Jurnalul de Studii Juridice

Journal of Legal Studies

ISSN: 1841-6195 (print); e-ISSN: 2067-8509 (electronic)

Covered in: Index Copernicus, Ideas RePeC, EconPapers, Socionet, CEEOL

LEGISLATIVE POWER OF THE COUNCIL OF THE EUROPEAN UNION

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Jurnalul de Studii Juridice, Year IX, No. 1-2, June 2014, pp. 21-41

Published by:

Lumen Publishing House

LEGISLATIVE POWER OF THE COUNCIL OF THE EUROPEAN UNION

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Abstract:

The definition of the classic version of state powers, established by Locke and Montesquieu, is well known: the legislative, the executive and the judicial. The European Union is not yet a state entity and does not have a constitution, in which the problem of realization of these powers to be quite complex. The literature states that the fundamental institutions of the European Union would build on the three powers: the European Parliament and the Council of the European Union would provide the legislative, the European Commission would apply to the executive and the Court of Justice of the European Union would be the judiciary. The Lisbon Treaty, however, avoid driving to highlight these powers of European leadership and administration and its texts states that there are "functions" of these institutions and not "powers." For instance, in the content of the Lisbon Treaty, the Council of the European Union and the European Parliament have a "legislative function" in European institutional leadership and do not represent a „legislative power". This article tries to show that the "legislative function" of the Council of the European Union is, in fact, a true "legislative power", because in this institution there are organizational structures, procedures and legal instruments for implementing this legislative power.

Keywords:

power, legislative, Council of the European Union, co-decision, European operating rules, voting rules, ordinary legislative procedure.

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Although the Council of the European Union[2] is the main European institution having a policy making character, it manifests legislative power effects in organization and operation, sharing them with the European Parliament. But why and how the Council manifests legislative power? To approach this issue the following hypotheses can be taken into consideration: the institutional structure of the Council allows for asserting its legislative character; the Council has proper legislative activities and precise tools for asserting its legislative power.

1. Organizational foundations of the Council of the European Union in asserting its legislative power

The Council of the European Union (EU), usually referred to as 'the Council', is a European institution. Council has the status of legislative body, being in fact the European Union legislature together with European Parliament. In most cases, the Council legislates under the proposals submitted to the European Commission. However, the Council may request the Commission to submit all proposals for its own needs. The Council of the European Union[3] is the fundamental European intergovernmental institution of decision which meets representatives of the Governments of the member states, at ministerial level and with professional skills in particular fields. Thus, each member state participates in the preparation of work of the Council and in the process of making decisions by Ministers of the member states in meetings and Board meetings. „The Council is generally regarded as an intergovernmental institution, making it the focus of those who regard the member states as being in ultimate control of the integration process."[4]

[2] The literature uses the term abbreviated to "Council", thereby understanding the European institution "The Council of the European Union". Specifically, after the entry into force of the Maastricht Treaty (adopted on 7 February 1992 and entered into force on 11 November 1993), the term "Council" was called "the Council of the European Union", a name taken by the Lisbon Treaty, which entered into force on 1 December 2009.

[3] Council headquarters are in Brussels, Justus Lipsius building, its meetings are taking place several times per month (April, June and October meetings held in Luxembourg). Formal positions of the Council are published through press after the meetings known as "conclusions".

[4] Thomas Christiansen, The Council of Ministers. Facilitating interaction and developing actorness in the EU, în Jeremy Richardson, *European Union. Power and policy-making*, Routledge, London, 2006, p. 148.

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This reality leads to understanding what is „common" within the European Union and what is „national interest" for each member state.

But what is the legislative power of the Council of the European Union and which are its organizational foundations for a real affirmation of that power? Regarding the concept of "legislative power" the literature offers many explanations from historical, political and legal point of view.

In the *Social Contract*, Rousseau portrays a respectful exception of sovereignty: the legislature is "in all respects an extraordinary man in the state (...) by his genius," and its strength it comes from "his great soul (...) real miracle to prove his mission."[5] The transfer of legislative powers in favor of the European Union breaks the "monopoly of general interest" of the national legislature.

Speaking of the "legislator" of the European Union, this is not a form of state government. Far from any spirit of provocation, the affirmation of "legislator" of the European Union reflects primarily the consolidation of the community legal order and a system of separation of powers.[6] The articulation of a legal and institutional order within the Union sits the profile of the European legislation. The identification of the legislature of the European Union represents an original relation between the law and the European citizen;[7] the law has the role of "directive" and "regulatory"[8] and the European citizen, bearer of sovereignty, does not preclude the achievement of institutional and legal order of the Union. In this case, the articulation of these orders is the "legislator" of the European Union as a complex legal actor.[9]

European Union Council is the representative institution of the member states, the place where they discuss, negotiate and resolve important issues concerning European realities, based on democratic forms and methods of management.[10] The Council is invested with political decision in relation to the other European institutions, especially

[5] J.-J. Rousseau, *Du Contrat social*, chapitre VII du livre II, in *Œuvres complètes*, Bibliothèque de la Pléiade, p. 241.

[6] Thomas Schmitz, Le peuple européen et son rôle lors d'un acte constituant dans l'Union européenne, RDP n° 6, p. 1709-1742.

[7] François Saint-Bonnet, *Loi*, in Denis Allan, Stéphane Rials (dir.), *Dictionnaire de la culture juridique*, Paris, PUF, 2003, pp. 962-964.

[8] Simone Goyard-Fabre, *Loi*, in Philippe Raynaud, Stéphane Rials (dir.), *Dictionnaire de philosophie politique*, Paris, PUF, 2003, p. 420-421.

[9] Béligh Nabli, La figure du „législateur" de l'Union européenne, in *Revue française de droit constitutionnel*, 4/ 2007 (n° 72), p. 2.

[10] http://europa.eu/about-eu/institutions-bodies/council-eu/index_fr.htm

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the European Parliament. But between politics and law are mutual interactions. "Formal side of politics is revealed as rigorous law. Considered the foundation of the social body, the law is a concentrated expression of the policy. By law and policy, the man tries to reduce uncertainty about the future, and the rule of law, seen as an expression of a policy group that seeks to introduce some type of appropriate relations that correspond to a horizon of political values."[11] Thus, the politics correlates with the law in order to put in action political and social values in a human society.

A robust approach to the legislative power of the European Union is required for understanding the separation of powers within the European Union.[12] The "legislator" of the European Union is not a fiction. "European law" is the product of the agreement of the wills of the partial legislative bodies, together forming the complex legislative body of the European Union. Also, the identification of the European legislator should be discovered in the relations between member states and the European Union. The willingness of member states contributes to the formation of the will of the European Union that expresses its original legislation.

A "formal" approach to the European legislative power involves theoretically the question: who is the actor of the legal acts? This question is echoing the problem of the separation of powers within the European Union. Historically, the principle of separation of powers is closely linked to the emergence of modern constitutionalism and has favored the state model framework. There is an institutional particularism of the European Union. It is a *sui generis* system that is not based on the classical scheme of separation of powers as defined by Locke and Montesquieu. However, the separation of powers can be seen as a concept of theoretical analysis or as an ideal type of distribution mechanisms of the legislative function of the European Union. On this point, the exercise of the legislative power of the European Union by a complex organ confirms the dissociation between function and legislative body.

The increased workload of the Council makes the exercise of the management of legislative power more complex and difficult, „and the Council is obliged to act from time to time like a second legislative

[11] Cristian Pîrvulescu, *Politici şi instituţii politice*, Editura Trei, Bucureşti, 2000, p. 19.
[12] Guy Braibant, Qui fait la loi ?, în *Pouvoirs*, n° 64,1993, p. 45-46.

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chamber rather than a ministerial directorate."[13] For the sake of functional simplification, the need to establish a Legislative Council was discussed in the framework of the European constitutional debate. For example, the *Convention on the Future of Europe* proposed to entrust the legislative function of the European Union to a single Council formation: the "Legislative Council." The proposal of the Convention revolved around the idea that any legislative work should be conducted in a specific Council Membership, because the European Union states results in a demonstration of their wills in the procedures for the development and adoption of Community legislation. The willingness of member states is at the heart of the Community legal order. The member states can be seen in the exercise of the legislative power through the participation of representatives of states in the Council of the European Union. The Council of Ministers is an institutional framework laid out in the expression of the legislative power of the States. However, the Council of Ministers may claim to be the co-author of legal community instruments and the basic co-performer of this function.

The willingness of member states is fundamental in structuring the Community legal order. The essence of European integration is driven by an intergovernmental logic. Also, the participation of state bodies in the development of primary and secondary community law is a complex activity of the member states of the European Union.[14] In this sense, the "participation" of the member state to the formation of Union law is primarily a political project. The Council of the European Union is intended to ensure the representation of member states. He is also a co-holder institution of the legislative power of the European Union, and co-author of Community legal acts.

In conclusion, the identification of the profile of the Council as the European legislator improves the legal institutional architecture of the European Union. The consolidation of the principle of separation of powers has a fundamental symbolic value, a very important step in the democratization of the European Union. This movement carries a problematic European legal normative order. The institutional balance of the European Union is linked to the hierarchy of norms within the

[13] Andreas Maurer, The Legislative Powers and Impact of the European Parliament, JCMS 2003, volum 41, nr. 2, p. 227.
[14] Alain. Pellet, Les fondements juridiques internationaux du droit communautaire, RCDAE, 1994, vol. 5, t. II, p. 270-271.

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Community legal order. The issue of the distinction between legislative action and executive action is the requirement of division of powers in "an European community of law." In the interest of transparency, it is therefore important to determine the best legal procedures, in terms of legitimacy and efficiency of the legislative power assigned to the various bodies of the European Union. The idea of combining the concept of the legislator in the European Union is not neutral. The initiative is part of the rebuilding movement of constitutional law. In this sense, it can discuss about the Treaty of Lisbon on par. 1 of Art. 16, that defines the powers of the Council in the following terms: „The Council shall, jointly with the European Parliament, exercise legislative and budgetary functions. It shall carry out policy-making and coordinating functions as laid down in the Treaties.„ Regarding the members of the European Union, Art. 16 para. 2 of the Lisbon Treaty contains clear statements: „The Council shall consist of a representative of each Member State at ministerial level, who may commit the government of the Member State in question and cast its vote.„

The Council is organized around four organizational structures: the Council configurations, the Presidency, the Permanent Representatives Committee (COREPER) and the General Secretariat.[15]

The Council configurations are very important for the functioning of the Council of the European Union[16], according to the subject matter dealt with. Each configuration consists of a ministry representative from each member state, who is empowered to commit his government. Under the Lisbon Treaty, Art. 16 para. 6, the most important formats are two in number: the General Affairs Council (GAC) and the Foreign Affairs Council (FAC).

The General Affairs Council ensures the work of the different Council configurations. „The Council shall meet in different configurations, the list of which shall be adopted in accordance with Article 236 of the Treaty on the Functioning of the European Union. The General Affairs Council shall ensure consistency in the work of the different Council configurations. It shall prepare and ensure the follow-up

[15] *Council Decision 2009/937/EU* of 1 December 2009 adopting the Council's Rules of Procedure.

[16] It is recommended do not make confusion between the Council of the European Union, the European Council (which is an EU institution attended by the Heads of State and Government, about four times a year to discuss the political priorities of the Union) and the Council of Europe (which is neither an EU body).

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to meetings of the European Council, in liaison with the President of the European Council and the Commission. The Foreign Affairs Council shall elaborate the Union's external action on the basis of strategic guidelines laid down by the European Council and ensure that the Union's action is consistent." During the sessions of the General Affairs Council (GAC), the Council examines the folders (dossiers) referring to several EU policies, such as negotiations on EU enlargement, preparation of multi-annual budgetary perspective Union or institutional and administrative tasks. It coordinates the preparation of European Council meetings and actions taken after those meetings. The Council also acts as the coordinator of work in different policy areas carried out by other Council configurations and examines records entrusted by the European Council. The article 3 of the 9th Declaration, annexed to the Treaty of Lisbon, better clarify this topic: „The General Affairs Council shall ensure consistency and continuity in the work of the different Council configurations in the framework of multiannual programmes in cooperation with the Commission. The member states holding the Presidency shall take all necessary measures for the organisation and smooth operation of the Council's work, with the assistance of the General Secretariat of the Council."

Foreign Affairs Council develops the Union's external action, in accordance with the strategic guidelines established by the European Council and ensures consistency of European Union action. Foreign Affairs Council is chaired by the High Representative of the European Union for Foreign Affairs and Security Policy.

With the entry into force of the Lisbon Treaty on 1 December 2009, the Council meets and operates in ten different formats (configurations) covering all EU policies, depending on the topics discussed:[17] General Affairs; Foreign Affairs; Economic and Financial Affairs; Justice and Home Affairs; Employment, Social Policy, Health and Consumer Affairs; Competitiveness (Internal Market, Industry, Research and Space); Transport, Telecommunications and Energy; Agriculture and Fisheries; Environment; Education, Youth, Culture and Sport. It is for each member state to determine the way in which it is represented in the Council. Several Ministers may participate as full members of the same Council configuration. The Foreign Affairs Council is responsible for:

[17] In the '90s, there were 22 Council configurations, their number was reduced to 16 in June 2000 and to 9 in June 2002.

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Common Foreign and Security Policy (CFSP); European Security and Defence Policy (ESDP); Justice and Internal Affairs; Common Commercial Policy (CCP); development cooperation and humanitarian aid.

In security and defense matters, for example, national governments exercise independent control over these issues, but they cooperate together to develop a Common Security and Defence Policy. The Council is the main part of this governmental cooperation. The European Union does not have any army. However, to enable it to respond more quickly to international conflicts and natural disasters, some EU member states providing troops to a rapid reaction force, whose role is limited to humanitarian action, disaster relief and peacekeeping.

Justice and home affairs (JHA) has a strong influence on the lives of European citizens and represents the legal policy according to the Lisbon Treaty. Consequently, the measures in these areas adopted at the EU and national level are subject to review by the Court of Justice in Luxembourg. In the field of justice and home affairs there are specialized bodies. Policies related to the area of freedom, security and justice are implemented by the member states and the EU institutions, such as: FRONTEX, EUROPOL, EUROJUST, the Fundamental Rights Agency of the European Union, the European Asylum Support Office, the European Monitoring Centre for Drugs, the European Police College.

The Council of Justice and Home Affairs meets approximately every two months, with the ministers of justice and interior ministers to discuss the development and implementation of cooperation activities and common policies in this area. European citizens should also have equal access to justice across Europe. Ministers of justice and interior are working together to ensure the borders'order of the EU and the fighting against terrorism and organized crime.

The Presidency of the Council of the EU is a very important European institutional structure. The Foreign Affairs council is chaired by the High Representative of the Union for Foreign Affairs and Security Policy. The Presidency of the other configurations of the Council is held by groups of three member states alternating every 18 months. Each member of the group holds the presidency on a rotating basis, except in

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relation to foreign affairs, for a period of six months.[18] During that semester, the Presidency chairs the meetings at all levels and develops negotiations and guidelines for adoption of decisions by the Council. To promote the continuity of the work Council, the Presidency cooperates closely in groups of three presidents (Troika), the last, the present, the future.

The Presidency is the driving force in carrying out the Council's work. The group of three member states and the High Representative that are to hold the Presidency of the Council configurations must present a draft programme of Council activities. The draft must then be approved by the General Affairs Council. The Presidency must also draw up the provisional agenda for the meetings scheduled during its term of office.

The Presidency also ensures that the rules of procedure are properly applied and that discussions are conducted in an official manner. It can also, if necessary, restrict the participation numbers, determine the duration of discussions and request common positions and written contributions. It can also represent the Council before the European Parliament.

The main responsibilities are set out in the *Rules of the Council*[19] containing 28 articles, accompanied by 6 annexes, such as: Council convened its own initiative or the initiative of the Commission or one of its members; setting the agenda for the meetings; decision to a vote and drafting the minutes; mediation in debate; identify acceptable compromise.

The COREPER (Committee of Permanent Representatives), committees and working parties are main organizational structures of the Council. The COREPER is responsible for preparing the work of the Council and for carrying out the tasks assigned to it by the Council. It is chaired by the representative of the member state which holds the Presidency of the Council. It ensures the consistency of the EU's policies and actions and sees to it that the following principles and rules are observed: the principles of legality, subsidiarity, proportionality and providing reasons for acts; the rules establishing the powers of Union

[18] Order of Council Presidencies was established by the *Council Decision of 1 January 2007*. Romania will have the EU presidency in the period of July to December 2019. Official Journal of the European Union (L 1/11 (4.1.2007).

[19] http://europa.eu/legislation_summaries/institutional_affairs/institutions_bodies_and_agencies/l14576_ro.htm

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institutions and bodies; the budgetary provisions; the rules on procedure, transparency and the quality of drafting (the Council's legal service is responsible for checking the drafting quality of legislative acts).

The COREPER operates under art. 240 par. 1 T.F.U.E.: „A committee consisting of the Permanent Representatives of the Governments 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 latter. The Committee may adopt procedural decisions in cases provided for in the Council's Rules of Procedure." The COREPER must examine in advance all the items on the agenda for a Council meeting. It must endeavor to reach an agreement, which is then submitted to the Council for adoption. If an agreement is reached, the item is included in the agenda for approval by the Council without discussion. The COREPER may set up committees or working groups to carry out preparatory tasks or studies.

The COREPER meets Permanent Representatives of the Member States. The need for consistency of decisions depends on the involvement of this committee in different folders. All the work of the Council are prepared and coordinated by the Committee of Permanent Representatives (COREPER), made up of Member States' ambassadors to the European Union, being considered permanent representatives of member states working in Brussels and their assistants. The work of this committee is prepared by more than 150 committees and working groups composed of delegates from member states. All these committees and working groups resolve technical issues and send working files to the Committee of Permanent Representatives (COREPER), ensuring consistency of work and resolving technical issues and politics before the files are transmitted to the Council. Among them, some committees have specific role to coordinate and provide expertise in a particular field, such as, the Economic and Financial Committee, the Political and Security Committee (responsible for monitoring the international situation, the common foreign and security policy, the political oversight and strategic leadership in crisis management operations) and the Steering Committee tasked with preparing police and judicial cooperation in criminal matters. The COREPER is the central mechanism of normative functioning of the European Union, its activity being focused on representation the interests of member states. The COREPER is the pivotal body of the European Union which has an advisory role in decision-making. This committee

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represents the established place of dialogue between member states Ambassadors, the support and preparing basic structure for the meetings of the Council of Ministers, exerting a preventive control over its agenda. Competent in all matters dealt with by the European institutions, including foreign policy issues and the common security and defence policy, the COREPER plays an important role in coordinating missions and crisis management operations of the European Union.

The General Secretariat assists in organizing, coordinating, monitoring and ensuring the coherence of the Council's work, as well as in implementing its programme of activities. It is placed under the responsibility of the Secretary-General, appointed by the Council acting by qualified majority. The Secretary-General also draws up the draft estimate of the Council's expenditure and administers its appropriations.

In conclusion, the Council of the European Union has a genuine legislative power, supported and assisted by the important and relevant organizational foundations. The Community method places the responsibility for the conduct of European policy holders of three different instances legitimacy, but acting jointly in decision-making: the European Commission, the EU Council and the European Parliament. The institutional triangle is based on a triple legitimacy: the general community interest, the member states and the European citizens. The relations between these three institutions have evolved in the treaties, especially with the voting procedure in the Council of the EU and the extent powers of the European Parliament. This institutional triangle should not overshadow the advisory bodies such as the Economic and Social Committee and the Committee of the Regions. In addition, since the entry into force of the Lisbon Treaty, national parliaments are formally involved in the decision process. The normative function is assumed by the EU Council and the European Parliament on a proposal from the Commission. The Council of the EU fulfills both a legislative power shared with the Parliament, and an executive power shared with the Commission.

2. Legislative activities of the Council of European Union

The rules of procedures concern the functioning and organisation of the Council of the EU, which is granted the power of self-regulation by Article 240(3) of the Treaty on the Functioning of the European Union: „The Council shall act by a simple majority regarding procedural matters

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and for the adoption of its Rules of Procedure." The European Union Council's legislative activities include: operating rules, voting rules, the ordinary legislative procedure (co-decision), special legislative procedures (consultation and approval), documents prepared and publicity.

Operating rules show the functioning of the Council. In this case, the Council meets when convened by its President. The dates for meetings are made known by the Presidency seven months before the beginning of its term of office. The Council has its seat in Brussels, but holds its meetings in Luxembourg in April, June and October. Meetings can be held elsewhere by a unanimous decision of the Council or of the COREPER.

The provisional agenda for each meeting is drawn up by the President. The final agenda is adopted by the Council at the beginning of the meeting. It is divided into two parts: „legislative deliberations" and „non-legislative activities." The quorum must be checked before a vote is taken. It requires the presence of a majority of members.

The Council votes on the initiative of its President. Voting is in the order laid down by the Council acting unanimously, beginning with the member who, according to that order, follows the member holding the office of President. Acts of the Council on urgent matters may be adopted by a written vote. It is for the Council or the COREPER to decide unanimously to use that procedure. The President may also propose if all the members of the Council agree.

Voting rules are clearly defined in the organization and functioning of the Council. The Council shall adopt decisions by the vote of the ministers of the member states. There are three types of voting, according to the provisions of the Lisbon Treaty on this topic: simple majority (for procedural decisions), qualified majority (a weighted voting system based on the number of inhabitants of the member states, for the adoption of various decisions on domestic economic affairs and trade) and unanimity (foreign policy, defence, judicial and police cooperation, and taxation) and constructive abstention. The Council shall meet in public when it deliberates and votes on a legislative proposal or when there is a general debate.[20] Instead, the debates in areas without legislative (foreign affairs), they are not public. Number of votes of each member

[20] Public Works Council meetings can be followed in real time on the website: video.consilium.europa.eu. Also you can watch how a minister of a country expresses the position of that country in a European problem.

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state is set out in the Treaties, stating where they need a simple majority, qualified majority or unanimity.

In case of *simple majority*, the Council shall decide on the basis of a proposal by the European Commission in cooperation with the European Parliament, or by the consultation procedure (agriculture, judicial and police cooperation, taxation) or co-decision (internal market). Thus, in terms of the art. 238 par. 1 T.F.U.E., decision can be taken by simple majority: „Where it is required to act by a simple majority, the Council shall act by a majority of its component members."

A *qualified majority* is achieved when the following conditions are met: most member states give their consent (in some cases with a two-thirds majority); at least 260 votes are cast in favor of the proposal, from a total of 352 votes. In addition, each member state may require confirmation that the votes in favor represent at least 62 % of the total population of the European Union. If this criterion is not met, the decision cannot be taken. The distribution of votes on member state is following: Germany, France, Italy, United Kingdom (29 votes); Spain, Poland (27 votes); Romania (14 votes); Netherlands (13 votes); Belgium, Czech Republic, Greece, Hungary, Portugal (12 votes); Austria, Bulgaria, Sweden (10 votes); Croatia, Denmark, Finland, Ireland, Lithuania, Slovakia (7 votes); Cyprus, Estonia, Latvia, Luxembourg, Slovenia (4 votes); Malta (3 votes).

The par. 3 of Art. 16 of the Lisbon Treaty also provides: „The Council shall act by a qualified majority except where the Treaties provide otherwise." But par. 4 of this article shows: „As from 1 November 2014, a qualified majority shall be defined as at least 55 % of the members of the Council, comprising at least fifteen of them and representing member states comprising at least 65 % of the population of the Union. A blocking minority must include at least four Council members, failing which the qualified majority shall be deemed attained. The other arrangements governing the qualified majority are laid down in Article 238(2) of the Treaty on the Functioning of the European Union." In the same spirit, par. 5 presents: „The transitional provisions relating to the definition of the qualified majority which shall be applicable until 31 October 2014 and those which shall be applicable from 1 November 2014 to 31 March 2017 are laid down in the *Protocol on transitional provisions*."

The continuous expansion of areas subject to qualified majority voting and the procedure of co-decision calls into question the claim of

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the member states to avail themselves of the quality of co-legislator. Meanwhile, it is necessary to develop the field of application of qualified majority in order to reduce the effect of the veto of the member state. The majority rule forced the minister to negotiate on issues where disagreement persists with other member states. The generalization of qualified majority voting does not mean that the decision the Council makes the economy of a consensus, but rather that the consensus occurs otherwise.[21] The qualified majority illustrates this concern of member states, including the fact that the decision-making is closely related to weighted voting system. In this context, „Where a vote is taken, any member of the European Council may also act on behalf of not more than one other member. Article 16(4) of the Treaty on European Union and Article 238(2) of this Treaty shall apply to the European Council when it is acting by a qualified majority. Where the European Council decides by vote, its President and the President of the Commission shall not take part in the vote. Abstentions by members present in person or represented shall not prevent the adoption by the European Council of acts which require unanimity."

The *unanimity rule* provides precisely the negative power to the member state to prevent the adoption of a measure by the Council. The unanimous vote preserves the right to veto of individual member state. The member state therefore has a power of co-decision to act when unanimity in the Council is required. In the logic of diplomatic conferences, the unanimity rule allows the member state to block the adoption of the act and the government's position is necessarily taken into account. The adoption of the act requires that the individual will of the state did not object. In this sense, the voting procedure also protects the sovereignty of the state.

The decision should be based on consensus, even in cases where a qualified majority would be sufficient, when a member state considers its interests particularly concerned by the measure at issue and in a reasonable time. This "agreement or disagreement" has no legal force: it does not endorse any international agreement or constitute an act *sui generis* of the Council of Ministers. Where, in the case of decisions which

[21] Jacqueline Dutheil de la Rochère, Fédéralisation de l'Europe ? Le problème de la clarification des compétences entre l'Union et les États, in O. Beaud (dir.), *L'Europe en voie de Constitution, Pour un bilan critique des travaux de la Convention*, Bruxelles, Bruylant, 2004, p. 319.

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may be taken by a majority, the fundamental national interests of one or more member states are involved, the governments strive to reach compromise solutions.

In paragraph 4 of art. 42, Treaty of Lisbon requires unanimity voting rule in security and defence policy, as follows: „Decisions relating to the common security and defence policy, including those initiating a mission as referred to in this Article, shall be adopted by the Council acting unanimously on a proposal from the High Representative of the Union for Foreign Affairs and Security Policy or an initiative from a member state. The High Representative may propose the use of both national resources and Union instruments, together with the Commission where appropriate."

For democratic principles of operation of the European Union, the Treaty of Amsterdam introduced *constructive abstention rule* to allow a member state to implement a decision, if national interests are not affected. However, the Council votes through a qualified majority all actions and common positions based on a common strategy. For decisions with military or defence implications, these exceptions are not implemented.[22] Unanimity gives a veto to each member state, being understood that „Abstentions by Members present in person or represented shall not prevent the adoption by the Council of acts which require unanimity." (art. 238 para. 4 TFEU).

Since the Treaty of Lisbon, there is an ordinary legislative procedure (co-decision) and two special legislative procedures (consultation and approval). With the Lisbon Treaty, the co-decision procedure has become the ordinary legislative procedure (Article 294 TFEU). The ordinary legislative procedure is adopted on a proposal from the Commission of a *regulation, directive or decision* by a qualified majority vote in the Council of the European Union and co-decision with the European Parliament. Established by the Treaty of Maastricht (1992), the co-decision procedure allows joint adoption by the Council and the European Parliament, of a legislative proposal. The Treaty of Lisbon makes this procedure the common law procedure, now renamed ordinary legislative procedure. In this case, European Parliament becomes a real co-legislator. The ordinary legislative procedure gives the same weight to the European Parliament and the Council of the European Union on a

[22] Franck Petiteville, *La politique internationale de l'Union européenne*, Paris, Les Presses de Sciences Po, 2006, pp. 48-49.

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broad range of areas (transportation, economic governance, immigration, energy, transport, environment, and consumer protection). The vast majority of European laws are made jointly by the European Parliament and the Council.

The proposal may be discussed in two readings in each institution; in case of disagreement, a conciliation committee composed of representatives of the Parliament and the Council meets to try to find a compromise. There are three readings of the *ordinary legislative procedure*. First reading: the Commission presents a legislative proposal to the European Parliament and the Council simultaneously; the European Parliament adopts amendments and submits them to the Council; the Council agrees with the result of the first reading in Parliament: legislation adopted. If not adopted, the second reading will follow: the Council does not accept the Parliament's vote, but it adopted a common position. The European Parliament confirms the amendments not included in the common position. The Council agrees: legislation approved. Either the Council rejects: the Conciliation Committee (25 members of the Parliament and 25 members of the Council) shall be convened to establish a link between the different positions. The European Parliament rejects the common position: legislation rejected. Third reading: The Conciliation Committee adopts a joint project based on the common position and the European Parliament amendments on the second reading. If the Council and the Parliament approve the law, the process is stopped. If the Conciliation Committee fails a common project: the European Parliament can definitively reject the proposal.

Special legislative procedure applies in specific cases provided by the Treaties, and that is the European Parliament with the participation of the Council of the European Union shall adopt regulations, directives or decisions. In some cases, this procedure provides that the Council of the European Union shall act unanimously and the role of Parliament is limited to a consultation, or that its participation is not required. In the consultation procedure (or single reading), the European Parliament gives its opinion on the proposed legislation, which is then adopted by the Council. This procedure is now applicable in a limited number of areas of law, such as internal market and competition law, or to international agreements within the framework of the European Union external action. The approval applies in particular to the Accession Treaties, the association agreements or other agreements with third countries. This

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procedure is also used in the adoption of new legislation against discrimination and this gives a veto to the European Parliament in case of application of the general legal basis under Article 352 of the Treaty on the functioning of the European Union (TFEU).

The European legislative function has two main components: a.) the primary law (treaties which define the fundamental rules on which the European Union is suing; they define the objectives of the EU, the rules of functioning of the European institutions, follow the procedures for making decisions and the relationships between the EU and the member states); b) the secondary law (the European Union institutions may adopt under Article 288 of the Treaty on the Functioning of the European Union (TFEU), legislative acts such as *regulations, directives, decisions or recommendations or opinions*, deriving from the principles and objectives defined in the Treaties.) The task of adopting legal instruments (regulations, directives or decisions) is assumed: the European Council that drives the broad guidelines, the Commission takes the legislative initiative, the Council of the EU decided to adopt legislation, the European Parliament, co-legislator with the Council of the European Union and even the Court of Justice case law which requires states.

The regulation is defined in Article 288, para. 2 TFEU: "A regulation shall have general application. It shall be binding in its entirety and directly applicable in all member states." Regulation is the most complete and most effective measure in the range of instruments that are available to the institutions of the Union. It is distinguished by two properties that are quite exceptional in international law: its ability to create the same law throughout the European Union regardless of frontiers, being equally valid and in full in all member states. Thus it is forbidden for member states to apply the provisions of incomplete regulation or to make a selection among these; speaking about direct applicability in all member states. This means an automatic validity in the EU and it is able to confer rights and impose obligations on member states, their bodies and individuals. The regulation shall have general application. Having a normative nature, the regulation addresses to categories of persons envisaged in a general terms. The author of a regulation may be the European Parliament and the Council, the institution that follows a special legislative procedure.

According to Article 288, para. 3 TFEU, „A *directive* shall be binding, as to the result to be achieved, upon each member state to which

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it is addressed, but shall leave to the national authorities the choice of form and methods." The Directive constitutes an instrument of indirect legislation. It seeks to reconcile the search for the essential unity of EU law and the preservation of the diversity of national circumstances. It is addressed to the member states, which sets a result to be achieved but that it leaves the choice of form and methods they adopt to achieve the objectives of the Union in the framework of their internal legal order. This way of linking the member states is a reflection of a desire to reduce the EU interventions in national legal and administrative systems. The member states may well take into account national specificities in achieving the objectives of the Union. The provisions of a directive does not automatically replace national legal rules, but require member states the obligation to adapt their national law to the provisions of the European Union.

The competence of member states, however, is doubly linked: on the delay, the Directive sets determined national bodies for its transcription time; as to modalities of work, the member states are in principle free to choose the form and means of the transposition, but the freedom of national authorities is not full, and the means and forms used must be consistent with the established purposes. Transposition should determine, sufficiently clear and precise, the rights and obligations arising from the provisions of a directive, so that the citizen of the Union has the opportunity to avail themselves or to oppose national courts.

In general, it is necessary to adopt binding national legal acts or to cancel or modify existing regulations and administrative provisions. A mere administrative practice is not enough, since it can by nature be changed at it will be made by the authorities concerned and it does not receive sufficient publicity. A flexibility recipient state depends on the accuracy of the Directive. The institutions of the European Union may set the result to be achieved so that it remains accurate to the member states any leeway to make adjustments on the bottom. It must be recognized that some directives are sometimes very detailed and contain substantive regulation that leaves only the choice of a pure and simple transcription. This trend is partly due to mistrust of the member states who fear that too much freedom given to their partners creates distortions of competition. The implementation of the guidelines is monitored by the Commission and allows for the exercise of this control, by including a statement that the member states must notify the Commission of the national measures

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taken to implement the Directive. The author of a Directive may be the European Parliament and the Council; for the Council, it needs a special legislative procedure.

Article 288, para. 4 TFEU defines the *decision* in the following terms: „A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them." The decision loses its individual character act exclusively, which allows entering the category of making a much bigger acts than in the past, including all acts adopted in the context of foreign policy. The Lisbon Treaty allows the adoption of a decision either as a legislative act by the European Parliament and the Council at the end of an ordinary legislative procedure or after a special legislative procedure.

Under Article 288, para. 5 TFEU, „the *recommendations and opinions* shall have no binding force." This category of acts allows the EU institutions to decide without legal obligation for the recipients: the member states or the citizens of the Union. The recommendations suggest recipients certain behavior without imposing their legal obligation. Thus, when there is reason to fear that the adoption or amendment of a legislative or administrative body in a member state is distorting the conditions of competition, the Commission may recommend to the State concerned the appropriate measures to prevent distortion and cause (Article 117 TFEU). Notices are issued by the EU institutions when appropriate to assess a situation or facts of the European Union or in the member states. If these acts are not binding, it does not mean they are devoid of any legal effect. When faced with distortions of competition resulting from disparities in legislation, the Commission recommends that member states the necessary measures, it may, if these recommendations are not followed up, submit to the Council a proposal for a directive.

Other acts are to be taken into consideration. The practice also revealed, alongside acts expressly referred to in Article 288 TFEU, a number of so-called "unnamed" acts or "atypical", adopted by the institutions of the Union, for various reasons beyond the scope defined by that provision.

Four categories of acts deserve particular mention: a) Acts concerning the internal life of institutions such as the internal rules; they are not devoid of legal effect; b) Resolutions, action or communications programs, that they are mainly intended to express intentions or policy guidelines without being sources of rights and obligations; c) Public

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statements or inter-institutional agreements of the European Parliament, the Council and the Commission, which are often an expression of the duty of loyal cooperation burden on institutions; d) statements in the context of foreign policy and security, that they reflect a political line but are not binding.

Publicity for the Council's proceedings, publication and notification of acts represents one of the most important activities of information to the European citizens. The Council's deliberations are public when it makes a decision on a draft legislative act, hence the distinction between the legislative and non-legislative parts of the agenda. The Council must also meet in public for certain types of deliberations: the public policy debate on the Council's programme of activities; policy debates held by the other Council configurations on their priorities; the Commission's presentation of its five-year programme, its annual work programme and its annual policy strategy; debates on important issues affecting the interests of the EU and its citizens, if the Council or the COREPER so decide by a qualified majority; certain non-legislative proposals judged by the Presidency to be of sufficient importance as long as the Council and the COREPER agree. Legislative acts adopted by the Council must be published in the Official Journal (OJ), as must international agreements concluded by the Union. For other types of acts, it is for the Council or the COREPER to decide whether or not to publish them.

In conclusion, the Council of the European Union has an evolution of its role and its legislative power through treaties and agreements between member states and other European institutions. However there is a strong resistance of inter-governmentalism. Member states are not ready to let their prerogatives of sovereignty to the European Union. There is no state of the European Union therefore the Council of the European Union cannot be the sole legislator; it needs the support of the European Parliament. Indeed, the Parliament and the Council are holders of bicameral legislature; and the Court of Justice of the European Union (CJEU) embodies the judiciary. If the Council of the European Union is the main European institution with the character of policy making, in its organization and operation it manifests the legislative power effects.

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