Document of the European Convention on the legal instruments (15 May 2002)

Caption: Descriptive note on the instruments available to the European Union and the Community for the exercise of their competences, forwarded to the Members of the Convention by the Praesidium on 15 May 2002. The document was intended to serve as a basis for the debate of the Convention on 23 and 24 May 2002 on how the missions of the Union should best be carried out.

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The legal instruments – present system (15 May 2002)

Summary

1. The subject of legal instruments follows on logically from that of competences: once it has been decided to implement a competence, it is necessary to decide *who* can do it, *how*, and with *what* effects. This basic issue is addressed in the three parts of the note:

– the catalogue of instruments available to the Union and Community: their form and effects;
– the institutions' "modus operandi";
– the quality of the legislation.

2. The note summarises the development, over the course of time, of catalogue of instruments available to the Union and Community: their form and effects.

• It first explains the original classification of Article 249 of the TEC (decision, regulation, directive, recommendation and opinion), the legislator having wide freedom to choose between these instruments on a case-by-case basis.

• The note then points out that, in addition to Article 249 of the TEC, other articles of the EC Treaty refer to specific instruments of diverse scope and nature, the legal effects of which are often difficult to pin down.

• In addition, the TEU includes two lists, presented in the note, of instruments specific to the areas of foreign policy and cooperation in criminal matters; in this area direct effect has been explicitly ruled out.

• Finally, certain instruments, not provided for in the Treaties, have been developed in practice; their legal value is not fully tested but they are not lacking in effect.

3. Is this increase in the number of instruments a factor of legal uncertainty, and one of the reasons for the opacity of which the Union stands accused?

4. To attain the objectives and exercise the competences of the Union and of the Community, the treaties assign powers to the institutions. But, as the note explains, the Union's institutional system does not rest on the principles of separation of powers accompanied by a definition of the usual functions of the institutions, as found in traditional constitutional law. Instead, the treaties sketch out pragmatically forms of cooperation between the institutions which represent different interests.

5. Legislative power is not defined by the treaties; they merely define, on a case-by-case basis, the respective roles of the institutions involved (the Council and the European Parliament as co-legislators or with differing degrees of participation, the Commission also playing an important role by virtue of its prerogatives of initiative). These roles are exercised via a very large number of procedures.

6. As regards the power to adopt rules for the implementation of acts of secondary legislation (third-level rules) at Community level, the treaty specifies that:

• the Council shall "confer on the Commission, in the acts which the Council adopts, powers for the implementation of the rules which the Council lays down. The Council may impose certain requirements in respect of the exercise of these powers.

• The Council may also reserve the right, in specific cases, to exercise directly implementing powers itself".

7. Is this lack of a coherent system of decision-taking procedures and their great diversity an additional cause of complexity and opacity?

8. Finally, the note raises the problem of the quality of Community legislation and its capacity to adapt to the complexity and speed of change, above all in the economic field. In this context, it refers to the discussions held within the European institutions, in particular the Commission, on the possibilities – without changing the treaties – for simplifying and rationalising the regulatory environment, and presents in detail the various mechanisms envisaged (consultations, impact analyses, co-regulation and self-regulation, evaluation of and follow-up to legislation, etc.).

9. Should some of these mechanisms be embodied in the treaties?

Introduction

10. The subject of legal instruments follows on logically from that of competences (see CONV 47/02): once it has been decided to implement a competence, the Union/Community must decide who should do it, how, and with what effects. This note will address the following subjects:

I. The catalogue of instruments available to the Union and Community: their form and effects.

II. The institutions' modus operandi.

III. The quality of the legislation.

I. The catalogue of instruments available to the Union and Community: their form and effects

11. Here as elsewhere, the evolution of the Community and of the Union in line with successive Treaties has led to matters being superimposed in a way which ultimately excludes any possibility of systematisation. To the original classification in Article 249 of the TEC have been added numerous acts of secondary legislation, some of which have the same names as those listed in that Article, but with characteristics of their own. Sometimes these are acts of a doubtful legal nature; at other times it is their binding nature which is not certain. Finally, while most of these acts are provided for by the Treaties, some instruments which could not be described as legal instruments but of which the binding force is de facto proven have gained acceptance through use.

A. The typology of acts of secondary law in Article 249 of the TEC

12. Article 249 contains the classic list of Community legal acts and their effects. It distinguishes between binding acts: the decision, the regulation and the directive; and non-binding acts: the recommendation and the opinion. (It should be noted that recommendations and opinions are not without legal effects, particularly as instruments of interpretation.)

13. Regarding binding acts, a decision "shall be binding in its entirety upon those to whom it is addressed". It therefore constitutes an individual act which is not of general scope. By contrast, both directives and regulations are of general scope, and are by their nature normative. However, while the former are addressed to Member States and establish an obligation to achieve a result, regulations are addressed directly to citizens and are binding in their entirety. Thus a directive sets a result to be achieved while leaving Member

States the choice of form and methods (though case-law has recognised that directives may under certain conditions have direct effect [1].) In practice, the directive as an instrument is characterised by the flexibility which it offers to the legislator. The latter may, according to need, simply set a very general framework for a policy or set minimum rules [2], but may also in particular cases lay down very detailed provisions leaving little or no margin of transposition to Member States [3].

14. Nevertheless, many have seen the directive as a means of legislating which is more in keeping with the principle of subsidiarity. Arguably, however, while the principle of subsidiarity is the key to decisions on the exercise of competences, it is rather the principle of proportionality, as defined by Article 5 of the TEC ("action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty"), which governs the choice of the legal instrument used to implement those competences. Paragraph 6 of the protocol on subsidiarity and proportionality gives some preference to directives rather than regulations, and to framework directives (an unknown instrument in the typology of the Treaty) rather than to detailed ones. Paragraph 7 of that protocol states that "Community measures should provide Member States with alternative ways to achieve the objectives of the measures".

However, each instrument seems to have its merits: the directive has flexibility which makes it possible to take account of the institutional and legal individuality of each Member State, whereas the regulation has the advantage of its immediate and homogenous application, which is indispensable in certain areas.

15. With few exceptions [4], the Treaty leaves the legislator freedom of choice as to the instrument to be used, particularly the choice between the regulation and the directive as the legal instruments "par excellence". This choice is independent of the category of competence involved (exclusive, concurrent or shared, or complementary), though some have argued that, for the principles of subsidiarity and proportionality to be effectively applied, the choice should be limited to particular instruments deemed suitable to different types of competence: e.g. in the case of concurrent competence, use would have to be made of directives or framework directives. Nor does the question of the choice between a directive and a regulation exhaust the question of the appropriate intensity of action by the Community. The reality of Community legislation shows that the degree of detail in the rules (and hence the freedom of action left to national authorities) is very variable.

B. Community acts outside the typology of Article 249

16. Article 249 does not exhaust the list of Community instruments laid down by the EC Treaty for the implementation of competences. Other Articles call for specific instruments of varied scope and nature, the legal effects of which are often difficult to pin down. This is for example the case with "guidelines", a term which appears in relation to economic coordination, employment policy [5] and trans-European networks, or "framework programme", used in relation to research or action programmes in the field of the environment, etc. Yet more difficult to categorise are cases where Community competence is exercised by means of coordination between the Member States.

17. It is also interesting to note that the term "decision" [6] is often used in practice in relation to texts of a normative character and general scope. These are heterogeneous legal acts, but very different from "decisions" within the meaning of Article 249 of the Treaty. This is the case for example with the Decision on Own Resources, the Decision laying down the procedures for the exercise of implementing powers conferred on the Commission (the "comitology" Decision), or Decisions based on Article 308.

18. The same terminological confusion affects some rules which the Treaty calls "implementing decisions" [7] which might give cause to regard them as "implementing rules" (third level). This is the case for example in Articles 148 and 162 concerning the Social Fund and the ERDF respectively.

19. Some have accordingly argued that for transparency and ease of understanding of Community acts, the number of instruments available to the Community to implement competences should be reduced and/or exhaustively catalogued.

C. Acts adopted under Title V of the TEU

20. Despite shared institutional unity with the Community system, Title V and Title VI of the TEU rest on very different principles from those underpinning the Community edifice. They sketch out a legal order in which the direct effect of instruments of secondary legislation has been explicitly set aside, with those instruments being confined to creating obligations at the level of the Member States and institutions of the Union.

21. Article 12 of the TEU contains a catalogue of foreign policy instruments:

− Principles and general guidelines are political acts adopted by the European Council.

− Common strategies prepared by the Council and adopted by unanimity by the European Council define the objectives and means of action of the Union in an area of common interest for the Member States. Their legal nature may be affirmed since they allow for the adoption by qualified majority of implementing acts (joint actions, common positions or any other decision).

− Joint actions are provided to address specific situations requiring operational action by the Union. They are binding on Member States, without further detail as to their consequences.

− Common positions define the approach of the Union to a particular matter of a geographical or thematic nature. Member States must comply with them in their national polices and diplomatic activity.

− Enhancing systematic cooperation between Member States in the conduct of their policy, which may take various forms and constitutes more a method of action than an instrument in itself.

22. Besides the list in Article 12, Title V provides for other instruments: this is the case with the mutual information and consultation mentioned in Article 16 and the mandates for the WEU provided by Article 17. It should further be noted that in Title V we find new uses of the term "decision" [8], in a broad sense as a measure adopted on the basis of Title V but also as an act to implement actions and common positions, where decisions are adopted by qualified majority [9]. In addition, other instruments such as guidelines, codes of conduct, or statements by the Council and the Presidency of the Union, have also gained acceptance. In short the complete range of foreign policy instruments is particularly difficult to define. They have consequences which are difficult to understand merely by dint of their classification in the Treaty.

D. Acts adopted under Title VI of the TEU

23. Broadly speaking, the Maastricht Treaty provided the same instruments for cooperation on CFSP matters and for justice and home affairs (JHA) – the third pillar. The Amsterdam Treaty modified the instruments available in the fields of police and judicial cooperation on criminal matters, which remained in the third pillar.

24. Article 34 of the TEU distinguishes four types of act:

− Common positions define the approach of the Union to a particular matter. Nothing is mentioned about their binding force.

− Framework decisions are for the purpose of approximating laws. They are binding upon Member States as to the result to be achieved. They resemble directives but direct effect is explicitly excluded.

− Decisions may not be used for the approximation of national laws. They are binding, but as with framework decisions, direct effect is excluded.

− Conventions are instruments adopted by the Council but subject to ratification by States. They are close to instruments of classic international law and enter into force in those States which have ratified them when they have been ratified by more than half of the parties involved.

Article 34 also provides for Measures, to be adopted by qualified majority [10], to implement decisions and conventions.

25. Despite the improvements made by the Amsterdam Treaty, many claim that these instruments are still not well suited to an area which generates considerable legislative activity, unlike the foreign and security policy area for which the instruments of the EU Treaty were first conceived.

E. Atypical instruments

26. The provisions of the Treaties do not contain all the means of action available to the institutions. Over time other instruments whose legal value is not always fully tested, but which are not lacking in effect, have been developed.

27. This category includes in particular:

− Interinstitutional agreements, which appear as a practical manifestation of the principle of sincere cooperation between institutions. No one doubts their effectiveness as an instrument of self-discipline for the institutions, particularly in the budgetary and legislative areas.

− Conclusions and resolutions of the European Council, which have a political rather than legal character, but which can massively affect legislative procedures.

− Council resolutions and conclusions, which have political value only, but which are not completely lacking in legal effects. They have a value in interpreting legal acts, as the Court has recognised.

− Statements by the Member States included in the minutes or conclusions of the Council, which do not have legal effects.

− Declarations attached by the institutions to certain legal acts, which have declaratory value only.

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28. Some have seen the multiplication of instruments which has accompanied the extension of Union's policies as a factor leading to legal insecurity and one of the principal reasons for the opacity of which the Union stands accused. Some have accordingly argued that the range should be reduced and/or that the legal effects of instruments in the three pillars should be harmonised.

II. The institutions' modus operandi

29. To attain the objectives and exercise the competences of the Union and Community, the Treaties allocate powers to the institutions. This allocation does not rest on a system of separation of powers, and there is no

general statement in the Treaties defining the usual functions of the institutions under the rule of law. Whereas legislative power belongs either jointly to the Council and the European Parliament as co-legislators, or to the Council with the participation of the European Parliament, with the Commission involved in the legislative process in both cases, executive power, including the power to dictate implementing rules, is determined case by case during the legislative process. The third indent of Article 202 of the TEC states that the Council "shall confer on the Commission, in the acts which the Council adopts, powers for the implementation of the rules which the Council lays down…. The Council may also reserve the right, in specific cases, to exercise directly implementing powers itself".

A. Legislative power

30. Legislative power, understood as the capacity to take secondary legislation decisions (second-level rules) in application of the Treaty, is exercised either jointly by the Council and the European Parliament as co-legislators, or by the Council with the involvement to differing degrees of the Parliament in most cases. The Commission also plays an important role in the Community pillar, through its prerogatives to initiate legislation. Legislative power is not defined by the Treaties. The EC Treaty defines the function of the Council as a legislator only in relation to access to documents (Article 207(3)). The Treaties delimit the respective roles of the institutions on a case-by-case basis according to a very large number of procedures.

31. If procedures are classified using just two parameters, namely the system of voting at the Council and participation by Parliament, a considerable number of combinations appear:

• qualified majority with codecision
• qualified majority with cooperation (even if residual)
• qualified majority with assent
• qualified majority and straight opinion
• qualified majority without involvement by the Parliament
• unanimity with codecision
• unanimity with assent
• unanimity with straight opinion
• unanimity without participation by the Parliament.

This list concerns only the Community pillar, and does not take account of requirements for opinions from the ESC and the CoR, nor for the specific majorities required in some individual cases. There are also special procedures such as the budgetary procedure, (which in practice differs considerably from what is laid down in the Treaty), the uniform electoral procedure, etc.

32. The application of a particular procedure to a particular subject is explained more by history (diplomatic negotiation at the time of the successive reforms of the Treaties) than by any systemic logic. The only principle which it is possible to identify is the tendency towards a generalisation of qualified majorities at the Council, accompanied by the power of codecision granted to the Parliament.

33. Some examples demonstrate this lack of consistency. Even if the general rule is that codecision is accompanied by a vote at the Council by a qualified majority, some provisions, even after Nice, stipulate the codecision procedure with unanimity by the Council, with the complications which that entails in terms of negotiation between the two institutions [11]. In some areas there is differentiation by sector. For example, Article 18, after Nice, makes freedom of movement subject to a qualified majority in the Council, except concerning measures relating to passports, identity cards, welfare and social security, which will still require unanimity. Similarly, Article 175 on the environment requires, as an exception, unanimity for some subjects: fiscal provisions, regional planning and energy supply. Mention should also be made of the phenomenon of "bridges", which permit or prescribe issues to move, after a given time-lapse, from unanimity to qualified majority voting. This is for example the case with visas, asylum and immigration (Article 67), the

environment (Article 175) and, after Nice, cohesion (Article 160).

34. A further lack of consistency concerns provisions which have significant financial repercussions. The budgetary procedure gives a predominant position to the Parliament as regards non-compulsory expenditure, whereas its participation in the legislative procedures leading to the acts which produce this sort of expenditure is variable, not to say modest. For example, Regulations relating to the Structural Funds [12] and to the Cohesion Funds (Article 161) are adopted with the assent of the Parliament, but Financial Regulations applying to the general budget (Article 279) with its opinion alone. On the other hand, guidelines and measures to finance trans-European networks (Article 156) or the framework programme for research (Article 166) are adopted by codecision.

35. The lack of a coherent system of procedures, and their great diversity, are additional factors leading to complexity and opacity, and has prompted some to suggest that there should be clear correlations between the legal instrument, the decision-making procedure and the type of action to be implemented, with instruments classified not only according to their form and effects, but also by the procedures by which they are adopted. At successive Intergovernmental Conferences, hierarchical systems, which also provided for the establishment of general procedural principles, have been unsuccessfully proposed. Instead each Intergovernmental Conference has increased the procedural complexity.

B. Implementing rules 13

36. Under the Treaty system, the general rule is that competence to implement and apply legislative rules lies with the Member States in accordance with their respective constitutional rules, in compliance with the Treaty and subject to the scrutiny of the Commission, the national courts and the Court of Justice [14]. The Community exercises such competences in a subsidiary capacity only, in particular where it is necessary to ensure some degree of homogeneity in applying secondary legislation. It should also be noted that the Treaty, unlike many national systems, does not distinguish between *regulatory* power (the power to adopt general implementing rules for legislative acts) and the power to enforce laws by means of individual acts, with both cases being covered by the concept of "implementation" within the meaning of Articles 202 and 211 of the EC Treaty.

1. The scope of implementing rules

37. As regards the power to adopt implementing rules for secondary legislation (third-level rules) at Community level in accordance with the third indent of Article 202 TEC, the Council shall "confer on the Commission, in the acts which the Council adopts, powers for the implementation of the rules which the Council lays down [15]. The Council may impose certain requirements in respect of the exercise of these powers. The Council may also reserve the right, in specific cases, to exercise directing implementing powers itself" [16].

38. The third indent of Article 202 was introduced at the time (Single European Act) for the purpose of relieving the legislator of technical or excessively detailed questions that were likely to overwhelm him with the burden of legislation relating to the internal market. But Community legislation is still often criticised as being too detailed and too technical. However, as noted above, proposals at successive IGCs for the introduction into the Treaties of the principle of the hierarchy of acts [17], with the aim of alleviating the technicality of second-level rules by making a clear distinction between what is "legislative" and what is "executive", have not been accepted.

39. In fact, however, the Treaty provisions already allow the legislator to make such choices, seriatim. The scope of implementing rules is decided in each individual case in the primary act. It is the institution or institutions holding legislative power which determine whether and to what extent recourse needs to be had to implementing rules. They therefore decide on a case-by-case basis on the degree of detail and technicality of second-level rules [18], and have the option to restrict (second-level) legislative acts to general principles and fundamental rules only, leaving the details and more technical questions to the implementing rules.

Perhaps the legislator should be encouraged to resort to delegation, while making provision for a right of call-back which would allow it to monitor implementing rules effectively? Could a mechanism [19] for legislative delegation to the Commission, subject to the legislator's scrutiny, be envisaged?

40. In short, the existence of two levels of rules (primary rules-second level and implementing rules-third level) is not clearly apparent in the Treaties, nor is it reflected in the reality of Community substantive law. Some believe it is now time to establish a clear and explicit hierarchy of acts in the Treaties. One could define the legislative and executive functions in the Treaties and specify which institutions are entitled to exercise them, and to what extent; and/or draw a clearer distinction between legislative acts and implementing rules and set it out expressly in the designation of acts.

2. Scrutiny requirements

41. In accordance with Article 202, the Council may "impose certain requirements in respect of the exercise of these [implementing] powers". These requirements consist in scrutinising the Commission's executive activity via committees composed of experts representing the Member States. The act currently governing this matter, commonly known as "comitology", is the Council Decision of 28 June laying down the procedures for the exercise of implementing powers conferred on the Commission. This Decision replaced that of 13 July 1987.

42. One of the aims of the "comitology" Decision is to bring order to the scrutiny procedures and to ensure that each act of secondary legislation does not provide for specific arrangements. In fact, the wording of the legal basis of these rules that are "to be laid down in advance by the Council" leaves no doubt as to the exhaustive nature of the Decision. It rationalises and simplifies committee procedures, reducing them to three. But some consider the committee procedures unnecessarily cumbersome: while the arrangements for scrutiny of the

Commission were originally introduced to enable the Council to confer third-level legislative functions on the Commission more frequently, and, therefore, as a simplifying factor, it is often asserted that they have with time become a complicating factor.

43. The Commission published the list of committees in its report on the functioning of committees in 2000: there are a total of 244. During that year, 1 742 acts were referred to the committees, and a total of 4 323 consultations of all kinds were conducted.

44. While it should be noted that consideration of comitology changes raises wider issues, it is clear that the current arrangements are proving burdensome, even for the governments of the Member States [20]. Some accordingly argue that further simplification of the committee procedures should now be envisaged.

III. Quality of legislation

45. The above questions do not exhaust the problem of the "quality" of Community legislation and its capacity to adapt to the complexity and speed of change, above all in the economic field. While the decision-making procedures are criticised as being excessively slow and cumbersome, its product is often accused of being rigid and verbose. Some believe that this argues for greater delegation of powers to the Commission and the national authorities; others that it points to taking greater account of, and adapting to the new mechanisms for, the self-regulation of economic operators [21].

46. For some years now, the European institutions, and in particular the Commission, have been discussing the simplification and rationalisation of the regulatory environment. More recently, these discussions have received the encouragement of the European Council which, in the framework of the Lisbon process, called on the European institutions, and the Member States, to "set out a strategy to simplify the regulatory environment, including the performance of public administration, at both national and Community level." This context also encompasses the broad debate on governance [22] launched by the Commission last year.

47. Relevant points include the following:

i) in legislative procedures, it is often argued that the preparatory phase is not sufficient from the point of view of the impact on economic operators, who would prefer greater in-depth consultation in advance, including on the choice of the most appropriate form of action. It is also argued that Community legal instruments should go hand-in-hand with other solutions. The open method of coordination launched in Lisbon, intended for experience-sharing, is one example: another is the voluntary cooperation method, with self-regulation based on co-operation between the interested parties. Some see in coregulation a way of combining the advantages of legislation (legal certainty and defence of the general interest) with those of self-regulation, as in the so-called "new approach" directives, where the essential requirements are set out in a framework directive, while undertakings have a choice as to the way in which they comply with those obligations.

ii) Legislative procedures take a very long time. The adoption of a legislative measure takes on average more than a year and a half. In the case of directives, two further years or more can go by before they are transposed into national law. These delays can consort badly with an often rapidly changing economic environment.

iii) Community legislative acts are often thought too detailed, frequently as a result of difficult compromises within and between the institutions. The transposition of directives and the implementation in general of Community acts in the Member States can give rise to additional complexity, divergence and delay. The Commission is preparing a proposal for a method of consultation with the Member States in order to improve the implementation of legislation and eliminate inconsistencies but also, and above all, to facilitate the adaptation of legislation to economic or technical change. Among other things, the Member States might be asked to produce regular tables showing the concordance of national measures with Community legislation.

iv) Evaluation and review of existing acts is seen as another field for coordinated action on the part of the Commission, national administrations and economic and social operators. Consideration is being given to the insertion of a revision mechanism (sunset clause) in legislative acts, in the form of a deadline for revision of the act.

48. Mention should also be made of the efforts which have long been made to recast and codify Community law. Initiatives to simplify existing legislation in the areas of agriculture and the internal market (SLIM initiative) have been under way for a number of years. Progress is slow.

[1] The case-law of the Court, which has recognised the direct application of directives, covers only cases where a State has not transposed or has badly transposed a directive, on expiry of the deadline. Furthermore, the provisions in question must by their nature be able to produce that direct effect, i.e. they must be precise and non-conditional. Finally, direct effect can be invoked in relation to a State which is at fault, but not to an individual.

[2] Examples: the most recent Framework Directives on the environment, and recent proposals for directives on immigration and asylum.

[3] Examples: directives laying down procedures for close cooperation between national authorities (Directive 91/414 concerning the placing of plant protection products on the market; GMO directives 1990/219 and 2001/18).

[4] Some legal bases impose a particular instrument, e.g. Article 89 prescribes a regulation, Articles 47, 52, 96 or 94 (ex 100) and 137 call for a directive, and Article 83 allows a choice between directives and regulations.

[5] It should be noted that guidelines on economic coordination and social policy are based on "conclusions" of the European Council, which in principle have no legal effect.

[6] This problems does not concern all languages: these acts are correctly distinguished in some language versions (e.g. in German

"Beschluss", as against "Entscheidung" within the meaning of Article 249).

[7] (in German: "Durchführungsbeschluss").

[8] As mentioned above, this problem does not concern all languages.

[9] It should be remembered that the qualified majority rule does not apply to decisions with military implications or in the defence area, and that it can be resisted by a Member State; the question may then be sent back to the European Council, which decides by unanimity.

[10] These are special qualified majorities: sixty-two votes representing ten Member States in the case of measures implementing decisions, and two thirds of Contracting Parties in the case of conventions.

[11] Articles 42, 47 and 151.

[12] Curiously, the Regulations on the Social Fund and the ERDF, which depend entirely on the Regulation on the Structural Funds, are adopted by codecision, whereas that relating to the EAGGF (Guidance section) is adapted with a straight opinion.

[13] This part of the note concerns only the EEC Treaty. Title V and Title VI of the TEU establish specific implementation obligations for the institutions and the Member States. Title VI, in particular, provides for implementation measures adopted by the Council after consultation of the Parliament, but the Council's practice has, with the Parliament's agreement, moved away from these provisions by often conferring implementation tasks on the Commission and by making use of committee procedures.

[14] Article 10 of the TEC; Protocol on the application of the principles of subsidiarity and proportionality annexed to the Treaty of Amsterdam (cf. Selected Instruments taken from the Treaties, Book 1, Volume 1, p. 567) and Declaration No 43 on that Protocol annexed to the Final Act of the Amsterdam Intergovernmental Conference.

[15] The Court has held that in cases involving codecision, Parliament should also be regarded as being covered by this Article.

[16] The Court has held that the Council must even give detailed justification of the decision to reserve itself the right to exercise executive powers.

[17] At the Maastricht IGC, Italy had proposed the following hierarchy between Community acts: constitutional, legislative, regulatory and administrative rules, with different adoption procedures. On the same occasion, the Commission proposed the following classification: "laws", regulations, decisions, recommendations and opinions. Laws would be adopted in accordance with a "codecision" procedure involving the European Parliament and the Council. The Commission would be competent to adopt the regulations and decisions necessary for implementing the laws. The Luxembourg Presidency had presented this proposal to the Conference, but while the codecision procedure was in fact introduced into the Treaty, the classification of acts remained unchanged. A Declaration annexed to the Treaty on European Union provided that "the Intergovernmental Conference to be convened in 1996 will examine to what extent it might be possible to review the classification of Community acts with a view to establishing an appropriate hierarchy between the different categories of act". Nothing in this area was adopted at Amsterdam.
At the Nice IGC, the Portuguese Presidency had proposed the idea of legislative act taken in codecision and limited to basic rules and general principles. Rules for application would be adopted by the Council using a less cumbersome procedure.

[18] The end result is a system somewhat similar to that of most European constitutions: the legislative and executive areas are determined by the predominant position in the decision-making process of the institution or institutions which represent the legislative arm. The legislator determines which legislative functions are to be performed by the executive, always within a legal framework and subject to the scrutiny of the courts.

[19] Similar to those which exist in several Member States.

[20] See the Poos Report on the Reform of the Council

[21] See, with regard to the financial services sector, the Lamfalussy report, and the resolution of the Stockholm European Council.

[22] See the White Paper on governance, COM(2001) 428 final.