Florian von Alemann, *Die Handlungsform der interinstitutionellen Vereinbarung: Eine Untersuchung des Interorganverhältnisses der europäischen Verfassung*. Heidelberg: Springer Verlag, 2006. 534 pages. ISBN 3-540-31145-9. EUR 94.95.

Interinstitutional agreements have a long-lasting tradition in the European Community, and yet they have only recently appeared in texts of primary law, namely, in the declaration no. 3 appended to the Treaty of Nice and in Article III-397 of the Treaty Establishing a Constitution for Europe, not yet in force. Against this background, one may not be amazed that, for quite a long time, interinstitutional agreements attracted hardly any attention in legal literature. The book under review, a doctoral thesis supervised by von Bogdandy and submitted in Frankfurt in 2004/2005, undertakes, along with other monographs which have appeared more recently, to fill this gap. The author's aim is to establish interinstitutional agreements as a "legal instrument of EU constitutional law", as stated by the title.

In the first part of the book, the author elaborates a dogmatic concept of interinstitutional agreements; in the second tries to classify them in terms of constitutional theory. For an evaluation, it is essential to note that the two main terms – i.e. "interinstitutional agreement" and "legal instrument" – are each given a special definition by the author. The term "interinstitutional agreement" is defined by four purely formal criteria (pp. 47 et seq.): (1) The agreement must be laid down in a written document; usually, it will be published in the Official Journal. (2) It is concluded between Parliament, Council and Commission. This reduction of participating actors reflects the status under the Constitutional Treaty which, however, still has to come into force. For the time being, the reduction is motivated by the circumstance that these three institutions are the main actors in European decision-making. (3) The agreement must be approved by a formal vote. (4) It is addressed exclusively to the actors themselves. The phenomenon of interinstitutional agreements is described as being unique to the European Union, since no equivalents can be found either in national constitutional law or in the practice of other international organizations (pp. 128 et seq. ). Although there are agreements which are concluded on the national level, these agreements primarily concern federal States and the *vertical* cooperation between central and subordinate level rather than the *horizontal* cooperation between different law-making institutions. The "constitutional conventions" known in common law countries lack formality and result from precedents, i.e. they are not negotiated in advance. For the sake of completeness, however, it should be added that in the meantime – i.e. after the conclusion of the study, which dates from March 2005 – an example can be found in German constitutional law: on 28 September 2006, an agreement was concluded between the German Bundestag and the Federal Government on cooperation in matters concerning the European Union (accessible at: www.bundestag.de/htdocs_e/europe/vereinb_zus_bt_breg_en.pdf).

The second expression which requires explanation is the term "legal instrument". This translation fails to convey all the connotations of the German word "*Handlungsform*", a term which stems from German administrative law and suggests some kind of classification; literally, it could be translated by "form" or "type of (State/public authority) action". The concept of "legal instrument" is used instead of the traditional concept of "source of law" ("*Rechtsquelle*") for the sake – as the author contends – of greater rationality (p. 177). For definitional purposes he proposes three criteria, two of which are newly developed by the author himself (pp. 179 et seq.): (1) A legal instrument is used by a public authority. (2) It has reached a certain degree of formal stabilization. (3) It is characterized by a normative momentum of its own. Given that interinstitutional agreements have become the standard instrument of interinstitutional cooperation, all these three criteria are found to be fulfilled.

The most contested question in the context of interinstitutional agreements is that of their binding character and judicial enforceability. These two aspects have to be dealt with separately and the author rightly does so. For an international lawyer, it is a common experience that not all legal obligations can be enforced in court since there is no world judiciary.

Although at EU level, there is a comprehensive judicial system, this does not mean that dogmatically, the two aspects could not or should not be addressed in different steps.

Starting with the binding character, the first question that has to be addressed is whether the EU institutions have the competence to create new types of legal instruments. The legal system of the EU is based on the principle of conferred powers (Art. 5(1) EC). Therefore, acts of secondary legislation have to have a legal basis in primary law. The author discusses various options. He concludes (pp. 215 et seq. ) that for the most part, interinstitutional agreements may find a legal basis in an unwritten competence for self-organization spanning all institutions ("*organübergreifendes Selbstorganisationsrecht*"). Given that the decision-making process in the EU is divided up among the three main actors (Parliament, Council and Commission), the *telos* of guaranteeing the operability of the system as a whole justifies the assumption of such a competence. Having answered this question in the affirmative, the author then turns to the legal effects of interinstitutional agreements (pp. 235 et seq. ). Although his concept of legal effects is not reduced to an act's binding nature, this issue will be primarily discussed here. So far, most legal writers have proposed to determine the binding nature of interinstitutional agreements on a case-by-case basis, dependent on the intent of the participating institutions. The author contradicts this view, arguing that the constitution alone and not the intent of the acting institutions is decisive for the determination of the binding character (p. 250). Since interinstitutional agreements have reached a certain degree of formal stabilization, he furthermore concludes that their binding nature *is the rule* and the non-binding nature the exception (p. 258). These conclusions invite contradiction. In the eyes of the reviewer, the author hereby is not sufficiently aware of the fact that interinstitutional agreements are concluded on an unwritten and therefore *legally* still informal basis. When the EU institutions make use of legal instruments which are constitutionally well-shaped such as regulations or directives, it is self-evident that these acts are meant to have a binding character and hence, the will of the participating institutions may be insofar neglected. In contrast, when institutions create new types of legal instruments, it cannot be said to be clear *a priori* that these agreements are meant to be binding in character. Therefore, the case-by-case approach still seems to be unavoidable.

In line with the results described above, the author contends that interinstitutional agreements must also be judicially enforceable (pp. 281 et seq. ). The author thereby contradicts the conclusions of the ECJ which has ruled that this type of agreement is of a merely preparatory nature without any legal effects (cf. Case C-58/94, *Netherlands* v. *Council*, paras. 25 et seq.). While the author's general result is quite in line with his previous arguments, he draws some conclusions which appear less convincing. For instance, he holds the view that an institution which is party to an interinstitutional agreement may not contest the agreement in court since this would mean that it would partly have to sue itself (pp. 299 et seq. ). As a consequence, however, this institution would be bound – even in the case of unlawfulness! – by an interinstitutional agreement without temporal limitation, unless the partners agree to modify it: not a very satisfactory result. Furthermore, according to the author, interinstitutional agreements may be not only the principal object of a court action, but may also be examined incidentally in proceedings directed against another act. In this context, he expresses the opinion that interinstitutional agreements may not be abrogated by posterior acts of a different type, in particular by unilateral acts of one of the participating institutions (p. 313; cf. also pp. 266 et seq. ). This result is deduced from the ECJ's judgment in Case 68/86, *UK* v. *Council*, para 48) where the Court found that the Council could not depart from a rule enshrined in the rules of procedure, even on the basis of a larger majority than is laid down for the adoption or amendment of the said rules, unless it formally amended them. This means, however, that interinstitutional agreements are given what could be called "super binding force": unlike other acts of secondary legislation which can be abrogated by one another irrespective of their type, interinstitutional agreements could be modified only by the same type of legal instrument. This result appears all the more questionable since here (see also

p. 90), the author accepts the ECJ's jurisprudence without questioning it or at least asking for its *ratio*.

These examples demonstrate that the author does not always avoid the temptation to over-estimate the object of his inquiry. On the other hand, it seems quite natural that not all the results of a doctoral thesis appear convincing to everybody. In the context of this review, only some important aspects could be highlighted on an admittedly selective basis. In sum, it should be emphasized that the author presents a highly inspiring and state-of-the-art study. At the end of his inquiry, he explains the uniqueness of interinstitutional agreements at EU level by the fact that *three* institutions are part of the decision-making process, which makes interaction much more difficult than in systems where only two institutions have to cooperate with each other (p. 435). This is a convincing hypothesis also against the background of the agreement concluded between the German Bundestag and the Federal Government on cooperation in matters concerning the European Union since here, too, a third party comes into play, namely, the Council. Although the Council is not a party to the agreement, the triangular structure is comparable. This study can be said to have paved the way for further developing the instrument of interinstitutional agreements; whether all curves will follow the direction indicated by the author remains to be seen.

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