The Morphology of Legislative Power in the European Community: Legal Instruments and the Federal Division of Powers

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I. Introduction: The European Community and the Indeterminate Province of Legislation

Each society needs common rules and mechanisms for their production. The concept of legislation is central to all modern societies. Legislation refers to the making of laws (*legis*).[1] 'But what, after all, is a law? As long as we remain satisfied with attaching purely metaphysical ideas to the word, we shall go on arguing without arriving at an understanding; and when we have defined a law of nature, we shall be no nearer the definition of a law of the State.'[2] Rousseau's critique of the indeterminate and metaphysical understandings of the concept of 'a law', expressed in 1762, was not immediately heard. When a few years later, the constitution of the United States of America was adopted, it simply stated that '[a]ll legislative Powers herein granted shall be vested in a Congress of the United States'.[3] The provision only tells us *that* Congress is endowed with legislative power but not *what* legislative power is. The newly born constitutional order of the United States—as many other modern constitutional orders—thus continued to rely on a pre-positivist constitutional conception of legislation with a 'metaphysical' dimension.

So, 'what, after all, is a law?' The concept of 'legislation' is, like all law, an offspring of history. Or more precise: the concept of legislation has been shaped by various national histor*ies*. Two competing conceptions of legislation have emerged in the modern era. The *parliamentary* or *procedural* conception of legislation is tied to our modern understanding of who should be in charge of the legislative function. Legislation is positively defined as every legal act adopted according to the *parliamentary legislative procedur*e. This procedural conception of

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[1] Shorter Oxford English Dictionary.

[2] J. J. Rousseau, *The Social Contract* (1762), Book 2, Chapter 6 (translated by G.D.H. Cole) (Dent & Sons, 1955), 29.

[3] Article I, section 1 U.S. Constitution.

legislation has traditionally shaped British and French constitutional thought.[4] In materially defining legislation as legal rules with general application, the *functional* conception of legislation also appeals to our historical precepts. Indeed, the thought that a legislative act represents a *general legal norm* runs through legal history.[5]

Which of these traditions has informed the European Community's constitutionalism? The European Community—born in 1958 with the genetic code of an international organization—could hardly be viewed to reproduce the *trias politica* of a nation state. Article 4 of the EEC Treaty modestly provided: 'The tasks entrusted to the Community shall be carried out by the following institutions: an Assembly, a Council, a Commission, a Court of Justice. Each institution shall act within the limits of the powers conferred upon it by this Treaty.'[6] When the European Community was established, its 'regulatory' competences were not immediately conceived of as of a 'legislative' quality. The nature of the Community in general, and its *decision*-making procedures in particular, defied the parliamentary conception of legislation: the law-making function was until the Single European Act (almost) exclusively in the hands of the Council with the European Parliament having, at most, a consultative function. From the viewpoint of national democracies, it seemed that all decision-making powers of the European Community were 'executive' in character.[7]

As an organic understanding of the separation of powers doctrine had been marred with difficulties, a functional conception of the separation of powers doctrine emerged early on. The three EC governmental branches have, consequently, been defined in the following terms: '[T]he *legislative* power relates to the function of enacting rules with a general and abstractly defined scope of application (this is what a Continental European lawyer would call the "lois matérielles"); the *executive* power relates to the function of applying the said legislative rules to individual cases or specific categories of cases; finally, the *judicial* power relates to the function of settling litigation that arises on the occasion of the application of the legislative rules to individual cases or specific categories of cases[.]'[8] In tandem with a functional understanding of the separation of powers a functional conception of legislative power entered the Community legal order. The procedural variety characterizing Community law-making reinforced the functional perspective brought to the concept of Community legislation.[9]

[4] For the British parliamentary definition of legislation, see: A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan & Co Ltd, 1961), especially Chapters I and II.

[5] H. Schneider, *Gesetzgebung* (C.F. Müller, 1982), 19.

[6] Article 4(1) EEC.

[7] Early commentators, therefore, spoke of the 'Beschlußrecht' of the Community (cf. H. Wagner, Grundbegriffe des Beschlußrechts der EG (Köln, 1965) as well as R.W. Lauwaars, *Lawfulness and Legal Force of Community Decisions* (A.W. Sijthoff, 1973)). More modern is the characterization of Community legislation as 'executive legislation', see: H.P. Ipsen, Zur Exekutiv-Rechtsetzung in der Europäischen Gemeinschaft, in: P. Badura & R. Scholz (eds.), *Wege und Verfahren des Verfassungslebens. Festschrift für Peter Lerche zum 65*. Geburtstag (Beck, 1993).

[8] K. Lenaerts, 'Some Reflections on the Separation of Powers in the European Community', [1991] 28 C.M.L. Rev. 11–35 at 13.

[9] What happened to the parliamentary or procedural conception of legislation in the Community legal order? Only the slow ascendancy of the European Parliament to become co-legislator with the

So, what, after all, is a *Community* law? Which types of laws does the Community have? What is the 'morphology' of the European Community's legislative instruments? How and to what extent do these legislative acts restrict the autonomy of the Member States? Can the Community choose from among its legislative instruments?

In order to respond to these questions, we shall first revisit the functional concept of Community legislation before presenting the various perspectives from which the legislative instruments have traditionally been examined. Choosing the federal division of legislative power as our privileged viewpoint, the subsequent sections will investigate the legislative and preemptive quality of the various legal acts emanating from the Community. While regulations, directives and State-addressed decisions will be analyzed as forms of 'internal legislation', directly effective international agreements concluded by the Community will be conceptualized as 'external legislation'. We shall briefly enquire when and under what conditions the Community legislator can choose among the various legislative instruments that Article 249 EC provides. The conclusion argues that the introduction of the instrument of a 'framework law' would (re-)federalize and sharpen the morphology of legislative power in the EC.

II. 'Community Legislation': The Nature of Legislation and the (Complex) Principles of Community Authorship

The EC Treaty did not positively define what 'legislative power' is. What then is 'Community legislation'? The question has obviously two dimensions: First, what characterizes a 'legislative' act in the EC legal order? Second, when will this legislative act be attributable to the 'Community'? The first dimension concerns the nature of a legislative norm. The second dimension concerns the question as to when the Community can be considered its author.

A. The First Dimension: The Functional Conception of Legislation in the Community Legal Order

The 'purest' functional conception of legislation emerges in the first half of the twentieth century and is closely associated with *Hans Kelsen* and the Vienna

Council under the co-decision procedure—today applicable to the majority of legal competences of the European Community—has cleared the way for the gradual emergence of a parliamentary definition of legislation in the Community legal order. The procedural conception of legislation had, to a large extent, informed the Constitutional Treaty (2004). For a discussion of the conception of legislative power underlying the Constitutional Treaty (2004), see: K. Lenaerts & M. Desomer, 'Towards a Hierarchy of Legal Acts in the European Union? Simplification of Legal Instruments and Procedures', [2005] 11 European Law Journal 744–54 and R. Schütze, *Sharpening the Separation of Powers through a Hierarchy of Norms*? EIPA Working Paper 1/2005=<http://www.eipa.nl/Publications/Summaries/05/FC0501e.pdf>.

School of Pure Law. The pure theory of law started from the premise that *all* public decision-making involved a normative dimension and that there was no ontological distinction between legislative, executive and judicial activities. The tripartite organizational structure of the State was seen as a historical contingency and not as the result of a natural physiological 'constitution' of the State. The Pure Theory of Law, therefore, rejects all 'institutional' or 'ontological' classifications of public acts into *a priori* legislative-executive-judicial. The classification of an act as 'legislative' or 'executive' can only be determined *in relation to* the totality of all legal norms within the legal order. The only recognized distinction in the management of the State was the *functional* dichotomy of 'law-creation' and 'law-application'. This view led to a 'relativistic turn' of the concept of legislation: the function of a normative act is *relative* to the state of development of the legal order.

'But what, after all, is a law?' The Pure Theory of Law distinguishes between 'general' and 'individual' norms that both form part of the legal order and thus constitute 'law'.[10] While the creation of any norm—whether general or individual—could be described as legislation 'in the broad sense', the concept of legislation is ultimately confined to the creation of general norms. Even with this limitation in mind, the activity of legislation will cut across all governmental activities:

> By legislative power or legislation one does not understand the entire function of creating law, but a special aspect of this function, the creation of general norms. 'A law'—a product of the legislative process—is essentially a general norm, or a complex of such norms. ('The law' is used as a designation for the totality of legal norms only because we are apt to identify 'the law' with the general form of law and erroneously ignore the existence of individual legal norms.) (...) It never occurs in political reality that all the general norms of a national legal order have to be created exclusively by one organ designated as legislator. *There is no legal order of a modern State according to which the courts and administrative authorities are excluded from creating general legal norms, that is, from legislating, and legislating not only on the basis of statutes and customary law, but also directly on the basis of the constitution*. (...) The general norms created by these organs are called ordinances or

[10] H. Kelsen, *General Theory of Law and State* (Russell & Russell, 1945), 38. The passage on which Kelsen relies on comes from the first lecture of Austin's classic study of 'The Province of Jurisprudence Determined' and reads as follows: 'Commands are of two species. Some are *laws* or *rules*. The others have not acquired an appropriate name, nor does language afford an expression which will make them briefly and precisely. I must, therefore, name them as well as I can by the ambiguous and inexpressive name of '*occasional* or *particular* commands'. The term *laws* or *rules* being not infrequently applied to occasional or particular commands, it is hardly possible to describe a line of separation which shall consist in every respect with established forms of speech. (. . .) By every command, the party to whom it is directed is obliged to do or to forbear. Now where it obliges *generally* to acts or forbearances of a *class*, a command is a law or rule. But where it obliges a *specific* act or forbearance, or to acts or forbearance, which it determines *specifically* or *individually*, a command is occasional or particular.' (J. Austin, *The Province of Jurisprudence Determined* (CUP, 1995) at 25).

regulations or have specific designations; but *functionally* they have the same character as statutes enacted by an organ called legislator.[11]

The legislative function is, according to Kelsen, never allocated to only one governmental branch. The nature of a public act is not determined by the institution emitting it or by the legal instrument used. 'Laws', 'regulations' or 'judgments' are not automatically of a (respectively) 'legislative', 'executive' or 'judicial' nature. Rather, it is their effects within the legal order—are they creating general norms or only individual ones—that determine if they are 'legislative' or merely 'executive' acts. The Vienna School can, consequently, refer to *parliamentary* legislation, *executive* legislation and *judicial* legislation without running into linguistic contradictions.[12] Judicial acts may create general legal norms, where they assume the character of a precedent.[13] 'Legislation' is *functionally* defined as that part of law-creation that produces *generally applicable* legal norms in a legal order.

What is a general norm and what is an individual norm? Kelsen defines the latter as 'norms which determine the behaviour of *one individual in one non-recurring situation and which therefore are valid only for one particular case and may be obeyed or applied only once*' and gives the example of a court judgment whose binding force is limited to the particular situation it decides.[14] The criterion of an act's 'generality' and 'individuality' is therefore identified with its scope of application: general norms apply generally; individual norms only apply to their specified addressee(s).

From this functional perspective, what are legislative acts in the Community legal order? Legislative power means legal power. A legislative rule must be an objectively binding rule. Contracts are also binding. Yet, they are not 'law' as their binding nature is conditional.[15] The breach of contract by one party may serve as justification for not adhering to the terms of the contract by the other party. This normative *reciprocity* will not be found in legislation: a legislative rule will be

[11] H. Kelsen, above n.10 at 256, 269–70 (emphasis added).

[12] Kelsen points out that our thinking of legislation as 'parliamentary legislation' has been conditioned by a habit of linguistic simplification. In everyday language, we tend to speak only of one legislator—that is in democracies: parliament—and label only its acts as 'legislation': 'Thus one can hardly speak of any separation of legislation from the other functions of the State in the sense of the so-called 'legislative' organ to the exclusion of the so-called 'executive' and 'judicial' organs—would alone be competent to exercise this function. The appearance of such a separation exists because only those general norms that are created by the 'legislative' organ are designated as 'laws' (leges). (. . .) This organ never has a monopoly on the creation of general norms, but at most a certain favoured position such as was previously characterized. Its designation as legislative organ is the more justified the greater the part it has in the creation of general norms' (*ibid.*, 272–3).

[13] Courts 'exercise a legislative function when their decision in a concrete case becomes a precedent for the decision of other similar cases. A court with this competence creates by its decision a general norm which is on a level with statutes originating with the so-called legislative organ' (*ibid.*, 272).

[14] Kelsen, *ibid.*, 38 (emphasis added).

[15] Contracts are typically reciprocal in nature: the primary obligation to fulfil the contract is contingent on the fulfilment of the norms by the other party. A breach of contract by one party typically releases the other party from its (primary) obligation under the contract. According to

enforceable against all the persons to whom it applies—regardless of whether it has been violated by some of its subjects.

Is the EC Treaty a treaty or institutional law? In *Commission v Luxembourg & Belgium*,[16] the defendants had argued that 'since international law allows a party, injured by the failure of another party to perform its obligations, to withhold performance of its own, the Commission has lost the right to plead infringement of the Treaty'. The Court did not accept this contractual reading of the EC Treaty as the latter was 'not limited to creating reciprocal obligations between the different natural and legal persons to whom it is applicable, but establishes a new legal order, which governs the powers, rights and obligations of the said persons, as well as the necessary procedures for taking cognizance of and penalizing any breach of it'.[17]

In *Commission v Italy*,[18] the European Court of Justice extended that line of argument to secondary law adopted on the basis of the EC Treaty. Italy had failed to implement a Community directive in time and the Court held that 'any delays there may have been on the part of the other Member States in performing obligations imposed by a Directive may not be invoked by a Member State in order to justify its own, even temporary, failure to perform its obligations'.[19] The non-reciprocal binding effect evidenced that the Community's legal instruments under Article 249 EC were indeed 'a law of an institutional and not of a contractual nature'.[20]

What about international agreements concluded by the Community? Will their normative character fall on the contractual side, or will their legislative side prevail? The constitutional possibility of 'external legislation' has been explored for more than 200 years in the US American constitutional order. Section 2 of Article VI of the US Constitution states: 'This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and *all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land*; and the Judges in every State shall be bound thereby[.]'[21] The supremacy clause was

O.W. Holmes, '[t]he only universal consequence of a legally binding promise is, that the law makes the promisor pay damages if the promised event does not come to pass. In every case it leaves him free from Interference until the time for fulfilment has gone by, and therefore free to break his contract if he chooses' (O.W. Holmes Jr., *The Common Law* (Little, Brown & Company, 1881), 301). In this point, we depart from H. Kelsen as for him the concept of legislation may include public and private law creation: 'The legal transaction is an act by which the individuals authorized by the legal order regulate certain relations legally. It is a law-creating act, for it produces legal duties and rights of the parties who enter the transaction. (. . .) By the legal transaction, individual and sometimes even general norms are created regulating the mutual behaviour of the parties' (H. Kelsen, above n.10 at 137).

[16] *Commission v Luxemburg and Belgium*, Case 90, 91/63, [1964] E.C.R. 625.

[17] *Ibid.*, 631.

[18] *Commission v Italy*, Case 52/75, [1976] E.C.R. 277.

[19] *Ibid.*, para. 11.

[20] P. Pescatore, *The law of Integration: emergence of a new phenomenon in international relations, based on the experience of the European Communities* (Sijthoff, 1974), 67 and 69.

[21] Emphasis added.

a clear choice in favour of monism that allows international treaties to be regarded as 'external legislation'. In *Foster v Neilson*, we read:

> A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument.
>
> In the United States a different principle is established. Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as *equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision*. But when the terms of the stipulation import a contact, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.[22]

An international treaty will be 'equivalent' to a legislative act, where the treaty 'operates of itself'. Self-executing international treaties will have a 'two-fold effect': 'It is an international agreement of the United States and, to the extent that it is intended to have domestic effects and consequences, the treaty is also a law of the United States, as much as an act of Congress.'[23]

In the EC constitutional order, a similar approach has been adopted. The Community legal order has signalled its 'monist' stance towards international treaties: Community agreements enter the Community legal order without the need for an additional act of transposition or incorporation.[24] International treaties 'form an integral part of the Community legal system' from the date of their entry into force.[25] Furthermore, Community agreements are treated like 'unilateral' acts of the Community institutions: 'As far as the Community is concerned, an agreement concluded by the Council with a non-member country in accordance with the provisions of the EC Treaty is an act of a Community institution, and the provisions of such an agreement form an integral part of Community law.'[26] Community treaties are, consequently, 'external' Community

[22] *Foster v Neilson*, [1829] 27 U.S. (2 Pet.) 253 at 314 (emphasis added).

[23] L. Henkin, 'The treaty makers and the law-makers: the law of the land and foreign relations', [1958–9] 107 University of Pennsylvania Law Review 903–36 at 906.

[24] The constitutional practice of concluding international agreements through decisions *sui generis* shows that international treaties themselves constitute the direct source of legal rights and obligations within the Community legal order.

[25] *Haegemann v Belgium*, Case 181/73, [1974] E.C.R. 449, para.5.

[26] *A. Racke GmbH & Co v Hauptzollamt Mainz*, C-162/96, [1998] E.C.R. 3655, para.41. A more 'dualist' position underlies *Commission v France*, Case 327/91, [1994] E.C.R. 3641 in which the ECJ insisted that the 'act' under review was not the agreement itself, but the 'treaty law' adopted to conclude the treaty. This interpretation has received academic support from T. Hartley. Hartley has claimed that the argument that the agreement itself is a Community act 'falls down since it confuses a unilateral act—which is surely what the drafters of [Article 234] must have had in mind—with a bilateral act.' (T. Hartley, 'International Agreements and the Community legal system: Some recent Developments', [1983] 8 E.L. Rev. 383–92 at 391). International agreements are accordingly considered an 'anomalous source of *Community* law' as they have their 'origin outside the Community legal

law.[27] They are equivalent to 'internal' Community legislation and part of 'the law of the land'.

Let us now turn to the 'legislative' quality of internally or externally produced Community law. In accord with the functional conception of legislation, the Community legal order has identified the legislative quality of a norm with its general application: 'The essential characteristic of a decision arises from the limitation of persons to whom it is addressed, whereas a regulation, being essentially of a *legislative nature, is applicable not to a limited number of persons, named or identifiable, but to categories of persons viewed in the abstract and in their entirety*.'[28] The functional distinction between normative acts of general application and individual normative acts has thus shaped the concept of legislation in the Community legal order. Only the former are regarded as Community legislation.

In the light of the mutual autonomy of the Community and the national legal orders, normative rules that only bind the Community institutions or the Member States will represent individual 'decisions'. They lack generality to be legislative acts. (From a functional perspective, a directive addressed to all Member States and without direct effect for third parties will constitute an individual act addressed to 25 identifiable addressees.) We shall see in the fifth part of this chapter, how the general effect of a Community norm is intimately tied to its direct effect in the national legal order. The direct and general effect of a Community norm constitute the basis for the concept of Community legislation. They are not the 'consequences' of EC legislation; they are its preconditions.[29]

B. The Second Dimension: Community Authorship—In Search for a 'Rule of Recognition'

In *whom* does the EC Treaty vest legislative power? What constitutional principles attest the Community authorship of a legal rule?[30] Will all acts adopted within the

order and are, in part, the acts of non-member states' (T.C. Hartley, *The foundations of European Community law: an introduction to the constitutional and administrative law of the European Community* (OUP, 2003), 159).

[27] The term 'external Community law' seems to have been first employed by J.H.J. Bourgeois, 'Effects of International Agreements in European Community Law: Are the Dice Cast?', [1983–4] 82 Michigan Law Review 1250–1273 at 1272.

[28] *Union de Federaciones Agrarias de Espana (UFADE) v Council*, Case 117/86, [1986] E.C.R. 3255, para.9 (emphasis added).

[29] *Contra*, J.A. Usher, *EC Institutions and Legislation* (Longman, 1998) 144.

[30] On the concept of authorship, see: A. von Bogdandy, F. Arndt & J. Bast, 'Legal Instruments in European Union Law and their Reform: A Systematic Approach on an Empirical Basis', [2004] 23 Y.E.L. 91–136 at 121. The attribution of legal acts to the EU is portrayed as a two-step process: 'a legal act is first attributed to an authoring institution (Council, Commission, etc.). (. . .) Mediated by the adopting institution an act is then attributed to the legal personality of the organization (the Communities and/or the European Union, depending on its legal basis and the general understanding of the Union's organizational structure.)' It is then claimed that '[i]n general, by focusing on the

institutional framework of the European Community be considered *Community* rules? In what situations, if any, are the Member States viewed as the collective authors of a legal rule? In theoretical terms, these practical questions could be bundled into the quest for an ultimate 'rule of recognition' for the EC legal order. The latter has been defined in the following terms:

> Whenever a rule of recognition is accepted, both private persons and officials are provided with authoritative criteria for identifying primary rules of obligation (...) In a very simple system like the world of Rex I (...), where only what he enacts is law and no legal limitations upon his legislative power are imposed by customary rule or constitutional document, the sole criterion for identifying the law will be a simple reference to the fact of enactment by Rex I. The existence of this simple form of rule of recognition will be manifest in the general practice, on the part of officials or private persons, of identifying the rules by this criterion. In a modern legal system where there are a variety of 'sources' of law, the rule of recognition is correspondingly more complex[.] (…) For the most part the rule of recognition is not stated, but its existence is *shown* in the way in which particular rules are identified, either by courts or other officials or private persons or their advisors.[31]

When will a rule belong to the Community legal order? Can we identify a rule (or various rules) of recognition in the EC legal order? Uncertainty about the Community authorship of a rule has existed in relation to at least four decision-making aspects: rules adopted by unanimity in the Council, mixed acts, decisions of international bodies and, finally, the EC Treaty itself. The ways in which the

decision which ultimately determines the wording of an act, Union law has developed a convincing criterion for designating both the legal and political responsibility' (*ibid.*,123). However, this abstract definition evades the very essence of the problem of Community authorship. When is 'the decision that ultimately determines the wording of the act' a *Community* decision? When does the 'Council' act as a Community institution, and when do the Member States act within the Council? Is a mixed act a Community act? These questions are not at all as easy as the authors want us to believe. Indeed, even in the rather mundane context of access to documents, the 'authorship rule' has been the source of constant disputes (S. Peers, 'The New Regulation on Access to Documents: A Critical Analysis', [2001–2] 21 Y.E.L. 385–442 at 392–3). More controversial still has been the discussion about the paternity of legal acts adopted within the Second and Third Pillar: while some commentators see them as acts of the European Union, others have argued that they ought to be attributed to the Member States (e.g. M. Pechstein & C. Koenig, *Die Europäische Union* (Mohr Siebeck, 2000), 80: 'Zurechnungsendsubjekte der Handlungen der Unionsorgane im Rahmen der GASP und der PJZS [können] nur die Vertragsstaaten des Unionsvertrages selbst sein'). Finally, the question of the (institutional) paternity of an act is different from the question of whether the Community legal order chooses to integrate legal norms generated in *non*-Community legal sources, such as customary international law. These legal acts—while created outside the Community legal order—could be given the *same legal effects* as Community law. That, however, does not turn them into 'natural' Community law.

[31] H.L.A. Hart, *The Concept of Law* (Clarendon, 1994) 100–1 (emphasis in original). For the international legal order, Hart accepted, however, that 'international law simply consists of a *set* of separate primary rules of obligation' which are not united into a single rule of recognition (*ibid.*, 233). 'It is, therefore, a mistake to suppose that a basic rule of recognition is a generally necessary condition of the existence of rules of obligation or 'binding' rules. *This is not a necessity, but a luxury*, found in advanced social systems' (*ibid.*, 235 (emphasis added)).

European Court of Justice has 'shown' the existence of a particular rule of recognition will be discussed for each of them in the following section.

(i) Unanimous Decision-making in the Council

The parallelism between unanimously agreed unilateral acts and international treaties 'has its basis in the undisputed fact that the consent of all the participating countries is a requirement which the two kinds of instruments share in common'.[32] '[A] general norm adopted by unanimous decision of an international organ composed of representatives of all parties to the treaty establishing the organ is not different from a norm created by a treaty entered into by States upon which the norm is binding'.[33] The difficulty in clearly distinguishing between unilateral and multilateral instruments originates in the double capacity in which States can act within the framework of an international organization:

> A State that votes for the adoption of a law-making resolution by an international organ acts in a double capacity. On the one hand, it expresses its assent to the rights and duties formulated in the enactment, and, on the other, it contributes to the creation of what now becomes the *voluntas* of the organization, i.e. an act the authorship of which must be attributed to the organization as a corporate body and not to individual consenting members nor to the members collectively. In unanimous decisions these two elements are so well balanced that it is not possible to regard either of them as being preponderant with respect to the other. *But the undeniable analogies between a unanimous law-making resolution and a treaty come to an end when the former has been definitely adopted and becomes part of the law of the organization*. From that moment the validity, binding force, application and termination of the regulative act of the international organization, whether unanimous or not, is governed not by the law of treaties but solely by the law of the international organization which is the author of the act. Instruments which are not subject of the law of treaties are not treaties.[34]

In relation to the Community legal order, when should unanimously agreed acts be conceptualized as *unilateral* acts of the Council and when ought they to be viewed as *multilateral* contractual engagements between the Member States? The unilateral or multilateral character of unanimously agreed acts adopted in the Council was at stake in *Commission v Italy*.[35] The Italian government had invoked a 'treaty' reservation to deny the binding force of a decision taken on the basis of Article 308 EC. The Italians had referred to the negotiations within the Council 'during which the parties retained the independence which they enjoyed by virtue of their sovereignty'. This was taken to mean that 'in spite of its form, the nature of this decision is that of an *international agreement*' with the effect that 'statements made

[32] K. Skubiszewski, 'Enactment of Law by International Organizations', [1965–6] 41 British Yearbook of International law, 198–274 at 221.

[33] H. Kelsen, *Principles of International Law* (New York, 1952) 366.

[34] K. Skubiszewski, above n. 32 (emphasis added).

[35] *Commission v Italy*, Case 38/69, [1970] E.C.R. 47.

by a contracting party at the conclusion of such negotiations form an integral part of the agreement reached'.[36] The European Court of Justice was not pleased with this argument:

> The power to take the measures envisaged by this article [i.e. Article 308 EC] is conferred, *not on the Member States acting together, but on the Council in its capacity as a Community institution*. Under [Article 308] the Council acts on a proposal from the Commission and after consulting the [Parliament]. Although the effect of the measures taken in this manner by the Council is in some respects to supplement the treaty, they are adopted within the context of the objectives of the Community. In these circumstances, *a measure which is in the nature of a Community decision on the basis of its objective and of the institutional framework within which it has been drawn up cannot be described as an 'international agreement'*.[37]

Measures adopted under Article 308 EC are *Community* acts and not multilateral international agreements. Community authorship was assumed for the Council acted 'in its capacity as a Community institution' within the institutional framework of the Community.

But can the 'Council' choose *not* to act in its capacity as a Community institution? Put differently, are the Member States free to decide when they want to act 'as' the Council and when only 'within' the Council? In *ERTA*, the European Court of Justice had to tackle the issue.[38] Here, the Member States—unhappy with a Commission proposal—had simply adopted 'proceedings' in order to coordinate their position for the negotiation of an international agreement. The Commission disliked being side-tracked and went to Court. The Council questioned the very admissibility of the annulment action, for it disputed the 'Community nature' of the act. The proceedings were, after all, 'nothing more than a coordination of policies among the Member States within the framework of the Council'.[39]

The Court admitted that the legal effect of the proceedings would differ 'according to whether they are regarded as constituting the exercise of powers conferred on the Community, or as acknowledging the coordination by the Member States of the exercises of powers which remained vested in them'.[40] It then referred to Article 230 which permitted the review of the legality of Council acts other than recommendations and opinions, finding that the Article covered all 'measures *adopted by the institutions* which are intended to have legal force'.[41] The fundamental question, however, remained: were these proceedings an act of the Council?

[36] *Ibid.*, para.9 (emphasis added). [37] *Ibid.*, paras.10–11 (emphasis added).
[38] *Commission v Council (ERTA)*, Case 22–70, [1971] E.C.R. 263. [39] *Ibid.*, para.36.
[40] *Ibid.*, para.4.
[41] *Ibid.*, para.39 (emphasis added). And a little later we read: 'It would be inconsistent with this objective to interpret the conditions under which the action is admissible so restrictively as to limit the availability of this procedure merely to the categories of measures referred to by [Article 249]. An action for annulment must therefore be available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects' (*ibid.*, paras.41–2).

In a Byzantine reasoning, the Court simply cut through the question of authorship. The 'Council' was simply equated with the 'Member States acting within the Council': '[T]he *Council's* proceedings dealt with a matter falling within the power of the Community' and therefore the proceedings 'could not have been simply the expression or recognition of a voluntary coordination, but were designed to lay down a course of action binding on both the institutions and the Member States, and destined ultimately to be reflected in the tenor of the [Community] regulation.'[42] The proceedings were thus treated as an act of the Community—irrespective of the absence of a Commission proposal—because the matter fell within the power of the Community. The Court hastened to add that while it was for the Council to 'decide in each case whether it is expedient to enter into an agreement with third countries, it does not enjoy a discretion to decide whether to proceed through inter-governmental or Community channels'.[43] The Court's conclusion smacked of a contradiction in terms, for '[t]he Council is but a Community organ. It has no intergovernmental double.'[44]

Will this mean that all rules adopted within the institutional framework or competence of the Community are *Community* rules? No, it will not. While the *ERTA* Court treated an *inter se* agreement between all Member States as an act of the Council, subsequent jurisprudence clarified that not all such *inter se* agreements would be assimilated to Community acts. In *Hurd*,[45] the Statute and the First Protocol of the European School was the subject of a national preliminary reference.[46] The Court pointed out that both were *international* agreements concluded by the Member States and that the 'mere fact that those agreements are linked to the Community and to the functioning of the institutions does not mean that they must be regarded as an integral part of Community law'.[47] Member States can, therefore, act *through* the Council as well as *within* the Council.

Indeed *inter se* co-ordination within the Council had become an established constitutional practice by the early 1970s. Among these, 'decisions of the Member States meeting in the Council' reflect the most popular and controversial category. The mouthful name is a misnomer: they are not unilateral acts—as the concept of

[42] *Ibid.*, para.53 (emphasis added).

[43] *Ibid.*, para.70. Would it not have been clearer to state that it was not for the *Member States* to freely choose whether to pursue a given project through international or Community channels? To add to the legal fictitiousness, the Court later admitted that is was not really the Council but the Member States acting 'in the interest and on behalf of the Community in accordance with their obligations under [Article 10] of the Treaty' (ERTA, para.90).

[44] 'Der Rat ist rechtlich nur Gemeinschaftsorgan. Er hat keinen intergouvernementalen Doppelgänger.' (C. Sasse, 'Zur Auswärtigen Gewalt der Europäischen Wirtschaftsgemeinschaft', [1971] 6 Europarecht. 208–241 at 215).

[45] *Derrick Guy Edmund Hurd v Kenneth Jones (Her Majesty's Inspector of Taxes)*, Case 44/84, [1986] E.C.R. 29.

[46] Statute of the European School of 12 April 1957 (United Nations Treaty Series, Volume 443, 129) and First Protocol of 13 April 1962 (United Nations Treaty Series, Volume 752, 267).

[47] *Derrick Guy Edmund Hurd*, para.20.

'decision' wrongly suggests, but international agreements.[48] 'En réalité, elles ne relèvent pas du droit interne des Communautés, mais bien du droit international. Ceci a pour conséquence notamment que de telles décisions ne peuvent pas être prises autrement que par accord mutuel des Etats membres, conformément au principe de 'égalité souveraine des Etats.' 'Il s'agit, somme toute, d'accords internationaux «en forme simplifiée», conclus dans le cadre offert par le Conseil des Communautés.'[49] Legal authorship ought to be attributed to the Member States, not the Community: They are 'complementary' to, but not itself, Community law.

So, when do the Member States act 'through' the Council and when 'within' the Council? Are there solid constitutional principles that determine when the Council as a Community institution authors a norm? Will all measures adopted according to a Community decision-making procedure be regarded as unilateral Community acts? In *European Parliament v Council and Commission*,[50] the Parliament cleverly argued that it was the Commission proposal, which would show that the act was adopted by the Council and not the collectivity of the Member States. The Court 'clarified' that according to Article 230 EC 'acts adopted by representatives of the Member States acting not in their capacity as members of the Council, but as representatives of their governments, and thus collectively exercising the powers of the Member States, are not subject to judicial review by the Court'.[51] The Commission proposal—this quintessential characteristic of Community law-making—was, however, not conclusive for assuming Community paternity for a legal rule: 'Not all proposals from the Commission necessarily constitute proposals within the meaning of Article 249 of the Treaty. *Their legal character must be assessed in the light of all the circumstances in which they were made*. They may just as well constitute mere initiatives taken in the form of informal proposals.'[52] Commission involvement will, consequently, be no DNA-proof for the *Community* paternity of an act adopted *within* the Council. (Nor, we should assume, will the involvement of the European Parliament represent an infallible proof of the Community authorship of a legal rule.) The Court preferred a flexible contextual approach.

(ii) Mixed Legal Acts

What is the EC's constitutional position as regards the paternity for 'mixed acts'? Are they considered Community acts or international acts authored by the

[48] B. de Witte, *Chameleonic Member States: Differentiation by means of Partial and Parallel International Agreements*, in: B. de Witte, D. Hanf, E. Vos (eds.), *The Many Faces of Differentiation in EU Law* (Intersentia, 2001), at 251–2. This is not uncontested. For the opposite view, see: H.P. Ipsen, *Europäisches Gemeinschaftsrecht* (J.C.B. Mohr, 1972) at 472: 'Da uneigentliche Ratsbeschlüsse ihrem *Gegenstande* und ihrer *Intention* nach *gemeinschaftsbezogen* sind, zählen sie insoweit zum Handlungsinstrumentarium des *Gemeinschaftsrechts*. Aus demselben Grunde sind sie auch im Entstehungsverfahren und hinsichtlich ihrer Kontrolle *tunlichst* dem Gemeinschaftsrecht zuzuordnen.'

[49] P. Pescatore, *L'ordre juridique des Communautés Européennes* (Presse universitaire de Liège, 1971), 140.

[50] *European Parliament v Council and Commission*, Case 181/91 and 248/91, [1993] E.C.R. 3685.

[51] *Ibid.*, para.12.

[52] *Ibid.*, para.18 (emphasis added). The Commission proposal was not regarded as essential to adopt *Community* legislation for measures under Article 67 EC during the transitional period of five years.

Member States, or both? The concept of mixity has long been part of the Community legal order— both in its internal and its external spheres. Internally, mixed acts have been employed as a form of co-operation in areas such as education and culture. They are adopted by the 'Council *and* the national Ministers meeting in the Council'. The decision-making body constitutes a 'legal hybrid'. Its acts have been characterized as 'communitarised' intergovernmental acts'.[53] Is this supposed to mean that the Community is not the natural father, but has nonetheless 'adopted' these intergovernmental acts into the Community legal family? A less metaphysical answer has been given by the Court in the external sphere: 'mixed agreements concluded by the Community, its Member States and non-member countries have the same status in the Community legal order as purely Community agreements, as these are provisions coming within the scope of Community competence'.[54] To the extent that norms within mixed agreements fall within the Community sphere, they are regarded as (external) *Community* legislation.

(iii) Decisions of External International Bodies

The absence of a clear 'rule of recognition' for the paternity of a legal rule emerges again in relation to decisions of international bodies set up by a Community agreement. These decisions, the Court of Justice found, may form an integral part of the Community legal order 'in the same way as the Agreement itself' where 'they are directly connected with the Agreement to which they give effect'.[55] Opinion 1/76, on the other hand, qualifies that statement. There, the Court had been asked to review the establishment of an international organ endowed with legislative powers to implement the objectives of the envisaged draft agreement. The body consisted—with the exception of Ireland—of a delegate from each Member State and Switzerland as well as a Commission representative. Decisions were to be taken by majority. The Commission had no vote. The marginal influence of the Community institutions had raised doubts as to the constitutionality of the arrangement for 'the decisions which are taken by the organs of the draft Agreement *cannot be considered as the action of the Community institutions*'.[56] For the Council, the international body was an 'external organ'.[57] Its decisions ought, consequently, not be considered as Community legislation.

The Court agreed. The role of the Community institutions was 'extremely limited': the 'determinate functions in the operation of the fund are performed by

[53] B. de Witte, 'The Scope of Community Powers in Education and Culture in the Light of Subsequent Practice', in: R. Bieber and G. Ress (eds.), *Die Dynamik des Europäischen Gemeinschaftsrechts* (Nomos, 1987) 261 at 274 and 276.

[54] *Commission v Ireland*, case 13/00, [2002] E.C.R. 2943, para.14.

[55] *Sevince*, Case 192/89 [1990] E.C.R. 3461, para.9.

[56] Opinion 1/76 (Inland Waterways), [1977] E.C.R. 741 (emphasis added), Council Submissions, 750 (emphasis added).

[57] *Ibid.*

the States' in such a way that the Member States would act 'in place of the Community'.[58] Decisions of the Fund could consequently not be classified as Community action. Furthermore, the Court specified three negative criteria that would, *ipso facto*, be incompatible with the concept of 'common action': (a) the complete exclusion, even if voluntary, of a Member State from the decision-making process, (b) the power of certain Member States to 'opt-out' from an activity, and (c) the existence of special prerogatives for certain Member States at variance with the constitutional principles governing the relations between the Member States of the Community.[59]

In sum, not all decisions of international bodies that are directly connected with the agreement to which they give effect will pass the Opinion 1/76 test. The Court will presumably apply a contextual approach and weigh, in each specific case, the respective importance of the Community and the Member State elements in the decision-making process. Only where the Community element prevails *and* where the decision-making process adheres to the three constitutional guidelines will the directly and generally effective decisions of international bodies represent *Community* legislation.

(iv) The EC Treaty as Primary Community Legislation?

Let us discuss one final point. Should the EC Treaty itself be characterized as Community legislation? In *Van Gend & Loos*, the European Court had found that an article of the EC Treaty could have 'direct application in national law in the sense that nationals of member States may on the basis of this article lay claim to rights which the national court must protect'.[60] Directly effective Treaty articles may even be enforced against other individuals.[61] Directly effective Treaty provisions of a general character, therefore, fall within the functional concept of legislation. Should these provisions, consequently, be regarded as 'constitutional legislation'? The classification of constitutional provisions as a special form of legislation is not unknown.[62]

Should the EC Treaty thus be conceptualized as the Community's 'constitutional legislation' or 'primary' Community legislation? That will depend on whether we can attribute these constitutional norms to the Community. The creation and/or amendment of a constitutional norm are governed by Article 48 TEU. New constitutional legislation requires the ratification by all the Member States in accordance with their respective constitutional requirements. The legislative procedure principally leaves the Member States as '*Herren der*

[58] *Ibid.*, paras.9, 11. [59] *Ibid.*

[60] *Van Gend en Loos*, Case 26/62, [1963] E.C.R. 1 at 11.

[61] *Defrenne v Sabena*, Case 43/75, [1976] E.C.R. 455 in relation to Article 141 EC.

[62] It can be found in the German constitutional order. Here, constitutional provisions can be amended by means of parliamentary legislation in a qualified legislative procedure, see: Article 79 Basic Law.

Verträge': '[T]he member States as a collective whole retain an essential capacity, that of the "constituent power". It is the States which made the Community's constitution ... It is true that some attempt has been made to "domesticate" the exercise of that power by making it subject to a Community procedure which involves action in the Commission, the [Parliament] and the Council, and sometimes even the Court of Justice. But in the last analysis revision of the constitution is carried out by means of treaties signed and ratified by the member States.'[63] The collectivity of the Member States—not the Community—thus constitutes the author of the constitutional norm. In the Community legal order of today, constitutional legislation is, therefore, not *Community* legislation.[64] Technically speaking, it is therefore wrong to refer to Community acts adopted on the basis of the EC Treaty as 'secondary *legislation*' of the Community. Community secondary law is *primary* Community legislation.[65]

III. Choosing Perspectives: The System of Legal Instruments and The Federal Division of Powers

Morphology is the science of forms and structures.[66] The morphology of legal power will, thus, investigate the forms and structures of legal instruments. A system of legal instruments should offer distinct normative formats for legal action.[67] Forcing public actions into pre-defined formats will, thereby, increase

[63] P. Pescatore, 'International law and Community Law', [1970] 7 C.M.L. Rev. 167–83 at 179.

[64] This statement would need to be qualified only once the doctrine of judicial precedent was to become formally accepted in the Community legal order. Today, however, judgments of the ECJ—while certainly 'acts of an institution'—are only binding *inter partes* and do thus not produce legal effects *erga omnes*. ECJ judgments 'cannot, therefore, create rights and obligations in a *general way*' and it 'may therefore be concluded that the judgments of the European Court are *not sources* but *authoritative evidences* of Community law' (A.G. Toth, 'The Authority of Judgements of the European Court of Justice: Binding Force and Legal Effects' [1984] Y.E.L. 1–77 at 69–70). Only the formal recognition of a doctrine of precedent would transform the ECJ's judgments from individual norms into judicial *legislation*. This judicial legislation would then even assume constitutional quality in so far as the Court of Justice interprets primary law.

[65] The terms 'secondary law' and 'secondary legislation' have, unfortunately, been employed indiscriminately by the European Court (cf. *Commission v Germany*, Case 61/94, para.52: 'When the wording of secondary Community legislation [*sic!*] is open to more than one interpretation (...) the primacy of international agreements concluded by the Community over provisions of secondary legislation means that such provisions must, so far as possible, be interpreted in manner that is consistent with those agreements.') as well as academics (cf. N. Foster, *EC Legislation (Blackstone's Statute Book)* (OUP, 2006), 1, referring to the EC Treaty as 'Primary legislation', J.A. Usher, *EC Institutions and Legislation* (Longman, 1998) 128, referring to the Article 249 EC instruments as 'Community secondary legislation' and P.M. Raworth, *The legislative Process in the European Community* (Kluwer, 1993), 112, referring to the 'tertiary legislation of the Commission' under Article 211 EC). Since the EC Treaty is not *Community* legislation, it is terminologically cleaner to refer to the EC Treaty as primary or constitutional law, to Community secondary law as ('primary') legislation and to delegated legislation as 'secondary' legislation or, if need be, 'tertiary' Community law.

[66] The Chambers Dictionary (Chambers Harrap, 2000).

[67] E. Schmidt-Aßmann, *Das allgemeine Verwaltungsrecht als Ordnungsidee* (Springer, 2004), 298–301.

the rationality of a legal system. The disciplining effect of a legal morphology reinforces the rule of law. The assumption that each Community instrument represents a particular format of normative characteristics has been as old as the Community itself. The 'formality principle' has been said to require the Community legislator to choose the *adequate* instrumental form depending on the material content of the legal act.[68]

The EC legal order envisages a variety of legal instruments for Community action. The 'typical' Community instruments are listed in Article 249 EC.[69] The provision states:

> In order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council, the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver opinions.
>
> A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.
>
> A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.
>
> A decision shall be binding in its entirety upon those to whom it is addressed.
>
> Recommendations and opinions shall have no binding force.

In 1958, each instrument enumerated in Article 249 seemed characterized by a distinct normative format. The 'regulation' appeared as the Community's legislative instrument. The 'directive' seemed an intergovernmental instrument that could only bind States. The 'decision' was only legally binding for those to whom it was addressed. 'Recommendations' and 'opinions' lacked the quintessential element of 'hard law' as they were not legally binding at all.[70]

[68] For the Community this argument has been made by E. Fuß: 'Schließlich gilt für den Erlaß von Organakten das *Prinzip des sachgerechten Formengebrauchs*. Dieser Grundsatz gebietet, daß die Form bzw. die Bezeichnung eines Gemeinschaftsakts stets seinem materiellen Gehalt entspricht. Mangelt es einem Organakt an der Kongruenz von Form und Inhalt, so ist dies ein Fehler, welcher die Nichtigkeit des betreffenden Organaktes im Sinne der Art. 33 EGKSV, 173 f. EWGV und 146 f. EAGV begründet. (E. Fuß, 'Rechtssatz und Einzelakt im Europäischen Gemeinschaftsrecht', [1964] 8 Neue Juristische Wochenschrift, 327–331, at 330).

[69] The institutional practice of Community decision-making has created a number of 'atypical' acts. The most prominent example of this category is the decision *sui generis*. Atypical acts will not be discussed here. For a discussion of atypical acts, see: U. Everling, 'Probleme atypischer Rechts- und Handlungsformen', in R. Bieber & G. Ress (eds.), *Die Dynamik des Europäischen Gemeinschaftsrechts* (Nomos, 1987) 417.

[70] Logic would dictate that non-binding acts lack a 'legal character' (H.P. Ipsen, Richtlinien-Ergebnisse, in: W. Hallstein (ed.), *Zur Integration Europas: Festschrift für Carl Friedrich Ophüls aus Anlaß seines siebzigsten Geburtstages* (C.F. Müller, 1965) 67–84 at p. 68 Fn.4: 'wegen mangelnder Verbindlichkeit nicht Rechtsakte'). Yet, the European Court has accepted the possibility of their having some 'indirect' legal effect. In *S. Grimaldi v Fonds des maladies professionelles*, Case 322/88, [1989] E.C.R. 4407, para.18, the Court held that recommendations 'cannot be regarded as having no legal effect' as they 'supplement binding Community provisions'. 'Non-binding' Community acts may, therefore, have legal 'side effects'. The present study will, however, not take them into account. For an interesting overview, see L. Senden, *Soft Law in European Community law: Its Relationship to Legislation* (Hart, 2004).

The legal instruments enumerated in Article 249 EC are *internal* to the Community legal order. They unfold their legal effects within Europe's geographical scope. International agreements were not expressly mentioned in the list of Article 249 EC. This was not surprising. In 1958, the power of the Community to conclude international treaties was very limited and the status of these Community agreements was still unclear. However, the evolution of the doctrine of parallel powers has meant that the Community will be entitled to conclude international treaties wherever it has the power to adopt internal legislation.[71] International treaties should, accordingly, be viewed as an additional implied legal instrument which runs 'in parallel' to the internal legal instruments of the Community.

What was the constitutional rationale behind Article 249 EC? Three (partly overlapping) explanatory models were available in 1958 to justify the diversity of legal instruments for Community action. First, the variety of legal instruments could theoretically structure the horizontal division of powers between the Community institutions.[72] National constitutions typically vest decision-making authorities with their specific legal instrument. A legal hierarchy structures the national legal system into a pyramid of layers thereby providing a mechanism for solving legal conflicts. This theory of legal instruments—and the hierarchical relationships among them—is thus intrinsically connected with the separation of powers doctrine. Unlike national constitutional orders, however, the Community legal order did not correlate its instruments with a specific Community organ or a particular legislative procedure. The Council could act by means of regulations, directives or decisions under a single procedure.[73] The absence of a hierarchical stratification among the Community's legal instruments has thus created an

[71] This is not uncontroversial. For a discussion of the 'instrument thesis' of the doctrine of parallel external powers, see: R. Schütze, 'Parallel External Powers in the European Community: From 'Cubist' Perspectives towards 'Naturalist' Constitutional Principles?', [2004] 23 Y.E.L. 225–74, at 235–6.

[72] 'Das von den Vertragsschöpfern eingeführte System der Organakte muß, um sinnvoll zu sein, auch durch eine entsprechende Hierarchie der Gemeinschaftsakte ergänzt werden. Diese Rangordnung wird in den Römischen Verträgen durch die Reihenfolge ihrer Aufführung in Art. 189 EWGV und Art. 161 EAGV deutlich zum Ausdruck gebracht. Danach kann kein Zweifel bestehen, daß die Verordnungen (und allgemeine Entscheidungen) den individuellen Entscheidungen im Rang vorgehen und selbst nur durch einen Rechtssatz abgeändert werden können.' (E. Fuß, 'Rechtssatz und Einzelakt im Europäischen Gemeinschaftsrecht', [1964] 8 Neue Juristische Wochenschrift 327–331, at 330). This position has received judicial support from the Court of First Instance in *Scholler Lebensmittel GmbH & Co. KG v Commission of the European Communities*, Case T-9/93, [1995] E.C.R. II-1611, where the CFI suggested a hierarchical relationship between legislative measures and individual decisions: 'According to the hierarchy of legal rules, the Commission is not empowered, by means of an individual decision, to restrict or limit the legal effects of such a legislative measure, unless the latter expressly provides a legal basis for that purpose' (*ibid*., para.162). T. Hartley has consequently suggested the existence of a hierarchy between the legal instruments in Article 249 EC (T.C. Hartley, *The Foundations of European Community Law: An Introduction to the constitutional and administrative law of the European Community* (OUP, 2003), 104).

[73] E.g. Article 308 EC. This point has been expressly made by the ECJ: '[T]he distinction between a regulation and a decision may be based only on the nature of the measure itself and the

amorphous body of secondary law.[74] The variety of legal instruments of the Community, therefore, cannot be justified by means of a *horizontal* separation of powers rationale.[75]

There was a second possible reason behind the system of legal instruments established by Article 249 EC: 'the niceties of the system of legal protection in the Treaty'.[76] The central provision for the judicial review of Community measures is Article 230 EC. Its fourth paragraph provides that '[a]ny natural or legal person may [on the grounds mentioned] institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.' The judicial review perspective has, traditionally, been the 'dominant paradigm for the discussion about instruments'.[77] The 'battle of forms' has indeed for a long time been fought in relation to the ability of private litigants to challenge Community acts.

The European Court had originally placed Article 230 and Article 249 EC on parallel tracks. In *Confédération nationale des producteurs de fruits et légumes and others v Council*,[78] the Court found that '[Article 249] makes a clear distinction between the concept of a 'decision' and that of a 'regulation' and that it was therefore 'inconceivable that the term 'decision' would be used in [Article 230] in a different sense from the technical sense as defined in [Article 249]'. Hence, a measure was a decision and *not a regulation* where the Community act was of individual concern to specific individuals.[79]

Yet, in the course of the last two decades, the Court has 'by and large decoupled the system of legal review from the type of act at issue'.[80] In *Cordorniu*,[81] the Court found that although 'the contested provision is, by nature and by virtue of its sphere of application, of a legislative nature in that it applies to the traders concerned in general, that *does not prevent it from being of individual concern to*

legal effects which it produces and not on the procedure for its adoption' (*Alusuisse Italia SpA v Council & Commission*, Case 307/81, [1982] E.C.R. 3463, para.13).

[74] Bast speaks of the 'unity of secondary law', see: J. Bast, *On the Grammer of EU Law: Legal Instruments*, Jean Monnet Working Paper 9/03 <http://www.jeanmonnetprogram.org/papers/03/030901-05.html 19>.

[75] The amorphous equality governing the European Community's secondary law has been the subject of repeated criticism for some time. The European Parliament has continuously demanded the recognition of a superior layer of Community parliamentary legislation above 'normal' secondary law. Declaration No 16 annexed to the TEU even gave a mandate to the 1996 IGC to 'examine to what extent it might be possible to review the classification of Community acts with a view to establishing an appropriate hierarchy between the different categories of acts'. These reform proposals had been taken up by the Constitutional Treaty (2004). For references, see above n.9.

[76] *Advocate General Roemer, Sgarlata and others v Commission*, Case 40/64, [1965] E.C.R. 215 at 234.

[77] Bast, above n.74 at 27.

[78] *Confédération nationale des producteurs de fruits et légumes and others v Council*, Case 16–17/62, [1962] E.C.R. 471.

[79] *Ibid.*, at 478.

[80] Bast, above n.74 at 13.

[81] *Codorníu S.A. v Council*, Case C-309/89, [1994] E.C.R. 1853, para.19 (emphasis added).

some of them'. This new approach has been extended to directives.[82] The *déformation morphologique*, brought about by the 'niceties' of the Treaty's original system of judicial review, has thus come to an end.[83] Today, the issue of legal standing can safely be put aside in a discussion of the system of legal instruments. The second explanatory rationale has, therefore, lost its power.

Let us proceed to a third reason possibly underlying the morphology of legal power in the EC. The various legal instruments could, finally, be taken to structure the vertical division of power between the European and the national level. The morphology of legal power would then have a *federal* dimension. Some early commentators argued that for each policy field the Treaty had fixed a specific format of regulatory intervention.[84] The constitutional nexus between the type of instrument and the Community competence in those early days is expressed in the following passage:

> To obtain a precise view on the sharing out of legislative competence between the Community and its Member States, one must, however take account, apart from the factors determining substantive attributions, of how the various legislative instruments placed at the Community's disposal are allotted between these subject matters. The means available are not shared out equally. Far from it: the allotment depends closely upon the objective sought to be achieved in each sphere. This needs to be explained in more detail. The grant of the Community of a power to make a regulation is an indication that there is a 'transferred legislative competence'. Here the Community itself fixes the legal rules which are binding in the Member States without any intervention of the legislative or even the

[82] Directives have equally been found to be reviewable acts under Article 230(4) EC. In *UEAPME v Council*, T-135/96, [1998] E.C.R. II-2335, the Court of First Instance found that '[a]lthough [Article 230], fourth paragraph, of the Treaty makes no express provision regarding the admissibility of actions brought by legal persons for annulment of a directive, it is clear from the case law of the Court of Justice that the mere fact that the contested measure is a directive is not sufficient to render such an action inadmissible. (. . .) In that respect, it must be observed that the Community institutions cannot, merely through their choice of legal instrument, deprive individuals of the judicial protection offered by that provision of the Treaty. (. . .) [T]he mere fact that the chosen form of instrument was that of a directive cannot in this case enable the Council to prevent individuals from availing themselves of the remedies accorded to them under the Treaty' (*ibid.*, para.63). The jurisdictional scope of Article 230(4) EC will, of course, include decisions addressed to Member States (cf. *Plaumann & Co v Commission*, Case 25/62, [1963] E.C.R. 95).

[83] There will, however, remain differences as regards the burden of proof: 'Die Qualifikation des Rechtsaktes ist in diesem Zusammenhang nur noch insofern von Bedeutung, als ein Kläger bei an ihn adressierten Entscheidungen im Gegensatz zu Verordnungen oder Richtlinien des Nachweises einer unmittelbaren und unmittelbaren Betroffenheit enthoben ist.' (H. Chr. Röhl, 'Die anfechtbare Entscheidung nach Art. 230 Abs. 4 EGV', [2000] 60 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, 331–66 at 354)

[84] M. Zuleeg, 'Die Kompetenzen der Europäischen Gemeinschaften gegenüber den Mitgliedstaaten', [1971] 20 Jahrbuch des öffentlichen Rechts (1971), 1–64 at 6: 'Kompetenzabstufungen nach Rechtsakten' and V. Constantinsesco, *Compétences et pouvoirs dans les Communautés européennes : Contribution à l'étude de la nature juridique des Communautés* (Pichon & Durand-Auzias, 1974) 85 (emphasis added)) : '[L]es organes ne sont pas libres, *sauf exception*, de choisir entre les actes énumérés à l'[article 249]. Chaque disposition du Traité énonce au contraire les actes que tel organe est habilité à édicter en fonction d'une manière déterminée. A chaque type de compétence semble donc correspondre un acte donné.'

executive national authority. (...) On the other hand, resort to the medium of the directive and the decision is an indication of a 'retained legislative competence' on the part of the Member States. (...) Yet even this retention of competence is merely formal, since we have seen that in these cases the decisions on legislative policy are taken at the Community level, so that the legislative competence exercised in this case by the States is merely a 'tied competence', i.e. an executive authority.[85]

This competence reading of the various legal instruments has occasionally been expressed by the European Court of Justice. In *Faccini Dori*,[86] the Court denied the horizontal direct effect of directives on the ground that '[t]he effect of extending that case law to the sphere of relations between individuals would be to recognize a power in the Community to enact obligations for individuals with immediate effect, whereas it has *competence* to do so only where it is empowered to adopt regulations'.[87]

In the following pages, we shall investigate the explanatory potential of this third rationale for the various legal instruments in the Community legal order. Is the morphology of legislative power in the European Community structured according to a federal rationale? In order to answer the question, we shall trace the broad lines of development of the Community's principal legal instruments—regulations, directives and state-addressed decisions as well as international agreements—alongside two dimensions. The instrument's *legislative* character will be defined as the extent to which the legal act unfolds a generally binding effect. It will be seen that the Court's jurisprudence has led to a situation whereby 'the concept of legislative measure within the meaning of the case law may apply to all the measures referred to by [Article 249] and not only to regulations'.[88] We shall thereby distinguish between three principal forms of legislation: direct, indirect and external legislation.

The second dimension represents an instrument's *pre-emptive* quality,[89] that is, the degree of legislative exclusion inherent in the use of one of the four legal instruments. The quest for the pre-emptive quality of Community measures concerns, in the final analysis, the question whether and how far the national legislator retains the ability to co-legislate with the Community in a policy field. This second dimension will, therefore, particularly relate to the *federal* division of legislative power between the Community and the national level.

[85] P. Pescatore, *The Law of Integration: Emergence of a New Phenomenon in International Relations, Based on the Experience of the European Communities* (Sijthoff, 1974), 62–3.

[86] *Faccini Dori v Recreb*, Case 91/92, [1994] E.C.R. 3325.

[87] *Ibid.*, para.24 (emphasis added).

[88] *Schröder and Thamann v Commission*, Case T-390/94, [1997] E.C.R. II-501, para.54. It is hard to believe that the Court of First Instance wished to include non-binding acts in this enthusiastic statement.

[89] On the concept of pre-emption in the Community legal order, see: R. Schütze, 'Supremacy without Pre-emption? The very slowly emergent Doctrine of Community Pre-emption', [2006] 43 C.M.L. Rev. 1023–1048.

IV. Direct Community Legislation: The Regulation

A. The Legislative Character of Regulations: Direct and General Applicability

Regulations shall have direct and general application in all Member States. They are the standard instrument of the European Community.[90]

By making regulations directly applicable, the Treaty recognized a monistic connection between that Community instrument and the national legal orders. Regulations would be automatically binding *within* the Member States—a characteristic that distinguished them from ordinary international law that would only be binding *on* States. In 1958, this was extraordinary for an international organization: 'L'attribution au Conseil et à la Commission du pouvoir d'adopter des actes de portée générale applicable sans interposition des autorités nationales sur le territoire de la Communauté est, sans conteste, un fait d'une importance exceptionnelle dans le développement de la société internationale'.[91]

Would the direct application of regulations imply their direct effect? The relationship between direct applicability and direct effect has been obscured by the early jurisprudence of the European Court of Justice.[92] Direct applicability should be taken to refer to the *normative* validity of a regulation within the national legal orders. The concept means that no 'validating' national act is needed to give regulations legal effects within national legal orders: 'The direct application of a Regulation means that its entry into force and its application in

[90] A. von Bogdandy, F. Arndt & J. Bast, 'Legal Instruments in European Union Law and their Reform: A Systematic Approach on an Empirical Basis', [2004] 23 Y.E.L. 91–136 at 98. The dominance of the regulation vis-à-vis the other legal instruments of the Community results, to a great extent, from its being the Community's principal 'executive' instrument. 69% of all regulations are 'delegated legislation', representing more than 90% of all secondary Community legislation (*ibid.*, 99).

[91] J.-V. Louis, *Les Règlement de la Communauté économique européenne* (Presses universitaires des Bruxelles, 1969) at 16. See also M. Zuleeg, 'Die Kompetenzen der Europäischen Gemeinschaften gegenüber den Mitgliedstaaten', [1971] 20 Jahrbuch des öffentlichen Rechts, 1–64, 8: 'Da die Völkerrechtslehre nach wie vor auf dem Standpunkt steht, daß die innerstaatliche Geltung einer völkerrechtlichen Norm eines staatlichen Anwendungsbefehls bedarf, erschien es den Verfassern der römischen Verträge geboten, ausdrücklich klarzustellen, daß bei Verordnungen keine besondere Geltungsanordnung mehr erforderlich ist.'

[92] In its early jurisprudence the Court often conflated the concepts of direct applicability and direct effect: 'According to [Article 249] and [Article 254] of the Treaty, regulations are, as such, *directly applicable* in all Member States[.] (…) Consequently, all methods of implementation are contrary to the *direct effect* of Community regulations and of jeopardizing their simultaneous and uniform application in the whole Community' (*Commission v Italy*, Case 39/72, [1973] E.C.R. 101, para.17). In *Amsterdam Bulb BV v Produktschap voor siergewassen*, Case 50/76, [1977] E.C.R. 137, paras.4–5 (emphasis added), we read that 'the direct effect of a Community regulation means that its coming into force and its application in favour of or against those subject to it are independent of any measure of reception into national law. By virtue of the obligations arising from the Treaty the Member States are under a duty not to obstruct the *direct effect inherent in regulations throughout the Community*'. This early jurisprudence led an early commentator to identify the concept of direct

favour of those subject to it are independent of any measure of reception into national law.'[93] Direct effect, on the other hand, refers to the ability of a norm to execute itself. It concerns the real effects of a norm in a legal order. Direct applicability makes direct effect *possible*.[94] The direct application of a norm is a condition for its direct effect. The direct application of regulations will, however, 'leave open the question whether a particular provision of a regulation has direct effect or not'.[95] In fact, as an early commentator noted:

> Many provisions of regulations are liable to have direct effects and can be enforced by the courts. Other provisions, although they have become part of the domestic legal order as a result of the regulation's direct applicability, are binding for the national authorities only, without granting private persons the right to complain in the courts that the authorities have failed to fulfil these binding Community obligations. This is by no means an unrealistic conclusion. In every member State there exists quite a bit of law which is not enforceable in the courts, because these rules were not meant to give the private individual enforceable rights or because they are too vague or too incomplete to admit of judicial application.[96]

The face that not all provisions of a regulation will be self-executing has been judicially acknowledged.[97] In *Azienda Agricola Monte Arcosa Srl*, the Court clearly re-affirmed the distinction between direct applicability and direct effect:

> [A]lthough, by virtue of the very nature of regulations and of their function in the system of sources of Community law, the provisions of those regulations generally have immediate effect in the national legal systems without its being necessary for the national authorities to adopt measures of application, some of their provisions may none the less necessitate, for their implementation, the adoption of measures of application by the Member States. (...) In the light of the discretion enjoyed by the Member States in respect of the implementation of those provisions, it cannot be held that individuals may derive rights from those provisions in the absence of measures of application adopted by the Member States.[98]

effect of regulations with the concept of 'invocability': '[T]he Court takes the view that all regulations at all times possess *direct effect*, that is to say that—irrespective of whether they explicitly embody rights and/or obligations with regard to individuals—they in any case entitle them to invoke their provisions in the courts' (R.W. Lauwaars, *Lawfulness and Legal Force of Community Decisions*, (A.W. Sijthoff, 1973) 14).

[93] *Fratelli Variola Spa v Amministrazione delle finanze dello Stato*, Case 34/73, [1973] E.C.R. 981, para.10.

[94] The Court has, ultimately, accepted this subtle distinction between 'direct applicability' and 'direct effect'. In *Van Duyn*, para.12 (emphasis added) we find that 'by virtue of the provisions of [Article 249] regulations are directly applicable and, consequently, *may* by their very nature have direct effect'.

[95] P. Pescatore, above n.85 at 164.

[96] G. Winter, 'Direct Applicability and Direct Effect. Two distinct and different concepts in Community law', [1972] C.M.L. Rev. 425–438 at 436.

[97] See *SpA Eridania-Zuccherifici nazionali and SpA Societa Italiana per l'Industria degli Zuccheri v Minister of Agriculture and Forestry, Minister for Industry, Trade and Craft Trades and SpA Zuccherifici Meridionali*, Case 230/78, [1979] E.C.R. 2749; *Commission v Belgium*, Case 137/80, [1981] E.C.R. 653 and *Commission v The Netherlands*, Case 72/85, [1986] E.C.R. 1219.

[98] *Azienda Agricola Monte Arcosa Srl*, Case 403/98, [2001] E.C.R. 103, paras.26, 28. Article 2(5) of Regulation 797/85 and Article 5(5) of Regulation 2328/91 stated: 'Member States shall, for the

The degree of legislative discretion left to the national level prevented the provisions from being 'relied on before a national court', 'where the legislature of a Member State has not adopted the provisions necessary for their implementation in the national legal system'.[99] Regulations may, therefore, explicitly or even implicitly call for the adoption of 'implementing measures' by national authorities 'each time the implementation of norms worked out by means of regulation cannot be carried out in practice unless the Member States resort to *complementary* measures'.[100] In the event of a non-directly effective norm in a regulation, the ECJ will 'transpose' the constitutional doctrines developed in the context of directives.[101] (Yet, unlike directives, regulations can have vertical *and* horizontal direct effects. Regulations 'are therefore a *direct source of rights and duties* for all those affected thereby, whether Member States or individuals, who are parties to legal relationships under Community law.'[102])

Regulations were originally the sole legislative instrument of the young Community.[103] Their general character distinguished them from individual decisions. In *Zuckerfabrik Watenstedt GmbH v Council*,[104] the ECJ defined

purposes of this Regulation, define what is meant by the expression 'farmer practicing farming as his main occupation'. This definition shall, in the case of a natural person, include at least the condition that the proportion of income derived from the agricultural holding must be 50% or more of the farmer's total income and that the working time devoted to work unconnected with the holding must be less than half the farmer's total working time. On the basis of the criteria referred to in the foregoing subparagraph, the Member States shall define what is meant by this same expression in the case of persons other than natural persons.' For another illustration of a provision in a regulation calling for national implementing measures, see: Article 35(1) of Regulation 1/2003 (O.J. L1/1): 'The Member States shall designate the competition authority or authorities responsible for the application of Articles 81 and 82 of the Treaty in such a way that the provisions of this regulation are effectively complied with. The measures necessary to empower those authorities to apply those Articles shall be taken before 1 May 2004. The authorities designated may include court.'

[99] *Ibid.*, para.29.

[100] F. Capotorti, 'Legal Problems of Directives, Regulations and their Implementation', in H. Siedentopf and J. Ziller (eds), *Making European Policies Work: The Implementation of Community Legislation in the Member States, Vol.I* (SAGE Publications, 1989). The legislative practice has attracted academic criticism: If 'the Community legislator intends to require implementing legislation on the part of the Member States, it would be clearer for anybody concerned with applying Community law if the part of the Regulation, which certainly requires such [implementing] legislation were to be separated and to take the form of a *directive*' (G. Gaja, P. Hay & R. D. Rotunda, 'Instruments for Legal Integration in the European Community—A Review', in: M. Cappelletti, M. Seccombe, J. Weiler, *Integration through law : Europe and the American federal Experience Vol.I Methods, Tools and Institutions*, 113–60 at 125 (emphasis added)).

[101] *Criminal proceedings against X*, Case 60/02, [2004] E.C.R. 651, paras.61–63, esp. para.62 (emphasis added): 'Even though in the case at issue in the main proceedings the Community rule in question is a regulation, which by its very nature does not require any national implementing measures, and not a directive, Article 11 of Regulation No 3295/94 empowers Member States to adopt penalties for infringements of Article 2 of that regulation, thereby making it possible to *transpose to the present case the Court's reasoning in respect of directives*.'

[102] *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, Case 106/77, [1978] E.C.R. 629, para.14–15 (emphasis added).

[103] *Confédération Nationale des Producteurs de Fruit et de Légumes v Council*, Case 16–17/62, [1962] E.C.R. 471, para.2.

[104] *Zuckerfabrik Watenstedt GmbH v Council*, Case 6/68, [1968] E.C.R. 409.

'general applicability' as 'applicable to objectively determined situations and involv[ing] legal consequences for categories of persons viewed in a general and abstract manner'. An act will not lose its general nature 'because it may be possible to ascertain with a greater or lesser degree of accuracy the number or even the identity of the persons to which it applies at any given time as long as there is no doubt that the measure is applicable as a result of an objective situation of law or of fact which it specifies'.[105] The crucial legislative characteristic of a regulation is then the 'openness' of the group of persons to whom it applies: where the group of persons is 'fixed in time', the Community measure will constitute a bundle of individual decisions addressed to each member of the group.[106]

Just as not all norms of a regulation need to be directly effective, not all provisions of a regulation must have a general character. Some provisions may have the character of individual decisions 'without prejudice to the question whether that measure considered in its entirety can be correctly called a regulation'.[107] However, one should presume that in order for a measure to be considered as a regulation the majority of its provisions should be directly and generally effective.

In relation to the geographical scope of regulations, the European Court—paying only partial tribute to the unambiguous wording of Article 249(2) EC—has confirmed that '[as] institutional acts adopted on the basis of the Treaty, (...) regulations apply *in principle* to the same geographical area as the Treaty itself'.[108] The Court has thus invited us to perceive a regulation's Community-wide applicability from an abstract normative perspective. Its normative validity across the entire territory of the European Community is constitutionally guaranteed. In actual fact, its concrete application can be confined to a limited number of Member States.[109]

B. The Pre-emptive Effect of Regulations: The Regulation as the Instrument of Legal Uniformity?

Regulations are binding in their entirety. They have been characterized as the 'most integrated form of Community secondary [*sic!*] legislation'[110] and as the 'source

[105] *Ibid*. at 415.

[106] *International Fruit Company and others v Commission*, Case 41–44/70, [1971] E.C.R. 411, esp. para.17.

[107] *Confédération nationale des producteurs de fruits et légumes and others v Council*, Case 16–17/62, [1962] E.C.R. 471, para.2.

[108] *Commission v Ireland*, Case 61/77, [1978] E.C.R. 417, para. 46 (emphasis added).

[109] A Regulation may only apply to one Member State without losing its character as a Regulation, see: *Compagnie française commerciale and financière v Commission*, Case 64/69, [1970] E.C.R. 221.

[110] G. Gaja, P. Hay & R.D. Rotunda, above n.100 at 124.

directe d' unification des législations'.[111] Considered as the instrument of legislative uniformity, will a regulation, thus, always totally preempt the national level within its scope of application? Is there, in other words, a fixed pre-emptive standard attached to the very instrumental format of a regulation?

The early jurisprudence of the European Court of Justice indeed emphasized the vigilantly pre-emptive nature of regulations. In order to protect the normative autonomy and uniform application of regulations within the national legal orders, the Court employed a strong pre-emption criterion. This initial approach is best illustrated in the *Bollmann* case.[112] Discussing the effect of a regulation on the legislative powers of the Member States, the ECJ found that since a regulation 'is directly applicable in all Member States, the latter, unless otherwise expressly provided, are precluded from taking steps, for the purposes of applying the regulation, which are *intended to alter its scope or supplement its provisions*'.[113] It seemed that '[l]'intervention d'un règlement prive en principe l'Etat membre du pouvoir d'arrêter des mesures normatives complémentaire à ce règlement. De telles mesures ne pourront être adoptées au niveau national qu'en vertu du règlement lui-même. Faute d'une habilitation expresse, dont la Cour s'attache généralement à restreindre la portée, elles se limitent aux règles nécessaires à l'exécution, lorsque le règlement ne contient pas l'ensemble des dispostions à ce sujet.'[114]

Early jurisprudence, consequently, suggested that all national rules that fell within the scope of a regulation or which somehow 'affected' its uniform application were automatically pre-empted.[115] Any supplementary national action would be prohibited. The Court seemed worried that any additional national action would undermine the normative autonomy of regulations: 'By virtue of the obligations arising from the Treaty and assumed on ratification, Member States are under a duty not to obstruct the direct applicability inherent in regulations and other rules of Community law.'[116] Provisions within regulations that permitted national action were, consequently, conceptualized as a re-delegation of legislative power to the national level.[117]

It was this early jurisprudence that created the myth that regulations would automatically engender occupation of the field pre-emption. Their capacity to field pre-emption came to be (wrongly) associated with their direct

[111] This is the title of an article by J.-V. Louis: 'Le Règlement, source directe d'unification des législation,' in D. de Ripainsel-Landy, *et al.* (eds), *Les instrumnets du rapprochement des législations dans la communauté économique européenne* (Bruxelles, 1976) 15–35.

[112] *Hauptzollamt Hamburg Oberelbe v Bollmann*, Case 40/69, [1970] E.C.R. 69.

[113] *Ibid.*, para.4 (emphasis added).

[114] J.-V. Louis, above n. 111 at 31.

[115] *Granaria v Produktschap voor Veevoeder*, Case 18/72, [1972] E.C.R. 1163, para. 16.

[116] *Fratelli Variola Spa v Amministrazione delle finanze dello Stato*, Case 34/73, [1973] E.C.R. 981, para.10.

[117] An analysis of the academic discourse concerning the pre-emptive nature of regulations in the 1970s is instructive. J.-V. Louis refers to Kovar and Pescatore, both of whom conceptualized the relationship between a regulation and national measures falling within its ambit under the lens of delegated legislation. The former author thus claimed that, 'la Cour a examiné la conformité des

applicability.[118] It was during this initial phase in the gradually emerging doctrine of Community pre-emption in which 'the Court did not base its decisions on the pre-emption doctrine as such, but on the *exclusionary effect of the type of legal acts employed, i.e. regulations*.'[119]

Subsequent jurisprudence, however, quickly disapproved of the simplistic correlation between regulations and field pre-emption. In *Bussone*, the Court found that the 'direct applicability of a regulation requires that its entry into force and its application in favour of or against those subject to it must be independent of any measure of reception into national law. Proper compliance with that duty precludes the application of any legislative measure, even one adopted subsequently, *which is incompatible with the provisions of that regulation*'.[120] But what was meant by the phrase 'incompatible with the provisions of that regulation'? In *Maris v Rijksdienst voor Werknemerspensioenen*,[121] the Court employed a weaker conflict criterion. Recalling that it was 'impossible for the authority of Community law to vary from one Member State to the other as a result of domestic laws, whatever their purpose, if the efficacy of that law and the necessary uniformity of its application in all Member States and to all those persons covered by the provisions at issue are not to be jeopardized', the regulation at issue would, however, only preclude 'the application of any provisions of national law to a *different or contrary effect*'.[122] Regulations therefore impose an obligation on national authorities to refrain from enacting national measures *contradicting* the letter or spirit of the regulation. A regulation may, thus, be placed anywhere on

mesures nationales à l'habilitation selon une démarche similaire à celles des juridictions administratives vérifiant le respect des limites d'une délégation de compétences', while the second author suggested that 'il s'agit, dans ce cas, de l'exercice par le législateur national d'une compétence 'liée'; en d'autres termes, nous sommes bien en présence d'une législation déléguée' (J.-V. Louis, above n.111 at 32–3).

[118] For example 'This capacity to pre-empt or preclude national measures can be regarded as a characteristic peculiar to a Regulation (as opposed to any other form of Community legislation) and may shed some light on the nature of direct applicability under [Article 249] of the Treaty' (M. Blumental, 'Implementing the Common Agricultural Policy: Aspects of the Limitations on the Powers of the Member States', [1984] 35 Northern Ireland Legal Quarterly, 28–51 at 39). Advocate General Warner expressed the same belief in *Zerbone v Amministrazione delle finance dello Stato*, Case 94/77, [1978] E.C.R. 99 at 126): 'Whilst a Member State may lay down rules of an administrative or procedural character in order to give effect in its territory to the provisions of a Community Regulation, and may also prescribe sanctions for any breach of such provisions where Community Law itself does not do so, a Member State may not legislate either so as to duplicate a Community Regulation or so as to purport to alter it. Nor, in the absence of a specific and valid authority conferred on a Member State, either expressly or by necessary implication, by Community legislation, may that State by its own legislation purport to supplement a Community Regulation under the guise of interpretation or otherwise'.

[119] M. Waelbroeck, 'The Emergent Doctrine of Community Pre-emption—Consent and Re-delegation', in T. Sandalow and E. Stein, *Courts and Free Markets: Perspectives from the United States and Europe, Vol. II* (OUP, 1982) 548–580 at 555 (emphasis added).

[120] *Bussone v Ministere italien de l'agriculture*, Case 31/78, [1978] 2429, paras.28–31 (emphasis added).

[121] *M. Maris, wife of R. Reboulet v Rijksdienst voor Werknemerspensioenen*, Case 55/77, [1977] E.C.R. 2327.

[122] *Ibid*., paras.17–18 (emphasis added).

the pre-emptive spectrum. Its pre-emptive ambit depends purely on the intention of the Community legislator.

Regulations do, consequently, not automatically establish total legislative uniformity. They will not *ipso facto* exclude all national legislation falling within their scope. Regulations will not always achieve 'complete' or 'exhaustive' legislation. On the contrary, a regulation may confine itself to laying down minimum standards.[123] Regulations may replace directives, thereby assuming their predecessors' pre-emptive degree like twin brothers.[124] It is, therefore, misleading to classify regulations as instruments of strict uniformity. Member States are, naturally, precluded from unilateral 'amendment' or 'selective application', whether by means of adding exceptions or unspecified conditions.[125] However, these constitutional obligations apply to *all* Community acts and do not specifically characterize the format of regulations.

In sum, regulations will not automatically eliminate all national legislative autonomy within their respective field of operation. The 'so-called exclusive effect of a regulation, i.e. that the Member States are not allowed to take any measure in the field covered by the regulation is not *absolute*'.[126] They may be binding in their entirety, but not pre-emptive in their entirety.

V. Indirect Community Legislation: The Directive and State-addressed Decision

A. From Individual Decision to Legislative Norm: The Doctrine of Direct Effect

The directive shall be binding 'upon' each Member State 'to which it is addressed'.[127] This formulation theoretically suggested two things. First, directives

[123] Council Regulation No 259/93 on the supervision and control of shipments of waste within, into and out of the European Community (OJ 1993 L 30, p. 1) provides such an example of a 'minimum harmonization' regulation. The regulation has been described as 'far from providing for a complete harmonization of the rules governing the transfer of waste, and might in part even be regarded (in the words of one commentator) as an 'organized renationalization' of the subject.' (Advocate General F. Jacobs, *Parliament v Council*, Case C-187/93, [1994] E.C.R. 2857, para.22 referring to D. Geradin, 'The legal basis of the waste Directive', [1993] 18 E.L. Rev. 418–27 at 426.

[124] 'Si ce n'est que ces nouveaux règlements qui se substituent souvent à d'anciennes directives leur ressemblent comme des frères jumeaux. La substance des textes demeure très proche, et il suffit pour s'en convaincre de comparer la directive cessation de l'activité agricole (nº 72/160 du 17 avril 1972) avec le règlement no 1096/88 du 25 avril 1988. Le contenu de ces règlements semble parfois si laconique qu'on peut se demander si l'on en frôle pas le détournement de procédure' (C. Blumann, *Politique Agricole Commune* (Litec, 1996) at 81).

[125] *Commission v Italy*, Case 39/72, [1973] E.C.R. 101, para. 20.

[126] R.H. Lauwaarrs, 'Implementation of Regulations by national Measures', [1983] 1 Legal Issues of Economic Integration 41–52 at 45. *Contra*, J.A. Usher, *EC Institutions and Legislation* (Longman, 1998) at 130: 'In effect Regulations could be said simply, if inelegantly, to amount to a 'keep out' sign to national legislation.'

[127] Article 249(3) EC.

were binding *on* States, not *within* States. On the basis of a 'dualist' understanding of the relationship between Community and national law, directives would have no validity in the national legal orders. In order to operate on individuals, the Community command would need to be 'incorporated' or 'transformed' into national law. The absence of their 'direct application' and the freedom of the Member States to choose how to implement them made directives appear to be a classic instrument of international law.[128]

Second, binding on the States, directives lacked *general* application: Their legal norms applied only to those States to which they were addressed.[129] Directives were individual decisions and not legislative measures. General application could only be achieved indirectly *via* the national legislator that would transform the Community 'decision' into a national act with general legal effects. Directives were, thus, not themselves Community legislation, but the source of co-ordinated national legislation. Directives have, consequently, been described as 'indirect legislation'.[130]

The gradual promotion of the directive from an instrument of indirect to an instrument of *direct* Community legislation required a fundamental change in its normative make-up:

> Seulement si on lui [la directive] reconnaît un effet direct dans les Etats membres, elle peut développer un effet identique ou similaire à celui de la loi, au sens que les particuliers peuvent l'invoquer et que ses dispositions peuvent servir de fondement aux décisions des tribunaux et des autorités administratives nationales. (...) En effet, l'applicabilité directe est d'une importance cruciale pour la question de savoir si la directive peut être qualifiée de 'loi' au sens matériel[.][131]

Only once the possibility of a directive's direct effects within the national legal orders was accepted could directives become a source of generally applicable norms. In a courageous jurisprudential line, the European Court of Justice did indeed inject these 'legislative' elements into the normative matrix of directives and substantially cured the 'infant disease' of the new legal order.[132] The medical

[128] For this view, see L.-J. Constantinesco, *Das Recht der Europäischen Gemeinschaften* (Nomos, 1977) at 614: 'Die Richtlinie ist im Hinblick auf das durch sie veranlaßte Verfahren in den Mitgliedsstaaten ein typisches zwischenstaatliches Instrument. Ihre Adressaten sind immer die Mitgliedstaaten; sie erlangen innerstaatliche Wirkung nur durch die nationale Ausführungsmaßnahme der Mitgliedstaaten.'

[129] The majority of directives apply to all Member Sates of the Community. These 'general directives' (G. Schmidt, *Artikel 189 Rn. 36*, in: H. von der Groeben, J. Thiesing, C.-D. Ehlermann (eds.), *Kommentar zum EU-/EG-Vertrag* (Nomos, 1999)) have received some explicit recognition in Article 254(2) EC, requiring the publication 'general directives' in the Official Journal of the European Union.

[130] P. Pescatore, 'The Doctrine of "Direct Effect": An Infant Disease of Community Law', [1983] E.L. Rev. 155–177 at 177.

[131] D. Triantafyllou, *Des compétences d'attribution au domaine de la loi : étude sur les fondements juridiques de l'action administrative en droit communautaire* (Bruylant, 1997), 93.

[132] P. Pescatore, above n. 130 at 155. The activist jurisprudence was the target of heavy judicial and academic attack. Some national judiciaries originally refused to accept it. The national defiance is

record of the judicial treatment is well documented and we can limit ourselves to a stenographic recapitulation.

The doctrine of the direct effect of Community directives was accepted in *Van Duyn v Home Office*.[133] Introducing a distinction between direct applicability and direct effect, the Court found that even if by virtue of Article 249(2) EC:

> regulations are directly applicable and, consequently, may by their very nature have direct effects, it does not follow from this that other categories of acts mentioned in that Article can never have similar effects. It would be incompatible with the binding effect attributed to a directive by [Article 249] to exclude, in principle, the possibility that the obligation which it imposes may be invoked by those concerned. In particular, where the Community authorities have by directive, imposed on Member States the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if the individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it into consideration as an element of Community law.[134]

Directives could, therefore, have direct effects within national law. But would these directly effective provisions also be directly applicable? The distinction made by the Court suggested that the two concepts of direct applicability and direct effect were different; but did one exclude the other? The answer will depend on the definition given to either concept: direct applicability has been defined as the automatic 'reception of provisions of regulations into the municipal legal orders of the member States',[135] while direct effect would refer to the possibility of a norm to 'be invoked by those concerned'.[136]

The former concept concerns the abstract question of the normative validity of an 'external' legal instrument in the domestic legal order.[137] The direct effect of a norm, on the other hand, is determined by its capacity to be 'operational' or self-executing, i.e. without need of further legislative specification. The question of direct effect thus concerns the capacity of a legislative norm *to be applied in a specific case*. As national courts will typically raise the direct effect question, the concept of direct effect has come to be equated with the concept of

illustrated in the *Conseil d'État*'s 'Cohn-Bendit' judgment. For an analysis of the judgment and the French doctrine at the time, see: J. Boulouis, 'L' applicabilité direct des Directives. A propos d'un arrêt Cohn-Bendit du Conseil d'État', [1979] 225 Revue du Marché commun, 104–110.

[133] *Yvonne van Duyn v Home Office*, Case 41–74, [1974] E.C.R. 1337.

[134] *Ibid*., para.12.

[135] G. Winter, 'Direct Applicability and Direct Effect. Two distinct and different concepts in Community law', [1972] C.M.L. Rev. 425–38 at 431.

[136] *Yvonne van Duyn*, para.12. In a later passage the Court lapses back into confusing direct effect with direct applicability when it states that 'legal certainty for the persons concerned requires that they should be able to rely on this obligation even though it has been laid down in a legislative act which has *no automatic direct effect in its entirety*' (*ibid*., para.13, emphasis added). The Court thus identifies direct applicability of a measure with its 'automatic direct effect in its entirety'.

[137] For a similar definition, see: K. Lenaerts & P. van Nuffel, *Constitutional Law of the European Union* (Sweet & Maxwell, 2005) 703: direct applicability is defined as 'whether a provision requires implementation *as a legal instrument*'.

justiciability.[138] Since, however, the doctrine of direct effect also address the executive branch,[139] this definition is too narrow. Direct effect should be taken to refer to the justiciability and *executability* of legislative norms. Why should the recognition of an 'administrative direct effect' represent a 'constitutional enormity'?[140] Direct effect refers to the capacity of a *legislative norm* to be the basis of an *individual decision*.[141] If a legislative norm has the capacity to execute itself, that is, apply without the need for concretizing legislation, this should be so in a judicial as well as administrative context. The recognition of administrative direct effect should, thus, be seen as a constitutional normality.

On the basis of these definitions, directly effective provisions of directives will also be directly applicable, for '[h]ow can a law be enforceable by individuals with a member-state if it is not regarded as incorporated in that State'?[142] The direct

[138] E.g. P. Pescatore, above n.130 at 176: direct effect 'boil[s] down to a question of justiciability', and A. Peters, 'The Position of International Law within the European Community Legal Order', [1997] 40 German Yearbook of International Law, 9–77 at 76: 'direct effect is best understood as an objective prerequisite for application of international rules by courts'.

[139] The executive branch will also be bound by a directive. In *Fratelli Costanzo SpA v Comune di Milano*, Case 103/88, [1989] E.C.R. 1839, para.31, the Court found it 'contradictory to rule that an individual may rely upon the provisions of a directive which fulfil the conditions defined above in proceedings before the national courts seeking an order against the administrative authorities, and yet to hold that those authorities are under no obligation to apply the provisions of the directive and refrain from applying provisions of national law which conflict with them. It follows that when the conditions under which the Court has held that individuals may rely on the provisions of a directive before the national courts are met, all organs of the administration (. . .) are obliged to apply those provisions.' For the duty of national competition authorities to disapply national legislation that contravenes Article 81 EC, see: *Consorzio Industrie Fiammiferi (CIF) v Autorita Garante della Concorrenza e del Mercato*, Case C-198/01, [2003] E.C.R. 8055, para.50: 'Since a national competition authority such as the Authority is responsible for ensuring, *inter alia*, that Article 81 EC is observed and that provision, in conjunction with Article 10 EC, imposes a duty on Member States to refrain from introducing measures contrary to the Community competition rules, those rules would be rendered less effective if, in the course of an investigation under Article 81 EC into the conduct of undertakings, the authority were not able to declare a national measure contrary to the combined provisions of Articles 10 EC and 81 EC and if, consequently, it failed to disapply it.'

[140] In this sense, see however: B. de Witte, 'Direct Effect, Supremacy and the Nature of the Legal Order', in: P. Craig and G. de Búrca (eds), *The Evolution of EU Law* (OUP, 1999), 177–213 at 193. The answer suggested by S. Prechal (*Directves in EC Law* (OUP, 2005) at 72) is the following: 'In my opinion, it should be taken into account that the position of administrative bodies is fundamentally different from that of national courts, which have, in the majority of Member States, the power to review and, where necessary, set aside national law and to refer preliminary questions to the European Court of Justice.' This explanation is arguably unconvincing: once we accept that national courts have the power to set aside national law—and for some Member States this did represented a 'constitutional enormity' when they entered the EC—it makes, in my opinion, no qualitative difference to extend that effect to national administrations.

[141] Even if direct effect is defined as the *capacity* or an *attribute* of a norm, this does not suggest that direct effect is an inherent *legal* quality of a norm. As the discussion of the doctrine of direct effect of international treaties will demonstrate, the executive or the judiciary may refuse *attributing* direct effect to a norm for political reasons. See, section VI. A below.

[142] J. Steiner, 'Direct Applicability in EEC Law—A Chameleon Concept', [1982] 98 The Law Quarterly Review, 229–48 at 234.

effect of a directive implies its direct application.[143] This proposition, however, will not work the other way: directly applicable norms are not necessarily directly effective. They are only *capable* of producing direct effects in national legal orders.[144] Finally, what about those provisions of a directive that are not directly effective? Are they nonetheless directly applicable? The answer must be in the affirmative:

> The fundamental choice made by the Court of Justice in *Van Gend en Loos* and *Costa v. ENEL* as to the relationship between Community law and national law in general also determines the place of directives within the legal orders of the Member States. The Community's own legal system is an integral part of the legal systems of the Member States. This means that the whole body of Community law (including directives, which are a component of this law) is as such incorporated within the national legal orders, without measures of transformation, incorporation—or whatever else the terminology might be—being necessary. (...) Thus, if the term 'directly applicable' in Article 249(2) is understood to refer to the automatic incorporation of regulations into the domestic legal order, directives are also directly applicable in this sense.[145]

While *Van Gend en Loos* had thus pierced the dualist veil also for directives, the doctrine of direct effect would allow individuals to rely on directives even where the technical prerogative of a national act completing the 'two-stage' legislative process had not been used. As the Court would point out: '[W]henever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the directive'.[146] Directives can directly endow an indeterminate class of individuals with rights. The directive must, therefore, be regarded as 'a Community measure of general application' and as such a 'legislative measure' in its own right.[147]

Has the Court, then, turned directives from an instrument of indirect legislation to an instrument of direct legislation? The answer escapes a simple black-and-white logic: Yes, directives could contain directly and generally effective norms and, as such, were direct Community legislation. However, individuals could only rely directly on directives, where the Member States had failed to

[143] The logical relation between directly effective provisions of directives and their direct application contrasts with the position of Treaty provisions. The EC Treaty has been ratified according to the constitutional traditions of the Member States and, consequently, gained legal validity in the dualist national legal orders through the national transformation act. When the ECJ therefore established the direct effect of Article 25 EC in *Van Gend en Loos*, the validity of the provision in all national legal orders was already settled. Its direct effect could not (retrospectively) imply its direct applicability.

[144] See the discussion on regulations, section IV. A.

[145] S. Prechal, *Directives in EC Law* (OUP, 2005), 92 and 229. For the same conclusion, see C. Timmermans, 'Community Directives Revisited', [1997] 17 Y.E.L. 1–28 at 11–2.

[146] *U. Becker v Finanzamt Münster-Innenstadt*, Case 8/81, [1982] E.C.R. 53, para.12.

[147] *Laboratoires pharmaceutiques Bergaderm and Goupil v Commission*, Case T-199/96, [1998] E.C.R. II-2805.

implement the directive correctly: '[W]herever a directive is correctly implemented, its effects extend to individuals *through the medium of the implementing measures adopted*'.[148] The Court has insisted on national implementing measures even for those parts of a directive that are directly effective.[149] The Community legal order thus favours the mediated *indirect* legislative effect of directives over their direct legislative effects. The indirect effect of directives thereby never stops: directives will always remain in the background as a form of 'fall-back' legislation even where the national authorities have correctly implemented the directive.[150] There is thus a permanent symbiosis between a Community directive and the national implementing legislation.

More importantly however, the direct legislative character of directives is constitutionally trimmed: '[T]he binding nature of a directive, which constitutes the basis for the possibility of relying on the directive before a national court, exists only in relation to 'each Member State to which it is addressed'. It follows that a directive may not of itself impose obligations on an individual and that a provision of a directive may not be relied upon as such against such a person.'[151]

[148] *U. Becker v Finanzamt Münster-Innenstadt*, para.19 (emphasis added).

[149] In *Commission v Belgium*, Case 102/79, [1980] E.C.R. 1473, para.12, we therefore read: 'The effect of the third paragraph of [Article 249] is that Community directives must be implemented by appropriate implementing measures carried out by the Member States. Only in specific circumstances, in particular where a Member State has failed to take the implementing measures required or has adopted measures which do not conform to a directive, has the Court of Justice recognized the right of persons affected thereby to rely in law on a directive as against a defaulting Member State (. . .) This minimum guarantee arising from the binding nature of the obligation imposed on the Member States by the effect of the directives under the third paragraph of [Article 249] cannot justify a Member State's absolving itself from taking in due time implementing measures sufficient to meet the purpose of each directive.'

[150] Even after its 'correct implementation', a Directive will remain a permanent standard of review and a potential source of direct rights, see: *Marks & Spencer plc. v Commissioners of Customs & Excise*, Case 62/00, [2002] E.C.R. I-6325, paras.27–8.: '[T]he adoption of national measures correctly implementing a directive does not exhaust the effects of the directive. Member States remain bound actually to ensure full application of the directive even after the adoption of those measures. Individuals are therefore entitled to rely before national courts, against the State, on the provisions of a directive which appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise whenever the full application of the directive is not in fact secured, that is to say, not only where the directive has not been implemented or has been implemented incorrectly, but also where the national measures correctly implementing the directive are not being applied in such a way as to achieve the result sought by it.' The Court continued by saying that 'it would be inconsistent with the Community legal order for individuals to be able to rely on a directive where it has been implemented incorrectly but not to be able to do so where the national [executive!] authorities apply the national measures implementing the directive in a manner incompatible with it.'

[151] *M. H. Marshall v Southampton and South-West Hampshire Area Health Authority*, Case 152/84 [1986] E.C.R. 723, para.48. The principal reason for the denial of horizontal direct effect in *Marshall* was thus still the 'dualist' nature of directives: their binding effect was only operative 'upon' States. In later jurisprudence the emphasis changed as the ECJ interpreted *Marshall* in the following manner: '[T]he case law on the possibility of relying on directives against State entities is based on the fact that under [Article 249] a directive is binding only in relation to 'each Member State to which it is addressed'. That case law seeks to prevent '*the State from taking advantage of its own failure to comply with Community law*' (*Faccini Dori v Recreb*, Case 91/92, [1994] E.C.R. I-3325, para.22 (emphasis added).

Directives cannot *directly* impose obligations on individuals. Directives lack horizontal direct effect.[152] This controversial constitutional view, taken by the ECJ 30 years ago, has overshadowed the legislative format of directives ever since. Directives could only have vertical direct effect. They were, to take this one step further, only a vertical form of direct legislation and could, moreover, only grant rights against public authorities of a State.[153] The normative character of directives as instruments of *direct* Community legislation is 'incomplete'.[154] Directives cannot, in themselves, constitute fully-fledged Community legislation.

In order to minimize this legislative defect, the Court has developed the doctrine of 'indirect effect'. National authorities are as far as possible 'required to interpret their national law in the light of the wording and the purpose of the

[152] In some cases the Court has allowed directives to adversely affect individuals. This phenomenon has been referred to as the 'incidental' horizontal effect of directives (P. Craig and G. de Búrca, *EU Law* (OUP, 2003), 220–27), 'horizontal side effects of direct effect' (S. Prechal, above n.145 at 261–70), the 'disguised' vertical effect of directives (M. Dougan, 'The "disguised" vertical direct effect of Directives', [2000] 59 Cambridge Law Journal, 586–612). In *Unilever Italia v Central Food*, Case C-443/98, for example, the Court found in paras.50 and 51 that while it remained true 'that a directive cannot of itself impose obligations on an individual and cannot therefore be relied on as such against an individual (see Case C-91/92 *Faccini Dori* 1994 ECR I-3325, paragraph 20), that case law does not apply where non-compliance with Article 8 or Article 9 of Directive 83/189, which constitutes a substantial procedural defect, renders a technical regulation adopted in breach of either of those articles inapplicable. In such circumstances, and unlike the case of non-transposition of directives with which the case law cited by those two Governments is concerned, Directive 83/189 does not in any way define the substantive scope of the legal rule on the basis of which the national court must decide the case before it. It creates neither rights nor obligations for individuals.'

On the other hand, the Court has set constitutional limits on the vertical effect of directives where it would indirectly impose an obligation on individuals. In *The Queen, on the application of Delena Wells v Secretary of State for Transport, Local Government and the Regions*, Case 201/02, [2004] E.C.R. I-723, the Court held that 'an individual may not rely on a directive against a Member State where it is a matter of a State obligation directly linked to the performance of another obligation falling, pursuant to that directive, on a third party [.] (. . .) On the other hand, mere adverse repercussions on the rights of third parties, even if the repercussions are certain, do not justify preventing an individual from invoking the provisions of a directive against the Member State concerned' (paras.55–7).

The incidental horizontal effect of directives remains a 'grey zone' in EC law—or better: a zone with various 'shades of grey' (cf. T. Tridimas, 'Black, White, and Shades of Grey: Horizontality of Directives Revisited', [2001–2] 21 Y.E.L. 327–54). The conceptual categories that have been developed to justify when a directive can adversely affect a private party and when not have degenerated into 'a form of sophistry which provide no convincing explanation for apparently contradictory lines of case law' (P. Craig and G. de Búrca, *ibid.*, at 226).

[153] Directives can only be 'beneficial' direct legislation as they can change the relationship between the State and a general class of individuals only to the benefit of the latter: directives lack 'inverse vertical direct effect' (cf. *Criminal proceedings against Kolpinghuis Nijmegen BV*, Case 80/86, [1987] E.C.R. 3969, para.10: '[A] national authority may not rely, as against an individual, upon a provision of a directive whose necessary implementation in national law has not yet taken place.').

[154] M. Dougan, above n.152 at 586.

[155] *Von Colson & Kamann v Land Nordrhein-Westfalen*, Case 14/83, [1984] E.C.R. 1891, para.26. The parameters of the duty of consistent interpretation have been defined in the following way: '[I]f the

directive'.[155] This obligation of 'consistent interpretation' applies to all national law—whether passed before or after the directive.[156] '[T]he obligation to interpret national law in conformity with the directive at issue may result in imposing a new obligation on individuals or otherwise affect their position.'[157] Within certain constitutional limits,[158] the doctrine of indirect effect, therefore, comes close to '*de facto* (horizontal) direct effect of the directive'.[159] The national courts are, however, not obliged to interpret a national provision *contra legem*. The duty of consistent interpretation is, therefore, a milder incursion on the legislative powers of the Member States than the doctrine of (horizontal) direct effect.[160] Under the latter doctrine, the national courts would be obliged to

application of interpretative methods recognised by national law enables, in certain circumstances, a provision of domestic law to be construed in such a way as to avoid conflict with another rule of domestic law or the scope of that provision to be restricted to that end by applying it only in so far as it is compatible with the rule concerned, the national court is bound to use those methods in order to achieve the result sought by the directive' (*Bernhard Pfeiffer (C-397/01) et al. v Deutsches Rotes Kreuz, Kreisverband Waldshut eV*, Joined Cases C-397/01 to C-403/01, [2004] E.C.R. 8835, para.116.) This passage has been taken to mean that '[n]ational courts are not obliged to invent new methods or to stain existing ones; those at their disposal, however, must be applied to full effect' (M. Klamert, 'Judicial Implementation of Directives and Anticipatory Indirect Effect: Connecting the Dots', [2006] 43 C.M.L. Rev. 1251–1275 at 1259). For the opposite view, see: S. Prechal, above n.157, 213.

156 *Marleasing SA v La Comercial Internacional de Alimentacion SA*, Case C-106/89, [1990] E.C.R. 4135, para.8: '[I]n applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of [Article 249] of the Treaty.'

157 S. Prechal, above n.145 at 308.

158 The duty of consistent interpretation imposed on national courts finds a constitutional limit in the 'general principles of law and in particular the principles of legal certainty and non-retroactivity' (*Criminal proceedings against Kolpinghuis Nijmegen BV*, para.13). In C*riminal proceedings against Arcaro*, Case 168/95, [1996] E.C.R. 4705, the Court even claimed that '[the] obligation of the national court to refer to the content of the directive when interpreting the relevant rules of its own national law reaches a limit where such an interpretation leads to the imposition on an individual of an obligation laid down by a directive which has not been transposed' (para. 42). This ruling should, however, be interpreted restrictively. Indeed, P. Craig ('Directives: Direct Effect, Indirect Effect and the Construction of National Legislation', [1997] 22 E.L. Rev. 519–538 at 527) has sceptically pointed out: 'If this is indeed so then it casts the whole doctrine of indirect effect into doubt.' In fact '[t]his was the whole point of engaging in the interpretive exercise'. 'Greater rights for the plaintiff will almost always mean commensurately greater obligations of the defendant.' The post-Arcaro jurisprudence appears to recognize this logical necessity (cf. S. Drake, 'Twenty Years after *Von Colson*: the impact of 'indirect effect' on the protection of the individual's Community rights', [2005] 30 E.L. Rev. 329–48 at 338).

159 S. Prechal, above n.145, 211. Nevertheless, it goes too far to claim that indirect effect is 'horizontal direct effect under another name' (T.C. Hartley, above n.72 at 221).

160 The question is, of course, *how much* milder! According to S. Prechal (above n.145 at 180) (emphasis added), '[t]he interpretation of national law in conformity with the directive constitutes, in general, a *relatively mild incursion* into the national legal system. In the ultimate analysis, it is then still national law which applies, although its content may be adjusted in the light of the directive'. The opposite view has been taken by Advocate General Jacobs: 'Because the existing case law already requires national courts in effect to enforce directives against individuals, by construing all provisions

disapply conflicting national law via the principle of supremacy.[161] While the doctrine of consistent interpretation is a method to avoid conflicts, the doctrine of supremacy is a method to *solve*—unavoidable—conflicts.[162] The *de facto* horizontal direct effect of directives will, thus, not only be *indirect*, but also *limited*, since it has to operate through the medium of national law. The doctrine of indirect effect thus further reinforces the character of directives as *indirect* Community legislation.

In sum, the legislative matrix of directives is structured in the following way. Directives are directly applicable. They are incorporated in the national legal orders from the moment they enter into force. They can also be directly effective—and thus a direct legislative source—once the deadline for implementation has passed.[163] However, directives can only be vertically directly effective. Their horizontal effects will typically be indirect, that is, transmitted *via* the medium of national law. The Court moreover favours the indirect legislative nature of directives—even for those parts that are directly effective: a directive's legislative substance will thus normally reach individuals through the medium of national legislation. The directive constitutes, therefore, a form of 'background legislation'. It only comes to the fore as (vertical) direct legislation, where the interpretation of national law fails to achieve the desired Community result. While the directive has thus elements of direct legislation, 'it is normally a form of *indirect regulatory or legislative measure*'.[164]

of national law, whether or not adopted for the purpose of implementing a directive and whether prior or subsequent to the directive, so as to give effect to the provisions of directives, it would not be a radical departure from the existing state of the law, in terms of its practical consequences, to assign horizontal direct effect to directives; such direct effect will arise only when it is impossible so to construe any provision of national law' (*Vaneetveld v Le Foyer*, Case 316/93, [1994] E.C.R. 763, para.32).

[161] I am grateful to M. Dougan for his thoughts on this issue presented at the DELl Seminar 'Competing visions on the effect of Community law: direct effect versus supremacy' (Durham, 1 November 2006).

[162] On the definition of the supremacy principle as a 'conflict-solving' mechanism, see: R. Schütze, *Supremacy without Pre-emption? The very slowly emergent Doctrine of Community Pre-emption*, [2006] 43 C.M.L. Rev. 1023–1048.

[163] Once a directive has been adopted, a Member State will, however, be under the constitutional obligation to 'refrain from taking any measures liable seriously to compromise the result prescribed' in the directive, see: *Inter-Environnement Wallonie ASBL v Region wallonne*, C-129/96, [1997] E.C.R. 7411, para.45. This obligation follows from Article 10 (2) in combination with Article 249 (3) EC and has nothing to do with the doctrine of direct effect. However, apart from the prohibition to frustrate the very objective of the directive, there is no anticipatory indirect effect: the national authorities are not required to interpret their national law in the light of Community law before the expiry of the deadline for transposition. After *Konstantinos Adeneler and Others v Ellinikos Organismos Galaktos (ELOG)*, Case C-212/04 (nyr), there is no longer room for speculation on this issue: '[W]here a directive is transposed belatedly, the general obligation owed by national courts to interpret domestic law in conformity with the directive exists only once the period for its transposition has expired' (*ibid.*, para.115).

[164] *Gibraltar v Council*, Case 298/89, [1993] E.C.R. 3605, para.16 (emphasis added).

B. The Regulatory Intensity of Directives: Constitutional Limits to Legislative Pre-emption?

Directives shall be binding 'as to the result to be achieved' and 'leave to the national authorities the choice of form and methods'.[165] The freedom to choose form and method of implementation conformed to the ordinary canon of international law.[166] Binding as to the result to be achieved, the instrument promised to respect the national level's power to autonomously select the legislative path that would lead towards the obligatory Community end. The 'two-stage legislation' had, it seemed, been specifically designed to protect the national sovereignty of the Member States.[167] The very term 'directive' suggested an instrument that would confine itself to 'directions' or 'guidelines'. The instrument's use for the harmonization of *national* law reinforced that vision.

Do directives embody broad-stroked 'directions' that will guarantee a degree of legislative autonomy to the national level? An early academic school has indeed argued that the instrumental format 'directive' will, *ipso facto*, protect a degree of national legislative autonomy.[168] These voices championed a constitutional framework limiting the directive's degree of pre-emption. To be a 'true' directive, a Community measure would have to leave a minimum degree of material legislative freedom to the national authorities. It could never field pre-empt national legislators within its scope of application, for:

> [d]ie Zuerkennung einer durchgängigen Verbindlichkeit bei gleichzeitiger vollständiger oder nahezu vollständiger Detaillierbarkeit würde bedeuten, daß die Richtlinien damit in Rechtsinstrumente verwandelt wären, die sich von den an die Mitgliedstaaten gerichteten Entscheidungen letzten Endes nur noch durch ihre Bezeichnung unterscheiden.

[165] Article 249(3) EC.

[166] See the discussion on the direct effect of international agreements below: see section VI.A.

[167] A. Bleckmann, *Europarecht: Das Recht der Europäischen Union und der Europäischen Gemeinschaften* (Heymanns, 1997) at 163: 'Die Einführung dieses zweistufigen Gesetzgebungsverfahrens hatte drei Gründe. Einmal sollte die Souveränität der Mitgliedstaaten und ihrer Parlamente geschützt werden. Die Gesetzgebungsbefugnis sollte weiterhin in der Hand des Staates bleiben, das nationale Parlament sollte in seiner Regelungsbefugnis nicht allzu stark eingeengt werden. Für diese Regelung sprach zweitens, daß der Gedanke der Supranationalität bei der Abfassung des EWGV schon verblaßt war. Und drittens sollte den Mitgliedstaaten mit der Richtlinie ein Raum für eigene Entscheidungen belassen werden'.

[168] The following authors can be marshalled in favour of this position: M. Zuleeg, above n.84, 10: 'Die Wahl der Mittel muß einen materiellen Entscheidungsspielraum gewähren, sie kann sich nicht lediglich auf die Wahl der Form des Umsetzungsaktes beziehen. Ohne materielle Regelungsbefugnis wäre die Einschaltung des nationalen Normsetzers sinnlos.'; G. Gaja, P. Hay, R.D. Rotunda, above n.110 at 133: 'The detailed character of many provisions may be inconsistent with the *concept of directive* as defined in the EEC Treaty [.]'; M. Pechstein, *Die Mitgliedstaaten der EG als 'Sachwalter des gemeinsamen Interesses'* (Nomos, 1987) 47: 'Im folgenden wird die Richtlinienbefugnis jedoch typologisch als Rahmenszuständigkeit verstanden.'; P.E. Herzog, Article 189, in D. Campbell *et al.* (eds.), *The law of the European Community: a commentary on the EEC Treaty* (Matthew Bender, 1995), 613: 'The view that the definition of a directive given in [Article 249(3) EC], has a limiting effect on the various grants of powers in substantive Treaty provisions authorizing the issuance of directives

Damit würde aber dem Instrument der 'Richtlinie' im Grunde genommen die Existenzberechtigung entzogen. (...) Den Mitgliedstaaten soll grundsätzlich ein Mindestmaß an Autonomie in dem von der Richtlinie jeweils geregelten Sachbereich belassen werden; sie sollen nicht auf ein in alle Einzelheiten bindend vorgeschriebenes Verhalten festgelegt werden. Hierin liegt der besondere Charakter des Rechtsinstruments 'Richtlinie', der ihm erhalten bleiben muß, wenn es nicht seinen eigentlichen Sinn verlieren soll.[169]

The directive as a specific legislative format would lose its reason for being, so the argument goes, if its preemptive character approaches that of State-addressed decisions or regulations. This position interprets the directive in competence terms: 'The constitutional definition given in Article 249 (3) EC to the directive constitutes a *competence limit*.'[170] The Community legislator would act *ultra vires*, if it went beyond the constitutional frame set by the format of the directive. When precisely the pre-emptive Rubicon was crossed remained, however, shrouded in linguistic mist: a 'substantial' or 'reasonably necessary' degree of legislative autonomy was claimed for the Member States.[171]

The argument in favour of an inherent constitutional limit to the pre-emptive effect of directives has been criticized.[172] The Treaty would refer to a choice as regards *form* and *methods* of implementation and does not expressly refer to a degree of *material* policy choice that the national level is entitled to retain. Indeed, the constitutional reality of the Community legal order has never endorsed a constitutional maximum standard for the pre-emptive effect of directives. On the contrary, in *Enka* the Court of Justice expressly recognized a directive's ability to be 'exhaustive' or 'complete' harmonization, wherever strict legislative uniformity

seems correct.'; D. Triantafyllou, *Vom Vertrags-zum Gesetzesvorbehalt: Beitrag zum positiven Rechtmäßigkeitsprinzip in der EG* (Nomos, 1996), 47 and 82: 'Konkurrierende Zuständigkeiten begründen insbesondere die Ermächtigungen zum Erlaß von Richtlinien. Dabei regelt—definitionsgemäß—der Gemeinschaftsgesetzgeber nur das Grundsätzliche (den Zweck), was den nationalen Gesetzgebern erheblichen Gestaltungsspielraum bei der Wahl der Mittel beläßt auch wenn sich die Regelungsdichte der Richtlinie im Laufe der Zeit erhöht hat.'; A. Furrer, *Die Sperrwirkung des sekundären Gemeinschaftsrechts auf die nationalen Rechtsordnungen: Die Grenzen des nationalen Gestaltungsspielraums durch sekundärrechtliche Vorgaben unter besonderer Berücksichtigung des 'nationalen Alleingangs'*, (Nomos, 1994), 65: 'ihr [Richtlinie] zurückhaltender, den nationalen Handlungsspielraum grundsätzlich wahrender Ansatz'.

169 D. Oldekop, 'Die Richtlinien der Europäischen Wirtschaftsgemeinschaft' [1972] 21 Jahrbuch des öffentlichen Rechts 55–106 at 92–3.

170 '[D]ie Legaldefinition der Richtlinie [bildet] eine Kompetenzschranke': M. Zuleeg, above n.84 at 11 (emphasis added).

171 D. Oldekop, above n.169 at 93: 'zulässige Maximum der Detaillierung ist dann überschritten, wenn dem Richtlinienadressaten keine beachetenswerte eigene, auf die Sache selbst bezogenen Gestaltungsmöglichkeit verbleibt'; P.E. Herzog, above n.168 at 614: 'reasonably necessary'.

172 The following commentators have been critical of the view: H-J. Rabe, *Das Verordnungsrechts der Europäischen Wirtschaftsgemeinschaft* (Appel, 1963), 41: 'Die Richtlinie selbst ist frei in ihrer "Regelungsintensität".'; H.P. Ipsen, Richtlinien-Ergebnisse, in: W. Hallstein (ed.), *Zur Integration Europas*: Festschrift für Carl Friedrich Ophüls aus Anlaß seines siebzigsten Geburtstages (C.F. Müller, 1965) 67–84 at 71: '[Es] besteht nahezu ausnahmslose Einhelligkeit darüber, daß die Richtlinie im

was necessary.[173] Directives can, therefore, occupy a regulatory field and have the capacity to totally pre-empt national legislators. This is, by no means, a singular phenomenon.[174]

The Community legislator has 'used the directive as a *loi uniforme* as needed, which can impose detailed instructions on the Member States as to the legal state of affairs to be created'.[175] The national choice, referred to in Article 249(3) EC, guarantees today only the power of Member States to implement the Community *content* into national *form*: '[T]he choice is limited to the *kind* of measures to be taken; their *content* is entirely determined by the directive at issue. Thus the discretion as far as form and methods are concerned does not mean that Member States necessarily have a margin in terms of policy making.'[176] The constitutional formula of 'choice of form and methods' only safeguards the formal freedom to translate the Community norm into the legal vernacular of the national legal order. The comparison of the Community instrument 'directive' with the (German) constitutional concept of *Rahmengesetzgebung* is, consequently, misleading. The pre-emptive capacity of directives is—like that of regulations and decisions—unlimited.

C. Excursus: The Instrumental Format of State-addressed Decisions

Decisions are directly applicable and may, as individual decisions, be directly effective *vis-à-vis* their addressees. From a functional perspective brought to the concept of legislation, the Treaty had clearly denied their legislative character: decisions shall only be binding in their entirety upon those to whom they are

Interesse ihrer Funktionsfähigkeit erforderlichenfalls die abschließende Rechtsgestaltung selbst enthalten darf, so daß die mitgliedstaatliche Form- und Mittel-Bereitstellung sich darin erschöpfen muß, dem Richtliniengehalt unverändert innerstaatliche Wirksamkeit zu verschaffen.', and, E. Fuss, 'Die 'Richtlinie' des Europäischen Gemeinschaftsrechts', [1965] 80 Deutsches Verwaltungsblatt 378–84 at 380: 'daß eine Richtlinie auch eine sehr detaillierte Regelung enthalten kann, wenn und soweit dies zur Erriechung eines Vertragszieles als unumgänglich erscheint'.

[173] *Enka BV v Inspecteur der invoerrechten en accijnzen*, Case 38/77, [1977] E.C.R. 2203, paras. 11–12: 'It emerges from the third paragraph of [Article 249] of the Treaty that the choice left to the Member States as regards the form of the measures and the methods used in their adoption by the national authorities depends upon the result which the Council or the Commission wishes to see achieved. As regards the harmonization of the provisions relating to customs matters laid down in the Member States by law, regulation or administrative action, in order to bring about the uniform application of the common customs tariff it may prove necessary to ensure the *absolute identity of those provisions*' (*ibid.*, paras.11–12).

[174] E.g. *Criminal Proceedings against T. Ratti*, Case 148/78, [1979] E.C.R. 1629.

[175] J. Bast, above n.74 at 11. Again, for an early criticism, see: R.W. Lauwaars, *Lawfulness and Legal Force of Community Decisions*, (A.W. Sijthoff, 1973) 30–31: 'But can this be carried so far that no freedom at all is left to the member States? In my opinion it follows from [Article 249] that the directive *as a whole* must allow member States the possibility of carrying out the rules embodied in the directive in their own way. A directive that constitutes a uniform law is not compatible with this requirement because, by definition, it places a duty on the member States to take over the uniform text and does not allow any freedom as to choice of form and method.'

[176] S. Prechal, above n.145 at 73.

addressed.[177] Decisions can be addressed to private persons. Decisions can also be addressed to Member States.[178] The normative format of this second group of decisions has evolved alongside that of directives. While in 1962 the Court had still identified the essential characteristic of a decision by reference to the fact that it applied only to a limited number of persons,[179] State-addressed decisions were soon announced to be able to create rights for a general category of 'third parties'.

In *F. Grad v Finanzamt Traunstein*,[180] the Court was asked to look at the effect of a Council decision addressed to all Member States. The German government had insisted on a textual reading of Article 249(4) EC: State-addressed decisions cannot create rights for private persons; rights or obligations within the national legal order could only emanate from the national implementing legislation. The response of the European Court was a clear no: 'Although the effects of a decision may not be identical with those of a provision contained in a regulation, this difference does not exclude the possibility that the end result, namely the right of the individual to invoke the measures before the courts, may be the same as that of a directly applicable provision of a regulation.'[181] State-addressed decisions will, consequently, be capable of creating rights for a general class of private citizens. They can be legislative acts.[182]

Yet will they be capable of imposing obligations on individuals? This is doubtlessly an inherent feature of 'private' decisions. Should this normative characteristic be extended to State-addressed decisions? Giving them horizontal direct effect would render them into a form of direct Community legislation. Some have indeed referred to the structural similarity between private decisions and State-addressed decisions to affirm the horizontal direct effect of the latter.[183]

[177] Article 249(4) EC. Decisions without any addressee—decisions *sui generis* (atypical acts, because of the obvious derivation from the constitutional definition offered in Article 249(4) EC)—have emerged as a new legal instrument and have been characterized as follows: 'A distinctive feature can be found in their specific operating mode: while regulations are directly applicable in all Member States and thus can directly oblige each legal subject, addresseeless decisions lack this capacity. The obligatory force of addresseeless decisions is limited. Obligatory effects are only created within the institutional sphere of the Union: they are binding upon the institutions and bodies set up by, or on the basis of, the Treaties, and their respective personnel.' (A. von Bogdandy, F. Arndt & J. Bast, 'Legal Instruments in European Union Law and their Reform: A Systematic Approach on an Empirical Basis', [2004] 23 Y.E.L. 91–136 at 104).

[178] State-addressed decisions are 'binding on all the organs of the State to which they are addressed, including the courts of that State' (*Albako Margarinefabrik Maria von der Linde GmbH & Co. KG v Bundesanstalt für landwirtschaftliche Marktordnung*, Case 249/85, [1987] E.C.R. 2345, para.17).

[179] *Confédération nationale des producteurs de fruits and légumes and others v Council*, Case 16–17/62, [1962] 471, para.2.

[180] G*rad v Finanzamt Traunstein*, Case 9/70, [1970] E.C.R. 825. [181] *Ibid.*, para.5.

[182] R. Greaves is more cautious when referring to the 'quasi-legislative' character of state-addressed decisions (R. Greaves, 'The Nature and Binding Effect of Decisions under Article 189 EC', (1996) 21 E.L. Rev. 3–16 at 11).

[183] A. von Bogdandy, J. Bast & F. Arndt, 'Handlungsformen im Unionsrecht: Empirische Analysen und dogmatische Strukturen in einem vermeintlichen Dschungel', [2002] 62 Zeitschrift

The better view, however, is to transpose the constitutional bar to horizontal direct effects—developed in the context of directives—to state-addressed decisions.[184] State-addressed decisions should only be vertically directly effective. State-addressed decisions, therefore, constitute a second form of indirect Community legislation.

VI. External Community Legislation: International Agreements

A. International Agreements—A Direct or an Indirect Form of Community Legislation?

In the 'globalized' world of today, international agreements have become an important legal instrument. Many legal orders have 'opened-up' to a monist position: under monism, international treaties are *constitutionally* recognized as an autonomous legal source of domestic law. The European Court of Justice has, early on, chosen a monist road: international agreements concluded by the Community enter the Community legal order without the need for additional transposition or incorporation. International treaties 'form an integral part of the Community legal system' from the date of their entry into force.[185] Community agreements are, therefore, directly applicable in the Community legal order.[186] The *capacity* of international treaties to directly and generally affect the lives of European citizens renders them into a form of external Community legislation.

Yet, even in a monist legal order, not all international treaties will be directly effective. Particular treaties may lack direct effect for 'when the terms of the

für ausländisches öffentliches Recht und Völkerrecht 77–161 at 98–99: 'Als privategerichtete Entscheidung ist sie dazu gerade prädestiniert, individuelle Verpflichtungen aufzuerlegen. Es bestehen deshalb auch keine Bedenken, eine staatengerichtete Entscheidung als Ermächtigungsnorm für einen Verwaltungsakt anzuerkennen. (. . .) Das spezifische Profil, daß die Richtlinie der staatengerichteten Entscheidung (. . .) voraus hat, liegt in einem Leistungs*un*vermögen zur unmittelbaren Verpflichtung Privater.'

[184] In this sense; T.C. Hartley, *The foundations of European Community law: an introduction to the constitutional and administrative law of the European Community* (OUP, 2003) 224 and already M. Zuleeg, above n. 84 at 9. The normative similarity of directives and that of State-addressed decisions has led some authors to view directives and State-addressed decisions as expressions of a broader generic instrumental form (A. Scherzberg, 'Verordnung—Richtlinie—Entscheidung', in H. Siedentopf (ed), *Europäische Integration und nationale Verwaltung* (Steiner, 1991), 17–42 at 42: 'Richtlinie und staatengerichtete Entscheidung stellen sich dagegen als Ausprägungen einer einheitlichen Handlungsform dar.').

[185] *Haegemann v Belgium*, Case 181/73, [1974] E.C.R. 449, para.5.

[186] The following section draws on the conceptual distinction between direct application and direct effect developed in the context of internal Community legislation, see: sections IV. A and V. A.

stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not to the judicial department; and the legislature must execute the contract before it can become a rule for the Court'.[187] Where a treaty addresses the legislative branch, it will not be self-executing as its norms will not be operational for the executive or the judiciary.

The doctrine of self-execution or direct effect is still a 'monist' doctrine. Dualist systems deny the legal validity of an international treaty within the domestic legal order *a priori*. Dualism insists on a validating domestic act. International agreements are not direct instruments of domestic legislation. Monist legal systems, on the other hand, recognize the legal validity of (properly concluded) international treaties in the national legal order. However, the *effectiveness* of a particular international treaty in the national legal order will depend on the extent to which it has been given direct effect.[188] The doctrine of direct effect represents, therefore, a yardstick for the actual openness of a legal system: it is a *chiffre* for the intensity—and concrete proof—of its monist creed.

Are Community agreements instruments of direct Community legislation or indirect legislative instruments; or, perhaps, both? The key to the direct or indirect legislative nature of international treaties in the Community legal order lies again in the doctrine of 'direct effect'. The question whether a Community agreement has direct effect has—just as for internal legislation—been monopolized by the European Court of Justice.[189] Let us investigate three aspects of the doctrine of direct effect for international agreements: the conditions for direct effect, the dimensions of direct effect and, finally, the constitutional nature of the direct effect doctrine for international agreements.

[187] *Foster v Neilson*, [1829] 27 U.S. (2 Pet.) 253 at 314.

[188] The direct effect of an international treaty within the domestic legal order is, ultimately, a domestic decision. See: Y. Iwasawa, 'The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis', [1985–6] 26 Virginia Journal of International Law 627–92 at 651: 'States determine how to implement their international legal obligations on the municipal level. It is well recognized that domestic law determines the 'validity' and 'rank' of treaties in domestic law. If this is so, domestic law should also determine the 'direct applicability' of treaties in domestic law. (...) The determination of whether the terms of a treaty are so precise that it could be considered directly applicable can vary from one state to another depending on various factors.' This is not uncontroversial, but corresponds to the position of the European Court of Justice: 'Although each contracting party is responsible for executing fully the commitments which it has undertaken it is nevertheless free to determine the legal means appropriate for attaining that end in its legal system, unless the agreement, interpreted in the light of its subject-matter and purpose, itself specifies those means' (*Portugal v Council*, 149/96, [1999] E.C.R. 8395, para.35).

[189] The Court has justified the 'centralization' of the direct effect question by reference to the uniformity of the Community legal order. The effects of the Community's international agreements 'may not be allowed to vary . . . according to the effects in the internal legal order of each Member State which the law of that State assigns to international agreements concluded by it. Therefore it is for the Court, within the framework of its jurisdiction in interpreting the provisions of agreements,

(i) Conditions for Direct Effect

When will an international treaty have direct effect in the Community legal order? The Court has devised a two-stage test.[190] In the first stage, the Court will examine whether the agreement *as a whole* is capable of containing directly effective provisions. The signatory parties to the agreement may have positively settled this issue themselves.[191] If this is not the case, the Court will employ a 'policy test' that will look at the nature, aim, purpose, spirit or general scheme of the treaty.[192] This evaluation is inherently political in nature as it will have political effects: the recognition of direct effect by the Community judicature will 'deprive the legislative or executive organs of the Community of the scope for manoeuvre [for implementation] enjoyed by their counterparts in the Community's trading partners'.[193] Direct effect is, thus, a 'political question'; and the first part of the doctrine of direct effect, therefore, a facet of a political question doctrine. Here, the Court's approach to the direct effect of external Community law differs from its approach to direct effect in the internal sphere: internal law is today *presumed* to be capable of direct effect.[194]

Where the 'political question' hurdle has been crossed, the Court will turn to examining the direct effect of a specific provision of the agreement.[195] The second stage of the test constitutes a classic direct effect analysis: individual provisions must represent a 'clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measures'.[196] While the formulation of the test is thus identical to that for internal legislation, the actual results may vary. Identically worded provisions in internal and external legislation may not necessarily be given the same effect.[197]

to ensure the uniform application throughout the Community' (*Hauptzollamt Mainz v Kupferberg & Cie.*, Case 104/81, [1982] E.C.R. 3641, para.14).

[190] For an excellent analysis, see: A. Peters, 'The Position of International Law within the European Community Legal Order', [1997] 40 German Yearbook of International Law 9–77 at 53–4 and 58–66.

[191] Kupferberg, para.17.

[192] Cf. *International Fruit Company and others v Produktschap voor Groenten en Fruit*, Case 21–24/72, [1972] E.C.R. 1219, para.20 as well as *Germany v Council*, Case 280/93, [1993] E.C.R. 3667, para.105.

[193] *Portugal v Council*, Case 149/96, [1999] E.C.R. 8395, para.46.

[194] A. Peters, above n.190 at 55. This difference between the doctrine of direct effect in the internal and the external sphere has been criticized by the author: '[G]iven the communitarization of international agreements, which makes them an integral part of Community law with Community nature, pure theoretical consistency would rather suggest granting direct effect to external Community law on the same footing as to internal Community law' (*ibid.*, 57).

[195] The two prongs of the test can be well seen in *Hauptzollamt Mainz v Kupferberg & Cie.*, Case 104/81 [1982] E.C.R. 3641: in paras.18–22, the Court undertook the global policy test, while in paras.23–27 it looked at the conditions for direct effect of a specific provision.

[196] *Demirel v Stadt Schwäbisch Gmünd*, Case 12/86, [1987] E.C.R. 3719, para.14.

[197] J.H.J. Bourgeois, 'Effects of International Agreements in European Community Law: Are the Dice Cast?', [1983–4] 82 Michigan Law Review 1250–1273 at 1261. See also the discussion on the pre-emptive effect of international treaties in section VI. B below. The reasoning of the Court will apply, *mutatis mutandis*, to the question of direct effect.

(ii) The Dimensions of Direct Effect

What are the dimensions of the doctrine of direct effect? Will a directly effective treaty unfold this effect vertically *and* horizontally? Two constitutional options exist. First, international treaties can have horizontal direct effect. Then international treaties would come close to being 'external regulations'.[198] Alternatively, the Community legal order could treat international agreements as 'external directives' and limit their direct effect to the vertical dimension. Community citizens could then only invoke a directly effective provision of a Community agreement against the Community and the Member States. The Court has not expressly decided the matter. Its analysis in *Polydor* seemed, however, tacitly based on the possible horizontal direct effect of the international agreement at issue.[199] There, the Court held that 'the *enforcement by the proprietor or by persons entitled under him* of copyrights (...) is justified on the ground of the protection of industrial and commercial property within the meaning of Article 23 of the Agreement and therefore does not constitute a restriction on trade between the Community and Portugal such as is prohibited by Article 14(2) of the Agreement. Such enforcement does not constitute a means of arbitrary discrimination or a disguised restriction on trade between the Community and Portugal.'[200] We should assume, contrariwise, that if the exercise of the proprietor's copyright had not been *justified* under Article 23 of the international treaty, the enforcement of his private right would have been prohibited under Article 14(2) of the international agreement. The treaty would then have imposed an obligation on an individual and would thus have had horizontal direct effect.

[198] It is not very helpful to approach the question of the possible horizontal direct effect of international treaties through a comparison with the EC Treaty. Yet, this has been the dominant perspective in European constitutional circles: 'Many provisions of the EC Treaty have been held to be directly effective both vertically and horizontally. The fact of their being addressed to states has been no bar to their horizontal effects. The same argument can be applied to international agreements' (D. McGoldrick, *International Relations Law of the European Union* (Longman, 1997) 133). This argument has rightly been questioned: 'On the other hand, it could be argued that a distinction should be made between the provisions of the Treaties and the provisions of international agreements concluded by the Communities. The underlying justification for the principle that certain provisions of the Treaties have direct effect is based on the nature of the Community legal order: a Community pursuing economic and social objectives and comprising not only the Member States but also their nationals. Those considerations do not apply to agreements with third countries and there is therefore no reason to construe the provisions of such agreements, in the absence of express provision, in such a way as to impose obligations on persons other than the parties to them' (I. MacLeod, I.D. Hendry & S. Hyett, *The external relations of the European communities: a manual of law and practice* (OUP, 1996) 137). The authors' warning note about the special nature of the EC Treaty as the constitutional charter of the Community must be taken seriously. However, it does not specifically provide an argument against horizontal direct effect of international agreements, but rather an argument against the direct effect of these treaties in general. In view of the 'secondary' legal nature of Community agreements, I therefore prefer to compare them to the legislative instruments under Article 249 EC.

[199] *Polydor and others v Harlequin and others*, Case 270/80, [1982] E.C.R. 329. For a discussion of the facts and the decision of the ECJ, see section VI. B below.

[200] *Ibid.*, para.22.

Doubts remained.[201] The Court did not dispel them in *Sevince*.[202] Dealing with a decision of an Association Council, the Court somewhat ambivalently held that '[a]lthough non-publication of those decisions *may* prevent their being applied to a private individual, a private individual is not thereby deprived of the power to invoke, in the dealings with a public authority, the rights which those decisions confer on him'.[203] Did this mean, contrariwise, that if these decisions—being assimilated to the international treaty that formed its base—had been published they could have had horizontal direct effect? If so, the great majority of international agreements that are directly effective will be so along the vertical and horizontal dimension.[204]

That reading has indeed gained ground. In *Deutscher Handballbund eV v Kolpak*[205] the Court was asked whether rules drawn up by the German Handball Federation 'within the framework of the autonomy which associations are recognised as having' would be discriminatory on grounds of nationality. The private sports association had refused to grant Kolpak—a Slovakian national employed by a German handball club—the same rights as German players. This seemed to violate Article 38 of the Association Agreement between the Community and Slovakia stipulating that 'workers of Slovak Republic nationality legally employed in the territory of a Member State shall be free from any discrimination based on nationality, as regards working conditions, remuneration or dismissal, as compared to its own nationals'. The question, therefore, arose whether this article 'also has effects *vis-à-vis third parties inasmuch as it does not apply solely to measures taken by the authorities but also extends to rules applying to employees that are collective in nature*'.[206]

The Court thought that this could indeed be the case. Referring to its case law on Article 39(2) EC, it recalled that 'working conditions in the different Member States are governed sometimes by provisions laid down by law or regulation and sometimes by agreements and other acts concluded or adopted by private persons'. This reasoning could be fully transposed to the equivalent provision in

[201] These doubts inevitably gave rise to a good degree of academic speculation. In 1985, the following questions were put to H.J. Glaesner—who was then the Director General of the Legal Service of the Council—by the House of Lords Select Committee on the European Communities: 'You are well acquainted with the direct effect doctrine of internal provisions of the Treaty of Rome. As regards external provisions, Community case law only supports direct effects which can be invoked against Member States. Is there any likelihood of it being extended to relations between private individuals . . . ?' 'Would the distinction be likely to be that the Court would be more ready to grant an individual's right arising out of an external treaty . . . but would [it] hesitate to impose obligations on individuals arising out of those external treaties?' The Director-General could only answer: 'That is my feeling; it is not a philosophical consideration but a *feeling* of mine' (Select Committee on the European Communities: Extemal Competence of the European Communities, [1984–5] Sixteenth Report (Her Majesty's Stationary Office, 1985), 154 (emphasis added)).

[202] *Sevince v Staatssecretaris van Justitie*, Case 192/89, [1990] E.C.R. 3461.

[203] *Ibid.*, para.24 (emphasis added).

[204] International agreements concluded by the Community will normally be published in the Directory of Community legislation in force.

[205] *Deutscher Handballbund eV v Maros Kolpak*, Case C-438/00, [2003] E.C.R. 4135.

[206] *Ibid.*, para.19 (emphasis added).

the Association Agreement. Consequently, 'Article 38(1) of the Association Agreement with Slovakia applies to a rule drawn up by a sports federation such as the DHB which determines the conditions under which professional sportsmen engage in gainful employment'.[207] This implicit recognition of the horizontal direct effect of international agreements has been confirmed outside the context of association agreements.[208]

In the absence of any mandatory constitutional reason to the contrary, this choice in favour of horizontal direct effect seems preferable. Like US American constitutionalism, the European legal order should not exclude the horizontal direct effect of international treaties. The problems encountered in the context of Community directives would be reproduced—if not multiplied—if the European Court were to split the direct effect of international treaties into two halves. Self-executing treaties should be able 'to establish rights *and duties* of individuals directly enforceable in domestic courts'.[209]

(iii) The Constitutional Nature of Direct Effect

Is the nature of the doctrine of direct effect in the external sphere the same as in the internal sphere of Community law? The constitutional meaning of the doctrine of direct effect has evolved over time. In the early days of the Community, the European Court of Justice appeared to conceive the doctrine of direct effect in terms of 'conferring rights on citizens of the Community which they can invoke before the courts'.[210] Premised on the assumption that the Community agreement was an 'integral part of Community law', the doctrine of direct effect seemed to concern the issue of whether an individual could invoke the international treaty to challenge the validity of Community or national legislation.

This 'subjective rights' reading of the doctrine has, however, been qualified in the Banana ruling. In *Germany v Council*,[211] the European Court of Justice was asked—for the first time—to review the legality of internal Community legislation against an international treaty under Article 230 EC. Not a Community citizen, but a Member State had questioned the validity of the EC's banana regulation. Germany argued that compliance with GATT rules was an objective condition for the lawfulness of Community acts and, therefore, had nothing to do with the question of direct effect.[212] The Court did *not* adopt this line of reasoning. 'Those

[207] *Ibid*., paras.32 and 37.

[208] See: *Igor Simutenkov v Ministerio de Educacion y Cultura and Real Federacion Espanola de Futbol*, Case C-265/03, [2005] E.C.R. 2579, where the Court confirmed *Deutscher Handballbund* in the context of the Partnership and Cooperation Agreement between the EC and the Russian Federation.

[209] S.A. Riesenfeld, 'International Agreements', [1989] 14 Yale Journal of International Law 455–467 at 463 (emphasis added).

[210] *International Fruit Company and others v Produktschap voor Groenten en Fruit*, Case 21–24/72, [1972] E.C.R. 1219, para.8.

[211] *Germany v Council*, Case 280/93, [1994] E.C.R. 4973.

[212] *Ibid*., para.103. The argument was repeated in *Portugal v Council*, Case 149/96, [1999] E.C.R. 8395, para.32.

features of GATT, from which the Court concluded that an individual within the Community can invoke it in a court to challenge the lawfulness of a Community act', the Court of Justice argued, 'also preclude the Court from taking provisions of GATT into consideration to assess the lawfulness of a regulation in an action brought by a Member State under the first paragraph of [Article 230] of the Treaty'.[213]

Did the *Bananas* ruling significantly change the nature and function of the doctrine of direct effect for international treaties? Did Europe 'slip on bananas'?[214] Under a minimalist reading, the Court simply extended the conditions for review from *private* applicants to one class of privileged applicants: the Member States. Solid constitutional reasons will justify such an extension.[215] The maximalist reading would go further and claim that nobody, not even the Community institutions, could invoke an international treaty that lacks direct effect to challenge the legality of Community or national legislation.[216] Regardless which reading will ultimately prevail, the ruling progressed to a more 'objective' meaning of the doctrine of direct effect of international agreements.[217] The Court came closer to characterizing direct effect as a function of the nature of the legal norm at issue.

[213] *Germany v Council*, Case 280/93, [1994] E.C.R. 4973, para.109 (emphasis added).

[214] U. Everling, 'Will Europe slip on Bananas? The Bananas Judgment of the Court of Justice and National Courts', [1996] 33 C.M.L. Rev. 401–437.

[215] These reasons are extensively discussed by A. Peters, above n.190 at 67–68.

[216] Has the maximalist reading been ruled out by subsequent jurisprudence? In *Commission v Germany (IDA)*, Case 61/94, [1996] E.C.R. 3989, the Court allowed the Commission to bring an infringement action under Article 226 EC on the basis that Germany had failed to fulfil its obligations under the International Diary Agreement (IDA), which—forming part of the WTO family—would presumably lack direct effect. The Court, however, suprisingly found that Germany had failed its obligations under the IDA. If that decision has been a conscious one, the Court will allow non-directly effective international agreements to serve as a standard of review for national measures, while it will not allow such a review for Community measures. The application of such a double standard would have the flavour of legal hypocrisy. For the opposite view, see: C. Timmermans, 'The EU and Public International Law', [1999] 4 European Foreign Affairs Review 181–94 at 192.

A second ruling could also be taken to signal a mellowing of the *Banana* ruling. In *Kingdom of the Netherlands v European Parliament and Council*, Case 377/98, [2001] E.C.R. 6229, the European Court stated in relation to the Convention on Biological Diversity (CBD): 'Even if, as the Council maintains, the CBD contains *provisions which do not have direct effect*, in the sense that they do not create rights which individuals can rely on directly before the courts, that fact does not preclude review by the courts of compliance with the obligations incumbent on the Community as a party to that agreement' (*ibid.*, para.54). However, this passage should be interpreted restrictively. The existence of a number of specific provisions without direct effect will not imply that the *agreement as a whole* lacks direct effect. The general direct effect of the CBD was not in principle excluded. It passed the general 'policy test' because the agreement 'unlike the WTO agreement, is not strictly based on reciprocal and mutually advantageous arrangements' (*ibid.*, para.53). Once the agreement passes the general policy test, the agreement as a whole can, arguably, be used as a standard of review.

[217] Instead of identifying direct effect with the existence of 'subjective rights' of individuals, the Court will rather ask whether the rule was 'among the rules applicable by their judicial organs' (*Portugal v Council*, para.43). 'This is a classic direct-effect analysis, which is geared towards establishing whether a provision is sufficiently operational for judicial application' (P. Eeckhout, *External Relations of the European Union: legal and constitutional Foundations* (OUP, 2004) 314).

The more objective notion of direct effect thus parallels the evolution of the doctrine of direct effect in the context of internal Community legislation.

The maximalist view, however, raises an important theoretical question. If an international treaty—like the GATT Agreement—cannot legally be enforced within the Community legal order, can we seriously argue that the agreement is an integral part of the Community *legal* order? Echoes of legal realism emerge: can a rule that is not enforceable in a legal order be considered a *legal* rule? Is there, in other words, not a link between legal validity and direct effect? The argument has indeed been made in the form of an elegant metaphor. The doctrine of direct effect would constitute the 'bridge between monism and dualism':

> The notion of direct effect is eminently suitable to serve as a seeming bridge between monism and dualism. This may sound counter-intuitive, for usually direct effect is associated with monism, so much so that in strict dualism, there is no place for a direct effect doctrine. Closer scrutiny reveals, however, that direct effect functions like a double-edged sword or, perhaps more accurately, as both a sword and a shield. On the one hand, the notion of direct effect does indeed allow international norms to be applied in domestic settings; here then, it works as a sword, opening up the domestic legal order. Yet, because direct effect is only granted to some norms and not to others, it also protects the national legal order from international law. The idea of direct effect thus functions as a gatekeeper: some norms may enter, others may not. (...) Put briefly, if a treaty provision is directly effective, then it can enter the Community legal order; if it is not directly effective, then the Community legal order remains closed.[218]

The idea that the doctrine of direct effect 'introduces' international agreements into the Community legal order, however, goes too far. It would overstretch the doctrine of direct effect and blur the conceptual border with the adjacent concept of direct application. This is debatable, for one might still object that '[i]f it is not operative, it is not a rule of law'.[219] However, the question is: when is a legal rule operative in a legal order?

Norms may have direct or indirect legal effects. An international treaty lacking direct effect may still enjoy an indirect effect in the Community legal order.[220] From this perspective, a Community agreement lacking direct effect can still be seen as an integral part of Community *law*. It has normative validity within the Community legal order and is directly applicable. The lack of direct effect simply means exactly that: an agreement that has no *direct* effect. It cannot be *directly*

[218] J. Klabbers, 'International Law in Community Law: The Law and Politics of Direct Effect', [2002] 21 Y.E.L. 263–98 at 295 and 297.

[219] P. Pescatore, 'The Doctrine of "Direct Effect": An Infant Disease of Community Law', [1983] E.L. Rev. 155–77 at 155.

[220] These indirect effects pose serious difficulties regarding the identification of direct effect with 'incorporation'. Klabbers is, therefore, forced to admit that despite the lack of direct effect of the international norms in *Fediol III* and *Nakajima*, 'international law is somehow already incorporated in Community law' (J. Klabbers, above n.218 at 298).

relied upon as a source of rights or a standard of review in the Community legal order. A treaty without direct effect requires a medium—an internal Community measure—to unfold its full effect in the Community legal order.

What are the indirect effects which a Community agreement can unfold? Is there a doctrine of indirect effects similar to the one the Court of Justice developed for internal Community law? Two constitutional principles spring to mind in this context.[221] First, there is the principle of 'consistent interpretation'.[222] In *Commission v Germany (IDA)*,[223] the ECJ defined the principle in the following terms: '*When the wording of secondary Community legislation [sic!] is open to more than one interpretation* (...) the primacy of international agreements concluded by the Community over provisions of secondary legislation means that such provisions must, *so far as possible, be interpreted in a manner that is consistent with those agreements*.'[224] The duty of the ECJ and national courts to interpret Community legislation 'as far as possible' in line with the Community's international treaties constitutes an extension of the doctrine of indirect effects into the external hemisphere of Community law.[225]

Secondly, there is the 'principle of implementation'.[226] In two exceptional circumstances an international agreement that lacks direct effect—typically: an agreement related to the WTO—will provide an *indirect* standard of review for the legality of a Community measure. This indirect review occurs 'where the Community *intended to implement a particular obligation* assumed in the context of the WTO, or where the *Community measure refers expressly to the precise provisions* of the WTO agreements'.[227] The legality of the internal Community measure is reviewed 'in the light of'[228] the international treaty.

According to the first prong of the implementation principle, established in *Nakajima*,[229] a WTO agreement will prevail over inconsistent Community legislation, where the latter intends to implement the former. In that case, the Anti-Dumping Code of the GATT was at stake. The Court pointed out that the applicant was 'not relying on the direct effect of those provisions' but on Article 230 EC, i.e. on an '*infringement of the Treaty or any rule of law relating to its*

[221] It would constitute a digression to discuss the—truly 'cubist'—constitutional principles governing the interpretation of mixed agreements. For an analysis of this complex area, see: J. Heliskoski, 'The Jurisdiction of the European Court of Justice to give Preliminary Rulings on the Interpretation of Mixed Agreements', [2000] 69 Nordic Journal of International Law, 395–412, and P. Koutrakos, 'The Interpretation of Mixed Agreements under the Preliminary Reference Procedure', [2002] 7 European Foreign Affairs Review, 25–52.

[222] For a discussion of the principle, see P. Eeckhout, *External relations of the European Union: legal and constitutional foundations* (OUP, 2004) 314–16.

[223] *Commission v Germany (IDA)*, Case 61/94, [1996] E.C.R. 3989.

[224] *Ibid.*, para.52 (emphasis added).

[225] See section VA above.

[226] P. Eeckhout, above n.222 at 316.

[227] *Portugal v Council*, Case 149/96, [1999] E.C.R. 8395, para. 49 (emphasis added).

[228] *Ibid*. In *Germany v Council*, Case 280/93, [1994] E.C.R. 4973, para.111, the Court uses the phrase 'from the point of view of'.

[229] *Nakajima All Precision Co. Ltd v Council*, Case 69/89, [1991] E.C.R. 2069.

application'.[230] The Community measure had been adopted in order to comply with the international obligations of the Community, and therefore it was apparently 'necessary to examine whether the Council went beyond the legal framework thus laid down'.

We encounter a variation on that theme in *Fediol*.[231] Regulation No 2641/84 had been adopted in the aftermath of 'the conclusions of the European Council of June 1982, which considered that it was of the highest importance to defend vigorously the legitimate interests of the Community in the appropriate bodies, in particular GATT'.[232] Its Article 2(1) prohibited all 'illicit commercial practices' as 'any international trade practices attributable to third countries which are incompatible with international law or with the generally accepted rules'. The specific reference to international law, in particular GATT, in the Community measure, so the Court claimed, did entitle it to review the actions of the Commission in the light of the GATT rules. As the Community legislator had instructed the Commission to let its action be guided by the international norms, judicial review of these actions would also involve the interpretation and indirect application of GATT.[233]

What is the constitutional rationale behind these cases? What is clear is that it was not the international agreements *themselves* that provided the direct basis for review. The international treaties were only the *indirect* standard, for the Community measures were only reviewed 'in the light of' these treaties. The international norms had been mediated through a Community measure. Could one not, therefore, argue that *through the act of implementation* the EC institutions have 'used and forfeited the international scope of manoeuvre'?[234] According to this view, it is the self-binding of the Community institutions—manifested in a specific domestic act by the Community—that provides the intellectual basis for the judicial review of Community actions.[235] The indirect effect of international rules will be determined by the *intention* of the Community legislator to implement international norms. Only '*because of that intention*, the international rule can be directly invoked to control the validity of the implementing legislation'. This approach is thus somewhat '*midway* between a monist and a dualist system of integrating international law'.[236] It is, arguably, closer to the monist than the dualist end of the spectrum.[237]

[230] *Ibid*., para.28. [231] *FEDIOL v Commission*, Case 70/87, [1989] E.C.R. 1781.

[232] Preample of the Regulation.

[233] *FEDIOL v Commission*, para.20.

[234] Eeckhout, above n.222 at 319.

[235] The constitutional concept of 'self-binding', albeit in the context of the executive branch, is well known in German public law.

[236] C. Timmermans, 'The EU and Public International Law', [1999] 4 European Foreign Affairs Review, 181–94 at 190 (emphasis added). Eeckhout neatly refers to the 'dualist streak' of the Court's approach: 'Whether one calls that type of effect direct or indirect, it is clear that, in theory at least, it involves more than mere consistent interpretation' (P. Eeckhout, 'The domestic legal status of the WTO Agreement: Interconnecting legal systems', [1997] 37 C.M.L. Rev. 11–58 at 44 and 42).

[237] From the viewpoint of our definitions of, respectively, direct applicability and direct effect, it is, strictly speaking, wrong to consider that the *Nakajima* doctrine 'envisages that international

(iv) Conclusion: International Agreements as a Direct Source of (External) Community Legislation

We can now return to the question we posed at the beginning of this section. Should international treaties concluded by the Community be seen as instruments of direct Community legislation or rather as indirect legislative instruments? In contrast to the Court's preference for the mediated effect of directives, the Court's approach to international treaties favours their direct effects over their indirect effects. Only where an international agreement lacks direct effect will the Court proceed to look for its indirect effects in the Community legal order.[238] Moreover, the Court has made clear that this indirect effect of international agreements represents an exception and, as such, will be interpreted restrictively.[239] Finally, as we saw above, the Court implicitly accepts the horizontal direct effect of Community agreements. Community agreements are, therefore, predominantly a form of direct legislation. They are best conceptualized as 'external regulations'—albeit placed on a higher hierarchical rank than internal regulations.

B. Double Pre-emption: International Agreements in the Community Legal Order

International treaties that are directly effective will be capable of legislative pre-emption in the domestic legal order. The pre-emptive effect of a Community

obligations have been *transposed* into EC law' which (G. A. Zonnekeyn, 'The ECJ's *Petrotup* Judgement, a Revival of the 'Nakajima Doctrine?', [2003] 30 Legal Issues of Economic Integration, 249–266 at 263 (emphasis added). The Community's international obligations need no 'transposition' in the sense of giving them legal validity in the Community legal order.

[238] This result has prompted F. Snyder to argue that there is a different relationship between the doctrines of direct effect and indirect effect in the external sphere. In the internal sphere the indirect effect doctrine would be 'a complement to, not a replacement of, direct effect', whereas in the external sphere it would be 'a replacement of direct effect, not merely a complement to it' (F. Snyder, 'The Gatekeepers: The European Courts and WTO Law', [2003] 40 C.M.L. Rev. 313–67 at 356). This is, with all respect, not quite a watertight statement: the doctrine of consistent interpretation—part and parcel of the doctrine of indirect effect—always operates in parallel to the doctrine of direct effect. It, therefore, complements the doctrine of direct effect in the internal and the external spheres.

[239] *Chiquita Brands and others v Commission*, Case T-19/01, [2005] E.C.R. II-315, para.117 (emphasis added): 'The rule arising from the Nakajima judgment is designed, *exceptionally*, to allow individuals, in an indirect manner, to plead infringement by the Community or its institutions, of GATT rules or WTO agreements. *As an exception to the principle that individuals may not directly rely on WTO provisions before the Community judicature, that rule must be interpreted restrictively*.' The restrictive interpretation of the *Fediol* principle, on the other hand, follows from the fact that the Court has not often applied it. The regulation challenged in *Germany v Council (Banana)* made a reference to the Community's obligations under international law in its preamble ('Whereas, so that the Community can respect Community Preference and its various international obligations, that common organization of the market should permit bananas produced in the Community and those from the ACP States which are traditional suppliers to be disposed of on the Community market providing an adequate income for producers and at fair prices for consumers without undermining imports of bananas from other third countries suppliers')—and yet the Court did not apply the *Fediol* principle to the facts of the case.

agreement may even be felt in two ways. First, directly effective Community agreements will pre-empt inconsistent *national* law.[240] Moreover, self-executing international obligations of the Community will pre-empt internal *Community* legislation that is in conflict with the international treaty. The pre-emptive potential of external over internal Community legislation follows from the 'primacy' of international agreements over the internal legal instruments of the Community.[241] Let us address the two dimensions of this double pre-emption in turn.

The first dimension of the pre-emptive ability of Community agreements relates to conflicting *national* measures. Will the pre-emptive scope of an international norm be the same as that of an identically worded provision of a regulation? We are forced to approach this question in an indirect manner, for the typical constellation reaching the Court involves a comparison between the pre-emptive effect of an agreement and the EC Treaty. In *Polydor*,[242] the Court was asked to rule on the compatibility of the 1956 British copyright act with the agreement between the European Community and Portugal. The bilateral free trade agreement envisaged that quantitative restrictions on imports and all measures having an equivalent effect to quantitative restriction should be abolished, but exempted all those restrictions justified on the grounds of the protection of intellectual property. Two importers of pop music had been charged with infringement of Polydor's copyrights and had invoked the directly effective provisions of the Community agreement as a sword against the British law.

Would the Community agreement pre-empt the national measure? If the Court had projected the 'internal' Community standard established by its jurisprudence in relation to Articles 28 EC *et seq*., the national measure would have been pre-empted. But the Court did not. It chose to interpret the identically worded provision in the Community agreement more restrictively.[243] Identical text will, therefore, not guarantee identical interpretation: 'The fact that the provisions of an agreement and the corresponding Community provisions are identically worded does not mean that they must necessarily be interpreted identically. An international treaty is to be interpreted not only on the basis of its wording, but also in the light of its objectives'.[244] Context will thus prevail over

[240] E.g. *Commission v Germany (IDA)*, Case 61/94, [1998] E.C.R. 3989, where the European Court did find a national measure pre-empted by an international agreement. The agreement at stake was the international diary agreement and the Court found 'that Article 6 of the annexes precluded the Federal Republic of Germany from authorizing imports of dairy products, including those effected under inward processing relief arrangements, at prices lower than the minimum' (para.39).

[241] *Ibid*., para.52.

[242] *Polydor and others v Harlequin and others*, Case 270/80, [1982] E.C.R. 329.

[243] *Ibid*., paras.15, 18–19.

[244] *Opinion 1/91 (EFTA Draft Agreement)*, [1991] E.C.R. 6079, para.14. In relation to the EEA, the Court found that it was 'established on the basis of an international treaty which, essentially, *merely creates rights and obligations as between the Contracting Parties* and provides for no transfer of sovereign rights to the inter-governmental institutions which it sets up' (*ibid*., para.20, emphasis added). The EC Treaty, by way of contrast, constituted 'the constitutional charter of a Community

text. In interpreting the pre-emptive depth of an international treaty, the Court will take the 'function' of the agreement into account. Only where an international norm fulfils the 'same function' as the internal Community norm, will the Court project the 'internal' pre-emptive effect to the international treaty.[245] It is, therefore, not correct to assume that international treaties are fully assimilated to 'internal' Community regulations, because they form an 'integral part' of the Community legal order.[246] While the Court may apply a milder form of pre-emption to international agreements, it has not announced any constitutional limits to the pre-emptive capacity of international agreements. They could, theoretically, field pre-empt the Community as well as the national legislators within their scope of application.

Let us turn to the second dimension of the pre-emptive effect of Community agreements. The capacity of international agreements to pre-empt inconsistent internal Community legislation follows from the primacy of the former over the latter. The contours of this second pre-emption analysis can be evidenced in *Kingdom of The Netherlands v Parliament and Council*.[247] The dispute concerned the annulment of Directive 98/44 EC on the legal protection of biotechnological inventions. The Netherlands had, *inter alia*, argued that the Community legislation violated Article 27(3)(b) of the TRIPS Agreement. The directive prohibits Member States to grant patents for plants and animals other than micro-organisms, while the international treaty provides for such a legal option. The Dutch government claimed that Article 27(3)(b) of the TRIPS agreement 'pre-empted' the higher Community standard.

The Court, while admitting that 'the Directive does deprive the Member States of the choice which the TRIPS Agreement offers to the parties to that agreement as regards the patentability of plants and animals', found that the Directive was 'in itself compatible with the Agreement'. The agreement would 'not prevent certain party States adopting a common position with a view to its application. The joint

based on the rule of law', one of whose particular characteristics would be 'the direct effect of a whole series of provisions which are applicable to their nationals' (*ibid.*, para.21).

[245] An illustration can be found in *Pabst & Richarz KG v Hauptzollamt Oldenburg*, Case 17/81, [1982] E.C.R. 1331, where the ECJ was asked to compare Article 53(1) of the association agreement between the Community and Greece: 'That provision, the wording of which is similar to that of [Article 90] of the Treaty, fulfils, within the framework of the association between the Community and Greece, the same function as that of [Article 90]. (. . .) It accordingly follows from the wording of Article 53(1), cited above, and from the objective and nature of the association agreement of which it forms part that that provision precludes a national system of relief from providing more favourable tax treatment for domestic spirits than for those imported from Greece' (*ibid.*, paras.26–27). This case law has more recently been confirmed in *The Queen v Secretary of State for the Home Department, ex parte Wieslaw Gloszczuk and Elzbieta Gloszczuk*, Case C-63/99, [2001] E.C.R. 6369 and *Land Nordrhein-Westfalen v Beata Pokrzeptowicz-Meyer*, Case C-162/00, [2002] E.C.R. 1049. While the ECJ had still found that the EC Treaty and EEA had different purposes and functions, the Court of First Instance seems now to favour a parallel interpretation of the EEA Agreement with identically worded provisions of the EC Treaty and secondary law in *Opel Austria GmbH v Council*, Case T-115/94, [1997] E.C.R. II-39.

[246] Eeckhout, above n.222 at 256.

[247] *Kingdom of the Netherlands v Parliament and Council*, Case 377/98, [200] E.C.R. 6229.

selection of an option offered by an international instrument to which the Member States are parties is an act that falls within the approximation of laws provided for by [Article 95] of the Treaty'.[248] The TRIPS agreement only represented an international 'minimum harmonization' vis-à-vis the Community legal order and could, as such, not constitute an exhaustive maximum standard. The ECJ, therefore, applied a rule pre-emption criterion to determine whether a legislative conflict between the international treaty and the Community directive existed.[249]

In sum, Community agreements have the capacity of double pre-emption: they can pre-empt inconsistent national and Community legislation. The pre-emptive potential of international agreements appears to be milder: only where the agreement has the same function as an internal Community norm will the Court accept the same pre-emptive effect that would be triggered by identically worded internal Community law.

VII. The Choice of Legal Instrument: From Strict Enumeration to Subsidiarity Control

The constitutional status quo under the 1957 Treaty has been described as follows: 'As a rule', wrote E. Grabitz in 1982, 'the Treaties establishing the European Communities leave the Community institutions with *no choice as regards the legal form which their acts take*; on the contrary, for each enabling rule they prescribe the form in which the required provisions must appear.'[250] In the early Community law literature, the debate on Community instruments was conducted in terms of legal *competence* and, consequently, embedded in discussions of the enumeration principle: 'Le principe de l'attribution des compétences ('*Prinzip der begrenzten Einzelzuständigkeit*') a pour corollaire qu'il n'est pas permis aux institutions communautaires de recourir à un acte 'plus fort' si le traité ne leur donne que le pouvoir d'adopter un acte de portée 'plus faible', par. ex., une directive et non un règlement. Il n'est pas possible de faire la même chose par une voie détournée, c'est-à-dire de recourir à des 'directives' qui ne seraient, en fait, que des règlements déguisés. D'où, l'intérêt de respecter les frontières entre ces actes.'[251] The Community will act *ultra vires*—beyond its legislative *competence*—if it adopts a regulation on a legal basis that only granted power to pass directives.

[248] *Ibid*., para.58.

[249] On the various types of pre-emption in the Community legal order, see: Schütze, above n.89.

[250] E. Grabitz, 'The Sources of Community law: Acts of the Community Institutions', in: EC Commission (ed.), *Thirty Years of Community Law* (EC Commission, 1981), 81–108 at 88 (emphasis added).

[251] J.-V. Louis, *Les Règlement de la Communauté économique européenne* (Presses universitaires des Bruxelles, 1969) 276.

This competence reading of the morphology of legal instruments was, as we saw above, shared by the European Court.[252]

Yet could the Community legislator avail itself of an instrument *less intense* than the one envisaged in a legal competence? Would it be constitutionally problematic, where the Community legislator would prefer the indirect legislative instrument of a directive over the direct legislative instrument of a regulation? The power to adopt a 'strong' legal instrument could theoretically be seen as implying the power to adopt less interfering legal instruments.[253] Such 'downward flexibility' seemed to leave the sovereignty-protecting rationale of the enumeration principle unaffected. Downward flexibility was accepted in the ECSC Treaty in the form of the 'principle of minimum intervention' that would guide the choice of legislative instruments.[254]

However, the principle of minimum intervention has not been extended to the EC Treaty.[255] Three main objections were invoked. First and foremost, downward instrumental flexibility would distort the federal division of legislative powers.[256] This argument is based on a competence reading of the instrument question and removes any discretion of the Community legislator to act through an instrument other than that enumerated in the EC Treaty. Secondly, there is a problem of relativism. Even if we assume that there is a scale of normative intensity across the Community's instruments, the principle of minimum intervetion begs the question: minimum intervention *for whom*? Might not a generally applicable regulation sometimes be less 'intense' than a more situation-specific decision? Finally, implied downward flexibility may create constitutional tensions in relation to the horizontal separation of powers and, more generally, with the rule of law principle. Not all constitutional orders allow its legislative branch to adopt individual decisions. For all these reasons, the implied powers doctrine had not been extended to embrace the internal (!) instruments of the Community.[257]

[252] See section III above.

[253] M. Zuleeg, above n.84 at 14: 'Die Beschlußform der Verordnung gewährt die weitestgehenden Kompetenzen. Daher können die Gemeinschaftsorgane bei Verordnungsbefugnis alle anderen Rechtsakte erlassen.'

[254] Article 14(5) ECSC read: 'In cases where the High Authority is empowered to take a decision, it may confine itself to making a recommendation.' (The terminology for the ECSC differed from the Article 249 EC terminology: the term 'decision' in the ECSC corresponded to 'regulations' and 'decisions' in the EC Treaty. ECSC 'recommendations' were similar to EC directives.)

[255] G. Schmidt. 'Artikel 189 Rn. 20', in: H. von der Groeben, J. Thiesing, C.-D. Ehlermann (eds.), *Kommentar zum EU-/EG-Vertrag* (Nomos, 1999).

[256] D. Triantafyllou, *Vom Vertrags- zum Gesetzesvorbehalt: Beitrag zum positiven Rechtmäßigkeitsprinzip in der EG* (Nomos, 1996), 61.

[257] To select an internal legal instrument other than the one provided in the legal competence, the Community legislator would need to fall back on Article 308 EC. On this issue, see: R. Schütze, 'Organized change towards an "ever closer union": Article 308 EC and the limits to the Community's legislative competence', [2003] 22 Yearbook of European Law 79–115, at 95–99. 'The Two Dimensions of Power: Regulatory Instruments and Article 308 EC'.

While the original Treaty of Rome only exceptionally knew competences that provided the Community with a choice between alternative legal instruments,[258] this phenomenon has today become the constitutional 'rule'. Successive Treaty reforms have gradually 'decoupled'[259] the two dimensions of power: the morphological question of what instrument is appropriate in a given situation has increasingly been separated from the material dimension of competence. The neutrality of many legislative competences towards the choice of legal instrument is today manifested in all those legal bases that entitle the Community simply to adopt the necessary 'measures'.[260] The choice of legal instrument has become a question of legislative discretion for the Community legislator. The discourse on the Community's instruments has, consequently, shifted from the *existence* aspect to the *exercise* aspect of the Community's legislative powers—from the enumeration to the subsidiarity principle.

The subsidiarity principle thereby influences the Community's choice of instrument *qua* the principle of proportionality. According to Article 5(3) EC, the Community must exercise its powers only to the extent necessary to achieve the objective of the Community action. The *federal* aspect of the principle of proportionality was acknowledged in the Edinburgh Guidelines and has, more recently, been consolidated in the Amsterdam Protocol on Subsidiarity and Proportionality. Unlike the Edinburgh Guidelines, the Subsidiarity Protocol seems to focus exclusively on the preemptive differences of the Community's legislative instruments.[261] The relevant articles read:

> The Community shall legislate only to the extent necessary. Other things being equal, directives should be preferred to regulations and framework directives to detailed measures. (...) Regarding the nature and the extent of Community action, Community measures should leave as much scope for national decision as possible, consistent with securing the aim of the measure and observing the requirements of the Treaty. While respecting Community law, care should be taken to respect well established national

[258] E.g. Article 43(2) EEC. [259] Bast, above n.74 at 13.

[260] The most prominent example of a legal competence whose nature has been identified through the legal instrument is Article 94 EC. The method of 'harmonization' or 'approximation' was identified with the instrument of the directive. Yet, ever since the SEA this view is untenable as the concept of harmonization has been severed from the specific instrument of the directive. Article 95 EC generally allows for 'measures for the approximation', including regulations, decisions and international agreements.

[261] The Edinburgh Guidelines read: 'The form of action should be as simple as possible, consistent with the satisfactory achievement of the objective of the measure and the need for effective enforcement. The Community should legislate only to the extent necessary. Other things being equal, directives should be preferred to regulations and framework directives to *detailed measures*. Non-binding measures such as recommendations should be preferred where appropriate. Consideration should also be given where appropriate to the use of voluntary codes of conduct' (EC Bulletin 10–1992 at 15). While the reference to 'detailed measures' captures the pre-emptive dimension of the choice of instrument debate, the second part of the quote suggests a subsidiary review for the choice between legally-binding and non-binding measures. One could, therefore, argue that there is a subsidiarity perspective in choosing the directive as a form of *indirect* legislation to regulations as a form of *direct* legislation.

arrangements and the organisation and working of Member States' legal systems. Where appropriate and subject to the need for proper enforcement, Community measures should provide Member States with alternative ways to achieve the objectives of the measures.[262]

There is still little jurisprudence on the application of the subisidarity principle, especially as regards the constitutional control of the Community's choice of legal instrument. In *Portuguese Republic v Commission*,[263] we find a partial break to this silence. A Portuguese decree had provided that certain airport charges were to be determined by a public undertaking on the basis of maximum take-off weight. The discriminatory pricing policy amounted to a state measure within the meaning of Article 86 EC and the Commission had issued a decision condemning the Portuguese system. Article 86(3) EC entitles the Commission to a choice between directives and decisions. Portugal brought an action for annulment of the State-addressed decision, alleging a violation of the principle of subsidiarity-proportionality: 'The Portuguese Republic contends that the Commission infringed the principle of proportionality laid down in the third paragraph of Article 3b of the EC Treaty (now the third paragraph of Article 5 EC) by choosing from among the courses of action open to it that which was the least appropriate and the most onerous' it added: 'Since the majority of Member States differentiate between domestic and international flights when calculating their airport charges', the directive was claimed to be 'the only instrument that could have brought about the necessary simultaneous harmonization of the relevant national laws.'[264]

The Court was not swayed. The Commission would enjoy a wide discretion in matters covered by Article 86 'as regards both the action which it considers necessary to take and the *means* appropriate for that purpose'.[265] Yet, the following constitutional guidelines were given for the choice between a directive and a decision:

> With regard to the powers which [Article 86(3)] authorises the Commission to exercise by means of decisions, the Court of Justice also held that they differ from those which it may exercise by means of directives. A decision is adopted in respect of *a specific situation in one or more Member States and necessarily involves an appreciation of that situation in the light of Community law*; it specifies the consequences arising for the Member State concerned[.] (...) [T]he choice offered by [Article 86(3)] of the Treaty between a directive and a decision is not determined, as the Portuguese Republic contends, by the number of Member States which may be concerned. The choice depends on whether the Commission's objective is to specify in general terms the obligations arising under the Treaty, or to assess a specific

[262] Articles 6 and 7 Amsterdam Protocol. For a discussion of the Protocol, see G. de Búrca, 'Re-appraising Subsidiarity's Significance after Amsterdam', Harvard Jean Monnet Working Paper, no. 7/1999=<http://www.jeanmonnetprogram.org/papers/99/990701.html>.

[263] *Portugese Republic v Commission*, Case 163/99, [2001] E.C.R. 2613.

[264] *Ibid.*, paras.16–17. [265] *Ibid.*, para.20.

situation in one or more Member States in the light of Community law and determine the consequences arising for the Member State or States concerned.[266]

A directive should, consequently, be employed to set out in *general terms* the obligations arising for Member States under the Treaty, while a decision was to be prefered 'in respect of a specific situation in one or more Member States'. The choice of legal instrument was not determined by the number of Member States implicated, but depended on the Commission's intentions: where it did not wish to adopt generally applicable rules it could select a decision over a directive. These are not very clear constitutional guidelines on the application of the subsidiarity principle for the choice of legal instrument. We shall have to wait until the Court develops clearer criteria in future jurisprudence.

VIII. Conclusion: Rationality Lost—Rationality Regained? Re-Federalizing the Morphology of Legislative Power

'But what, after all, is a law?' '[W]hen we have defined a law of nature, we shall be no nearer the definition of a law of the State'.[267] And, even when we have defined a law of the State, we shall not necessarily be nearer the definition of a law of the European Community. In the hope of going beyond the 'Law is The Law' tautology,[268] this chapter has tried to clarify the nature of Community legislation and to analyse its various formats from the perspective of the federal division of powers.

Drawing on a functional conception of legislation, we defined legislative power as the power to adopt directly and generally effective norms. This definition covered internal and external law-making. Yet when, after all, are legislative norms *Community* norms? The question of legal authorship turned out to be complex. The Community legal order has not 'shown' one single rule of recognition, but has rather developed a number of rules of recognition. The existing constitutional principles will not unequivocally determine the normative paternity of a legislative norm. The Court appears to favour a 'contextual' approach: the involvement of the Community institutions in the rule-making process is *not* in itself a sufficient reason to assume the Community authorship of a legislative norm.

The remainder of this chapter moved to examine the morphology of the Community's legal instruments from the perspective of the federal division of

[266] *Ibid*., paras.27–28 (emphasis added). [267] J. J. Rousseau, above n.2.

[268] Nothing against tautologies, especially witty ones: 'Law, says the judge as he looks down his nose/ Speaking clearly and most severely/ Law is as I've told you before/ Law is as you know I suppose/ Law is but let me explain it once more/ Law is The Law'. The full version of the poem can be found in W.H. Auden, *Selected Poems* (E. Mendelson (ed.)) (Vintage Books, 1979), Poem 48.

power. The normative format of each instrument was analysed alongside two dimensions. The first dimension was the instrument's legislative character, that is, the extent to which a legal act unfolds directly and generally binding effects. The second dimension concerned each instrument's pre-emptive nature, that is, to what extent national legislators remain entitled to co-legislate within the scope of the Community measure.

In 1958, the regulation constituted the only legislative instrument of the Community. Directives and decisions were, originally, supranational 'executive' acts: they were binding on their addressees and could not be said to have general effects. The doctrine of direct effect of directives and State-addressed decisions injected a legislative dimension to these measures. This legislative dimension was, however, only vertical: their direct effect was limited to granting rights to individuals. Moreover, both instruments will predominantly operate *qua* national legislation—thence their character as *indirect* legislation: their legislative effect will typically 'extend to individuals *through the medium of the implementing measures*'.[269] External Community legislation had been made possible thanks to the monistic stance of the Community legal order towards international agreements concluded by the Community. In the absence of constitutional reasons to the contrary, we assumed that Community agreements can have vertical and horizontal direct effects and, therefore, classified them as direct legislation. More precisely, we argued that Community agreements could be seen as 'external regulations'.

To what extent differ the pre-emptive identities of these legislative instruments? Regulations have traditionally been seen as instruments of strict uniformity. Yet, we saw that regulations will not automatically field-pre-empt the national legislators within their scope of application. Directives, by way of contrast, have been thought of as instruments of harmonization leaving some legislative discretion to Member States. The freedom, referred to in Article 249(3) EC, however, only entitles Member States to implement the Community *content* into national *form*. Today, Community directives cannot be pressed into the constitutional mould of framework legislation. There simply is no constitutional limit on the pre-emptive effect of directives that would (p)reserve legislative power to national legislators. Nor are there any *a priori* constitutional limits on the pre-emptive capacity of State-addressed decisions or international agreements. Thus, with regard to the pre-emptive capacity of these four legislative instruments of the Community, any differentiating constitutional typology—if it were ever designed—has been glossed over by constitutional practice. In this respect, the federal reason behind the morphology of legislative power in the EC has been 'lost'.

However, when we are told that the Community must choose the least restrictive instrument so as to 'leave as much scope for national decision as possible',[270] '[c]ette controverse suppose au départ une opposition entre moyen d'intervention

[269] *U. Becker v Finanzamt Münster-Innenstadt*, Case 8/81, [1982] E.C.R. 53, para.19 (emphasis added).

[270] Article 7 Amsterdam Protocol.

'forts', dont le type serait le règlement, et moyen d'intervention 'faibles' que seraient notamment, les directives'.[271] A subsidiarity perspective for the choice of instrument makes little sense as long as the respective pre-emptive identities of the Community's legal instruments have not been sharpened.

The desire to (re-)federalize the system of Community instruments has been apparent since the 1990s: '[P]artly as a reaction to the detailed character of many directives, a new term became fashionable: the framework directive.'[272] The introduction of the constitutional concept of 'framework law' would reinforce the constitutionalization of the philosophy of cooperative federalism that began with the introduction of complementary competences in the Community legal order.[273] If modeled on the constitutional format of a German 'framework law', the latter's pre-emptive effect should be constitutionally limited and guarantee a substantive degree of legislative choice to the national level. The framework law is the legislative instrument *par exellence* for the constitutional philosophy of cooperative federalism and the principle of subsidiarity. More than a decade ago, the EC Commission argued its case in the following words:

> If legislative action is necessary, the subsidiarity principle dictates that Community legislation and national measures each be given its own respective role: Community legislation forms the framework into which national action must be fitted. For this purpose, the Treaty of Rome devised an original instrument, which typifies subsidiarity: the directive sets the result to be achieved but leaves it to the Member States to choose the most appropriate means of doing so. (...) In practice, of course, the distinction between directive and regulation has become blurred[.] (...) If the subsidiarity exercise is to produce any overall tangible results, then it must unquestionably be by systematically reverting to the original concept of the directive as a framework of general rules, or even simply of objectives, for the attainment of which the Member States have sole responsibility.[274]

Thus, instead of adding the new instrument of 'framework law' to Article 249 EC's catalogue of legal instruments, a judicial operation could equally achieve

[271] D. de Ripainsel-Landy & A. Gerard, 'La Notion juridique de la Directive utilisée comme instrument de rapprochement des législations dans la CEE', in : D. de Ripainsel-Landy *et al.* (eds.), *Les instruments du rapprochement des législations dans la commnauté économique européenne* (Bruylant, 1976) 37–94 at 41.

[272] S. Prechal, *Directives in EC Law* (OUP, 2005) 15, explains further: 'This is an unknown instrument in the typology of the EC Treaty and it is, in fact, not clear what it exactly refers to.' In its jurisprudence, the ECJ uses the concept in a different context. It uses the term 'framework directive' to refer to a directive that lays down general principles, which will subsequently be developed by a series of specific *Community* directives (cf. Pfeiffer above n.155 at para.4). This appears also to be the understanding brought to the concept by the Community legislator, see: for example, Directive 2002/21 on a common regulatory framework for electronic communications networks and services (Framework Directive), [2002] OJ L 108, 33–50.

[273] R. Schütze, 'Cooperative Federalism Constitutionalised: The Emergence of Complementary Competences in the EC legal order', [2006] 31 E.L. Rev. 167–84.

[274] *Commission Communication on the Principle of Subsidiarity*, Bulletin EC 10–1992, 116–26 at 123.

the desired constitutional surgery. That would require the Court of Justice to constitutionally trim the pre-emptive dimension of directives. This 'return' to the 'original concept of the directive as a framework of general rules' would preserve a degree of material legislative autonomy for the Member States. The distinct constitutional identity of the directive *vis-à-vis* the regulation could then be anchored in the former's constitutionally limited pre-emptive effect. The morphological specificity of the directive would, therefore, not be lost—even if the Court were (eventually) to accept the horizontal direct effect of directives. (The advantages of having an instrument of *indirect* legislation within the system of legal instruments could be preserved in the instrument of the State-addressed decision.) It is to be hoped that the European Court of Justice—or: *future* Constitution-makers—[275] will capitalize on the constitutional advantages of framework legislation for a clearer division of power between the Community and the Member States. The morphology of legislative power in the European Community would benefit from a regained federal rationale.

[275] The Constitutional Treaty (2004) would not have satisfied this constitutional wish. Article I-33(1) of the Constitutional Treaty introduced the concept of 'framework law' in the following terms: 'A European framework law shall be a legislative act binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.' From a functional perspective, 'framework laws' would have been identical to directives. (According to Article I-33 CT, the instrumental format of the directive would not be reserved to 'framework laws' but also be available for 'European regulations'.) Focusing on a better *horizontal* separation of powers, the Constitution-makers regrettably overlooked the instrumental reforms for the *vertical* separation of powers. The Constitutional Treaty would thus have hardly modified the morphology of legislative power. The only exception seems to be the recognition of decisions without addressees in Article I-33 CT.