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Professor J.H.H.Weiler
European Union Jean Monnet Chair

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Jonas Bering Liisberg

The EU Constitutional Treaty and its distinction between legislative and non-legislative acts – Oranges into apples?

NYU School of Law • New York, NY 10012

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New York University School of Law
New York, NY 10012
USA

Abstract

The paper examines the introduction of a distinction between legislative and non-legislative acts in the Constitutional Treaty. The drafting history and the possible implications are analyzed. Questions covered include: Was the introduction of the distinction necessary in terms of clarification or was it primarily a lever to strengthen support for more powers to the European Parliament and the Commission? Could the distinction nurture false expectations of what the EU is, or could it undermine efforts at improving transparency and enforcement of subsidiarity? The paper concludes that the distinction probably has little real significance and no serious counterproductive effects. The drafting history and analysis illustrate the pitfalls of analogies to national constitutional orders and the complexity of simplification.

"THE EU CONSTITUTIONAL TREATY AND ITS DISTINCTION BETWEEN LEGISLATIVE AND NON-LEGISLATIVE ACTS – ORANGES INTO APPLES?"

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By Jonas Bering Liisberg[*]

> *"The very language of modern democracy, its grammar, syntax and vocabulary, revolve around the state, the nation and the people ... The Union, it is generally accepted, is not a state. The result is a description of oranges with a botanical vocabulary developed for apples."*
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> Joseph Weiler, on "Democracy Deficit Literature" and the problem of translation, in *The Constitution of Europe* (CUP, 1999), p. 268.

1. Introduction

The Treaty Establishing a Constitution for Europe[1] introduces an express distinction between legislative acts and non-legislative acts of the European Union, thereby answering in the affirmative one of the founding questions of the Laeken Declaration from 2001: "*Should a distinction be introduced between legislative and executive measures?*"[2]

This paper looks at why and how this distinction was introduced, crafted and agreed upon, during the Convention on the Future of Europe and the ensuing Intergovernmental Conference (IGC) leading to the signature of the Constitutional Treaty in October 2004.[3] Chapter 2 takes a closer look at the drafting history, while Chapter 3 looks at some of the implications of the distinction.[4]

More specific questions covered include: Was drawing a line between legislative and non-legislative acts of the Union a necessary element of the much-desired simplification of

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[*] Head of International and Legal Affairs Division, Ministry of Employment, Denmark. Views expressed are personal to the author. Comments are welcome at jliisber@post.harvard.edu.

[1] Hereafter the Constitutional Treaty. See O.J. 2004, C 310/1.

[2] See Laeken Declaration: the Future of the European Union, 15 December 2001, available at http://europa.eu.int/comm/laeken_council/index_en.htm.

[3] Closely related to the topic of this working paper are subjects such as the new concept of "delegated regulations", the new meaning of "implementing acts", possible implications for control by Member States of Commission implementation (comitology) as well as the general topic of a hierarchy of legal norms in the EU. These subjects will only be touched upon briefly where directly relevant for the distinction between legislative and non-legislative acts.

[4] A note on sources: The account of the drafting history is based exclusively on written sources publicly available at the website of the Convention (http://european-convention.eu.int) and the website of the IGC 2003 (http://ue.eu.int). Documents from the Convention are generally preceded by "CONV", whereas documents from the IGC are preceded by "CIG". Some Convention documents do not have a CONV no., e.g. some Working Group documents (WD), summaries of Praesidium meetings, and amendment forms introduced by individual members of the Convention. See full list of titles and references to documents in the annex.

instruments and procedures? Was it simply a matter of clarification and better explanation to the citizens? Or was it also, perhaps even primarily, used as a lever to strengthen support for more powers to the European Parliament and the Commission, based on arguments of democracy and efficiency? Was the mission successful? Is the distinction, as applied with respect to the various activities of the EU and the legal bases in Part III of the Constitutional Treaty, consistent? Could there be unintended, consequences of the drawn distinction with respect to other goals of the Constitutional Treaty, such as increased transparency and stricter control of subsidiarity compliance?

In sum: Was the introduction of an express distinction between legislative and non-legislative acts necessary in terms of clarification of the unique EU legal landscape? Could the distinction nurture false expectations of what the EU really is, and could a somewhat arbitrary line between the legislative and non-legislative sphere undermine efforts at improving transparency and enforcement of subsidiarity in EU rulemaking? Or – as a third and less conspicuous possibility – is the new distinction simply a benign vignette in the architecture of the European construction?

To spare the impatient reader time and trouble: The final, less dramatic hypothesis wins in the end, coupled with a few words of caution against too close analogies with national constitutional orders, however tempting they may be, in the pursuit of political corrections of the construct of Europe.

A note on the gloomy prospects of entry into force of the Constitutional Treaty seems in place: Even if the Treaty, as we know it, might never enter into force, the ensuing account could hopefully still be a relevant contribution to the study of EU legal instruments and decision-making, and not only to the rather esoteric discipline of counter-factual EU legal history. The delimitation of the legislative and non-legislative work of the EU is a persistent theme in the history of EU treaty-making, and most likely the express distinction introduced in the Constitutional Treaty will survive in some form in a modified, amended or entirely new foundational treaty of the EU.

1.1. The legal situation today: Legislation as a term of convenience

The European Court of Justice has referred to the generic term "Community legislation" in numerous cases almost since the dawn of its activity, even if the Treaties make no reference to the term as such.[5] The Court has never had to lay down, in abstract terms, a definition of legislation. In the application of Article 230(4) EC on annulment procedures instituted by individual applicants, the case law of the Court relies on a broad concept of legislation in the sense of all binding acts of general application.[6]

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[5] Case law from as early as the 1950s under the ECSC Treaty employed "legislative" language, see e.g. Case 8/55, *Féderation de Charbonnière de Belgique v. High Authority*, [1956] ECR 245, 258, referring to the ECSC instrument of general decisions as "quasi-legislative measures … with legislative effect *erga omnes*" (French: "d'actes quasi législatifs", "un effet normatif erga omnes"; German: "fast um Gesetzgebungsakte handelt", "normative Wirkung erga omnes"). For a more recent example of common "legislative" usage, see e.g. Case 348/85, *Denmark v. Commission,* [1987] ECR 5225: "Community legislation must be certain and its application must be foreseeable by those subject to it", para. 19.

[6] See, e.g., Case C-298/89, *Gibraltar v. Council*, [1993] ECR I-3605, paras. 15-17. On the "unlawful delegation" doctrine of the Court and the *Köster* case, see further below.

The term legislation is also used extensively in the practice of the political institutions. The Rules of Procedure of the Council contain an indirect definition of legislation, with no relation to the formal categorization or legal effects of instruments in general, see Article 207(3) EC, discussed further below. The current subsidiarity protocol and protocol on national parliaments rely on a lose concept of legislation with no definition supplied in the texts themselves, see also further below.

It is not possible to deduct a clear or consistent definition of legislation from the practice of the institutions. The term is sometimes used as synonymous with "law" in its most abstract and broad meaning, including the Treaties (perhaps excluding non-formalized sources of law), sometimes as synonymous with "regulatory measures", encompassing all sources of *derived* law (perhaps excluding individual decisions).[7]

Despite the inconsistencies, the following four characteristics seem to be implied in current usage, or at least generally acceptable as minimum elements of a definition of an existing concept of Community legislation:

1. Formalized, derived source of law (excluding Treaty provisions and general principles of law)
2. Binding (excluding, e.g., recommendations and opinions)
3. Of general application, i.e. normative (excluding, e.g., decisions in individual cases)[8]
4. Adopted directly on the basis of Treaty provisions (excluding acts adopted on the basis of delegation in secondary sources of law)[9]

This is probably the closest we can get to an abstract definition of Community legislation at present, and even that involves a certain degree of simplification. The problem, for some, is not so much any simplification or shades of grey involved, but rather that the attempt amounts to an imperfect and much too complex definition of legislation for political purposes. Can't we say more?

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[7] By way of illustration: In the official EU legal database, EUR-Lex, the file category "Legislation" (in French "Législation", in German "Rechtsvorschriften"), encompasses two sub-categories, "International agreements" and "Secondary legislation", the latter of which is divided into "Regulations", "Directives", "Decisions" and "Other acts".

[8] So-called decisions *sui generis*, without addressees, will generally be considered legislation. Decisions *sui generis* are used, i.a., to authorise the conclusion by the Community of international agreements. It is settled case law that an international agreement concluded by the Council under Article 300 EC, is considered "an act of the institutions", cf. Article 234(1)(b) EC, which from its entry into force forms "an integral part of the Community legal system", see, e.g., Case C-321/97, *Andersson*, [1999] ECR I-3551, para. 26. See also Eeckhout, *External Relations of the European Union*, (OUP, 2004), pp. 277-278. Even if the provisions of international agreements may have the same legal effect as regulations and directives, international agreements as such are generally not regarded as "legislation" in current usage, even less under the terminology of the Constitutional Treaty.

[9] Some non-formal use of the term today seems to include tertiary sources of law of general application, e.g. the vast body of Commission regulations, adopted on the basis of authorization in Council regulations, in fields such as agriculture, competition, state aid, and certain internal market areas subject to regulatory comitology procedures. Also the Council is the author of certain tertiary acts of general application, e.g. in the field of anti-dumping.

Not in the current legal order of the European Union. It is not possible to establish an exhaustive, consistent definition of legislation based on *who* adopts legislation, on *how* legislation is adopted, or on *what* separates the content of true legislation from other kinds of regulation. It is not even possible to define legislation simply by reference to certain types of legal instruments, such as regulations and directives.[10]

For a brief demonstration:

1. *Typological definition.* Problem: The treaty does not even implicitly categorize legal instruments based on a distinction between legislation and non-legislation. Regulations and directives are the closest we get, but they are often adopted not on the direct basis of the Treaty, but under authorization in secondary sources of law. And some decisions qualify as legislation.

2. *Authorship definition.* Problem: There is no one legislature in the European Union. There are three main kinds of formal authorship to pieces of Community legislation: Council pieces of legislation; European Parliament and Council co-pieces of legislation; Commission pieces of legislation. All the institutions, including the European Parliament, also adopt other acts than legislation, e.g. non-binding acts and instruments related to the conclusion of international agreements.

3. *Procedural definition.* Problem: There is no one legislative procedure in the European Union. Legislation may be adopted in accordance with a wide variety of procedures, depending on the legal basis, involving to various degrees the Commission, the Council, and the Parliament, and even other institutions not normally associated with legislation in a national mindset. Most of these procedures may also be applicable to the adoption of other acts than legislation.

4. *Content-based (material) definition.* Problem: Which material, objective criteria would clearly distinguish legislation from non-legislation today? A look at some ideas:

    a. *Legislation amounts to expression of original political will as opposed to implementation of pre-defined goals?* The EU legislator is not omnipotent, but constrained by the principle of conferred powers and by the aims of the Treaty. In that sense, all Community action, also legislation, can be said to be implementation.

    b. *Legislation involves basic and fundamental political choices as opposed to technical and detailed issues reserved for non-legislation?* Apart from the inexact nature of the criteria, no one would argue that the legislature is or should be barred from going into detail, as long as the result is rules of general application.[11] It is true that there are

[10] See, e.g., Craig and de Búrca, *EU Law* (OUP, 2003), pp. 139-140.

[11] No distinct current general principle of law seems to exclude the EU legislator from adopting what is in effect an individual decision in the form of an instrument of general application (legislation). The affected individual or group of individuals may, regardless of the name of the instrument, institute annulment proceedings under Article 230(4) EC. Whether an individual decision contained in a directive or regulation is valid will depend on its legal basis as well as general principles of law, including fundamental rights. See for an illustrative example, Case T-306/01,

limits, albeit imprecise and quite wide, as to how much the EU legislature can delegate to the Commission. But the "unlawful delegation doctrine" of the Court, providing that essential elements of a given subject area must be set out in the primary act, is a rule against *détournement de procedure*, not an attempt at material definition of legislation.[12]

c. *Legislation does not include internal measures, administrative or budgetary acts, acts concerning inter-institutional or international relations, even when such acts satisfy the four formal legal characteristics of Community legislation identified above?* This negative delimitation is set out in the Council's Rules of Procedure for the purposes of the application of Article 207(3) EC on greater access to documents when the Council is acting in its legislative capacity.[13] Obviously, the definition is vague and only partial, based on political choice in the specific context. It is an institution-specific rule of procedure, with the particular aim of increasing transparency, not a definition of legislation for the purpose of a clearer typology of legal instruments.

So while there is such a concept as Community legislation, and the term is used readily by all actors and observers alike, there is no generally accepted, easily understood, simple, operative or exhaustive definition of the concept. It is probably possible to agree on four formal legal characteristics, which narrow down the field, but it still leaves us with a rather heterogeneous group of instruments of which several would not be regarded as legislation according to a looser, more commonsensical and nationally inspired idea of what legislation is, be it material or formal.

Is that a problem? Not from a strictly legal point of view. In the EU legal order today, legislation is basically a term of convenience. We are not in desperate need for a definition. Other definitional questions relating to Community legal instruments seem more real, e.g., the issue of direct effect of EU legal instruments.

Yusuf and Al Barakaat International Foundation v. Council, Judgment of the Court of First Instance of 21 September 2005, nyr., paras. 181-189 and 322-328. In many national constitutional orders, where a principle of separation of powers applies and a single legislature is easily identifiable, the legislature is generally barred from passing laws which affect a single individual or group of individual in the same way as judgments or individual executive acts. Schütze, *Sharpening the Separation of Powers through a Hierarchy of Norms?*, EIPA Working Paper 2005/W/01, available at http://www.eipa.nl, is possibly of the opinion that such a principle could flow from the new distinction between legislative and non-legislative acts in the Constitutional Treaty, at p. 11, stating that the Treaty "indirectly introduces a material limitation around its otherwise procedural definition of legislation: The Community legislature will be constitutionally prevented from dressing individual decisions into the form of a "European law"."

[12] See Case 25/70, *Köster*, [1970] ECR 1161, para. 6 ("The basic elements of the matter to be dealt with [must be] adopted in accordance with the procedure laid down by [the enabling Treaty] provision"); Case 23/75, *Rey Soda*, [1975] ECR 1279, para. 10 ("the concept of implementation must be given a wide interpretation"); and Case 240/90, *Germany v. Council*, [1992] ECR I-5383, paras. 36-37 ("rules which, […] are essential to the subject-matter envisaged, must be reserved to the Council' s power", and "such classification must be reserved for provisions which are intended to give concrete shape to the fundamental guidelines of Community policy"). See also Prechal, "Adieu à la directive?", (2005) EurConst., 481-494; and Schütze, *supra* note 11, at pp. 10-11.

[13] See Council Decision 2004/338/EC, the Council's Rules of Procedure, 22 March 2004, O.J. 2004, L 106/22, Article 7(1). Further discussed below in Chapter 3.3.

Is the lack of a definition of legislation a problem from a political point of view, held up against ideals of clarity, transparency, efficiency, legitimacy and democracy? No one would argue that the complexity of the current legal order is itself desirable, but is a distinction between legislation and non-legislation a precondition to achieve more clarity, transparency and legitimacy? Not necessarily, but it might be instrumental and the distinction intuitively makes sense if the idea of a national democracy is seen as the molding form for a simpler and better European Union.

As we shall see, during the Convention on the Future of Europe, a broad consensus emerged that it would be desirable to introduce a clear distinction between legislative acts and non-legislative acts, which is only possible, of course, if the term legislation gets defined.

1.2. No new issue: A legal order in search of order

The question of a distinction between legislative and executive acts has been on the constitutional agenda of the EU for as long as the agenda has existed.[14] The milestones include: the Spinelli draft Treaty for a European Union (1984)[15], the European Parliament resolution of the nature of Community instruments (1991)[16], the IGC leading up to the Maastricht Treaty (1992)[17], the Herman draft Constitution (1994)[18], the Reflection Group and the IGC leading up to the Amsterdam treaty (1997)[19] as well as the IGC preceding the Nice Treaty (2000)[20]. Use of the term "law" ("*loi*") in stead of "regulation" ("*règlement*") was even considered, it seems, at the conception of the Rome Treaty in 1957, but found to be too controversial.[21]

As during the European Convention in 2002-2003, the case for a formal concept of legislation was also in the past made in the broader context of simplification and hierarchization of instruments, explicitly or implicitly linked to arguments of democracy and legitimacy (more powers to the European Parliament) as well as efficacy and efficiency (more powers to the Commission, by way of legislative delegation, under the supervision of the Council *and* the European Parliament).

The case for the introduction of a formal concept of "legislation" and a clearer hierarchization of instruments was opposed during the IGCs throughout the 1990s, by governments wary of a Europe built too closely in the image of the legal order of a (federal) state. And even if the governments in principle agreed that simplification and even hierarchization of instruments might be desirable, any work in that direction proved fraught with too many sensitive implications.

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[14] See, for a brief summary of the historical background, CONV 162/02, 13 June 2002, p. 14, footnote 17.
[15] See European Parliament, Draft Treaty on a European Union, O.J. 1984, C 103/1.
[16] See Resolution of the European Parliament on the nature of Community Acts, O.J. 1991, C 129/136.
[17] See Declaration No. 16 to the final act of the Maastricht Treaty.
[18] See European Parliament, Draft Constitution for the European Union, O.J. 1994, C 61/155.
[19] See the Reflections Group's Report (the Westendorp report) of 2 June 1995, available at http://europa.eu.int/en/agenda/igc-home/eu-doc/reflect/final.html, para. 126.
[20] During the Nice IGC it was proposed to revise Article 249 EC by introducing a formal concept of legislative acts. The context was extension of co-decision. See Presidency note in CONFER 4740/00, 10 May 2000, pp. 3-4 and 10.
[21] See CONV 625/03, 17 March 2003, p. 5, footnote 5.

The term "legislative" for the first time found its way into the Treaties with the Amsterdam Treaty in 1997. It came about not in the context of simplification of instruments, but mainly in the context of transparency where it was felt by many, not least the Member States normally unwilling to apply the terminology of Montesquieu and Locke to the EU, that the secrecy of the Council minutes with respect to the normative activities of the Council had become unacceptable.[22]

2. The drafting history of the Constitutional Treaty

The Laeken Declaration from December 2001 gave a rather prominent place to the issue of "legislation versus non-legislation" in a not too detailed section on simplification of the Union's instruments, the primary aim of which seemed to be a reduction of the number of instruments and more clarity as to their legal effects.[23] The section also highlighted the question of whether EU legislation was becoming too detailed, and whether it might be desirable to have more frequent recourse to framework legislation.

At one of the first plenary debates of the Convention in May 2002, the issues of competences, instruments and procedures were addressed. According to the summary of the meeting, a large majority of speakers criticized the confusion and proliferation of instruments available to the Union and insisted on the need to streamline those instruments by re-defining them, simplifying them and reducing their number. Some were in favor of a clear hierarchy of rules. During the discussion, it was also mentioned by some that a genuine separation of powers should be introduced, and in that respect, emphasis was placed on "the need to draw a greater distinction between legislation and other implementing acts".[24]

2.1. Convention Working Group on Simplification

In July 2002 a "Working Group on simplification of legislative procedures and instruments", WG IX, was established by the Praesidium, with Vice-Chairman Amato at the head of the table.[25] The mandate of WG IX, prepared in the light of the plenary debate in May, was fairly simple and apparently not very ambitious when it came to instruments: "How could the number

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[22] The notion of "legislative acts" was also used in the protocol on subsidiarity and the protocol on national parliaments, both attached to the Amsterdam Treaty, discussed further below.

[23] Under the heading "Simplification of the Union's instruments", the relevant part of the Laeken Declaration reads as follows: "Who does what is not the only important question; the nature of the Union's action and what instruments it should use are equally important. Successive amendments to the Treaty have on each occasion resulted in a proliferation of instruments, and directives have gradually evolved towards more and more detailed legislation. The key question is therefore whether the Union's various instruments should not be better defined and whether their number should not be reduced. In other words, should a distinction be introduced between legislative and executive measures? Should the number of legislative instruments be reduced: directly applicable rules, framework legislation and non-enforceable instruments (opinions, recommendations, open coordination)? Is it or is it not desirable to have more frequent recourse to framework legislation, which affords the Member States more room for manoeuvre in achieving policy objectives? For which areas of competence are open coordination and mutual recognition the most appropriate instruments? Is the principle of proportionality to remain the point of departure?"

[24] See CONV 60/02, 29 May 2002, pp. 5-9.

[25] For a more political account of the work of WG IX and the significance of the leadership of Amato, see Norman, *The Accidental Constitution*, (Eurocomment, 2005), pp. 26, 82-85, 106-107, and 168-169.

of legal instruments referred to in the Treaties be reduced? Could they be given names which indicate their effect more clearly?"[26]

The work of WG IX was kick-started by a plenary debate in September 2002 on simplification of instruments and procedures. The summary of the discussion provides important clues to the discussions and proposals that would follow.[27] Many speakers stressed, that "simplification was not an end in itself, but an instrument for democracy and effectiveness", and a very large number of speakers favored changing the names of the legal instruments to bring them more into line with the traditions of the Member States, stressing that "familiar things should be called by familiar names".

The formula for simplification, suggested at this stage, was similar to ideas tested during the IGCs of the 1990s: Binding legal instruments of general application should be called "European laws", instead of regulations, and "European framework laws", instead of directives. The term "regulation" should be reserved for implementing rules. A significant number of Convention Members found that a clearer hierarchy of norms should help to make it easier to distinguish between (second level) norms which fall within the remit of the legislative function and those (third level) norms which are the responsibility of the executive. So conceived, there would be three levels of EU norms: constitutional, laws and regulations.

Other voices were also heard in the plenary: Some members argued against extension of the principle of separation of powers to the European Union; some insisted on the duality of the executive function (between the Commission and Council, not to speak of the Member States), and some warned against the dangers of a too simple hierarchy of legal norms. These cautious "dissident" voices, echoing the objections of the past, would not leave a very visible impression on the work of WG IX. But the complexity of the legal situation did of course dawn on the group as work progressed. The idea of a simple three-tiered hierarchy was not possible to introduce without fundamentally altering the nature of the EU. The familiar things with unfamiliar names were not as familiar as some members of the Convention perhaps thought.

In an annotated mandate to WG IX, the Convention Secretariat sought to guide the discussions and raised various possibilities on approaches to simplification of instruments, focusing on the link to the issue of hierarchy of norms.[28] Most of the questions are not directly relevant to the introduction of a distinction between legislative and non-legislative instrument. As to the topic of this paper, the starting point of the annotated mandate was that a clear hierarchy should serve the aim of alleviating the technicality of second-level rules by making a clear distinction between what is "legislative" and what is "executive".

Two possible methods were outlined: One could be to define the legislative and executive *functions* in the Treaties and specify which institutions are entitled to exercise them. In this connection it was pondered whether it would "be possible in the Treaties to limit legislative acts only to general principles and fundamental rules." Another (alternative or additional) method

[26] See CONV 206/02, 19 July 2002, Annex, p. 5.
[27] See CONV 284/02, 17 September 2002, pp. 3-6. As a basis for the discussion, the Secretariat had prepared two descriptive notes on the present system of procedures and legal instrument, respectively. See CONV 162/02, p. 1.
[28] See CONV 271/02, 17 September 2002.

could be to set out a clearer distinction between legislative acts and implementing rules in the designation and naming of acts. The following questions were raised: "Is it possible to enshrine a clear and explicit hierarchy of acts in the Treaties? Should a correlation be established between decision-making procedures and the various levels of act? Should legal instruments be classified not only according to their form and effects but also the procedure by which they are adopted?"

2.2. WG IX hearing of legal experts

The work of WG IX involved a hearing specifically on instruments of three prominent inside experts of the institutions: Koen Lenaerts, then Judge of the Court of First Instance (now the Court of Justice), Jean-Claude Piris, Director-General of the Council Legal Service, and Michel Petite, Director-General of the Commission Legal Service.

The presentations by Piris and Petite were primarily concerned with other issues than the concept of legislation.[29] Lenaerts, however, focused almost exclusively on what he saw as a pressing need to introduce a clear distinction between legislation and executive acts in the Treaties. According to Lenaerts, a distinction between legislation and non-legislation should be the starting point for any work on simplification of instruments.[30] The distinction should not be based on the identity of the author of a given legal act, but on the procedure followed for its adoption. The purpose, according to Lenaerts, would not be to apply principles of separation of powers, but to "identify, in a transparent way, the procedure, which is best suited – in terms of legitimacy and efficiency – for the exercise of the legislative and executive functions of the institutions of the Union".

On this basis Lenaerts proposed a two-pronged definition of legislation very close to the suggested definition from the Nice IGC: Acts which express a basic policy choice *and* which have been adopted in compliance with the co-decision procedure, should be considered legislation. Acts adopted on the basis of other procedures, regardless of author, should be considered executive.

Lenaerts drew attention to what he saw as a core problem: the so-called "autonomous regulations", defined as acts of general application adopted by the Council or the Commission directly on the basis of the Treaty. Lenaerts admitted to the difficulties – the difficult political choices and different national perspectives on various areas of policy – involved in applying his proposed distinction between legislation and execution to the work of the Union institutions.

[29] Some words of caution on "legislation" from Piris seem noteworthy: "[I]t would be very difficult to transpose to the Union the customary clear distinction between legislative and executive authority ... It is certainly open to the Treaty's authors, should they see fit, to undertake such a project, but the powers conferred on the institutions by the Treaties are so convoluted that such a distinction between legislative and executive authority could not be made without upsetting the existing balance." See WD 6, 6 November 2002, pp. 21-24. In an article published fairly soon after the hearing, Lenaerts referred to Piris' approach as "radically different" from his own, see Lenaerts and Desomer, "Simplification of the Union's Instruments", in de Witte (ed.), *Ten Reflections on the Constitutional Treaty for Europe*, 2003, available at http://www.iue.it/RSCAS/e-texts/200304-10RefConsTreaty.pdf, p. 110, footnote 2.

[30] See WD 7, 6 November 2002. See also CONV 363/02, 22 October 2002.

Lenaerts called for a distinction to be made between those acts which involved basic policy choices (which in the future should be subject to co-decision with the European Parliament as co-legislator) and those of "a more technical nature" which did not justify a direct intervention of the legislator, lest the co-decision procedure and the European Parliament become congested. These acts of a more technical nature should, according to Lenaerts, either be adopted on the basis of a delegation from the legislator (and no longer directly on the basis of the Treaty) or directly on the basis of the Treaty if the "legislative" options have been expressed directly in the Treaty.

As examples of "autonomous regulations" which today involve basic policy choices, Lenaerts mentioned the basic anti-dumping regulation under Article 133 EC, regulations under the Common Agricultural Policy, and the directives adopted by the Commission alone under Article 86(3) EC on public undertakings and competition law.[31] As an example of autonomous regulations, which did not involve basic policy choice, Lenaerts mentioned state aid regulations.[32]

2.3. WG IX submits its final report

After the hearing of the experts the Secretariat submitted a proposal to WG IX for a three-tiered framework (legislative acts, delegated/subordinate acts, implementing acts).[33] The Secretariat proposed a definition of legislation as acts "adopted on the basis of the Treaty and which define the essential elements of a given area". The proposal stated that co-decision should be the general rule for the adoption of legislation, but suggested that exceptions might be necessary.

The Secretariat conducted an enquete among the members of WG IX based on a questionnaire including many of the questions from the annotated mandate. According to a summary of the replies, "most of the replies feel that a distinction must be introduced in the treaty between what is legislation and what is implementation, but without that distinction calling into question the allocation of competences or the current institutional balance". On the issue of definition, "most of the replies consider that the concept of legislation should be defined by content and not by adoption procedure", i.e. with reference to terms like fundamental principles, general guidelines, political choices, and essential elements. Most of the replies took the view that the co-decision procedure should be the rule for adoption of legislative acts, with specific provisions and exceptions for certain areas. Renaming of acts employing the "law" terminology was not a priority for many, but no members were against the idea.[34]

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[31] Case law of the Court confirms that there is no inherent difference in the nature of the regulatory powers of the Commission under Article 86(3) EC as compared to the more general regulatory powers of the Council on internal market and competition. The Court rejected an argument based on the principle of separation of powers according to which the Treaty did not in principle confer legislative powers on the Commission, see Cases 188-90/80, *France et al v. Commission*, [1982] ECR 2545, paras. 4-7. See also Craig and de Búrca, *supra* note 10, 1134-35; and Lenaerts and van Nuffel, *Constitutional Law of the European Union*, (Thomson, 2005), pp. 261-262.

[32] Lenaerts' revelation of the complexity of the current situation to the members of WG IX led the Chairman to produce an elaborate overview of "autonomous acts". See WD 10, 24 October 2002.

[33] See WD 11, 29 October 2002.

[34] See WD 13, 6 November 2002. Some replies argued in favour of caution regarding the extent of terminological simplification and standardization, taking care not to "affect the institutional balance reflected in each of the treaty's legal bases."

A contribution at this stage from the Commission representative in WG IX is also noteworthy. The Commission representative argued for a content-based definition of legislation ("rules of general scope determining at least the essential elements of the field in question") and a distinction in the non-legislative sphere between acts of execution in the strict sense and delegated acts, which – somewhat self-contradictory – is described as being essentially of a legislative nature.[35]

The final report of WG IX[36], submitted by the end of November 2002, was almost as foreseen in the annotated mandate from September. It came quite close to the visions of Lenaerts and received wide support, especially from MEP members of WG IX.

The report started out by quoting the wise motto of Vice-Chairman Amato during the work of the group: "Nothing is more complicated than simplification". It then went on to a more political, almost moral, message: "The democratic legitimacy of the Union is founded on its States and peoples, and consequently an act of a legislative nature must always come from the bodies which represent those States and peoples, namely the Council and the Parliament", and "Acts which have the same nature and the same legal effect must be produced by the same democratic procedure". Both statements turn on the imprecise notion of a "legislative nature". The aim of increasing European Parliament involvement, rather than just promoting simplification, is obvious. In the same vein, the connection to the idea of hierarchy of norms was made by stating that "a clearer hierarchy [...] is the consequence of a better separation of powers [...] not with the aim of paying tribute to Montesquieu, but out of concern for democracy."

The scheme for simplification of instruments suggested in the report (which provides no draft legal texts) was very close (almost identical) to what would be the final result of the Convention and the IGC, although the presentation in certain sections was somewhat unclear. The most important recommendations in relation to the subject of this study were:

- Use of law terminology, distinguishing between legislative acts (laws and framework laws) and non-legislative acts (regulations and decisions).[37]
- A three-tiered framework or hierarchy of binding, normative legal acts, involving:
  1. *Legislative acts*: Characterized by covering the "essential elements" in a given field; adopted as a general rule on the basis of co-decision (open for exceptions in areas of great political sensitivity for the Member States).
  2. *Delegated regulations*: Characterized by fleshing out detail or amending certain elements of legislation, to be adopted by the Commission, as a general rule, on the

[35] See WD 16, 7 November 2002. The paper seems primarily focused on increasing the scope for execution and implementation by the Commission. In it the Commission representative argued that principles of separation of powers imply that the legislative branches of government cannot be involved in the executive. Acts of execution in the strict sense did not justify "regular control of the Commission by the legislatures", whereas delegated regulations warranted effective control by the legislature, e.g. in the form of call-back, due to their legislative nature.
[36] See CONV 424/02, 29 November 2002.
[37] The report, somewhat self-contradictory in its terminology, but substantively in line with the thinking of the Commission, referred to delegated regulations as "a new category of legislation", see e.g. p. 8.

basis of authorization contained in a legislative act; subject to various control measures by the legislators.

3. *Implementing acts*: Regulations or decisions implementing legislative acts, delegated regulations or acts provided in the Treaty itself; adopted by the Commission on the basis of authorization in legislation; subject to comitology procedures.

- An additional category of binding acts (not placed in the suggested hierarchy): Non-legislative acts adopted on the basis of the Treaty. Form: "Decisions" or "regulations". The category of acts was exemplified in four groups: (1) Internal organization measures, e.g. rules of procedures of the institutions; (2) Appointments; (3) Cases where the institutions act as technical authorities (certain areas of competition and state aid mentioned); (4) Cases where the institutions exercise executive functions and develop in detail the policy choices already expressed in the Treaty in a particular area (no examples given).[38]
- Clarification of terminology in specific legal bases, avoiding generic terms such as "measures", stating instead specifically which instruments may be used in each legal basis.

The reception of the report in the Convention plenary in December 2002 was generally very positive. As to instruments, the great majority of speakers agreed with the report, all speakers being in favour of a radical cut in the number of the legal instruments. The Chairman, Giscard, concluded that "there was consensus on ... names which would be more in keeping with Member States' traditions." Giscard also noted that "the Convention had broadly welcomed the idea of a three-tier legislative system through including a hierarchy of legislation in the Treaty", although "some aspects of the system would need to be defined more accurately at a later stage".[39]

2.4. Drafts of legal texts are introduced by the Praesidium

The first draft of the provisions of "*Title V on Exercise of Union Competence*" was submitted to the Convention by the Praesidium by the end of February 2003.[40] It closely tracked and followed the proposals of WG IX.

The draft included the report's proposal for a new category of rules, delegated regulations, in between legislation and implementation. As the Chairman had announced in the plenary in December, the Praesidium tried to explain the need for this new level in comments to the draft. It is debatable whether the explanations and arguments, at least held up against a pure ideal of simplification, are entirely convincing, but that issue falls outside the purview of this study.[41]

[38] Examples of the last category were deleted in the final report. In the previous draft, WD 21 REV 2, 27 November 2002, the examples were: "measures adopted by the Council in relation to competition policy under Article 83 to apply the principles set out in Articles 81 and 82, or the measures adopted by the Council in relation to State aids under Article 89, to apply the principles set out in Article 87, and the exceptions considered in the third subparagraph of Article 88(2)".

[39] See CONV 449/02, 13 December 2002.

[40] See CONV 571/03, 26 February 2003.

[41] For discussions of "delegated regulations" and possible comitology implications, see, e.g., Craig, *The Constitutional Treaty and Executive Power in the Emerging Constitutional Order*, 2004, EUI Working Paper 2004/7, available at http://www.iue.it/PUB/law04-7.pdf; Curtin, *Mind the Gap: the Evolving EU executive and the Constitution*, 2004, 3rd Walter van Gerven Lecture, 2004, available at

The first draft defined a regulation only in one version, the "regulation-regulation" version, which in terms of legal effect was identical to the existing instrument called regulation (direct application), and not also a "regulation-directive" version (leaving transposition to Member States). This ignored the advice of, among others, the Council Legal Service, who made the point during the hearing in WG IX that the new "regulation" should comprise both versions, so as to best comply with the principles of proportionality and subsidiarity.[42] The defect of the definition was eventually mitigated.[43]

On the so-called "autonomous regulations", the draft postponed what Lenaerts had pointed to as a core issue in WG IX: How should the distinction between legislative acts and non-legislative acts be applied to the individual legal bases in the Treaty providing for autonomous regulations? The introduction of the draft Articles referred briefly to the criteria mentioned in the report of WG IX and stated that the question would be dealt with in Part II (eventually Part III) of the Treaty. The subject was also touched upon in the comments to draft Article 26 (eventually Article I-35) covering all non-legislative acts. The Praesidium did not go into detail.

The problem was partially addressed in the comments on the basis of two implied, somewhat circular assumptions: (1) If the EC Treaty confers competence directly on the Commission, acts adopted under such legal bases by the Commission alone must be non-legislative (why? because we have just introduced the principle that only the Council and Parliament can enact legislation).[44] And (2) If co-decision is used today, it follows that the legal acts adopted must be legislation (why? because we have just renamed co-decision the legislative procedure).[45]

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http://www.law.kuleuven.ac.be/ccle/pdf/wvg3.pdf; Schütze, *supra* note 11, pp. 10-12; Hofmann, *A Critical Analysis of the new typology of Acts in the Draft Treaty Establishing a Constitution for Europe*, 2003, EIOP 2003/9, available at http://eiop.or.at; Lenaerts and van Nuffel, *supra* note 31, 613-614; Lenaerts and Gerard, "The structure of the European Union according to the Constitution of Europe: the emperor is getting dressed", (2004) ELR, pp. 289-322; Bergström and Rotkirch, *Simply Simplification? The Proposal for a Hierarchy of Legal Acts*, 2003, SIEPS Report 8/2003, available at http://www.sieps.su.se.

[42] E.g. to avoid that the prescribed use of Commission directives under Article 86(3) EC would have to be replaced by regulations as the only available non-legislative instruments. The oversimplification was eventually corrected by providing that a European regulation could have the characteristics of both the current regulation and directive. Lenaerts and Desomer, "Towards a Hierarchy of Legal Acts in the European Union? Simplification of Legal Instruments and Procedures", (2005) ELJ, 744-765, finds that the new complex definition of regulation is a result of "overzealous simplification", and that it should rather have been divided into two instruments, regulation and framework regulation, at p. 753.

[43] One unfortunate expression, which could cause some confusion, remained in the definition of regulation in Article I-33(1): It is said that a regulation is for the "implementation" of legislative acts and of certain provisions of the Constitution, even if it is clear from the following provisions that the instrument is used both as delegated regulations ("to supplement and amend certain non-essential elements of the law or the framework law") and implementing acts ("for implementing legally binding Union acts").

[44] "Where acts are adopted by the Commission, there can be no question as to whether an act is legislative or non-legislative in nature, since it is not able to adopt legislative acts", CONV 571/03, p. 13. Thus avoiding a discussion on the issue of Article 86(3) EC directives adopted by the Commission alone.

[45] "In any case, once the list of exceptions to the legislative procedure has been decided on, the other legal bases providing for the Council to take the decision would result in non-legislative acts", CONV 571/03, p. 14.

The first draft Articles on instruments in Part I was met by 237 amendments.[46] In a note produced by the Secretariat, the amendments were analyzed and found to confirm support for the basic approach, including the distinction between legislative and non-legislative acts,[47] the creation of "delegated regulations", and the general rule that co-decision (the legislative procedure) should apply to the adoption of all legislation.[48] A closer look at the amendments illustrates the difficulty of finding a simple expression of the complex legal situation of the Union. A wide variety of ideas on how to achieve simplicity reflected the idiosyncrasies of national mindsets, political and institutional agendas as well as the simple fact of how difficult the task was.

At the ensuing plenary debate on the draft Articles in March 2003, the views expressed and conclusions drawn were closely in line with the analytical note on the amendments: Broad agreement on a hierarchy, on the distinction between legislative and non-legislative acts, and on delegated regulations.[49] According to the summary, there was some "perplexity" as to the concept of (directly applicable) "non-legislative" acts, which Vice-Chairman Amato explained were already part of EU law.[50] Doubts continued to be expressed as to whether "delegated regulations" were truly "non-legislative" or should rather be called "legislative" given the fact that their purpose was to "supplement and amend" elements of laws and framework laws.

No one seems to have raised the specific subject of autonomous regulations, and the choices involved in the application of the new distinction between the legislative and non-legislative to the specific legal bases of Part III of the Treaty. Indirectly the subject was touched upon through the concern expressed by many MEPs that laws and framework laws in exceptional cases could be adopted according to other procedures than co-decision (the legislative procedure). Amato replied that the "Praesidium's intention had always been to specify these exceptional cases during work on Part Two [eventually Part Three] of the Constitution, when the legal bases for Union policies would be examined."[51]

2.5. Important parallel work by legal experts commissioned by the Praesidium

The task of applying the new typology and specifying in each of the legal bases in Part III of the Constitutional Treaty, which types of instruments could be used, was assigned to a group of legal experts from the institutions under detailed instructions from the Praesidium. The legal experts group submitted two main reports during the spring of 2003.

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[46] By comparison, draft Articles 1-16 triggered around 700 amendments as was the case with the draft articles on Justice and Home Affairs. The draft Articles on external action were met with more than 800 amendments.
[47] Only two amendments suggested giving up the distinction. The Swedish Government representative and a group of members from Sweden, found it "unclear and confusing", and the Czech Government representative argued that "all the introduced acts [in Article I-33] are legislative acts in the Continental understanding", see the individual amendment forms available at http://european-convention.eu.int.
[48] See CONV 609/03, 12 March 2003.
[49] See CONV630/03, 21 March 2003. Some members called for the inclusion of an additional level of rules, the organic law, to be used for constitutional issues and own resources, involving enhanced majorities in the Council and Parliament.
[50] Perplexity was felt, not least it seems, among British members, see the report from a select committee of The House of Lords, contained in CONV 625/03, p. 5.
[51] See CONV 625/03, p. 4.

The first mandate of the group was adopted by the Praesidium in late January 2003, and asked the group to prepare texts for Part III, noting that "the amendments to be made are primarily the result of the findings of the Working Group on the simplification of legislative procedures and instruments, which were favourably received by the Convention".[52] The working group was explicitly asked not to make any amendments regarding issues "on which no consensus had emerged within the Convention, and which have not yet been resolved by the Praesidium", particularly the issue of extension of co-decision and QMV. The difficult issue of applying the new distinction between legislative and non-legislative acts was not covered by the mandate.

The first report of the legal experts to the Praesidium, which included an initial attempt to fit the entire EC Treaty and EU Treaty into the framework for the Constitutional Treaty proposed by the Praesidium in October 2002[53], was passed on to the Convention in March 2003.[54] In the accompanying note from the Secretariat, it was explained that the aim of the technical work was to provide "a basic document to facilitate discussion within the Praesidium and the Convention on those aspects of Part [III] which require substantive decisions." The scope of the legislative procedure, including possible exceptions to it, was highlighted as one of such issues, whereas the breakdown between legislative and non-legislative acts was apparently not regarded as a substantive issue suited for discussion in the Convention.

The group of legal experts highlighted the issue of the breakdown between legislative and non-legislative acts of the Council in its comments and suggestions: "[T]he working party of experts would like to draw the Convention's attention to the need to make a precise breakdown between the Council's legislative and non-legislative competences as provided for in draft Articles 25(2) and 26 [eventually Articles I-34 and I-35] of the Constitution. In this respect it notes that the exercise by the Council of legislative competences would lead, at this stage in the Convention's proceedings, to two procedural consequences: firstly, the Council is obliged to meet in public [...]; secondly, under the draft Protocol on Subsidiarity, the "early warning mechanism" applies to legislative proposals only."[55] The group also drew attention to other interesting complexities not entirely reflected in the final report of WG IX on simplification and the Praesidium's first draft Articles on instruments.[56]

The issue of Article 86(3) EC, conferring power on the Commission to adopt directives on e.g. liberalisation of telecommunication markets, the nature of which was debated in WG IX, was handled as a technical issue by the group of legal experts in accordance with the comments to the draft articles on instruments: Only the Council and the Parliament, not the Commission, were

[52] See CONV 529/03, 6 February 2003.
[53] See CONV 369/02, 28 October 2002.
[54] See CONV 618/03, 17 March 2003.
[55] See CONV 618/03, p. 186, pt. 32.
[56] Most importantly, that the European Parliament has decision-making powers beyond its power to organize itself, most notably with respect to the Ombudsman and the Statute of its members, where the Council gives its approval, but the Parliament is the author. Also the Court of Justice is authorized to establish its Rules of Procedure (with the approval of the Council), an instrument which goes beyond a set of internal business rules. The missing reference to the special legislative powers of the European Parliament was fixed in the revised draft Articles on instruments, see below. The form of the Court's and the Tribunal's Rules of Procedure remain *sui generis*, see Articles III-355 and III-356 of the Constitutional Treaty.

able to adopt legislative acts, it said, and it thus followed that the "directives" of Article 86(3) EC had to be classified as non-legislative instruments. The only problem was that there was no non-legislative equivalent to directives in the first draft articles, so the Group had to recommend the use of "regulations" and "decisions" in Article 86(3) EC, pointing in a footnote to the fact that providing for the adoption of regulations would represent a change to status quo.[57]

The second report of the legal experts was issued in May 2003. It was based on two complementary mandates, one of 2 April, mainly dealing with technical issues,[58] and one of 19 April, addressing the more sensitive points raised by the legal experts in their first report: the extension of the legislative procedure and the breakdown between legislative and non-legislative acts.[59]

In the second mandate of 19 April, the Praesidium set out four categories of existing legal bases[60]:

(1) Legal bases already subject to co-decision and "whose legal nature is not under discussion";
(2) Legal bases to which co-decision (the ordinary legislative procedure) *could* be extended;
(3) Legal bases for acts of a legislative nature, but not suited for the ordinary legislative procedure
(4) Legal bases for non-legislative acts (with reference to the criteria of WG IX)

The lists had been adopted by the Praesidium at a meeting on 10 April 2003, on the basis of a proposal drawn up by the Secretariat. The Praesidium decided that the lists should be sent to the legal experts before they were submitted to the Convention.[61] The lists seem to have involved difficult political discussions in the Praesidium, as it appears from the introductory note from the Secretariat to the report of the legal experts, rather unusually, that the proposals on decision-making procedures only had the support of a *majority* of the Members of the Praesidium.[62]

The main focus of discussions in the Praesidium must have been the extension of QMV in the Council and the extension of European Parliament powers. The dividing line between the legislative and the non-legislative spheres did probably not attract much attention among the members of the Praesidium, being – on the surface – a rather technical issue. In fact the breakdown between the legislative and non-legislative was far from only technical, which perhaps could have been made clearer to the Convention when the lists were submitted.[63]

2.6. The drafting by the Convention comes to a close

[57] See CONV 618/03, Vol. I, p. 36, footnote 1. The problem was eventually mitigated, see *supra* note 43.
[58] See CONV 682/03, 11 April 2003.
[59] The second complementary mandate was made available to the Convention when the second report of the group of legal experts was published. It is contained as an Annex in CONV 729/03, 12 May 2003.
[60] Excluding the legal bases under discussion in the Convention, i.a. Justice and Home Affairs, external relations and the new specific legal bases in areas where Article 308 EC is frequently used today.
[61] See "Summary of Proceedings. Meeting of the Praesidium, Brussels, 10-11 April 2003", 15 April 2003.
[62] See CONV 729/03, p. 1.
[63] In the introductory note to the second report of the legal experts, the Secretariat carefully laid out the proposals of the Praesidium with respect to procedures (QMV and the European Parliament as co-legislator), but did not highlight the choices made with respect to the distinction between legislative and non-legislative acts.

The Praesidium tabled a second draft of Articles on instruments, now draft Articles I-32 to I-37, by the end of May 2003, as part of an almost complete draft to Part I of the Treaty.[64] The modifications as compared to the first draft were limited, as would be expected from the conclusions drawn at the plenary in March.

The Praesidium noted that the proposed amendments covered "an extremely diverse range of issues or reflect isolated positions and divergent tendencies". The Praesidium proposed to follow the call by many Members (and the legal experts) to create a type of regulation that incorporated the features of the existing directive, in order to be able to draw on a non-legislative instrument which is binding on Member States as to the result, but flexible as to the means. The Praesidium decided not to follow the call by many members for a fourth level of acts, the organic law, arguing, i.a., that "adding a type of act which is new and also unfamiliar to the legal traditions of many Member States is unlikely to make for increased clarity in the Union legal system".[65]

On the link between acts and procedures, the Praesidium acknowledged a need for clarification after it had examined the classification of the legal bases and procedures and the report of the legal experts: "The designation "legislative" for the procedure which constitutes the general rule could prove misleading, since it appears to be the determining criterion and not the consequence of the "legislative" nature of the act." Against this background, the prefix "ordinary" was added to the term "legislative procedure", thus allowing for the term "special" legislative procedures, in order to avoid "excluding the legislative nature of the very limited number of acts which might be adopted by the Parliament or by the Council" and thus ensuring that the Council is regarded "as acting as legislator, i.e. subject to the rules of transparency and subsidiarity".

The debate on 30 to 31 May did not address issues of specific relevance to the distinction between legislative and non-legislative acts. The focus was on institutions and external relations. On Title V in Part I, comments were directed at the specific provisions on CFSP and defense, not on the general provisions regarding instruments, which had not been changed since the plenary on 26 May.[66] Title V of Part I would not be changed further by the Convention.

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[64] See CONV 724/1/03 REV 1, Annex 2, 26 May 2003.

[65] The same could be said for the distinction between "delegated regulations" and "implementing acts". The reasoning illustrates the force of parallels to national legal orders in the pursuit of simplification, even if it is sometimes ignored that state-model arguments are not always commensurate with the essential elements of the Community method, e.g. the near-exclusive right of initiative of the Commission in the EU legislative procedure, a feature which is probably not paralleled in many, if any, of the 25 national legal orders. Likewise, certain features of national constitutional orders, such as the right of the executive to dissolve the parliament, would probably not to be a welcome import from national systems, at least not in the eyes of the European Parliament. Lenaerts and van Nuffel, *supra* note 31, seem to be of the opinion that the European Parliament (but not the Council) should be accorded a right of initiative, even if the Parliament itself is no longer pressing for this, see pp. 577-578. See also Jacqué, "The principle of institutional balance", (2004) CMLRev., pp. 383-391, pointing out that the significance of the Commission's right of initiative is "increasingly being hollowed out" by provisions in EU legislation which oblige the Commission to submit proposals, p 390. If the EU is moving towards a parliamentary model of democracy, Jacqué further recalls that "in such systems balance is ensured by the possibility of dissolution of parliament", which even if only used very rarely "contributes to strengthening the independence of the executive.", p 391. See also Craig, *supra* note 41, questioning whether the Commission can hold on to its near monopoly of legislative initiative, if its president becomes elected, at pp. 9-10.

[66] See CONV 798/03, 17 June 2003.

A last-minute change to Title IV before the submission of Part I of the Treaty to the European Council in Thessaloniki 19-20 June 2003 is of some relevance: The general bridging clause ("*passerelle*") was included at this stage, providing both for a switch from unanimity to QMV and for a switch from a special legislative procedure to the ordinary legislative procedure, by way of a decision by the European Council.[67] The passerelle may not be used to change from a non-legislative procedure to a legislative procedure.

A revised text of Part III was published by the Praesidium on 12 June, and this text served as the basis for suggested amendments.[68] Members were reminded that amendments to Part III "must not be designed to modify existing provisions on policies, except, of course, for those areas, such as foreign policy, economic governance, freedom, security and justice, which have been examined within the Convention at working group and plenary session level."

More than 1600 amendments were submitted to this text before the deadline of 23 June and processed in record time by the Secretariat, who tabled a synthesis note four days later.[69] As would be expected, the main issue was the extent of the ordinary and the special legislative procedures respectively, some wanting to expand, some wanting to restrict the influence of the European Parliament and/or use of QMV in the Council.

Only few amendments addressed the numerous legal bases for "non-legislative" rule-making that emerged as a result of the proposed application of the new distinction between legislative acts and non-legislative acts. In fact, such amendments came almost exclusively from one member of the Convention, MEP Sylvia-Yvonne Kaufmann (PES, DE), who generally argued for substituting non-legislative legal bases with legislative legal bases in order to get the European Parliament involved more.[70] In two areas, competition and state aid, also the German government representative, Fischer, introduced amendments calling for the use of legislative instruments (and the ordinary legislative procedure), arguing that competition and state aid were areas of a legislative nature with a clear impact on the rights of citizens.[71] None of the amendments calling for a non-legislative legal basis to be changed into a legislative legal basis were followed.

Amendments introduced by the Commission at this juncture for two new non-legislative legal bases on competition and state aid were accepted by the Praesidium. The new provisions authorized the Commission to supplement, directly on the basis of the Treaty, Council

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[67] See Part I as submitted to the European Council in Thessaloniki, CONV 797/1/03, 12 June 2003, compared with the final text of the Convention, CONV 850/03.

[68] See CONV 802/03, 12 June 2003. It was not made clear what changes had been made compared to previous drafts.

[69] See CONV 821/03, 27 June 2003, as well as the later addition, CONV 821/03, COR 1, 2 July 2003. See also Norman, *supra* note 25, pp. 261-63.

[70] Kaufmann's amendments against non-legislative legal bases were, i.a., directed at Article III-133(3)(d) (free movement of workers), Article III-151(5) (customs union), Article III-163 (competition), Articles III-167(3)(e) and III-169 (state aid), and Article III-231(3) (agricultural regulations on prices, levies, aid and quantitative limitations, as well as on fixing and allocation of fishing opportunities. See CONV 821/03.

[71] See CONV 821/03, pp. 21 and 23. Individual amendment forms available at http://european-convention.eu.int.

regulations on competition and state aid.[72] The Commission argued that the two legal bases were necessary to maintain status quo in light of the "hierarchy of norms introduced by Title V of Part I".[73]

The reasoning is not altogether clear: Was it the opinion of the Commission that the Council would not be able to delegate powers to the Commission in the new non-legislative regulations on state aid and competition, because "genuine" delegation is only possible by way of a *legislative* instrument (see Article I-36 on delegated regulations: "European laws and framework laws may delegate to the Commission ...")? And if so, why could delegation by the Council in a regulation not simply be said to confer "implementing" powers on the Commission (see Article I-37 on implementing acts: "legally binding Union acts... [may] confer implementing powers on the Commission")? How that would alter status quo is not clear. The introduction of the two new legal bases is probably not very significant or likely to cause problems, but as the Council Legal Service commented during the IGC, the wording does raise some questions as to legal clarity.[74]

On agriculture, a number of amendments were introduced. Some contested the chosen formula for splitting the legal basis up into a legislative part and a non-legislative part,[75] some suggested that the area of non-legislative rule-making should be left to the Commission rather than the Council.[76] A larger number of MEPs criticized the fact that the Council would no longer be required to consult the European Parliament when adopting non-legislative agricultural acts directly on the basis of the Treaty, which could be seen as a slight set-back, even if the partial

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[72] See Article III-165(3) ("The Commission may adopt European regulations relating to the categories of agreement in respect of which the Council has adopted a European regulation pursuant to Article III-163, second paragraph, (b)."), and Article III-168(4) ("The Commission may adopt European regulations relating to the categories of State aid that the Council has, pursuant to Article III-169, determined may be exempted from the procedure provided for by paragraph 3 of this Article.")

[73] "La modification proposée vise à maintenir le statu quo en ce qui concerne l'adoption par la Commission des règlements d'exemption par catégorie. En effet, la hiérarchie des normes introduites par le Titre V de la Partie I, ne prévoit plus la construction actuelle du traité, selon laquelle la Commission peut adopter, en application directe du traité, les règlements visant à exempter (si certaines conditions sont respectées) des catégories d'entreprises de l'obligation de notifier certains types d'accords; la Commission ne peut utiliser cet instrument qu'après avoir reçu l'autorisation du Conseil d'adopter un règlement d'exemption pour le type d'accord concerné. La modification proposée maintient la possibilité pour la Commission d'adopter tels règlements tout en gardant l'autorisation préalable du Conseil", see text of amendment form available at http://european-convention.eu.int.

[74] During the IGC, the Council Legal Service noted: "The scope of the powers assigned to the Council and the Commission respectively, and whether or not Commission regulations are subordinate to Council regulations, is not clear from the wording". See CIG 4/1/03, REV 1, 6 October 2003*,* pp. 204-205 and 208-209. Discussions in the legal experts group during the IGC did not lead to any changes or clarifications of the text on this point.

[75] E.g. the French government representative, Villepin, proposed that the text of para. 3 should be revised to add, amongst matters on which the Council may adopt regulations, the mechanisms for the common organisation of agricultural market and for rural development policy, and the arrangements for granting and level of aids. The Finnish Government representative, Tiilikainen, on the other hand wanted to reduce the scope of para. 3 by the deletion of "fixing prices, levies, aid and quantitative limitations", restricting the text to fishing quotas but adding control and enforcement. See CONV 821/03, p. 55.

[76] Amendment by a group of MEPs headed by Borell. The Commission proposed, as under competition and state aid, to introduce a separate legal basis according to which "the Commission shall adopt implementing acts for the laws, framework laws, regulations and decisions provided for in paragraphs 2 and 3". Although the reasoning behind was similar to the proposal under competition and state aid, the amendment was not followed. The Commission proposed the same amendment during the IGC, also with no success, see CIG 37/03, 24 October 2003, p. 14.

change to the legislative procedure (co-decision) in agriculture represented a significant "net-victory" for the Parliament.[77]

A slightly revised text of Part III was tabled by the end of June 2003, in response to a few of the proposed amendments.[78] At the ensuing plenary of 4 July, the Chairman explained that the Praesidium had taken some of the amendments on board and would continue its work on Part III in the light of comments made during the plenary meeting. It probably goes without saying that, at this stage, not much attention was devoted to topics of direct relevance to this study.[79]

At the final plenary session of the Convention on 9 and 10 July 2003 important pieces to the puzzle fell into place, none of which, however, are of direct relevance to the distinction between legislative and non-legislative acts.[80]

2.7. The Intergovernmental Conference takes over

During the ensuing IGC, with its ambitious time schedule and self-imposed political restraints to respect, as far as possible, the draft of the Convention, the new typology of legal acts, the new distinction between legislative and non-legislative acts, and how it was applied to the various policy areas and legal bases, practically never came into play.

Some of the issues were touched upon in the work done by a group of legal experts, led by the Council Legal Service, to carry out a "legal verification" of the Treaty. The group, which comprised experts of Member States and the Commission, held numerous meetings in parallel with the political negotiations. Work was based on a strict "mutual agreement" regime, which meant that if just one Member State found a suggestion for legal clarification or improvement unacceptable, the question would either be referred to the "non-institutional track" of the IGC for political resolution or left alone.

As a basis for the work of the group, the IGC Secretariat, headed by the Council Legal Adviser Piris, drew up a first draft legal verification of the text of the Convention with editorial and legal comments to the texts as well as suggested corrections.[81]

Some of these comments touch on fairly sensitive and difficult legal issues, and some of the suggestions are based on debatable assumptions of whether the Convention had intended to

[77] Amendment by a group of MEPs headed by Brok, see CONV 821/03, p. 55. During the IGC, the Commission proposed to introduce consultation of the European Parliament with respect to non-legislative agricultural acts of the Council, see CIG 37/03, p. 14. The proposal apparently did not receive wide support and was not pressed up the political ladder. Accordingly, the Convention text was not changed on this point.
[78] CONV 836/03, 27 June 2003.
[79] See CONV 849/03, 10 July 2003.
[80] A draft legal verification of the text of Part III had been submitted the day before, which incorporated the further changes to Part III agreed upon by the Praesidium in light of the plenary session on 4 July, referred to as SN 2474/03 in CONV 847/03, 8 July 2003. The plenary debate on 9 July led to CONV 848/03, 9 July 2003, and after the final day of debate on 10 July, the final text in CONV 850/03, 18 July, emerged encompassing all four parts of the draft Treaty. See also CONV 853/03, 23 July 2003.
[81] See CIG 4/1/03, 6 October 2003.

change current law or codify and reflect the existing legal situation. To give a few examples of relevance to the topic of this paper:

- *On the Council:* Article I-23(1) on the Council refers to its "legislative and budgetary functions" and its "policy-making and coordinating functions". The Council Legal Service suggested, very logically, to add "executive functions" as the Council would continue to serve important executive functions, including as the sole author of several non-legislative acts. The addition was not accepted by the group of experts and never made it into the final text.[82]

- *On the definition of "regulation":* Article I-33(1) reads "It [a regulation] 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, but shall leave to the national authorities the choice of form and methods". The drafting was criticized by the Council Legal Service: "In the absence of any other details, this definition covers two possibilities: either a regulation that contains only "regulation"-type provisions or only "directive"-type provisions, the two types not being mixed in the same act (the "regulation" or "directive" nature of the act being identified in the act's final provisions), or a regulation that contains both types of provisions."[83] The text was left unchanged.

- *On delegated regulations and conditions for the exercise of delegation:* With respect to Article I-36(2), the Council Legal Service noted that the foreseen revocation of delegation is a general measure which in fact will result in a change of the basic act, also for the future, thus making it possible for the European Parliament or the Council on its own to change the law, not requiring a proposal from the Commission. "It will be seen that this provision provides for revocation of the delegation of powers in future, which involves an amendment of the basic act which may be adopted, without a Commission proposal, by the European Parliament alone or by the Council alone."[84] The text was not changed.

- *On specification of instruments:* The logic had been to specify in all legal bases whether it provided for the adoption of legislative instruments or non-legislative instruments. Only in one instance had the Convention used a generic term that could both include legislative and non-legislative acts, i.e. in the flexibility provision of Article I-18. The case is special for many reasons, and the use of both legislation and non-legislation is probably necessary for the provision to maintain its universal nature. Changes proposed by the Council Legal Service in the legal experts group led to two other legal bases providing for a choice between legislative and non-legislative instruments: Article III-291 (on the association of overseas countries and territories, today Article 187 EC) and III-424 (on outermost regions, today Article 299 EC). The reasons suggested by the Council Legal Service: "The present Article 187 TEC refers to the adoption of "provisions" which may thus take the form of the different types of act provided for by the Treaty. This legal basis makes it possible to derogate from provisions of the Treaty or to amend laws or framework laws. Therefore, in view of the hierarchy of norms, it is suggested that provision be made for the use of the

[82] See CIG 4/1/03, pp. 60-61.
[83] See CIG 4/1/03, pp. 82-83.
[84] See CIG 4/1/03, pp. 85 and 89.

four types of binding act listed in Article I-32 (whilst retaining the same voting rule in the Council)." Notice that a Commission proposal is not laid down for regulations and decisions in Article III-291, but required under Article III-424.[85]

3. Implications of a distinction

Against the background of the drafting history – the definition of legislation in Part I and the breakdown between legislative and non-legislative legal bases in Part III of the Constitutional Treaty – at least two questions seem relevant:

1) How consistent is the breakdown in Part III, held up against the suggested material criteria by WG IX for a distinction between legislative and non-legislative acts?

2) What are the consequences of the applied distinction with respect to general rules and procedures, which hinge on the concept of legislation, in particular rules on transparency of Council activities and on the application of the subsidiarity principle?

3.1. The blurry concept of "legislative nature"

During the drafting of the Constitutional Treaty, the idea that certain rules or powers were of an *a priori* "legislative nature", that a material, almost universal set of criteria applied, was often expressed and held as self-evident. In the end, it was not material criteria, but rather procedural and institutional criteria that helped the drafters decide how to label most, but not all, of the treaty-based powers of the institutions.

First, it was assumed that all powers of the Council currently subject to co-decision with the European Parliament were of a legislative nature, regardless of the material scope, subject-matter or type of regulatory output today. Arguments that legal bases for supporting action by the Union, e.g. action programmes in the field of culture or education, should continue to be set out in decisions *sui generis* and remain subject to co-decision, even if decisions would now be considered non-legislative, were rejected. That would not fit well within the new terminology and the nexus between the legislative procedure (co-decision) and legislative acts.

Second, it was assumed that only the Council and European Parliament had powers of a legislative nature, thus making it easy to label all existing Treaty-based regulatory powers of the Commission as "non-legislative". Accordingly, it was never really an issue whether powers of the Commission to issue directives under Article 86(3) EC perhaps should be labeled legislative and thus become subject to either the ordinary legislative procedure (co-decision) or a special legislative procedure.

The rest of the regulatory legal bases could not be labeled on the somewhat circular basis of institutional or procedural criteria, but had to be subject to some sort of material test: Where the Council today is the sole author of binding legal acts of general application, it had to be decided

[85] See CIG 4/1/03, pp. 354-355 and 486-487. See also CIG 51/03, 25 November 2003, p. 3, under the heading "Making good some omissions".

whether the powers of the Council were of a legislative nature (thus making the legal basis subject to the ordinary legislative procedure or, in exceptional cases, a special legislative procedure), or whether the powers were of an executive nature (thus making the procedure and involvement of the Parliament less relevant).

As will be remembered, the material criteria which were laid out by the WG IX on Simplification, and which ostensibly guided the drafters of Part III of the Constitutional Treaty, involved an analysis of whether the Council was empowered to make "policy choices" and adopt rules on "the essential elements" of a given field (in which case the legal basis would be labeled "legislative"), or whether the Council was only empowered to "develop in detail the policy choices already expressed in the Treaty in a particular area" (in which case the legal basis would be labeled "non-legislative").

One of the most important issues during the IGC phase of the drafting was the extension of European Parliament powers. More specifically, whether a policy area and a given legal basis should become subject to the "ordinary legislative procedure" in accordance with the new general rule or remain subject to "a special legislative procedure" with the Council as the sole author. Noticeably, the debate did not involve arguments over whether a legal basis was in fact of a legislative or non-legislative nature, even if, in reality, the breakdown was just as important to the question of extended European Parliament involvement in regulatory activities of the EU.

Even during the Convention phase, it was rarely discussed whether a legal basis was in fact of a legislative nature as suggested by the initial drafters of Part III. And it was even more rarely contested whether a legal basis labeled non-legislative was in fact of an executive nature. Hardly anyone raised the issues of whether competition and state aid powers were in fact non-legislative.

3.2. Borderline cases

The most interesting or debatable borderline cases are the legal bases on competition and state aid and the legal bases on trade and agriculture. Also illustrative of the inherent difficulty in distinguishing between legislative and non-legislative acts are the legal bases on restrictive measures against individuals and on the security of supply of certain goods.[86]

3.2.1. Competition and state aid

Rule-making by the Council on the basis of Articles 83(1), 87(2)(e) and 89 EC involves a high degree of political choice. The relevant Council regulations often affect the legal position and fundamental rights of individuals, e.g. rules on fines, powers of investigation and inspection of

[86] Other borderline cases, not further explored here, include certain non-legislative legal bases in the EMU area, e.g. Article III-186(2) on specification of euro coins, as well as the non-legislative legal basis for incorporating into EU law collective agreements between management and labour at Union level, see Article III-212(2). Conversely, questions could in principle be raised whether some of the legal bases classified as legislative are truly legislative held up against the criteria of WG IX, perhaps most evidently with respect to Article I-37(3) on Member State control of Commission implementing powers which provides for a "comitology law" in stead of a "comitology decision" as today.

private premises, and repayment of illegal state aid. There is no doubt, for instance, that the recent modernization of the EC anti-trust enforcement rules by Regulation 1/2003, which replaces Regulation 17/62, would be regarded as "legislation" in current usage.[87] The same goes for the EC Merger Regulation[88] as well as the procedural and enabling Council regulations on state aid.[89]

Such regulations seem to go beyond the development in detail of "*policy choices already expressed in the Treaty*" as suggested in the report of WG IX. It is true that the Treaty establishes a set of fairly clear and to some extent directly applicable material rules on competition and state aid, but as to enforcement and procedure only few political choices are made in the Treaty, apart from designating the Commission as the institution in charge of execution.[90]

The fact that the classification fell out as it did during the Convention and was never really contested could have many explanations. Council and Commission interests, well-represented in the Praesidium, probably agreed that procedures on the crucial and sensitive core competences of the Union on competition and state aid should remain intact, avoiding (more) politicization and perhaps less agility through greater involvement of the European Parliament. But why, then, was the area not simply categorized as a legislative basis with a *special* legislative procedure?

During the first plenary debate on the report from WG IX, the Chairman promised that there would only be a limited number of exceptions to the general rule that legislative acts would be adopted under the ordinary legislative procedure (co-decision). Against that background there could well have been a preference with the drafters of the initial texts of Part III to characterize a legal basis as non-legislative rather than having to add it to the list of exceptional legal bases subject to special legislative procedures, notwithstanding the implications this might have for transparency in Council procedures and the "early warning mechanism" under the subsidiarity protocol.

In perspective, it may be noted that when the issue of legislation had last been discussed in the context of Treaty revision, during the Nice IGC in 2000, it was proposed that competition and state aid regulatory powers be considered legislative.[91]

3.2.2. Agriculture

[87] Even by the regulation itself, as evidenced by the first consideration in the preamble: "In the light of experience, however, that Regulation [i.e. Reg. 17/62] should now be replaced by legislation designed to meet the challenges of an integrated market and a future enlargement of the Community." See Regulation 1/2003/EC on implementation of the rules of competition laid down in Articles 81 and 82 EC, O.J. 2003, L 1/1.

[88] Regulation 139/2004/EC on the control of concentrations between undertakings (Merger Regulation), O.J. 2004, L 24/1.

[89] Regulation 994/1998/EC on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid, O.J. 1998, L 142/1, and Regulation 659/1999/EC laying down detailed rules for the application of Article 93 EC, O.J. 1999, L 83/1.

[90] In writings after the Convention, Lenaerts seems to have reached the conclusion that Articles 83 and 87 EC should have been categorized as legislative legal bases. See, most clearly expressed, Lenaerts and Desomer, *supra* note 42, at p. 754.

[91] See the Presidency note, CONFER 4740/00, on the extension of co-decision to include "provisions subject to qualified majority [in the Council] providing for the adoption of acts of a legislative nature". The list of such "legislative provisions" deemed suitable for co-decision, included the main legal bases on competition and state aid.

On agriculture, an outside observer might have expected that the powers of the Council would also have been classified as non-legislative, following the reasoning applied to competition and state aid, according to which the Fathers of the Treaty had already expressed the basic policy choices.

Instead, the main agricultural legal basis, Article III-231(2) and (3), of the Constitutional Treaty, splits the current legal basis, Article 37 EC, into a legislative part and a non-legislative part. Rules on the "common organization of the market" for agricultural products as well as other "provisions necessary for the pursuit of the objectives of the common agricultural policy and the common fisheries policy" are classified as legislative, whereas, probably as a *lex specialis*, rules on "fixing prices, levies, aid and quantitative limitations and on the fixing and allocation of fishing opportunities", are classified as non-legislative. How this division will work in practice falls outside the remits of this paper. Based just on the wording, the dividing line does not seem crystal clear.[92]

There is undoubtedly a legitimate political explanation why the Convention proposed, and the IGC decided, (1) that the European Parliament should not be involved in Council rule-making on agricultural prices, aid levels, quotas, fishery catch allowances etc., not even by consultation any longer, and (2) that this more detailed and technical part of the market regulation should not be left to the Commission (or exceptionally the Council) on a case-by-case basis in accordance with the new system of delegation and implementation under the Constitutional Treaty.

A plausible explanation could to be that proponents of more European Parliament influence were satisfied with the Parliament finally becoming co-legislator on the general agricultural rules, whereas Member States wanted to hold on to Council regulatory control of sensitive details such as prices and quotas. Again, the reason a special legislative procedure was not prescribed for the legal basis covering the sensitive detailed areas of agricultural regulation, instead of classifying it as a non-legislative legal basis, might also have been political as could have been the case with competition and state aid, see above.

In any case, it is clear that the breakdown between the legislative and the non-legislative parts of agricultural policy, as proposed by the Praesidium in May 2003 and eventually endorsed by the IGC in the final Treaty text, did not follow mechanically from the conceptual distinction between legislative and non-legislative acts and the material criteria laid out by WG IX on Simplification.

3.2.3. Trade

[92] According to a working document from the Convention Secretariat, submitted as a contribution to the work of WG IX, the Article 37 EC procedure is applied to approximately 60 out of 3000 agricultural acts published on average in the Official Journal each year. The note also recalls that, during the Nice IGC, the Commission proposed to submit to the co-decision procedure some of the Article 37 acts, "those which make fundamental choices", which covered, it seems, a wider range of areas than what the Constitutional Treaty decided should be subject to co-decision, see WD 10, p. 3.

On trade policy instruments (excluding the treaty-making parts of the EU common commercial policy), one might have expected to find a similar division between a legislative and a non-legislative part of the legal basis as the one introduced in the agricultural legal basis.

Clearly, some of the so-called autonomous trade instruments, adopted by the Council directly on the basis of Article 133(2) EC, are quite technical[93] or simply implement binding international agreements already entered into[94], whereas others involve sensitive political choices and affect the legal situation of individuals more directly, including such instruments as anti-dumping regulations, the generalized system of preferences (GSP), general import regulations and export policy measures.[95] The bifurcated model from the agricultural legal basis was not the one used in the end, however.

The Convention's draft Treaty suggested classifying autonomous trade instruments adopted by the Council today on the basis of Article 133 EC as legislation, making them all subject to the ordinary legislative procedure (co-decision). Draft Article III-315(2) had the following wording: "European laws or framework laws shall establish the measures required to implement the common commercial policy."[96] In the final Treaty this changed to: "European laws shall establish the measures defining the framework for implementing the common commercial policy." What had happened?

During the IGC, the draft legal verification, presented by the Council Legal Service, suggested that Article III-315(2) should state that European laws on trade should only provide a framework, on the basis of which powers to adopt more detailed rules should be delegated, based either on Article I-36 (delegated regulations) or on Article I-37 (implementing acts).[97] The proposal of the Legal Service was not accepted in the working group of legal experts, probably because some Member States still questioned whether the European Parliament should at all be made co-legislator in trade policy.[98]

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[93] Regulation 1555/2005/EC abolishing tariff quota for imports of soluble coffee covered by CN code 21011111, O.J. 2005, L 249/1.

[94] Regulation 7/2005/EC adopting autonomous and transitional measures to open a Community tariff quota for certain agricultural products originating in Switzerland, O.J. 2004, L 4/1.

[95] The Common Customs Tariff (CCT) is also an important autonomous trade measure, adopted not under Article 133, but under the separate provision on the Customs Union, Article 26 EC. In the Constitutional Treaty, this legal basis is classified as non-legislative in its entirety, see Article III-151(5). The Common Customs Code (CCC) on the application of the CCT, including valuation of products and rules of origin, is contained in a regulation adopted by the Council and Parliament under co-decision on a multiple legal basis comprising Articles 26 (customs union), 95 (internal market), 133 (trade) and 135 EC (customs cooperation), see Common Customs Code, Regulation 2913/92/EC, O.J. 1992, L302/11, as amended by Regulation 648/2005, O.J. 2005, L 117/13. Under the Constitutional Treaty, it must be assumed that the CCC will be contained in a legislative instrument, even if one of the legal bases only provide for the adoption of non-legislative instruments, see below on combined legal bases.

[96] See CONV 850/03, draft Article III-217(2).

[97] See CIG 4/1/03, p. 381. The source of inspiration was the new legal basis on humanitarian aid, Article III-321(3), containing almost identical wording: "European laws or framework laws shall establish the measures defining the framework within which the Union's humanitarian aid operations shall be implemented."

[98] See CIG 37/03, p. 12. One legal adjustment in Article III-315(2) was accepted already in the legal experts group. The Council Legal Service pointed out "that reference to framework laws as instruments in the common commercial policy, an area of exclusive Union competence requiring rigorously uniform rules (only regulations are currently adopted), hardly seems appropriate." Against this background, the reference to framework laws was deleted. CIG 4/1/03, p. 381.

Accordingly, the wording of Article III-315(2) was left unchanged in the first legally edited and revised draft treaty, which served as the basis for the political amendments during the IGC.[99] The question wound up in the package of non-institutional issues under the subheading "miscellaneous", comprising approximately ten suggestions for change "which were discussed but not solved in the Group of legal experts and were supported by a large majority of delegations". With respect to trade, the Italian Presidency proposed to follow the suggestion by the Council Legal Service in order "to clarify that urgent unilateral trade protection measures be adopted under a lighter procedure than the legislative one".[100] This was generally accepted and the issue did not resurface in the spring of 2004.[101] The final wording seems to leave open for the legislator to decide which institution will be the author of non-legislative measures under the framework defined by legislation.[102]

3.2.4. Restrictive measures

On restrictive measures against individuals, such as the freezing of funds to combat terrorism, questions may also be raised as to the consistency of the distinction between the legislative and non-legislative spheres. Two new legal bases are at issue: Article III-160, providing for, i.a., the freezing of funds of individuals, groups or non-state entities to combat terrorism (e.g. IRA), and Article III-322(2), providing for CFSP-related restrictive measures against individuals, groups and non-state entities (e.g. Al-Queda).[103]

Forming almost a hybrid between the agricultural legal basis and the trade policy legal basis, Article III-160 is divided in two parts: A legislative part, according to which European laws, adopted in accordance with the ordinary legislative procedure, shall set out the "framework for administrative measures", and a non-legislative part, according to which European regulations or decisions, adopted by the Council, shall "implement the European laws referred to in the first paragraph".

Apart from the questions, which may be raised as to the actual operation of such a bifurcated legal basis as well as the rationale for not simply following the new general scheme of delegation and implementation foreseen in Part I of the Constitutional Treaty, one may ask why, by comparison, the closely related legal basis on CFSP-related restrictive measures against

[99] See CIG 50/03, 25 November 2003, p. 186.
[100] See CIG 52/1/03 REV 1, 25 November 2003, p. 12, and see CIG 60/03 ADD 1, 9 December 2003, p. 68.
[101] See by implication CIG 73/04, 29 April 2004, pp. 70-71 and 126. Other trade policy issues were discussed at the political level almost until the end; final agreement was reached with the trade section in CIG 80/04, 12 June 2004, p. 18. See also CIG 81/04, 16 June 2004, p. 47.
[102] The Council Legal Service had pointed to the possibility that the Article could explicitly designate the Council as the non-legislative regulatory authority (which would have excluded recourse to "delegated regulations" under Article I-36 as such acts may only be adopted by the Commission): "If the IGC considers that it should be stipulated that such [autonomous trade] measures should be taken by the Council, a sentence could be inserted stating that "the Council, on a proposal from the Commission, shall adopt the regulations or decisions relating [in particular] to measures to protect trade". See CIG 4/1/03, p. 381.
[103] The measures foreseen by Article III-322(2) are today adopted with the help of the flexibility provision of Article 308 EC, see e.g. Regulation 2580/2001/EC on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, O.J. 2001, L 344/70.

individuals is not even partly classified as a legislative legal basis. Article III-322 only refers to non-legislative instruments.[104] The impact on the legal situation of Union citizens may be the exact same, as is evidenced by the insertion in both provisions of an identical proviso requiring that the acts adopted "shall include necessary provisions on legal safeguards".[105]

The classification of all acts adopted under the CFSP-related legal basis, Article III-322(2), as non-legislative may possibly be explained with the fact that such acts constitute implementation of a CFSP decision. A CFSP decision is, however, not itself a legislative act, so there is still no legislation involved. Also this example goes to prove, that is not a simple matter of conceptual logic what is of a "legislative nature" and what is not.

3.2.5. Security of supply

Finally, the legal basis on security of supply of certain products, Article III-180(1), may be mentioned to illustrate a borderline case which quietly changed classification from legislative to non-legislative legal basis during the drafting work of the Convention.

Today, the legal basis on security of supply, Article 100(1) EC, is used to adopt Council directives on energy supplies of a normative nature, with possible indirect effects on the legal situation of individuals, e.g. supply security obligations on companies.[106]

In the first draft of the Economic section of Part III from May 2003, the legal basis was designated a legislative legal basis providing for the adoption of "European laws of the Council", i.e. not subject to the ordinary legislative procedure (co-decision).[107] In the next complete draft of Part III, the instrument had changed to a non-legislative act.[108] Not a "European regulation", as would be expected considering the use of directives today under Article 100(1) EC, but only providing for the adoption of a "European decision". No reasons are seen to have been supplied for the change of classification.

As with competition and state aid, the explanation might simply have been a wish by the drafters to reduce the number of provisions subject to a special, rather than the ordinary, legislative procedure.

3.3. Transparency

In the Convention legal experts' blueprint for Part III of the Constitutional Treaty, commissioned by the Praesidium in spring 2003, it was made clear that the classification of a legal basis in Part

[104] During the legal track of the IGC, the Council Legal Service suggested merging the two legal bases, see CIG 4/1/03, pp. 393 and 199.
[105] The proviso was inserted as a result of discussions during the IGC in the spring of 2004 and was accompanied by a declaration to the Final Act, see CIG 73/04, pp. 122-123. A similar proviso had been suggested by the Council Legal Service already in the fall of 2003, see CIG 4/1/03, p. 393.
[106] See, e.g., the recent Directive 2004/67/EC of 26 April 2004 concerning measures to safeguard security of natural gas supply, O.J. 2004, 127/92.
[107] See CONV 727/03, 27 May 2003, Annex II, p. 11.
[108] See CONV 802/03, p. 49. The provision was not included in the interceding, partial package of Part III texts, CONV 805/03, 11 June 2005.

III as non-legislative meant that the new rules on open Council meetings and the "early warning mechanism" on subsidiarity would not apply to action under that legal basis.

The existing provisions on open Council meetings, as found in the Council's Rules of Procedure from 2004, also operate on a distinction between legislative acts/proposals and other acts/proposals, providing for greater openness with respect to legislative action.[109] Compared to the Constitutional Treaty, three differences as compared to the existing legal situation should be noted.

First, the current rules on open Council meetings are laid down in secondary law, the Council's Rules of Procedure, which may be changed by simple majority of the Council on its own motion. The Constitutional Treaty introduces for the first time a Treaty-based requirement for open Council meetings. The current Treaties only provide for "legislative openness" of the Council with respect to documents, notably by requiring the Council to make public the results of votes and explanations of vote as well as statements in the minutes, when it acts in its legislative capacity, the definition of which is left to the Council itself, see Article 207(3) EC.

Second, the current rules of procedure leave a fairly wide margin to the Council itself to decide which discussions on legislative matters should be open to the public. Until recently a fairly short list of "the most important legislative proposals" has been adopted by the Council at the beginning of each Presidency, listing those proposals subject to co-decision which to some extent will be debated at open meetings the following six months.[110] By comparison, the Constitutional Treaty leaves no such margin to the Council and stipulates – without exceptions – that "the Council shall meet in public when it deliberates and votes on a draft legislative act", see Articles I-24(6) and I-50(2).

Third, the current rules of procedure operate with a wider concept of legislative activities compared to the Constitutional Treaty. As mentioned in the introduction, the concept of legislative acts is defined in Article 7 of the Council's Rules of Procedure as "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 internal measures, administrative or budgetary acts, acts concerning inter-institutional or international relations". It is clear that this definition encompasses action under some of the legal bases, such as competition and state aid, which are classified as non-legislative in the Constitutional Treaty.

In response to concerns raised by institutions and media, the Council has recently decided to open up further its meetings to the public, going some way, but not yet all the way, in the

[109] Article 8 of the Rules of Procedure governs the extent to which Council meetings should be open to the public. The provision distinguishes between legislative proposals to be adopted under co-decision (para. 1) and other legislative proposals to be adopted by the Council as the sole legislator (para. 3). Legislative proposals under co-decision are subject to a higher degree of openness and fairly detailed rules, which prescribe that the presentation by the Commission and the ensuing debate in the Council of the "most important legislative proposals" must be public (para. 1(a)), and that votes as well as the final Council deliberations leading to the vote on "legislative acts" (by implication *all* legislative proposals under co-decision, not just the most important ones) shall be open to the public (para. 1(b)).

[110] See e.g. Council note 10101/1/05 REV 1, 13 July 2005, and Council note point 10100/05, 12 July 2005.

direction of the Constitutional Treaty.[111] According to conclusions adopted by the Council in December 2005, oral presentations by the Commission and the ensuing debate as well as final deliberations on "all legislative proposals under the co-decision procedure" will from now on be open to the public. Final deliberations, it is clarified, will include "all debates that take place once the other institutions or bodies have submitted their opinions". The conclusions further state that the Council will hold more open debates on "important legislative proposals" not covered by co-decision.[112] The conclusions do not formally change the Rules of Procedure but amount to a more transparency-friendly interpretation of especially Article 8(1) of the Rules of Procedure.

When comparing the situation today with the provisions of the Constitutional Treaty, it should be kept in mind that today it is only legislative proposals *under co-decision*, which are subject to greater openness of meetings than other legislative proposals. That narrows down the difference between the Constitutional Treaty and the current regime, considering that all legal bases subject to co-decision today will be considered legislative legal bases under the Constitutional Treaty.

When it comes to openness with respect to *documents* containing legislative votes, explanations of vote as well as statements to the minutes, the different definition of legislation could be of some significance. Today no distinction is made between legislative proposals subject to co-decision and other legislative proposals in this respect. Article 207(3) EC and the Rules of Procedure require that all such legislative documents be made public by the Council. The current Treaty requirement with respect to votes, explanations of vote and statements to minutes finds no exact match in the Constitutional Treaty.[113] But given the *a fortiori* requirement of the Constitutional Treaty that all legislative meetings be opened, it seems unlikely to make any difference, except possibly for proposals which under the current Rules of Procedure are considered legislative, but will be considered non-legislative under the Constitutional Treaty, e.g. competition rules.

For the reasons sketched out above, the Constitutional Treaty represents a significant step forward in opening up legislative meetings of the Council compared to the situation today: The requirement of open legislative meetings acquire Treaty status and it becomes an absolute rule with no exceptions, applicable throughout all stages of the legislative process. Still, in assessing the significance of this step forward, it must be kept in mind that the meaning of "legislative" activities is somewhat narrowed at the same time. Most likely, this will in practice not result in a step back to more secrecy in the areas of the Council's regulatory activities no longer considered legislative under the Constitutional Treaty. Nothing precludes the Council from continuing its

[111] The European Ombudsman published a special report in October 2005, recommending that the Council amend its Rules of Procedures and "*review its refusal to decide to meet publicly whenever it is acting in its legislative capacity*". The Ombudsman found, somewhat surprisingly given the wording of the EC Treaty, that this refusal by the Council was a case of maladministration. The inquiry was based on complaints from a group of MEPs. See Special Report from the European Ombudsman in complaint 2395/2003/GG, 4 October 2005, available at http://www.euro-ombudsman.eu.int.

[112] See Doc. 15834/05, 15 December 2005, which was adopted by the Council on 21 December 2005. Also it is announced that public debates and votes will broadcast in all languages through video-streaming on the internet from the summer of 2006.

[113] Article III-399(2), providing that the European Parliament and the Council shall ensure "publication of the documents relating to the legislative procedures under the terms laid down by the European law referred to in Article I-50(3)", comes close and should probably be construed in the same manner as Article 207(3) EC.

practice of also regarding its "autonomous regulatory activities" as legislative for the purposes of transparency. But it will not be formally required to do so by the Constitutional Treaty.

3.4. Subsidiarity and the "early warning mechanism"

The Constitutional Treaty's twin protocols on subsidiarity and national parliaments,[114] drafted by the Convention on the basis of extensive discussions and only slightly modified by the IGC, both operate on the basis of a distinction between legislative and non-legislative action by the Union. The operative provisions of the protocol on subsidiarity are only relevant to legislative action of the Union, and the same is practically true with respect to the protocol on national parliaments.

The protocols build on the existing protocols introduced with the Amsterdam Treaty[115], with significant add-ons and innovations. Most importantly, the protocol on subsidiarity provides for a new "early-warning system" involving national parliaments in monitoring how the principle of subsidiarity is applied. The national parliaments will be informed of all new legislative initiatives, and if at least one third of them consider that a proposal infringes the principle of subsidiarity, the Commission will have to reconsider its proposal and either decide to withdraw, maintain or amend its proposal, and must give reasons for its decision.

The provisions on subsidiarity and proportionality in the Constitutional Treaty itself, Article I-11(3) and (4), are essentially carried over from the EC Treaty with no substantial changes. The principles still apply to Union "action" as such, not just "legislative" action. It is only the protocol which is limited to legislative action. A novel feature in the new version of Article 5 EC is an explicit reference, in both paragraphs 2 and 3, to the protocol on subsidiarity and proportionality, as well as a specific mentioning of national parliaments and the "early warning mechanism" with respect to subsidiarity. Today there is no textual link in Article 5 EC to the existing protocol on subsidiarity.

The current protocols on subsidiarity and national parliaments, introduced by the Amsterdam Treaty, refer to "legislation" as well as "legislative acts", "activities" and "proposals" in certain provisions. But not as extensively as the new protocols and based on a different, looser and wider concept of legislation.

The operative provisions of the current protocol on subsidiarity mainly refer to "action by the Community" as the overarching, broadest possible term, in line with Article 5(2) and (3) EC. The terms "legislation" and "legislate" are used a couple of times without any reference to a definition. It seems safe to assume that the Commission (and the Court) will interpret these few specific references to legislation in the current protocols in a broad sense of the word, including at least all the acts covered by the definition of legislation in the Council's Rules of Procedure. In the current protocols on national parliaments the concept of legislation is used explicitly with reference to the definition in the Council's Rules of Procedure.

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[114] Full titles: "Protocols on the application of the principles of subsidiarity and proportionality" (hereafter: protocol on subsidiarity) and "Protocol on the role of national parliaments in the European Union" (hereafter: protocol on national parliaments).

[115] Bearing the same titles as the new protocols, "Protocol on the application of the principles of subsidiarity and proportionality" and "Protocol on the role of national parliaments in the European Union".

It is clear from the above, at least formally, that the revised protocols on subsidiarity and national parliament will have a narrower field of application than the current protocols. Does that mean a step back in the enforcement of subsidiarity and the involvement of national parliaments? Probably not. Two general comments seem in place:

First, the provision on subsidiarity of the Constitutional Treaty has the same field of application as today, i.e. covering all "Union action". So even if the provisions of the new protocol may not apply strictly to situations that the existing protocol is applied to today, the institutions remain under a Treaty obligation to ensure observance of the principle, also in their non-legislative activities. They just have less formal guidance in some of these situations than they used to have. In practice, the institutions will most likely stick to the same procedures followed today.

Second, even if the "early warning mechanism" will not be directly applicable to all activities currently regarded as legislation under the existing loser definition, the mechanism still represents a significant innovation and will apply to the most widely used legal bases, including internal market, environment, transport etc. So in all cases, the "early warning mechanism" is still a considerable net-gain for national parliaments.

Having said this, it might still have been desirable or at least logical if the protocol on subsidiarity also applied to other regulatory activities than formal legislation as defined in the Constitutional Treaty. Questions may be raised whether the protocol fully serves its purpose by linking its field of application to the new, narrower definition of legislation.[116] Primary rule-making by the Union in areas of shared competence will in most situations, actually or potentially, affect the legislative room for manoeuvre of national parliaments, regardless of whether such EU rule-making is considered legislative or non-legislative under the Constitutional Treaty.[117] One of the main purposes of the protocol and the new "early warning mechanism" is to protect the legislative domain of the national parliaments and to ensure that the national level is able to act, including by national legislation, where national authorities are better placed than the EU level.

Specifically with respect to competition and state aid, where rule-making by the Council will be considered non-legislative as opposed to the situation today, an argument can be made, that under the Constitutional Treaty the area of competition law at the European level is considered an exclusive competence of the Union, and as such no longer subject to the principle of subsidiarity.[118] Today the institutions apply the subsidiarity principle to major competition regulations adopted by the Council.[119]

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[116] See, e.g., Dougan, "The Convention's Draft Constitutional Treaty: bringing Europe closer to its lawyers?", (2003) ELR, 763-793, at p. 784.

[117] See definition of shared competence, and the implied concept of pre-emption, in Article I-12(2).

[118] See Article I-13(1) (b), according to which "the establishing of the competition rules necessary for the functioning of the internal market" belongs to the sphere of exclusive Union competence. It is debatable whether this is the legal situation today. During the IGC, the Council Legal Service expressed the opinion, that "the Convention made the political choice to establish a new exclusive competence, as competition is not at the present stage an exclusive competence", see CIG 4/1/03, pp. 46-47. See also Dougan, *supra* note 116, ("surely incorrect" that competition today is exclusive competence, at p. 770); and Craig, "Competence: Clarity, Conferral, Containment and Consideration", (2004) ELR, 323-344 ("some ambiguities" about the relationship to the internal

One may raise the question whether the link between the new concept of legislation and the subsidiarity protocol was sufficiently analyzed and discussed in the parallel work of the two working groups on simplification and subsidiarity, WG IX and WG I, respectively.

The implications of the link may not have been clear to the members of the Working Group on the Principle of Subsidiarity, WG I, when they submitted their final report in September 2002, two months before the final report of WG IX on Simplification.[120] WG I seems to have been clear that the protocol and the "early warning mechanism" should only apply to legislative proposal. But it seems that little, if any, attention was paid to the problem of definition of legislation. The conclusions of WG I seem to assume that it will be relatively clear which acts are of a "legislative nature" and which are not.[121] The issue of the definition of legislation, as compared to the present situation, was not raised in the technical comments to the draft protocols, submitted by the Praesidium in the spring 2003.[122]

The Praesidium's proposal, based on the report from WG I and the report on discussions in the plenary, was not met with many amendments.[123] No one seems to have raised the issue of what implications it might have that the protocol and early-warning mechanism would be limited to a new, narrower definition of legislative proposals. At this time the proposal for a definition of a legislative act was known, although the breakdown of the legal bases had still not been decided on.

In sum, while it is probably correct to assume that the implications of the link in the subsidiarity protocol to the new concept of legislation, e.g. with respect to competition and other non-legislative regulatory powers of the Council, was not considered in depth by most Members of the Convention, the somewhat limited scope of application of the protocol does not in itself limit the scope of application of the principle of subsidiarity.

3.5. Other issues

On close study of the Constitutional Treaty, questions may be raised whether the distinction between legislative and non-legislative acts is also relevant to other horizontal issues than transparency of Council debates and the subsidiarity protocol.

3.5.1. Judicial review of legal acts

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market, but "clear that the basic competition rules presently dealt with in Arts 81 and 82 EC fall within the domain of exclusive competence", attaching importance to the distinction between "establishment" of competition rules and their "application", at pp. 327-328).

[119] See, e.g., the preamble of Regulation 1/2003/EC, consideration no. 34.

[120] See CONV 286/02, 22 September 2002. The report delivered a detailed blue-print for the subsidiarity protocol that was essentially adopted without major changes by the Convention and eventually the IGC.

[121] See CONV 286/02, p. 10. See also CONV 331/02, 11 October 2002, and CONV 798/03, p. 3.

[122] See CONV 579/03, 27 February 2003.

[123] See CONV 610/03, 12 March 2003, pp. 2-3. See also conclusions of the ensuing plenary debate, CONV 630/03, pp. 11-12.

In one place, Article III-365(4) on judicial review of EU legal acts, i.e. the revised version of Article 230(4) EC, the Treaty does not refer to legislative or non-legislative acts, or to any of the formal names of legal acts, but to a concept of a "regulatory act". Is this fowl or fish? Or neither? A clarification was sought during the legal track of the IGC, but the wording from the Convention draft remained unchanged.

The full text of the paragraph reads: "Any natural or legal person may, under the conditions laid down in paragraphs 1 and 2, 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."[124]

The background is the work done by the Convention with a view to improving access to the European Court of Justice by individuals wishing to challenge the legality of acts of general application. A discussion circle was formed in the first part of 2003 to come up with ideas related to the Court of Justice, including the much debated issue of access by individuals to the Court.

The work involved hearings of the President of the Court of Justice, Gil Carlos Rodríguez Iglesias, and the President of the Court of First Instance, Bo Vesterdorf. Both Presidents referred to the new distinction between legislative and non-legislative acts, as proposed by WG IX in the fall of 2002, and made the point that the Treaty should probably continue to have a restrictive approach to actions by individuals against legislative measures whereas it seemed appropriate to be more flexible with respect to non-legislative acts. The presidents did not use the expression "non-legislative" acts, but instead referred to "regulatory measures".[125] It is not clear whether this difference of terminology from the work of WG IX and the draft texts from the Praesidium was intended to imply any difference in legal meaning, but it seems unlikely.

The discussion circle proposed a moderate revision of Article 230(4) EC as wished by a majority of its members to ensure fuller access to the Court of Justice. The report suggested the following wording: "Any natural or legal person may, under the same conditions, institute proceedings against an act addressed to that person or which is of direct and individual concern to him, and against [an act of general application][a regulatory act] which is of direct concern to him without entailing implementing measures".[126]

The square brackets in the text were left to the Convention to decide on, and were accompanied by the following explanation on the intention of the authors: "A majority … would prefer the option mentioning "an act of general application". However, some members felt that it would be more appropriate to choose the words "a regulatory act", enabling a distinction to be established

[124] The current wording of Article 230(4) reads: "Any 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."
[125] In the words of President Iglesias: "The distinction between legislative measures and regulatory measures is in fact contemplated in the Final Report of [WG IX]. If such a hierarchy of secondary legislation were to become a reality, it would seem appropriate to continue to take a restrictive approach to actions by individuals against legislative measures and to provide for a more open approach with regard to actions against regulatory measures." See CONV 572/03, 10 March 2003, p. 4. President Vesterdorf conveyed the same message using similar terminology, see CONV 575/03, 10 March 2003, p. 5.
[126] See CONV 636/03, 25 March 2005, pp.7-8, para. 20. See also Circle I, WD 8, 11 March 2003, pp. 5-7.

between legislative acts and regulatory acts, adopting - as the President of the Court had suggested - a restrictive approach to proceedings by private individuals against legislative acts (where the condition "of direct and individual concern" still applies) and a more open approach as regards proceedings against regulatory acts."[127]

In the first draft provisions of Part III on the Court of Justice, which were submitted in the middle of May 2003, the Praesidium went for the version suggested by the Court representatives, i.e. "regulatory act", rather than the broader expression "act of general application.[128] The draft was met with a number of amendments advocating a further-reaching revision of Article 230(4) EC, with many, including the German government representative, suggesting to replace "regulatory act" with "act of general application" or similarly broad language. The French government representative suggested replacing "regulatory act" with the more specific "regulation", in the new "non-legislative" sense of the word.[129] The choice of the words "a regulatory act" was maintained in the final version of the Convention draft.

During the IGC, the Council Legal Service pointed out that the reference to "regulatory acts" was not in line with the new terminology on instruments. The Legal Service assumed that the intention of the authors was to refer to binding non-legislative acts of general application. Accordingly, the Council Legal Service suggested replacing "a regulatory act" with "a regulation or decision having no addressees".[130] This was not accepted, however, in the working group of legal experts, presumably because one or perhaps more Member States found that the suggestion went beyond a purely legal clarification. The Council Legal Service did not pursue the matter further, and the issue was never raised at the political level of the IGC.

In sum, the term "regulatory acts" is probably safely construed as encompassing all non-legislative acts of general application, even if more consistency in terminology had been desirable, and many commentators would have preferred the revision of Article 230(4) EC to have gone further.[131]

3.5.2. Limitations of rights in the Charter on Fundamental Rights

Article II-112(1) on the limitations of Charter rights provides that: "Any limitation on the exercise of the rights and freedoms recognized by this Charter must be provided for by law". The wording is the same in the existing Charter, see Article 52(1) of the Charter.

During the legal verification work of the IGC, the Council Legal Service proposed that the reference to "law" be replaced by the words "a legislative act" to avoid confusion with the

[127] See CONV 636/03, para. 22.
[128] See CONV 734/03, 12 May 2003, p. 20. In the accompanying comments to the proposed text, the Praesidium noted that the discussion circle had been divided on whether to modify the strict conditions of Article 203(4) EC, and that those in favour had been divided among themselves. See also CONV 725/03, 27 May 2003, p. 148.
[129] See CONV 796/03, 6 June 2003, p. 13.
[130] See CIG 4/1/03, p. 428-429.
[131] See for critical discussions of the issue, Varju, "The Debate on the Future of the Standing under Article 230(4) TEC in the European Convention", (2004) EPL, 43-56; and Koch, "Locus Standi of Private Applicants under the EU Constitution: Preserving Gaps in the Protection of Individuals' Right to an Effective Remedy", (2005) ELR, 511-527.

narrower concept of "European law" as defined in Article I-33.[132] The suggested substitution was not accepted in the legal experts working group. That was probably very fortunate.

First, the risk of confusion with "law" is limited considering that the prefix "European" is used in all places where the Constitutional Treaty refers to "law/laws" as the name of an EU instrument.

Second, and more importantly, the legal meaning and scope of this horizontal provision on legitimate restrictions of fundamental rights would have been significantly changed if "law" had been narrowed down to "a legislative act." This might have excluded, e.g., EU competition regulations serving as a legal basis for inspection of private premises.

Article II-112(1) and its reference to "law" should be interpreted like its model, the European Convention on Human Rights, which requires that restrictions in fundamental rights must not only pursue a legitimate aim, be necessary and proportional, but must also have a basis in domestic law.[133] The term "law" is and should be interpreted rather broadly in this context, to include a wide variety of legal sources, including administrative decrees, case law, and general principles of law, as long as there is a basis in law in the relevant legal system, whether it is a national system or the Community system. The important thing from a fundamental rights point of view is not the form of the legal basis, but is quality. It must be both accessible and foreseeable as to its meaning and nature.[134]

3.5.3. The AETR principle

According to Article I-13(2) "the Union shall ... have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope."

The provision sets out the doctrine of exclusive implied treaty-making powers of the Union and is intended to codify the AETR principle laid down in the case law of the European Court of Justice.[135] According to the text, exclusivity occurs in three instances, the first of which is linked to the concept of a "legislative act of the Union".

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[132] See CIG 4/1/03, p. 160-161. In French, proposing to replace "la loi" with "un acte législatif", and in German "gesetzlich" with "in einem Gesetzgebungsakt".

[133] See, e.g., Articles 8(2), 9(2), 10(2) and 11(2) ECHR. The term "law" is also used in Article 7 ECHR on retroactive penal law.

[134] See, e.g., for recent authority, Case of *Streletz, Kessler and Krenz v. Germany*, Applications nos. 34044/96, 35532/97 and 44801/98, Judgment of 22 March 2001, para. 50 ("[W]hen speaking of 'law' Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises written as well as unwritten law and implies qualitative requirements, notably those of accessibility and foreseeability"). See also Harris et al, *Law of the European Convention on Human Rights*, (Butterworths, 1995), pp. 285-289.

[135] See CONV 528/03, 6 February 2003, p. 17. During the legal track of the IGC, the Council Legal Service stated that the draft of the Convention of Article I-13(2) did not reflect the legal situation resulting from existing case law. Based on suggestions from the Legal Service, the group of legal experts agreed on slight changes in the last part. See CIG 4/1/03, p. 46-47, and CIG 50/03, p. 23.

The link to a "legislative act" is most likely based on para. 79 of the so-called Air Transport decision from 2002, according to which "whenever the Community has included in its internal legislative acts provisions relating to the treatment of nationals of non-member countries or expressly conferred on its institutions powers to negotiate with non-member countries, it acquires an exclusive external competence in the spheres covered by those acts"[136]

It is debatable whether the Court in this paragraph in fact makes a link between legislative acts and the express conferral of powers to negotiate an international agreement. Linguistically, the term "internal legislative acts" only seems relevant for the situation relating to treatment of third country nationals, not the situation of express conferral.

More importantly, the Court today uses the term "legislative act" in a broad, unspecified sense of the word, probably comprising all derived sources of law, at least those of general application. Thus, it seems misleading to transplant this term into the Constitutional Treaty context, where a more specific, narrower concept of legislation applies.

In real life, the problem is probably very limited. The crucial parts of the three-pronged exclusivity doctrine are undoubtedly the two last elements, the interpretation and application of which are the most likely to cause disputes between the Commission and the Council, and in these two last elements there is no link to "legislation". Notwithstanding the wording of Article I-13(2), the express conferral of powers to a Union institution to negotiate an international agreement will probably be accepted by most as implying an exclusive Union competence, even if it were set out in a non-legislative instrument. Still, the term "legislative" seems misplaced in this context given its new meaning.[137]

3.5.4. Combined legal bases

As a final illustration of possible ill-considered consequences of the distinction between legislative and non-legislative acts one may point to the issue of combined legal bases for EU rule-making.

It is settled case-law that a legal act of the Community must, as a rule, be based on one legal basis alone. By way of exception the measure must be founded on two or more legal bases, if the act simultaneously pursues two or more inseparable objectives of which none is secondary or indirect. However, no dual legal basis is possible where the procedures laid down for each legal basis are incompatible with each other. [138]

[136] See Case C-468/98, *Commission v. Sweden*, [2002] ECR I-9583, para. 79, citing *Opinion 1/94, WTO*, [1994] ECR I-5267, para. 95, and *Opinion 2/92, OECD*, [1995] ECR I-521, para. 33.

[137] In Article III-323(1) on the general powers to conclude international agreements (not necessarily exclusive powers), which in many ways is parallel to Article I-13(2), the term "legislative" act is avoided; instead reference is made to a "legally binding union act". In the English version of the Convention draft Treaty the term "legislative" was in fact used in Article III-323(1), which proved to be a misinterpretation from the French version ("un acte juridique obligatoire"), eventually corrected as part of the legal verification work of the IGC, see CIG 50/03 COR 7 (EN), 11 June 2004, p. 2.

[138] See, e.g., Case C-338/01, *Commission v. Council*, [2004] ECR I-4829, paras. 54-57.

In line with this case law, it is conceivable that the Court will find that a dual legal basis is also excluded if the relevant legal bases are not all either categorized as legislative or non-legislative. Today it is possible to identify EU rules based on combined legal bases, which under the Constitutional Treaty will be part legislative, part non-legislative.[139]

Problems of combined legal bases will probably not be insurmountable: First, many of the possible combinations of legal bases across the legislative/non-legislative divide may be excluded by the Court already for reasons of incompatible procedures.[140] Second, the flexibility provision of Article I-18 (today Article 308 EC) might prove possible to use if it is felt imperative to use a combined instrument based on a legislative and a non-legislative legal basis instead of just dividing the instrument in two.[141]

4. Conclusion: Intelligent design or Evolution?

Drawing a line between legislative and non-legislative acts of the Union was never an indispensable element of the much-desired simplification of instruments and procedures. From the beginning of the Convention it was clear that other, higher aims than just simplification in the interests of transparency and clarification to the citizens were pursued, most notably increased influence to the European Parliament (the democracy argument) and increased delegation of regulatory tasks to the Commission (the efficiency argument).[142]

Both of these aims could of course have been pursued and accomplished without the introduction of an express distinction between legislative and non-legislative acts, but the distinction, along with the renaming of legal acts and the attempt to establish a hierarchy, based on forceful parallels to national democracies and the notion of separation of powers, worked as a crowbar to open the door which had remained locked after discussions at the IGCs of the 1990s.

Seen in this perspective, the "mission of distinction" of the Laeken Declaration was successful. A formal notion of "legislation" was perhaps not crucial, but it was most likely instrumental in

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[139] See e.g. the Common Customs Code, Regulation 2913/92/EC, as amended, which is based on Articles 26, 95, 133 and 135 EC, of which Article 26 becomes a non-legislative legal basis, see Article III-151(5) and footnote 95 above.

[140] Not the case if, e.g., the combination is a special legislative procedure and a non-legislative procedure, both providing for QMV in the Council and consultation of the European Parliament. But the *ordinary* legislative procedure might be held to be incompatible with a non-legislative procedure according to which the Council decides by unanimity or perhaps by qualified majority but with no obligation to involve the European Parliament. Today, the combination of co-decision and unanimity occurs in a few legal bases, see e.g. Article 42 EC, but it is contested whether the combination is allowed if it results from a dual legal basis, see e.g. Case C-338/01, *supra*, where the Court seems to exclude the possibility, see para. 58. In a case pending before the Court, Advocate General Kokott has issued an opinion that a procedure providing for no involvement of European Parliament is incompatible with a procedure providing for co-decision, even if both involve QMV in the Council, thus excluding the combination of Article 133 EC on trade with Article 175(1) EC on environment for purposes of internal legislation, see Case C-178/03, *Commission v. European Parliament and Council,* Opinion of 26 May 2005, paras. 56-65.

[141] Note that Article I-18 is not specific as to the form of measures and may thus serve as a legal basis for both legislative and non-legislative instruments.

[142] Also openly expressed by influential proponents of the distinction, see, e.g., Lenaerts and Desomer, *supra* note 42, at p. 744; and from before the draft Treaty, Lenaerts and Desomer, "Bricks for a Constitutional Treaty of the European Union: Values, Objectives and Means", (2002) ELR, 377-408, at p. 402.

getting broad agreement on the change to co-decision on most of the important policy areas left unchanged from Amsterdam and Nice. The distinction between legislative acts and non-legislative acts also helped getting broad acceptance of the introduction of "delegated regulations", clearing the way for what could be a significant change to the current comitology system.

"Using familiar names for familiar things" was in many ways the motto of the mission. The problem is, of course, that things of the EU are not as familiar as they may seem to some. And if we try to "familiarize" the seemingly familiar things we may have to alter delicate balances, the characteristics, even the whole genetic code of the European Union. Also, some things are more familiar to lawyers from some constitutional orders of the Union than lawyers from other orders.[143] And, while some simplification of instruments is an undeniable and important result of the Constitutional Treaty, new complexities are also introduced.

In the end, the introduction of a distinction between legislative and non-legislative acts in the Constitutional Treaty, along with attempts to introduce separation of powers and a norm hierarchy will not change the genetic code of the EU. The Treaty provides no definition of legislation, neither procedural nor material, but simply a formal definition, reserving the designation "legislation" to two instruments, European laws and European framework laws, which will produce effects and be adopted according to procedures not always different from the effects and procedures pertaining to non-legislative regulations.[144] The aim of a genuine hierarchy of norms is not accomplished.[145] And the principle of institutional balance is not replaced by a principle of separation of powers.[146]

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[143] The primarily French inspiration for the distinction between legislative and non-legislative regulation has not gone unnoticed, see e.g. Prechal, *supra* note 12; and Ziller, "National Constitutional Concepts in the New Constitution for Europe", (2005) EurConst., 247-271 and 452-480. A number of English language scholars have expressed some reservation as to the new distinction and terminology, see, e.g., Dashwood and Johnston, "The Institutions of the Enlarged EU under the Regime of the Constitutional Treaty", (2004) CMLRev., 1481-1518, ("the system of non-legislative acts… appears to us both complex and far from clear", at p. 1484, footnote 11); Cremona, "The Draft Constitutional Treaty: External Relations and External Action" (2003) CMLRev., 1347-1366, ("The new categorization does not, at first sight, appear to simplify matters (quite apart from the confusion of changing the names of familiar types of instrument, such as the regulation)", at p. 1356); and Craig, *supra* note 41, ("Much to be said in principle" for a distinction , but "important issues left open", at p. 4). See for a general assessment of the new typology, Hofmann, *supra* note 41.

[144] Lenaerts and Desomer, *supra* note 42, p. 752 at footnote 38, finds that the existence of a *special* legislative procedure "seems to nourish the democratic deficit". In their list of legal bases subject to a special legislative procedure, the authors forget to point to the fact that the power of the European Parliament in some of the special legislative procedures is actually enhanced as compared to today, most notably by the requirement of parliamentarian "consent" in Articles I-18 (flexibility provision), I-54(4) (own resources), I-55(2) (financial perspectives) and III-124(1) (non-discrimination legislation).

[145] Also the conclusion of Lenaerts and Desomer, *supra* note 42: The authors point out that no hierarchical order is apparent between a regulation based directly on the Treaty and a delegated regulation or a law/framework law, or between a law/framework law adopted according to the ordinary and a law/framework law adopted according to a special legislative procedure, p. 764. In earlier assessments, Lenaerts seems to have been of the opinion that the Constitutional Treaty did in fact enable "the establishment of a true hierarchy of norms", which, although not defined as such in the Constitutional Treaty, was implied, see Lenaerts and Gerard, *supra* note 41, p. 310, footnote 6; and Lenaerts, "A Unified Set of Instruments", (2005) EurConst, 57-61, at p. 57, footnote 2. Notice that the lack of genuine hierarchy is not seen as big problem in the final assessment by Lenaerts and Desomer from 2005, concluding that resolution of conflicts between different legal acts "will most likely remain a matter of interpretation of … legal bases" and that, accordingly, "it is well possible, as is currently the case, that the question of hierarchy

Simplicity in the image of national democracies is clearly not achieved by the Constitutional Treaty – to the regret to some, to the relief of others. In fact, one might argue that in the process of clearing the way for more co-decision powers to the European Parliament and more delegated regulatory powers to the Commission, the mission of simplification involved the introduction of new complexities, such as "delegated regulations", and could raise new difficult legal questions on the instruments without solving all the existing ones.[147]

Zooming in on the details of how the distinction between legislative and non-legislative acts was constructed and applied in the Constitutional Treaty, it is clear that the work involved some difficult political choices and that questions remain as to the consistency and logic of the breakdown between legislative and non-legislative legal bases for EU action in Part III of the Treaty.[148]

It is also clear from the drafting history that even if the implications of the breakdown were made clear by the legal experts, both in terms of the adoption procedure and the "knock-on" effects on transparency and the new subsidiarity "early warning mechanism", only few Members of the Convention raised issues with the breakdown and it never became a subject of the IGC. This could of course be taken to prove that the drafters of the Treaty were spot-on right in their application of the distinction to the EU policy areas. The explanation could also be that time was scarce and priorities had to be made by the individual members of the Convention and the IGC,

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will hardly be raised at all", p. 765. One might ask if or how this conclusion fits with earlier strong calls by the same authors for a genuine hierarchy, described as a precondition for increased legitimacy and transparency, see e.g. Lenaerts and Desomer, *supra* note 29, ("Democratic legitimacy and transparency require, in our view, the introduction of a clear hierarchy of norms, based on the content of the act and the type of procedure for adopting the act", at p. 108), reflecting the contributions of Lenaerts to WG IX of the Convention. See also, from before the Constitutional Treaty, Bast, *On the Grammar of EU Law: Legal Instruments*, 2003, NYU Jean Monnet Working Paper 9/2003, available at http://www.jeanmonnetprogram.org ("A hierarchical order of instruments would only be rational if Union law were completely restructured. Such a project would have to justify the destructive consequences for the current legal order grown under a different premise", at p. 42); and Bieber and Salomé, "Hierarchy of Norms in European Law", (1996) CMLRev., 907-930.

[146] One important issue is the absence of a clear definition of the executive, see, e.g. Curtin, *supra* note 41, at p. 7; and Craig, *supra* note 41, at pp. 3 and 7. Lenaerts and Desomer, *supra* note 42, concludes that the Constitutional Treaty "brings the Union closer to the model of institutional separation of powers that we know from the Member States", p. 763, but also that "the Court's ruling in [Cases 188-190/80] *France, Italy and the United Kingdom v. Commission*, denying the Union a general principle of separation of powers, still stands under the Constitution", p. 764. See also Jacqué, *supra* note 65.

[147] See for a general assessment of the new typology, Hofmann, *supra* note 41. The author concludes that the Constitutional Treaty is "oriented towards state-like models", which "has the advantage of developing a legal system that seems familiar to European citizens", but "the disadvantage is that it is only mal-adapted to the European modes of governance", p. 25.

[148] See for an early, critical assessment, Dougan, *supra* note 116, at p. 784, concluding that the distinction between legislative and non-legislative acts "sometimes appears rather arbitrary", e.g. with respect to competition, producing "similarly arbitrary knock-on effects" with respect to the subsidiarity "early warning mechanism" and the *locus standi* of individuals before the European Court of Justice. Transparency of Council meetings is not mentioned by Dougan among the "knock-on effects". Ziller, *supra* note 143, at p. 470, tries to explain, perhaps even defend, what he refers to as "the unachieved hierarchy", by drawing an analogy to the constitutional order of France, which since 1958 has provided for a general regulatory power pertaining to the executive by which the government may adopt "règlements autonomes", not involving the parliament, which may be subject to ex post judicial review in the French courts, as opposed to laws adopted by the parliament.

seeing that more important institutional issues were on the table. Or perhaps the explanation is that the effects of the distinction and the breakdown were not all well-considered or considered at all by a majority of Members of the Convention.

Yet, even if all the legal implications of the distinction and the breakdown between legislative action and non-legislative action might not have been clear, and even if certain areas, such as competition, may have been wrongly classified held up against the criteria ostensibly used, it seems fair to conclude that no damage is done by the distinction.

The Constitutional Treaty's new provisions on Council meetings open to the public and the subsidiarity "early warning mechanism" are still important new developments in EU Treaty law. Perhaps their scope of application could and should have been broader, encompassing also some or all of the policy areas classified as non-legislative, but the Treaty does not involve a set-back with respect to transparency and subsidiarity in non-legislative areas compared to the existing legal situation.

In conclusion, the distinction between legislative and non-legislative acts should not be able to sustain false expectations or fears of a transformation of the EU in the image of a national democracy – the EU is still an "unidentified political object" under the Constitutional Treaty, regardless of the imported language of legislation from national democracies. And the somewhat debatable line drawn between the legislative and non-legislative sphere in Part III of the Constitutional Treaty does not undermine the achievements of the Treaty with respect to transparency, involvement of national parliaments and enforcement of subsidiarity.

The new distinction between legislative and non-legislative act, it seems, is basically a harmless ornament in the European construction, the added value and beauty of which mainly depend on the eyes of the beholder.

The aim by some to use the distinction as part of an attempt at "intelligent design" to reshape the EU in the image of national democracies failed. The future will show if the distinction may instead be regarded as a result of natural selection or random mutation, which might be significant for the future evolution of the EU identity as a polity.

Suffice it to quote wise words of Deirdre Curtin: "We may need to accept that we cannot define, describe and justify the European Union in polity terms, at least not within any existing frame of reference. (...) Perhaps the best approach is to conceptualize the polity of the EU in the conditional future tense, as not something that *is,* but something that may evolve over time. For the present, rather than focus on the horizon of the EU as a polity, we had better consider the EU as a composition of various regimes, grounded in empirical reality."[149]

[149] Curtin, "Tailoring Legitimacy to the Shape of the EU", (2005) EurConst.., 424-426, at p. 425.

ANNEXES

1. Literature

- Jürgen Bast, "On the Grammar of EU Law: Legal Instruments", NYU Jean Monnet Working Paper 9/2003, available at http://www.jeanmonnetprogram.org
- Carl Fredrik Bergström & Matilda Rotkirch, "Simply Simplification? The Proposal for a Hierarchy of Legal Acts", Swedish Institute for European Policy Studies, SIEPS Report No. 8 June/2003, available at www.sieps.su.se
- Roland Bieber and Isabelle Salomé, "Hierarchy of Norms in European Law", (1996) CMLRev., 907-930
- Gráinne de Búrca, "The EU Constitution: in Search of Europe's International Identity", 4th Walter van Gerven Lecture, 2004, available at http://www.law.kuleuven.ac.be/ccle/pdf/wvg4.pdf
- Paul Craig, "Competence: Clarity, Conferral, Containment and Consideration", (2004) ELR, 323-344
- Paul Craig, "The Constitutional Treaty: Legislative and Executive Power in the Emerging Constitutional Order", European University Institute (EIU) Working Paper LAW No. 2004/7, available at http://www.iue.it/PUB/law04-7.pdf
- Paul Craig and Gráinne de Búrca, *EU Law*, (OUP, 2003)
- Marise Cremona, "The Draft Constitutional Treaty: External Relations and External Action", (2003) CMLRev., 1347-1366
- Deirdre Curtin, "Mind the Gap: the Evolving EU executive and the Constitution", 3rd Walter van Gerven Lecture, 2004, available at http://www.law.kuleuven.ac.be/ccle/pdf/wvg3.pdf
- Deirdre Curtin, "Tailoring Legitimacy to the Shape of the EU", (2005) EurConst., 424-426
- Alan Dashwood and Angus Johnston, "The Institutions of the Enlarged EU under the Regime of the Constitutional Treaty", (2004) CMLRev, 1481-1518
- Michael Dougan, "The Convention's Draft Constitutional Treaty: bringing Europe closer to its lawyers?" (2003) ELRev., 763-793
- Piet Eeckhout, *External Relations of the European Union*, (OUP, 2004)
- D.J. Harris et al, *Law of the European Convention on Human Rights*, (Butterworths, 1995),
- Herwig Hofmann, "A Critical Analysis of the new typology of Acts in the Draft Treaty Establishing a Constitution for Europe", European Integration Online Paper 2003/9, available at http://eiop.or.at
- Jean-Paul Jacqué, "The principle of institutional balance", (2004) CMLRev., 383-391
- Cornelia Koch, "Locus Standi of Private Applicants under the EU Constitution: Preserving Gaps in the Protection of Individuals' Right to an Effective Remedy", (2005) ELR. 511-527
- Koen Lenaerts, "A Unified Set of Instruments", (2005) EurConst., 57-61
- Koen Lenaerts and Marlies Desomer, "Simplification of the Union's Instruments", in Bruno de Witte (ed.), "Ten Reflections on the Constitutional Treaty for Europe", 107-131, at 110-111, available at http://www.iue.it/RSCAS/e-texts/200304-10RefConsTreaty.pdf,
- Koen Lenaerts and Marlies Desomer, "Towards a Hierarchy of Legal Acts in the European Union? Simplification of Legal Instruments and Procedures", (2005) ELJ, 744-765
- Koen Lenaerts and Marlies Desomer, "Bricks for a Constitutional Treaty of the European Union: Values, Objectives and Means", (2004) ELR, 377-408
- Koen Lenaerts and Damien Gerard, "The structure of the European Union according to the Constitution of Europe: the emperor is getting dressed", (2004) ELR, 289-322

- Koen Lenaerts and Piet van Nuffel, *Constitutional Law of the European Union*, (Thomson, 2005)
- Peter Norman, *The Accidental Constitution*, (Eurocomment, 2005)
- Sacha Prechal, "Adieu à la directive?", (2005) EurConst., 481-494
- Tapio Raunio "Much Ado about Nothing? National Legislatures in the EU Constitutional Treaty", European Integration Online Paper 2005/9, available at http://eiop.or.at
- Robert Schütze "Sharpening the Separation of Powers through a Hierarchy of Norms? Reflections on the Draft Constitutional Treaty's regime for legislative and executive law-making", EIPA Working Paper 2005/W/01, available at http://www.eipa.nl
- Marton Varju, "The Debate on the Future of the Standing under Article 230(4) TEC in the European Convention", 10 European Public Law (2004), 43-56
- Joseph Weiler, *The Constitution of Europe*, (CUP, 1999)
- Jacques Ziller: "National Constitutional Concepts in the New Constitution for Europe", (2005) EurConst., 247-271 and 452-480

2. Convention, IGC and other preparatory documents

The Convention

(a) CONV:

- CONV 60/02, "Note on the plenary meeting, Brussels, 23 and 24 May 2002", 29 May 2002
- CONV 162/02, "The legal instruments: the present system", 13 June 2002
- CONV 206/02, "Working Groups: Second Wave", 19 July 2002
- CONV 271/02, "Mandate of Working Group IX on the simplification of legislative procedures and instruments", 17 September 2002
- CONV 284/02, "Summary report on the plenary session, Brussels, 12 and 13 September 2002", 17 September 2002
- CONV 286/02, "Conclusions of Working Group I on the Principle of Subsidiarity", 22 September 2002
- CONV 331/02, "Summary report on the plenary session, Brussels, 3 and 4 October 2002", 11 October 2002
- CONV 363/02, "Note summarising the meeting of Working Group IX (Simplification) on 17 October 2002", 22 October 2002
- CONV 369/02, "Preliminary draft Constitutional Treaty", 28 October 2002
- CONV 375/1/02, "Final Report of Working Group V", 4 November 2002
- CONV 424/02, "Final report of Working Group IX on Simplification", 29 November 2002
- CONV 449/02, "Summary report on the plenary session – Brussels, 5 and 6 December 2002", 13 December 2002
- CONV 528/03, "Draft of Articles 1 to 16 of the Constitutional Treaty", 6 February 2003
- CONV 529/03, "Remit of the working party of experts nominated by the Legal Services", 6 February 2003
- CONV 571/03, "Draft of Articles 24 to 33 of the Constitutional Treaty", 26 February 2003
- CONV 572/03, "Oral presentation by M. Gil Carlos Rodríguez Iglesias, President of the Court of Justice of the European Communities, to the discussion circle on the Court of Justice on 17 February 2003", 10 March 2003

- CONV 575/03, “Oral presentation by M. Bo Vesterdorf, President of the Court of First Instance of the European Communities, to the discussion circle on the Court of Justice on 24 February 2003”, 10 March 2003
- CONV 579/03 “Draft Protocols on: – the application of the principles of subsidiarity and proportionality; – the role of national parliaments in the European Union,” 27 February 2003
- CONV 609/03, “Reactions to draft Articles 24 to 33 of the Constitutional Treaty – Analysis”, 12 March 2003
- CONV 610/03, “Reactions to the draft Protocol on the application of the principles of subsidiarity and proportionality - Analysis”, 12 March 2003
- CONV 618/03, ”Part Two of the Constitution – Report by the working party of experts nominated by the Legal Services of the European Parliament, the Council and the Commission”, 17 March 2003
- CONV 625/03, CONTRIB 279, “Reports of the Select Committee on the European Union of the House of Lords, presented by Lord Tomlinson and Lord Maclennan", 17 March 2003
- CONV630/03, “Summary report of the plenary session – Brussels, 17 and 18 March 2003”, 21 March 2003
- CONV 636/03, “Final report of the discussion circle on the Court of Justice”, 25 March 2005
- CONV 682/03, “Complementary mandate for the working party of experts nominated by the Legal Services”, 11 April 2003
- CONV 724/1/03 REV 1, Annex 2, ”Revised text of Part One of the Constitution”, 26 May 2003
- CONV 725/03, “Draft Constitution, Volume II. Draft text of Parts Two, Three and Four”, 27 May 2003
- CONV 727/03, “Draft sections of Part III with comments”, 27 May 2003
- CONV 729/03, “Part Two of the Constitution - Second report by the working party of experts nominated by the Legal Services of the European Parliament, the Council and the Commission”, 12 May 2003
- CONV 734/03, “Articles on the Court of Justice and the High Court”, 12 May 2003
- CONV 796/03, “Summary sheet of proposals for amendments concerning: - Part Three, Title VI "The functioning of the Union": Court of Justice (Subsection V) (Articles III-254 to III-285, ex-Articles 221 to 245)”, 6 June 2003
- CONV 797/1/03, “Revised text of Part One”, 12 June 2003
- CONV 798/03, “Summary report on the plenary session – 5 June 2003, Brussels”, 17 June 2003
- CONV 802/03, “Draft Constitution, Volume II – Draft revised texts of Parts Two, Three and Four”, 12 June 2003
- CONV 805/03, “New or revised provisions of Part III”, 11 June 2003
- CONV 814/03 “Summary of plenary debate – Brussels, 11-13 June 2003”, 19 June 2003
- CONV 821/03, “Reactions to draft text CONV 802/03 – Analysis”, 27 June 2003
- CONV 821/03, COR 1, 2 July 2003
- CONV 836/03, “Draft Constitution, Volume II”, 27 June 2003
- CONV 847/03, “Draft Constitution, Volume II”, 8 July 2003
- CONV 848/03, “Draft Constitution, Volume II”, 9 July 2003
- CONV 849/03, “Note on the plenary session – 4 July 2003”, 10 July 2003, p. 4
- CONV 850/03, “Draft Treaty establishing a Constitution for Europe”, 18 July 2003

- CONV 853/03, "Summary report on the plenary session – Brussels, 9 and 10 July 2003", 23 July 2003

(b) Working Documents of WG IX
- WD 6, "Simplification of legislative procedures and instruments – Paper by Mr Jean-Claude Piris", 6 November 2002
- WD 7, "How to simplify the instruments of the Union? – paper by prof. Koen Lenaerts", 6 November 2002
- WD 10, "Working Document submitted by the Chairman of the Working Party, Mr. Amato: Examples relating to acts adopted directly on the basis of the Treaties by the Council, the Commission or the ECB", 24 October 2002
- WD 11, "Working document: proposal for a "legislative/executive" delimitation within the institutional system of the European Union", 29 October 2002
- WD 13, "Simplification of the Union's instruments – Summary of replies to the questionnaire", 6 November 2002
- WD 16, "Proposal from the Commission's representative in the Working Group to distinguish legislative and executive functions in the institutional system of the European Union", 7 November 2002
- WD 21 REV 2, "Draft final report of Working Group IX on Simplification", 27 November 2002

(c) Summaries of Praesidium Meetings
- "Summary of Proceedings - Meeting of the Praesidium, Brussels, 10-11 April 2003", 15 April 2003

(d) Amendments
- German Govt. Rep./Fischer: 2 amendment forms, available at http://european-convention.eu.int/Docs/Treaty/pdf/825/Art%20III%2049%20Fischer%20DE.pdf and http://european-convention.eu.int/Docs/Treaty/pdf/826/Art%20III%2055%20Fischer%20DE.pdf.
- Commission: 1 amendment form, available at http://european-convention.eu.int/Docs/Treaty/pdf/825/Art%20III%2051%20Barnier%20FR.pdf
- Swedish Govt: http://european-convention.eu.int/Docs/Treaty/pdf/24/Art24hjelm-wallen.pdf
- Czech Government representative: http://european-convention.eu.int/Docs/Treaty/pdf/24/24_Art%20I%2032%20Kohout%20EN.pdf

(e) Other
- Legal Services: Separate document in English and French, SN 2474/03, shows in underlined and strikeout text the technical adaptations suggested by the legal experts
- Discussion Circle I, WD 8, "Draft final report of Mr António Vitorino, Chairman of the Discussion Circle", 11 March 2003

IGC
- CIG 4/1/03 REV 1, "IGC 2003 – Editorial and legal comments on the draft Treaty establishing a Constitution for Europe – Basic document", 6 October 2003

- CIG 37/03, “IGC 2003 – Non-institutional issues; including amendments in the economic and financial field”, 24 October 2003
- CIG 50/03 “2003 IGC – Draft Treaty establishing a Constitution for Europe (following editorial and legal adjustments by the Working Party of IGC Legal Experts)”, 25 November 2003
- CIG 50/03 COR 7 (en), 11 June 2004
- CIG 51/03, “2003 IGC: editorial and legal adjustments to the draft Treaty establishing a Constitution for Europe and to the Protocols - Presentation of the outcome of proceedings of the Working Party – CIG 50/03”, 25 November 2003
- CIG 37/03, “IGC 2003 – Non-institutional issues; including amendments in the economic and financial field”, 24 October 2003
- CIG 52/1/03 REV 1, “IGC 2003 – Naples Ministerial Conclave: Presidency proposal”, 25 November 2003
- CIG 60/03 ADD 1, “IGC 2003 - Intergovernmental Conference (12-13 December 2003) ADDENDUM 1 to the Presidency proposal”, 9 December 2003
- CIG 73/04, “IGC 2003 – Meeting of Focal Points (Dublin, 4 May 2004) working document”, 29 April 2004
- CIG 80/04, “IGC 2003 – Ministerial meeting, Luxembourg, 14 June 2004”, 12 June 2004
- CIG 81/04 “IGC 2003 - Meeting of Heads of State or Government, Brussels, 17/18 June 2004”, 16 June 2004

3. Case law

ECJ

- Case 8/55, *Féderation de Charbonnière de Belgique v High Authority*, [1956] ECR 245
- Case 25/70, *Köster*, [1970] ECR 1161
- Case 23/75, *Rey Soda*, [1975] ECR 1279
- Cases 188-90/80, *France et al v. Commission*, [1982], ECR 2545
- Case 348/85, *Denmark v. Commission*, [1987] ECR 5225
- Case C-202/88, *France v. Commission*, [1991] ECRI-1223
- Case C-298/89, *Gibraltar v. Council*, [1993] ECR I-3605
- Case 240/90, *Germany v. Council*, [1992] ECR I-5383
- Opinion 2/92, *OECD*, [1995] ECR I-521
- Opinion 1/94, *WTO*, [1994] ECR I-5267
- Case C-321/97, *Andersson*, [1999] ECR I-3551
- C-468/98, *Commission v. Sweden*, [2002] ECR I-9583
- Case C-93/00, *European Parliament v. Council*, [2001] ECR I-10119
- Case C-378/00, *Commission v. European Parliament and Council,* [2003] ECR I-937
- Case C-338/01, *Commission v. Council*, [2004] ECR I-4829
- Case T-306/01, *Yusuf and Al Barakaat International Foundation v. Council*, Judgment of the Court of First Instance of 21 September 2005, nyr,
- Case C-301/02 P, *Tralli v. ECB*, [2005] ECR I-4071
- Case C-178/03, *Commission v. European Parliament and Council*, Opinion of Advocate General Kokott, 26 May 2005, nyr

ECtHR:

- Case of *Streletz, Kessler and Krenz v. Germany*, App. nos. 34044/96, 35532/97 and 44801/98, Judgment of 22 March 2001

4. Legal acts and other documents

Legislation
- Common Customs Code, Regulation 2913/92/EC, O.J. 1992, L 302/11, as amended most lately by Regulation 648/2005/EC, O.J. 2005, L 117/13
- Regulation 994/1998 on the application of Articles 92 and 93 of the EC Treaty to certain categories of horizontal State aid, O.J. 1998, L 142/1
- Regulation 659/1999/EC laying down detailed rules for the application of Article 93 of the EC Treaty, O.J. 1999, L 83/1
- Regulation 2580/2001/EC on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, O.J. 2001, L 344/70
- Commission Directive 2002/77/EC on competition in the markets for electronic communications networks and services, O.J. 2002, L 249/21
- Regulation 1/2003/EC on implementation of the rules of competition laid down in Articles 81 and 82 EC, O.J. 2003, L 1/1
- Regulation 139/2004/EC on the control of concentrations between undertakings (the EC Merger Regulation), O.J. 2004, L 24/1
- Decision 2004/338/EC, Council's Rules of Procedure, O.J. 2004, L 106/22
- Directive 2004/67/EC concerning measures to safeguard security of natural gas supply, O.J. 2004, L 127/92
- Regulation 7/2005/EC adopting autonomous and transitional measures to open a Community tariff quota for certain agricultural products originating in Switzerland, O.J. 2005, L 4/1
- Regulation 1555/2005/EC abolishing tariff quota for imports of soluble coffee covered by CN code 21011111, O.J. 2005, L 249/1

Other documents/instruments/references:
- Constitutional Treaty, O.J., C 310/1
- Commission Communication, "For the European Union – Peace, Freedom, Solidarity", COM (2002) 728 final/2, 11 December 2002
- The Reflection Group's Report (Westendorp report) of 2 June 1995, available at http://europa.eu.int/en/agenda/igc-home/eu-doc/reflect/final.html
- Spinelli, European Parliament, Draft Treaty on a European Union, O.J. 1984, C 103/1
- Herman, European Parliament, Draft Constitution for the European Union, O.J. 1994, C 61/155
- Council note point "I/A", 10101/1/05 REV 1, INF 124 "Transparency: Council Deliberations on acts adopted in accordance with the co-decision procedure (Article 251 TEC), (Article 8 para. 1 (a) of the Council's Rules of Procedure", 13 July 2005
- Council note point "I/A", 10100/05, INF 123, "Transparency: List of topics on which there could be open debates at meetings of the Council (Article 8 para. 3 of the Council's Rules of Procedure)", 12 July 2005
- Note 12520/05, Public 8, "Monthly summary of Council acts, August 2005", 26 September 2005.

- Doc. 15834/05, “I/A Item Note – Improving openness and transparency in the Council – draft conclusions”, 15 December 2005, adopted by the Council on 21 December 2005
- Doc. 14495/05, “Transparency in the Council”, 18 November 2005
- Addendum 1 to Doc. 15834/05.
- ”Special Report from the European Ombudsman to the European Parliament following the draft recommendation to the Council of the European Union in complaint 2395/2003/GG”, Strasbourg, 4 October 2005, available at http://www.euro-ombudsman.eu.int.
- Presidency note in CONFER 4740/00, ”IGC 2000: Other amendments to be made to the Treaties with regard to European institutions – European Parliament”, 10 May 2000