Chapter 2: Legislative, Executive and Judicial Powers conferred by the Treaties

Legislative Powers: General

2-1 Primary legislation is contained in the Treaties; but secondary legislative powers are conferred by the Treaties on certain Institutions - the Council, the European Parliament and the Commission, - and on the European Central Bank.

2-2 Secondary legislation comprises the three binding and two non-binding categories of measures, referred to as regulations, directives, decisions, recommendations and opinions; and the general rule governing the legislative powers in question is as follows:

> In order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council, the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver opinions.[1]

Legislative Powers: the European Parliament

2-3 Unlike many national Parliaments, the European Parliament has no inherent or independent legislative powers. In effect, its legislative powers are:

- powers of co-decision with the Council,
- powers of cooperation with the Council and
- the right to advise the Council.

Although the European Parliament has no constitutional power to initiate legislation, it may, acting by a majority of its members, request the Commission to submit any appropriate proposal on matters on which it considers that a Community act is required for the purpose of implementing the Treaty.[2] The Commission is not, however, under any constitutional obligation to accede to the European Parliament's request.

2-4 For the purposes of specific types of secondary legislation, there is a complicated procedure by which measures are adopted on the basis of an interchange between the European Parliament and the Council, resulting in a joint decision between the two Institutions. This is commonly known, though not in the Treaties themselves, as the co-decision procedure.[3] The types of legislation subject to this procedure are those specified in individual provisions of the Treaties; for example, harmonisation measures designed to complete the internal market, other than fiscal measures or measures relating to the free movement of persons or the rights and interests of employed persons.[4] The procedure itself is described later in this book.[5]

2-5 Similarly, for the purposes of other specific types of secondary legislation, there is a procedure - less complicated than the co-decision procedure, - commonly known, though not in the Treaties themselves, as the cooperation procedure.[6] The main feature of this procedure is that, where the European Parliament votes in a certain way, the Council has to act unanimously. Here again, the procedure is followed only in cases specified in individual provisions of the Treaties: for example, measures laying down common rules applicable to international transport.[7] This

procedure, too, is described in more detail later.[8]

2-6 Various provisions of the Treaties require the Council, before adopting a legislative measure, to consult the European Parliament. The consultation procedure applies, for example, to regulations made by the Council for the application of the Treaty provisions on state aids.[9] Although the European Parliament's advisory powers fall short of "blocking powers", they cannot be overridden by the Council. Thus, if the European Parliament fails to offer an opinion on the measure referred to it by the Council under the consultation procedure, the Council must, if it wishes to adopt the measure, first exercise one or more of the options open to it[10], namely:

- to request the application of the emergency procedure provided for by the internal regulation of the European Parliament, or
- to request an extraordinary session of the European Parliament[11] or
- to apply to the Court, on the grounds of the European Parliament's alleged failure to act, for a declaration that the failure is contrary to the Treaty.[12]

2-7 As to powers to amend proposed legislation, the European Parliament is limited, in the case of the co-decision and cooperation procedures, to proposing amendments in accordance with the special arrangements envisaged under those procedures and, in the case of the consultation procedure, to proposing amendments, which may or may not be accepted by the Commission and Council.[13]

2-8 In addition to the legislative powers described above, the European Parliament has some quasi-legislative powers in respect of the European Communities' budget.[14]

Legislative Powers: the Council

2-9 In general, the principle of legislation in the European Union is that, while the Commission proposes, the Council disposes. There are exceptions to this principle[15]; but almost all important secondary legislation reaches the statute book only when the Council formally adopts it. The method by which the Council adopts proposed legislation is prescribed by the provisions in the Treaties conferring legislative powers in specific sectors and not by any general rule of law. For example, incentive measures in the public health sector are adopted in accordance with the co-decision procedure [16]; measures involving vocational training are adopted in accordance with the cooperation procedure[17]; and measures taken to attain, in the course of the operation of the common market, one of the objectives of the Community, where the Treaty has not provided the necessary powers, are adopted in accordance with the consultation procedure.[18] Whichever procedure is followed, the Council, either with the European Parliament or on its own, is the final legislative body in the European Union.

2-10 Since the scheme for the proposal and adoption of secondary legislation in the European Union is based on the concept of the Commission making the requisite proposals[19], the Council has no formal powers to propose legislation and only limited powers to amend proposals made by the Commission.[20]

Legislative Powers: the Commission

2-11 In adopting secondary legislation, the Commission has the following powers:

– legislative powers conferred directly by the Treaties[21] and

– legislative powers delegated under secondary legislation adopted by the Council.[22]

A small point of terminology sometimes causes confusion. When the Commission formally proposes legislation to the Council and European Parliament, it "adopts" the proposal. This is not, however, the same thing as adopting legislation: it is merely a reference to the decision by the Members of the Commission to submit a given proposal to the other two Institutions. When the Commission adopts a legislative measure under either of the two powers referred to above, it is not required to submit the measure at the drafting stage or at any later stage to the European Parliament. Yet some Commission legislation may be just as important as Council legislation: the directives on telecommunications are a case in point.[23] More often, Commission regulations are on relatively detailed aspects of the common agricultural policy and, although they technically constitute legislation, they are more in the nature of day-to-day administrative instructions on prices and the like.[24]

Legislative Powers: Other Bodies

2-12 A role somewhat similar to that of the European Parliament under the consultation procedure is conferred on the Economic and Social Committee. It must in some cases, where the Treaty so provides, and may in other cases, where the Council or Commission considers it appropriate, be consulted on legislative proposals; and the Committee may issue an opinion on its own initiative.[25] But legislation cannot be held up by the absence of an opinion from the Committee.[26]

2-13 Similar principles to those applying to the Economic and Social Committee govern the role of the Committee of the Regions.[27]

2-14 Under the provisions of the Treaty dealing with monetary policy[28], the European Central Bank has the power to make regulations for certain purposes prescribed in the Treaty and in the Statute of the European system of Central Banks and to take decisions.[29] These regulations and decisions have legal force: they are in the nature of secondary legislation; and principles similar to those applying to regulations and decisions made by the Council and Commission apply to regulations and decisions made by the European Central Bank.[30] The Bank does not, however, have the power to issue directives. It does have the power to make recommendations and deliver opinions; but these have no binding force.

Executive Powers: the Council

2-15 Miscellaneous powers to take decisions, other than legislative decisions, are conferred on the Council under various provisions of the Treaties. Although some of these powers are quasi-legislative and quasi-judicial, the great majority can be described as executive. The general scheme for dividing constitutional responsibility among the Institutions is based on the division of executive responsibility between the Council's duty to take decisions on policy and the Commission's duty to

implement them. Given that executive powers comprise the making and the carrying out of a policy, it can be said that the Council is primarily responsible for the one and the Commission for the other. To this general principle there are many exceptions. Nevertheless, it is a principle which applies to executive actions as diverse as the conduct of negotiations with non-member states in matters of international trade, in which the Council decides on a mandate and the Commission negotiates within the terms of the mandate[31], to the process by which the definition of the tasks, priority objectives and organisation of the Structural Funds[32] is entrusted to the Council, while the Commission remains responsible for administering one of the Structural Funds, namely, the European Social Fund.[33] The Council has a number of special executive powers in connection with both the common foreign and security policy[34] and police and judicial cooperation in criminal matters.[35]

Executive Powers: the Commission

2-16 Although the Council has executive powers, it is the Commission which is properly regarded as the main executive arm of the European Union. The Commission has general executive powers and specific executive powers. The general executive powers are to ensure that the provisions of the Treaties and the measures taken by the Institutions pursuant to the Treaties are applied[36] ; to have its own power of decision[37]; and to exercise the powers conferred on it by the Council for the implementation of rules which the Council has laid down.[38] The specific executive powers are conferred by a variety of provisions of the Treaties. For example, the Commission may fix the amount of countervailing charges in the context of the common agricultural policy[39]; it may examine and act on the rates and conditions of certain aspects of transport policy[40]; it monitors the development of the budgetary situation and of the stock of government debt in the Member States[41]; it conducts negotiations on behalf of the Community within the framework of the common commercial policy[42]; and it has the task of promoting close cooperation between the Member States in the social field.[43] There are many similar examples.

Executive Powers: Other Bodies

2-17 Since the Court of Auditors has the duty to provide the European Parliament and the Council with a statement of assurance as to the reliability of the Communities' accounts and the legality and regularity of the underlying transactions, it has executive powers for the purpose.[44] However, as in the case of the executive powers exercised by the Commission, some of these powers are also in the nature of quasi-judicial powers and are discussed further below.

2-18 Some of the executive powers of the European Central Bank have yet to be defined[45]; and some are inseparable from those exercised by the European System of Central Banks.[46] In one respect, however, the executive power of the European Central Bank is clear and unambiguous: it has the exclusive right to authorise the issue of bank notes within the Community.[47] Although the European System of Central Banks is governed by the decision-making bodies of the European Central Bank[48], it has a number of important tasks which are of an executive character, such as the conduct of foreign exchange operations.[49]

Judicial and Quasi-Judicial Powers

2-19 Judicial powers are exercised within the European Union by the Court of Justice of the European Communities and the Court of First Instance.[50] Member States' courts may also give rulings on Community law; but it is the Court of Justice which is the final judicial authority empowered to ensure that, in the interpretation and application of the Treaties, the law is observed.[51] If a matter lies outside the scope of the Treaties, the Court has no jurisdiction; but, where it has jurisdiction, its judgments are enforceable in accordance with the rules of civil procedure in the state in whose territory it is carried out.[52]

2-20 Quasi-judicial powers are exercised by:

- the Commission, for example, when investigating and taking decisions cases under the rules on competition[53] and dumping[54] ;
- the Court of Auditors, in its examination and determination whether all revenue has been received and all expenditure incurred in a lawful and regular manner and in its power to call for documents for those purposes[55]; and
- the European Central Bank, in its power to impose fines or periodic penalty payments on undertakings for failure to comply with obligations under its regulations and decisions.[56]

Miscellaneous powers

2-21 Advisory powers, other than, or in addition to, those forming part of the European Union's legislative processes, are exercised by:

- the European Parliament, for example, in certain types of agreements between the European Community and non-member states or international organisations[57] and in connection with the main aspects and basic choices of the common foreign and defence policy[58];
- the Court of Auditors[59];
- the Economic and Social Committee[60];
- the Committee of the Regions[61];
- the Committee of Permanent Representatives[62];
- the Political Committee[63];
- the Coordinating Committee[64];
- the European Central Bank[65]; and
- the Economic and Financial Committee.[66]

2-22 Some of the constitutional powers of the Institutions and other bodies, especially those of the European Parliament, do not fall conveniently into the classic categories of legislative, executive and judicial powers. Two such powers may be mentioned here to illustrate the point. One concerns the effects of a motion of censure on the activities of the Commission: if carried by a two-thirds majority of the votes cast, representing a majority of the members of the European Parliament, the members of the Commission are required to resign as a body.[67] Another concerns the requirement that, before certain types of international agreement can be concluded, the European Parliament must give its assent; and, in the absence of this assent, the agreement cannot be concluded.[68]

1. Article 249 (formerly 189), first paragraph, EC Treaty.

2. Article 192 (formerly 138b), second paragraph, EC Treaty.

3. Article 251 (formerly 189b), EC Treaty.

4. Article 95 (formerly 100a), EC Treaty. Where the word "approximation" is used in the text of the Treaty (as in Article 95) or of secondary legislation, the word "harmonisation" is used in the text of this book, except in direct quotations. This is because the word "approximation" is incorrect in that context. See further Chapter 9, note 38.

5. See Chapter 21.

6. Article 252 (formerly 189c), EC Treaty.

7. Article 71(1)(a) (formerly 75(1)(a)), EC Treaty.

8. See Chapter 21.

9. Article 89 (formerly 94), EC Treaty, applying Articles 87 and 88 (formerly 92 and 93.)

10. Case 138/79, *SA Roquette Freres v Council* (the "Isoglucose Case").

11. Article 196 (formerly 139), second paragraph, EC Treaty.

12. Articles 232 and 233 (formerly 175 and 176), EC Treaty.

13. As to the co-decision and cooperation procedures, see notes 3 and 6 above respectively.

14. See Chapter 24.

15. The exceptions arise: first, where the Commission exercises legislative powers directly from the Treaties; second, where the Commission exercises legislative powers delegated from the Council; third, where the Commission's exclusive right to propose legislation and amendments is modified under the special parliamentary procedures; and fourthly, where the body making the regulations is the European Central Bank. See Chapter 21.

16. Article 152(4) (formerly 129(4)), first indent, EC Treaty.

17. Article 150(4) (formerly 127(4)), EC Treaty.

18. Article 308 (formerly 235), EC Treaty.

19. This follows from the wording of the specific provisions of the Treaty conferring legislative powers in various sectors: the wording follows with some variants the formula that "the Council, acting on a proposal from the Commission, ... "

20. See, for example, Article 251(2)(c) (formerly 189b(2)(c) and (d)), EC Treaty; and Article 252(e) (formerly 189c(e)), EC Treaty. Both these provisions are discussed in more detail in Chapter 21.

21. For example, under Article 86(3) (formerly 90(3)), EC Treaty.

22. For example, the regulation-making powers conferred by Council regulations under Article 83(1) (formerly 87(1)), EC Treaty (competition policy).

23. Commission Directives EEC/88/301 (subject to partial annulment in Case C-202/88, *France v Commission*); EEC/90/388 (subject to partial annulment in Case C-271/90, *Spain v Commission*); and EC/94/46.

24. The L series of the Official Journal of the European Communities is usually full of these types of regulation.

25. Article 262 (formerly 198), first paragraph, EC Treaty.

26. Ibid, second paragraph, EC Treaty.

27. Article 265 (formerly 198c), EC Treaty.

28. Articles 105 to 111 (formerly 105 to 109), EC Treaty.

29. Article 110(1) (formerly 108a(1)), EC Treaty.

30. Article 110(2) (formerly 108a(2)), EC Treaty.

31. Article 133(3) and (4) (formerly 113(3) and (4)), EC Treaty.

32. Article 161 (formerly 130d), EC Treaty.

33. Article 147 (formerly 124), EC Treaty.

34. See paragraph 7-21 below.

35. See paragraph 8-9 below.

36. Article 211 (formerly 155), first indent, EC Treaty.

37. Ibid, third indent, EC Treaty.

38. Ibid, fourth indent, EC Treaty.

39. Article 38 (formerly 46), second paragraph, EC Treaty.

40. Article 76(2) (formerly 80(2)), EC Treaty.

41. Article 104(2) (formerly 104c(2)), EC Treaty.

42. Article 133(3) (formerly 113(3)), second paragraph, EC Treaty.

43. Article 137 (formerly 118), EC Treaty.

44. Article 248(1) (formerly 188c(1)), second paragraph, EC Treaty.

45. Article 105(6), EC Treaty (same numbering).

46. Article 110(1) (formerly 108a(1)), EC Treaty.

47. Article 106(1) (formerly 105a(1)), EC Treaty.

48. Article 8, Protocol 18 to the EC Treaty (formerly printed as the Third Protocol, EU Treaty.)

49. Article 105(2), EC Treaty, sets out these tasks (same numbering).

50. Articles 220 and 225 (formerly 164 and 168a), respectively, EC Treaty.

51. Article 220 (formerly 164), EC Treaty.

52. Articles 244 and 256 (formerly 187 and 192), EC Treaty.

53. Articles 3 to 9, Council Regulation 17 of 1962.

54. Council Regulation EEC/2176/84, made under Article 113, EEC Treaty (now Article 133, EC Treaty). Under the anti-dumping procedure, the Commission carries out the investigation; but the Council makes the final decision. Thus any claim that the quasi-judicial proceedings have been unfairly conducted may be direted against the Council. See Case C-46/98, *European Fertilizer Manufacturers Association (EFMA) v Council*.

55. Article 248(3) (formerly 188c(3)), second paragraph, EC Treaty.

56. Article 110(3) (formerly 108a(3)), EC Treaty. The powers are exercised within the limits and on the conditions adopted by the Council under Article 107(6) (formerly 106(6)), EC Treaty.

57. Article 300(3) (formerly 228(3)), first paragraph, EC Treaty. Compare the assent powers, discussed in Chapter 16.

58. Article 21 (formerly J.10), first paragraph, EU Treaty.

59. Article 248(4) (formerly 188c(4)), second and fourth paragraphs, EC Treaty.

60. Article 262 (formerly 198), first paragraph, EC Treaty.

61. Article 265 (formerly 198c), first paragraph, EC Treaty.

62. Article 207(1) (formerly 151(1)), EC Treaty. At first sight, the Committee appears to have an executive role; but, since it does not have any powers peculiar to itself and only helps the Council, its role is in reality advisory. This does not prevent it from being an extremely powerful element in the constitution of the European Union. The Committee is usually known by its French acronym, "COREPER".

63. Article 25 (formerly J.15), EU Treaty.

64. Article 36(1) (formerly K.8(1)), EU Treaty.

65. Article 105(4), EC Treaty (same number).

66. Article 114(2) (formerly 109c(2)), EC Treaty.

67. Article 201 (formerly 144), EC Treaty.

68. Article 300(3) (formerly 228(3)), second paragraph, EC Treaty.