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Transparency in the European Union

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Abstract

The reason why I chose the issue of transparency is that I have a personal stake in the matter. Now someone has said that the European Union is really a conspiracy of the initiators. At the time the European Community (or "Community") was created, we had a totally different political culture, both in the Member States, but certainly in the international field. The European Community concentrated on highly technical matters–economic matters, trade matters, matters that were relevant to the farmers, and the public at large was really not very interested. In general, the concept of democracy was a somewhat different one, so it is understandable that the focus at the time was on the executive and not on the legislative powers. We are now, thirty-five years later, talking about the democratic dimension, about the lack of legitimacy, and national parliaments' attempt to claim back power. They are not trying to claim back power from the European Parliament; they are claiming back something that they lost forty years ago, from their governments. They have woken up to the fact that they cannot recuperate it, just as you cannot undo an omelette once you have broken the eggs. That is the reason why a High Council of national parliamentarians would, in my view, be a bad thing; it would be a very retrograde action.

TRANSPARENCY IN THE EUROPEAN UNION

*Laurens Jan Brinkhorst**

The reason why I chose the issue of transparency is that I have a personal stake in the matter. I would like to start with a small anecdote. In 1973, I was a young minister in the Dutch Government, and I attended my very first Council of Ministers. It has marked my view on the European Union (or "Union") ever since. That meeting started as every Council meeting with the adoption of the so-called A-points, points not up for debate but for information only. At the time, the resolutions of the European Parliament were only A-points. The Belgian President of the Council said, "First the A-points. Let's just take note, with one stroke of the hammer, of the resolutions of the European Parliament." I had been on the train from The Hague to Brussels for two hours and I had actually read some of the resolutions. In them, I found a number of interesting points, so I was very disappointed that the Belgian President was suggesting that we should not discuss them. I raised my little finger, and I said, "Mr. Chairman, before you actually adopt the A-points, I would like us to discuss one interesting resolution of the European Parliament." Eight pairs of eyes looked at me as if I had committed the greatest sin in life even to mention that the resolutions of the European Parliament were worthy of any discussion. He said, "Mr. Brinkhorst, you are here for the very first time. In the Council of Ministers we do not discuss the resolutions of the European Parliament." I have gone to many Council meetings since, but this first experience has stayed with me. That kind of closed culture has been to the detriment of the credibility of the European Union for many, many years.

Now someone has said that the European Union is really a conspiracy of the initiators. To a certain extent, you might say that is true. At the time the European Community (or "Community") was created, we had a totally different political culture, both in the Member States, but certainly in the international field. The European Community concentrated on highly technical matters—economic matters, trade matters, matters that were

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relevant to the farmers, and the public at large was really not very interested. In general, the concept of democracy was a somewhat different one, so it is understandable that the focus at the time was on the executive and not on the legislative powers.

I remember the famous Belgian statesman, a Founding Father of the European Community, Paul-Henri Spaak, who, when discussing the institutional set-up of the Western European Union, exclaimed, "Oh God, we forgot the Parliament—*on a oublié la coiffure parlementaire.*"[1] Parliamentary involvement was seen as an accessory rather than a major constituent element of these international organizations.

Now, you cannot hold it against the authors of the time. The Founders of the Community all had good intentions, and certainly in the international field, parliaments have never played an important role. And at that time, European Union issues were mainly seen as international affairs. So, in a sense, it is the *vitium originis*, or the original vice, of the European Union that the parliamentary dimension never took hold, not even when national parliaments agreed to important transfers of sovereignty.

We are now, thirty-five years later, talking about the democratic dimension, about the lack of legitimacy, and national parliaments' attempt to claim back power. They are not trying to claim back power from the European Parliament; they are claiming back something that they lost forty years ago, from their governments. They have woken up to the fact that they cannot recuperate it, just as you cannot undo an omelette once you have broken the eggs. That is the reason why a High Council of national parliamentarians would, in my view, be a bad thing; it would be a very retrograde action.

So basically, the Council of Ministers was created as a hybrid organism right from the beginning. It served as an executive and a legislator at the same time. This hybrid nature necessarily leads to official secrecy, although at the informal level, news filters through. Some of what actually happens has been recorded in *Agence Europe*, a European daily press agency. That is a very different thing, however, from the formal transparency and official publicity that is needed in an open society.

For many years the executive and the legislative remained

1. Translated as "We forgotten to top it all off with the Parliament."

linked, and for that reason the whole structure remained closed. Within this structure, the European Commission has its own role to play.

The Commission derives its strength from its collegiate nature. The Commission is also by necessity a closed body. It must act as one in proposing a legislative act, taking into account the interest of the Community as a whole. The right of initiative of the Commission is crucial and an act on which the whole legislative procedure rests. The Commission could not have fulfilled the role that has been assigned to it if any dissent within its ranks were publicized. The confidential nature of the Commission is of the essence, even if it is steeped in French culture.

Now for the *coiffure parlementaire.* It was deemed necessary to add a parliamentary dimension at the start of the European Community, but the European Parliament initially was composed of delegations of national parliamentarians. The European Parliament began as an assembly of national parliamentarians who did it as a side job and who liked to go to Strasbourg because the wine was good and the dinners were fine. But they were not really there to control the Commission or the Council.

And then, of course, national parliamentarians, the fourth element of the equation, had even less to do. They were not even aware that the European Union was becoming the most important constitutional structure in the post-war period. For them it was international affairs. There were a few individuals going to Strasbourg who enjoyed themselves, but the real business was being done in the national parliaments. That is why national parliaments lost their grip on European affairs.

Now, why are we in a fascinating period of change? I agree that the big change came in the period after Maastricht,[2] but already somewhat earlier, in the 1980s, institutional changes took place. You may recall that in the late 1970s and early-1980s the Community was moribund. We were not handling the oil crisis; we were not handling the inflation period; we were renationalizing. But in the early-1980s, the business community rediscovered the European Union. It was in reaction to Japa-

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]).

nese competitiveness, to American competitiveness, which had weathered the storms of the 1970s and early-1980s, and it was business.

The will to reestablish ourselves on the global market led to the Single European Act.[3] The Single European Act did not come because we wanted to protect the environment or do anything about social affairs. We wanted to regain our competitive edge vis-à-vis the Americans and the Japanese.

But then, very soon, we discovered that the Single European Act also involved European civil society. It involved the environment community—you cannot have norms on car emissions without actually taking into account the environmental dimension; you cannot do anything about food safety without taking into account consumers—and the consumers and the environment community suddenly discovered that the Community decision-making structure was a closed shop. That is when the revolt started.

By the time the Maastricht Treaty was being negotiated, an increasing number of people realized that creating a single European currency would affect each individual citizen of the European Union, and that is the moment when the revolt really gathered momentum.

I have gone a little bit into that background to explain why the watershed that we are witnessing now is, in my mind, going to change the practice fundamentally, although it will still take some time.

I now come more to *de lega lata*, not only *de lege ferenda*—Declaration No. 17[4] was added to the Maastricht Treaty, and basically states no more than that the principle of access to information is needed in order to strengthen the transparency of decision-making. It is no more than a statement of principles. Christian Timmermans, quite rightly, distinguished access of information from the decision-making process.

Progress on the access of information only occurred after the difficulties of the Maastricht Treaty ratification process—I

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

4. *See* TEU, *supra* note 2, Declaration on the right of access to information, [1992] 1 C.M.L.R. at 785, 31 I.L.M. at 367 (annexed to Treaty on European Union ("TEU")) (stating that "the transparency of the decision-making process strengthens the democratic nature of the institutions and the public's confidence in the administration").

refer to the initial Danish "No," I refer to the French difficulties in this Referendum, and of course to the narrow ratification vote in the United Kingdom.[5] The essential point was that the citizens of Europe, civil society, and non-governmental organizations had become fed-up with the secrecy of the Commission and of the Council.

Let me just add one other sort of personal note. At that time, I was Director-General for the Environment. We started drafting something called the Access to Information Directive.[6] The environment, of course, belongs to everybody, and therefore it belongs to nobody, whereas transport, for example, pertains to the transporters, and agriculture pertains to the farmers. The development of a European environmental policy depends for its credibility solely on the availability of objective information. It was necessary, for example, to understand what chemical plants were doing, what the petrochemical factories were doing, and what domestic households were doing with their waste. So we had an interest in drafting an Access to Information Directive in the field of the environment.

To begin with, I had great difficulty in getting the Commission to accept such a text because of its closed culture to which I referred before. Also, the most relevant information in the environmental field rested with the Member States. In the end, it was proposed by the Commission, adopted by the Council, and the Member States have accepted the obligations of the Directive.

But then they said, "Well, how about the Commission? Can we also get data from the Commission?" I think Christian Timmermans was already Deputy Director-General. The Commission said, "Well, let's look at that later, when we have general access to information." I say this to show that this mentality is recent.

I limit myself to these comments on this point because I

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5. *See* GEORGE A. BERMANN ET AL., 1998 SUPPLEMENT TO CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW 2 (1998) (discussing ratification of TEU in Denmark and United Kingdom); GEORGE A. BERMANN ET AL., CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW 18 (1993) (mentioning Danish referendum rejecting TEU and French referendum approving TEU by slim majority).

6. Council Directive No. 90/313 of 7 June 1990 on the freedom of access to information on the environment, O.J. L 158/56 (1990).

would like to also reorient the discussion on what actually happened in Amsterdam.

The Council and the Commission in the meantime have adopted acts for the access to information and access to documents. Parliament has followed suit with, I think, a very good text on access to information. On a number of points, the limitations on access to information in the Commission's document go beyond what is in the Parliament's.

As far as the Amsterdam Treaty is concerned, a fundamental point to recognize is that what was originally a vaguely-formulated principle has now become a formal right. Now again, this right has to be translated into practice.

Christian Timmermans quite rightly referred to the new Article 151(3), which requires the Council to publish the results of their votes, to publish the explanation of votes, and to publish the statements and the minutes.[7] For the first time, Member States' parliaments will have the opportunity of knowing what their governments really have been doing. That has not been the case, with perhaps the exception of Denmark, where the culture of openness is deeply rooted.

Access to documents has gained even more relevance because of the increasing importance of the "third pillar."[8] In the Treaty of Amsterdam, cooperation within the third pillar—police and judicial matters—must provide citizens with a high level of safety within an area of freedom, security, and justice.

One of the very fundamental frustrations for parliamentarians over the last five or six years has been to keep track of what has been decided by the Ministers of Justice and Home Affairs. The culture of secrecy surrounding their activities is pervasive.

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7. *See* Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Oct. 2, 1997, art. 2(39), O.J. C 340/1, at 43 (1997) (not yet ratified) [hereinafter Treaty of Amsterdam] (replacing art. 151 of Treaty establishing the European Community ("EC Treaty")); Consolidated version of the Treaty establishing the European Community, art. 207(3), O.J. C 340/3, at 266 (1997), 37 I.L.M. 79, 122 (not yet ratified) [hereinafter Consolidated EC Treaty] (art. 151(3) 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, at 78-79 (1997).

8. *See* Koen Lenaerts, *Federalism: Essential Concepts in Evolution — The Case of the European Union*, 21 FORDHAM INT'L L.J. 746, 751 (1998) (identifying Title VI of TEU as "third pillar" of European Union).

Yet the area of Justice and Home Affairs is particularly relevant to citizens, more so than Common Foreign and Security Policy.[9] Citizens are directly confronted with the repercussions of these decisions, and the attainment of freedom, security, and justice is a very delicate balance. This area of Justice and Home Affairs will definitely be the test case in matters of transparency and access to information.

Last year not less than seventy percent of all the Council texts were texts in the field of justice and home affairs. Ten years ago we did not even have the Justice and Home Affairs Council, and five years ago about fifteen percent of those documents were not known to anybody except to those who had drafted them. That means that at the end of the twentieth century in this particular policy area, we are governed in the same way as the Congress of Vienna was running Europe about two hundred years ago.

The major change in mentality will occur, however, in those policy areas where Parliament has the right of co-decision. In accordance with the Treaty of Amsterdam, the Council will have to indicate when it is acting in a legislative capacity—which is tricky because that could mean that the Council must then act in co-decision with Parliament. In that co-decision procedure, Parliament and Council will have identical rights, as Mr. Petite and Mr. Maganza have stated. No parliamentarian will accept cooperation with the Council on the basis of secret texts. I think that co-decision will be a determining factor in the change in political culture that must occur.

Now, I have not said anything about the role of the Ombudsman. The office of the Ombudsman was introduced by the Maastricht Treaty.[10] In preparing the *First Report of the Ombudsman*,[11] the Ombudsman requested from all the institutions and bodies in the European Union a document on their policy of publication and access to information. You will see

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9. *See* TEU, *supra* note 2, tit. V, O.J. C 224/1, at 94-96 (1992), [1992] 1 C.M.L.R. at 94-96.

10. *See* Treaty establishing the European Community, Feb. 7, 1992, art. 138e, O.J. C 224/1, at 56 (1992), [1992] 1 C.M.L.R. at 677-78 [hereinafter EC Treaty], *incorporating changes made by* TEU, *supra* note 2 (setting forth responsibilities of Ombudsman).

11. *The European Ombudsman: Report for the year 1995* (visited Sept. 28, 1998) <htpp://www.euro-ombudsman.eu.int/report95/en/default.htm> (on file with the *Fordham International Law Journal*).

some quite remarkable replies. But the fact that the Ombudsman's report has been published, the fact that it will be discussed in the Parliament, will already change the culture.

One final point perhaps on secondary legislation. It is an issue that has not been covered today, but I will try to give you an idea of what developments, from a parliamentary point of view, are taking place. You will see a renewed struggle between the institutions on the so-called issue of Comitology[12] and the related issue of hierarchy of norms. The existence of hundreds of committees made up of representatives of Member States controlling Commission actions in the field of secondary legislation and the unclear distinction between primary and secondary legislation was first raised during the negotiations on the Single European Act. It came up at Maastricht; it was not resolved in Maastricht. It came up in Amsterdam; it was not resolved in Amsterdam.

These issues keep coming back because they contain the real danger of undermining Parliament's acquired rights of co-decision and thereby the democratic input in the legislative process. The so-called *modus vivendi*, which states that the Council and the Commission will inform the Parliament about what happens within the committees, will no longer suffice. Parliament will react very strongly to what the Commission is going to put forward as a result of the Declaration No. 31 of Amsterdam,[13] which I think is due to come in June or September of this year.

I think that here we have a real issue. The real issue is to what extent the Council and the Parliament will be on equal footing as far as secondary legislation is concerned. We know that not only in the field of agriculture, but also in many, many committees a lot of things are happening that the individual citizen—let alone the individual parliamentarian—does not know. So we will have to come to the end of this vicious circle of secrecy. The battle is not over, it has just started, but the watershed is there.

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12. For a discussion of Comitology, see P.J.G. KAPTEYN, INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITIES 240-47 (Lawrence Gormly ed., 2d ed. 1989).

13. Treaty of Amsterdam, *supra* note 7, Declaration relating to the Council Decision of 13 July 1987, O.J. C 340/1, at 137 (1997).