

A Critical Analysis of the new Typology of Acts in the Draft Treaty Establishing a Constitution for Europe
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Abstract
This article describes and critically analyses the proposed new typology of acts in the “draft treaty establishing a constitution for Europe” and its implications for the EU legal system. It comments on the categories of act on the three levels of constitutional law, legislation and implementation. It highlights the importance of the correlation between the catalogue of fundamental rights on one hand and the definition of legislation on the other, which will reform the relation between legislative and executive powers in the Union. The article also uncovers several shortcomings in the proposed typology of acts including the problematic relation between delegated regulations and implementing regulations as well as the lack of adjustment of the proposed system of legal acts to the special nature of the EU.
Kurzfassung
Dieser Beitrag beschreibt und analysiert die im “Entwurf eines Vertrages über eine Verfassung für Europa” vorgeschlagene neue Typologie der Rechtsakte. Der Beitrag diskutiert die Auswirkungen der Vorschläge des Europäischen Konvents für das Rechtssystem der EU und kommentiert die im Konventsentwurf vorgesehenen Kategorien des europäischen Verfassungsrechts, der Gesetzgebung und der Umsetzungsakte. Der Beitrag weist insbesondere auf den Zusammenhang zwischen der Eingliederung des Charta der Grundrechte der Union in einen europäischen Verfassungsvertrag und die Definition der europäischen Gesetzgebung hin, der das Verhältnis zwischen der legislativen und der exekutiven Gewalt in der Union verändern wird. Der Artikel weist weiterhin auf die problematische Beziehung zwischen Delegierten Verordnungen und Durchführungsrechtsakten hin. Er beleuchtet ferner die mangelnde Anpassung des vorgeschlagenen Systems der Rechtsakte an die spezifischen Bedingungen in der EU.
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I. The Suggested New Typology of Acts – Questions for the EU Legal System [↑]

One of the most important items on the agenda of EU constitutional reform is the simplification of the legal system by creating a new typology of legal acts of the EU, organised according to concept of a hierarchy of norms. Such a reform agenda has implications for the further development of the ‘separation of powers’ and the ‘institutional balance’ on the European level.⁽¹⁾ It also has implications for legitimacy of governance through more transparent and understandable legal acts and decision-making mechanisms. The structure of the typology of acts and the allocation of decision-making procedures is at the heart of the relation between the Member States (MS) and the EU powers.

This article analyses and critically evaluates the latest concepts for a new typology of legal acts as suggested by the European Convention’s “draft treaty establishing a constitution for Europe”.⁽²⁾ Part one of this article gives a brief overview over the debate on a reform of the typology of acts and its use of the concept of hierarchies of norms. Parts two to five analyse the different categories of implementing acts, delegated regulations, legislation and primary law. The presentation will start with the ‘lowest level’ of law, the level of implementing acts, and then continue to delegated acts, the level of legislation to the level of constitutional law. Parts six and seven look at special categories of acts and the rules for transformation from the old to the new system.

I.1. Central Themes of the Debate on the Typology of Acts [↑]

For nearly as long as the EC exists, has there been debate about a re-classification of the system of EC legal acts. The debate however gained momentum in the past twenty years in the wake of the ‘emancipation’ of the European Parliament (EP) within the institutional triangle of EP, Council and Commission. There are four main overarching and interrelated themes, which kept the discussion alive, but also complicated the search for solutions:

The first theme is the question of democratic legitimacy of EC/EU decision-making. The connection between this theme and the ideas to reform the typology of EC legal acts can be traced back to the EP’s 1984 Draft Treaty Establishing the European Union.⁽³⁾ This draft provided, similar to the EP draft constitution of the EU,⁽⁴⁾ for a core constitution, which contained the three level differentiation between constitutional laws, simple legislation and implementing measures.⁽⁵⁾ According to this view, legislation was to be passed both by the EP and the Council. The hope was that if the EP were to become on par with the Council, the negative effects of delegation with respect to parliamentary involvement in decision-making could be counterbalanced. The influence, which national parliaments had lost on the national level, the EP would exercise on the European level.

These proposed changes to the EC legal system, however, entailed a different perception of the nature of the EC rule making than had prevailed in the early days of the EEC. The second main theme in the debate about the typology of acts was therefore whether EC rule making could actually be compared with what is commonly known in the MS as ‘legislation’ and therefore deserved to be labelled that way. These discussions existed despite the ECJ, in one of its first cases, had declared that general decisions under the ECSC “are quasi legislative measures adopted by a public authority with legislative effect ‘*erga omnes*’.”⁽⁶⁾ The ECJ was thereby more outspoken about the nature of Community rulemaking than the EEC treaty had been. Instead, rule making under the original Treaty of Rome had often been regarded as technical regulation, delegated to the EC by the MS. According to this view, EC legislation was characterized by the use of experts’ knowledge, the rationality of

which was strictly task-related, neutral to compromise and fairly independent of political interest representation.⁽⁷⁾

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The third major theme in the debate was the issue of the appropriate ‘institutional balance’. During the Intergovernmental Conference (IGC) leading to the Treaty of Maastricht, suggestions were actively debated, which proposed inter alia to introduce a functional and organic separation of powers closer to *Montesquieu’s* model of the trias politica. According to these suggestions, administrative power of implementation would lie mainly with the Commission, when the implementation of a measure is designed to take place at the Community level. Legislative power would have been allocated to a legislature composed of the Council and the EP deciding by a legislative procedure – the codecision procedure.⁽⁸⁾ The proponents of these suggestions hoped to construct not only a more transparent but also a more effective and efficient legal system.

As we know, the Treaty of Maastricht attempted to strengthen democratic legitimacy of EC rule making by introducing the codecision procedure. But it did not amend the classification of legal acts in Art. 249 EC. The debate was deferred to the 1996 IGC, which was called to “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.”⁽⁹⁾ The post-Maastricht discussion continued to reflect and to expand the suggestions for a hierarchy from the pre-Maastricht debate.⁽¹⁰⁾ It was here where the fourth major theme in the discussion was increasingly discussed: The ongoing interinstitutional conflict on the conditions of delegation of executive competences to the Commission under a system of committees, which became known as ‘comitology’.⁽¹¹⁾ Here the EP tried to establish the right to become involved in recourses, in case a comitology committee would not pass a Commission draft for a delegated act.

The treaty amendments agreed in the Treaty of Amsterdam and the Treaty of Nice finally extended the scope of applicability of the codecision procedure, but the MS did not reach any agreements on reforming the typology of community acts, or the terms of delegation of executive functions to the Commission. Although the codecision procedure now is the main legislative procedure, a plethora of different decision making procedures remain in all three pillars of the EU. The existence of the vast amount of different types of legal acts can be regarded as sedimentary layers of past treaty amendments.

These different types of EU legal acts are also problematic with respect to the terminology, which is not chosen for its elegance or clarity; it is chosen to highlight the non-state nature of the European legal system. This language had to serve to facilitate compromise in IGCs between more pro-integration forces on the one hand and more integration scepticists on the other hand. As a consequence, of two terms, the treaties have always chosen to use the less state-like terminology:⁽¹²⁾ The word ‘treaty’ was for example used instead of ‘constitution’, ‘own resources’ instead of ‘taxes’ and ‘levies’, ‘directives and regulations’ instead of ‘legislation’. The choice of these sometimes-euphemistic terms has however also added to the exclusion of non-specialists from the debate in European affairs. This enhances the impression that Europe is a matter of the elites only, an area for pretentious civil servants and specialist lawyers. The exclusion of the public from the debate through the creation of ‘Euro-lingo’ terminology is beneficial for the creation of rumours and misunderstandings on the substance and nature of European governance. This in turn is detrimental to the legitimacy of European governance.

I.2 The Convention's Proposals

The European Convention's draft of a treaty establishing a constitution for Europe makes a fresh attempt at solving the underlying problems. It suggested to simplify the existing system of EU legal acts in two steps: Firstly, to end the distinction between the EU and EC and unite the three different pillars. This would reform existing EU law, which in each pillar has its own system of legal acts.⁽¹³⁾ Second, to create a new typology of legal acts (draft Art. I-32 et seq.). The different categories of legal acts would be renamed with terminology more akin to national legal systems.

The proposed typology of legal acts would not only differentiate between primary and secondary law but also between legal acts of legislative and of administrative nature. It would thereby establish the following separate categories of legal acts: Constitutional law, which would be created and amended according to an expanded treaty amendment procedure laid down in the draft Art. IV-6, 7.⁽¹⁴⁾ Union legislation, which would consist of the instruments of European laws and European framework laws (budgetary provisions and matters under what is currently the second pillar of the EU would have special provisions).⁽¹⁵⁾ The third level would consist of implementing measures, which could be issued if uniform conditions for implementing are needed. The Commission or in special cases the Council or the ECB would be entitled to issue "European implementation regulations" or "decisions".⁽¹⁶⁾ Additionally, a specific category has been suggested for the delegation of legislative powers to the Commission.⁽¹⁷⁾

Draft Art. I-32 (2) declares the typology of acts in the draft treaty to be non-conclusive. The legislative institutions may issue 'atypical' legal acts but they "shall refrain" from doing so.⁽¹⁸⁾ According to the case law of the ECJ, this means that the legislature is under a procedural requirement to state reasons for a decision to apply an atypical legal act instead of a typical one.⁽¹⁹⁾

I.3. Some Criteria for Evaluation

The four central strands of the debate on the reform of the typology of acts have set the theme for the evaluation of the convention's proposals. Additionally, an observer might wish to take into account that the suggestions made during the many years of discussion for a constitution for Europe all relied on a reorganisation of the typology of legal acts according to hierarchic criteria. Hierarchies of norms are a structural element in legal systems, which are used to organise the relation between different types or categories of norms. This is especially important in cases in which different types of norms could be applicable to the same situation but would lead to different results.⁽²⁰⁾

The effect of organising a legal system according to hierarchic criteria is that it can firstly be more easily streamlined to respect some basic principles. Also, the legal system can potentially be expected to be more transparent with respect to the sources and origins of legal acts. A hierarchic structure of norms can moreover be used to consolidate a legal system. The higher principles can be used as steering tool by submitting the development of hierarchically 'lower' provisions to the conditions set by the 'higher' norms. This, on the other hand, entails a certain limitation for legal innovation by imposing limitations on the development of 'lower' ranking provisions. The requirement of consistency of all legal acts with higher ranking principles will have an effect both on the ability to create individually effective solutions and to do justice to individual cases.⁽²¹⁾ Its existence helps to enforce the rule of law in a legal system. The invention of the hierarchy of norms has therefore been praised as one of the great tools to increase the effectiveness, simplicity and transparency of a legal system.⁽²²⁾ The Convention's proposals therefore need to be evaluated as to their approach to the use of hierarchies as an organising structure within the legal system.

The reform of the typology of legal acts also needs to be analysed from a different perspective. Not only was the current system lacking structural clarity due to its evolutionary development, it also was no longer representing the structural reality of the EU's legal system. The 'gap' between the formal constitution and the institutional reality is especially problematic in the area of the legal framework governing executive action on the Union level.⁽²³⁾ In this respect, the reform of the typology of acts also needs to be reviewed as to whether it adds to a constitutional framework, which is capable of structuring the complex relations of governance in the European Union.

A reform of the typology of acts will also almost automatically have effects on the distribution of powers between the MS and the Union and the 'institutional balance' between the Union's institutions. The definition of the different forms of action, by definition of their reach and the applicable decision-making procedure, will have implications on the weight of each institution in the political process from rule making to rule implementation. The allocation of powers therefore has implications for the source of legitimacy of the Union governance. More power for the Commission in the area of legislation and implementation for example automatically requires legitimation more from the expertise of the specialist actors. This mode of legitimacy, which *Lenaerts* and *Verhoeven* call the 'regulatory model', is based on the idea of the EU as a Community with limited competences to regulate technical matters delegated by the MS: the EU as '*Zweckverband*'. A stronger inclusion and supervisory role of the EP on the other hand could point at legitimation from a 'parliamentary model'. Regulating many matters in the realm of primary law or requiring unanimity in Council would strengthen the intergovernmental model.⁽²⁴⁾

In the following, section the analysis of the proposals for a new typology of acts will be reviewed in each of the hierarchic levels of the Convention's proposals.

II. The Category of Non-Legislative, Implementing Acts [↑]

One of the problems of the current legal system is the difficulty of differentiating between EU legal acts of legislative and of non-legislative character. The instruments provided for in Art. 249 EC are used for both legislation and implementation. Implementing as well as legislative acts are issued in the form of regulations, directives and decisions. The hierarchic relationship between two norms of secondary legislation can presently only be identified by an analysis of the legal basis of an act.⁽²⁵⁾ The ECJ uses additional criteria such as general principles of law in order to determine the hierarchic position of two legal acts to each other. The most fundamental of these principles is that the Commission, when exercising delegated competences, firstly is bound by the terms of the delegation, secondly may not go beyond the scope of delegation,⁽²⁶⁾ and thirdly has to comply with the modalities defined in the act of delegation.⁽²⁷⁾ The ECJ determines the limits and conditions of delegation on a case by case basis.⁽²⁸⁾

The draft Treaty establishing a constitution for Europe would introduce the separation of legislative and non-legislative acts in the following formal way: Acts of the Commission will generally be of non-legislative nature. The Commission will issue a "European implementing regulation or decision" if implementing competences have been delegated to it (draft Art. I-36 (4)).⁽²⁹⁾ Legal acts adopted by the Council on the other hand can either be legislative acts or a implementing acts (in the exceptional case where implementing powers have been conferred on the Council instead of the Commission). The ECB will have, as today under Art. 110 EC, certain implementing powers in its realm of competence.⁽³⁰⁾

The terminology used for the implementing acts under the proposed new regime, would reflect the difference between legislative and implementing measures. Only non-legislative measures could be called regulation or decision. This would resolve the former confusion in terminology between regulations and directives under Art. 249 EC, which were being used for legal acts of legislative character as well as of implementing character.

The Convention's draft treaty establishing a constitution for Europe contains a clarification for the relation between the MS and the EU institutions in implementing powers: Draft Art. I-36 (1) states that "Member States shall adopt all measures of national law necessary to implement legally binding Union acts."⁽³¹⁾ Only where "uniform conditions for implementing binding Union acts are needed" may the power to issue implementing acts be conferred on the Commission or in exceptional cases the Council (draft Art. I-36 (2)). It therefore follows the model of "executive federalism".⁽³²⁾

II.1. Distinction Implementation – Legislation

The distinction between legislation and implementation under the convention's draft constitutional treaty is basically a formal one. Any measure taken under the formal legislative procedure is a legislative act of the Union.

This formal differentiation is a significant clarification of the relation between legislation and implementing acts. Proposals for the introduction of a hierarchy of norms had in the past suggested to create a typology of acts that would have focussed more on establishing a functional as well as organic separation of powers. This would have meant to define legislative and implementing acts not only by formal decision-making but also by substantial criteria. According to the EP resolution on the nature of Community acts of 1991, for example, "a clear allocation of powers should result in the conferral of implementing powers on the Commission".⁽³³⁾ According to this model, the Commission would have had the right to spontaneously issue implementing measures to any legislative act of the Community without explicit delegation in the law.⁽³⁴⁾

The Commission had tried both in the preparatory phase for the Single European Act and the Treaty of Maastricht to receive the competence to have the right to issue implementing regulations without necessity of an explicit single-case authorisation by a Council's delegating provision.⁽³⁵⁾ However, the Commission's incentive had been rejected in all following IGCs. For good reasons: Vesting authority to spontaneously issue implementing regulations would have given the Commission extensive powers of close to legislative nature. Naturally, a treaty norm providing the Commission with such a right would have conferred extensive discretionary power for the definition of the notion of 'implementation'.⁽³⁶⁾

Would the Commission have been granted the right to autonomously implement any legislative act of the Community – with or without explicit delegation – this would have entailed a substantive change in the vertical division of powers between the MS and the EU.⁽³⁷⁾ The Commission would have had been given the power to effectively change the principle of 'executive federalism'. Also, denying the Commission the right to spontaneously issue implementing regulations, has the effect of strengthening the parliamentary versus the regulatory model of legitimacy. The EC legislature under this model enjoys a wide scope of discretion to decide over subject areas it wishes to delegate and to decide to which extent it wishes to rule a matter in the form of a law.

II.2. The Recipient of Delegation of Implementing Powers [↑]

Under the draft constitutional treaty, delegation is only possible to the Commission. Only exceptionally delegation is possible to the Council under draft Art. I-36 (2). It is not possible to other Union institutions or additional administrative bodies such as European agencies.⁽³⁸⁾ This limitation might be intended to safeguard the coordinating role of the Commission for executive measures on the EU level. It however disregards the existing gap between the institutional reality in EU law and the constitutional situation. It constitutionalises a strict understanding of limitations to delegation under what is known as the ‘Meroni-doctrine’ – a limitation to delegation established in the early days of European integration within the framework of the ECSC treaty.⁽³⁹⁾ The practical reality of executive structures and the legal situation under EU law is now far more complex than in the 1950’s. An increasing number of agencies undertake administrative functions and have been created to effectively carry out complex tasks in the network of administrative structures between the European and the MS level. Especially regulatory agencies prepare or issue externally binding decisions.⁽⁴⁰⁾ Most types of agencies are involved in contractual relationships with private bodies and MS administrations. The EU’s constitutional reality, backed by the case law of the ECJ, has therefore been developed to a degree, which has partly overcome the Meroni doctrine. Should the Meroni doctrine be given constitutional blessing in draft Art. I-36, it will become more complicated to delegate executive powers to agencies. The divide between the constitutional provisions and the requirements of the architecture of the emerging European network administration, which includes European agencies, will increase.

II.3. The Legal Instruments for Implementation: Regulations, Decisions, Contracts and Soft Law Tools [↑]

The definition of a “European implementing decision” follows the model of the decision in Art. 14 ECSC, which simply declared a decision to be binding in its entirety. In contrast to the definition of a decision in Art. 249 EC, the European implementing decision therefore does not necessarily need to indicate to whom it is addressed. This allows for its application in CFSP matters. Also, this wider definition will do away with the differentiation between ‘normal’ and ‘atypical’ decisions. The latter differentiation had caused confusion in the past because not all languages have the terminology to differentiate these different legal terms for these different forms of act.⁽⁴¹⁾

Implementing Regulations will be used to issue implementing acts of more abstract and general nature than decisions directed at individual recipients. In reality, however, implementation takes place not only by means of acts such as regulations and decisions, which can unilaterally impose obligations on other parties (such as MS and individuals). Very often and to an increasing extent, implementation is undertaken by multilateral agreements between various kinds of actors – both public and private – from the European and the national levels. The contractual relations are the core of the emerging administrative network implementing EU policies. Art. 238, 282 and 288 EC indicated that the Community was entitled to enter into contracts of private and public law nature. Since the EU as a whole would have legal personality under the new EU constitutional treaty (draft Art. I-6), contracts under public and private law can be concluded by the EU and its institutions. This is explicitly acknowledged under draft Art. III-238. Due to their ever-increasing importance in practice, the instrument of contracts should however have been much more prominently listed as instrument of implementation next to implementing regulations and decisions.⁽⁴²⁾

A different question is whether the draft constitutional treaty should take into account implementation that does not take place by formal implementing regulations, decisions or contracts. In each policy area there is a different mix of instruments. Especially, where the Commission is involved in implementation, it uses 'atypical' forms of acts to guide the process. Such forms are for example guidelines, vademecums, codexes, notices or circulars to Member State administrations. They are not always published in the Official Journal. Especially in the area of agriculture, circulars will in some cases be directly sent to the national administrations. These originally soft law tools can however have indirect effect on binding the Commission's discretion with respect to certain policy decisions.⁽⁴³⁾

This shows that the differentiation between binding and non-binding implementing acts is not always easy to draw. Part I of the draft constitutional treaty omits explicit references to any administrative tools for implementation of EU law other than implementing regulations and implementing decisions.

One might argue though, that draft Art. I-32 (2) contains a sort of hidden opening clause for atypical acts. Draft Art. 32 (2) states that the EP and Council "when considering proposals for legislative acts" "shall refrain from adopting acts not provided for by this Article in the area in question." The wording of this clause however is unclear with respect to whether it will allow atypical implementation acts. The reason is that draft Art. I-32 (2) can be read in two ways:

One reading could result in understanding the text as to mean that only in those cases, where legislative acts are considered, is there the possibility to, exceptionally, use atypical acts. The EP and Council are however called upon to 'refrain' to do so. This interpretation of draft Art. I-32 (2) would result in a limitation of its scope of applicability to atypical acts of legislative nature. The advantage of such limited interpretation would be that it would reflect its status as an exception to the clear list of categories of legal acts in the draft constitutional treaty. The result of such limited interpretation would nevertheless be very unfortunate: It would mean that there would be no flexibility clause in the area of implementing acts. But the necessity of flexible regulatory approaches is much more urgent in the area of implementation than in that of legislation. Even if such limited interpretation would prevail, it could still be expected that soft law tools of the EU will continue to be used in implementation. A restrictive reading of draft Art. I-32 (2) would consequently widen the gap between the constitutional structure and the legal reality.

Another, alternative and more pragmatic, interpretation of draft Art. I-32 (2) would be the following: Only where the use of legislative acts was considered by the EP and Council, should the legislator "refrain from adopting acts not provided for by this Article". In all other areas, the argument would go, could atypical legal acts be used. The disadvantage of such interpretation is quite clear: It does not seem to be in-line with the explicit intention of the draft Articles I-32 *et seq.* The goal of the reform of the system of legal acts is to clarify the legal system by delimiting the potential categories. Therefore, such wide interpretation could be regarded in contrast to the teleologic method of interpretation of draft Art. I-32 (2). On the other hand, such wide interpretation would allow for a realistic approach to implementing tools, albeit at the price of transparency and clarity of the system. It would reconcile the needs of administration in the EU with the constitutional basis. It could be regarded the alternative better capable of realising the 'effet utile' of the legal system. In my view it seems more likely that the pragmatic approach of the second alternative interpretation will prevail.

II.4. Comitology

Supervision of implementing powers delegated to the Commission and the provision of information by national experts to the Commission by means of Comitology procedures has to date been one of the major sources of interinstitutional conflict.⁽⁴⁴⁾ The distinction between a category of legislative and implementing measures is at the centre of the considerations how to reform the EC's comitology procedures, especially with respect to the definition of the EP's role in respect to these procedures.⁽⁴⁵⁾ In fact, the history of the debate on the introduction of a new hierarchically organised typology of acts has been largely influenced by this problem. The EP originally wanted to see the Council barred from too many executive functions. It therefore favoured the Commission's independence from the Council's possibility to recourse through Comitology procedures. With growing competence in legislative matters it changed its position to call for a bigger involvement of the EP in recourse of legislative matters.⁽⁴⁶⁾ The draft treaty establishing a constitution for Europe leaves the EC treaty's approach to comitology largely untouched. Comitology is referred to in draft Art. I-36 (3) in much the same indirect manner as it was referred to in Art 202 third indent EC.

Nevertheless, the Comitology regime will need to be considerably amended and adapted should the draft constitutional treaty enter into force. This is based on two reasons:

Firstly, – despite the similarity between draft Art. 36 (3) and Art. 202 third indent EC – the draft constitutional treaty has provided for the instrument of delegated regulations (draft Art. I-35). These would “supplement or amend certain non-essential elements of European laws or framework laws”. As described in the following chapter, the legislator including the EP can make such delegations subject to certain conditions inter alia to revoke the delegation and to decide upon a matter in the legislative forum. Currently, for this type of activity the 1999 Comitology decision provides for the so-called “regulatory procedure”.⁽⁴⁷⁾ The regulatory procedure however allows for recourse of matters only to the Council, not to the EP. In the future, they could be made subject to a review of both the EP and the Council.

Another reason for the strengthening of the EP's role in Comitology is that under Art. 202 EC, the Comitology decision was taken by a unique quasi-legislative procedure by the Council acting unanimously upon a proposal from the Commission and after obtaining the opinion of the EP. Under the draft Art. 36 (3) the Comitology decision would be taken in the regular legislative procedure, i.e. by co-decision. That would allow the EP to influence the future structure of comitology procedures to a much larger extent than was so far possible.

II.5. Conclusions

The proposed introduction of the category of implementing measures is laudable, since it will lead to a clearer distinction between legislative and implementing measures. It thereby includes a formal distinction in a hierarchic relation, which, although long accepted by the ECJ, had never been adequately addressed in the constitutional structure of the treaties. The introduction of the formal category of implementing acts the draft constitution follows as parliamentary model in creating legitimacy of Union governance. Allowing for Commission activity in the area of implementation only after delegation of implementing powers strengthens the EP's role. Submitting the future comitology decision to the co-decision procedure further strengthens it.

Problematic aspects of the proposed category of implementing acts are the narrow definition of the bodies which can be a recipient of delegation. Especially problematic with respect to the needs of modern network administration for the implementation of EU law is the lack of acceptance of contracts as form of administrative action.⁽⁴⁸⁾

III. The Special Category of Delegated Legislation [↑]

Draft Art. I-35 would allow for the delegation of legislative powers to the Commission under certain conditions. It indicates that delegated regulations “supplement or amend certain non-essential elements of the European law or framework law” thereby regulating within the realm of the legislative matter. The guiding idea for this new category of legal act was to allow the legislature to concentrate on the central elements of a law and to avoid overly detailed legislation in the EU.(49)

With respect to the category of delegated regulations, four main questions arise: First, what are the limitations to delegation? Second, what are the conditions for delegation of legislative matters under the new law? Third, which are the possibilities to revoke a delegation? Finally, how can delegated regulations be distinguished from implementing regulations?

III.1. Limitations to Delegation [↑]

Limitations to the legislator’s discretion on delegation arise from two sources: First, the choice of the type of legal act is guided by the principle of proportionality (draft Art. I-37 (1) and I-9 (4)). This principle guides the discretion whether to delegate competences for regulation by the Commission in delegated regulations.(50)

Second, the ECJ has to date established case law on general conditions for delegation.(51) A close review of the case law of the ECJ on limitations to delegation reveals, that the criteria, which the ECJ applied so far to distinguish essential non-delegatable matters from non-essential delegatable matters, will need to be adjusted in the framework of the new constitutional draft.

The ECJ has to date decided on limits of delegation issues in the framework of the distribution of legislative and executive powers in Art. 202 and 211 EC. There it drew on the immanent differentiation between general rules and rules for ‘implementation’. (52) The ECJ’s definition of the term ‘implementation’ differs according to the policy field to be judged. Most of the reported cases concerned agricultural policy. In the area of agricultural policy, the ECJ held that it was sufficient for the Council to adopt the basic elements of a matter by the legislative procedure.(53) The court held that “it follows from the context of the Treaty” and “from practical requirements” that the concept of implementation must be given a “wide interpretation.” The Council thus confers extensive power on the Commission.(54) Therefore basic or essential elements of a measure are only provisions intended to shape the fundamental guidelines of Community policy.(55) In subject areas other than agricultural policy the ECJ defined more narrow requirements for the precision of the delegating norm.(56) In a non-agriculture case, the Court requested that the delegating provision itself must define the criteria for assessing the situation in question as well as the kind of measures to be taken by the Commission and the period of their validity.(57) In all cases, the implementing act must comply with provisions enacted in the delegating act; it may not be *ultra vires*.(58)

In summary, it can be concluded that the ECJ has so far not developed abstract substantial criteria for the differentiation between legislative matters which need to be dealt with within a legislative forum, and matters which may be delegated to decision-making in a non-legislative forum. It rather defines them in relation to the policy field of the EC treaty at stake.

In the framework of the incorporation of the charter of fundamental rights of the EU, such abstract criteria will arise. The distinction between ‘essential’ legislative and ‘non-essential’ implementing measures will be influenced first and foremost by the description of limitations to fundamental rights (part II of the draft). Only additionally, will the essentialness be analysed by the constitutional treaty’s articles on policy matters (part III of the draft constitutional treaty). The logic behind this observation is the following: Rights protected under the incorporated Charter of Fundamental Rights of the European Union are not granted without restrictions.⁽⁵⁹⁾ Under the charter of fundamental rights there are basically two ways of defining conditions under which the exercise of rights can be restricted.

Either the article explicitly states the conditions for potential exercise and restriction of a right, or – where the fundamental right does not grant an explicit possibility of limitation⁽⁶⁰⁾ – the right can be restricted under the grounds of draft Art. II-52 (1). In both cases, the limitations usually require authorisation “by law” (national or European).⁽⁶¹⁾

In this respect it is essential to recall that the draft treaty establishing a constitution for Europe does not distinguish between formal/procedural and substantive definitions of legislation.⁽⁶²⁾ Instead, it is based on the notion of a formal definition. Under the formal definition of ‘law’, a legal act is an act which has passed through the legislative procedure. This is the definition of ‘law’ in part I of the new draft constitution, which in combination with the requirement in part II for the limitation of fundamental rights, allows for the definition of core, non-delegatable elements of a law. This consequence of the new draft constitution would therefore also require a change in the case law of the ECJ on limitations to delegation.

The difference to the situation as it stands is the following: Currently, Art. 6 (2) EU declares that the Union “shall respect fundamental rights” as “general principals of Community law”. The ECJ reviews EC legal acts against the criteria of their respect for and compatibility with fundamental rights. The question of limitations of fundamental rights however, has been addressed with respect to substantive issues. It has not been addressed with respect to the procedure in which certain limitations need to be decided. The case law has been indifferent as to whether the limitation was decided by means of, for example, the codecision or legislative procedure, or decided by the Commission in implementing acts. Draft Art. II-52 (1) now explicitly requests a ‘law’ as basis of a limitation. There is no reason to believe that the definition of ‘law’ in part II of the draft constitutional treaty should differ or be broader from the definition of ‘law’ in part I.

The result of this change in approaches can be illustrated for example by revisiting the case C-240/90 *Germany v. Commission*⁽⁶³⁾: In that case, Germany was contesting the legality of a Commission implementing regulation for the sheep and goat meat markets. It claimed that the Commission was not entitled to decide upon the imposition of penalties to fraudulent farmers in an implementing regulation without being explicitly entitled by the Council to do so. Germany argued *inter alia* that the penalties would affect the fundamental rights of farmers. Therefore, aspects such as the type of penalties and the maximum amounts thereof formed part of the essential elements of a matter, which had to be decided in a legislative and not in an executive forum. The ECJ, however, in full court, did not deem it necessary to address the fundamental rights argument of the applicant. It ruled purely on the basis of the policy matter:

Art. 37 (3) EC gave the Council the power to decide on agricultural market organisations. In this framework, the Council would need to “give concrete shape to the fundamental guidelines” of its policy. Penalties, which would ensure the proper management of the Community funds in this policy area, were not part of these fundamental guidelines. Hence, decisions about the existence, the type or the maximum amount of penalties could be part of implementing powers, which had been delegated to the Commission. The ECJ thereby rejected the notion that the limitation of fundamental rights would constitute a core element of non-delegatable issues. It did not even require an explicit delegation in the question of penalties. In the case decided, the question of penalties was regarded to be implicit in a fairly wide-ranging delegation.

Under the new draft constitutional treaty, the situation would have been different. The provisions on agricultural policy in part III of the draft constitutional treaty are now accompanied by a catalogue of fundamental rights in part II of the draft. Penalty provisions would affect the rights in this catalogue of fundamental rights. The imposition of considerable penalties on farmers would, for example, infringe the farmers’ right to property under draft Art. II-17 insofar as a farmer could be obliged to pay a fine. That in turn could restrict the farmers’ ability to conduct their business in the future, which would affect their rights in draft Art. II-16. Any limitations on the exercise of the fundamental rights proclaimed in part II of the draft constitutional treaty, however, must be provided by law (draft Art. II-52 (1)). Commission implementing regulations are explicitly non-legislative acts. Thus, under the new draft constitutional treaty, Germany’s argument that the Council legislation on market organisation would have had to address the question of penalties explicitly would have had merit.

This is an example for the effect, which the introduction of a new typology of legal acts organised according to the principles of a hierarchy of norms will have. The new limitations to delegation in combination with the inclusion of a catalogue of fundamental rights will considerably change the parameters of delegation. So far, limitations to delegation were based on the policy area involved; now the main limitations will be the criteria derived from the fundamental rights.⁽⁶⁴⁾ This will add to what has been called the ‘parliamentary model of legitimacy of decision-making in the EU’. The most essential questions which concern balancing the fundamental values of the constitution against each other are decided within the most democratically directly legitimised forum: the EP and the Council.⁽⁶⁵⁾ The effect of this new structure of the constitutional provisions cannot be underestimated. It will, if properly applied, fundamentally change the delimitation between legislative and administrative functions under the Treaty.

III.2. Conditions for Delegation

Draft Art. I-35 (1) on delegated regulations prescribes several conditions of delegation of legislative functions. On a case-by-case basis the legislator needs to lay down “the objectives, content, scope and duration of the delegation.” These criteria for legality of delegation are not only procedural in the sense that the legislator has to formally spell out in the delegating law the objectives, content, scope and duration of the delegation. The criteria for legality are also substantive insofar as the objective, content and scope of a delegation need to be defined. In this sense they could be regarded as additional criteria to define what is ‘essential’ and thus a matter reserved for formal legislation.

Whether the substantive nature of these criteria will be effective limitations to the exercise of the legislative discretion finally depends on their enforceability in Court. The ECJ has so far reviewed substantive criteria limiting legislative discretion mainly under procedural aspects: It reviews only whether the legislator has indicated in the piece of legislation under review and whether the elements of the legal principle have been taken into account.⁽⁶⁶⁾ The ECJ therefore has been hesitant to review the legislator’s discretion against its own interpretation of the substantive criteria. It is doubtful whether, under the case law of the ECJ, the substantive criteria in draft Art. I-35 will be an effective pre-condition for delegation.

However, the ECJ could also follow a different model and enforce the substantive criteria in a stricter manner. Similar criteria to those defined draft Art. I-35 (1) exist in several former approaches to a reform of the typology of acts.⁽⁶⁷⁾ All contain wording, which is very close to Art. 80 (1) of the German constitution, the Grundgesetz ('GG').⁽⁶⁸⁾ The German constitutional court's approach in applying that formula can be summarized in the following test: The legislator itself must take the essential decisions by defining the tendency and program of a delegated matter sufficiently.⁽⁶⁹⁾ The affected citizen should be able to know in advance the content and limits the delegated administrative regulation could legally have.⁽⁷⁰⁾

Nonetheless, the ECJ's possibility to apply the German Constitutional Court's approach experience is limited. The reason for this is that both the test outlined in draft Art. I-35 (1) and in Art. 80 (1) GG are highly contextual. According to the German constitutional approach, essential matters may only be addressed by a law (or in administrative single-case decisions by an administrative act directly authorized by a law) and are governed by a gradual approach: the more intensely the intended action infringes essential questions, the more precise the parliamentary law has to deal with all aspects of the matter.⁽⁷¹⁾ This gradual approach, at first sight seems reasonable and suitable to be adopted by the ECJ. However, in the context of EU law, its applicability would be limited by the principle of subsidiarity. Subsidiarity regulates not only 'if' the European level is competent but also to which extent ('insofar') European regulation is necessary.⁽⁷²⁾

Therefore, the doctrine of essentialness as applied by the German constitutional court with its gradual approach on one hand and the principle of subsidiarity on the other hand contain not only differing but incompatible parameters for the determination of the scope of regulation. According to the gradual approach of the doctrine of the essentialness, the more essential a matter is, the more detail the legislator needs to regulate. On the other hand, the principle of subsidiarity requires the differentiation of the level of regulation on the European level according to criteria of effectiveness and practicability. The conflict between these two principles becomes all the more prevalent in light of the preamble of the Charter of Fundamental Rights of the Union and draft Art. II-51 which both request due regard for the principle of subsidiarity in the application of the charter.

The ECJ will have to carefully develop its case law to balance the requirements of legislative essentialness with the general principles of subsidiarity and proportionality.

III.3. Possibility to Revoke a Delegation

The core concept of delegated regulation is that the legislator has the possibility to determine on control mechanisms on a case-by-case basis.⁽⁷³⁾ This distinguishes the categories of delegated regulations from implementing acts in which review is undertaken by comitology procedures.

Draft Art. I-35 (2) defines the possibilities to revoke a delegation. The conditions of application to which the act of delegation is subject will be determined in the delegating law or framework law. Without any definition, the legislator will not be able to later revoke a delegated competence. The legislator will not be able to directly rely on the basis of one of the two procedures provided for in draft Art. 35 (2).

The list of possible conditions for delegation has been an element of substantial discussion within the Convention. In an earlier version of the draft article on delegated regulations, the list of possible approaches was exhaustive.⁽⁷⁴⁾ In the final version of the Convention's draft constitutional treaty, the list of possible conditions of delegation has been shortened, but the list is no longer exhaustive. Now the conditions of application "may consist" of one or more of the listed possibilities. This

leaves the legislator latitude to develop new forms of conditions.⁽⁷⁵⁾

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The two possibilities now listed in the draft Art. I-35 (2) are firstly, that the EP and the Council “may decide to revoke the delegation.” Secondly, the delegated regulation may enter into force only “if no objection has been expressed” by the legislator within a set period of time.⁽⁷⁶⁾ With the legislator not being bound to these forms of conditions for delegation, the two possibilities in draft Art. I-35 (2) can be regarded as examples for conditions of delegation.

This list of possibilities has been developed from conditions of delegation used in the British legal system.⁽⁷⁷⁾ Instruments to secure parliamentary review of delegated legislation. Secondary legislation may be submitted to two basic procedures before being able to enter into force, known as the ‘affirmative’ and the ‘negative’ procedure. According to the (less used) affirmative procedure, no legislation may take effect until there has been approval of Parliament. According to the (more frequent) negative procedure, draft secondary legislation will take effect within a given period of time, unless there has been express disapproval by parliament.⁽⁷⁸⁾

In earlier versions of the draft constitutional treaty, both the affirmative and the negative procedures had been listed next to the possibility to revoke a delegation. In later versions, the negative ‘disapproval’ procedure was dropped from the list of possibilities listed in draft Art. I-35 (2). Now only the possibility to revoke and the affirmative procedure are explicitly listed. The legislature remains free to construct other review and recourse procedures. This possibility of choice will continue to spark interinstitutional conflict similar to the decade-old conflict on comitology. In the definition of recourse procedures, the EP will need to take into account its limited resources for review of delegated acts. In general, the legislator should take into account that the system of scrutiny provided for in the draft Article on delegated regulations, does not allow the EU legislator to amend the proposed Commission regulations. Under the non-conclusive list of recourse methods such approaches should be constructed in order to ease the legislative practice.

III.4. Distinction to Implementing Regulations

Finally, the question therefore arises which matters should be dealt with in implementing acts rather than in delegated regulations. More generally, why differentiate between the two categories of act?

With respect to terminology, confusion can and will arise where a distinction needs to be drawn between different legal acts issued by the Commission called regulations. The Commission may act upon delegated legislative competences issuing “delegated regulations” under draft Art. I-35 (1). When the Commission issues non-legislative acts upon delegation of the implementation powers it can issue “European implementation regulations and directives”. In practice therefore, the criteria for determining the legality of the Commission measures will be the delegating act in both cases.

With this distinction, the question arises as to why there should be the parallel possibility of delegated legislation in the form of a “delegated regulation” issued by the Commission and the Commission issuing “European implementation regulations”. Draft Art. III-266 (4) (ex. Art. 230 EC) which regulates standing of non-privileged actors against acts of abstract-general nature does not distinguish between these categories. Draft Art. III-266 (4) refers to all types of regulatory acts (delegated and implementing) on the same level as legislative acts. It only asks for the nature of an act – abstract general or not – to establish standing in Court. This shows that even within the legal system, the distinction between delegated and implementing regulations is regarded as unintelligible for the Courts.

As mentioned in the chapter on implementing acts, in practice the only real distinction between “delegated regulations” and “implementing regulations” will be the mode of supervision of the Commission with respect to the delegated matter. In the case of delegated regulations under draft Art. I-35 (2) the European Parliament can reserve for itself the right to either revoke the delegation or to object a proposed measure. Implementing regulations under draft Art. I-36 would on the other hand be subject to Comitology rules. Under the existing Comitology decision, the European Parliament enjoys only very limited rights. Even under the most onerous Comitology procedure, the so-called regulatory procedure, the EP does not have the right to request recourse from the legislative forum.⁽⁷⁹⁾

The distinction between the two categories of act is not clear and probably the result of a compromise between two schools of thought within the convention: On the one hand there is the opinion that the Commission as the prime EU executive body should play an eminent role in implementing and forming EU legislation. This approach would argue in favour of far reaching delegation to the Commission, which would have resulted in stronger ‘regulatory’ legitimisation of the Union. On the other hand, there is the opinion that a restricted and controlled role of the Commission in implementing EU law can be achieved by implementation under the supervision of comitology or similar procedures.

Both opinions are represented in the solution found by the convention. The delegation approach under draft Art. I-35 favours EP involvement on control, the implementation approach in draft Art. I-36 allows for more MS involvement. The result of the parallel approach however has become an unwieldy set of legal instruments. Their hierarchic relation with respect to each other is not clear. The parallel approach is not suitable for the real challenges of implementation of EU law. It distracts from the real problems of including EU agencies and legal forms of the administrative network of EU and national bodies under the conditions of EU network administration.

III.5. Conclusions and Further Considerations [↑]

The reasoning behind the introduction of the new category of delegated regulation had been described in a Convention documents as follows: Generally, implementing acts were not regarded “matters, which concern the legislator.”⁽⁸⁰⁾ Therefore, the EP should review only delegated legislation. However, the need for a distinct category of legal acts called delegated legislation is not convincingly argued. Why should the fact that the MS are generally in charge of issuing implementing measures require two types of measures that allow for the regulation of matters of abstract-general content in non-legislative measures? The distinction seems to be based on the flawed conception that it is possible to distinguish between legislative and implementing matters on the technical scale. After all, issuing implementing regulations can accommodate the need for far reaching delegation with the need to issue acts of abstract-general nature. It would have been much more convincing to adapt the Comitology procedures to allow for legislative supervision through the involvement of MS representatives.⁽⁸¹⁾

What makes things still more complicated is that the way the different types of acts are set up, they do not avoid the possibility of sub-delegation from the Commission. Theoretically it is therefore possible and likely that the Commission will – in the area of delegated regulations – decide that it will itself have the power to issue implementing acts in the form of implementing regulations or implementing decisions. The Commission could sub-delegate competences to itself. In these cases, supervision of the Council is only indirectly possible by the legislative institutions by recalling the original act of delegation.⁽⁸²⁾

IV. Legislation: The Category of Laws and Framework Laws [↑]

Draft Art I-32 lists two types of binding legislative instruments for the EU: Laws and framework laws. The definitions of laws and framework laws correspond to the current definitions of regulations and directives under Art. 249 EC.⁽⁸³⁾ Laws and framework laws are therefore familiar types of legal acts. They are renamed in order to clarify their status and to be labelled with names more understandable to citizens.⁽⁸⁴⁾

IV.1. Laws and Framework Laws [↑]

IV.1.a. Formal Definition

Unlike regulations and directives, laws and framework laws are exclusively legislative instruments. Legislative acts under the new typology of acts are only acts that have been adopted in the formal so-called 'legislative procedure', a slightly reformed co-decision procedure (draft Art. III-298).⁽⁸⁵⁾ Laws and framework laws therefore basically have a formal and not a substantial definition.⁽⁸⁶⁾

This approach has the decisive advantage that it will solve some, if not most, of the legal basis problems of current legislation: Under the EC treaty, procedural provisions for a decision were defined in each policy matter. Therefore, the legal basis of an act was not only decisive to answer the question whether the European or the national level was competent to issue the act, but also to tell which institutions would have the right to be involved in which manner in the legislative procedure.⁽⁸⁷⁾ The existence of many different legislative procedures therefore was a source of constant interinstitutional conflict as well as conflict between the EU and the MS.

However, under the proposed new system, exceptions to the general legislative procedure (codecision) can be provided for in draft Art. I-33 (2). This exception clause – although not directly in line with the consideration of simplification of the legal system, might prove helpful to give the EU the flexibility to bring certain issues closer to the 'traditional' EU decision-making procedure in small steps. In the past, this approach of bringing matters closer to EU decision making by allowing for unanimous decision making and only later switching to majority voting in the Council and co-decision in the EP.

Given the continuity of definitions and approach, there seems no reason why the ECJ's case law for the interpretation of the regulations and directives should not continue to be applicable. This will include the case law on direct effect of directives, which will be applicable to framework laws. Individual citizens will continue to have a right to claim if the circumstances allow, the direct effect of a framework directive. It further will include the '*Francovich*' case law on the right of individuals to claim damages in case of faulty transformation of directives, which were intended to confer rights to private parties. Therewith the distinction between laws and framework laws could in practice remain as little transparent as the existing distinction between regulations and directives.

IV.1.b. Substantive Definition [↑]

Despite this basically formal definition of the law, there are also substantial limitations to the realm of EU legislation. They derive both from treaty provisions allocating competences to other institutions than the legislator and from general legal principles protected by the EU legal system.

Limits of the legislature's competencies, for example, derive from the prohibition of the legislature to address matters, which are reserved for special agencies. Such competencies have been allocated in primary law in the area of monetary policy to the ECB (draft Art. III-79 , Art. 110 EC).

Other treaty-based rules limiting the legislature's competencies derive from the draft constitutional treaty's definition of the interinstitutional equilibrium. An example for such rule can be found in the distribution of powers defined in the field of external relations – the conclusion of agreements between the Community and other parties as provided for in draft Art. III-222. In an abstract sense this rule is valid for all treaty provisions where the Commission has been vested with specific executive duties, which it must not be deprived of (e.g. draft Art. III-50, 51 in the area of competition law and state aid).

Other substantive criteria are that there are limitations to the delegation of legislative powers to the Commission. Next to the above-discussed question of essential elements of a law,⁽⁸⁸⁾ substantive delimitations of the area of legislation may stem from the general principles of law outlined in draft Art. I-9, (the principle of limited attribution of competences – the “principle of conferral”, the principle of subsidiarity and the principle of proportionality). Other substantive criteria have not been mentioned in the constitution and have so far not been accepted by the ECJ as general principles of law but which play an ever increasingly important role. The Commission has for example published a list of guidelines for the system of pre-evaluation of the effects of legislation and ex-post review. Both criteria could have been included alongside with general guidelines of the use of expertise in legislative procedures.⁽⁸⁹⁾

In summary, EU legislative acts primarily defined by their formal status as acts, which have been adopted in the legislative procedure. The scope of EU legislation is then delimited by certain substantive criteria.

IV.1.c. Evaluation ↑

The Concept of EU legislation has been well constructed. The introduction of a formal distinction between categories of legislative and implementing acts which are distinct in their hierarchic position, their decision making mode and the institutions involved in their creation and supervision was long overdue. The lack of a formal distinction has in the past given rise to many conflicts between the MS and the European level as well as interinstitutional conflicts between European institutions. These mainly centred around the legal basis problem of an act. With the introduction of a general legislative procedure, these problems should be largely overcome. The difficult distinction between regulations and directives nevertheless has been maintained in the form of laws and framework laws. This will lead to continuing case law on the question of direct effect of framework laws in EU law.

IV.2. Budgetary Laws ↑

One of the special categories of act are the European Union's financial provisions. They have always enjoyed a specific position within EU law due to their specific requirements of a complex system of balancing of the diverse financial interests within the Union.⁽⁹⁰⁾ Notwithstanding certain suggestions for a simplification of the current EC budgetary procedure,⁽⁹¹⁾ the more detailed suggestions for a new classification of Community acts have always granted the budgetary procedure a specific status not by its hierarchic position, but by submitting it to a distinct decision-making procedure.⁽⁹²⁾

This holds true for the draft treaty establishing a constitution for Europe. Financial provisions in this draft are acts of secondary legislation, therefore called ‘laws’ under the draft constitution. However, only the annual budget follows the legislative procedure. Three different levels of decision making exist with procedures that range from semi-constitutional to legislative: First, the decision on the Union’s own budget (draft Art. I-53 (3) which requires the approval of the MS according to their respective constitutional requirements). Second, the law on the multi-annual financial framework (draft Art. I-54 requiring the consent of the majority of members of the EP) and third, the annual budget (draft Art. I-55, III-306, taken under the legislative procedure).

Especially the decision-making procedure for the EU budget requiring unanimity and ratification will allow MS to hold the EU ransom and will cause considerable and unfortunate debates about EU spending. The MS possibility to blackmail the Union will therefore be detrimental to a reasonable spending of EU funds and therefore to the legitimacy of EU governance as a whole.

IV.3. Statutes and Rules of Procedure

Whilst Statutes can be issued in the form of simple legislation,⁽⁹³⁾ some Rules of Procedure etc. will be issued as acts of secondary legislation but remain outside of the legislative procedure by the institutions in their specific function as bearers of the right of self-organisation.⁽⁹⁴⁾ Special types of these acts of self-organisation are, for example, draft Art. III-227 (2) under which a European law of the EP will establish the regulations on the performance of MEPs. Draft Art. III-230 allows the EP to legislate on its own initiative on rules governing its right of inquiry.

IV.4. Interinstitutional Agreements

Interinstitutional Agreements (IIAs) – often also termed as Joint Declarations – are a category of Community acts with legal force, which do not fit into the classical distinction between legislative and implementing acts. Unfortunately, they are not explicitly mentioned in the draft constitutional treaty. Unlike laws and framework laws which directly concern the citizens and/or the MS, IIAs are a third category of non-constitutional, secondary law: rules which only impose obligations on Union institutions or which only have an internal effect in the EU institutions.⁽⁹⁵⁾

The current legal status of these instruments is not evident. The ECJ makes reference to IIAs in its case law.⁽⁹⁶⁾ IIAs are concluded by Community institutions and are therefore “acts” of the latter. For that reason, IIAs fall within the category of secondary law. They are frequently drafted by way of ad-hoc interinstitutional negotiation.⁽⁹⁷⁾ Their legal status is only partially defined in the Treaty in rather vague statements as in Art. 218 (2) EC according to which methods of cooperation shall be settled by “common accord“. The draft constitutional treaty article replacing Art. 218 EC does no longer contain a reference to interinstitutional agreements. That however does not mean that institutions will no longer be able to avail of them in order to regulate interinstitutional legal issues.

The diversity of subject areas to which IIAs are applied in practice complicates a more precise definition of their legal status. IIAs concluded by virtue of the treaty provisions can be regarded as legally binding when so intended by the drafters of the agreement. For the others the situation is less clear. Their common characteristic is that they have no explicit legal base in the treaties but can often be regarded as a result of the institution’s obligation to effectively cooperate deriving from Art. 7 EC.⁽⁹⁸⁾ Binding effect can be assumed to the extent the declaring parties have such in mind since the EP, Council and Commission possess limited legal personality. Their intention though is often expressed in fairly vague terms, the impact ranging from the merely political statements to binding provisions.

Instead of clarifying their legal effect and status by giving them a broader basis of authorisation within the constitution, the draft constitutional treaty has unfortunately decided to ignore this phenomenon. That will however not make the interinstitutional agreements become an unnecessary tool. The procedure for their adoption, especially the majority requirements, the obligation of publication in the Official Journal and the Court's competence for review will continue to be disputed.

IV.5. Conclusions ↑

The basically formal definition of legislation in the EU is an approach, which is convincing in its simplicity. The requirement for explicit delegation is equally fortunate and adds to the clarity of the legal system and the transparency as to which criteria to measure non-legislative acts. The category of legislative measures of the Union however suffers from a flaw that can be seen in much of the draft constitutional treaty: it is too closely framed according to 19th and 20th century national constitutional models. It does not take the specific conditions of a construct like the EU sufficiently into account. One example is that listed legislative acts only contain two of the three main types of legislative action. The gap between the legal and the constitutional reality will remain open on the level of legislation.

V. Constitutional Law ↑

The highest level of law under the new legal order established by the draft treaty establishing a constitution for Europe would be the treaty itself. It is – like the Treaties of Rome and Maastricht – a treaty between MS. Consequently, primary law would continue to consist of the constitutional treaty and its protocols as well as unwritten general principles of law,⁽⁹⁹⁾ which the ECJ protects as part of primary law.⁽¹⁰⁰⁾

Primary law would, according to the convention's draft Art. IV-6, 7, be created by means of a treaty amendment procedure. The amendment procedure would consist of four steps, the final step being the ratification by all MS according to their respective constitutional procedures.⁽¹⁰¹⁾ This ratification requirement can be regarded as the last direct link between EU law and public international law principles. Even though the European Convention promises a treaty to establish a 'constitution' the MS still play the decisive role in its creation and amendment. MS therefore are both part of the 'pouvoir constituant' as well as the 'pouvoir constitué' of the new constitutional treaty.⁽¹⁰²⁾ With respect to constitutional law therefore the parliamentary mode of legitimacy falls to MS parliaments. A strong intergovernmental aspect accompanies it.

V.1. Different Categories of Primary Law ↑

The draft treaty establishing a constitution for Europe contains differentiations on the level of primary constitutional law. As with other categories of act, criteria for differentiation can stem either from formal or from substantive criteria. Formal criteria for differentiation are differing amendment procedures. Substantive criteria are non-procedural implicit or explicit limitations to the possibility to amend acts of primary law.

Formal criteria create a differentiation between primary law on one hand, which requires the full formal treaty amendment procedure and on the other hand provisions, which are subject to a less onerous amendment procedure. The latter provisions are and have to date always been the exception to the rule and they continue to be so. Examples for matters with simplified formal amendment requirements have become few but the draft constitutional treaty contains exceptions in the form of 'autonomous' amendment procedures (procedures in which the final step of Member State

ratification has been replaced by a Council decision). (103)

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The discussion on substantive criteria as limits to treaty amendments has in the past been one of the main themes in the literature on the hierarchy of norms in EU law.(104) Certain limitations to treaty amendments have been laid down in the two ECJ opinions on the EEA treaty.(105) These however only requested that certain treaty provisions such as Art. 220 EC (draft Art. I-28 (1)) were amended by explicit treaty amendment procedures, not by implicit amendment of another treaty provision (e.g. Art. 310 EC). In its opinion 1/00, the ECJ reconfirmed its position taken in the EEA opinions.(106) Treaty amendments are therefore limited insofar as an amendment of treaty law needs to be explicit.

More substantive – albeit indirect – limitations to the MS power to amend treaties however derive from common constitutional law in Europe. MS as the EU are both bound by common constitutional principles as described e.g. in draft Art. I-2 (“The Union’s values”).(107) Treaty amendments, which do not respect these principles, will be illegal under national law and cannot be ratified by national parliaments.(108) Therefore, the conclusion can be drawn that there are certain principles inherent in European constitutional law, which in practice will not be amendable due to the interconnection of MS and EU law. From a hierarchic point of view, this would indicate different levels of primary law. These implicit hierarchic relations however do not in themselves merit a differentiation in typology of acts for different levels of primary law.

A very different question will be the relation between the different parts of the draft constitutional treaty. These contain provisions of very different nature. All parts are nominally on the same hierarchic level. Part III on policies of the Union however contains very much more detailed provisions on certain policy fields than part I on the definition and the objectives of the EU and part II on fundamental rights. Generally, in cases of conflict of different provisions of primary law, the ECJ has so far applied the *lex specialis* rule under which the more general rule is subordinate to the rule specifically applicable to the situation in question.(109) This would lead to the result that the detailed policy oriented provisions would prevail not only over the general organisational rules but also over the provisions on fundamental rights in part III of the treaty. In the future, it can be expected that there will be cases where the ECJ will not apply the *lex specialis* rule and might interpret provisions of part III in light of the first two parts of the draft constitutional treaty thus indicating a certain internal hierarchy amongst provisions of primary law.(110)

V.2. Categories of Constitutional Law Resulting from the Incorporation of the Charter on Fundamental Rights of the Union

The incorporation of the Charter of Fundamental Rights into the treaty as primary law, introduced two new categories of law on the constitutional level:

Firstly, the European Convention(111) added a sentence into the fourth paragraph of the preamble of the charter of fundamental rights. This addition declares that “the charter will be interpreted by the Courts of the Union and the MS with due regard to the explanations prepared at the instigation of the Presidium of the Convention which drafted the charter“(112) The legal nature of this reference to the explanatory document is unclear.

One possible interpretation of this reference would be to regard the ‘explanations’ to the charter as fixed in time by the Convention presidium. The consequence of this interpretation would be that the ‘explanations’ would require a full treaty amendment procedure including a Convention phase to be amended at a later stage.⁽¹¹³⁾ Alternatively, the explanation’s constitutional status in the future could also be completely deleted by deleting the reference to the ‘explanations’ in the preamble of part two of the draft constitutional treaty. Essentially, the ‘explanations’ thereby are granted the same legal status as a formal treaty provision. The disadvantage of this approach would be obvious: The reason why the ‘explanations’ are not given the status as a formal protocol in the constitutional treaty is that they should be referred to in an informal way. Such would allow for the limiting effect of the explanations on the substantial content of the fundamental rights in the charter to remain visible.

On the other hand, it would be possible to take the reference literally. Since there are no conditions attached to the reference, this would mean that the preamble to the draft would be a ‘renvoi’ to the entire text of the explanations, including its preamble which originally stated that the explanations have “no legal value” and after amendment by the European Convention that they “although not having the status of law” are nevertheless a “valuable tool of interpretation”. That would make the ‘explanations’ a kind of soft law treaty protocol.

In view of the last two considerations, the reference to the explanations shows the following characteristics: Firstly, the explanations are regarded by the Convention to be amendable as to the substance of the explanations as well as the description of their binding nature. The future amendments of the explanations can therefore take place in the framework of the process for treaty amendments outlined in draft Art. IV-6 and 7. Secondly, given their status as interpretative documents of a constitutional text, the explanations should not be susceptible to amendment by simple legislation. These characteristics put the explanations into a legal status very similar to a treaty protocol. The non-binding nature of the content of the explanations makes them a sort of sui-generis type of soft law protocol.

Not only the difficulties in establishing the legal status of the ‘explanations’ are an indicator for them being problematic as a legal category. Also the fact that the draft constitution now contains a sort of ‘dynamic link’ to an interpretative document is questionable in light of the distribution of powers. The explanations are intended to limit the ECJ’s role in the interpretation of the treaty provisions. Including the ambiguous category of a ‘reference to explanations’ is unnecessary and – in view of the legal problems of interpretation – misguided. The ECJ would in any case have the right to take the explanations into account in its case law with or without the formal reference.

The second new category of acts introduced into EU primary law by the incorporation of the Charter of Fundamental Rights of the Union is the distinction between rights and principles enshrined in draft Art. II-52 (5).⁽¹¹⁴⁾ Under the draft Art. II-52 (5) the role of the principles under the new treaty is clarified insofar as they will not be a source of rights for individual citizens, but can be used to interpret acts implementing these principles. This latter distinction therefore is a tool for clarification of an existing limitation of the fundamental rights of the treaty. It stems from the different nature of fundamental rights in the Convention’s draft.

V.3. Organic Laws / Institutional Laws

The draft treaty establishing a constitution for Europe keeps to the ‘classical’ distinction between constitutional law on the primary level and ordinary laws for legislation based on primary law. The Convention decided not to single out certain matters to a category called ‘organic law’ and position them within a hierarchic level between primary and ordinary secondary law.

In earlier draft constitutions for the EU suggested a separate category of legal acts, which would “regulate in particular the composition, tasks or activities of the institutions and organs of the Union“.(115) It was to be submitted to more ponderous decision-making procedures than ordinary Community legislation but be easier to amend than a constitutional law. (116)

The archetype of the suggested category of organic law derives from Art. 46 of the French Constitution which itself contains no abstract definition of the contents of this category. Instead it refers to the different articles, which provide for the adoption of such laws.(117) Organic law as category also exists in the Spanish and the Italian constitutions.(118) In Spain, organic laws not only embody institutional questions but are applied to basic legislation within the scope of fundamental rights.(119) This also applies to the category of the organic law as suggested by the EP’s Draft Treaty of 1984 and the Draft Constitution of 1994. The catalogues of the EP drafts contained a multitude of different matters, not only dealing with institutional questions but also with subjects ranging from the realisation of monetary union to the scope of today’s Art. 235.(120) Furthermore there were suggestions in the literature which proposed to extend the scope of organic law beyond the institutional matters with e.g. the definition of a “catalogue of human rights”, “rules on limits to fundamental rights, codification of unwritten principles of EC law” and “basic rules in the various policy areas.”(121) Others more simply suggested applying this category to all matters to which it is impossible to abstain from the Council’s unanimity vote.(122)

The advantage of the proposed category of organic laws would be the possibility to formally distinguish between primary law of truly constitutional nature on one hand and more detailed rules on the other. The problems of not having such distinction can be aptly studied in the draft treaty establishing a constitution for Europe. Part one, two and four of the draft contain matters of truly constitutional nature. In part three, many matters are of a more technical nature. A category of organic law could provide an instrument for matters that require a higher degree of formal legitimacy than simple legislation but which are not themselves constitutional by nature.(123) This would also increase the transparency of the EU’s legal system because the category of organic norms would allow the drafting of a constitution that is short and therefore more transparent and intelligible to readers.

These positive aspects should be contrasted with some potential disadvantages of the introduction of the category of organic law: The effect of a possible shorter constitutional text would have to be evaluated in light of the subsequent increase in the overall complexity of the legal system and difficulties in the delimitation between the different categories of acts.

The Spanish constitutional experience teaches that marking out the boundaries between the scope of organic law and ordinary legislation creates serious difficulties in practice(124). All suggestions to introduce organic law on the EC-level define its scope by single-case enumeration. Any catalogue of organic law matters would thereby inevitably revive the uncertainty and interinstitutional dispute over the correct legal basis requiring different decision-making procedures attached to the subject areas. A possible increase in transparency by way of a shorter constitutional text therefore could turn out to be compensated by problems with the application of the catalogue of enlisted matters. Furthermore, the differentiation between organic law and ordinary Community legislation would in practice be difficult to observe because the suggested actors in the legislative process of organic law and ordinary legislation would be identical(125).

In view of these difficulties, the Convention's draft constitutional treaty did not propose the step to introduce the category of 'lois organiques'. Such a step would have been a more major departure from the current division between MS' powers with respect to the creation of primary law and the supranational mode of decision-making used for the area of secondary law. Had the draft constitutional treaty contained the proposal to introduce the category of organic laws, the MS would have weakened their decisive influence over a large range of matters which so far have been regulated in the EU and EC treaty and are now regulated in part three of the draft treaty. Practically therefore, the non-introduction of the category of organic law maintained the more intergovernmental mode of legitimacy in the EU.

VI. Special Categories of Acts [↑]

Special categories of legal acts have existed under the EU and EC treaties and would continue to exist under the draft treaty establishing a constitution for Europe. These categories can be found on all levels of the hierarchy: Constitutional, secondary (legislative) and tertiary (implementing) provisions. Art. 249 EC, as draft Art. I-32 contain non-conclusive lists of categories of acts.

VI.1. Non-Binding Legal Acts

The draft constitutional treaty provides for two types of non-binding legal acts: Recommendations and Opinions. These instruments remain the same as they have been since the Treaty of Rome in 1957 and their subsequent interpretation in EU law. The inclusion of the charter of fundamental rights will however make one legal consequence of non-binding Recommendations and Opinions more transparent: The EU can not infringe on fundamental rights of individuals with non-binding recommendations or opinions, by e.g. recommending citizens to take a certain action which would infringe on fundamental rights of third parties. In this respect it is very unfortunate that draft Art. III-266 (1) explicitly excludes the ECJ's review of the legality of recommendations and opinions since this leaves a lacuna in the protection of the citizens. This provision might be regarded as unconstitutional constitutional law, given the adherence of the EU to the rule of law.⁽¹²⁶⁾

VI.2. 'Open Method of Coordination'(OMC) [↑]

The Convention's working group on simplification had suggested that "constitutional status should be assigned to the open method of coordination, which involves concerted action by the MS outside the competences attributed to the Union by the treaties".⁽¹²⁷⁾ The working group did not make any suggestions as to how to do so. One of the reasons for this is that it would be extremely difficult to find a uniform definition for the vast amount of governance techniques, which are usually referred to as 'OMC'.⁽¹²⁸⁾ A working group of the European Commission preparing the 2001 White Paper on Governance had aptly defined OMC as a new form of collective action to foster compatibility, consistency or convergence between MS' public policies. "Covering a variety of arrangements, it stands half-way between pure legislative integration and straightforward cooperation." Observers of the phenomenon of OMC also remark that the conditions and forms of the coordination differ considerably according to the policy area in which the method is applied.⁽¹²⁹⁾ For example, cooperation in the area of economic policy has rapidly increased since the Maastricht treaty and that of employment policy since the treaty of Amsterdam. Officially, it was endorsed on the Lisbon Council introducing the 'Lisbon process' as a means of policy making. The coordination between the MS takes place in a networking fashion applying techniques such as, e.g., the creation of policy guidelines for MS, benchmarking and reporting of progress.⁽¹³⁰⁾ Often legislation in a given policy area goes hand in hand with the coordination processes.

OMC as referred to in the draft constitutional treaty contains a chapter five in part three on “Areas where the Union may take coordinating, supplementary or supporting action.” The legal acts listed in the policy fields of this area are usually laws or framework laws as well as recommendations.⁽¹³¹⁾ Part one of the draft constitutional treaty does not contain any specific forms of legal acts for coordination of national policies.

In overview, the Convention’s proposals therefore provide the following approach to the policy method termed the ‘open method of cooperation’: Legislative acts define the activity of the EU in certain areas where coordination between the MS and the EU is necessary. The conditions of this cooperation and the type of networks will be laid down in that legislation, including all soft-law instruments, which will be necessary for the implementation. With this approach, the problem of the open method is removed from the realm of a distinctive category of legal acts and into the realm of the typology of implementing acts of the Union.

However, as was described below, this is precisely where the problem of the new typology of acts lies: It fails to recognize the different types of implementation which take place on the Union level which cannot be described as implementing regulations, decisions and recommendations. The activities, which are generally described as OMC however usually take place in the pre-legal more political sphere. The word ‘open’ thereby indicates non-binding acts. MS are usually not under the obligation to act. There are usually no sanctions attached to non-coordination or non-fulfilments of policy guidelines or approaches. This effect makes the definition of legal acts specifically designed to serve the purposes of the open method appear as juxtaposition.

This would, however, not have excluded the inclusion of some framework requirements for the use of OMC in a sort of generic provision. In such a generic provision, requirements for transparency and broad participation of stakeholders in the policy as well as a consultative role of the EP and the Committee of the Regions could be laid down.⁽¹³²⁾ That could either take place directly within the constitution, or it could be undertaken by law upon delegation of the constitution in a manner similar to the laying down of the „rules and general principles” for Comitology procedures in draft Art. I-36 (3) (Art. 202 third indent EC). The Convention’s decision not to provide for such a generic provision, however, seems well justified. Most of the provisions on transparency and participation are already guaranteed in Art. 41 of the European Charter of Fundamental Rights of the Union. A specific provision referring to OMC would in any case face the grave problem of defining the notion of OMC and therefore its field of applicability.

VI.3. Acts for Common Foreign and Security Policy ↑

Although under the draft constitutional treaty, all three former pillars of the EU treaty have been united, the typology of legal acts outlined in draft Art. I-32 to 36 does not contain an exhaustive list of acts. The former typology of legal acts for the EU’s second pillar is contained in draft Art. I-39 and I-40. ⁽¹³³⁾ The legal acts for the third pillar are restated in draft Art. I-41.⁽¹³⁴⁾

With this distinction between types of legal acts, the EU treaty’s pillar structure reappears within the draft constitution. The former second pillar matters have a new, simplified typology of legal acts. The core of these new acts is the European decision. It is a decision sui-generis that is taken by the European Council or by Council of Ministers by unanimity. European decisions under CFSP are implemented by the MS.

Systematically however, the creation of a sui-generis instrument for CFSP called European decision fits into the structure of the system of legal acts which regards laws and framework laws as acts of the legislator decided under co-decision. Foreign policy with this distinction has also formally been allocated to the executive branch of European government. The provision of Art. I-39 (6) illustrates this approach by allowing for the EP to be consulted only with respect to the ‘main aspects and basic choices’ of CFSP. The budgetary power is the main mode of influence for the EP in this policy area.

VI.4. International Agreements ↑

As under EC law, the Union under the draft constitutional treaty can enter into international agreements. International agreements are a distinct type of legal act of the Union. They are submitted to a special procedure for both negotiation and ratification (draft Art. III-222, Art. 300 EC). Association agreements continue to exist as sub-category of international agreements (draft Art. III-221, Art. 310 EC) which allow for specific types of agreements.

International agreements under the draft constitutional treaties will continue to have a distinct position ‘in between’ primary and secondary law. The provisions of international agreements “from the coming into force thereof, form an integral part of Community law.”⁽¹³⁵⁾ Thus, the ECJ reviews Community’s secondary law for its compliance with the international agreements,⁽¹³⁶⁾ thereby indicating their hierarchic position between primary and secondary law.

VII. Intertemporal Rules, Transformation from Old to New? ↑

The draft constitutional treaty does not contain explicit guidelines for the transformation from the old to the new regime. Legal acts issued under the EU and EC treaties would therefore remain in force until amended or abolished. This approach at first sight seems wise in view of the difficulties with the attempt to transform the committees established before and after the first comitology decision was adopted in 1987 to the new system of comitology under second comitology decision of 1999. ⁽¹³⁷⁾ In practice however, the non-transformation will cause intransparency since for a long period of time the old and the new terminology will be used in parallel.

VIII. Review and Conclusions ↑

If a legal system were to be compared with geology, the draft constitutional treaty could be compared to a – mild – earthquake. The draft constitutional treaty leaves many of the structures of the architecture of the European Union intact. Nevertheless, it does lead to a certain restructuring of the tectonic plates and it does open up new faults or make old ones visible.

A shake up of the levels of legal instruments of the EU has led to the long awaited formal differentiation between legislative and non-legislative instruments. This aspect of the proposed hierarchy of norms is a very welcome step in reducing the intransparencies of the EU’s legal system and adding to its overall maturity. The trend of the last treaty reforms from the Single European Act to Nice towards more parliamentary legitimisation of EU governance continues. But the draft constitutional treaty does not propose a revolution. Regulatory and intergovernmental forms of legitimisation continue to be very important.

The proposed system also has its faults (not only in the geological sense). The draft constitutional treaty avoids embracing many of the issues, which make the European constitutional system special. Instead of reflecting these peculiarities, it is oriented towards state-like models. That has the advantage of developing a legal system that seems familiar to European citizens. The disadvantage is that it is only mal-adapted to the European modes of governance. Examples for these faults are especially to be found in the area of non-legislative measures. The draft constitutional treaty does not recognise the reality of the implementation of European law through administrative networks made up of European and MS public bodies as well as private parties. The draft constitutional treaty lists only unilateral forms of action such as implementing regulations and decisions. Contracts and soft law tools find no mention in the articles on implementing acts. Equally, the draft constitutional treaty ignores the development of using agencies for implementation. In this respect, the typology of acts is not conclusive, even though the list in draft Art. I-32 would allude to indicate comprehensiveness. The ECJ will practically accept the plurality of types of acts and of their origin by analysing a legal act primarily on the basis of the substance and not the form.

Faults also exist with respect to legislative measures. The draft constitutional treaty generally explicitly recognises acts of legislative nature, which are addressed at the MS or individuals (framework laws and laws). Only in single cases does it provide for forms of legal acts addressed at other institutions and organise certain procedures (budgetary laws and the law on comitology procedures). Interinstitutional agreements on the other hand are not mentioned as category of act.

An earthquake, however mild, may also suppress certain tectonic plates. Such has happened in the case of the draft constitutional treaty with respect to the proposals to formally include a reference to the 'open method of coordination' on one hand and the idea to introduce organic laws on the other. Not to create the category of organic laws especially strengthens intergovernmental forms of legitimatisation. Part III of the draft constitutional treaty continues to require a formal treaty/constitution amendment procedure. But it comes at the cost of an unwieldy and intransparent constitutional treaty containing no less than three hundred printed pages. The faults an earthquake creates are usually rather abrupt. In this respect, the lack of transformation provisions or intertemporal regulations within the new legal system is very problematic. There will be considerable confusion with respect to 'old' and 'new' provisions, especially with respect to the terminology applied.

One of the most central features of the shake-up, which the draft constitutional treaty would introduce, is to strengthen the use of the hierarchic structures in the EU's legal system. This simple organisational structure will help to guarantee the rule of law within the legal system by increasing the transparency and the requirements for legality of all legal acts of the Union. This will affect the legal system on all three levels.

On the level of primary law, the inclusion of the Charter of Fundamental Rights will lead to a clarification of conditions for EU governance. The definition of legislative measures within the constitutional treaty allows for the use of a single legislative procedure – the codecision procedure. That will help to avoid interinstitutional conflict as well as conflict between the MS and the institutions on the legal basis of an act.

On the third level, the level of non-legislative acts, the concept of hierarchy has been successfully applied to submit all non-legislative acts on the European level to the requirement of delegation. The concept of hierarchies unfortunately has not been applied within the third level. The draft constitutional treaty proposes to introduce two categories of non-legislative acts: delegated regulations and implementing regulations and decisions. The relation between these two categories is more than unclear. Where the hierarchic approach has been included it shows promising results. It allows streamlining non-legislative measures to legislation and primary law. Examples are the clarification of the limits to delegation, which come with the inclusion of a catalogue of fundamental rights and the explicit limitations defined in draft Art. I-35.

In that respect, if one were to continue the comparison of the draft constitutional treaty with a minor earthquake in geology, the draft constitutional treaty has the effect of – despite producing some new faults – shaking the layers of law into place. Given the remaining faults however, the hope that this constitution will be able to last for the next 50 years largely unchanged will seem unrealistic. EU law remains a territory in a geologically active area. The new system of legal acts will continue to require adaptation to the reality of the legal system in order to remain relevant. The moving tectonic plates are the relations between MS and the EU, the developing systems of administrative networks for EU law implementation and the further trend to parliamentary legitimacy of EU governance, the next step of which will be the politisation of the Commission. These tectonic movements will have an effect on the development of the system of legal acts in the EU.

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Endnotes [↑]

(1) Final Report of Working Group IX on Simplification CONV 424/02 of 29 November 2002, 2; for the general effect of the Institutional Balance, see e.g.: *Koen Lenaerts, Amaryllis Verhoeven*, *Institutional Balance as a Guarantee for Democracy in EU Governance*, in: Christian Joerges, Renaud Dehousse (ed.), *Good Governance in Europe's Integrated Market*, Oxford 2002, 35 et seq.

(2) The European Convention, Draft Treaty establishing a Constitution for Europe, CONV 850/03 of 19 July 2003.

(3) EP Draft Treaty Establishing the European Union, (OJ 1984 C 77/33).

(4) Art. 31 VI, EP Draft Constitution of the European Union, 10 February 1994 (OJ 1994 C 61/155).

(5) The 1984-draft Treaty distinguishes between constitutional laws (amendments of the Treaty are

subject of the procedure described in Art. 84), ordinary laws and regulations concerning the modalities of the application of the laws (Art. 34). Each group of norms has its own decision making procedures and institutional responsibility. The draft Treaty though also provided for a classical threefold division of powers with the EP and the Council as bicameral legislator (Art.36) and the Commission as executive (Art. 40). For commentary see: *Francesco Capotorti et al., Le Traité d'Union Européenne*, Paris 1985, 130.

(6) The ECJ used this terminology to describe the special kind of rule making by an authority of neither international public law character nor comparable to national systems. The Community's quasi legislation has direct effect without the necessity of national ratification and is subject to judicial review only by ECJ. Case 8/55, *Fédération Charbonnière de Belgique v. High Authority of the European Coal and Steel Community*, [1954-1956] ECR 245, 258.

(7) *Hans Peter Ipsen*, Zur Exekutivrechtsetzung in der Europäischen Gemeinschaft, in: Peter Badura, Rupert Scholz (ed), *Wege und Verfahren des Verfassungslebens*, München 1993, 425-441 with further references.

(8) For a review of the discussions on the IGC leading to the Treaty of Maastricht, see: *Jim Cloos et al., Le Traité de Maastricht*, Paris 1994, 369-373; *Enrico Martial*, Italy and the European Political Union, in: Finn Laursen, Sophie Vanhoonacker (eds.), *The Intergovernmental Conference on Political Union*, London 1992, 146; *Werner Weidenfeld* (ed.), *Maastricht in der Analyse*, Opladen 1994, 223. The EP's position is outlined in: Second Interim Report of the Committee on Institutional Affairs on the constitutional basis of European Union, 12 November 1990, Rapporteur: Mr. Emilio Colombo, EP Doc. A3-0301/90; Resolution on the Intergovernmental Conferences in the context of Parliament's strategy for European Union, 22 November 1990, O.J. 1990 C 324/219, 233; Resolution on the enhancement of democratic legitimacy in the context of the Intergovernmental Conference on Political Union, EP Doc. B3-0551/91, O.J. 1991 C 129/134, 135; Resolution on the nature of Community acts, EP Doc. A3-0085/91, O.J. 1991 C 129/136 – 138. The Commission's point of view is documented in: Commission opinion of 21 October 1990 on the proposal for amendment of the Treaty establishing the European Economic Community with view to political union, Bull. EC Sup 2/91, 117 – 119 and 121 – 123.

(9) Declaration No. 16 to the Final Act of the Treaty on European Union, OJ 1992 C 191/101.

(10) Discussion outlined in the: Report from the Reflection Group on the 1996 Intergovernmental Conference, SN 520/1/95 REV 1 (REFLEX 21), 35; EP Committee on Institutional Affairs, Working Document on the categories of legal act of the European Union and the relationships between them, Rapporteur: *Willi Rothley*, March 15, 1995, PE 211.103/ rev.; *Roland Bieber, Isabelle Salomé*, Hierarchy of Norms in European Law, 33 CMLRev. 1996, 910; *Alan Dashwood*, Democracy, Accountability and Transparency, in: Alan Dashwood (ed.), *Reviewing Maastricht Issues for the 1996 IGC*, London 1996, 92 et seq.; *C.A.J.M. Kortmann*, Het normenstelsel in het gemeenschapsrecht, 44 SEW (1996), 116-124; *Robert Kovar*, La déclaration No. 16 annexée au traité sur L'union Européenne: Chronique d'un échec annoncé ?, 33 CDE (1997), 3 et seq.; *Siegfried Magiera*, Zur Reform der Normenhierarchie im Recht der Europäischen Union, 18 Integration (1995), 197 et seq.; *Pierre-Yves Monjal*, La Conférence intergouvernementale de 1996 et la hiérarchie des normes communautaires, 32 RTDE (1996), 681-716; *Antonio Tizzano*, La hiérarchie des normes communautaires, RMC 1995, 219, 228; *Gerd Winter* (ed.), *Sources and Categories of European Union Law: A Comparative and Reform Perspective*, Baden-Baden 1996.

(11) *Claude Blumann*, Le parlement européen et la comitologie: une complication pour la Conférence intergouvernementale de 1996, 32 RTDE (1996), 17 et seq.; *Christoph Demmke, Georg Haibach*, Die Rolle der Komitologieausschüsse bei der Durchführung des Gemeinschaftsrechts und die Rechtsprechung des EuGH, DÖV 1997, 710 et seq.; *Herwig C.H. Hofmann, Annette Elisabeth Töller*, Zur Reform der Komitologie, in: 1998 Staatswissenschaften und Staatspraxis, 209-239; *Jean-*

Dominique Nuttens, La «comitologie» et la conférence intergouvernementale, RMC 1996, 314-327; *Jean Claude Piris*, Après Maastricht, les institutions communautaires sont-elles plus efficaces, plus démocratiques et plus transparentes?, 30 RTDE (1994), 12-20, 28; *Massimo Silvestro*, Modifications des procédures législatives à la suite du Traité sur l'Union Européenne et renforcement des procédures de contrôle politique et administratif, RMC 1995, 171-172.

(12) *Jean-Louis Bourlanges*, La hiérarchie des normes et la typologie des actes de l'Union européenne, document préparatoire pour EP DOC A5-0425/2002 of 17 December 2002.

(13) The first pillar has a catalogue of legal acts laid down in Art. 249 EC (Regulations, directives, decisions as well as recommendations and opinions). This catalogue is not exhaustive. The EC treaty provides for additional types of legal acts in individual treaty provisions (e.g.: 'appropriate provisions' under Art. 71 para 1 (d) EC, 'incentive measures' under Art. 149 para 4, Art. 151 para 5 and Art. 152 para 4 c) EC, 'provisions primarily of fiscal nature' and 'measures' under Art. 175 para 2 EC, 'guidelines' under Art. 211 para 1 EC. The EC treaty contains several types of legal acts which are decided by a decision making procedure different from 'normal' secondary legislation e.g. the EC's 'provisions relating to the system of own recourses of the Community' under Art. 269 para 2 EC and 'appropriate measures' to obtain the necessary powers of the Community under Art. 308 EC). Further categories of legal acts, often referred to as 'atypical legal acts' have been developed in practice (e.g. Decisions which unlike the decisions named in Art. 249 EC, are neither directed at a member state nor at an individual, example: Council Decision 1999/468 O.J. L 1999/184 of 28 June 1999, the so called Comitology Decision). Further types of measures have been established for example with respect to the 'open method of cooperation'. Here the Council decides on guidelines and establishes, where appropriate, quantitative and qualitative indicators and benchmarks – see No 37 of the Presidency Conclusions of the Lisbon European Council on 23 and 24 March 2000, http://www.europarl.eu.int/summits/lis1_en.htm#c). The second and third pillars each have their distinct typology of legal acts defined in the relevant articles of the EU Treaty (For the second pillar (CFSP) in Art. 12 et seq. EU with 'principles and general guidelines' Art. 13 para 1 EU, 'common strategies' Art. 13 para 2 EU, 'decisions' Art. 13 para 3 EU, 'joint actions' Art. 14 EU and 'common positions' Art. 15 EU; In the framework of the third pillar Art. 34 para 2 a)-d) provides for: common positions, framework decisions, decisions and conventions). The decision-making procedures are not allocated to single types of legal acts but are defined in the provisions on the policy matter.

(14) See [chapter V](#) of this article.

(15) The regular legislative decision-making procedure for European laws and framework laws would be the co-decision procedure as provided for in draft Art. III-298. See [chapter IV](#) of this article.

(16) See [chapter II](#) of this article.

(17) See [chapter III](#) of this article.

(18) This provision – taken from Art. 7 of the Council's Rules of Procedure (Council Decision of 22 July 2002 adopting the Council's Rules of Procedure, OJ 2002 L 230/7) – has now been raised to constitutional level.

(19) See the comparable case C-378/00, *Commission v European Parliament and Council (LIFE)*, of 21 January 2003 in which the ECJ decided on the European legislature's right to chose the appropriate Comitology procedure under Art. 5 of the second Comitology decision 1999/468/EC of 28 June 1999 (OJ 1999 L 184/23). The ECJ restated that „even though an act adopted by a Community institution does not lay down a rule of law which that institution is bound to observe, but merely lays down a rule of conduct indicating the practice to be followed, that institution may not depart from it without giving the reasons which have led it to do so“.

(20) *Herwig C. H. Hofmann*, Normenhierarchien im Europäischen Gemeinschaftsrecht, Berlin 2000, 11 *et seq.*; *Wolfram Müller-Freienfels*, Zur Rangstufung rechtlicher Normen, Kyoto 1989; *Theodor Schilling*, Rang und Geltung von Normen in gestuften Rechtsordnungen, Berlin/Baden-Baden 1994.

(21) See: *Gustav Radbruch*, Rechtsphilosophie, 6th edition, Stuttgart 1963, § 9, 168 *et seq.*

(22) *Roland Bieber, Isabelle Salomé*, *supra* note 10; *Roland Bieber*, Die Vereinfachung der Verträge zur Errichtung der Europäischen Union, 11 DVBl (1996), 1340.

(23) That holds true both for forms of action, i.e. ‘atypical legal acts’, as well as for the area of administrative governance structures, i.e. the development of comitology, agencies and administrative networks issuing administrative acts sometimes with transnational effect on citizens. See: *Gráinne de Búrca*, The Institutional Development of the EU, in: Paul Craig, Gráinne de Búrca (eds.) The Evolution of EU Law, Oxford 1999, 61; *Steijn Smismans*, Institutional Balance as Interest Representation, in: Christian Joerges, Renaud Dehousse (eds.), Good Governance in Europe’s Integrated Market, Oxford 2002, 92.

(24) *Koen Lenaerts, Amaryllis Verhoeven*, *supra* note 1, 50. The models used by *Lenaerts* and *Verhoeven* are akin to *Weiler’s* modes of legitimacy called international, supranational and infranational modes, first published as: *Weiler et al*, ‘European Democracy and its Critique – Five Uneasy Pieces’, EUI Working Papers 95/11, Florence 1995, 25 *et. seq.*

(25) The relation between different types of norms can be created by ‘vertical’ and ‘horizontal’ differentiation criteria. On the horizontal level, criteria for the priority of a norm are the *lex-specialis* and the *lex-posterior* rules as well as the criteria of its source. The source of a norm as being the result of a fully fledged parliamentary law can in some legal systems provide for a higher level of a norm than it being the product of executive rule-making.

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

(27) Case 6/71, *Rheinmühlen v Einfuhr- und Vorratstelle für Getreide*, [1971] ECR 823, at 841; Case 34/78, *Yoshida v Kamer van Koophandel en Fabrieken voor Friesland*, [1979] ECR 115; Case 114/78, *Yoshida v Industrie- und Handelskammer Kassel*, [1979] ECR 151 and Opinion of Advocate General Capotorti of 13 December 1978, [1979] ECR 137, at 140; *Hans Smit*, in: Peter E. Herzog (ed.), The Law of the European Community, Volume 5, 5-579.

(28) See: Case T-285/94, *Pfloeschner v Commission*, [1995] ECR II-3029, at 3047, para 51; Case 38/70, *Deutsche Tradax GmbH v Einfuhr- und Vorratstelle für Getreide und Futtermittel*, [1971] ECR 145, at 154.

(29) Delegation can also entitle the Commission to issue a „delegated regulation” covering non-essential aspects of legislative functions (draft Art. I-35). See for detail [chapter III](#) of this article.

(30) The draft constitutional treaty introduces a further term called „regulatory acts“ in draft Art. III-266 (4) (ex. Art. 230 (4) EC). This is a generic term, describing i.e. all legislative and implementing acts other than decisions and contracts.

(31) The distribution of the implementing powers between the European level and the Member States is currently defined in the EC Treaties only through Art. 10, 202 third indent and 211 fourth indent EC. Art. 10 EC obliges the Member States to „take all appropriate measures (...) to ensure fulfilment of the obligations arising out of this Treaty”. Under Art. 202 and 211 EC the Commission or the Council can issue implementing measures after delegation of the power to do so.

(32) *Jochen Frowein*, Integration and the Federal Experience in Germany and Switzerland, in:

Mauro Cappelletti et. al. ed, *Integration through Law*, Vol I, Book 1, Florence 1986, 586-587; *Koenraad Lenaerts*, *Regulating the regulatory process: „delegation of powers“ in the European Community*, 18 *ELRev.* (1994), 28.

(33) EP Resolution on the nature of Community acts A3-0085/91, April 18, 1991 (OJ 1991 C 129/137); *see also*: Commission opinion of 21 October 1990, Bull. EC Supp. 2/91, at 122; *Siegfried Magiera*, *supra* note 10, 206; *Antonio Tizzano*, *supra* note 10, 227.

(34) Commission opinion of 21 October 1990, Bull. EC Supp. 2/91, 122. The Commission's suggestion reached back to a dispute in the early days of the Community. In those days it was unclear whether ex. Art. 155 first indent EC gave the Commission the right to spontaneously issue implementing measures. An argument in favour of such a right was derived from a comparison with some of the Member States constitutions (especially Art. 21 of the French constitution according to which the Prime Minister „assure l'execution des lois“). This, so it was argued, suggested the interpretation of ex. Art.155 first indent EC in the sense of containing the Commission's right to autonomously issue implementing measures (See the overview at: *Jan Kalbheim, Gerd Winter: Delegation requirements for rule-making by the Commission*, in: Gerd Winter (ed.), *Sources and Categories of European Union Law: A Comparative and Reform Perspective*, Baden-Baden 1996, 586; *Reinhold Kraushaar, Zur Kompetenz der Kommission der EWG zum Erlaß von Verordnungen*, 12 *Die Öffentliche Verwaltung* (1959), 726). In the course of time the negative answer prevailed in the ECJ's case law. This was due to the understanding that it was not the first indent of ex. Art.155 EC but its fourth indent, which constituted the legal basis of the Commission's executive powers. E.g.: Case 23/75, *Rey Soda v. Cassa Conguaglio Zuccherero*, [1975] ECR 1279, at 1302. Art. 211 EC therefore did not allow the Commission to spontaneously make implementation rules.

(35) Concerning the Single European Act: *H.-J. Glaesner, Die Einheitliche Europäische Akte*, 21 *Europarecht* (1986), 146; Concerning the Treaty of Maastricht: Commission opinion of 21 October 1990, Bull. EC Supp. 2/91, 122: „In the absence of a specific reference to implementation on the national level, implementation would be a matter for the Community's institutions, an approach which is close to the arrangement for regulations at present. Executive powers could be vested in the Commission by the Treaty, in the case of both regulatory measures and administrative provisions. A law could not depart from this general rule“. The main reason was presumably that the Council had shown to be rather reluctant in delegating the right to issue implementing regulations and when it so did, imposed restricting requirements on the Commission in form of comitology procedures.

(36) Conferring onto the Commission the power to spontaneously issue implementing measures power therefore would have increased a wide spread fear, that legislatures were „further loosing out to unaccountable executives.“ See: EP Doc. A4-0102/95/PART I.B, No. 18.

(37) If, as possible remedy to such inversion, both the Member States and the Community institutions would hold the right to implement the Community's legislative acts there would be the danger of conflicting measures. This would have endangered equal application of EC law and the legal certainty of the citizens.

(38) For comprehensive overview and analysis over agencies, see: *Dorothee Fischer-Appelt, Agenturen der Europäischen Gemeinschaft*, Berlin 1999.

(39) For a precise outline of the Meroni doctrine: *Renaud Dehousse, The Transformation of EU Governance*, in: Christian Joerges, Renaud Dehousse (eds.), *Good Governance in Europe's Integrated Market*, Oxford 2002, 220.

(40) Two examples of many: Art. 43 (5) and 45 (6) of the Council Regulation 40/94 of 20 December 1993 (OJ 1994 L 11/1) on the Community trademark (as amended in OJ 1994 L 349/1, OJ 1995 L 303/1); Art. 62 Council Regulation 2100/94 of 22 July 1994 (OJ 1994 L 227/1) on Community plant

varieties (amended in OJ 1995 L 258/1). The agencies Europol and Eurojust will be equally active in the exercise of public powers including issuing decisions.

(41) E.g. French and English. In Dutch and German the distinction was drawn between the formal decision under Art. 249 EC and the atypical „Besluit” or „Beschluß“ which are decisions without (potential) addressee. The draft decision under will allow replacing the current CFSP „joint actions“ and „common positions“. Also, what was so far the Council’s Comitology ‘decision’ will in future be replaced with a European ‘law’ under draft Art. I-36 (3).

(42) This can be illustrated by the effect of the mismanagement of contractual relations that was one of the reasons for the fall of the Santer Commission. See: *Paul Craig*, *The Constitutionalization of Community Administration*, Jean Monnet Working Paper 3/03, 20.

(43) See e.g. Case T-7/89, *Hercules Chemicals*, [1991] ECR II-1711, in which the question arose whether the Commission was obliged to grant access to a file in a competition case on the basis of rules which had been published in the Commission’s twelfth report on competition policy. See for the general problems in this area: *Michelle Cini*, *The soft law approach: Commission rule-making in the EU’s state aid regime*, 8 *Journal of European Public Policy* (2001), 192; *Hartmut Hilgenberg*, *A Fresh Look at Soft Law*, 10 *European Journal of International Law* (1999), 499; *Anton Klösters*, *Kompetenzen der EG-Kommission im innerstaatlichen Vollzug von Gemeinschaftsrecht*, Köln 1994, 39; *Francis Snyder*, *Soft Law and Institutional Practice in the EC*, EUI Working Paper Law No. 93/5; *K.C. Wellens*, *G.M. Borchardt*, *Soft Law in the European Community Law*, 14 *ELR* (1989), 267.

(44) The Commission only recently in it’s White Paper on Governance suggested to restrict the role of Committees to mere advisory function. See: European Commission, *European Governance: A White Paper*, COM (2001) 428 of 25 July 2001.

(45) See e.g. for further reference: *Annette Elisabeth Töller*, *Komitologie*, Oplanden 2002.

(46) *Georg Haibach*, *The History of Comitology*, in: Mads Adenas, Alexander Türk, *Delegated Legislation and the Role of Committees in the EC*, The Hague 2000, 185; *Herwig C.H. Hofmann*, *Annette Elisabeth Töller*, supra note 11, 209.

(47) Art. 2 (b) and 5 of the Council Decision 1999/468 of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission. According to Art. 2 (b) these may also contain delegation of quasi legislative functions. It states that implementing „measures of general scope designed to apply essential provisions of basic instruments“ should be adopted by use of the regulatory procedure as well as „where a basic instrument stipulates that certain non-essential provisions of the instrument may be adapted or updated by way of implementing procedures“.

(48) For the relevance of this see e.g.: *Carol Harlow*, *Accountability in the EU*, Oxford 2002, 178 *et seq.*

(49) The European Convention, Draft of Articles 24 to 33 of the Constitutional Treaty, CONV 571/03 of 26 February 2003, 3.

(50) That principle will however also apply to the question of the extent of regulation and delegation within certain types of legal acts. The extent of regulation and the question whether an act of implementation shall take place on the European or the national level, which is element of the decision under draft Art. I-35 (2), will both be assessed against the principle of subsidiarity (draft Art. I-9 (3)).

(51) This case law will be relevant after the entry into force of the draft constitutional treaty due to a

lack of formal distinction between legislative and delegated/implementing measures under the EU and EC treaty. The ECJ therefore established its guidelines for delegation for all matters, which under the draft constitutional treaty would be regarded delegated regulations and implementing acts.

(52) Case 240/90, *Germany v. Commission*, [1992] ECR I-5383, at 5384, 5417-5419. None of the treaty provisions give a definition of the term of ‘implementation’.

(53) Case 25/70, *Einfuhr- und Vorratsstelle für Getreide und Futtermittel v. Köster, Berodt & Co.*, [1970] ECR 1161, at 1170 para 6.

(54) Case 23/75, *Rey Soda v. Cassa Conguaglio Zucchero*, [1975] ECR 1279, at 1300, 1301, para. 10, 14; *see also*: Case 121/83, *Zuckerfabrik Franken v. Hauptzollamt Würzburg*, [1984] ECR 2039, at 2058; Joined Cases 133 to 136/85, *RAU/BALM*, [1987] ECR 2289, at para 31; Case 46/86, *Romkes v. Officier van Justitie*, [1987] ECR 2685, at para. 16; Case C-417/93, *Parliament v. Council*, [1995] ECR I-1185, at 1219, para. 30; Case C-156/93, *Parliament v. Commission*, [1995] ECR I-2019, at 2047, para. 18.; Case C-303/94, *Parliament v. Council*, [1996] ECR I-2943.

(55) That is not true of penalties. “In order to delegate to the Commission the power to provide for penalties in the sector of the common agricultural policy, a delegation of power couched in general terms is sufficient.”: Case C-240/90, *Germany v. Commission*, [1992] ECR I-5383, at 5384, 5434 *et. seq.*

(56) “It must be pointed out that such a wide interpretation of the Commission’s powers can be accepted only on the specific framework of the rules on agricultural markets.“ “It can not be relied upon to justify a provision adopted by the Commission on the basis of its implementing powers in agricultural matters where the purpose of the provision lies outside that sphere but within a sector subject to an exhaustive set of rules laid down by the Council.“ Case 22/88, *Industrie- en Handelonderneming Vreugdenhil BV v. Minister van Landbow en Visserij*, [1989] ECR 2049, at 2076.

(57) Case 291/86, *Central-Import Münster GmbH & Co. KG v. Hauptzollamt Münster*, [1988] ECR 3679, at 3706.

(58) Case C 303/94, *Parliament v. Council*, [1996] ECR I-2943.

(59) See draft Art. II-52 (1): „Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.“

(60) E.g.: draft Art. II-2, 3, 4, 5, 6, 7, 11, 12, 13, 14 (1,2), etc.

(61) Draft Art. II 52 (1).

(62) Hierarchies of norms are usually structured according to procedural and/or to substantial criteria. An example for procedural criteria is the procedure for the creation or amendment of a norm. Regularly, constitutional provisions are subject to the most onerous amendment procedure in a legal system, much more so than simple acts of legislation. The highest level in the hierarchy of norms therefore is taken by the category of acts with the highest threshold for amendment. These thresholds can also consist of specific requirements for majority or even unanimity or requirements of involving additional institutions in the decision-making procedure. Substantive criteria for hierarchic relations between different categories of norms on the other hand do not differentiate according to procedural criteria but according to its significance. The highest level on the hierarchy

is then taken by provisions, which have fundamental character e.g., provisions on procedural matters for detailed decision-making. According to this criterion, provisions, which apply the fundamental principles to single areas of law, are on a lower level of the hierarchy.

(63) [1992] ECR I-5383.

(64) This observation raises the interesting question of the relation between the new parts II and III of the draft constitutional treaty. I will address this matter in chapter V of this article.

(65) Given these developments, it seems all the more astonishing that draft Art. I-36 on *implementing* acts does not contain any explicit limitations of essentialness for the definition of implementing powers. Only draft Art. I-35 on delegated regulation contains the explicit reference to non-essential elements.

(66) Case law of the ECJ exists mainly with respect to the principle of Subsidiarity under Art. 5 (2) EC. See especially: Case C-84/94, *working time directive*, [1996] ECR I-5755; C-233/94, *deposit guarantee schemes*, [1997] ECR I-2405; C-377/98, *biotechnological inventions*, [2001] ECR I-7079.

(67) E.g. by the EP Committee on Institutional Affairs during the preparation for the 1996 IGC. Rapporteur *Rothley* suggested as obligation of the legislature to at least rule the „content, purpose and extent of a delegation“ (EP Committee on Institutional Affairs, Working Document on the categories of legal act of the European Union and the relationships between them, Rapporteur: *Willi Rothley*, March 15, 1995, PE 211.103/ rev). See also earlier suggestions from the EP to refer to the wording of the German GG: MEP *Bourlanges* Eur. Parl. Deb. Nr. 3-404/135 (17. April 1991).

(68) Art. 80 (1) GG requires a delegating act to define ‘the content, the purpose and the extent’ of the delegation: „Dabei müssen Inhalt, Zweck und Ausmaß der erteilten Ermächtigung im Gesetze bestimmt werden.“

(69) See most recently in the judgement of 24 September 2003, Az 2 BvR 1436/02 regarding the constitutional complaint by a female muslim candidate for the position of a public school teacher. She was not employed on the basis that she would insist on wearing a headscarf in school as symbol of her belief. The German Constitutional Court decided that such issue was essential for the exercise of the rights of the potential teacher and of the students in school. Therefore, the matter had to be dealt with in or on the basis of a law.

(70) BVerfGE 80, 1, 21; BVerfGE 68, 319, 333; BVerfGE 55, 207, 226.

(71) The intensity can be due to the severity of the infringement of a fundamental right, due to the duration of the infringement, or due to the sensitivity of the fundamental right in question. See e.g.: BVerfGE 49, 89 (127). An example is criminal law. In the field of criminal law the requirements are particularly strict. The primary rules of conduct as well as the penalty range, must be foreseeable from the statute itself, and may not be element of an administrative regulation. See e.g. BVerfG decision of July 3, 1962, BVerfGE 14, 174, (185-187). But the necessary precision is relative to the special features of the regarded issue, particularly how far a specific description of the regulated facts is practically possible. The more complex the regulated area is or the more it can be expected that facts are going to change quickly, the less specificity is required. See e.g.: BVerfGE 58, 257; *Uwe Kischel*, Delegation of Legislative Power to Agencies: A Comparative Analysis of United States and German Law, 46 *Administrative Law Review* (1995), 234.

(72) See draft Art. I-9 (3) of the draft treaty establishing a constitution for Europe. See also: *Theodor Schilling*, Subsidiarity as a Rule and as a Principle, Harvard Jean Monnet Working Papers 10/95.

(73) One of the main differences between the draft for delegated regulations and implementing

regulations is the definition of the conditions of and limitations for the delegation of regulatory powers: Draft Art. I-35 (1) on delegated regulations prescribes several conditions and limitations of delegation of legislative functions. On a case-by-case basis the legislator lays down „the objectives, content, scope and duration of the delegation.” Also, the delegation „may not cover the essential elements” of a legislative matter. Implementing Regulations under draft Art. I-36 (2), on the other hand, are limited by cases „where uniform conditions for implementing binding Union acts are needed”.

(74) See: The European Convention, Draft of Articles 24 to 33 of the Constitutional Treaty, CONV 571/03 of 26 February 2003, 7, 15.

(75) An example for such forms of review created by the legislation is the area of the financial services sector. In this area, the Commission shall be authorized to adapt the technical aspects of the financial services regulation allowing for fast reactions to the markets. The procedure that was developed – the so-called ‘Lamfalussy’ procedure, allows for a recall of the delegated regulation to the legislator, EP and Council. That was so far not possible under the traditional comitology procedures. The Lamfalussy method has been extended gradually from the regulation of the European securities markets, primarily in the area covered by the investment services directives, the stock exchange directive and related directives.

(76) In the earlier version of the draft constitutional treaty a third possibility was the possibility of the “provisions of the delegated regulation were to lapse after a period set by the law“, CONV 571/03 of 26 February 2003, 7.

(77) British Parliament has in the past made wide use of the right of delegation. See e.g.: *William Wade, Christopher Forsyth, Administrative Law*, Oxford 1994, 864: „Among these [examples for wide delegated powers] none would be more remarkable than the provision of the European Communities Act 1972, which gives power to make Orders in Council and regulations for giving effect to Community law which are to prevail over all Acts of Parliament, whether past or future, subject only to safeguards against certain aspects such as increased taxation, retrospective operation, delegated legislation or excessive penalties“. This led to the concern that delegated legislation was increasingly shaping policy instead to simply flesh out parliament’s primary legislation.

(78) *Peter Leyland, Terry Woods, Administrative Law*, 4th ed., Oxford 2002, 137.

(79) See Art. 5 of Council Decision (1999/468/EC) of 28 June 1999 laying down the procedure for the exercise of implementing powers conferred on the Commission (Comitology Decision).

(80) *The European Convention*, Technical Comments, Draft of Art. 24 – 33 of the Constitutional Treaty, of 26 February 2003, CONV 571/03, 17.

(81) See also: *House of Lords Select Committee on European Union*, Twelfth Report of 11 March 2003, para. 38.

(82) In this case, the main difficulty is that the same problems could arise with the differentiation between matters regulated in a delegated regulation and an implementing regulation, which have so far existed where the Council decided to retain the implementing powers to itself. See e.g. Case 119/77, *Nippon Seiko v. Council and Commission*, [1979] ECR 1303, at para. 24; Case 46/86, *Romkes v. Officier van Justitie*, [1987] ECR 2671, at para. 16.

(83) *The European Convention*, Technical Comments, Draft of Art. 24 – 33 of the Constitutional Treaty, of 26 February 2003, CONV 571/03, 11.

(84) *The House of Lords Select Committee on European Union*, Twelfth Report of 11 March 2003,

para. 11 however points out that the term ‘law’ in English is not precise enough. ‘Law’ in the common law sense, has several meanings. Other languages differentiate, e.g. in French there are the terms ‘droit’ and ‘loi’. In German, ‘Recht’ and ‘Gesetz’. Therefore in English language the best term might be ‘European statute’ and ‘framework statute’ instead of ‘law’.

(85) Of course there are also exceptions to this e.g. in draft Art. III-227 (1) and (2) with respect to laws on the composition of the EP or in draft Art. III-285 with respect to the statute of the ECJ. MS Parliaments will be involved in EU legislation under the terms of the Protocol on the Role of National Parliaments in the European Union. Under this protocol, MS parliaments will be informed about policy proposals six weeks prior to the draft being placed on the Council’s agenda. The protocol further provides for the legal basis of the interparliamentary cooperation under COSAC. It would have been problematic to include MS parliaments fully into EC legislation (this had been proposed in the pre-convention discussion by several authors. See for an overview over the debate: *House of Lords Select Committee on European Union*, Seventh Report, A Second Parliamentary Chamber for Europe, 27/11/2001, <http://www.parliament.thestationeryoffice.co.uk/>; *Ingolf Pernice*, ‘The Role of National Parliaments in the European Union’, WHI – Paper 5/01, 13 et seq. www.rewi.hu-berlin.de). Studies reviewing problems of full inclusion and possibilities of alternative modes of involvement suggest that the approach taken in the protocol is sufficient to allow for national parliamentary involvement (see the conference papers to the ICEL second annual congress, 2001, *The Role of National Parliaments in EU Affairs* at http://www.icel.ie/annualCongress_two.htm; *Herwig C.H. Hofmann*, *Parliamentary Representation in Europe’s System of Multi-Layer Constitutions: A Case Study of Germany*, 10 *Maastricht Journal* (2003), 39).

(86) This is a change to the current mixed formal and substantial definition of legislation in EU law. Art. 7 of the Council Decision of 22 July 2002 adopting the Council’s Rules of Procedure (OJ 2002 L 230/7) for example defines cases where the Council acts in its legislative capacity as follows: „The Council acts in its legislative capacity within the meaning of the second subparagraph of Article 207 (3) of the EC Treaty when it adopts rules which are legally binding in or for the Member States, by means of regulations, directives, framework decisions or decisions, on the basis of the relevant provisions of the Treaties, with the exception of discussions leading to the adoption of internal measures, administrative or budgetary acts, acts concerning inter-institutional or international relations or non-binding acts (such as conclusions, recommendations or resolutions).“

(87) See for a background: *Kieran Bradley*, *The European Court and the Legal Basis of Community Legislation*, 13 *E.L.R.* (1988), 379-402. The leading case for the extensive case law on this matter is: Case C-300/89, *(Titanium-Dioxide) Commission v Council*, [1991] ECR I-2867, para. 22 – 25, see: *Kieran Bradley*, *L’arret dioxyde de titane un jugement de salomon?*, 28 *C.D.E.* (1992), 609 et seq.

(88) Although there is no definition in the draft constitutional treaty of what constitutes essential elements of a law, some indicators can be drawn from the definition of limitations to fundamental rights in part II of the draft constitutional treaty. See the discussion above in [chapter III](#).

(89) See e.g. Communication from the Commission on Impact Assessment (COM 2002/276) of 5 June 2002; Communication from the Commission, Consultation document: Towards a reinforced culture of consultation and dialogue (COM 2002/277) of 5 June 2002.

(90) See Art. 268 et seq. EC.

(91) *Thomas von der Vring*, *Legal acts in the budgetary process of the European Union*, in: Gerd Winter (ed.), *Sources and Categories of European Union Law: A Comparative and Reform Perspective*, Baden-Baden 1996, 467.

(92) E.g.: Art. 40 (1) EP Draft Constitution of the European Union, 10 February 1994.

(93) E.g. for agencies: Council Regulation 58/2003/EC of 19 December 2002 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programs (OJ 2003 L 11/1)

(94) E.g. draft Art. III-236 on Rules of Procedure of EP, III-239 on Rules of Procedure of the European Council, III-242 (3) Council, III- 256 ECJ, III-252 Commission.

(95) IIAs have so far been applied to give answers to open questions of the interinstitutional relationships and procedural requirements between Commission, Council and the EP (e.g.: On 25 May 1999, the Parliament, the Council and the Commission concluded an interinstitutional agreement concerning internal investigations by the European Anti-fraud Office (OLAF) (OJ 1999 L 136/15)). They provide for means of cooperation within the constitutional framework. Often, they help to avoid paralysis in the decision-making process and litigation before court due to lacunae in the Treaties leaving much room for interpretation of the political role to be played by the individual institutions (see: *Jörg Monar*, Interinstitutional Agreements: The Phenomenon and its new Dynamics after Maastricht, 1994 CMLRev., 693; *Charles Reich*, La mise en œuvre du Traité sur l'Union Européenne par les accords interinstitutionnels, 1994 RMC, 81 – 85; *Francis Snyder*, Interinstitutional agreements: forms and constitutional limitations, in: Gerd Winter ed., Sources and Categories of European Union Law: A Comparative and Reform Perspective, Baden-Baden 1996, 453). Further, they are used as guidelines to develop certain overruling policy statements concerning issues like human rights, racism and xenophobia and the triptych of democracy, transparency and Subsidiarity. (see: Joint Declaration of 5 April 1977 on Fundamental Rights (OJ 1977 C 103/1; Joint Declaration of 11 June 1986 on Racism and Xenophobia, (OJ 1986 C 158/1); Interinstitutional Declaration of 17 November 1993 on democracy, transparency and Subsidiarity (OJ 1993 C 329/133)). Overview at: *Thijmen Koopmans*, Regulations, Directives, Measures, in: Ole Due, Jürgen Schwarze (eds.), Festschrift für Ulrich Everling, Vol 1, Baden Baden 1995, 697.

(96) Case T-17/00, *Rothley v. EP*, Judgement of 26 February 2002; Case C-11/00, *Commission v. Netherlands*, Judgement of 10 July 2003.

(97) See e.g.: Modus Vivendi between the European Parliament, the Council and the Commission concerning the implementation measures for acts adopted in accordance with the procedure laid down in Art. 189 b of the EC Treaty of January 18, 1995, (OJ 1995 C 43/40); based on Commission's proposals which again was shaped according to the EP suggestions laid down in the ONP dispute: EP resolution on questions of comitology relating to the entry into force of the Treaty on European Union, (OJ 1994 C 20/176) and the underlying Report of the Committee of Institutional Affairs EP Doc. A3-0147/93; Legislative resolution embodying the opinion of the European Parliament on the common position established by the Council with a view to the adoption of a European Parliament and Council Directive on the application of open network provision (ONP) to voice telephony (OJ 1994 C 44/93); and EP Doc. A4-0189/95.

(98) *Roland Bieber*, The Settlement of Institutional Conflicts on the Basis of Art. 4 of the EEC Treaty, 21 CMLRev. (1984), 520; Advocate General Frederico Mancini, Case 204/86, *Greec Republic v. Council of the European Communities*, [1988] ECR 5323, 5349. Unsettled is the relationship between IIAs and other secondary Community law. The opinions range from the position that any derived provisions conflicting with IIAs would be subject to annulment (*Francis Snyder*, Interinstitutional agreements: forms and constitutional limitations, in: Gerd Winter (ed.), Sources and Categories of European Union Law: A Comparative and Reform Perspective, Baden-Baden 1996, 453, 461) to the opinion that IIAs were subordinate to regulations and directives because the latter had a dignified status due to the fact that their origin and effect have an identifiable treaty basis (Advocate General Frederico Mancini, Case 204/86, *Greec Republic v. Council of the European Communities*, [1988] ECR 5323, 5349).

(99) E.g. draft Art. I-7 (3).

(100) During the process of ‘Constitutionalization’, there has been an in-depth discussion about the nature and the conditions of creating a constitution. This article does not concentrate on the conditions for creating a constitution. Instead, it analyses the different levels of law, which would be constituted by the new draft constitution. For many: *Roland Bieber*, *Verfassungsgebung und Verfassungsänderung in der Europäischen Union*, in: Roland Bieber, Pierre Widmer (Hrsg.), *L’espace constitutionnel européen*, Zürich 1995, 313.

(101) The first three steps would be: 1) a proposal submitted by either a Member State, the Commission or the European Parliament to Council. 2) in case of proposals of some importance, a Convention would adopt by consensus a recommendation. 3) an IGC would determine by common accord the amendments to be made.

(102) With these suggestions for the new constitution, the original request, which the EP had raised during the preparation of the Treaty of Amsterdam and the Treaty of Nice to play an official role in the IGC itself, has not been taken up by the Convention’s proposals for a new treaty amendment procedure. Neither does the EP have a formal vote on the proposed treaty amendments. The draft Art. IV 6 and 7 therefore fall short of what was proposed in earlier draft constitutions as „Constitutional Laws“, which required not only the MS ratification but also the consent of the EP. See: Art. 31 (1), Draft Constitution of the European Union, OJ 1994 C 61/156; Art. 84, EP 1984 Draft Treaty Establishing the European Union.

(103) E.g. the statute of the Court shall be laid down in a Protocol under draft Art. III-285. Although a Protocol is primary law, most parts of the statute of the Council can be amended by law, the decision-making procedure of which is not the general legislative procedure. Also with respect to the ECJ, under draft Art. III-255 first sentence, the Council may increase the number of Advocate Generals.

(104) *Andreas von Arnould*, *Normenhierarchien innerhalb des primären Gemeinschaftsrechts*, 38 *Europarecht* (2003), 191-216; *Roland Bieber*, *Les limites matérielles et formelles à la révision des traités établissant la communauté européenne*, *RMC* 1993, 343-350; *Jean Boulouis*, *Les avis de la Cour de justice des Communautés sur la compatibilité avec le Traité CEE du projet d’accord créant l’Espace économique européen*, *RTDE* 1992, 462; *Jaqueline Dutheil de la Rochère*, *L’espace économique européen sous le regard des juges de la cour des justice des communautés européennes*, *RMC* 1992, 607; *M. Luisa Fernandez Estel*, *Constitutional Values and Principles in the Community Legal Order*, 2 *Maastricht Journal* (1995), 129-144; *Markus Heintzen*, *Hierarchisierungsprozesse innerhalb des Primärrechts der Europäischen Gemeinschaft*, 29 *Europarecht* (1994), 35-49; *Herwig C. H. Hofmann*, *supra* note 20, 80 et seq.; *José Luís da Cruz Vilaça*, *Nuno Piçarra: Y a-t-il des limites matérielles à la révision des traités instituant les communautés européennes?*, 29 *CDE* (1993), 3-37; *J.H.H. Weiler*, *Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration*, 31 *JCMS* 1993, 418, footnote 2, who observed that the Court „seemed to construe legal principles which even Treaty amendment could not violate“.

(105) Opinion 1/91, *EEA I*, [1991] ECR I-6079; Opinion 1/92, *EEA II*, [1992] ECR I-2821.

(106) Opinion 1/00, *ECCA*, of 18. April 2002, para. 11-14.

(107) See for overview: *Peter Häberle*, *Gemeineuropäisches Verfassungsrecht*, in: Roland Bieber, Pierre Widmer (eds.), *L’espace constitutionnel européen*, Zürich 1995, 361-389.

(108) See for example the criteria set up by the German constitutional court in the famous *Maastricht* decision: BVerfGE 89, 155, *Maastricht*, often referred to in English speaking literature as the „*Brunner*“ case, (English translation in: 1 *CMLR* (1994), 57).

(109) This has been established by the ECJ in the case-law on the legal basis problem: Case C-300/89 (*Titanium-Dioxide*) *Commission v. Council*, [1991] ECR I-2867, para. 22 – 25; Case 68/86, *United Kingdom v. Council*, [1988] ECR 855, para. 14 – 22; Case 45/86, *Commission v. Council*, [1987] ECR 1493, para. 12 – 23; Case 177/78, *Pigs and Bacon Commission v. Council*, [1979] ECR 2161; Case 83/78, *Pigs Marketing Board v. Redmond*, [1978] ECR 2347.

(110) An example could be the rules on delegation of competences and limitation of fundamental rights discussed above in [chapter III 1](#) of this paper.

(111) This addition to the preamble was included upon pressure from some of the UK and the Irish members of the Convention.

(112) CONV 850/03, 47. The original version of the Charter itself was published in OJ 2000 C 364/1, the explanations prepared at the instigation of the Praesidium of the Convention which drafted the charter are published as document CHARTE 4473/00 CONVENT 49 of 11 October 2000. The European Convention has published a revised version of explanations of the charter as document CONV 828/03 of 9 July 2003, which after its publication was subject to further revisions within the Convention.

(113) The European Convention has for example produced updated versions of the original explanatory document by the Convention establishing a charter of fundamental rights of the Union.

(114) The original Charter of Fundamental Rights of the European Union as proclaimed by the European Council in December 2000 in Nice, did not contain such a paragraph.

(115) Art. 31 (1) subpara. 2, EP Draft Constitution of the European Union, Resolution of 10 February 1994, OJ 1994 C 61/155, 162.

(116) Currently, these matters are either dealt with in a Treaty amendment or by other means such as Interinstitutional Agreements and Joint Declarations. (See: Opinion of Advocate General Frederico Mancini in Case 204/86, *Greece v. Council*, [1988] ECR 5323, 5349; Jörg Monar, Interinstitutional Agreements: The Phenomenon and its new Dynamics after Maastricht, (1994) C.M.L.Rev. 693; Francis Snyder, Interinstitutional agreements: forms and constitutional limitations, in: Gerd Winter (ed.), Sources and Categories of European Union Law: A Comparative and Reform Perspective, Baden-Baden 1996, 453). In some cases ‘atypical legal acts’ are employed to regulate institutional matters. The resulting legal product is a decision (E.g.: Council Decision of 24 June 1988 on the system of the Community’s own recourses, OJ 1988 L 185/24), in one case a decision and act, a combination that mirrors its emanation from both the Council and the Member States (Decision and Act of 10 September 1976 Concerning the election of the representatives of the Assembly by direct universal suffrage, OJ 1976 L 278/1).

(117) For a more detailed description see e.g.: Dmitri Georges Lavroff, *Le droit constitutionnel de la Ve République*, Paris 1995, 629.

(118) See the overview by: Roland Bieber, Bettina Kahil, „Organic Law“ in the European Union, in: Gerd Winter (ed.), Sources and Categories of European Union Law: A Comparative and Reform Perspective, Baden-Baden 1996, 444.

(119) Luis María Díez-Picazo, Sources and categories of legal acts – Spain, in: Gerd Winter (ed.), Sources and Categories of European Union Law: A Comparative and Reform Perspective, Baden-Baden 1996, 185.

(120) Art. 52 (3) and Art. 12 (2), 1984 EP Draft Treaty Establishing the European Union; Art. 9 (Attainment of objectives) EP 1994 Draft Constitution of the European Union (OJ 1994 C 61/165).

(121) *Roland Bieber, Bettina Kahil*, supra note 119, 451.

(122) *Ingolf Pernice*, supra note 86, 2; *Antonio Tizzano*, supra note 10, 226.

(123) *Bieber, Kahil*, supra note 122.

(124) *Luis María Díez-Picazo*, Sources and categories of legal acts – Spain, in: Gerd Winter (ed.), Sources and Categories of European Union Law: A Comparative and Reform Perspective, Baden-Baden 1996, 195.

(125) *Bieber, Kahil*, supra note 122, 425; See e.g. the difficulties of keeping apart the different forms of action in the currently existing comparable situation when the Council is authorized to issue acts of legislative nature and also issue implementing acts it executes itself: Case 119/77, *Nippon Seiko v. Council and Commission*, [1979] ECR 1303, 1331, para. 24.

(126) The ECJ will need to extend its case law to allow for claims against recommendations and opinions if they violate fundamental rights parallel to its approach in the famous *Comitology* case, in which it granted the EP standing although that was not provided for in Art. 230 EC. See: Case 302/87, *European Parliament v. Council*, [1988] ECR 5615.

(127) The European Convention, Final Report of Working Group IX on Simplification, CONV 424/02 of 29 November 2002, 7.

(128) For an overview see e.g. the conference papers published on the following website:
<http://www.ces.fas.harvard.edu/conferences/omc.html>

(129) See e.g.: *Dermot Hodson, Imelda Maher*, The Open Method as a New Mode of Governance: The Case of Soft Economic Policy Co-ordination, 39 JCMS (2001), 719; *Ingo Linsenmann, Christoph Meyer*, Dritter Weg, Übergang oder Teststrecke?, 25 Integration (2002), 285; *Caroline de la Porte*, Is the Open Method of Coordination Appropriate for Organising Activities at European Level in Sensitive Policy Areas?, 8 ELJ (2002), 38; *Sabrina Regent*, The Open Method of Coordination: A New Supranational Form of Governance? 9 ELJ (2003), 190.

(130) Results of the European Council, Lisbon 2000, para. 37.

(131) See e.g. draft Art. III-174 (4), (5), (6) on public health, Art. III-175 (3) on industrial policy etc. Especially relevant is therefore Art. III-180 on Administrative Cooperation.

(132) See for further proposals and references to Convention documents: *Gráinne de Búrca, Jonathan Zeitlin*, Constitutionalising the Open Method of Coordination – What Should the Convention Propose?, CEPS Policy Brief No 31, March 2003.

(133) Art. 12 – 15 EU.

(134) Art. 34 (2) a) – d).

(135) E.g.: Case 181/73, *R. & V. Haegeman v. Belgian State*, [1974] ECR 449, 460.

(136) E.g.: Case 21-24/72, *International Fruit Company*, [1972] ECR 1219, 1229.

(137) Council Decision of 28 June 1999 (OJ 1999 L 184/23).

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