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An Appraisal of the Treaty of Amsterdam from the Perspective of a Member of the European Parliament

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Abstract

When one has such learned predecessors, representing the two powerful institutions, who give such a balanced view of the Treaty of Amsterdam (or "Amsterdam Treaty"), what more can a simple parliamentarian say? I think my first comment would be, Amsterdam–yes, the worst has been avoided. I think that this comment is an honest compliment to the efforts of my predecessors during the Intergovernmental Conference ("IGC"). The outcome could have been much worse.

AN APPRAISAL OF THE TREATY OF AMSTERDAM FROM THE PERSPECTIVE OF A MEMBER OF THE EUROPEAN PARLIAMENT

*Laurens Jan Brinkhorst**

When one has such learned predecessors, representing the two powerful institutions, who give such a balanced view of the Treaty of Amsterdam[1] (or "Amsterdam Treaty"), what more can a simple parliamentarian say? I think my first comment would be, Amsterdam—yes, the worst has been avoided. I think that this comment is an honest compliment to the efforts of my predecessors during the Intergovernmental Conference ("IGC"). The outcome could have been much worse.

My first point is that the whole climate of the three-year preparation for Amsterdam was, both politically and economically, a very negative one. Politically, several governments were undergoing "Euroskeptic" phases: the United Kingdom was split not only up the middle over Europe, but also horizontally; the German government was increasingly concerned about giving up the Deutschmark; and the French government was divided into a majority who wanted to go back to intergovernmentalism and a minority who wanted to go further. But, above all, we had an economic climate with increasing unemployment and a situation in which many citizens—I refer here to the Danish and French referendums—demonstrated that the European Union was not really close to their hearts.

Against this background, it is really quite remarkable that we could agree on anything at all. My first compliment, therefore, would be to the negotiators who managed to keep the European Union as an ongoing concern. The European Union has not only survived, but also, in certain respects, been strengthened.

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1. Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Oct. 2, 1997, O.J. C 340/1 (1997) (not yet ratified) [hereinafter Treaty of Amsterdam].

The job called for in the Maastricht Treaty[2] (or "Treaty on European Union"), was to develop the European Union on the basis of the *acquis communautaire.*[3] During the IGC, there existed a serious risk that elements would be added that might perhaps undo the original *acquis communautaire.* Fortunately, this risk has been avoided. For example, the vital right of initiative of the Commission with regard to the common policies has been safeguarded and, as we will see, has even been extended to the whole police and justice cooperation under the "third pillar."[4] The role of the Court of Justice—on which I will not further dwell because who better than former Court of Justice President Ole Due to defend it—has been further developed and earlier attacks have been thwarted. So from that point of view, Amsterdam cannot be faulted.

Against this background, it is not surprising that the Treaty of Amsterdam contains no Preamble. It is the first time that the Treaties were revised without a reassertion of the political vision in a Preamble. This demonstrates the very pragmatic nature of the operation. If some participants had insisted on a new Preamble to the Treaty, like that in the Single European Act[5] or in the Treaty on European Union,[6] there probably would not have been any agreement. The bottom line is that the Treaty of Am-

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2. Treaty on European Union, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719 [hereinafter TEU] (amending Treaty establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty], *as amended by* Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA]).

3. *See* Roger J. Goebel, *The European Union Grows: The Constitutional Impact of the Accession of Austria, Finland and Sweden,* 18 FORDHAM INT'L L.J. 1092, 1140-57 (1995). Professor Goebel analyzes the evolution of the *acquis communautaire* concept since the first enlargement. He notes that: "This term, [*acquis communautaire,*] so hard to translate that the French is invariably used even in English texts, means essentially that the intrinsic core of the Community (now the "Union") legal and political structure is a given ("acquis") which the new Member State must accept, not challenge or call into question." *Id.* at 1141; *see* C. Curti Gialdino, *Some Reflections on the Acquis Communautaire,* 32 COMMON MKT. L. REV. 1089 (1995).

4. Title VI of the Treaty on European Union ("TEU"), Provisions on cooperation in the fields of justice and home affairs, is commonly referred to as the "third pillar" of the European Union. TEU, *supra* note 2, tit. VI, O.J. C 224/1, at 97-98 (1992), [1992] 1 C.M.L.R. at 735-38; *see* Koen Lenaerts, *Federalism: Essential Concepts in Evolution—The Case of the European Union,* 21 FORDHAM INT'L L.J. 746, 751 (1998).

5. SEA, *supra* note 2, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741.

6. TEU, *supra* note 2, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719.

sterdam has confirmed, and in certain respects redefined the existing structures.

I think that the acid test of Amsterdam lies in whether it can be operational enough to master the new economic and political challenges of the European Union.

I would like to dwell, first of all, on the question of the institutional structure. One might say that the issues of the size of the Commission and of the weighting of the votes in the Council were not so important and that their resolution could be postponed. Messrs. Piris and Maganza take this view. But I would beg to differ, agreeing with the Belgian, French, and Italian governments, which issued a Declaration on this point.[7] It was on institutional reform that the IGC was meant to make progress in order to create the conditions for enlargement. The Declaration also makes clear that the capacity to decide on legislation and other matters in an enlarged Union requires an extension of qualified majority voting in the Council.

In a sense, Mr. Petite agrees with me. He states that qualified majority voting[8] (or "QMV") becomes increasingly important when the European Community (or "Community") grows from fifteen to twenty to twenty-five Member States. It is already proving impossible to decide through unanimity in a the European Union with fifteen countries; the chances of reaching unanimity with twenty, or twenty-two, or twenty-five are even more remote. On this essential point the Amsterdam Treaty has failed to facilitate the conditions for enlargement. Furthermore, the future of the European Union itself is uncertain because any revision of the treaties requires unanimity, and that essential point has been maintained by both Maastricht and Amsterdam.

Not everything is gloomy, however, in the institutional field. Indeed, the European Parliament's role, against all odds, has been strengthened. This strengthening has not happened because the Member States were so interested in giving more

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7. *See* Treaty of Amsterdam, *supra* note 1, Declaration by Belgium, France and Italy on the Protocol on the institutions with the prospect of enlargement of the European Union, O.J. C 340/1, at 144 (1997).

8. *See* Treaty establishing the European Community, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 573 [hereinafter EC Treaty], *incorporating changes made by* TEU, *supra* note 2 (setting forth weighted votes of Council for qualified majority); *see also* GEORGE A. BERMANN ET AL., CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW 52-53 (1993).

power to the Parliament, certainly not. It was because they all had a bad conscience. Decision-making at the European level must be subject to democratic control. As national parliamentarians lose their grip on European legislation, the European Parliament must be granted the right to exert that control. That is basically the central question that the Amsterdam Treaty begins to address. Mention must be made here of the two representatives of the European Parliament—Elisabeth Guigou and Elmar Brok—who participated in the IGC discussion and thereby contributed to the significant strengthening of Europe's only democratically-elected institution.

The one institution that, indeed, has come out better is the European Parliament. When you legislate in the world of the 1990s, it is not possible to legislate without any parliamentary involvement in Europe. That is basically the central question that the new Treaty begins to address.

It is incredible that this point has been put off for so long. The monopolistic legislative role of the Council of Ministers was always an unnatural role. To a certain degree that has now been corrected. A reliable estimate is that seventy-five percent of Community legislation must be adopted through full co-decision of the European Parliament and the Council when the Treaty of Amsterdam enters into force.

But, let us not forget that the key area of agriculture, which accounts for fifty percent of Community expenditure, has not been democratized. The Parliament is only consulted on decisions in this field. Let us not forget that on budgetary issues—and we are talking about a Community budget of close to US$100 billion—there has been no further improvement. The division of budgetary powers between the Council and European Parliament has remained the same. Also, in the area of commercial policy, Article 113, an area so important for the orientation of the international standing of the European Union, the European Parliament is not, in any formal sense, involved. So, there are really quite a few areas where the democratic nature of this European Union needs to be fully achieved, and on none of these issues has any Member State made any serious effort to do anything about it.

So, as an ongoing concern, developments for the worse have been avoided. As to the future development we are in a

standoff phase. It is too early to judge whether this Union can cope with the enormous challenges ahead.

A second positive aspect, also in view of the future enlargement, is the insertion of the principles of human rights and democracy into the Treaty, together with an element of political control.[9] Of course, there was a concern that the prospective new Member States of Central and Eastern Europe, which so recently had come out of the darkness of Communism, might slide back and it was therefore seen as important that the Community institutions should, in such a situation, have some leverage. One may remember that this was not the case in the 1960s and early-1970s, when Greece, for instance, fell under a military dictatorship. The Member States had to resort to the Council of Europe and the freezing of the Association Agreement in order to apply pressure against Greece on the human rights front. There may be some hypocrisy in the introduction of human rights into the Treaty at present time, but I think, nevertheless, that such an introduction is a positive point.

Thirdly, I very much agree with Mr. Petite's comments on flexibility. Flexibility is to the Treaty of Amsterdam what subsidiarity was to the Treaty of Maastricht. It is, of course, absolutely necessary that in a European Union of more than twenty Member States, more than four million square kilometers, and 500 million citizens, we find a new balance between dogmatic uniformity on the one hand, and a danger of disintegration on the other. The latter danger, as embodied in the desire of some for a Europe *à la carte*, always looms around the corner, and I compliment the authors of the Amsterdam Treaty for having found imaginative solutions on this issue.

In the choice between Europe *à la carte*, or a "multiple speed Europe," or concentric circles, or *géométrie variable*, all these wonderful terms that only Continentals can devise, I think that the concept of flexibility, or "closer cooperation,"[10] has

9. *See* Treaty of Amsterdam, *supra* note 1, art. 1(8)-(9), O.J. C 340/1, at 8-9 (1997) (amending art. F of TEU and inserting art. F.1 into TEU); Consolidated version of the Treaty on European Union, arts. 6, 7, O.J. C 340/2, at 153-54 (1997), 37 I.L.M. 67, 69 (not yet ratified) [hereinafter Consolidated TEU] (arts. F and F.1 of TEU), *incorporating changes made by* Treaty of Amsterdam, *supra*. By virtue of the Treaty of Amsterdam, articles of the TEU will be renumbered in the Consolidated version of the Treaty on European Union. Treaty of Amsterdam, *supra*, art. 12, O.J. C 340/1, at 78-79 (1997).

10. *See* Treaty of Amsterdam, *supra* note 1, art. 1(12), O.J. C 340/1, at 22-23 (1997) (inserting tit. VIa, Provisions on closer cooperation, into TEU); Consolidated TEU,

saved us. Flexibility, subject to the concrete conditions written into the Amsterdam Treaty, allows a majority of Member States to pursue further integration in a situation where not all Member States wish to participate. In this respect, the opt-out of the United Kingdom from the Social Protocol[11] and the opt-outs of the United Kingdom and Denmark from the third stage of Economic and Monetary Union[12] have been useful experiences. Basically, the current philosophy is that flexibility or closer cooperation should be allowed, but only as an *ultimum remedium* and subject to the condition that it respects the *acquis communautaire.*

The new flexibility provisions represent a potential model for progress exclusively regulated in accordance with EC rules, and they prohibit at the same time any fallback from the current level of integration. I hope that this is the right interpretation for the future. For the time being, on this point, I am really pretty positive.

My fourth point concerns the free movement of persons. That was, of course, a major challenge because not only did the third pillar not work, but also we had this indeed opaque, as Mr. Petite said, Schengen Agreement.[13] Although the Protocols X,

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supra note 9, tit. VII, O.J. C 340/2, at 169-70 (1997), 37 I.L.M. at 77 (tit. VIa of TEU); Treaty of Amsterdam, *supra*, art. 1(11), O.J. C 340/1, at 21-22 (1997) (inserting art. K.12 into TEU); Consolidated TEU, *supra*, art. 40, O.J. C 340/2, at 167-68 (1997), 37 I.L.M. at 76 (tit. K.12 of TEU); *see also* Treaty of Amsterdam, *supra*, art. 2(5), O.J. C 340/1, at 25-26 (1997) (inserting art. 5a into Treaty establishing the European Community ("EC Treaty")); Consolidated version of the Treaty establishing the European Community, art. 11, O.J. C 340/3, at 184 (1997), 37 I.L.M. 79, 81 (not yet ratified) [hereinafter Consolidated EC Treaty] (art. 5a of EC Treaty), *incorporating changes made by* Treaty of Amsterdam, *supra.* By virtue of the Treaty of Amsterdam, articles of the EC Treaty will be renumbered in the Consolidated version of the Treaty establishing the European Community. Treaty of Amsterdam, *supra*, art. 12, O.J. C 340/1, at 78-79 (1997).

11. TEU, *supra* note 2, Protocol on social policy, O.J. C 224/1, at 126-28 (1992), [1992] 1 C.M.L.R. at 776-80. The Protocol on social policy is annexed to the EC Treaty. Annexed to this protocol are an agreement on social policy and two declarations. *See* TEU, *supra*, Agreement on Social Policy Concluded between the Member States of the European Community with the Exception of the United Kingdom of Great Britain and Northern Ireland, [1992] 1 C.M.L.R. at 776-80; *id.*, Declaration on Article 2(2), [1992] 1 C.M.L.R. at 780; *id.*, Declaration on Article 4(2), [1992] 1 C.M.L.R. at 780.

12. *See* EC Treaty, *supra* note 8, art. 109, O.J. C 224/1, at 37-38 (1992), [1992] 1 C.M.L.R. at 643-44.

13. Schengen Agreement Between The Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of controls at the common frontiers, June 14, 1985, 30 I.L.M. 68, 73 (1991).

Y, and Z[14] are not the most marvelous legal structures that I could imagine, sooner or later, the United Kingdom, Ireland, and Denmark will have to come to terms with the provisions for the free movement of persons flowing from the Schengen Agreement, which are to be incorporated in the Treaty. I think therefore that we should look at this point more as political scientists than as lawyers.

The incorporation of the Schengen provisions in the Treaty, which is still the subject of negotiations between the Member States, is not going according to plan. Some Member States would prefer to transfer the whole of Schengen to the third pillar. This step would be harmful from an institutional point of view because in that case the democratic and judicial control by, respectively, the European Parliament and the European Court of Justice, would not be guaranteed.

I offer an example: the Schengen information system. Should it be financed by the Community budget? What will be on the first pillar side? What will be on the third pillar side? We here have a number of elements that still need to be untangled. As a member of the Budget Committee, I can say that the Budget Committee will be particularly anxious to have full control over the financing of the SIS, if it considers that the structure adopted is one that is not satisfactory.

My final point concerns the Economic and Monetary Union. The point has been made by Mr. Maganza, quite rightly I think, that the Stability Pact[15] is one of the key points of Am-

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14. Treaty of Amsterdam, *supra* note 1, Protocol on the application of certain aspects of Article 7a of the Treaty establishing the European Community to the United Kingdom and to Ireland, O.J. C 340/1, at 97-98 (1997) (formerly Protocol X in draft Treaty of Amsterdam); *id.*, Protocol on the position of the United Kingdom and Ireland, O.J. C 340/1, at 99-100 (1997) (formerly Protocol Y in draft Treaty of Amsterdam); *id.*, Protocol on the position of Denmark, O.J. C 340/1, at 101-02 (1997) (formerly Protocol Z in draft Treaty of Amsterdam).

15. Also known as the Stability and Growth Pact of June 1997, the Stability Pact is composed of one political recommendation and two regulations. Council Recommendation of 7 July 1997 on the broad guidelines of the economic policies of the Member States and of the Community, O.J. L 209/12 (1997); Council Regulation No. 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, O.J. L 209/1 (1997); Council Regulation No. 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure, O.J. L 209/6 (1997); *see* Roger J. Goebel, *European Economic and Monetary Union: Will the EMU Ever Fly?*, 4 COLUM. J. EUR. L. 249, 310-13 (1998); *see also* Jan Meyers & Damien Levie, *The Introduction of the Euro: Overview of the Legal Framework and Selected Legal Issues*, 4 COLUM. J. EUR. L. 321, 330-31 (1998) (discuss-

sterdam, even though it is of course not part of the Amsterdam Treaty. The Employment Chapter[16] was inserted into the Amsterdam Treaty as a major incentive in getting the new French Government to accept the Amsterdam Treaty as a whole.

The one unresolved point, of course—and I come back to the point of accountability—is to whom will the European Central Bank be accountable? That is going to be a major political debate. Independence is important. No one wants to undermine the role of the Central Bank, but this new European Central Bank is much more independent even than the Federal Reserve or the Bundesbank. The European Parliament intends to organize hearings on the first nominees, but this can only be one part of the accountability question. We should all realize that accountability is still a major political challenge.

To sum up, the European Union as an ongoing concern has been safeguarded, and the first pillar, the European Community, remains the key constituent element of that process. One should not believe that the second and third pillars are of the same value. But the new challenges shed a more doubtful light. On Agenda 2000,[17] the future financing of the European Union, the accession of ten new Member States, it is uncertain what will happen. I recall that Queen Elizabeth stated that 1992 had been an *annus horribilis*, referring of course to the divorce of Prince Charles and Lady Princess Diana. I believe that the European Union will go through three *anni horribiles*, because we are still talking about the financing of the European Union with twenty-five Member States, with no chance of having qualified majority voting introduced on these kind of issues.

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ing two components of Stability and Growth Pact). The European Council issued a resolution on the Stability and Growth Pact that set forth firm commitments of the Member States, the Commission, and the Council regarding the implementation of the pact. *See* Resolution of the European Council on the Stability and Growth Pact of 17 June 1997, Amsterdam, O.J. C 236/1 (1997).

16. *See* Treaty of Amsterdam, *supra* note 1, art. 2(19), O.J. C 340/1, at 33-35 (1997) (inserting tit. VIa on Employment into EC Treaty); Consolidated EC Treaty, *supra* note 10, tit. VIII, O.J. C 340/3, at 235-36 (1997), 37 I.L.M. at 107 (tit. VIa, arts. 109n-109s of EC Treaty).

17. Commission of the European Communities, Agenda 2000: For a Stronger and Wider Union, COM (97) 2000 Final/1 (July 1997); Commission of the European Communities, Agenda 2000: The Challenge of Enlargement, COM (97) 2000 Final/2 (July 1997); *see Agenda 2000: For a stronger and wider Union* (visited Aug. 23, 1998) <http://www.europa.eu.int/comm/agenda2000/overview/en/agenda.htm> (on file with the *Fordham International Law Journal*).

So the jury is still out, but I am comforted by the fact that we have become a somewhat more democratic community. Because I have another chance to contribute, I will address that issue in more detail later.[18]

18. Laurens Jans Brinkhorst, *Transparency in the European Union*, 22 FORDHAM INT'L L.J. 85 (1998).