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## Formulation of Objectives and Decision-Making Procedure in the European Union

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# Formulation of Objectives and Decision-Making Procedure in the European Union

Hans-Joachim Glaesner

## **Abstract**

This article discusses potential problems with the governmental structure of the European Union. The Treaty on European Union (or “Maastricht Treaty”) establishes procedures for the formulation of objectives and decision-making. Article C does speak of a single institutional framework of the Union, and Titles V and VI envisage specific tasks for the Council and the Commission. The European Parliament has no legal authority to take part in the procedure for formulating objectives and decision-making. Pursuant to Articles J.7 and K.6, the European Parliament has only a limited right to be informed by the Presidency of the Council and to present its position to the Council. The Parliament, however, may query the Council and take a position in its annual report. Further, judicial review by the Court of Justice is not possible. In those instances where the Council and the Commission share responsibility under a cooperative framework, they fail to exercise such powers in accordance with procedural provisions of the EC Treaty.

# FORMULATION OF OBJECTIVES AND DECISION-MAKING PROCEDURE IN THE EUROPEAN UNION

*Dr. Hans-Joachim Glaesner\**

## CONTENTS

Introduction.....	765
I. Changes of the EC Treaty .....	767
A. The European Commission .....	767
B. The Council .....	769
C. The European Parliament .....	772
D. The Co-Decision Procedure .....	775
II. The Cooperation Scheme .....	778
III. Bridges Between the EC and Cooperation .....	781
IV. General Obligations of Membership .....	786
Conclusion .....	787

## INTRODUCTION

Apart from its substantive rules, the Treaty on European Union<sup>1</sup> (or "Maastricht Treaty") establishes procedures for the formulation of objectives and decision-making. These provisions retain, on the one hand, changes in the procedural provisions of the EEC, now EC, Treaty<sup>2</sup> and create new decision-making mechanisms for Titles V and VI on cooperation.<sup>3</sup> Under Article L of the TEU,<sup>4</sup> the rules of Community law do not apply to these mechanisms. Nevertheless, Article C does speak of a single institutional framework of the Union,<sup>5</sup> and Titles V and VI envisage

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1. Treaty on European Union, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719, 31 I.L.M. 247 [hereinafter TEU] (amending Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II) [hereinafter EEC Treaty], as amended by Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA], in TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES (EC OFF'1 Pub. Off. 1987)).

2. Treaty Establishing the European Community, Feb. 7, 1992, [1992] 1 C.M.L.R. 573 [hereinafter EC Treaty], incorporating changes made by TEU, *supra* note 1.

3. TEU, *supra* note 1, tits. V, VI.

4. *Id.* art. L.

5. *Id.* art. C, ¶ 1. "The Union shall be served by a single institutional framework which shall ensure the consistency and the continuity of the activities carried out in

specific tasks for the Council and the Commission.<sup>6</sup> On the other hand, the European Parliament has no legal authority to take part in the procedure for formulating objectives and decision-making. Pursuant to Articles J.7 and K.6, the European Parliament has only a limited right to be informed by the Presidency of the Council and to present its position to the Council. The Parliament, however, may query the Council and take a position in its annual report. Further, judicial review by the Court of Justice is not possible. In those instances where the Council and the Commission share responsibility under a cooperative framework, they fail to exercise such powers in accordance with procedural provisions of the EC Treaty. The applicable provisions under Articles J.11 and K.8 concern the composition of the institutions.

Article C provides a link between the two legally independent policy-making bodies. Article C requires that the Council and the Commission shall take responsibility for ensuring the consistency of all foreign policy measures taken by the Union in the context of its external relations, security, economic, and development policy.<sup>7</sup> This rule goes beyond Article 30(5) of the Single European Act, which transferred responsibility for consistency to the Council Presidency and the Commission.<sup>8</sup> It remains to be seen whether the Council and the Commission can fulfill their task where the Parliament is required to play an increasing role in Community decisions. The requirement that the Council define the framework for the Union's general political development does not alleviate this friction, because Council decisions are not binding upon the European Parliament.<sup>9</sup>

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order to attain its objectives while respecting and building upon the *acquis communautaire*." *Id.*

6. *Id.* tits. V, VI.

7. *Id.* art. C, ¶ 2. "The Union shall in particular ensure the consistency of its external activities as a whole in the context of its external relations, security, economic and development policies. The Council and the Commission shall be responsible for ensuring such consistency. They shall ensure the implementation of these policies, each in accordance with its respective powers." *Id.*

8. SEA, *supra* note 1, art. 30(5), ¶ 2. "The Presidency and the Commission, each within its own sphere of competence, shall have special responsibility for ensuring that such consistency is sought and maintained." *Id.*

9. Jean-Paul Jacqué & Simon Denys, *Le Rôle du Conseil Européen* 28 (Institut Européen d'Administration Public Working Paper 1984); SMIT & HERZOG, *THE LAW OF THE EEC*, prelim. obs., arts. 145-54.

## I. CHANGES OF THE EC TREATY

A. *The European Commission*

The Maastricht Treaty proposes changes in the procedural provisions of the EC Treaty in pursuit of a development that has constantly experienced new impetus since the creation of the Community. The Commission's function in the lawmaking procedure has not been basically altered by these procedural changes. The Commission still retains a monopoly over proposal-making wherever a Commission proposal is envisaged in the legal basis chosen. Thus, a proposal by the Commission is a prerequisite to setting in motion the legislative process. In addition, the central provision of Article 149(1) and (3) of the EEC Treaty has been incorporated into Article 189a(1) and (2) of the EC Treaty.

Accordingly, the Council can depart from Commission proposals but only by unanimous consent. The Commission can also amend a proposal at any time prior to Council action.<sup>10</sup> An implicit conclusion derived from the Commission right to amend proposals is that the Commission has the right to withdraw its proposal so long as the Council has not yet taken any action. Once a proposal is withdrawn, the procedural prerequisite falls away and the Commission has blocked the law-making procedure.<sup>11</sup>

It is true that the Council, on the basis of Article 152 of the EC Treaty,<sup>12</sup> and the Parliament, on the basis of the new Article 138b,<sup>13</sup> are empowered to request that the Commission submit a proposal. Such a request, however, creates no legal obligation that the Commission submit a legislative proposal. In so far as such a duty exists on other legal grounds, the only action that remains is the failure to act pursuant to Article 175 of the EC Treaty. Apart from this, the Parliament may table a motion of censure on the activities of the Commission in accordance with

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10. EC Treaty, *supra* note 2, art. 189a(1)-(2).

11. GERT NICOLAYSEN, *EUROPARECHT* I 149 (Baden-Baden 1991).

12. EC Treaty, *supra* note 2, art. 152. "The Council may request the Commission to undertake any studies the Council considers desirable for the attainment of the common objectives, and to submit to it any appropriate proposals." *Id.*

13. *Id.* art. 138b. "The European Parliament may, acting by a majority of its members, request the Commission to submit any appropriate proposal on matters on which it considers that a Community act is required for the purpose of implementing this Treaty." *Id.*

Article 144.<sup>14</sup> Experience has revealed that the Parliament has recourse to this possibility only in a few cases and has in no case attained the necessary majority of two thirds of the votes cast and the majority of the members of the Parliament for such a motion.

The Commission's right to amend or withdraw a proposal at any time is excluded pursuant to Article 189a(1) if the Council and the Parliament draw up a joint text under the co-decision procedure of Article 189b(4) and (5). In this instance, the role of the Commission is limited to taking part in the Conciliation Committee's proceeding and to taking all the necessary initiatives with a view to reconciling the positions of the European Parliament and the Council. The limitations on the Commission's role in the joint law-making procedure is justified by the requirement that the Council and Parliament must each agree to the revised proposal negotiated within the Conciliation Committee. Article 189a(1) excludes the right to amend, and along with this the Commission's right of withdrawal, only for paragraphs 4 and 5 of Article 189a, i.e., for the actual procedures in the Conciliation Committee. Should the proceedings of the Conciliation Committee fail to result in a joint text, paragraph 6 empowers the Council to accept the agreed upon version of the text, although the Parliament may nevertheless reject the Council's acceptance.<sup>15</sup> Because paragraph 6 is not mentioned in Article 189a(1), the Commission at this stage in the proceedings retains its normal function of having an effect on the lawmaking procedure of the Council and the Parliament by amending or withdrawing its proposal.

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14. *Id.* art. 144, ¶ 1. "If a motion of censure on the activities of the Commission is tabled before it, the European Parliament shall not vote thereon until at least three days after the motion has been tabled and only by open vote." *Id.*

15. *Id.* art. 189b(6).

Where the Conciliation Committee does not approve a joint text, the proposed act shall be deemed not to have been adopted unless the Council, acting by a qualified majority within six weeks of expiry of the period granted to the Conciliation Committee, confirms the common position to which it agreed before the conciliation procedure was initiated, possibly with amendments proposed by the European Parliament. In this case, the act in question shall be finally adopted unless the European Parliament, within six weeks of the date of confirmation by the Council, rejects the text by an absolute majority of its component members, in which case the proposed act shall be deemed not to have been adopted.

*Id.*

B. *The Council*

The changes affecting the Council made by the Maastricht Treaty to the provisions of the EEC Treaty concern essentially the composition of the Council. According to Article 146 as it has stood up to now, the Council consisted of one member of the government of each Member State.<sup>16</sup> Under the revised Article 146, a Member State may henceforth also be represented in the Council by a minister who is not a member of the government of this Member State.<sup>17</sup> Such a minister must, however, be empowered to represent the government of the Member State on a binding basis. This ruling takes account of the circumstance that, in an ever increasing scale, rules are being adopted at the Community level that, depending on the constitution of a Member State, fall within the competence of regional bodies or affect their interests.

The Maastricht Treaty takes account of this state of affairs by incorporating Articles 198a to 198c into the EC Treaty. These provisions created the Committee of the Regions, which the Council and the Commission are to consult as provided by the Treaty. Its function may be compared, in terms of the law-making procedure of the Community, with the Economic and Social Committee. The increased influence of the regions in the formulation of the policy objectives of the Union is of special importance for the German "Länder" in the Federal Republic, where the same problematical issue led to a new version of Article 23 of the Basic Law.<sup>18</sup>

Similarly, the revised Belgian Constitution,<sup>19</sup> under which regions and communities were created as legal persons integrated into the new federal state, provides in Article 35 that the competence of central government exists only to the extent that no responsibility of the communities or the regions is provided for by the constitution or a special law.<sup>20</sup> Thus, the question of

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16. EEC Treaty, *supra* note 1, art. 146, ¶ 1. "The Council shall consist of representatives of the Member States. Each Government shall delegate to it one of its members." *Id.*

17. EC Treaty, *supra* note 2, art. 146, ¶ 1. "The Council shall consist of a representative of each member-State at ministerial level, authorised to commit the government of that member-State." *Id.*

18. BGBl art. 23, at 2086 (1992) (Ger.).

19. Moniteur Belge, Feb. 12, 1994.

20. *Id.*

whether a representative of a regional corporation is to be deemed a minister within the meaning of Article 146 of the EC Treaty will have to be judged according to national constitutional law. Council decisions are still taken at the ministerial level. The Permanent Representatives' Committee, provided for in Article 151 of the EC Treaty,<sup>21</sup> hitherto has the task of preparing the work of the Council. Article 8 of the Council's Rules of Procedure of 6 December 1993<sup>22</sup> departs from this rule. Article 8 provides that the Committee may unanimously decide to adopt a legal act by the written procedure.

The decision concerning acceptance of the legal act, however, remains reserved to the ministerial level. A further task is potentially allocated to the Permanent Representatives in Article 189b(4), concerning the Conciliation Committee as part of the co-decision procedure.<sup>23</sup> Pursuant to this provision, the Conciliation Committee is composed of the members of the Council or their representatives and an equal number of representatives of the European Parliament. From a legal point of view, this provision does not appear to run counter to the fact that the Council decides at the ministerial level. For it is not the task of the Conciliation Committee to adopt legal acts but to aim at reaching agreement on a joint text. Politically it remains to be seen whether it is worthwhile to conduct the negotiations in the Conciliation Committee instead of between the Members of the Council, i.e., ministers, and the members of the European Parliament.

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21. EC Treaty, *supra* note 2, art. 151(1). "A committee consisting of the Permanent Representatives of the member-States shall be responsible for preparing the work of the Council and for carrying out the tasks assigned to it by the council." *Id.*

22. Council Decision of 6 December 1993, art. 8, O.J. L. 304/1, at 3 (1993) [hereinafter Rules of Procedure].

23. EC Treaty, *supra* note 2, art. 189b(4).

The Conciliation Committee, which shall be composed of the members of the Council or their representatives and an equal number of representatives of the European Parliament, shall have the task of reaching agreement on a joint text, by a qualified majority of the members of the Council or their representatives and by a majority of the representatives of the European Parliament. The Commission shall take part in the Conciliation Committee's proceedings and shall take all the necessary initiatives with a view to reconciling the positions of the European Parliament and the Council.

*Id.* Article 189b(5) provides that a common text elaborated in the Conciliation Committee requires the approval of both the Council and the European Parliament. *Id.* art. 189b(5).



The political discussions concerning the Treaty of Maastricht led to a further change in the practice of the Council. This was, however, not taken up in the Treaty on European Union but led to a change in the Council's rules of procedure. The conclusions of the European Council of 11 and 12 December 1992 in Edinburgh called for the Council activities to be more open to the public.<sup>24</sup> According to Article 3 of the earlier rules of procedure of the Council, meetings of the Council are not open to the public, unless the Council unanimously decides otherwise. This has never happened in practice. In the version of the Rules of Procedure dated 6 December 1993, Article 4 continues the principle of Council meetings not being open to the public.<sup>25</sup> Article 6 provides that Council policy debates on the six-monthly work programme and also, if need be, on the Commission's annual work programme, shall be publicly retransmitted by audiovisual means.<sup>26</sup> Other debates can be conducted in public in the same way, if the Council decides unanimously. Although it may be desirable that the Council, as the central legislator of the Community, discourages the impression of diplomatic secrecy, the process of taking concrete decisions will likely be only slightly affected by the new Article 6 of the Rules of Procedure.

Article 7(5) of the new rules of procedure should open up the work of the Council to greater public scrutiny.<sup>27</sup> This provision establishes that the results of Council votes shall become public when the votes on law-making instruments have been cast. The same goes for votes in the context of the Conciliation Committee under Article 189b and for unanimous decisions in the framework of Titles V and VI of the Maastricht Treaty. In all other cases, the Council may decide upon publicizing the results of votes. Because there is no unanimity provision for such a decision, Article 148(1) of the EC Treaty applies, and the Council acts by a simple majority of its members.<sup>28</sup>

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24. See E.C. BULL., no.12, at 9 (stating that European Council reached agreement on guidelines to implement measures "to increase transparency and openness in the decision-making process of the Community").

25. Rules of Procedure, *supra* note 22, art. 4(1), O.J. L 304/1, at 2 (1993).

26. *Id.* art. 6(1), O.J. L 304/1, at 2 (1993).

27. *Id.* art. 7(5), O.J. L 304/1, at 3 (1993).

28. EC Treaty, *supra* note 2, art. 148(1). "Save as otherwise provided in this Treaty, the Council shall act by a majority of its members." *Id.*

*C. The European Parliament*

A significant step forward in the decision-making procedure of the Community is found in the changes to the EEC Treaty concerning the Parliament. The Parliament had been limited to delivering an opinion on proposals from the Commission. The submission of an opinion continues to be a procedural requisite for decision-making by the Council, but such opinions do not bind the Council as to its content.<sup>29</sup> Similarly, this system was also applied in the adoption of the EC budget, until an amendment to Article 203 of the EEC Treaty by the 1970 and 1975 Treaties granted Parliament a genuine power of co-decision alongside the Council. A corresponding contribution, however, by the Parliament to legislation remained impossible. The Parliament, the Council, and the Commission could only reach an understanding on a joint declaration of 4 March 1975,<sup>30</sup> by which a conciliation procedure was established. The object of this procedure was to bring any positions on which the Council and the Parliament deviated together into a joint position or at least to bring about an approximation of the two divergent positions.

The Council's exclusive power of decision-making remained unaffected. The conciliation process proved insufficient and failed to fulfill the expectations incorporated into it. Conciliation occurs in a committee in which the Council, at the ministerial level, members of the Commission, and a Parliament delegation meet. The position of the Council and Parliament are often the result of compromises arrived at with great difficulty. There is little opportunity for manoeuvre in negotiations on either side. Thus, the conciliation process did not afford the Parliament any cooperative responsibility, because a joint declaration cannot give rise to any change in the Treaty. This would have presupposed the procedure pursuant to Article 236 as the law stood at the time.<sup>31</sup>

The Single European Act, through the introduction of Article 149(2), empowered the Parliament to participate in the deci-

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29. *S.A. Roquette Frères v. Council*, Case 138/79, [1980] E.C.R. 3333, [1979-1981 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8703.

30. Joint Declaration of the European Parliament, the Council and the Commission, O.J. C 89/1 (1975).

31. Article 236 of the EEC Treaty was repealed at Maastricht.

sion-making procedure to a greater extent.<sup>32</sup> The new provision envisaged a procedure for cooperation between the Council and the Parliament with participation by the Commission. In so far as this procedure is necessary due to the legal basis chosen, two readings of a proposal by the Commission take place both in the Council and in the Parliament. If the Parliament rejects a common position of the Council worked out on the basis of a proposal, the Council can only accept the position by unanimous action.

Additionally, the Parliament has the right to propose amendments. Should the Commission incorporate the Parliament's amendments into its proposal, the legal act can be accepted by a qualified majority in Council. Otherwise, unanimity by the Council is still required in order to take a decision that departs from the Parliament's amendment proposals. The basic principle is that the Council can depart from Commission proposals only by unanimity, and is contained in Article 149(1) of the EEC Treaty, now Article 189a(1) of the EC Treaty. Article 149(2) of the EEC Treaty was incorporated by the Treaty on European Union into Article 189(c) of the EC Treaty. Within the framework of the collaboration procedure, the sole responsibility of the Council remains upheld, even if the procedures by which the Council takes a decision can be influenced by the Parliament. This outcome of the negotiations on the Single European Act failed to meet the demands of the European Parliament and the concept that different Member States had of the strengthening of the position of the Parliament. For this reason, the Parliament was allocated a genuine power of co-decision in Articles 237 and 238 of the EEC Treaty. According to these articles, the assent of the Parliament is required both for the accession of a new Member State and to conclude an association agreement. Both provisions were adopted in the Maastricht Treaty. Thus, under Article 228(3), the conclusion of association agreements within the meaning of Article 238, together with such agreements that establish a specific institutional framework by organizing cooperative structures, agreements having important budgetary implications, or amending an act adopted under the co-decision procedure under Article 189b, must be

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32. EEC Treaty, *supra* note 1, art. 149(2) (providing applicable procedure when Council acts in cooperation with European Parliament).

accepted by the Parliament.<sup>33</sup>

The admission of Member States is now governed by Article O of the Treaty on European Union in such a way that an accession is possible only to the Union and not limited to the European Communities.<sup>34</sup> The Parliament must assent to such an accession. Therefore, the Parliament is accorded a power that affects not only the European Community, but also the Union as a whole, i.e., also Titles V and VI on cooperation, even though collaboration by the Parliament in the implementation of the cooperation is not given. The Treaty of Maastricht extended the scope of application of the assent procedure. Thus, the EC Treaty under Article 8a, which concerns the exercise of the right of every citizen of the Union to reside within the territory of the Member States, requires the assent of the Parliament.<sup>35</sup>

Furthermore, the provisions for the Parliament's elections by direct universal suffrage, established in Article 138(3) of the EC Treaty, in accordance with a uniform procedure in all Member States, can be decided upon by the Council, only with the Parliament's assent, and then recommended to the Member States for adoption.<sup>36</sup> There is no provision for the assent of the Parliament to the provisions on the system of own resources. According to the second subparagraph of Article 201 of the EC Treaty, the Council simply has to consult the Parliament. A discrepancy continues in the budgetary field. The Parliament has, in the framework of Article 203 of the EC Treaty, genuine powers of decision as regards expenditure,<sup>37</sup> but these powers are nevertheless limited by revenues, which were decided upon without participation by the Parliament.

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33. EC Treaty, *supra* note, art. 228(3). "[S]hall be concluded after the assent of the European Parliament has been obtained." *Id.*

34. TEU, *supra* note 1, art. O, ¶ 1 ("Any European State may apply to become a Member of the Union. It shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the assent of the European Parliament, which shall act by an absolute majority of its component members.").

35. EC Treaty, *supra* note 2, art. 8a(2) ("[T]he Council shall act unanimously on a proposal from the Commission and after obtaining the assent of the European Parliament.").

36. *Id.* art. 138(3), ¶ 2.

37. *Id.* art. 203.

D. *The Co-Decision Procedure*

The cases in which the Parliament's assent to Council decisions is necessary are limited in number and generally speaking do not entail the legislative functions necessary for the development and functioning of the Community. For the latter, the Maastricht Treaty introduced, in Article 189b of the EC Treaty, a so-called co-decision procedure.<sup>38</sup> This applies wherever provision is made therefore in the article of the EC Treaty that is relied upon as legal basis. Doubtless the most important case of application is Article 100a, which is the legal basis for all measures for the realization of the internal market. The procedure, as with other procedures, is set in motion by a proposal from the Commission. This proposal, however, must be submitted not only to the Council but also to the European Parliament.

The first reading in this procedure corresponds to the cooperation procedure, which is now laid down in Article 189(c). The Council, acting by a qualified majority, adopts a common position after obtaining the opinion of the European Parliament. For this stage of the procedure, the question arises whether the Council, pursuant to Article 189a(1) can unanimously amend the legal basis and so prevent the co-decision procedure from being carried out. This issue took on practical form in a cooperation procedure in connection with the preparation of the directive on waste from the titanium dioxide industry.<sup>39</sup> The Commission had based its proposal on Article 100a of the EEC Treaty, which at that time made provision for the cooperation procedure. The Council had, albeit after renewed consultation with the Parliament, amended the legal basis and based its decision on Article 130s of the EEC Treaty, which provides simply for the Parliament to be consulted.<sup>40</sup> This action by the Council gives rise to serious concern. It runs counter to the basic concept of the cooperation procedure, the object of which is to provide a structure for cooperation between the Council and the Parliament and to give the Parliament more influence.

There is an irreconcilability here in that the Council unanimously restricts the rights of the Parliament. In a judgment on

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38. EC Treaty, *supra* note 2, art. 189 b.

39. Council Directive No. 91/156/EEC, O.J. L 78/32 (1991).

40. See Koen Lenaerts, *The Principle of Subsidiarity and the Environment in the European Union: Keeping the Balance of Federalism*, 17 FORDHAM INT'L L.J. 846, 871-75 (1994).

an action brought by the Commission against the Council which relied upon the choice of criteria for the legal basis, the Court of Justice took no position on the procedural question outlined above.<sup>41</sup> The concern that exists in connection with the cooperation procedure must exist to a greater extent with regard to the co-decision procedure under Article 189b of the EC Treaty. An amendment, reached unanimously by the Council as to the legal basis, would encroach to an even greater degree on the rights of the Parliament as laid down in the provision. These rights include, as opposed to those in the cooperation procedure, the possibility for the Parliament to prevent a decision of the Council, whereas in the cooperation procedure, rejection by the Parliament can be unanimously overturned by the Council.

Where the Parliament does not agree with the common position of the Council, it can propose changes or even express its intention of rejecting the common position. Such conduct by the Parliament affords the Council the opportunity to convene a Conciliation Committee in order to explain its position to the Parliament within the Committee. This Committee is comparable to a certain extent with the Committee which was envisaged in the concertation procedure, albeit with the difference that in the concertation procedure the Council held the reins as regards how to proceed. In the co-decision procedure, the Parliament determines how things are to proceed. The Parliament can either, with an absolute majority of its members, confirm the rejection of the common position or propose amendments. To the extent that there is no absolute majority in the Parliament, neither for rejection nor for amendment, the Parliament takes no stand on the common position but simply announces its intention of rejecting it. Thus, the Council can, according to Article 189b(2)(b), adopt the legal act in accordance with its common position.<sup>42</sup> Blocking of the Council requires an absolute majority in the Parliament at each stage of the co-decision procedure. This provision ensures that the law-making procedure in the Community cannot be blocked in plenary session by a simple majority that has arisen fortuitously. This danger exists above all because frequently in plenary sessions only relatively few Mem-

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41. *Commission v. Council*, Case C-300/89, [1991] E.C.R. 2867, [1993] 3 C.M.L.R. 359 [Titanium Dioxide].

42. EC Treaty, *supra* note 2, art. 189 b(2)(b).

bers of Parliament are present. Furthermore, the presence of the quorum has to be verified only on application by a Member and not *ex officio* by the President.

If the Parliament decides by absolute majority to propose amendments to the common position of the Council, the Council is informed thereof now. The Parliament's influence on the way in which the Council formulates its objectives is nonetheless rendered relative to the extent that the Commission has to give its opinion on these amendments. If the Commission agrees to the Parliament's proposals, the Council can take a decision by a qualified majority approving the amendments as proposed by the Parliament. If the Commission rejects the Parliament's proposals, however, the Council can act unanimously without taking account of the Parliament's proposals. Once this is done, the procedure is concluded by the Council. Only where the Council does not approve the act in question is a Conciliation Committee convened.

In this Committee, the Parliament once more has the possibility of influencing the formulation of objectives. In the Committee, which is composed of all Members of the Council or their representatives and an equal number of representatives of the Parliament, an effort is made to reach agreement on a joint text. A joint text is arrived at when it is agreed to by the qualified majority of the Council and the majority of the representatives of the European Parliament. The joint text is subsequently only accepted as a legal act when it has been adopted by the Council by a qualified majority and by the European Parliament with an absolute majority of the votes cast. This affords the Parliament the possibility of preventing adoption of the proposed legal act. If the Conciliation Committee fails to come up with a joint text, the Council, acting by a qualified majority, can decide upon the legal act in accordance with the common position to which it agreed before the conciliation procedure was initiated, possibly with taking into account the amendments proposed by the European Parliament. Yet, even in this case, it is possible for the Parliament, by an absolute majority of its component Members, to reject the promulgation of the legal act and thus to bring the procedure to an end.

It must be noted that in the so-called co-decision procedure, pursuant to Article 189b, the contribution made by the Parliament has been reinforced when compared with the cooperation

procedure. There can be no talk, however, of any genuine co-decision by the Parliament under the budgetary procedure in Article 203 and those cases, envisaged by the Treaty, that require the Parliament's assent for Council decisions. In the one instance, the Council can adopt a legal act without any contribution by the Parliament under Article 189b(2)(b), whenever the Parliament has not taken a decision. On the other hand, pursuant to paragraph 3, the Council can unanimously disregard any proposal for amendment made by the Parliament. Only where the Council does not take such a decision is it possible for the Parliament to reject the promulgation of a legal act on the basis of a joint text or, without this, with the absolute majority of its members.

## II. *THE COOPERATION SCHEME*

According to Article E, the European Parliament, the Council, the Commission, and the Court of Justice shall exercise their powers under the conditions and for the purposes provided for, on the one hand, by the provisions of the Treaties establishing the European Communities and of the subsequent Treaties and Acts modifying and supplementing them and, on the other hand, by the other provisions of the Maastricht Treaty.<sup>43</sup> The provisions on a common foreign and security policy<sup>44</sup> and on cooperation in the fields of justice and home affairs<sup>45</sup> delegate tasks to the Council and the Commission and, in a marginal way, to the Parliament. Nevertheless, Article L excludes the application of Community law to Titles V and VI.<sup>46</sup> Judicial review by the Court of Justice does not take place in this instance. Articles J.11 and K.9 simply declare as applicable only those articles of the EC Treaty that concern the composition of the Council, the Commission, and the Parliament. Furthermore, according to Article J.11, Article 217 of the EC Treaty, which affords the legal basis for settling the language question, is applicable.<sup>47</sup>

As for the rest, the formulation of objectives and the decision-making procedure do not take place according to the pro-

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43. TEU, *supra* note 1, art. E.

44. *Id.* tit. V.

45. *Id.* tit. VI.

46. *Id.* art. L.

47. EC Treaty, *supra* note 2, art. 217.



cedural provisions contained in the Community treaties. The Commission has no monopoly of initiative to force the Council, by means of proposals, to introduce a procedure to take a decision. The Commission is fully associated only with the work of cooperation of the Member States.<sup>48</sup> For this reason, the Commission can only make an attempt, by relying upon its political weight and material contributions in negotiations within the Council, to promote cooperation between the Member States. Thus, decisions can be taken, on the basis of the amorphous initiative, by the Commission, or each Member State.<sup>49</sup> Only the European Council can, in the context of cooperation in foreign policy, induce the Council to take decisions. Pursuant to Article J.3, the Council decides, on the basis of general guidelines from the European Council, that a matter should be the subject of joint action.<sup>50</sup> It should be emphasized that a corresponding provision is lacking in the Community Treaties, i.e., that cooperation in the field of foreign policy is subject to direct influence by the European Council, whereas for the Communities only Article D is valid.<sup>51</sup> According to Article D, the European Council shall provide the Union with the necessary impetus for its development and shall define the general political guidelines thereof.<sup>52</sup> This makes it clear that the European Council, which has a more inter-governmental character, cannot, legally considered, intervene in the procedural structures of the Community. This, however, is the case for cooperation in foreign policy under Article J.3(1).<sup>53</sup> Decisions of the Council are taken unanimously.<sup>54</sup> The Council may decide unanimously to take implementation measures by a qualified majority. The concept of "unanimity" in Titles V and VI means that all Member States must agree, because Article 148 of the EC Treaty does not apply. According to Article 148, abstention from voting by one Member State of the Council shall not prevent the adoption by the Council of acts that require unanimity.<sup>55</sup> In practice, this means that

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48. *Id.* arts. J.9, K.4.

49. *Id.* arts. J.8(3), K.3(2).

50. *Id.* art. J.3.

51. *Id.* art. D.

52. *Id.*

53. *Id.* art. J.3(1) ("The Council shall decide, on the basis of general guidelines from the European Council, that a matter should be the subject of joint action.").

54. *Id.* arts. J.3, K.4.

55. *Id.* art. 148.

every Member State has a right to veto in the framework of cooperation.

The European Parliament does not take part in the decision-making procedure in the context of cooperation between Member States. According to Articles J.7 and K.6, the Parliament simply has the right to be informed by the Presidency or the Commission and to submit to the Presidency its views on outstanding issues.<sup>56</sup> The Presidency ensures that these views are taken into consideration. Thus, consultation of the Parliament by the Presidency is not a prerequisite for the Council's taking a decision, as is the case with regard to the Parliament's position in the system of Community law. In addition, the Parliament may ask questions of the Council and make recommendations to it. Yet, as can be seen from the choice of wording, these too do not result in any binding effect.

It is through decisions of the Council that common positions and joint actions in matters covered by the foreign and security policy<sup>57</sup> and joint positions, joint action, and recommendations to accept agreements in the fields of cooperation in justice and home affairs can be taken<sup>58</sup> are decided upon. The decisions do not take the form envisaged for acts of the Community in Article 189 of the EC Treaty. Article 17 of the Council's Rules of Procedure of 6 December 1993, prescribes a different formulation for these decisions.<sup>59</sup> According to Article 18(3) of the Council's Rules of Procedure, publication of these decisions in the Official Journal of the European Union shall be decided on a case by case basis.

Apart from the form, these decisions cannot be granted the legal binding effect defined in Article 189 of the EC Treaty.<sup>60</sup> Binding effect can only be of the nature of international law. Thus, Article J.2 establishes a duty on the part of Member States to ensure that their national policies conform with the common positions of the Community.<sup>61</sup> Article J.3(4) reads, "Joint actions shall commit the Member States in the positions they adopt and

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56. *Id.* arts. J.7, K.6.

57. *Id.* art. J.3.

58. *Id.* art. K.3.

59. Rules of Procedure, *supra* note 26, O.J. L 304/1 (1993).

60. EC Treaty, *supra* note 2, art. 189(4) ("A decision shall be binding in its entirety upon those to whom it is addressed.").

61. TEU, *supra* note 1, art. J.2.

in the conduct of their activity."<sup>62</sup>

In Title VI, providing cooperation in the fields of justice and home affairs, there are no corresponding provisions. All the same, one will have to proceed on the assumption that the joint positions and joint measures decided upon under Article K.3 should have binding effect in accordance with the will of the parties concluding the EC Treaty.<sup>63</sup> This is the result not only of the fact that the wording is identical to the terminology used in Articles J.2 and J.3, but also that the representation of joint positions and the implementation of joint measures presupposes, through the necessity of the terms used, that the Member States are bound by the decisions of the Council.

These observations indicate that cooperation in the fields covered by Titles V and VI takes place outside and independently of the scope of the Community legal system. In as much as this cooperation takes place in the Council and with participation by the Commission, these two bodies do not, despite cooperation being integrated into the Community's infrastructure, act as Community institutions. One can refer to this situation as one in which bodies act on a lending-out basis. In the fields of justice and home affairs, they can only be active as Community institutions when the Council decides, pursuant to Article K.9, that Article 100c of the EC Treaty should apply to certain fields of cooperation. This type of decision needs ratification by the Member States and thus represents a Treaty amendment that does not follow the general provisions of Article N on the procedure for amendment of the Treaty.<sup>64</sup>

### III. *BRIDGES BETWEEN THE EC AND COOPERATION*

In a few cases, the bodies of the Community can, in the context of Community law-making, be active in fields covered by Titles V and VI. Article K.1 assigns the provisions on the crossing of external borders, the entry of third country nationals, and their right to residence in the Member States to intergovernmental cooperation. Similarly, Article 100c of the EC Treaty provides that the Council, on a proposal from the Commission, determines which countries' nationals have to be in possession

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62. *Id.* art. J.3(4).

63. *Id.* art. K.3.

64. *Id.* art. N.

of a visa when crossing the external borders of the Community.<sup>65</sup> The Commission can submit proposals that do not correspond to the guidelines decided upon in the field of cooperation, because the Commission is not bound by decisions taken in the context of cooperation. In these situations, the Council, in accordance with Article 189 of the EC Treaty, can depart from the Commission proposal only unanimously.<sup>66</sup> A conflict may arise between an act concluded pursuant to the Community procedure and a decision taken pursuant to Article K.4, if the Member States do not abide by the decision taken in the context of cooperation when voting in the Council.

In the framework of cooperation in the field of foreign and security policy, where there is provision for action by the Community to impose sanctions, such sanctions are decided upon on a proposal from the Commission and by the Council of the Community acting by a qualified majority.<sup>67</sup> Action by the Community is necessary when the sanctions decided upon call for measures that fall within the competence of the Community, for example, when commercial policy sanctions are concerned. According to Article M of the TEU, the Community Treaties remain unaffected thereby.<sup>68</sup> On the other hand, the Community cannot take action if the measures decided upon in the framework of cooperation do not fall within the competence of the Community. This is the result of the principle of limited individual conferment of powers, as laid down in Article 4 of the EC Treaty.<sup>69</sup> In addition, the Commission can decide whether it wishes to make a proposal and, if necessary, the type of proposal.<sup>70</sup> For the Commission to be legally bound to the decisions taken in the context of cooperation may not be inferred from the fact that Member States are bound under international law to these decisions. Indeed, this would not reconcile with the independence and the status of the Commission in the inter-institutional structure. Article 157(2) of the EC Treaty expressly for-

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65. EC Treaty, *supra* note 2, art. 100c. These decisions are now taken unanimously, but after January 1, 1996, a qualified majority will suffice.

66. *Id.* art. 189a.

67. *Id.* art. 228a.

68. TEU, *supra* note 1, art. M.

69. EC Treaty, *supra* note 2, art. 4(2) ("Each institution shall act within the limits of the powers conferred upon it by this Treaty.").

70. *Id.* art. 228a, ¶ 1 ("[T]he Council shall take the necessary urgent measures.").

bids members of the Commission from taking instructions from any government or from any other body.<sup>71</sup> Should the Commission put forward proposals that depart from the measures decided upon between the Member States, then it is equally valid that the Council can depart from them only unanimously.<sup>72</sup> There is no provision for a position to be taken by the Parliament for decisions taken pursuant to Article 228a. When measures need to be taken pursuant to Article 228a, they are regularly autonomous measures and not the conclusion of agreements with third states. Article 228(3) requires participation by the Parliament when concluding international agreements and therefore does not apply.

Thus, in the field of budgetary law, the Parliament does have the possibility, legally watertight but nonetheless limited, to influence the cooperation of the Member States as provided under Titles V and VI of the TEU. According to Articles J.11 and K.8, administrative expenditures shall be charged to the budget of the European Communities. Furthermore, the Council may decide unanimously that operational expenditures should also be charged to the budget of the European Communities. In this case, explicit provision is given in both Articles to the application of the budgetary procedure envisaged in the EC Treaty. Article 203 of the EC Treaty gives the Parliament a genuine right to take decisions alongside the Council.<sup>73</sup> When dealing with non-compulsory expenditures, i.e., expenditures that do not necessarily result from the Treaty or from acts adopted in accordance therewith, the Parliament can also take decisions on budgetary estimates that run counter to the will of the Council. Administrative expenditures, especially expenditures on staff, are treated as non-compulsory expenditures according to an agreement between the Council and the Parliament.

Even if officials of the organs of the Community are active in the fields of cooperation, they retain their status on the basis

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71. *Id.* art. 157(2). "The members of the Commission shall, in the general interest of the Community, be completely independent in the performance of their duties. In the performance of these duties, they shall neither seek nor take instructions from any government or from any other body." *Id.*

72. *Id.* art. 189a.

73. EC Treaty, *supra* note 2, art. 203.

of the Staff Regulations.<sup>74</sup> The Parliament can influence the staff plan only in so far as it is possible to establish which officials work exclusively or substantially for the fields of cooperation. Some indication is given by the fact that both the Commission and the General Secretariat of the Council have formed special Directorates-General for the area of cooperation in the field of foreign and security policy.

In as much as the Council decides to enter operational expenditure in the budget of the Community, the Parliament's ability to influence likewise depends on whether compulsory or noncompulsory expenditure is at issue. This question should be of greater importance to the Parliament than concern with administrative expenditures because the decision for budget estimates directly influences the implementation of the measures decided upon. There is a strong argument for allocating operational expenditures as non-compulsory and thereby to accord the Parliament "the last word." This expenditure is not by way of necessity resulting from the EC Treaty or the legal acts adopted on the basis of the Treaty. The Community or its institutions cannot, as has been demonstrated, be considered legally bound by the decisions taken in the field of cooperation. Thus, the Parliament's constant practice has been to reject any legal effect of decisions that did not come into being as law-making acts of the Community. For example, the Parliament, as early as 1974, decided on a budget estimate for the proposed regional fund that exceeded by one million ECU the amount decided upon by the European Council.

Where estimates are entered in the budget of the Community for the implementation of cooperation, the rule in Article 205 of the EC Treaty addresses the implementation of the budget.<sup>75</sup> According to Article 205, the budget is implemented by the Commission. Article 22(1) of the Financial Regulation<sup>76</sup> repeats this provision. Under paragraph 2 of Article 22, the powers necessary for the implementation of the sections in the budget concerning the European Parliament, the Council, the Court of Justice, and the Court of Auditors are conferred on

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74. Council Regulation No. 259/68/EEC/EURATOM/ECSC, art. 2, 11 J.O. L 56/1 (1968), O.J. Eng. Spec. Ed. 1968, at 4.

75. EC Treaty, *supra* note 2, art. 205.

76. O.J. C 80/1, at 12 (1991).

these bodies by the Commission.<sup>77</sup> These sections comprise the administrative expenditure of each respective body. Special problems should not arise for the administrative expenditure that arises in the field of cooperation. Although, the Commission has not hitherto formally recognized these relevant powers, it is accepted practice that the other bodies nevertheless carry them out. If estimates for operational expenditure in the field of cooperation were not entered in the section of the Commission, but in the Council, this would run counter to the practice hitherto. This practice establishes that operational expenditure is conducted for the execution of Community policies under the responsibility of the independent Commission with only the administrative expenditure of the other bodies being entrusted to them. In an emergency, the Commission would have the opportunity to bring an action and claim validly that conferment within the meaning of Article 22(2) of the Financial Regulation did not take place.

Apart from the practical point of view that the infrastructure of the General Secretariat of the Council would have to be adjusted to the new tasks and, in all probability, enlarged for the administration of the operational expenditure, it suggests itself that the matter should be clarified by an amendment to the Financial Regulation. An amendment would have to be decided upon, pursuant to Article 209 of the EC Treaty, by the Council acting unanimously on a proposal from the Commission and after consulting the Parliament and obtaining the opinion of the Court of Auditors.<sup>78</sup> Further, an amendment to the practice would mean that control by the European Parliament, as the Parliament in general exercises it over the Commission, would not be possible for the implementation of this part of the budget. In every case, there is nevertheless control by the Court of Auditors in accordance with Article 188c of the EC Treaty. The annual report by the Court of Auditors would also concern this expenditure. This annual report forms the basis of the procedure, governed by Article 206 of the EC Treaty, for the granting of a discharge for the implementation of the budget.<sup>79</sup> Article 206 provides that the European Parliament shall give a dis-

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77. *Id.* art. 22(2), O.J. C 80/1, at 12 (1991).

78. EC Treaty, *supra* note 2, art. 209.

79. *Id.* art. 206.

charge to the Commission.<sup>80</sup> This reflects the basis already referred to above that the Commission and not the Council is responsible for the operational expenditure in the budget of the Community. An amendment to the Financial Regulation along the lines sketched out above would limit control by the Parliament in terms of the discharge it gives to the Commission.

#### IV. *GENERAL OBLIGATIONS OF MEMBER-STATES*

According to Article M, the Treaty on European Union does not affect the Community Treaties.<sup>81</sup> This means that decisions within the framework of the system of cooperation cannot be taken on those particular subject matters that fall within an exclusive or potential responsibility of the Community institutions. The provision laid down in Article M has further legal consequences. The Member States are not, in the field of cooperation, released from the duties incumbent upon them by virtue of Article 5 of the EC Treaty. According to that provision, they have to take all appropriate measures, whether general or particular, to ensure fulfillment of their obligations arising out of Community law.<sup>82</sup> In addition, they have a duty to abstain from any measure that could jeopardize the attainment of the objectives of the Treaty.<sup>83</sup>

A finding by the Court of Justice has made it clear that the provision laid down in Article 5 is not a declaration of principle, but that the provision gives rise to a concrete obligation on the part of Member States that, if not taken into account, amounts to an infringement of the Treaty by the Member State concerned.<sup>84</sup> Thus, the Court of Justice may examine decisions taken by the Member States in the context of areas of cooperation to see if they reconcile with Community law.<sup>85</sup> This action is not available to the Parliament, because, according to Article 173 EC Treaty, it can take action only against the Council for the

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80. *Id.*

81. TEU, *supra* note 1, art. M ("[N]othing in this Treaty shall affect the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying or supplementing them.").

82. EC Treaty, *supra* note 2, art. 5.

83. *Id.*

84. Commission v. Italy, Case 39/72, [1973] E.C.R. 101, [1973] C.M.L.R. 439.

85. This situation arises when the Commission brings proceedings for infringement of the EC Treaty under Article 169. EC Treaty, *supra* note 2, art. 169.



purpose of protecting its prerogatives.<sup>86</sup> Because the Council does not act in the field of cooperation as an institution of the Community, an action by the Parliament against the Council should not be admissible. In addition, it appears difficult to conceive that the rights of the Parliament should be jeopardized by decisions in the field of cooperation. It is, however, the case that there exist powers for the Parliament to bring an action, pursuant to Article 173, where legal acts are being contested according to Article 100c or Article 228a or where decisions in the context of the budgetary procedure are concerned.

### CONCLUSION

Through the Treaty on European Union, the development of the Community's structures for decision-making continued. Under the decision making procedure in the area of the Community legal system, the tendencies that were to be detected hitherto are being carried on. This is particularly so for the European Parliament and the procedures for voting in the Council. The wholly new structures for the development of objectives in the areas covered by Titles V and VI represent a structuring of the hitherto inconsistent cooperation of Member States in the most varied fields of policy and thereby afford the possibility for greater coherence in the development of the Union. At the same time, however, the relationship between the field of the Communities and that of cooperation remains, legally speaking, problematical. It remains to be seen whether the implementation of the new systems results in a clearer scenario that makes a more reliable legal analysis possible.

The next step envisaged in the development of the decision-making procedures is, according to Article 189b(8) of the EC Treaty, a governmental conference scheduled to take place in 1996.<sup>87</sup> It appears certain that such a conference will concern itself not only with Article 189b of the EC Treaty. Until the EC Treaty is amended, which could be decided upon by a governmental conference, further development of Community law and

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86. *Id.* art. 173.

87. *Id.* art. 189b(8) ("The scope of the procedure under this Article may be widened, in accordance with the procedure provided for in Article N(2) of the Treaty on European Union, on the basis of a report to be submitted to the Council by the Commission by 1996 at the latest.").

of the law of the Union will be determined, as hitherto, by the law as applied in practice. Along with new decisions taken by the Court of Justice, inter-institutional agreements will play a significant role in this process. It appears to be too early at the moment, however, to analyze these agreements and to give them any legal classification. To date, only a small number have come into being. Nevertheless, the Parliament has called for various agreements that predominantly concern the decision-making procedure both in the context of the Community and in the fields of cooperation under Titles V and VI of the TEU.