement on road transport (ERTA) of 31 March 1971, seized on the contextual position of this provision in order to re-establish the Community's international capacity in its logical entirety. It is worth noting, however, that, since then, following a signal from that same Court of Justice in its Opinion No 1/94 of 15 November 1994 on the procedure for the entry into force of the agreements setting up the World Trade Organisation (WTO), the Treaty of Nice has further eroded the Community's capacity in the field of trade agreements. Once again, this is a far cry from the concept underlying the second paragraph of Article 6 of the ECSC Treaty.

**Institutional structure**

Article 7 lists the common institutions: High Authority, Common Assembly, Special Council of Ministers and Court of Justice. This provision established the quadripartite structure that was to be a characteristic of the Community system, unlike the tripartite structure of the constitutional state. In an attempt to define the logic of this system, we could say that, in its initial form, there are, in that order, an executive body, a parliament, a judicial authority and a federative body. One vital aspect of this structure has, hitherto, stood the test of time and fortune, namely its *quadripartite* form, adjusted in such a way as to reflect the constituent parts of the Community as a whole. It was inevitable that this overall structure would be adjusted at the time of the transition from a specialised institution to a generalised common market. In the EEC Treaty, this structure was to be readjusted again so as to give precedence to the Parliamentary Assembly, followed by the Council, the Commission and, finally, the Court. Their respective political weight was to be distributed in a markedly different way, on the basis of the tasks devolved to the EEC.

**The executive body**

One initial difference in the new ranking order, which is, in fact, a contrast, can be seen in Article 8 of the ECSC Treaty, which provides that 'it shall be the duty of the High Authority to ensure that the objectives set out in this Treaty are attained'. Here, too, it had been proposed, at the time of the preparatory negotiations for the Treaties of Rome, to incorporate this provision in the new Treaty. That would have given the EEC a genuine executive body; but the suggestion was firmly rejected. The outcome, following difficult negotiations, was the first and last indents of what has become Article 155 (211) of the EEC Treaty, which provides that: 'In order to ensure the proper functioning and development of the common market, the Commission shall:

— ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied;

— […]

— exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter.'

So the new Community was no longer to have an executive body worthy of that name. As demonstrated by the interminable string of problems arising between the Council and the Commission as to how to share this ill-defined function, jettisoning that ECSC provision is the chief cause of the weakness of the present Community system.

**Supranationality in particular**

The ECSC was established at a time when the term 'supranationality' was still employed without causing any problem. In fact, it was created as a genuinely supranational institution, although the wording of the Treaty of Paris is discreet on this point. Indeed, this fateful word appears only once, in Article 9, which urges members of the High Authority to refrain from any action incompatible with the supranational character of their duties. The term vanished without trace after the adoption of the Merger Treaty. Since then, it has been banned and is no longer used by writers who want to 'move with the times'. Personally, I would say, in regard to this structural problem, that we must distinguish between words and reality. Like the term 'federal' and its derivatives, 'supranational' is a classifying term that, as such, applies *a posteriori* on the basis of empirically

established reality. The criterion for classifying the phenomenon that concerns us here consists in what Kantian philosophy defines as *heteronomy*, as opposed to autonomy. The truth of the matter was that, at the very moment when this term was banned, the Member States accepted massive doses of supranationality, in the form of rules governing markets, rules on competition and taxation rules; at the very moment, therefore, when the supranational nature of the institutional structures was being disguised, normative and procedural supranationality was accepted without protest. The characteristic aspect of such situations becomes very marked when a state wants established rules to be changed: it will then emerge that they are irreversible, especially in cases where unanimity was required for their establishment. The most recent example is the creation of European monetary union. This union materialised in a spirit of enthusiasm in the countries concerned, who were only too happy to be rid of national constraints and hoped that they could finally participate in an obstacle-free monetary area. Our governments pretend that they have not understood the message.

**The decision-making system**

One of the strong points of the ECSC Treaty lies in the decision-making system set out in Articles 14 and 15. This was an entirely novel creation on the part of the negotiators of the Treaty of Paris. We owe it to the negotiators of the EEC Treaty that these provisions were amended and supplemented on the basis of a clearer approach, in the light of the practical experience acquired from the ECSC. Accordingly, Articles 189–191 (249–254) of the EEC Treaty introduce a new nomenclature of institutional acts — regulation, directive, decision and opinion — together with an explicit definition of their effects, notably the direct applicability of regulations. The *Official Journal*, introduced in practice by the High Authority, is now elevated to a position where it features explicitly in the new Treaty. The result is the creation of a genuine *legislative power* for the Community. To date, the substance of these provisions has, fortunately, remained intact, and they explain the remarkable effectiveness of Community law; yet it has to be said that they have, in their turn, been affected by the legal proliferation of the system. It remains to be feared that, with ‘subsidiarity’ elevated to the status of principle, these well-ordered provisions may give way to a return to the approximations of intergovernmental methods, at the expense of binding and directly applicable rules. This warning is necessary, for developments of this kind would spell the end of the European system.

**The Assembly**

The provisions governing the Parliamentary Assembly set out in the ECSC Treaty have been fundamentally revised. This Assembly, originally made up of delegates from the national parliaments, is now elected by direct universal suffrage and has the power to participate in the exercise of legislative power. This, no doubt, signifies progress towards genuine democratisation, but, in this respect, the European citizen is still undervalued. This must be said quite bluntly, given all the talk about the ‘democratisation’ of the Community process. In fact, the Member States and Parliament itself have never implemented the EEC Treaty provision that requires the European Parliament to be elected in accordance with a uniform procedure in all Member States. Worse still, several Member States have succeeded in fundamentally altering the election rules by methods such as blocking lists, turning their entire territory into a single electoral constituency, holding the elections on the same date as their own national elections or arranging in advance for resignations in order to fool voters about the identity of the representatives who will eventually take a seat in Parliament. Nobody has yet dared study these procedures objectively and critically. The result of this kind of fraud is that, in the eyes of the people, Parliament is not really regarded as representative. This has produced a break between the European Parliament and the national parliaments, which has led to the need to create a second assembly, made up of representatives of the national parliaments — as in the time of the ECSC! Added to this, there are two further weaknesses, namely the huge numbers of European Parliament staff in absolute figures (resulting from the demands of the small Member States) and this assembly’s insatiable appetite for powers and privileges, which is quite incommensurate with the Community’s real objectives. In this respect, the new Europe, compared with the modest beginnings of the ECSC, may well founder in its own immoderation.

**The Council**

As for the ECSC’s ‘Special’ Council, it has become, in the EEC, the linchpin of the system, in its dual

capacity of legislator and executive body. The Commission carries out these tasks in two ways: firstly, it has the sole right to propose legislation; secondly, in the prudent wording of Article 155 (211) of the EEC Treaty, it implements the rules laid down by the Council. In turn, however, the Council's prerogatives are contested by a new body that was, in fact, first created and then legitimised by the Treaty on European Union under the title of 'European Council', a meeting of Heads of State or Government (in fact, Heads of Government, plus a single Head of State). This body is tending to take over the powers of both the Community legislator and the executive body and thereby to abolish the separation of powers that had originally been established within the quadripartite institutional structure created by the authors of the ECSC Treaty. As a result of the insatiable appetite of the members of this 'Council', the European Union is now moving towards an intergovernmental system basically governed by the principle of mutual agreement. The consequences of this shift will not become fully apparent until the time comes when enlargement of the Union has become a fait accompli and more than 20 Heads of State or Government will be jostling for position in the European Council.

**The Court**

For the time being, the Court of Justice is the only institution that has emerged intact from this readjustment, since, in essence, the formula that now defines its powers, in Article 164 (220) of the EEC Treaty, was already laid down in Article 31 of the ECSC Treaty: 'The Court of Justice shall ensure that in the interpretation and application of this Treaty […] the law is observed.' Yet there are clouds on this horizon, on two counts. The first is that a Court of First Instance has been set up alongside it and that the hierarchical relationship between the two is not entirely clear. The second is that, at a time when discussions were raging about subsidiarity, the European Parliament, on a proposal from the Chairman of its Committee on Institutional Affairs, had demanded that an appendix be added to Article 164 providing that the Court may act only in compliance with this sacrosanct 'principle'.

**Commercial policy**

Article 71 of the ECSC Treaty, on commercial policy, specifies that the Member States shall retain their powers in this regard. This was only logical at a time when the Community was still a specialist institution. The Treaty of Rome, which introduces a common commercial policy, has not changed this situation. That might seem understandable while there was still a High Authority, but, logically, this anomaly should have disappeared when, as a result of the Merger Treaty, the Commission took over the powers of the coal and steel executive body. It then emerged that the Member States were by no means prepared to give up these residual powers. That is why, in the common customs tariff, coal and steel occupy separate positions, negotiated by the intergovernmental method. This oddity was codified in the EEC's annex on tariffs attached to the Marrakesh Agreement establishing the WTO. Logically, the EEC Treaty would have required that, on the expiry of the ECSC Treaty, these positions would automatically fall within the remit of the EEC. It is, therefore, to be assumed that the representatives of the Community will address a communication to that effect to the WTO in which to inform it of the disappearance of this anomaly. That will, at least, be one positive result of this event because, for ECSC products, the principle of the customs union will then replace that of a free trade area, which, objectively speaking, although this has never been said, was the principle of the Treaty of Paris.

**A few general provisions**

Four general provisions of the ECSC Treaty have acquired some prominence following their incorporation in the EEC Treaty. One is Article 41, which gives the Court of Justice sole jurisdiction to give *preliminary* rulings on the validity of acts of the High Authority and of the Council where such validity is in issue in proceedings brought before a national court or tribunal. A strange fate befell this provision: it was never applied while the ECSC remained as it stood; in fact, it was applied only in trivial cases after the signing of the Merger Treaty. Conversely, Article 41 came to the attention of the negotiators of the EEC Treaty, who incorporated the provision on preliminary rulings in the EEC Treaty, where it appears in Article 177 (234). In so doing, they made two changes to their model: they extended it to cover the interpretation of the Treaty and secondary legislation and, rightly anticipating the disputes to which this new formula would give rise, they specified that only the supreme courts were required to bring a matter before the Court of Justice. This was a stroke of genius, because Article 177 has now become the mainstay of the development of Community law. A

second, equally important borrowing is Article 86, on measures *to ensure fulfilment* of the obligations resulting from the Treaty or decisions on its application. This clause was reiterated, in the appropriate place, in Article 5 of the EEC Treaty, which has now become Article 10. Then there is Article 95 on *cases not provided for*, which was incorporated, in more general terms, in Article 235 (308) of the EEC Treaty. Here, we must note a rather important drafting detail. The drafters, aware of the excesses to which this provision might lead in the hands of the Council and in order to define the scope of these supplementary decisions, opted for the phrase 'objectives of the Community'. Under the ECSC system, these terms defined both the scope of the High Authority's executive power and the limits of the powers granted with regard to 'cases not provided for'. However, under the EEC Treaty, where this power is put in the hands of the Council, the latter has used it to go beyond these objectives and to give the Community extra powers. This abuse of power has become one of the sources of the 'subsidiarity' ideology, which, in its turn, now threatens to block the accomplishment of the Community's tasks, even within the area that is legitimately its own. Finally, we have Article 97, which spelled the expiry of the ECSC Treaty by limiting its duration. The authors of the EEC Treaty were aware of this when they drafted the corresponding provision in the EEC Treaty. That explains the contrasting wording of Article 240 (312) of the EEC Treaty, which provides that: 'This Treaty is concluded for an unlimited period.' In this regard, people are once again looking apprehensively towards the future, during an economic situation when, under the influence of the pro-sovereignty camp of all hues and on the pretext of simplification, the perennial nature of the EEC Treaty could surreptitiously be challenged. We must, therefore, ensure that this precious provision remains intact, bearing well in mind that the *contractual* nature of this tie that unites us is stronger than the promises set out in some vague and fragile 'constitutional' charter.

So goodbye to the ECSC Treaty. It has come to the end of the road; but it paved the way, with no going back, for the process of European unification, the basic coordinates of which have remained valid throughout the trials and tribulations of half a century. Most of its objectives have been attained. The quadripartite institutional structure, well-adapted to the needs of a community of states in search of unity based on respect for specific national characteristics, still constitutes the cornerstone of the system. The decision-making and legislative mechanism derived from the ECSC Treaty is without parallel in the world, the judicial system is working at full capacity. It is important to safeguard these foundations at a time when everybody is talking about enlarging the system without seeming to be concerned with its cohesion.

**Bibliographical notes**

The terminology of the European treaties has been revised since the Maastricht Treaty by the introduction of the concept of 'European Union', superimposed on the earlier concept of 'Community'. This means that I have had to change my terminology depending on the context, depending on whether a quoted provision is taken from one or other of the two treaties. Moreover, following the Amsterdam Treaty, the EEC Treaty articles were renumbered. Since I took a broadly historical approach, I had to adhere to the original numbering in order to connect the ECSC and the EEC, adding the current numbering of the articles in brackets. In passing, I should like to draw attention to the inconvenience of the new numbering from a scientific point of view in that, *ipso facto*, it devalues everything that has been published over several decades.

I would refer the reader to three of my publications which consider in rather more depth some of the issues addressed in this article.

• The activities of the 'Legal Group' in the negotiations on the Rome Treaties, *Studia Diplomatica (Chronique de Politique Étrangère)*, Brussels, vol. XXXIV, 1981.

• 'L'exécutif communautaire, justification du quadripartisme institué par les traités de Paris et de Rome', *Cahiers de Droit Européen*, 1978, pp. 387–406.

• 'Mit der Subsidiarität leben, Gedanken zu einer drohenden Balkanisierung der Europäischen Gemeinschaft', *Festschrift Ulrich Everling*, 1995, pp. 1071–1094. Page 1076 of that publication gives precise details of the attack by the European Parliament and the Chairman of its Committee on Institutional Affairs on the powers of the Community. The European Parliament documents concerned are as follows: reports A3-163/90 of 22 June 1990 and A3-163/90B of 4 July 1990, together with the corresponding EP resolutions published in the *Official*

*Journal of the European Communities*, 1990 (OJ C 231, p. 163 and OJ C 324, p. 167).