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Summary

Interinstitutional Agreements: a Legal Instrument of EU Constitutional Law

1. The scientific debate about interinstitutional agreements revolved until recently nearly exclusively around the questions of legally binding effects and the possibility of judicial review. The development of a consistent understanding of this type of instrument was neglected. Various studies started from considerably different assumptions about what an interinstitutional agreement consisted of. Accordingly, they came to dissimilar conclusions. Confusion still reigns about the legal status of interinstitutional agreements. Predominantly, the very possibility of a uniform legal regime is denied. The Union Courts have not explicitly ruled on interinstitutional agreements either although some clues appear occasionally in their case law. But apparently, they have wilfully avoided committing themselves. The state of the debate highlights above all the necessity of preliminary conceptual thoughts prior to a determination of the legal status.

2. The European institutions' use of the notion interinstitutional agreement is diverse. The European Parliament has defined it in its rules of procedure as a generic term for any co-operative act between multiple institutions. Simultaneously, the institutions denote a part of the arrangements concluded between them explicitly as interinstitutional agreements. It is systematically dissatisfying to include a general term within the group it is supposed to define. The development of a consistent understanding of interinstitutional agreements excludes its application as a generic term. It is indispensable to find different criteria for a clear identification of interinstitutional agreements. Even if the denomination of the act would allow such clarity, it is not a sufficient criterion alone, given the unsystematic practice of the institutions. It may, however, serve as a piece of evidence amongst others. In order to avoid overcharging the identification's significance, preference should be given to formal criteria.

The first candidate is the degree of formality. For the purposes of this study, interinstitutional agreements must fulfil minimum formal requirements which regularly include the publication of the act in the Of-

ficial Journal. Second, the participating actors matter. The term interinstitutional agreement will be restricted to acts of the three main institutions: Parliament, Council and Commission. Third, the participating institutions must have approved the acts in a formal vote. And fourth, the act must be addressed exclusively to themselves. Therefore, in this study interinstitutional agreements will be understood as collective acts of the three legislative-executive institutions which have been elaborated by them on an equal level and approved in a formal vote and which are addressed exclusively to the participating institutions and are positively laid down in a single document. These acts are regularly published in the Official Journal. The acts filtered via these criteria from the European legal order will serve as the empiric basis for a normative systematisation.

3.1. The starting point for a legal conceptualisation and categorization of interinstitutional agreements is an analysis of the legal practice of the European institutions. First of all, emphasis has to be laid on procedural aspects. The procedures for the creation of interinstitutional agreements are not positively settled. Nevertheless, different modalities for each single step of procedure have been formed in practice, which are partly codified in interinstitutional agreements themselves. In contrast to the predominant rule that the Commission exerts the right of legislative initiative, the initiative for the conclusion of interinstitutional agreements may come from any institution. In this respect a parallel to the acts of self-organisation of the different institutions exists. In practice, initiatives mostly come from the Parliament or the Commission. Apart from that, the European Council increasingly requests that the three main institutions conclude interinstitutional agreements. The negotiation process of the text of the act can be divided into a technical and a political level. On the technical level staff members of the institutions – mostly from the legal services – prepare a common draft. With the appointment of a "High-Level Technical Group for Interinstitutional Cooperation" this phase has attained a certain procedural stability. It is to be expected that this group will become the standard forum for technical negotiations of interinstitutional agreements.

On the political level two distinct models prevail. In the trilogue procedure the presidents of the institutions or their deputies negotiate. For the European Parliament, the chairmen of the competent committee or the rapporteur may also participate. Additionally, there is the procedure of interinstitutional conferences. In contrast to the trilogue, delegations of the institutions negotiate. Especially for a non-hierarchical institution like the European Parliament this is a significant difference. During

interinstitutional conferences package-deals with several agreements or other acts are typically negotiated.

The final adoption of an interinstitutional agreement requires the approval of all participating institutions according to their internal rules. Only the European Parliament has set up a specific procedure in its rules of procedure. According to these rules, the draft text will be examined by the Committee on Constitutional Affairs and then submitted to the plenum to reach a decision. The Council only excludes interinstitutional agreements from the specific rules for cases in which it acts in its legislative capacity. The Commission has no special rules.

After adoption and signing by the presidents of the participating institutions, interinstitutional agreements are regularly published in the Official Journal. The modalities of publication know a certain grading between the individual publication as a single act and the publication as an annexe to the decision of adoption. Only the first case corresponds to a proper publication in technical terms. Although the graded publication casts no doubts on the qualification of the act as an interinstitutional agreement, in comparison to the predominant model of a single publication it constitutes an exception. The vast majority of the concluded interinstitutional agreements follow that model. The share has further increased in recent years.

The requirements for an amendment or the withdrawal of interinstitutional agreements can be deduced from the provisions of the agreements themselves and the common practice of the institutions. These indications reveal that the agreements may only be withdrawn or amended through a joint formal act of all participating institutions. In sum, it can be concluded that interinstitutional agreements have gained extensive procedural stability.

3.2. Formal aspects distinguish modern positive law from other systems of rules. According to the practical idea of law of this study any legal act is characterised by its mode of creation and its formal stability. In this respect interinstitutional agreements do not differ essentially from other acts of European secondary law. Their propositions are drafted in legal present tense and exhibit their technical character via a plain and objective style. However, the inner structure of the existing interinstitutional agreements is not uniform. Whereas the majority follow the structure of general acts of secondary law, some deviations exist. In one point interinstitutional agreements clearly differ from other acts of secondary law: their stipulations are simply numbered in Arabic numerals whereas otherwise secondary law is structured in articles. This devia-

tion from the general pattern contributes to coining the specific legal form of interinstitutional agreements.

The designation of particular acts is not uniform either. Whereas the majority of especially the more recent interinstitutional agreements are explicitly designated as such, other designations subsist. However, some of them can be explained by specific circumstances. Especially bilateral acts had not been designated as interinstitutional agreements over a long period of time. This practice has changed only recently. In sum a process of standardization of the designation of interinstitutional agreements can be observed.

Apart from that, legal acts of the European Union regularly contain a statement of reasons, which discloses the legal und factual grounds the act is based on. However, a legal duty to indicate the reasons exists according to art. 253 TEC only for the binding instruments of art. 249 TEC. Interinstitutional agreements also frequently provide a statement of reasons, albeit this practice is not universal. In this respect, they do not differ from other acts of secondary law, especially in the area of self-organisation, which often fail to supply a statement of reasons. Further formal aspects are concluding phrases and annexes as well as declarations on the acts. Whereas interinstitutional agreements lack a characteristic concluding phrase, annexes and declarations can be found more often. Particularly recent interinstitutional agreements show a generalised practice of declarations on the final act. Furthermore some interinstitutional agreements contain specific rules about the date on which they enter into force.

It can be concluded that interinstitutional agreements display a procedural and formal stabilisation. From a formal point of view, no substantial divergence from other European secondary law persists. Therefore, according to the practical idea of law of this study, interinstitutional agreements are acts of law of the European Union.

4.1. A comparison with other legal orders adds no further insight into the legal categorization of interinstitutional agreements. Neither in the examined continental constitutional orders, nor in Great Britain, the United States of America or international law do equivalent legal instruments exist. No more than three German federal state constitutions (*Landesverfassungen*) know agreements between parliaments and governments to settle questions of participation and information. The obvious hypothesis thus suggests that the apparent uniqueness of interinstitutional agreements is linked to the individuality of the European institutional order. Therefore, criteria for a systematic categorization have to be found in the Union's legal order itself.

4.2. Initially, a disassociation from other joint legal instruments helps interinstitutional agreements to take shape. They differ from the related instrument of the joint decision notably in that they are mutually addressed to the participating institutions. This mutual relation expresses a contractual momentum which distinguishes the agreements from the logical structure of other legal acts including joint decisions. Compared to the exchange of letters or notes of the presidents of the institutions, interinstitutional agreements stand out with regard to the procedures of negotiation and adoption as well as, generally, their publication. The exchange of letters or notes is rarely published. Furthermore, usually no single act exists but an agreement documented by the initial letter and the answer. Declarations on other acts – even if they are issued commonly by all institutions – are not independent legal acts. Their accessory character distinguishes them from interinstitutional agreements. The same applies to preparatory acts which lack legal independency. Even if their provisions have to be carried out by further acts of the institutions, interinstitutional agreements are final acts which close the interinstitutional law-making procedure. Codes of conduct, by contrast, do not form a specific legal instrument, but represent the content of a group of acts. They may be adopted in different legal forms including interinstitutional agreements. It has to be ascertained in each separate case whether an act which is denoted code of conduct is also an interinstitutional agreement. Apart from that, different settlements between other institutions of the EU as well as between the main institutions and other community entities exist. Apart from the fact that these acts do not fulfil the criteria defined in the beginning of this study, they also differ from interinstitutional agreements with regard to their content. The legal objects of these acts predominantly involve administrative-technical questions. Moreover, none of these acts has explicitly been denoted as an interinstitutional agreement.

Against the backdrop of this disassociation a positive categorization in the Union's legal order can be undertaken. The legal category of procedural law (*Organisationsrecht*) appears to be the most appropriate for this task. This category is a complex of rules governing the internal procedures and the setting up of the institutional structure of sovereign organisations. The general purpose of procedural acts is the establishment and the preservation of the functional capacity of the organisation as a whole. Whereas other legal acts are aimed at direct social impact, procedural law is characterised by its mediated impact. Interinstitutional agreements concern above all the budget and legislative procedure of the European Union. They superimpose these core areas of sovereign

activity with interinstitutional procedural rules. A significant impact on the respective procedures can thus be observed.

4.3. The qualification of interinstitutional agreements as an independent legal instrument of Union law completes the systematic categorization process. The term legal instruments replaces the customary terminology which spoke predominantly of sources of law. Yet, this metaphor is outdated and it refers to premises which are contested. A legal instrument in the understanding of this study is characterised by its formal stabilization and a normative momentum of its own. The formal stabilization has already been proved within the context of shaping interinstitutional agreements as legal acts of Union law. One aspect of such normative momentum is based on demands on the part of different institutions to conclude further agreements. They thus express a recognition of the instrument which is obviously linked with a special normative expectation. The process of developing normative momentum can also be construed from the trend of interinstitutional agreements becoming the standard instrument of interinstitutional cooperation. In comparison to the single act, the legal instrument has therefore gained an added normative value which apparently predestines it for the regulation of specific tasks. Finally, another element of normative momentum is enshrined in references to interinstitutional agreements in primary and secondary law. Though no transfer of legal effects occurs, these references constitute a normative recognition by the legal order which reveals the self-referential character of law. Interinstitutional agreements can therefore be depicted as an independent legal instrument. Thus constructed, the legal form can be gainfully examined to discover characteristics of its legal regime.

5. The first aspect of the legal regime has regard to questions of competence. A distinction has to be made between the creation of the legal instrument and the competence to conclude individual agreements. The system of competences of the European Union is governed by the principle of attributed competences, which embraces all fields of sovereign activity without regard to legal effects or intended impact. In view of art. 249 TEC, a competence to create new legal instruments can only have a limited scope. The limits of competence of the Community as a whole may not be expanded. New legal instruments aiming at direct legal effects on member states or Union citizens would in any case be illegal. Within these limits a competence of the institutions to concretize the constitutional text exists which may allow the creation of new instruments. The invention of interinstitutional agreements complies with this limit.

The conclusion of individual agreements is based on the grounds of a competence for self-organisation spanning all institutions. Because decision-making procedures usually span several institutions, the need for a competence to pass organisational rules spanning several institutions exists, in order to preserve the operability of the organisation as a whole. These rules encompass the interinstitutional procedures and institutional rules. Interinstitutional agreements are the ideal instrument for these purposes. Limits of competence derive on the one hand from the legal ground which encompasses solely interinstitutional rules. Neither purely internal organisational regulations of a single institution nor legally binding stipulations toward member states are lawful on this ground. Furthermore primary law sets an absolute limit for the conclusions of interinstitutional agreements. Constitutional amendments or *contra legem* provisions on interinstitutional grounds are by all means illegal.

6.1. As already outlined, different opinions persist on the question of whether interinstitutional agreements are legally binding acts. The possibility of a comprehensive mode of legal effects for all existing agreements is mostly denied. Accordingly, the existence of legally binding effects may be determined on the basis of a case-by-case study of the intention of the participating institutions. However, for lack of legal personality of the institutions, this intention is not a suitable starting point to determine legal effects of interinstitutional agreements. Neither can the duty of loyal cooperation convey legally binding effects. In any legal order, legal effects of a specific act logically ensue from the competence and not the intention of an institution. Therefore the competence has to be examined for the possibility to enact provisions with legally binding effects. The institution-spanning competence of self-organisation basically entitles an institution to do so. The general assumption is therefore that interinstitutional agreements are legally binding unless the provisions of an agreement clearly stipulate the contrary.

The question of binding effects of interinstitutional agreements only partly describes their general mode of legal effects. Characteristic for this mode are its contractual properties as a special category of interinstitutional contracts. This contractual interpretation must nevertheless not be confounded with a civil law dimension. The mutual obligation is based on the competence and not a private autonomous freedom. In contrast to other acts of law whose mode of effects is logically determined by a relation of subordination, the mutual effects of interinstitutional agreements have a horizontal direction. Those who set the rules and those who are affected are identical. This special contractual mode

of effect distinguishes interinstitutional agreements fundamentally from other acts of secondary law.

6.2. The relations of interinstitutional agreements to other acts of law can be divided according to their capacities for either active or passive derogation. The standard case of European secondary law is the comprehensive capacity for mutual derogation. In accordance with this, interinstitutional agreements are basically capable of altering existing acts of secondary law. An exception to this is the rules of procedure of the institutions. The institutional autonomy together with the limits of competence bar derogations. The capacity for passive derogation is subject to a more restrictive view. Their specific mode of effects prevents interinstitutional agreements from derogations by any other instruments. The precondition for any amendment or withdrawal is a collective act of all participating institutions. That need not be an interinstitutional agreement itself. A joint decision may also be eligible.

6.3. Apart from compulsory legal effects other categories of effects exist which can be summarized as indirect legal effects. There is no exclusiveness between these effects and legal obligations. However, indirect effects are particularly suitable to describe and categorize non-binding acts. Such an act may for instance increase the requisite standard of the statement of reasons if the institutions do not comply with its provisions. Interinstitutional agreements may be eligible for these effects insofar as they contain non-binding guidelines. Further indirect effects comprise the establishment of good faith. However, this principle only applies to the external sphere. In the internal sphere good faith is not conceivable. The relation between the institutions is governed by the principle of loyal cooperation and not by elements of good faith. Interinstitutional agreements hence do not qualify for this category of indirect effects. Furthermore, guidance for interpretation can be conceived as another indirect effect. Irrespective of their binding effects, the provisions of an act can become relevant for the interpretation of other acts. This category of effects is particularly pertinent for interinstitutional agreements, because their provisions represent the participating institutions' common opinion. Finally, increasing the constitutional dynamic can be conceived as an indirect effect. It consists in an anticipation of future constitutional amendments. Nevertheless, that is a political rather than a legal effect.

7.1. Legal effects of an act gain their operability to a great extent by the means of judicial enforcement. The conditions for an appeal against an interinstitutional agreement must differ according to the European system of legal remedies between privileged and non-privileged applicants.

Contrary to the prevailing legal doctrine, privileged applicants may challenge acts regardless of possible binding effects they have. Acts with other legal effects below a legal obligation may also be challenged. Interinstitutional agreements can therefore generally be reviewed by the European Courts. Nevertheless, as the participating institutions are not allowed to sue themselves they lack the *locus standi*. Therefore, they have to rely upon the procedures of revision of the agreements themselves. Solely non-participating institutions and member states have the *locus standi* to challenge interinstitutional agreements. In substance, basically all legal grounds may be considered. In practice, the legal ground of incompetence will only be relevant with regard to relative or horizontal incompetence. An infringement of an essential procedural requirement may occur regarding the rules of procedure of the different institutions. The most probable ground is the infringement of the treaty.

Non-privileged applicants are confronted with a limitation of reviewable acts. This group of applicants may only challenge acts with legally binding effects. However, the differentiation between general and individual effects is outdated and no longer underlies the current case law. The practice of mistitling an act (so as to hide what is actually another type of act) has thus lost its significance. This extension is restrained nevertheless by the Union's Courts via a restrictive interpretation of the *locus standi*. The relevant act must be of direct and individual concern. Especially the requirement of individual concern limits the access to the jurisdiction of the Union's Courts for private applicants. It is highly improbable that an interinstitutional agreement will individually concern a third party. At most in borderline cases individual concern of a third party may occur. In that case, this agreement would probably be illegal for lack of competence.

Other procedures like the preliminary ruling or the objection of inapplicability theoretically apply to interinstitutional agreements as well, but their significance can be neglected since actual cases are implausible.

7.2. Apart from direct legal review where interinstitutional agreements are themselves object of the procedure, they can become relevant in other procedures as a legal standard. First of all, acts of secondary law may be challenged on the ground of an infringement of an interinstitutional agreement. In terms of substance, the grounds of an infringement of an essential procedural requirement or of an infringement of the treaty are the most pertinent. As far as interinstitutional agreements contain procedural provisions, their infringement may be challenged on the ground of an infringement of an essential procedural requirement.

In that case the key question is whether the requirement is essential. Otherwise the ground of an infringement of the treaty may apply.

8. The constitutional development of the European Union can be divided into three phases parallel to the evolution of interinstitutional agreements which are determined by different constitutional moments. The first phase begins with the budget treaties of 1970 and 1975. The participation of the European Parliament in the adoption of the European budget started an institutional dynamic which changed the European Communities profoundly. From an instrumental point of view the European Parliament gained leverage to impose further strengthening of its position. In substance a discrepancy between the law-making competences and the budget competences arose which caused considerable institutional instability. In no small part, this instability triggered the formation of the instrument of the interinstitutional agreement. As a pragmatic answer to the inadequacy of the budget procedure set out in the primary law, this new instrument was to help resolve interinstitutional conflicts.

The next phase is marked by the adoption of the Treaty of Maastricht. Apart from the political attention the integration project gained in this phase, a consolidation of the instrument of interinstitutional agreements took place. In quantitative terms a number of new agreements were adopted, and in qualitative terms their scope was extended beyond the budget procedure.

The starting preparations for eastern enlargement define the beginning of the third phase of constitutional development. For the EU it is characterised by the attempt to deepen the integration in order to establish the capacities for enlargement. The instrument of interinstitutional agreement goes through the first steps of constitutionalisation. Apart from early references in the treaties' protocols, the Treaty of Nice for the first time includes interinstitutional agreements in the body of the treaty. Furthermore the intergovernmental conference adopted a declaration which recognizes interinstitutional agreements for the first time in general terms. In spite of some incoherencies this declaration is of importance for the constitutional recognition. The final step of constitutionalisation is intended to occur through the constitutional treaty of June 2004. As long as it is not ratified this phase still continues.

9. The legal qualification of the existing European constitution aroused considerable discord in the past. Currently the opinion which subscribes to the qualification of the existing treaties as a constitution seems to prevail. However this qualification is only the starting point for the development of a European constitutional theory. Early indica-

tions can be extracted from an analysis of the substrata of the European constitution. This is how a working model can be sketched which allows a constitutional study of interinstitutional agreements. According to this model the constitution is characterised by the interplay of constitutional structures and constitutional principles. Whereas constitutional structures represent the normatively stable foundations of the constitutional order, constitutional principles as obligations of optimization ensure the best possible realization of constitutional choices. Whilst complementing each other these two elements shape the character of the constitutional order. Among European constitutional structures is counted firstly the primacy of the constitution which is inherent in every constitutional order. Additionally there is the institutional structure which is characterised by the institutional triangle of Parliament, Council and Commission on the one hand and Court of Justice and Court of Auditors on the other. Another structural element is the system of competences. Furthermore the – currently still existing – fragmentation of the European Union into supranational and intergovernmental policy areas as well as the federal configuration are part of Europe's constitutional structure. The constitutional principles primarily consist of the rule of law and the European democratic principle. They represent principles of the highest order which may contain different sectorial principles. Thus sketched, the model of the European constitution built upon constitutional structures and constitutional principles is resistant to minor constitutional amendments.

10. Interinstitutional agreements fulfil different functions for the European constitution. The function as an analytical concept describes steering capacities with regard to the systematic condition of the constitution. Functions do not possess a legal value on their own. They help to understand normative relations between legal instruments and the constitutional order. First, interinstitutional agreements fulfil a stability function. The legal moderation of interinstitutional conflicts helps to avoid institutional instabilities. Additionally there is a flexibility function. Interinstitutional agreements are an instrument to administer subconstitutional adaptations of decision-making procedures which shield the constitution from rigidity. The constitution-making powers are thus relieved from constant constitutional amendments. Therefore flexibility and stability prove to be interrelated. Furthermore, interinstitutional agreements fulfil a networking function. The relations between the institutions, only rudimentarily sketched in primary law, are filled out by a network of cooperative and commonly agreed rules. The institutions thus mutually integrate themselves procedurally and guarantee that the

decision-making procedures stay operational. Finally a publicity function of interinstitutional agreements can be ascertained. As they become the standard instrument of interinstitutional cooperation, other more informal forms of cooperation are increasingly supplanted. Interinstitutional relations thus gain transparency. These diverse functional aspects reveal the importance of interinstitutional agreements for European constitutional law. Together they form an *acquis interinstitutionnel* which represents a sort of interinstitutional parallel constitution.

11.1. The relation between the main European institutions is determined by the principles of institutional autonomy, institutional balance and the duty of loyal cooperation. This structure implies the rejection of a model of separation of powers or functions. In contrast, the triangle structure of the legislative-executive institutions forms an organisation of overlapping functions with institutional separation. With regard to the predominant national paradigm of separation of powers – even in its modern form of functionally adequate institutional structure – this model is no shortfall but an adequate organisational answer to the task of exercising supranational sovereignty. The interinstitutional agreement has revealed itself as an ideal instrument to translate constitutional principles into practice. It realizes the principle of loyalty in a manner that respects autonomy and balance. Against this background, the relation between the main European institutions can be re-conceptualized as a procedural coalition. On the one hand, this expresses the reflexive character of the interinstitutional relations which has a mainly procedural configuration. And on the other hand the coalition element stresses both mutual dependence and political-strategic independence. The procedural coalition of the European constitutional institutions appropriately describes a modern organisational model for the realisation of supranational public power.

11.2. This specific organisational structure explains the uniqueness of the legal instrument of interinstitutional agreements. It is an intrinsic part of the procedural coalition of the European institutions, a part which does not exist in this form in any other constitutional order. An additional distinguishing condition is the lack of a coherent constitutional culture of the European constitution. Whereas in national constitutional orders the interinstitutional relations largely rely upon culturally forged customs, the European constitution is more dependent on the extension of legal bonds.