The Plurality of the Legislative Process and a System for Attributing Procedures to Competences

By Christiane Trüe[*]

A. Introduction

This contribution aims to assess whether the Constitutional Treaty (CT) succeeds in achieving a systematic "fit" between the legislative procedures and the relevant underlying competences. The system to be developed here aims at promoting democratic legitimacy, transparency and efficiency in the EU's legislative process. This is undertaken under the assumption that systematization might contribute to achieving these fundamental aims. Obviously, such a system needs to rely on generalization and simplification to a considerable extent; it cannot provide more than a model which must necessarily be subject to exceptions.

To elucidate this, the continuing variety of legislative procedures under the CT will be presented in Part B of this paper. Following that, in Part C, democratic legitimacy, transparency and efficiency will be identified as criteria for a systematic attribution of procedures to competences, and the requirements following from these criteria regarding the organization of legislative procedures will be elaborated: some variation among procedures will be found to be justified by the varying nature of competences. Finally, the attribution of procedures to competences in the CT will be analyzed in the light of these criteria in Part D.

B. Continuing Variety of Legislative Procedures

At first sight, the CT seems to remove the "plurality" of the legislative process familiar from the past. Article I-34 (1) states that co-decision (Article III-396) is the "ordinary" legislative procedure for the adoption of legislative acts. However, Article I-34 (2) and (3) simultaneously hint at maintaining a diversity of legislative procedures by referring to "special legislative procedures" (whereby the Council or the EP can legislate with the other's "participation") and to "specific cases" of initia-

[*] Dr. iur., LL.M. (East Anglia), Senior Research Fellow, Institute for International Law, University of Göttingen. Email: CTruee1@gwdg.de. Many thanks to Marc Stauch for his comments on an earlier draft.

tives or recommendations from players other than the Commission. These "special procedures" and "specific cases" can be found in Part III CT, which largely accumulates the current EC and EU Treaties without major amendments, and provides for numerous exceptions from co-decision, in particular, for consent or consultation of the EP instead of co-decision, or for no formal role for the EP (particularly in CFSP).[1] It is Part III CT which is ultimately decisive, as Article I-12 (6) leaves it to Part III to determine the scope and arrangements for exercising EU competences.

There is not much novelty either with regard to the basic versions of the three main legislative procedures: the position of the EP remains the same; the Commission's main role in most fields continues to be the initiation and presentation of proposals and, where appropriate, of amendments. The Council retains the final decision in almost all procedures, in the co-decision procedure together with the EP; variants regarding the Council continue to centre on whether the latter must decide by unanimity or by qualified majority, i.e. whether a Member State can veto legislation or not. In politically sensitive areas, such as CFSP, taxation, the choice between different sources of energy etc., the unanimity requirement means that each Member State continues to be protected by having a right of veto. In the fields of social security (Article III-136 (2)) and criminal justice (Articles III-270 (3), III-271 (3)) a sort of "emergency brake system" is introduced: if a Member State anticipates dangers for fundamental aspects of its social security or criminal justice systems it may request that a draft framework law be referred to the European Council; this will have the effect of suspending the decision-making process.

The procedural element of qualified majority voting will be amended: Article I-25 replaces the current weighing of votes by a more elaborate system of a dual majority based on Member State votes (minimum of 55 %) and the representation of the population in the latter (minimum of 65 % of the EU population); this is complemented by minimum quorums for the qualified majority (15 Member States) and the blocking minority (four Member States).

More variety arises within the legislative procedures, due to a number of additional elements which may apply in several procedures, complementing their basic versions, in particular with regard to their legitimacy or efficiency. Many legal bases provide for a duty to *consult the Economic and Social Committee, the Economic and Financial Committee* or *the Committee of the Regions* in order to include their expertise and to broaden the basis of legitimation.

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[1] On the actual application of co-decision, *see* Armin von Bogdandy/Jürgen Bast/Felix Arndt, *Handlungsformen im Unionsrecht*, 62 HEIDELBERG JOURNAL OF INTERNATIONAL LAW (HJIL) 77, 137-9 (2002).

In addition, Article I-47 (4) introduces a new right of *petition* to initiate a legislative procedure where citizens consider that a legal act of the Union is required for the purpose of implementing the Constitution.

Further variety may result from the national parliaments' newly formalized role, as they can individually provide reasoned opinions on a proposed act.[2] All formal documents of the Commission, EP and Council during the legislative process are to be forwarded directly (i.e. not *via* the Council members) to the national Parliaments. The latter have six weeks to avail themselves of the new *ex ante* political *monitoring mechanism* for ensuring the effective application of the principle of subsidiarity: if national parliaments uniting a certain percentage of all the votes allocated to parliaments[3] give reasoned opinions on non-compliance with the principle of subsidiarity the draft must be re-examined (Art. 7 para. 3 Subsidiarity Protocol).[4]

To maintain Member State control, the European Council may determine the "*strategic interests*" of the Union for all areas of *external action* (i.e. including common commercial policy, Article III-293) and may thereby set guidelines before the actual legislative procedure begins, although, ostensibly, the European Council is not to acquire a legislative role as such (Article I-21(1)).

Finally, the CT specifies another group of exceptions to the co-decision rule, which may be roughly classed as legislation for the implementation of relatively specific CT articles. For example, co-decision will not be required for legislation to imple-

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[2] Treaty Establishing the Constitution for Europe, Article I-9, Dec. 16, 2004, 2004 O.J. (C 310) 1 [hereinafter CT]; Articles 1 – 4 Protocol on the Role of the National Parliaments; Article 3 Subsidiarity Protocol.

[3] Usually a third but it is a fourth in Article III-264 CT.

[4] *See* Stephen Weatherill, *Better Competence Monitoring*, 30 EUROPEAN LAW REVIEW (ELR) 23, 29 (2005); Jürgen Schwarze, *Ein pragmatischer Verfassungsentwurf*, 38 EUROPARECHT (EuR) 535, 546-7 (2003); Geneviève Tuts, *La Convention: plus de clarté, de transparence, d'efficacité et de démocratie pour l'Europe*, REVUE DE LA FACULTÉ DE DROIT DE LIÈGE 341, 359 (2004); Markus Ludwigs, *Die Kompetenzordnung der Europäischen Union im Vertragsentwurf über eine Verfassung für Europa*, 7 ZEITSCHRIFT FÜR EUROPARECHTLICHE STUDIEN (ZEuS) 211, 221-4 (2004); Rupert Scholz, *Das institutionelle System im Entwurf eines Vertrags über eine Verfassung für Europa*, *in* DER VERFASSUNGSENTWURF DES EUROPÄISCHEN KONVENTS 100, 105-6 (Jürgen Schwarze ed., 2004); Philipp Dann, *The Political Institutions*, *in* PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW 36 (Armin v. Bogdandy & Jürgen Bast eds., forthcoming October 2005); Franz C. Mayer, *Competences – Reloaded? The Vertical Division of Powers in the EU after the New European Constitution*, 3 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 493, 502 (2005); Franz C. Mayer, *Die drei Dimensionen der europäischen Kompetenzdebatte*, 61 HEIDELBERG JOURNAL OF INTERNATIONAL LAW (HJIL) 577, 605-7 (2001); Paul Craig, *Competence: Clarity, Conferral, Containment and Consideration*, 29 EUROPEAN LAW REVIEW (ELR) 323, 343-4 (2004).

ment certain articles on the customs union,[5] competition law[6] and common agricultural policy.[7] These authorize the adoption of European regulations by the Council on a proposal of the Commission and provide for the EP to enjoy at most a right to be consulted. Sometimes the Commission may legislate on its own.[8] Accordingly, Article I-35 (2) generally provides for the adoption of European regulations and decisions by the Council, the Commission or the European Central Bank. In certain cases, specifically in CFSP (Article I-40), such powers may also be delegated to the Council alone.

In addition, regarding implementing legislation in nearly any field of EU activity, Articles I-36 and I-37 (2) retain the option currently found in Articles 202/211 EC to delegate appropriate powers to the Commission to supplement or amend certain non-essential elements of European laws and framework laws.[9]

Considerable plurality of legislative procedures thus becomes obvious.

C. Criteria for the Attribution of Procedures to Competences

Before analyzing whether the procedural arrangements within the CT fit the competences to which they are attributed, three main criteria will be developed that should arguably underpin a well-founded attribution of procedures to competences in a multi-level system of legislation. These are, respectively: democratic legitimacy, transparency and efficiency.[10]

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[5] Article III-151 CT.

[6] Articles III-161 and III-162 CT (to be implemented according to Article III-163 CT).

[7] Within the CAP the Council shall, without consultation of the EP, adopt European regulations or decisions on the details of CAP (Article III-231 (3) CT); the Commission can fix certain countervailing charges (Article III-232 (2) CT; currently, Treaty Establishing the European Community, Art. 38, consolidated version Dec. 24, 2002 O.J. (C 325) 33 [hereinafter EC Treaty]).

[8] Article III-166 (3) CT.

[9] On the quantity of delegated legislation, *see* von Bogdandy et al., *supra* note 1, at 139-42; Jürgen Bast et al., *Legal Instruments in European Union Law and their Reform*, 23 YEARBOOK OF EUROPEAN LAW 91, 126-7 (2004); Koen Lenaerts and Marlies Desomer, *Simplification of the Union's Instruments*, *in* TEN REFLECTIONS ON THE CONSTITUTIONAL TREATY FOR EUROPE 107, 114 (Bruno de Witte ed., EUI-RSCAS/AEL 2003), *available at* http://www.iue.it/RSCAS/Research/Institutions/EuropeanTreaties.shtml.

[10] For similar criteria, *see* Peter-Christian Müller-Graff, *Strukturmerkmale des neuen Verfassungsvertrages für Europa*, 27 INTEGRATION 186, 187-8 (2004); Tuts, supra note 4, at 346.

I. Democratic Legitimacy

In order to develop the requirements of democratic legitimacy, we should first consider the nature of the particular legislation that needs to be legitimized. Under the CT, the details of what kind of legislation is permitted continue to follow from the competences the latter is based upon. These competences can themselves be categorized on the basis of how far the relevant subject areas are integrated, i.e. have been moved to the EU level of responsibility, or how far they are intergovernmental, i.e. largely remain the domain of the Member States, with international co-operation being a matter for the governments. To some extent such a categorization needs to exceed that undertaken in Article I-12 and the following provisions.[11] As we shall see, different procedures are required in order to satisfy the ensuing different needs of legitimation.

1. Categorization of Competences

On the basis of the supranational-integrative or intergovernmental-co-operative character of EU competences, and the resulting degree of integration achievable on their basis, the competences may be divided into three main categories, plus one additional one. These are, respectively, supranational-integrative, intermediate and intergovernmental-co-operational competences, plus competences for implementation. Which category a competence can be allocated to depends on the *effects of the legislative acts* (on the citizens and on the Member States) permitted by the relevant legal basis, and on the *aims and permissible scope and content* of such legislation; in particular the extent to which the subject area under regulation can be subject to EU legislation, how far EU legislation and Member State legislation interact, and in how far legislation has to be left to the Member States.[12]

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[11] The latter only provides a rather rough distinction based on the exclusivity or non-exclusivity of competences and does not as such consider the extent of integration achieved, nor is it fully consistent with the legal bases in Part III. *See* Christiane Trüe, *Das System der EU-Kompetenzen vor und nach dem Entwurf eines Europäischen Verfassungsvertrags*, 64 HEIDELBERG JOURNAL OF INTERNATIONAL LAW (HJIL) 391, 413 (2004). *See also* Weatherill, *supra* note 4, at 29-31; Stephen Weatherill, *Competence*, *in* TEN REFLECTIONS ON THE CONSTITUTIONAL TREATY FOR EUROPE, *supra* note 10, at 45, 52; Martin Nettesheim, *Die Kompetenzordnung im Vertrag über eine Verfassung der Europäischen Union*, 39 EUROPARECHT (EuR) 511, 528 (2004); Matthias Ruffert, *Schlüsselfragen der Europäischen Verfassung der Zukunft*, 39 EUROPARECHT (EuR) 165, 189-92 (2004); Schwarze, *supra* note 4, at 542-6; Craig, *supra* note 4, at 326. For a more detailed classification, Armin von Bogdandy and Jürgen Bast, *Vertical Order of Competences*, in PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW, *supra* note 4, at 18; INGOLF PERNICE, EINE NEUE KOMPETENZORDNUNG FÜR DIE EUROPÄISCHE UNION 6 (WHI-Paper 15/02), *available at* http://www.whi-berlin.de/pernice-kompetenzordnung.htm.

[12] In detail on the categorization of competences, *see* CHRISTIANE TRÜE, SYSTEM DER RECHTSETZUNGSKOMPETENZEN 97 (2002); *see also* Müller-Graff, *supra* note 10, at 193-4, Martin

First, as regards the *types of legislative acts* (Article I-33 (1)) permitted by the legal bases: their effect on the citizens and on the Member States differs.[13] *European laws, regulations and decisions* are to be directly applicable and to create direct legal relationships between the EU and the citizens. They are designed to regulate whole subject areas. If the making of European laws and regulations is permitted by a legal basis, this points towards a supranational-integrative competence.

By contrast, the relationship created by EU legislation may be more remote and indirect regarding the citizens, but may have more of an impact on the Member States and their ability to exercise their sovereign powers freely; in particular, Member State parliaments may be obliged to implement EU legislation. This effect will usually be achieved by *framework laws*; only in exceptional cases may these confer rights on the individual. In addition, citizens or Member States can be affected by a piece of legislation, even without a direct legal relationship, and with varying intensity, e.g. in environmental law. Legal bases permitting the making of framework laws may thus provide for a less integrative competence than those permitting European laws or regulations, but the competence will usually still exceed the intensity of integration inherent in *measures of cooperation*, in particular, due to its impact on the substantive law of Member States.[14]

However, depending on their content, European laws, regulations and framework laws as well as decisions[15] can also be instruments to bring about a mere *cooperation* of the Member States, or to complement or support their activities in certain subject areas. Accordingly, the types of acts permitted by the legal bases can only provide a starting point for categorization.[16]

In addition, therefore, *the aims and permissible scope and content*[17] of secondary legislation must be considered in order to establish the categories of competence, and

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Nettesheim, *Kompetenzen, in* EUROPÄISCHES VERFASSUNGSRECHT 415, 439-45 (Armin von Bogdandy ed., 2003).

[13] Also Conv/375/1/02 REV 1, Final Report WG V, 4 November 2002, p. 12-13, available under www.european-convention.eu.int.

[14] Regarding the latter, *see* von Bogdandy et al., *supra* note 1, at 99.

[15] *Id.* at 103-4.

[16] On the current Treaties *id.* at 79; Jürgen Bast et al., *supra* note 9, at 93.

[17] *See* von Bogdandy and Bast, *supra* note 11, at 12-17 (with a distinction between empowering and standards-establishing provisions).

the corresponding requirements of legitimation. In general terms, the legal bases permit EU legislation either in pre-defined subject areas or in any subject area related to a defined aim to be pursued on a given legal basis (e.g. the functioning of the internal market); both may be subject to substantive restrictions.[18]

First, certain legal bases empower the EU to *make uniform law for given subject areas*. Here the resulting legislation will often be of direct application to the citizen, and thus serve to integrate the *subject areas* fully, possibly to the exclusion of the Member States (in so far this category corresponds to the category of exclusive competences in Articles I-12/13). Such subject area competences exist, e.g., for common commercial policy: regarding international trade uniform Community law replaces Member State law *en bloc*, but does not require intense interaction of EU and Member State law.[19]

By contrast, the second, intermediate group of EU competences (which forms part of the very diverse[20] category of "shared" competences in Article I-12) is characterized by an interaction of the EU and the Member States within the relevant subject areas. This indicates a less supranational-integrative approach; here the relevant legal bases do not usually permit the regulation of whole *subject areas, but only of certain issues* within the latter, and only to the extent that this is required for the pursuit of the objective defined in the legal basis.[21] EU framework laws may be used in order to oblige the Member States to adjust their legal systems to EU aims, whilst leaving the subject areas as such within the responsibility of the Member States. Internal market harmonization provides the main example: it means that the EU legislates in potentially all subject areas relevant to the functioning of the internal market, and requires the Member States to adjust their legal systems to the EU legal system. In effect, harmonized areas of law are usually regulated by Member State law; and the Member States have to ensure that it remains a consistent body of law. EU legislation will usually require the amendment of individual sectors or provisions, rather than a whole re-regulation of the area.[22] Such interactive law-

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[18] TRÜE, *supra* note 12, at 117; von Bogdandy and Bast, *supra* note 11, at 18-19.

[19] TRÜE, *supra* note 12, at 398.

[20] Craig, *supra* note 4, at 334-335; von Bogdandy and Bast, *supra* note 11, at 48.

[21] *See* Case C-376/98, Germany v. EP and Council, 2000 E.C.R. I-8419; Case C-377/98, The Netherlands v. EP and Council, 2001 E.C.R. I-7079; Case C-491/01, British American Tobacco, 2002 E.C.R. I-11453.

[22] von Bogdandy and Bast, *supra* note 11, at 28-29; Craig, *supra* note 4, at 334-335; Dann, *supra* note 4, at 8-10; PHILIPP DANN, PARLAMENTE IM EXEKUTIVFÖDERALISMUS 29 (2004). *See also* TRÜE, *supra* note 12, at 188.

making requires joint and well-adjusted legislation of both the EU and the Member States.

A third group, of even less integrative legal bases, tending towards the intergovernmental-cooperative end of the spectrum, only permits *complementation or support* of Member State activities, without the EU being able to require major or, indeed, any substantive amendments of Member State law. Such legal bases are those for EU contributions to Member State activity in the relevant field, still including limited harmonization, for example, contributions to environmental protection (also category of shared competences in Articles I-12/I-14), or excluding even limited harmonization, e.g. for contributions to the flowering of Member State cultures (category of complementary competences in I-12[23]). The least integrated legal bases within this category will only permit measures to bring about intergovernmental cooperation, whilst maintaining state control over the area, e.g. within the CFSP.

In addition to these three categories of legislation "proper," a separate category of law-making competence can be established: the *competence to make implementing acts* where the main content and the essentials are pre-determined in the CT itself or in delegating secondary legislation.[24] The latter can be made on a legal basis from one of the three categories outlined above.

2. Providing Democratic Legitimacy

As already indicated, the different categories of competence outlined above appear to require different ways of providing for democratic legitimacy: all citizens or Member States, if affected by a legislative act, should be in a position to influence its content, the more directly they are affected, the more direct their influence should be.[25] On this basis it will be argued that supranational-integrative competences call for corresponding supranational-integrative legitimation. By contrast, the more competences tend towards the intergovernmental-co-operative end of the

[23] Or "non-regulatory powers", *see* von Bogdandy and Bast, *supra* note 11, at 31.

[24] See Part B. above.

[25] This is to include both individuals and collectives as sources for legitimacy. For details on theories of democracy, *see* Uwe Volkmann, *Setzt Demokratie den Staat voraus?*, 127 ARCHIV DES ÖFFENTLICHEN RECHTS (AÖR) 575, 582 (2002); Armin von Bogdandy, *Globalization and Europe: How to Square Democracy, Globalization, and International Law*, 15 EUROPEAN JOURNAL OF INTERNATIONAL LAW (EJIL) 885, 890 (2004). With a preference for the individual-based approach, *see* Thomas Schmitz, *Das europäische Volk und seine Rolle bei einer Verfassungsgebung in der Europäischen Union*, 38 EUROPARECHT (EuR) 217, 226 (2003). *See also* Petersen, in this volume.

spectrum, the more they will call for intergovernmental-co-operative legitimation.[26] At this point the question arises: what exactly is "supranational-integrative legitimation" or "intergovernmental-co-operative legitimation" with regard to the EU, and how is it provided?

The EU and its legislation are generally regarded as resting on two bases for democratic legitimacy (Articles I-1 (1), I-46).[27] On the one hand, citizens are represented at Union level as EU citizens by the directly elected European Parliament and, to some extent, by the Commission.[28] On the other hand, the Members of the Council, i.e. government ministers controlled by their home parliaments, represent their Member States and, indirectly, their people as a whole. They thus provide indirect legitimacy to EU acts, albeit each limited to his or her people.[29] The formal role for the national parliaments described above adds a new strand of legitimacy, addressing, on the side of the Member States, the problem of the shift from parliamentary to executive-governmental law-making in the Council.[30] How far this indirect legitimacy is fully provided depends on whether the Council decides by

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[26] For this approach, *see* LEONTIN-JEAN CONSTANTINESCO, RECHT DER EUROPÄISCHEN GEMEINSCHAFTEN 131 (1977); Paul Demaret, *The Treaty Framework*, *in* LEGAL ISSUES OF THE MAASTRICHT TREATY 3, 4 (David O'Keeffe and Patrick Twomey eds., 1994); Siegfried Magiera, *Die Einheitliche Europäische Akte und die Fortentwicklung der Europäischen Gemeinschaft zur Europäischen Union*, *in* GEDÄCHTNISSCHRIFT FÜR WILHELM KARL GECK 507, 510 (Wilfried Fiedler and Georg Ress eds., 1989); Mayer, *Die drei Dimensionen der europäischen Kompetenzdebatte*, *supra* note 4, at 626.

[27] On the "dual dimension" of the EU, see Dimitris Tsatsos, *Die Europäische Unionsgrundordnung*, 22 EUROPÄISCHEN GRUNDRECHTE ZEITSCHRIFT (EuGRZ) 287 (1995), Stefan Oeter, *Föderalismus*, *in* EUROPÄISCHES VERFASSUNGSRECHT, *supra* note 12, at 59, 88; Christian Calliess, Demokratie im europäischen Staaten- und Verfassungsverbund 3 (Göttinger Online-Beiträge No. 14, 2004), *available at* http://wwwuser.gwdg.de/~ujvr/europa/Paper14.pdf; DANN, *supra* note 22, at 2, 15 and 43 (Council); *id*. at 279 and 363 (European Parliament); Dann, *supra* note 4, at 34 (based on his model of "executive federalism").

[28] *See* Calliess, *supra* note 27, at 8-9; Jürgen Bröhmer, *Das Europäische Parlament: Echtes Legislativorgan oder bloßes Hilfsorgan im legislativen Prozess?*, 2 ZEITSCHRIFT FÜR EUROPARECHTLICHE STUDIEN (ZEuS) 197, 205 (1999); Georg Ress, *Das Europäische Parlament als Gesetzgeber*, 2 ZEITSCHRIFT FÜR EUROPARECHTLICHE STUDIEN (ZEuS) 219 (1999). More direct legitimation could be provided by the citizens themselves in referenda, but, as shown above, such direct legitimation is not provided for in the CT. *See* Dann, *supra* note 4, at 15 and 20-2 (on the limits of the EP's powers and Commission legitimacy); *id*. at 16 and 22-7; DANN, *supra* note 22, at 306.

[29] On this problem, *see* Ress, *supra* note 28, at 221-24; MARCEL KAUFMANN, EUROPÄISCHE INTEGRATION UND DEMOKRATIEPRINZIP 337 (1997); Dann, *supra* note 4, at 10-15; DANN, *supra* note 22, at 76-122.

[30] *See, e.g.*, Müller-Graff, *supra* note 10, at 198; Ruffert, *supra* note 11, at 181-82; Oeter, *supra* note 28, at 100. On the limits, *see* Dann, *supra* note 4, at 35-39; DANN, *supra* note 22, at 163 and 269.

unanimity; decision-making by qualified majority voting tends towards the supranational-integrative as the outvoted Member States have agreed to accept the majority decision for the sake of membership and on the basis of the Treaties.

Consequently, one can distinguish between EU level legitimacy which is provided supranationally-integratively, mainly by the EP and to some extent also by the Commission, and legitimacy provided intergovernmentally by the Member States via their representatives in the Council. Each of the three legislative EU institutions is thus associated with a different form of legitimacy. The amount of democratic legitimacy provided by each varies according to the legislative procedure prescribed by the legal basis. Procedures will tend to be more supranational-integrative in proportion to the degree of influence accorded to the EP. By contrast, they will qualify as more intergovernmental-cooperative in so far as greater influence is accorded to the Council and, within it, the individual Member States.

In order to develop a more nuanced approach to the organization of the procedures, the relationship between direct EU level and indirect Member State level legitimacy, and the manner in which they interact, must be examined. Can they apply cumulatively, or are they mutually exclusive, but mutually substitutable in part?

A first glance at the two bases of democratic legitimacy identified above suggests that there is nothing to prevent cumulating direct and indirect legitimacy: the maximum of democratic legitimacy would be based on both the citizens as individuals and on the Member States as representing the collective identities of the citizens. Accordingly, for maximum legitimation, EU legislation would have to be issued by unanimity in the Council following involvement of both the Commission and the EP during the procedure, and, further, with final EP consent. Only unanimity in the Council provides full indirect legitimacy, and only equal involvement of the EP in the legislative process, with the opportunity to influence the content of the legislative act, gives full weight to the more direct legitimacy provided by the EP.

However, a second approach might be to see the two forms of direct and indirect democratic legitimacy as in opposition to each other. Of the amount of overall legitimacy achievable, its maximum could either derive from the indirect legitimacy provided by Member State parliaments and governments, *or* from the more direct legitimacy provided by the EP. This would take account of the fact that EU competence is, in many respects, bought at the expense of Member State power, which may also mean that legitimacy can come from one *or* the other source, but not from both at the same time.

If that is correct, a choice is required: the first solution would be to take an entirely state-based perspective, which is also based on legitimacy requirements such as the homogeneity of the electorate, the feeling of national solidarity, and equal value of votes. From this perspective, only the legislating institutions of the state can provide legitimacy, which would also be the maximum achievable. The Council would thus have to decide by unanimity, and the EP would be accorded no role at all, or only a complementary role, as in the consultation procedure.[31] From the opposite, euro-centrist perspective, the EP only, without the requirement of the Council's consent, should be the EU legislator, possibly with a complementary role for the national parliaments.[32] For the latter position one could rely on the fact that the EP is directly legitimated, and the only institution which represents the citizens as *European* citizens, and not as citizens of their Member States.[33]

However, there is a third possible approach. This is to regard EU and Member State legitimation as at least in part substitutable and thus able to replace each other: the part of legitimacy not provided by one is made up for by the other; for example, if a Member State is outvoted under qualified majority voting, the gap in indirect legitimation regarding its citizens could be filled by the more direct legitimation of the EP; the loss of legitimacy on one side is compensated by strengthening the legitimation by the other.[34] In fact, the CT can be seen to attempt just such a combination of both forms of legitimacy in the co-decision procedure. This approach of substitutability is also the most flexible one in order to provide legitimacy fitting the intensity of integration in the relevant area. However, strengthening the EP includes more centralization and less autonomy for smaller entities, thus also strengthening the dictatorship of the majority over minorities: minorities can be better protected in smaller entities.[35]

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[31] This is indeed the opinion of the German Federal Constitutional Court, as expressed in the *Maastricht* ("*Brunner*") decision. BVerfGE 89, 155. *See* KAUFMANN, *supra* note 29, at 224 and 337. For comments, *see, e.g.*, Ress, *supra* note 28, at 219-20; THOMAS SCHMITZ, INTEGRATION IN DER SUPRANATIONALEN UNION, 94-6 (2001); Oeter, *supra* note 27, at 93-107; DANN, *supra* note 22, at 281.

[32] Ruffert, *supra* note 11, at 181-82.

[33] On this approach, *see* SCHMITZ, *supra* note 31, at 492; Schmitz, *supra* note 25, at 217; Ress, *supra* note 28, at 221-22.

[34] *See* Ress, *supra* note 28, at 229; Calliess, *supra* note 27, at 7. Based on the concept of a plurality of overlapping (regional, state, supra-state) peoples, Schmitz, *supra* note 25, at 219.

[35] *See* SCHMITZ, *supra* note 31, at 95.

3. Systematic Attribution of Procedures to Competences

With regard to attributing procedures to constitution-making and to the three plus one main categories of EU competence established above, none of the ways of providing legitimacy outlined in the previous section seems wholly apt for all constellations of EU legislation. Rather, the different types of legitimacy and the options for their combination should match the different categories of competence, and procedures should be attributed to competences accordingly. One can identify the following main constellations.

Cumulative maximum legitimacy appears appropriate where the citizens are affected by the relevant rules both in their individual identities and in their collective identities as citizens of their Member States. This occurs, in particular, where a new, overarching entity is created or amended without replacing the existing ties of the citizens with the Member States. The obvious example is the adoption of the CT itself.[36] Otherwise, the model developed above, with its categories of competence on the one hand, and its identification of supranational-integrative and intergovernmental-cooperative legitimation on the other, can guide the building of groups:

The first *supranational-integrative category* of EU competence (where an integrative approach is followed that seeks to establish direct relationships between the EU and the citizens within a subject area, and/or aims at a uniform, directly applicable regulation of a subject area by EU law) would appear to require an equally integrated, relatively direct legitimation provided by the EP and the Commission, replacing any indirect legitimacy provided via the Council.

Second, the intermediate category of *competence between integration and cooperation* requires joint legitimation with equal influence of the EU (EP and Commission) and the Member States (Council), but not necessarily the cumulated legitimacy of a constitution. Here EU legislation interacts with Member State legislation in certain sectors, and influences its content. Such legislation occurs in types of EU acts with more of an indirect effect on the citizens, but a direct effect on the Member States. This does not create an additional need for legitimation exceeding the one previously present in the Member State alone, and part replacement of Member State legitimation by EU legitimation in the case of qualified majority voting appears acceptable within a framework of joint legitimacy, although this allows for a direct impact on the Member States' legal orders.[37]

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[36] Differentiating further in this vein, Schmitz, *supra* note 25, at 228-234.

[37] *See* Weatherill, *supra* note 4, at 49.

The third, *least integrated category of competences*, where the EU may only support, complement or co-ordinate Member State policy, requires legitimation by the Member States to be predominant. If there are some common concerns which may be furthered by coordination, complementation or support, the Member States should still hold the decisive power via the Council, with only complementary, if any, legitimation provided by the EP.

Finally, with regard to the *separate category of implementing acts*, the executive institutions either at EU level or at Member State level may be authorized to legislate within the framework of the relevant CT article or the empowering act, rather than the typical legislating institutions, in particular, the European Parliament or Member State parliaments. Legal bases for such implementing legislation have requirements of legitimation different from the three main categories; in particular, the essentials will have already been legitimized in the delegating act; this does not need to be duplicated.

In summary, as long as there are such different categories of competence, there cannot be any general rule as to the optimal balance between legitimacy provided by the EP and legitimacy provided by the Member States via the Council. The perfect balance will have to be elaborated for each legal basis individually. What emerges clearly, though, is that the co-decision procedure will not always be the most democratically legitimate procedure: by uniformly providing for dual democratic legitimacy, it accords the Member States influence over the direct relationship of the EU with its citizens, or the EP and Commission influence where only or predominantly the Member States are concerned.

II. Transparency

Transparency is the second criterion which will be applied in assessing the manner in which the procedures are attributed to competences. Obviously, the easiest way to provide transparency would be to prescribe just one uniform legislative procedure involving a single legislating institution (parliament), as might be the case in a unitary state (not, however, in a federal state such as Germany).[38] However, if one accepts that at least some plurality of procedures is required in order to ensure democratic legitimacy in multi-level legislating systems, transparency must be achieved by alternative arrangements. The only way to achieve transparency whilst maintaining the current competences,[39] with their different needs for legitimacy,

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[38] *See* von Bogdandy et al., *supra* note 1, at 133-36.

[39] On the consequences of a strict delimitation of competences, *see* TRÜE, *supra* note 12, at 188 and 589; von Bogdandy and Bast, *supra* note 11, at 50; Mayer, *Competences – Reloaded? The Vertical Division of*

appears to be a limitation of procedures – or their basic versions – in number and complexity, laying these open as such, categorizing the types of competence systematically and consistently,[40] and matching the procedures equally systematically and consistently to the categories of competences. If the system becomes too complex, the present opaque state of affairs will continue.[41]

III. Efficiency

Another principle for the organization of legislative procedures is efficiency. First, this concerns speed: it must be kept in mind that 25 or more Member States cannot usually decide by unanimity, negotiating until full consent in every detail is achieved. Neither can the EP or national Parliaments be granted unlimited time to arrive at their decisions. Time efficiency can be improved, though, by procedural variety, and in line with the legitimacy requirements outlined above: co-decision may be needlessly time-consuming where supranational decision-making without the Council would provide sufficient legitimacy. Similarly, delegated autonomous legislation, i.e. legislation where the EP has already decided in favor of the rule in the piece of legislation which forms the basis for the proposed act, does not necessarily require full democratic legitimation of the implementing provisions, and can be organized in a more time-efficient way (without the EP or unanimity in the Council).

Furthermore, ensuring the quality of legislation requires the involvement of experts and thus adds to the complexity of procedures; the current Treaties and the CT provide for the consultation of several committees. In addition, at least as far as interactive law-making by the EU and its Member States is concerned, legal experts from all Member States must be involved in order to prepare a smooth transposition of EU acts into the Member State legal orders. Efficiency thus requires the participation of the Member States, via the Council and its supporting bodies of experts, such as the COREPER.

Powers in the EU after the New European Constitution, *supra* note 4, at 498; Udo Di Fabio, *Some Remarks on the Allocation of Competences Between the European Union and its Member States*, 39 COMMON MARKET LAW REVIEW (CMLR) 1289, 1298 (2002); Weatherill, *supra* note 11, at 46; Dann, *supra* note 4, at 36 (also regarding the matching consensual way of decision-making).

[40] On the defects of the CT here, *see* Mayer, *Competences – Reloaded? The Vertical Division of Powers in the EU after the New European Constitution*, *supra* note 4, at 496; TRÜE, *supra* note 12; Christiane Trüe, *EU-Kompetenzen für Energierecht, Gesundheitsschutz und Umweltschutz und die Position der Euratom nach dem Verfassungsentwurf des Konvents*, 59 JURISTENZEITUNG (JZ) 779 (2004).

[41] SCHMITZ, *supra* note 31, at 474-75.

IV. Preliminary Conclusions

It transpires from the above that legitimacy, transparency and efficiency cannot be achieved simultaneously to the maximum extent of each. Democratic legitimacy in the multi-level EU system cannot be perfect, and maximizing it requires variable and thus untransparent balances of procedural elements. As opposed to this, maximum transparency of procedures would require a reduction of procedures in number to just one, which would also have to be less complex. However, this would not satisfy the requirements of legitimacy and efficiency. On the other hand, democratic legitimacy requires transparency, as citizens can only legitimize, via their representatives, what they can understand.[42] Compromises between the three principles must thus be found.

D. Attribution of Procedures to Competences under the Constitutional Treaty

It now remains to assess whether the requirements identified in the previous section are met by the CT.

I. Democratic Legitimacy

As explained above, legitimacy regarding *supranational-integrative subject area competences* calls for a corresponding supranational-integrative EU legislative process. However, the relevant legal bases in the CT often provide for co-decision, to the effect that the Council maintains its control over legislation, albeit the control of individual Member States is mitigated by qualified majority voting. In addition, Member State influence will even be increased as a result of the formal involvement of national parliaments. Some justification for this may lie in the fact that it is the Member States' executives who have to ensure the administrative implementation and application of such law. Supranational EU legitimation would also appear most legitimate for acts on the direct relationship between the EU and its citizens, namely for the organization of the supranational institutions (EP and Commission). Indeed, specific procedures apply to *legislation* regarding the workings of *the European Parliament*: the EP has specific legislative powers, in particular, a right of initiative (Articles III-330, III-333, III-335 (4)). However, the Member States maintain a tight control over the emergence of a source of legitimacy potentially independent of their own: the Council's consent is required for the regulations and general con-

[42] *See* Tuts, *supra* note 4, at 346 and 356. On the conflict of these principles, *also* DANN, *supra* note 22, at 6-7.

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ditions and the rules on the temporary Committee of Enquiry.[43] Moreover, the Council decides on a uniform procedure for the elections to the EP by unanimity and with the consent of the EP.

Thus the CT fails to strengthen supranational-integrative legitimation and continues to rely on intergovernmental legitimacy where the former would be appropriate. This may, however, be justified by the – still existing – structural flaws of the EP, e.g., the lack of equality of votes in the EP.[44] In addition, considering the Member States' wish to remain masters of the Treaty, such an independent supranational development of the EU appears to be ruled out. A further strengthening of independent EU legitimation would arguably involve a change in the nature of the EU, which would begin to exist and legislate independently of the Member States, thus relegating their sovereignty to that of constituent states of a federal state.[45] In order to avoid this, and to ensure Member State control, administrative implementation by the Member States and legitimacy of the whole process of integration, co-decision or specific procedures with extra rights for the EP appear to be the maximum achievable at present.

As regards competence for *interactive law-making with a medium intensity of integration*, the joint democratic legitimation provided by the co-decision procedure is most appropriate. By providing for the latter the CT recognizes that joint legislation needs joint legitimation and expertise. However, there are exceptions: for example, tax harmonization is still a matter of unanimity voting within the Council in the consultation procedure: here the legislative procedure does not correspond to the need for combined legitimation.

For the *third, complementary category of competence*, co-decision does not appear to provide optimal legitimation. Rather, as argued earlier, procedures which allow more influence from the Council, and of the individual Member State within it, appear appropriate. This is because the influence of EU law on the citizen is usually indirect and only complementary, and the Member States retain the main responsi-

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[43] It was generally avoided to invest the EU with a legitimacy independent from the Member States, *see* von Bogdandy and Bast, *supra* note 11, at 36.

[44] *See* Dann, *supra* note 4, at 37-38; DANN, *supra* note 22, at 387; Calliess, *supra* note 27, at 18. Measured against state constitutions, *see* KAUFMANN, *supra* note 29, at 229.

[45] *See* Müller-Graff, *supra* note 10, at 196-8; *see also* Elisabeth Rumler-Korinek, *Kann die Europäische Union demokratisch ausgestaltet werden? Eine Analyse und Bewertung aktueller Beiträge zur "europäischen Demokratiedebatte"*, 38 EUROPARECHT (EuR) 327, 339-40 (2003). On the need for "consociational practices" to compensate for the lack of homogeneity and national subsidiarity, *see* Oeter, *supra* note 27, at 107-109.

bility for the relevant subject area. This is the case even where limited harmonization is permitted. Here full intergovernmental legitimacy would be catered for by unanimity rather than majority voting in the Council, whilst supranational legitimation would be required only to a limited degree. The latter may be needed in particular where the EU adds some supranational element to Member State activity, thus providing an overarching extra level of policy, possibly with a direct effect on the citizen, for example, by providing funds for student exchanges. For the latter co-decision, possibly with a unanimity requirement in the Council, appears appropriate based on the needs for legitimation. A concern which may explain the general move of complementary competences to co-decision was that citizens should perceive the EU, and particularly the EP, as something directly addressing their personal concerns. Personal engagement of the citizens is rather likely to occur in fields of such limited, complementary competences (environment, health, education, culture etc.) than in relation to the „cold" internal market.

Intergovernmental *cooperation* in CFSP is now at least deemed able to exist within a uniform, consolidated Treaty framework,[46] but, in order to preserve the intergovernmental character of CFSP, the CT provides for separate CFSP institutions and instruments as well as for a specific, rudimentary legislative procedure, which requires an initiative from a Member State or a proposal of the Foreign Minister (Articles I-40 and I-41). The Council, as well as the European Council, usually decides by unanimity. The European Parliament shall only be consulted on the main aspects and basic choices of CFSP, and be kept informed of how it evolves. Here the intergovernmental character of the competence is mirrored very exactly in the procedure.

The distinction between legislative and non-legislative acts in Article I-35 and the following provisions facilitates the use of different procedures for the adoption of implementing legislation.[47] The requirements of legitimacy are usually fulfilled as long as delegated and implementing legislation remains within the limits set by the CT articles or by the "proper" legislative acts detailing the essentials. Leaving legislation to the executive institutions Council and Commission, to the exclusion of the EP, appears appropriate for implementing and executive law-making.

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[46] J. Kokott and A. Rüth, *The European Convention and its Draft Treaty Establishing a Constitution for Europe: Appropriate Answers to the Laeken Questions?*, 40 COMMON MARKET LAW REVIEW (CMLR) 1315, 1322 (2003).

[47] Previously Vedel-Commission, EC-Bull. Suppl. 4/1972; Art. 34 and following provisions; Draft Treaty 1984 of the EP; Commission, EC-Bull. Suppl. 2/1991, p.127.

II. Transparency

Transparency has become an explicit requirement of the workings of the EU institutions, particularly regarding legislation (Article I-50). Moreover, an attempt has been made to improve transparency of the legislative process by making co-decision the "ordinary" procedure. However, rather than providing clarity this is deceptive: as shown above, considerable procedural diversity continues to exist.[48] If at all, the CT has made at best marginal progress in clarifying for the citizen "who does what in Europe." At least the number of procedures has been slightly reduced; however, their complexity has rather increased due to the right of petition and the formalization of the role of national parliaments.[49]

The lack of transparency of the legislative process is, however, also due to the close institutional links between the EU and its Member States: the Council is a Union institution, but consists of representatives of the Member States.

III. Efficiency

By extending the scope of the co-decision procedure the CT does not always improve time-efficiency. Legitimation by the Council, as well as the formal involvement of national parliaments, will nearly always be required under the CT, even where democratic legitimacy could be ensured appropriately by the EP alone.[50] However, the control of the individual Member State is mitigated by qualified majority voting, which ensures some efficiency, increasingly so due to the attribution of co-decision to further legal bases.[51]

A compromise between unanimity and qualified majority voting may also improve time efficiency: the "emergency brake system" introduced in the fields of social security (Article III-136 (2)) and criminal justice (Articles III-270 (3), III-271 (3)) appears to be a more efficient alternative to unanimity. It allows for a move from unanimity to majority voting, because it leaves to the Member States a last resort by which they can protect domestic systems regarded as particularly vulnerable. In

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[48] More optimistic Kokott and Rüth, *supra* note 46, at 1324; Johann Schoo, *Finanzen und Haushalt*, *in* DER VERFASSUNGSENTWURF DES EUROPÄISCHEN KONVENTS 66 (Jürgen Schwarze ed., 2004).

[49] *See* Calliess, *supra* note 27, at 28.

[50] Pointing to the irreconcilability of exclusive competence and the cumbersome decision-making system, *see* von Bogdandy and Bast, *supra* note 11, at 22-3.

[51] *See* Tuts, *supra* note 4, at 355.

addition, the refining of majority voting by the 65-55-%-rule, and the rule on the minimum number of States to make up a majority or a blocking minority, may have facilitated the move of some legal bases from unanimity to qualified majority voting. This appears to provide considerable protection for the individual states, whilst preserving efficiency and furthering equality in the representation of the citizens, and avoiding the blockade of the decision-making process. This improvement in time efficiency is limited to those legal bases which would otherwise continue to require unanimity in the Council; whether the co-decision procedure itself has become more time-efficient remains open to doubt.[52]

The legislative-non-legislative divide with a facilitated procedure for implementing and executing legislation is to be welcomed as an improvement in efficiency. It would indeed make democratic legitimacy ineffective and banal if involvement of the EP, the national parliaments, and the Council and Commission, were required regarding all the details of implementation. The introduction of this distinction has also opened up the possibility of moving the essentials of Common Agricultural Policy into co-decision, as it has removed the argument against that stemming from the number of purely implementing acts on the same legal basis (currently 37 EC) as legislation on the essentials.

E. Conclusions and Prospects

The plurality of the legislative process continues under the CT. However, this plurality is justified to some extent, as far as it responds to the diverse needs of legitimacy and efficiency in relation to the different legal bases of EU competence, which authorize legislation ranging from the supranational-integrative to the intergovernmental co-operational. However, the CT fails to systematically attribute procedures to competences corresponding to their intensity of integration, and their ensuing different needs. Instead, the attribution of procedures to competences still appears to be the result of political pressure, towards increasing the influence of the EP and, at the same time, maintaining considerable Member State control over legislation. Thus the attributed procedures do not always match the character of the competences; it constitutes a certain *venire contra factum proprium* if a supranational competence is vested in the Union whilst leaving the legislative procedure intergovernmental. Even so, to some extent the procedures match the intensity of integration provided for by the legal basis, especially regarding the intermediate category of competence between integration and co-operation, and regarding implementing legislation.

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[52] Regarding the early warning mechanism, *see* PERNICE, *supra* note 11, at 22-4; Weatherill, *supra* note 4, at 31-33.

Thus, even if more by accident than design, some reasonable patterns emerge in line with the principles of legitimacy, transparency and efficiency. The attribution of procedures to competences thus answers the preamble's call, repeated by I-8, to be "united in diversity." However, the elements of unity, incorporated in the legal bases for supranational-integrative legislation, could have been supported further by adding a more supranational legislative procedure for the matching competences. Similarly, diversity within the EU could have been better protected by leaving more influence to the Member States, also via the Council, regarding the third category of competence.[53]

[53] On the call of the CT for its own continuing reform, *see* Bast, in this volume.

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