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DELEGATION OF REGULATORY AUTHORITY IN THE EUROPEAN UNION
The relevance of the American model of independent agencies
DELEGATION OF REGULATORY AUTHORITY IN THE EUROPEAN UNION
The relevance of the American model of independent agencies*

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ABSTRACT

The central thesis of this study is that it is both politically necessary and legally possible to delegate some of the Commission's regulatory authority to independent administrative entities (regulatory agencies).

This thesis is backed up by a comparative study of the American system of independent agencies and the emergence of similar bodies—but with a strictly executive and consultative role—in the European Union. It is lent further support by a dynamic legal/political approach in the Community system of separation of powers, delegation of responsibilities and institutional balance. Finally, it is strengthened by the possibility of introducing a battery of supervisory measures to ensure that such bodies stay within their remit, while at the same time safeguarding their independence, effectiveness and legitimacy.

The main contribution of this study is to launch a critique of the status quo as regards the organisation of regulatory authority within the European Union, highlighting the inflexibilities inherited from a bygone era and mapping out the legal paths to be followed in order to overcome that legacy—an urgent task if the Commission is to find its way out of its current crisis and the institutions as a whole are to reposition themselves in the decision-making process in a way that is consistent with the philosophy of the Treaties, while adapting to the obvious changes that have taken place since the 1950s.

Should the Commission take up the central thesis of our study in its work on European governance, all its departments will have to embark on an enormous strategic exercise: they will be called on to review their activities from this new perspective, to propose a detailed legal framework for implementing a new regulatory policy, and to convince the other institutions, the Member States and the European public of the need for and benefits of the new system.

Alongside the administrative reforms, this regulatory reform could provide a major professional challenge for the Commission's staff, which might enable them to dissipate the present climate of widespread despondency.
Introduction

There is something rotten in the state of Europe. ¹

The enthusiasm of the 1960s (with the establishment of the Common Customs Tariff and the introduction of the common policies), the euphoria of the 70s (with the expansion of negative integration and the gradual removal of obstacles to the four fundamental freedoms), the momentum of the 80s (with southward enlargement and the policy of economic and social cohesion) and even the hopes generated by the completion of the internal market and the launch of economic and monetary union and the single currency in the 90s - have all come and gone.

Europe is afflicted by doubt and in a soul-searching mood, as witnessed by a whole series of events: the BSE crisis ("mad cow disease"), which has undermined confidence in the ability of the European institutions to manage complex and critical situations for the well-being of the public,² the resignation of the Santer Commission in the face of the rather cursory but irrevocable conclusion by the Committee of Independent Experts that it had lost control of and command over its departments,³ the recent Danish vote⁴ and three consecutive revisions of the Treaties in eight years which, despite their merits, have failed to come up with effective and convincing solutions to the malfunctions that have emerged and the challenges that lie ahead.⁵

The European Union (EU) now faces an unprecedented enlargement to the East without the institutional and administrative apparatus it needs to succeed.⁶

The new Prodi Commission has laid the emphasis on a thorough reform of its internal workings and urged the other institutions to follow suit.⁷ A vast reorganisation of internal structures and procedures is already under way, under the direction of Vice-President Kinnock and geared essentially to improving management.⁸ It is a good initiative. But is it enough?

¹ To paraphrase a famous exclamation from Shakespeare's Hamlet.
² The Commission already narrowly survived a censure motion in 1995-96.
⁴ At a referendum on Denmark's membership of the euro, over 53% of the population voted against joining, despite the fact that the Government, the main political parties, employers and trade unions were in favour!
⁶ Two groups of countries are knocking at the door: the first, consisting of Poland, Hungary, the Czech Republic, Slovenia, Estonia, Cyprus and possibly Malta, should join around 2004, while the second and more problematic group — Slovakia, Romania, Bulgaria, Latvia, Lithuania and possibly Turkey — is expected to join by the end of the decade. This means that around 2010 the EU could have twenty-eight Member States, without counting the former Republics of Yugoslavia (particularly Croatia, but also Macedonia, Bosnia and Serbia (with or without Kosovo and Montenegro) plus Albania, which will certainly have European aspirations once they have become democratic. And the question of Europe's geographical borders has not yet been settled … See Jacques Attali: Europe(s). Fayard ed., Paris 1994.
⁷ See Vice-President Neil Kinnock's communication, Some Strategic Reform Issues, 10 November 1999.
⁸ See Neil Kinnock's communication, presented in agreement with the President and Ms Schreyer, Reforming the Commission, 1 March 2000. An amendment of the Staff Regulations of officials is also under way on the
Apparently not. The obvious management failings are merely symptoms of general inadequacies and a climate of malaise. They are not the deeper cause, which must be sought in the radical changes and ongoing mutations in the EU's general decision-making process and in the Commission in particular. A long series of developments, often perceptible, sometimes obvious, but mostly latent, have affected both the decision-making machinery and the interaction between the different players involved.

After a long initial period (1957-84) which can be described as consensual, these changes began to take place towards the end of the 1980s with the proliferation of measures needed to complete the internal market and to direct responsibility for managing a mass of concrete projects in fields ranging from regional policy to external relations, taking in social policy, education, culture, etc.  

Introduction of the principles of **partnership** and **subsidiarity** were laudable attempts to stem this bout of regulatory and administrative bulimia. Application of these principles has borne some fruits but can they restore the balance while steering Europe towards a course of sound and effective action? The answer is clearly “no”: The principle of partnership, even applied in a broad sense, not only to the Member States, to whom a large part of the burden of implementing Community rules has already been (re)delegated, but also to non-member countries, in particular the applicant countries, is not enough to curb the heavy workload of devising, preparing, negotiating, adopting and implementing general rules. Furthermore, the principle of subsidiarity, even if applied extensively, will never obviate the need to take a large proportion of regulatory decisions at Union level, precisely because even the most cautious use of that principle shows that both national and regional bodies are unsuited to taking this type of decision. It has even been pointed out — and quite rightly — that the Community's powers will be extended regardless of subsidiarity. 

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9 This was a period of massive extension of the Community's powers: backed up by the political will of the Member States, the Delors Commission assumed direct management of many of these new policy areas.

10 The principle of partnership, already a feature of the application of the common agricultural policy (CAP), was introduced into the management of the Structural Funds, which had gradually grown in importance to account for 35% of the Community budget; the principle of subsidiarity was introduced by the Maastricht Treaty to define more clearly how to exercise powers not held exclusively by the EU. See N. Emiliou: *Subsidiarity: an effective barrier against the enterprises of ambition?* ELR, vol. 17, 1992, p. 383-407.

11 The pace at which Community rules are introduced has clearly slowed and management of the CAP and regional policy by national government departments has been a marked success. But at the same time new needs have emerged. See below, p. 35-36.

12 Besides the agricultural and Structural Funds, the Commission recently delegated to national authorities the task of implementing major programmes in other fields of activity. See the communication on the Leonardo II, Socrates II and Youth programmes relating to education and training. (note 132 below). On the delegation of responsibilities to non-member countries, see the Report by the Planning and Coordination Group on Externalisation, SEC(2000)823, 11 May 2000.

The internal market is a great boon, but if it is to operate smoothly, more measures must be adopted to ensure rapid and effective enforcement throughout the Union of standards, uniform patents, authorisations for the circulation of new products, rules on safety and consumer protection and fair and healthy competition. Moreover, science and technology are proceeding apace in all these fields. Quick and effective action is needed. But how?

It is clear that the European institutions — and the Commission in particular — are neither designed nor equipped to tackle such a regulatory challenge. Worse still, this basic deficiency is now compounded by a crisis of identity and confusion over the model for European integration, which certainly do not facilitate the task of redefining and assigning different spheres of responsibility in a realistic and cool-headed manner.

The conclusion must be drawn that Europe is currently suffering from a genuine crisis of governance. In this context, President Prodi’s White Paper on European Governance is a welcome development, as it highlights the need to think beyond a purely administrative reform and displays an awareness of the real nature and scale of the problem.

We use the concept of governance here in its most commonly accepted meaning, to denote the importance of cooperation and positive interaction between the public authorities in different spheres of responsibility and/or at different geographical levels. The concept of governance puts the accent on unity, cooperation and decentralisation and thus forms a stark contrast to bureaucratic hierarchy, compartmentalisation and central control. It is a particularly useful concept for analysing the institutional and regulatory aspects of Europe, as the construction of the Community brings into a play a complex power struggle between the central authorities and national and regional authorities dispersed over a vast geographical territory, comprising several independent States with diverging legal and political traditions and requiring far-reaching coordination to ensure the consistency of policies implemented at different levels. In this context, the concept of governance appears to be a more faithful reflection of the institutional balance within the EU, which is a unique entity that cannot be assimilated to any existing model in national or international law.

On the basis of these premises, President Prodi’s communication identifies six areas where work needs to be done on European governance: the first is to enrich the public debate on European matters by bringing discussion of major issues to the people and making scientific expertise more democratic. The second is to improve the way in which the

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14 Several authors have sensed and drawn attention to the transfer to the EU of powers relating to risk management after the traumatic experience of the BSE crisis. See, among others, Giandomenico Majone: Europe’s “democratic deficit”: the question of standards. ELJ, vol. 4, no. 1, March 1998, p. 5-28.  
15 See the White Paper on European Governance "Enhancing democracy in Europe" - communication from President Prodi on working methods, SEC(2000)901, 30 May 2000.  
16 The term "European Community" refers to the economic aspects of the Treaties and designates what is now known as the “first pillar”, while the term "European Union" has a wider meaning which also takes in the second and third pillars, i.e. the common foreign and security policy (CFSP) and cooperation in the fields of justice and home affairs. I use the two terms here interchangeably.  
17 There is a vast bibliography on the institutional nature of the EU. However, all authors are agreed on its unique nature. See, among others, Jean-Victor Louis: The Community legal order, 2nd ed., European Perspective Series, European Commission, Brussels, 1990.
process for producing and implementing Community rules is handled — with special emphasis on aspects other than the adoption of rules, in particular their quality, acceptability and effectiveness — by establishing inclusive procedures and evaluation arrangements. The third area, which is of particular interest for the purposes of this study, is concerned with improving the exercise of European executive responsibilities where there is a plea for greater decentralisation. The fourth task is to promote coherence and cooperation through a "networked Europe". The fifth concerns the way in which Europe contributes to world governance in an increasingly interdependent world where its role is now that of an entire continent. The sixth and final task is to step up integration and strengthen the strategic dimension of policies across the European continent.

Our study relates to the third of these areas and covers in particular what can be termed horizontal/external decentralisation, rather than vertical/internal decentralisation. We have already mentioned the new regulatory challenges faced by Europe. We have also seen that the European institutions, and in particular the Commission, are neither designed nor equipped to face such a challenge. This takes us back to the question of delegating some regulatory authority to independent bodies, unless the Commission is to become a mammoth administration employing tens of thousands of officials, which seems neither politically acceptable nor materially feasible — or even desirable.

Europe has already sensed this need, as witnessed by the proliferation of agencies set up in the last ten years. However, because of the strict and detailed legal framework, and overly restrictive interpretation thereof, the role of these agencies has remained largely consultative and executive; hence, far short of what is really needed and what they themselves are capable of. On what terms could they be extended to the regulatory domain? In which sectors should new agencies be set up? How can we guarantee consistency of action? What guarantees must be laid down to ensure their independence, the transparency of their activities and their accountability? These are some of the questions we will ask and attempt to answer.

Because of the dominant line of thinking within the institutions, sustained by case-law dating back 45 years, the European legislator can only delegate regulatory powers to institutions provided for by the Treaties, for fear of upsetting the sacrosanct institutional balance. But which balance are we talking about here? Is it the one arising from the ECSC Treaty (establishing the European Coal and Steel Community), which was very different from the institutional balance laid down by the EEC Treaty (establishing the European Economic Community)? And, even if we could argue by analogy, is the institutional balance that existed at the end of the 1950s identical to the one we see today? Does the much-talked-about democratic deficit in the European institutions exist solely in the limited powers of the European Parliament or should it also be sought in the executive rule-making process between the Commission and Council? Are we satisfied with the workings and democratic legitimacy of the various committee procedures? What is the respective scope of laws and administrative regulations in Community law? When is the Commission really

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18 See below, p.28.
20 See below, p.41-45.
weakened? Are there lessons to be learned for the exercise of regulatory activity from the answers to the above questions?

Here are a few preliminary problems, which must be overcome before we reach any final conclusions.

It is my personal conviction that there is a crisis of governance in Europe and that one of the most effective remedies is to embark on a thorough overhaul of the EU’s regulatory process. In this context, the delegation of regulatory powers, under scrupulous supervision, is the best course to follow —if possible, without having to amend the Treaty first. This is a conviction I have formed from having worked in Commission departments for the past 22 years, including 16 years in the Legal Service, and having witnessed at close quarters the recent crisis culminating in the collective resignation of the Santer Commission, when I was a member of his private office in 1998-99.

This conviction has been further strengthened here in the United States, as I have been able to take a step back from events and study the American model of regulatory agencies, which I feel is in many ways relevant for an analysis of the situation in Europe.

It is now time to take that personal conviction further and present a rigorous demonstration of my intuitions.

I intend to do so as follows: first I shall describe the delegation of regulatory authority in the United States and the EU and the origins and workings of agencies on the two sides of the Atlantic in order to identify common features and differences (Part A).

I shall then look at the balance of powers in the two legal systems in order to demonstrate their intrinsic similarities, on the strength of which I shall relativise the arguments against regulatory agencies based on a supposed respect for an outdated institutional balance (Part B). In these two sections I shall demonstrate the need for and feasibility of regulatory agencies.

Third, I shall address the problem of the substantial and procedural guarantees for an efficient and transparent regulatory process, in particular guarantees of the accountability of the regulatory agencies, which will be examined from two standpoints: autonomy and control (Part C).

In my conclusions I shall attempt to refute the existing status quo in delegation theory within the EU and establish a revised version of the Meroni doctrine.

Last but not least, a few words about my methodological approach. This study does not have any particular theoretical ambitions. I have no epistemological inclinations and do not intend to add yet another “-ism” to what is already a well-stocked collection of different approaches for analysing the phenomenon of European integration.

If there is one point on which all authors agree, it is that the European venture is a highly original one. Researchers are unanimous in citing the unique nature of the Community’s
institutional architecture and legal system. From that starting point, advocates of the intergovernmentalist/internationalist approach (such as A. Moravcsik)\textsuperscript{21} stress the dominant role of Member States in the European process, the constitutionalists/supranationalists (such as J.H.H. Weiler)\textsuperscript{22} insist on the key role played by the Community's novel institutions in developing European integration, in particular the Commission and the Court of Justice, while those who favour the regulatory/infranationalist approach (such as G. Majone)\textsuperscript{23} highlight the central place of the rule-makers and civil society in the entire rule-making process.

But can and must the European or Community phenomenon be shoehorned into just one of these three main approaches —not to mention functional federalism, consensual or participatory federalism, the theory of integration through the law, institutionalism\textsuperscript{24} and so many other variants born of laudable intellectual attempts to investigate European integration from a scientific angle (whether multi-disciplinary or not)? My answer is a clear “no”.

While it is true that the Council of Ministers lends itself more to an intergovernmental analysis, it is equally plain that the Commission and in particular the Court of Justice call for a more constitutionalist approach, while the utility of the regulatory approach for studying complex decision-making procedures, such as the codecision procedure between Parliament and the Council and in particular what is known as "committee procedure or comitology" (the so-called comitology), cannot be denied either.\textsuperscript{25}

For all these reasons, I would describe that my approach as deliberately \textit{eclectic} and \textit{pragmatic}. It thus reflects the Community method, which can be summarised as an international treaty that provides for national powers to be ceded to supranational institutions on which this Treaty confers the right to initiate legislation (common interests), part of the decision-making process (obligation to cooperate) and the tasks of monitoring breaches of the new legal system thus created (adherence to the “federal” pact) and protecting the rights deriving from it (the rule of law).

\textsuperscript{21} Andrew Moravcsik: \textit{Why the European Community strengthens the State: domestic politics and international cooperation}, Working Paper No 52, Center for European Studies, Harvard University, 1994. In his more recent work, the author places the civil society as the most important aspect of the European integration. See, \textit{The choice of Europe: Social Purpose and State Power from Messina to Maastricht}. Ithaca, N.Y.: Cornell University Press, 1998.


\textsuperscript{24} In a recent, as yet unpublished study (\textit{The institutional foundations of intergovernmentalism and supranationalism in the EU, in IO, no. 56, 2001, forthcoming}), G. Garrett and G. Tsebelis attempt to transcend the main schools of thought by establishing a general theory of the workings of the Community institutions based on their overall functional interaction (legislation, implementation, adjudication) as players in the decision-making process (game theory+veto players).

We have now lived for nearly 50 years under the impact of this novel system whose initial objectives have—to say the least—been expanded in spectacular fashion. And everyone agrees that the practical operation of the system—and very often the results it obtains—go far beyond the aspirations and expectations of the founding fathers of the Treaty. Without any exaggeration, these can be described as unintended effects.26 The construction of the Community is a novel process, but also an open-ended and dynamic one. Each revision of the original Treaty reflects a shared degree of awareness of the additional steps to be taken to serve best the common interest.

It hardly matters if these steps are too timid for some and too bold for others. It hardly matters what each individual sees as the ultimate goal of this unprecedented enterprise. It hardly matters if we eventually arrive at a situation in which the people of Europe (a real European demos) are aware of their common future and want to defend it together.

The important thing is to let the Community method do its work. The rest will follow. It is impossible to predict what the final outcome will be, and most likely that outcome will not correspond exactly to any known formula. It would be contrary to the Community method to try to enclose it in a rigid and inflexible theoretical straitjacket. At the same time it would be a pity to curb its potential effects, which are certainly unpredictable and unintentional, but often fruitful and beneficial.27

For all these reasons I believe one cannot and must not create a single explanatory model of the workings of the Community institutions. If there is one model which fits best, it would be an evolutionary/transformational model, i.e. a model which evolves and is transformed with the institutions—in other words an "anti-model". When and if the process of European integration is ever complete, we shall be able to ask questions about the nature of the outcome and, possibly, formulate explanatory theories.

This study is of course no more than a modest contribution on a very specific individual feature of this magnificent process. It does not set out to draw generalisations, but focuses on the usefulness and feasibility of delegating Community regulatory authority to independent agencies. While taking care to stick to these methodological premises in the arguments I will develop, I shall nevertheless allow myself some necessary digressions to illustrate my theses.

26 For example, whether the intergovernmentalists, institutionalists or functionalists like it or not, the procedure of referring cases for a preliminary ruling (Article 234 (former Article 177) of the Treaty) was neither planned nor designed to become a means of exercising indirect control over the constitutionality of national laws.
27 If there is a reliable model for analysing the Community phenomenon, I would say it is a combination of a bottom-up approach (from individuals to the institutions) and a top-down approach (from the Member States to the institutions and Union citizens) aimed at identifying the interaction of the main players in the process, i.e. national bodies and the Community institutions, but also individuals (natural and legal persons), who are perhaps the most active architects, but the least visible and very much neglected by orthodox thinking on European integration. See, Xénophon Yataganas: *The individuals and the Member States before the Community’s legality*, 2 vol. Sakkoulas ed., Athens 1994 and 1998.
A. Two different but convergent federal systems

It does not require any particular intellectual effort to pinpoint the striking differences between the American and European experiences of federalism.

In the United States of America, this process, which, judging by recent decisions of the Supreme Court, is still in gestation, has already been under way for over two centuries. In Europe the adventure of "closer union" has been going on for barely 50 years, but has already passed through several stages: the ECSC in 1951, the EEC or "common market" in 1957, the Merger Treaty in 1966, the Single European Act in 1987 followed by the internal market, The Treaty of Maastricht /Treaty on European Union in 1992 with its three pillars, the Amsterdam Treaty in 1997 and the Nice Treaty in 2000. And the process is far from over.

There are enormous divergences in the geographical, demographic, cultural and political factors involved: the US came into being in a vast, practically untouched and extensible territory full of unsuspected natural resources. The scant population of natives and immigrants left room for a massive influx of people from elsewhere. Despite the initial predominance of the Protestant culture, the relative vacuum in all areas of economic and social life encouraged a relatively rapid blending of differences and the extensive homogenisation of the local "humus" (the famous melting-pot). We must add to that the almost total extermination of the natives and a civil war which very quickly wiped out any notions of asserting a "deviant" identity over the model that was deemed after the event to be autochthonous and dominant.

We might say that, in Europe, things happened exactly the other way round: on one of the world's oldest territories, which is relatively limited in expanse and intensively exploited, not to mention devastated by two recent wars, a group of independent countries, boasting civilisations dating back sometimes thousands of years, possessing different languages and cultures and intent on keeping them, and having established secular legal and political systems and highly developed socio-economic relations, deliberately decided to share — and manage in common— part of their sovereign prerogatives, the better to secure their future in a world heading rapidly towards globalisation.

Underneath these major and obvious divergences, however we can, if we look a little more closely, find common ground.

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28 A selection of articles on different aspects of this question can be found in N.J. Ornstein and M. Perlman: The United States faces the United Europe, AEI Press, Washington DC 1991.


30 Like the Amsterdam Treaty, the Treaty of Nice specifically calls for a further Intergovernmental Conference (IGC) to settle questions left outstanding.

At a time when the US was discovering the federalist riches of Althusius, precisely because it was a young, heteroclitic and amorphous amalgam in need of order, Europe had just succumbed to the implacable logic of Bodin's theory of state sovereignty as a means of coping with the appetites of the old antagonistic peoples gnawing away at it. But both sides very quickly incorporated into their respective models the discipline of Grotius' public international law, the system of institutional balance inspired by Montesquieu's theory of the separation of powers and Rousseau's social contract, and the democratic/republican mechanics of de Tocqueville. Both have always shared and still share today the same fundamental values.

There has therefore been a kind of historical cleft, arising from economic and social conditions, which is now narrowing. Why and how?

The need to move towards federalism, which was felt by the US at the end of the 18th century, was understood by the Europeans only amid the ruins of World War II. That is why the former embarked immediately on a large-scale ideological project enshrined in the Constitution, while the latter merely pooled their strategic production capacities in order to avoid a new conflict or, at the very least, make such a conflict more difficult in future. So our first conclusion, which may help us in our subsequent deliberations, is that the US is an example of **statutory federalism**, whereas the EU may perhaps be an example of **derived federalism**.

Because of the statutory-foundational nature of American federalism and the rapid solution to the problem of shared sovereignty in the form of the Federation, a system of partnership was able to develop very quickly between the federated entities and the central authority, which today still allows American federalism to be highly decentralised without calling into question the status of the federal authority. By contrast, the derived nature of European federalism, which arose from functional tasks conferred on common institutions, generates constant tension between these supranational institutions and the Member States, preventing a rational distribution of powers. The tension was heightened during the period of massive extension of Community powers that was ended by the introduction of the principle of subsidiarity which, despite everything, established criteria for drawing a dividing-line between the powers assigned to the Community and those supposed to remain at national or even regional and local level. Here too the historical gap is obvious, but the first signs of it being bridged are also perceptible.

The principle of subsidiarity has redefined two parallel trends that had been shaking the constitutional foundations of the Member States: because of the increase in the Community's responsibilities as a result of the growing internationalisation of the problems to be tackled, coupled with the extension of majority voting in the Council to facilitate decision-making, national governments were placed in the awkward position of no longer being in control of a large part of their rules and regulations. Moreover, the situation was aggravated by an extensive interpretation of the subsidiary powers of the institutions under Article 308 of the Treaty. The technique of opt-outs was merely an imperfect, one-off remedy, as is the concept of enhanced cooperation (opt-ins) in the Amsterdam and Nice Treaties.33

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32 In this context, some authors have asserted that the Community's sphere of responsibility is potentially unlimited. See Koen Lenaerts: *Constitutionalism and the many faces of federalism*, AJCL, vol. 38, 1990, p.205-263. Even more explicit are J.H.H. Weiler and N.J.S.Lockhart in “Taking rights seriously” seriously: *the European Court and its fundamental rights jurisprudence*, CMLR, vol. 32, 1995, p. 51-94 and 579-627: “…the potential for Community legislative reach into Member States' domains is not only dynamic but may, perhaps, be limitless.” However, seen in the context of the article's subject matter, I believe this is more of an *obiter dictum* than a normative statement.

33 This is a facility allowing Member States to remain outside of, go beyond or fall short of common rules in specific cases expressly provided for by general legislation and duly supervised. Despite initial fears that it
By contrast, the principle of subsidiarity has turned back the tide: by keeping the lid on the Pandora's box of subsidiary (and/or implicit) powers, it has contributed to a spectacular decentralisation of Community prerogatives.34 The expansion of partnership arrangements, the timid but real introduction of agencies and Prodi's communication on European governance all bear witness to this. The initial trend towards centralisation, inevitable in a period of mutual suspicion fed by the existence of two concurrent and sometimes conflicting systems of law, is noticeably giving way to an inverse process that encourages cooperation between local, regional, national and Community bodies acting within a single legal framework in an emerging federal system.35

The same difference between statutory and derived federalism has led to very different institutional architecture on the two sides of the Atlantic. On one side we have a rather classic federal system in the US, with a central authority comprising a bicameral legislative branch (House/Senate), an executive branch with at its head a directly elected President, assisted by government departments and the Administration (agencies), and a Supreme Court which guarantees the federal pact (breakdown of responsibilities between States and the Federation) and the consistency of laws with the Constitution.36 On the opposite side we have in the EU a unique and original set-up which still reflects the initial functional approach. It comprises a legislative function, initially constituted by the Member States meeting in the Council of Ministers, but increasingly shared between the Council and the European Parliament under the codecision procedure, an executive, which is supposedly represented by the Commission, a supranational body par excellence, which, however, has two major peculiarities in that it has a monopoly over the right to initiate legislation but no monopoly over the executive, since the Council can retain some executive power for itself, and a judiciary branch (consisting, since the Treaty of Maastricht, of the Court of First Instance [CFI] and the European Court of Justice [ECJ], which has the task of interpreting and ensuring the uniform application of Community law in the Member States, in accordance with novel procedures.37

Just as in the US, where the initial, rather rigid separation of powers gradually gave way to a system of checks and balances in the face of an increasingly complex socio-economic reality requiring the interpenetration/interaction of different powers, so the EU's unique architecture is slowly but surely moving towards an institutional balance that displays significant similarities with the American system, a striking example being the system of bicameralism of sorts (Council and European Parliament) in operation since the introduction of the codecision procedure.

The most spectacular changes have been in the European Parliament, which started out as something less than a consultative assembly under the ECSC Treaty and a purely consultative body from 1957, then experienced a singular increase in the weight of its opinions,38 before becoming directly elected in 1979,39 winning points in
the budgetary procedure and finally being elevated to the rank of a real co-legislator on a par with the Council, as a result of the successive Treaties of Maastricht, Amsterdam and Nice and the combined effects of the cooperation and codecision procedures and the extension of qualified majority voting.

At the same time, despite its dwindling influence on the taking of final decisions, precisely because of the codecision procedure, the Commission has seen its executive powers strengthened as a result of both Court decisions and the adoption of the decision on committee procedures. The Council is also in the throes of change and, in any event, is looking increasingly like a second legislative chamber representing the Member States alongside the Parliament, which represents the people(s) of the EU.

Recently there have been a number of calls for further moves in the same direction. Having a President appointed by Parliament and invested with additional powers would strengthen the Commission's executive role. If Parliament were to appoint the President of the executive and install the team just after its election, now that the two terms coincide, this could stimulate the formation within Parliament of real European parties conducting coordinated campaigns in all the Member States. As a result, the composition of the Commission would be a more accurate reflection of political differences in the EU, giving the whole integration process a real flavour of parliamentary democracy. At the same time, it might pave the way for the emergence of a European demos. Further light could be shed on the landscape by revising and clarifying the hierarchy of Community norms. We could have real framework laws adopted by the Council and Parliament under the codecision procedure and put into effect by implementing regulations adopted by either the Commission or the Member States, in accordance with the principle of subsidiarity, allowing that hybrid instrument, the directive, to be abolished. This could put the whole Community system on a fast track to federalisation.

However, we have yet to reach that stage. In fact, EU institutions are definitely not designed upon the principle of parliamentary/federalist democracy. The Parliament is asked to confirm a new Commission appointed by the Member States. It may also remove this Commission from power. But the Commission is not a Cabinet; is more like an executive committee of high civil servants. In the present situation, only if the Parliament had the power to remove Council members could we reasonably talk about the EU as having more than a vague resemblance to the parliamentary democracies of its Member States. And in the future, only if the President of the Commission is elected directly in all the Member States and independently form his cabinet, could we speak about the emergence of an executive federal authority.

The European Court of Justice deserves a special mention, for it has perhaps been the main vehicle of the silent revolution. It began as a simple international court, but, by making extensive but very judicious use of its prerogatives under the Treaty, it has gradually established itself as a real supreme court of the EU—a genuine constitutional court for all Member States, scrutinising their loyalty to the Community. It has

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42 If the Council is in agreement with Parliament, it no longer requires unanimity to reject a Commission proposal. See, G. Garrett and G. Tsebelis argue that the role of the Commission (and the Court) could become important again after Amsterdam and Nice, because of the extension of qualified majority voting and the difficulties in forming majorities in the Council and Parliament to pass new legislation. In Legislative politics in the EU (forthcoming).
44 See also below, p.42, note 151.
45 See the debate taking place after the treaty of Nice on the reshape of the EU.
achieved this through its rich and innovative case-law, which is still capable of sudden and spectacular developments.\textsuperscript{49}

Its most important milestones can be summarised as follows: a) establishment of the principle of the primacy of Community law over national law,\textsuperscript{50} even with regard to subsequent legislative provisions or constitutional provisions,\textsuperscript{51} b) establishment of the principle of the direct effect of Community law in the Member States' legal systems,\textsuperscript{52} and c) sole power to decide on the invalidity of a rule of Community law,\textsuperscript{53} to cite only the most important developments. Also worthy of mention is the extraordinary and unique procedure laid down in Article 226, which imposes a responsibility on States that is unprecedented in international law and highlights the supranational virtue of the Treaties.

Looked at individually, these principles already take us a long way down the road to integration (by way of comparison, the US Supreme Court accepts the principle of direct effect but not absolute primacy); considered as a package, however, they constitute a truly explosive mixture. Together they encroach on all the Member States' powers and even challenge national constitutional law itself: the legislative branch is no longer in absolute control of its own agenda, the executive loses a large part of its discretionary power and the highest level of the judiciary (courts of appeal, constitutional courts) sees an erosion of its prerogative to consider the constitutionality of laws whenever—and this is increasingly the case—such laws are in or touch on the Community domain. Moreover, in cases where these high courts do enjoy a monopoly of the right to examine constitutionality and sole power to declare a law void, they are astonished to find themselves assisted in their task by minor judges who, by referring cases for a preliminary ruling, set themselves up as quasi-constitutional courts, thus forming part of a complete, unified system of legal protection within a single, reconciled EU legal framework.\textsuperscript{54}

No doubt this is what Pierre Pescatore, a judge of the European Court of Justice, had in mind when he wrote in 1982 that we must encourage Europeans “to recognise that on many issues arising in a federal context, the US have the advantage of some 150 years of a highly diversified judicial development from which many useful lessons may be learned”.\textsuperscript{55}

There is no doubt that the US and the EU are two distinct and largely different polities. It is also certain that they are in a different stage of their development: the US has a certain advantage over the EU both chronologically and materially. But both have been—and are still being—transformed by similar forces. At this stage of their respective development, the fundamental question remains which is the optimum way to promote national (or Community) interests in a manner that is sensitive to state sovereignty.

The US deals with this problem in a very pragmatic fashion, whereas in the EU there is a tendency to theorise too much before taking action. In other words, in the US people are more interested in the particular balance of powers and decision-making mechanisms that have to be established in order to resolve a specific problem, whereas in the EU we are infinitely more concerned with examining whether the procedures that have to be introduced are compatible with existing rules, even where these rules are evolving rapidly and not very clear in themselves.


\textsuperscript{50} Costa v ENEL, Case 6/64, [1964] ECR 585 et seq., where the Court gave priority to Community law over provisions of Italian law.


\textsuperscript{52} Van Gend en Loos v Nederlandse Administratie der Belastingen, Case 26/62, [1963] ECR 1 et seq.

\textsuperscript{53} Firma Foto-Frost v Hauptzollamt Lübeck Ost, Case C-314/85, [1987] ECR 4199.


I believe that this difference in approach is also due to the very distinct nature of the two federal experiences: the foundational nature of American federalism imbues it with a certain confidence which gives it the institutional scope and public acceptance to experiment with new regulatory solutions, even if they have to be retargeted and their effects corrected after the event. The derivative nature of European federalism, on the other hand, makes it doubt its own initiatives, which must from the outset fit in with a laboriously pre-defined framework in order to win acceptance from the institutions and the public. And this difference in approach is heightened by the contrast between the pragmatic Anglo-Saxon mentality and the Cartesian mindset predominant in Europe, which lays the emphasis on conceptualising and theorising before rational comprehension, and above all before any action is taken.

And yet it is most interesting to note that, despite these differences in approach, the terms of the debate are very similar on both sides of the Atlantic. It is significant here that the devolution debate in the US — and in particular the institutional reforms arising from it — overlap or even coincide with equivalent discussions in the EU on subsidiarity, the sharing-out of Community powers, institutional reform and the democratic deficit. At the core of the two parallel debates we can identify the same concern to ensure the adequate and sound legitimacy of changes that are announced, planned or proposed. In this context the concept of legitimacy includes effectiveness and accountability, two factors which are closely bound with the debate on the new instruments and new procedures that are needed to cope with the shifting realities in a world undergoing rapid and profound change.

Regarding the question that is of most interest to us, it is noticeable that in parliamentary/majority systems, one party or coalition of parties controls both parliament and the government, resulting in direct, hierarchical control over the administration, whereas in a system of checks and balances/institutional balance, administrative rule-making is rendered accountable by means of different practices and institutional arrangements.

Similarly, in parliamentary systems, the courts tend to protect parliament's legislative prerogative by ensuring that civil servants do not overstep the limits of their powers, whereas federal systems offer more fertile ground for pro-active measures by courts which may be more or less extensive, depending on relations between the different powers. It is obvious that the EU, at least in its manner of functioning, is closer to the federal than the parliamentary model of organisation of powers.

These are some of the reasons for adopting a comparative approach between the US and the EU, particularly in the crucial area of the delegation of regulatory authority, a special feature of post-industrial societies such as ours.

In everyday life, delegation is a primordial function (we have long delegated to our grocer the task of procuring our food, or delegated to our garage the task of repairing our car, and recently we have even been delegating the management of our assets to specialised companies — who knows what else we will be delegating tomorrow), so we can easily gauge the importance of delegating regulatory authority in current systems of governance.

In any case, all political systems can be understood in a theoretical way as a chain of delegation from voters to the ultimate policymakers. And this chain of delegation is paralleled by a set of accountabilities running in the reverse direction.

We shall now look further at this question and the solutions that have been found on the two sides of the Atlantic.

1. Delegation in the US

56 It is well-known that the procedural conditions laid down by the APA in 1946 for rule-making by agencies was inspired by the Democrats' fears that a Republican President might not manage the New Deal policy satisfactorily. See also below, p.25.
The US Constitution does not allow for the delegation of part of the legislative function; on the contrary, a reading of the text would suggest that it prohibits it. The relevant provisions leave no margin for interpretation: the wording of the first three articles is extremely clear:

“Article 1, Section 1: All legislative Powers herein granted shall be vested in a Congress of the US, which shall consist of a Senate and a House of Representatives…

Article 1, Section 8: The Congress shall have Power… to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the US, or in any Department or Officer thereof.

Article 2, Section 1: The executive Power shall be vested in a President of the USA…

Article 3, Section 1: The judicial Power of the US, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish…”

These provisions succinctly establish a very clear separation of the three powers, leaving legislative power entirely in the hands of Congress, including decisions about the structure of government and the courts. The President is designated as the sole repository of executive power, while Congress decides on the number and powers of the services necessary and appropriate to carrying out the work of government. The system is not entirely watertight: the interference of the President in the legislative process via the power of veto, which can be overridden by a two-thirds congressional vote, and Congress's powers over the executive and judiciary via the impeachment procedure, are only the most prominent examples of the inevitable interaction between the three branches of government, reflecting above all the system of checks and balances between them. The practical application of the provisions of the Constitution has led to an extraordinary number of disputes about the encroachment of one branch on the others, reflected in the long and rich history of Supreme Court judgments. This is a field that still exercises the Supreme Court and will perhaps always continue to do so.

However, the logic of the separation of powers and its formulation in the Constitution, despite its more limited application in practice, initially gave rise to the “non-delegation doctrine", according to which Congress may under no circumstances delegate its legislative prerogatives to another branch of the constituted powers. As has been rightly pointed out, this doctrine has its origins in the conviction that this would actually be a form of sub-delegation. This was also partly due to the fact that the US constitutional system, especially in the beginning, was founded in a relatively weak executive, so that the first hundred and fifty years (until the New Deal period) of the American republic saw policymaking dominated by the legislature. All power is vested in the People, and the three powers instituted by and for the People are already its representatives. This reasoning, essentially inspired by private law, where delegation of the mandate is strictly prohibited, was brilliantly transposed to the public law sphere by John Locke in his Second Treatise of Government. Together with the writings of Montesquieu on the separation of powers to protect the people from tyranny, this formed the main intellectual basis of the American Constitution.

58 Gerald Gunther, Kathleen M. Sullivan: Constitutional Law, 13th ed., op. cit., p. 354. The overlap between certain activities of the President and Congress has led some observers to talk of a bipolar executive branch, which closely resembles the situation in the Community, where executive power is shared between the Commission and the Council.
59 Ibid. p. lxxi.
The non-delegation doctrine, however, has had little practical effect. In two centuries the Supreme Court has only twice cited it when setting aside regulations. Conversely, it has several times allowed the possibility of delegating legislative power under certain conditions. In a comparatively recent case the Supreme Court ruled that the non-delegation doctrine “does not prevent Congress from seeking assistance, within proper limits, from the coordinate Branches. [Thus,] Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors. So long as Congress lays down by legislative act an intelligible principle to which the person or the body authorized to act is directed to conform, such legislative action is not a forbidden delegation of legislative power.”

This could hardly be clearer. Despite a few isolated and cyclical reversals, this remains a valid precedent.

In the above judgment the Supreme Court restates its earlier ruling: the words “seeking assistance” refer to the reality of a modern state, the complexity of which requires the delegation of regulatory functions. There, of course, be another legislative act defining the powers delegated; delegation necessarily entails the exercise of a degree of discretionary power, and the delegation may apply to different administrative or judicial bodies. The legislature must lay down intelligible principles with which the delegated body must comply when exercising the discretion it has been granted. Congress should provide agencies with a road map or algorithm for translating technical findings into policy, rather than relying more substantially on agencies’ policy judgment.

It is this latter condition that raises the most sensitive issues. How are the limits to regulatory discretion to be determined? What is the thrust of the intelligible principle? Which is the degree of details indicated on the roadmap? Is the aim of “ensuring a high level of public health protection”, for example, sufficient to justify delegating regulatory powers in matters of food safety to an independent agency? Why is it an intelligible principle? When it comes to determining the limits, how much is too much? And if the measure is in itself reasonable and consistent with the mandate, but produces effects that cause irreparable harm to other sectors of State activity, who is to adjudicate the conflicting claims?

These and other problems have arisen and in part been resolved in the American context. Instead of reacting defensively or fearfully, the United States, backed by imaginative regulations and a pragmatic Supreme Court, has been able to develop a commonsense approach dictated by the objective needs of coordination between the departments of government.

This evolution is not surprising: the US Constitution does not offer indications about the delegation problem, because the founders assumed that the legislature would jealously guard its policymaking powers. They were therefore much more concerned about the possibility of congressional aggrandizement. This original

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65 “(A) hermetic sealing-off of the three branches of government from one another could easily frustrate the establishment of a National Government capable of effectively exercising the substantive powers granted to the various branches by the Constitution…” Chief Justice Taft’s opinion in J.W. Hampton & Co. v US, 276 U.S. 394 (1928).
67 Panama Refining Co. v Ryan, see supra note 58.
70 “…to my mind, simply illustrate the principle stated more than 50 years ago by Mr Chief Justice Taft that delegations of legislative authority must be judged according to common sense and the inherent necessities of the government coordination” Justice Rehnquist concurring opinion in Industrial Union Department AFL-CIO v. American Petroleum Institute, 487 US 607 (1980).
framework functioned normally until the 20th century, when social and political changes led the federal executive to play a more active role in the regulation process. Furthermore, during the New Deal period, the Congress itself assimilated the advantages of delegating broad economic and social policy to the executive and, consequently, to the independent regulatory agencies. Immediately, three kind of criticism appeared: the size of the delegation, its control and the quality of the delegated public policy. Three responses have been provided: the Congress specify carefully the limits of the delegated executive powers, it also constrains executive discretion with restrictive administrative procedures under judicial review and allocates work across the branches, avoiding the concentration of power in the hands of committees.\textsuperscript{72}

The non-delegation doctrine is more of a theory of the necessary and sufficient conditions for delegating regulatory powers entailing a degree of discretion, where this seems to be essential for the sound and efficient management of the complex situations created by contemporary society.\textsuperscript{73}

2. Delegation in the EU

In a system where powers are conferred on the EU by the Member States, all Community action rests on a legal basis provided for in the Treaty. Given the fundamental importance of this almost constitutional principle for all Community action, it follows that the executive powers of the Commission must also be exercised according to a legal basis, in accordance with the rule of law.\textsuperscript{74}

The fundamental point about the attribution of powers in European law is that, unlike other federal systems, this is not done by area of action (competition, environment, etc.), or by decision-making body (legislative, executive), but cumulatively, in the sense that the Treaty determines simultaneously the field of activity, the competent institution and the form of and procedure for decision-making.\textsuperscript{75} It is thus a system of specific and limited empowerment, which significantly reduces the scope for rulemaking by the Community and blocks the road to a transition to a federal system, which could have been achieved by general empowerment.\textsuperscript{76} Furthermore, as we have already pointed out, neither an all-embracing interpretation of subsidiary powers (Article 308), nor a liberal definition of implicit powers can compensate for these restrictions arising from the determination of the Member States to retain absolute control over the process of integration.\textsuperscript{77}

This principle of powers conferred by means of limited empowerments leads to a system of overall distribution of Community power characterised by an interdependence of institutions invested with distinct and carefully defined functions. It is more of a blueprint for institutional balance, than a system of separation of powers.\textsuperscript{78}

This is particularly apparent from the unique way in which a blend of legislative and executive power is shared between the three institutions. The principle of conferred powers makes this balance immutable: no changes are allowed and no powers may be transferred within the system, other than those provided for by the Treaty. By refusing to allow Community institutions to delegate tasks to organisations not mentioned in the

\textsuperscript{72} See the parallelism with the comitology procedure in the EU, that result to an effective aggrandizement of the legislative brunch. Below, p.41-45.
alupia/DA99.html
\textsuperscript{75} See Article 7 TEC, in relation to the specific provisions in each area of Community activity. See H.P. Krausser: \textit{Das Prinzip begrenzter Ermächtigung in Gemeinschaftsrecht als Strukturprinzip des EWGV}, ed. Duncker & Humbolt, Berlin 1991.
Treaty, the principle of conferred powers has the effect of preserving and protecting the constitutions of the Member States and their sovereign powers.\textsuperscript{79}

Several observers have also argued that functional attribution of powers by limited empowerment reflects respect for the democratic basis of the Communities, in the sense that their action is prescribed and approved by elected Parliaments and the governments that command their confidence.\textsuperscript{80}

Can we go further and claim, by analogy, that as well as this reticence in the Treaty about the attribution and exercise of Community powers, there is also a more general reservation in the law as regards the performance of the institutions' administrative tasks? The answer here is “no”. Without going into the details of the exact extent of an exclusive preserve of Community administration, it is uncontested that a legal basis must at least cover the creation of legal entities under public law, the delegation of powers to private bodies and the establishment of autonomous central authorities.\textsuperscript{81}

In the area under consideration here it is immediately clear that, even in this restrictive context of delegation of powers, the Treaties explicitly allow the legislature (Council and Parliament) to transfer the powers devolved to it to the executive (Commission) (Articles 202 and 211). This is the problem of the executive's regulatory/rule-making powers, whose existence has never been contested, despite the fact that they cannot be reconciled with a strict interpretation of the separation of powers, which has long been abandoned.

A literal reading of the articles referred to above might, of course, suggest that the powers transferred to the Commission were implementing powers only, entailing no rule-making capability. But no one today accepts such a reading, given the very broad interpretation of executive powers by the Court of Justice,\textsuperscript{82} and the extensive debate on comitology.\textsuperscript{83} It is also difficult to determine exactly where rule-making begins and simple implementation of the law ends, particularly in the Community context, where the hierarchy of norms is unclear, not least because of the duplication of legislative instruments (Council and Commission regulations). It has rightly been observed that “the distinction between conferring executive powers and delegating legislative powers corresponds to the difference between the principle of conferred powers and the insistence on a legal basis”.\textsuperscript{84} In this context the provisions of the Treaty would be sufficient if it were a simple matter of implementation, but further delegation would require ad hoc legislative provisions. In practice the basic Council regulations contain this formal empowerment.

A more significant point for our purposes is that the delegation of powers under Community law, like many other things, is more of a political problem than a point of law. The greater the delegation, the less the decision-making process is controlled by the representatives of the Member States. This is why the delegation has always been seen as an important factor in tilting European integration towards the federal model.

Even more relevant is the fact that this might suggest that Community law prohibits sub-delegation, because the only body to which power may be delegated under the terms of the Treaty is the Commission. The


\textsuperscript{80} M. Zuleeg: Der Verfassungsgrundsatz der Demokratie und die EG. Der Staat, vol. 17, 1978, p. 27.

\textsuperscript{81} On the administration's exclusive domain and the limits thereof see A. Laubadère/J-C. Venezia/Y. Gaudemet: Traité de droit administratif, LGDJ, Paris 1990, p. 516.

\textsuperscript{82} See, for example, Case 23/75 Rey-Soda v Cassa Conguaglio Zucchero [1975] ECR 1301. Case 133-136/85 Walter Rau Lebensmittelwerke v BALM [1987] ECR 2334 and Case C-27/89 Scarpe v Onic [1990] ECR I-1701. The Court considers in general that the Commission’s executive competence can be extended provided this does not violate the basic provisions of the Treaties.


\textsuperscript{84} D.Triantafyllou, op. cit., p. 282.
Commission alone may not make arrangements for sub-delegation, nor does the Treaty provide for the possibility of the Council investing the Commission with such power. However, the intervention of the Member States is often necessary and desirable to implement the Commission's regulatory instruments, and indeed very often expressly provided for in the basic Council regulation. However, the great variety of tasks entrusted to the Commission has led it and the other institutions to introduce other forms of externalisation (agencies, technical assistance offices, known as TAOs). Political scientists have coined the phrase external and internal delegation to describe this phenomenon. External delegation denotes the transfer of rule-making powers from the Member States to the European institutions or from them to outside bodies including Member States. Internal delegation thus refers to the transfer of executive powers from the Council to the Commission.

I do not fully agree with this typology. Such a distinction implies a purely intergovernmental model of the Community structure, with a strict separation of the two legal orders, which are presented as competing rather than cooperating with one another. It also restricts the Commission’s delegated powers to implementation only, which is not always the case, as we have just seen. I would argue for the same distinction but including under internal delegation everything that involves the transfer of powers between the Member States and the institutions; that is, considering the Member States on the one hand as the delegating authorities under the Treaty, in their capacity as constitutional power of the Union, and on the other as the recipients of delegated powers in their role of decentralised administrations of the Union, within the context of a single, constantly evolving, federalising entity. This also has the advantage of limiting external delegation to the delegation of powers of any kind to independent outside bodies, which is the most controversial aspect of the subject and the main focus of this study.

In order to narrow the focus even more, we should also exclude from external delegation those administrative entities other than Commission departments which enjoy a certain amount of administrative autonomy (e.g., Publications Office, Humanitarian Aid Office, Statistical Office, European Anti-Fraud Office) and any other body provided for in the Treaty but not forming part of the Commission administrative structure (European Central Bank, Euratom Supply Agency, Joint Research Centre). This study also discounts the rarer cases of delegation of Community powers to international bodies.

The Commission's attitude at the moment is extremely hostile to any moves toward external delegation of any of its powers. Despite several traumatic experiences and the obvious inadequacy of its own staff, in terms of both numbers and skill profiles, to carry out all the tasks required, and contrary to its own declared intention of "doing less but doing it better", the Commission, advised by its Legal Service, believes that only an amendment to the Treaty (which could be equally problematic) can clear the way to the delegation of its powers to independent European administrative authorities.

This doctrine, which we shall examine in detail later, rests on two main arguments. The first, which is openly expressed, concerns the inviolability of the institutional balance, which prohibits any delegation of regulatory powers entailing a margin of discretion to external bodies that have no basis in the Treaty. The

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86 In fact, the majority of studies concerning the delegation problem in the EU deals with the transfer of competencies from the member States to the European institutions, and not from them to independent authorities.
88 See below, p.32.
89 See below, p.32-35.
second argument, which is generally unspoken, concerns the loss of Commission powers, which is presented as undermining the process of integration as a whole.

In any event, the creation of independent administrative authorities of this type is much less problematic in the US and in Anglo-Saxon countries in general, concerned less about legalistic theory and more about due process than continental Europe, where the search for doctrinal truth often takes precedence over more pragmatic concerns, as we shall see.

3. The origins and growth of regulatory agencies in the US

The term "agency" can cover a variety of types of organisation going by different names (e.g. Administrations, Boards, Commissions), but all sharing the following characteristics: they are independent administrative entities, incorporated by law, with a separate legal personality and endowed with decision-making power of a regulatory (rule-making) or individual (adjudication) nature in a specific area of activity. Agencies are an Anglo-Saxon, or more particularly American invention, because the *sine qua non* of their existence is an open administrative arena characterised by a pragmatic, empirical approach. Such entities would be simply inconceivable in an ex-Communist state and have difficulty surviving in a dirigiste system.

The first agency, the Interstate Commerce Commission (ICC), set up in 1889, was the fruit of Congress's distrust of President Harrison, manifested in the removal of the organisation from the Department of the Interior, to which it had previously been attached. Another first-generation agency, the Federal Trade Commission (FTC), which investigates economic cartels and unfair competition, also owes its existence to congressional wariness of the administration, coupled with doubts about the effectiveness of judicial review in tackling such practices.

Since then, independent agencies have proliferated in a wide variety of areas and have acquired an important place in the workings of the American system of administration. Their number (which is itself a matter of some uncertainty), the extraordinary diversity of their fields of action, their constantly evolving status and the rich case law referring to them, all testify to the fact that their main *raison d'être* is their practical usefulness and effectiveness.

However, these independent entities remain the creation of Congress, which also controls their budget and can, at any time, alter their mandate or impose its legislative veto on their decisions. Their directors are

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90 The definition given by the APA (Chapter 5, section 551) is very broad: “agency means each authority of the Government of the US, whether or not it is within or subject to review by another agency, but does not include..” followed by eight exceptions, the Congress, the Courts, the governments of the States, etc.

91 We shall consider here only the American model of the independent agencies. Nevertheless, the Canadian “regies” and British “quangos” (quasi-autonomous non-governmental organisations) are very similar.


93 The United States Government Manual (1985-86, p. VI-VII) lists 57 such authorities, including the Security and Exchange Commission (SEC), the Nuclear Regulatory Commission (NRC), The National Labor Relations Board (NLRB), The Federal Communications Commission (FCC), the Environmental Protection Agency (EPA), the Federal Energy Regulatory Commission (FERC), the Consumer Product Safety Commission (CPSC), the Food and Drugs Administration (FDA), the National Aeronautics and Space Administration (NASA), the Immigration and Naturalization Service (INS), to name just a few of the most important. But the list is only indicative, given that the Government Manual says “and any other similar agency designated by statute as a Federal independent regulatory agency or Commission”.

94 Where Europeans would try to formulate a general theory of administrative law, most Americans would try to determine above all whether these agencies are appropriate or not to effective management of government activity and, consequently, whether they need to be improved or abolished. See, Michael H. Davis: *L'expérience américaine des “independent regulatory Commissions”*. In Cl.A. Colliard and G. Timsit: *Les autorités administratives indépendantes*. PUF, Paris 1988, p. 222-235.
appointed jointly by the President and Congress along bipartisan lines, and their decisions are subject to judicial review. So where exactly does their independence lie? Apart from the formal criterion of not being part of the executive (they are located outside the hierarchy of the 13 federal government departments) and ignoring for a moment those commentators who claim that their independence is a myth, the basis of their independence must be sought in the fact that their directors cannot be dismissed by the executive without good reason. There must be due cause, such as ineffectiveness, dereliction of duty or abuse of power.

Given that these agencies have no basis in the Constitution, it is difficult to see where they belong in the separation of powers. The result has been a very hesitant approach by the Supreme Court in its rulings on their relations with the executive and the legislature and on the extent of judicial review. Finally, the American agencies seem to be the product of different cyclical trends (for example, periods of intense regulation like the New Deal or rapid deregulation under the Reagan administration), which is accepted de facto in the institutional system and which evolves according to pragmatic needs and the requirements of due process.

Indeed, the legitimacy of the American agencies is closely linked to the fact that they offer guarantees of transparency and cooperation with civil society. Existing practice was codified, extended and improved by the Administrative Procedure Act (APA), adopted in 1946. The essence of this basic law on the workings of the agencies is the division of their activity into two categories: enacting rules for general application (rule-making) and, in some cases, issuing individual decisions of a quasi-judicial nature (adjudication). The rule-making consists of adopting formal and informal regulations (hard law and soft law). Both are subject to procedures associating all the interested parties. The requirements for the first category are very stringent and include an adversarial hearing and prior communication of a written statement of the objectives of the proposed measures.

Adjudication can also be formal or informal. Both require quasi-judicial procedures which, in the case of formal adjudication, are very stringent and equivalent to a real hearing before a regular tribunal. Finally, all agency decisions are subject to judicial appeal for abuse of discretion. Despite the fact that the latter concept is hard to define, and the courts’ rulings have been criticised on this point, the procedural framework provided by the APA as a whole has undeniably helped to consolidate the existence and work of an administrative instrument dedicated to quick and efficient decision-making in difficult and controversial areas, often with tight budgetary constraints.

This has led some to argue that the emergence of agencies reflects the determination of the politicians to shift potentially difficult decisions, which may have high political or social costs to experts in a bureaucracy. While there is some truth in this, it is not the whole story: the agencies remain answerable to the three

99 Gellhorn and Byse’s: Administrative Law, op. cit., p. 510 and 1325.
102 Sidney A. Shapiro: Substantive reform, judicial review and agency resources: OSHA as a case study. Ibid., p. 645-670.
branches of government to differing degrees and are subject to continuous monitoring, which leads to periodic improvements in the way they operate.\textsuperscript{103}

American agencies reflect the political reality of the country: they embody a system of checks and balances that leads to genuine cooperation which, even when it takes place in adversarial terms, contributes —by excluding the extremes— to moderation in the exercise of power. The agencies, as it were, combine elements of all three branches of government. They are a condensed form of governance, or “the headless fourth branch of government”.\textsuperscript{104}

And what about Europe?

4. The origins and growth of executive agencies in the EU

Following their success in the Anglo-Saxon world, and in response to economic and social changes, the regulatory agencies have begun to take root in the stony ground of continental administrations and now enjoy a certain degree of public and legal recognition.\textsuperscript{105} We shall confine ourselves here to the phenomenon of specifically European agencies which have, apparently for the same reasons, undergone a spectacular expansion over the past decade and are provoking a debate that touches the constitutional foundations of the Union.

The European agencies are autonomous Community bodies of a public nature, not established by the Treaties, but created as a result of acts of secondary legislation adopted by the Council. They have their own legal personality and have been established with a view to fulfilling tasks of a technical or scientific nature, or a specific management task provided for in their terms of reference.

The emergence of European agencies is a recent phenomenon.\textsuperscript{106} The 12 agencies currently in existence were set up in two waves. The two first-generation agencies were established in 1975 (in the field of social affairs), followed by the second generation at the beginning of the 1990s, in connection with the completion of the internal market.\textsuperscript{107}


\textsuperscript{104} Peter L. Strauss: \textit{The place of agencies in Government: separation of powers and the fourth branch.} CLR, vol. 84, no. 3, April 1984, p. 573-633.


\textsuperscript{107} In chronological order of establishment, the European agencies are as follows:

1) European Centre for the Development of Vocational Training (CEDEFOP), Articles 151 and 308, Regulation No 337/75 of 10.2.75.

2) European Foundation for the Improvement of Living and Working Conditions, Article 308, Regulation No 1365/75 of 26.5.75.

3) European Environment Agency (EEA), Article 175, Regulation No 1210/90 of 7.5.90.

4) European Training Foundation, Article 308, Regulation No 1360/90 of 7.5.90.

5) European Monitoring Centre for Drugs and Drug Addiction, Article 308, Regulation No 302/93 of 8.2.93.

6) European Agency for the Evaluation of Medicinal Products (EMEA), Article 308, Regulation No 2309/93 of 22.7.93.

7) Office for Harmonisation in the Internal Market (OHIM), Article 308, Regulation No 40/94 of 20.12.93.

8) European Agency for Health and Safety at Work, Article 308, Regulation No 2062/94 of 18.7.94.

9) Community Plant Variety Office (CPVO), Article 308, Regulation No 2100/94 of 27.7.94.

10) Translation Centre for Bodies of the European Union, Article 308, Regulation No 2965/94 of 28.11.94.

11) European Monitoring Centre for Racism and Xenophobia, Articles 284 and 308, Regulation No 1035/97 of 2.6.97.
The European agencies are small Community coordinating structures, located in ten different Member States. They have a total staff of just over 1,000 and receive approximately €100 million in subsidies from the general budget of the EU.

They were created with the following objectives: management autonomy, flexibility, involvement of the Member States, and closer attention to citizens’ concerns. It is hardly surprising that these concerns are the same as those that gave rise to the emergence of agencies in America.

Although the European agencies are very different in terms of both size and purpose, as a general rule they present a common basic structure and similar operational instruments.

All European agencies function on the basis of the following framework:

- a limited mandate, which is laid down by the establishing regulations and consists of tasks of a technical, scientific or management nature,
- an administrative or management board, the majority of whose members are representatives of the Member States, which lays down the general guidelines and adopts the work programmes according to its terms of reference, available resources and political priorities,
- an executive director elected by the administrative/management board, and responsible for the entire programme of activities and the proper management of the agency, who may be assisted by an office comprising members of this board and/or a budgetary committee,
- one or more advisory committees (mostly scientific),
- all European agencies have in common the following provisions: staff regulations, inclusion of subsidies in the procedure for the general EU budget, principle of annuality of the budget, own rules of procedure and financial regulations based on standard models and supervision by the Commission’s financial controller.

The Commission thus has no formal relations or procedures with the agencies, but exercises its powers primarily through its representatives in the boards, who are usually senior officials from the relevant Commission departments.

Despite their organisational similarities, the European agencies are —given the diversity of their mandates, their partners and their clients— a rather heterogeneous collection. Four types of European agency can be distinguished, according to their objectives:

**The agencies serving the operation of the internal market (regulatory model).** They are the Office for Harmonisation (Alicante, Spain), the Community Plant Variety Office (Angers, France) and the European Agency for the Evaluation of Medicinal Products (London, UK). All perform quasi-regulatory functions (publication of trademarks, authorisations to release products into commercial circulation) and provide services to sectors of industry for which they charge fees which represent their own financial resources. All three are second-generation agencies and may be regarded as prototypes of the European agency model.

**The observatories (monitoring model).** This category comprises the European Environment Agency (Copenhagen, Denmark), the European...

12) European Agency for Reconstruction, Article 308, Regulation No 2454/99 of 15.11.99.
Monitoring Centre for Drugs and Drug Addiction (Lisbon, Portugal) and the European Monitoring Centre on Racism and Xenophobia (Vienna, Austria). These three agencies share a common remit, which they perform for different areas of activity. Their main task is to provide objective, reliable and comparable information, acquired through a network of partners, which they must set up and manage on a day-to-day basis. The nature of the phenomena they observe varies, and may be technical, scientific or social, but the operational procedures are identical.

The agencies promoting social dialogue at European level (cooperation model). This category also comprises three agencies: the two first-generation ones, the European Centre for the Development of Vocational Training (established in Berlin but transferred to Thessaloniki, Greece in 1994), the European Foundation for the Improvement of Living and Working Conditions (Dublin, Ireland), and the European Agency for Safety and Health at Work (Bilbao, Spain). These agencies have a tripartite management board designed to ensure full representation of the social partners (employers and labour) as well as the Member States and the Commission, reflecting openness to civil society.

The agencies operating as subcontractors to the European public service (executive model). Three bodies fall into this last category: The European Training Foundation (Turin, Italy), the Translation Centre for Bodies in the EU (Luxembourg) and the Agency for the Reconstruction of Kosovo (Thessaloniki/Pristina), which could now extend its activities to the whole of Yugoslavia. The first is a technical assistance office, the third has more extensive management powers, and the second provides all the translations required by the European agencies, which it charges for.

In the short time since the European agencies were set up, their output has been broadly satisfactory. They have provided effective assistance to the Commission in ensuring the smooth operation of the Single Market, and they have successfully operated their networks and achieved recognition by their partners. They have also highlighted European interest in certain sensitive and high profile areas, contributed to greater clarity in budget management (activity-based budgeting) and brought a greater degree of transparency to Community affairs, if only because they are geographically dispersed among various EU countries.

However, their autonomy and responsibility and the monitoring to which they are subject remain poorly defined, not to say thoroughly vague. The boards of administration are too big and cumbersome —even the smallest have three times as many members as the Executive Board of the ECB—and enlargement might make them completely unmanageable unless steps are taken in time. There is still a power struggle going on, and it is hard to reach agreement on a reasonable way of organising political control. The European agencies remain dependent on several partners: the Commission and Court of Auditors for financial management aspects, the European Parliament and Council for their budgets, their own networks in the Member States, all of which means that their executive directors have to play a highly political role, which was not envisaged at the outset and which jeopardises their independence. At the same time, the agencies find themselves forced to adapt their working methods to those of the Commission, but without the same institutional weight or resources, which also leads to some duplication of the work of the responsible department of the Commission. The net result of all of this is that the European agencies have not yet been able to demonstrate that they can bridge the gap between Community affairs and the concerns of Europe's citizens.

However, there is now a debate about the extension of agencies to new areas of activity. Several new bodies have been proposed: a European agency for cooperation in connection with the externalisation of a large part of the Community's overseas aid policy; a European Agency for Veterinary and Plant Health Inspection; a European land-use planning agency, another for biodiversity, and a monitoring centre for bio-technologies—not to mention the growing demand for European regulatory bodies in the fields of telecommunications, energy and all public utilities operating in transnational networks (TENs).

The Commission's recent proposals for a Food Safety Agency, a European Aviation Safety Authority (EASA) and a European Maritime Safety Agency are even more important, in terms of both their remit and the scope of the debate they have unleashed within the Commission on their feasibility. The Commission departments responsible for these sectors had explicitly proposed regulatory agencies with clear discretionary powers, but the Legal Service stood by the Meroni doctrine, which prohibits any step in that direction.

The list of proposals pending is not exhaustive. Even areas traditionally and efficiently administered centrally by the Commission have not escaped the problem of agencies. A prime example is competition, where the Community executive wields powers derived directly from the Treaty and has progressively established a genuine European policy. Although a European cartel office is not on the cards, the Commission recently propose close cooperation with national authorities in this field to ensure more effective implementation of Articles 81 and 82 of the Treaty.

Clearly, the trend over the past decade has been consistently in one direction: it is worth recalling that in 1990 a food safety agency was deemed politically inappropriate, whereas today it is France that is insisting on its creation. Or again, in 1990 mutual recognition of national authorisations was considered sufficient for

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110 See the recent proposal for a Astute of agencies managing the Community Programs. 13 December 2000.
111 The proposal to create such an organisation (COM (96) 223 final of 29.5.96) was withdrawn by the Commission in June 1997.
113 White Paper on Food Safety presented by the Commission, COM (1999) 719 final of 12.1.2000. The Commission's definitive proposal on the subject was presented very recently: Proposal for a regulation of the Parliament and the Council laying down the general principles and requirements of food law, establishing the European Food Authority and laying down procedures in matters of food safety. COM (2000) 716 of 8 November 2000. Despite a few cautious improvements (rationalisation, restructuring and simplification of the chain of committees involved in the subject area, tentative opening to private individuals through informal information and consultation procedures, cooperation with national counterpart authorities via networks and introduction of a mediation procedure to resolve conflicts with them) the strict separation between risk assessment and risk management means that this document remains firmly within the tradition of purely consultative agencies: the European Food Authority would play no part in risk management, which would remain the exclusive responsibility of the Commission. For a more balanced approach to this important issue, see St. Breyer: Breaking the vicious circle: toward effective risk regulation. Holmes Lectures at the Harvard Law School, April 1992.
117 C.D. Ehlermann: Reflexions on a European cartel office. CMLR, vol. 32, 1995, p. 471-486. The author moved recently (during a hearing before the “Governance” task force the 26 February 2001) from his previous positions and now accept the added value of a European “Kartellamt”. If this choice, in an area where the Commission’s competences are clearly provided by the Treaty itself becomes now plausible, we can imagine the necessity of the same modus operandi in areas where the EU’s decisionmaking shows important grey zones.
118 European Commission: White paper on modernisation of the rules implementing Articles 85 and 86 (after the consolidation of the Treaties, Articles 81 and 82) of the EC Treaty. COM (99) 101 final.
European labelling of medicinal products, whereas four years later the EMEA had to be set up precisely because the mutual distrust of the national authorities created serious problems for the implementation of the multi-state procedures. Despite the recent and almost total liberalisation of the telecommunications sector, a European authority would surely have been able to reduce the disparities between national regimes and improve coordination.\textsuperscript{119} In the field of public utilities (water, gas, electricity), a European agency would undoubtedly have been able to eliminate some of the rigidities that have survived from the old or recently abolished state monopolies.\textsuperscript{120}

For all this, the European agencies still remain purely executive bodies. Can we now take the plunge and move towards a more open, operational model, which would still respect the institutional balance prescribed by the Treaty? We shall examine this question below.

**B. Regulation and institutional balance**

There is no doubt that institutional balance plays a major role in the regulatory process and in the delegation of powers of this type. As mentioned above, the Meroni doctrine has a special place in this issue at Community level. We will therefore present a brief introduction of the doctrine before going on to a detailed analysis of its underlying premises.

**The Meroni doctrine**

There is no serious disagreement about the need to delegate some regulatory powers; consequently, no one challenges the objective usefulness of agencies. Furthermore, no one would disagree that the objective reasons which led to their establishment in all developed countries are also valid for the EU. Everyone accepts that, although the Treaty does not provide for the creation of such agencies, neither does it exclude them.

However, the balance of the powers assigned to the institutions is an essential characteristic of the Community structure, and a fundamental guarantee afforded by the Treaty to European citizens. With this in mind, if we can allow that the Community institutions delegate powers which have been conferred on them by the Treaty to bodies having their own legal personality, such delegation must be limited to implementing powers clearly defined and entirely supervised by the delegating institution on the basis of specific and objective criteria. On the other hand, such delegation cannot concern discretionary powers involving a margin of political judgment, or this would jeopardise the balance of powers between the institutions. To act otherwise would require an amendment of the Treaty.\textsuperscript{121}

This is at the core of the Meroni doctrine, which appears lately even to have expanded, since its advocates see negative elements in such an amendment of the Treaty, in that the possibility of giving even limited implementing powers to agencies could affect the powers of the Commission and its position as horizontal

\textsuperscript{119} Directive 90/387 as amended by Directive 92/44 contains open network provisions, establishes a coordinating committee and dispute settlement and conciliation procedures (Articles 8 and 12) for cases involving several Member States that cannot be settled at national level. This is a step in the right direction, but by no means enough. The same problems apply, mutatis mutandis, to the Trans-European Networks (TEN).


\textsuperscript{121} This is supported by all the memoranda from the Commission's Legal Service and also by the main literature on Community law. See, for example, Koen Lenaerts: *Regulating the regulatory process: delegation of powers in the European Community.* ELR, February 1993, p. 23-49, which accepts that agencies are useful but regards them as “internal bodies” in the institutional architecture (p. 40).
A certain reading of the institutional balance would thus become an eternal and unchangeable principle in the same way as human dignity in the German Constitution.

The Meroni case law and in particular the way it is interpreted by the Commission may be criticised on several counts. Firstly, on the formal legal level, it should be pointed out that:

Even were it possible to agree to the idea that no institution not provided for by the Treaty should be able to exercise powers of Community public service, it must be accepted that the judgment did not concern the specific problem of public satellite bodies created by the Community legislator. As has rightly been pointed out, such an approach would require serious examination of a possible *numerus clausus* of Community institutions with respect to Article 211 of the Treaty, considered as a rule of exclusive delegation or simply of principle. This was not possible in the ECSC Treaty, where even the former Article 155 did not exist. However, the strictness of the Meroni judgment is quite admissible and pertinent for the delegation of such powers to private legal persons, which was the question in this case. Consequently, the transposition of this judgment *in toto* to the context of agencies is mistaken and misleading.

The Meroni doctrine was also criticised for not being compatible with subsequent judgments, which nevertheless provided some clarification, without, it is true, touching on the thorny problem of the delegation of normative powers in the strict sense. First, in the same context of the ECSC Treaty, the Court has itself stipulated that the Meroni judgment does not prevent the Commission from delegating limited implementing powers to private persons. However, we are thinking here in particular of cases in which the Court graded the Commission's tasks and recognised that it may assess the most appropriate way of fulfilling specific tasks and, if appropriate, may decide to this end to use the services of external bodies, including bodies established under private law. If the Commission is the executive *par excellence* but not the exclusive executive of the Community, it may be inferred from such judgments and the comparative law of the Member States that it is possible to delegate the execution of limited public service tasks according to a specific legal basis.

This thesis is also corroborated by the Commission's standard practice of delegating to approved intermediaries within the Member States the performance of tasks which go far beyond pure management, but are in line with criteria laid down by a Council Regulation. This was further highlighted by the recent decision to delegate implementation of the Socrates II, Leonardo II and Youth programmes in large part to the Member States. The Commission's Legal Service found itself in an embarrassing situation when it became known that some Member States, in particular the Netherlands, had delegated all the tasks to private

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122 The recent memorandum of the Legal Service of 29 September 2000, in reaction to the announcement of the White Paper on Governance.
123 D. Triantafyllou, op. cit., p. 306.
124 "...the possibility of entrusting to bodies established under private law,...", Case 9/56, cited above, p. 151 and 157.
127 See for example Council Regulation (EEC) No 2081/93, which deals with the allocation of grants to final beneficiaries.
agencies. The way out is to consider that the Commission's delegation concerns only the Member States. If their internal legal systems permit it, there is no reason why they should not make use of private bodies.128 Consequently, Community public service tasks may be assigned to private persons by means of an initial delegation to the national authorities. This approach is completely inconsistent, but has the merit of pointing up the problem and blowing another hole in the Meroni doctrine.

Another criticism concerns the acceptable limits of valid delegation. A close reading of the Meroni judgment seems to show that such a possibility already exists. The Court states that “In reserving to itself the power to refuse its approval, the High Authority has not retained sufficient powers for the delegation…to be contained within the limits defined above. …the High Authority has made it clear that it adopts the data furnished by the Brussels agencies without being able to add anything thereto. In those circumstances the delegation of powers granted to [them] gives those agencies a degree of latitude which implies a wide margin of discretion and cannot be considered as compatible with the requirements of the Treaty.”129 The Court's finding that the Commission lacks a margin for discretion is therefore limited to its material inability to give an opinion on the figures on which the agencies' proposals are based. The Court therefore leaves open the possibility of better defining the form of the delegation in order to make it compatible with the Treaty. But this quotation from the judgment is also a real a priori admission that certain regulatory tasks of a highly technical nature are outside political control. I believe that today the Commission endorses in the same way the proposals of the London agency on authorisations for the marketing of medicines. Should the Meroni case law also be applied in this case? Certainly not.

The Meroni doctrine may also be criticised on the basis of the distinction between conferred powers and delegated powers. According to this thesis, which appears to be supported by the Council's Legal Service, powers are not initially conferred by the Treaty on an institution and then delegated by that institution to external bodies; rather, they are powers created by secondary legislation and directly conferred by that legislation on the bodies in question. Therefore, there is no delegation of powers within the meaning of the Meroni judgment, which is not applicable in this instance, and the institutional system is not concerned.

One final criticism may be made with regard to the confusion between the conditions ratiome materiae (scope of the delegation) and ratione personae (institution given the delegation) of a legal/lawful delegation of Community regulatory power. In this regard, the Meroni doctrine appears to be founded not only on an extremely restrictive view of the scope of the delegation, but also on a closed view of the institutions which could be entrusted to exercise delegated power. The discretion of the Community legislator is doubly bound, both as to the power delegated and as to the identity of the person to whom it is delegated. Thus, the ancient rule of nemo plus juris ad alium transfere potest quam ipse habet does not concern only the jus (scope of the delegation) but the alius (person empowered) as well. Clearly, such an interpretation, which is only justified by the supposed numeros clausus of persons to whom

129 Case 9/56, already cited.
Community regulatory powers may be delegated, completely blocks any possible evolution of the system.

Beyond formal criticisms, what seems to me even more important is to look for the constitutional bases of the Meroni doctrine that introduce an untenable and unjustified rigidity into the institutional evolution of the European Union.

In my opinion, the institutional premises, which underlie the logic of these theses are as follows: 1. the delegation of regulatory powers constitutes, within the framework of the EU, a constitutional provision. 2. The European Constitution necessarily evolves according to the parliamentary/majority model. 3. The democratic deficit can therefore only be seen as a lack of legitimacy on a par with that enjoyed by the national governments. 4. Therefore, comitology is the necessary and sufficient cog in the system. 5. The institutional balance laid down in the Treaty is immutable, and 6. For all these reasons, the Regulatory Agencies cannot be democratically accountable and tend to give the Community Institutions a predominant intergovernmental character.

We will now analyse these premises.

1. The nature of Community regulatory power

Given that the Commission's implementing powers have always been interpreted extensively, not least to ensure the effectiveness of the primary measures decreed by the Council (and the European Parliament), it is normal to understand regulatory power in Community law as the ability to adopt general and abstract binding rules within the framework of more general legislation adopted by the competent authority. Why shouldn’t agencies, duly vested to this end, be eligible to draw up such measures, especially in areas which are highly specialised and involve a rapidly evolving technical aspect? Advocates of the Meroni doctrine consider that the implementing powers conferred on the Commission by Article 202 as spelt out in Article 211 plus the budgetary implementing powers laid down by Article 274 involve the formulation of general rules of application and the applicability of those rules in specific cases. The powers laid down by the Treaty cannot be reduced, unlike others which do not flow directly from the Treaty. They conclude that the granting of such a power to an agency is ultra vires, that the Commission has, as it were, a constitutional duty to execute its powers by its own departments, any external delegation being prohibited.

This already radical position is made even more so by the fact that it ignores the highly technical nature of some regulatory measures, regarding this distinction as an excuse in order to diminish the powers of the Commission, since in a post-industrial world all legislation is necessarily technical in nature but involves for the legislature wide margins for political judgment and discretionary power. And it goes to the very limits of its logic, by questioning whether even an appropriate amendment of the Treaty would make it possible to overcome the arguments which prevent regulatory powers from being conferred on agencies or whether there are, in other words, underlying principles in Community law that are not susceptible of constitutional amendment, which cannot be reconciled with recognition of regulatory powers in the hands of bodies other than the three institutions.

According to this view, the only thing which can be delegated is technical, scientific and/or administrative assistance for fulfilling the tasks laid down by the Treaty, on the understanding that such “assistance” is limited to preparatory, or in any case ancillary measures, that it does not involve any margin of discretion and that final responsibility for the execution of these tasks remains entirely with the Commission.

130 Case C-240/90 cited above, footnote 43.
In this context, the very legality of assistance bodies set up to manage external aid programmes (Kosovo) is in doubt, as they encroach upon the Commission’s budgetary powers. The same goes for the "law-application" agencies (medicines, industrial property), as their technical assessment of the issues nevertheless involves discretionary choices. And it is completely incomprehensible to extend this dogmatic approach to fairly complex areas, such as airline or maritime safety, in which legislators can be confident that the regulators’ policy goals and methods are nearly identical to their own. Delegating with broad discretion in these areas will then result in outcomes close to those preferred by legislators and, consequently, to those preferred by their constituents as well. Where is the illegitimacy here? Only a dogmatic approach can explain such an unfounded rigidity. A fortiori in the case of the EU, where the assumption that, as legislators are elected and bureaucrats are not, policy decisions made by the former are assumed to have a legitimacy that bureaucrats’ rulings lack, is not valid at the Commission level.

This view of the nature of regulatory power is based not only on an immutable and fixed institutional balance, but it ignores the most important elements of that balance. The distinction between the monopoly on legislative initiative and the adoption of the final text is certainly one of these. The Commission’s proposal for a more rational schema for the distribution of regulatory power would not only in no way diminish its prestige, but would strengthen its character as a policy-formulating, target-oriented institution, while preserving the essentials of the Community method. And of course nothing would prevent the legislator from ratifying such a law as a development in line with institutional balance, as we will show below.

This view finally ignores the difference between legislation that is a punctual activity and regulation that is a perpetual process, which embodies application of the general rules to individual cases (decisions of quasi-judicial nature) and adaptation of these rules to specific situations (executive decisions). These decisions are both regulatory measures, which necessarily involve a certain margin of discretion. In this respect, they are closer to an administrative implementation activity already delegated to the Member States, than to a legislative work exercised by the EU institutions. Consequently, the delegation of such an authority to independent agencies is not a simple transfer of competence, but an effort to europanize some areas of governance, where the cooperation between community and national administrations is not sufficient to ensure an efficient rule-making or a uniform implementation.

2. The limitations of the parliamentary/majority logic

There is no doubt that the parliamentary system is deeply rooted in the collective European consciousness. Whether it be in the purely majority form (Britain) or in the form of coalition government, the elected parliament as the direct expression of the will of the people is the depository of democratic legitimacy. The executive, however strong, is supposed to apply the laws, which the parliament issues, thereby controlling it.

It was evident not the parliamentary model that the Treaty fathers chose for the European enterprise. A purely consultative assembly, a legislature made up of representatives of the Member States within the Council of Ministers, and a new kind of executive responsible for legislative initiative and supervision of application of the Treaties and secondary legislation. Rather, this original separation of powers, discreetly called “institutional balance”, connotes the difficulty of describing in familiar public law terms a necessarily unprecedented system. Institutional balance is therefore a term describing the distribution and functionality of Community powers and not a normative principle. This is corroborated by the very
nature of the Treaty, a text which has its origins in international law (the Member States remain the Lords of the Treaty), but which appears to be a framework law in limited areas.\footnote{See the judgment of 12 October 1993 by the German Constitutional Court (Bundesverfassungsgericht) on the ratification of the Maastricht Treaty, reported in CMLR No 1, 1994, p. 57, and the judgment of 6 April 1998 by the Danish Constitutional Court (Højesteret) in the Carlsen case. Michael Zürn: Democratic governance beyond the Nation-State: the EU and the other international institutions. EJIntRel, vol. 6, 2000, p. 183-221.}

This unique system held within it from the very beginning the seeds of a very strong capacity for dynamic evolution: first the Court of Justice, which helped to forge a federal framework for this amalgam of interwoven powers; then, extension of the scope of application of the Treaty, which gave it the appearance of a constitutional text; finally, global development, which showed that the Member States, taken separately, were no longer capable of surviving and the relative conviction, supported by the clear success of the enterprise, that the European Communities were destined to go ever further in the process of integration (“of creating an ever closer union among the peoples of Europe”).\footnote{Preamble of the Treaty.}

Undeniably, this evolution was accompanied by an approximation of the institutions to the parliamentary model. Many leapt to the conclusion that parliamentarian federalism is inherent in the nature of the EU.\footnote{Especially, all the federalist movements.} But this is not proven. This process of continuous democratisation of the Community institutions, in particular through the increase in the powers of the European Parliament and the extension of majority voting in the Council, seems rather a wish to draw the European model towards the national parliamentary/majority models, as the only ones capable of ensuring the legitimacy of the institutions, than an operational necessity inherent in European governance.\footnote{Renaud Dehousse: European governance in search of legitimacy: the need for a process-based approach. In “Governance in the EU”. Ed. European Commission, Luxembourg, 2001, p. 185-205.} On the contrary, certain signs lead us to think that this process contains contradictory elements and, if it continues in this way, may lead to dangerous predicaments for the future of integration as a whole.

Firstly, the parliamentary/majority logic transposed to Community level brings contradictions with it: traditionally, the ultimate source of legitimacy of the Community enterprise lay in the democratically elected national governments, which adopted the Treaties, and by the national parliaments which ratified them, prompting some astutely to observe that the right of veto is the ultimate foundation of the Community’s democratic legitimacy.\footnote{J.H.H. Weiler: The transformation of Europe. YLJ vol. 100, 1991, p. 2403-2525.} With the extension of Community powers, whole subjects have been taken out of the hands of the national parliaments, and the more frequent recourse to the majority may lead to acceptance at Community level of options which are not those of certain particular governments. Even worse, some governments occasionally knowingly use the Community level to pass legislation which would never be accepted by their own national parliaments. Indirect legitimacy no longer works. The problem of the legitimacy of Community decisions arises.

However, the majority system in the Council is on one hand becoming more and more uncertain and complicated with the prospect of enlargement,\footnote{A linear extrapolation of the existing system may lead to absurd situations, where a group of States representing the absolute majority of the European population cannot get a legislative text passed within the Council, while another clearly minority group can block such decisions. The recent Treaty of Nice, by adopting a kind of triple majority system makes the decision making process more difficult. See, X.A. Yataganas: The Treaty of Nice: the distribution of power and the institutional balance in the EU: a continental perspective. Harvard Law School, The Jean Monnet Chair papers, March 2001.} while the increase in the powers of the European Parliament is potentially losing its impact, if it does not have the means to exercise a real control and if the Commission

\url{www.jeanmonnetprogram.org}
remains a weak executive and in any case comes up against the lack of a European *demos*, the ultimate and apparently insurmountable obstacle to progress towards federalisation.\(^{142}\)

This inadequacy of the parliamentary/majority model to legitimate the Community process is in my opinion illustrated by the fact that the two opposed camps on the European political scene, the federalists and the euro sceptics, come together on this specific problem, both placing the emphasis on the powers of the parliaments.

The agencies’ issue has the merit of attempting to make another contribution to the questions of legitimacy, by placing at the centre of its concerns not the institutional architecture but the decision-making process. But agencies are, by definition, non-majority bodies not answerable to the nation's elected representatives, everything the parliamentary model abhors. Can this obstacle be overcome?

The operation is not simple and becomes more complicated because of the peculiar structure of the EU as a unique system of separation of powers. The most striking original feature is the sharing of the executive power among several independent institutions (Commission + Council), with an important redelegation of the implementing measures to the Member States (over 80%), which makes their uniform application over the entire Community’s territory much more difficult.

In fact, there is an institutional vacuum between EU legislators and the implementation of European laws by the national authorities at the Member States level. The absence of adequate features of conflict resolution and an unequal expertise and independence of the national regulators further undermines the efficiency of the system. The lack of a European administration infrastructure makes cooperation between the national administrations essentially depend on their mutual trust and loyalty. In the perspective of enlargement, this situation becomes clearly insufficient to assure the credibility and legitimacy of the European rule-making process.

The regulatory agencies may contribute to complete this institutional vacuum. Their presence better takes into account the divergent interests than can direct cooperation between the Community and the Member States. This way, the agencies are capable of diminishing the permanent tension between European and national authorities on the sharing of the executive powers. The agencies may be a honest broker between them.

To resume, a view of European democracy based on the supremacy of Parliament therefore goes against the very nature of the Community institutional architecture.

In our opinion, this is the main reason for the confusion in the debate on the democratic deficit of the European institutions, to which we now turn.

### 3. The question of the democratic deficit

For there to be a deficit, there must be a factor for comparison. And in order to compare, there must be comparable bodies. The idea of the European institutions’ democratic deficit assumes that they are being compared with national institutions and that the two are comparable. Both assumptions are unfounded.

The European enterprise was a pragmatic invention, not a preconceived model.

The concept of democratic deficit was a complete invention, developed exclusively by academic thinking. What a noble occupation, to give an empirical structure theoretical and, what is more, democratic consistency!

The first efforts quite naturally focused on an indirect foundation due to the fact that the Community system was still in the making. This was built around conferred powers, a principle fulfilling a democratic function according which Community action falls within the framework accepted by the national governments and

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approved by the national parliaments. The conferring of limited and non-extendable powers without a new agreement of the Member States' national institutions also plays a reassuring and conservative role, which is very pleasing to the supporters of national sovereignty. Thus, the safeguarding of national sovereignty also contributes to the democratic foundation of the European enterprise through the notion of conferred powers. Hence some of the difficulties pointed out above in decompartmentalising the institutional system and transferring powers outside.

The parliamentary logic is very much present in people's minds. It is therefore quite natural to look to this system for any missing or additional legitimacy in the Institutions, by relating them to the legitimate national institutions ("sovereignists") or by applying to them the same model (federalists).

These models have evolved quietly and with a certain complementarity for several years, while the Member States were fewer and more homogeneous and Community powers were more limited and less interventionist. This was more or less the right way for the period of so-called negative integration.

From the 1980s, with successive enlargements that required an active policy of economic and social cohesion and above all with the mass of regulatory measures necessary not to achieve the internal market, but to make it work, the machine seized up. Nobody was happy, some finding that the national parliaments were losing too many powers, others retorting that the European Parliament had to recover the rights of control necessary to ensure democratic legitimacy at the supranational level.

And naturally we have gone further down the same road believing, often in good faith, that the method is still appropriate. Maastricht and Amsterdam were very important steps on this road.

However, has become increasingly clear that this is more a process of politicisation than democratisation and that if it continues it will only further distance European citizens from the common enterprise. It has been shown that the extension of common powers to redistributive policies in areas where the Member States have considerable policy differences increases rather than reduces the democratic deficit. We have seen that the Commission has to act in highly technical areas without either the know-how or the human resources necessary to do so. The result is increasing mistrust of Community rulemaking, crowned by spectacular crises.

Finally, the Community Institutions are not conceived on a democratic/parliamentary model, in the sense of a vertical responsibility towards the people. Paradoxically, if this were the democratic criterion for accession, then the EU would not be able to join itself! Furthermore, it is not mathematically certain, and perhaps not really politically advisable, that the EU should become a federal and democratic super state. It therefore seems prudent, if only for a long transition period, to look elsewhere for the foundation of its legitimacy.

144 Werner Ungerer: Institutional consequences of broadening and deepening the Community: the consequences for the decisionmaking process. CMLR, vol. 30, 1993, p. 76-83. Tony Blair: Interview in the Financial Times, 23 March 1999. See also the Protocol annexed to the Amsterdam Treaty on the role of the national parliaments in the EU, which, according to most authors, reveals the double legitimacy of the Community decisions emanating from the European Parliament and the national parliaments. Jean –Claude Piris: Does the EU have a Constitution? Does it need one? Harvard Law School, Jean Monnet Chair working papers, 2000. www.jeanmonnetprogram.org
145 G. Majone: Regulatory legitimacy. In “Regulating Europe”, op. cit., p.298. But the opposite thesis was also supported, in particular in the field of taxation, where the Member States could manage their tax revenue better and more economically in common, while fully preserving their sovereignty. A.J. Menéndez: Another view..., op. cit. supra, note 13. Dietmar Nickel: The Amsterdam Treaty—a shift in the balance between the institutions?; who points out that each change of the Treaties it is not a zero sum game and several institutions or all of them may gain, re-establishing the institutional balance at a higher level. Ibid. 1998.
J.H.H. Weiler once identified the source of this legitimacy as the ideological triptych “peace-prosperity-cosmopolitanism” in reaction to the other horror-triptych “total war-depression-nationalism”.146

I would say that the EU was for a long time and very fortunately still is the guarantor of these three values dear to the European people. As long as it remains so, it will be legitimate. The most important thing is to take decisions with which the citizens can identify and here we are attempting to reflect on the material conditions for taking such decisions. The people of Europe are not particularly anxious that the EU should become accountable to them through their national governments or parliaments —which are, incidentally, very often subject to similar problems of legitimacy. In short, European citizens, the ultimate source of legitimacy, are less interested in the democratisation of the institutions and far more concerned about the actual ability to take measures, which correspond to their aspirations. Nobody can demonstrate that the process of democratisation, as we know it, is a condition for improving the decision-making process. On the contrary, there are reasons for fearing the worst.

As an illustration, in the three areas where Community regulatory power seems destined to expand considerably in the near future (economic and monetary union, police cooperation and criminal matters, and foreign policy, security and defence), the Member States have clearly stated their intention not to rely on the normal process of codecision on a proposal from the Commission.147 Therefore, any attempt to bring the decision-making process in these areas closer to the national prototypes, can only contribute —at least for the moment— to an extreme tension which will certainly not serve the progress of European integration.148

All these observations lead to one conclusion: the democratic deficit does not manifest itself so much in the distribution of power among the institutions, but in fact boils down to the confidence that citizens may legitimately have in the decisions of the supranational authorities.149

4. The shortcomings of comitology

This can also be seen in the operation of the committees involved in the exercise of the Commission's implementing powers. Under Article 202, the Council lays down the arrangements for the exercise of these powers. In this context various committees (advisory, management, regulatory with their variants) have been created, made up of representatives of the Member States and chaired by the Commission, which must be consulted —the importance of consultation varying according to the type of committee– before the Community executive can take a final decision.150

These committees have proliferated to such an extent (which is why we now talk of "comitology") that their nomenclature and procedures were first codified in 1987151 and then a second time in accordance with the declaration annexed to the Treaty of Amsterdam.152

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146 J.H.H. Weiler: Europe after Maastricht. Do the new clothes have an Emperor? As cited by A. Moravcsik in “why the European Community strengthens the State…, op.cit., p. 24.
147 It is interesting to point out, that for the EMU a central European agency, the CEB, was created, thus in the other areas many member States would prefer an intergovernmental cooperation. See, X.A. Yataganas: The treaty of Nice...,op. cit.
148 As it has been pointed out, international organizations are not and probably cannot be democratic. This does not mean that they are undesirable; they are useful bureaucrats bargaining systems. Consequently, it is helpless trying to democratize something that is fundamentally non-democratic. See, Robert A. Dahl: Can international organizations be democratic? A sceptic’s view. In Ian Shapiro and Casiano Hacker-Cordon: Democracy’s edges. Cambridge University Press, 1999, p.19-36.
149P. Schmitter, How to democratize the EU..., op. cit., p. 23-52.
150 According to the general budget of the EU for the financial year 1997 there are over 400 of these committees. OJ L 44/1997, p. 485.
This "constitutionalisation" of the committees was the compensation for the Council's concession to delegate to the Commission the widest, *ratione materiae*, implementing powers and therefore to give up, as a general rule, the possibility of retaining such powers for itself. However, the committees ensured that the national administrations were involved, to a varying extent, in the Commission's decision-making process. The choice of committee was often a battleground between the two institutions, the Commission often proposing purely advisory committees, which increases its decision-making power, and the Council imposing regulatory committees, which allow much more influential involvement of the Member States in the decision-making process. In any event, comitology illustrates the Member States' wish not to hand the executive function exclusively to the Commission and is, therefore, an extra complication for EU institutional balance.\(^{153}\)

Comitology became established as a structure separate from the decision-making processes in the framework of the Common Agricultural Policy (CAP) back in the 1960s and was first enshrined in a Court judgment in 1970.\(^{154}\) The system worked relatively well up to the adoption of the European Single Act and the first decision of 1987, when the European Parliament rightly observed its own absence from this decision-making process, but it was unable to convince the Court of Justice.\(^{155}\) What the European Parliament was unable to gain before the Court, it obtained under subsequent interinstitutional agreements, which gave it full access, though for information only, to the documents relating to the procedures concerned.\(^{156}\)

According to the recent decision on comitology procedures, the European Parliament is finally, a regular participant in the implementation process both upstream and downstream. Upstream, the Commission has to send it all draft regulations and must take account of its views without being obliged to follow them up. Downstream, following a negative opinion or in the absence of an opinion of the regulatory committee, the Commission must notify Parliament of its revised proposal to the Council. The European Parliament may then state its views to the Council, though the Council is not obliged to follow them up.\(^{157}\)

But, at the same time, the role of national parliaments may increase. As was already pointed out, in the EU context, we can predict that “as issues being negotiated become more conflictual and have more immediate impact on constituents’ welfare, parliaments should act to create structures to constrain the governments’ actions in EU negotiations”.\(^{158}\) Governments will therefore be obliged to take into account the potential parliamentary opposition *ex ante*. Consequently, institutionalized parliamentary engagement within the EU will lead to more credible government commitments.\(^{159}\)

The whole history of comitology thus shows the difficult problem of ensuring the legitimacy of a supranational decision-making process. The wish to tie the process, even indirectly, to the Member States is a sign of the same concerns but with the same limits noted above in respect to the parliamentary/majority model.

The attempts to link the process to a European Parliament, which is rapidly enhancing its status, are hampered by that Institution's evident inability to carry out effective *ex ante* control of the subjects in question. The BSE


\(^{156}\) See the Plumb/Delors agreement of 1988 and, after the Maastricht Treaty and the new Article 189b, the interinstitutional agreement on comitology (modus vivendi) following the Commission's initiative between the three institutions of 1994. OJ. C. 43/1995, p.40.


episode demonstrates that only prior control can be useful and effective, provided that the European Parliament has the necessary expertise to get to the root of the decisions taken.\textsuperscript{160} The areas covered by the decisions of committees sometimes go beyond even the technical capacity of the specialist departments of the Commission, whose top officials are supposed to chair these committees. The full Commission thus often ratifies decisions without having the means to contradict them and therefore takes on a \textbf{shaky political responsibility}.

The experts on the committees, as representatives of their respective countries, are rather inclined to place the national interest before the Community interest, a tendency which is also apparent, for want of anything better, within the Commission.\textsuperscript{161} The quality and soundness of the final decisions suffer from this.

Committees also err in their lack of responsibility and transparency. Answerable only to their respective ministers and having unloaded their final responsibility onto the Commission, members have no valid reason to develop an independent scientific expertise, to protect and increase the prestige of their committee, to become the necessary and respected interlocutors of other parallel bodies at the international level or to form networks with such bodies in order to manage latent conflicts, absorb crises and arrive at negotiated solutions, thus saving enormous amounts of work and taxpayers' money.

Their procedures are not explained, their meetings are not public, their visibility to the general public is almost nonexistent. At the same time, they are open to the danger of a double capture by both the lobbies and the political hierarchy\textsuperscript{162} yet they contribute greatly to an impressive raft of regulations which profoundly affect the lives of individuals and businesses.

It is not surprising that a Dane, for instance, will feel better protected by his national consumer protection association than by grey committees, meeting far away, made up of unknown members and following non-transparent procedures. This is where a large part of the democratic deficit lies,\textsuperscript{163} despite the fact that these committees are deemed to respect the institutional balance for the sole mechanical reason that the Commission usually ratifies the final decision while the Council reclaims its powers, under the Treaty, in some cases.

Regarding this situation, we can observe that, in a sense, the functioning of these committees proves –\textit{a contrario}– the usefulness of the agencies.\textsuperscript{164} In fact, in an era in which public policy becomes ever more complex, the only way for the legislator to make all important policy decisions \textit{intra muros} would be to concentrate significant amount of authority in the hands of powerful committees. This means more bureaucratic/politically controlled committees inside the European Parliament and further extension of the comitology procedure for the implementing measures. From some points of view, this would be better than abdication to executive brunch agencies. But, this \textit{modus operandi} really results in an aggrandizement of the


\textsuperscript{161} The Lord Nicholas Phillips of Worth Matravers report to Tony Blair on the BSE crisis and the responsibilities of the British administration. Le Monde, 28 October 2000, p. 20. Recent pools also indicate that citizens are more confident to scientists than to politicians for dealing with the important questions of environment and health. See, Le Monde, 30 November 2000.

\textsuperscript{162} The committees have often been criticised for being selectively open to large-scale organised economic interests. Despite some opening up to the public as regards information following the recent decision on comitology, interested parties may not take part in the administrative procedure of the adoption of acts and therefore have very little opportunity to mount a successful challenge to adopted measures once they have been enforced in the internal legal orders of the Member States.

\textsuperscript{163} P.P. Craig: *Substantive legitimate expectations in domestic and Community law* CLJ, vol. 55, 1996, p. 289-312.

\textsuperscript{164} Some authors come, indirectly to the same conclusion, in viewing the committees as a “deliberative supranationalism”, or as a “supranational political forum” and proposing measures enhancing the legitimacy and the democratic function of the comitology procedure. See, Ch. Joerges and J. Neyer. >From intergovernmental bargaining to deliberative political processes: the constitutionalisation of comitology. ELJ, vol. 3, September 1997, p. 273-299.
legislative branch, thus the delegation system allows to divide the labor across the legislative and executive branches of government, so that no one set of actors could dominate the regulatory process. If the concentration of power (legislative and executive) in the hands of one actor “may justly be pronounced the very definition of tyranny”, limits on delegation would threaten the individual liberties they supposed to protect. We must, in the EU, take this potential danger seriously.

5. The nature of the institutional balance

If there is an institutional balance, it has changed dramatically since 1951. It is therefore a mistake to see this as an immutable principle. Such a view only hides a latent and unjustified concern about an imminent and threatening change which is to upset a complicated and delicate distribution of powers.

We cannot otherwise explain how this principle claims to cover the same thing from the ECSC Treaty up to the present day. The Treaty of Paris is radically different from the Treaty of Rome in this regard: an Assembly without even an advisory function carried out by an ad hoc committee and a High Authority (Commission) that has more marked regulatory powers but in far more limited areas. It is a truism to say that the ECSC Treaty is infinitely more supranational, in particular as regards the powers of the executive, while being confined to the sectors of coal and steel production. And that is quite normal, as the small number of areas covered allayed the Member States’ fears of entrusting management to a supranational Authority (even the name is revealing).

In such circumstances, and despite the fact that we do not agree with all the conclusions drawn from the Meroni case, we can more easily explain a spontaneous restrictive approach to the delegation of regulatory powers. The undertakings concerned must enjoy all the protection offered by the Treaty, precisely because of the lack of other democratic-control mechanisms. But would the same judges have said the same thing if the Assembly appointed the High Authority, if it were co-legislator with the Council of Ministers, if the High Authority were competent only to draw up regulatory measures restricted as to content and to the procedure to be followed? I doubt it. And can we, a fortiori, fifty years on, in a radically different situation, be totally attached to case law handed down in the conditions described above? Surely not.

In this process of evolution of the various aspects of the institutional balance, the growing politicisation of the actors involved, in particular the Commission and the European Parliament, is, perhaps, the most important factor. The ever-closer involvement of the European Parliament in the legislative process, its right to approve the Commission and its programme, and the increase in the powers of the President of the Commission, have been measures designed to lessen the democratic deficit of the institutions. I do not claim that these measures have done nothing to democratise the operation of the institutions, but I believe they have produced effects that go much further than the object sought. My reasoning is as follows: it is natural for integration to develop more quickly and without obstacles when the areas to be unified are kept outside the divisions of political combat. This explains the greater strength of negative integration and perhaps justifies the closed and almost consensual way the regulatory process in the Community works. Curiously, the democratic deficit thus seems to be the price to pay in order to accelerate the European enterprise, in the same way as to maintain national sovereignty.

165 Federalist, 47.
166 This fear is even felt by Heads of State and of Government. See the Turin European Council clause in shaping the mandate of the IGC concluded by the Amsterdam Treaty: “…respecting the balance between the institutions…” Nevertheless, this balance was changed at Amsterdam and is continually changing.
167 See above, p. 32-35.
168 Ph. Schmitter: Alternatives for the future of European polity: is federalism the only answer? In M. Tello ed., op. cit., p. 349.
On the contrary, the introduction of elements of direct democracy in the decision-making process and above all the politicisation of that process, combined with the difficulties inherent in the adoption of positive integration measures, make the process at once more complicated and fundamentally different. At the same time, we are seeing a loss of influence of the Member States in this revised and corrected decision-making process, which reduces the scope of national sovereignty, making it less urgent, not to say unnecessary, to link it with the legitimacy of the Community institutions. We therefore see a tension between the call to reduce the democratic deficit and safeguarding national sovereignty in its entirety. On the other hand, it is certain that the absolute legitimacy of the Community Institutions through their parliamentarisation/politicisation will only be possible after the emergence of the European demos, which clearly will not happen tomorrow. Continuous politicisation is therefore, in the long run, at an impasse; in the meantime, it destabilises the basis of the decision-making process.

This indisputable politicisation shifts the instrumentalist notion of the institutional balance towards a concept closer to the separation of powers in a fledgling federation and towards a system of checks and balances (or of multiple veto-players) in a more mature federal State. It is no longer a principle which is only static/negative, in the sense of an absolute ban on amending a distribution of power deemed immutable, but in view of the latent changes in this balance, it is gradually becoming a dynamic/positive principle. Its rationale no longer lies so much in safeguarding a balance of power between the institutions, but in guaranteeing the credibility of their necessary cooperation in the lawmaking process, based on their legitimacy vis-à-vis civil society.

While in a classic parliamentary system the separation of powers basically aims to protect the people from possible tyranny arising from the concentration of all power in the hands of one actor, in a system of dynamic institutional balance or imperfect separation of powers, the wider dispersal of those powers may be an additional guarantee.

The contribution of agencies must be viewed in this context.

6. Agencies in the Community architecture

In the United States, independent administrative authorities began to exercise a large part of regulatory power towards the end of the nineteenth century. The trend increased during the period of the New Deal and has continued to progress up to the present day. Europe followed the same path half a century later: the first agencies appeared after the Second World War and developed rapidly in the 1970s and 80s. They are now responsible for the majority of public policymaking on both sides of the Atlantic.

In both cases, agencies were the fruit of experience from a pragmatic approach to the growing problem of the abandonment of whole areas of redistributive policies by central government and deregulation, which created the need for horizontal regulation in several sectors of economic and social life and in controlling the effects of private activity in areas traditionally considered to be the public sector. Their existence was not foreseen by either the US or the EU’s Constitutions and their modus operandi was gradually developed thanks to imaginative legislation and innovative legal rulings.

Their particular strength can be seen when it comes to highly technical matters combined with the need to deliver decisions of an almost legal nature. Their main advantage consists in their independence vis-à-vis the executive, which ensures greater continuity in the policy pursued and increased flexibility both in the adoption of decisions and their application to specific cases. Their involvement in controversial sectors and

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169 It is true that a large amount of academic work is based on a lack of knowledge of the realities and the proper functioning of the institutions. See, Ch. Crombez, B. Steunenberg and R. Corbett: Understanding the EU legislative process. Political scientists’ and practitioners’ perspectives. European Union Politics, vol. 1, no. 3, 2000, p.363-381.

170 For the reasons why Europe was so much later, see G. Majone: The rise of statutory regulation in Europe. In his work Regulating Europe op. cit., p. 46.
their procedural openness has led to greater transparency, closer association of civil society with the problem involved and improvement in the quality of public debate.\textsuperscript{171}

At the present stage of its development the EU appears to be a pre-federal construction, which, as regards public regulation, faces the same problems as its Member States. At its heart the Commission in fact functions as a super-agency, it has reached the limits of its expansion. The timid creation of the first European agencies of an advisory and executive nature is proof of this, while more recent creation of quasi-regulatory agencies (medicines, patents, plant varieties) underlines this need. The increased demand for real independent administrative authorities (civil aviation, maritime security, food safety) is the first indication of a change in attitudes, which will quickly lead to an overhaul of the regulatory process within the Community.

We have attempted to demonstrate above that the political and legal conditions to move forward have not been met. The two major means used up to now are inadequate: simple communitarisation of state powers and the linear movement of the European institutions towards a national democratic model are not only inadequate but underline even further—if this were necessary— the need for a profound restructuring of the regulatory process.

The creation of agencies with specific statutes and mandates voted on the basis of codecision by the European Parliament and the Council on a proposal from the Commission respects the distribution of powers. By acting as a lunga manu of the European institutions, they contribute to a simplification and increased clarity of their own powers. They also liberate the Commission’s duties of policy formulation and target achieving, which are currently stifled under the dual pressure of dealing with a heavy daily workload of technical regulations and improving its internal management. The legislators (Council+Parliament and the Commission exercising regulatory competencies) can, through agencies, avoid some hard decisions they would otherwise have to face, thus making possible the enactment of certain laws that would otherwise be politically infeasible or technically unattainable. So the possibility of delegating to independent agencies produces countervailing forces that make policy movement more rapid when material necessity emerges and more stable and accurate when divergent political interests are at stake. The balance between the Institutions is thus re-weighted and enhanced.

Agencies are also more capable of reinvigorating Article 10 (formerly Article 5) of the Treaty by broadening the scope of cooperation between the national and Community levels and spreading the necessary mutual trust of all actors involved in the regulatory process to similar national organisations and to the Member States’ networks of civil society.

By working in close cooperation with the parallel national and international authorities, agencies may contribute to better understanding between the Institutions and the Member States and between the Member States’ and the Community’s global partners.

Being mid-way between the political institutions and the bodies provided for by the Treaty but which play their own particular role (e.g. ECJ, ECB, EIB), agencies can also contribute to a more harmonious understanding among all the actors in the European enterprise.

As depoliticised bodies anxious to enhance their own public image, agencies seem better able to restore the credibility of the regulatory process and to regain public confidence in its reliability.\textsuperscript{172}

Finally, by freeing an increasingly politicised Commission from this task and networking with the national administrations and relevant bodies in civil society, agencies are likely to maintain a satisfactory and


qualitatively superior representation of all social opinions and scientific expertise within the Community regulatory process.\textsuperscript{173}

In short, far from disturbing the institutional balance, agencies seem quite capable of respecting it, enhancing it and following it in its inevitable development.\textsuperscript{174} At the same time, delegation of some regulatory authority to agencies can be seen more as an \textit{europeanization of the administrative activity} than as a transfer of power to external bodies. In this respect, the community method remain valid; it is only adapted to the specific conditions of public authorities intervention in our post-modern, heavily regulated societies.

I am convinced that the Court of Justice will have no difficulty in reading this new situation and adapting its case law, because, in our opinion, there is no need to change it.

However, the fact of having asked the questions as to the need/advisability and feasibility/legality of agencies within the institutional framework of the EU does not solve the problem of their accountability and democratic control. We will consider this in the final part of this study.

\textbf{C. Accountability: autonomy and control}

One of the main arguments against setting up such bodies, assuming the constitutional obstacle is removed, is the doubt about realistic and effective possibilities for ensuring that they are accountable and subject to review. Their independence is also sometimes perceived as running counter to these two principles. Many scholars conclude that delegation to agencies results in a legislative abdication. In practice, the chain of delegations is far from perfect, but the accountability approach is a very useful starting point for identifying deviations between ideal type and political practice.

We will therefore now turn to a consideration of the substantive and procedural limits on the operation of agencies, which can restrict their independence and thus ensure democratic accountability and control.

The range of control measures is very wide, and classifying them is not easy.\textsuperscript{175} However, all the authors agree that the two determining factors ensuring that agencies are democratically accountable are \textbf{the limits on their independence and the extent to which they are supervised}. The ultimate goal is to ensure that their decisions are in accordance with the will of the people, which is presumed to be the same as that of their elected representatives, thus making review essentially political.\textsuperscript{176} However, limiting agencies' independence raises the question "to whom are they answerable?" while the various review measures, whether administrative, budgetary, procedural or judicial, raise the question of "how and to what extent can they be held accountable?". We will therefore consider the problem of agencies' accountability under the two headings: autonomy and control.

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\textsuperscript{173} Ch. Joerges et al. eds. \textit{Integrating scientific expertise into regulatory decisionmaking: national traditions and European innovations}, Nomos Verlag, 1997.


\textsuperscript{176} Mathew D. McCubbins, Roger G. Noll, Barry R. Weingast: \textit{Administrative procedures as instruments of political control}, JLEO, vol. 3, no. 2, Fall 1987, p. 243-278.
\end{flushleft}
1. Autonomy

The limit of agencies’ political autonomy remains a difficult issue. Too little independence would undermine the comparative advantage these bodies have over the ordinary administration, while absolute autonomy places them beyond control. Determining the golden rule is not an easy task.

The Community executive must be independent for its regulation to be credible. The authors of the Treaty were aware of this, stipulating in Article 213 that Members of the Commission “…shall neither seek nor take instructions from any government or from any other body,” and that each Member State “undertakes to respect this principle and not to seek to influence the Members of the Commission in the performance of their tasks.” By analogy, we clearly derive from this provision an obligation on both the legislative and executive authorities not to interfere in the tasks of the agencies as laid down in the national systems. But how far should this independence stretch?

To go some way towards answering this question, we must consider three aspects: the creation of agencies, their relationship to the three arms of power and the appointment of their managers.

a) The founding statutes

The question whether agencies are attributed powers by the legislative or the executive branch, which arises in US law, is not relevant in Community law. The specific nature of the separation of powers within the EU, and the fact that even executive agencies are created by the legislator, removes this preliminary difficulty. Regulatory agencies will require an instrument adopted by the European Parliament and the Council by codecision on a proposal from the Commission. Whether this is on the basis of a new provision of the Treaty, revised for the purpose, or of the sectoral provisions, perhaps combined with Article 308, is of little importance. What matters is that the instrument setting up the agencies is the fruit of cooperation, according to the Community method, between the executive and legislative arms, with the result that the terms of their remits and the scope of their actions are already limited in accordance with the requirements of the Community’s institutional balance.

The definition of their remit is of prime importance in this connection. No one doubts that it must be clearly defined. However, it cannot and must not be defined in such a way as to deprive agencies of any discretionary power, to the point of reducing their role once again to that of mere executor. The situations requiring regulation are so varied and the science of regulation is changing so rapidly that any attempt to formulate exhaustive remits will itself undermine the effectiveness of the decisions to be taken. Nonetheless, the remit must contain clear and intelligible principles that can be subjected to judicial review if an agency exceeds its powers or acts clearly outside its margin of discretion.

In any event, as the areas covered by the remit develop, it may need to be amended on a regular basis and by the same procedure, with a view to keeping up with these developments and building on the experience gained. The legislator may in any case amend the remit at any time.

This system not only respects institutional balance, it can also give it a new lease on line by eliminating regular conflicts of influence and encouraging the Institutions to cooperate on the choices and basic policies to adopt, while leaving the agencies to handle the day-to-day management of the regulatory machine. We cannot, however, rule out the possibility of the legislature capturing in the wake of normal procedures certain subjects or isolated cases which are politically very sensitive, while turning to the agencies as the preferred advisors in such cases. This retention power/right to revoke may be exercised at the principal’s initiative or at the initiative of the agency, when particularly delicate questions are at stake.

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177 We are not discussing administrative autonomy, which is self-evident, but the degree of political independence, which is controversial.

178 Peter L. Strauss: *The place of agencies in government: separation of powers and the fourth branch*, op. cit., note 104.

179 The possibility of involving even the Court of Justice and/or the Court of First Instance, through the appointment of certain members of their management boards, would complete this synergy.

180 It is an attempt to transfer to public law the ancient French term of “droit d’évocation”, which indicated the prerogative of the monarch to withdraw a part or the entirety of some delegated powers, and still designates the right of a superior Court to recall a case from an inferior one, in order to adjudicate directly.
All of this is especially useful to the Commission as well, which would see its political image strengthened. For, despite the Treaty provision, the Members of the Commission always have been and always will be (fortunately, as it happens) politicians with very close links to their respective countries, if not their electoral constituencies. Consequently, immunity to political pressure from the capitals and regions is not guaranteed. If such pressure is felt within the Commission, which decides, theoretically, by majority but in practice by consensus, this can only undermine the quality and consistency of regulatory decision-making. This is also valid, mutatis mutandis, for the national experts in the framework of the comitology procedures. In sum, the Commission would have greater status and a more important political role if it were to design the general framework within which certain regulatory decisions can be taken, have them adopted by the Council and the Parliament, and participate in monitoring their application, rather than taking these same decisions itself, often formally.

b) Relationship with the legislative and executive powers

Agencies are thus not created in a vacuum, but neither do they work in one. Their interaction with all the arms of Community power, as well as with the Member States and the citizens, is visible and can be improved in the general interest. We have just seen that they depend on the Institutions for their establishment and their remit; the same applies therefore to their continued existence. It is obvious that, by the same procedures, they can be demoted to executive bodies or Commission departments if the added value of their activity justifies it, they can be merged with other agencies if duplication is identified, and they can ultimately be disbanded, if evaluation of their activities shows that the reasons for their establishment no longer exist or that their objectives can usefully be achieved by other means.

This fact generates an attitude within agencies of responsibility for their own actions and of self-restraint with regard to the performance of their tasks. The initiative for taking any of the above steps will fall to the Commission, which will thus develop the useful and important role of monitoring and evaluating the agencies in order to propose any necessary measures. With a view to its growing political role as the single genuine European executive, whose President would have greater powers, it could be given the prerogative of initiating the procedure for dismissing senior agency staff for serious misconduct in the performance of their duties, on the US model.

Apart from the power of life and death they have over agencies, the Council and Parliament, in their capacity as budgetary authority, have the last word on the agencies’ finances, which they can change according to their policy priorities and performances by recipient bodies. Financial control over the agencies in any event constitutes an important control instrument shared between several institutions. And, as we shall see, this substantive legal limit on the action of agencies can be supplemented by procedural rules that are generally applicable and subject to judicial review.

In cooperation with the administrative courts in the Member States, the European Court of Justice and Court of First Instance will remain the ultimate guarantors of compliance by the agencies with the entire legal framework. Last, but not least, by working in a network with national administrations, parallel bodies in the Member States and the relevant professional associations, agencies will not be strangers to the concerns of Europe’s citizens. On the contrary, they will become more responsible to them by the visibility of their activities and, in

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181 The Commission votes only very rarely, if the President has exhausted all other means of reaching a consensus. The votes are not made public.
182 See below, p.55-59.
183 Philip J. Harter: Executive oversight of rulemaking: the President is no stranger, AULR 1987, vol. 36, p. 557-571; see also below p. 56-57.
184 Here, I revise a position I defended in the past and agree with the Committees on Budgets and Budgetary Control that the European Parliament could and should review in this connection even the budgets fed by the own resources of agencies billing services to their customers; X. Yataganas: Certains aspects…, op. cit., p. 42-43.
185 See below, p.58-59.
186 See below, p.59-62.
any event, considerably more responsible than the anonymous experts meeting in the corridors of the committee system, who are answerable only to their respective governments. Agencies are bound to take account of the policy choices of the executive and legislative arms, with the sword of Damocles (judicial review) hanging over them. It is vital that they retain autonomy of judgment and choice, once they have weighed up all these conditions. The independence of agencies is not a myth. Their alleged irresponsibility of action is.

c) Appointment procedures

Greater responsibility, an additional guarantee of a limit on the autonomy of agencies, can be stimulated by the procedures for appointing and dismissing agencies’ executive boards. This is another means of linking them to all the Institutions and to civil society in such a way as to make them more legitimate and representative, thus maintaining the institutional balance within the Community.

In the present situation, despite the fact that the existence of an administrative board is a common and central element of all agencies, composition and voting rights vary and reflect the degree of autonomy and control that the legislative power wishes to delegate to each particular agency. Member States are always represented, but in some cases they are balanced by representatives of the social partners, in others by independent experts appointed by the European Parliament. The Commission is also always represented, but with quite different degrees of influence and control, ranging from powerful positions with several members and permanent seats to representation without a vote.

The above illustrates the extreme diversity of these bodies and the range of available solutions for achieving the right mix of conditions so that their tasks can be performed more effectively. This is a positive and flexible aspect, which should be retained. In the case of regulatory agencies, this diversity should even be increased, but reshaped: increased, in order to involve all interested parties, and reshaped in order to provide a better reflection of the position of the agencies within the Community’s institutional balance. Greater diversity does not of course mean administrative boards that are overpopulated, cumbersome and inefficient. An average of twenty people at most (which is already a lot) should be the rule, even after the next enlargements. To achieve this, new rules for appointing members need to be drawn up. A plausible procedure would involve the Commission and Parliament choosing from a list submitted by the Council, containing three times the number of names as posts to be filled. The Court of Justice (and/or Court of First Instance) would be able to appoint one member, when the agency concerned would also have a quasi-judicial function. The Economic and Social Committee (ESC) would appoint representatives of the economic and social interests concerned, when appropriate, and the same would apply to the Committee of the Regions, if the agency's activities affected important regional concerns. Only the Commission, as the executive, would automatically be represented in all cases by appointees of its choice. In all these procedures, there should be an attempt to achieve maximum representation of the Member States, without each of them having the right to a seat. It should also be a possible to dismiss the agencies' managers before the end of their contract (three years, renewable twice), but only for serious misconduct in the performance of their duties. The decision would be the responsibility of the President of the Commission, subject to review by the Court.

We have thus described a network of multiple relationships between the agencies and all the powers acting at Community level. In practice, the operation of this structure guarantees and limits the autonomy of the agencies, these limits being basically political in nature. With specific regulatory, executive and quasi-judicial functions delegated by the legislature, and connected to all the powers that primarily perform these functions, agencies constitute a condensed form of governance, uniting in a given field the extreme diversity and segmentation from which contemporary societies suffer. Their actions are therefore more effective than central executive action, while at the same time, regulated and monitored.

Within the European Community agencies are likely better to reflect and respect the balance between the institutions and better to take account of citizens' interests, thus partly closing the democratic gap in the EU. These political limits on the relative autonomy of the agencies are also the ex ante conditions for their accountability, in that they provide in advance the means of ensuring that they operate as closely as possible in accordance with the wishes of the delegating authorities and the expectations of the citizens. However,

these preconditions are not sufficient in themselves. Once created, the agencies, like any social entity, acquire a dynamic of their own, which can have undesirable results both for the Institutions that created them and for the individuals they are intended to serve. Hence the need for *ex post* control, a subject to which we will now turn.

2. Control

The delicate and difficult balance to be struck between autonomy and control was succinctly summarised by T. Moe, who argued that the mechanisms linking the agencies to all the other branches of power are so numerous and complex that they ultimately result in a situation where “no one controls the agency, and yet the agency is under control”.188 This paradox is easy to explain.

Modern administration does not easily tolerate restrictive mandates worded so precisely that they remove any scope for discretion. It is thus in a position of constant interaction between rulemaking and enforcement.189 Consequently, judicial review is never easy, especially when scientific issues are at stake.190 At the same time, individual citizens or groups may contest agencies’ actions before the courts and possibly win their cases. Such proceedings remain limited however, and cannot ensure that all of society benefits from the agencies' activities. This is particularly true of the EU, where, owing to the very limited possibilities for individuals (natural and legal persons) to bring direct action for annulment before the European courts, decisions can be usefully contested only once they have been implemented in national law.191 As a result, we need a diversified battery of interconnected mechanisms to ensure the right balance between autonomy and control.192

This variety of mechanisms is also required by the operating costs that agencies may generate, which may be administrative or financial. If, by administrative cost, we understand the potential gap between the objectives of the delegator and the work of the agency, a gap which is likely to widen as the remit is, and by financial cost, the higher or lower expenditure that might be generated by the intensity and/or scope of the agency’s regulatory activity, it is clear that these costs are closely interconnected. A broad remit may reduce the delegator’s costs in terms of regulatory production, but it will certainly increase the costs of monitoring the agency to ensure that it complies with the terms of its remit, while a very restricted remit will probably have the opposite effect. Hence, the need for an intelligent balance between the degree of independence and appropriate control measures, as illustrated by the great variety both of types of agency and of control mechanisms.

Over the past twenty years, particular authors, drawing essentially on US practice, have developed an impressive series of supervision mechanisms, the typology of which varies greatly according to the relative importance each attributes to one or other of them.193 I have chosen to present these mechanisms in five categories, which seem to me to better reflect the state of thought on the subject: (a) executive oversight, (b) budgetary evaluation, (c) procedural control, (d) judicial review and (e) network coordination. Let us now consider each of these in turn.

a) Executive oversight

The proliferation of supervision mechanisms is a recent phenomenon, even in the United States. It dates from the 1970s, when a series of agencies were set up in the health, safety and environment fields. It was in these fields in particular that it became urgent to determine whether the agencies were effectively meeting the social needs for which they were set up and whether their operating costs were in line with the results achieved. The trend became particularly marked under the Reagan administration and resulted in 1981 in the enactment of a

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191 See below, p.62.
first Executive Order 12291, reflecting the President's determination to take control of these overactive administrative bodies on the pretext of curbing measures that were economically unjustified. What is more interesting is the adoption of a second Executive Order 12498, in January 1985, establishing the powerful Office of Management and Budget (OMB) under the President and giving it responsibility for the executive oversight of the agencies. Its tasks also include supervision and coordination of the entire regulatory work of the agencies. It is worth giving a brief description of the OMB's modus operandi.

The OMB intervenes at three stages:

First, it has the right to review the regulatory programme of the agencies for information purposes and in order to identify any duplication in the work of different agencies, as well as to assess which regulatory projects are particularly contested or contain potentially dangerous elements.

Next, the OMB receives the Regulatory Impact Analysis (RIA), in which the agency has to assess the costs of each regulation proposed (including the indirect costs of regulatory activity), demonstrating that they are less than the expected direct and indirect benefits. The OMB has sixty days in which to respond. In the vast majority of cases, the plans are accepted without amendment; in some cases, the OMB negotiates improvements to the proposed regulation with the agency; in very exceptional cases, the plan is rejected as being particularly undesirable, and the agency has to review the proposal and either re-submit or withdraw it. It can also refer the matter to the President or Vice-President if the latter has express authority to deal with it, but appeals of this type are rare. It should be pointed out that, at this stage, proceedings are not public, the OMB and the agency negotiating behind closed doors.

Finally, having received the go-ahead from the OMB, the agency has to send the Notice of Proposed Rulemaking (NPRM) to the Federal Register. The proposal is published there with all the supporting material and is opened to public debate. During a period of between 30 and 90 days, depending on the circumstances, any interested party may submit comments. The agency decides at its discretion what response to make to these comments, but it must take express account of them in its final decision, or face action before the courts for procedural defect. Once the deadline has passed, the agency must finalise its proposal and submit it again to the OMB thirty days prior to its publication as a final regulation in the Official Gazette. The OMB has only one month in which to carry out the final examination of the texts and the underlying economic analysis. It is extremely rare for it to raise objections at this late stage in the procedure. In general, the OMB first endeavours to and does obtain from the agency a very detailed explanation of the reasons for the instrument and the specific improvements to certain points, and more frequently, involving alternative and less costly ways of ensuring compliance with the rules enacted.

It is tempting to think that a similar office with the same powers as the OMB could very easily operate within the Central Audit Service already attached directly to the Commission's President.

b) Budgetary evaluation

Executive oversight is an overall monitoring process, which includes budgetary evaluation aspects. However, the budgets of the agencies deserve particular attention. As we have seen, regulatory activity generates indirect costs, which are much higher than the direct expense of running regulatory bodies. The costs of applying the regulations cannot be taken into account within ordinary budget procedures and require particular budgetary discipline.

Consequently, the real budgetary cost of the agencies is not represented by their operational expenditures, but primarily by the costs of the public and private sectors' and consumers' applying the regulations enacted. It is

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194 46 Federal Regulation 13193.
195 Parallel, but non-formalised powers were already exercised by Congress, via the Congressional Budget Office (CBO) and the General Accounting Office (GAO); see M. Farina: Congress: Keystone of the Washington establishment, Yale University Press, New Haven, 1977. These powers closely resemble those of the European Parliament in respect of the Community agencies, see M. Tappin: The EP Budget Committee and the agencies; L. Brinkhorst: The general budget and the agencies; and S. Tillich: Remarks on the financial autonomy and accountability of the agencies, in A. Kreher: The EC agencies…, op. cit., pp. 29, 35 and 123.
196 The equivalent of the C series of the Official Journal of the European Communities.
difficult to estimate these costs, but there are now very sophisticated and sufficiently reliable methods (Compliance Cost Assessment) of doing so.\textsuperscript{197}

In this context, the Commission should prepare the Regulatory Budget (RB) separately from the budgetary procedure, essentially on the basis of the RIA; it should establish total costs per agency and propose a maximum ceiling on European regulatory expenditure, adopting an operational budget for each agency on the basis of these two factors.\textsuperscript{198} The final decision would of course be taken by the budgetary authority (Parliament and Council) in accordance with the ordinary budget procedure. The RB may prove to be a very useful tool for controlling and improving agency activity, since, by placing a ceiling on the indirect costs of regulatory activity and setting the operational budget in accordance with that ceiling, it will encourage the agencies to allocate resources in the most efficient manner for achieving their objectives.

This task could also be entrusted to a “regulatory clearing house” within the central audit service in cooperation with the Budget Directorate-General. This way of working could and should eventually lead to the creation of a real Community OMB.\textsuperscript{199}

This method of estimating total Community regulatory expenditures and fixing the operational budgets of the agencies could also indirectly ease the budgetary process. All are familiar with the animosity that develops each year between Parliament and the Council over budgetary choices, reflecting their different policy orientations, and with the Commission’s frustration at increasingly finding itself in the awkward position of having to implement policies without sufficient funds. The method proposed here involves objective data, in figures, being used for estimating regulatory expenditure, which should allow that part of the budget to be agreed with less conflict. It also provides a more realistic estimate, which should reduce the instances of frustration in the Commission and in the agencies themselves in their capacity as budget implementation bodies. In this context, it is not excluded that the Member States could directly finance a part of the overall European regulatory expenditure, in cases of lack of sufficient amounts inscribed in the annual budget under the ceiling of the financial perspectives.

c) Procedural control

These two means by which agencies are controlled quasi-directly by the established powers (legislative and executive) have been criticised by US writers: first, because the cost of these systems is not negligible; second, because the result is not absolutely guaranteed; and third, because the necessary data is essentially obtained from the agencies themselves, which very often flood the supervisory bodies with extensive documentation that is not always very clear, and which, worse still, may manipulate the information in order to influence the final decisions.\textsuperscript{200} Critics usually suggest that a more effective means of control is ensured by procedural requirements set in advance, that the agencies must respect both in rulemaking and in adjudication decisions. Clear and binding procedures are also likely to counterbalance the information lag of the controlling bodies.

US administrative law has taken the initiative in this respect too. The Administrative Procedure Act (APA) adopted in 1946 represents a statutory recognition of existing judicial precedents and lays down a uniform framework for fair conduct of agency activities and minimum standards of openness and transparency.

The main points of the APA can be summarised as follows: no new policy or change of existing policy without public notification of content and reasons; obligation to obtain comments from all interested parties; direct participation by interested parties in decision-making, or, if this is not possible, publication of all the

\textsuperscript{197} In the United States, the EPA has carried out extensive analysis to estimate the cost of recent amendments to the Clean Air Act and to the Safe Drinking Water Act. In the EU, the impact assessment form that must accompany all legislative proposals by the Commission constitutes a similar exercise.

\textsuperscript{198} This would be a kind of Activity Based Budgeting (ABB), which is already applied by the Commission, but extended to include indirect cost elements generated by the application of regulations.

\textsuperscript{199} Key recommendations 2 and 3 of the Majone and Everson report, slightly modified.

\textsuperscript{200} See McCubbins, Noll and Weingast: \textit{Administrative procedures…}, op. cit., pp. 250-251.
constituent elements of each case; explicit account taken of all relevant comments made, and obligation to give reasons for decisions concerning them.\textsuperscript{201}

It follows that the agencies cannot present their work as a \textit{fait accompli}, but must actively seek to obtain all valid data, that the entire decision-making process is conducted openly, providing a number of opportunities to public and private actors to make their voices heard and to call for changes in policy, and lastly that the entire process has a major civic effect on all of society.\textsuperscript{202}

Starting from these very high standards, the APA has, over half a century of application, undergone changes and extensions that have helped to give it greater impact and which illustrate the pragmatic US approach based on a desire always to adapt law to experience and not to introduce even new elements into old law that is unsuitable for them.\textsuperscript{203}

Among the descendants of the APA are the Freedom of Information Act (FOIA), adopted in 1966 and amended in 1974, 1976, 1986 and 1996, which grants citizens extensive access to all agency documents and files except in ten specific cases, listed exhaustively (public disclosure requirements),\textsuperscript{204} the Government in the Sunshine Act (GITSA), adopted in 1976, which applies some transparency aspects of the FOIA to the operation of government, and the Federal Advisory Committee Act (FACA), adopted in 1972 and amended in 1976, which lays down further requirements for open sessions of the various committees operating within the agencies.\textsuperscript{205}

In addition to these acts, there are others, which lay down procedural requirements for taking account of specific factors in the regulatory activity of agencies. The most important examples are the National Environment Policy Act (NEPA), which requires an environmental impact assessment, and the Regulatory Flexibility Act (RFA), adopted in 1980, which requires all agencies to take account of the consequences that their regulatory proposals may have for small businesses.\textsuperscript{206}

All these procedural requirements are open to judicial review, which can lead to the measure concerned being cancelled for omission of an essential procedural requirement or to a right to appropriate compensation being granted, or both.

Control via binding procedures has a number of advantages: it helps the agencies to stick to their remit, against which their actions are constantly being measured by public authorities and individuals. The APA, as amended and interpreted by the Courts, establishes several provisions for third-party participation (the so-called fire alarm oversight) that plays a conciliatory role in the relations between the agencies and their principals that in the EU are the Council, the Parliament and the Commission.\textsuperscript{207} Consequently, the costs inherent in direct supervision tend to fall, as do legal costs, since the procedures prevent potential litigation. They also have two major indirect effects: by involving interested professional groups and the administration in the decision-making process they both ensure synergy in setting and checking the agenda for regulatory action, thus increasing its legitimacy, and allowing consensual changes of direction without brutal

\textsuperscript{201} Ibid. pp. 257-259

\textsuperscript{202} Media specialists say that greater freedom of information contributes to more effective control of the press. This principle can be transposed to agencies via information disclosure and obligatory processing of this information.

\textsuperscript{203} See the two anniversary volumes of the ALR, vol. 50, no. 4, Fall 1998, and the ALJAU, vol. 10, no. 1, Spring 1996, dedicated to 50 years of the APA.

\textsuperscript{204} What is important here is that the burden of proof that the information required cannot be made public rests with the agency and not the person making the request. We can measure how far these instruments are from the timid opening of the Community institutions as regards public access to documents.

\textsuperscript{205} It is obvious that the EU, despite a degree of timid opening, is very behind in this respect; see the report by the European Ombudsman, Mr Jacob Söderman, presented at the FIDE Congress on \textit{The citizen, the administration and Community law}, Stockholm, Sweden, 3-6 June 1998.

\textsuperscript{206} The EU, which now accepts the environmental dimension in all other policies, may usefully draw inspiration from these Acts.

amendments of the status quo ante (autopilot effect). At the same time, they even help to make the sometimes very vague remits of some agencies more specific.

Last but not least, the procedural requirements often help to identify and to put the basic question of the conflict of values between the effects of various regulatory processes. Balancing interests in such cases is a highly political task that cannot be delegated to any agency.

Community law already has legislative instruments formalising certain essential procedural requirements. The importance of the legal basis requirement for the administrative procedure is recognised. While it is not necessary to determine all administrative procedures by legislative instrument, this is desirable for certain procedures of particular political and practical importance. The decision-making processes of the agencies, with a view to their development in the EU, is an obvious example. A European APA is perfectly imaginable in the context of existing provisions of the Treaty and of secondary legislation. The Commission must propose a regulation on the basis of Article 308 on the administrative procedures to be followed in the regulatory process, that the Council and Parliament will confirm by co-decision.

d) Judicial review

While most of the mechanisms considered so far are forms of ex ante control, judicial review is the ex post control mechanism par excellence.

In the United States, no one disputes the fact that the courts must examine both the substantive legality requirements applicable to agency decisions (in particular, compliance with the remit) and procedural requirements (primarily, compliance with the provisions of the APA and related legislation). However, this judicial review is not always easy. Remits are often worded in evasive terms, without intelligible criteria and sufficiently clear objectives to decide in court whether they have been exceeded, and an examination of compliance with procedures can easily drift into a judicialisation of agency activity, which itself is a major drawback as regards the efficiency of their work.

However, it is not possible either for the remit to be worded in such a watertight and exhaustive manner as to constrain excessively the work of the agencies, or for procedures to be so clear and simple that they freeze any scope for initiative in the management of the decision-making process. The tension between the tightness of the provisions and the flexibility of action is the fundamental problem that the courts ultimately have to solve.

The Supreme Court has resolved this tension realistically by giving agencies a degree of flexibility to interpret their own statutes according to principles inherent in the execution of their remit. In the Chevron judgment, agencies were given a considerable degree of discretion in this respect. Although this judgment was criticised as being very lax and although some courts, after Chevron, showed a clear determination to step backwards by interpreting agency statutes literally, it is now widely accepted that legislative instruments setting up agencies can provide the basic framework only, and necessarily allow teleological interpretation of their provisions. By analogy, agencies can also extensively interpret and apply procedural rules in order to perform their functions.

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209 See especially the competition rules on controlling cartels and state aid, and Regulation 17/62.
210 D. Triantafyllou: Des compétences d’attribution..., op. cit. p. 343.
211 Majone and Everson reach the same conclusion, see Institutional Reform..., in “Governance in the EU”, op. cit. p.170-175.
Evidence of the need for and usefulness of this wide interpretation is the fact that agencies are very often required to implement choices in the public interest in areas where it is not obvious from a policy point of view which is the best choice.

This kind of consideration, coupled with the need for fast, effective regulation, led some US writers to reject the unacceptable constraints introduced into the regulatory process by the cumbersome checks by President and Congress217 and by the rigid intervention of the courts.218 Proponents of such arguments end up proposing to allow agencies to deviate from the conditions set, when common sense and good policy so dictate.219

We do not endorse these arguments. They are bound to give agencies carte blanche in the regulatory process, removing any legitimacy they have and, if serious errors were made, could end up discrediting the entire system of mechanisms for delegating discretionary power. On the contrary, we think that the solution remains in balancing the substantive and procedural requirements, which must be subject to political and judicial review.

I consider procedural requirements to be more easily subjected to judicial review. Reviewing substantive requirements is equivalent to assessing their appropriateness (Does the disputed measure best meet the agency's objectives? Is it more suited to attaining the desired goal? Is there another more effective means of meeting the same objectives in accordance with the remit?). All are unusual questions for a court. In constitutional law, the situation is different, since a ruling must be given on the validity of measures that violate basic rights, making plausible a tough approach (hard-look test) to these basic freedoms which are often mishandled by political majorities.220 In administrative law on the other hand, the protected property, even where it is affected, does not require such an approach, especially since intervention can take several forms and be more or less intense, and since the most appropriate solution is not necessarily obvious from the outset. In such cases, checks on legality can be only minimal, based on the manifest incompatibility of the measure with the objectives and operating rules set for the agency.221

For these reasons, a number of authors conclude that, ultimately, political review of agency activity is a better means of ensuring their accountability.222

One thing is certain: for the judicial review process to be as effective as possible, it must not become commonplace. This would accentuate all the problems inherent in the exercise of judicial review, such that in the long term it might hinder agencies’ smooth operation. To avoid such a situation, two lines of action should be followed: first, internalising part of judicial review by introducing quasi-judicial procedures within the agencies, helping to solve problems before they become disputes; and second, managing the decision-making process via networks of professional interests. We will consider the contribution of networks to the regulatory process separately.223

217 As M. Seidenfeld states, “currently, to promulgate a substantive rule an agency must comport with the procedural requirements of 20 statutes and executive orders, imposing over 100 independent steps in the rulemaking process”, Bending the rules..., op. cit., p. 440.
219 Alfred C. Aman Jr: Administrative equity: an analysis of exceptions to administrative rules, DLJ, 1982, p. 277-331. Aristotle's notion of equity (Ηθική Νικομεχια) would apply here. He considers equity to be a virtue that can correct in individual cases the injustices necessarily created by the uniform application of general rules.
220 Laurence H. Tribe: American Constitutional Law, 2d ed. 1988, p. 780. In fact, judges are neither trained to evaluate the scientific evidence nor institutionally suited to make the socio-economic trade-offs that such rulemaking entails.
222 Mark Seidenfeld: Bending the rules..., op. cit., p. 487.
223 It is worth noting also that, under the APA, only objections brought during the consultation procedure may be the subject of judicial review, see below, p.66-69.
As regards keeping judicial procedures to a minimum, existing Community law already contains provisions along these lines. For example, the technical decisions of the Community Plant Variety Office (CPVO) are subject to appeal before a Board of Appeal acting like a court of first instance prior to appeal to the Court of Justice. In addition, Articles 44 and 118 of the CPVO and OHIM establishing regulations respectively provide that the Commission shall control (by requiring the alteration or annulment of any unlawful act) the legality of those acts of the President, in respect of which Community law does not provide for any control on legality by another body, and of the acts of the administrative council relating to the budget of the Offices. Member States, any member of the administrative board or simply any person directly and personally involved may refer any such act to the Commission for examination of its legality.

The Commission thus plays a quasi-judicial role. Its intervention is governed by a formal procedure resembling that of the APA, in particular as regards deadlines. The Commission can conclude that the contested act is unlawful and require its withdrawal. It has important power, making it the guardian of the legality of acts of the Offices. The Commission has to check the same factors as set out in Article 230 of the Treaty (lack of competence, infringement of an essential procedural requirement, infringement of Community law or misuse of powers), which are some of the grounds for actions for annulment before the ECJ. The independence of the Offices remains intact, since the checks are carried out ex post and cannot question the appropriateness of the decisions concerned. This form of control is thus preventive, encouraging the Offices' managers to take care to comply with the substantive and procedural requirements, and prompting them to cooperate closely with the Community executive.

The European Agency for the Evaluation of Medicinal Products (EMEA), on the other hand, does not take autonomous decisions, owing to the fact that the decision-making process is always subject to a final decision by the Commission via committee procedure, and sees all relevant decisions end up before the European courts.

So we see that Community law contains the seeds of a system of judicial review equivalent to that which prevails in the United States. This system may develop and improve with the emergence of regulatory agencies at Community level.

This optimism is based on the fact that the ECJ, following its law-making period, is already starting to conduct judicial review of the administration, as regards not only the contractual and non-contractual liability of its servants, but the requirements of genuine openness of the Community's decision-making system to society as well, on the basis of ensuring compliance with a number of principles relating to transparency, equal access and giving reasons for decisions.

We have already seen that a European APA may accelerate these tendencies. We will now see why the creation and direction of networks could be another positive factor in the same direction.

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224 Here, we distinguish the first stages of quasi-judicial powers granted to European agencies, see also the telecommunication directives, above, note 119.

225 This cumbersome procedure leads to long delays, which are criticised by the sector, see Peter Chapman: *Drugs firms demand action to speed up approvals procedure*, European Voice, 12-18 October 2000, p. 6.

226 Abundant and long-established case law exists in this area, but it is relatively restrictive, based on the terms of Article 288 of the Treaty.

227 For example, the ECJ's recent willingness to use Article 253 of the Treaty to ensure that the decisions of Community institutions are well founded and taken with appropriate reference to expert advice and interested professional groups, indicate that Community law can easily encompass a scheme of judicial review which will increase the public accountability of the agencies through rights of individual review. See case C-269/90 Hauptzollamt München-Mitte v Technische Universität München [1991] ECR I-5469 and case C-212/91 Angelopharm v Freie und Hansestadt Hamburg [1994] ECR I-171.
To avoid overloading the ECJ, except for proceedings for a preliminary ruling within the agencies,228 provision could be made for cooperation with the administrative courts in the Member States229 and with a European Constitutional Council, responsible, among other things, for the delicate task of ruling on the extent of agencies’ powers and the legality of their founding statutes in the light of the Treaty.230

In the meantime, judicial review of regulatory activity in the EU remains very unsatisfactory. The almost total absence of procedural requirements and the quasi impossible access of the Court by private persons are evidence of this. It is not surprising that as regards, for example, the framework directives on environmental protection, no implementing measure has been contested before the Court of Justice since 1991. In the related field of pesticide regulation (Council Directive 94/43/EC, OJ L 227, 27.7.1994, p.31), only one implementing measure has been cancelled, and it was for having ignored the European Parliament's right to be consulted.231

e) Network coordination232

There is no doubt that the emergence of complex problems highlights the limits of the Commission’s policymaking and executive abilities. This situation underlines the need to seek ways of coordinating the resources and skills of actors at lower levels, both for the generation of information and for the implementation of policies where it has been found that the Commission’s existing tools under the Treaty are inadequate.233

In more normative terms, with the emergence of a new mode of democratic regulation based on procedurisation of the production and the application of norms234 and on the coordination of collective action, providing collective actors with a structure is a very important factor. This mode of regulation does not substitute the foregoing substantive modes of policymaking, but rather represents an attempt to increase their potential by achieving a better and tidier linkage between the bureaucratic, the expert and the social systems of knowledge.235 It is also true that nongovernmental organizations and civil societies associations in general, substitute the State in areas it is unable or unwilling to act. Under this viewpoint, collective action is an extension of the state activity in areas where its advocacy or representative functions are difficult or undesirable.236

Consequently, public authorities must seek to encourage both reflexivity (by putting in place evaluation and revision mechanisms) and collective participation. The latter principally entails guaranteeing the cooperation of the various (possibly all) stakeholders. It is a very positive, inclusive approach, but, if legitimacy is to be

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228 See above, p.61.
229 By limiting individuals' rights of appeal to actions brought before the national courts against internal measures applying agency decisions, subject to review by the ECJ via the preliminary ruling procedure. See Francesca Bignami: The administrative State in a separation of powers Constitution: lessons for European Community rulemaking from the United States, Harvard Law School, Jean Monnet Chair working papers, 1999, www.jeanmonnetprogram.org.
230 By extending the powers already conferred on such a body by J.H.H. Weiler: The EU belongs to its citizens: three immodest proposals, ELR, April 1997, p. 155.
232 We will consider networks as a means by which agencies are controlled by organised civil society. It is equally justified to consider them as a limiting factor on agencies' independence via the control exercised by citizens.
233 In the EU this is particularly urgent in the field of environmental policy, where the new powers are not accompanied by an appropriate administrative scheme.
234 McCubbins, Noll and Weingast [McNollgast] points out that in a system that disperses authority by entrusting legislative and executive powers to independent government branches, administrative procedure facilitates accountability. This is all the more true for the EU, where the legislative and executive powers are shared between the three main institutions, without mentioning the other bodies provided for or not by the Treaty. [McNollgast]: The political origins of the APA, JLEO, vol. 15, 1999, p. 180-221.
enhanced, stronger and better organized actors must not be given undue advantages. If collective learning is a main condition for modern governance, the role of the public authorities is to organise it. The control aims of government action must be partially re-oriented from exclusively substantive outcomes to the establishment and support of participative mechanisms. This implies neither a change in the location of ultimate responsibility for decision-making nor a diminution of the responsibility of the public authorities. On the contrary, decisions are now taken on the basis of processes that are open and inclusive. Under this system, the public authorities have increased responsibility to ensure the adequacy of the procedures by which collective learning and coordinated action can be achieved.

For the Commission, this clearly consists in its ability to operate as a body, which can orchestrate collective action through networks of different actors involved in the regulatory process.

As Notis Lebessis and John Paterson point out, “this is of particular relevance to the broader question of the role of the Commission as an animator of networks of actors. The multitude of administrative levels and of stakeholders involved in European government action raises questions of co-ordination, which will have even greater significance in an enlarged and more diversified Union. The coherence of this action will, therefore, depend increasingly on the quality of the cooperative relations which the Commission forges with these actors and the relationships which it fosters and encourages among them.”

The United States and the EU are both deliberately and normatively multi-level systems of government. They both basically depend on coordination between multiple public authorities. In both systems, policy outcomes are the product of negotiation and mutual adjustment between different actors involved in the decision-making process. Consequently, it is not surprising that network structures have become the default mode of institutional form on both sides of the Atlantic.

The committee procedure alone brings into play an extensive network of experts; every working day an average of 1,000 officials and experts attend about 20 different Council working groups in Brussels. Each brings together representatives from all 15 Member States plus the Commission to negotiate executive Community measures. About 70 percent of the EU’s regulatory output is actually decided at this level.

These decision-makers meet behind closed doors and are answerable to their respective national administrations, which thus also avoid scrutiny by the national parliaments. The operation of these networks is neither transparent nor democratic. It is true that the Commission has recently made efforts to extend its networks to include private interests affected by this mass of opaque regulation (e.g. social dialogue, new technologies, environment), but it is still far from providing this process with a reasoned structure.

Community networks cruelly lack sufficient representativeness and decision-making capacity. They frequently favour certain powerful groups, neglecting civil society, which remains barely organised, particularly in certain Member States. Furthermore, a compromise based on the lowest common denominator is frequently found by a suspect consensus which fails to make the various approaches known or even deliberately conceals them within a system that tolerates no disagreement, itself considered to be harmful to the process of European integration.

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242 Andrew McLaughlin and Justin Greenwood: The management of interest representation in the EU, JCMS, vol. 33, no. 1, 1995, p. 143-156. It should be noted that the committee procedure very rarely leads to opinions
The Commission does not often have the necessary technical expertise for regulation that is becoming more and more specialised. The gap was filled immediately by the private sector, which sometimes manages, even directly, to have an important influence on Community regulation.243

There are numerous other examples that illustrate the necessity but also the inadequacy of the current network system at Community level.

This is another area in which agencies can play a salutary role. They are particularly suited to operating within a network involving national and Community administrations. Agencies sometimes, are not destined to work in a vacuum, or to replace national decision-makers; still less can they replace the representatives of civil society. However, they have a natural vocation to stimulate the interaction of all these players, public and private, national, international and European. They can also encourage new important interests by favouring participation in the decision-making process of emerging players.244 Agencies even develop the exceptional capacity to form national experts into an international network capable of cooperating with the private sector, while maintaining its independence and efficiency. The experience of the positive development of the scientific committees under the EMEA is an example.245

The osmosis between national and Community agencies forms a transnational network of institutions pursuing similar objectives and facing analogous problems, more motivated to defend its professional standards and policy commitments against external influence and to cooperate with other parallel organisations than a national civil service annexed to a central bureaucracy.

Consequently, as G. Majone and M. Everson point out, “there is no reason why the network model, given the right conditions, could not be extended to all areas of economic and social regulation of Community interests and indeed to all administrative activities where mutual trust and reputation are the key to greater effectiveness.”246

It is obvious that the operation of agencies within a network will be all the more reliable and effective, the more representative and legitimate the participants are. However, in the current state of the decision-making process within the Community, networks appear as an additional guarantee of its legitimacy, even if the conditions for their own legitimacy are not yet fully met.

Lastly, it was noted that monitoring of the procedural requirements coupled with extensive participation by individuals in the regulatory process may raise two issues: the slowing of the process (gridlock, ossification), and the potentially growing influence of private interests on public decisions (interest capture). However, if there is a slowing down, it is largely compensated for by greater public support for the objectives pursued by the measures concerned. Regarding the second issue, it cannot be denied that the current committee system is much more vulnerable to outside influences, and especially major organised interests, while the opening of

not in favour of Commission proposals, which suggests that its own experts consult experts in the Member States in advance.

243 It should be pointed out in this connection that 20% of Commission staff are non-officials moving between the private sector and the European public service. See the Report of Independent Experts (Rapport des Sages), which led to the Santer Commission’s collective resignation in March 1999.

244 See McCubbins, Noll and Weingast: Administrative procedures…, op. cit., p. 264-268.

245 A similar tendency is noticeable in recent Commission proposals to decentralise the conditions for applying Articles 81 and 82 of the Treaty on restrictive practices and abuse of a dominant position (Commission White Paper on modernisation of the rules implementing the Treaty provisions on competition policy, 1999).

246 Institutional reform: independent agencies, oversight, coordination and procedural control, in Governance in the EU, op. cit., p.166.
the system will be of greater benefit to small interest groups, which do not have the resources to finance permanent lobbying structures in Brussels.247

CONCLUSIONS

We have attempted in this paper to show that creating European regulatory agencies can increase both the efficiency and the legitimacy of the decision-making process within the EU. We have also argued, contrary to the prevailing school of thought, that this could be legally possible under the current treaties.248

In doing so, we have drawn on the US model of independent regulatory agencies. We found that, despite fundamental differences between the two systems, US federalism and the emerging European federalism face similar problems. One such parallel problem relates to the efficiency and legitimacy of the regulatory process in an increasingly complex and changing environment. We asserted that where the Americans take a realistic and pragmatic approach, Europeans are always prisoners of a flagrantly dogmatic legalism. This dogmatic approach is especially visible when it comes to the delegation of regulatory powers involving a real margin of discretion. It is rooted in a rigid conception of institutional balance within the Community based on case law dating back 45 years. It is blocking any development of European decision-making mechanisms.

Arguing essentially from a legal point of view, supported by arguments from other disciplines, in particular the political sciences and governance theory, we have attempted to re-situate this case law in its historic context and in the current reality of institutional balance. We were thus able to affirm that the revised and corrected Meroni doctrine presents no obstacle to the creation of such bodies.

We then analysed the range of means available for effective control of agency activity, which sets limits on their independence and increases their accountability. We concluded that this regulatory whole could establish and ensure bodies that not only respected the institutional balance, but were also capable of revitalising it, via a clearer and more visible division of powers, and keeping up with its development, by introducing participation and cooperation, not only between the existing institutions, but also between them and emerging players, such as networks of parties affected by Community regulation.

We were thus able to argue that the involvement of such agencies in a decision-making process subject to operational rules and tough but justified judicial review means better protection for the rights of European citizens. At the same time, it can raise the quality of public debate on the main European issues.

We also argued that the operation of agencies contributes to better management of the scientific and technical expertise required in modern rulemaking procedures.

Generally speaking, a model of a European regulatory agency based on these principles is not only feasible, but also highly desirable, since it can significantly help to modernise Community governance and to improve governance worldwide.

While I hope they are convincing, legal/political arguments do not of course suffice to take this step. What is required is strong political determination on the part of the Member States and all the European Institutions, giving rise to a new administrative and regulatory culture. This will not be easy since all involved display


248 It is even preferable, because a special treaty provision may introduce other undesirable inflexibilities in the overall decisionmaking process. I thank Pr. J.H.H. Weiler to point me out this particular danger.
a curious tendency to believe that they will lose out: the Commission, since it will have to give up some of its decision-making prerogatives, and the Council, since it will no longer have direct control (via the committee procedure) over the same part of regulatory activity.

The European Parliament will perhaps be the only player to be more open to this possibility, in view of its relative absence from implementing procedures, although all the Institutions would still need to be persuaded not to attempt (in return) to interfere in the day-to-day management of these new bodies, thus avoiding the temptation to micro-manage, which is well known to be detrimental to the smooth operation of agencies. However, I consider this fear, shared by the Community executive and legislative powers, to constitute a further argument in support of the necessity of the operation.

Nonetheless, I cannot be excessively optimistic that these changes will come about rapidly. Since the issue, rightly or wrongly, has constitutional implications, resistance will be strong. Hence the usefulness of putting forward two interim proposals.

Until the logjam is broken (whether or not by an amendment to the Treaty), the Commission could follow one or both of two alternatives:

a) Identify the areas requiring decentralised regulation and entrust them to independent offices within its own administration. I dare to hope that this would pose no major problems. On the contrary, such an approach would have a number of advantages: it would be an intramural version and a small-scale model of what should become Europe's regulatory landscape in the 21st century. It could have an educational dimension, removing existing prejudices from people's minds. This would make the transition to a real system of regulatory agencies much easier.

b) Propose and have adopted the European APA and apply it in full to current committee procedures.249 This poses no problems in the light of the Treaty and could have the positive effect of obliging the Commission to forward proposals for measures not only to Parliament but to the public by publishing them in the Official Journal, with an invitation to submit comments to which it would have to reply, without being bound by them in terms of the outcome. The Council would have the same obligations, if, after discussions in the committee, it decided to modify the content of the Commission's proposal. Interested groups would thus be able to participate in the administrative procedure, which would allow them first, to express their ideas, and second, to bring informed actions before the ECJ for infringement of essential procedural requirements (under the APA)250 and for manifest error of appraisal (minimum check on legality) if they are directly and individually affected. It goes without saying that they could always contest the substance before the national courts after the adoption of the implementing measures.

The committee procedure would have everything to gain in terms of credibility, as would Community regulation.

The combined proposal would consist in setting up specialised offices and applying the European APA to them. This would circumvent the constitutional problem, simplifying and enhancing the regulatory process. The transition to a fully fledged system of agencies would become even easier. This would form an interim system allowing attitudes to change with a view to introducing the definitive solution.251

Finally, the existence of a central European authority for the adoption, implementation and enforcement of regulatory commitments in certain areas is perhaps more important than the location of this authority. It is essential that agencies should exist; inside or outside the Commission is secondary. In this respect, the

249 A similar proposal already exists: F. Bignami: The administrative State…, op. cit., in fine, section VIII: “Proposal for notice and comment in the Community”.

250 Which will de facto open up the Court under Article 230, since individual and direct interest is much easier to prove where compliance with procedural requirements is concerned.

251 Nevertheless, I must accept that imposing a heavy control mechanism to not independent entities could be counterproductive. The control measures cited before concern really independent agencies disposing a certain margin of discretionary power.
proposal of a **European network of national regulators** must be further explored.\(^{252}\) It is a simple formula, not presupposing any delegation of authority and consequently without any institutional implications. It has also the advantage of being operational in all the cases. It responds to the necessity of an **Europeanization of the regulatory process**, without any centralization movement.

To link up with the premises set out at the very beginning of this paper, let us go back over them again. The EU has an unwritten constitution in the form of the Treaties and the Community method born of their application. It is an original creation, which is both noble and functional; noble, because adherence to its philosophy is voluntary, and functional, because it has generated a vast and successful integration process. It must be preserved and adapted to new realities. The process of regulation is one such area that requires adaptation. There are others that the IGC will attempt to resolve with a view to enlargement. There are still others that the White Paper on governance will highlight, including the crucial problem, connected with this paper, of opening the EU to its citizens and improving public dialogue. A number of proposals are already on the table. They should gradually be implemented, beginning with the easiest to introduce and moving on to the more difficult, which will require an amendment of the Treaties.

For all these reasons, I would be happy if these considerations could make a modest contribution to the current debate, all the more so if all involved could agree that the EU’s Institutions need not only an administrative facelift to move on, but also far-reaching structural changes.

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AFTERWORD

In a recent note circulated under the authority of the President, the Legal Service of the Commission moved from its previous positions on three main points:

a) It accepts that “the tasks conferred to agencies namely concern the exercise of public power in order to reach general interest objectives”. This extremely large formula obviously encompasses wider attributions than those purely consultative or of technical assistance ones. Consequently, if the agencies’ nature of tasks belong to the heart of Community policies, the means to achieve them must also be accordingly important. In my mind, this leads to the conclusion that these bodies should have some discretionary power.

b) What was already done with the creation of the Kosovo agency, is now legally possible by the institutionalization of the so-called management agencies. In other words, the budget’s execution powers of the Commission became delegatable. This constitutes a breakthrough of overwhelming importance, because these powers are provided by the Treaty itself. The normative foundation of the non-delegation doctrine of competences related to the institutional balance established by the Treaty, is no longer valid. Under these circumstances, we can legitimately put the question, Why can’t such a delegation be extended —conditionally—to other aspects of a European regulatory work in expansion, without modifying the Treaty.

c) Last but not least, the most spectacular change in the Legal Service’s doctrine concerns its acceptance that agencies cannot exercise “regulatory powers of general character”. We can assume —a contrario—that these bodies can exercise specific or particular regulatory powers. This statement leads directly to the vast and real problematic about the respective limits of laws and regulations under the Community’s legal order. Without entering the complex debate on the possible clarification in the hierarchy of European norms that needs a revision of the Treaty, we can define —under constant Treaty—the border of specific regulatory powers to be conferred to independent agencies. In this respect, it is without any doubt that such powers embodied individual decisions in application of the general regulations, which is already the case for some of the existing agencies. The same distinction exists under American law, between “rulemaking” and “adjudication”. But for what reason, a limited discretionary power —inside certain margins and according quantitative or/and qualitative criteria defined by the legislature— would not be assimilated to a specific/particular regulatory power? We must search furthermore in that direction.

The conclusion is that the Legal Service and the Commission they have already moved —even without saying it—from the Meroni doctrine. We welcome this evolution, which opens new perspectives for a more rational exercise of the European regulatory tasks. It is now legally and politically possible to define a rulemaking framework for the European agencies —including a certain margin of discretionary power—without a previous modification of the Treaty. At least, we now have a good basis for discussion in order to think seriously and quietly about the degree of necessary europeanization of the EU’s administrative activity and the appropriate level of taking the relevant decisions.


The concrete result of that new openness is the White Paper of the Commission on European Gouvernance.254

In fact, under the title « Better application of EU rules through regulatory agencies », we can read that :
« A range of national regulatory agencies exist across the member States in areas with a need for consistent and independent regulatory decisions. Increasingly these regulators have an important role in applying Community law. 

At EU level, twelve independent agencies have been created. Tha majority of these bodies have either an information gathering task… or they assist the Commission by implementing particular EU programs and policies… In three cases EU agencies have a regulatory role. (OHIM, CPVO and EAEM). The creation of further autonomous EU regulatory agencies in clearly defined areas removes for openness will improve the way rules are applied and enforced across the Union. Such agencies should be granted the power to take individual decisions in application of regulatory measures. They should operate with a degree of independence and within a clear framework established by the legislator. The regulation creating each agency should set out the limits of their activities and powers, their responsibilities and requirements for openness. The advantage of agencies is often their ability to draw on highly technical, sectoral know-how, the increased visibility they give for the sectors concerned (and sometimes the public) and the cost-savings that they offer to business. For the Commission, the creation of agencies is also a useful way of ensuring it focuses resources on core tasks. »

As far as the conditions of the creation of such agencies are concerned, the White Paper goes ahead :
« The Treaties allow some responsibilities to be granted directly to agencies. This should be done in a way that respects the balance of powers between the Institutions and does not impinge on their respective roles and powers. This implies the following conditions :
- Agencies can be granted the power to take individual decisions in specific areas but cannot adopt general regulatory measures. In particular, they can be granted decision making power in areas where a single public interest predominates and the tasks to be carried out require particular technical expertise (e.g. air safety).
- Agencies cannot be given responsibilities for which the Treaty has conferred a direct power of decision on the Commission (for example, in the area of competition policy).
- Agencies cannot be granted decision making power in areas in which they would have to arbitrate between conflicting public interests, exercise political discretion or carry out complex economic assessments.
- Agencies must be subject to an effective system of supervision and control. »

And the White Paper to conclude on some action points as follows :
« The Commission will consider the creation of regulatory agencies on a case-by-case basis. Currently, proposals are before the Council and the European Parliament for three agencies : a European Food Authority, a Maritime Safety Agency and an Air Safety Agency with only the latter having a clear power to take individual decisions.

The Commission will :
- Define in 2002 the criteria for the creation of new regulatory agencies in line with the above conditions and the framework within they should operate.
- Set out the Community’s supervisory responsibilities over such agencies. »

We can easily measure the progress made since the predominance of the Meroni doctrine. And we are still at the very beginning of a long process toward a more and more broader delegation of the regulatory authority at European level. Especially if the Commission swifts, after the coming IGC, from the model of a neutral and independent administration to a real political executive brunch of government.

March 2002
Xénophon A. Yataganas.

ABBREVIATIONS

ABB  Activity Based Budgeting
AJCL  American Journal of Comparative Law
ALJ(AU)  The Administrative Law Journal (of the American University)
ALR  Administrative Law Review
APA  Administrative Procedure Act
APSR  American Political Science Review
AULR  The American University Law Review
BSE  Bovine Spongiform Encephalopathy
CLJ  Cambridge Law Journal
CAP  Common Agricultural Policy
CDE  Cahiers de Droit Européen
CFI  Court of First Instance
CFSP  Common Foreign and Security Policy
CKLR  Chicago-Kent Law Review
CLR  Columbia Law Review
CMLR  Common Market Law Review
CPVO  Community Plant Variety Office
DLJ  Duke Law Journal
DÖV  Die öffentliche Verwaltung
EC  European Community
ECB  European Central Bank
ECJ  European Court of Justice
ECR  European Court Reports
ECSC  European Coal and Steel Community
EEC  European Economic Community
EG  Europäische Gemeinschaft
EJIntRel  European Journal of International Relations
EJPR  European Journal of Political Research
ELJ  European Law Journal
ELR  European Law Review
EMEA  The European Agency for the Evaluation of Medicinal Products
EMU  Economic and Monetary Union
EPA  Environmental Protection Act
ERPL  European Review of Public Law
ESC  Economic and Social Committee
EU  European Union
EuR  Europarecht
EWGV  Europäische Wirtschaftsgemeinschaft Vertrag
FIDE  Federation Internationale pour le Droit Européen
FTC  Federal Trade Commission
ICC  Interstate Commerce Commission
<table>
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<th>Abbreviation</th>
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<tr>
<td>IGC</td>
<td>Intergovernmental Conference</td>
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<tr>
<td>IO</td>
<td>International Organization</td>
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<td>IRLE</td>
<td>International Review of Law and Economics</td>
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<td>JCMS</td>
<td>Journal of Common Market Studies</td>
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<tr>
<td>JLEO</td>
<td>Journal of Law, Economics and Organization</td>
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<td>LGDJ</td>
<td>Librairie Générale de Droit et de Jurisprudence</td>
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<td>MIT</td>
<td>Massachusetts Institute of Technology</td>
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<td>NLRB</td>
<td>National Labor Relations Board</td>
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<td>RIA</td>
<td>Regulatory Impact Analysis</td>
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<td>MLR</td>
<td>Modern Law Review</td>
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<td>OHIM</td>
<td>Office for Harmonisation in the Internal Market</td>
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<td>OJ</td>
<td>Official Journal</td>
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<tr>
<td>OMB</td>
<td>Office of Management and Budget</td>
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<td>OSHA</td>
<td>Occupational Health and Safety Act/Administration</td>
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<td>PUF</td>
<td>Presses Universitaires de France</td>
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<tr>
<td>RB</td>
<td>Regulatory Budget</td>
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<td>SCR</td>
<td>Supreme Court Review (USA)</td>
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<td>TEC</td>
<td>Treaty of the European Community</td>
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<td>TEN</td>
<td>TransEuropean Networking</td>
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<td>Treaty of the European Union</td>
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<td>Texas Law Review</td>
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<td>ULB</td>
<td>Université Libre de Bruxelles</td>
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<tr>
<td>US</td>
<td>United States (of America)</td>
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<td>YLJ</td>
<td>Yale Law Journal</td>
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