

The instruments of the EU in clarifying the legal system

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Aiming at a clearer legal system

The clarification of the EU's legal system is one of the most important duties of the Convention on the Future of the European Union. The aim is to establish a clearer and more easily controllable treaty base to strengthen the democratic legitimacy and efficiency of the Union and to improve coherence among various policy areas.

The clarification of the constitutive Treaties demands, on one hand, the division of the treaties in order to eliminate the non-constitutional norms from the highest level of rules and to re-organise the constitutional norms (EU's competences and instruments, citizens' rights, EU's institutions) into a logical system. On the other hand, the constitutional provisions are also to be presented in a more *comprehensive* and *coherent* manner in the constitutive Treaties.

The clarification of the EU's legal system – and the safeguarding of EU's efficiency and functioning – must be based on the assessment of the historical integration structures that hinder the achievement of the aforementioned objectives. The pillar structure is the most prominent of those factors. The pillar structure impedes, in numerous ways, the creation of a transparent and coherent legal, and political, system. The dismantling of the pillar structure is to be aimed at in situations in which it would clearly improve the functioning of the Union. *A complete conformity* between the current pillars is not, however, to be sought for instance in institutional issues and questions relating to decision-making.

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In order for the Union to carry out its duties, the Member States have conferred certain competences to the Union level. The legal interrelation of the instruments established for the use of the competences remains disorganised and inconsistent in the constitutive Treaties. The instruments applied in the use of the powers, similarly to the competence system, have been created in different phases of the integration history. The extension of competences has not, in every occasion and for varying reasons, been limited to the existing selection of instruments (Art. 249). The nature of the competences and the relating political situation have had too strong an influence on the choice of instruments. This has resulted in an incoherent and blurred competence system. The different types of competences are not dovetailed in a consistent manner to the applied instruments and, furthermore, instruments with quite different legal effects have been given the same name in different pillars. In addition, the legal effects of certain instruments (e.g. interinstitutional agreements) remain ambiguous.

The Convention agreed, on a wide front, that, as regards revising the delimitation of competences, a certain flexibility between the EU and the Member States would be beneficial in an enlarged Union, too. The delimitation of competences must not be unduly locked on the basis of the present needs. A similar kind of flexibility must be maintained in relation to the instruments. Flexibility in the delimitation of competence does not conform with such procedures in which the constitutive Treaties would provide exact rules on the instruments to be applied in relation to each type of competence and, therefore, debar all room for case-

specific discretion concerning intensity of the Union's action. The Union's system of instruments must, nevertheless, be simplified and its coherence improved on the same premises as the delimitation of competence. The aim must be to establish an adequate balance between the clarity and flexibility of the system. The appropriateness of the *mode* and *names* of the present instruments needs to be assessed as part of that work.

Conformity of instruments

The instruments relating to the Union's competences must be assessed as part of the overall clarification of the EU's legal system. This work must be initiated at the level of the EU's constitutive Treaties and proceed through the whole system of norms. The reform must aim at a clearer and more understandable system in which *different kinds of instruments* differ more distinctly than presently in both nature and legal effects. The hierarchy of norms must also be strengthened.

The clarification must be based on the separation of legislative and executive functions also in relation to the instruments. Norms used in the implementation of decisions must differ in both name and order of enactment from legislative action. The clarification serves to improve the comprehensibility of the Union's decision-making procedures and the delimitation of competence among the EU institutions. The Council and the European Parliament carry the main responsibility for Union's legislative work and the introduction of the Union-level norms to be applied in the implementation of legislation is mainly left to the Commission.

The system of legal instruments must also be harmonised beyond pillar boundaries. As regards the second pillar, the most logical solution would be to communitarise the Union's external policy instruments. That would clarify the present system without introducing considerable changes to the division of powers among the institutions. Despite the communitarisation of the instruments, the main policy definition of the CFSP could maintain its intergovernmental nature. The nature of the other political instruments under the second pillar (common positions and common strategies) should also be re-assessed. In relation to external relations, particular attention should also be attached to external agreements as the constitutive Treaties do not give adequate weight to them as Union instruments. The lack of clear provisions on the EU's legal personality brings about problems in the use of competence in the field of external relations.

Clearer presentation of the instruments in the constitutive Treaties

Even if it is not reasonable to provide exclusive provisions on the instruments to be applied in each situation, the relation between the existing instruments and various categories of competences should be clarified and made more consistent. The constitutive Treaties should, in addition to clearer categorisation of competences, include a more extensive presentation of the instruments available for the implementation of competences – and their central characteristics – so that each competence category would be accompanied with a listing of the available instruments.

The mode and legal effects of the instruments must be well-defined. The instruments with equivocal legal effects must be re-assessed. The possibilities for harmonising the instruments must be considered both concerning the legal and political instruments. Another premise should be to include all the utilised instruments in the constitutive Treaties. It is not very well in line with the constitutional nature of the work on the Union's future that the EU at the same time

develops instruments or decision-making procedures that remain outside the constitutional framework.

Clarifying the legislative process

The present decision-making procedures of the EU reflect the fact the conferment of material powers to the Union has been made at the expense of clarity and conformity. The imposition of certain restraints on the use of these powers in a manner ensuring that an individual Member State can assert influence in fields in which it has strong national interests has many times formed a precondition for the conferment of powers. As a result, the mode of legislative processes depends on the substance of powers rather than on the instrument assigned to the implementation of powers.

The enlargement of the European Union makes it imperative to dismantle these historical restraints. The development of the Union's legislative system must, more determinately than ever, aim at democracy and efficiency. That requires the clarification of legislative procedures. The present legislative procedures, linked to separate competence bases, are among the greatest barriers for the simplification of the EU's legislative system. The system can be simplified only if it is to be *based on* instrument-specific legislative procedures which can be subject to exceptions only in special cases. There may be a number of parallel instruments which will leave room for variation between legislative procedures and legal effects.

The assessment of the EU's legal and political instruments must be accompanied with an examination of the decision-making procedures with which the instruments would be most expedient to connect. The aim must, therefore, be to clarify and harmonise decision-making procedures as well. As the Member States are responsible for changing the constitutional norms of the European Union, the Council and the European Parliament should make provisions on the actual legislative work. The functioning of the employed legislative procedure – the codecision procedure – in an enlarged Union must, however, be assessed.