Justice, only justice shalt thou pursue...(Deut.XVI:20)

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On the Grammar of EU Law: Legal Instruments

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Abstract

The paper is concerned with the instruments of EU law, the most important of which are regulations, directives, decisions, and addresseeless decisions *sui generis*. It demonstrates that some basic concepts that have been developed in national public law are inconvenient in the context of EU law. The author gives a brief history of legal thinking concerning the different types of Community acts, puts them into their Constitutional framework and re-examines the relevant politics of the European Court of Justice. The concept of 'operating mode' is offered as an adequate tool for analyzing and systematizing the instruments. The leading idea is that the theory of instruments must be founded in a sound knowledge of legislative practice and that a reform of the legal instruments is a permanent task for legal science rather than for Treaty amendment.

On the Grammar of EU law: Legal Instruments

*Jürgen Bast**

I. INTRODUCTION

If one understands legal discourse as part of the general moral discourse, it is about moderating and hopefully resolving social conflicts. These conflicts involve differing moral views and different interests and are often the subject of great passion. Legal rationality does not make these disappear, but rather imposes a specific mode of argumentation. Nonetheless, sometimes legal science requires a level of abstraction that is so high that the law's practical ends are obscured. A theory of instruments for European constitutional law seems to be as far away from these everyday problems as a book on Italian grammar is from enjoying a cappuccino on a Florentine piazza. And yet without knowledge of the Union law's grammar we would have no relation to its semantics and semiotics; as speakers in the universe of this law we could not communicate with any self-confidence, similar though it may appear to our own native legal language.[1] In contrast to linguistics, which is able to provide the speaker with knowledge about a largely pre-established system of rules, such concepts as legal instrument, competence or hierarchy of norms are themselves part of the legal order and therefore subject to voluntary change. A study of legal institutions and conceptions is never merely descriptive. This is especially so since legal instruments are in large part the product of theoretical constructions. Anyhow, the main objective of the following nonetheless lies in reconstructing the current state of the law. It is hoped that the study may make an indirect contribution to the European constitutional order's further development through methodological reflection on the theory of its instruments.

Some terminological clarifications should be made at this point. This study employs the terms

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'instrument' (or 'type of act', in German *Handlungsform*) as a synthetic concept to name a class of legal acts that are characterized by a coherent set of legal attributes. For example, when the Council adopted *Regulation (EEC) No 1408/71* it intended to affiliate this act to the instrument 'regulation' in the sense of Art. 249(2) EC (to the class of Community acts known as regulations); thus the legal regime of the instrument 'regulation' applies to the act at issue.

The term 'instruments of constitutional law' may appear odd to some readers. In the constitutional context one usually speaks of 'legal sources', whereas some traditions reserve the term 'type of act' to administrative law. In the context of the latter, it includes both legal and factual actions. Such a distinction is not intended: this study deals solely with legal action. Therefore, within the context of this contribution, all the relevant 'instruments' are legal instruments and all the relevant 'acts' are legal acts. Thereby a broad concept of law is employed, encompassing both individual measures as well as non-binding statements. Also, the terms 'law-making' or 'legislation' apply to any kind of acts, be they individual or general in nature or whether they have binding or non-binding effects. This terminological conception is based on the language of the Treaties, which use the term 'acts' regardless of their nature or form (in French the term *actes* is used, in German the interchangeable terms *Akte* or *Handlungen*).[2] Consequently, talking about an 'act' does not hint at a certain instrument. This broad scope makes also clear why the term 'source of law' does not fit here: in most theoretical contexts this concept is reserved for instruments that, at least usually, contain binding norms of general application.

It is difficult to get an overview of this contribution's subject matter, making certain restrictions necessary. Only those instruments that are valid under the Union Treaties ("the Treaties on which the Union is founded", Art. 48 EU) will be considered. Primary law itself and the so-called complementary law (agreements of international law concluded between the

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[1] On the origins of linguistics in the didactic needs for teaching foreign languages see O. Ducrot, Der Strukturalismus in der Linguistik, in: F. Wahl (ed.), *Einführung in den Strukturalismus*, 1973, 13 (14 et seq.).

Member States)[3] are not included in this contribution. Another simplification is made with respect to the law created within the institutional framework of the Union (secondary law or derived law), despite the fact that this negatively impacts the ability to generalize certain results: international instruments that form a part of the Union's legal order (external Community agreements and acts adopted by cooperation bodies set up by such an agreement) bring up special problems that cannot be addressed here. Finally, this study will face the problems at the center, so that it is overwhelmingly the *Community* instruments that will be considered; the special instruments of secondary law under the EU Treaty will be mentioned only peripherally. The reader should therefore bear in mind that this article conceives Community law as a qualified part of Union law.[4]

This study is divided into four sections. First, an overview of the current understanding of the theory of instruments is presented with an attempt to understand the reasons for its current 'niche existence' (II). The following section turns to positive law. It analyses the primary law's provisions governing legal instruments and structuring secondary law. The final part of this section focuses on the Court's handling of the instruments, completing the survey of their constitutional basis (III). A comparative analysis of the distinct instruments' requirements for the lawfulness of an act is the subject of the following section (IV). The final section examines the instruments' different legal effects and, at the same time, makes a proposal for systematizing them (V).

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[2] See e.g. Arts. 230(1), 232(3) and 234(1) lit. b) EC.
[3] E.g., decisions or agreements of the 'Representatives of the Member States meeting in Council'.
[4] On this conception A. von Bogdandy, The case for legal unity: The European Union as a single organization with a single legal system, *CML Rev.* 36 (1999), 887.

II. CURRENT UNDERSTANDING

1. Outline of the Disciplines' Development

For the past fifty years legal science has been trying to understand and clarify the instruments of Community law. Although during this period there has been no significant paradigm change, there have been notable swings in the level of interest in the subject and changes in the nature of the questions asked. The fluctuations partly correlate with events in constitutional development, yet at other times the change in the nature of the questions does not appear to be accompanied by such changes in the legal landscape. One constant is that the theory of instruments is made awkward by the cumbersomeness of its subject matter: it can often only be laboriously dealt with by employing the customary national tools of the trade. The number of scholars who have devoted their energies to this subject has thus always been limited. These days, few among those engaged in the grand subject of constructing European constitutional law are contributing to the fundamental basis of the theory of instruments. The political interest in reforming the legislative instruments currently articulated in the context of the debate about the future of the EU[5] caught the theory of instruments off guard. For example, there is no standard work compiling the insights won during the various phases and examining their present validity and coherence. Developing a presentation on the theory's current state first using a diachronic method therefore suggests itself. It will be seen that as the scientific community went through different phases, its interest in different instruments of Community law changed accordingly. The following brief history of the theory of instruments can also serve to bring together some of the insights into the legal profile of these instruments.

a) Community for Coal and Steel – Focus on the Decision

In the early European Community for Coal and Steel (ECSC), decisions directly addressed to

[5] Cf. European Convention, Working Group IX on Simplification, Final Report, CONV 424/02.

enterprises in the coal and steel sector dominated the discussion concerning the Community instruments. With this instrument to regulate the mining markets, the ECSC Treaty provided the supranational High Authority with a legal potential that had heretofore been reserved to the state.[6] The scholarship on this hybrid entity, composed of public international law and economic law, oriented itself towards the experiences of national administrative law as if it were self-evident.[7] The state of international law scholarship at that time must be recalled:[8] particularly the doctrine of the sources of international law was hardly able to cope with the new phenomenon of economic law created by an international organization.[9] National constitutional law could not serve as a reference point, because the ECSC's legislative institution, the High Authority, was not considered to be a legislator according to the separation of powers doctrine, but rather only an administrative body. Consequently, it could only adopt *actes administratifs* in the sense of French law.

French administrative law had a deep influence of the ECSC Treaty text and its dominating influence on the development of Community law in these days cannot be overlooked.[10] One could cite the four grounds of review *(moyens)* contained in Art. 33(1) ECSC, the logic of which cannot be understood without knowing the *Conseil d'Etat*'s case-law. The *locus standing* of private applicants against a general decision (Art. 33(2) ECSC) should also be mentioned here. This is quite different to, for example, German administrative law, where the distinction between a norm of general application (*Rechtssatz*) and an individual measure

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[6] G. Jaenicke, Die Europäische Gemeinschaft für Kohle und Stahl (Montanunion), *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 14 (1951/1952), 727 (744 et seq.); H. Mosler, Die europäische Integration aus der Sicht der Gründungsphase, in: O. Due (ed.), *Festschrift für Ulrich Everling*, 1995, 911 (920).

[7] C. H. Ule, Der Gerichtshof der Montangemeinschaft als europäisches Verwaltungsgericht, *Deutsches Verwaltungsblatt* 1952, 66 (67 et seq.); B. Börner, *Die Entscheidungen der Hohen Behörde*, 1965, 1 et seq., 29 et seq., 107 et seq.

[8] The doctrine of International Organizations was still based on G. Jellinek, *Die Lehre von den Staatenverbindungen* (1882), 1996, 158 et seq.

[9] W. Meng, *Das Recht der internationalen Organisationen, eine Entwicklungsstufe des Völkerrechts*, 1979; E. Riedel, Farewell to the Exclusivity of the Sources Triad in International Law?, *European Journal of International Law* (2000), Vol. 2, 58.

[10] Cf. M. Fromont, *Rechtsschutz gegenüber der Verwaltung in Deutschland, Frankreich und den Europäischen Gemeinschaften*, 1967.

(*Einzelakt*) is decisive. Under the ECSC, the executive nature of the rule-making body was essential, so that an action for annulment was opened for all *actes administratifs*, whether or not they are *actes règlementaires* or *actes individuelles*.[11] The German tradition of administrative law with its key category of the administrative act (*Verwaltungsakt*) was introduced only with difficulty. One point of entry was the distinction between individual and general decisions, which was still necessary because the ground of review against the latter was – impractically – limited to misuse of powers.[12] Some German scholarship on general administrative acts (*Allgemeinverfügungen*) could be made fruitful here by applying the concept pairs 'general – individual' and 'concrete – abstract' to the *décision* under the ECSC Treaty.[13]

The subject of reviewable decisions also dominated the Court's case-law from the beginning. What measures the private individual enjoys legal protection against has been a controversy in European law since these days. Alongside the distinction between general and individual decisions, a controversy which was largely supplanted by the discussion of the reviewable regulation under the EEC Treaty, the distinction between reviewable binding decisions and non-binding opinions was crucial.

With respect to both questions, scholars were faced with difficult conditions from the beginning. A differentiation of the types of decisions according to formal criteria was already made nearly impossible by the identity of the designations. Against the background of the oligopolistic market structure at that time, distinguishing between a general decision and a "camouflaged individual decision"[14] was by no means unproblematic. Even the High

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[11] R. Chapus, *Droit du contentieux administratif*, 2001, paras. 629 et seq.

[12] A. Schüle, Grenzen der Klagebefugnis vor dem Gerichtshof der Montanunion, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 16 (1955/1956), 227 (230 et seq.); B. W. Meister, *Ermessensmissbrauch oder détournement de pouvoir als Fehlertatbestand der Nichtigkeitsklage des Montanvertrags*, 1971.

[13] E.-W. Fuß, Rechtssatz und Einzelakt im Europäischen Gemeinschaftsrecht (part 2), *Neue Juristische Wochenschrift* 1964, 945 (946 et seq.); Börner, see note 7, 117 et seq.

[14] Case 8/55, *Fédération charbonnière de Belgique* v. *High Authority*, [1955] ECR (English Ed.) 245 et seq.

Authority relied on an *ex post* qualification by the Court.[15] The High Authority's position on the question of whether or not a statement contained a *décision* at all was quite the reverse. After the Court began declaring that informal letters and communications could constitute reviewable decisions, the High Authority attempted to reserve to itself the power of definition: the enterprises could rely on the fact that only those statements that had a certain form were intended to create legal obligations. To this end the High Authority established binding formal criteria concerning the form of legal acts in *Decision No 22/60* of 7 September 1960.[16] Among other prerequisites, the terminology used in the heading should indicate whether or not the act is a "decision". The ECJ decisively rejected these efforts, although Art. 15(4) ECSC provided the basis for a convincing argument in favor of such a power of definition for the High Authority.[17] The Court's steadfast position pro legal protection was already evident from these early judgments. To preclude the danger of a political institution arbitrarily foreclosing legal protection by the Court, formal criteria for the qualification of a reviewable act should play only a limited role. The ECJ was prepared to accept the unfortunate consequences of decoupling the system of legal protection from the system of legal instruments, in this case with the result that the requirements pertaining to reviewable decisions pursuant to Art. 33 ECSC were less strict than those pertaining to enforceable decisions pursuant to Art. 92 ESCS.[18] The hope that *Decision No 22/60* could structure the various types of legal instruments at a single stroke was thus scuttled; the Court's conception of an act's "legal nature" held sway. Nevertheless, the appearance and the formal organization of Union acts as they are known today and as they are set forth in Annex IV of the Council's

[15] On the criteria of demarcation see Joined Cases 36/58–38/58, 40/58 & 41/58, *SIMET et al.* v. *High Authority*, [1959] ECR (English Ed.) 157 et seq.
[16] OJ 61, 1248/60.
[17] Joined Cases 53/63 & 54/63, *Lemmerz-Werke et al.* v. *High Authority*, [1963] ECR (English Ed.) 239 et seq.
[18] Joined Cases 8/66–11/66, *Cimenteries Cementbedrijven et al.* v. *Commission*, [1967] ECR (English Ed.) 75 et seq.

Rules of procedure were developed on the basis of *Decision No 22/60*.[19]

It should be briefly mentioned that the Court had already taken positions in other areas under the ECSC that continue to stamp Community law and the theoretical understanding of its instruments. For instance, delegating legislative powers to bodies that are not fully politically and legally responsible under the Treaty is prohibited to this day.[20] This fundamental judgment, known as the *Meroni* case law, even today ensures that the legislative instruments codified in the Treaties may only be used by the ordinary Treaty institutions. Of continuing importance is the comprehensive incidental control beyond the wording of Art. 36(2) ECSC, implying that the High Authority is strictly bound by its own general decisions. This can be understood as a strategy to cope with the lack of a hierarchy between law-making institutions, which is even more relevant under the EC Treaty. Finally, it was already apparent under the ECSC that the Court would have to create elements of a European administrative law through its case-law, as it did, for example, when it developed the criteria for the retroactive withdrawal of decisions providing a benefit.[21] The theory of instruments thus still has the coal dust of the early days of Community law in its clothes, so to speak. Even after the funeral ceremonies for the first Community, the coal miner's clothes should be worn with the same pride as the Sunday suit.

b) The EEC in the 60s and 70s – Focus on the Regulation

When confronting the swampy quagmire known as the CAP, it may be advisable for the European lawyer to be wearing workman's clothes. It was the agricultural sector that occupied the Court the most after the EEC was founded. In this second phase scientific interest in the Community's instruments was overwhelmingly devoted to the regulation, the

[19] Council Decision of 22 July 2002 adopting the Council's Rules of Procedure (2002/682/EC, Euratom), OJ L 230, 7.
[20] Cases 9/56 and 10/56, *Meroni* v. *High Authority*, [1958] ECR (English Ed.) 133 et seq. and 157 et seq.

general decision's more sophisticated successor. Until the end of the 60s numerous publications on this legislative instrument kept appearing,[22] among them notably the monographic study by *J.-V. Louis*[23]. The regulation, with its ability to affect the legal position of the market citizen like a national statute, fascinated scholars: it was considered to be an expression of the new public authority's supranationality and autonomy.[24] Its qualification as a Community statute was prevented only by the separation of powers doctrine, which requires that a law be enacted according to parliamentary legislative procedures. Nonetheless, from now on national constitutional law was a point of reference for the understanding of Community instruments.

The relationship between Community law and national law took center stage. The Commission's and Council's legislative powers of decision unmistakably began to compete with the national parliaments, a situation that required conceptual clarification. More specifically, the regulation and its claim to be directly applicable in all Member States brought up the problem of a collision with national law, a problem aggravated in those Member States that provide that international treaties usually have the same rank as the ratifying statute.[25] *H. P. Ipsen* cogently theorized that the regulation as set forth in the Treaty was an expression of the new quality of Community law separating it from ordinary public international law. The Community character of the regulation is found in the inviolable uniqueness of its uniform application throughout the Community.[26] *M. Zuleeg* saw in Art. 189(2) sentence 2

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[21] Joined Cases 7/56 & 3/57–7/57, *Algera et al.* v. *Common Assembly*, [1957] ECR (English Ed.) 39 et seq.

[22] R. Kraushaar, Zur Kompetenz der Kommissionen der Europäischen Gemeinschaften zum Erlass von Verordnungen, *Die öffentliche Verwaltung* 1959, 726; H.-J. Rabe, *Das Verordnungsrecht der Europäischen Wirtschaftsgemeinschaft*, 1963; G. L. Tosato, *I regolamenti delle Comunità europee*, 1965; J. R. Haase, *Die Kompetenzen der Kommission im Verordnungsrecht der Europäischen Wirtschaftsgemeinschaft*, 1965; W. Möller, Die Verordnung der Europäischen Gemeinschaften, *Jahrbuch des öffentlichen Rechts der Gegenwart N.F.* 18 (1969), 1.

[23] J.-V. Louis, *Les règlements de la Communauté économique européenne*, 1969.

[24] C. F. Ophüls, Staatshoheit und Gemeinschaftshoheit, in: C. H. Ule (ed.), *Recht im Wandel*, 1965, 519 (550).

[25] Not a few contributions focused solely on the regulation when discussing the conflict between supremacy of Community law and national *lex-posterior*-rule, see K. Carstens, Der Rang europäischer Verordnungen gegenüber deutschen Rechtsnormen, in: B. Aubin et al. (eds.), *Festschrift für Otto Riese*, 1964, 65; R. H. Lauwaars, *Lawfulness and Legal Force of Community Decisions*, 1973, 14 et seq.

[26] H. P. Ipsen, *Europäisches Gemeinschaftsrecht*, 1972, 10/41.

EEC (Art. 249(2) sentence 2 EC) the positive law solution to collisions of national and supranational law: in case of conflict the Community law prevails.[27]

The power to make regulations also played a significant role for the ECJ in grounding the autonomy of the Communities' legal order. The "establishment of institutions endowed with sovereign rights, the exercise of which affects the Member States and also their citizens"[28] is a central argument that the ECJ relied on for the direct effect of Community law. In *Costa v. E.N.E.L.* the ECJ reasoned that Community law was supreme, making explicit reference to the unqualified binding force of the regulation and its direct applicability.[29] On the other hand, the ECJ has always rejected the *e contrario* argument that, since the regulation by its very nature has direct effect, other categories of acts can never have similar effects.[30]

For the system of legal protection under Art. 173 EEC (Art. 230 EC), Art. 189(2) EEC provides a key concept, namely that of general application (in German *allgemeine Geltung*, in French *portée générale*), which functions as the counterpart to the individual concern of a decision. At first the ECJ only reluctantly accepted the general rule laid down in Art. 230(4) EC that individuals have no standing against a regulation. However, it required that the act must "have the character of a regulation" according to its substance.[31] The ECJ also judged the question of whether a decision addressed to Member States can be challenged by an individual according to whether the act is of general application or one which is of individual concern to the plaintiff and, due to the implementing authority's lack of discretion, is also of direct concern.[32] It took some time before the ECJ freed itself from the chains of this conception and finally rejected the premise that an act cannot simultaneously be of general

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[27] M. Zuleeg, *Das Recht der Europäischen Gemeinschaften im innerstaatlichen Bereich*, 1969, 154 et seq.
[28] Case 26/62, *van Gend & Loos*, [1963] ECR (English Ed.) 1 et seq.
[29] Case 6/64, *Costa*, [1964] ECR (English Ed.), 585 et seq.
[30] Case 9/70, *Grad*, [1970] ECR 825, para. 5; Case 41/74, *van Duyn*, [1974] ECR 1337, para. 12.
[31] Joined Cases 16/62 & 17/62, *Confédération nationale des productuers de fruits et légumes et al.* v. *Council*, [1962] ECR (English Ed.) 471 et seq.
[32] Case 231/81, *Spijker Kwasten* v. *Commission*, [1983] ECR 2559, para. 10; Case 206/87, *Lefebvre* v. *Commission*, [1989] ECR 275, para. 13.

application and be of individual concern to certain natural or legal persons.[33]

With respect to the legal effects of regulations, the ECJ held that Member States "no longer have the powers to legislative provisions" in a field fully regulated by a regulation, and national measures that "alter [the regulation's] scope or supplement its provisions" are not permissible.[34] Thus the Member States are prohibited, for example, from adopting any measure which would conceal the Community nature and effects regarding the direct applicability and entry into force of a regulation.[35] On the other hand, the choice of a regulation does not oblige the Community legislator to create an exhaustive regime, so that a regulation may permit the Member States legislative discretion or oblige them to take further implementing action to fill in the gaps.[36] The path has thus been cleared for the regulation's direct application and, at the same time, its suitability as an instrument of harmonization, the presumptive domain of the directive.

Generally speaking, the ECJ has accepted the multifarious usages of the regulation, e.g., for the conclusion of international agreements, the adoption of procedural rules and even for autonomous Treaty amendment[37] that otherwise usually takes the form of an addresseeless decision (in German *Beschluss*). The thesis based on Art. 189(2) EEC that regulations are reserved for general norms[38] was unable to gain acceptance: a regulation's general applicability is a necessary condition for its not being able to be contested by an individual, not, however, for the legality of the regulation as such. The ECJ has displayed little inclination to review legislative discretion regarding the type of act and will not substitute its

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[33] See below, III. 3. b).
[34] Case 40/69, *Bollmann*, [1970] ECR 69, para. 4.
[35] Case 39/72, *Commission* v. *Italy*, [1973] ECR 101, para. 17; Case 34/73, *Variola*, [1974] ECR 981, paras. 10–11.
[36] Case 31/78, *Bussone*, [1978] ECR 2429, paras. 28/33; Case 230/78, *Eridania*, [1979] ECR 2749, para. 34; Case 237/82, *Jongeneel Kaas et al.*, [1984] ECR 483, para. 13.
[37] Case 185/73, *König*, [1974] ECR 607, paras. 5 et seq.
[38] U. Everling, Die ersten Rechtsetzungsakte der Organe der Europäischen Gemeinschaften, *Betriebs-Berater* 1959, 52 (53).

own evaluation for that of the enacting institution.[39]

The differentiation the Court developed in the 70s concerning the scope of the duty to provide reasons pursuant to Art. 190 EEC (Art. 253 EC) is remarkable as well. With regard to regulations and other instruments of general application, the enacting institution may limit itself to indicating the general situation which led to the measure's adoption and the general objectives the measure is intended to achieve.[40] The Community legislator's discretion – a formula of the ECJ that applies equally to the Council and the Commission – corresponds to a less demanding duty to provide reasons than is the case with an act executing a general rule. With this argumentation the ECJ modified its jurisprudence on the ECSC, which balanced a limited review of discretionary decision-making with a general increase on the demands to provide reasons.[41] The background for this change was the mass of routinely adopted regulations: the regulation had become the instrument of choice for the administration's daily norm production, especially in the agricultural field.[42] Under these circumstances the dominant function of the duty to provide reasons was to help the Court to review the legality of an act, in particular with respect to the powers of the enacting institution.[43] In contrast, the right of those concerned to information as an expression of accountability to the European public has only limited significance. The ECJ's often criticized lax scrutiny of the formulaic phrases used later when giving reasons relating to subsidiarity has its origins here.[44]

c) The Discussions in the 80s and 90s – Focus on the Directive

A third phase, which started in the 80s and continued far into the 90s, focused attention on the

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[39] Case 5/73, *Balkan-Import-Export*, [1973] ECR 1091, para. 18.
[40] Case 5/67, *Beus*, [1968] ECR (English Ed.) 83 et seq.; Case 78/74, *Deuka*, [1975] ECR 421, para. 6; Case 166/78, *Italy* v. *Council*, [1979] ECR 2575, para. 8.
[41] Joined Cases 36/59–38/59 & 40/59, *Präsident Ruhrkohlen-Verkaufgesellschaft et al.* v. *High Authority*, [1960] ECR (English Ed.) 423 et seq.
[42] Case 78/74, see note 40, 421, para. 6; Case 29/77, *Roquette Frères*, [1977] ECR 1835, paras. 13/18.
[43] The duty to state the legal basis serves this objective, see Case 45/86, *Commission* v. *Council*, [1987] ECR 1493, paras. 8–9.
[44] Cf. Case C-233/94, *Germany* v. *Parliament and Council*, [1997] ECR I-2405, paras. 22 et seq.; further case-law in A. Schramm, Zweistufige Rechtsakte, oder: Über Richtlinien und Grundsatzgesetze, *Zeitschrift für*

directive. It had taken a long time for the scholarly community to construe the directive as a true legislative instrument.[45] Until then the directive was considered to be "by its nature" a "decision addressed to the Member States"[46] and thus an individual measure, not a general norm. *R. H. Lauwaars*, who published the first monographic study surveying the requirements relating to the lawfulness of secondary Community law, stated that a directive "in fact do[es] not contain norms, ... it only establishes legal relationships between the Member State concerned and the Community"[47].

This picture changed dramatically when the specialized scholarship and, for the first time, the broader legal community turned to the innovations developed by the Court regarding the effects benefiting the individual when directives were improperly implemented.[48] In particular in the German literature, one witnessed a steady increase of publications[49] in the wake of the conflict between the ECJ and German courts concerning the direct application of the 6th VAT directive (*Becker* decision).[50] The *Grad* case,[51] which concerned a decision addressed to the Member States, did not receive such attention, although *E. Grabitz* had already outlined the consequences for the vertical direct effect of directives in 1971.[52] The doctrine of indirect effect, which requires national law to be construed in light of Community directives,[53] and

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öffentliches Recht 56 (2001), 65 (82).

[45] For an early endeavor see E.-W. Fuß, Die "Richtlinie" des Europäischen Gemeinschaftsrechts, *Deutsches Verwaltungsblatt* 1965, 378.

[46] Everling, see note 38, 52.

[47] Lauwaars, see note 25, 32.

[48] Case 41/74, see note 30, para. 12; Case 152/84, *Marshall*, [1986] ECR 723, para. 49.

[49] U. Everling, Zur direkten innerstaatlichen Wirkung der EG-Richtlinien, in: B. Börner (ed.), *Einigkeit und Recht und Freiheit: Festschrift für Karl Carstens*, Vol. 1, 1984, 95; S. Magiera, Die Rechtswirkungen von EG-Richtlinien im Konflikt zwischen BFH und EuGH, *Die öffentliche Verwaltung* 1985, 937; M. Hilf, Der Justizkonflikt um EG-Richtlinien: gelöst, *Europarecht* 1988, 1; R. Wegmüller, Der Anwendungsvorrang von Richtlinien – eine Diskussion ohne Ende?, *Recht der internationalen Wirtschaft* 1991, 501.

[50] *Bundesfinanzhof* 133, 470; Case 8/81, *Becker*, [1982] ECR 53, para. 21; Case 70/83, *Kloppenburg*, [1984] ECR 1075, para. 14; *Bundesfinanzhof* 143, 383; *Bundesverfassungsgericht* 75, 223 (245).

[51] Case 9/70, see note 30, para. 5.

[52] E. Grabitz, Entscheidungen und Richtlinien als unmittelbar wirksames Gemeinschaftsrecht, *Europarecht* 1971, 1; similarly R. Wägenbaur, Ist die Unterscheidung zwischen Verordnungen, Richtlinien und Entscheidungen nach Art. 189 EWG-Vertrag hinfällig geworden?, *Deutsches Verwaltungsblatt* 1972, 244.

[53] Case 14/83, *Colson et al.*, [1984] ECR 1891, para. 26; Case C-106/89, *Marleasing*, [1990] ECR I-4135, para. 8; D. Curtin, The Province of Government, *EL Rev.* 15 (1990), 195 (220 et seq.); W. Brechmann, *Richtlinienkonforme Auslegung*, 1994; P. Craig, Direct Effect, Indirect Effect and the Construction of National Legislation, *EL Rev.* 22 (1997), 519.

Member State liability for improper implementation of directives[54] further fueled the debate. During this phase a phenomenon in European law's scholarship developed that can be described as 'ECJ-positivism'. The legal community anxiously followed the innovations introduced into Community law by the ECJ, splitting the former into true believers and sharp tongued critics. The ECJ's apparent restless activism scarcely left time to systematically work through and critically analyze the consequences of the recent judgments for the system of legal instruments. To give an example, many observers felt that it was only a question of time before the ECJ recognized the horizontal direct effect of directives.[55] They underestimated the ECJ's readiness to preserve an unique profile of the directive.[56] The supplemental legal institutions the ECJ developed in these days on the basis of the primacy of Community law are connected to a Member State's breach of Community law. The expansion of the directive with respect to the doctrine of legal defects can be founded in the obligation set out in Art. 5 EEC (Art. 10 EC), which protects Community legislation – which is the result of political compromises often achieved only with difficulty – from being unilaterally challenged by extra-legal means.[57] It was therefore hardly obvious that the Court would respond to the call to recognize the direct effect of the provisions of a recommendation. A 'directive' having no binding force does not carry with it a duty to implement, so that the idea of sanctioning the failure to act does not apply.[58]

The reasons for the remaining dissatisfaction with the contours given to the directive by the

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[54] Joined Cases C-6/90 & C-9/90, *Francovich et al.*, [1991] ECR I-5357, para. 31; R. Caranta, Governmental Liability after Francovich, *Cambridge Law Journal* 52 (1993), 272.

[55] Construed as an element of constitutionalization by E. Stein, Lawyers, Judges and the Making of a Transnational Constitution, *American Journal of International Law* 75 (1981), 1; a distinct call to the Court in the Opinion of A.G. Lenz, Case C-91/92, *Faccini Dori*, [1994] ECR I-3325, paras. 43 et seq.; A. L. Easson, Can Directives Impose Obligation on Individuals?, *EL Rev.* 4 (1979), 67; T. Tridimas, Horizontal Direct Effect of Directives: a Missed Opportunity?, *EL Rev.* 19 (1994), 621.

[56] Case C-91/92, see note 55, para. 24; Case C-192/94, *El Corte Ingles*, [1996] ECR I-1281, para. 17.

[57] A. von Bogdandy, Rechtsfortbildung mit Art. 5 EG-Vertrag, in: A. Randelzhofer et al. (eds.), *Gedächtnisschrift für Eberhard Grabitz*, 1995, 17 (26 et seq.).

[58] Case 322/88, *Grimaldi*, [1989] ECR 4407, para. 16.

Community legislator and the ECJ are not to be found in the doctrine of legal defects.[59] The underlying conflict dates back to the early days of Community law. Particularly German authors, arguing from the wording of Art. 189(3) EEC, claimed that the Member States must retain a considerable amount of discretion when implementing directives.[60] Confronted with the presumption that the directive is an instrument exclusively reserved for framework legislation, the directive's career indeed appears to be that of abuse of discretion.[61] Legislative practice and case-law have never accepted this view, which implies that a certain regulatory density functions as an immanent limitation on the Community's competences when a directive is chosen by the adopting institution.[62] Instead, they have always used the directive as *loi uniforme* as needed, which can impose detailed instructions on the Member States as to the legal state of affairs to be created.[63] Today the admissibility of the directive as a true legislative instrument with a two step implementation structure is universally recognized, and the insistence on the so-called original conception is consigned to future Treaty reform. Without further clarification, the ECJ and CFI can assume that, as regards the standing of the individual to challenge a directive, it is normally a form of indirect legislation and thus an act of general application.[64] This applies equally and without qualification to Commission directives.[65] The decisive difference to the regulation is the directive's inability to impose obligations of itself on an individual, a difference that must also be taken into account when considering the legal consequences of deficient implementation.[66]

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[59] Cf. M. Hilf, Die Richtlinie der EG – ohne Richtung, ohne Linie?, *Europarecht* 1993, 1.
[60] For an actual example see O. Hahn/J.-D. Oberrath, Die Rechtsakte der EG – Eine Grundlegung (part 2), *Bayerische Verwaltungsblätter* 1998, 388 (389); on the state of discussion in the 1960's U. Schatz, Zur rechtlichen Bedeutung von Art. 189 Abs. 3 EWGV für die Rechtsangleichung durch Richtlinien, *Neue Juristische Wochenschrift* 1967, 1694.
[61] Cf. B. Biervert, *Der Missbrauch von Handlungsformen im Gemeinschaftsrecht*, 1999, 138 et seq.
[62] See e.g. Case 38/77, *ENKA*, [1977] ECR 2203, paras. 15/17.
[63] Ipsen, see note 26, 21/29; M. Zuleeg, in: H. von der Groeben/J. Thiesing/C.-D. Ehlermann (eds.), *Kommentar zum EU-EG-Vertrag*, 1997, Art. 3b EC (Maastricht), para. 6; M. Nettesheim, in: E. Grabitz/M. Hilf (eds.), *Das Recht der Europäischen Union*, 2002, Art. 249 EC, para. 132.
[64] Case C-10/95 P, *Asocarne* v. *Council*, [1995] ECR I-4149, para. 28; CFI, Joined Cases T-172/98 & T-175/98–T-177/98, *Salamander et al.* v. *Parliament and Council*, [2000] ECR II-2487, para. 29.
[65] Joined Cases 188/80–190/80, *France et al.* v. *Commission*, [1982] ECR 2545, para. 6.
[66] Case C-97/96, *Verband deutscher Daihatsu-Händler*, [1997] ECR I-6843, para. 24; Case C-443/98, *Unilever*,

2. Current Scholarship

a) The Theory of Instruments on the Retreat?

The discussion since the 90s is characterized by a remarkable incongruity. The one hand, European legal scholarship – after the difficulties experienced in ratifying the Treaty of Maastricht – is being moved, indeed shaken, by great debates: the Union's democratic legitimacy, the limits of its competences, the role of the judiciary, the Union's future shape.[67] On the other hand, the theory of instruments has not been able to make an independent contribution to these discussions. It is typical that even fundamental constitutional changes – the Treaty on the European Union, the Economic and Monetary Union, the development of the co-decision procedure, the numerous new competences – have scarcely been analyzed from the perspective of the theory of instruments. A similar decoupling from the general discipline can be seen with respect to secondary law. Legislation and case-law are the subject of intensive scientific study, but it is dominated by the specialized sectoral disciplines that – for obvious reasons – are hardly interested in the abstract questions related to the doctrine of legal instruments. One looks mostly in vain for the intersectoral view of the structures of secondary law from the perspective of a theory of instruments. This, in turn, stands in stark contrast to the claim of many that a reform of the instruments is needed to introduce order to a chaotic situation.[68] At any rate, it currently appears that scholarly attempts to systematize the

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[2000] ECR I-7535, para. 50; on recent case-law see St. Weatherill, Breach of Directives and Breach of Contract, *EL Rev.* 26 (2001), 177; M. Lenz/D. S. Tynes/L. Young, Horizontal What? Back to Basics, *EL Rev.* 25 (2000), 509; K. Lackhoff/H. Nyssens, Direct Effect of Directives in Triangular Situations, *EL Rev.* 23 (1998), 397.

[67] Cf. A. von Bogdandy, A Bird's Eye View on the Science of European Law, *ELJ* 6 (2000), 208.

[68] M. Ruffert, in: Ch. Calliess/M. Ruffert (eds.), *Kommentar zu EU-Vertrag und EG-Vertrag*, 2002, Art. 249 EC, paras. 14–15; R. Lukes, Rechtsetzung und Rechtsangleichung, in: M. Dauses (ed.), *Handbuch des EU-Wirtschaftsrechts*, 2001, sec. B II, para. 49; Nettesheim, in: Grabitz/Hilf, see note 63, Art. 249 EC, para. 216; Th. Koopmans, Regulations, directives, measures, in: Due, see note 6, 691.

legal instruments are dismissed with a shrug of the shoulders.[69]

On an optimistic reading, the lack of innovative discussion speaks for a settled body of knowledge, which at the same time reflects the absence of the revolutionary upheavals that had buffeted the Community legal instruments since the founding of the EEC. This settled body can be inspected in the educational literature on European law, a subject that is now too vast for any one person to gain an overview. The relevant commentaries are also oriented towards a cumulative exposition of the insights on the individual instruments under Art. 249 EC. The directive occupies the central position, as it is apparently the only instrument that presents unsolved problems – a finding that is reflected in the relevant bibliographies.[70]

A more critical analysis would be concerned that the current state of affairs is more accurately explained by the lack of a general doctrine, which has led to splitting scholarly attention. Yet an evolutionary subject like the legal instruments requires constant scientific study, incorporating new developments and at the same time being capable of getting rid of unneeded ballast from earlier phases. This demands constantly keeping the totality of the instruments in view and presupposes the readiness to question the theoretical premises forming the basis for identifying problems.

b) Some Immanent Reasons for Waning Interest

Reasons for the retreat of the theory of instruments are to be found in the sparse structure of the subject matter. One aspect may be the disappointment caused by the ECJ's reluctance to follow the scholarly community's suggestion for a stricter scrutiny of the institution's exercise of discretion regarding the choice of instruments.[71] Particularly for the German public law tradition it was a well-known method to compensate for the lack of legitimacy resulting from

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[69] Grabitz' contribution in the anthology *Thirty Years of Community Law* still by and large represents the cutting edge of the theory of instruments, E. Grabitz, Chapter V, in: Commission of the European Communities (ed.), *Thirty Years of Community Law*, 1981, 91 et seq.

[70] For an impressive example see Nettesheim, see note 68.

[71] E.g., in Case C-70/88, *Parliament* v. *Council*, [1991] ECR I-4529, the Court paid no attention to Parliament's

a weak parliamentary assembly by introducing a stricter judiciary regime controlling the law-making institutions. *E. W. Fuß*'s dictum from 1964 that "the rule of law's dimensions of European Community law … are decisively determined by the ways and means that the Treaty fathers have devised for the system of Community instruments"[72] must be read against this background. The proposals for a strong principle of proper usage of instruments, centering on the congruence between content and form, stems from this noble impetus. Yet the Court has never accepted the consequences of this proposal, for example, that in an admissible action for annulment against a decision "in the form of a regulation" is always well founded because Art. 230(4) EC is dealing with an illegal "confusion of instruments".[73] Instead, other considerations such as the stability of legal relationships and the effectiveness of Community law have stamped the ECJ's approach.

A second discouraging factor concerns the relationship between the theory of competences and the theory of instruments. From the early days the scholarship understood it to be the rule that the Treaties would set out the admissible instrument(s) when they provided a Community institution with a competence.[74] Enabling norms without a provision regarding the type of act were to be the exception: whether such enabling norms require a standard measure (i.e., one contained in the Treaty' catalogue of instruments) or whether a so-called act *sui generis* is demanded must be decided on a case-by-case basis.[75] The theory of instruments systematically thus fell under the principle of attributed powers and had to serve its functions.[76] Yet it had

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opinion that Art. 31 Euratom-Treaty does not provide a sufficient legal basis for a regulation, see para 19.

[72] E.-W. Fuß, Rechtssatz und Einzelakt im Europäischen Gemeinschaftsrecht (part 1), *Neue Juristische Wochenschrift* 1964, 327.

[73] Ibid., 330; similarly Th. Oppermann, *Europarecht*, 1999, para. 752.

[74] Ipsen, see note 26, 20/24; Grabitz, see note 69, 97; J. Schwarze, *Europäisches Verwaltungsrecht*, Vol. 1, 1988, 239.

[75] The Treaties of Rome used the term 'decision' (in French: *décision*) no only to name a specific instrument (in German: *Entscheidung*, in Dutch: *beschikking)* but also as a synonym for the term 'act' (in German: *Beschluss*, in Dutch: *besluit*). When an enacting institution designated an act of secondary law as *Beschluss* and *besluit*, it was clear, that the act was not a decision in the meaning of Art. 189(4) EEC but a decision *sui generis*. Very soon this 'non-designation' evolved into a designation for a specific instrument, the addresseeless decision, see below, II. 2. c).

[76] H.-P. Kraußer, *Das Prinzip begrenzter Ermächtigung im Gemeinschaftsrecht als Strukturprinzip des EWG-Vertrags*, 1991, 26.

always been difficult to make this interpretation consistent with positive law as enabling norms expressly demanding a certain instrument were already in the numerical minority with the early Treaty of Rome.[77] At the latest with the consolidation brought about by the Treaty of Amsterdam it became obvious that it had become the general rule that the empowered institution may choose the appropriate instrument itself. Today enabling norms providing a specific instrument are a singular and largely anachronistic phenomenon that does not lend itself to be a systematic basis for the theory of instruments. It is the 'Treaty fathers' who are responsible for decoupling the Community instruments from the competences: since the Single European Act practically only 'neutral' enabling norms have been introduced into the Treaties.[78] Art. 100a EEC (Art. 95 EC), which consciously waives the directive requirement of Art. 100 EEC (Art. 94 EC) and replaces it with the term "measures", is symbolic of the strategic shift pro legislative discretion regarding the choice of instruments, a shift which the scholarship still has to recognize in its full theoretical impact.

A third immanent explanation for the lack of interest in the instruments of Community actions goes further to the core of Community law. Compared to national administrative and constitutional law, a surprising number of legal institutions require no recourse to the type of act. Community acts are mostly subject to a unitary system of standard-establishing norms, often formulated as general principles of law.[79] In contrast, the material and procedural requirements which stem from an act's legal basis are highly differentiated. However, this structuring of the legal order through the horizontal order of competences is, as indicated above, largely neutral with regard to the instruments. The specific legal basis steers the legislative process by indicating which legislative procedures is to be used, yet this order of

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[77] E. Wohlfarth, in: E. Wohlfarth/U. Everling/H. Glaesner/R. Sprung (eds.), *Die Europäische Wirtschaftsgemeinschaft*, 1960, Art. 189 EEC (Rome), para. 17.

[78] Most important exception: Art. 118a(2) EC (Maastricht), extended in Art. 137(2) EC (Amsterdam), now Art. 137(2) lit. b) EC (Nice).

[79] Th. Schilling, Bestand und allgemeine Lehren der bürgerschützenden allgemeinen Rechtsgrundsätze des Gemeinschaftsrechts, *Europäische Grundrechte-Zeitschrift* (2000), 3.

procedures is not even remotely connected to the instruments. Finally, as will be discussed in further detail below, the Court itself has by and large decoupled the systems of legal review from the type of act at issue. In many areas where national public law brings order through its different instruments, Community law uses other means to impose order.[80] If one wishes to draw the – overly hasty – conclusion that a theory of Community instruments is irrelevant, then the question arises whether the discipline has sufficiently emancipated itself from the national context.

c) Open Issues

The theory of instruments has yet to establish its place within Union constitutional law. Even worse, today it can hardly fulfill its basic task of providing an overview of the arsenal of legal instruments, let alone being in a position to systematize them.[81] It is probably owing to legal science's traditional shyness of empiricism that numerous new developments in legal practice have been neglected.[82] Three catchwords sufficiently demonstrate the point.

For one, there is the decision addressed to Member States. Those theories that conceive all kinds of decisions unitarily as administrative acts of Community law will have difficulty examining it.[83] Since *A. Scherzbergs* innovative, though overly broad remark, that directives and decisions addressed to Member States are expressions of a single legal instrument,[84] the theory has hardly made any progress.[85] Case-studies of its practical use could be fruitful for the discussion, e.g., as a device for hierarchical communication between Union and Member

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[80] The opposite view – a dominant role of the type of act in the Union legal order – is rather common, see Biervert, see note 61, 106 et seq. ("Handlungsformengerichtetheit der europäischen Rechtsordnung").

[81] E. Schmidt-Aßmann, Die Lehre von den Rechtsformen des Verwaltungshandelns, *Deutsches Verwaltungsblatt* 1989, 533 (540).

[82] The lack of empirical research causes weaknesses even for advanced proposals for reform, cf. G. Winter, Reforming the Sources and Categories of European Law, in: Winter (ed.), *Sources and Categories of European Unions Law*, 1996, 13.

[83] A. Bockey, *Die Entscheidung der Europäischen Gemeinschaft*, 1997, 31; C. Junker, *Der Verwaltungsakt im deutschen und französischen Recht und die Entscheidung im Recht der Europäischen Gemeinschaft*, 1990, 164.

[84] A. Scherzberg, Verordnung – Richtlinie – Entscheidung, in: H. Siedentopf (ed.), *Europäische Integration und nationalstaatliche Verwaltung*, 1991, 17 (42).

[85] Recently U. Mager, Die staatengerichtete Entscheidung als supranationale Handlungsform, *Europarecht* (2001), 661.

State authorities in approval procedures involving both constitutional levels, as a device for cooperative planning within the context of the Structural Funds or as a device for granting Community benefits thereby using Member States' administrative capacities. The interplay of directives and decisions in a legislative association, such as in the single market law, could prove to be another rewarding area of research. Utilizing the empirical plurality of decisions addressed to Member States – beyond the well-known Commission decisions relating to state aids – could help to create a conception abstract enough to span the various policy fields in which it is used and encompass its multitudinous functions.

The gaps in research with regard to the addresseeless decision (in German *Beschluss*, in contrast to a decision in the sense of Art. 249(4) EG, that has an explicit addressee and is designated as *Entscheidung*) are even more dramatic. Without any attention worth speaking of in the scientific community, a binding Community instrument was developed that, in practice, is even used far more frequently than the directive.[86] Decisions without an explicit addressee are adopted in all policy fields and find a legal basis in nearly all enabling norms. They are of great importance for institutional self-organization as well as in external relations. The addresseeless decision won a certain degree of publicity as the standard instrument to adopt Community programs related to the budget, especially as the co-decision procedure is dominant here. The lack of differentiation between instruments and competences has resulted in the assumption that these budget related decisions form an instrument *sui generis* going unrecognized as a subspecies of the broader category. Community practice, however, developed coherent identifying features and has handled addresseeless decisions as routine for more than 20 years. The difficulties in distinguishing the decision/*Beschluss* from the

[86] According to the official "Directory of Community legislation in force" about 10 per cent of all acts that actually form current Union law are designated as "Beschluss" in their German heading. One has to add roughly the same number of addresseeless decisions which were used to conclude international agreements on behalf of the Community. For further statistics see A. von Bogdandy/J. Bast/F. Arndt, Handlungsformen im Unionsrecht: Empirische Analysen und dogmatische Strukturen in einem vermeintlichen Dschungel, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 62 (2002), 77 (90).

decision/*Entscheidung* are largely solved in all official languages as the former contains a unique introductory clause and, decisively, the final section omits an addressee to whom the decision is formally addressed.[87]

I propose that addresseeless decisions be interpreted as binding legal acts that are intended to directly cause a legal change in the Union legal order.[88] In terms of its formal structure the addresseeless decision is a single-stage instrument that has constitutive effect and enjoys general applicability. An addresseeless decision is not able to impose, either directly or indirectly, duties or obligations on private parties or Member States, but it can create actionable individual rights against the Union's institutions.[89] However, as the ECJ found with respect to the famous ERASMUS-decision, the Member States do have the duty to facilitate the practical results intended by an addresseeless decision.[90]

In the literature to date addresseeless decisions are considered to be atypical measures without a coherent legal regime. They are often brought into connection with completely different phenomena, such as the complementary law of the Member States, Council resolutions or other non-binding acts.[91] Others suspect a connection with enabling norms that do not specify the instrument to be used, whereby the German word "*Beschluss*" in this case is understood to substitute for a term specifying the instrument the act employs.[92] Usually the addresseeless decisions, together with all other measures that do not comply with the catalogues of instruments in the Treaties, are thrown into the catchall category of "acts *sui generis*". Once an act has been assigned to this category, one can only say that its possible legal effects can

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[87] In three of the official languages an adresseeless decision is already identifiable by its title: German distinguishes between *Entscheidung* und *Beschluss*, Dutch between *beschikking* and *besluit*, and Danish between *beslutning* and *afgørelse*.

[88] von Bogdandy/Bast/Arndt, see note 86, 99 et seq.; the author's doctoral thesis (University of Frankfurt am Main, in preparation) will contribute to the doctrine of the addresseeless decision.

[89] Case C-58/94, *The Netherlands* v. *Council*, [1996] ECR I-2169, para. 38; CFI, Case T-105/95, *WWF UK* v. *Commission*, [1997] ECR II-313, para. 55.

[90] Case 242/87, *Commission* v. *Council*, [1989] ECR 1425, paras. 11 and 19.

[91] U. Everling, Probleme atypischer Rechts- und Handlungsformen bei der Auslegung des europäischen Gemeinschaftsrechts, in: R. Bieber/G. Ress (eds.), *Die Dynamik des Gemeinschaftsrechts*, 1987, 417.

[92] M. Schweitzer/W. Hummer, *Europarecht*, 1996, para. 412; Koopmans, see note 68, 697: "it is just something

only be judged on a case-by-case basis.[93] It is telling that publications recognizing the addresseeless decision as an independent legal instrument come from experts close to the institutions.[94] It is a harsh judgment on the current state of the theory of instruments that the institutions have long since had an established knowledge of this instrument, yet it has remained the 'secret knowledge' of their Legal Services due to a lack of scholarly attention.[95] Constructing conceptions by abstraction, a primordial task of the theory of instruments,[96] can no longer be left to the institutions as their 'in house' doctrine.

A third area still awaiting empirical research and theoretical systematization should be briefly mentioned: the non-binding acts in their various forms. The codified instruments – opinions and recommendations – enjoy a privileged attention that is hardly justifiable on substantive grounds. Comparatively little attention is given to the non-binding instrument most often used in practice: the resolution.[97] Perhaps the most intensive debate in the realm of non-binding instruments concerns the Commission's communication and its use as an administrative guideline addressed to the Member States.[98] Another line of discussion sees connections to the sources of international law, particularly soft law.[99] So far an overview of the non-binding

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the Council 'decided' ".

[93] Oppermann, see note 73, paras. 536 and 577; B. Biervert, in: J. Schwarze (ed.), *EU-Kommentar*, 2000, Art. 249 EC, para. 5.

[94] J.-L. Dewost, Décisions des Institutions en vue du développement des Compétences et des Instruments juridiques, in: Bieber/Ress, see note 91, 321 (327); I. E. Schwartz, in: von der Groeben/Thiesing/Ehlermann, see note 63, Art. 235 EC (Maastricht), para. 344.

[95] There is a lack of transparency in the institutions' practice, too. The Rules of Procedure of the Commission (adopted 29 November 2000, OJ L 308, 26) still limits its scope to the quintet of instruments foreseen in Art. 249 EC; likewise, until recently the Council's Rules of Procedure ignored addresseeless decisions in its annexed "Provisions concerning the form of acts". For the first time Council Decision of 22 July 2002 adopting the Council's Rules of Procedure (see note 19) recognizes the addresseeless decision as a regular Community instrument (cf. the German, Dutch, and Danish versions of Annex IV, letter B).

[96] Schmidt-Aßmann, see note 81, 534.

[97] On the resolution's development Dewost, see note 94, 327 et seq.; statistics and case-law in von Bogdandy/Bast/Arndt, see note 86, 120 et seq.

[98] G. della Cananea, Administration by guidelines, in: I. Harden (ed.), *State aid: Community law and policy and its implementation in Member States*, 1993, 61; J. Gundel, Rechtsschutz gegen Kommissions-Mitteilungen zur Auslegung des Gemeinschaftsrechts, *Europarecht* 1998, 90; H. Adam, *Die Mitteilungen der Kommission: Verwaltungsvorschriften des Europäischen Gemeinschaftsrechts?*, 1999; A.-M. Tournepiche, Les Communications: instruments privilégiés de l'action administrative de la Commission européenne, *Revue du Marché Commun et de l'Union Européenne* 454 (2002), 55.

[99] M. Bothe, "Soft Law" in den Europäischen Gemeinschaften?, in: I. von Münch (ed.), *Staatsrecht, Völkerrecht, Europarecht: Festschrift für Hans-Jürgen Schlochauer*, 1981, 761; K. C. Wellens/G. M. Borchardt, Soft Law in

instruments, worked out in a system that shows how the various types of non-binding acts relate to their different functions and how they relate to the types of binding acts, is missing.

III. CONSTITUTIONAL FRAMEWORK

1. Art. 249 EC as the Central Norm

In view of the uncertain and incomplete theoretical basis, it appears appropriate to take a step back and reconsider the constitutional basis for the Union's legal instruments. Art. 249 EC is the uncontested central norm for the system of instruments and has itself only been amended once, namely, when the Maastricht Treaty introduced the co-decision procedure. Art. 249 EC served as the model for Art. 110 EC, which recognizes the power of the ECB to adopt regulations, decisions, recommendations and opinions by its decision-making bodies.[100] The legal effects attributed to ECB instruments are precisely those of Art. 249 EC, so Art. 110 EC contains identical instruments.[101] Decisions pursuant to Art. 34 EU and the framework decision, on the other hand, are considered to be distinct legal instruments under the EU Treaty characterized precisely by their differences to the instruments contained in Art. 249 EC.

a) Normative Content of Art. 249 EC

In view of its remarkable stability and ramifications, there is surprising uncertainty as to the

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European Community Law, *EL Rev.* 14 (1989), 267.

[100] The Protocol on the Statute of the European System of Central Banks and of the European Central Bank (ESCB-Statute) invented two new instruments, whose operating mode was unknown to the Treaties: guidelines and instructions of the ECB, cf. Art. 12.1 ESCB-Statute. These instruments are binding upon the national central banks to whom they are addressed, Art. 14.3 ESCB-Statute. In contrast to Community decisions pursuant to Art. 249(4) EG these acts are addressed to Member States' administrative bodies, not to the Member States as such. On the one hand this follows from the independence of the national centrals banks from any instructions from Member States' Governments, Art. 108 EC. On the other hand this operating mode of ECB-instructions and ECB-guidelines emphasizes that the national central banks are an integral part of the ESCB, which is centrally governed by the decision making bodies of the ECB. In organizational terms the national banks are Member States' bodies, functionally they act solely as Community bodies, M. Selmayr, Wirtschafts- und Währungsunion als Rechtsgemeinschaft, *Archiv des öffentlichen Rechts* 1999, 357 (376 et seq.).

[101] B. Smulders, in: von der Groeben/Thiesing/Ehlermann, see note 63, Art. 108a EC (Maastricht), para. 4; C. Zilioli, in: von der Groeben/Thiesing/Ehlermann, see note 63, after Art. 109m EC (Maastricht), Art. 12 ESCB-Statute, para. 7.

legal meaning of Art. 249 EC. It has already been mentioned that Art. 249 EC reflects aspects of the legal quality of EC law and how collisions with national law are to be resolved.[102] Not a few authors saw in the formulation "in accordance with the provisions of this Treaty" an expression of the principle of attributed powers, now enacted into positive law in Art. 5(1) EC.[103] However, this formula expresses a strict hierarchy between (primary) Treaty law and (secondary) derived law, which is a precondition that makes the principle of attributed powers work.[104] Furthermore, by placing its instruments in the hands of the Commission, of the Council, and of Council and Parliament acting jointly "in order to carry out their tasks", Art. 249(1) EC qualifies these institutions as the Union's legislative institutions.[105] But what is the legal content of Art. 249 EC with regard to the types of acts? What legal requirements are connected to what legal consequences?

A minimalist interpretation reads the catalogue in Art. 249 EC as parenthetical definitions, concretizing other Treaty provisions that use its terminology. Art. 249 EC informs these provisions, as Advocate-General *Lagrange* said.[106] Convincing results can be achieved by this approach for enabling norms that specify the instrument that is to be used: thus Art. 249(5) EC makes clear that recommendations and opinions, which Art. 211 EC empowers the Commission to adopt, "have no binding force". If, however, one can also conclude from Art. 249(2) EC that under Art. 94 EC the Council may adopt only acts that are directly applicable in all Member States,[107] is rather questionable. Connecting Art. 249 EC to other norms simply postpones the problem: it has to be resolved by interpreting Art. 249 EC itself.

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[102] G. Schmidt, in: von der Groeben/Thiesing/Ehlermann, see note 63, Art. 189 EC (Maastricht), para. 1; Nettesheim, see note 63, Art. 249 EC, para. 1.

[103] Ipsen, see note 26, 20/21; Biervert, see note 93, Art. 249 EC, para. 12.

[104] Ruffert, see note 68, Art. 249 EC, para. 9; E. Grabitz, in: Grabitz/Hilf, see note 63, Art. 189 EEC (Rome), para. 20; on the interrelation between the principles of positive and negative legality see A. von Bogdandy/J. Bast, The European Union's vertical order of competences: The current law and proposals for its reform, *CML Rev.* 39 (2002), 227 (229 et seq.).

[105] In exact terms this should read: two institutions and one combination of institutions. Acts adopted under the co-decision procedure are attributed both to Parliament and the Council. In accordance with the Treaties, Parliament acting alone has no significant role as a legislator.

[106] Opinion of A.G. Lagrange, Joined Cases 16/62 & 17/62, see note 31.

According to prevalent formulations, Art. 249 EC denotes the "essential characteristics"[108] or the "structure and effects"[109] of the Article's instruments. Art. 249 EC thus designates what legal effects are caused by an act of type *X* according to the relevant paragraph. On this 'natural' reading it is understandable why the Court does not draw consequences from the silence of a particular paragraph:[110] it would be an exercise in futility to exhaustively list the legal effects of an instrument. The question then arises as to which elements must be present to indicate whether an act affiliates to the instrument of type *X*. The common understanding, when confronted with this question, reverses its logic and deduces the instrumental identity of the act in question from the presence of certain elements also contained in Art. 249 EC. The case-law on Art. 230 EC shows numerous formulations that use Art. 249 EC as a definition of effects typical for a certain instrument. In other words, it is claimed that a measure must be a directive, for example, because it has the legal effects of a directive, and that it must have these legal effects because it is a directive. Such a circular logic can only be avoided if the instrumental identity of an act can be determined by a method other than that of simply attributing to it precisely that instrument's legal effects. The legislative institutions' practice has ameliorated this problem from the start by designating what instrument the act is supposed to be in its title, complemented with fixed introductory and concluding clauses. It is significant that in almost all cases in which the legal effects of an act were contested before the Court – e.g., the direct effect produced by the provisions of a directive – the instrumental identity of the act (the fact that it *is* a directive) was not in dispute. However, where the category that the act belongs to was contested – e.g., where one party claimed that the act is a directive and the other claimed it is a recommendation – the ECJ tried to avoid the circular argument above, usually resorting to competence issues. Thus it answered the question

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[107] Möller, see note 22, 14 et seq.
[108] G. Schmidt, in: von der Groeben/Thiesing/Ehlermann, see note 63, before Arts. 189–192 EC (Maastricht), para. 4.
[109] Biervert, see note 93, Art. 249 EC, para. 1.

whether an act designated as a recommendation was a "true recommendation" by reference to the fact that the legal basis given for the act does not provide for the adoption of a binding measure.[111] Not even the ECJ can derive a norm's "legal nature" from its pure content.

b) Limitations Imposed by Art. 249 EC

The cross-referencing of Community instruments with its defined legal effects was never so tight that the legal effects set forth in Art. 249(2) – (5) EC could not be attributed to instruments other than those catalogued in Art. 249 EC. Both in practice as well as in legal science there is broad consensus that such a limitation in the sense of a *numerus clausus* was not intended by the 'Treaty fathers'.[112] The usual argument for the incompleteness of the listing is that the Treaties contain enabling norms that do not specify what type of act shall be used.[113] On closer inspection this turns out to be as circular as the contention that the instruments foreseen in Art. 249 EC are not entirely adequate under some enabling Treaty norms:[114] in both cases it is assumed that an alternative form of action is a real option. Yet it is precisely this assumption that must be proved. A more substantial intimation is the instrument-neutral formulation "act" found in Art. 230(1) and 234(1) EC.[115] Yet once again it must first be demonstrated why the term "act" in these Articles should not – beyond the scope of Art. 249 EC – be limited to specialized instruments expressly foreseen in the Treaties, such as the budget or the several Rules of Procedure. Nonetheless, the open wording ensures that the development of new instruments will not present the system of legal review with

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[110] Case 41/74, see note 30, para. 12.
[111] Case 322/88, see note 58, para. 15.
[112] Wohlfarth, see note 77, Art. 189 EEC (Rome), para. 18; Everling, see note 38, 53; Rabe, see note 22, 47; of late years S. Douglas-Scott, *Constitutional Law of the European Union*, 2003, 113 et seq.; K. Lenaerts/P. van Nuffel/R. Bray, *Constitutional Law of the European Union*, 1999, No 14-089; Schmidt, see note 102, Art. 189 EC (Maastricht), para. 15; Ruffert, see note 68, Art. 249 EC, para. 121; Nettesheim, see note 63, Art. 249 EC, para. 73; for a different opinion see R. Streinz, *Europarecht*, 1999, para. 375; ambiguously Oppermann, see note 73, para. 535: "Es gibt kein 'Typenerfindungsrecht' der Gemeinschaftsorgane." [The Community institutions have no 'right to invent types of acts'.], but see ibid., para. 577.
[113] Schweitzer/Hummer, see note 92, para. 412; Biervert, see note 61, 73.
[114] R. Bieber, *Verfahrensrecht von Verfassungsorganen*, 1992, 286.
[115] H.-W. Daig, *Nichtigkeits- und Untätigkeitsklagen im Recht der Europäischen Gemeinschaften*, 1985, para. 22.

insurmountable challenges. Legal science's willingness to accept the institutions' dynamism in creating and using new instruments stands in awkward counter-position to the theory of instruments' alleged functional task of working towards the principle of attributed powers.[116] An implied power of the institutions to create new legal instruments is only plausible if the limits placed on the Union's competence are respected. Art. 249 EC thus functions as a limit on the kinds of permissible Community instruments insofar as their legal effects must fall within the spectrum of legal effects foreseen by Art. 249(2)–(5) EC. It would therefore be *de constitutione lata* impermissible, for example, if the Council were to empower the Commission to adopt a new type of decision giving direct instructions to the Member States' administrative authorities instead of using a decision formally addressed to the Member States.[117] The further development of the system of legal instruments should be limited to combining those legal effects foreseen in the Treaties with each other and putting these new instruments into practice. Two principles will serve as criteria for material review: first and foremost, the principle of legal certainty, and second, the prohibition of evasion with respect to mandatory procedural provisions.[118] It would constitute an abuse of discretion if new instruments were created when there was no clear need to expand the spectrum of instruments. The constitutional limits of a system open to development are thus also determined relative to the *acquis* of already established legal instruments. A general principle of clarity of instruments[119] can therefore only have stable contours once the practical application of the legal instruments has been studied in detail.[120]

Perhaps the most important normative content of Art. 249 EC concerns not the relationship between the types of acts and their specific legal effects, but rather that between the instruments and the enacting institution(s). Since Art. 249 EC entrusts specifically these

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[116] Ipsen, see note 26, 20/23 et seq.; Kraußer, see note 76, 86.
[117] On guidelines and instructions of the ECB see note 100.
[118] Nettesheim, see note 63, Art. 249 EC, para. 75.
[119] Cf. Opinion of A.G. Tesauro, Case C-325/91, *France* v. *Commission*, [1993] ECR I-3283, paras. 21–21.

institutions with these instruments, it prevents their use by all other institutions and bodies, be they foreseen in the Treaties or auxiliary bodies created by the Treaty institutions.[121] The common *mantra* that Art. 249 EC is not exhaustive is thus insofar imprecise since, in relation to the institutions that may make use of the instruments listed in Art. 249(2)–(5) EC, it *is* exhaustive. This exclusivity is also strictly observed in practice. Of course the Treaties empower other institutions to create binding rules in specific cases, e.g., the European Parliament in Art. 190(5) and 195(4) EC, or expressly permit them to adopt binding acts, e.g., the rule-making bodies set up by international agreements, Art. 300(2) subparagraph 2 EC. For these types of acts those instruments contained in Art. 249 EC are not available. This limitation obviously applies to the Member State acting jointly through their representatives meeting in Council. Finally, Art. 249(1) EC requires a legal basis in "*this* Treaty", so that the Council acting under an enabling norm of the TEU is unable to avail itself of this provision.[122]

2. The Unity of Secondary Law

In addition to these normative contents, Art. 249 EC also permits light to be shed on the structure of secondary law. For the order of instruments foreseen in Art. 249 EC, hierarchy plays a far lesser role than is the case under national constitutional law.

a) Equality of Legislative Institutions

To begin with, the Community has, as can be seen in Art. 249(1) EC, not just one, but several legislative institutions. This is not as such unusual: all European states know delegated legislation or other kinds of rule-making by governmental institutions, and some constitutions

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[120] For a different approach see Biervert, see note 61, 105 et seq.
[121] Grabitz, see note 104, Art. 189 EEC (Rome), para. 17.
[122] The current law as registered by the "Directory of Community legislation in force" is composed of the instruments of Art. 249 EC with a portion of 71 per cent. Another 9 per cent goes to Community agreements under Art. 300 EC. The largest group falling outside the scope of Art. 249 EC are acts designated as "Beschluss", with a portion of 10 per cent. Roughly two thirds of the latter are attributed to the regular legislative institutions cited in Art. 249 EC, see von Bogdandy/Bast/Arndt, see note 86, 136.

even permit legislation by sub-national authorities, for example statutes adopted by the parliamentary assembly of a German or Austrian *Bundesland* or of a Spanish *communitad autonoma*. In national constitutional law, however, these concurrent law-making authorities are typically vested with their own typical instruments different from the parliamentary statute.[123] Even when the respective instruments share the same designation the constitutional order distinguishes the legal regimes according to the enacting authority, especially when the constitution gives a governmental institution the power to adopt a statute. Art. 249 EC provides no basis for such a distinction and the Court has rejected all attempts to distinguish the legal effects of an instrument according to the acting institution.[124] Contrary to the national states, in which the plurality of the sources of law was developed on the basis of different modes of creation or instances of legislation, Community law decoupled the process of law-making from the legal regime of its instruments. Consequently, a doctrine of sources in the narrow sense is largely inapplicable to the instruments of secondary law.

This insight can be made even more radical. The institutions not only make use of the same instruments, there is also no hierarchy between the institutions, something that has a central ordering function in the Member States. Community law employs the concept of institutional balance, that is, the balance between the various Treaty institutions. The core idea behind this constitutional principle is that each institution may only act in accordance with its respective powers attributed to it by the Treaties and, furthermore, that this horizontal order of competences may not be changed by the institutions.[125] The inter-institutional relationship is thus based on the autonomy and the equality of the institutions created by the Treaties.[126] This

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[123] Cf. F. B. Callejón, Das System der Rechtsquellen in der spanischen Verfassungsrechtsordnung, *Jahrbuch des öffentlichen Rechts der Gegenwart N.F.* 49 (2001), 413 (427).
[124] Case 41/69, *ACF Chemiefarma* v. *Commission*, [1970] ECR 661, paras. 60/62; Joined Cases 188/80–190/80, see note 65, para. 6.
[125] Case 25/70, *Köster*, [1970] ECR 1161, para. 4; Case 138/79, *Roquette Frères* v. *Council*, [1980] ECR 3333, para. 33; Case C-70/88, *Parliament* v. *Council*, [1990] ECR I-2041, para. 21.
[126] Joined Cases 7/56 & 3/57–7/57, see note 21; Case 204/86, *Greece* v. *Council*, [1988] ECR 5323, para. 17; Ch. Calliess, in: Calliess/Ruffert, see note 68, Art. 7 EC, para. 3; Nettesheim, see note 63, Art. 4 EC (Maastricht), para. 3.

implies a non-hierarchy between the legislative institutions as foreseen by Art. 249 EC and has the consequence that the legal acts of the different institutions generally enjoy the same rank within the hierarchy of norms.[127] The constitutional situation of a plurality of legislators of equal rank creates problems that, while largely unknown to national constitutional law, are well-known to national administrative law. In such constellations it is not the concept of rank, but rather the field of competence that carries the main burden of delimitating the respective powers.

There is a further consequence in this regard. Assuming there is a sufficient legal basis, there is nothing which would prevent an act adopted by one institution from being amended or even withdrawn by another institution.[128] When a norm collision between acts of different institutions occurs, the rule of *lex posterior derogat legi priori* applies.[129] Acts of secondary law are able to derogate from earlier acts of secondary law, irrespective of the enacting institutions.[130] This unfamiliar consequence could only be avoided if the horizontal order of competences perfectly apportioned the institutions' powers so that any derogation from the act of another institution would be *ultra vires*, falling outside the scope of competence assigned to that institution by the Treaties. In fact Community law tries to realize this strict delimitation of powers in many areas, but there are also counterexamples where the order of competences intentionally permits different institutions to legislate concurrently by providing overlapping enabling norms. The relationship between Art. 95(1) and Art. 86(3) EC is one example for that. The Treaties, and even more often acts of secondary law, use another technique as well, namely, reserving to the Council the right to override acts adopted by the

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[127] The equality of the acts adopted by the Commission and the Council is undisputed when both institutions employ a legal basis directly foreseen in the Treaty, see e.g. Grabitz, see note 104, Art. 189 EEC (Rome), para. 21. The critical case of delegated legislation will be discussed below, see lit. d).

[128] This is known from national administrative law, e.g., in Germany §§ 48(5) and 51(4) *Verwaltungsverfahrens-Gesetz*.

[129] The *lex-posterior*-principle prevails over substantive considerations, Case C-46/98 P, *Petrides* v. *Commission*, [1999] ECR I-5187, paras. 40–41.

[130] Unconvincingly Schmidt, see note 102, Art. 189 EC (Maastricht), para. 23; Ruffert, see note 68, Art. 249 EC, para. 11; Biervert, see note 93, Art. 249 EC, para. 10.

Commission.[131]

b) Equality of Legislative Procedures

The insight about one institution's ability to derogate from another institution's act is equally applicable to acts adopted under different procedures: Community law does not recognize a hierarchy of legislative procedures.[132] The *lex-posterior* principle is thus to be applied when there has been a change in the competences by Treaty amendment. If an act was adopted under a provision which was later amended, it is the procedure under the provision in force that is relevant. This is true even if the earlier act was adopted under a stricter legislative procedure (or by a different institution).

This mechanism can also be observed when the scope of application of two enabling norms overlaps. In its case-law on the choice of the appropriate legal basis the ECJ[133] does not assume that enabling norms have no overlapping scope of application, but rather that there is, namely for procedural reasons, a need to define as clearly as possible which enabling norm(s) shall apply to the measure to be adopted. If a measure's content falls predominantly within an enabling norm's scope of application, even though other norms are incidentally or indirectly affected, the measure must be founded on a single legal basis, namely that required by the

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[131] Expressly foreseen in primary law, e.g., in Art. 88(2) EC. For an example based on secondary law see Council Decision of 31 March 1998 amending Commission Decision 97/534/EC on the prohibition of the use of material presenting risks as regards transmissible spongiform encephalopathies (98/248/EC), OJ L 102, 26 (no longer in force). The Council's decision as well as the amended Commission's decision employed the identical legal basis, several directives of the Council. It is typical for the management procedure that the Council reserves to itself the right to amend a habilitated act of the Commission which shall apply immediately, cf. Art. 4(3) and (4) of Council Decision of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (1999/468/EC), OJ L 184, 23; the Court upheld this practice, Case 30/70, *Scheer*, [1970] ECR 1197, para. 21.

[132] The opposite view is still dominant: Schmidt, see note 102, Art. 189 EC (Maastricht), para. 23; Grabitz, see note 104, Art. 189 EEC (Rome), para. 22; Biervert, see note 93, Art. 249 EC, para. 10; S. Magiera, Zur Reform der Normenhierarchie im Recht der Europäischen Union, *integration* 18 (1995), 197 (200); support from P. Gilsdorf/R. Priebe, in: Grabitz/Hilf, see note 63, Art. 39 EC (Maastricht), para. 48a.

[133] For an overview, see M. Nettesheim, Horizontale Kompetenzkonflikte in der EG, *Europarecht* 1993, 243; N. Emiliou, Opening Pandora's Box: the Legal Basis of Community Measures before the Court of Justice, *EL Rev.* 19 (1994), 488; Ch. Trüe, *Das System der Rechtsetzungskompetenzen der Europäischen Gemeinschaft und der Europäischen Union*, 2002.

main or predominant purpose or component.[134] The incidental aims or effects do not require a double legal basis, which would necessitate that the material and procedural requirements of both enabling norms be observed.[135] This 'center of gravity'-doctrine contains a suppressed assumption that has significant ramifications for the structure of secondary law: an act legally adopted has the potential of derogating from previous acts that fall within the scope of other enabling norms,[136] without requiring that the procedural requirements relevant for the adoption of the latter are observed.[137] Obviously, the application of the *lex-posterior* rule does not require that the legislative procedures be parallel. The principle in French public law known as the *parallélisme des formes*[138] is not consistently applicable in Union law.[139]

This constitutional situation has not been changed by the introduction of the co-decision procedure. Rather, acts adopted jointly by the European Parliament and the Council have been seamlessly added to the various equal-ranking legislative procedures.[140] This innovation of the Treaty of Maastricht was preceded by a – still continuing[141] – 'reform-discussion' concerning an appropriate hierarchy of norms. At its core, this discussion was a debate about the role of the European Parliament in the Union's constitutional scheme. The creation of a new layer of

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[134] Case C-70/88, see note 71, para. 17; Case C-42/97, *Parliament* v. *Council*, [1999] ECR I-869, para. 40; Joined Cases C-164/97 & C-165/97, *Parliament* v. *Council*, [1999] ECR I-1139, para. 14; Case C-491/01, *BAT et al.*, Judgment of 10.12.2002, para 94.

[135] When a recourse to such a dual legal basis is not permissible because the legislative procedures are incompatible with one another, and at the same time the act simultaneously pursues a number of objectives, indissociably linked, without one being secondary and indirect in relation to the other, even a main objective must be achieved under a 'wrong' legal basis, Case C-300/89, *Commission* v. *Council*, [1991] ECR I-2867, paras. 17–21; Opinion 2/00, *Cartagena Protocol*, [2001] ECR I-9713, para 23.

[136] The same conception applies to delimit the competences of the Union from those of the Member States, see joined Cases C-95/99–C-98/99 & C-180/99, *Khalil et al.*, [2001] ECR I-7413, paras. 37 and 56.

[137] Cf. Case 165/87, *Commission* v. *Council*, [1988] ECR 5545, para 17; *in nuce* already in Case 111/63, *Lemmerz-Werke* v. *High Authority*, [1965] ECR (English Ed.) 677 et seq.

[138] Th. Schilling, Rang und Geltung von Normen in gestuften Rechtsordnungen, 1994, 190.

[139] Cf. Opinion of A.G. Darmon, Case 16/88, *Commission* v. *Council*, [1989] ECR 3457, para. 26. Indisputably the principle of *parallélisme des formes* is applicable when only one enabling norm is relevant, Case C-292/95, *Spain* v. *Commission*, [1997] ECR I-1931, para. 30; Opinion of A.G. Mischo, Cases C-248/89 and C-365/89, *Cargill*, [1991] ECR I-2987, para. 38.

[140] Case C-259/95, *Parliament* v. *Council*, [1997] ECR I-5303, para. 27; Parliament based its claim on the wording of Arts. 229, 230, 249, 250 and 251 EC, but the Court didn't follow the idea that acts adopted under the co-decision procedure are 'untouchable', ibid., para. 24.

[141] A. Tizzano, La hiérarchie des normes communautaires, *RMUE* 1995, 219; Magiera, see note 132; P.-Y. Monjal, La Conférence intergouvernementale de 1996 et la hiérarchie des normes communautaire, *RTDE* 32 (1996), 681; R. Bieber/I. Salomé, Hierarchy of Norms in European Law, *CML Rev.* 33 (1996), 907; H. Hofmann,

secondary law above current secondary law was demanded, the new layer comprising all measures for which Parliament has (shared) responsibility. The 1991 draft of the Luxembourg Presidency expressly foresaw a 'Community statute' prevailing over all other legal instruments.[142] The Maastricht conference decided against such a revolution. Rather, the TEU introduced the co-decision procedure as the future standard method for securing democratic legitimacy, but it refrained from introducing a hierarchical distinction between secondary legislative measures. Instead, it opened the spectrum of regular instruments to the co-decision legislator by amending Art. 249(1) EC. Thus, the step-by-step process of expanding the scope of application of Art. 251 EC to other areas was made possible without requiring that a new hierarchy of norms worked out for every Treaty amendment. The Treaties' allocation of procedures and competences has never been and is not now an expression of a coherent 'grand scheme', but rather reflects political compromises between different national interests and constitutional politics. A vertical ordering principle for secondary law cannot be derived from the horizontal order of competences.

c) Equality of Binding Instruments

If secondary law cannot be put into a hierarchical system based on the author of a measure nor on procedural aspects, perhaps a hierarchy could be established on the basis of the type of instruments? Such an 'superior/inferior' relationship cannot be read out of Art. 249 EC, even if the arrangement of the instruments' listing is sometimes construed in this manner.[143] Some authors have taken it as being absolutely necessary to the rule of law that criteria for a hierarchical order of instruments be developed.[144] However, a convincing demonstration of

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Normenhierarchien im europäischen Gemeinschaftsrecht, 2000.

[142] Non-Paper of the Luxembourg presidency of 17 April 1991, published in: W. Weidenfeld (ed.), *Maastricht in der Analyse*, 1994, 265 (288).

[143] Louis, see note 23, 144.

[144] Fuß, see note 72, 330.

this thesis has as yet to be produced.[145] In contrast to national constitutional law, Community law must largely forego the structuring order a dominant instrument would bring by establishing a reference point – similar to the statute's role within the Member States – for the rank of all other sources of law.[146] Nor can the regulation do this. Apodictic dicta, such as that a directive can never derogate from a regulation,[147] probably arise from the desire to yield to the regulation the pride of place similar to that of a statute, being untouchable by any other instrument.[148] There is no convincing argument against the use of an instrument other than that being used in the past on the occasion of regulatory reform, as the proportionality principle requires this possibility to be considered.[149] In practice there are innumerable examples of regulations, directives, adresseeless decisions and decisions addressed to Member States that complement, derogate from or abolish each other.[150] Basically, different legal instruments can derogate from each other, which is simply a consequence of the equal rank of the adopting institutions. The conservatism as to the choice of instruments observed in practice is not an expression of a legal inability.

Some limitations on the interchangeability of the instruments are imposed on what may be termed the specific 'operating mode' of the legal instrument involved, i.e., the totality of the legal effects an act causes resulting simply from its affiliation to a certain type of act. Binding force is the legal effect most relevant with respect to the interchangeability of instruments. Art. 249 EC indicates that a clear division can be made between two groups of instruments: between binding and non-binding instruments. This distinction can also be employed beyond

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[145] Schwarze, see note 74, 235.
[146] A. Ross, *Theorie der Rechtsquellen* (1929), 1989, 34 et seq., Callejón, see note 123, 421 et seq.
[147] Grabitz, see note 104, Art. 189 EEC (Rome), para. 22.
[148] P. Laband, *Das Staatsrecht des deutschen Reichs*, vol. 2 (1911), 1964, 68.
[149] Protocol on the application of the principles of subsidiarity and proportionality (1997), No 6.
[150] See e.g. Council Decision 92/438/EEC of 13 July 1992, OJ L 243, 27, which amended *inter alia* Council Directive 91/628/EEC of 19 November 1991, OJ L 340, 17; the amended directive served as legal basis for Council Regulation (EC) No 1255/97 of 25 June 1997, OJ L 174, 1. In fact, there are only few examples for directives amending a regulation, e.g., Council Directive 83/515/EEC of 4 October 1983, OJ L 290, 15, amending Council Regulation (EEC) No 1223/83 of 20 May 1983, OJ L 132, 33; or Council Directive 96/26/EC of 29 April 1996, OJ L 124, 1, amending Council Regulation (EEC) No 3572/90 of 4 December 1990, OJ L 352,

the scope of Art. 249 EC. With the inclusion of recommendations and opinions, Art. 249 EC opted for an extensive concept of law. The theory of instruments must therefore not only take the relevance of non-binding acts for the legal order seriously but must also construe an act's non-binding character as part of the *legal* effects it produces. Nonetheless, a non-binding act is not capable of derogating from a binding act.[151] Therefore the totality of acts adopted in the form of a non-binding instrument build an independent ('tertiary') group below that of the binding instruments. This lower rank is due to the specific operating mode of these instruments.[152]

d) Implementing Measures not of an Independent Rank

The foregoing analysis of the structure of secondary law showed a picture of a horizontally organized body of law.[153] The thesis of a single rank of secondary (derived) law, however, is confronted with the weighty counterargument represented by so-called implementing measures.

The term 'implementing measures' refers to legal acts that do not find their legal basis directly in the Treaty, but rather in an act of secondary law.[154] The exercise of implementing powers requires the delegation of power in a preceding act. The latter is usually called a 'basic act' or, borrowing from Latin terminology, an 'act of habilitation'. Art. 202 and 211 EC indicate that this conferral of powers is the normal case in Community legislation.[155] Accordingly, the institutions delegating (habilitating) powers may be either the Council or

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[151] Case C-149/96, *Portugal* v. *Council*, [1999] ECR I-8395, para. 56.

[152] R. Baldwin, *Rules and Government*, 1995, 226.

[153] On should recall that this contribution does not address instruments of international law and their level of rank-order in Union law; for the hierarchization effected by Art. 300(7) EC see R. Uerpmann, Völkerrechtliche Nebenverfassungen, in: A. von Bogdandy (ed.), *Europäisches Verfassungsrecht*, 2003, 339 (344).

[154] The implementing measures of the Union's institutions must not be confused with implementing measures of the Member States. Implementation of Community law through Member State's action is itself an umbrella concept bundling together legislative transposition and administrative application; see Ch. Möllers, Durchführung des Gemeinschaftsrechts, *Europarecht* (2002), 483.

[155] For a general discussion on habilitated decision-making, see M. Andenas/A. Turk (eds.), *Delegated legislation and the Role of Committees in the EC*, 2000; C. Joerges/E. Voss (eds.), *EU Committees: Social regulation, Law and Politics*, 1999; for the procedural aspects, see K. Lenaerts/A. Verhoeven, Towards a Legal

Council and Parliament acting jointly under the co-decision procedure. Art. 202 EC names both the Commission and the Council, which may "reserve the right ... to exercise directly implementing powers itself" as institutions exercising delegated (habilitated) powers.[156] In addition, there is habilitated rule-making practiced by the ECB.[157] The Court has declared the conferral of powers on Treaty institutions as being *prima facie* permissible,[158] thereby employing a broad concept of 'implementation', encompassing legislation in the form of all instruments as well as partial amendment of the provisions of the basic act.[159] A habilitated act must, however, be consistent with the procedural as well as the material requirements set forth in the basic act, even if the institution acting is the same institution that delegated the power to act (as can occur particularly when the Council reserves the right to exercise implementing powers itself).[160] In case of conflict, the basic acts prevails: an institution that adopts an habilitated act which is inconsistent with the basic act acts *ultra vires*.[161]

Doesn't this bifurcation of secondary law into basic acts and implementing acts indicate that there is a full-fledged rank-order within secondary law?[162] The relationship between acts directly based on the Treaties and those based on an act of derived law would then be just the same as between primary and secondary law. One would have to conceptualize this

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Framework for Executive Rule-Making in the EU?, *CML Rev.* 37 (2000), 645.

[156] An institution's self-authorization is attractive, because the procedure foreseen for the adoption of a habilitated act may be different from that of its basic act, whilst both acts are attributed to the same institution. A constitutive type of self-authorization is only at hand when the implementing measures need not observe the procedure relevant for the basic act, Case C-58/94, see note 89, paras. 40 and 42 et seq. Council self-authorization is a common practice: roughly 10 per cent of the Council's acts in force are founded on a legal basis in secondary law. Examples for Commission self-authorization are rather rare. In this case the basic act needs the Council's approval, yet the habilitated act does not, e.g., Commission Regulation (Euratom) No 220/90 of 26 January 1990, OJ L 22, 56, is based on Art. 38 of Commission Regulation (Euratom) No 3227/76 of 19 October 1976, OJ L 363, 1; the latter is based on Art. 79(3) Euratom-Treaty.

[157] E.g., European Central Bank Regulation (EC) No 2157/1999 of 23 September 1999, OJ L 264, 21, is based on Art. 6(2) of Council Regulation (EC) No 2532/98 of 23 November 1998, OJ L 318, 4.

[158] Case 25/70, see note 125, para. 6; Case 23/75, *Rey Soda*, [1975] ECR 1279, paras. 10/14.

[159] Case 41/69, see note 124, paras. 60/62; Case 16/88, see note 139, para. 11; Case C-417/93, *Parliament* v. *Council*, [1995] ECR I-1185, paras. 29–30.

[160] Case 38/70, *Tradax*, [1971] ECR 145, para. 10; Joined Cases 9/71–11/71, *Compagnie d´approvisionnement, de transport et de credit et al.* v. *Commission*, [1972] ECR 391, paras. 12–25; Case 46/86, *Romkes*, [1987] ECR 2671, para. 16.

[161] Case 6/88, *Spain* v. *Commission*, [1989] ECR 3639, para. 15; Case C-156/93, *Parliament* v. *Commission*, [1995] ECR I-2019, para. 13; Case C-103/96, *Eridania Beghin-Say*, [1997] ECR 1453, para. 20.

[162] H. Kelsen, *Reine Rechtslehre* (1960), 1992, 228 et seq.; Ross, see note 146, 308 et seq.

relationship as a hierarchy of norms, with the consequence that the higher law enjoys supremacy (*lex superior derogat legi inferiori*).

Many authors come to this conclusion without, however, expressly arguing the case.[163] According to this conception a habilitated act must not only be consistent with the act it is based on, but also with all other acts that are to be found on the same level as the basic act in question. Every act directly based on a Treaty norm would serve as a standard-establishing norm for every habilitated act: this resistance to derogation – the suspension of the *lex-posterior* rule, the application of the *lex-superior* rule – is the practical consequence when one conceptualizes implementing measures as a level of a rank-order. The unmistakable model for this conception is the relationship between statutes and regulations, as it is commonly known to the Member States' constitutional orders.[164] This analogy has the added attraction of being able to be translated into the accustomed terminology of the separation of powers doctrine: implementing measures could be attributed to the executive branch, whereas legislation directly based on the Treaty could be understood as being legislative in character.[165]

There are, however, considerable concerns *de lege lata*. It is already questionable whether a sufficient material content can be found in legal reality (beyond the formal criteria being based on derived enabling norm) which would justify talking about an 'implementing character' of the legal act in question. Considerations of legal logic also speak against construing the rank of an act's legal basis as being constitutive for the rank of that act.[166] Thus, on closer inspection, the relationship between statutes and regulations in national legal orders, at least as it pertains to the interaction between different legal instruments, proves to be the

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[163] Lenaerts/van Nuffel, see note 112, No 14-039; H. Schmitt von Sydow, in: von der Groeben/Thiesing/Ehlermann, see note 63, Art. 155 EC (Maastricht), para. 74; Schmidt, see note 102, Art. 189 EC (Maastricht), para. 23.

[164] A. von Bogdandy, *Gubernative Rechtsetzung*, 2000, 227 et seq., on the exceptional case of Arts. 34 and 37 *Constitution française* see ibid., 262 et seq.

[165] K. Lenaerts, Some Reflections on the Separation of Powers in the European Community, *CML Rev.* 28 (1991), 11 (17 et seq., 30 et seq.); Douglas-Scott, see note 112, 125.

[166] Indeed, in national constitutional law the rank of regulations is equal irrespective of whether the governmental power follows from parliamentary delegation or from a constitutional provision, von Bogdandy,

wrong point of reference. The Spanish and Italian model of delegated legislation (*decreto legislativo*) far more convincingly solves the problem of habilitated acts.[167] It should be noted that this is a different conception of delegated legislation than that under the British constitution. When the Spanish Constitution requires the adoption of a *decreto legislativo,* this delegated power exercised by the Government leads to laws having the rank and form of a *statute* (not of a regulation) that can depart from or amend other statutes, including those enacted by the Spanish Parliament. The only exception to this rule is that it cannot derogate from the delegating statute itself.[168] This is exactly the legal relationship between a habilitated act of Community law and all other acts directly or indirectly derived from the Treaties. Following the model of *decreto legislativo,* there are partial hierarchies within secondary law insofar as a habilitated act cannot derogate from its specific basic act unless the latter explicitly permits this.[169] The hierarchy so established is only *relative* and does not imply a generalized hierarchy with respect to other acts of derived law.[170] Habilitated acts belong to the single rank of secondary law. In case of conflict with other acts of derived law the normal *lex posterior* rule applies, so none of the latter can serve as standards for the legality of the habilitated act (except the specific basic act). In how far a habilitated act is able to amend an older act of secondary law depends solely on the scope of the powers conferred by the basic act.

e) Is the Lack of Hierarchy an Anomaly of the System?

If one overlooks the peripheral group of non-binding acts, secondary law appears to be a

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see note 164, 251 et seq.

[167] Art. 82 *Constitution Española,* Art. 76 *Constituzione italiana*; see I. de Otto, *Derecho constitutional: Sistema de fuentes*, 1988, 182 et seq.; G. Zagrebelsky, *Manuale di diritto constituzionale, Vol. 1: Il sistema delle fonti del diritto*, 1990, 208 et seq.

[168] von Bogdandy, see note 164, 295.

[169] Different Art. 83 lit. a) *Constitution Española*: "Basic laws may in no case authorize the modification of the basic laws." In the Union's legal order a habilitated act may amend provisions of its basic act if the amended provision is "non-essential", Art. 2 lit. b) of Council Decision 1999/468/EC (see note 131).

[170] The conception of partial hierarchy between acts of secondary law equally applies when primary law so orders; on the hierarchization effected by Art. 202 EC see Case C-378/00, *Commission* v. *Parliament and*

surprisingly modern, democratic 'society', where there are no differences according to birth or rank – one nation under a common ruler: the Treaty law. Not a few find this non-hierarchical order suspect, and the absence of an "appropriate hierarchy between the different categories of acts"[171] is considered to be a systemic deficiency of Community law.[172]

It should be born in mind, first, that the hierarchical order of instruments in national constitutional law goes together with the distribution of governmental functions to the various constitutional institutions via legal instruments. The higher rank of a statute is both historically and systematically explained by the fact that this instrument usually is assigned to a parliamentary procedure.[173] Functionally the domain of the law (*Gesetzesvorbehalt*) is a prerogative of the parliament, so that the legal profile of a statute is indivisibly connected to parliament's direct democratic legitimacy and to the legislative procedure's deliberative and public quality.[174] In Union law the decoupling of legal instruments from respective procedures and enacting institutions finds its logical extension in the equality of rank between all binding instruments. A hierarchical order of instruments would only be rational if Union law were completely reconstructed. Such a project would have to justify the destructive consequences for the current legal order grown under a different premise.

This objection is not convincing with regard to the habilitated secondary law and the proposal to downgrade it to an instrument of lower rank, because Union law in fact distinguishes between basic acts and implementing measures by reference to their legislative procedures. Yet, the essential rationality of a hierarchy of norms is to create an adequate normative regime via multi-phased and multi-layered legislation, and this is already provided by the legal system today. The model of partial hierarchies guarantees that the more complex procedure is

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Council, Judgment of 21 January 2003, paras. 39–40.

[171] Declaration No 16 to the Maastricht Treaty on the hierarchy of Community acts.

[172] See note 141; Ch. Möllers, Verfassunggebende Gewalt – Verfassung – Konstitutionalisierung, in : von Bogdandy, see note 153, 1, 45 et seq.

[173] H. Heller, Der Begriff des Gesetzes in der Reichsverfassung, *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 4 (1928), 98 (118).

reserved for the preceding act fixing the essentials of a regulatory regime. The following level, which fleshes the regime out, can use streamlined procedures, but it does not call into question the compromises reached in the basic act. Anyhow, a cross-sectoral rank-order within secondary law is not essential. It should be born in mind that the empirical heterogeneity of habilitated acts is, in the end, a consequence of the Treaties' sectoral differentiation. In some areas the Treaties regulate the sector so heavily that even acts directly based on a Treaty provision can be construed as simply the implementation of a given regulatory program. In other areas the same level of concretization is first reached through further steps down the legislative road. It would shed no light on the subject, for example, to differentiate the Commission's habilitated powers regarding agricultural state aids (based on regulations) from exactly the same powers it has directly based on Art. 88 EC in other sectors: it would be obviously inadequate to place both groups of decisions addressed to Member States on different levels of a rank-order.

It is an essential objective of the Treaties to find solutions to sector specific problems by adequately distributing competences, so as to do justice to the involved interests and the projected need for legislation. Clearly, with respect to the current distribution of tasks between the institutions and to the multiplicity of legislative procedures, the Treaties do not always convincingly attain this objective. This does not change the fact that structuring the law of an organization whose competences are enumerated must largely assume a horizontal organization of its law founded on individual enabling norms. Under this circumstances the concept of competence plays the key role in preventing and solving conflicts within the law. However, for the horizontal order of competences to achieve a rationality similar to that found in the vertical order of instruments under national constitutional law, a basic hierarchy is necessary: primary law must be strictly binding on secondary law. So long as this claim to

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[174] von Bogdandy, see note 164, 199 et seq.

obedience is observed, the egalitarian social order of secondary law will not devolve into anarchy.

f) Unusual Demands on the Theory of Instruments

It is time to sum up some insights won in this section. The theory of instruments in Union law has to cope with tasks that are largely unknown in national constitutional law. Its material's structures require emancipation from accustomed paradigms and methods. The theory cannot employ the classical sources of law doctrine since the instruments of secondary law are not differentiated according to their modes of creation. Nor can it rely on the separation of powers tradition; the theory of instruments must rely on positive Treaty law to ensure a satisfactory distribution of powers to the constitutional institutions. Also the Kelsenian theory of a legal rank-order, as important as it is for the interrelation between primary and secondary law, has no explanatory force in the context of secondary law. Whereas in national law the hierarchical category of rank structures the legal system, in Union law this task is handed over to the competences set up by the Treaties. The doctrine of competences and the doctrine of instruments are thus functionally independent from each other. The individual instrument's legal regime must be developed at a distance from the doctrine of competences. Only in this way is the theory of instruments able to yield information on which legal instruments may be used under a particular enabling norm and which instrument in a concrete case will most effectively fulfill the intent followed by the adopting institution while at the same time intruding as little as possible on legally protected interests.

3. The Court's Conception

The aspect of legal protection has so far only been peripherally discussed. This appears to be a negligent omission, given that structuring the system of legal protection is considered to be

one of the main tasks of Community legal instruments.[175] The examination of acts from the perspective of judicial review can be said to be the dominant paradigm for the discussion about instruments.[176] The relevance of legal instruments for the regime of legal protection does not appear to be debatable since Art. 230 EC unmistakably operates with the terminology of Art. 249 EC. The Court itself has emphasized the tight connection between the two norms[177] and yet has gone another way since the beginning of the 70s. By now the system of legal protection of private persons' interests as well as the system of legal review as a whole have been completely severed from the system of legal instruments. A reconstruction of this situation belongs to the constitutional basics that this section shall develop. It will be argued that the ECJ gives the legislative institutions far greater power to define the type of act than is generally recognized.

a) The Concept of an Act According to Art. 230(1) EC

From the very beginning the Court saw itself confronted with conflicting objectives. On the one hand, the autonomy of Community legal instruments had to be protected and a 'flight to international law' prevented. The Court's policy on legal instruments cannot be understood without realizing the fear that the unique nature of the Community legal order would be called into question by reference to instruments and practices common in international law. The origins of the cautious reticence in recognizing that complementary law has legal effects similar to Community law can be found here.[178] The legal institution of the primacy of Community law functions as a firewall against all forms of Member State action, including those acts undertaken in the form of international law instruments, even if the agreement or

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[175] Schmidt, see note 102, Art. 189 EC (Maastricht), para. 26; H. Hetmeier, in: C. O. Lenz (ed.), *EGV-Kommentar*, 1999, Art. 249 EC, para. 5.

[176] On the recent discussion on effective legal protection of the individual see L. Allkemper, *Der Rechtsschutz des Einzelnen nach dem EG-Vertrag*, 1995; J. C. Moitinho de Almeida, Le recours en annulation des particuliers (article 173, deuxième alinéa, du traité CE), in: Due, see note 6, 849; K. Lenaerts, The legal protection of private parties under the EC Treaty, in: *Scritti in onore di Guiseppe Federico Mancini*, Vol. 2, 1998, 591; A. Ward, *Judicial Review of the rights of private parties in EC Law*, 2000.

[177] Recited in Case C-298/89, *Gibraltar* v. *Council*, [1993] ECR I-3605, para. 15.

"decision" in question is intended to be 'integration friendly'.[179] The ECJ has also served notice to the institutions that the legal effects typical of Community law can only be produced if the institutions use the instruments foreseen in the Treaties, or, as the ECJ put it, "uniform application of Community law can only be guaranteed if it is the subject of formal measures taken within the context of the Treaty".[180] This goal could happily be tied to another principle: the protection of the ECJ's monopoly on the authentic interpretation of Community law. The Court consequently rejects the notion that the Commission has the power to make binding interpretations of agricultural regulations via informal statements;[181] the Court even more strictly rejects the alleged binding force of interpretative "decisions" by the Administrative Commission on Migrant Workers,[182] an anachronistic anomaly of the Union's institutional system in the social security sector[183].

On the other hand, the ECJ has never seriously tried to prevent the institutions from having recourse to atypical instruments. The ideal of a limited canon of legal instruments appeared to the Court to be too risky and would have put the legislative institutions in heavy chains. Applying this ideal would probably have proven to be counterproductive: numerous acts by the institutions would have been deprived of the effects of Community law, the number of informal agreements among the Member States would have increased rather than decreased and in both cases it would have been impossible for the Court to control Member State compliance with obligations they had entered into.

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[178] Cf. Case 44/84, *Hurd*, [1986] ECR 29; Case C-6/89, *Commission* v. *Belgium*, [1990] ECR I-1595.

[179] Only once was this principle set aside by the Court: it qualified the Brussels Convention on Jurisdiction and Judgments as being a part of Community law, Case 25/79, *Sanicentral*, [1979] ECR 3423, para. 5; Case C-398/92, *Mund*, [1994] ECR I-467, paras. 11–12; today the Brussels Convention has been replaced with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 34, 1.

[180] Joined Cases 90/63 & 91/63, *Commission* v. *Belgium and Luxembourg*, [1964] ECR (English Ed.) 625 et seq.; Case 74/69, *Krohn*, [1970] ECR 451, para. 9.

[181] Case 132/77, *Société pour l'exportation des sucres* v. *Commission*, [1978] ECR 1061, paras. 11–21; Case C-50/90, *Sunzest* v. *Commission*, [1991] ECR I-2917, para. 13.

[182] Case 19/67, *van der Vecht*, [1967] ECR (English Ed.) 345 et seq.; Case 98/80, *Romano*, [1981] ECR 1241, para. 20.

[183] On the proposal to replace it with an advisory committee see von Bogdandy/Bast/Arndt, see note 86, 150–151 and 157–158.

Against this background the Court formulated a broad conception of what could constitute a Community act. The 'observance of the law', as the Court understood it, should extend to *all* actions of the institutions that fell within its jurisdiction. This requires a concept of a legal act that is largely divorced from its physical appearance. Even the most innocuous writings from a Commission department cannot escape being recognized by the Court as potentially containing a Community act.[184] The conflict of goals becomes acute when the informal act is at the Council level: on the one hand, ordinary international law operating between Member States is not recognized as Community law, yet on the other hand, the Council cannot escape the jurisdiction of the ECJ whenever it suits it simply by calling itself an intergovernmental conference. The ECJ found the surprising solution in the doctrine of competences: irrespective of its designation or formal appearance, an act within the meaning of Art. 230(1) EC is present when the subject matter the Member States' representatives agreed on in the institutional context of the Council falls within the exclusive competence of the Community – the ERTA jurisprudence was born.[185] If, to the contrary, an act of an institution is indisputably present, the act's contestability under Art. 230 EC does not necessarily require that the act in question have its legal basis in the EC Treaty.[186]

The scope of this approach itself indicates that a corrective was needed, one that the ECJ found in the flexible category of "legal effects" which an act is capable of having or intended to have.[187] In the terminology of Art. 249 EC, the term 'legal effects' can be translated as

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[184] Case 182/80, *Gauff* v. *Commission*, [1982] ECR 799, para. 18; Case 135/84, *F.B.* v. *Commission*, [1984] ECR 3577, para. 6; Case C-39/93 P, *SFEI et al.* v. *Commission*, [1994] ECR I-2681, para. 27. A reviewable act may also lie in undated decisions of the Commission implicitly referred to in later action, e.g. in a press release, Case C-106/96, *United Kingdom* v. *Commission*, [1998] ECR I-2729. However, in view of Art. 232 EC pure silence does not constitute a reviewable act, save as expressly foreseen in secondary law, CFI, Joined Cases T-189/95, T-39/96 & T-123/96, *SGA* v. *Commission*, [1999] ECR II-3587, paras. 26–27.

[185] Case 22/70, *Commission* v. *Council*, [1971] ECR 263, paras. 3/4; Joined Cases C-181/91 & C-248/91, *Parliament* v. *Council and Commission*, [1993] ECR I-3685, para. 12; on the different types of vertical competences see von Bogdandy/Bast, see note 104, 239 et seq; F. C. Mayer, Die drei Dimensionen der europäischen Kompetenzdebatte, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 61 (2001), 577 et seq.; M. Nettesheim, Kompetenzen, in: von Bogdandy, see note 153, 415 (445 et seq.).

[186] Case C-316/91, *Parliament* v. *Council*, [1994] ECR I-625, para. 9; Case C-170/96, *Commission* v. *Council*, [1998] ECR I-2763, paras. 16–17.

[187] Case 22/70, see note 185, paras. 38/42; Case 60/81, *IBM* v. *Commission*, [1981] ECR 2639, para. 9.

'binding force'. A normative basis for this conception can be found in Art. 230(1) EC, which opens the way for an action for annulment against acts "other than recommendations and opinions".[188] The ECJ passes over the methodological problems of finding out whether an act is binding when the formal criteria are removed: the logical conclusion of the legal effects an act produces from its instrumental identity (visible by its designation and other formal criteria) would have counteracted the Court's intentions. For all that, both the use of an atypical designation as well as the lack of a signature in the name and on behalf of the adopting institution are indications that the act is non-binding.[189]

Again it is the doctrine of competences that plays a significant role, here in determining whether an act is binding: if an institution in a certain area lacks the power to adopt an act with binding force, this is a strong indication that the act does not have 'legal effects', in which case an action for annulment is inadmissible.[190] In reaction to the growing flood of Commission communications interpreting Community law in general terms, the ECJ also turned this approach on its head: in view of an institution's inability to adopt a binding act, a non-binding instrument containing (wrong!) statements about alleged duties or obligations produces 'legal effects', which means that an action for annulment brought by a Member State is admissible and, due to the lack of competence, also well founded.[191] When the ECJ finally even recognized 'legal effects' of a non-binding communication on a subject matter that the Commission could otherwise have regulated by a binding instrument (the action is then admissible, but the claim not necessarily founded), the contradictions caused by the

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[188] Under Art. 234(1) EC this corrective is not needed, see Case 113/75, *Frescassetti*, [1976] ECR 983, paras. 8/9; Case 90/76, *van Ameyde*, [1977] ECR 1091, para. 15; Case C-188/91, *Deutsche Shell*, [1993] ECR I-363, para. 18.

[189] Joined Cases 42/59 & 49/59, *SNUPAT* v. *High Authority*, [1961] ECR (English Ed.) 53 et seq; Joined Cases 90/63 & 91/63, see note 180.

[190] Case 151/88, *Italy* v. *Commission*, [1989] ECR 1255, para. 22; Case 175/84, *Krohn* v. *Commission*, [1986] ECR 753, para. 21.

[191] Case C-366/88, *France* v. *Commission*, [1990] ECR I-3571, para. 12; Case C-303/90, *France* v. *Commission*, [1991] ECR I-5315, paras. 10–11; Case C-57/95, *France* v. *Commission*, [1997] ECR I-1627, para. 10; the Court is employing a concept of French administrative law, where an action for annulment against so-called interpretative guidelines (*circulaires interprétatives*) is admissible, Gundel, see note 98, 97; on Case C-366/88

stubborn refusal to look at formal criteria to identify whether an act is binding or not became obvious.[192]

In the end, the theory of instruments must resign itself to the fact that the ECJ determines whether an act has 'legal effects' mainly on a case-by-case basis. In doing so, it is led by the question of whether judicial review is an appropriate legal consequence in this particular case. The Court consistently refers to the ERTA formula, according to which an action for annulment must be available for "all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects".[193] This formula offers the ECJ a sufficiently flexible tool. The price is the practically complete severing of the criteria for determining when there is a reviewable act from the doctrine of instruments. There is a connection only insofar as once the institutions choose one of the binding instruments contained in Art. 249 EC the act is most assuredly subject to judicial review. This already indicates a 'division of labor' between the Court and the legislative institutions, something which can be even more clearly demonstrated with the reviewable decision under Art. 230(4) EC: the institutions have far-reaching powers in their choice of instruments, including those that are beyond the scope of Art. 249 EC. They are not, however, able to exempt themselves from legal review simply by using a certain legal instrument.

a) The Concept of a Decision According to Art. 230(4) EC

On closer analysis, the "decision" in the sense of Art. 230(4) EC turns out to be a procedural concept like the term "act" in the sense of Art. 230(1) EC. An act's qualification as a decision means that a natural or legal person can petition the Court for protection against it. This does not imply, however, that an act qualified as a decision is affiliated to a particular legal instrument. The following reconstruction of this separation uses insights won in a study by

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see G. della Cananea, *Revista italiana di diritto pubblico comunitario* (1992), 691.

[192] Case C-325/91, see note 119; the Opinion of A.G. Tesauro, ibid., para. 14, confronted this problem.

[193] Case 22/70, see note 185, paras. 38/42.

H. C. Röhl, who recently was able to show that the concept of the reviewable decision belongs to procedural law and that this conception's roots are in French administrative law.[194]

The sparse basis for the ECJ's dichotomy between measures of 'general application' and those of 'individual concern' has already been mentioned. If an act was found to be generally applicable, it was definitely not actionable by individuals.[195] After some initial unclarity as to whether the measure's abstractness or its generality was to be examined,[196] the ECJ found that the decisive criteria was whether the number and identity of those who could be affected by its provisions was fixed at the time the act was adopted and could not be expanded later.[197] General application does not depend on whether the number or even identity of those affected can be determined at a given time.[198]

An analysis of the ECJ's methodology shows that the first cracks between legal protection and the doctrine of instruments had already developed in this phase. The Court openly claims that it does not consider the type of act as a decisive criterion for an act's reviewability. The credo was: "The choice of form cannot change the nature of the measure."[199] The motivation for disregarding the act's formal qualification is clear: it would be an open contradiction to the ECJ's understanding of itself as the guarantor of the citizen's individual rights if the legislative institutions could deny the individual legal protection solely by "the choice of form". In this regard, when the ECJ claims the exclusive power of definition for itself as to whether or not the contested act is, in fact, a decision, it has already departed from an understanding of the decision as a coherent legal instrument as set forth in Art. 249(4) EC, its

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[194] H. Ch. Röhl, Die anfechtbare Entscheidung nach Art. 230 Abs. 4 EGV, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 60 (2000), 331.
[195] Joined Cases 16/62 & 17/62, see note 31.
[196] Cf. Fuß, see note 13, 946 et seq.
[197] Joined Cases 41/70–44/70, *International Fruit Company et al.* v. *Commission*, [1971] ECR 411, paras. 16/22; Joined Cases 87/77, 130/77, 22/83, 9/84 & 10/84, *Salerno et al.* v. *Commission and Council*, [1985] ECR 2523, para. 30.
[198] Case 6/68, *Watenstedt* v. *Council*, [1968] ECR (English Ed.) 409 et seq.; Case 45/81, *Moksel* v. *Commission*, [1982] ECR 1129, para. 17.
[199] Case 101/76, *Koniklijke Scholten Honig* v. *Council*, [1977] ECR 797, paras. 5/7; Joined Cases 789/79 & 790/79, *Calpak et al.* v. *Commission*, [1980] ECR 1949, para. 7; Case 307/81, *Alusuisse Italia* v. *Commission*

protests notwithstanding. As far as can be seen, there is no example in case-law for the Court attaching any further legal consequences to a finding that the measure is a decision other than the action's admissibility. Thus a reviewable decision in the form of a regulation, the legal nature of which is, in the language of the Court, "a conglomeration of individual decisions", remains a regulation with all its legal consequences: it is equally valid in all official languages, it first enters into force with its publication rather than with notification to those of whom it is of individual concern[200] and the Court's declaration that the act is void takes effect *erga omnes*.[201] By qualifying an act as a reviewable decision, the Court subjects the act to a specific regime of legal protection without, however, 'correcting' the act's designation or re-qualifying it as a different instrument. The ECJ by no means contests the institutions' power to autonomously define the instrument an act is affiliated to and thus to determine its legal effects: it simply declares this fact to be irrelevant for the question of legal protection.

A second step on the system of legal protection's way to neutrality with regard to the type of act is the decreasing importance of the concept of 'general application' as the criterion decisively foreclosing legal protection for individual applicants. The examination of whether "the measure applies to objectively determined situations and produces legal effects with regard to categories of persons described in a generalized and abstract manner"[202] was gradually replaced with the concept of 'individual concern' as the criterion decisively opening access to the Court.[203] The ECJ thus uses the *Plaumann*-formula, according to which persons are individually concerned in the sense of Art. 230(4) EC if the contested act "affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which

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and Council, [1982] ECR 3463, para. 7.

[200] The opposite view had no success, E.-W. Fuß, Rechtsatz und Einzelakt im Europäischen Gemeinschaftsrecht (part 3), *Neue Juristische Wochenschrift* 1964, 1600 (1603).

[201] Case 138/79, *Roquette Frères* v. *Council*, [1980] ECR 3333, para. 37; this is different with regard to a true collective decision in the meaning of Art. 249(4) EC, CFI, Case T-227/95, *AssiDomaen Kraft Products* v. *Commission*, [1997] ECR II-1185, para. 58: where an addressee did not bring an action for annulment, the decision continues to be valid and binding on it.

[202] Joined Cases 789/79 & 790/79, see note 199, para. 9; Case 307/81, see note 199, para. 9.

[203] Case 100/74, *CAM* v. *Commission*, [1975] ECR 1393, para. 19; Case 26/86, *Deutz et al.* v. *Council*, [1987]

they are differentiated from all other persons, and by virtue of these factors distinguishes them individually just as in the case of the person addressed"[204]. At first, however, this formula still served as an *e contrario* test to falsify the act's normative character, i.e. its general applicability.

The straw that broke the camel's back was anti-dumping regulations. For the first time, the ECJ recognized that measures may "in fact, as regards their nature and scope, [be] of a legislative character," and yet "the provisions may none the less be of direct and individual concern" to some of the affected persons.[205] If it appeared at first that this new approach could be explained solely by the peculiarities of trade related protection measures,[206] it did not long remain limited to this sector. In the *Codorniu* case this development reached a new highpoint, where an act's general applicability completely loses its status as a criterion foreclosing an action's admissibility.[207] The *Plaumann*-formula now determines whether or not a reviewable decision is present independently of the contested measure's "legal nature".[208] The instrument formally chosen and the legal nature of an act became preliminary questions, the answer to which could already positively determine the action's admissibility; it could not, however, definitively determine its inadmissibility.[209] In what has meanwhile become the CFI's and ECJ's consistent case-law, this is first determined by the examination of whether there are aspects sufficiently individualizing the plaintiff's concern caused by an act of general

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ECR 941, para. 9.

[204] Case 25/62, *Plaumann* v. *Commission*, [1963] ECR (English Ed.) 95 et seq.

[205] Joined Cases 239/82 & 275/82, *Allied et al.* v. *Commission*, [1984] ECR 1005, para. 11.

[206] Case 191/82, *Fediol* v. *Commission*, [1983] ECR 2913, paras. 27 et seq.; Case 264/82, *Timex* v. *Council*, [1985] ECR 849, para. 16.

[207] Case C-309/89, *Codorniu* v. *Council*, [1994] ECR I-1853, para. 19; already prepared in Case C-358/89, *Extramet* v. *Council*, [1991] ECR I-2501, para. 16.

[208] H. Krück, in: von der Groeben/Thiesing/Ehlermann, see note 63, Art. 173 EC (Maastricht), para. 42.

[209] Verifying an act's "legal nature" may be relevant for the substance of the case, e.g. whether the act meets the variable standards of the 'giving reasons requirement', see below, IV. 2. Furthermore, a successful claim based on the Community's liability must meet the criteria for unlawful normative acts when a reviewable decision of general application is contested, CFI, joined Cases T-480/93 & T-483/93, *Antillean Rice Mills et al.* v. *Commission*, [1995] ECR II-2305, para. 184; overly broad D. Booß, in: Grabitz/Hilf, see note 63, Art. 230 EC, para. 56: "Die Abgrenzung zwischen normativem Akt und Entscheidung … hat keine praktische Bedeutung." [The demarcation between a normative act and a decision … has no practical relevance.]

application.[210] With a view to effective legal protection, recently there appears to be a tendency for the Community courts to go even beyond the boundaries set by the *Plaumann*-formula or at least to construe the scope of Art. 230(4) EC as wide as is still consistent with the wording.[211] For interpreting the concept of an individually concerned person the explicit addressee of a decision in the sense of Art. 249(4) EC would thus no longer have a significant meaning, not even as a basis for comparison.

Albeit with a certain delay, the concept of a reviewable decision shows a parallel development to the concept of an act in the meaning of Art. 230(1) EC. The type of act is only relevant for the act's contestability by individuals insofar as the adopting institution can positively open legal recourse for the explicit addressee by choosing the formal decision in the sense of Art. 249(4) EC. As a balance, the addressee of this decision must expect that, after the deadline set forth in Art. 230(5) EC has expired, the act's validity will be held against him or her.[212] Otherwise an act may not be rendered non-actionable simply due to the choice of instrument.[213]

The ECJ's conception results in a specific 'division of labor' between it and the legislative institutions. The latter are responsible for the choice of the legal instrument and thus – within the limits foreseen by the Treaty – for the determination of the legal effects the act produces. On the other hand, it is not within their power to decide whether and to what extent legal review against their acts may be possible. The ECJ claims this power exclusively for the judiciary. This leads to an irritating consequence that the theory of instruments still has fully to work out: the judicial system's 'blindness' regarding the type of act. The theory of

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[210] Case C-451/98, *Antillean Rice Mills* v. *Council*, [2001] ECR I-8949, para. 46; CFI, Case T-109/97, *Molkerei Großbraunshain et al.* v. *Commission*, [1998] ECR II-3533, para. 57; on the recent case-law in detail A. Arnull, Private Applicants and the Action for Annulment since Codorniu, *CML Rev.* 38 (2001), 7 (23 et seq.).

[211] CFI, Case T-177/01, *Jégo-Quéré* v. *Commission*, [2002] ECR II-2365, paras. 50–51; the boundaries set by the wording of Art. 230(4) EC are emphasized in Case C-50/00 P, *Unión de Pequeños Agricultores* v. *Council*, [2002] ECR I-6677.

[212] Booß, see note 209, Art. 230 EC, para. 88.

[213] For an admissible action against a directive see CFI, Case T-135/96, *UEAPME* v. *Council*, [1998] ECR II-2335, para. 63; against an addresseeless decision ECJ, Case 297/86, *CIDA et al.* v. *Council*, [1988] ECR 3531,

instruments will have to sever itself from the paradigm of legal protection if it does not want to become irrelevant.

An alternative approach could begin with the assumption that the legislative institutions have exclusive power to define which instrument was employed for any given act. By that choice an act is vested with specific legal characteristics different to all other instruments. The totality of these characteristics constitute the legal regime of that instrument. Since these elements fall either on the legal requirements' or the legal consequences' side of the conditional structure of norms, one can ask questions in two directions. First, what *specific conditions* does Union law place on a particular instrument so that an act's lawfulness is beyond doubt? Second, what are the *specific legal effects* of this particular instrument, i.e., what capacities of modifying the Union's and Member States' legal orders characterize this instrument's operating mode? Only the first question belongs to the traditional understanding of the tasks of public law: developing principles that assist in legal proceedings to decide whether an act is legal or not. Anyhow, according to an appropriate understanding of the theory of instruments should not only limit public authority's action, but also guide and direct it.[214] A theory of instruments for European constitutional law should drop the *ex-post* perspective of the ECJ and take the *ex-ante* perspective of the legislative institutions, offering them an elaborated canon of instruments whose legal regimes have been clearly worked out. The theory is thus faced with very broad tasks, and the first order of business is to systematize the subject matter. With this approach, the judiciary mainly comes into play at the junction between Union and national law. To cope with the questions that arise with the interaction of the legal orders, national courts must rely on settled knowledge of the legal effects of the act at issue. Amongst the actions and proceedings before Community courts, it is not Art. 230 EC but rather Art. 234 EC that represents the terrain on which the theory of instruments must

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para. 13; Case 187/85, *Fediol* v. *Commission*, [1988] ECR 4155, para. 6.

[214] Schmidt-Aßmann, see note 81, 537.

prove itself useful in practice.

The following sections investigate both question complexes, first the one concerning the variable conditions for an act to be legal and have effect (IV.), then the question concerning the legal effects being attached to the individual instruments (V.).

IV. VARIABLE CONDITIONS FOR LEGALITY AND EFFECT

Identifying to which instrument an act is affiliated, in order to subject it to a specific legal regime belongs to the classical tasks of a theory of instruments. The instruments serve as a 'memory cache' for insights and rules that apply to the respective act without having to 'download' them for each and every case.[215] It has already been mentioned briefly that Union law does not utilize this 'memory cache' on the legal requirements' side nearly as much as the national legal orders. Nevertheless, it does not completely renounce this rationality. For its uncontestable lawfulness, an act must fulfill conditions that stem solely from its affiliation to the legal regime of a particular instrument. Here one must distinguish between the conditions pertaining to the act's legality (*Rechtmäßigkeit*) and the conditions for the act to be applied and have effect (*Wirksamkeit*). Although legal Community acts once adopted often have still no effect unless certain further conditions are fulfilled, this in itself does not cast doubt on the legality of the act.[216] The reverse is also true. Except in cases where the measure exhibits particularly serious and manifest defects, an illegal act continues to have effect: it enjoys a presumption of validity.[217]

1. Conditions for an Act to Have Effect

The conditions for a Community act to have effect are clearly differentiated according to the instrument at issue. This concerns the preconditions and the date of entry into force and is also

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[215] E. Schmidt-Aßmann, *Das allgemeine Verwaltungsrecht als Ordnungsidee*, 1998, Chapter 6, para. 33.
[216] Case 185/73, see note 37, para. 6.

relevant for the time limit for an action pursuant to Art. 230(5) EC.[218] The rule that the enacting institution must decide on a proposed text in accordance with the relevant rules of procedure applies to all instruments equally; the adopted version of the legal text is witnessed by the signature of a member of the institution. Some instruments already take effect when this is done unless the act itself specifies that it enters into force at a later time.[219] Particularly the addresseeless decision can take effect immediately, without a need for any further action. This is also the case for Council resolutions. However, the entry into force of most instruments is under the suspending condition that it either be published in the Official Journal or notified to the explicit addressee.

The publication requirement has always been applicable to regulations because of their potential to directly impose burdens for an indeterminate number of persons. Art. 191 EEC was considered to be an expression of a fundamental principle: a Community measure cannot be applied to those concerned before they have had the opportunity to make themselves acquainted with it.[220] The Treaty of Maastricht's reformulation of Art. 191 EEC (Art. 254 EC) at least partially reflected the fact that the regulation is not the only legislative instrument at the Union's command. Besides the instrument at issue, Art. 254 EC uses two further criteria to establish a publication requirement as a condition for an act to have effect: the procedure according to which an act may be adopted and its explicit addressee. Directives and decisions adopted in accordance with the co-decision procedure as well as directives which are addressed to all Member States must be published. Art. 254 EC also applies to regulations and decisions by the ECB by means of reference. Since the co-decision procedure does not involve the ECB only its regulations must be published, which is the same legal situation as

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[217] Case 15/85, *Consorzio Cooperative d´Abruzzo* v. *Commission*, [1987] ECR 1005, para. 10.
[218] K.-D. Borchardt, in: Lenz, see note 175, Art. 230 EC, para. 73.
[219] Exceptionally, an act taking effect as from a date prior to the date of its adoption is legal if the purpose to be attained so requires and the legitimate expectations of the persons concerned are properly respected, Case C-110/97, *The Netherlands* v. *Council*, [2001] ECR I-8763, para. 151.
[220] Case 98/78, *Racke*, [1979] ECR 69, para. 15; however, a belated publication does not affect the legality of the

under Art. 163 Euratom. Directives and decisions that do not fall under Art. 254(1) or (2) EC shall be notified to the explicit addressee and take effect upon such notification, Art. 254(3) EC. Individual notification is not, however, a condition for the act's legality: irregularities in notification may be healed if the addressee otherwise acquires knowledge of the measure, though such a circumstance may have consequences for the time limit to bring action pursuant to Art. 230(5) EC.[221]

With respect to the adresseeless decision the system of the conditions for effect seems to have a serious loophole: although it is binding, its publication is only on a voluntary basis. An individual notification is logically impossible as the addresseeless decision is defined precisely in not having a specific addressee. An analogous application of Art. 254 EC is only convincing for a addresseeless decision adopted under the co-decision procedure.[222] This unique regime of *ad hoc* effect of a binding instrument finds a certain justification as the addresseeless decision is unable to impose obligations on private parties.[223] Yet, it would be more appropriate to its legislative character, in particular for concluding international agreements or setting up programs with financial impact, if subsequent publication were established as a general rule for this instrument.[224]

2. Conditions for Legality

There are also some requirements varying according to the instrument whose disobedience can touch on an act's legality.[225] The legal consequences for such legal defects are that the act

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act, Case C-149/96, see note 151, para. 54.

[221] Case 48/69, *ICI* v. *Commission*, [1972] ECR 619, paras. 39/43.

[222] In practice all addresseeless decisions adopted under the co-decision procedure are published in the "L" series of the Official Journal in the chapter that is reserved for "acts whose publication is obligatory".

[223] According to Art. 17(4) lit. d) of its Rules of Procedure (see note 19) the Council is free to decide, on a case-by-case basis, whether or not "other Council acts, such as sui generis decisions or resolutions" should be published in the Official Journal.

[224] This kind of publication requirement would not put the *ad-hoc*-effect of addresseless decisions in question, but rather limit the adopting institution's discretion whether the act should be published. From the perspective of the principle of democracy there is a similar problem with regard to association councils and similar cooperation bodies adopting decisions having legal effects, see Case C-192/89, *Sevince*, [1990] ECR I-3461, para. 24; Art. 17(5) of the Council's Rule of Procedure is not convincing.

[225] The relevant point of time to examine an act's legality is the date of its adoption, joined Cases 15/76 & 16/76,

may be declared void when challenged and the act may be withdrawn by the enacting institution under streamlined conditions.[226] Interestingly, these consequences are not themselves specific to any one instrument: the Court assumes that there is a single system of legal consequences for all unlawful Community acts.[227] In particular, unitary criteria are to be applied when distinguishing between an act being illegal but valid and an act being inexistent because of serious and manifest defects. This conception of the Court implies that an illegal regulation must be applied in permanence when not challenged in time, an unusual circumstance compared to most constitutional orders.[228] It is also surprising that an illegal act that is normative in character is able to be withdrawn with retroactive effect.[229]

The duties pursuant to Art. 253 EC to provide reasons and refer to proposals or opinions form the central conditions for a specific instrument's legality.[230] Art. 253 EC must be understood in light of the difference made in Art. 249 EC between binding and non-binding instruments: it is only the former that fall within its scope of application. Following this logic, an addresseeless decision adopted by an institution of Art. 249(1) EC must be understood as coming within the scope of the triad of "regulations, directives and decisions".[231] The requirement that an act's legal basis must be expressly indicated is usually derived from Art. 253 EC. According to the ECJ this requirement is also vested in the principle of legal certainty, which implies that legislation must be clear and its application foreseeable for all

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France v. *Commission*, [1979] ECR 321, para. 7; CFI, Case T-115/94, *Opel Austria* v. *Council*, [1997] ECR II-39, paras. 87–88.

[226] The exclusive power to declare an act void under Art. 231 EC is supplemented by the power to declare an act invalid with *erga omnes* effect under Art. 234(1) lit. b) EC und the power to declare an act inapplicable *inter partes* under Art. 241 EC.

[227] X. Arzoz, Rechtsfolgen der Rechtswidrigkeit von Verordnungen der Europäischen Gemeinschaften, *Jarbuch des öffentlichen Rechts der Gegenwart N.F.* 49 (2001), 299 (308).

[228] Cf. the criticism by Arzoz, see note 227, 316 et seq.; under the preliminary procedure the plea of illegality against a regulation is still permissible unless it is obvious that an action under Art. 230 EC would have been admissible, Case C-188/92, *Textilwerke Deggendorf*, [1994] ECR I-833, paras. 17–18; Case C-408/95, *Eurotunnel*, [1997] ECR I-6315, para. 29.

[229] Case C-248/89, *Cargill* v. *Commission*, [1991] ECR I-2987, para. 20; Case C-365/89, *Cargill*, [1991] ECR I-3045, para. 18.

[230] M. Shapiro, The Giving Reasons Requirement, *University of Chicago Law Forum* (1992), 179.

[231] CFI, Case T-382/94, *Confindustria et al.* v. *Council*, [1996] ECR II-519, para. 49; that this should be so is certainly not obvious, as is evidenced by the German, Dutch and Danish wording of the Treaty.

interested parties. The Court therefore extended the duty to indicate a legal basis to a reviewable Commission communication.[232] The duty to provide reasons thus applies to all Community acts which are intended to have 'legal effects'. Whether this applies to the special instruments under Art. 12 and 34 EU still requires clarification: there is no express instruction in primary Union law, see Art. 28 and 41 EU. As already mentioned, within the family of binding acts the scope of the duty to provide reasons varies according to the act's 'legal nature'.

This mostly covers the instruments' variable conditions for legality. In addition, there are the rules determining the languages of the institutions fixed in *Regulation (EEC) No 1* of 15 April 1958.[233] The language the act shall be drafted in depends on who is affected by its legal effects. For the regulation and "other documents of general application", they are to be drafted in all official languages pursuant to Art. 4 of *Regulation (EEC) No 1*. Since these acts enter simultaneously into force in multiple languages, all versions must be the subject of the adopting institution's decision-making procedure.[234] The disregard of this requirement constitutes an infringement of an essential procedural requirement.[235]

Indirectly legal conditions relating to the instruments may also spring from the act's legal basis: where the legal basis exceptionally forces the adopting institution to use a certain instrument, then the requirements for legality particular to that instrument must be observed. For example, Art. 89 EC and Arts. 24, 217 Euratom-Treaty require the Council, and Art. 39(3) letter d EC and Art. 79(3) Euratom-Treaty require the Commission to use the regulation. A further domain of the regulation is Art. 229 EC when the Court is been given unlimited jurisdiction to review the lawfulness of penalties. The requirement to use directives

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[232] Case C-325/91, see note 119, para. 26.
[233] Regulation No 1 determining the languages to be used by the European Economic Community, OJ English special edition: Series I, Chapter 1952–1958, 59.
[234] Cf. Art. 18 Rules of Procedure of the Commission, see note 95; the Council claims a more flexible rule, Art. 14(1) Council's Rules of Procedures, see note 19.
[235] Case C-137/92 P, *Commission* v. *BASF et al.*, [1994] ECR I-2555, para. 76.

is somewhat more frequently found in the Treaties, especially in the areas of establishment and services (Arts. 44–47 and 55 EC), minimum social requirements (Art. 137 EC) and the harmonization of Member States' laws under Art. 94 EC.[236] With regard to these Articles, it is open to question whether the intent is merely to require that only the directive be used or whether it isn't rather the exclusion of regulations and decisions addressed to Member States, i.e., instruments that directly impose duties and obligations on the citizen.[237] The practice of basing recommendations and addresseeless decisions on these norms therefore does not seem legally objectionable. Sometimes secondary law also requires that a certain instrument be used, for example, both block exemptions in competition law and protection measures in commercial law require regulations.[238]

When the Community legislator is bound to a particular instrument, Art. 249 EC does not place any further requirements on the conditions for the act's legality beyond those rare aspects discussed above. Thus, there is no special principle of equality that follows from the fact that the regulation is "applicable in all Member States".[239] As already mentioned, the fact that the directive shall leave the implementing Member States "the choice of form and method" does not represent a limit on the level of regulatory detail.[240] This is an important difference to the instruments under most national constitutional law: In Union law an act's maximum regulatory density do not depend on the instrument used (e.g., there is no instrument like the German framework statute under Art. 75 *Grundgesetz*) nor does Union law know requirements on the minimum regulatory density depending on the instrument at issue (e.g., there is no rule comparable to that under German constitutional law that all

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[236] Arts. 96 and 132 EC have no current relevance, neither have enabling norms of the Euratom-Treaty that require the use of directives.

[237] Cf. below, V. 1.

[238] E.g., Art. 1 of Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid, OJ L 142, 1; Art. 14(1) of Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community, OJ L 56, 1.

[239] This interpretation was proposed by Möller, see note 22, 7 et seq.; for the dominant opinion see Schmidt, see note 102, Art. 189 EC (Maastricht), para. 33.

'essential' decisions must take the form of a statute). The obligations placed on the legislator by the specific requirements of the relevant enabling norm and the subsidiarity principle operate as functional equivalents of these institutes.[241] This once again makes clear that it would be inappropriate to locate the task of guaranteeing the limits of the Union's competences with the theory of instruments.

V. OPERATING MODE AS THE CENTRAL CATEGORY

In stark contrast to the laconism of the specific requirements for legality, the instruments' legal effects are highly differentiated. It is on this field that the theory of instruments must provide orientation and test whether the differences in the operating modes can be described as a 'division of labor' between the instruments.

1. An Attempt to Systematize the Instruments

There are (at least) four elements that are of central importance in classifying the legal effects of Community instruments. The first is whether the legal effects are binding or non-binding. A number of legal attributes that Union acts may have are dependent on a binding operating mode, most notably among them the capacity to create individual, actionable rights. The creation of individual rights resulting from the direct effect of an act presupposes as a rule the existence of a correlative duty,[242] something which can only be imposed by an act having binding force.[243] It has long been established that the directive in its entirety belongs to the binding legal instruments;[244] its ability to create individual rights follows from the Member

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[240] See note 63.

[241] Consequently, the type of act plays no decisive role when the Union's legislator pre-empts autonomous Member States' legislation through occupying a field falling within the scope of a concurrent competence, von Bogdandy/Bast, see note 104, 242 et seq.; on the concept of pre-emption see E. Cross, Pre-emption of Member State Law in the European Community, *CML Rev.* 29 (1992), 447.

[242] Case 26/62, see note 28; Joined Cases C-6/90 & C-9/90, see note 54, para. 31.

[243] The exclusion of direct effect of EU-framework decisions and EU-decisions pursuant to Art. 34(2) EU is a systematic anomaly, see von Bogdandy/Bast/Arndt, see note 86, 111 et seq. and 155 et seq.

[244] On the outdated opinion that the provisions of a directive have no binding force insofar they relate to forms

States' duty to transpose the normative program laid down in the directive. However, the creation of individual rights is inappropriate as an independent classificatory criterion because, first, it is located at the 'subatomic' level of an act's provisions and, second, it is not a necessary attribute of any Community instrument.

A second criterion follows from Art. 249 EC, too: it depends on the instrument an act employs whether or not its legal effects are specific to a formally defined addressee. The formulations "to which it is addressed" and "to whom it is addressed" define directives, decisions addressed to Member States and decisions addressed to private persons through their addressee-specific operating mode, whereas the legal effects of regulations and addresseeless decisions evolve vis-à-vis everyone (*erga omnes*).[245] The same differentiation can be made amongst the non-binding instruments: recommendations work as non-binding directives and thus have (non-binding) legal effects only for their addressees, whereas resolutions and opinions have no specific addressee. Using an instrument with an addressee-specific operating mode makes it possible to limit the personal and/or territorial scope of an act's legal effects, something which is not possible for the regulation or the addresseless decision.

A third criterion to systemize the instruments according to their legal effects is only unclearly formulated in Art. 249 EC, though it has been clearly worked out by the Court and in legislative practice: the differentiation according to whether an instrument shows a one-step or a two-step implementation structure. The legal effects of regulations and all kinds of decisions, including those without an addressee, evolve when the act enters into force, whereas directives and recommendations – unless they foresee pure omissions – require or recommend implementing acts on the part of the Member States. Consequently, these

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and methods of Member States' transposition, see Schatz, see note 60, 1967.

[245] EU-framework decisions as well as guidelines and instructions of the ECB belong to the group if instruments with an addressee-specific operating mode, too. Council Decisions under Art. 34(2) EU are not determined by this criterion.

instruments first acquire their full legal effects in conjunction with subsequent Member State action.[246] Regulations and decisions addressed to Member States can foresee a two-step implementing procedure, depending on their substantive content. However, this is not necessarily attached to the operating mode of these instruments. The directive's two-step implementation structure correlates with two time periods (before and after the expiry of the deadline to implement): the legal effects are significantly different for each period.[247]

A fourth criterion concerns the varying capacities to impose legal duties and obligations. The category of obligatory force is a key to understanding the differences between the binding instruments: whereas a regulation or a decision addressed to private persons can directly impose duties and obligation on everyone within the Union's jurisdiction, the addresseeless decision does not have the ability to oblige private parties or Member States. The obligatory force of a addresseeless decision goes, however, beyond the self-binding effect on the adopting institution, because addresseeless decisions can, like every binding instrument, impose original duties and obligations for the totality of the Union's institutions and bodies. In terms of its obligatory force, the directive characteristically takes on a middle position: it directly imposes duties and obligations on the Member States to which it is addressed and, furthermore, has the ability through the Member State's implementing act to indirectly impose duties and obligations on private parties. The directive's inability to directly oblige private parties, not even after expiry of the deadline to implement, is the rationale of this instrument. Non-binding instruments do not have an obligatory force, though they can indirectly possess such a force in conjunction with other legal norms, in particular the principle of good faith reliance.[248]

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[246] See now Art. 137(3) EC (Nice).

[247] For an overview of the two-step operating mode see A. Scherzberg, Mittelbare Rechtssetzung durch Gemeinschaftsrecht, *Jura* 1992, 572; on the legal effects of a directive until the date on which it must be transposed see Case 148/78, *Ratti*, [1979] ECR 1629, paras. 41 et seq.; Case C-316/93, *Vaneetveld*, [1994] ECR I-763, para. 16; Case C-129/96, *Inter-Environnement Wallonie*, [1997] ECR I-7411, paras. 42 et seq.

[248] Nettesheim, see note 63, Art. 249 EC, para. 213; in exceptional cases even a non-binding instrument can be

In view of their obligatory force it is unclear how decisions addressed to Member States should be classified. It is beyond doubt that, in addition to their ability to directly impose duties and obligations on the Member State(s) to which it is addressed, they can also have the effect of indirectly imposing duties and obligations on the citizens. The question of whether decisions addressed to Member States can also be the direct source of obligations for private parties is critical. The scholarship tends to decide this question negatively, arguing with an analogy to directives.[249] The consequence of this thesis is that, at the level of the operating mode, no positive distinguishing criterion can be found: every directive would simultaneously be a decision addressed to Member States. At the same time it is claimed that there is a sharp distinction between regulations and decisions addressed to Member States, though there is no evidence that the Court is following this conception.[250] Quite a bit speaks for the view that both the regulation and the decision addressed to Member States, that in practice often appear as substitutable, equally possess the ability to serve as a legal basis for administrative acts by the national authorities that burden private parties. Thus regulations and decisions addressed to Member States – in contrast to directives[251] – are directly executable.[252] In any case, national provisions favorable to private parties may not be applied if this is necessary to comply with a decision addressed to the Member State.[253] At the operating-mode level, an independent profile of decisions addressed to Member States and directives thus emerges: only the latter are able to strictly bind the Member States and at the same time ensure that duties and obligations on private parties first arise by the Member State's implementing

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an "action taken by the institutions" in the meaning of Art. 10(1) EC, see Case 141/78, *France* v. *United Kingdom*, [1979] ECR 2923, paras. 8 et seq.

[249] R. Greaves, The Nature and Binding Effect of Decisions under Article 189 EC, *EL Rev.* 21 (1996), 3 (12 and 16); Nettesheim, see note 63, Art. 249 EC, para. 202; support from Zuleeg, see note 63, Art. 3b EC (Maastricht), para. 13 and E. Klein, *Unmittelbare Geltung, Anwendbarkeit und Wirkung von Europäischem Gemeinschaftsrecht*, 1988, 21.

[250] Case 30/75, *Unil-It*, [1975] ECR 1419, para. 18, gave no answer to that question. On horizontal direct effect of regulations and decisions see Case C-192/94, see note 56, para. 17.

[251] A. Scherzberg, Die innerstaatlichen Wirkungen von EG-Richtlinien, *Jura* 1993, 225 (227).

[252] Scherzberg, see note 84, 37.

[253] Case 249/85, *Albako*, [1987] ECR 2345, para. 17; Case C-24/95, *Alcan*, [1997] ECR I-1591, para. 38.

measures.[254] Against this background, the differentiation made in Art. 254 EC between a decision addressed to a Member State, which usually waives the publication requirement, and directives addressed to all Member States, for which publication is obligatory, appears to be unsatisfactory. In this instance, Union constitutional law does not coherently connect the conditions for an instrument to have effect with the legal effects the instrument produces. The fact that the expiry date to bring an action against a decision addressed to a Member State is first set into motion after the decision has come to the knowledge of the plaintiff[255] does not fully compensate for this deficiency.

2. The Instruments' Multifunctionality

It was demonstrated that clear definitions for the operating mode of the most important instruments of derived Community law can already be formulated with the help of the four criteria of binding force, formal addressee, implementation structure and obligatory force. It is also difficult to identify further differentiating legal effects that follow from the type of act and are not merely typically associated with an instrument. In particular, the difference between a normative act and an individual measure can be mirrored within the instruments' system only insofar as decisions addressed to private parties and non-binding instruments certainly do not have normative character.[256] Moreover, a grouping according to legislative and executive acts (however that could be operationalized) can say nothing with any general validity about regulations, directives, decisions addressed to Member States and addresseeless decisions.

Certainly, classifying the legal instruments at the abstract level of their operating mode

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[254] A further difference is that the direct effect of a decision addressed to Member States does not require a Member State's failure to comply with its duty to ensure proper implementation, Mager, see note 85, 679.

[255] Case C-180/88, *Wirtschaftsvereinigung Eisen- und Stahlindustrie* v. *Commission*, [1990] ECR I-4413, para. 22.

[256] In the language of the Court even non binding acts can be of "general application", see Case 92/78,

remains strangely sterile in comparison to a characterization that focuses on their typical use in practice and on specific supranational regulatory methods: it appears to be far more fruitful to understand the directive, for example, as an instrument for the harmonization of laws, and the regulation as an instrument to create unitary law.[257] However, the gain in plasticity is bought at the expense of precision. It is not only that regulations and decisions addressed to Member States are also suited to harmonizing Member States' laws – and indeed in practice they are actually used for this purpose – so that this function is not exclusive to the directive. Functional descriptions of Community instruments also unintentionally run the danger that mere empirical excerpts are raised to normative rules. Directives can serve not only to stimulate national legislation but also just as well to activate administrative planning, such as when the Member States are charged with the task of developing programs to realize qualitatively designed objectives; directives can fully regulate a certain sector as well as confine themselves to setting minimum standards, imposing conditions on mutual recognition or obliging the Member States to make reports. The regulation, with an obligatory force that is not dependent on a specific addressee, is surely predestined to normatively regulate states of affairs in a general and permanent manner; yet it is equally suited to highly specialized interventions in the administration of the agrarian sector or to the creation of a framework in which 'open coordination' can take place. Empirical analysis of a complex legal order argues for recognizing all instruments as being multifunctional and developing their legal profile in such a manner that it spans the various functions.[258]

Additionally, it must be recalled that Union law only very rarely regulates a field in a single, comprehensive act. Horizontal framework legislation and specialized sectoral rules, basic, implementing and amending acts, institutional, financial and material provisions, derogating

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Simmenthal v. *Commission*, [1979] ECR 777, Ls. 2; Case C-313/90, *CIRFS et al.* v. *Commission*, [1993] ECR I-1125, para. 44.

[257] See for example Biervert, see note 93, Art. 249 EC, para. 18.

[258] For an alternative approach see Mager, see note 85, 662.

acts and dispenses with a time limit repeatedly appear in a multiplicity of acts, employing different legal basis and using different legal instruments. An adequate functional description of these multiplicity of acts, the scientific study of their 'chemical attributes', requires showing the molecular structure (with an often bizarre beauty) that the 'legal act-atoms' form with each other. Yet it is precisely when unraveling the complicated network of norms which legislative practice has allowed developing that a sound theoretical knowledge of the instrument's legal effects is required. Function follows legal potential, not vice-versa.

3. The 'Division of Labor' Between the Instruments

Clear distinctions between the instruments' legal character is not the only prerequisite for making rational decisions as to which instrument to use. An orderly interaction between the instruments presupposes that the differences between them can be described as a 'division of labor', whereby each instrument has a sufficiently independent profile. The binding instruments of Community law seem to fulfill this requirement. In particular, the above-described criteria make clear which loophole was closed with the addresseeless decision: a legal instrument that the institutions can use to make binding determinations without at the same time addressing the citizen or a Member State is not foreseen in Art. 249 EC.[259] Unsatisfying auxiliary constructions, such as Community subsidies on the 'legal basis' of a Council resolution[260] are superfluous today.

Yet is it worth while to retain regulations, directives and various kinds of decisions when the Treaties permit the adoption of regulations in nearly all cases that require legislative activity? After all, the regulation's statute-like operating mode includes and surpasses all the other

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[259] Calling for such an instrument Koopmans, see note 68, 697; others propose to invent a new instrument of institutional law on the model of the French *loi organique*, e.g. R. Bieber/B. Kahil, "Organic Law" in the European Union, in: Winter, see note 82, 423; Winter, see note 82, 28 et seq.

[260] See Dewost, see note 94, 328; on the illegal practice of granting Community subsidies without a legal basis in a binding instrument Case C-106/96, see note 184.

instruments' legal abilities. Those who want to bundle all powers for which Parliament shares responsibility into one instrument, called the 'Community law', make precisely this assumption.[261] The response has already been prepared in various formulations in the presentation on legal effects: of course a law can do everything, and yet it also cannot do less than 'everything'. For example, the specific capacity that a directive has that a regulation does not is its inability to directly impose obligations or duties on private parties. The strength of this instrument lies in its 'built-in' weakness – a paradox for the theory of instruments but one that allows the legislator a nuanced use of powers. By choosing a 'weaker' instrument the legislative institutions are able to make use of a 'memory cache' for specific limitations, thereby excluding unwanted legal effects.[262] The performance profile of the addresseeless decision comes even more sharply into focus from this perspective. Its strength lies in its consistent protection of individual rights and the preservation of Member State autonomy. Connections to the doctrine of competences come into view: with its specific operating mode, the addresseeless decision is predestined to be used when the Treaties empower the institutions to adopt "incentive measures, excluding any harmonization".[263] Whether the Union acted within the limits of such a non-regulatory competence can be determined only after a textual analysis if a decision addressed to the Member States is used; when the same incentive program is determined by a addresseeless decision these limits will already be secured by the choice of instrument.

Does this 'division of labor' between the instruments' effects justify speaking of a coherent 'system' of instruments in an ambitious sense? This would be premature. First, it should be recalled that the relatively good overview in this contribution was made possible by limiting the subject matter: the further one gets from Art. 249 EC as the organizing center the riskier

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[261] Winter, see note 82, 30 et seq.; Hofmann, see note 141, 31 et seq.
[262] Too pessimistic on the ability of Community instruments to serve as a 'memory cache' Röhl, see note 194, 363 et seq.
[263] Arts. 149(4), 151(4) and 152(4) lit. c) EC; similarly Art. 129 EC.

the claim of rationality becomes. For example, beyond the dominant Council resolutions, there is a multiplicity of non-codified non-binding acts with various names and styles, the rational application of which has yet to be proven. From the point of view of legal certainty it is unacceptable that it must be established on a case-by-case basis whether "guidelines" or "conclusions" were in fact intended to be non-binding. The EU Treaty's special instruments are an even more problematic source of confusion; they have proven themselves to be doggedly resistant to theoretical analysis. For example, the legal effects of a "decision" ("*Beschluss*") adopted under Art. 34(2) letter c EU (which is at the same time an enabling norm) are completely obscure. In addition, there is the fact that the instruments under the EU Treaty do not enjoy the security of falling within the jurisdiction of the ECJ independently of the enabling norm, thereby at least partly escaping the disciplining effects of case-law.

The methodology represents a second qualification. Of course the world of Community instruments seems to be reasonably in order when, in systematizing the main Community instruments, precisely those concepts are employed that were developed to identify the differences just between these instruments. Whether or not the need for a differentiated spectrum of instruments is satisfied by the current law cannot be appraised in this way alone. The existing instruments appear to some to be insufficient because of a lack of differences.[264] An intervention by the 'Treaty fathers' to create a new instrument, the legal regime of which limits the Community's regulatory intensity, e.g., a 'framework directive', is conceivable.[265] In fact, the debate about the appropriate usage of regulations and directives suffers from the fact that it is being conducted along a line that, *de lege lata*, is immanent in neither instrument.[266] One must question, however, whether Union law would really be helped if the

[264] On the call for a new instrument exclusively for implementing measures see III. 2. e).

[265] The Protocol on the application of the principles of subsidiarity and proportionality already uses this term, cf. No 6; actually this could only mean a certain drafting of a regular directive; opposing the creation of a new category of directives H. Hetmeier/A. V. Richter, Kompetenzabgrenzung in der Europäischen Union, *Zeitschrift für Gesetzgebung* (2001), 295 (318).

[266] Cf. Koopmans, see note 68, 695 et seq.

highly political conflict concerning the desirable intensity of Union action is directly carried out on the field of Community instruments. It is equally doubtful whether adding such vague concepts as the 'general framework' to the arsenal of legal instruments would be useful.[267] In any case, the demand for further differentiation by means of new instruments goes beyond the scope of this article.

A third reservation is general in nature. Whether the Community instruments form a rational, coherent system can only be determined by analyzing the interplay between legislation and legislative instruments. The 'division of labor' at the operating mode level offers little more than a framework that must prove itself in practice with regard to the exercise of discretion in the choice of instruments. It is rather doubtful that the institutions have always been clear as to the specific performance profile when choosing the instrument that appeared appropriate to them.[268] The Member State representatives' preference for the directive appears to be based on its two-step implementation structure, leaving the actors in the national political systems space for publicly visible activity even when in substance there is little room for maneuver.[269] In contrast, other aspects of the directive's legal regime, namely its potential to safeguard individual rights, plays a lesser role as a criterion for guiding discretion. Decisions addressed to the Member States once again bring up critical questions. If a decision is equally addressed to *all* Member States, it can neither realize its potential to have limited territorial effects nor can the directive's self-limiting potential be applied. In view of Art. 254 EC it is questionable whether a regulation might not be more appropriate in many cases; waiving the publication requirement can only rarely be justified. From the perspective of the theory of instruments,

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[267] Commission, A project for the European Union, Communication of 22.5.2002, COM (2002) 247 final, 22; Entschließung des Bundesrates zur Kompetenzabgrenzung im Rahmen der Reformdiskussion zur Zukunft der Europäischen Union, Beschluss vom 20.12.2001, Bundesrats-Drucksache 1081/01.

[268] Mainly this aims at the Commission's proposals. Open conflicts among the legislative institutions to which instrument a proposed act should be affiliated are rare; on the conflict of opinions regarding the first ERASMUS-program – the Commission proposed a decision addressed to the Member States, the Council voted for an addresseless decision – see I. Hochbaum, Politik und Kompetenzen der Europäischen Gemeinschaften im Bildungswesen, *Bayerische Verwaltungsblätter* 1987, 481 (483).

[269] Koopmans, see note 68, 695.

there is only exceptionally a need for decisions addressed to all Member States.

The last paragraphs underline this contribution's general thesis that the theory of instruments must be founded on the observance of legislative practice, and that it is only within the context of this concrete reality that it can be developed further. The theory of instruments needs to be built up on detailed case-studies and sector-specific analyses which can be cautiously generalized. Reforming the Community's legal instruments remains a long-term task for legal science, one that is still awaiting a renaissance.