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**The Taxonomy of Law
in EC Agricultural Policy:
A Case Study of the Dairy Sector**

FRANCIS SNYDER

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DEPARTMENT OF LAW

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FOREWORD

This paper was originally written as a contribution to a research project on 'The Hierarchy and Sources of EC Law', directed by Prof.Dr. Gerd Winter, Zentrum für Europäische Rechtspolitik (ZERP) an der Universität Bremen, and financed by the European Parliament. It will also appear in a collective publication: Gerd Winter (ed.), Reforming the Categories and Hierarchy of EC Legal Acts to be published in 1995. The author wishes to express his gratitude to the editor for his kind permission to publish the paper in the EUI Working Papers series.

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The first part of the book is devoted to a general introduction to the theory of the firm. It starts with a discussion of the basic concepts of the firm, such as the production function, the cost function, and the profit function. The second part of the book is devoted to the theory of the firm in a dynamic context. It starts with a discussion of the basic concepts of the dynamic firm, such as the dynamic production function, the dynamic cost function, and the dynamic profit function. The third part of the book is devoted to the theory of the firm in a stochastic context. It starts with a discussion of the basic concepts of the stochastic firm, such as the stochastic production function, the stochastic cost function, and the stochastic profit function. The fourth part of the book is devoted to the theory of the firm in a general equilibrium context. It starts with a discussion of the basic concepts of the general equilibrium firm, such as the general equilibrium production function, the general equilibrium cost function, and the general equilibrium profit function. The fifth part of the book is devoted to the theory of the firm in a policy context. It starts with a discussion of the basic concepts of the policy firm, such as the policy production function, the policy cost function, and the policy profit function.

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THE TAXONOMY OF LAW IN EC AGRICULTURAL POLICY: A CASE STUDY OF THE DAIRY SECTOR

FRANCIS SNYDER*

I INTRODUCTION

A WHY IS THE HIERARCHY OF ACTS PROBLEMATIC?

The hierarchy of acts in the European Community (EC) is both deceptively simple from the legal standpoint and inherently controversial from the political standpoint. On the one hand, Article 189 EC provides that the EC institutions may take a limited number of acts and also defines the main characteristics of these acts. It has long been recognised, however, that the Treaty provisions do not give an accurate description of practice. The characteristics of the listed acts do not always correspond to their description in the Treaty, and the EC legislative institutions have used (and the European courts have recognised) new types of acts. On the other hand, Article 189 embodies a conception of the EC as a divided-power system which is both the product of compromise and unusual in character. This basic conception has, however, often been criticised. Moreover, the configuration of interests that was crystallised in the initial Treaty compromise has altered over the years; this is reflected to some extent in the Maastricht Treaty on European Union (TEU). Thus, Article 189 does not reflect

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current practice. Nor does it seem to meet the basic expectations of its users. For both legal and political reasons, therefore, the hierarchy of acts as expressed in the EC Treaty would appear to be ripe for reform.¹

B PURPOSE AND SCOPE OF THE REPORT

In order to contribute to this exercise, the present report considers the taxonomy of acts that have been used in the agricultural sector. The report has three main purposes. The first purpose is to analyse the types of acts which have been employed in the development of the Common Agricultural Policy (CAP). The second purpose is to consider the role of the principal EC institutions in the adoption of this legislation. The third purpose is to ascertain what legal forms have been used to express different types of policy decisions. In other words, we are concerned with the extent to which CAP legislation embodies a distinction between legislative and executive functions, institutions and acts.²

We also wish to ascertain the extent to which the European Parliament has participated in the enactment of legislation with regard to the CAP. Finally, we are concerned with the types of legal acts which have been used by different EC institutions to put into practice different types of economic policy. As the ensuing discussion will show, these three purposes are intimately related.

The agricultural sector accounts for more EC legislation (as well as more

¹ This paper treats the agricultural sector, so it is concerned only with the EC Treaty. It does not deal with other aspects of the TEU.

² For the present purposes, this report accepts Lenaerts' functional definition of the separation of powers, as well as his argument that there is no necessary correspondence between functions and institutions in the EC system. See Koen Lenaerts, 'Some Reflections on the Separation of Powers in the European Community', (1991) 28 Common Market Law Review 11.

judgments by the European Court of Justice) than any other sector. In 1976 and 1977 more than 83% of EC legislation concerned agricultural matters.³ In the single month of August 1977 the legislative output of the EEC included: one decision concerning economic and monetary policy; one decision and one draft directive concerning regional policy; three decisions concerning industry; four decisions and nine regulations concerning foreign trade; and 39 decisions and 167 regulations concerning agriculture. For this and for other months of the same year, agricultural legislation averaged about two decisions and eight regulations per working day.⁴ For sugar and syrups alone, in 1977 the EEC issued three opinions, five proposals, 87 directives and 365 regulations.⁵ Since then the relative importance of the agricultural sector in EC legislation has declined, but it still remains very significant.⁶ As of 1993 approximately 25% of all EC legislation was devoted to agriculture.⁷

As a result of the sheer amount of agricultural legislation, it is impossible in a brief report to consider the agricultural sector as a whole. We need to

³ Commission Answer to Written Question 588/78 (OJ 1978 C282/56) cited in Francis G. Snyder, Law of the Common Agricultural Policy (Sweet & Maxwell, London, 1985).

⁴ David Pickard, Gillian Norris and Nick Young, 'Three Case Histories in Agriculture', Centre for European Agricultural Studies, Wye College, University of London, unpublished report for Leverhulme Project, nd), p 1.

⁵ Ibid., p 2.

⁶ It would be interesting to compare total CAP legislation with total EC legislation from 1958 to the present, and to plot the results against a comparison of CAP expenditure with total EC expenditure during the same period.

⁷ Rene Barents, 'The Quality of Community Legislation: Some Observations on EC Legislation in the Agricultural Sector', (1994) 1 Maastricht Journal of European and Comparative Law 101 at 103.

circumscribe the object of study in a more limited but nevertheless sufficiently representative way. For this reason, the present report focusses in particular on the law concerning milk and milk products. The dairy sector has always been, and remains, of seminal importance in EC agriculture, policy and law. It was economically and socially very significant for both northern and southern countries among the original Six Member States. In addition, it was among the first agricultural sectors to be regulated by EC law and since then has always accounted for a very large proportion of EC agricultural expenditure. Furthermore, it remains of great political salience within the EU as a whole. The dairy sector is also of manageable proportions for a brief study. Though perhaps no single sector could really be deemed typical of EC agriculture in a statistical sense, the dairy sector presents a sufficiently representative case study. Consequently, any conclusions which might be drawn from it should be capable of being extrapolated to the agricultural sector as a whole.

Here it is not possible even to deal with all aspects of EC constitutional law concerning the dairy sector; for the present purposes, 'constitutional law' means the basic principles governing the organisation and exercise of public power. In particular, the report focusses on the main types of acts which have been used so far in the dairy sector and considers why these specific types have been used. It also delineates the roles which the Commission, the Council and the European Parliament, respectively, have played in translating dairy sector policies into law. The report thus is concerned mainly with the horizontal or intra-EC aspects of EC constitutional law regarding the dairy sector.

In some areas of agricultural law, however, for example concerning structural policy, a very significant legislative role is also played by the Member States.

For reasons which appear later, the CAP has been mainly concerned in the past with price and market policy rather than structural policy, so the legislative role of the Member States has been of secondary importance. Some aspects of the legal relationship between the EC and the Member States are mentioned in the following discussion. For the most part, however, this vertical dimension of EC constitutional law regarding the dairy sector lies outside the scope of the report. Nor does this report consider the relationship of the dairy sector to the EC's economic constitution, even though some remarks are made in passing which concern the relation between state and market with respect to the dairy sector.

C ORGANISATION OF THE REPORT

The remainder of the report consists of two parts followed by conclusions.

The next part (II) describes the legal organisation of the dairy sector. It first outlines the Treaty framework within which dairy legislation has been enacted. Second, it sketches briefly the creation of the normative paradigm for enactment of the basic dairy sector regulation, namely the cereals regime. Third, it analyses in some detail the current basic regulation for milk and milk products. Fourth, it surveys the other dairy legislation which is currently in force. Finally, it summarises the main trends in the enactment of dairy legislation from 1964 to the present.

The following part (III) considers the legal forms which have been used to put into practice selected major policy decisions. After a brief introduction, it focuses on two of the most important and controversial policy decisions enacted with regard to the dairy sector during the past thirty years. The first concerns

various measures which were introduced in the 1970s to control surplus production, in particular what was known as 'the skimmed milk powder deposit scheme'. The second consists of a related but discrete set of measures which are sufficiently distinctive to be considered a separate set of policy decisions, namely dairy quotas.

The final part (IV) summarises the main conclusions. On the basis of the case study, it first identifies the main variables in the analysis of the acts used in EC agricultural policy. Then it outlines the division of legislative labour with regard to the CAP. It then maps three critical paths that need to be considered in any proposed reform of the hierarchy of EC acts. Finally, it offers some general concluding remarks concerning the main determinants of the taxonomy of law in EC agricultural policy.

II EVOLUTION OF THE LEGAL ORGANISATION OF THE DAIRY SECTOR

A THE TREATY FRAMEWORK

The CAP, as is well known, is based on Articles 38-47 of the EC [formerly EEC] Treaty. In the original Treaty of Rome, Title II Agriculture was included in Part II Foundations of the Community, together with the 'four freedoms' and the common transport policy. This legal context was significant, both in terms of the EC political and economic constitution and in terms of the EEC legislative process. It conferred upon agriculture a privileged legal, political and economic status which was equivalent to that of the EEC's basic economic principles.⁸ Together with the 'four freedoms' and competition law, it thus presented a picture of the EC as a mixed economy, in which both state and market had a fundamental role. It also contributed to the rigidity of EEC law-making in the agricultural sector: in particular, it provided a clearly expressed constitutional provision for the subsequent entrenchment, by the European Court of Justice, of a broad interpretation of Article 43(2) as the legal basis of agricultural legislation.

In this respect, however, the EEC Treaty was amended by the Maastricht Treaty on European Union. Part II Foundations of the Community was deleted and replaced by a new Part II Citizenship of the Union, and a new Part III Community Policies regrouped the former Parts II and III. As a result, Title II Agriculture is now merely one among thirteen titles within Part III Community Policies. So far this legal change has passed largely unnoticed, but eventually

⁸ See Francis Snyder, *New Directions in European Community Law* (Weidenfeld & Nicolson, London, 1990), pp 106-107.

it may have far-reaching consequences. Its implications for the status of agriculture within the constitutional structure of the EC deserve to be closely monitored.

According to Article 38(1), the common market is to extend to agriculture and trade in agricultural products. As provided more precisely and more forcefully in Article 38(4), the operation and development of the common market for agricultural products must be accompanied by the establishment of a common agricultural policy among the Member States. The CAP was the first (and for a long time the only) common EEC policy. It is therefore not surprising that agriculture is an area in which, once having acted (and thus pre-empted the field), the EC has always been considered to have exclusive competence. It may be suggested, therefore, that the taxonomy of acts in the agricultural sector has been of singular importance, both practical and symbolic, in the development of EC law as a whole.

The objectives of the CAP are stated in Article 39 EC. In order to attain these objectives, as provided in Article 40(2), a common organisation of agricultural markets shall be established. According to Article 40(2), it is to take one of the following alternative forms: (a) common rules on competition, (b) compulsory co-ordination of the various national market organisations, or (c) a European market organisation. In practice, the third form has invariably been adopted. A common organisation of the market is thus a type of regulatory scheme; it is often called a regime.

Within the framework of the common organisation, the EC institutions have very broad legislative powers. Article 40(3) states that the common organisations

established in accordance with Article 40(2) may include all measures required in order to attain the Article 39 objectives. These measures may include but are not limited to the following: the regulation of prices, production and marketing aids, storage and carry-over arrangements, and common rules for stabilising imports or exports. The common organisation is limited, however, to the pursuit of the Article 39 objectives. Nevertheless, it is clear that the CAP is a highly regulatory policy: within the framework of the EC's economic constitution, it is often portrayed as the epitome of state intervention and economic regulation.⁹ In this respect, however, it should be noted that the EC is consistent with the pattern of agricultural policy-making in Europe and virtually throughout the world. In modern times, with the exception of the United Kingdom between the mid-1800s and the 1930s, the state (and in particular central government) has always intervened very strongly in agricultural markets.¹⁰

Article 43 EC provides the legal basis for CAP legislation. The EEC Treaty established a schedule for the implementation of measures concerning the common market in agriculture and a common agricultural policy. In order to evolve the broad lines of a common agricultural policy, the Commission was, immediately the Treaty entered into force, to convene a conference of the Member States with a view to making a comparison of their agricultural policies, in particular by producing a statement of their resources and needs (Art. 43(1)

⁹ See, e.g. Streit and Mussler, 'The Economic Constitution of the EC - From "Rome" to "Maastricht" (1995) 1 European Law Journal 000. Compare Constantinesco, 'La constitution économique de la C.E.E.', (1977) 13 Revue Trimestrielle de Droit Européen 244.

¹⁰ For a similar conclusion from two different political standpoints, see eg Michael Tracy, Government and Agriculture in Western Europe, 1880-1988 (Harvester Wheatsheaf, London, 3rd edition 1989); John Grahl and Paul Teague, 1992 -The Big Market: The Future of the European Community (Lawrence & Wishart, London, 1990), pp 74-79.

EC). This conference was held at Stresa, Italy, from 3-12 July 1958.

Within two years of the Treaty's entry into force, the Commission was, taking into account the work of the conference and after consulting the Economic and Social Committee, to submit proposals for working out and implementing the common agricultural policy, including the replacement of national market organisations by one of the forms of common organisation provided for in Article 40(2), and also for implementing the measures specified in Title II Agriculture (Art. 43(1), para. 1 EC). The common market was to be established progressively during a transitional period of twelve years, divided into three stages of four years each (Art. 8(1) EEC). Regarding agriculture in particular, the Member States were to develop the common agricultural policy by degrees during the transitional period and bring it into force by the end of that period at the latest (Art. 40(1)). Acting unanimously during the first two stages and by a qualified majority thereafter, the Council was, on a proposal from the Commission and after consulting the Assembly [now European Parliament] to make regulations, issues directives or take decisions, without prejudice to any recommendations it might also make (Art. 43(3), para. 3 EC). Transitional measures were provided by Articles 44, 45 and 46. Based on this Treaty framework, a common organisation of the market has been adopted by the EC for virtually all temperate-zone agricultural products.

B THE NORMATIVE PARADIGM

The first common organisation of the market for dairy products was enacted in 1964.¹¹ In 1968 it was replaced by the regulation which, despite many

¹¹ Council Regulation 13/64/EEC, JO 27.2.1964 p 549/64.

amendments, is still in force today.¹² Adopted on the basis of Articles 42 and 43(2) EC, the dairy regime took the form of a Council regulation. Its legal basis and legal form were not only consistent with the strong mandate conferred on the EC and its institutions by the Treaty. They also followed a pattern of EC agricultural law-making which had been established by the Council in adopting the first market organisations in the early 1960s: the cereals regime provided the normative paradigm.¹³ This paradigm involved the use of a regulation to create a European-level scheme which would apply uniformly throughout the Member States.

This section of the report focusses on this normative paradigm. It concentrates primarily on the structures and processes involved in the enactment of the first cereals regime. The following paragraphs thus focus mainly on the period prior to the enactment of the first dairy regime in 1964. The discussion is not however concerned with the cereals regime *per se*. Instead, its main purpose is to illuminate the subsequent choice of a regulation as the normative form used for the basic legal act in the dairy sector. In other words, this part of the report tries to answer the question as to why, in the dairy sector, a regulation was used instead of another type of act. The main argument is two-fold. First, the dairy regime, as most other commodity regimes, is based on a single normative paradigm: that of the common organisation of the market in cereals. Second, this normative paradigm was constructed by a combination of structural and processual elements, which converged in the enactment of the first cereals

¹² Council Regulation 804/68/EEC, OJ 28.6.68 L148/13.

¹³ The point is well-known. See also Michael Tracy, Government and Agriculture in Western Europe, 1880-1988 (Harvester Wheatsheaf, London, 3rd edition 1989), p 256.

regulation in the early 1960s.

This initial choice of a regulation as the normative act for the common organisation of agricultural markets was the result of the convergence of several different factors, some related to structures and others related to processes.¹⁴ In order to understand these factors, the enactment of the dairy regime needs to be set in the historical context of the late 1950s and early 1960s. Cereals were of fundamental importance in the European agricultural economy,¹⁵ and, partly as a consequence, they were among the first agricultural products to be regulated by the EC. The common organisation of the market for cereals was adopted in 1962.¹⁶ It provided the essential legal model for later regimes, including that for milk and milk products.

The original six EC Member States were strongly in favour of a common EEC agricultural policy. As Lindberg wrote at the time, '[w]hat is significant for political integration is the seeming unanimity with which the need for a common agricultural policy had been accepted. Except for the Dutch, the cleavages

¹⁴ On this distinction, see "'Interests" and the Legislative Process', chapter 2 in my New Directions in European Community Law (Weidenfeld & Nicolson, London, 1990), pp 32-62.

¹⁵ See Francis G. Snyder, Law of the Common Agricultural Policy (Sweet & Maxwell, London, 1985), p 74. It was widely recognised, including by the European Parliament, that '[l]es prix des céréales occupent en quelque sorte une position clé dans le système des prix agricoles': see Parlement Européen, Rapport fait au nom de la commission de l'agriculture sur les propositions de la Commission de la C.E.E. au Conseil (doc. 37) concernant des résolutions du Conseil relatif à l'établissement d'un niveau commun des prix pour le lait et les produits laitiers, la viande bovine, le riz, le sucre, les graines oléagineuses et l'huile d'olive, certaines mesures spécifiques dans le secteur du sucre, certaines mesures spécifiques dans le secteur du lait (Rapporteur: M. J.H. Dupont) (Parlement Européen, Documents de Séance, Document 57, 9 mai 1966), p 3.

¹⁶ Council Regulation 19/62, OJ 1962 L933/62.

revealed in the Assembly's debates occurred on the basis of party affiliation and not nationally. The Socialists and Christian-Democrats were in direct opposition on a number of points, but both espoused positions involving increased centralisation'.¹⁷

The original six Member States also shared the view that the CAP could potentially make a central contribution to European integration.¹⁸ Thus, for example, in adopting the first cereals regime, the six Member States considered that they had 'inaugurated the Community's first binding and virtually irreversible common policy, and one which seemed to be a necessary, if not a sufficient, step towards closer economic integration'.¹⁹ In fact, the CAP has often been described as the EC's 'marriage contract'.²⁰

These political views were held, as one might expect, without express reference

¹⁷ Leon N. Lindberg, The Political Dynamics of European Economic Integration (Stanford University Press, Stanford, 1963), pp 257-258.

¹⁸ See Martin Petersen, International Interest Organizations and the Transmutation of Postwar Society (Almqvist & Wiksell, Stockholm, 1979), p 227.

¹⁹ Edmund Neville-Rolfe, The Politics of Agriculture in the European Community (Policy Studies Institute, London, 1984), p 222.

²⁰ See Francis Snyder, 'The Common Agricultural Policy in the Single European Market', Collected Courses of the Academy of European Law 1991, Vol. II, Book I (Kluwer, Dordrecht, 1992) pp 303-326 at p 311. See also Giancarlo Olmi, Commentaire Mégret: Le Droit de la CEE. 2: Politique Agricole Commune (Editions de l'Université de Bruxelles, Brussels, 1991), pp 323-326; Leon N. Lindberg, The Political Dynamics of European Economic Integration (Stanford University Press, Stanford, 1963), pp 219-220. In the negotiations to draft the Rome Treaty articles on agriculture, 'it was a series of Franco-German deals, often forged outside the main conference, that paved the way for an agreement on agriculture. These effectively set the agenda for debate and the framework for a solution': Richard T. Griffiths, 'The Origins of the Common Agricultural Policy', in J. Cheng (ed), The Common Agricultural Policy of the European Communities (English draft of an article to be published in Chinese; in press), p 31.

to any specific legal form. Given the conjunction of Articles 43(2) and 189 in the EEC Treaty, however, it may be suggested that the use of a regulation was an obvious symbol of the shared conception of a common policy and an equally obvious means to promote its uniform application. At the same time, the same legal form supplied the main normative instrument which was available to the Member States to ensure, so far as possible, that the CAP made a central contribution to European integration. It is worth noting that the configuration of the original six Member States itself is important. It is the legal product of these Member States, expressing mainly their views and interests, that has continued to provide the model for the legal form of the CAP.

The use of an EEC regulation was also favoured - or at least tolerated - by the interest groups in the key Member States, especially France and Germany. This was so, first, in the sense that they favoured the 'europeanisation' of agricultural policy, and second in the sense that 'the principle of establishing common market organisations was nowhere questioned among farmer organisations.'²¹ Interest groups in the cereals sector helped to establish the basic legal pattern. Subsequently, their counterparts in the dairy sector, though apparently with less enthusiasm, accepted this normative paradigm.²²

In addition, and not of the least importance, the use of a regulation as the legal form for the basic commodity regimes was favoured by both the Commission and the Council and, as will be seen later, the European Parliament. The

²¹ Martin Peterson, International Interest Organizations and the Transmutation of Postwar Society (Almqvist & Wiksell, Stockholm, 1979), p 235.

²² See Francis G. Snyder, Law of the Common Agricultural Policy (Sweet & Maxwell, London, 1985), p 8-10, 71 and sources cited there.

convergence of the views of the Commission and the Council was not however a foregone conclusion at the time. It resulted from conflict, negotiation and compromise. These processes concerned mainly the priorities and the content of agricultural policy. However, because they occurred in the shadow of Article 189 EEC, and more specifically the original assumptions which underlay the drafting of that Article, they inevitably involved more or less direct implications for the choice of legal form.

The Commission originally favoured developing a European-level structural policy before using the price mechanism to integrate agricultural markets. This priority was rejected by the Council, notably by the high-price countries such as Germany and Benelux, mainly on socio-political rather than economic grounds. They wanted the politically delicate structural policy to remain in hands of national governments, with the Community having responsibility for price and market policy.²³ If a Community structural policy had been developed, it would most likely have involved the use of a harmonisation directive. In contrast, the choice of price and market policy as the first priority of EC agricultural policy tended (to put it in the least strong terms) to direct the Community legislator's attention towards the use of a regulation. The choice of price and market rather than structural policy thus had direct implications for the choice of legal instrument. In the light of the importance of the CAP among EC policies, it may also be suggested that this early priority had fundamental and long-lasting (though largely unforeseen) consequences for the development of EC law.

Consequently, in the early 1960s the Commission presented specific proposals

²³ Martin Petersen, *International Interest Organizations and the Transmutation of Postwar Society* (Almqvist & Wiksell, Stockhol, 1979), pp 228-235.

of different types according to whether they concerned structural policy or market policy. With regard to structural policy, the proposed EC measures were designed to coordinate, guide and eventually harmonise national measures. With regard to price and market policy, however, the Commission stated that 'in the common-market phase it is not possible merely to coordinate domestic systems which differ so widely or to adopt any one of them unchanged for application to the market as a whole. The aim must be to arrive at a new form of organisation, selecting its elements from the various existing forms and whenever possible enlisting the assistance of the market organisations of the various countries'.²⁴ In these respects it would appear that, despite its important initiating and mediating role, the Commission mainly reflected the views of the Council. Thus it gave priority to market policy over structural policy as the main agricultural policy to be developed at EC level. In addition, and consequently, it gave priority to the use of a regulation rather than a directive.

This legal form was also consistent with the EC's exclusive competence in the field and the agreed need to unify the agricultural markets of the Member States. Moreover, with regard to market policy there was in some cases a legislative gap to be filled, because national organisations of the market in all products did not previously exist in all Member States.²⁵ Furthermore, it should be noted that the

²⁴ Leon N. Lindberg, *The Political Dynamics of European Economic Integration* (Stanford University Press, Stanford, 1963), p 240, quoting from EEC Commission, *Proposals for the Working Out and Putting into Effect of the Common Agricultural Policy in Application of Article 43 of the Treaty Establishing the European Economic Community* (Brussels, 30 June 1960), Part III, p 18. Note that very similar arguments were advanced by the Member States for the retention of structural policy mainly in the hands of national governments, and thus for Community action, if any, to take the form of directives.

²⁵ See Francis G. Snyder, *Law of the Common Agricultural Policy* (Sweet & Maxwell, London, 1985, p 71 and sources cited there.

use of a regulation enhanced the position of both the Commission and the Council. In the creation of the CAP, '[t]he Commission's proposals were based on the assumption that a satisfactory agricultural policy demanded centralized direction by Community institutions working with, but not under, national officials'²⁶ Yet, as Tracy describes,

[t]he power of decision, however, lay with the Council....In November 1960 the Council adopted certain general principles; on 20 December it adopted a more substantive Resolution declaring that a system of import levies could meet the need for a Community instrument to facilitate the transition to the common market stage....

The 'package' adopted on 14 January 1962 established the method of support for the definitive common market organisation [for cereals], which the Treaty had left open. In line with the Council Resolution of 20 December 1960, import levies played key role, but as one element in a more extensive system, involving much more intervention than the Commission proposed....²⁷

This complex picture was complemented by procedural and processual factors.

These factors, which concerned the EC decision-making process, were not limited to the agricultural sector. On the one hand, to give the example of the dairy sector, the first dairy regulation formed part of an extremely complex 'package deal', involving draft regulations for a number of agricultural products.²⁸

²⁶ Leon N. Lindberg, The Political Dynamics of European Economic Integration (Stanford University Press, Stanford, 1963), p 279; original emphasis omitted.

²⁷ Michael Tracy, Government and Agriculture in Western Europe, 1880-1988 (Harvester Wheatsheaf, London, 3rd edition 1989), pp 254, 255.

²⁸ See eg Leon N. Lindberg, The Political Dynamics of European Economic Integration (Stanford University Press, Stanford, 1963), p 246-252; Edmund Neville-Rolfe, The Politics of Agriculture in the European Community (Policy Studies Institute, London, 1984), pp 204-231

The basic principles for the dairy sector were adopted in a series of 'marathon session' between 18 December 1961 and 14 January 1962.²⁹ This form of decision tended to give even more weight than might otherwise be the case to the use of the first commodity regime, that of cereals, as a basic paradigm. On the other hand, the original six Member States considered that 'it was essential ... to have firmly established the principles of the CAP and consolidated them in the form of legally binding regulations before negotiations on the British application to join the Community could get seriously under way'.³⁰

In the circumstances this political dynamic itself had both a general element and a specific element. The general element referred to 'la construction européenne', the building up of the acquis communautaire which would have to be accepted by new applicants for EEC membership. The specific element concerned the establishment of a CAP based, grosso modo, on the continental model of agricultural policy, as distinguished from that of deficiency payments formerly used by the United Kingdom. These two elements coincided in the legal form of a regulation.

C THE DAIRY REGIME

A common organisation for dairy products was first agreed in 1964 as Council

²⁹ See F. A. M. Altling von Gesau, 'Les sessions marathon du Conseil des Ministres', in Pierre Gerbet and Daniel Pépy (sous la direction de), La décision dans les Communautés européennes (Presses Universitaires de Bruxelles, Brussels, 1969), pp 99-107 at 106.

³⁰ Edmund Neville-Rolfe, The Politics of Agriculture in the European Community (Policy Studies Institute, London, 1984), p 215.

Regulation 13/64.³¹ This first dairy regulation instituted a basic management of the dairy market, but it did not provide for a unified price system.

Two important points regarding this regulation deserve to be noted, even at the risk of anticipating the following discussion. First, it was accepted by all of the EC institutions that the appropriate legal form for enacting the dairy regime was a regulation. This emerges clearly from the report of the European Parliament Committee on Agriculture on the proposal submitted by the Commission to the Council.³²

Second, the choice of a regulation as the appropriate legal form did not necessarily exclude consultation of the European Parliament. To put it another way, although the EC institutions agreed on the legal form, they did not agree on the role of the European Parliament. When the Commission proposal for this

³¹ Council Regulation 13/64/EEC, JO 27.2.1964 p 549/64. For detailed discussion of the dairy regime, see Jacques Mégret, Jean-Victor Louis, Daniel Vignes and Michel Waelbroeck, Le Droit de la Communauté économique européenne. Commentaire du Traité et des textes pris pour son application. 2: Agriculture (Editions de l'Université de Bruxelles, Brussels, 1973), especially pp 119-131; Francis G. Snyder, Law of the Common Agricultural Policy (Sweet & Maxwell, London, 1985), especially pp 83-84; Francis G Snyder, Common Agricultural Policy of the European Economic Community (Butterworths, London, 1990, reprinted from Halsbury's Laws of England, Volume 1(2), 4th edition reissue (Butterworths, London, 1990); Giancarlo Olmi, Commentaire Mégret: Le Droit de la CEE. 2: Politique Agricole Commune (Editions de l'Université de Bruxelles, Brussels, 2nd ed 1991), especially pp 175-178; Trattato Breve di Diritto Agrario Italiano e Comunitario (diretto da Luigi Costato) (CEDAM, Padova, 1994).

³² See Parlement Européen, Rapport fait au nom de la commission de l'agriculture sur les propositions de la Commission de la C.E.E. au Conseil (documents 25, 26 et 27) relatives au règlement portant institution d'un régime de prélèvements et établissement graduel d'une organisation commune des marchés du lait et des produits laitiers, au règlement portant établissement graduel d'une organisation commune des marchés dans le secteur de la viande bovine et au règlement portant établissement graduel d'une organisation commune du marché du riz (Rapporteur: M. R. Charpentier) (Parlement Européen, Documents de Séance, 1962-1963, Document 41, 20 juin 1962), passim.

regulation was submitted by the Council to the European Parliament [then Assembly], it included the following article:

Article 22

Sur proposition de la Commission, le Conseil, statuant à l'unanimité au cours de la deuxième étape et à la majorité qualifiée par la suite, peut prendre pour les produits visés à l'article premier, paragraphe 1, toutes mesures dérogatoires au présent règlement afin de tenir compte des conditions particulières dans lesquelles ces produits pourraient se trouver.

A modification was proposed by the European Parliament Committee on Agriculture, as follows:³³

Article 22

Sur proposition de la Commission, et après consultation du Parlement européen, le Conseil, statuant à l'unanimité au cours de la deuxième étape et à la majorité qualifiée par la suite, peut prendre pour les produits visés à l'article premier, paragraphe 1, toutes mesures dérogatoires au présent règlement afin de tenir compte des conditions particulières dans lesquelles ces produits pourraient se trouver.

This proposed modification was not accepted by the Council. Instead, the regulation as finally enacted provided as follows:

Article 23

Sur proposition de la Commission, le Conseil, statuant à l'unanimité au cours de la deuxième étape et à la majorité qualifiée par la suite, peut

³³ Projet d'avis du Parlement européen concernant la proposition de règlement portant institution d'un régime de prélèvements et établissement graduel d'une organisation commune des marchés du lait et des produits laitiers, art. 22, in Parlement Européen, Rapport fait au nom de la commission de l'agriculture sur les propositions de la Commission de la C.E.E. au Conseil (documents 25, 26 et 27) relatives au règlement portant institution d'un régime de prélèvements et établissement graduel d'une organisation commune des marchés du lait et des produits laitiers, au règlement portant établissement graduel d'une organisation commune des marchés dans le secteur de la viande bovine et au règlement portant établissement graduel d'une organisation commune du marché du riz (Rapporteur: M. R. Charpentier) (Parlement Européen, Documents de Séance, 1962-1963, Document 41, 20 juin 1962), p 22 (emphasis in original).

modifier la liste des produits visés à l'article premier paragraphe 2, ou prendre pour ceux-ci toutes mesures dérogatoires au présent règlement afin de tenir compte des conditions particulières dans lesquelles ces produits pourraient se trouver.³⁴

As a result, the European Parliament was excluded from the legislative procedure for the enactment of subsequent acts within the framework of the first dairy regime.

It should be noted that the Commission proposal also included provision for the management committee procedure, to be used when so provided by express terms of the regulation.³⁵ The European Parliament did not propose any modification to this provision.³⁶ This procedure was included in the enacted regulation.³⁷

It thus deserves to be emphasised that, even in the early days of the dairy regime, there was no necessary connection between the choice of a regulation

³⁴ Règlement no. 13/64/EEC du Conseil, art. 23, JO 27.2.1964 p 549/64.

³⁵ Projet d'avis du Parlement européen concernant la proposition de règlement portant institution d'un régime de prélèvements et établissement graduel d'une organisation commune des marchés du lait et des produits laitiers, arts. 23-25, in Parlement Européen, Rapport fait au nom de la commission de l'agriculture sur les propositions de la Commission de la C.E.E. au Conseil (documents 25, 26 et 27) relatives au règlement portant institution d'un régime de prélèvements et établissement graduel d'une organisation commune des marchés du lait et des produits laitiers, au règlement portant établissement graduel d'une organisation commune des marchés dans le secteur de la viande bovine et au règlement portant établissement graduel d'une organisation commune du marché du riz (Rapporteur: M. R. Charpentier) (Parlement Européen, Documents de Séance, 1962-1963, Document 41, 20 juin 1962), p 23 (emphasis in original).

³⁶ Ibid.

³⁷ Règlement no. 13/64/EEC du Conseil, arts. 24-26, JO 27.2.1964 p 549/64.

as the appropriate legal act for establishing the dairy regime, on the one hand, and the exclusion of the European Parliament from the procedure for enacting most implementing legislation, on the other hand. History provides two telling examples. First, in negotiations in the mid-1950s on the Spaak proposals concerning the wording of the agricultural articles of the Rome Treaty, a French amendment removed the obligation to consult the European Parliament; as a result of Dutch insistence, however, this obligation was reinstated.³⁸ Yet both countries favoured the 'europeanisation' of agricultural policy. Second, the rapporteur of the European Parliament Committee on Agriculture on the dairy proposal was M. René Charpentier. In the mid-1950s Charpentier, while a French delegate to the Council of Europe, had presented a proposal involving the creation of a supranational authority to the Benvenuti Committee, which was established by the Consultative Committee of the Council of Europe to set up a 'Green Pool'.³⁹ His report to the European Parliament on the Commission's dairy proposal clearly favoured inclusion of the European Parliament in the legislative procedure.

The emphasis on the role of the European Parliament in enacting agricultural legislation emerges with even more force from the 1966 report by the European Parliament's Committee on Agriculture regarding the Commission's proposals to the Council concerning the establishment of a common price for dairy products

³⁸ Richard T. Griffiths, 'The Origins of the Common Agricultural Policy', in J. Cheng (ed), The Common Agricultural Policy of the European Communities (English draft of an article to be published in Chinese; in press), p 35.

³⁹ Edmund Neville-Rolfe, The Politics of Agriculture in the European Community (Policy Studies Institute, London, 1984), pp 187-188. Neither this proposal nor the more intergovernmental proposal put forward by a British delegate was agreed by the Committee: ibid. at 188.

and other commodities. After thanking the Commission for its important work, the European Parliament Committee stated that:

'Si donc votre commission se félicite de ce que l'exécutif ait proposé ces mesures, elle s'étonne de constater que dans aucune des trois propositions de résolution du Conseil ne figurent les termes "vu l'avis du Parlement européen". Bien que la consultation officielle relève de la compétence du Conseil, il n'en demeure pas moins que par le passé, lorsque l'exécutif présentait des propositions dans le cadre de l'article 43 du traité de la C.E.E., il faisait état dans le préambule de la nécessité de consulter le Parlement européen.

Votre commission voit là une omission tout à fait regrettable qui, elle l'espère, n'est pas symptomatique de l'attitude de la Commission de la C.E.E. à l'égard de la démocratie dans la Communauté européenne.⁴⁰

Furthermore, in its proposed resolution on the matter the Committee on Agriculture:

...

souligne avec force que la mise en oeuvre de la politique agricole commune soustraira la politique agricole au contrôle des Parlements nationaux, lesquels n'auront plus, de ce fait, la possibilité de veiller à la situation en matière de revenus des personnes travaillant dans l'agriculture et constate que les pouvoirs actuels du Parlement européen ne l'habilitent pas à assurer la relève des Parlements nationaux;

estime en conséquence que cette lacune dans la structure institutionnelle de la Communauté rend indispensable un renforcement des droits du

⁴⁰ Parlement Européen, Rapport fait au nom de la commission de l'agriculture sur les propositions de la Commission de la C.E.E. au Conseil (doc. 37) concernant des résolutions du Conseil relatif à l'établissement d'un niveau commun des prix pour le lait et les produits laitiers, la viande bovine, le riz, le sucre, les graines oléagineuses et l'huile d'olive, certaines mesures spécifiques dans le secteur du sucre, certaines mesures spécifiques dans le secteur du lait (Rapporteur: M. J.H. Dupont) (Parlement Européen, Documents de Séance, Document 57, 9 mai 1966), p 11.

Parlement européen[.]⁴¹

It has been remarked that the principal locus of decision-making with regard to agricultural prices was the Commission-Council axis and that:

'[I]ntervention du Parlement dans la décision a peu de portée pratique. Il n'est pas consulté sur les modifications des textes initiaux qui ont lieu au cours et au terme de la négociation. En l'occurrence d'ailleurs, on peut considérer cette situation comme normale. Dans la plupart des pays de la Communauté, c'est au pouvoir exécutif que revient le choix des prix agricoles. La latitude d'action des gouvernements est plus ou moins étendue, selon la procédure qu'ils sont tenus de suivre et dont la détermination incombe aux parlements.'⁴²

Though referring expressly only to the setting of prices, this statement is revealing, both directly and by implication, with regard to the role of the European Parliament in the early days of CAP. But, even taking into account the legal powers, political status and composition of the European Parliament at the time, it can hardly be argued that the European Parliament accepted without protest its virtual exclusion from the legislative procedures.

Subsequently, during the EC transitional period, differences among national dairy prices were phased out. A definitive dairy regime was then adopted in

⁴¹ Proposition de résolution portant avis du Parlement européen sur les propositions de la Commission ..., in *Parlement Européen, Rapport fait au nom de la commission de l'agriculture sur les propositions de la Commission de la C.E.E. au Conseil (doc. 37) concernant des résolutions du Conseil relatif à l'établissement d'un niveau commun des prix pour le lait et les produits laitiers, la viande bovine, le riz, le sucre, les graines oléagineuses et l'huile d'olive, certaines mesures spécifiques dans le secteur du sucre, certaines mesures spécifiques dans le secteur du lait (Rapporteur: M. J.H. Dupont) (Parlement Européen, Documents de Séance, Document 57, 9 mai 1966), p 16-17.*

⁴² Hélène Delorme, 'L'adoption du prix unique des céréales', in Pierre Gerbet and Daniel Pépy (sous la direction de), *La décision dans les Communautés européennes* (Presses Universitaires de Bruxelles, Brussels, 1969), pp 269-296 at 269-270.

June 1968.⁴³ It differed from its predecessor in providing for a unified price system. Like its predecessor, however, it took the form of a Council regulation. In addition, it continued to exclude the European Parliament from the procedures for enacting legislation within the framework of the dairy regime.

Council Regulation 804/68 still remains the basic regulation in the dairy sector. It provides for the exercise of legislative authority by the Council and the Commission. In this respect, it follows a general pattern for the allocation of legislative authority which can be said to be typical of other common organisations of the market. In order to appreciate this pattern, it is necessary to analyse in more detail the specific provisions of the Regulation. This analysis will help us to answer two questions. First, what were and are the respective roles of the Council, the Commission and the European Parliament? Second, why were these roles assigned to these institutions in the basic regulation?

As provided by Regulation 804/68, the Council has the authority for the following matters [in order as they appear in the Regulation]:

- to decide derogations from the milk year established by the Regulation (see art. 2, para. 1);
- to fix annual threshold prices (art. 4) and intervention prices (art. 5);
- to vary the date after which a control stamp on butter reaching certain standards is required (art. 6(5));
- to make general rules governing intervention measures for butter and in particular the conditions under which such measures may be applied (art. 6(6));
- to determine general rules governing intervention measures for first-quality

⁴³ Council Regulation 804/68/EEC, OJ 28.6.768 L148/13.

skimmed-milk powder and in particular the conditions under which such measures may be applied (art. 7(4));

-to determine general rules governing intervention measures for Grana Padano and Parmigiano Reggiano cheeses, and in particular the conditions under which such measures may be applied (art. 8(4));

-to determine general rules governing aid for skimmed milk and skimmed milk powder for use as animal feeding-stuffs, and in particular the conditions under which aid may be granted (art. 10(2));

-to adopt general rules governing aid for skimmed milk processed into casein, and in particular the conditions under which such aid may be granted (art. 11(2));

-to decide on measures other than intervention to facilitate the disposal for surplus butterfat and to adopt general rules governing their application (art. 12(2));

-to fix the starting date of validity for import and export licences (art. 13(2));

-to determine the groups of products and their respective pilot products, for the purpose of imposition of variable import levies, as well as the special provisions for fixing the levies (art. 14(6));

-to make exceptions to a requirement that only butter reaching certain quality standards and bearing a control stamp may be imported into the Community (art. 16(1));

-to adopt general rules for granting export refunds, for fixing their amount and for advance fixing (art. 17(3));

-to prohibit, in special cases and in whole or in part, the use of inward processing arrangements in respect of dairy products which are intended for the manufacture of other dairy products (art. 18(1)) and to adopt provisional rules concerning inward processing (art. 18(3));

-to adopt general rules concerning measures to be taken when the free-at-frontier price for one or more of the pilot products rises substantially above the threshold price and this situation is likely to continue, thereby disturbing or threatening to

disturb the Community market (art. 20(2));

-to adopt detailed rules concerning the appropriate measures to be applied in trade with third countries if, by reason of imports or exports, the Community market in one or more dairy products experiences or is threatened with serious disturbances which may endanger the objectives set out in Article 39 EC (art. 21(1)); -

-to amend or repeal any such measures decided upon by the Commission and subsequently referred to the Council by any Member State (art. 21(3));

-to adopt transitional provisions concerning intra-Community trade in dairy products pending the adoption of a Community system of supplementary measures for certain dairy products (art. 22(2));

-to authorise the Federal Republic of Germany, at its request, to grant degressive national aids to consumption for butter and specified cheeses for a limited period (art. 25(1));

-to adopt general rules concerning measures to compensate ('clawback') for any such national aid granted for butter and specified cheeses by the Federal Republic of Germany (art. 25(4));

-to take measures concerning the production and marketing of butter, providing, in particular, for a control stamp on butter reaching certain standards (art. 27); and

-to decide, at the end of the transitional period and in the light of experience, whether to retain or amend the provisions of the Regulation concerning the management committee procedure (art. 32).

Within the framework of Council Regulation 804/68 and in order to implement it, the Council thus has retained legislative authority for a very wide range of matters. This authority is frequently described in the Regulation in terms of 'adopting general rules'.

In contrast, the Council has delegated to the Commission responsibility for the

following matters:

-to adopt detailed rules for the application of the intervention measures for butter, and in particular the amount of aid for private storage (art. 6(7));

-to adopt detailed rules for the application of the intervention measures for first-quality skimmed-milk powder (art. 7(5));

-to adopt detailed rules for the application of the intervention measures for Grana padano and Parmigiano Reggiano cheeses (art. 8(5));

-to adopt detailed rules for the application of measures concerning aid for skimmed milk and skimmed milk powder for use as animal feeding-stuffs (art. 10(3));

-to adopt detailed rules for the application of measures concerning aid for skimmed milk processed into casein (art. 11(3));

-to adopt detailed rules for the application of measures other than intervention to facilitate the disposal of surplus butterfat (art. 12(3));

-to determine the list of products for which export licences are required, as well as the period of validity of import and export licences and other related detailed implementing rules (art. 13(2));⁴⁴

-to adopt detailed rules for the imposition of variable import levies, in particular the methods of determining the free-at-frontier prices and, where appropriate, the margin within which variations in the factors used in calculating the levy do not require any change in the latter (art. 14(7) and to fix variable import levies (art. 14(8));

-to adopt detailed rules concerning exceptions to the requirement that only butter reaching certain quality standards and bearing a control stamp may be imported into the Community, and in particular measures for the control of butter imports

⁴⁴ It is not entirely clear from the wording of art. 13(3), para. 2, whether the Commission or the Council is responsible for determining the period of validity of import licences. This is in fact the responsibility of the Commission: see, e.g., Commission Regulation 2729/81 (special rules implementing the system of import and export licences and the advance fixing of export refunds), OJ 26.9.81 L272/19.

(art. 16(2));

-to adopt detailed rules for the application of general rules for granting export refunds, for fixing their amount and for advance fixing, as well as for fixing refunds at regular intervals or, where necessary, for altering the refunds in the intervening period (art. 17(4),(5));

-to decide, at the request of a Member State or on its own initiative, upon the necessary measures applied if, by reason of imports or exports, the Community market in one or more dairy products experiences or is threatened with serious disturbances which may endanger the objectives set out in Article 39 EC (art. 21(1));

-to adopt detailed rules for the application of general rules concerning any grant by the Federal Republic of Germany of degressive national aids to consumption for butter and specified cheeses for a limited period, as well as concerning measures to compensate ('clawback') for any national aid granted for butter and specified cheeses by the Federal Republic of Germany (art. 25(5));

-to adopt rules for the communication by the Member States and the Commission of information necessary for implementing the Regulation and for the distribution of this information (art. 28); and

-to adopt any necessary transitional measures to facilitate the transition from the system of Regulation 13/64 to that of Regulation 804/68 (art. 35).

It lies outside the scope of this report to examine in more detail the economic policy issues which are the subject of specific powers, and in the absence of such a detailed examination it may be misleading to classify specific powers as legislative, basic executive or routine executive powers. It may be suggested, however, that the matters for which the Council has retained authority to act alone include some matters which involve general principles or are politically sensitive, some matters which require the establishment of general administrative principles, and some matters which are very detailed and involve market management. For example, it may be suggested that, among the matters which

Regulation 804/68 assigns to the Council alone, the first group might include, for example, the power to make general rules governing intervention measures for dairy products, the power to decide on measures other than intervention to deal with over-production, the determination of groups of products for the purposes of variable import levies, and the adoption of general rules concerning export refunds. The first group refers to legislative powers, which might be exercised by the Council and the European Parliament; the second group refers to basic executive powers, which might be exercised by the Council; and the third group refers to routine executive powers, which might be exercised by the Commission.

The Regulation does not draw a clear distinction between legislative and executive functions. Nor does it establish a clear demarcation between legislative and executive institutions. Its basic framework was derived from the normative paradigm of the cereals regime, and like the latter it was essentially the product of the Council. From the formal legal standpoint, it should be recalled that the Regulation, like other regulations establishing a common organisation of the market for specific agricultural products, was adopted by the Council on a proposal from the Commission and following consultation of the European Parliament. It should also be noted that at that time the European Parliament was called the Assembly, a term which aptly expressed its institutional weakness and mainly advisory role.

In all the matters for which it has legislative responsibility, the Council is to act in accordance with the voting requirements laid down in Article 43(2) EC on a proposal from the Commission. In other words, the legislative authority and the voting requirements are borrowed from Article 43(2) EC. The use of qualified

majority voting applied only in principle but not in practice, however, as a result of the Luxembourg Compromise which prevailed until the mid-1980s. As a consequence, the 1968 Regulation must certainly have been adopted by unanimity on the basis of a consensus and without any formal vote. It is therefore likely to have embodied the results of bargaining and compromise: for example, consider the special provisions concerning Germany and Italy. What is most important for the present purposes and deserves special emphasis, however, is that the legislative procedure provided in Article 43(2) has been omitted from the provisions of Council Regulation 804/68 which confer implementing powers on the Council: in enacting legislation within the framework of this Regulation, the Council is not required to consult the European Parliament. The only exception concerns the taking of measures concerning the production and marketing of butter, in particular so as to provide for a control stamp on butter [and now skimmed milk powder]⁴⁵ reaching certain standards; such measures must be taken in accordance with the procedure laid down in Article 43(2) EC (art. 27). It may be suggested that the reason for this exception is the key role of the production and marketing of these two products in the framework of EC dairy policy. EC policy aims to support the market price of liquid milk mainly by regulating the market for butter and skimmed milk powder, which are the most important products subject to intervention.⁴⁶

The powers delegated to the Commission are to be exercised by the Commission according to the management committee procedure, which is set out in article

⁴⁵ This amendment was inserted by Council Regulation 559/76, OJ 15.3.76 L67/9.

⁴⁶ On market intervention, see Francis G. Snyder, Law of the Common Agricultural Policy (Sweet & Maxwell, London, 1985), pp 62-66, 83.

30 of the Regulation. As currently expressed in legislation, the management committee procedure requires that the Commission be assisted by a committee composed of the representatives of the Member States and chaired by a representative of the Commission. A draft of proposed legislation must be submitted by the Commission representative to the committee. The opinion of the committee is to be delivered within a specified time limit and on the basis of a vote weighted according to the provisions of Article 148(2) EC. In the meantime, the measures adopted by the Commission are to apply immediately. However, if the measures are not in accordance with the opinion of the committee, they must be communicated by the Commission to the Council. Two avenues then are possible. According to the first variant, the Commission may defer application of the measure for a period of not more than one month, during which time the Council, acting by qualified majority, make take a different decision. According to the second variant, the Commission must defer application of the measure for a period of not more than three months, during which time the Council, acting by qualified majority, make take a different decision. The management committee procedure does not include consultation of the European Parliament.⁴⁷

Consequently, once having participated in the initial adoption of the Regulation by means of the consultation procedure, the European Parliament is (and since 1964 has been) excluded from almost every aspect of the regulation of the dairy sector. This exclusion holds regardless of whether, within the framework of the

⁴⁷ Council Decision 87/373, art. 2, OJ 1987 L197/33, which gives legal form to the management committee procedure and other 'comitology' procedures. This Decision was challenged unsuccessfully by the European Parliament in Case 302/87 European Parliament v Council [1988] ECR 5615.

basic Regulation, the legislative authority is the Council or the Commission: the former acting as if it had reserved to itself implementing powers under Council Decision 87/373, and the latter acting on the basis of powers delegated to it by the Council. It is well-known that Council Decision 87/373 merely codified (then) current practice, but what is striking is that, with regard to the CAP, the practice existed much earlier and in fact was codified in the basic commodity regimes. The European Parliament thus is hardly involved at all in the production of norms concerning matters dealt with in the framework of the basic Regulation. The sole exception appears to be measures concerning a quality control stamp for the production and marketing of butter.

The combination of these two legislative tracks, both of which exclude the European Parliament, was a political compromise.⁴⁸ Despite the wording of Article 155 EEC, the original six Member States refused to cede executive powers concerning an extremely important economic sector to a supranational Commission. Consequently the Commission proposed, and the European Parliament accepted, a two-fold solution. On the one hand, the Council not only retained the power to adopt basic regulations; it was also accorded a large role in enacting implementing regulations, including many which appear to be of a purely administrative nature. On the other hand, in the exercise of powers delegated to it by the Council, the Commission accepted to act in conjunction with committees composed of representatives of the Member States. The latter, known as the management committee procedure, was subsequently recognised

⁴⁸ Giancarlo Olmi, *Commentaire Mégret: Le Droit de la CEE, 2: Politique Agricole Commune* (Editions de l'Université de Bruxelles, Brussels, 1991), pp 49, 299, see also pp 300-302; see also Leon N. Lindberg, *The Political Dynamics of European Economic Integration* (Stanford University Press, Stanford, 1963), pp 277-278.

by the European Court of Justice.⁴⁹

Since 1968 Council Regulation 804/68 has been directly supplemented, extended or amended many times, and numerous implementing measures have been adopted. As of December 1993 the legislation in force which directly affected the basic dairy regulation included three supplementing regulations, one extending decision, one implementing regulation and 22 amending regulations. This testifies once again to the high concentration of legislative authority in the Council.

D THE LAW IN FORCE

In addition to the basic Regulation, numerous other legislative measures have been taken since 1968 in the dairy sector. This section focusses on the law currently in force, while the next section analyses the general trends in the enactment of dairy sector legislation from 1964 to the present.

This section aims to highlight links which might exist between economic policy and law, and in particular the content of economic policy, the legislative authority and types of act. For this purpose it is useful to classify the law in force according to a scheme commonly used by economists.⁵⁰ The main headings of this scheme are as follows: (1) designation, (2) price support, (3) provisions for liquid milk, (4) milk quality, (5) intervention arrangements, (6) subsidies and aids for disposal - skimmed milk and skimmed-milk powder, (7)

⁴⁹ Case 25/70 *EVst für Getreide und Futtermittel v Koster* [1970] ECR 1161; Case 23/75 *Rey Soda v Cassa Conguaglio Zucchero* [1975] ECR 1279.

⁵⁰ See, e.g., *CAP Monitor*, sec. 7.

subsidies and aids for disposal - butter, (8) subsidies and aids for disposal - school milk, (9) the management of supply, (10) milk quotas, (11) intra-community trade in dairy products, (12) trade with third countries, (13) special trade arrangements, (14) accession of Spain and Portugal, (15) German unification and (16) CAP reform. These headings may be grouped into five broad categories: general measures, demand management, supply management, trade and reform.⁵¹

If we view the law as it stood on 1 March 1994,⁵² we see the following picture.

With regard to general measures: (1) Designation, labelling and advertising of milk products are protected under Council Regulation 1898/87.⁵³ (2) Price support methods are provided in the basic Council Regulation 804/68, and the annual prices are fixed in the form of a Council regulation.⁵⁴ (3) Provisions for liquid milk were adopted in 1971 in the form of Council Regulation 1411/71.⁵⁵ (4) Measures regarding milk quality have been adopted in Council directives to take account of national variations or to permit derogations; a Commission

⁵¹ These categories are derived from Francis G. Snyder, Law of the Common Agricultural Policy (Sweet & Maxwell, London, 1985), pp 130 *et seq.*

⁵² At the time of writing, this was the date of the last update of the relevant section of the CAP Monitor.

⁵³ OJ 317187 L182/36. Here, as with regard to other measures discussed in this section, amending measures are omitted.

⁵⁴ For example, Council Regulation 1562/93 (threshold prices for certain milk products for the 1993/94 milk year), OJ 25.6.93 L154/93.

⁵⁵ OJ 3.7.71 L148/4.

regulation on improvement of milk quality in several Member States⁵⁶; and a Commission decision concerning technical methods of analysis.⁵⁷

With regard to demand management, a pattern resembling more closely traditional distinctions between legislative and executive functions and institutions has been followed. (5) Council regulations and Commission regulations were used to enact general rules and detailed implementing rules, respectively, concerning intervention arrangements for butter,⁵⁸ skimmed milk powder⁵⁹ and cheese.⁶⁰ The Council gave the Commission power to limit intervention; this power was exercised by means of a Commission regulation.⁶¹

⁵⁶ Commission Regulation 1117/92 (improvement of the quality of milk in Spain, Ireland, Northern Ireland and Portugal), OJ 15.92 L117/85.

⁵⁷ Council Directive 92/46 (health rules for the production and placing on the market of raw milk, heat-treated milk and milk-based products), OJ 14.9.92 L268/1; Council Directive 92/47 (conditions for granting temporary or limited derogations from specific Community health rules on the production and placing on the market of milk and milk-based products), OJ 14.9.92 L268/33; Council Directive 92/118 (health standards for liquid milk, dried milk and dried milk products not intended for human consumption) OJ 15.3.93 L62/49; Commission Decision 91/180 (certain methods of analysis and testing of raw milk and heat-treated milk), OJ 13.4.91 L93/1.

⁵⁸ Council Regulation 985/68 (general rules for intervention on the market in butter and cream), OJ 18.7.68 L169/1, as amended; Commission Regulation 685/69 (detailed rules of application for intervention on the market in butter and cream), OJ 15.4.69 L90/12, as amended; Commission Regulation 1589/87 (sale by tender of butter to intervention agencies), OJ 6.6.87 L146/27.

⁵⁹ Council Regulation 1014/68 (general rules for the public storage of skimmed milk powder), OJ 22.7.68 L173/4; Commission Regulation 625/78 (detailed rules of application for public storage of skimmed milk powder), OJ 31.3.78 L84/19.

⁶⁰ Council Regulation 971/68 (general rules for intervention on the market in Grana Padano and Parmigiano-Reggiano cheeses), OJ 17.7.68 L166/8; Commission Regulation 1107/68 (detailed rules of application for intervention on the market in Grana Padano and Parmigiano-Reggiano cheeses), OJ 29.7.68 L184/29.

⁶¹ Council Regulation 777/87, OJ 20.3.87 L78/10.

Commission regulations were also used to institute a tendering system for butter⁶² and skimmed milk powder⁶³ and private storage aid for skimmed milk powder.⁶⁴ (6) With regard to subsidies and aids for disposal of skimmed milk and skimmed milk powder, Council regulations have been used to establish general rules and Commission regulations have been used to provide detailed implementing rules.⁶⁵ (7) The same pattern has prevailed with regard to subsidies and aids for the disposal of butter.⁶⁶ (8) The same pattern has

⁶² Commission Regulation 1589/87 (sale by tender of butter to intervention agencies), OJ 6.6.87 L146/27.

⁶³ Commission Regulation 1158/91 (buying in by tender of skimmed milk powder to intervention agencies), OJ 4.5.91 L112/65.

⁶⁴ Commission Regulation 1362/87 (detailed rules for the application of Regulation (EEC) No 777/87 with respect to the buying-in and the granting of aid for the private storage of skimmed milk powder), OJ 19.5.87 L129/9.

⁶⁵ Council Regulation 986/68 (general rules for granting aid for skimmed milk and skimmed milk powder for use as feed), OJ 18.7.68 L169/4; Commission Regulation 1105/68 (detailed rules for granting aid for skimmed milk for use as feed), OJ 29.7.68 L184/24; Commission Regulation 1725/79 (rules for granting aid to skimmed milk processed into compound feedingstuffs and skimmed-milk powder intended for feed to calves), OJ 7.8.79 L199/1; Commission Regulation (fixing the amount of the aid for skimmed milk and skimmed milk powder for use as feed), OJ 18.5.85 L158/7; Commission Regulation 2871/90, OJ 5.10.90 L275/20; Council Regulation 987/68 (general rules for granting aid for skimmed milk powder processed into casein or caseinates), OJ 18.7.68 L169/6; Commission Regulation 2921/90 (aid for the production of casein and caseinates from skimmed milk), OJ 11.10.90 L279/22; Commission Regulation 368/77 (sale by tender of skimmed milk powder for use in feed for pigs and poultry), OJ 24.2.77 L52/19; Commission Regulation 443/77 (sale at a fixed price of skimmed milk powder for use in feed for pigs and poultry and amending Regulations (EEC) No 1687/76 and (EEC) No 368/77), OJ 24.2.77 L52/19; Commission Regulation 2213/76 (sale of skimmed milk powder from storage), OJ 11.9.76 L249/6.

⁶⁶ Council Regulation 3730/87 (general rules for the supply of food from intervention stocks to designated organisations for distribution to the most deprived persons in the Community), OJ 15.12.87 L352/1; Commission Regulation 2099/82 (transfer to the Italian intervention agency of skimmed milk powder held by the intervention agencies of other Member States), OJ 31.7.82 L223/1; Commission Regulation 3143/85 (sale at reduced prices of intervention butter intended for direct consumption in the form of concentrated butter), OJ 12.11.85 L298/9; Commission Regulation 429/90 (granting by invitation to tender of an aid

prevailed with regard to subsidies and aids for disposal in the form of school milk.⁶⁷

With regard to supply management, the general pattern has prevailed. (9) Leaving the dairy quota system aside for the moment, the main measures concerning the management of supply involved the establishment of general rules by Council regulation and the provision of implementing rules by Commission regulation.⁶⁸ (10) The dairy quota system has followed the same

for concentrated butter for direct consumption in the Community), OJ 21.2.90 L45/8; Commission Regulation 570/88 (sale of butter at reduced prices and the granting of aid for butter and concentrated butter for use in the manufacture of pastry products, ice cream and other foodstuffs), OJ 1.3.88 L55/31; Commission Regulation 2191/81 (granting of aid for the purchase of butter by non-profitmaking institutions and organisations), OJ 1.8.81 L213/20; Commission Regulation 2192/81 (granting of aid for the purchase of butter by the armies and similar forces of the Member States), OJ 1.8.81 L213/24; Commission Regulation 2315/76 (sale of butter from public stocks), OJ 25.9.76 L261/12.

⁶⁷ Commission Regulation 1842/93, OJ 10.7.93 L168/27; Commission Regulation 3392/93, OJ 11.12.93 L306/27.

⁶⁸ Council Regulation 1078/77 (introducing a system of premiums for the non-marketing of milk and milk products and for the conversion of dairy herds), OJ 26.5.77 L131/1; Commission Regulation 1391/78 (amended rules for the application of the system of premiums for the non-marketing of milk and milk products and for the conversion of dairy herds), OJ 24.6.78 L167/45; Commission Regulation 2962/78 (amending Commission Regulation 1391/78 with regard to the identity card arrangements introduced in connection with the system of premiums for the non-marketing of milk), OJ 16.12.78 L352/23; Council Regulation 1357/80 (general rules for the system of premiums for maintaining suckler cows), OJ 5.6.80 L140/1; Commission Regulation 1244/82 (detailed rules implementing the system of premiums for maintaining suckler cows), OJ 20.5.82 L143/20; Council Regulation 1079/77 (general rules for the collection of the co-responsibility levy introduced in respect of milk and milk products [now abolished]), OJ 26.5.77 L131/6; Commission Regulation 1822/77 (detailed rules for the collection of the co-responsibility levy introduced in respect of milk and milk products [now abolished]), OJ 9.8.77 L203/1; Council Regulation 2073/92 (promoting consumption in the Community and expanding the markets for milk and milk products), OJ 30.7.92 L215/67.

pattern;⁶⁹ this system is discussed further below.

Before 31 December 1992 the regulation of intra-Community trade in dairy products involved the use of monetary compensatory amounts (mcas). Accession compensatory amounts (acas) were applied in trade between the original EC and new Member States. A new agri-monetary system, which is not of course specific to the dairy sector, was introduced by Council regulations⁷⁰ and detailed management measures were taken by Commission regulations.⁷¹

⁶⁹ The original legislation included Council Regulation 856/84, OJ 1.4.84 L90/10 and Council Regulation 857/84, OJ 1.4.84 L90/13. See also Commission Regulation 1250/84 (fixing the amounts of the levy referred to in article 5c of Regulation 804/68 in the milk and milk products sector), OJ 5.5.84 L120/14; Commission Regulation 426/92 (fixing, for the 8th time, amounts for the levy referred to in article 5c of Council Regulation 804/68 in the milk and milk products sector), OJ 22.2.92 L47/13; Commission Regulation 820/93 (fixing, for the 9th twelve-month period, amounts for the levy referred to in article 5c of Council Regulation 804/68 in the milk and milk products sector), OJ 6.4.93 L85/15 ; Commission Decision 90/60 (implementation in the Netherlands), OJ 15.2.90 L41/25; Commission Decision 90/65 (implementation in Denmark), OJ 17.2.90 L43/35; Commission Decision 90/66 (implementation in Ireland), OJ 17.2.90 L43/36; Commission Decision 91/236 (implementation in the United Kingdom), OJ 26.4.91 L106/66; Commission Decision 92/19 (Denmark), OJ 15.1.92 L9/21; Commission Decision 93/586 (Denmark), OJ 12.11.93 L279/45. See also Council Regulation 1637/91 (fixing compensation with regard to the reduction of the reference quantities referred to in article 5c of Regulation 804/68 and compensation for the definitive discontinuation of milk production), OJ 15.6.91 L150/30; Commission Regulation 2349/91 (detailed rules for the application of Regulation 1637/91), OJ 2.8.91 L214/44; . The current system is set out in Council Regulation 3950/92 (establishing an additional levy in the milk and milk products sector), OJ 31.12.92 L405/1, and Commission Regulation 536/93 (detailed rules on the application of the additional levy on milk and milk products), OJ 10.3.93 L57/12. See also Council Regulation 2055/93 (allocating a special reference quantity to certain producers of milk and milk products), OJ 29.7.93 L187/8; Council Regulation 2187/93 (offer of compensation to certain producers of milk and milk products temporarily prevented from carrying on their trade), OJ 5.8.93 L196/6.

⁷⁰ Council Regulation 3813/92, OJ 31.12.92 L387/1; as amended by Council Regulation 3528/93, OJ 1.5.93 L108/106, and by Council Regulation 1068/93, OJ 22.12.93 L320/32.

⁷¹ See also Commission Regulation 13657/85 (amending provisions implementing MCAs with effect from 27 May 1985 in respect of intervention butter sold at a reduced price), OJ 27.5.85 L139/22; Commission Regulation 1723/93 (determining the prices and amounts fixed

Trade measures fall into several sub-categories. (12) Trade with third countries involves import and export licences and levies, export refunds and food aid. Regarding licences, levies and related matters such as special procedures or administrative assistance, the adoption of detailed rules has been done by the Commission by means of regulations, acting within the general framework established by the Council in the basic Regulation 804/68.⁷² The same pattern applies to export refunds, except that the Council has set down general rules in the form of a separate regulation.⁷³ Similarly, within the framework of the basic

in the milk and milk products sector which are reduced as a result of the monetary realignments of September and November 1992 and January and May 1993), OJ 1.7.93 L159/123; Commission Regulation 1756/93 (fixing the operative events for the agricultural conversion rate applicable to milk and milk products), OJ 2.7.93 L161/48.

⁷² Commission Regulation 1073/68 (detailed rules for determining free-at-frontier prices and for fixing levies in respect of milk and milk products), OJ 26.7.68 L180/25; Commission Regulation 2729/81 (special rules implementing the system of import and export licences and the advance fixing of refunds in respect of milk and milk products), OJ 26.9.81 L272/19; Commission Regulation 1216/68 (method for determining the lactose content of compound feedingstuffs imported from third countries), OJ 10.8.68 L198/13; Commission Regulation 2967/79 (conditions under which certain cheeses benefiting from preferential import treatment are to be processed), OJ 29.12.79 L336/23; Commission Regulation 2968/79 (detailed rules for the provision of administrative assistance in connection with the export of soft ripened cow's milk cheeses eligible for special treatment on import into a non-member country), OJ 29.12.79 L336/25; Commission Regulation 2730/81 (list of agencies in non-member importing countries entitled to issue invitations to tender in the milk and milk products sector), OJ 26.9.81 L272/25; Commission Regulation 1767/81 (detailed rules for applying specific import levies on certain milk products), OJ 5.7.82 L196/1 ; Commission Regulation 1953/82 (special conditions for the export of cheeses to certain third countries), OJ 21.7.82 L212/5; Commission Regulation 1072/83 (repealing Regulation 86/83 suspending certain provisions of Regulation 1767/82 with regard to implementation of detailed rules governing the import of certain cheeses), OJ 4.5.83 L117/5; Commission Regulation 2248/85 (detailed rules for administrative assistance with the exportation of Emmentaler cheese subject to quota restrictions that qualifies for special treatment on importation into the USA), OJ 7.8.85 L210/9.

⁷³ Council Regulation 876/68 (general rules for granting export refunds on milk and milk products and criteria for fixing the amount of such refunds), OJ 3.7.68 L155/1; Commission Regulation 1098/68 (detailed rules for the application of export refunds on milk and milk

Council regulation on food aid,⁷⁴ detailed administrative arrangements and market management have been left to the Commission.⁷⁵

products), OJ 29.7.68 L184/10; Regulation 192/75, OJ 31.1.75 L25/1; Commission Regulation 776/78 (application of the lowest rate of refund on exports of dairy products and repealing and amending certain regulations), OJ 19.4.78 L105/5; Commission Regulation 1214/80 (periods during which milk products may remain under customs control for advance payment of refunds), OJ 15.5.80 L122/26; Commission Regulation 1760/83 (special detailed rules for the application of the system of advance-fixing certificates for certain agricultural products exported in the form of goods not covered by Annex II to the Treaty and derogating from Regulation 2730/79 with regard to payment of refunds on butter), OJ 30.6.83 L172/20; Commission Regulation 2729/81 (special rules implementing the system of import and export licences and the advance fixing of refunds in respect of milk and milk products), OJ 26.9.81 L272/19; Commission Regulation 896/84 (additional provisions concerning the grant of export refunds on milk and milk products), OJ 1.4.84 L91/71; Commission Regulation 349/86 (suspending application of certain provisions of Regulation 1760/83 as regards the payment of refunds in respect of butter exported in the form of certain products not covered by Annex II of the Treaty), OJ 19.2.86 L42/5; Commission Regulation 3187/92 (suspending advance fixing of export refunds on certain dairy products exported in the form of goods not covered by Annex II to the Treaty), OJ 31.10.92 L317/74; Commission Regulation 1769/93 (fixing adjustments to be made to certain refunds fixed in advance for milk and milk products), OJ 3.7.93 L162/10.

⁷⁴ Council Regulation 3972/86, OJ 30.12.86 L370/1, amended by Council Regulation 1930/90, OJ 7.7.90 L174/6. For an analysis of the former Regulation, including the institutional aspects, see my 'The European Community's New Food Aid Regulation: Towards a Development Policy?', chapter 5 in my *New Directions in European Community Law* (Weidenfeld & Nicolson, London, 1990), pp 146-176.

⁷⁵ Commission Regulation 2268/84 (special sales of intervention butter for export to various destinations and amending Regulation 1687/76), OJ 3.8.84 L208/35; Commission Regulation 1645/85 (suspending Regulation 2268/84 on special sales of intervention butter for export to various destinations and repealing Regulation 2278/84), OJ 19.6.85 L159/5; Commission Regulation 863/91 (special sale of intervention butter for export to the Soviet Union and amending Regulation 569/88), OJ 9.4.91 L88/11; Commission Regulation 1290/91 (supply of skimmed milk powder to Romania), OJ 17.5.91 L122/14; Commission Regulation 2450/91 (supply of butter to Romania), OJ 13.8.91 L225/32; Commission Regulation 2451/91 (supplies of butter and skimmed milk powder to Bulgaria), OJ 13.8.91 L225/33; Commission Regulation 3378/91 (detailed rules for the sale of butter from intervention stocks for export and amending Regulation 569/88), OJ 21.11.91 L319/40; Commission Regulation 2839/93 (special sale of intervention butter for export to the Republics of the former Soviet Union), OJ 19.10.93 L260/8.

(13) The EC has special trade arrangements for New Zealand butter and Commonwealth cheese and regarding Poland, Hungary and the Czech and Slovak Republics as well as the European Economic Area. Within the framework of general principles established by Council regulations, the detailed management of these matters has been done on the basis of regulations enacted by the Commission.⁷⁶

(14) The accession of Spain and Portugal to the EC on 1 January 1986 involved transitional arrangements concerning prices, trade and agricultural structures which apply until 31 December 1995. General rules have been determined by

⁷⁶ Concerning New Zealand, see Council Regulation 3841/92 (continued import of New Zealand butter into the United Kingdom on special terms), OJ 31.12.92 L390/1; Commission Regulation 3885/92 (detailed rules for implementing the special arrangements for imports of butter from New Zealand into the United Kingdom), OJ 31.12.92 L391/18. Concerning Australia, see Commission Regulation 1552/80 (detailed rules for the provision of administrative assistance in connection with the export of certain cheeses eligible for special treatment on import into Australia), OJ 21.6.80 L153/23; Commission Regulation 3439/83 (special conditions for the export of certain cheeses to Australia), OJ 6.12.83 L340/7. Concerning the EEA, see Commission Regulation 3677/81 (detailed rules for the provision of administrative assistance in connection with the export of cheeses eligible for special treatment on import into Finland), OJ 23.12.81 L367/12; Commission Regulation 3700/81 (detailed interim rules for the application of the Cheese Agreements with Austria and Finland), OJ 24.12.81 L369/33; Commission Regulation 3305/82 (detailed rules for the provision of administrative assistance in connection with the export of cheeses eligible for special treatment on import into Norway), OJ 10.12.82 L350/11; Commission Regulation 1316/93 (detailed rules of application for the management of an annual quota of 1000 tonnes of cheese and curds opened by the Community to Sweden), OJ 29.5.93 L132/73; Commission Regulation 1597/93 (determining extent to which applications for import licences introduced under the annual cheese quota opened by the Community to Sweden may be accepted), OJ 25.6.93 L153/22. Concerning the Europe Agreements, see Commission Regulation 584/92 (detailed rules for the application to milk and milk products of the arrangements provided for in the Interim Agreements between the Community and the Republic of Poland, the Republic of Hungary and the Czech and Slovak Federal Republic), OJ 7.3.92 L62/34.

Council regulations,⁷⁷ and detailed implementing rules have been adopted in the form of Commission regulations.⁷⁸ Certain specific matters regarding a single

⁷⁷ Council Regulation 466/86 (general rules for the system of accession compensatory amounts for milk and milk products on account of the accession of Spain), OJ 1.3.86 L53/23; Council Regulation 3639/90 (application in Portugal of the common price for butter), OJ 27.12.90 L362/2; Council Regulation 3640/90 (general rules for the system of accession compensatory amounts for milk and milk products during the second stage of the accession of Portugal), OJ 27.12.90 L362/3; Council Regulation 739/93 (application of the common price for milk powder in Portugal), OJ 31.3.93 L77/4; Council Regulation 740/93 (setting Community compensation for definitive discontinuation of milk production in Portugal), OJ 31.3.93 L77/5.

⁷⁸ Commission Regulation 606/86 (detailed rules for applying the supplementary trade mechanism to milk products imported into Spain from the Community of Ten), OJ 1.3.86 L58/28; Commission Regulation 3612/89 (withdrawing certain milk products from the list of products subject to the supplementary trade mechanism), OJ 2.12.89 L351/22; Commission Regulation 2889/90 (definitive measures on the issuing of STM licences for milk and milk products), OJ 6.10.90 L276/25; Commission Regulation 3812/90 (detailed rules for the application of the supplementary trade mechanism to milk products imported into Portugal from the Community of Ten and Spain), OJ 29.12.90 L366/15; Commission Regulation 183/91 (definitive measures on the issuing of STM licences for milk and milk products as regards Spain), OJ 26.1.91 L20/14; Commission Regulation 302/91 (definitive measures for the issuing of STM licences for milk and milk products as regards Spain), OJ 8.2.91 L36/18; Commission Regulation 783/92 (definitive measures on the issuing of STM licences for milk and milk products as regards Spain), OJ 31.3.92 L84/25; Commission Regulation 1024/92 (definitive measures on the issuing of STM licences for milk and milk products as regards Spain), OJ 25.4.92 L108/29; Commission Regulation 2164/92 (detailed rules for the application of the specific supply arrangements for the Canary Islands relating to milk products and establishing the forecast supply balance), OJ 31.7.92 L217/17; Commission Regulation 2174/92 (detailed rules governing the grant of private storage aid for Sao Jorge and Ilha cheese), OJ 31.7.92 L217/64; Commission Regulation 2219/92 (detailed rules for the application of the specific supply arrangements for Madeira relating to milk products and establishing the forecast supply balance), OJ 1.8.92 L218/75; Commission Regulation 2233/92 (detailed rules for the application of the specific premium for the maintenance of dairy herds in the Azores), OJ 1.8.92 L218/100; Commission Regulation 2234/92 (detailed rules for the application of the aid for the consumption of fresh milk products in Madeira), OJ 1.8.92 L218/102; Commission Regulation 2235/92 (detailed rules for the application of the aid for the consumption of fresh milk products in the Canary Islands), OJ 1.8.92 L218/105; Commission Regulation 3832/92 (abolishing security for STM licences applicable from 1 January 1993 to deliveries into Spain of products other than fruit and vegetables), OJ 31.12.92 L387/49; Commission Regulation 1579/93 (detailed rules for the application of Council Regulation 739/93 in respect of the aid scheme for aid to milk producers in Portugal), OJ

country have been dealt with by Council and Commission decisions, following roughly a distinction between general principles and administrative measures.⁷⁹

(15) With regard to German unification, the rules of the CAP applied in the former GDR as of 3 October 1990 followed by a brief transitional phase. Dairy quota arrangements were made applicable in the former GDR by Council regulation.⁸⁰ Intervention measures for skimmed milk powder were provided by Council regulation.⁸¹ These measures were replaced by the 1992 new dairy quota regulation.

Finally, reform (16). The basic reforms of the CAP with regard to the dairy sector have been enacted by Council regulations.⁸² Additional Council regulations have been used concerning specific features.⁸³

In conclusion to this section, it may be remarked that all of these measures

24.6.93 L152/12.

⁷⁹ Council Decision 144/89 (extending certain provisions on the supply of milk and milk products at a reduced price to cover Portugal), OJ 25.2.89 L53/54; Commission Decision 89/352 (fixing conversion rate to be used pursuant to Council Decision 89/144), OJ 30.5.89 L146/38.

⁸⁰ Council Regulation 3577/90, OJ 17.12.90 L353/23.

⁸¹ Council Regulation 2768/90, OJ 29.9.90 L267/15.

⁸² Council Regulation 816/92, OJ 1.4.92 L86/83, amends the basic Council Regulation 804/68 for this purpose.

⁸³ Council Regulation 2072/92 (fixing the target price for milk and the intervention prices for butter, skimmed milk powder and Grana Padano and Parmigiano Reggiano cheeses for two annual periods from 1 July 1993 to 30 June 1995), OJ 30.7.92 L215/65; Council Regulation 2073/92 (promoting consumption in the Community and expanding the markets for milk and milk products), OJ 30.7.92 L215/67.

concern price and market policy, broadly conceived. As previously noted, the concentration on price and market policy rather than structural policy was the core of the original conception of the CAP. Hence the measures examined here do not include much of EC structural policy, which, not being specific to the dairy sector, cannot be treated within the scope of this brief report. It should be noted, however, that until the mid-1980s EC legislation concerning structural policy was a mixture of (mainly Council) regulations and (mainly Council) directives. This reflected two factors. On the one hand, the agricultural structures of the Member States differed greatly when the EEC was established, and they are still characterised by substantial differences. On the other hand, until the early 1970s structural policy was largely the responsibility of the Member States. Taken together, these factors of diversity have led the Council to give somewhat more importance to directives in relation to structural policy; in relation to price and market policy, the adoption of a uniform policy and the use of regulations have been the rule.

E GENERAL TRENDS, 1964 - PRESENT

The analysis of dairy sector legislation at a particular time needs to be complemented by the presentation of general trends. A picture of the principal trends regarding EC dairy legislation from 1964 to the present can be derived from statistical data. For this purpose we can use the Receuil des Actes Agricoles prepared and updated periodically by the European Commission, together with the Directory of Community Legislation in Force, which is based on the Official Journal of the European Communities and published twice each year. The former, in principle, lists all agricultural legislation ever adopted by the European Community; the latter, again in principle, lists legislation currently in force. Unfortunately, the two sources are not always mutually consistent.

Nevertheless, when used with care, they allow us to generate a series of tables concerning the pattern of dairy sector legislation thus far and the dairy sector legislation currently in force. Here we are concerned only with certain essential features of this legislation, in particular regarding the legislative authority and the legal form.

Table I shows the types of acts that were used when legislation was enacted concerning the dairy sector during the period from 1964 to 1993.

TABLE I
Legislation concerning the Dairy Sector,
1964-1993,
by year and type of act
(to OJ 18.11.93 L283)

Year	regulations		directives		decisions		total no.
	no.	%	no.	%	no.	%	
1964	1	100	0	0	0	0	1
1965	0	0	0	0	0	0	0
1966	0	0	0	0	0	0	0
1967	0	0	0	0	0	0	0
1968	67	83	0	0	14	17	81
1969	122	88	0	0	16	12	138
1970	86	89	0	0	11	11	97
1971	53	95	0	0	3	5	56
1972	54	92	1	2	4	7	59
1973	91	88	0	0	12	12	103
1974	72	94	0	0	5	6	77
1975	90	91	0	0	9	9	99
1976	113	97	0	0	4	3	117
1977	98	96	0	0	4	4	102
1978	99	95	0	0	5	5	104
1979	67	99	0	0	1	1	68
1980	75	99	0	0	1	1	76
1981	68	94	0	0	4	6	72
1982	113	96	0	0	5	4	118
1983	116	95	0	0	6	5	122
1984	138	94	0	0	9	6	147
1985	110	94	1	1	6	5	117
1986	128	98	0	0	3	2	131
1987	120	95	0	0	6	5	126
1988	99	96	0	0	4	4	103
1989	125	98	0	0	2	2	127
1990	144	92	0	0	12	8	156
1991	142	94	0	0	9	6	151
1992	111	97	2	2	1	1	114
1993	81	93	0	0	6	7	87
Total	2583	94	4	0	162	6	2749

Source: calculated from Commission des Communautés européennes, Recueil des Acts Agricoles, Tome X/1 Produits laitiers (Edition revue et complémentée) [1987]; updated with the Mistral database.

Regulations were the most commonly used type of act, accounting for 94% of all acts during the thirty-year period, while decisions accounted for 6% of all acts. Directives were almost never used in the dairy sector.

Table II, based on the same data, shows the acts during the same period according to the year and the enacting authority.

TABLE II
Legislation concerning the Dairy Sector,
1964-1993,
by year and enacting authority
(to OJ 18.11.93 L283)

Year	Enacting Authority				Total number
	Council number	%	Commission number	%	
1964	1	100	0	0	1
1965	0	0	0	0	0
1966	0	0	0	0	0
1967	0	0	0	0	0
1968	18	22	63	78	81
1969	28	20	110	80	138
1970	24	25	73	75	97
1971	17	30	39	70	56
1972	19	32	40	68	59
1973	17	17	86	83	103
1974	16	21	61	79	77
1975	32	32	67	68	99
1976	22	19	95	81	117
1977	28	27	74	73	102
1978	31	30	73	70	104
1979	9	13	59	87	68
1980	21	28	55	72	76
1981	25	35	47	65	72
1982	41	35	77	65	118
1983	30	25	92	75	122
1984	46	31	101	69	147
1985	27	23	90	77	117
1986	27	21	104	79	131
1987	31	25	95	75	126
1988	25	24	78	76	103
1989	27	21	100	79	127
1990	26	17	130	83	156
1991	21	14	130	86	151
1992	24	21	90	79	112
1993	12	14	75	86	87
Total	645	23	2104	77	2749

Source: calculated from Commission des Communautés européennes, Recueil des Acts Agricoles, Tome X/1 Produits laitiers (Edition revue et complémentée) [1987], updated with the Mistral database.

The overwhelming majority of acts (77% of all acts) were taken by the Commission, with the Council accounting for 23% of all acts. This suggests the following preliminary conclusion. In spite of the fact that the Council has reserved to itself the authority to take not only general measures but also implementing measures, in fact, from the statical standpoint, most of the implementing measures are taken by the Commission.

Tables III and IV amalgamate the two preceding tables. Based on the same data, they show the dairy sector legislation from 1964 to 1989 according to the year, enacting authority and type of act in numbers and percentages, respectively.

TABLE III
 Legislation concerning the Dairy Sector,
 1964-1993,
 by year, enacting authority and type of act
 (to OJ 18.11.93 L283)
 [in numbers]

Year	Enacting Authority and Type of Act						
	Council			Commission			total
	reg	dir	dec	reg	dir	dec	
1964	1	0	0	0	0	0	1
1965	0	0	0	0	0	0	0
1966	0	0	0	0	0	0	0
1967	0	0	0	0	0	0	0
1968	18	0	0	49	0	14	81
1969	28	0	0	94	0	16	138
1970	22	0	2	64	0	9	97
1971	16	0	1	37	0	2	56
1972	18	1	0	36	0	4	59
1973	15	0	2	76	0	10	103
1974	16	0	0	56	0	5	77
1975	28	0	0	62	0	5	99
1976	22	0	0	91	0	4	117
1977	28	0	0	70	0	4	102
1978	31	0	0	68	0	5	104
1979	9	0	0	58	0	1	68
1980	21	0	0	54	0	1	76
1981	24	0	1	44	0	3	72
1982	39	0	2	74	0	3	118
1983	27	0	3	89	0	3	122
1984	40	0	6	98	0	3	147
1985	22	1	4	88	0	2	117
1986	26	0	1	102	0	2	131
1987	27	0	4	93	0	2	126
1988	24	0	1	75	0	3	103
1989	26	0	1	99	0	1	127
1990	25	0	1	119	0	11	156
1991	21	0	0	121	0	9	151
1992	22	2	0	89	0	1	114
1993	12	0	0	69	0	6	87
Total	608	4	33	1975	0	129	2749

Source: calculated from Commission des Communautés européennes, Recueil des Acts Agricoles, Tome X/1 Produits laitiers (Edition revue et complémentée) [1987]; updated with the Mistral database.

TABLE IV
 Legislation concerning the Dairy Sector,
 1964-1993,
 by year, enacting authority and type of act
 (to OJ 18.11.93 L283)
 [in percentages]

Year	Enacting Authority and Type of Act							total
	Council			Commission				
	reg	dir	dec	reg	dir	dec		
1964	100	0	0	0	0	0	100	
1965	0	0	0	0	0	0	0	
1966	0	0	0	0	0	0	0	
1967	0	0	0	0	0	0	0	
1968	22	0	0	60	0	17	100	
1969	20	0	0	68	0	12	100	
1970	23	0	2	66	0	9	100	
1971	29	0	2	66	0	4	100	
1972	31	2	0	61	0	7	100	
1973	15	0	2	74	0	10	100	
1974	21	0	0	73	0	6	100	
1975	28	0	4	63	0	5	100	
1976	19	0	0	78	0	3	100	
1977	27	0	0	69	0	4	100	
1978	30	0	0	65	0	5	100	
1979	13	0	0	85	0	1	100	
1980	28	0	0	71	0	1	100	
1981	33	0	1	61	0	4	100	
1982	33	0	2	63	0	3	100	
1983	22	0	2	73	0	2	100	
1984	27	0	4	67	0	2	100	
1985	19	1	3	75	0	2	100	
1986	20	0	1	78	0	2	100	
1987	21	0	3	74	0	2	100	
1988	23	0	1	73	0	3	100	
1989	20	0	1	78	0	1	100	
1990	16	0	1	76	0	7	100	
1991	14	0	0	80	0	6	100	
1992	19	2	0	78	0	1	100	
1993	14	0	0	79	0	7	100	
Total	22	0	1	72	0	5	100	

Source: calculated from Commission des Communautés européennes, Recueil des Acts Agricoles, Tome X/1 Produits laitiers (Edition revue et agrémentée) [1987]; updated with the Mistral database.

The bulk of dairy sector legislation was Commission regulations (72% of all acts), while Council regulations accounted for only 22% of all acts. To the extent that dairy sector legislation is representative of CAP legislation as a whole, however, the data do not seem to support the hypothesis according to which the amount of CAP legislation has increased steadily during the past few years. Nor do they suggest that an increasing proportion of CAP legislation is accounted by Commission regulations, which might indicate for example growing difficulties in the management of the agricultural sector.⁸⁴ The total number of acts does not appear to be significantly higher in recent years than in the mid-1980s, and Commission regulations have usually accounted for a large proportion of all acts since the early 1970s.

Another perspective on the types of acts used in the dairy section may be gained by considering the legislation currently in force. Table V shows the dairy legislation still in force as of December 1994 according to the year in which it was enacted.

⁸⁴ For these hypotheses, see the interesting article by Rene Barents, 'The Quality of Community Legislation: Some Observations on EC Legislation in the Agricultural Sector', (1994) 1 *Maastricht Journal of European and Comparative Law* 101 pp 104-105.

TABLE V
 Legislation in Force concerning the Dairy Sector
 as of December 1993
 (to OJ 18.11.93 L283),
 by year

Year of Enactment	Number	% Acts in Force
1964	0	0
1965	0	0
1966	0	0
1967	0	0
1968	12	6
1969	2	1
1970	1	0
1971	4	2
1972	2	1
1973	0	0
1974	1	0
1975	3	1
1976	6	3
1977	8	4
1978	9	4
1979	7	3
1980	4	2
1981	9	4
1982	11	5
1983	8	4
1984	6	3
1985	7	3
1986	6	3
1987	6	3
1988	4	2
1989	5	2
1990	14	7
1991	25	12
1992	26	13
1993	22	11
Total	206	100

Source: calculated from Official Journal of the European Communities, Directory of Community Legislation in Force. Office of Official Publications of the European Communities, Luxembourg, 22nd edition 1993; updated by Mistral database.

While some very old legislation is still in force, much of the current dairy sector legislation (43% of total acts still in force) dates from the past four years.

Table VI shows the dairy legislation still in force according to the enacting authority.

TABLE VI
Legislation in Force concerning the Dairy Sector
as of December 1993
(to OJ 18.11.93 L283),
by enacting authority

Enacting Authority	Number	%
Council	41	20
Commission	165	80
Total	206	100

Source: calculated from Official Journal of the European Communities, Directory of Community Legislation in Force. Office of Official Publications of the European Communities, Luxembourg, 22nd edition 1993; updated by Mistral database.

Commission acts account for 80% of acts in force.

Table VII shows the dairy legislation still in force according to the type of act involved. It indicates clearly that almost all of the dairy sector legislation in force consists of regulations.

TABLE VII
 Legislation in Force concerning the Dairy Sector
 as of December 1993
 (to OJ 18.11.93 L283),
 by type of act

Type of Act	Number	%
regulation	183	89
directive	2	1
decision	21	10
Total	206	100

Source: calculated from Official Journal of the European Communities, Directory of Community Legislation in Force. Office of Official Publications of the European Communities, Luxembourg, 22nd edition 1993; updated by Mistral database.

Table VIII amalgamates the immediately preceding tables. It shows the dairy legislation still in force according to the year, type of act and enacting authority.

TABLE VIII
 Legislation in Force concerning the Dairy Sector
 as of December 1993
 (to OJ 18.11.93 L283),
 by year, enacting authority and type of act

Year	Council			Commission			Total
	reg	dir	dec	reg	dir	dec	
1964	0	0	0	0	0	0	0
1965	0	0	0	0	0	0	0
1966	0	0	0	0	0	0	0
1967	0	0	0	0	0	0	0
1968	7	0	0	5	0	0	12
1969	0	0	0	2	0	0	2
1970	1	0	0	0	0	0	1
1971	4	0	0	0	0	0	4
1972	0	0	0	2	0	0	2
1973	0	0	0	0	0	0	0
1974	0	0	0	1	0	0	1
1975	0	0	0	1	0	0	1
1976	2	0	0	3	0	0	5
1977	1	0	0	5	0	1	7
1978	1	0	0	8	0	2	11
1979	0	0	0	7	0	0	7
1980	0	0	0	4	0	0	4
1981	1	0	0	7	0	0	8
1982	3	0	0	8	0	1	12
1983	1	0	0	7	0	0	8
1984	1	0	0	5	0	0	6
1985	0	0	0	7	0	0	7
1986	1	0	0	5	0	0	6
1987	1	0	0	4	0	1	6
1988	1	0	1	2	0	1	5
1989	0	0	0	3	0	1	4
1990	3	0	0	7	0	4	14
1991	1	0	0	19	0	5	25
1992	4	2	0	19	0	1	26
1993	5	2	0	14	0	3	22
Total	38	2	1	145	0	20	206

Source: calculated from Official Journal of the European Communities, Directory of Community Legislation in Force. Office of Official Publications of the European Communities, Luxembourg, 22nd edition 1993; updated by Mistral database.

Table IX uses the same information to show the regulations according to enacting authority and decade of enactment.

TABLE IX
Regulations in Force concerning the Dairy Sector
as of December 1993
(to OJ 18.11.93 L283),
by enacting authority and decade

Decade	Council		Commission		Total	
	No.	%	No.	%	No.	%
1964-1973	12	31.6	9	6.2	21	11.4
1974-1983	9	23.7	51	35.1	60	32.8
1984-1993	17	44.7	85	58.6	102	55.7
Total	38		145		183	

Source: calculated from Official Journal of the European Communities, Directory of Community Legislation in Force. Office of Official Publications of the European Communities, Luxembourg, 22nd edition 1993; updated by Mistral database.

The table allows us to examine in more detail the previous finding that the most legislation currently in force was enacted by the Commission. It shows that the bulk of Commission regulations currently in force are of relatively recent vintage, while a very high proportion of Council regulations currently in force are relatively old. This finding lends support to the assertion that Commission acts are often ephemeral, while those of the Council are more fundamental.⁸⁵

If we consider together the two variables treated in these immediately preceding

⁸⁵ See, e.g., Giancarlo Olmi, Commentaire Mégret: Le Droit de la CEE, 2: Politique Agricole Commune (Editions de l'Université de Bruxelles, 1991), p 153, n 230.

tables, we can derive a picture of the relationship between (a) total number of acts enacted from 1964 to 1989 and (b) the number of acts still in force.

TABLE X
Relationship of Acts in Force to Number of Acts Enacted
in the Dairy Sector, 1964-1993

	Enacted Acts (A)	Acts in Force (B)	% (B/A)
Sub-total Council	645	41	6.4
Sub-total Commission	2104	165	7.8
Total	2749	206	7.5

Source: calculated from Official Journal of the European Communities, Directory of Community Legislation in Force. Office of Official Publications of the European Communities, Luxembourg, 22nd edition 1993; updated by Mistral database.

Though most acts currently in force are Commission acts, the Commission ranked only slightly higher than the Council in the proportion of its total enacted acts which are still in force.

This table provides the basis for a further preliminary conclusion when put together with other data presented in this report. It is true that the Commission has taken more acts, and that a greater number of Commission acts are currently in force. It is also true that much of Commission legislation is short-lived, while the Council legislation currently in force has been in force for a longer period. But Table IX may also indicate the extent to which the Council is in fact adopting not only general rules but also implementing legislation; otherwise one might expect to see a greater difference between the figures for the Council and the Commission.

III LEGAL FORM OF SELECTED MAJOR POLICY DECISIONS

A INTRODUCTION

In analysing the taxonomy of acts used in the dairy sector, it is useful not only to consider dairy sector legislation as a whole but also to examine in more detail selected policy decisions. In this way we can see what legal form was used to express in legal terms different types of policies. Two major policy decisions are discussed in this section. They are, first, the control of surplus production, and, second, the dairy quota system. Both exemplify the management of the supply of dairy products. The main emphasis throughout the discussion is on the way in which the relevant policy decisions were expressed in legal form; the choice and content of economic policy is noted only to the extent necessary for our present purposes.

B CONTROL OF SURPLUS PRODUCTION

The dairy sector was among the first agricultural sectors in the European Community to be characterised by overproduction, and also among the first regarding which policies and legal measures were adopted.⁸⁶ Virtually all, if not all, of the basic measures have been taken by Council regulation. For example, in 1976 a skimmed milk powder deposit scheme was introduced by Council Regulation 573/76.⁸⁷ In 1977 the co-responsibility levy was introduced by

⁸⁶ See e.g. Francis G. Snyder, *Law of the Common Agricultural Policy* (Sweet & Maxwell, London, 1985), pp 124, 143 et seq.

⁸⁷ OJ 15.3.76 L67/18.

Council Regulation 1079/77.⁸⁸ In 1984 the dairy quota system (discussed later) was introduced by Council Regulations 856/84 and 857/84.⁸⁹ All were based legally on Article 43(2); all were original legislation enacted by the Council; and all were enacted according to the consultation procedure.

In order to explore the issues raised by surplus control measures, we can concentrate on the skimmed milk powder deposit scheme. It was the first such measure to be introduced, thus providing a precedent in some respects for subsequent measures. In addition, the background to the measure and its adoption and implementation are relatively well-documented, in part because of its international impact.⁹⁰

In December 1975 the Commission proposed a scheme for disposing of skimmed milk powder, which was (and is) with butter and some cheeses the main CAP intervention product in the dairy sector and thus a major form of dairy surplus.⁹¹ The proposed scheme took the form of a regulation setting up a skimmed milk powder deposit scheme.

⁸⁸ Council Regulation (EEC) 1079/77 on a co-responsibility levy and on measures for expanding the markets in milk and milk products, OJ 26.5.77 L131/6. This regulation was challenged, unsuccessfully, in Case 138/79 Hans-Markus Stolting v Hauptzollamt Hamburg-Jonas [1979] ECR 713.

⁸⁹ Respectively, OJ 11.4.84 L90/10 and OJ 11.4.84 L90/13.

⁹⁰ See, for example, Andrew Fenton Cooper, 'The Protein Link: Complexity in the US-EC Agricultural Trading Relationship', (1987) 11 Revue d'intégration européenne/Journal of European Integration 30.

⁹¹ For further details, see David Pickard, Gillian Norris and Nick Young, 'Three Case Histories in Agriculture', Centre for European Agricultural Studies, Wye College, University of London, unpublished report for Leverhulme Project, nd), pp 40-61; Francis G. Snyder, New Directions in European Community Law (Sweet & Maxwell, London, 1990), pp 19-26.

The main alternatives for dealing with surplus production were three-fold: reduction of the price of milk to the farmer, an increase in subsidies for the use of skimmed milk powder in feedingstuffs, and a publicity campaign financed by a levy on producers. The first was considered not to be feasible from the political standpoint.⁹² The second was deemed not to be feasible for financial reasons. The third was subsequently reflected in the co-responsibility levy.

It has been suggested that the then Agricultural Commissioner (Lardinois) 'had a strong personal hand in the evolution of the scheme'.⁹³ This suggestion seems however to be directed primarily at the content of the scheme. By contrast, the legal form of the scheme appears to have been relatively uncontroversial. It was assumed by all EC institutions, agricultural organisations, the dairy trade and related sectors that, for the sake of uniform application, the measure would take the form of a regulation. Even during the debate after the first proposal became known, little was apparently said of the legal form. The legal form continued to be given relatively little importance, even though the originally proposed scheme itself was strongly criticised and ultimately reformulated. Nor was the legal form controversial when the reformulated version was adopted as Council Regulation 563/76.⁹⁴

Council Regulation 563/76 was challenged in the European Court of Justice in

⁹² *Ibid.*, at 50-51.

⁹³ David Pickard, Gillian Norris and Nick Young, 'Three Case Histories in Agriculture', Centre for European Agricultural Studies, Wye College, University of London, unpublished report for Leverhulme Project, nd), at p 45.

⁹⁴ OJ 15.3.76 L67/18.

what became known as the 'skimmed milk powder cases'.⁹⁵ The Court of Justice annulled the Regulation on the ground that it was incompatible with the principles of non-discrimination and proportionality. There is no suggestion in the arguments of the parties, the Advocate-General's opinion or the judgment of the Court of Justice that the legal form of the measure was in any way an issue. In other words, at all stages of the policy-making process, the adoption of legislation and the implementation of the policy, the debate focussed on the choice of policy instruments and then on the implementation of legal measures, but not on the legal form of the measure in which the policy instrument was expressed.⁹⁶ Indeed, the legal form debate was short-circuited by the assumption that uniform application, and therefore a regulation, was required. Nevertheless, it may be suggested that the amount of litigation concerning this regulation raises a question as to the legitimacy of the basic policy decisions.

C DAIRY QUOTAS

Similar conclusions may be drawn from the example of dairy quotas. The dairy quota system was originally introduced, in great haste,⁹⁷ by two Council

⁹⁵ Case 114/76 Bela-Mühle Josef-Bergmann KG v Grows-Farm GmbH & Co KG [1977] ECR 1222; Case 116/76 Granaria BV v Hoofdproduktschap voor Akkerbouwprodukten [1977] ECR 1247; Joined Cases 119 and 120/76 Olmühle Hamburg AG v Hauptzollamt Hamburg Waltershof and Firma Kurt A Becher v Hauptzollamt Bremen-Nord [1977] ECR 1269; Joined Cases 83 and 94/76, 4, 15 and 40/77 Bayerische HNL Vermehrungsbetriebe GmbH and Co. KG v Council and Commission [1978] ECR 1209; Case 101/78 Granaria BV v Hoofdproduktschap voor Akkerbouwprodukten [1979] ECR 623. For an analysis, see Francis Snyder, New Directions in European Community Law (Sweet & Maxwell, London, 1990), pp 19-26.

⁹⁶ On this distinction, see also Francis G. Snyder, Law of the Common Agricultural Policy (Sweet & Maxwell, London, 1985), pp 145-149.

⁹⁷ The Council of Agricultural Ministers reached a decision in the night of 30-31 March 1984; the milk quotas entered into effect as from 2 April 1984. See Graham Avery, 'The Common Agricultural Policy: A Turning Point?', (1984) 21 Common Market Law Review

regulations and one Commission regulation. Two alternative policies were rejected. A drop in milk prices was rejected because of its serious and immediate consequences for agricultural incomes. A differentiated increase in the co-responsibility levy was rejected as an alternative, because in order to be effective 'the differences would have had to be so great that it would have led to inequalities among member states and could have compromised the unicity of the market mechanism'.⁹⁸

The legal technique used to enact the dairy quota system was as follows. Council Regulation 856/84⁹⁹ inserted a new article 5c in (and thus amended) the basic dairy regulation, Council Regulation 804/68. This new article provided for an additional levy intended to regulate and stabilise the market. Council Regulation 857/84 then adopted general rules for the application of the levy.¹⁰⁰ Commission Regulation 137/84 laid down detailed rules for the application of the levy.¹⁰¹ The dairy quota system thus involved a three-fold division of legislative labour. The general legal framework was enacted by the Council in the form of a regulation. Within this framework general implementing rules were adopted by the Council, again in the form of regulations. Also within this

481.

⁹⁸ Michel Petit, Michele de Benedictus, Denis Britton, Martijn de Groot, Wilhelm Henrichsmeyer and Francesco Lechi, Agricultural Policy Formation in the European Community: The Birth of Milk Quotas and CAP Reform (Elsevier, Amsterdam, 1987), p 125.

⁹⁹ Council Regulation 856/84 amending Regulation 804/68 on the common organisation of the market in milk and milk products, OJ 1.4.84 L90/10.

¹⁰⁰ Council Regulation 857/84 (general rules for the application of the levy referred to in Article 5c of Regulation 804/68 in the milk and milk products sector, OJ 1.4.84 L90/13.

¹⁰¹ Commission Regulation 1371/84 (detailed rules for the application of the additional levy referred to in Article 5c of Regulation 804/68, OJ 18.5.84 L132/11.

framework, detailed implementing rules were enacted by the Commission, again using mainly regulations.

The three-fold division of legislative labour has several implications. In this respect the structure and the interrelationship of the initial rules are revealing. Council Regulation 856/84, amending the basic dairy regulation, was based legally on Article 43 EEC in general. Its preamble referred also to a proposal by the Commission, the opinion of the European Parliament and the opinion of the Economic and Social Committee. This regulation provided (in the new article 5c(6)) that the Council, acting on a proposal from the Commission in accordance with the voting procedure laid down in Article 43 of the Treaty, was to lay down the general rules for the application of the new article. In other words, these general rules of application were to be fixed by the Council, on the basis of a Commission proposal and by a qualified majority vote: the European Parliament was excluded. The same regulation also provided (in new article 5c(7) that detailed rules for the application of the new article 5c were to be adopted in accordance with the procedure laid down in article 30 of the basic dairy regulation, that is, by the management committee procedure. This was (and for the dairy sector still is) the procedure for the exercise by the Commission of powers delegated to it by the Council. As stated earlier, it also excludes the European Parliament.

Council Regulation 857/84 laying down general implementing rules referred generally to the EEC Treaty but did not give a specific Treaty article as the legal basis. One must presume that it was also based on Article 43(2), a point of view which in the circumstances would surely have been upheld by the European Court of Justice. The recitals also referred to a Commission proposal

but not to any opinion of the European Parliament or of the Economic and Social Committee. This was in accordance with the Council's first dairy quota regulation. Yet his second Council regulation sets out general principles but also deals with some quite detailed matters, notably those which potentially or actually involve different treatment of different Member States and thus were politically delicate.

Commission Regulation 1371/84 laying down detailed implementing rules referred generally to the EEC Treaty but not to any specific article as its legal basis. However, it also referred expressly to article 5c(7) of Council Regulation 804/68, as amended by Council Regulation 856/84; this article provided for the adoption of detailed implementing rules by the management committee procedure. The last recital of the Commission Regulation noted, however, that 'the Management Committee for Milk and Milk Products has not delivered an opinion within the time limit set by its chairman'. In the circumstances, according to the management committee procedure the Commission was entitled to maintain its proposal which then entered into force.

The dairy quota system has been the subject of numerous amendments. It is worth remarking that most of these amendments, themselves often subjected to challenge in court, were enacted by the Council.¹⁰² Dairy quota legislation in force as of December 1993 included four Council regulations,¹⁰³ five

¹⁰² The principal measures are summarised in Luigi Costato (diretto da), Trattato Breve di Diritto Agrario Italiano e Comunitario (CEDAM, Padova, 1994), pp 478-482.

¹⁰³ Council Regulation 1637/91 (compensation for reduction of quotas and for definitive discontinuation of production ['SLOM quotas'], OJ 15.6.91 L150/30; Council Regulation 3950/92 (establishing levy [replacing the basic dairy quota regulation], OJ 31.12.92 L405/1; Council Regulation 2055/93 (allocating special reference quantity to certain producers), OJ

Commission regulations,¹⁰⁴ and six Commission decisions.¹⁰⁵ Several of these measures have been amended, but always by the enacting institution and the same type of act.¹⁰⁶

Several general remarks may be made. First, despite all the criticisms and comments to which the dairy quota system has been subjected, virtually none focus on the legal form, or even on the fact that the European Parliament was excluded from the adoption of general (implementing) rules. In its critical evaluation of the system, the Court of Auditors stated in 1987 that 'the main economic and financial objectives have not been achievedthere were flaws in its initial conception, and it was progressively weakened by amendments adopted by the Council during the first two years of its operation'.¹⁰⁷ But apart from this criticism of the Council's legislative practice, the Court of Auditors did

29.7.93 L187/8; Council Regulation 2187/93 (offer of compensation to certain producers temporarily prevented from carrying on trade), OJ 5.8.93 L196/6.

¹⁰⁴ Commission Regulation 1250/84 (fixing superlevy amounts), OJ 5.5.85 L120/14; Commission Regulation 2349/91 (detailed rules for application of Council Regulation 1637/71 on compensation), OJ 2.8.91 L214/44; Commission Regulation 426/92 (extending superlevy), OJ 22.2.92 L47/13; Commission Regulation 536/93 (detailed rules for application of Council Regulation 3950/92, OJ 10.3.92 L57/12; Commission Regulation 820/93 (extending superlevy), OJ 6.4.93 L85/15.

¹⁰⁵ Commission Decision 90/60 (approving draft implementing measures in the Netherlands), OJ 15.2.90 L41/25; Commission Decision 90/65 (same, for Denmark), OJ 17.2.90 L43/35; Commission Decision 90/66 (same, for Ireland), OJ 17.2.90 L43/36; Commission Decision 91/236 (same, for United Kingdom), OJ 26.4.91 L106/66; Commission Decision 92/19 (same, for Denmark), OJ 15.1.92 L9/21; Commission Decision 93/586 (approving criteria for allocation of additional quota in Denmark), OJ 12.11.93 L279/45.

¹⁰⁶ This paragraph is based on Official Journal of the European Communities, Directory of Community Legislation in Force (22nd edition, December 1993).

¹⁰⁷ Court of Auditors, Special report No 2/87 on the quota/additional levy system in the milk sector accompanied by the replies of the Commission, OJ 5.10.87 C266/1 at C266/3.

not make any comment on the legal form of the regulation. In any event, its criticism was directed at the frequency of the amendments rather than to their legal form.

Second, it may be suggested that two factors account for the lack of any particular interest on the part of the legislative institutions in the use of any legal form except a regulation.

On the one hand, there is the legal culture (or 'world view') of the European Community with regard to agriculture. It has often been simply assumed that agriculture will be regulated by uniform laws, particularly with regard to prices. When the dairy quota system was originally enacted, the use of a regulation was not questioned, even though in content the regulation permitted considerable divergence among Member States: for example, with regard to a choice between producer-based or dairy-based schemes, criteria for determining initial quota allocation, the permanent redistribution of quota from the national reserve, temporary reallocation of unused quota, distribution of the burden of levy payments among excess producers, and in particular transfer of quota between producers.¹⁰⁸

On the other hand, another factor may be summarised as bureaucratic politics. None of the main institutions appears to have had any interest in changing the traditionally used legal form. On the contrary, it might be suggested that the interests of the Commission and the Council in general, and also with regard to the use of dairy quotas in particular, converged in favour of the use of a

¹⁰⁸ See also Alison Burrell, 'Introduction', in Alison Burrell (ed), Milk Quotas in the European Community (CAB International, Wallingford, 1989) p 3-4.

regulation. ^{power?} A detailed study of the adoption of dairy quotas suggests that two main objectives underlay the Commission's behaviour: to act as the main guardian of the EC's achievements, and to preserve and if possible increase its own share of power. According to the same source, the Agricultural Council's main interest was in preserving its freedom of action and in defending the basic principles and mechanisms of the CAP.¹⁰⁹ Similarly, in so far as the European Parliament has participated in the legislative process, it has done so mainly by and on the basis of the work of its Agricultural Committee. It may be suggested that the Committee shared many of the assumptions just described with regard to the importance of uniform regulation.

Third, the role of negotiation and compromise in the EC legislative process was an important factor. The agreement on dairy quotas was part of a package deal, which also embraced

the dismantlement of monetary compensatory amounts, the proposed tax on oils and fats other than butter, and limitations to the entry of cereals substitutes. In addition, following the Luxembourg Compromise there existed at the time the practice of taking consensual decisions on the basis of unanimity. This decision-making system has been characterised in terms of the 'cost of not taking a decision as the engine of the bargaining process'. It tends to be heavily biased in favour of the status quo.¹¹⁰ This encompassed the continued use of a

¹⁰⁹ Michel Petit, Michele de Benedictus, Denis Britton, Martijn de Groot, Wilhelm Henrichsmeyer and Francesco Lechi, Agricultural Policy Formation in the European Community: The Birth of Milk Quotas and CAP Reform (Elsevier, Amsterdam, 1987), pp 117-122.

¹¹⁰ Michel Petit, Michele de Benedictus, Denis Britton, Martijn de Groot, Wilhelm Henrichsmeyer and Francesco Lechi, Agricultural Policy Formation in the European Community: The Birth of Milk Quotas and CAP Reform (Elsevier, Amsterdam, 1987), pp 130-131. See also Fritz Scharpf, 'The Joint-Decision Trap: Lessons from German Federalism

regulation as the standard act or basic legal instrument in the agricultural sector.

Fourth, the same generalisation regarding a lack of interest in legal form applies to the numerous cases involving the dairy quota system which have been brought before the national courts and the European Court of Justice. None of these cases have concentrated on the use of a regulation as the legal form. Instead they have concentrated almost exclusively on general principles of European Community, such as equality, legitimate expectations and the right to enjoy property.¹¹¹ *existence not form*

and European Integration', (1988) 66 Public Administration 239; reprinted in Francis Snyder (ed), European Community Law, vol. I (Dartmouth, Aldershot, 1993).

¹¹¹ For a review of many cases, see Luigi Costato (diretto da), Trattato Breve di Diritto Agrario Italiano e Comunitario (CEDAM, Padova, 1994), pp 486-490; Michael Cardwell, 'General Principles of Community Law and Milk Quotas', (1992) 29 Common Market Law Review 723.

IV CONCLUSION

A MAIN VARIABLES

The preceding sections of this report have examined in some detail EC legislation concerning the dairy sector. On the basis of this discussion, we can first identify some of the main variables which underlie EC dairy sector legislation. These variables refer to the legal basis of dairy sector legislation; the legislative authority; the use of original legislation or delegated legislation; legislative procedure; types of act; and the role of the European Parliament. As will be seen, they are closely intertwined. They also constitute crucial points in any attempt at reform.

A first variable is the legal basis. The legal basis of legislation in the dairy sector has always been Article 43(2) EC [formerly EEC]. It may be suggested that this is due less to any intention to reduce the European Parliament's role than to the routinisation of law-making and the legal culture of EC agricultural policy.

The use of Article 43 as the sole legal basis of legislation in the agricultural sector, including the dairy sector, has been confirmed repeatedly by the Court of Justice. The leading case is the 'First Hormones' case.¹¹² In this case the Court of Justice held that, taken as a whole, Article 43 EEC is the appropriate legal basis for any legislation concerning the production and marketing of agricultural products listed in Annex II of the Treaty, so long as the legislation contributes to the development of one or more of the CAP objectives set out in

¹¹² Case 68/86 United Kingdom v Council [1988] ECR 855; see also Case 131/86 United Kingdom v Council [1988] ECR 905 ('Battery Hens').

Article 39 EEC. In reaching this conclusion, the Court of Justice referred to two earlier judgments, Case 83/79 Pigs Marketing Board v Redmond¹¹³ and Case 117/78 Pigs and Bacon Commission v McCarren¹¹⁴.

Subsequently, in the 'Second Hormones' case the Court of Justice reiterated the Article 39 objective of market stabilisation and this broad conception of the CAP objectives. Consequently it concluded in that 'the reduction of agricultural production surpluses cannot be said to be foreign to the objectives of the common agricultural policy'.¹¹⁵ Similarly, in Animal Glands the Court of Justice held that objectives of the CAP stated in Article 39 EEC included the making available of agricultural products for non-food industries such as pharmaceutical industry; this contributed to assuring the availability of supplies and ensuring that supplies reach consumers at reasonable prices.¹¹⁶

It may be suggested that one should note two important points.

On the one hand, the assertion that 'Article 43(2) EC is the legal base in the dairy sector' may have misleading connotations. Formally speaking, the assertion is true, in that, for the purpose of the duty to state reasons as expressed in Article 190 EC, all dairy sector legislation, ranging from the basic regime enacted by the Council to the most detailed implementing legislation adopted by

¹¹³ [1978] ECR 2347.

¹¹⁴ [1979] ECR 2161.

¹¹⁵ Case C-331/88 R. v Minister of Agriculture, Fisheries and Food ex parte Fédération Européenne de la Santé Animale (FEDESA) [1990] ECR I-4023 at 4066 (para. 27).

¹¹⁶ Case 131/87 Commission v Council [1989] ECR 3743 at 3758 (para. 23).

the Commission, is based on Article 43(2) EC. With regard to political practice, however, this assertion does not reveal the whole story. It may simply mean that the parentage of subsequent implementing legislation, including general implementing rules adopted by the Council, can be traced back to legislation adopted on the basis of Article 43(2) EC. As a result, the former is based on Article 43(2) from the formal legal standpoint. It does not necessarily mean, however, that the European Parliament has participated by means of the consultation procedure in the adoption of the legislation.

On the other hand, the political, economic and legal context of the early Redmond and McCarren cases differed fundamentally from those of later decisions. The early cases concerned the compatibility of national market organisations with EC common organisations of the market. The later cases concerned procedural issues within the EC level itself, namely the scope of Article 43(2) as the legal basis of CAP legislation. It may be suggested that there is no convincing reason why general statements made in nature of obiter dicta in the former context should necessarily be treated as binding legal principles in the latter context. However, the 'First Hormones' case consolidated the earlier case law and generalised it into an apparently fixed principle concerning the scope of Article 43(2). For this purpose it was irrelevant if one of the important reasons for the decision may have been the concern of the Court of Justice to maximise qualified majority voting, especially in the light of the imminent entry into force of the Single European Act.

The crucial importance of the legal basis for the present purposes will appear shortly. As previously noted, this legal basis had virtually a constitutional character before the entry into force of the Maastricht Treaty on European

Union. It is too early to say whether the new legal context will have any influence on the choice of legal basis. Superficially, it might appear that, so far as many aspects of agricultural policy are concerned, there is unlikely to be any change. Nevertheless, it may be strongly suggested that the legal basis of agricultural legislation needs to be reconsidered, especially in the light of what may be called the partial de-constitutionalisation of agriculture in the Maastricht Treaty.

A second variable concerns the choice of legislative authority. The choice of Article 43(2) EC as the legal basis of legislation implies a choice of the Council as original legislative authority. With regard to the actual legislation authority, however, as with regards to the legal basis, this statement may also be misleading: the Council can act either as original legislator or by the exercise of delegated powers which it reserves to itself. In other words, the Council does not always act qua original legislator, at least if this expression is taken to mean that it enacts legislation according to the procedures set out in Article 43(2) EC. Nor does it mean necessarily that the Council cannot exercise its legislative power by delegating power to the Commission. In fact, it is clear from statistical data that these legislative paths have been followed on numerous occasions. This point is discussed further in the next section.

A third variable concerns legislative procedure. The choice of Article 43(2) determines a specific legislative procedure: the consultation procedure. This assertion is subject to two comments.

On the one hand, as already noted, however, this assertion is true so far as it goes, but it may not go very far. In particular, it conveys the impression that the

legislative procedure provided in Article 43(2) EC is used in all dairy sector legislation. But, as already seen, this impression is false. For example, the European Parliament participated in enacting the basic Council regulation establishing the dairy regime, but it does not participate either in the enactment of general implementing rules by the Council within the framework of this regulation (with a few exceptions) or in the adoption of detailed implementing rules by the Commission, also within the framework of the basic regime. These latter two legislative procedures differ in this and other respects from the Article 43(2) legislative procedure, even though from the formal legal standpoint they are all based on Article 43(2) EC.

On the other hand, it is essential to notice that times have changed, and that, for the European Parliament, the consultation procedure in Article 43(2) now provides a 'minimalist' rather than a 'maximalist' role. When the EEC Treaty was agreed, the consultation procedure was the procedure which gave the greatest role to the European Parliament.¹¹⁷ Following the adoption of the Single European Act and most recently the Maastricht Treaty, this is no longer the case. The European Parliament is more favoured by the cooperation procedure instituted by the Single European Act, and still more favoured by the co-decision procedure instituted by the Maastricht Treaty on European Union. Yet as long as the Commission and the Council select Article 43(2) as the legal basis for agricultural legislation (including dairy sector legislation), and as long as this choice is upheld by the European Court of Justice, the role of the European Parliament will not be able to expand. This is one important implication of the recursive policy of the Court of Justice, supporting in this respect previous

¹¹⁷ See also Case 138/79 Roquette v Council [1980] ECR 3333.

policy decisions by the Commission when proposing legislation and the Council when enacting it. As I have suggested elsewhere, these institutions form a 'structural set', that is, a set of institutions which is 'formed through the mutual convertibility of rules and resources in one domain of action into those pertaining to another'.¹¹⁸ It may be suggested that the implications of this point for the hierarchy of norms in EC law also deserve further study.

A fourth variable concerns the types of act. Article 43(2) permits the institutions to choose between various types of act; it does not require a single specific type of act. Almost invariably, however, the legislative institutions have chosen to use regulations. Thus regulations account for 94% of all dairy sector legislation enacted between 1964 and 1993. Of all acts during this period, Commission regulations account for 72% and Council regulations for 22%. If we consider only legislation now in force, 89% are regulations, and only 1% are directives. Almost half (43%) have been enacted within the past four years. More than 70% of all dairy sector legislation now in force consists of Commission regulations.

This variable, as others, is influenced significantly by the European Court of Justice, which has held the use of 'soft law' to be outside the Commission's

¹¹⁸ See my 'Soft Law and Institutional Practice in the European Community', in Stephen Martin (ed), The Construction of Europe: Essays in Honour of Emile Noel (Kluwer, Dordrecht, 1994), pp 197-225 at p 204; the quotation is from Anthony Giddens, 'A Reply to My Critics', in David Held and John B. Thompson (eds) Social Theory of Modern Societies: Anthony Giddens and His Critics (Cambridge University Press, Cambridge, 1989) pp 253-259 at 299.

competence.¹¹⁹ On a superficial view, it may seem as if there were a trade-off between allowing the exclusion of the European Parliament, on the one hand, and an insistence of reviewable acts, on the other hand. It may be suggested, however, that, given the current balance of power among EC institutions, the latter is more likely to be an attempt to insure a minimum guarantee of certain legal standards.

It deserves to be emphasised, however, that such judicial decisions do not necessarily require the use of a regulation. Instead, as is well-known, the Court of Justice has consistently held that, since the implementation of the CAP involves the evaluation of complex economic situations, the discretion of the Council embraces both the nature and the scope of the measures to be taken and, to some extent, the finding of the facts on which to base legislation. Thus, in reviewing the exercise of discretion, the Court of Justice must confine itself to examining whether it contains a manifest error, constitutes a misuse of power or clearly exceeds the bounds of discretion.¹²⁰ A similarly wide discretion is enjoyed by the Commission and the management committees.¹²¹

The fifth variable concerns the use of original legislation or delegated legislation. Article 43(2) is silent on this point but in practice permits either. The choice between original legislation and delegated legislation is extremely important

¹¹⁹ See, e.g., Case C-366/88 France v Commission [1990] ECR I-3571; C-303/90 France v Commission [1991] ECR I-5315. See also Rene Barents, 'The Quality of Community Legislation: Some Observations on EC Legislation in the Agricultural Sector', (1994) 1 Maastricht Journal of European and Comparative Law 101 at 107-108.

¹²⁰ See, e.g., Case 138/79 Roquette v Council [1980] ECR 3333 at 3358-3359.

¹²¹ See, e.g., Case 78/74 Deuka v EVst für Getreide und Futtermittel [1975] ECR 421 at 432.

from the constitutional standpoint, as well as from the perspective of political legitimacy. In the dairy sector, as in EC law more generally, however, these two categories of acts and the two functions to which they are usually assigned are not clearly demarcated. Nor is there a clear distinction between legislative and administrative institutions.

B THE DIVISION OF LEGISLATIVE LABOUR

The preceding analysis illuminates the division of legislative labour in the dairy sector and, more generally, within the CAP. It allows us to make four general points.

First, there is not any clear distinction between the legislative function and the administrative function which might be based on commonly used criteria, such as the identification of the enacting authority, the type of act or the nature of the economic policy in question.

Second, there is not any clear distinction between general rules and implementing measures which could be correlated neatly with the identity of the enacting authority or with the type of act.

Third, if one wishes to draw a distinction between the legislative function and the administrative function, or between legislative acts and administrative acts, this distinction must be based on a careful analysis of the basic Council regulation establishing the common organisation of the market. There do not appear to be any general or abstract principles in the EC system which might otherwise provide the basis for such a distinction.

Fourth, on the basis of such an analysis, it is possible to posit for heuristic purposes a spectrum showing a general correlation between the nature of an act, that is, whether an act is legislative or administrative, on the one hand, and the procedure for enactment of the act, on the other hand. The ends of the spectrum are clear. At one pole, legislative acts call for procedures involving the European Parliament (*in casu*, the consultation procedure). At the other pole, administrative acts require enactment by the Commission using the management committee procedure. As already seen, in practice there are many instances situated at the latter pole and very few at the former. The problematic case is however in the middle of the spectrum: this is the enactment of general implementing rules by the Council, acting on a proposal from the Commission but without consulting the European Parliament.

The extent to which legislative authority in the dairy sector has been retained (and exercised directly) by the Council is indeed striking. This appears to have been achieved usually by the Council acting not as original legislator but by the exercise of its powers to take general implementing legislation within the framework of the basic dairy regulation. This concerns even matters which might be considered to lie outside the scope of legislative authority, strictly speaking, and to fall within the ambit of administrative action. In other words, the evolution of legislation in the dairy sector testifies to the lack of any clear distinction in the EC between a legislative authority and an administrative authority or between a legislative act and an administrative act. This distinction remains largely to be elaborated and implemented in the EC legal system to the same extent as it is found in the systems of the Member States.

On this basis, we can propose an hypothesis to the effect that the dairy sector

is characterised by a three-fold division of legislative labour. First, the Council adopts a framework regulation, the regime, which is the most general norm used in the sector. Second, acting within this framework the Council adopts general implementing measures. Third, also acting within this framework the Commission adopts specific implementing measures. The political reasons for this state of affairs are well-known, and the preceding analysis has discussed in detail its various legal aspects. The legal form of these acts has usually, if not always, been a regulation. The legal nature of the acts, however, is not so clear. It may be suggested that the first and third acts, respectively, are legislative and administrative in character. The second category, however, includes some acts which appear to be legislative and others which appear to be administrative in character. These acts are enacted by the Council for a variety of reasons, such as economic importance or political sensitivity. In any event, it would appear to be difficult to draw from the logic of constitutional or administrative law any clear criteria which would apply to the whole of this category.

For the European Parliament the second and third categories of acts have especially harmful consequences, but it is important to note that all of these categories are deleterious. First, if original legislation is enacted by the Council on the basis of Article 43(2), the role of the European Parliament is limited to that provided by the now 'minimalist' consultation procedure. Second, if delegated legislation is enacted by the Council on the basis of its retained powers, the role of the European Parliament is even more limited. Third, the same is true if legislation is adopted by the Commission on the basis of powers delegated to it by the Council; the European Parliament has no role in the management committee procedure. As already seen, the vast majority of acts fall into the second and third categories, so the European Parliament is habitually

excluded. It may be suggested that it is unfortunate that the EC institutions are still operating under the shadow of a political compromise reached during the 1960s. It may also be suggested that this political compromise is now outdated and needs urgently to be reviewed.

C CRITICAL PATHS

If we put these variables and the division of legislative labour together, we can identify three paths which are of critical importance for the hierarchy of acts in the dairy sector and for the role of the European Parliament (and of course the other institutions) in their enactment.

The first critical path is as follows: choice of legal basis → legislative procedure → role of the European Parliament. In this path, the choice of legal basis determines the role of the European Parliament. As already noted, however, it determines the role of the European Parliament in the sense of limiting it to a 'minimalist' role at best. In fact, the legal basis of an act may not provide a clear guide to the role of the European Parliament if the act consists of 'delegated' legislation; that is, it does not distinguish whether the 'delegated' authority is that of the Council or the Commission. Consequently, it may be suggested the legal basis of dairy sector (hence agricultural) legislation, is a matter which deserves further attention.

The second critical path is as follows: original legislation versus delegated legislation → legislative authority → role of the European Parliament. In this path, the type of legislation determines the role of the European Parliament. We have already seen that, again, this determination operates in an ambiguous way. If the Council enacts original legislation, it does so on the basis of Article 43(2),

using the consultation procedure already discussed. If delegated legislation is used, it may be adopted by either the Council or the Commission. In this case, the legislative authority may vary. But regardless of whether the Council delegates authority to the Commission or it chooses to exercise 'delegated authority' itself, the European Parliament is excluded from the legislative procedure. For example, there does not appear to be any legally binding measure or interinstitutional agreement (leaving open the question as to the extent to which such an agreement is legally binding) concerning the participation of the European Parliament in such procedures.

The third critical path concerns the types of act. What determines the type of act? The type of act is not necessarily determined by the choice of legal basis. Article 43(2) EC leaves open the type of act. Nor does the legislative procedure determine the type of act. Similarly, the choice of legislative authority does not determine the type of act. The same is true of the distinction between original and delegated legislation. It may be suggested, therefore, that other factors are required to explain the overwhelming use of regulations. It may be suggested further that these factors lie in the basic assumptions of the EC institutions regarding the agricultural sector. We may refer to these basic assumptions as legal ideology,¹²² working practice or legal culture, such as the requirements of a common policy, the need for uniformity, the role of agriculture in European economic integration and so forth. This point suggests strongly that the constitutional culture of the EC, as well as that of the EU, deserves further

¹²² For examples, see 'Ideologies of Competition: Two Perspectives on the Completion of the Internal Market' and 'The Special Legal Status of Agriculture: Assumptions and Contradictions in Economic Law', chapters 3 and 4 respectively in my New Directions in European Community Law (Weidenfeld & Nicolson, London, 1990), pp 63-99 and 100-145.

investigation. This holds not only with regard to the dairy sector but also with regard to the CAP as a whole.

D CONCLUDING REMARKS

In conclusion, several general points stand out in this case study of the dairy sector. They demonstrate clearly that both political and legal factors have helped to determine the taxonomy of acts in EC agricultural policy.

First, the political decision in the early 1960s to give priority to price and market policy, rather than structural policy, had a fundamental and enduring effect on the choice of acts. Deemed to require uniform application, the former orientated the EC legislator almost inevitably to the use of regulations.

Second, the first common organisation of the market, that of cereals, provided the paradigm for subsequent commodity regimes. In the drafting of subsequent legislation, including the dairy regime, this legislative model exercised a magnetic attraction. This was true not only with regard to the choice of legislative act, but also with regard to the internal structure of the regulation and even to many of the basic policy instruments. The CAP thus was foreclosed according to this paradigm before EC enlargement, notably to include the United Kingdom and the Mediterranean countries. It remains to be seen whether the recent and future expansion of the EC will lead to fundamental changes in the CAP, in particular concerning the choice of acts.

Third, a political bargain among the Commission, Council and the European Parliament (then Assembly) in the early 1960s underlay the legislative division of labour which has prevailed since then in the CAP. Clearly, the major player

in this process was the Council. In fact, it is open to question whether, given its political status and legal powers at the time, the European Parliament had any real weight at all in making this decision. In the event, as a result of this bargain, within the framework of the basic regulation establishing the commodity regimes, almost all CAP legislation has been enacted either by the Council exercising its retained powers or by the Commission by means of the management committee procedure. In either case, the European Parliament has been substantially excluded. It may be suggested that this decision-making structure has been closely related to the development, including the successes, failures and heretofore lack of real reform, of the CAP.

Fourth, for the first twenty-five years of the history of the EC the agricultural sector had a special constitutional status.¹²³ In addition, the CAP was the EC's first common policy. The former was enshrined in, and the latter was mandated by, the Treaty of Rome. It is perhaps not surprising, therefore, that many of the general principles of EC law have developed as a result of the voluminous and complex legislation and litigation concerning the agricultural sector. At the same time, this constitutional status has been a powerful influence in shaping the legislative form, decision-making process and legal culture with regard to the CAP. For example, it has contributed to the rigidity of legal structures, such as the legal basis of agricultural legislation and the legislative procedures with regard to the role of the European Parliament. These structures, in turn, have helped to shield the CAP from reform. It remains to be seen whether any changes will follow from the partial de-constitutionalisation' of agriculture in the Maastricht Treaty, or eventually from the 1996 Intergovernmental Conference.

¹²³ See also Francis Snyder, 'Integrità e frontiere del diritto europeo: Riflessioni sulla base della Politica agricola comune', (1994) 4 *Rivista Italiana di Diritto Pubblico Comunitario* 581.

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