

## THE PRINCIPLE OF INSTITUTIONAL BALANCE

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### 1. Introduction

References to institutional balance in the Community legal order go back a very long way. The balance between the institutions can be envisaged in two different ways, one legal, the other political. From a legal point of view, institutional balance is a constitutional principle which must be respected by the institutions and the Member States; infringements may be condemned and sanctioned by the Court of Justice. From a political point of view, it can be envisaged as a means of describing the way the relationship between the institutions is organized. In this case, it is undeniable that there has been a significant evolution in the balance between the institutions since the origins of the Community. The shape of the institutional triangle (Parliament, Council, Commission) has been modified both by the successive revisions of the treaties and by the practice of the institutions. We would like to examine further these two facets of the principle, the one static, the other dynamic; at the same time, we cannot ignore the fact that these two aspects may also interact. Moreover, the case law of the Court has encouraged or prevented certain developments, depending on how the Court itself interpreted the principle.

### 2. The principle of institutional balance: A constitutional principle

From a legal point of view, the principle of institutional balance is one manifestation of the rule that the institutions have to act within the limits of their competences. The principle of institutional balance does not imply that the authors of the treaties set up a balanced distribution of the powers, whereby the weight of each institution is the same as that of the others. It refers simply to the fact that the Community institutional structure is based on the division of powers between the various institutions established by the treaties.

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It is this situation which is reflected by Article 7(1), of the EC treaty according to which each institution acts within the limits of the powers conferred upon it by the Treaties. The distribution of the powers between the institutions reflects the place that the authors of the treaties wanted to grant to each one of them in the exercise of the missions that they entrusted to the Community. In this context, the task of the Court is to ensure that this system is maintained, in order to prevent the compromises made at the time of the drafting of the treaties being called into question again. The balance to which the Court refers is therefore that established by the Treaty. It is therefore not acceptable for one institution to extend its powers unilaterally to the detriment of another institution. Such a hypothesis is not purely academic, because one of the major features of the strategy of the European Parliament has consistently been an attempt to extend its powers, using the means of pressure it had on the other institutions. It thus sought, when it had only a merely advisory role, to obtain from the Commission an undertaking that the latter institution would exercise its powers in the direction desired by the Parliament, in particular with regard to the modification or the withdrawal of its proposals. For its part, the Commission, while it agreed to take into account the Parliament's proposals, was for a long time careful not to engage itself in the least in a way which would restrict its power of initiative.<sup>1</sup>

The first genuine reference to the institutional balance is found in the *Meroni* case, where the Court sees "in the balance of powers which is characteristic of the institutional structure of the community a fundamental guarantee granted by the Treaty in particular to the undertakings and associations of undertakings to which it applies."<sup>2</sup> For the Court, the principle is a substitute for the principle of the separation of powers which, in Montesquieu's original exposition of his philosophy, aimed to protect individuals against the abuse of power. In the absence of a separation of powers, the principle of institutional balance made it possible to guarantee to undertakings that a modification of the institutional balance would not call into question the decision-making process envisaged by the treaties and the accompanying guarantees provided by the treaties. However, this protective aspect of the principle seems to have been gradually lost as other means of protection appeared, including the guarantee of the respect of fundamental rights.

The clearest expression of the principle was given in the context of so-called "comitology", that is to say the methods according to which commit-

1. COM(81)581 final, "The relations between the Community institutions", published under the title "the Community institutional system, balance to be restored", Bull. EC, 3/82.

2. Case 9/56, *Meroni*, [1958] ECR 11; see also opinions of 17 Dec. 1959 pursuant to Art. 95 ECSC, [1959] ECR 551.

tees composed of representatives of the Member States form a framework within which the Commission exercises the executive powers which are delegated to it. In the *Köster* case, the Court stated that “the question put concerns more particularly the compatibility of the management committee procedure with the Community structure and the institutional balance as regards both the relationship between institutions and the exercise of their respective powers.”<sup>3</sup> The Court considered that the delegation of executive powers to the Commission, while subjecting the exercise of these powers to the supervision of a committee made up of representatives of the Member States and to the Council’s power to withdraw them again, did not distort the Community structure, or the institutional balance. Moreover, on the basis of the principle of institutional balance, the *Isoglucose* case confirmed the right of consultation of the Parliament, as representing “an essential factor in the institutional balance intended by the Treaty.”<sup>4</sup>

The principle of institutional balance thus leads the Court to supervise the respect by the institutions of the competences conferred on them. Thus, the Court stated in the *Wybot* case, “in accordance with the balance of powers between the institutions provided for by the treaties, the practice of the European Parliament cannot deprive the other institutions of a prerogative granted to them by the treaties themselves”.<sup>5</sup> Any encroachment by one institution on the powers allotted to another institution is consequently prohibited. The same applies to any delegation of power from one of the institutions to an external body or to another institution insofar as this would alter the institutional balance.

For the Court, the purpose of the principle was not only to maintain the division of powers between the institutions, but also to protect the interests of private individuals. In its view, the decision-making process provided for by the Treaty established guarantees for individuals which were not to be reduced or removed. The object of the principle was therefore not only to safeguard the interests of the institutions, but also those of private individuals. However, the Court modified this position in a judgment of 13 March 1992:

“it is sufficient to state that the aim of the system of the division of powers between the various Community institutions is to ensure that the balance between the institutions provided for in the Treaty is maintained, and not to protect individuals. Consequently, a failure to observe the balance between the institutions cannot be sufficient on its own to engage the

3. Case 25/70, *Einfuhr- und Vorratsstelle für und Getreide Futtermittel v. Köster*, [1970] ECR 1161.

4. Joined cases 138 & 139/79, *Rocket and Maizena*, [1980] ECR 3333, para 33.

5. Case 149/85, *Roger Wybot v Edgar Faure*, [1986] ECR 2391.

Community's liability towards the traders concerned. The position would be different if a Community measure were to be adopted which not only disregarded the division of powers between the institutions but also, in its substantive provisions, disregarded a superior rule of law protecting individuals."<sup>6</sup>

Apparently, a distinction must be made in the decision-making process between those rules which concern the institutional balance in general and those which more specifically protect private individuals; only an infringement of the latter rules would be such as to engage the liability of the Community.

The rules which govern the division of powers between the institutions can entail effects for the contents of decisions. This explains the close attention which the Court pays to the choice of the correct legal basis, since the legal basis determines the decision-making procedure. The legal basis, in the form of the Treaty article on which an act is based, is one of the manifestations of the institutional balance. It was thus with a view to preserving this balance that the Court recognized the active right of the Parliament to bring an action for annulment in order to protect its prerogatives:

"Those prerogatives are one of the elements of the institutional balance created by the Treaties. The Treaties set up a system for distributing powers among the different Community institutions, assigning to each institution its own role in the institutional structure of the Community and the accomplishment of the tasks entrusted to the Community. Observance of the institutional balance means that each of the institutions must exercise its powers with due regard for the powers of the other institutions. It also requires that it should be possible to penalize any breach of that rule which may occur."<sup>7</sup>

In this case, the Court did not use the principle in a static manner, but on the contrary relied on it to supplement the Treaty in a dynamic way.

The principle of institutional balance has been an essential element in inter-institutional practice. The Council has used it to counter the actions, presented as "faits accomplis", imposed unilaterally by the Parliament. Thus, the Parliament formed the habit each time it revised its rules of procedure of codifying therein the vision that it had of its relations with the other institutions. Relying on the principle of institutional balance, the Council has systematically declared that it considered that this type of provision could not be used against it. In the same way, the principle has provided useful sup-

6. Case C-282/90, *Vreugdenhil BV v. Commission*, [1992] ECR I-1937, paras. 20–22.

7. Case 70/88, *Parliament v. Council*, [1990] ECR I-2041, paras. 21–22.

port for the Commission when it tried to oppose the claims of the Parliament to obtain the withdrawal of its proposals. Nevertheless, the concessions made by the Commission in its last framework-agreement with the Parliament seem to have marked the crossing of a boundary, from which there is no return. For this reason, the Intergovernmental Conference insisted on taking a position on this, and inserted in Nice, in the final act, a Declaration No. 3 in which it is recalled that inter-institutional agreements cannot amend the treaties and must be concluded by the three institutions. This Declaration marks the limits of the faithful cooperation between institutions on which these agreements are based, by indicating implicitly that this cooperation is subordinate to the respect of the principle of institutional balance. The Declaration helps to ensure the respect of the institutional balance by preventing two institutions from arranging their powers to the detriment of the third.

### **3. The development of the institutional balance within the Union**

Although the Court of Justice takes the institutional balance into account under a static aspect – that is to say, as it results from the treaties – it is evident that the balance established by the treaties has developed radically throughout the history of the Community. If one regards the relations within the institutional triangle, the history of the Community is marked by the progressive growth of the powers of the Parliament to the detriment of the those of the two other institutions.

The first observation which comes to mind when one considers this development is that it has taken place without prior reflection, simply pulled along by the strongest current. No-one took the trouble to wonder what consequences the innovations from the various treaty amendments would have on the balance of powers in general within the Community. In the majority of the Member States, the drafting of constitutional texts is accompanied by a search for balance by means of the meticulous adjustment of weights and counterbalances. In the Community, however, the authors of the various revisions of the treaties acted on the basis of successive additions without wondering what long-term effect the changes made to the treaties might have. The Community lacked an architect with an overall vision of the building that was constructed by means of the successive additions. Surprisingly enough, the Convention on the future of Europe did not reflect on this either. It was satisfied with extrapolating the development started by the Single European Act without stopping for one moment to take the time to have an overall look at the system as it would be on completion. No-one raised the question of what type of political régime the Community should strive after.

Such a situation is all the more surprising given that national constitutional law handbooks provide erudite studies on the classification of political regimes, based on the detailed observation of the national constitutions.

Students are taught to distinguish between the American-style arrangement of separation of powers and the European parliamentary régime. One is forced to conclude that all this learning was lost the moment the European Union was at issue. This situation is even more astonishing as the acceding States were all emerging from a phase of constitutional development, during which they had created new institutions on the basis of the experiences of western Europe. It was claimed that as the Community system was so specific, *sui generis*, there was no point in taking account of national experiences. This argument is admissible up to a certain point. It is true that there is really no equivalent elsewhere for the division of the executive between Council and the Commission; however, the relations between the Commission and Parliament remain in many respects close to those which may arise between a government and a (national) parliament. When those involved resolved to ignore the comparative approach, they also deprived themselves of the lessons that could be drawn from the national approaches. Under these conditions, studying the development of the balance of power within the Community is fairly simple.

At the start, the balance was established primarily between the Council and the Commission, the Parliament having only an advisory role. This balance was rudely disturbed by the Luxembourg compromise, which led to a paralysis of the system, reducing the role of the Commission and making the decision-making process quite arbitrary, owing to the *de facto* return to a requirement of unanimity. Moreover, since the Council decided, when it decided, unanimously, it could always ignore the Commission proposal. It was during this period that the European Parliament started to gain importance. Basing its efforts on legal means, and in particular on the *Isoglucose* case law, the Parliament endeavoured to influence the Commission so that the latter would take over Parliament's amendments. The Parliament also obtained the recognition of its legal competence, first passive and then active, which enabled it to protect its prerogatives before the Court. It also used the inter-institutional agreements to develop its powers, in particular in the legislative field via co-operation, and by consultation in the field of foreign affairs. Most importantly, however, it made full use of its budgetary powers in order to influence the legislative action of the Community. Thus, at the end of this initial period, while the Council appeared to be the dominant institution, the Parliament had been able to strengthen its powers, and was supported by a watertight alliance with the Commission.

The first essential change came with the Single European Act. The adop-

tion of the cooperation procedure marked a modest increase in the powers of the European Parliament. The framework was still essentially the same as in the previous period, however, because the Parliament could play its role fully only if it was in alliance with the Commission. The other essential change was the demise of the Luxembourg compromise and the development of qualified majority voting. Admittedly, decision-making was still *de facto* largely unanimous, but under the threat of recourse to a qualified majority. The minority could no longer block the system, and faced the choice between cooperation in search of a unanimous compromise so that they could gain partial satisfaction, or non-cooperation which meant they were simply in the minority. It was significant that, although the Luxembourg compromise was not abolished, it was no longer invoked. In any case, it was difficult to “repeal” a compromise which did not have any legal existence, and which was an agreement to disagree rather than a genuine compromise. This period was certainly a window of opportunity for the Commission which, under the Presidency of Jacques Delors, regained its authority. For the Parliament, it was the apprenticeship for legislative work, a field in which it proved that it could be a reliable partner for the Council.

The second change was the product of the Maastricht, Amsterdam and Nice treaties, which reveal a certain continuity as regards the institutional balance. In the Community pillar, the Parliament largely came to share legislative power with the Council. It also gained a part in the appointment of the Commission. For the Council, the areas of qualified majority voting became more and more common. Finally, the Commission gradually appeared to be on the losing side in the Community system. It lost control of the legislative process because of the disappearance of its powers in the last phase of the co-decision procedure. It also lost its cohesion, in the absence of strong internal leadership, and the various reforms which were adopted to strengthen the role of the President have not remedied this. The crisis around the Santer Commission revealed the true state of affairs.

Indeed, the changes introduced by the treaty amendments have had as a consequence that the Parliament, which negotiates on a basis of equality with the Council, no longer needs a close alliance with the Commission. The relationship between the Commission and the Parliament, which was also based on equality, has become weaker. The strategy of the Parliament consisted henceforth in trying to gain for itself the powers which the Commission was losing, tying the Commission's hands by framework agreements which aim to impose on the Commission the use of its powers in conformity with the will of the Parliament. The Commission, shaken by the Santer crisis, could not defend itself against the claims of the Parliament. After having recovered its authority with regard to the Council in the period following the

Single European Act, it lost it again to the Parliament, which did not hesitate to use all its weapons, in particular budgetary, in order to achieve this. The Parliament tried to act in the same way with regard to the Council, but here it was less successful, since it did not have the ultimate weapon of censure. The Council was extremely hesitant to enter into inter-institutional agreements on the second or third pillar, which the Parliament proposed. It is significant that the only agreement concluded on the Common Foreign and Security Policy was in the margin of the intergovernmental conference in Amsterdam, at the instigation of the Council, since the Parliament feared that if it refused, the IGC would insert more binding provisions in the Treaty. In the same way, the Parliament's demands with regard to comitology had very little effect, since the Member States considered that the implementation of texts adopted by the legislature falls, in principle, within the competence of the Member States – which means that the adoption of Community implementation measures has to be supervised by them.

The current situation is therefore characterized by a decrease in the power of the Commission, which appears to be the institution which has lost out in the developments. The institutional balance has shifted to its disadvantage. The explanation is simple. The Commission only retains authority with regard to the Council if it expresses, in an independent way, the general interest. But insofar as developments have put the Commission largely in the hands of Parliament, it has lost its credibility *vis-à-vis* the Council, and the latter prefers to negotiate directly with the Parliament rather than with a Commission which has been made the spokesman of the arguments of Parliament. Moreover, the search for agreement in first or second reading with the Parliament reduces the powers of the Commission, which can hardly hang on to its proposal when the other two institutions have reached agreement on a different text. Finally, although the Commission formally still enjoys its right of initiative, the real significance of this is increasingly being hollowed out. Community legislation is swarming with provisions which oblige (contrary to the Treaty?) the Commission to submit proposals, and which frequently indicate their content as well.

We should add that the claims for the Commission's being composed of a national of each Member State do not tend to strengthen the Commission; in fact, it is very surprising that the Commission supports these claims. In reality, in spite of the legal independence of the members of the Commission, this solution inevitably makes the Commission an intergovernmental institution which is in competition with the Council. However, insofar as each Commissioner has one vote, the majority in the Commission is quite different from that in the Council. From a political point of view, one cannot prevent the Council from withholding its support from proposals made or



decisions taken by an institution which is composed intergovernmentally, when – in the Council’s view – that institution’s majority does not reflect the general interest, but reflects a compromise between national interests reached without the weighting (demographic or otherwise) in the Council. Lastly, it is not certain that the “double hat” which it is proposed to grant to the EU Foreign Minister<sup>8</sup> will be to the advantage of the Commission. The Foreign Minister will be appointed by the European Council, so will be tempted to lean towards that institution, from which he draws his legitimacy. A paradoxical effect of the system would be to place all foreign affairs questions under the control of the Council.

What is at stake for the Intergovernmental Conference is therefore to restore the institutional balance to the advantage of the Commission. For that purpose, it is advisable to restore the Commission’s independence. One cannot fail to be surprised by the arguments developed currently by the Commission for a widened composition. The Commission argues that, for reasons of legitimacy, it would be impossible to decide on a question of State aid without the participation of a Commissioner with the nationality of the State concerned. But doesn’t this support the idea that Commissioners represent the Member States? Where does that leave the “independence” of the Commission? It is significant that the Benelux countries – which have always been supporters of a strong Commission – have realized that a strong Commission must be limited in size. However, even if this problem is settled, the issue remains of some kind of counterweight to ensure the independence of the Commission, both with regard to the Council and the Parliament. If the tendency is towards a parliamentary model, it should be recalled that in such systems balance is ensured by the possibility of dissolution of parliament. Even if this occurs very rarely, the existence of the possibility contributes to strengthening the independence of the executive. If another model is preferred, it should be recalled that in systems with a rigid separation of powers, the responsibility of the executive towards the legislative does not exist. There are therefore many reasons why we should not be satisfied with the work achieved so far, but should continue to reflect – beyond the current Intergovernmental Conference – on the means of establishing a genuine balance between the institutions.

8. A proposal of the 2003 Draft Constitution. See further Cremona, “The draft constitutional treaty: External relations and external action”, 40 CML Rev., 1347–1366.