

Gerd Winter (ed.)

# Sources and Categories of European Union Law

A Comparative and Reform Perspective



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## Preface

According to Declaration No. 16 annexed to the Final Act of the Treaty on European Union "the Intergovernmental Conference to be convened in 1996 will examine to what extent it might be possible to review the classification of Community acts with a view to establishing an appropriate hierarchy between the different categories of act."

Meanwhile a number of documents have been elaborated in order to clarify the options. As stated in the report of the chairman of the Reflection Group for the 1996 Conference, Carlos Westendorp<sup>1</sup>, two major strands of thought have emerged: a confederal vision which being based on state-like principles of a separation of powers, aims at a threefold hierarchy of constitutional, legislative and executive norms; balanced against an intergovernmental vision which in stressing subsidiarity advocates the retention of the prevailing *sui generis* catalogue of legal acts. To the extent it contains proposals, the present study takes a position midway between the confederal and the intergovernmental approaches. It is based on the assumption that there is indeed a structure in-between federal statehood and intergovernmentalism which needs and merits stabilization. The major thrust of the work is however to provide basic information and reflection for the current debate as well as for future discussion, should the 1996 Conference postpone a more radical reform.

Early on in the preparation of this manuscript it became clear that the problem is not merely one of defining a catalogue and hierarchy of legal acts, but is instead far more complex touching on more basic issues of competence-allocation, law-making procedures, institutional structures, and fundamental conceptions of the European Union. Thus, we have adopted a dual approach, delving into deeper issues, whilst at the same time placing these questions firmly in the context of the proposed reforms for 1996.

The volume has 2 major sections. One is concerned with the sources and categories of legal acts at the Member State level. Information is provided on models of cataloguing legal acts upon which the Community may draw in the process of stabilizing its own system. The 7 Member States chosen represent the 3 most characteristic constitutional traditions in Western Europe, i.e. the French/Italian/Spanish, British/Danish/Dutch, and the German models. Although all of the individual studies were based upon one agreed questionnaire, it is striking to note how not only the research results but also their style of presentation and choice of focus appear to mirror the differences between constitutional traditions.

The second major part contains research carried out at the Community level. The major Community legal acts are discussed in the different contexts of practical application, competences, pre-emption, law-making procedures, institutional structures, and inter-relation with Member State law-making. The discussion goes beyond the core categories (regulation, directive, and decision) and also includes forms of interinstitutional agreements, organic laws, administrative soft law, standardization, and collective bargaining.

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<sup>1</sup> Europe Documents N. 1951/1952, 27 Sept. 1995, p. 14 (Topic 8).



The summary contains a proposed reformed catalogue of EC legal acts based upon the research gathered together in this volume.

The research presented here was suggested by Willi Rothley, Vice-Chairman of the EP Committee for Legal Affairs, and was furthered in many ways by Thomas von der Vring, former Chairman of the EP Budget Committee. It was financially supported by the European Commission, General Secretariat where Mr. Carel Edwards and Dr. Gosalbo Bono provided valuable organizational assistance.

Professor Ulrich Everling, Dr. Hans-Joachim Glaesner and Professor Jörn Pipkorn provided seminal insight during the early stages of designing and structuring the project.

That the first version was ready in March 1995 and a revised version can now appear is due to the aid and expertise of Tara Una Diedrichsen who not only authored one of the studies but translated others, of Vivienne Cadger and Claudia Tege, who helped with editing, Gretchen Herzfeld who transcribed several of the texts, and, in particular, of Andrea Gavriel who besides providing several transcriptions managed the project network and produced the copy ready for print.

Bremen, October 1995

Gerd Winter

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## **A. Summary of the Project**

Proposed Categories and hierarchy of EC legal acts and other instruments

Treaties

Organic Law  
(Council Unanimity  
EP Codecision)

Convention on Own Resources  
(Approval by Member States)

Institutional Agreements

Community Law

Autonomous Decree

(Full) Law } Directive Law }	{	Consensual Law (EP codecision) Majoritarian Law (EP codecision) Ratification Law (EP assent) Budget Law (EP codecision)
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(by Council, ECB)

Community Decree

(Full) Decree - Directive Decree  
(by Council, Commission including  
Management or Regulatory Committees,  
Agencies)

Decision

Recommendation  
Opinion  
Circular

Administrative  
Guideline  
Conclusion

Code of Practice  
Vademecum  
etc.

Collective  
Agreement  
Technical  
Standards



# Reforming the sources and categories of European Union Law: A Summary\*

*Gerd Winter*

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\* Many thanks to Michelle Everson for invaluable linguistic assistance and clarifying questions

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## I. Overview of the types of legal acts

The EC Treaties offer 5 types of legal acts, those are

- the **regulation**
- the **directive**
- the **decision**
- the **recommendation**
- the **opinion**.

This catalogue reacts in specific ways to 3 constitutional problems, namely

- the compulsory nature of a legal act
- its generality of application
- its confederal configuration.

As to the compulsory nature, both non-binding (recommendation, opinion) and binding (regulation, directive, decision) acts are provided for. As to generality, individual (decision), general (regulation) as well as a combination (directive) of individual (as to the addressee) and general (as to the content) acts are offered. As to the confederal configuration, full and directly effective (regulation), as well as partial and indirectly effective (directive) acts are offered. Through this patterned catalogue the EC presents itself as an organisation that may act in a variety of capacities, i.e.

- either by stimulation or by compulsion,
- either by rule-making or by adjudication in individual cases, and
- either by ground-setting or by fully blown action.

Practice has complemented the officially offered types of act in 2 ways: New types of act have been reflecting the existing problem dimension, whilst further types of act have also been added to meet new constitutional problems.

A number of loosely termed instruments have been evolved by the Commission, including **communications, memoranda, guidelines, codes of practice, frameworks, informatory notices and vademecums**. Through these the Commission has informed about ECJ jurisprudence, laid down its own interpretation of primary and secondary law provisions, structured its discretionary powers, or implemented corresponding mandates contained in legal acts. These communications etc. serve as means of coordinating the (executive) functions of the member state agencies and the Commission, and may therefore be classified as measures responding to the problem of confederal configuration. Some of these instruments, such as codes of practice and vademecums are also of consequence to the individuals. In absence of formal empowering provisions and of binding force, they are examples for EC **soft law** and



are equatable, in this capacity, with the other types of act having no binding effect, i.e. recommendations and opinions.

**Resolutions** (Entschließen) may be mentioned as a further type of act belonging to the non-binding category.

As noted there are a number of constitutional problems which are not reflected in the catalogue of legal acts contained in Art. 189 ECT. In particular, no specific types of act were provided to represent

- the division of legislative and executive powers,
- the division of supranational and intergovernmental rule-making structures,
- the division of the innerinstitutional and the external spheres
- the division of societal and governmental (or of "private" and "public") rule-making structures.

Practice has, however, invented types of act that reflect some of these variants. Not every type received a new name. Some types were, however, simply deployed but not officially recognized.

The latter is generally true for the division of legislation and execution. In practice, in many policy areas, 'ground-laying' legal acts can be distinguished from implementing legal acts. Sometimes the acts are informally called "mother" and "daughter" directives or regulations. In a growing number of cases the basic legal act is earmarked framework directive or regulation.<sup>2</sup> In some rare cases the basic act is called a "codex".<sup>3</sup> While this name is used in the text of the legal act itself, the act is nevertheless a regulation under the terms of Art. 189 ECT. The term "law", although having been proposed for the purposes of Treaty revision, has however not been used in practice.

If looked at under the dimension of supranationalism/intergovernmentalism, all of the types listed in Art. 189 belong to the supranational sphere. Sometimes, however, the Treaties make the entering into force of a provision dependent of its adoption by the Member States according with their respective constitutional requirements.<sup>4</sup> The provisions then belong (at least partly) to the intergovernmental sphere. In one case such a measure has been termed "Decision and Act",<sup>5</sup> a name that reflects its emanation both from the Council and from the Member States.

The Treaty on European Union has added 2 types that also belong to the intergovernmental sphere and, more specifically, to the two other "columns" besides the EC. They are called the **common position** and the **common action**. Although concluded by the Council, they do not need to be adopted by the Member States and are given a certain (not very clearly described) binding effect upon the Member States (but not directly on individuals).<sup>6</sup>

<sup>2</sup> See Th. Adam, G. Winter, Framework regulations, in this vol., p. 508.

<sup>3</sup> See the Customs Codex, Council Regulation 2913/92/EEC, OJ L 302/1 (1992).

<sup>4</sup> E.g. provisions for elections of the EP by universal suffrage, Art. 138 para. 3 ECT.

<sup>5</sup> Decision and Act on universal suffrage of 10 Sept. 1976, OJ L 278/1 (1976).

<sup>6</sup> Art. J.2 para. 2 and Art. J.3 Nos. 1, 4.



With regard to the division of the innerinstitutional and the external spheres, one again notices that the types offered by Art. 189 ECT, all belong to one domain, the external sphere. Practice has, however, shown that the EC organs often rule on internal matters. The related act is then in many cases called a 'decision'.<sup>7</sup> 'Decision' is, however, not meant to exclusively earmark such internal acts. The word is also used in the quality of a general term covering any legal act, be it a regulation, directive or further act. The problem arising is that "decision" in this general sense cannot be distinguished from "decision" in the sense of an individual binding act as established by Art. 189 para. 4 ECT.<sup>8</sup> This and the fact that a specific term would be helpful to characterise internal acts, may be ground for further exploration. If such an internal act is of such fundamental importance that a stronger influence by the Member States may be appropriate, an organic law might need to be considered.<sup>9</sup>

Inter-institutional agreements and joint declarations must also be mentioned in this context. They are most often used for shaping the relationships between the EC institutions. They differ from decisions by virtue of their more or less contractual character, which is also the basis for their more or less binding force.

As regards the division between societal and governmental law-making, the latter predominates in the Treaties. Practice has however developed forms of incorporating standardization by professional organisations.<sup>10</sup> Moreover, collective agreements between management and labour have been assigned a role in Community law.<sup>11</sup>

## II. Methodological remark

Legal acts are designed to serve as tools in the hands of a given political system. They break down into various types. The several types are defined to be used for particular tasks, to emanate from particular authors, and to have particular effects. For instance, from the definition of a "framework law" it can be concluded that the task to be performed is the setting of a frame which leaves room for others to fill, that the author is the legislator, and that in its effect the act is legally binding.

Not every question as to the tasks, author and effect of legal acts must be answered by defining the types as such. The answers can also be established by separate provision: in grammatical terms: by a predicate tied to the noun representing the type. For instance, instead of saying that laws shall in certain areas of competence be framework laws, one can work with just a 'law' and submit it to the proportionality principle, to the effect that should this principle so require it the law will entail a mere framework without constituting a separate type of act designated as framework law.

7 See e.g. the Comitology Decision of the Council 87/373, O.J. L 197/33 (1987).

8 This is different e.g. in the German version of the EC Treaty where "decision" in the general sense is a "Beschluss" and in the specific sense a "Entscheidung".

9 See R. Bieber, B. Kahil, Organic Law, in this vol., p. 433.

10 See J. Falke, Standardization, in this vol., p. 645 et seq.

11 See M. LeFriant, A. Höland, Contrats collectifs, in this vol., p. 677 et seq.



Or, seen from the other angle: which tasks are allocated to which actors, how the actors are constituted, and what the effects of their activities shall be, can be expressed by this or that rule, but alternatively also by this or that definition of type of legal acts. These two possibilities must be kept in mind when it comes to framing types and rules.

No matter which semantical or grammatical path is chosen, the designing of legal instruments must be connected with broader considerations about rule-making tasks, authors and effects. For instance, suggesting that a distinction between a legislative and an executive type of legal act be introduced, presupposes the clarification of which institutions would perform either the legislative or the executive role.

This again requires reflections on a more fundamental level, i.e. that of the general principles which characterise the political system under consideration, for instance, whether the EC should be organized according to the principle of the separation of powers at all.

If there is a level of analysis "below" that of designing legal tools and their context there is one more level "above" the latter which might be termed *semiotic*: The types of legal acts must be given names. From a legal perspective, the constitution-maker is free to choose any name for labelling the types of legal acts. For instance, a binding legal act could well be named a recommendation, if this is so determined by law. But the constitution-maker would be ill advised to actually do so. Problems might arise if the name used in a specific legal context proved inconsistent with its use in another legal context or its use in everyday-life, present or past. If the name has symbolic value in a given political culture, it may even prompt or alternately frustrate public consensus. For instance, the replacement of the regulation by a Community Law would be more than a mere technical semiotic operation. It would instead symbolise one further step towards democratic European statehood.

In the following I shall first outline the basic options for principles on which to base the further analysis. I shall then concentrate on the typology of legal acts, presenting options of definition or grammatical construction and relating each of these to the more fundamental level of principles, functions and structures, as well as to semiotic questions concerning the finding of proper names.

Being a consultative paper, the report is written from the perspective of a constitution-maker who identifies a range of variants and considers their merits. It is therefore not determinative but heuristic. In certain respects, however, firm positions must be taken in order to reduce complexity.

### III. Options for principles constituting the European Communities

#### I. *A mixtum compositum*

I assume that the European Communities are neither a federal state (Bundesstaat) nor an international organisation (Staatenbund) but a *mixtum compositum sui generis* that



may be termed a confederation (Staatenverbund). Sovereign powers are shared by both the Member States and the confederation, although the ultimate sovereignty in accordance with Carl Schmitt's definition of, who controls the state of emergency ("Verfügung über den Ausnahmezustand"), still rests with the Member States.<sup>12</sup> It is doubtful whether dynamics towards "an ever closer union" are still operating but, in any case, already integration has reached a level at which it might persist and consolidate itself as a genuine intermediary specimen.

This characterization of the EC does not preclude allusion to the principles governing federal states when understanding and designing the legal acts which emanate from the sovereign powers the EC uncontestedly possesses; on the contrary, it invites it.

However, further conceptions which compete with state-derived models must also be considered here. Two of them are of particular interest.

## 2. *The technocracy hypothesis*

One strand conceives of the EC as an economic "Zweckverband", something resembling a joint venture for the achievement of specific economic goals and having limited competences and disposing of mere technical-administrative means. EC functions are said to be characterized by "decision-making methods oriented towards expertise and independence from political-voluntative pursuance of interests"<sup>13</sup>. In this view the resulting legal acts, merely being executive in character, are sufficiently legitimized through the ratification laws of the Member State parliaments and need no **additional legitimation at the European level**<sup>14</sup>. If taken literally this would imply that EC law-making does not raise concerns about parliamentary democracy, the rule of law and the separation of powers, since parliaments have already spoken, thereby providing law which protects against an arbitrary executive, and rendering European legislature superfluous. Not only the input side of EC law-making but also its output side would be seen as technocratic. This would support doctrinal concepts which embody direct effect because decisions regarded to be cognitive and limited in scope would not leave latitude for national decision-making. Concerns about member state

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12 Insofar my assumption corresponds to the perception of the EC by the Bundesverfassungsgericht in its Maastricht judgement (see BVerfGE 89, 155) where the Member States are qualified as "Herren der Verträge". In spite of the allusion to the Schmitt notion of sovereignty of this formula one should note that Carl Schmitt theorized on a type of federation (Bund) where the question if sovereignty rests with the Member States or with the federation remains suspended, simply because the basic homogeneity of the Member States excludes the emergence of existential conflicts. (See C. Schmitt, *Verfassungslehre*, 1928, p. 371). The Court seems to assume that the EC has not yet reached this stage (which Schmitt considered to be the case with the Deutsches Reich of 1871). Whilst I follow the Court in this perception it will later be seen that my conclusions drawn from it are different.

13 H.P. Ipsen, *Zur Exekutiv-Rechtssetzung in der Europäischen Gemeinschaft*, in: *Festschrift für Peter Lerche*, 1993, p. 425 et seq.

14 Ipsen, *ib. cit.* p. 430



sovereignty would be minimized since technical decisions do not encroach upon etatist reserves.

In discussion on reform the described theory would advise in favour of an easing-out of things "political". It would reduce existing tasks and competences to matters strictly economic,<sup>15</sup> seek out "non-majoritarian" institutions<sup>16</sup> and argue against the introduction of a new type of a Community Law.

The described theory is not convincing because it disregards the dynamic evolution of the European Union (if one may say so: the spillover effect) over the past 30 years.<sup>17</sup> Its empirical basis is and has for long been extremely weak.<sup>18</sup> In fact, decisions implying fundamental political conflicts are abound in EC law-making. To consider but one example, and that from the early Community years, the initial choice of establishing common market organisations for agricultural products as against either the liberalization of markets or the application of structural policies may be mentioned. This choice involved billions of pounds of subsidies, deeply changed agricultural incomes, and had severe environmental effects. There is no way in which this decision might be termed a technical-administrative one.<sup>19</sup> This demonstrates that even in its earlier years the European Community had to take landmark decisions of great political weight. Apparently, this situation has continued over the subsequent years.

### 3. *The mediation hypothesis*

Another strand of thought sees the EC as a forum and mediator for informal, flexible cooperation and negotiation.<sup>20</sup> Like the theory of technocracy it denies that power (in the Weberian sense of the ability to enforce compliance against the citizens' will) is exerted; this, however, for different reasons: Whereas the first approach points to the (postulated) cognitive basis of decision-making, the second refers to its consensual character; the need for consensus thus determining that no participant need follow an order against their own will.

**Constitutional principles corresponding to state power do not fit within the framework of this theory of cooperation.** Parliamentary legitimation of law-making would be misplaced, law-making is dissolved into complex patterns of political and

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15 For an attempt in this direction see E. Steindorff, *Grenzen der EG-Kompetenzen*, 1990.

16 See in this respect G. Majone, *Independence vs. Accountability? - Non-Majoritarian Institutions and Democratic Government in Europe*, EUI Working Paper in Political and Social Sciences, No. 94/3, Florence 1994, and M. Everson, "Independent Agencies", in this vol., p. 602 et seq.

17 Astonishingly enough Ipsen without the slightest change defends a position he had advocated already 25 years ago, see *idem*, *Fusionsverfassung Europäische Gemeinschaften*, 1969, pp. 62-67.

18 U. Everling, *Überlegungen zur Struktur der Europäischen Union und zum neuen Europa-Artikel des Grundgesetzes*, *Deutsches Verwaltungsblatt* 1993, p. 936.

19 See F. Snyder, *Agricultural policy*, in this vol., p. 354.

20 The authors most forcefully arguing along this line are R.O. Keohane and St. Hoffmann, *Conclusions: Community politics and institutional change*, in: W. Wallace, *The dynamics of European integration*, 1990, p. 276 et seq.



professional networks and coalitions. Separation of powers would be pointless since instead of the traditional 3 powers, a multitude of committees, clearing houses, negotiation rounds etc., would contribute to the emergence of a polyarchy. The rule of law would be groundless because arbitrary government would be controlled through continuous monitoring and adjustment. Supremacy and the direct effect of supranational law would be of little concern because conflicts would be settled by interpretative adjustment and compromise. Likewise devising a clear-cut catalogue of legal acts would be a secondary matter given the manifold and more flexible appearances of soft law.

The empirical basis of the mediation hypothesis is much richer than that of the technocracy hypothesis. One may point to the Luxemburg compromise which has been an example of cooperation both as to its form and to its content. Other instances are the many consultation rounds between EC and member state personnel when Commission proposals for a legal act are elaborated, when COREPER committees prepare common positions of the Council,<sup>21</sup> when working groups pave the way for the opinions of management or regulatory committees,<sup>22</sup> when implementation problems are ironed-out through consultation between member state agencies and the Commission.<sup>23</sup> The attempts made to bridge conflict of laws problems through generous interpretation of these<sup>24</sup> and the invocation of cooperation formulae<sup>25</sup> may also be explained in those terms.

Yet, the mediation hypothesis, although analytically appealing, may not be the best advisor in a normative context where institutional reform is on the agenda. The relentless dissolution of formal structures into flexible and floating patterns would entail a number of risks. Amorphous patterns may prevent the identification of those who are responsible for failures. Secrecy in political discourse may hinder generalising public debates on overall Union interests and obligations. Better knowledge and economic means will give some greater influence than others. Cooperative networks tend to co-opt members thus deflecting away unwelcome criticism. Access is most often reserved for elites because disadvantaged interests are either not invited or lack the means of permanent participation. Progress via environmental process of interpretation of national law in the light of EC legal acts might prevent a fresh political analysis of a given issue. It is a sociological fallacy to take the factually pervasive informality as a sign for that formal structures are

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21 L. Krämer, The elaboration of EC environmental legislation, in: G. Winter (ed.), *European Environmental Law. A Comparative Perspective*, 1996.

22 J. Falke, G. Winter, Regulatory committees, in this vol p. 541 et seq.

23 H. Adam, G. Winter, Commission guidance, in this vol p. 629 et seq.

24 See for the British dilemma of reconciling parliamentary supremacy with the ECJ doctrine of direct effect of directives R. Macrory, Sources, in this vol p. 76. See also S.H. Phillipps, P. Jackson, *Constitutional and Administrative Law*, 7th ed., 1992, p. 100 et seq.

25 See for the German dilemma of reconciling the elaborated national and the looser Community concepts of checking legal acts against fundamental rights the Maastricht decision of the Bundesverfassungsgericht (BVerfGE 89, 175) where the court says that constitutionality of EC legal acts was a matter of cooperation between it and the ECJ.



superfluons. Quite to the opposite informal structures are intervoven with formal structures, they draw their benefits and distortion from them.

#### 4. *The polity hypothesis*

The technocracy hypothesis has alerted us to the fact that politics is still very much present in the EC. The mediation hypothesis teaches us that this politics does not flow from a single power centre but is polyarchic in character. Still, power is exerted and accordingly failures and misuses of power must be expected. This, however, provides the material for a third hypothesis, one which analyses and assesses a political system in terms of interest domination and public control. This hypothesis - it may be named the polity hypothesis - would make use of more traditional principles modelled on state-like configurations, such as

- democratic legitimation of power
- the rule of law
- separation of powers
- subsidiarity of the higher in relation to the lower level of centralization
- subsidiarity of state in relation to societal action.

These principles which assume a measure of statehood in the case of the political system under discussion must, if applied to the EC, clearly be adapted to the latter's "suum genus", i.e. its intermediary position between a state and an international organisation, and its being characterised by a polyarchy rather than by simple power relationships.

For the sake of logical clarity, it might be stated that such principles are here not referred to as constitutional norms with binding effect. As the context of this study is the reform of the EC constitution itself, it seems more appropriate to take them as criteria of political morality, dignified by long tradition but forcing the challenge of an adaption to new conditions.

## IV. The Community Law and the Problem of Democratic Legitimation

### 1. *Directive - Regulation - Law*

There is no Community Law; the Regulation and the Directive alone are available for the framing of decisions which might be regarded as having a legislative bearing. The "Directive", in being addressed to the Member States and in having to be transposed



into national law, implies international rather than supra-national organization.<sup>26</sup> "Regulation" while possessing direct effect, nevertheless mirrors the technical, administrative character of the tasks for which it is employed.<sup>27</sup> Neither of these types of act would be an adequate denotation of legislation - if there was legislation at all. Likewise, recommending, as some have done, that a Community Law be introduced, would presuppose that an activity can be identified which would deserve to be called legislation. The term "Law", "Loi", "Gesetz" has always had significant political connotations. Therefore, introducing a "Community Law" would herald another kind of Community than the international organisation the directive alludes to, as well as the supranational but technical "Zweckverband" which the regulation denotes.

The question that poses itself is therefore whether there is, and indeed whether there should be, legislation in the EC. If so, it must further be clarified who the legislator is and ought to be, and for what particular competences.

We approach the answer by touching upon the more fundamental level of constitutional principles, i.e., in the present context, the notion of the law and the principles of democratic legitimation, of separation of powers and of the rule of law.

## 2. *Is there Community legislation?*

Historically, the "Law" or "Loi" has above all symbolized its source, namely the people (or part of this), and its effect, namely its supremacy over the power of the monarch. This is true for the "Act of Parliament" defeating the Crown in the English revolution of 1688 as well as for the Loi proclaimed in the French revolution of 1789 to be "l'expression de la volonté générale"<sup>28</sup>, deriving from the Assemblée Nationale and announcing "l'acte auquel tous les peuples doivent être soumis".<sup>29</sup> This notion of a law did not exclude the participation of other bodies in law-making, such as representation of the nobility, of federal states or even of the Crown, but the thrust was on legitimation through an elected body.

In this democratic vision, the content of the law could be anything the legislator found appropriate. No constitutional requirements were established in this respect.<sup>30</sup> Only later, the experience of Jacobin despotism and fears that the working class or other "ideological" majorities might dominate elected bodies, led to the

26 H.P. Ipsen, *Europäisches Gemeinschaftsrecht*, 1972, p. 455. This parallelising is not to say that it equals a conclusion agreed upon in the framework of an international convention: It does not have to result from unanimous voting, it does not allow to opt out, and it does not need adoption according with the national constitutional provisions.

27 H. Wagner, *Beschlußrecht der Europäischen Gemeinschaften*, 1965, p. 276 where the author also warns against a doctrinal classification of the regulation as law because of the (then) executive character of the EC.

28 Art. 6 Déclaration des Droits de l'Homme August 26 1789.

29 Conclusion of the Assemblée Nationale of 1789.

30 H. Heller, *Der Begriff des Gesetzes in der Reichsverfassung*, in: *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer*, Heft 4, 1928, p. 98 et seq.



development of substantive criteria such as the generality of laws, specifically designed to limit the powers of the legislature.<sup>31</sup> We shall return to them below.

In recent years new substantive criteria have also been discussed; criteria which point in a different direction, most particularly the limiting of an overzealous but the encouragement of a too reticent a parliament. In Germany, the Constitutional Court developed a constitutional principle providing that decisions on matters essential for the enjoyment of fundamental rights or for society as a whole, were perforce to be taken by parliamentary law.<sup>32</sup>

Turning back to the initial question as to whether there is Community legislation, the original democratic notion of the 'Law' does not help much. This notion would advise to call those legal acts Laws which belong to the area of codecisino the European parliament. Given the possibility of revising the pertinent procedures such advice would however be too static. We are therefore in need of a **substantive description of the Law** from which it could be assessed what local acts should be concluded by elected bodies and what others not. Substantial criteria can indicate the kinds of decision that lack legitimation, and should therefore be handed over to structures where elected bodies (co-)decide. In search of such criteria we might draw on the constitutional history of certain of the Member States, in particular those like Germany where constitutional thought has been particularly productive in this respect. As the present exercise is only heuristic we may for a while disregard the historical context in which the criteria have appeared. Questions of this context will later be returned to. Criteria characterizing the content of laws may be distinguished from those characterizing the function of laws in solving political problems.

The content of laws is reflected by criteria of

- (1) **generality**: the Law addresses the public in general while other legal acts (the "administrative act") aim at individual or individualizable persons;
- (2) **externality**: the Law determines the rights and duties of the citizen, while other legal acts (e.g. administrative guidelines) aim at the internal activities and organisation of the government;
- (3) **essentiality (of content)**: the Law only those particular rules which are indispensable (or fundamental) for the designing of a comprehensive body of rules for a given policy. Other individual rules are left to further bodies to decide.

The function of laws is reflected by criteria of

- (4) **protection of individual rights**: a Law is the proper form for a decision on whether the government may interfere with an individual right, while governmental action which is neutral in this respect, or even furthers individual positions, may be undertaken without a basis in a Law;

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31 J. Jellinek, *Gesetz und Verordnung*, 1964 (first edition 1887), p. 91.

32 K.-H. Ladeur, *Sources*, in this vol., p. 241.



- (5) **essentiality (of problem):** a Law is the proper device when a political system is about to take a decision about matters essential for the exercise of fundamental rights or for society in general.

It cannot be doubted that these criteria are (in different combinations) met by many Community regulations and directives. Externality (2) is already an element of the definition of both the regulation and the directive. Generality (1) is part of the definition of the regulation.<sup>33</sup> Many legal acts could be cited which serve as a basis and limiting framework for interference with individual rights on the part of the Commission or member state agencies (4). Many legal acts decide upon problems essential to the Community and the member states (5).

Finally, EC practice has developed methods of accentuating legal acts which contain the basic rules for a given policy (3). For instance, in the agricultural sector, a regulation (804/68/EEC) was adopted establishing the basic structures of the common organisation of dairy products, including a unified price system. This basic regulation was from time to time amended when new basic policy changes took place, for instance in 1984 when a new article was inserted introducing the dairy quota system (Regulation 856/84). On this basis, a multitude of detailed regulations were enacted both by the Council acting on Commission proposals (but without parliamentary participation) and by the Commission itself.<sup>34</sup>

In the environmental sector, a basic directive for the control of water pollution (76/464) was adopted laying down criteria for water quality objectives and emission thresholds. In addition, the directive detailed for various options of Member States as to whether either or both kinds of such standards should be prescribed and applied, and further mandated the drawing-up of subsequent directives containing quantified standards. Later on, a number of directives were indeed adopted which established the required standards.

The already mentioned Customs Codex may be cited as a third example of the assembling of dispersed provisions of importance in one consolidated regulation.

It is certainly safe to resume that legislation in the substantive sense is present at the Community level, and that therefore the question of parliamentary legitimation should be placed on the agenda.

### 3. *Identifying the legislator*

#### a) *The European and the national parliaments.*

Requesting parliamentary legitimation does not automatically lead to the European Parliament as the primary source of democratic legitimation. National parliaments must also be considered. Whilst during the seventies and eighties debates about the "democratic deficit" of the EC almost unanimously supported the strengthening of the

<sup>33</sup> See however Art. 173 para. 4 ECT.

<sup>34</sup> See further F. Snyder, "Agricultural policy", in this vol., p. 370.



European Parliament, the focus has meanwhile shifted in favour of the raising of the profile of national parliaments. Whilst the first round led to the complementing of indirect legitimation through the Council by direct legitimation through the EP, this "double legitimation" is currently often regarded as in need of completion through a third string, i.e. the involvement of national parliaments.<sup>35</sup> The options that have been suggested point into 3 different directions, i.e.

- the improvement of the parliamentary impact on the nature of ministers' votes in Council, e.g. via parliamentary select committees
- establishing ties between the EP and the national parliaments, e.g. via "assizes" of members of the parliaments or joint sessions of policy-specific committees, with a view to influencing both the EP's and the national ministers' voting<sup>36</sup>
- establishing a direct link between national parliaments and the EC legislative procedure; e.g. by instituting a new consultative body of parliamentary representatives, by enlarging those competences where the adoption of a legal act by the member state parliaments is required, or even by creating, as in certain areas, an evocation right for the national parliaments, with the consequence that the proposed legal act must be approved by all or a limited quorum of national parliaments.

All of these suggestions more or less explicitly entail a devaluation in the importance of the role of the EP. This might be considered to be somewhat of a paradox. Such demands may well be motivated by concerns for legitimacy, and indeed they have been supported most vigorously by authors emanating from those Member States with the strongest democratic traditions, i.e. Denmark and the UK, but their net result is nevertheless a reduction in the degree of direct legitimation in the Community. This is, however, in part explained since the British principle of parliamentary supremacy necessarily precludes any analysis based on direct legitimation within the EC.<sup>37</sup>

In these two countries the first of the above-mentioned options is particularly well developed; in particular it seems that especially the House of Lords Select Committee has proven itself to be capable of shedding national blinkers and taking the broader view of a European public interest<sup>38</sup>. This, however, appears to be an exception. The House of Lords is known for its relatively independent and long-term orientation. This is due to a specific British tradition of independent senior statesmanship that is seldom to be found in other Member States, both culturally and in terms of institution-building. Unfortunately therefore, the House of Lords Select Committee can hardly serve as a model for most of the other Member States. It is to be expected that in the normal case national parliaments will adopt a national point of view. Thus

35 See Th. v.d. Vring, *Legitimations*, in this vol., p. 392.

36 Cf. G. Laprat, *Réforme des Traités: Le Risque du Double Déficit Démocratique*, RMC 1991, p. 710. The author does not mention the third variant.

37 Devaluations of the EP have also been based on the above cited technocracy and mediation hypothesis.

38 K.M. Newman, *The impact of national parliaments on the development of Community Law*, Liber Amicorum P. Pescatore, 1992, p. 483 et seq.



a dilemma arises: either the parliaments are given the power to bind their minister - which would breach EC constitutional principles since the Council's very existence is based on compromise - or the parliaments are restricted to a right to advise their minister - which, given competing priorities, would make the related parliamentary work somewhat unattractive (such is the German experience), or the preserve of a tiny group of insiders whose contact with the rest of their fellow members of parliament is a touch diffuse (such is the Danish experience).<sup>39</sup>

Neither is the second of the above listed models very promising. Creating bonds between national parliaments and the EP rests on the vision of one large legitimacy structure. But the model disregards the fact that the national and the European parliaments 'compete for the same goods', i.e. competences at the levels represented by them and influence on decision-making touching upon those same competences. This makes co-operation difficult.<sup>40</sup>

The third model - the creation of an advisory body representing the national parliaments - would institutionalize this competition to the detriment of an effective law-making procedure. It also overlooks the fact that if strong national interests are at issue, the MEPs of one member state often vote together notwithstanding their particular party affiliations.<sup>41</sup> Nevertheless, some kind of direct and binding involvement for the national parliaments may remain necessary in certain areas of great national importance. We shall return to this.

We conclude that **the EP appears to be better qualified than national parliaments to legitimize EC action** both on substantive grounds, since the MEPs can afford to think 'European', and on procedural grounds, because the EP is close enough to the power center to understand its rationale.

#### *b) The Council and the Commission*

This is not to say that the EP should be the sole institution representing the legislative function. The **monopolizing of the power of initiative** (the right to submit proposals for legal acts) by the per se supranational agent (the Commission) has proven to be a wise arrangement and should be retained, including the qualifications contained in Arts. 138 b para. 2 and 152. **The (con-)federal perspectives represented by the Council** must, of course, also remain a decisive second element. The Council will, however, continue to slip from its central position as the core legislative body, just as the Bundesrat did in the course of development of the German Reich.<sup>42</sup> Even then however, it must be considered whether the Council should either exclusively retain some of the competences it at present exerts or after mere consultation with the EP.

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39 See further I.M. Jarvad, Sources, in this vol., p. 98; Th. v.d. Vring, Legitimation, in this vol p. 397.

40 Th. v.d. Vring, Legitimation, in this vol., p. 395.

41 Th. v.d. Vring, Legitimation, in this vol., p. 407.

42 See K.-H. Ladeur, Sources, in this vol., p. 239.



Most of the EP's drafts for a Union constitution have demanded the abandonment of these competences and introduce a comprehensive model of EP codecision-making.

I believe that there should be several kinds of institutional mix constituting the legislative function and corresponding to different tasks and competences.<sup>43</sup> Although not all of the numerous combinations presently to be found in the Treaties should be upheld, they can be taken as a quarry of experience out of which a new and simplified catalogue may be carved. In what follows a catalogue of this kind shall be developed.

#### 4. *A Catalogue of Community Laws*

##### a) *Amendments to the Treaties*

In correspondance with the intermediary character of the EC, the Treaties possess a double nature as international treaties and as the constitution of an organisation possessing state-like sovereign competences. By implication this requires a double legitimation, first by consent of the member state parliaments or national referenda, and secondly by consent of the EP.<sup>44</sup>

##### b) *Organic Acts*

There is a level of law which organises the functioning of the EC institutions ("functional law"<sup>45</sup>) which can, by virtue of its importance, be ranked between the Treaties/Constitution itself, and the implicit powers of the several institutions to adopt rules for their internal organisation and procedures.<sup>46</sup> The scope of this kind of law presently includes

- rules for the election of the EP;<sup>47</sup>
- rules on the resources of the Union;<sup>48</sup>
- rules on the application of ECT-procedures to competences belonging to the EUT Cooperation in the fields of justice and home affairs;<sup>49</sup>
- rules on the application of the Art. 189b - procedure (co-decision) to further fields.<sup>50</sup>

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43 See G. Winter, Competences, in this vol., p. 414.

44 Art. N para. 1 subpara. 2 EUT only provides for consultation with the EP.

45 R. Bieber, *Das Verfahrensrecht von Verfassungsorganen*, 1992, p. 23 et seq.

46 See, also for the following, R. Bieber, B. Kahil, *Organic law*, in this vol., p. 423 et seq.

47 Art. 138 para. 3 ECT.

48 Art. 201 ECT.

49 Art. K.9 EUT.

50 Art. 189 b para. 8 ECT.



The Treaties in these cases provide that the legal acts must be adopted by the Member States according to their own constitutional requirements, i.e. no ratification normally entailing parliamentary consent, but a possibly more simple procedure. The EP must assent in the first of the listed cases and is only consulted in the others. The resulting legal product is sometimes called "Decision and Act",<sup>51</sup> which expresses its double nature as both a decision of the Council and an international agreement. The "Decisions and Acts" have thus far not been integrated into the Treaty texts but have been kept separate as a kind of complementary constitutional law.

This kind of intermediary functional law is covered by so-called 'organic laws' in France and Spain. There they are subject to especially strict procedural requirements.<sup>52</sup> In Spain the major reasons for introducing the organic law were twofold<sup>53</sup>: the constitution-makers could postpone decisions they could not agree upon to a later date when new consensus might be expected, and they could leave matters open for future changing conditions without having to go through the complex procedure of amending the Constitution. These reasons are strikingly analogous to those behind Arts. 138 ECT, K.9 EUT (first reason), and 201 ECT (second reason).

In accordance with R. Bieber's suggestion<sup>54</sup>, it is submitted that this category of law be adopted for the EC constitution and EU Treaty, but that the procedure described above be changed. **The organic law should be subject to the co-decision of the EP and require unanimity in Council but no adoption by the Member States.** The right of initiative should primarily be vested in the Commission, but might also be vested in the other institutions in matters touching solely upon their own affairs.

As regards the hierarchy of laws, **the organic law should, in accordance with the French system, rank below the Treaties/Constitution, but above ordinary legal acts.**<sup>55</sup> This suggestion is made in the light of the problems encountered in Spain, where conflict between organic and other laws has been solved by means of rules of competences rather than by a hierarchical order.<sup>56</sup> Such a system appears to have disregarded the fact that procedural and organisational matters are, on logical grounds, superior to substance. The adoption of the Spanish system is therefore not recommended.<sup>57</sup>

The scope of EC organic laws might be enlarged. Some of the rules contained in the Treaties/Constitution could be downgraded and housed instead within the ambit of an organic law. Examples of such rules might be the determination of the seat of the institutions<sup>58</sup> and the rules on the formal requirements for EC legislation.<sup>59</sup> Others,

51 See above FN 5.

52 Art. 46 French Constitution, Art. 81 Spanish Constitution. See M. Miaille, *Les sources*, in this vol., p. 166; L.M. Díez-Picazo, *Sources*, in this vol., p. ; R. Bieber, B. Kahil, *Organic law*, in this vol., p. 20 et seq.

53 Díez-Picazo, *Sources*, in this vol., p. 193.

54 In this vol., p. 448.

55 Bieber, Kahil, *Organic law*, in this vol., p. 437.

56 Díez-Picazo, *Sources*, in this vol., p. 189, 194.

57 Díez-Picazo, *Sources*, in this vol., p. 196.

58 Art. 216 ECT.



which are now subject to simplified procedures, might be upgraded, such as the establishment of ancillary institutions,<sup>60</sup> the statute on the EC Ombudsman,<sup>61</sup> and the seat of the institutions.<sup>62 63</sup> A third group might consist of those competences that, under the present law, already fall into the procedure of unanimity in the Council, i.e. modifications of the statutes of the ECB and the ESCB (Art. 106 para. 5), and provisions for the excessive deficit procedure (Art. 104 c para. 14).

Bieber/Kahil suggest the extension of the scope of organic law to cover substantive law such as rules on fundamental rights and the codification of unwritten principles. Spanish experience however warns against such an extension to substantive matters. Art. 81 of the Spanish Constitution thus similarly stipulates the use of organic laws when a subject-matter is developed within the scope of fundamental rights. In practice this extension has however caused many problems of delimitation.<sup>64</sup>

c) *Ordinary Community Laws*

aa) *Content and function*

The ordinary Community Law might supersede the role of that particular category of regulations and directives which deals with essential problems and fixes essential rules. Such a "Law" would symbolize that an essential question is involved and draw public attention both to its working-out and existence. The EP could concentrate its deliberations on such essential matters thus freeing itself from many other legal acts of a minor importance. The EP could also select a few such acts for a broad debate explicitly addressing and including the European public.

However, there is a difference between recommending the use of the Community Act for those purposes and making this use a binding norm. In other words, the question is whether the Act shall only be available as legislative tool for essential problems and rules, or if the legislative organs shall be free to use that category for essential as well as other matters. It is submitted that the realm of the "Law" is not defined by binding constitutional law, and that this applies to the fixing of criteria both of content and of function.<sup>65</sup>

As to functions it is not advisable to restrict the realm of the Law (be it by definition or predicate) to, for instance, areas of intrusion into individual rights or to social essential problems. This does not exclude constitutional reservations or even mandates for Community Acts: Constitutional principles such as the rule of law or separation of powers can be designed to require that an Act must be promulgated before the executive may take action. The Treaty/Constitution could also request the

59 Arts. 190, 191 ECT.

60 Arts. 151 para 1, 168 a para 2, 235 ECT; Art. 30.

61 Art. 138 e para 4 ECT.

62 Art. 216 ECT.

63 Bieber, Kahil, Organic law, in this vol., p. 452.

64 Díez-Picazo, Sources, in this vol., p. 194.

65 See on this distinction supra, IV 2.



enactment of a Community Law in certain areas.<sup>66</sup> But beyond this, the legislature should be free to take up any matter (covered by EC competences and investigated to ensure compliance with subsidiarity) they deem appropriate. It should be left to the legislature to decide upon the criteria of essentiality and to determine which matter is indeed 'essential'.

As to content it is inadvisable to lay down too detailed a legal framework. History shows that such criteria may be misused by those who wish to keep parliaments away from far-reaching decisions. For instance, attempts have been made to deploy the generality criterion to exclude parliamentary decision-making on individual or internal matters of great societal importance.<sup>67</sup> **Laws must also be viable means for deciding on individual cases or internal matters** provided these are sufficiently important (such determination, however, should remain within the legislature's discretion).

As to the essentiality criterion, the Luxemburg Presidency's Draft Treaty on Union (1991) proposed that Community Law be used only to fix basic rules for a (rather small) catalogue of competences where the law was foreseen, i.e. for the procedures of the structural funds, action programmes for environmental policy, and frameworks for research programmes.<sup>68</sup> The same line (though expressed through a different legal technique) was taken by the Commission in its Initial Contributions to the Intergovernmental Conference (1991). Here it is stated that the Community law "can be applied in every field of Community activity, but only in relation to the basic elements of the matter to be dealt with".<sup>69</sup>

**It is not advisable to confine the Community Law to fixing essential rules.** A criterion of essentiality is too vague and would give rise to endless debates about interpretation. The criterion might also be misunderstood, being taken to mean that a law should only use broad language (as is normally done when principles are stated). It is possible, however, that an essential provision, for instance the duty to reduce carbondioxide emissions, might be expressed in a very precise manner, in this case through a quantified standard like a 30% reduction of 1987 loads by the year 2005.

Those who fear that laws which are undefined in substantial terms might be arbitrarily misused in individual cases should consider that equality of treatment

66 On the rich variety of national constitutional reservations and mandates for legislation (as well as their possible absence) see the national reports, in particular Ladeur, Sources, in this vol., p. 240; Díez-Picazo, in this vol., p. 192; Jarvad, in this vol., p. 104; Kortmann, in this vol., p. 130; Mactory, in this vol., p. 79; Cervati, in this vol., p. 223.

67 For instance, when in the times of the German Weimar Republic the dukes of Hannover and Hessen were expropriated by a law, some legal scholars (including Carl Schmitt) argued that the law was invalid because it concerned a specific case and no general matter (see H. Heller, loc. cit. (FN 28), p. 108). Another example: During the 1860ies Bismarck reorganised the military spending money which was not provided by a (constitutionally required) budget law. The prevalent doctrine considered budget laws to be laws only in a formal sense (as being passed by parliament). Lacking external legal effect, the breach of such a law could not be regarded to be illegal. See Heller, loc. cit., p. 111.

68 Art. 130 d, 130 s para. 2, and 130; para. 1 of the Draft.

69 Part on Democratic Legitimacy, Explanatory Memorandum No. 3.2.2.



would still be available as a protective constitutional requirement and that legal protection would be granted by Art. 173 para. 4 ECT.<sup>70</sup>

This requirement for flexibility in the definition of Community Law does not exclude but rather presupposes the existence of further constitutional principles, most particularly the subsidiarity principle, which demand that under certain circumstances (or more generally: as far as possible<sup>71</sup>) Laws should restrict themselves enunciating basic rules. Similarly, we feel that our approach is compatible with the introduction of different types of law, including a Directive Law. How to use such instrument should, however, be left to the discretion of the legislature provided the limits of EC competences are observed.

The criteria under discussion should however serve as political guidance to the legislator. For instance, the EP might reject a Commission proposal for being too individual, internal, non-essential in content or function etc., which in turn might lead the Commission to modify the proposal such that only the basic elements of the policy are fixed by the law, further details being delegated to executive rule-making. Inversely, the EP might in other cases find that an important matter needs to be decided upon in precise terms and reject a vaguely framed proposal.

**We conclude by submitting that the Community Law should legally be defined by its origin, i.e. its creation by the legislative process, but not by its content or function. The confining of the Law to certain contents and functions should be seen as a question of political guidance, and not one of constitutional law.**

#### *bb) Origin*

If the Community Law is to be defined by its origin, logically this origin must be described. The origin will entail a combination of Commission, Council and Parliamentary contributions. The elements of combination include various voting quora in the Council and the Parliament as well as different forms of parliamentary participation.

The primary question is whether a Law may arise through only one form of combination, or whether there might be several. All of the proposals for a Treaty on European Union which suggest a Community Law have stipulated that such a Law might only derive from one procedure, namely codecision and conciliation.<sup>72</sup> I believe this is too rigid. A structure deeply imbedded in the Treaties, which allocates

70 Reference to the principle of equality in this context is frequent also on the level of the national constitutions, see C.A.J.M. Kortmann, in this vol., p. 130; L.M. Díez-Picazo, in this vol., p. 192. The related article of the German Grundgesetz which prohibits laws which regulated individual cases (Art. 19 para. 1) is also interpreted to allow for regulation of individual cases provided the principle of equality is observed (which means that a good reason for treating the individual case differently from others must be shown). See K.-H. Ladeur, in this vol., p. 244.

71 This was stated in the EP's Draft Treaty (1984) Art. 34 ("so far as possible").

72 See, e.g., Art. 38 of the EP Draft European Union Treaty (1984), commented by J.-P. Jacqué in: Capotorti/Hilf/Jacobs/Jacqué, loc. cit., where at p. 164 it is mentioned that solutions providing 2 procedures (though ones not connected with competences) had been discussed. See T. Diederichsen, History, in this vol., p. 341.



different competences to different kinds of procedures, in this case deserves more consideration. Connecting the notion of 'law' with different promulgation procedures is not unknown in national constitutions. To give a German example; depending on the particular competence exercised by a law the Bundesrat's consent must either be gained or alternately the law may pass, the Bundesrat's objection to the law notwithstanding. It is therefore submitted that **several procedures should be considered insofar as this is suggested by the respective categories of competences.**

The safest path forward is to build on what practice has already developed, to explore the rationale of the forms found, and develop them further. Although theoretically a multitude of combinations are imaginable; involving varied voting quora in the Council and different modes of EP participation, only a few combinations have to date prevailed. They can be characterized in the following way<sup>73</sup>:

(1) First level confederal statehood:

Unanimity in Council, consultation or no consultation of the EP

(2) Second level confederal statehood:

(a) Weak Legitimation

Majority in Council, consultation or no consultation of the EP

(b) Reinforced Legitimation

Majority in Council, cooperation of EP

(c) Strong Legitimation

Majority in Council, co-decision or assent of EP.

Although historical contingencies have played their role, a certain logic behind the allocation of competences to different formations may nevertheless be identified in the Treaties as they stand.<sup>74</sup>

**Formation (I)** where the Member States retain a veto right, is used for competences which

- have serious effect on the revenues and expenditures of the public budgets of the Member States (indirect taxes, social security, structural funds, R and D financing, industrial policy, environmental taxes, founding of joint undertakings, distribution of profits and losses of the Central Banks and the ECB);
- involve important areas of infrastructure policies (regional planning, soil utilization, water resources, energy sources and supply);

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73 See further G. Winter, *Competences*, in this vol., p. 410 et seq.

74 I consider only the ECT and EURATOM leaving the ECSC-Treaty aside.



- impinge upon other important domestic interests (professional associations, termination protection for employees, cultural policy, codetermination in enterprises, crucial transport issues );
- involve far-reaching alterations of EC institutions (statute of the ECB and ESCB) and EC competences (Art. 235 ECT).<sup>75</sup>

Whilst the latter might be dealt with under organic laws, the other areas all have in common a substantial degree of interference in domestic affairs. Although one might ask if every single such item really requires special protection through the veto right; in principle, however, it seems justifiable to retain the category.

As to the participation of the EP, this is confined to consultation in most areas of competence although assent is required for making basic rules for the Structural Funds, and codecision is foreseen for the establishment of the long-running framework R and D programm.

**It is submitted that for the sake of clarity only one form of EP participation be adopted in this combination, and that it be codecision including a conciliation procedure.** This would mean the establishment of a particularly intrusive form of substantive law which is identical with organic law as to its procedure. In terms of hierarchy it would, however, constitute a normal level of effect ranging below that of the organic law.<sup>76</sup> This category of law may be called **Consensual Law**.

**Formation (2) (b)** is characterized by majority voting in the Council with either cooperation, codecision or approval by the Parliament. The fields covered by codecision and cooperation are more or less the same, more specifically the establishment of the internal market, including the harmonization of domestic conditions for competition; in other words, the classical field of economic and social regulation. The two procedures differ in that the cooperation procedure has served an experimental purpose with the exercise of competences with a stronger EP participation being tested prior to upgrading to the codecision procedure.<sup>77</sup> In the meantime all such experiments have proven to be successful and therefore codecision should be introduced in all of the cases presently subject to the cooperation procedure. This type of law might be called **Majoritarian Law**.

The assent procedure differs from the other two in that no conciliation is foreseen. This is consequent in those cases where the EP can only say yes or no because the subject matter was fixed by previous negotiation from which the EP was excluded. This specifically occurs in cases of the approval of international treaties. It has been argued elsewhere that **EP assent should apply to every international treaty**<sup>78</sup>. In other cases where there is latitude for the modification of proposals for legal acts, for instance in the case of an amendment to the ESCB Statute (Art. 106 para. 5), assent should be replaced by the codecision procedure.

The appropriate name for this law would be **Ratification Law**.

75 Winter, in this vol., p. 414.

76 See supra p. 31.

77 Winter, in this vol., p. 419.

78 Winter, in this vol., p. 420.



**Formation (2) (a)** which combines majority voting in Council with no participation or mere consultation on the part of the EP, is connected with competences which are mostly concerned with money and currency policies. The exclusion of parliamentary codetermination will in all likelihood shield the decision-making system from changing political majorities. This purpose is in principle convincing and should lead to the acceptance of the procedure as a separate combination.

Yet, a careful check should be made to determine whether all of the competences presently allocated to this formation in fact deserve to belong to it. Rules concerning government aid, distortion of competition, free movement of goods, free movement of capital, free payment transactions, agricultural policy and nuclear energy policy should not be shielded from parliamentary debate. They should instead be transferred to formation (2) (b), and possibly in some cases (like nuclear energy policy) to formation (1).

Returning to the field of money and currency policy, any decisions amending the Statute of the ESCB should be based on **Organic Law**. Further decisions, i.e. those which seek to set explicit goals for money or currency policies, or to determine economic policy and the common external trade policy, might be classified as belonging to the governmental sphere rather than to legislation. Therefore one might consider placing them in that category of legal acts which concerns those cases of the delegation of executive powers regulated by the Treaties/Constitution itself.<sup>79</sup> As will be discussed below such legal acts might be called **Community Decrees**.

d) *The Budget Law and related Organic Laws*

aa) *Form and Procedure*

The adoption of the budget is not covered by any one of the types of legal acts provided for in Art. 189. Having passed through the procedure laid down in Art. 203 the budget is "declared" by the President of the European Parliament to have been finally adopted. This is regarded to be a legal act *sui generis*.<sup>80</sup>

Very roughly the procedure of adoption is the following<sup>81</sup>: upon submission by the Commission of a preliminary draft, the Council establishes the draft budget. Compulsory expenditure may be "modified" by the EP (absolute majority of votes cast), but the Council can supersede this, acting on a qualified majority. Non-compulsory expenditure may be "amended" by the EP (majority of its members); the amendments may be "modified" by the Council (qualified majority), but retained by the EP (majority of its members and three fifth of the votes cast). This means that in the case of compulsory expenditure, the Council, and in the case of non-compulsory expenditure, the EP has the final say.

79 See on this category intra p. 46.

80 See in more detail Th. v.d. Vring, Budgetary process, in this vol., p. 470.

81 R. Bieher in v.d. Groeben/Thiesing/Ehlermann, *Kommentar zum EWG-Vertrag*, 4th edition 1989, Art. 199 note 21.



The adoption of the budget is, however, accompanied by some other legal acts which limit the discretion of the Budgetary Authority (i.e. the EP and the Council)<sup>82</sup>. A Council Decision, adopted by the Member States, determines the EC's resources, including maximum shares in VAT income (serving as a subsidiary source to revenue from charges and customs duties), and maximum shares of the GNP (serving as a subsidiary to the revenue from the VAT shares).<sup>83</sup>

On the basis of annual decisions the Commission fixes a maximum rate of increase in relation to non-compulsory expenditure. These decisions can be overturned by agreement between the Council and the EP.<sup>84</sup>

Agreements of this kind have been twice concluded. The more recent one, concluded between the EP, the Council and the Commission in October 1993,<sup>85</sup> determined the upper limits for the own resources for 7 years to come and fixed the increases in non-compulsory expenditure. The ceilings are divided into 5 rubrics containing different policy fields (so-called financial perspective).

In addition, the Inter-institutional Agreement has established an ad hoc conciliation procedure between the EP and the Council which is designed to facilitate checks as to which expenditures estimated in the preliminary Commission draft of the budget must be regarded as compulsory.

Considering possible reforms, it might be suggested that the result of the budgeting process be promulgated in the form of a Community Law. Like other laws, this Law would require the signatures of the Presidents of the EP and the Council (Art. 191).

One might consider whether the procedure should not be assimilated with the general codecision procedure (as is the case with national budgetary procedures such as the German one).<sup>86</sup> After all, with regard to compulsory expenditure, the Inter-institutional Agreement described above has already instituted a conciliatory procedure which, as a type, also exists at the core of the codecision procedure. But the differences are probably still too large (or should rather be removed by approximation of the codecision to the budgetary procedure). In particular, the budgetary procedure is constructed on the hypothesis that the probability of a final impasse should be low. By contrast, the codecision procedure can more easily result in a non-decision. Nevertheless, a procedural reform appears to be necessary.

First of all the difference between compulsory and non-compulsory expenditure should no longer be determinative for the voting powers of the participating organs.<sup>87</sup> As was shown, practice itself has already developed a viable solution which is based on conciliation between the EP and the Council, the Commission having the

82 Th. v.d. Vring, in this vol., p. 481.

83 Decision 88/367/EEC, Euratom on own resources, OJ L 185 (1988).

84 Art. 203 para. 9.

85 Inter-institutional Agreement October 29 1993 on budgetary discipline, OJ C 331 (1993).

86 Art. 110 para. 3 Grundgesetz provides some specialties but in general the normal law-making procedure applies.

87 Th. v.d. Vring, in this vol., p. 485.



final word in cases of lasting conflict between the other two organs. This solution might be included in any reformulation of the Treaty.

With respect to concerns about strengthening of the rights of the EP in regard to the agricultural sector, a special **agricultural financing law** may be considered to guarantee the main elements of the financing of the agricultural policy. Such a law should, however, also contain the special precautionary mechanism developed in the Council's Decision on budgetary discipline.<sup>88</sup> This law would be concluded with a codecision from the EP and unanimity in Council and be given higher rank than budgetary law. This means that it would count as an **organic law**. Apart from this law (or even including it) another organic law, likewise concluded with a codecision of the EP and unanimity in Council, should be promulgated and should contain the financial perspective now included in the Inter-institutional Agreement on budgetary discipline, i.e. the predetermination of the upper limits for the main policy fields for a certain period of time.

*bb) Legal Effect*

The budget as approved and declared to be approved, has and should, as a Budget Law, have the following legal effects:

- (1) The relevant organs are empowered to spend the provided means. This, however, does not imply that they do not need additional substantive powers. At the very least, expenditures of a significant amount (approx. 50 million ECU) are regarded as requiring a substantive legal basis<sup>89</sup> irrespective of whether the spending of the sum would interfere with individual rights (e.g. of competitors) or not. There is presently doubt whether those commentaries which the EP sometimes attaches to expenditure items in order to qualify the flow of expenditure, have legal effect.<sup>90</sup> It is submitted that the commentaries bind the implementing organ if they do not contradict specific conditions set by substantive law nor deviate from the basic goals of that law. A clarification along this line may be achieved by revising Art. 205.
- (2) No rights or duties for individuals are created by the budgetary law.
- (3) The Member States are obliged to provide the revenue approved by the budget (provided this meets the limits set by the above proposed organic laws on financial perspective).
- (4) To a certain extent the next budgetary process is bound by the previous budget.<sup>91</sup>

Further clarification is needed with regard to expenditure envisaged within the framework of intergovernmental co-operation, i.e. the Common Foreign and

88 Decision 88/377, OJ L 185 (1988). See Th. v.d. Vring, in this vol., p. 477.

89 Cf. R. Bieber in v.d. Groeben e.a. Art. 199 note 21.

90 See further Th. v.d. Vring, in this vol., p. 479.

91 Th. v.d. Vring, in this vol., p. 485.



Security Policy and Co-operation in the fields of Justice and Home Affairs.<sup>92</sup> In the absence of a binding legal act such expenditure cannot be regarded as compulsory. On the other hand, the EP should not be totally free to refuse adequate funds in the case of such joint actions. In principle then, the role of the EP in such cases should generally be restricted to that of the application of technical budgetary criteria (such as economy and efficiency). It should also, however, in particular cases, where it feels it has been unduly excluded from the consultation process, be entitled to let its political stand merge into its budgetary decision.

Summing up, with respect to certain peculiarities of its origin and effect the budget decision may not simply be framed as a "Community Law" but given the special status of a "Budget Law".

#### e) *Law and Convention on EC Resources*

As has been noted, according to Art. 201 provisions relating to the system of Community resources have the double nature of a Council decision and an international agreement requiring adoption by the Member States, which in most cases will mean by the national parliaments. Given the fundamental significance of those provisions, it may be suggested that this double nature be retained but that at the EC level the co-decision of the EP should be required which means that there should be a Community Law requiring approval by the Member States according to their respective constitutional requirements. This "Community Law and Convention on EC Resources" would be the only case of such a double natured legal act (the other cases provided for by the present Treaties being, we suggest, superseded by organic law).<sup>93</sup>

## V. The Community Decree and the Division of Legislative and Executive Powers

### I. *Introduction*

Art. 145 Para. 3 and 155 Para. 4 ECT, provide that powers for the implementation of legal acts may be conferred on the Council (acting then in an executive function) or the Commission. In common with basic acts, the executive acts are clothed as regulations, directives or decisions. The difference in content is not expressed through the name of the instrument itself, excepting the fact that the Official Journal names the author of each act ("Council regulation", "Commission regulation" etc.) as part of the heading, and provides further information on the procedure of decision-making in

92 Th. v.d. Vring, in this vol., p. 480.

93 See above n. 31



the opening statement of the considerations. The title of a Council Regulation alone, however, provides no hint as to whether it entails a basic, or an executive act.

Questions arise on both the semiotic and the conceptual levels. The first is whether executive legal acts should be given a specific name. For instance, should basic regulations be renamed as Community laws, "regulation" could be used for executive acts.

The conceptual question is more difficult, but needs to be answered if a "regulation" in the executive sense is to be defined. The question is twofold:

- (1) Which should be the executive institutions?
- (2) Which powers should under which conditions be conferrable on them?

We attempt to ascertain the answers by putting the questions into the broader framework of the separation of powers.

## 2. *Division of powers - an applicable principle?*

The separation of powers has traditionally been conceived of as a bulwark against overly powerful power centers. The fragmentation of power and the mutual checks and balances as amongst the divided parts was of primary concern in times of absolutist monarchy. Since then the separation of powers has also become a frame of reference for the design of an optimal division of labour between the institutions of a given political system. As there is no overwhelming single power source concentrated at EC level, the traditional separation of powers is similarly somewhat redundant. However, a division of labour between the institutions of the Community does exist, and in the light of this, it is for our purposes better to speak of 'the division of powers'.

Whether the traditional division into three powers, and more exactly into the legislature, executive and judiciary should also serve as a model for the EC is open to debate. Some suggest that a fourth branch - non-majoritarian regulatory institutions - should be recognized.<sup>94</sup> Whilst we have, at an earlier point, rejected an underlying technocratic vision for the construction of the EC institutions *in toto*, the creation of independent agencies as part of a more complex division of powers is certainly to be considered. One of the problems here is whether this should be restricted to institutions of constitutional value (of which two are already - the ESCB and the Court of Auditors - to be found<sup>95</sup>) or also be opened up as a possibility for secondary legislation.<sup>96</sup> From another viewpoint, the Council (possibly also the Committee of the Regions) could also be conceptualized as a fourth or fifth branch, representing member state interests. This would imply that the Council's role is no longer seen as the core *sui generis* of the Community, "un organe hybride, à cheval entre

94 G. Majone, loc. cit. (FN 16).

95 See Arts. 107 and 188 b para 4 ECT.



l'intergouvernemental et le communautaire",<sup>97</sup> but as only one power-centre among others. Whilst a number of provisions of the EEA and the Maastricht Treaty have undoubtedly reinforced such a change of role, the Council's hybrid nature has as yet certainly not totally disappeared. Therefore it might be premature to simply regard it as another branch among the divided EC powers.

The major question in the framework of this division of powers which is relevant in our context, is whether the distinction between the legislature and the executive should be adopted. It has been argued that the individual functions of the EC institutions are too varied, the Commission, for instance, possessing administrative as well as legislative functions.<sup>98</sup> Division of powers must, however, be understood in functional terms so that different constellations of institutions rather than single institutions would be conceived of as the relevant powers.<sup>99</sup>

Present practice within EC law-making speaks forcefully in favour of adopting such a model. In many fields it has already begun to distinguish between basic legal acts and executive ones. Some examples were mentioned above (ch. IV 2).

### 3. *Identifying the executive branch*

Yet, evolving practice needs further precision. In particular, it is unclear whether the relevant institutional constellations that make up the executive shall be determined in institutional terms or in substantial terms, i.e. by reference to certain kinds of regulatory matter. The difference between these two approaches can be demonstrated in cases of mother and daughter directives (such as Directives 76/464 and 82/176 related to water pollution) which are both issued by the same mixture of institutions (i.e. in the cited case a combination of the Council on Commission proposal and after hearing the EP). The substantial approach would judge from the difference in essentiality/technicality of the content of the directives and conclude that the same institutional mix should be regarded as legislative for the mother, and as executive for the daughter directive. This would, however, be somewhat confusing. **It is therefore submitted that the executive branch should be determined in institutional terms, i.e. by listing the pertinent institutional constellations.** This technique would also correspond to the strategy suggested earlier for the cases of the normal and organic legislator.<sup>100</sup>

For the executive branch the variants found in legal practice are the following:

97 R. Fournasier, *Réflexions sur le procédé de coopération*, in: J. Schwarze (ed.), *Legislation for Europe 1992*, 1989, p. 71.

98 H. Schmitt von Sydow, *Die Verwaltungs- und Regelungsausschlußverfahren der EWG*, 1973, p. 162.

99 K. Lenaerts, *Some reflections on the separation of powers in the European Communities*, CMLR 1991, 11 et seq. (13).

100 See above p. 25 et seq.



- (1) Council alone upon Commission proposal<sup>101</sup>
- (2) Commission alone or together with advisory committees<sup>102</sup>
- (3) Commission together with management or regulatory committees<sup>103</sup>
- (4) Council alone after failure of the management or regulatory committee procedure<sup>104</sup>
- (5) Regulatory agencies<sup>105</sup>

The Commission has repeatedly proposed the elimination of types (1), (3) and (by implication) (4)<sup>106</sup>, while the European Parliament has consistently advocated a solution whereby procedures other than Commission decision-making be instituted under the enabling law (which has been assumed to involve parliamentary co-decision) thus allowing the EP a veto-power in the matter.<sup>107</sup>

The experience with Council executive rule-making has sometimes been other than very convincing. For instance, the Council when acting in absence of formal parliamentary participation may be tempted to circumvent previous legislative decisions. This happened when the Council in the context of the Pesticides Directive, allowed pesticides to infiltrate groundwater at a rate which goes beyond the limits set by the Drinking Water Directive.<sup>108</sup> The former political decision rigidly to protect the groundwater under the auspices of drinking water was readdressed at the implementation stage after pressure from agrarian and industrial interests.<sup>109</sup> In addition, for the agricultural sector at least, it has been shown that the Council when acting in an executive capacity has engaged itself both with matters of a more essential and of a more administrative nature thus failing to develop clear criteria for delineating a genuine sphere, in which it itself might undertake implementation

101 See for the many Council regulations in agricultural policies F. Snyder, in this vol., p. 360 et seq. For another example see Directive 91/414 on the marketing of pesticides (OJ L 230/51 (1991)), Art. 18, where the Council is empowered to lay down common principles for the evaluation of pesticides.

102 J. Falke, G. Winter, in this vol., p. 544.

103 This is the most common combination addressed by regulations and directives, see J. Falke, G. Winter, in this vol., p. 552.

104 This type has in most instances a life-time limited by deadlines, see Council Decision 87/373/EEC, OJ L 197/33 (1987), and J. Falke, G. Winter, in this vol., p. 545 et seq.

105 One first example of an agency possessing regulatory powers is the trade-mark agency. The other so-called agencies have either only information-gathering tasks or consist of not much more than a regulatory committee. See further J. Falke, G. Winter, in this vol., p. 580; M. Everson, in this vol., p. 616 et seq.; also for the need to reconsider the *Meroni*-criteria as to providing agencies with discretionary powers.

106 Report by the Commission on the European Union (1975) and Initial Contributions by the Commission to the Intergovernmental Conference on Political Union (1991), see T. Diedrichsen, in this vol., p. 325, 337.

107 See the EP's Draft Treaty on European Union (1984), Art. 40, commented by F. Capotorti, M. Hilf, F. Jacobs, J.-P. Jacqué, *The European Union Treaty*, 1986, p. 168 et seq.; Herman Report on a Constitution of the European Union (1994) (PE 203.601/fin.) Art. 34. See T. Diedrichsen, in this vol., p. 331, 340 and J. Falke, G. Winter, in this vol., p. 562.

108 See Council Directive 94/43/EEC, OJ L 227/31 (1994), Appendix No. 2.5.1.2.

109 The EP protested against this proceeding, see Resolution B3-1736/93, OJ C 20/43 (1993).



measures. The vast policy area *de facto* controlled by the Council in agriculture has at the same time kept to a minimum the space for legislative action based on the participation of the EP.<sup>110</sup>

One might therefore consider whether the Council should cease to act as a part of the executive. This would not preclude the creation of legislative measures which are a combination of mother and daughter legal acts. Only the daughter act must also be the subject of the normal legislative procedure.

But a suggestion of this kind would disregard the fact that executive matters can be highly controversial from the national point of view, and need therefore be reserved to the Council in those cases. Agricultural policy, e.g. the fixing of intervention prices, provide examples of this kind. **Therefore the possibility that the Council might issue executive regulations should be retained.** Their realm of application should, however, be confined to the very minimum. Of course, such regulation would have to abide by the provisions contained in the Ground Law.

**The possibility of instituting management and regulatory committees should also be preserved.** Those committees have already proved their ability to feed expertise into EC rule-making and to integrate diverging national and social interests and cultures.<sup>111</sup> Some adjustments nevertheless appear to be advisable:

First of all, **a logical matching of committee type and function should be found.** Only one type of management committee procedure should be offered which implies that the period of deferred application of the Commission proposal would be fixed once for all, exceptional abbreviation or prolongation remaining possible by order of the specific legal act. - In some regulatory committees the political aspects, as promoted by the envoys of national ministries, are overstressed. Care should be taken that the **technical aspects prevail**, which implies that experts from national technical agencies (if there are any) should be present. - Moreover, **the access of social, consumer and environmental interests to the committee working groups should be rationalized.** - **The regulatory committee type IIIb<sup>112</sup> should be abandoned.** - **The EP or the pertinent EP committee should, together with the Council, be given a right of evocation whenever the management committee has opposed to or the regulatory committee has not disputed the terms of the Commission proposal.<sup>113</sup>** Whether the EP (or a competent EP committee) ought also to be able to retain powers of participation (e.g. a **reservation of approval**) in executive rule-making, is difficult to answer. Some member state constitutions (or constitutional customs) indeed provide for this with regard to their national parliaments.<sup>114</sup> However, the large number of executive rules made at the EC level advises against such a possibility. Legislative and executive functions would thus be overburdened. Such powers might logically

110 F. Snyder, Agricultural policy, in this vol., p. 380.

111 See further J. Falke, G. Winter, in this vol., p. 569 et seq.

112 It goes without saying that the originally proposed but not adopted variant III c where the competence remains with the Council should not be introduced. See C.D. Ehlermann, *Compétences*, RMC 1988, p. 232 et seq.

113 J. Falke G. Winter, in this vol., p. 580.

114 See for the Netherlands C.A.J.M. Kortmann, in this vol., p. 132; for Britain R. Macrory, in this vol., p. 83; for Germany K.-H. Ladeur, in this vol., p. 257.



also need to be given to the Council - which would make delegation structures even more complicated. Therefore, in contrast to that which the EP has proposed in this respect,<sup>115</sup> we do not support the establishment of a right of participation for the EP in the routine executive rule-making.

Contrary to the EP position, it is submitted that the catalogue of committee procedures should be regulated by a separate legal act. Council decision 87/373 could serve as a starting point, although the form of the act should be a Community Law, more specifically an Organic Law.<sup>116</sup> The decision on which type of procedure shall apply in which cases should be taken in line with the above mentioned EP proposals, i.e. by those legal acts which regulate the related substance matters. The constitutional basis for the committee system should be laid down in Art. 155 rather than Art. 145 ECT, or else (and even better) in a newly drawn up chapter on the legislative function.

To the extent that regulatory agencies are considered appropriate - we submit that their primary field be restricted to repetitious, administrative and routine-matters, like e.g. the classification of chemical substances, whereas the constitutional type agency is left out in the present context<sup>117</sup> - a general power of instituting them should, however, be included into the Treaties in order to slightly widen the very restrictive criteria established by the Court of Justice in its Meroni doctrine.

#### 4. Powers of the executive and their attribution

In principle, logic would appear to demand that only those kinds of powers which can truly be called executive be conferred on what has been carved out as the executive branch. However, the Treaties, as well as some member state constitutions, point in other directions which will be discussed before the core question - conferral of executive powers - can be tackled.

##### a) Genuine legislative powers of the executive?

According to the French constitution of 1958, the government possesses genuine legislative powers alongside and separate from those of the parliament.<sup>118</sup> Their use leads to legal acts which, although named *décrets*, have the status of a law. As this constitutional tradition is singular among the EU member states (and might in any

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115 Resolution of the EP December 16, 1993, OJ C 201/176 - 178 (1994). See J. Falke G. Winter, in this vol. p. 579.

116 On the form of legislation concerning organisational matters see below and R. Bieber, B. Kahil, in this vol., p. 448.

117 M. Everson, in this vol., p. 618; J. Falke, G. Winter, in this vol., p. 580.

118 Arts. 34, 37.



way be strongly criticised<sup>119</sup>), it should not be taken as a model for the EC version of the separation of powers.

The Treaties themselves, it is true, distort the ideal of a neat system of divided powers. Although caused by reasons other than those underlying the French model they nevertheless contain provisions which confer powers of a legislative bearing on the Commission, as in, for instance Art. 48 para. 3 d (conditions for foreign workers to remain in the state of employment) and Art. 90 para. 3 (application of competition rules to public undertakings). It may be suggested that this endowment of the executive with legislative powers through the Treaties/Constitution should be removed.<sup>120</sup>

b) *Legislative powers in cases of legislative inaction?*

The Italian and Spanish constitutions endow the government with powers to act in the place of the legislator if circumstances of an extraordinary and urgent necessity so require.<sup>121</sup> The resulting acts are called '*decreto legge*' or '*decreto ley*', respectively, and have the status of a law. They are valid only for a short period of time if not approved by the legislator or reenacted by the Government. While in Spain modest use has been made of the power,<sup>122</sup> it has frequently been misused in Italy.<sup>123</sup>

This possibility of misuse (although of different nature in the EC) advises against the adoption of such a device for the EC system. Those cases of legislative inaction and imperative action which already occurred at the EC level, have been deemed not to fall within the competence of the Commission. As was stated by the ECJ<sup>124</sup>, the relevant competence should revert to the member states although the consent of the Commission must also be sought to the point where the necessary coordination of measures can be secured.<sup>125</sup>

c) *Delegation by law of legislative powers to the executive?*

The French and Italian constitutions provide for the possibility that legislative (as distinct from executive) powers may be delegated by a law to the government.<sup>126</sup> The resulting acts are called '*ordonnance*' or '*decreto legislativo*', respectively, and, replacing a law, gain the status of a law.

119 M. Miaille, in this vol., p. 159.

120 See further J. Kalbheim, G. Winter, Delegation, in this vol., p. 584.

121 Art. 77 Italian constitution (cf. A.A. Cervati, in this vol., p. 224; Art. 86 Spanish constitution (cf. L.M. Dfiez-Picazo, in this vol., p. 197).

122 L.M. Dfiez-Picazo, in this vol., p. 198.

123 A.A. Cervati, in this vol., p. 224.

124 ECJ May 5, 1981, Case No. 804/79 (Commission v UK), ECR 1981, p. 1067.

125 J. Kalbheim, G. Winter, in this vol., p. 585.

126 Art. 38 French constitution, see M. Miaille, in this vol., p. 157 et seq.; Art. 76 Italian constitution, see A.A. Cervati, in this vol., p. 226.



However, besides the difficulty to neatly distinguish between legislative and executive powers the possibility of delegating legislative powers discourages the legislature to take its own role seriously. Therefore, only powers to delegate (or, more exactly, attribute) executive powers to the executive should be provided.

d) *Autonomous powers of the executive to enact executive regulations?*

A constitution may allow the government to enact executive regulations even in the absence of a delegating law. The government need only respect those legislative reservations, which constitutional provisions establish.<sup>127</sup> The German constitution (Art. 80 GG) is generally understood to ban this kind of "gesetzesunabhängige Rechtsverordnung" (a regulation without a law).<sup>128</sup>

EC competences are framed such that for every competence, there is a clear stipulation of the institutional setting required for their exercise. Therefore a general autonomous rule-making power cannot be envisaged in terms of the EC institutional system. However, the Treaties may themselves bestow specific powers on the executive such as powers of the Council or the ECB in the framework of implementing the Monetary Union where there is justification for making decisions independent of parliamentary majorities. The resulting acts may be called **Autonomous Decrees**.

e) *"Spontaneous" powers executing a Law?*

Two concepts may be distinguished: either an explicit attribution of powers must be made by an individual law, or the executive is, under the constitution, given a general power to issue executive rules under any law which leaves space for such rules. The latter solution is to be found in Art. 21 of the French Constitution, which provides the Premier Ministre with a power characterized as a "pouvoir réglementaire certes subordonné mais spontané".<sup>129</sup> Bestowing such power on the Commission has repeatedly been proposed by the EP and the Commission.<sup>130</sup> By contrast, Arts. 145 and 155 ECT have opted for the first solution. It is submitted that the first solution, i.e. the explicit attribution of powers should indeed be retained; the main reason being that the distribution of the executive competences among the Member States and the EC executive would otherwise be confused.<sup>131</sup>

127 The Spanish constitution can probably be seen to be a case in point. See L.M. Díez-Picazo, in this vol., p. 199.

128 K.H. Ladeur, in this vol., p. 259. For a different view see W. Böckenförde, *Gesetz und gesetzgebende Gewalt*, 1981, p. 395 et seq.

129 J.C. Blumann, RTDE 1988, p. 26. See M. Miaille, in this vol., p. 173.

130 See e.g. EP Draft Treaty on European Union (1984), Art. 34, commented by F. Capotorti in Capotorti/Hilf/Jacobs/Jacqué, *loc. cit.*; Commission Contributions to the Intergovernmental Conference on Political Union (1991). Cf. T. Diedrichsen, in this vol., p. 337, 340.

131 See J. Kalbheim, G. Winter, in this vol., p. 599.



f) *Delegation of powers executing a Law*

How broad the powers are which the legislature may confer on the executive is conceptualized in two different ways by the member states' constitutions; both ways being functionally equivalent.

The first is to distinguish between legislative and executive tasks and to derive limits for the delegation (if any) from the definition of what 'executive' in fact means. More precisely; within this construction one might better speak of an "attribution" of executive powers since *stricto sensu* only legislative powers may be "delegated".<sup>132</sup> Where the government possesses executive powers in its own right, a law which deals with executive tasks must then be understood as an "invitation" by the legislature to the government to make use of its executive powers.<sup>133</sup> The second concept sees the powers which are conferred as vested in the legislature. The thrust is here on setting requirements for delegation. By such delegation the originally legislative powers are transformed into executive powers.

The first route is taken by France,<sup>134</sup> Spain,<sup>135</sup> and Italy,<sup>136</sup> the second by Britain, Denmark, the Netherlands and Germany.<sup>137</sup>

Arts. 145 para. 3 and 155 para. 4 ECT, seem to have been framed in the French tradition. This means that what may be conferred to the Commission and what not must be delineated by interpretation of the term implementation (in French: *exécution*). The Court of Justice has done so by reading those terms to require that the basic legal act must fix the "essential elements" of the matter thereby implying that *exécution* means deciding about non-essential matters.<sup>138</sup> It is, however, submitted that for the sake of greater clarity the second route should be taken. This means that the preconditions for conferral of powers should explicitly be written into the Treaty. The proper place is Art. 155 rather than Art. 145 or, even better, a new provision in a new section on legislation.

Of greater importance than the conceptualization of the delegation requirements (in the background of which more basic differences in constitutional history are hid) is their content. At first sight it is striking to note that constitutions with such varied regards for the place of parliaments, with the French (of 1958) on the one side and the Dutch, Danish and British on the other, reach the same conclusion, i.e. they allow for the delegation of very broad powers.<sup>139</sup> The reasons underlying such a similarity

132 A.A. Cervati, in this vol., p. 226.

133 R. Klisch, *Gesetz und Verordnung in der Verfassung der 5. französischen Republik*, 1971, p. 216.

134 For France: see M. Miaille, in this vol., p. 172.

135 For Spain: see L.M. Díez-Picazo, in this vol., p. 199.

136 For Italy: see A. Cervati, in this vol., p. 226.

137 See for Britain R. Macrory, in this vol., p. 79; for Denmark I. Jarvad, in this vol., p. 114; for the Netherlands C.W.A. Kortmann, in this vol., p. 131; and for Germany K.-H. Ladeur, in this vol., p. 259.

138 See J. Kalbheim, G. Winter, in this vol., p. 590.

139 For France see Art. 38 Constitution according to which legislative powers may be conferred to the government. For Denmark and the Netherlands see Jarvad, in this vol., p. 114 and Kortmann, in this vol., p. 133. In Britain there is an understanding that questions of principle should be a matter



are, however, diametrically opposed. Whereas in the first group, broad delegation is based upon a kind of mistrust in the ability of parliament to fulfil its legislative tasks, in the second, this is done in the belief that parliament itself knows best when and what to delegate. Germany falls somewhat in the middle, on the one hand also displaying mistrust, but on the other, exhorting parliament to take its role seriously by stipulating the determination of the content, goal and scope of the delegated powers (Art. 80 para. 1 sentence 2 Grundgesetz). In addition, the *Wesentlichkeitstheorie* (essentiality test) developed by the BVerfG, requires that all essential matters be decided by parliamentary statute.<sup>140</sup> The Court of Justice establishing its essentiality criterion, but showing flexibility has gone part of the way down the German path.

It may be suggested that the criterion of essentiality should be taken up in the drafting of a related treaty provision.

##### 5. *The selection of the executive institutional setting*

As there are several kinds of institutional setting upon which executive powers may be conferred, criteria are needed for selecting the most appropriate ones. These cannot be developed here in any great detail, and it would probably be premature (if advisable at all) to establish such criteria at the Treaty/Constitution level or by way of an organic law. The direction in which further discussion might go shall nevertheless be detailed below.<sup>141</sup> The following list is a first sketch:

**Council alone:** rules and decisions which are highly controversial from the member states' perspective, or which should be made independently from majoritarian institutions.

**Commission plus regulatory committee:** rules related to technical or economic problems with political implications.

**Commission plus management committee:** rules and major decisions related to technical or economic problems arising out of differences between the practical administrative implementation of the law by national agencies.

**Adjudicatory agencies:** rules and decisions related to the routine administrative implementation of a law which needs to be undertaken on the EC level.

**Professional standardization organisations:** rules establishing technical standards not implying far-reaching consequences for human health and the environment.

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for primary legislation, and matters of detail to the secondary, but in strict legal terms parliament is not hindered to delegate matters of principle. See Macrory, in this vol., p. 80.

<sup>140</sup> The exact relationship between Art. 80 Grundgesetz and the *Wesentlichkeitstheorie* is not yet clear doctrinally. The latter has in any event a broader field of application because it covers also executive action in individual cases while Art. 80 is confined to executive rule-making (see K.-H. Ladeur, in this vol., p. 241, 256).

<sup>141</sup> See further J. Falke, G. Winter, in this vol., p. 580 et seq.



**Commission alone or plus advisory committees:** everything listed above as a subsidiary; anything else, including rules and decisions on problems needing expeditious and flexible reaction.

#### 6. *"Regulation" or "Decree"?*

Calling the executive act a "regulation" (Verordnung, règlement) would appropriately point to the fact that the act is executive in character. However, as it would be impossible to rename the large number of existing EC legal acts, confusion might arise as to the old and new definitions of such regulations. "Decree" (Dekret, décret) might be a viable alternative which, from the national constitutional perspective, adequately connotes the executive character of the legal act. As "regulation" is often also used as a generic legal or sociological term, the doctrinal and sociological description of EC law production would also benefit from a more specific name.

### VI. Directive Act / Decree and the problem of confederal subsidiarity

#### 1. *Introduction*

Assuming both a Community Law and a Community Decree are introduced as legal tools, it is appropriate to ask whether both of these should be divided into a full and a partial variant. This was, for instance, proposed by the EP Institutional Committee in its report Bourlanges.<sup>142</sup>

If such a division is endorsed in principle it must be given a precise shape. Drawing on the distinction made between the regulation and the directive seems to suggest itself in this respect. Alternately, recourse might be made to the distinction drawn between full law and framework law, or full law and principle law as it is deployed in some federal states, most notably in Germany.

#### 2. *The apparatus of confederal subsidiarity*

Confederal subsidiarity must be distinguished from that general form of subsidiarity which is used to describe the relations maintained between individuals and the state. It must be understood as a broad concept structuring the relationship between the Member States and the European Union, and provides a rich apparatus. The major instruments include

<sup>142</sup> OJ C 129/136-139 (1991).



- the principle of limited **individual entitlement** to competences, i.e. the denial of a competence-competence;
- the confining of several competences to the establishment of **principles** rather than full-blown regulation;
- the **subsidiarity** principle in the narrower sense, which must be respected even if a competence is given;
- the **proportionality** principle as applied to the exercise of a competence.

Confederal subsidiarity is also built into the various rules which constitute the **preemption effect** of secondary EC law, in particular the rule that more extensive national measures are possible when the EC legal act primarily aims at other goals than perfecting the Internal Market (e.g. Art. 130s ECT), or in case of safeguard clauses (e.g. Art. 100a para 5 ECT).<sup>143</sup> A rigorous application of the subsidiarity principle to the concept of preemption would even suggest that harmonization measures (those of the active, not of the reative kind) are to understood as more minimum harmonization which allow for stricter national measures.<sup>144</sup>

The category of a directive is a further expression of the subsidiarity principle. Given the apparatus listed above which exists alongside that category it may be questioned if the directive as it stands and a directive or framework law as it may be considered for the future is really necessary. Should it not be left to the legislator to decide under the subsidiarity and proportionality principles when and to what extent to confine the content of an envisaged legal act to setting a goal or frame?

The greater **flexibility** entailed, speaks favour of an affirmative answer, since instead of a clear-cut either-or solution, a whole range of different intensities of regulation would be made possible. **Transparency** on the contrary, speaks against such an approach. The retention of two forms of act would allow for further clarification in relation to questions of how detailed a regulation need be, whether it has direct effect, and how legal protection might be secured. Thus for example, if one of the forms of act were to be made directly effective as a *category*, then the legislator, in choosing that particular form of act, would similarly be making a statement as to whether it have direct effect or not. The alternative solution would entail the explicit statement of the nature of effect in each and every regulation.

Whether an EC legal act is directly effective or alternately, whether transposition is necessary, is not only of technical importance for the national legislator. For instance, in the case of a directive (even one containing very detailed provisions) the member state can continue to making use of traditional legal terminology while in the case of a regulation it must divulge this in favour of the often unfamiliar EC nomenclature. Regulations in particular lead to the fragmentation of the national legal systems where national laws come to exist besides EC laws. This renders systematic codification

<sup>143</sup> A. Furrer, Preemption, in this vol., p. 525 et seq.

<sup>144</sup> This is forcefully advocated by A. Furrer, in this vol., p. 527 et seq. See also Furrer's proposal for a codification of preemptive effects where a number of different checks are combined



efforts almost impossible. It may therefore be suggested that in terms of intensity and direct effect of regulation two different types of legal act should be retained.

### 3. *Construction problems of the directive*

When designing the two types of act on the basis of the distinction drawn between regulations and directives, sight should not be lost of the fact that both instruments have over the years developed a manner which in certain respects deviates from the original concept. With regard to the extension of the substantive content, regulations are not always exhaustive. For instance, Art. 13 para. 1 of the Regulation on the shipment of waste<sup>145</sup> leaves it to the member states to decide whether to also adopt the control system set for cross-border shipments for internal shipments, or to establish a different system which must however be compatible with the Community system.<sup>146</sup> Directives, on the other hand, have very often been used for exhaustive formulation.<sup>147</sup>

Similar confusion has been noted with regard to **direct applicability**.<sup>148</sup> Regulations often allow or even force the member states to adopt transformation legislation. The directive, on the other hand, although designed not to have primary direct effect has been deemed to have 'secondary' direct effect after the expiry of the deadline for transposition.<sup>149</sup>

Increased similarity between the two forms can thirdly be observed in that regulations as well as directives establish no longer merely legal relationships within the member states and impose transposition duties on the member states, but also impose other duties upon the member states and their administrative agencies (which then are directly addressed), for example duties to submit information (reports, programmes, data received in licensing or notification procedures, etc.).

This threefold convergence between the two forms is, however, not the only problem requiring clarification. A further problem is that the development of the doctrine of the (secondary) direct applicability of directives might similarly be strongly criticized. The doctrine of direct applicability besides requiring that the provision in question be sufficiently precise and not open to interpretation, also presupposes that a situation of estoppel exists between an individual and the state. This means that the failure to transpose a directive has left such an individual relatively disadvantaged under national law. The inverse of such a situation, where the failure to transpose a directive has left the individual with an advantage under national law, is thus taken as precluding the doctrine of direct applicability. This

<sup>145</sup> Council regulation No. 259/93/EEC, OJ L 30/1 (1993).

<sup>146</sup> See for more examples Th. Adam, G. Winter, in this vol., p. 514 et seq.

<sup>147</sup> See G. Winter, Directive, in this vol., p. 488.

<sup>148</sup> "Direct applicability" refers to what the law-applying institutions do, while "direct effect" points to what changes result in a given system of rights and duties. See K. Lenaerts, Constitutionalism and the many faces of federalism, *AmJCompL* 1990, p. 210.

<sup>149</sup> The terms "primary" and "secondary" are introduced for the sake of brevity.



holds true regardless whether the individual be in a 'vertical relationship' with the state, a triangular relationship with the state and a third party, or a 'horizontal' relationship with parties other than the state or its regulatory agencies. The importance of the preclusion of direct applicability is apparent if one of the parties in such a relationship is 'burdened' by the advantageous position of the other.

Arguments might be found to show that estoppel situation should similarly exist in such cases. Arguably the offending member state is acting unfaithfully, and even in violation of the non-discrimination principle (Art. 6) in relation to the foreign competitors of the advantaged national citizen who are disadvantaged by a national law which has already implemented the directive. Moreover, the offending member state acts unfaithfully vis-à-vis its own national citizens drawing a benefit from the directive to the disadvantage of any of fellow citizens.<sup>150</sup>

On the other hand, the rule of law, requiring a clear legal basis for burdensome governmental action, may speak against the unlimited direct applicability of directives.

#### 4. *Recourse to the framework law?*

If it is felt that a concrete effort must be made to redesign Community legal acts so as to re-establish the harmonized and comprehensive application of Community norms by each of the member states, it may prove worthwhile to make recourse to evoking models of full and framework law, for example (because of their long tradition), as they have been developed in Germany.<sup>151</sup> A closer examination, however, raises doubts as to whether the adoption of the concept of the German framework law would prove helpful. It might even cause additional problems.

As regards the extension of content, the framework law differs radically from the directive. Whilst in the case of the directive, the ECJ has refrained from (legally) requiring that the content of a directive be limited in detail, the German Bundesverfassungsgericht has ruled to this effect that framework laws must be minimal in character. This requirement has recently also been written into Art. 75 GG. In practice, however, the test similarly has proven to be very weak. At the European level many legal battles might be expected if a similar requirement were to be established. Given the often very diverse perceptions and cultures of national law, the vagaries of the transposition process often requires detailed directions in the directive itself, in order to secure harmonised implementation. Therefore, it is submitted that the proposed partial law should not be constructed so as to constitutionally require the EC legislature to refrain from detailed instruction-

<sup>150</sup> See the discussion of these arguments by General Advocate Lenz in the Dori case, ECJ Case No. C-91/92 of Conclusions presented Febr. 9, 1994, n.y.r. See also G. Winter, *Directive*, in this vol., p. 503.

<sup>151</sup> For the Spanish concept of a framework law see Díez-Picazo, in this vol., p. 206.



giving. Such restraint should be a matter for political orientation and possibly for the subsidiarity and proportionality principles.<sup>152</sup>

With respect to **direct applicability** the German framework law offers the possibility of combining directly applicable provisions with provisions which need to be transposed into Länder laws.<sup>153</sup> As stated above, directives often contain provisions which impose duties other than to transpose the directive on the Member States or Member State agencies, for example, information duties. Directives, however, do not contain (and would not be allowed to contain) obligations having a direct effect upon individuals (except in cases of non-transposition). The said element within the framework law appears to provide for some flexibility which might be considered appealing also for the EC level. For the sake of clarity of the typology of Community Law it is however not recommended that the possibility of primary **direct effect** for some provisions should be recognized in the proposed partial law, except for such provisions which impose specific obligations on specific member state agencies.

Curiously enough, as regards (secondary) direct applicability as a sanction for non-transposition, there is no such device in the German framework-law concept. The sanction which is provided, resembles the Arts. 169, 170 procedure: the Bund can take the Land to the BVerfG for the non-compliance of a Land law with the Bund frame-work law, or (in case of a failure to enact a Land law) for breach of the constitutional duty (Art. 75 para. 3 GG) to enact a Land law (Art. 93 para. 1 Nos. 2 and 3 GG).<sup>154</sup> However, in a basically homogeneous federal state, as Germany is, there is no urgent need for stricter sanctions because the Länder normally follow suit. In the much more heterogeneous EC the ECJ has rightly identified the Art. 169, 170 procedure as insufficient and has developed the possibility for individuals to invoke directives as a supplementary device. But sadly, the ECJ has halted halfway in the development of this doctrine, giving rise to concerns about the priority of the rule of law over estoppel and non-discrimination considerations. Those concerns could, however, be simply dispelled by a definition of the partial law which, in contrast to the formulation in Art. 189 para. 3, clearly states that direct applicability shall result after the failure to meet the deadline for transposition in all cases of precise and unconditioned provisions including those of disadvantageous effect (except where this leads to penal sanctions).<sup>155</sup>

Lastly, the German concept of framework law has not developed a clear-cut notion of a framework executive act. It is not even clear if the Bund possesses the power to issue implementing regulations at all, or if it must leave any such regulation to the Länder.<sup>156</sup> The EC, however, would seem to require a form of partial regulation (or,

152 See G. Winter, Directive, in this vol., p. 490.

153 See Th. Adam, G. Winter, in this vol., p. 290. By contrast, the Spanish framework law is directly applicable in toto being constructed not as a norm of a higher order than the regional laws have but as a norm relying on a juxtaposed concurrent competence of the state and having a preemptive effect on diverging regional law. See Díez-Picazo, in this vol., p. 206.

154 See Th. Adam, G. Winter, in this vol., p. 294.

155 G. Winter, Directive, in this vol., p. 506.

156 Th. Adam, G. Winter, in this vol., p. 285.



within the catalogue proposed here: decree) with a clear character, including secondary direct applicability.

Summing up, the reference to the German framework law has demonstrated that a simple adoption of the concept would not be possible. This does not mean that the concept could not be enriched and adapted to EC needs. Still, doubts remain as to whether "framework" would be the metaphor most appropriate for the task to be fulfilled. In German legislative practice, framework laws have often established principles which need further concretization by the Länder.<sup>157</sup> Other laws contain partial or minimum harmonization which may be complemented by more detailed Land laws.<sup>158</sup> Neither of these variants are well represented by the notion of a framework. Alternately, one might conceive of the adoption of a **principle law** which is also to be found in the German constitution (and in fact was the historical predecessor of the framework law).<sup>159</sup>

But, more fundamentally, both "principle" and "framework" presuppose that the territories to be integrated are basically homogeneous, i.e. have a more or less common understanding of the terms used by such law and are politically not so disconnected as to overexploit the latitude left them. The EC is, however, different. It must provide more than a partial harmonization. On the contrary, it must create conditions which ease all of the member states into a new organization (the internal); a task made more difficult in an area of heterogeneous legal traditions and political orientations. For this task, planning in terms of goals and means/forms, in other words of "direction", appears to be more appropriate. Moreover, this rhetoric is better suited than the "principle" and the "framework" to the fixing of envisaged goals in quantitative terms, an instrument much in use in EC law,<sup>160</sup> and understandably so, since figures can less easily be differently interpreted than principles.

In sum, it appears to be preferable to retain the notion of a **directive**. It should, however, be given a clearer legal construction (including secondary direct applicability in all cases excepting those of penal sanctions). In the context of this here proposed system of legal acts the establishment of the categories of **Directive Law/Full Law** and of **Directive Decree/Full Decree** is suggested.

A further advantage of this terminology is that confusion is avoided with regard to other possible meanings of the term "framework law". The EC has itself used the expression for legal acts which assemble the basic principles of a policy which is distributed amongst a larger number of not always very well coordinated legal acts which furthermore contain the delegation of implementing powers to the

157 For instance, Art. 6 Federal Water Act provides that a license for utilizing public waters must be refused if the "public welfare" is harmed. The Länder must specify what "public welfare" means.

158 For instance, Art. 29 Federal Nature Protection Act establishes a special right of nature protection associations to participate in associative proceedings. The Länder may go beyond this by giving the associations also a right of action in court.

159 Th. Adam, G. Winter, in this vol., p. 206 et seq.

160 See e.g. the limits set for sulphur-dioxide emissions by Directive 88/609, OJ L 336/1 (1988). The limits are overall thresholds for each Member State and graded in the temporal dimension.



Commission.<sup>161</sup> "Framework" in this context is understood as a framework for implementation by the executive (rather than by the Member States). This notion is also known in some of the Member States, in particular in France ("loi cadre").<sup>162</sup> As a doctrinal concept, not as a separate legal type the notion of a Framework Act (not: Framework Decree) might be retained for the EC system of legal acts.

## VII. The Commission circular and the problem of Member State administrative implementation

### 1. Introduction

In principle, the Member States are responsible for the administrative implementation of EC law, which is especially noteworthy in respect to directly applicable EC legal acts. This decentralized system however needs coordination. This can, to a certain extent, be arranged "horizontally" by the Member State administrative agencies themselves<sup>163</sup>, but will still also require substantial input from the Commission. Questions which arise in the daily administrative round are often too detailed and need too speedy a solution to be left to formal executive rule-making. Additional tools appear to be necessary. The following will investigate whether the EC system is adequately equipped in this respect.

### 2. National models

The German constitution provides the Bund with the consent of the Bundesrat with the power to address binding administrative guidelines to the Länder in the areas of 'genuine and mandatory execution' by the Länder of Bund laws (Arts. 84 para. 2, 85 para. 2 GG)<sup>164</sup>. In contrast, neither the Spanish state enjoys such powers vis à vis the Regions<sup>165</sup> nor the Dutch state vis à vis the Provinces<sup>166</sup>. Nevertheless the central body in these countries also issues statements of an informal character which provide guidance for the decentralized agencies. A similar practice can be observed in Britain

161 See, for instance, the Commission proposals for a directive on air quality (OJ C 216/4 (1994)) and on water quality (OJ C 222/6 (1994)). The name "framework directives" was used in the XXVIII. General Report of the Commission on the activities of the EU, 1995.

162 M. Miaille, in this vol., p. 160.

163 Recently efforts have been made to strengthen such a "third level" of administrative integration, see Commission Communication on the development of the cooperation of the administrations in the application and enforcement of Community law for the internal market, Com(94) 29 final February 16, 1994.

164 See H. Adam, Administrative guidelines, in this vol., p. 310 et seq.

165 See L.M. Díez-Picazo, in this vol., p. 207.

166 See C.A.J.M. Kortmann in this vol., p. 139.



as to information addressed by ministries to local authorities<sup>167</sup>. These statements are used to interpret the law by authorities and courts. They are also used to explain the conditions under which the superior body will make use of its supervisory powers or may withdraw services or funds. Precisely these latter possibilities give the *prima facie* informal tools an indirectly binding effect, which in sociological terms may be called a binding effect in the shadow of formal powers.

### 3. *EC practice and law*

The EC Treaties do not provide the Commission with formal powers to issue administrative guidelines binding upon the Member States. The attempts of some legal scholars to derive such powers from Art. 155 para. 1 and/or Art. 169 ECT are not particularly convincing<sup>168</sup>.

The Commission, however, has mirrored its national counterparts by developing a number of informal means of guidance which are sometimes published as Communications in the Official Journal, but often remain unpublished (but are disclosed upon request). Such informal instruments include information about

- ECJ jurisprudence, relating for example to Arts. 30, 36 ECT
- interpretation by the Commission of terms used in primary or secondary law
- principles the Commission wants to apply in the exercise of discretionary powers
- application requirements should a Member State need the Commission's approval of national administrative action.<sup>169</sup>

Guidance provided by the Commission goes under different names such as communication, vademecum, informatory or interpretive notice, Community framework, etc.<sup>170</sup>

These instruments do not have binding effect either on the Member States or on Member State agencies or on individuals. However, they do bind in a factual sense, since if not respected, they may cause the Commission to instigate an Art. 169 proceeding, and formally order a Member State to follow the interpretation or discretionary framework<sup>171</sup>. Examples include the granting and revoking of subsidies under Art. 93 para. 2, the refusal to fund a project out of the Structural Funds, or the withholding of financial compensation out of the Agricultural Guarantee Fund. One

167 See R. Macrory in this vol p. 91.

168 Cf. H. Adam, G. Winter, Commission guidance, in this vol., p. 638.

169 See H. Adam, G. Winter, in this vol., p. 631 et seq.

170 For examples see H. Adam, G. Winter, in this vol., p. 631 et seq.

171 For instance, in 1990 the Commission adopted a formal decision (Decision 90/381/EEC, OJ L 188/55 (1990)) requiring Germany to apply the Community framework on state aid to the motor vehicle industry. See F. Snyder, Soft Law and institutional practice in the European Community, EUI Working Paper LAW No. 93/5, p. 23.



might again speak of a factual binding effect in the shadow of certain formal powers to intervene or to provide a benefit. Going beyond this, one might say that Commission guidance creates a legitimate expectation in relation to the conduct of the Commission; an expectation deserving legal protection should the Commission later act differently.<sup>172</sup>

It has been proposed by the Commission that it should receive formal powers to adopt the administrative guidelines necessary to implement legal acts<sup>173</sup>, which may be understood also to imply provisions binding upon the Member States. This, however, appears to be premature. The present state of informal proceeding has an advantage in that different instruments can be tried out and experience can be gathered. For instance, it can be observed that the various instruments do not distinguish between instruments addressed to the Member States and others, which are addressed to or at least are of concern for individuals. It may be that these are signs of a development in which the traditional line between the internal and the external spheres of the administration has become blurred; a distinction which may be replaced by that made between more or less essential decisions which would be further reflected by the distinction made between more or less formal instruments<sup>174</sup>.

Moreover, formal powers to enact binding guidelines would probably require a measure of Council involvement, at least where the guidelines are shaped in accordance with the German model, where, as stated above, Bundesrat consent is required. This would, however, reduce the flexibility of the instrument.

To advocate formal powers only because of concern about legal protection is not justified since Commission action or inaction under its existing "shadowing" powers can be challenged, and the Commission interpretation of EC law is not binding for the ECJ<sup>175</sup>.

Therefore it is submitted that the Commission should not be provided with powers to issue guidelines binding on the Member States. The present practice should prevail where the Commission issues non-binding rules in the ante-room of various formal power it possess. For the sake of clarity of legal categories it is submitted that those rules are given a name. Commission circular (circulaire, Rundbrief) would be an appropriate choice.

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172 See for inforamatory notices in agricultural policy ECJ November 25, 1980, Case No. 820/79, (Belgium v Commission), ECR 1980, p. 3537 (3548).

173 Initial Contributions by the Commission to the Intergovernmental Conference on Political Union (1991), see T. Diedrichsen, History, in this vol., p. 333.

174 Cf. K.-H. Ladeur, in this vol., p. 264.

175 ECJ February 24, 1987, Case No. 310/85 (Deufil GmbH und Co. KG v. Commission), ECR 1987, p. 901 (927). See the comment by Snyder, loc. cit. (FN 171), pp. 10-15.



## VIII. "Other decisions", Commission circulars and the distinction between internal and external spheres

### 1. Introduction

Although they concern issues wider than the distinction made between the internal and external spheres, both "other decisions" and circulars are also significant in this particular area. I shall discuss them in turn.

### 2. "Other decisions"

Decisions called "other decisions" or "decisions sui generis" should not be confused with decisions made under Art. 189 para. 4. They constitute a kind of residual category whose legal status is not defined. This difference is better expressed by the Germanic terms such as *Beschluß*, *besluit*.

This type of act is interesting in the context of this chapter insofar as it is often used in order to denominate rules concerning the inner-organisational sphere. For instance, decisions of this kind have been taken by the Commission, Council or EP to lay down the rules of procedure for the Commission and the Council, the rules of procedure for establishing and implementing the budget, a typology of committees as a form of delegating executive powers to the Commission, the setting up of specific committees, transfers of competences, certain appointments, etc.<sup>176</sup>. This instrument has, however, also been used for acts having a clear external orientation but remaining inconclusive as to their binding effect which has in turn led scholars to list them as a form of soft law<sup>177</sup>. I shall deal with this other function in the next section.

In the present context one might consider whether certain of the internally orientated "decisions" should not be brought under different categories of legal act. This concerns those decisions which, although dealing with internal organization, are of great importance to the general public or to individuals. In relation to this kind of rules German jurisprudence has developed a reservation for a parliamentary law<sup>178</sup>. Less didactically than in Germany, those member states with strong parliamentary traditions are likely to accept that parliament may legislate on such matters.<sup>179</sup> It is therefore submitted that these essential decisions should be taken in the form of a Community Law. For areas of particular importance to single member states an Organic Law should be chosen<sup>180</sup>. To the extent that the "decision" concerns an

176 See further R. H. Lauwaars, *Lawfulness and legal force of Community decisions*, 1973, p. 50 et seq.

177 K.C. Wellens, G. M. Borchardt, *Soft law in European Community Law*, E.I.R. 1989, p. 266 (299)

178 K.-H. Ladeur, in this vol., p. 241.

179 See e.g. J.M. Jarvad, in this vol., p. 104.

180 See above p. 31.



individual case and shall be binding upon the addressee (be it a Member State or an individual), it should be framed as a "real" decision in the sense of Art. 189. The internal, externally less important acts of non-binding value, should remain residual acts (*sui generis*). In order to avoid confusion, however, one should abandon the name "decision" and instead use the term "conclusion" ("Beschuß/besluit").<sup>181</sup>

### 3. *Guidance*

In chapter VI various contents and forms of Commission guidance were presented. It was shown that this guidance is not in every case addressed to the member states alone, but may also be addressed or made available to individuals, for example firms which fear that a subsidy received from its state in breach of the Commission's framework for subsidies must be returned.

These vademecums, codes of practice, communications, informatory and interpretive notices, etc. do not count among the legal acts. In terms of traditional doctrine they would be grouped as internal administrative guidelines. They are regarded as binding only upon the issuing agency and its subordinate bodies, i.e., in our context, the Commission and its general directorates and dependent agencies. The power to issue such guidelines is derived from the **organizational power innate to any public organization**, established and given tasks by a constitution or law. This internal 'non-law' may, according to widespread doctrine in many Member States<sup>182</sup>, nevertheless have **indirect "external" effect**. Such effect may be considered when an agency deviates from its own guidelines, and an affected person argues that this is against the law or constitutes a misuse of discretion. Indirect external effect is also at issue when an affected person argues that the authority follows guidelines which misinterpret the law or are based on false assumptions; a case often arising in environmental and technology related law<sup>183</sup>.

The power to issue administrative guidelines in its own sphere originates from the institutional structures of the Commission and other EC organs; **there is no need for reformulation of the Treaties in this respect**. One might even encourage the Commission to also **make use of the term "administrative guidance"**, as long as this is not applied to information explicitly addressed to the Member States (either directly or to their agencies) information which was here suggested to be called Circulars. Whether such internal guidelines will be given indirect external effect in the above sense remains to be seen. There are ECJ judgements which point in this direction<sup>184</sup> but the question should be left to the further consideration of the Court.

181 The Germanic terms anyway translate themselves better into "conclusion" than into "decision".

182 For Spain see L.M. Dfiez-Picazo, in this vol., p. 212; Th. Adam, in this vol., p. 307; R. Macrory, in this vol., p. 90.

183 See H. Adam, in this vol., p. 314; K.-H. Ladeur, in this vol., p. 266.

184 See F. Snyder, loc. cit. (FN 171), p. 18 et seq.; Wellens/Borchardt, loc. cit. p. 308 et seq.



## IX. Persuasive instruments and the diffusion of sovereignty

It is a common theme at the national level that "command and control" instruments are being supplemented and partially replaced by instruments and influence. This trend is even more notable at the EU level. Mirroring the related concept of international law the notion of soft law is sometimes used to characterize this phenomenon<sup>185</sup>. This notion is, however, used for such diverse variants that its explanatory and doctrinal potential is rather poor. The following phenomena appear to deserve separate treatment due to their very different origin and their suitability for doctrinal treatment:

- informal administrative guidance (communications, vademecums, policy frameworks, informatory and interpretive notices as a means to influence subordinate agencies in the shadow of formal powers (see above ch. VII);
- internal administrative guidelines possibly having an indirect external effect (see above ch. VIII 3);
- internal organizational and procedural rules ("other decisions") possibly having an external effect (see ch. VIII 2);
- "other decisions" taken by Member State representatives in the Council, under certain conditions being capable of becoming binding ("simplified conventions") (see ch. IV 4 e);
- white, green etc. papers, action programmes, programmatic resolutions and declarations, model regulations or directives, etc. which basically belong to the political arena but could be invoked to reinforce a certain legal interpretation (see below ch. X);
- informal or formal agreements between private parties and the Commission, voluntary codes of conduct, etc., aiming at preventing formal legislation or administrative intervention;
- recommendations and opinions, public warnings or other consumer information, codes of good practice, (another sort of) "other decisions", etc., all aiming at persuading rather than co-ercing private actors.

Most of the listed instruments have been touched upon elsewhere in this study. Leaving the agreements and voluntary codes aside - they do not seem to need constitutional framing - the area of persuasive instruments deserves greater attention. In this study no in-depth assessment is possible. Questions which need, however, to be raised include:

- Should a legislative reservation, i.e. the necessity of an empowering law be introduced for certain areas?

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185 Snyder, loc. cit. (FN 171); Wellens/Borchardt, loc. cit.



- Does Art. 189 para. 5 ECT provide such a basis?
- Are persuasive instruments strictly bound to competence requirements?
- Are they subject to the subsidiarity and proportionality test and might they even be a required result of that test?
- Can persuasive instruments be challenged or requested before the European Courts?
- What are the common national principles of tort law as applied to persuasive instruments, and can they be applied to Community action in this field?

It seems that these and other questions can best be answered by emerging jurisprudence and legal doctrine. It is therefore not recommended that the written Treaties/Constitution directly address this issue.

## X. Inter-institutional agreements and the problem of institutional self-evolution

### 1. Practice

Inter-institutional agreements and joint declarations have in the past constituted the major means whereby relationships between the law-making EC institutions have been evolved. They have often put into practice what was only then formally recognized in subsequent versions of the Treaties. In many cases the EP has taken the initiative, thereby successfully strengthening its role in the political workings of the Community. For instance, inter-institutional agreements and (less frequently) joint declarations have established: first, that the EP is to be consulted even in those cases where the Treaties do not require consultation; secondly, that the Commission will, to the extent possible, support parliamentary initiatives and opinions; and thirdly, that a conciliation procedure shall be triggered in cases of dissent between the EP and the Council on significant Community acts<sup>186</sup>.

The instrument of a joint declaration has also been used for other, more substantial issues like human rights, racism and xenophobia, democracy, transparency and subsidiarity, and intellectual property protection in cooperation with third countries. These issues touch upon values fundamental to the European polity<sup>187</sup>.

<sup>186</sup> See for these and other examples F. Snyder, *Inter-institutional Agreements*, in this vol., p. 453.

<sup>187</sup> Snyder, in this vol., p. 455 et seq.



## 2. *Legal effects*

The analysis of the legal effects of agreements and declarations should start with what the partners themselves have in mind in this respect<sup>188</sup>. If they do not want legal effects, such effects cannot be assumed. Given the use of this term, it seems that joint declarations shall not and consequently do not have effects which are binding either upon the declaring or upon any third party. For instance, an individual could certainly not invoke human rights against an EC measure purely on the ground that these form part of a joint declaration. He or she may, however, remind the EC institutions that they have made such political declarations. Beyond this, the ECJ has referred to this particular declaration as a restatement reinforcing principles the legal force of which derives from other sources<sup>189</sup>.

With respect to agreements, the name itself seems to presume binding effect. Still, the content of an agreement may appear to dispute this. Indeed, mutual obligations are often not precisely defined. Rather, intentions are laid down, which can be set aside in abnormal cases. Nevertheless, the agreement may still be taken to reinforce the concretization of the Art. 4 based duty of inter-institutional cooperation.

To the extent that obligations have a clear meaning, there is no reason to deny that they be binding upon the signatories. The EP, Council and Commission possess legal personality within the ambit of their constitutional rights and duties. There is no principle in the Treaties stating that every rule concerning EC-lawmaking must be laid down in the Treaties or by legal act.

If the inter-institutional agreement binds the parties, what are the consequences should one partner renege on their obligations? Can, for instance, the EP bring an action before the Court of Justice under Art. 175 ECT to establish Treaty infringement, should the Council fail to consult it? Is the agreement part of the "Treaty" in the sense of Art. 175? Arguments may be found for this particular case but from a reform perspective, the problem appears to require clarification through a reformulation of Art. 175. Even more troublesome is the question whether the breach of an agreement complementing the Treaty lawmaking procedures, may lead to the invalidity of the legal act produced. In other words, would the ECT in the above mentioned case of non-consultation apply the jurisprudence which it has developed for Treaty based consultation? Advocate General Mancini in one statement seems indeed to suggest that the agreement, if precise and unconditional, has a higher rank than the derived provisions<sup>190</sup>. If this were to be accepted, it would follow that individuals might also challenge the validity of the provisions.

In the present context we feel no need to take a position in relation to this controversy. The question should be settled by jurisprudence and scholarships, preferably in accordance with the direction given by Advocate General Mancini.

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188 Snyder, in this vol., p. 461.

189 Snyder, in this vol., p. 461.

190 ECJ September 27, 1988, Case No. 204/86 (*Greece v. Council*), ECR 1988, p. 323 (5349), cited by Snyder, in this vol., p. 463.



### 3. *Limitations*

Of course, agreements may not violate Treaty provisions or principles. This is, however, as easily stated as it is difficult to apply, especially in relation to procedural requirements which, as stated, have in most cases been the subject of agreements. The major problem is to determine whether a procedural rule established by the Treaties must be read to be a comprehensive or only a minimum requirement, and if the latter is the case, from what perspective that minimum should be assessed.

The voting quorum in the Council, for instance, should be seen as being a conclusive rule. Unanimity required by the Treaty could not be replaced by a majority requirement through a mere inter-institutional agreement. On the other hand, where the Treaties do not provide for consultation with the EP and no convincing reason (like e.g. executive independence from political majorities in the field of currency and money policies<sup>191</sup>) for such an exclusion might be identified, the provision should be taken to be non-conclusive. To date, such situations have been assessed from the viewpoint of the EP: any improvement in its role was accepted as legitimate reason for exceeding the minimum procedures laid down in the Treaty. This view which can be based on the principle of democracy, may be challenged those who regard additional competences for the EP as a threat to their national democratic principles. But it has been argued elsewhere in this summary<sup>192</sup> that democracy of the EC lawmaking should be sought through a strengthening in the role of the EP.

In any case, it appears that **questions touching upon the substantial limitation of inter-institutional agreements cannot be solved through explicit regulation. They should be left to future jurisprudence and scholarship.** This does not preclude the establishment of procedural provisions such as **the obligation to publish inter-institutional agreements in the Official Journal**<sup>193</sup>.

Whether inter-institutional agreements also be subordinate to secondary EC law is less clear, but should be held to be so in the case of regulations and directives, because contrary to the former, the latter derive a particularly dignified status from the fact that their origin and effect are regulated by the Treaties. This implies that "other decisions" having no external legal effect, can not have priority over inter-institutional agreements.

Last not least should be noted that with respect to some issues **inter-institutional agreements could be replaced by Organic Laws.**

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191 See above.

192 Above p. 29.

193 See F. Snyder, in this vol., p. 464, giving further reaching proposals for reform.



## XI. Technical standardization and the problem of legitimizing professional self-regulation

The establishment of the internal market has caused a massive demand for the technical standardization of products. Whilst in earlier phases, "co-ordinative" standards, i.e. standards ensuring the compatibility and interchangeability of products prevailed, it was soon realized - a viewpoint strongly reinforced by the relevant interest groups - that coordinative standards also have, by implication, side-effects on occupational health, consumer interests and the environment, and their need to be supplemented by "regulative" standards specifically protecting workers, consumers or the environment.

The initial attempts of the EEC to itself undertake the standardization failed and were replaced by the "new approach". Under this, the task was handed over to the national standardization organisations which soon 'europeanized' themselves in the framework of European standard-setting organisations.<sup>194</sup>

The question, however, was how this system of **self-regulation by professional organizations**, could be reconciled with the genuinely political mission of paving the way to the internal market whilst at the same time protecting health and the environment.

The solution developed was both substantial and procedural:

**Substantial requirements** as to the level of protection were formulated in the legal acts applying to a given product sector. Such requirements which were sometimes specified by interpretative guidelines of the Commission were sufficiently precise to meet the constitutional criteria for technical standardization even of that Member State (i.e. Germany) which is most elaborate in this regard.<sup>195</sup>

On the other hand, **procedural safeguards** were felt to be necessary and, in some respects, the best form of control. One variant was close co-operation between the Commission and the European standardization organizations, especially in the concretization of substantial requirements. In contrast, the other variant: the participation of public interest group representatives has made little progress. Whilst such groups have succeeded in gaining input into national standardization organizations, this pattern has not been reproduced at the European level, simply because the national organizations may send only very few representatives who will most often be technical experts.<sup>196</sup> The Commission submitted further reaching proposals in a Green Paper in 1990, in particular the creation of a pluralist European Standardization Council and Board, as well as the granting of an observer status to trade unions and consumer associations in the technical committees. The plans were subsequently dropped. Other, more modest solutions have recently been mooted, in particular with regard to the representation of labour unions.

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194 J. Falke, Standardization, in this vol., p. 646.

195 J. Falke, in this vol., p. 666.

196 J. Falke, in this vol., p. 656.



We feel that standardization should be included within any reform of the constitution of the EC. Standardization by professional organizations is a major challenge to "public" lawmaking. Whilst in principle, enabling and recognition of "societal" law-making is appealing, and whilst standardization of this kind is certainly expedient and skilled, it does raise problems of legitimacy the solution of which should not be left to simple legislation. An article should be inserted into a chapter on 'legislation and executive rule-making', where a framework for legitimate professional standardization should be laid down.<sup>197</sup> Alternately, further regulation may be delegated to an organic law.

## XII. Collective agreements and the problem of contracted law-making

Alongside professional standardization, collective contracts concluded between management and labour and their declaration of general application, constitute a further kind of "societal law-making". Once again, whilst the basic approach deserves endorsement, problems of legitimacy nevertheless arise.

The agreement on social policy ventures into this innovative field by giving management and labour special consultation rights, by allowing them to pre-empt certain EC law-making should they wish to regulate such matters through contractual relations, and by recognizing the status of an agreement "concluded at Community level" which may be implemented according to normal practice and national law, or by a Council decision on a proposal from the Commission.<sup>198</sup>

This being a venture without precedent, almost all of the provisions constituting the system have raised problems of interpretation: Does "management and labour" include only the cross-sector high level organizations or does it also extend to sectoral organizations (which have more experience of and reason for contracting), regional organizations (which may negotiate on cross-boundary problems of a regional character) and even other organizations such as associations of the unemployed? The answer to this question further determines the answer to a second question as to what the meaning "agreements concluded at the Community level" might be: can they be sectoral and regional? Should not the partners to such agreements be required to fulfil certain preconditions as regards their representative nature, before the general applicability of such agreement be recognized? If a Council decision is requested, to which extent might the Commission alter the content of the agreement in its proposal? What is the effect of the Council decision? Does it make the agreement generally applicable through the implementation of contracts or is legislation only needed if the agreement so requires or supposes?<sup>199</sup>

To date the consultation procedure set up by Art. 3 para. 4 of the agreement has been used only once, whilst Art. 4 which provides the possibility of collective agreements

197 See the proposal by J. Falke, in this vol., p. 674.

198 See M. LeFriant, A. Höland, *Contrats collectifs*, in this vol., p. 682.

199 For these controversies see further M. LeFriant, A. Höland, in this vol., p. 679 et seq.



has yet to be applied. This would seem to advise against any present reform of the system. On the other hand, the apparent unimportance of the system (which stands in sharp contrast to the lively scholarly discussion surrounding it) could derive from its lack of clarity. Therefore a certain revision might be considered. It is submitted that the conclusion of sectoral and regional collective agreements should be encouraged by the clear definition of the permissible social partners, but that care should be taken to formulate requirements as to the representative status of the participating organizations.<sup>200</sup> In the wider future the described system could also be employed for further policy areas as, for example, social insurance, consumer and environmental protection. One can envisage the framing of a basic provision in the proposed chapter on legislation and executive rule-making, leaving the further elaboration to an organic law.

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200 M. LeFriant, A. Høland, in this vol., p. 685.