Robert Schuman Centre

European Institutional Architecture after Amsterdam: Parliamentary System or Regulatory Structure?

RENAUD DEHOUSSE

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ROBERT SCHUMAN CENTRE

European Institutional Architecture after Amsterdam: Parliamentary System or Regulatory Structure?

RENAUD DEHOUSSE

EUI Working Paper **RSC** No. 98/11

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To write about the institutional provisions of the Treaty of Amsterdam is something of a paradox. Although the European Council, meeting in Corfu in June 1995, had indicated that the upcoming intergovernmental conference (IGC) would have as one of its main tasks the consideration of a series of measures "necessary to facilitate the work of the institutions and guaranteee their effective operation in the perspective of enlargement", the IGC has notoriously failed to agree on the most important issues, such as the composition of the Commission or the weighing of Member States' votes in the Council of Ministers. At the same time, it is well known that large-scale international negotiations are far from representing an inspired exercise in constitution-making: the need to reach consensus among all participants naturally results in piecemeal compromises which often crystallize around the lowest common denominator. The Single European Act, with its heavy emphasis on the completion of the internal market, nonetheless contained a large number of *quid pro quos*.[1] This trend was even clearer in the Maastricht Treaty, which was rightly described as constructing "a Europe of bits and pieces".[2] The Treaty of Amsterdam is no exception to the rule: many comments have stressed its patchwork nature.

At the same time, however, when browsing through the various institutional provisions scattered throughout the Treaty, two paradigms seem particularly relevant to understanding the logic underlying many of the changes that have been introduced. Each of these paradigms is characterized by its own vision of the missions and of the institutional architecture of the European Union (EU). The first, which has been defined as a *regulatory model,*[3] views the Union as a special purpose organization,[4] the primary task of which is to address a number of issues over which it can hope to achieve greater efficiency than the Member States acting individually. In contrast, many people still tend to view Europe as a primitive political system, which should gradually evolve towards the *parliamentary model* dominant in European countries.

While I would submit that most of the institutional changes introduced by the Treaty of Amsterdam can be linked to one of these models, it does not follow that the IGC should be analysed as a clash between two camps, each

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[1] Dehousse, "1992 and Beyond: The Institutional Dimension of the Internal Market Programme", (1989/1) *Legal Issues of European Integration*, 109-136.

[2] Curtin, "The Constitutional Structure of the Union: A Europe of Bits and Pieces", 30 *C.M.L. Rev.* (1993) 17-69. See also Jean-Louis Quermonne, "Trois lectures du traité de Maastricht. Essai d'analyse comparative", 42 *Revue française de science politique* (1992) 802-818.

[3] Majone, *Regulating Europe*, London: Routledge (1996).

[4] The expression "special purpose organization" is the most commomly used English translation for Ipsen's description of The European Community as a form of *Zweckverband*, which presents many analogies to the regulatory model described here. See the description of this model given in Christian Joerges, "European Economic Law, the Nation-State and the Maastricht Treaty" in Renaud Dehousse (ed.), *Europe aftr Maastricht: An Ever Closer Union?* , Munich: Law Books in Europe (1994), 29-62 at 38-39.

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with its own vision of the Union's institutional future. Those who have followed the work of the conference know that this would be too simplistic a view of what was essentially a multi-faceted multilateral negotiation, rendered extremely complex by the diversity of the participants' agenda. The absence of common objectives has often been signalled as one of the main difficulties faced by the negotiators. This notwithstanding, the two models which have been sketched here can be used to disentangle the web of decisions taken at Amsterdam.

The purpose of this article is not to discuss the respective merits of these two models, but rather to give an overview of the main changes introduced by the new Treaty and to create some order in what might otherwise appear as a bundle of uncoordinated decisions. The article is thus organized as follows. Part I presents an overview of the main tenets of the two models, traces of which can already be found in the pre-Amsterdam institutional architecture. Part II seeks to discern more clearly their respective influences over the new treaty. Part III then attempts to understand the reasons which may explain the coexistence of these two approaches within the treaty and offers a tentative assessment of the implications involved in forthcoming enlargements.

1. Two Blueprints for the Institutional Architecture of the European Union

Jacques Delors suggested some time ago that there are two dominant schools of thought as regards the primary *raison d'être* of European integration: those who view Europe as an *area* in which free trade should be organized and those who rather regard it as a *power* in the making.[5] This distinction is so broad as to leave room for many types of institutional arrangements. However, among the many models which have been considered in relation to the IGC,[6] two - the parliamentary model and the regulatory model, respectively - appear particularly useful for an analysis of the Amsterdam Treaty. Again, I should stress that what follows are ideal-types, inspired by different perceptions of Europe's main mission, rather than clearly articulated projects for its institutional development. Arguably, these models may be of some help as a heuristic device in order to understand the evolution of the last decade. Yet, it does not follow that these are the only models that have actually been employed, or that can be conceived of, in reflections on the organization of the European society.

[5] *L'unité d'un homme*, Paris: Odile Jacob (1994).

[6] Nentwich and Falkner, "Intergovernmental Conference 1996: Which Constitution for the Union?", *European Law Journal* (1996) 83-102.

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1.1. The Parliamentary Model

The parliamentary system is not only the dominant form in Western Europe, it also happens to be the standard reference in reflections on the institutional architecture of the European Union. I can therefore confine myself here to underlining the main reasons which may explain the attempts to transpose it at European level.

Unlike the regulatory model, for which institutional questions are a means to achieve certain objectives rather than an end in themselves, the parliamentary approach stems from a vision of democratic legitimacy in which institutional arrangements are essential. Because of their representative character, parliaments are regarded as the repository of a legitimacy capital. They must therefore enjoy a decisive say in public policies for the latter to be legitimated. As is widely known, the emphasis on the role of parliaments is quite strong in the classical definition of the "democratic deficit": the problem is said to arise from the fact that many of the competences transferred to the European Community are of a legislative nature, which are traditionally the prerogative of parliaments at national level. At Community level, however, the powers of the European Parliament remain limited.[7] Two additional corrollaries of this aproach are also worthy of mention, although they have so far received less attention in debates on the European institutions: parliaments are supposed to be able to control the operation of the executive, and the executive function is presented as the mere implementation of policy decisions taken through the legislative process.

This representative understanding of democracy is so deeply rooted in Western European tradition that one tends to consider that it should affect all public policies. Thus, those who advocate the tranformation of the European Union into a continental power, which ought to gradually acquire a range of functions similar to those traditionally enjoyed by nation-states, often plead in favour of an extension of the rights of the European Parliament in all areas in which the Union is active. As is well known, the last two decades have been characterized by attempts to inject ever greater doses of parliamentarism into the European institutional system. The budgetary debate of the 1970s, the growing involvement of the European Parliament in the legislative procedures, and last but not least, its role in the appointment of the European Commission as defined by the Maastricht Treaty, have been important stages in this evolution -- an evolution in which the Treaty of Amsterdam marks an important step, as will be seen below.

[7] See the resolution of the European Parliament on the democratic deficit in the European Community of 17 June 1988, *OJ* C187/229.

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In spite of its oft-criticized ambiguity, the generic concept of "political union", which is used to describe the objective to be reached in the integration process, stresses two important facets of the model. First, the construction of Europe, like nation-building, is not intended to be confined to market integration, but should also encompass traditional activities of the states, such as the provision of welfare and security. Secondly, politics are expected to play a greater role on the future European scene than they do today. This is generally seen as a positive evolution, as it is expected to bring European institutions closer to the schemes existing at national level.

1.2. The Regulatory Model

The regulatory approach is primarily a functional one: in this view, the European Union should concentrate on activities in which it can hope to achieve greater efficiency than can the Member States, whether that be because of the transborder character of the issues to be dealt with or because states acting alone are likely to generate negative externalities for their partners. While the emphasis clearly rests on market integration, it should not be thought that this confines the European institutions to negative integration, i.e. to the removal of obstacles to free trade.[8] After all, the establishment of a single market necessarily requires a measure of harmonization in an area that can be broadly defined as "risk regulation", namely the assessment and management of risks that may result from natural events or human activities.[9] Indeed, the development of Community involvement in areas such as environmental policy, consumer protection or health and safety at work, has been impressive in the post Single Act years. However, Europe should not aim to acquire the range of powers that have traditionally been associated with the nation-state. Giandomenico Majone, the most active theorist of the regulatory model at European level, has for instance suggested that European institutions are not really equipped to deal with redistributive policies, as the latter are not efficiency-driven.[10]

Although space constraints prevent an extensive treatment of the theroretical underpinnings of this approach here, it is essential for our purposes to understand that this vision of the Union's main mission has a number of institutional corollaries.[11] The first of these is that there should be a clear division of labour between the Member States and the European Union. Secondly, risk regulation tends to ignore lawyers' basic distinction between legislative decisions and implementing rules. By its very nature, risk regulation

[8] Pinder, "Positive Integration and Negative Integration - Some Problems of Economic Integration in the EEC", 24 *The World Today* (1968) 88-110.

[9] Breyer, *Breaking the Vicious Circle. Towards Effecive Risk Regulation*, Cambridge, MA: Harvard University Press (1993).

[10] Majone, *Regulating Europe*, London: Routledge (1996) 296-300.

[11] Caporaso, "The European Union and Forms of State: Westphalian, Regulatory or Post-Modern?", *Journal of Common Market Studies* (1996) 29-34.

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requires complex risk assessments which cannot be performed *ex ante* through legislative instruments: implementing agencies are often granted a mix of rule-making and implementation powers. Thirdly, pure intergovernmental solutions are viewed as providing often inadequate responses to the problems that have to be tackled at European level. National regulators may lack adequate knowledge of the behaviour of the regulated, particularly when the latter happen to be located in other countries; they may also be tempted to use their regulatory capacity strategically to favour domestic firms. As a result, their credibility as enforcers of European policies tends to be poor. The regulatory model therefore lays considerable emphasis on delegation to supranational institutions which, because of the autonomy they enjoy, are assumed to be less prone to capture by specific interests and can therefore be expected to be stricter in enforcing regulatory standards throughout the Union.[12]

However, supranational agencies (be it the Commission or autonomous administrative agencies) can only fulfil such a role if their institutional autonomy is preserved. While it is clear that the Commission cannot and should not operate in a political vacuum, its credibility is dependent on its ability to remain immune to interference from national governments or party politics in its daily activities. Where its autonomy is in doubt, pressures to curtail its powers are likely to follow: the German proposal to establish European cartel office, for instance, was motivated by the fact that the Commission appeared to be too exposed to "political" pressures.[13] The regulatory model therefore finds a much more favourable environment in Madisonian systems, which emphasize the need for a system of institutional checks and balances in order to disperse power. Indeed, the concentration of power in a few hands - " whether of one, a few, or many, and whether hereditary, self appointed, or elective" .[14] - is perceived as the worst evil Transposed to European level, this approach suggests that legislative mandates and budgetary controls, while performing a most useful function of democratic control, should not transform relationships between the Commission and other institutions (in particular, the European Parliament) into a purely principal-agent relationship.

Lastly, it follows from these premises that the legitimacy of European public policies must be ensured by resorting to techniques which enjoy a less prominent role in domestic political systems. While there may be provisions to ensure a degree of representativeness to each institution, the autonomy each of them is supposed to enjoy prevents the emergence of a model of representative democracy similar to those prevailing in Western European countries. Legitimacy must therefore flow from other sources. Clear mandates must set

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[12] Gatsios and Seabright, "Regulation in the European Community", 5 *Oxford Review of Economic Policy*, (1989) 37-60.

[13] See the comments of Dieter Wolf, President of the Bundeskartellam, in Ehlermann and Laudati (eds), *Robert Schuman Centre Annual on European Competition Law 1996*, The Hague: Kluwer (1997) at 8-11.

[14] *The Federalist Papers*, N. 47 (James Madison), ed. By Gary Wils, New York : Bantain (1982) at 244.

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out, possibly at constitutional level, the objectives to be reached (price stability, a high level of health and consumer protection, etc.). Supranational institutions are held accountable for the progress achieved in pursuing these objectives. Procedures are equally important: decision-making processes must be sufficiently transparent in order to allow representatives of the various interested parties to express themselves.[15]

Coined in such abstract terms, the regulatory model might seem far away from today's realities. Yet this impression largely stems from the fact that the public (and academic) discourse on European institutions is heavily influenced by the parliamentary model. In fact, several aspects of the existing institutional structure seem fairly close to central concerns of the regulatory model. From the outset, the emphasis has been laid on functional integration in a limited number of areas in which "*de facto* solidarity" could be achieved, according to the preamble of the Treaty of Paris. The founding fathers' emphasis on the autonomy of the Commission and the important institutional prerogatives granted to the latter need not be recalled for the readers of this review. Since the Single European Act, European interventions in the realm of risk regulation have grown steadily. The institutional aspects of monetary union, and in particular, the autonomy granted to the future European central bank, clearly rest on an institutional vision which owes more to the regulatory approach developed above than to the canons of parliamentary democracy -- hence the manifold objections it has encountered in various countries. As can be seen, while the theorization of the regulatory model may sound new, it encompasses a number of aspects which are familiar to observers of the European scene.

The differences between the regulatory and parliamentary models largely flow from their respective premises. The regulatory model approaches institutional questions from a functional angle, while the parliamentary model starts from the assumption that more democracy should be injected into the European process. This notwithstanding, it is clear that both models have had a strong influence over the institutional development of the European Union. The Treaty of Amsterdam is no exception to the rule, as we shall now see.

[15] Majone, *supra* note 5 at 291-96.

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2. The Amsterdam Treaty

2.1. Towards a Parliamentary Model?

2.1.1. Parliament as a Co-legislator

The European Parliament is largely viewed as the institution that has most benefited from the Treaty of Amsterdam: Elmar Brok MEP, a Parliament representative at the IGC, summarized the dominant view when he suggested that 'if there is one winner in the Amsterdam Treaty, then it is the European Parliament'.[16]

The Parliament's position has been redressed in several respects. Its legislative powers have been greatly extended. Legislative co-decision has been foreseen in eight new provisions, including in areas which have recently acquired political salience, such as social policy[17] and public health.[18] Even more significant is the fact that a shift to co-decision was introduced in 15 existing provisions, mainly in replacement of the cooperation procedure which will henceforth be confined to monetary policy. The provisions in questions cover decisions in areas such as the free movement of workers,[19] the freedom of establishment,[20] transport policy,[21] research [22] and environment policies.[23] Co-decision therefore emerges as the most frequently used legislative procedure. The result is surprising if one recalls how much disagreement was voiced over the scope of the co-decision procedure at the time the Maastricht Treaty was being negotiated -- only six years ago. Moreover, throughout the IGC, several delegations had made no secret of their opposition to an extension of the Parliament's legislative prerogatives. Apparently, this did not suffice to stop the supporters of the parliamentary model - which suggests that it is wrong to assume that in complex negotiations upholders of the status quo always prevail.

The change must be analysed in connection with the simplification of the co-decision procedure decided in Amsterdam. Article 189b has become shorter, less complex, and therefore easier to understand. At the same time, the balance of power has been shifted in favour of the European Parliament. Some of the changes are of a symbolic nature: when a conciliation committee is convened it must focus on the amendments put forward by the Parliament; the latter is no longer required to inform the Council when it intends to reject the Council's common position. More significantly, the so-called "third reading", which was

[16] European Policy Centre (ed.) *Making Sense of the Amsterdam Treaty* (1997) at 45.
[17] Articles 118(2) and 119.
[18] Article 129(4).
[19] Article 49.
[20] Articles 54(2) and 56(2).
[21] Articles 75(1) and 84.
[22] Article 130.
[23] Article 130s(1).

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perceived by Parliament as a symbol of its subordinate role in legislative procedures, has been abolished. Under the Maastricht system, when the conciliation committee failed to agree on a compromise text, the Council still had the option to "confirm its common position" by a qualified majority decision. All Parliament could then do was to reject this common position, a decision which required an absolute majority of its component members. Only a few months after the coming into force of the Maastricht Treaty the Parliament showed that this was no insurmontable obstacle if it could flex its muscles, as it did in relation to the proposed directive on voice telephony, which it rejected. However, many MEPs feared the negative side of the weapon: in the event that the Parliament should reject a text, it could easily be held responsible for the failure of the legislative procedure. Moreover, given the requirement of a majority of *members* of Parliament for the rejection of the common position, it could not be thought that this threat would always be sufficient to encourage the Council to be cooperative in the conciliation committee. The revision has addressed that difficulty by changing the default condition: in case of failure to reach agreement, 'the proposed act shall be deemed not to have been adopted'.

Combined together, the simplification and the extension of the co-decision procedure certainly improve the overall position of the European Parliament. Parliament has also seen its standing improved in Pillars II and III. It must now be consulted in relation to the various kinds of normative measures to be adopted in the areas that remain in the third pillar, i.e. police and judicial cooperation in criminal matters. Moreover, Article J18(2) has put an end to a bitter dispute over the operational expenditures incurred as a result of decisions taken in the framework of the common foreign and security policy (CFSP) by providing that most of these expenditures should be charged to the Community budget, which will consolidate parliamentary control over foreign policy matters.[24]

2.1.2. A Bicameral Legislature?

Put together, these developments clearly suggest that parliamentary influence over a wide range f matters should grow significantly in the years to come. From the Parliament's standpoint, the Amsterdam harvest is more impressive than the previous ones. The Single European Act had inaugurated the legislative dialogue through the establishment of the cooperation procedure; the Maastricht treaty had marked Parliament's accession to the role of co-legislator with the introduction of the co-decision procedure. The Amsterdam Treaty has gone a step further along the same path both in qualitative terms, by putting the Parliament and the Council on an equal footing in the co-decision procedure, and in quantitative terms, with the extension of this procedure to a significant number of new areas.

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[24] See F. Dehousse "Les résultats de la conférence intergouvernementale", *Courrier hebdomadaire du CRISP* (1997) N°1565-66 at 39-40 for a more detailed analysis.

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Seen in historical perpective, the process is impressive in its continuity. In little more than ten years, the Parliament has moved from the status of a consultative assembly to that of a fully-fledged legislative body. To be sure, the process is not yet complete: the pillar structure of the Union, which has been left untouched (in principle, if not in substance, given the transfer of some matters from the third to the first pillar) in Amsterdam, still holds a number of barriers against parliamentary influence, and there continue to be a number of areas in which the Parliament remains -- formally at least -- confined to a subordinate role: it is merely consulted in agricultural policy[25] and tax harmonization,[26] while its consultation is still not formally provided for the common commercial policy. Notwithstanding these black holes, and in view of the evolution of the last decade, it does not seem excessive to argue that the institutional system is now close to that of a number of federal systems, in which the legislative power is shared by two branches, representing the population of the Union and its Member States, respectively.[27]

This option in favour of a bicameral legislature has been reinforced -- admittedly in an implicit fashion -- by the Protocol on the role of national parliaments in the European Union, which was approved in Amsterdam. It will be recalled that the early 1990s saw a real upsurge of interest in the role of national parliaments in the integration process. The phenomenon was not limited to academic circles: in its ruling on the Maastricht treaty, the German Constitutional Court stressed that, given the underdeveloped character of the European political process, national parliaments were key providers of legitimacy:

> Democratic legitimacy in the Union of States constituting the European Union is necessarily conferred by feedback from the actions of the European institutions in the parliaments of the Member States.[28]

Building on that trend, some institutionalization of the role of national parliaments had been advocated in various circles. Some went as far as to suggest the creation at European level of an assembly composed of representatives of national parliaments, which would be given a say in the European legislative process.[29] For its part, the French government had

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[25] Article 43.

[26] Article 99.

[27] For a reflexion on this model, see Lenaerts and Snijder, "The Question of Democratic Representation: On the Democratic Representation through the European Parliament, the Council, the Committee of Regions, the Economic and Social Committee and the National Parliaments", in J.A. Winter et al (eds) *Reforming The Treaty on European Union - The Legal Debate*, The Hague: Kluwer (1996) 173-97.

[28] Cases Nos 2 BvR 2134 and 2159/92; judgment of 12 October 1993, reprinted in Oppenheimer (ed.) *The Relationship between European Community Law and National Law: The Cases*, Cambridge University Press (1994) 525 at 554.

[29] *A proposal for a European Constitution*, Report by the European Constitutional Group, December 1993.

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advocated the establishment of a similarly composed High Consultative Council to advise the Commission on the proper use of the subsidiarity principle.

None of these proposals met with much interest during the negotiations. The reflection group which prepared the intergovernmental conference unambiguously rejected the creation of a permanent organ with its own staff and premises as well as what it has called "a second chamber" comprising members of national parliaments,[30] stressing instead that the primary role of national parliaments in relation to European decision-making "lies in the monitoring and control that each parliament exerts over its government's action in the Coucil" and that it is up to each state, and not to the Union, to regulate these powers.[31]

The Amsterdam Protocol fully endorsed this view. While it pays lip service to the need to enable national parliaments to express their views on European matters, it essentially limits itself to providing that they should be forwarded all Commission consultation documents (green and white papers as well as communications) and that draft legislative proposals should be made available by their government "as appropriate".[32] In addition, a minimum of six weeks must elapse between the time that draft legislative proposals are made available and a possible decision by the Council.

Similarly, while the protocol generously invites the conference of European affairs committees -- the so-called COSAC, which brings together representatives of the organs responsible for European affairs in national parliaments and a small delegation of the European Parliament -- to make "any contribution it deems appropriate" to European institutions, it deliberately avoids any reference to the more ambitious "Assizes" model. This latter foresees a meeting of large delegations of members of the European Parliament and of national parliaments, along the lines of the meeting that took place in Rome in November 1990. Although that model has been at times presented as a means of injecting further legitimacy into the European system, the proposal was rejected by the reflection group.[33]

Thus, as regards national parliaments, the most important innovation does not appear in the relevant protocol, but rather in the new Article 151(3), according to which "when the Council acts in its legislative capacity, the results of votes and explanations of vote as well as statements in the minutes shall be made public."

While a milder version of this principle already appeared in the Council's

[30] Reflection Group's report, 5 December 1995, at para. 93 and 95.
[31] Ibid. at para. 91.
[32] Articles 1 and 2.
[33] Supra note 25 at para. 93.

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rules of procedure,[34] its effect was mitigated by far-reaching exceptions, particularly as regards explanations of votes which could only be made public through an ad hoc decision of the Council.[35] The consolidation of the principle is of course important for national parliaments, which will now be in a better position to scrutinize the behaviour of their government's representative in the Council – at least in those cases where a formal vote is taken.

To sum up, it appears that the drafters of the treaty have not departed from the two-tiered deliberative process advocated by the German Constitutional Court. The role of national parliaments remains essentially indirect. They may attempt to influence the behaviour of European institutions, but they have been denied any direct invovement in the legislative procedures. The future will tell whether the Amsterdam Treaty has been the high water mark as regards their influence in ordinary European decision-making processes. Given the role they play in the ratification process, it might be premature to count them out. What is evident, however, is that the Maastricht blueprint is characterized by a clear rejection of a number of elaborate models that had been proposed, and by a further step -- a drift, some might argue -- towards a federal-type bicameral legislature.

2.1. 3. Parliament and Commission

The relationships between the legislature and the executive are the cornerstone of the parliamentary system: as parliaments are regarded as the main providers of legitimacy, executive authority must derive from, and be responsible to, the legislature. In this view, government responsibility before parliament is essential, as it allows voters to dismiss rulers with whom they are dissatisfied.

Although the European Commission has only been endowed with limited implementation powers, it fulfils many functions traditionally allocated to the government machinery in contemporary systems: policy impulsion, drafting of legislation, monitoring of its implementation, etc. Relationships between the Parliament and the Commission are therefore of central importance in understanding the kind of institutional system which is likely to emerge as a result of the changes operated in the last decade.

The Maastricht Treaty had already made major steps towards a kind of parliamentary governement.[36] In this treaty provision was made for the Parliament to be consulted on the choice of person that governments of the Member States intended to appoint as President. A "vote of approval" was required before the appointment of the whole Commission could be formalized.

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[34] Article 7(5).

[35] Article 5 (1). See also the comments in section 2.2.2.

[36] See Article 158 and the comments of Noel, "A New Institutional Balance", in Dehousse (ed.) *Europe after Maastricht*, supra note 4 at 20-21.

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Finally, the Commission's term of office was made to coincide with that of Parliament, confirming that the drafters of that treaty intended the votes cast in European elections to be reflected in the choice of a new Commission. Some of these elements simply codified established practices: the Stuttgart Declaration of 1983 already provided for consultation with the Parliament's enlarged bureau on the choice of President, votes of confidence had already taken place in the past and, in 1989 and 1993, the Commission waited until this vote before it taking its oath of office.

Yet, beside its symbolic value, the "constitutionalization" of these procedures has clearly reinforced the Parliament's hand: the fact that it can withhold its "approval" at the end of the procedure clearly reinforces its position in the early stages. Even though it would be legally posssible to ignore objections to the national governments' choice for the Commission Presidency, a Commission chaired by a person about whom Parliament had expressed an unfavourable opinion would be unlikely to secure a majority at the time of the "vote of approval". Likewise, the Parliament has relied on the approval requirement to convince members of the Santer Commission -- who were initially reluctant -- to participate in "confirmation hearings" before the appropriate parliamentary committees (a procedure which proved to be notoriously difficult for some of them).

These innovations have undoubtedly transformed the quality of the relationship between Parliament and the Commission. As suggested by Emile Noël, the vote of approval has something of the character of an election and it confers a higher political profile on the Commission.[37] This view seems to be shared by Mr Santer, who has stressed that in the post-Maastricht context "la Commission peut se vanter d'une légitimité démocratique et parlementaire."[38] Further, Parliament's role in the appointment procedure has given added credibility to the threat of a censure vote, which has reinforced its control over the daily activities of the Commission. As a result, Parliamentary influence has considerably increased, including in legislative procedures which had been previously characterized by a Commission-Council dialogue.[39]

This evolution is likely to be further accentuated as a result of the few changes introduced by the Amsterdam Treaty. Article 158(2) now requires the nomination of the "President designate" to be approved by the European Parliament. As has been indicated, this simply aligns the text of the treaty on the new balance of power in the post-Maastricht appointment procedure. In July 1994, when the nomination of Jacques Santer appeared to be in doubt following the United Kingdom's veto of Belgian Prime Minister Jean-Luc Dehaene, Mr

[37] Supra note 31 at 21.

[38] *Le Monde*, 20 janvier 1995.

[39] See Dehousse, "The Legacy of Maastricht: Emerging Institutional Issues", *Collected Courses of the Academy of European Law*, vol. III, Book 1, The Hague: Kluwer (1992) 181-239 at 226-28 for a more detailed analysis.

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Santer made it clear that he would withdraw if he failed to rally the support of a majority of MEPs, thereby indicating that he regarded the consultation of Parliament as tantamount to a confirmation vote. The modification of Article 158(2) must therefore be viewed as a confirmation of an (implicit) option in favour of a parliamentary system, rather than as a change in the appointment procedure. Indeed, it has been suggested that

> the nature of the debate on Mr Santer in July 1994, following his statement to the House, and the meetings he held with the three largest Political Groups, illustrated the character of the procedure as one of building-up a parliamentary majority for the confirmation vote.[40]

The only novel element introduced at that level regards the position of the President *vis-à-vis* his fellow commissioners. The Treaty of Amsterdam now foresees that in explict terms that "[t]he Commission shall work under the political guidance of its President".[41] A declaration included in the Final Act of the conference has confirmed the principle by indicating that

> [The Conference] considers that the President of the Commission must enjoy broad discretion in the allocation of tasks within the College, as well as in any reshuffling of those tasks during a Commission's term of office.

This suggests a determined will to confer upon the President, *primus inter pares*, a clearer authority than in the past over the members of the executive. Although the vagueness of these provisions has been seen as a sign of weakness,[42] they have to be read in conjunction with the second paragraph of Article 158 (2), according to which the members of the Commission will in the future be appointed by "the governments of the Member States ... by common accord with the nominee for President". This may give some bite to the otherwise vague statements quoted here. The President's authority over the Commission may be significantly reinforced by his enhanced status in the appointment procedure. Although he has not been granted disciplinary powers, the threat of a non-renewal may help him to impose a certain discipline on unruly colleagues, which was not always possible in the past. It can therefore be argued that the Amsterdam Treaty has made a further step in the direction of those parliamentary models in which the head of the executive is recognized as a special authority over the cabinet.

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[40] Corbett et al., *The European Parliament*, 3d. ed. London: Catermill (1995) at 248.
[41] Article 163, first paragraph.
[42] See European Policy Centre (ed.), *Making Sense of the Amsterdam Treaty*, supra note 16 at 108.

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2.2. *The EC as a Regulatory Structure*

The above elements might lead one to believe that a clearcut choice has been made in favour of the parliamentary model. This, however, might be too rapid a conclusion, for the Amsterdam Treaty has also introduced a series of changes -- the extension of the Community competences in the field of social regulation, the new provisions on transparency or the subsidiarity protocol -- which rather bring the EC closer to the regulatory model discusssed in the first part of this article. Admittedly, at first glance, these elements might appear as neutral from the institutional standpoint, in that they do not openly reflect a particular vision of the Union's institutional architecture. Yet, the kind of issues they try to address, and the approach which has been chosen, are clearly evocative of some kind of regulatory model, as we shall now see.

2.2.1. *The Development of Risk Regulation*

The development of EC competence to deal with risk regulation is one of the most surprising aspects of the Amsterdam Treaty. The main purpose of the IGC was to review the functioning of Pillars II and III and to discuss the institutional changes that might be necessary to prepare for the forthcoming enlargements. No one expected real changes in the missions of the European Community. Given the post-Maastricht enthusiasm for the subsidiarity principle, it was widely acknowledged that a further expansion of EC competences was undesirable. However, the BSE scare and the dysfunctions it revealed opened a window of opportunity for the Commission. It thus decided to table a series of amendments aiming at enlarging the legal basis for Community interventions in the field of public health and consumer protection.

Some of the changes that were agreed upon are of a cosmetic nature. Thus, the primary ambition of Community health policy is no longer merely to "contribute to ensure a high level of human health protection by encouraging the co-operation between Member States"[43] but to ensure "a high level of human health protection in the definition and implementation of Community policies".[44] The Community is also invited to play a more active role in the protection of consumers: it must now promote their *right* to information and to organize themselves,[45] as well as monitor (and no longer simply assist) the policies pursued by the Member States.[46] Likewise, consumer protection requirements must now be taken into account in other Community policies.[47]

[43] Maastricht version of Article 128.
[44] New Article 129.
[45] Article 129a(1).
[46] Article 129a(3)(b).
[47] New Article 129a.

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Although the direct impact of such amendments is likely to be limited,[48] they bear evidence of a greater willingness on the part of national governments to accept that the Community has an autonomous role to play in the areas at issue. More importantly, several elements are likely to give additional clout to Community interventions. First, the Maastricht Treaty clause that prevented the Community from adopting harmonization measures in the field of public health[49] has been removed. Secondly, the role of the European Parliament has been enhanced by the shift to co-decision in public health and environmental policies.[50] This will also apply to adoption of health measures in the veterinary and phytosanitary sectors, in which the rights of the European Parliament have traditionally been limited, as they formed part of agricultural policy. This Parliament's new powers might well result in a stronger European presence in theses fields: MEPs have often advocated a pro-active stance in these policy areas, which are of interest to the overall European populace.

As had already been the case with the Single Act, the prospect of a Europeanization of risk regulation has been met with some concern by states which have already developped regulatory policies. They fear that the need to reach a consensus might lead to a lowering of their standards of protection. This has led to the mushrooming of statements exhorting, in a somewhat redundant fashion, the Community to ensure "a high level of protection" in its regulatory policies. In addition, it has been felt necessary to enlarge the scope of the safeguard clause contained in Article 100a, by allowing Member States to introduce new provisions to protect the environment or the working environment (but, oddly enough, not public health or consumers). The measures in question must be duly motivated and approved by the Commission,[51] whose role as an umpire in interstate relations is thereby implicitly confirmed. The impact of such escape clauses is difficult to assess: although they were largely perceived as a threat for the unity of the European market at the time of the Single Act,[52] it could actually be argued that the possibility of opting out is one of the elements that has enabled states with a high level of protection to drive up the European regulatory standards in a number of areas.[53] Interestingly, Article 100a (7) states that when national provisions derogating from

[48] See e.g. case c-233/94, *Germany v. Parliament and Council*, judgment of 13 May 1997, not yet reported, where in response to a claim that Community directive 94/19/EC was incompatible with the Community's objective to attain a high level of consumer protection, the Court of Justice indicated that "although consumer protection is one of the objectives of the Community, it is clearly not the sole objective". It further stressed that "no provision of the Treaty obliges the Community legislature to adopt the highest level of protection which can be found in a particular Member State" (at recital 48).

[49] Article 129(4).

[50] New Article 130s(1).

[51] Article 100a(4) to (9). On the need for the Commission to motivate its own decision, on national measures, see case C-41/93, *France, v. Commission*, [1994] ECR I-1829.

[52] See Pescatore, "Some Critical Remarks on the Single European Act", *Common Market Law Review* (1987) (24) 9 for a notable example.

[53] Sbragia, "Environmental Policy", in Wallace and Wallace (eds), *Policy Making in the European Union*, Oxford University Press (1996) 235-55.

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harmonization measures are approved by the Commission, the latter must examine whether to propose an adaptation to that measure. This in itself can be seen as an implicit confirmation that the derogation clause may have a pro-regulation impact. Why this is so can be easily explained: if the "grounds of major need" or the scientific evidence justifying a derogation are sound, they might as well lead to a stricter Community provision.

Be that as it may, the combination of changes introduced by the Amsterdam Treaty clearly suggests that national governments were eager to develop risk regulation at European level. How exactly this will be achieved has not been specified. Yet, by its very nature, risk regulation requires complex decisions which cannot be taken *in abstracto* by way of legislative instruments. Laws may require pharmaceuticals to be safe, and foodstuffs healthy; they may even lay down in great detail procedures governing the way in which risks related to these goods must be assessed. Ultimately, however, the decision on whether they may be marketed will be taken by bureaucratic structures, having regard *inter alia* to the available scientific evidence – a requirement which is now explicitly acknowledged in several treaty provisions.[54] Moreover, several innovations contained in the Treaty, such as the provisions on transparency or the subsidiarity protocol can be viewed as attempts to bypass the parliamentary model that has so far dominated in reflexions on the future institutional structure of the Union, as shall now be seen.

2.2.2. Transparency

The transparency of public policy-making is by no means a problem peculiar to European institutions. On the contrary "Government in the Sunshine" is a standard problem of contemporary governance. The multiplicity of functions assigned to state machineries in the twentieth century has led to the development of large bureaucratic structures, often quite opaque, and which appear not to be actually accountable to anyone. Hence the growing pressures to improve the openness of decision-making processes.

While there has been an upsurge of interest in the transparency issue at European level, there has been little acknowledgement that a proper treatment of the problem requires a new paradigm of democratic legitimacy.[55] It can indeed be argued that the emergence of the issue is largely due to a crisis of representative democracy: if parliaments were able to effectively control the

[54] See e.g. Article 100a(3) and (5) and Joerges, Ladeur and Vos (eds) *Integrating Sientific Expertise into Regulatory Decision-Making*, Baden-Baden: Nomos (1997).

[55] See however Craig, "Democracy and Rule-Making within the EC: An Empirical and Normative Assessment", 3 *European Law Journal* (1997) 105-130; Curtin, *Postnational Democracy - The European Union in Search of a Political Philosophy*, Universiteit Utrecht (1997); Weiler et al. "European Democracy and its Critique" in J.Hayward (ed.) *The Crisis of Representationin Western Europe*, London: Sage (1995) 4-39.

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workings of bureaucracies and could act as a forum in which the diverse interests in a given polity could be voiced, the problem would lose much of its acuteness. Typically, the techniques that have been used at national level to come to grips with the growth of the bureaucratic state -- provisions on access to official documents and participation in administrative practices -- were somehow conceived as a way to compensate for the fact that parliaments face growing difficulties in overseeing the activities of the administration. Moreover, specific features of the Community system render parliamentary of bureaucratic networks more difficult than at national level. Even though the European Parliament's power over the Commission has been considerably enhanced by the Maastricht Treaty, it largely remains an outsider in comitology networks, the role and the importance of which is now increasingly acknowledged. This explains why the comitology debate, which was largely fed by the Commission in the 1980s, has now become a bone of contention between the Parliament and the Council.[56] At the same time, the European Parliament has not (yet?) emerged as a forum in which political debate on important social issues can be developed.[57]

Seen in this light, the pressures in favour of greater transparency appear to a large part due to an implicit, but nonetheless quite real, scepticism as to the ability of citizens to acquire real influence via the medium of representative democracy. The Commission's undertaking to consult widely before tabling legislative proposals[58] is symptomatic of a willingness to reach out to a broader constituency. Undoubtedly, there are additional facets to the transparency problem. Decision-making procedures are so complex that they are largely unintelligible to a lay audience. Likewise, as indicated above, the publicity of voting records may be viewed as a way of holding national delegations accountable before their respective parliaments for their actions within the Council of Ministers. But it nevertheless remains difficult to connect these questions to the classical concept of representative democracy.

In contrast, the bridges with the regulatory model are manifold. As it lays the emphasis on the autonomy of regulatory agencies, that model assumes a considerable degree of separation of powers: legislatures lay down the legislative framework within which agencies have to operate, and they check whether the objectives and guidelines that have been set for agency action have actually been respected, but they are not supposed to monitor agencies' day-to-day activities, save in exceptional circumstances.[59] The quest for alternative sources of legitimacy has led advocates of the regulatory model to recognize

[56] Bradley "The European Parliament and Comitology: on the Road to Nowhere?", 3 *European Law Journal* (1997) 230-57.

[57] See my "Constitutional Reform in the European Community: Are there Alternatives to the Majoritarian Avenue?", *West European Politics* (1995) 118-136, for a more extensive analysis.

[58] "Interinstitutional Declaration on Democracy, Transparency and Subsidiarity", reproduced in *Europe documents* n° 1857 of 4 November 1993 at 2.

[59] Section 1.2.

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that the huge variety of interests affected by public policies must somehow be reflected in decision-making processes in order to avoid the "capture" of regulators by the most powerful interests.[60] In such a context, access to documents held by decision-makers and the transparency of decision-making procedures are obviously of great importance. The steps made in that direction therefore appear related to a vision of legitimacy which is closer to the regulatory model than to the hitherto dominant parliamentary approach.

This seems worthy of note as a number of significant changes have been introduced by the Treaty of Amsterdam. Prior to the Maastricht Treaty, a principle of secrecy prevailed in relation to European institutions, with the sole exception of the European Parliament. Their meetings were regarded as confidential, as was a substantial portion of their documents, both the preparatory materials and minutes of the meeetings.[61] While this principle was hardly challenged as regards the Court of Justice, where it is perceived as a guarantee against undue pressure on judges, the secrecy surrounding the proceedings of the Council and the Commission have become a matter of concern in recent years, especially given the central role they play in legislative procedures.

As a result, some progress towards greater openness has been achieved in the post-Maastricht period as part of a package aimed to improve the public perception of European institutions. A declaration attached to the Maastricht Treaty, which laid down in general terms the principle of access to information, was given effect through a Code of Conduct concerning public access to Council and Commission documents.[62] These non-binding documents were then supplemented by unilateral decisions of the two institutions. The Council has amended its Rules of Procedure to provide for a (limited) number of public debates, which can be subjected to "retransmission by audiovisual means",[63] and to allow some access to records[64] and explanations of votes.[65] Both the Council and the Commission have adopted a decision laying down the procedural rules to be followed in dealing with applications for documents.[66]

However, the scope of these innovations was more symbolic than real: far from creating a subjective right to information, which could be judicially enforced, they largely left untouched the principle of confidentiality, as far-

[60] See e.g. Sunstein, "Factions, Self-Interest, and the APA: Four Lessons since 1946", *Virginia Law Review*, vol. 72, 1986, 271-296.

[61] See Article 32 of the Statute of the European Court of justice, Article 5(1) of the Council's Rules of Procedure and Article 7 of the Commission's Rules of Procedure.

[62] *OJ* L1993, 340/41.

[63] Article 6(2).

[64] Article 7(5).

[65] Article 5(1).

[66] Council decision 93/731/EC of 20 December 1993 *OJ* L 340/43, Commission decision 94/90/ECSC, EC, Euratom of 8 February 1994, OJ L 46/58.

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reaching exceptions motivated by the protection of the "public interest" or the institutions' interest in the confidentiality of their proceedings were allowed.[67] Moreover, both institutions appear to have followed a similar practice, systematically denying access to documents which might reveal the tenor of internal deliberations. This latter practice has been condemned by the Court of First Instance. The Court has required an individual examination of requests, in which the alleged public interest justifying a rejection of the application must be balanced against the applicant's interest in getting the information.[68] A detailed statement of reasons must also be given in the event that the request is rejected.[69] However, as the Court did not go further than these "due process" requirements, decisions on whether to grant access appear to remain largely discretionary.

Viewed against this background, the Treaty of Amsterdam contains a number of substantial innovations. Firstly, it establishes in unambiguous terms a right of access to European Parliament, Council and Commission documents.[70] While the "principles and conditions" according to which this right is to be exercised remain to be defined,[71] the fact that it has been enshrined in the Treaty is bound to condition their action: the multiplication of far-reaching exceptions should no longer be possible as it would defeat the very purpose of the Treaty amendment. Although Article 191a(3) provides in vague terms that each institution must "elaborate in its own rules of procedures specific provisions regarding access to its documents", this should not be seen as opening the door to many restrictions. Being mere rules of internal organization, rules of procedure cannot deviate from the principles adopted by the Community legislature in implementation of Treaty provisions.[72] In spite of its vagueness, this provision appears to cover the practical modalities of access to documents, rather than decisions of principle. To avoid any misunderstanding in this respect, Treaty status has been granted to the rule according to which, when the Council acts in a legislative capacity, the results of votes, explanations of vote and statements attached to the minutes are to be made public.[73] In other words, as regards access to documents, the hierarchy of values established in the post-Maastricht period appears to have been reversed: public access has become the rule, and confidentiality an exception to be interpreted narrowly.

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[67] See the exceptions listed in the Code of conduct, as well as Article 4 (2) of Council decision 93/731 EC.

[68] Case T-194/94, *John Carvel and Guardian v. Council*, [1995] ECR II-2765.

[69] Case T-105/95, *WWF v. Commission*, judgment of 5 March 1997, not yet reported.

[70] New Article 191a.

[71] The Treaty contemplates a decision by the Council and the Parliament in accordance with the co-decision procedure.

[72] See case C-58/94, *Netherlands v. Council*. [1996]ECR I-2186.

[73] Article 151(3). See above, section 2.1.2.

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This notwithstanding, there remain important limits to the principle of openness. While at first sight the exclusion of the Court of Justice and the Court of Auditors from the provisions on transparency does not appear likely to harm the interests of European citizens, the same cannot be said of the absence of any reference to the myriad of committees that assist the Commission and the Council or to the newly established European agencies. True, these bodies enjoy no formal decision-making power. Yet, decisions adopted by European institutions are notoriously influenced by their deliberations, particularly when complex scientific assessments are required. It would therefore be important for interested parties to be granted access to the documents which are consulted in this context in order to be able to make representations to the competent bodies. [74] Similarly, retaining the reference to *documents* rather than to *information* is to be regretted as it enable European institutions to reject requests in which the relevant documents are not clearly identified.[75]

Be that as it may, the changes brought about by the Treaty of Amsterdam, provided they are duly implemented, may emerge in the future as a significant step towards the adoption of a legal framework enabling the development at European level of a form of pluralist democracy, which allows the variety of interests affected by decisions of the European institutions to be heard. As pluralist approaches tend to attach more importance to the possibility of influencing decision-makers than to the control of people's representatives, the absence of any provision for open meetings of the Council when it acts as a legislator is less likely to be resented as a major handicap than it is in the classic parliamentary model. In other words, the Amsterdam provisions on transparency, with their innovations as well as their omissions, appear closer to basic tenets of the regulatory model than to the parliamentary one.

2.2.3. Subsidiarity

The demarcation of the respective competences of central institutions and of the component units is a problem common to all divided powers systems, including the European Union. Why, then, discuss subsidiarity in relation to the regulatory model?

The reasons for this are to be found in the way that the subsidiarity principle has been defined in the EC Treaty. As is known, the second paragraph of Article 3b, which introduced the subsidiarity principle, does not define the competences of the Community: the demarcation is operated by other Treaty provisions, at the top of which appears the principle of attributed powers.[76] The

[74] Dehousse, Joerges, Majone, Snyder and Everson, *Europe after 1992: New Regulatory Strategies*, Florence: EUI Working Paper LAW 92/31, 1992, 29-31.

[75] See Curtin, "Betwixt and Between: Democracy and Transparency in the Governance of the European Union", in Winter et al., *Supra* note 22, 95-121 at 108.

[76] Article 3b, first paragraph. This point has been underlined quite clearly in the conclusions of the

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primary aim of the subsidiarity principle appears to be to *regulate* the use made by the Community of the (non-exclusive) competences it enjoys by virtue of the Treaty. To this effect, the Treaty has defined a twofold subsidiarity test, which combines elements of effectiveness and efficiency.[77] While there has been intense discussion on the usefulness of such criteria in the post-Maastricht years, these elements are recalled here merely to stress one point: namely that this vision of subsidiarity is more consonant with a vision of the European Community as a special-purpose organization, where the way institutions use their power is governed by more or less precise guidelines, rather than with a "classical" problem of demarcation of the respective competences of the centre and the periphery in a a two-tiered system.

This view is reinforced by the analysis of the "Protocol on subsidiarity and proportionality" of the Treaty of Amsterdam. The reflection group had already indicated that it would be useful to adopt a number of guidelines to give flesh to the somewhat vague criteria laid down in Article 3b. In the flood of literature that has been devoted to the subsidiarity principle, two main avenues have been identified for its implementation: firstly a substantive one, the primary objective of which is to define as precisely as possible the conditions which should be met be met for the Community to act and the ways in which its action should be tailored to avoid undue interference with Member States' prerogatives, and secondly a procedural one, laying down the steps which must be taken by the institutions in undertaking their subsidiarity assessments.

The Amsterdam Protocol tries to develop these two approaches in a parallel fashion. It lays down substantive guidelines as well as procedural requirements, which are intended to compel European institutions to address the subsidiarity issue at all levels of the legislative procedure, from the Commission's proposals (Art. 4) to the dialogue between the European Parliament and the Council (Articles 11 and 12).

Having said this, it must however be recognized that the Protocol fails to add anything to what had been agreed at the European Councils of Birmingham and Edinburgh in 1992 or what was set down in the Interinstitutional Agreement of 28 October 1993 between the European Parliament, the Council and the Commission.[78] The substantive guidelines, such as the need to consider the implications of a lack of Community action or the preference to be given to directives, reproduce those that were agreed at the Edinburgh European

Edinburgh European Council: "The principle of subsidiarity does not relate to and cannot call into question the powers conferred on the European Community by the Treaty as interpreted by the Court. It provides a guide as to how those powers are to be exercized at the Community level ..." (*Bull. EC* 12-92, at 13).

[77] This point is developed in my work "Community competences: Are there Limits to Growth?" in R. Dehousse (ed.), *Europe after Maastricht,* supra note 4 at 109-112.

[78] The Agreement has been reproduced in *Europe Documents* n° 18157 of 4 November 1993.

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Council.[79] Similarly, on the procedural front, the obligation for the Commission to justify that its proposals respect the subsidiarity principle was already present in the Interinstitutional Agreement (articles II.1 and II.2). Likewise, article 11 of the Protocol, which requires the Parliament and the Council to control the compatibility of Commission proposals with the subsidiarity principle, reiterates (although in a slightly different language) what had been stated in article II.4 of the Agreement.

Here again, the main innovation is of a qualitative, rather than substantive, nature. According to article 239 of the EC Treaty, protocols "form an integral part" of the Treaty, and therefore enjoy binding force, unlike interinstitutional agreements which are generally regarded as "soft law" instruments.[80] Thus, prior to the Amsterdam Protocol, it was not clear whether the failure of the Commission to justify its proposals with regard to the subsidiarity principle could lead to the annulment of a Community act. True, Article 190 of the Treaty requires Community acts to be motivated and the Court of Justice has read this provision, combined with article 3b, as requiring a statement of the reasons which had led to Community action.[81] This, however, only applies to the final version of the legislative instrument, and not to the interim position adopted by the institutions.

The fact that procedural requirements have been enshrined in a protocol therefore appears to give them added value. The drafters of the Protocol seem to hope that this enhanced proceduralization will ensure that subsidiarity matters be duly addressed in the deliberations of the institutions. Whether modifications of this calibre will bring about a radical change in the legislative policy of the institutions is another matter...

[79] Article 6 of the Protocol, which reflects points 1.18 and 19 of the guidelines agreed at the Edinburgh European Council. See *Bull. EC* 12-92, at 14-15.

[80] Snyder, "Interinstitutional Agreements: Forms and Constitutional Limitations" in Gerd Winter (ed.), *Sources and Categories of European Union Law: A Comparative and Reform Perspective* (Nomos, Baden-Baden (1996), pp 453-466.

[81] Case C-233/94, *Germany v. Parliament and Council*, judgment of 13 May 1997, not yet reported.

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3. Conclusion: An Unstable Equilibrium

3.1. The Ambiguity of the Amsterdam Treaty

Although the above analysis has identified greater coherence than one might have thought in the institutional reforms introduced by the Amsterdam Treaty, that consistency remains characterized by a fundamental ambiguity.

On the one hand, the Treaty has in many ways confirmed the option for the parliamentary model made six years earlier in Maastricht. The main elements of the model are twofold: a bicameral legislature, reflecting the dual legitimacy of the Union, and an executive whose appointment and whose term of office depend on the support of a majority in the lower house. These are features which are common to all political systems that seek to combine federalism and a form of parliamentary government.

True, the evolution towards this model is not yet complete. Both the Commission and the Parliament remain confined to a secondary role in the intergovernmental pillars, even if their position has been marginally improved. The extension of qualified majority voting has been limited. In spite of the warning of the Court of Justice, which had stressed that the unanimity within the Council of Ministers is incompatible with an active parliamentary contribution to the legislative procedure,[82] co-decision has been introduced in areas where unanimity was retained.[83] In other areas, qualified majority has been instituted without a corrollary increase in the powers of the European Parliament, whose role remains one of consultation.[84] Last but not least, the current weakness of European political parties has so far prevented the emergence of a form of party government similar to that which exists in many Western European states. The investiture of Mr. Santer has shown that when national parties choose to flex their muscles, their will can prevail over that of EP party groups.[85] This notwithstanding, as regards the relationships between the Parliament and the executive, which is after all the cornerstone of parliamentary government, the legal framework which is now in place is typical of a parliamentary system. A change in the behaviour of political parties might therefore bring about a complete crystallization of the model without any modification of the Community's "formal constitution".

On the other hand, although the parliamentary system remains by far the dominant paradigm in the discourse on the reform of European institutions, the

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[82] Case C-300/89, *Commission v. Council [Titanium Dioxide]*, [1991] ECR I-2867.

[83] Articles 8a (2), 51 and 57 (2).

[84] See e.g. Articles 130 o (establishment of joint undertakings in the framework of research policy) or 109 q (employment policy guidelines).

[85] Hix, "Executive Selection in the European Union: A Critical Reflection on the Commission President Investiture Process", paper presented at the seminar of the IPSA Research Committee on European Unification, Brussels, 10-12 July 1997.

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last decade has witnessed a gradual emergence of issues and instruments which do not correspond to the parliamentary tradition. Unlike the parliamentary approach, the growing involvement of the European Community in the field of risk regulation is not motivated by a quest for more legitimacy, but rather by functional concerns, such as the need to reconcile market integration and a number of complex issues that beset modern societies. We have seen that some of the basic tenets of the parliamentary model are ill-adapted to deal with these new tasks. Parliamentary control over the executive and (indirectly) over the bureaucracy is unavoidably limited for decisions that involve resorting to complex scientific evidence. Even if it were effective, representative democracy is likely to appear to many as an imperfect reflection of the multiplicity of interests that coexist in modern society. Likewise, parliamentary control over the day-to-day activities of the administration may become a source of politicization, which would undermine the credibility of regulatory structures. Hence a growing interest for alternative forms of legitimation that may grant interested parties some influence over Community decision-making processes. The fact that some of these concerns have found their way into the Amsterdam Treaty provisions on transparency, even though the regulatory model still has few declared supporters, appears to confirm that an evolution is under way.

3.2. The Enlargement: Time for a Choice?

This apparent contradiction should not be overdramatized. Even at state level, patterns of governance may vary immensely from area to area. Defence matters are generally centralized, even in countries where the separation of powers is traditionally emphasized; the autonomy enjoyed by central banks in the conduct of monetary policy is now widely accepted; social partners may exert a quasi-legislative function for some apects of social policy, etc. Why then should one expect the European Union to display a greater degree of coherence?

Yet the antagonistic aspects of the two models should not be ignored. Important contradictions appear at two levels: the way that public policy decisions are envisaged and the relationships between legislatures and the executive. While the parliamentary model still lays considerable emphasis on legislation as the key public policy instrument, risk regulation, because of its intrinsic complexity, cannot be achieved merely through general principles contained in a legislative document; it is largely a matter of administrative decisions. Moreover, the degree of autonomy that regulatory bodies should enjoy according to the regulatory model is incompatible with the parliamentary model which regards parliamentary control over the administration as essential.

If this analysis is correct, the contradictions which have been noted could emerge even more clearly in the years to come. One should therefore expect that the executive function broadly speaking will become the focus of greater attention than in the past. Relationships between the Commission and the Parliament, as well as the latter's role in comitology, will be central issues in this context. Contrasting visions of the optimal institutional architecture should

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therefore come to the fore. The BSE crisis might in retrospect appear as a milestone indicating the beginning of a new era in European public policy-making.

The enlargement debate may act as a catalyst in this process. So far, the debate has largely focused on the representation of Member States within the Commission, with only scant attention given to the issue of relations among the various institutions. Although it was not possible to reach a compromise, the Amsterdam protocol on the enlargement contains the seeds of a future agreement: the larger Member States have accepted that each country should retain one commissioner and have indicated their willingness to drop their "right" to an additional commissioner. It has also been agreed that this concession should be compensated in terms of reweighting of votes in the Council of Ministers.[86] What remains to be seen is essentially how this will be achieved.

Although this quasi-agreement is technically questionable (the balance of power within the Council of Ministers being as much a matter of the threshold for majority decisions as of voting powers[87]), it is politically important as it signals a willingness to preserve the multinational character of the Commission, which has been an essential feature of the Community's institutional balance from the outset. Whether the enhanced control powers that the European Parliament enjoys over the Commission will allow the latter to retain a sufficient autonomy is open to question. Parliament's newly acquired powers could ultimately lead to a strengthening of party cleavages which might compromise another pillar of the European Union's stability, namely the multi-partisan profile of the Commission.[88] Dealing with this question will require a clearer vision of how the relationships between the executive and the legislative should be conceived, so that whoever is placed in charge of the negotiation will also be given the opportunity to address the tension between the two visions of the European Union's institutional architecture outlined in this article. However, can this gordian knot be cut without a debate on the ultimate objectives of the Union?

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[86] Peter Ludlow, "A View from Brussels: A Quarterly Commentary on the EU", No. 5, Brussels: CEPS, July 1997.

[87] Kirman and Widgren, "European Economic Decision-Making Policy : Progress or Paralysis? Institutional Questions for 1996", 21 *Economic Policy* (1995) 421-460.

[88] The problem has been analyzed at greater length in my work "Constitutional reform in the European Community: Are there Alternatives to the Majoritarian Avenue", *West European Politics*, 1995, 118-136.

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