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Towards a Hierarchy of Legal Acts in the European Union? Simplification of Legal Instruments and Procedures

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Abstract: *A remarkable feature of the Union's legal order is the absence of a genuine hierarchy of legal acts—a pre-established ranking of different types of legal acts in accordance with the democratic legitimacy of their respective authors and adoption procedures, which is used as a means to resolve conflicts among these different types of legal acts. There is however a clear suggestion of such hierarchy in the sequence in which the newly created legal instruments are listed in Article I-33(1) and in the organisation of the subsequent Articles I-34 to I-37 of the European Constitution. In this contribution, the (lost) logic behind the Union's current set of legal instruments is analysed, followed by an examination of the reform of the system of legal instruments carried out in the European Constitution. Lastly, an attempt is made to answer the question as to whether this reform amounts to the establishment of a genuine hierarchy of legal acts in the Union.*

I Introduction

The European Convention has adopted an ambitious understanding of the objective of 'simplification of the Union's instruments' contained in the Laeken Declaration of 15 December 2001. It has not merely reduced the number of, and renamed the remaining, legal instruments. Whereas the Union's legal instruments are currently classified predominantly in terms of their impact in the national legal orders, the Convention has redefined them in terms of their adoption procedures and the political weight of the content of the act in question. This approach is therefore concerned with increasing the input legitimacy of Union acts, rather than with achieving a net increase in the simplicity of the system of legal instruments. The Heads of State or Government have confirmed this choice during the 2003–2004 Intergovernmental Conference that followed the Convention, and, finally, in signing, on 29 October 2004 in Rome, the Treaty establishing a Constitution for Europe.

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This contribution examines, first, the logic behind the Union's current system of legal instruments and the elements that have fuelled the debate on the reform of that system in the Convention (Section II). In Section III, the contribution focuses on the basic features of the Union's new system of legal instruments in the Constitution. Section IV attempts to answer the question of whether the changes brought about in the Constitution amount to a genuine hierarchy between different types of legal acts in the Union.

II The (Lost) Logic Behind the Union's Current System of Legal Instruments

A The Absence of a Hierarchy of Legal Acts in the Union

A remarkable feature of the Union's set of legal instruments is the absence of a genuine hierarchy of legal acts that is well known in the national legal orders.[1] With a genuine hierarchy of legal acts, we mean a pre-established ranking of different types of legal acts in accordance with the democratic legitimacy of their respective authors and adoption procedures, which is used as a means to resolve conflicts among these different types of legal acts. In our national legal systems, a statute enacted by the directly elected parliament generally takes precedence over any regulation adopted by the indirectly elected government, and a statute enacted by the parliament by means of a special majorities procedure will generally prevail over a 'normal' statute. The European Union does not recognise a similar hierarchy of acts.

When we focus on the Union's core business, the Community pillar, we find that the definitions of the Community legal instruments do not reveal any information as to the author of the act. On the contrary, according to Article 249 EC, 'the European Parliament acting jointly with the Council, the Council [as well as] the Commission [can] make regulations and issue directives, take decisions, make recommendations or deliver opinions'.[2] Related to that, no connections between legal instruments and specific decision-making procedures are established in the EC Treaty, that is, there are no uniform legislative and implementing procedures, nor are there instruments of a clearly legislative or executive nature. Instead, each time rule making is considered, the institutions are to verify their competence, the applicable decision-making procedure and the legal instrument to be used in the relevant legal basis in the Treaty. Since there is no general identification of the institutions as legislative or executive powers, every single legal basis in the Treaty conveys a different institutional balance. In its 1982 landmark case, *France, Italy and United Kingdom v Commission*, the Court of Justice refuted the UK's suggestion that it would be 'clear from the Treaty provisions governing the institutions that all original law-making power is vested in the Council, whilst the

[1] At present, several hierarchising principles are at work within the framework of the Treaties: binding Union law takes precedence over national law; so-called secondary Union law has to respect primary Union law, i.e., all the provisions of the Treaties, as well as the general principles of Union law to be found on the same level; external agreements take precedence over internal secondary Union law; binding Union law prevails over non-binding Union law; implementing acts need to respect the basic act they implement; and later acts prevail over previous acts of the same kind and acts of a specific nature prevail over acts of a general scope. These principles settle certain types of conflicts between Union and national norms, but are 'neutral' as regards the questions of the democratic foundation of Union acts and the political weight of their adoption procedures.

[2] Furthermore, according to Art 110 EC, the European Central Bank can make regulations, take decisions, make recommendations, and deliver opinions.

Commission has only powers of surveillance and implementation'.[3] The Court of Justice held 'that the limits of the powers conferred on the Commission by a specific provision of the Treaty are to be inferred not from a general principle, but from an interpretation of the particular wording of the provision in question . . . analysed in the light of its purpose and its place in the scheme of the Treaty'.[4] Finding out the rank as between Community legal acts that refer to different legal bases in the EC Treaty is therefore a matter of division of competence and not of hierarchy of different types of legal acts. A related consequence of the absence of a hierarchy of institutions and adoption procedures in the EC legal order is that each of the different Community instruments can be used to lay down the basic policy choices in a given competence area, or, on the contrary, can contain mere technical implementation measures. In other words, the choice for a regulation, a directive, or a decision does not reveal, as such, the legislative or executive *nature* of the act adopted under that label.[5] The designation 'regulation', 'directive', or 'decision' therefore does not inform us on the rank of the measure in the overall legal system.[6]

This is explained by the fact that the original European Communities were not perceived as political entities, but rather as extensions of the national bureaucracies created primarily in order to establish a common market and to address, with flanking policies, the side-effects this would bring about. The aim of and the key to the Communities' success was, and still is, result-based governance deserving of the citizens' tacit approval and thus aiming at a high level of output legitimacy. This administrative model for the Communities demanded a system of legal instruments that accounts for a high degree of efficiency and flexibility. For a very long time, the instruments laid down in Article 249 EC—regulations, directives, decisions, recommendations, and opinions—have proved to be particularly apt for that task.

B Organising Principles behind the Union's Current Set of Legal Instruments

We find that three parameters organise the original system of Community legal instruments: the binding/non-binding force of the act, the general/individual scope of application of the act, and the direct/indirect impact of the act in the Member States' legal orders. Whereas Community regulations, directives, and decisions are binding instruments, recommendations and opinions are not. Regulations have a general application, meaning that their normative scope is formulated in an abstract fashion. Directives and decisions, in contrast, are only binding upon those to whom they are addressed. Directives and decisions can be addressed to a single, to some or to all Member States; in addition, decisions can be addressed to private parties. Decisions are therefore partic-

[3] Joined Cases 188-190/80 *France, Italy and United Kingdom v Commission* [1982] ECR 2545, para 4.

[4] *Ibid.*, para 6. The Court of Justice goes on to say that 'it is not possible to draw any conclusions from the fact that most of the other specific provisions of the Treaty which provide a power to adopt general measures confer that power on the Council, acting on a proposal from the Commission' (para 7).

[5] That does not mean that such information is not available, but that it can simply not be deduced from the choice of legal instrument by the institutions. This additional information is to be found in the legal basis of the act (a provision of the Treaties or an act of secondary EC law), in the case law of the Court of Justice, in the title, or the text of the act.

[6] This makes the issue of legal instruments in general of a lesser importance in the EC legal order, and this in turn helps to explain why the subject in general has attracted fairly little academic attention. For other reasons, see J. Bast, 'On the Grammar of EU Law: Legal Instruments' (2003) *Jean Monnet Working Paper* 9/03, 15–16.

ularly apt to apply the general rule to an individual case. Within the category of binding instruments with a general scope, a distinction is made according to their respective impact in the legal orders of the Member States. Regulations, on the one hand, are directly applicable in the Member States' legal orders and are therefore useful in case a uniform legal régime throughout the territory of the Member States is desirable. Directives, on the other hand, are to be transposed into national law first, in order to have a legal bearing on individuals. Since this instrument leaves to Member States the choice of form and methods to achieve the result aimed at, it is particularly well suited for designing a mere legislative framework at European level, while respecting regulatory diversity in the Member States.[7] Lastly, since Article 249 EC does not specify the direct or indirect applicability of decisions in the national legal orders, it is left to the institutions whether to include a period for implementation or not.[8]

Exigencies of day-to-day governance have increased the complexity of the EC's original system of legal instruments. New instruments have originated in practice. The so-called *sui generis* decision is generally accepted to be a binding instrument and is used, among other things, for decisions of an organic nature,[9] for the approval of international agreements[10] and for setting up programmes.[11] It is most frequently employed when a legal basis in the EC Treaty prescribes the adoption of 'measures', without further specifying which particular shape these measures should take.[12]

Moreover, when the Treaty on European Union institutionalised different forms of political cooperation that had started off outside the Community framework, two additional sets of instruments were generated. The distinct names of the instruments served to emphasise the difference in nature of the second (common foreign and security policy, or CFSP) and third (police and judicial cooperation in criminal matters, or PJCC) pillar competences vis-à-vis the Community competences. The CFSP instruments are merely of a political nature. The Court of Justice has no jurisdiction to control the legality of joint actions, common positions and joint strategies, nor of second pillar decisions implementing the former instruments.[13] The PJCC pillar equally knows common positions; furthermore, the possibility of concluding conventions between the Member States is a clear indication of the semi-intergovernmental nature of this pillar. Two other PJCC instruments, however, are very similar to the

[7] We are all familiar with the story of the fading distinction between regulations and directives, which has led to the creation of the political, not legal, category of 'framework directives', so as to indicate respect for the original but disregarded philosophy of the definition of a directive. This is however not the point we would like to develop in this contribution. See, for instance, the Commission's White Paper on European Governance, 25 July 2001, COM(2001) 428 final, available at the Commission's website: <http://www.europa.eu.int/comm/governance/white_paper/index_en.htm>.

[8] Case C-156/91 *Hansa Fleisch v Landrat des Kreises Schleswig-Flensburg* [1992] ECR I-5567.

[9] See, for instance, Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ L 184/23 17/7/1999; Council Decision 2004/752/EC, Euratom of 2 November 2004 establishing the European Union Civil Service Tribunal, OJ L 333/7 9/10/2004.

[10] See, for instance, Council Decision 2004/496/EC of 17 May 2004 on the conclusion of an Agreement between the European Community and the United States of America on the processing and transfer of PNR data by Air Carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection, OJ L 183/83 20/5/2004.

[11] See, for instance, the Erasmus Decision, of which the legality was challenged in the Court of Justice, Case 242/87 *Commission v Council* [1989] ECR 1425.

[12] For instance, Article 308 EC.

[13] See Arts 12–15 and 46 TEU.

Community legal instruments. PJCC decisions and framework decisions only differ from regulations and directives to the extent that the possibility of having direct effect in the Member States' legal orders is expressly denied in Article 34 TEU, and that the Court of Justice only has partial jurisdiction to control the legality of such acts.[14]

Lastly, the institutions frequently make use of all sorts of soft law instruments, such as declarations, communications, non-standard recommendations,[15] resolutions, conclusions, etc. These primarily political acts are adopted outside the Treaty framework, without reference to a legal basis for Union action. They should therefore not be used for binding purposes. In order to foreclose the institutions circumventing the reviewability of an act by shaping it as a non-binding instrument, the Court of Justice examines the true intentions of the institutions as regards the legal effects of the act concerned. Thus, in specific circumstances, a resolution,[16] a communication,[17] a code of conduct,[18] and a conclusion of the Council[19] have been qualified as binding acts of which the Community judge could check the legality.[20]

Altogether, about fifteen different instruments feature in the Union's basic treaties, and a couple more lie outside the Treaty framework. Cross-pillar action often involves the use of many different legal and political instruments, as well as decision-making procedures, putting at risk the coherence of Union action. The original efficiency and flexibility envisaged for the Community system of legal instruments are therefore gone. Moreover, this situation limits the transparency of Union action, and thus, the possibilities of democratic control.

III A New System of Legal Instruments in the European Constitution

A A Reduced, Renamed, and Redefined list of EU Legal Instruments

This is why the Heads of State or Government have identified as a key question in the Laeken Declaration 'whether the Union's various instruments should not be better

[14] For an exploration of the consequences of these similarities and differences between framework decisions and directives, see the Opinion of Advocate General Kokott of 11 November 2004 in Case C-105/03 *Criminal proceedings against Maria Pupino*, not yet reported in ECR.

[15] We are referring here to recommendations *other than* the Article 249 EC recommendations. The standard Article 249 EC recommendations require a firm legal basis in the EC Treaty and are published in the L-series of the *Official Journal*. Article 211, second indent, EC confers on the Commission a general power to adopt such recommendations, whereas the Council benefits from such power only in some specific legal bases, such as Articles 99(2) and (4) (annual economic policy guidelines), 128(4) (annual employment guidelines), 149(4) (education), 151 (culture) and 152 EC (public health). These Treaty Articles also provide for a particular adoption procedure that is to be respected in order for the recommendation to be lawfully adopted. Yet, the Council often does adopt recommendations outside that legal framework, i.e. without reference to any legal basis and without following any particular adoption procedure. These non-standard recommendations are mere political statements and are published in the C-series of the *Official Journal*.

[16] Case 32/79 *Commission v United Kingdom* [1980] ECR 2403, para 11.

[17] Case C-325/91 *France v Commission* [1993] ECR I-3283, paras 14–30; Case C-57/95 *France v Commission* [1997] ECR I-1627.

[18] Case C-303/90 *France v Commission* [1991] ECR I-5315, paras 15–35.

[19] Case 22/70 *Commission v Council* [1971] ECR 263, para 53.

[20] Two points need to be stressed here. First, when the Court of Justice requalifies the binding/non-binding nature of an act in spite of what would logically go with the chosen instrument, this qualification is in each case the strict result of the analysis of the *content* of the act concerned and should therefore not be generalised to all acts bearing the same label. Second, the Court of Justice does not reshape the act under scrutiny into a different Article 249 EC or other instrument that better fits its 'true' nature.

defined and whether their number should not be reduced'. Agreement was easily reached in Convention Working Group IX on 'Simplification' on the principle of a cross-pillar reduction of the number of instruments and the establishment of a catalogue of the remaining—possibly renamed—instruments in a single provision of the Constitution, containing an exhaustive description of their number and legal scope.[21] Similarly, the Working Group decided to reduce the number of adoption procedures and to streamline the use of the remaining ones throughout the Constitution.[22] This understanding of the simplification device, which addresses the need to increase transparency and legal certainty in the jungle of the Union's legal instruments described above, is both evident and crucial, but is not the only possible one.

The Constitution is indeed successful in significantly reducing the number of legal instruments for all current pillars. In Part I, Title V on 'Exercise of Union Competence', Article I-33 lists European laws, European framework laws, European regulations, European decisions, recommendations, and opinions. The brevity of this list is nevertheless somewhat deceptive. It will suffice here to mention the omission of the international agreement as an essential tool to realise the Union's external dimension[23] and the suggestion that European regulations and European decisions actually make up for a whole range of instruments that will continue to have different legal bearings.

The three parameters, binding/non-binding, general/individual scope, and direct/indirect application in the national legal orders, have been retained as organising principles for the remaining Union legal instruments. General application is a quality attributed to European laws, European regulations and, presumably, European decisions that do not specify to whom they are addressed.[24] Furthermore, as regards their effect in the national legal orders, European laws are binding in their entirety and are directly applicable in the Member States (cf. EC regulations), while European framework laws are binding on the Member States to which they are addressed only as to the result to be achieved, leaving the national authorities free to choose the form and means of achieving that result (cf. EC directives). European regulations, in turn, can have an effect similar to that of European laws, or of European framework laws. A European decision is binding in its entirety. Lastly, recommendations and opinions have no binding force.

B Enhancing Democratic Legitimacy in an Increasingly Political Union

It is, however, a fourth organising principle—the distinction between legislative and non-legislative acts—that makes the new list of instruments essentially different from its predecessor. The Laeken Declaration added a second question on the matter of simplification of the Union's legal instruments: 'In other words, should a distinction be

[21] See Final Report of Working Group IX on 'Simplification', CONV 424/02/REV1, 29 November 2002, 3–6. All Convention documents can be retrieved at the European Convention's website: <http://european-convention.eu.int/>.

[22] *Ibid.*, 13–18.

[23] See, however, Article III-323 Constitution: '1. The Union may conclude an agreement with one or more third countries or international organisations where the Constitution so provides or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Constitution, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope. 2. Agreements concluded by the Union are binding on the institutions of the Union and on its Member States'.

[24] *A contrario*, according to the fifth paragraph of Art I-33(1), '[a] decision which specifies those to whom it is addressed shall be binding only on them'.

introduced between legislative and executive measures?'. For many, this was a clear indication that what was meant by the Heads of State or Government was not a mere simplification, but a thorough reform of the *system itself* of legal instruments in the Union legal order. The absence, in the present Treaties, of an exclusive link between EU legal instruments, on the one hand, and certain authors, adoption procedures, types of powers, the legislative or executive character or level of detail of the act, on the other hand, indeed suggests that there is ample room for reform by establishing (some of) these links. High expectations were raised among Convention members as regards the positive impact simplification in this second sense could have on different aspects of the perceived democratic deficit in the Union: the lack of transparency and legal certainty in the functioning of the European Union, the perception that the political institutions of the Union gradually extend their powers by means of a broad interpretation thereof, the lack of political responsibility on grounds of the knowledge of who does what in the framework of the Union's powers, etc.

We have reiterated above that the Union does not know an organic separation of powers. Nor is it possible to classify the different legal instruments as legislative or executive in nature. It is nevertheless evident that the Union *legislates* in the substantive meaning of the word, i.e. takes basic policy choices, and that the Union *implements* the basic policy choices laid down in basic acts or in the Treaty itself.[25] It is therefore possible to describe the Union in terms of a *functional* separation of powers, i.e. distinguishing between legislative, executive, and judicial functions, each being exercised in accordance with different procedures adapted to the function in question.[26] The aim of the constitutional reform agreed upon by the Convention in this field is exactly to rationalise the use of procedures and instruments in an increasingly political Union so that the basic policy choices in the EU legal order are taken according to the democratically most legitimate decision-making procedure, and in the shape of a legal instrument reflecting this situation in its name.[27] Other measures of a more technical or detailed nature may consequently be adopted according to less-demanding procedures and under a different label.[28]

Article I-33 of the Constitution ascribes the label 'legislative' to all acts taking the shape of a European law or a European framework law, while the remaining instruments are said to be 'non-legislative'. The significance of this distinction only becomes clear in Articles I-34 to I-37 of the Constitution, which connect different adoption procedures and substantive criteria to legislative and non-legislative instruments.

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[25] Unless implementation is left to the Member States (the so-called *administration indirecte*), in accordance with the principle of subsidiarity (cf. Article I-37(1) Constitution).

[26] K. Lenaerts, 'Some Reflections on the Separation of Powers in the European Community', (1991) CMLR 11.

[27] In the words of the Final Report of Working Group IX: 'To simplify therefore firstly means 'to make comprehensible', but also to provide a guarantee that acts with the same legal/political force have the same foundation in terms of democratic legitimacy'. Final Report of Working Group IX on 'Simplification', CONV 424/02/REV1, 29 November 2002, 2.

[28] Remarkably, another series of proposals expressly rejected the suggestions presented above, in the name of a different conception of democratic legitimacy. In this view, the idea of identifying the legislative and the executive function in the Union makes no sense, since the Union is not a state. See, for instance, the contribution by C. Cisneros, Working Document 5 of Working Group IX, 2: 'Cela n'a donne pas de sens d'envisager de faire une distinction entre compétences législatives et compétences d'exécution visant éventuellement la définition des procédures ou l'attribution aux institutions de compétences à caractère général dans l'un ou l'autre cas. Il ne s'agit pas de déterminer 'qui approuve les normes d'exécution', ni d'établir un contrôle du législateur sur l'exécution du droit communautaire'.

C Legislative Instruments and Procedures

Under the Constitution, the essential elements of Union policies are to be laid down in legislative acts, taking the shape of European laws or European framework laws.[29] The substantive essential elements criterion is neither mentioned in Article I-33, which defines the Union's legislative instruments, nor in Article I-34, which is devoted to legislative acts in particular. It is nevertheless clearly expressed in the definition of 'delegated European regulations' contained in Article I-36, which holds that '[t]he essential elements of an area shall be reserved for the European law or framework law and accordingly shall not be the subject of a delegation of power'. European laws and European framework laws replace EC regulations and PJCC decisions, and EC directives and PJCC framework decisions, respectively, for the cases in which these are currently being used to adopt measures of a *legislative nature* (i.e. measures having their legal basis directly in the Treaty and deciding the essential elements in the area concerned). The disappearance of PJCC decisions and framework decisions puts an end to the exclusion of direct effect of PJCC pillar acts provided for in Article 34 TEU. It is this choice—made after difficult debates in the Convention—that appears to be[30] decisive in speaking of the 'communitarisation' of the PJCC pillar.[31] Lastly, the category of European laws also replaces for the future the present *sui generis* decisions with a legislative character, such as decisions of an organic nature[32] or decisions establishing action programmes.[33]

European laws and framework laws, as legislative acts, share as their most essential characteristic the fact that they are, in principle, adopted according to the 'ordinary legislative procedure', implying the largest political input in EU decision-making. This procedure is the current co-decision procedure involving the European Parliament and the Council on an equal footing, on a proposal from the Commission,[34] with qualified

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[29] For an interesting attempt to specify what precisely constitute the essential elements of an area, see the 'Penelope' Contribution to a Preliminary Draft Constitution of the European Union of 4 December 2002, ordered by Commission President R. Prodi, retrievable at the Union's Futurum-website: <http://europa.eu.int/futurum/index_en.htm>. According to Article 77(2) of the document, '[legislative acts] shall determine the fundamental principles, general orientation and essential aspects of the measures to be taken to that end. They shall determine the rights and obligations of persons and undertakings and the nature of the guarantees which they are to enjoy in all Member States'.

[30] Opinion of Advocate General Kokott of 11 November 2004 in Case C-105/03 *Criminal proceedings against Maria Pupino*, not yet reported in ECR, 33-34.

[31] The normalisation of the jurisdiction of the Court of Justice in the area of police and judicial cooperation in criminal matters has also contributed greatly to the communitarisation of the PJCC pillar under the Constitution. Some particularities with regard to decision-making have nevertheless survived, such as the right of initiative of (a quarter of) the Member States (Article III-264), or have been newly introduced, such as the so-called alarm-bell procedure for the harmonisation of national legislation concerning criminal procedural and substantive law (Articles III-270(3) and (4) and III-271(3) and (4) Constitution) (see note 39 *infra*).

[32] Compare note 9 with the new legal bases in Articles I-37(3) (comitology) and III-359(1) (establishment of specialised courts) Constitution, prescribing European laws.

[33] Compare note 11 with the new legal basis in Article III-283(3) Constitution (education), prescribing European laws.

[34] Article I-34(1) Constitution. Article I-34(3) Constitution deviates from the general rule of the Commission initiating legislation, stating that '[i]n the specific cases provided for in the Constitution, European laws and framework laws may be adopted at the initiative of a group of Member States or of the European Parliament, on a recommendation from the European Central Bank or at the request of the Court of Justice or the European Investment Bank'.

majority voting in the Council.[35] It guarantees a double legitimacy of the legislative process: the European Parliament, as a directly elected body, accounts for the voice of the European citizens, whereas the Council represents the interests of the Member States.

The ordinary legislative procedure becomes the standard for the adoption of legislative acts under the Constitution. This means that each time a European law or framework law is prescribed in Part III of the Constitution, it automatically applies, *unless indicated otherwise*. The successful extension of the co-decision procedure[36] is indeed countered by the survival of 'special legislative procedures' to be used '[i]n the specific cases provided for in the Constitution'.[37] This generally stands for the Council adopting European laws or framework laws alone, deciding with unanimity, after consultation of the European Parliament.[38] It is the particular sensitivity of the policy fields concerned for some (or all) Member States that inspired the Member States to deviate from the ordinary legislative procedure and to reserve control over these fields, through unanimous voting in the Council, to their own government and parliament.[39] From a legitimacy, efficiency, and transparency perspective, this solution only seems to nourish the democratic deficit.

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[35] Article I-25 Constitution.

[36] For some prominent examples, see Articles III-231 (common agricultural policy) and III-315 (common commercial policy) Constitution.

[37] Article I-34(2) Constitution.

[38] See, for instance, Constitution Articles I-54(3) (establishing the limits of the Union's own resources), III-126 (the right to vote and to stand as a candidate in municipal elections and elections to the European Parliament), III-171 (harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation), III-176 (language arrangements for the uniform protection of European intellectual property rights throughout the Union), III-210(3) (several areas in the field of social policy), III-274(1) (establishment of a European Public Prosecutor's Office), III-275(3) (operational cooperation between police authorities), III-277 (the conditions under which the competent authorities of the Member States may operate in the territory of another Member State), etc. Only in three instances that do not relate to substantive legislation, 'special legislative procedure' stands for the European Parliament adopting a European law alone, after obtaining the consent of the Council and sometimes the Commission (Article I-34(2) Constitution): see Articles III-330 (conditions governing the performance of the duties of the MEPs), III-333 (provisions governing the exercise of the right of inquiry) and III-335 (conditions governing the performance of the Ombudsman's duties).

[39] K. Lenaerts and M. Desomer, 'À la recherche d'un équilibre pour l'Union: répartition des compétences et équilibre institutionnel dans le projet de Traité établissant une Constitution pour l'Europe', in O. De Schutter and P. Nihoul (eds.) *Une Constitution pour l'Europe* (Larcier, 2004) 75. An alternative tool to reach this goal is to add an alarm-bell procedure to qualified majority voting (see note 31 *supra*). Whereas a veto blocks EU decision-making, the alarm-bell procedure does not: when the European Council does not succeed by consensus to get the legislative process going again within four months or to request the Commission or a group of Member States to table a new proposal, or when twelve months after a new proposal has been tabled the European framework law has not been adopted yet, and at least one-third of the Member States is prepared to engage in an enhanced cooperation on the basis of the tabled proposal, the authorisation to do so is deemed to have been given. The fear to be left out and to have to assent with the framework law in a later stage, when everything has been set by the other Member States, is a strong incentive for the lone dissenter(s) to search for a compromise. This incentive mechanism—the threat to engage in enhanced cooperation—is however not always coupled with the alarm-bell procedure: see Article III-136(2) (coordination of social security schemes of employed and self-employed migrant workers and their dependants) Constitution.

D Non-Legislative Instruments and Procedures

All acts that are not legislative acts are unrevealingly called 'non-legislative acts' in the Constitution. Two binding instruments make up this category: European regulations and European decisions. On the one hand, a European regulation is an act of general application, which may either be binding in its entirety and directly applicable in all Member States, or be binding, as to the result to be achieved, upon each Member State to which it is addressed, while leaving to the national authorities the choice of form and methods.[40] European regulations thus subsume current EC regulations and EC directives, to the extent that these are today used to shape measures of a non-legislative nature (i.e. not directly adopted on the basis of the EC Treaty and not expressing the essential elements in a policy area). As a consequence, one will have to study the text of a European regulation to find out its impact in the Member States' legal orders. Clarity would have been enhanced by a distinction between European regulations and European *framework* regulations—parallel to the divide between European laws and framework laws. It seems that overzealous simplification has caused some harm here.[41] A European decision, on the other hand, is either binding in its entirety and has a general scope, or is only binding upon its addressees in cases where it specifies those to whom it is addressed.[42] This broad definition allows for the replacement of a whole range of current instruments. In the field of CFSP, common strategies, joint actions, common positions and implementing decisions[43] are merged into the European decision.[44] It further substitutes current EC decisions, PJCC implementing decisions, and some *sui generis* decisions.[45]

Non-legislative acts can serve three different purposes: first, they can be used for the direct implementation of some provisions of the Constitution, i.e. the case of so-called 'autonomous regulation';[46] second, European (delegated) regulations can serve to supplement or amend certain non-essential elements of the law or framework law;[47] and third, they can be employed to implement, in the strict sense, legally binding Union acts when uniform conditions throughout the Union are needed.[48]

E The Continued Existence of 'Autonomous Regulations'

As regards the first purpose, it is not unknown to the national legal orders that certain non-legislative action can be *directly based on the Constitution*, without prior

[40] Article I-33(1), fourth paragraph, Constitution.

[41] Accordingly, a provision of the Constitution equivalent to a provision in the EC Treaty that is implemented by the Commission by means of a directive foresees a European regulation as executive normative instrument. This will allow the Commission to choose a directly applicable act instead; compare Article 86(3) EC with Article III-166(3) Constitution.

[42] Article I-33(1), fifth paragraph, Constitution.

[43] See Arts 12–15 TEU.

[44] Articles I-40(3) and (6), I-41(4), III-294(3) and III-300 Constitution.

[45] *Sui generis* decisions that are currently used for the conclusion of international agreements by the Council (Article 300(3) EC), for instance, will take the shape of European decisions under Article III-325(6) of the Constitution. But see as well notes 32 and 33 and the accompanying text.

[46] This possibility is only expressly mentioned for European regulations (see Article I-33(1), fourth paragraph, Constitution), but a multitude of examples in Part III of the Constitution indicate that the same is true for European decisions (see, e.g. in the area of CFSP).

[47] Article I-36 Constitution.

[48] Article I-37 Constitution.

intervention of the legislator. Foreign policy, for instance, is a pre-eminently diplomatic function, which constitutions confer directly upon the executive in Member States and the Union alike, requiring only *ex post* political intervention from the parliaments. In other instances, the Constitution requires the Council to adopt certain measures of an administrative nature, such as European regulations, in order to ensure administrative cooperation between the relevant departments of the Member States, as well as between those departments and the Commission in the field of freedom, security, and justice.[49] Nonetheless, other cases provided for in the Constitution are questionable: the choice of non-legislative acts in certain fields seems primarily motivated by the intention to evade the ordinary legislative procedure. In the field of competition law, for example, making provision for fines and periodic penalty payments or putting into operation the constitutional provisions for the various branches of the economy are authentic legislative issues. The fact that the Council is to adopt European regulations (i.e. non-legislative acts) for these purposes, albeit after consulting the European Parliament,[50] is not coherent with the general logic of the Constitution on the matter.

F The Mechanism of Delegation of Legislation

The second function of the Union's non-legislative instruments is reserved for European regulations only. Article I-36 of the Constitution introduces a subcategory of delegated European regulations with the intention of limiting the detailed character of Union legislation without abandoning the guarantee of democratic legitimacy of Union legislative acts. The mechanism of delegation, which is new to the legal order of the European Union, thus permits the Union legislator (the European Parliament and/or the Council) to delegate to the Commission the power to supplement or amend certain non-essential—technical or detailed—elements of the law or framework law, while retaining a real power of control, i.e. the ability to retrieve, as it were, its power to legislate. This should allow for swift reaction to rapidly changing circumstances in certain regulated domains. The essential elements of an area, in contrast, are constitutionally reserved for the European law or framework law, and accordingly, cannot be the subject of a delegation of power.[51]

It is also up to the legislator to explicitly define the objectives, content, scope, and duration of the delegation of power in the basic European laws and framework laws. Article I-36(2) specifies the conditions to which the delegation may be subjected. Two mechanisms allow the legislator to intervene in cases where the substantive boundaries set down in the basic European law or framework law are under threat. First, the European Parliament *or* the Council may revoke the delegation to the Commission. This is the so-called 'legislative call-back mechanism'. Second, the basic European law or framework law may make entry into force of the delegated regulation conditional upon a 'no objection' by the European Parliament *or* the Council within a certain time limit. Most likely, both formulas are to be understood as meaning that, in cases where the ordinary legislative procedure has been applied, both the European Parliament and the

[49] Article III-263 Constitution.
[50] Compare Article III-163 Constitution with Article 83 EC.
[51] Article I-36 Constitution.

Council can exercise these *a priori* control mechanisms singlehandedly, whereas, in cases where a special legislative procedure has been followed, only the institution—the Council—involved in authorising the delegation is entitled to do so. In any case, the Court of Justice remains competent on the basis of Article III-365 of the Constitution—the equivalent of Article 230 EC—to deal with any violation of the conditions established in the decision to delegate.[52] For the European Parliament, repealing the delegation or raising objections requires acting by a majority of its component members, which is a lot heavier than the normal majority of the votes cast prescribed for the adoption of the law or framework law at the basis of the delegation. In comparison, for the Council, qualified majority voting suffices for activating any of the control mechanisms.[53] In cases where the basic legislative act had been adopted in accordance with a special legislative procedure requiring unanimity, this means that repealing or objecting to the delegation is actually easier than adopting the basic legislative act itself. In general, it will therefore be simpler for the Council to politically enforce the limits of the delegation to the Commission than for the European Parliament. As to the question of the exhaustive nature of the list of legislative control devices, the strict voting arrangements prescribed in Article I-36(2), second paragraph, seem to confirm that exhaustive character. In any event, the philosophy itself behind the introduction of the mechanism of delegation of legislation in the EU rules out the use of 'comitology' committees to control respect for the basic legislative act.[54] This is because the use of 'heavy' comitology procedures, involving regulatory and management committees composed of representatives of the Member States, may result *de facto* in implementation by the Council, leaving no legislative control mechanism to the European Parliament.[55] Lastly, since Article I-36 does not mention the possibility of entrusting the power to adopt delegated regulations to the Council or to agencies, these possibilities are considered to be ruled out.

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[52] It is nonetheless to be expected that the Court of Justice will only exercise marginal control over what exactly are to be considered the essential elements in a given policy area and are therefore reserved to the legislator.

[53] Article I-36(2), second paragraph, Constitution.

[54] *Contra* M. Dougan, 'The Convention's Draft Constitutional Treaty: bringing Europe closer to its lawyers?' (2003) ELR 786. It will nevertheless remain possible for the Commission to involve an expert committee in the drafting of delegated regulations, such as the European Securities Committee (ESC) and the Committee of European Securities Regulators (CESR) within the framework of the so-called 'Lamfalussy procedure'. Regarding this procedure, the IGC has adopted a declaration '[taking] note of the Commission's intention to continue to consult experts appointed by the Member States in the preparation of draft delegated European regulations in the financial services area, in accordance with its established practice' (see Declaration 8 on Article I-36, annexed to the European Constitution, CIG 87/04 ADD2 REV2).

[55] This is also the sense of the Commission's proposal for a Council Decision amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, COM(2002)719 final, as amended by COM(2004)324 final. The proposal suggests a reform of the regulatory committee procedure awaiting the entry into force of the Union's Constitution (which contains the more radical changes portrayed above), in order to 'contribute to clarifying the exercise of executive functions and placing on an equal footing the European Parliament and the Council as supervisors of the Commission's exercise of the implementing powers conferred on it, and using to the maximum effect the legal scope afforded by the current Treaty, which does not allow to go further' (p. 2).

G Implementation in the Strict Sense

The third and last function of non-legislative instruments is implementation *sensu stricto*. First and foremost, implementation of legally binding acts of the Union naturally belongs to the Member States.[56] Only '[w]here uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified specific cases[57] and [in CFSP matters],[58] on the Council' (Article I-37(2)). Union implementing acts can take the form of European implementing regulations or European implementing decisions.[59] Implementation by the Commission will also in the future be monitored by 'comitology' committees (Article I-37(3)). What is new here is that any future comitology decision will have to be laid down by European law, involving the European Parliament through the ordinary legislative procedure, instead of by the Council alone deciding unanimously.[60] The fact that an implementing role for the Council is being maintained in 'duly justified specific cases' (Article I-37(2)), is, in our view, to be considered as an anomaly in the overall picture of separation of functions that emerges from Articles I-33 to I-37. The same argument does not hold for the other 'exception' on the principle of implementation by the Commission contained in Article I-37(2), namely implementation by the Council 'in the cases provided for in Article I-40', i.e. the Union's common foreign and security policy. The reason is that implementation of CFSP in fact concerns the diplomatic function of the Union, which is different from the executive function in the strict sense of implementation of the Union's legislative acts. Lastly, it is surprising that no mention is made in Article I-37 (nor in Article I-35) of the role of agencies in implementing Union policies.

H Non-Binding Legal Instruments and Non-Standard Acts

Recommendations and opinions, two familiar non-binding legal instruments, complete the list provided in Article I-33(1). Article I-35(3) places recommendations under the heading of non-legislative acts. The Article functions as a general legal basis for the adoption of recommendations by the Council and the Commission,[61] whereas the European Central Bank can only avail itself of recommendations 'in the specific cases provided for in the Constitution'. For the Council in particular, this provision specifies that '[i]t shall act on a proposal from the Commission in all cases where the Constitution provides that it shall adopt acts on a proposal from the Commission', and that '[i]t shall act unanimously in those areas in which unanimity is required for the adoption of a Union act'.[62] This is an echo of the current situation in the EC Treaty since, at present, the Council does not benefit from a general power to adopt recommendations, but instead, derives that

[56] This principle is uncontested, but it is nevertheless the first time that it is included in the Union's constitutional texts; see Article I-37(1) Constitution.

[57] See Case C-16/88 *Commission v Council* [1989] ECR 3457, para 10; Case C-257/01 *Commission v Council*, not yet reported.

[58] See Articles I-40 and I-41 Constitution.

[59] Article I-37(4) Constitution.

[60] See Article 202 EC and the Comitology Decision, cited in footnote 9. On this topic, see K. Lenaerts and A. Verhoeven, 'Towards a Legal Framework for Executive Rule-Making in the EU? The Contribution of the New Comitology Decision' (2000) CMLR 645–686.

[61] Presently, the Commission derives such power from Article 211 EC.

[62] Article I-35(3) Constitution.

power from several different legal bases prescribing each time different decision-making procedures (including, sometimes, the co-decision procedure). Nonetheless, in practice, the Council nowadays often adopts recommendations without reference to a specific legal basis and, accordingly, without following a predetermined decision-making procedure. Such recommendations are non-standard acts, or 'soft law'. The entry into force of the Constitution, with its general authorisation to the Council to adopt recommendations, should make these non-standard recommendations redundant.

This brings us to the more general question of the fate of non-standard acts—such as resolutions, declarations, communications—in the Constitution. The formula in Article I-33(1), '*To exercise the Union's competences* the institutions *shall use* as *legal instruments*, *in accordance with Part III*, European laws, European framework laws, European regulations, European decisions, recommendations and opinions'[63] leaves no doubt as to the exhaustive character of the list of EU legal instruments. The confusing second paragraph of Article I-33, however, blurs this newly acquired clarity. It reads as follows: 'When considering draft legislative acts, the European Parliament and the Council shall refrain from adopting *acts not provided for by the relevant legislative procedure in the area in question*'.[64] According to the final document of Convention Working Group IX on 'Simplification', a previous draft of this sentence aimed at avoiding 'the erroneous impression that the Union legislates through the adoption of non-standard instruments'.[65] In a positive sense, this means that a legislative procedure can only lead to the adoption of a European law, a European framework law, or a recommendation—the latter, as the case may be, falling in line with the exigencies of proportionality.[66] In a negative sense, however, this phrase seems to indicate the lasting availability, in areas in which no draft legislative acts are considered, of non-standard acts that are mostly of a *political* nature, but whose legal effects are nevertheless not always clear.[67] From a transparency perspective, the exclusion, in general, of the use of any non-standard act would therefore have been a much better option. Having at their disposal recommendations and opinions for the shaping of non-binding acts should then suffice for the institutions. A concern for flexibility—non-standard acts can be speedily adopted without having to respect the requirements, such as formal adoption procedures, set out in the Treaty—and probably also a sense for realism have inspired the drafters of the Constitution to preserve the availability of non-standard acts. The Court of Justice will remain vigilant and will continue to check the *content* of the act—and not the *form*[68]—to ascertain whether the act is intended to produce legal effects and is therefore a binding act against which an action for annulment will lie.[69]

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[63] Emphasis added.

[64] Emphasis added.

[65] Final Report of Working Group IX on 'Simplification', CONV 424/02/REV1, 29 November 2002, 6–7.

[66] See the replication of the principle of proportionality in Article I-38(1) as one of the 'principles common to the Union's legal acts'.

[67] For an alternative reading of this provision—illustrating its ambiguity—see H. Hofmann, 'A Critical Analysis of the New Typology of Acts in the Draft Treaty Establishing a Constitution for Europe', (2003) 7(9) *European Integration Online Papers.* Available at: <http://eiop.or.at/eiop/texte/2003-009a.htm>.

[68] In the daily practice of the Commission in competition cases, many 'decisions' are taken in the shape of letters, telexes, emails, etc. These are often intended to have genuine binding effect. In case of conflict, the Court of Justice will therefore disregard the shape of the act in a quest to maximise judicial review for private parties. See, for example, Joined Cases T-452 and T-453/93 *Pevesa and Inpesca v Commission* [1994] ECR II-229, para 29 (concerning a letter from the Commission).

[69] For a thorough discussion of the Court of Justice's case law in this respect, see K. Lenaerts and D. Arts, *Procedural Law of the European Union* (Sweet & Maxwell, 1999) paras 7-007 to 7-024.

I Some 'Specific Provisions'

A final remark relates to Articles I-40 to I-43, the so-called 'specific provisions' set down in the Title on 'Exercise of Union Competence'. These do not, in our opinion, belong there in their current form. On the one hand, to the extent that these provisions deal extensively with the substance of the concerned policies, they belong in Part III of the Constitution. On the other, a much shorter provision could have sufficed for dealing in Part I with the particularities in terms of legal instruments and procedures of the areas concerned.

The Convention wished to point out the 'specific' character of the concerned policy areas (common foreign and security policy, common defence policy, the area of freedom, security and justice, and solidarity between Member States in case of terrorist attacks or natural or man-made disasters) as regards the use of legal instruments and the applicability of legal procedures. For the Union's common foreign and security policy and common defence policy, this specificity is situated within the continuing intergovernmental character of these policies, which is expressed by the dominance of the European Council and the Council of Ministers in decision-making, the prevalence of unanimity voting and the exclusion of European laws and framework laws to the advantage of European decisions (Articles I-40(3) and (6) and I-41(4)). The area of freedom, security, and justice has been 'normalised' in the Constitution as regards decision-making procedures and use of legal instruments, the only deviation from the 'Community method' still prevailing being the right of initiative of a group of Member States[70] (Article I-42(3)). A new particularity is the special role that national parliaments are assigned in Article I-42(2) in the evaluation of the implementation of the area of freedom, security, and justice,[71] in the political monitoring of Europol,[72] and the evaluation of Eurojust's activities.[73,74] Lastly, the solidarity clause prescribes the mobilisation by the Union of all the instruments at its disposal to assist a Member State that is the object of a terrorist attack or the victim of a natural or man-made disaster.

J Reform of the Legal Instruments as a Vehicle to Reinforce Subsidiarity and Proportionality

The principle of proportionality guides the Union in giving preference, in all circumstances, to the least coercive and peremptory instrument sufficient to attain the pursued objective. Proportionality is reiterated in Article I-38(1) as one of the 'principles common to the Union's legal acts'. It states that '[w]here the Constitution does not specify the type of act to be adopted, the institutions shall select it on a case-by-case basis, in compliance with the applicable procedures and with the principle of proportionality referred to in Article I-11'. Article I-38(2) further provides that legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests, or opinions required by the Constitution. For draft European legislative acts, the Protocol on the application of the principles of subsidiarity

[70] See Article III-364 Constitution, discussed in note 31 *supra*.
[71] Article III-260 Constitution.
[72] Article III-276(2) Constitution.
[73] Article III-273(1) Constitution.
[74] See also note 31 on the so-called alarm-bell procedure.

and proportionality further requires a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality.[75]

Article 2 of the Protocol on the application of the principles of subsidiarity and proportionality annexed to the Constitution adds to that a duty for the European Commission to consult widely before proposing European legislative acts, taking into account, where appropriate, the regional and local dimension of the action envisaged. The Protocol also introduces a mechanism of *ex ante* political control by the national parliaments so as to ensure compliance of draft European legislative acts with the principle of subsidiarity.[76]

On the other hand, the proposal by Convention Working Group V on 'Complementary Competences' to foreclose the use of certain binding legal instruments[77] in the sphere of the Union's areas of supporting, coordinating, or complementary action, which was intended to substantiate the spirit of subsidiarity, was not accepted by the plenary of the Convention. According to the definition in Article I-12(5), the Union is nevertheless prohibited from superseding the Member States' competence in these areas. The Constitution therefore excludes harmonisation of national laws and regulations in the provisions that develop the areas of supporting, coordinating, or complementary action in Part III of the Constitution.[78]

Moreover, some members of Convention Working Group V felt that a 'hierarchy of intensity of Union action' should be inserted into the Constitutional Treaty as a separate legal principle along with the principles of subsidiarity and proportionality. Others felt that this 'scale of intervention' would be a useful element in the further elaboration of the principles of subsidiarity and proportionality.[79] Neither of the proposals survived the plenary of the Convention.

Lastly, the majority of the members of Convention Working Group XI on 'Social Policy' proposed to insert in the Constitution a horizontal provision defining the open method of coordination and its procedure.[80] This wish did not materialise in the Constitution: the notion of the 'open method of coordination', as such, is not mentioned even once. Several provisions on supporting, coordinating or complementary action nevertheless provide for the elements that make up that approach.[81]

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[75] Article 5 of the Protocol.

[76] Pursuant to Arts 6 and 7 of the Protocol, '[w]here reasoned opinions on a draft European legislative act's non-compliance with the principle of subsidiarity represent at least one third [of the national Parliaments], the draft must be reviewed. This threshold shall be a quarter in the case of a draft European legislative act submitted on the basis of Article III-264' (i.e. on the initiative of a quarter of the Member States, in the area of harmonisation of substantive and procedural criminal laws and regulations).

[77] According to Working Group V, ideally, '[s]upporting measures authorise the Union to adopt recommendations, resolutions, guidelines, programmes, and other legally non-binding acts as well as legally binding decisions, to the extent specified in the relevant Articles of the 'secondary Treaties'. Union legislation (regulations and directives) may not be adopted as supporting measures, unless exceptionally and clearly specified in the relevant Treaty Article'; see CONV 375/1/02 of 4 November 2002, 4–5.

[78] See Arts III-278(5) (public health; it is noteworthy that some aspects of human health protection are classified as shared competences in para 4 and therefore escape the prohibition of harmonisation), III-27(3) (industry), III-280(5)(a) (culture), III-281(2) (tourism), III-282(3)(a) (education, youth and sports), III-283(3)(a) (vocational training) and III-284(2) (civil protection) Constitution.

[79] Final Report of Convention Working Group V on 'Complementary Competencies', CONV 375/1/02 REV1, 4 November 2002, 12–13.

[80] CONV 421/02 of 22 November 2002, 2 and 17–20.

[81] See Arts III-213 (social policy), III-250(2) (research and technological development), III-278(2) (public health) and III-279(2) (industry) Constitution.

K Reform of the Legal Instruments and locus standi *before the Court of Justice*

The newly established hierarchy between legislative and non-legislative instruments is relevant for two aspects of *locus standi* against Union acts: first, the criteria for the standing of individual applicants before the Union judge have been revised in accordance with this new division; and second, the distribution of the legality control between the Court of Justice and the Court of First Instance for actions for annulment lodged by Member States in force since 1 June 2004 is in fact based on the divide between legislative and non-legislative acts.

As regards the standing of individual applicants challenging the validity of Union acts before the Union judge, Article 230(4) EC provides that '[a]ny natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former'. In its famous *Plaumann* judgment of 1962, the Court of Justice set a very restrictive standard of interpretation as regards the requirement of individual concern for challenging acts of general application: '[p]ersons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed'.[82] Pursuant to this formula, many actions for annulment lodged by individual applicants against acts of general application that are of an executive nature have been declared inadmissible.[83] This limitation of *locus standi* for individuals before the Community judge is generally based on a concern for legal certainty: a generalised opening of the action for annulment for individuals would lead to a flood of litigation. It is the classical viewpoint of the Court of Justice that this situation does not detract from the right to an effective remedy before a competent judge, which is one of the foundations of the Community as *Rechtsgemeinschaft* and is guaranteed in the EC legal order.[84] The Court of Justice traditionally maintained that the EC Treaty, through Articles 230 (action for annulment), 241 (exception of illegality), 234 (preliminary ruling) and 235/288 (action for damages), has established a coherent and complete system of judicial protection.[85]

In its judgment, *Jégo-Quéré*, of 3 May 2002,[86] the Court of First Instance abandoned the restrictive interpretation of the notion of individual concern, supported by the famous Opinion of Advocate General Jacobs in the case, *Unión de Pequeños*

[82] Case C-25/62 *Plaumann v Commission* [1963] ECR 95. For a critical analysis of the *Plaumann* test, see P. Craig and G. De Búrca, *EU Law, Text, Cases and Materials* (Oxford University Press, 2003), 488–491.

[83] See, for instance, Case T–173/98 *Unión de Pequeños Agricultores v Council* [1999] ECR II-3357.

[84] Case C-294/83 *Les Verts v European Parliament* [1986] ECR 1339, para 23. The Court of Justice grounds this right on the constitutional traditions common to the Member States and on Articles 6 and 13 ECHR: see, for instance, Case C-222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, para 18; Cases T–172/98, T–175/98, and T–177/98 *Salamander v European Parliament and Council* [2000] ECR II-2487, para 78.

[85] Case C-294/83 *Les Verts v European Parliament* [1986] ECR 1339, para 23; Cases T–172/98, T–175/98, and T–177/98 *Salamander v European Parliament and Council* [2000] ECR II-2487, paras 72–77.

[86] Case T-177/01 *Jégo-Quéré v Commission* [2002] ECR II-2365.

Agricultores, of 21 March 2002.[87] Both Advocate General Jacobs and the Court of First Instance contested the assertion that the preliminary rulings procedure and the action for damages against the Community are valuable alternatives to the action for annulment for individuals to contest the validity of Community acts of general application that affect their legal position. It is almost impossible for individual applicants to challenge Community acts that do not require any implementing measures at national level. In that case, no measure is available in which to lodge an action in the national court. Even worse, an individual affected by a Community measure of general scope may in some instances have to violate the rules laid down by the measure in order to then rely on the invalidity of those rules as a defence in criminal or civil proceedings directed against him or her. Advocate General Jacobs, as well as the Court of First Instance, concluded that such a situation is not capable of offering the individual an adequate means of judicial protection.[88] Shortly thereafter, the European Court of Human Rights in Strasbourg confirmed this position in its judgment, *Posti and Rahko*.[89] Advocate General Jacobs and the Court of First Instance found additional support for redefining the notion of individual concern in Article 47 of the Charter of Fundamental Rights of the European Union,[90] which contains the right to an effective remedy. According to Advocate General Jacobs, the only satisfactory solution is therefore to accept 'that a person is to be regarded as individually concerned by a Community measure where, by reason of his particular circumstances, the measure has, or is liable to have, a substantial adverse effect on his interests'.[91] The new formula suggested by the Court of First Instance is slightly less broad: 'a natural or legal person is to be regarded as individually concerned by a Community measure of general application that concerns him directly if the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him'.[92]

The Court of Justice was not won over by the new approach and reaffirmed its restrictive interpretation of the notion of individual concern—the *Plaumann* test—in its judgment in the case, *Unión de Pequeños Agricultores* of 25 July 2002.[93] Moreover, it confirmed its position on the comprehensiveness of the Community's system of legal remedies and procedures.[94] It thereby recognised the crucial role that Member States are to play in this respect, in accordance with the duty of loyal cooperation laid down in Article 10 EC.[95] Finally, the Court of Justice admitted that it is 'possible to envisage a system of judicial review of the legality of Community measures of general application different from that established by the founding Treaty and never amended as to its

[87] Opinion of Advocate General Jacobs of 21 March 2002 in Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677.

[88] *Ibid.*, para 45; Case T-177/01 *Jégo-Quéré v Commission* [2002] ECR II-2365, para 45.

[89] ECHR, *Posti and Rahko v Finland*, *Reports*, 2002-VII, para 53, with reference in para 54 to the *Extramet* judgment of the Court of Justice (Case C-358/89 *Extramet Industrie v Council* [1991] ECR I-2501, paras 13–14).

[90] Art II-107 Constitution.

[91] Opinion of Advocate General Jacobs of 21 March 2002 on Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677, 59–60.

[92] Case T-177/01 *Jégo-Quéré v Commission* [2002] ECR II-2365, para 51.

[93] Case C-50/00 P, *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677, para 36.

[94] *Ibid.*, para 40.

[95] *Ibid.*, paras 41–42.

principles', and recalled that 'it is for the Member States, if necessary, in accordance with Article 48 EU, to reform the system currently in force'.[96]

The European Convention took this appeal to heart. A majority of the members of the Discussion Circle on the Court of Justice advocated the introduction of more flexible criteria for individual challenges against acts of general application. The plenary of the Convention adopted that position and amended Article 230(4) EC as follows: 'Any natural or legal person may . . . institute proceedings against an act addressed to that person or which is of direct and individual concern to him or her, and against a regulatory act which is of direct concern to him or her and does not entail implementing measures' (Article III-365(4) Constitution).

What is new as compared to the current *Plaumann* test is the last part of the formula. The wording 'regulatory acts' is unfortunate, as it points to acts of general application of an executive nature. It means that the new criteria for standing for individual applicants correspond to the division between legislative and non-legislative acts: an individual will be entitled to challenge the Union's non-legislative acts of general application that do not entail implementing measures before the Union judge. To the extent that national implementing measures exist, individuals can—as is currently the case—contest these before the national judge, who can ask a preliminary question to the Court of Justice in case doubts are raised as to the validity of the European measure. Directly challenging European legislative acts—European laws and framework laws—is ruled out, as is the case in several of the Member States. A justification could be found in the higher democratic legitimacy of these acts—those that come into being through the ordinary legislative procedure—which would make judicial review less pressing. The new conditions for admissibility come closer to the European Court for Human Rights' interpretation of Articles 6 and 13 ECHR. An *a priori* exclusion of any judicial review of legislative acts nevertheless seems hard to reconcile with the Court of Human Rights's judgment in *Posti and Rahko*.[97]

The second remarkable intersection between the systems of judicial review and legal instruments concerns the distribution of the legality control between the Court of Justice and the Court of First Instance for actions for annulment against Union acts lodged by Member States. Council Decision of 26 April 2004 amending Articles 51 and 54 of the Protocol on the Statute of the Court of Justice reserves for the Court of Justice jurisdiction in the actions referred to in Articles 230 and 232 EC when they are brought by a Member States against an act of, or failure to act by, the European Parliament or the Council, or by both those institutions acting jointly except in three instances: decisions taken by the Council to allow state aid under special circumstances (Article 88(2), third subparagraph, EC), trade protection measures adopted by the Council (Article 133 EC) and acts of the Council by which the Council exercises implementing powers in accordance with Article 202, third indent, EC.[98] The Court of First Instance is competent not only to hear cases lodged by Member States in those three

[96] *Ibid.*, para 45. For a thorough comment, see D. Hanf, 'Talking with the "pouvoir constituant" in times of constitutional reform: the European Court of Justice on private applicants' access to justice', (2003) MJ 265–290.

[97] K. Lenaerts and T. Corthaut, 'Judicial Review as a Contribution to the Development of European Constitutionalism' (2004) *Yearbook of European Law* 24.

[98] In addition, actions by Member States against an act of or failure to act by the Commission under Article 11(a) EC are also reserved for the Court of Justice. Council Decision of 26 April 2004 amending Articles 51 and 54 of the Protocol on the Statute of the Court of Justice, OJ L 132/5 29/4/2004.

instances, but also to hear any cases initiated by Member States against the European Commission or the European Central Bank. A closer look at this division reveals a division of labour between the Court of Justice and the Court of First Instance that neatly coincides with the distinction between legislative and non-legislative measures developed in the Constitution. The Court of Justice is thus in charge of applications brought by Member States against acts of a *legislative nature*, whereas the Court of First Instance concentrates on all acts of a *non-legislative nature*. Only after the entry into force of the Constitution will this division of labour correspond to distinct legal instruments: the Court of Justice will deal with actions for annulment by Member States against European laws and framework laws, while the Court of First Instance—renamed 'the General Court'—will deal with Member States' appeals against European (delegated) regulations and European decisions.

IV Towards a Genuine Hierarchy of Legal Acts for the Union?

A The Sense of Hierarchy in the Union's New List of Legal Instruments

There is a clear suggestion of hierarchy in the sequence in which the different categories of legal instruments are listed in Article I-33(1) and in the organisation of the subsequent Articles I-34 to I-37 ('Legislative acts', 'Non-legislative acts'; 'Delegated regulations', 'Implementing acts'). Nevertheless, the Constitution does not explicitly refer to a hierarchy of Union acts.

The sequence largely coincides with the scale of democratic legitimacy of the respective adoption procedures: the heavier the weight of an adoption procedure in terms of democratic legitimacy, the higher a norm is ranked in the list. The streamlining of adoption procedures and instruments that has been carried through in the Constitution effectively brings the Union closer to the model of institutional separation of powers that we know from the Member States. The European Parliament's role in decision-making has been strengthened: the co-decision procedure has been turned into the default legislative procedure for basic policy choices in the field of the Union's exclusive and shared competences; its field of application has been extended; and the mechanism of delegation of legislation will allow for more speedy supplementing or amending non-essential provisions of legislative acts under equal supervision of the European Parliament and the Council. As regards the Council, the Constitution requires that it will meet in public when acting in its legislative capacity,[99] i.e. as the second legislative chamber representing the Member States, and that it will ensure publication of any documents relating to legislative procedures.[100] The Commission, lastly, has been confirmed as the principal European executive power in its capacity as the exclusive beneficiary of the delegation of legislation, thereby precluding the Council, agencies, and regulatory committees. Implementation in the strict sense is, in principle, bestowed on the Commission, under supervision of 'comitology committees'.

B Hierarchy of Legal Acts—or a Matter of Legal Basis?

The question remains whether this reform of the Union's system of legal instruments and adoption procedures is sufficient to warrant the conclusion that the Constitution

[99] Articles I-24 and I-50 Constitution.
[100] Article III-399 Constitution.

has endowed the Union with a true hierarchy between different types of legal acts. In our view, the Court's ruling in *France, Italy and the United Kingdom v Commission*,[101] denying the Union a general principle of separation of powers, still stands under the Constitution. The reason is that the picture of separation of powers between the Union's political institutions is still too blurred by too many particularities in the use of legal instruments and adoption procedures.

Both the existence of a special legislative procedure—the Council adopting legislative acts on its own, mostly by unanimity—and the continuing occurrence of instances of 'autonomous regulation' by the Council—the Council adopting non-legislative acts of a general scope directly on the basis of a provision of the Constitution[102]—obscure the institutional balance model as set out in part I of the Constitution.[103] It is thus not clear what the relationship would be, in the case of a conflict, between a European (framework) law and a European regulation both adopted by the Council directly on the basis of different provisions of the Constitution. It is not even certain whether the solution to the conflict would be more straightforward in case the European (framework) law were adopted according to the ordinary legislative procedure, endowing it with more democratic legitimacy.

A particular example of this uncertainty can be observed in the provisions concerning the implementation of the Union's common agricultural policy. Whereas the introduction, in Article III-231, of the ordinary legislative procedure for the pursuit of the objectives of the common agricultural and fisheries policy is a major improvement in democratic legitimacy, it is remarkable that this same provision reserves for the Council, 'on a proposal from the Commission, [the adoption of] European regulations or decisions on fixing prices, levies, aid and quantitative limitations and on the fixing and allocation of fishing opportunities'. This 'executive reserve' for the Council embodies a feeling of distrust for the (co-)legislator (who might want to legislate too much on the details), which in turn raises doubts as to the primacy of the European laws and framework laws adopted in the field of agriculture and fisheries over the European regulations adopted directly on the basis of another paragraph of the same Treaty provision.

Furthermore, the substantive breakdown between European delegated regulations and European implementing regulations and decisions is far from clear. It seems not unthinkable that the Council, acting according to a special legislative procedure, will give precedence in its legislative acts to implementation by the Commission—or by itself—over delegation to the Commission for the shaping of the details. From the Council's point of view, the advantage of the implementing procedure is obviously control by the Member States by means of comitology committees over the Commission's work. The Council may even be inclined to go all the way and reserve implementation to itself, since it is clear from the prescription in the Constitution of the special legislative procedure that we are dealing with a sensitive policy matter. It will be up to the Court of Justice to clarify what is meant with 'duly justified specific cases' in Article I-37 of the Constitution.[104] All these particularities in any case make it hard

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[101] Cf., note 3, *supra.*

[102] See, for instance, the example of 'autonomous regulation' in the field of competition law (Article III-163 Constitution), discussed above.

[103] Articles I-19 to I-29 (The institutional framework) and I-46 (the principle of representative democracy) Constitution.

[104] See in this respect the landmark judgment in Case C-257/01 *Commission v Council*, not yet reported in ECR.

to predict whether a European delegated regulation will at all times take precedence over a European implementing regulation or decision.[105]

Resolving conflicts between different types of legal acts that have their ultimate legal basis in different provisions of the Constitution will most likely remain a matter of interpretation of these legal bases and of the particular institutional balance and vertical distribution of competence that is implied. Legal bases will be interpreted in a manner that allows them to coexist in a consistent way, as it is assumed that the masters of the Constitution did not intend to include conflicting provisions in the Constitution. We therefore believe that it is well possible that, as is currently the case, the issue of conflicting provisions and the question of hierarchy will hardly be raised at all.

[105] In case a European implementing regulation or decision is based on a European delegated regulation, the prevalence of the latter is of course beyond doubt, since the normal *Köster* reasoning then applies (Case 25/70 *Einfuhr- und Vorratsstelle für Getreide und Futtermittel v Köster er Berodt & Co* [1970] ECR 1161).