

Working Group IX

Working document 07

## **Working Group IX « Simplification »**

**SUBJECT :** « How to simplify the instruments of the Union? »  
- Paper by prof. Koen Lenaerts

Members of Working Group IX « Simplification » will find attached a paper by prof. Koen Lenaerts, Judge at the Court of First Instance, submitted on 17<sup>th</sup> October 2002.

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## **How to simplify the instruments of the Union?**

Note for the hearing by Working Group IX “Simplification of procedures and instruments”

October 17, 2002

– European Convention –

### **Introduction**

1. The problems relating to the instruments of the Union have been clearly diagnosed. With the successive revisions of the Treaties on which the Union is founded, the number of instruments has increased dramatically. As a result, it has become particularly difficult to distinguish precisely the means of action through which the Union can exercise its powers. The Treaties do not even define the legal scope of a number of instruments. The overall picture is one of vagueness and of legal uncertainty. Member States, local communities as well as the citizens more and more have the impression that the Union has been given a free hand in certain fields, allowing it to use whatever instrument it deems fit to exercise its powers. The lack of democratic legitimacy has further been criticised with respect to acts which are presented as “executive acts” although they reflect basic policy choices.

The present note only deals with legally binding instruments. It does not cover parallel reflections concerning soft law instruments.

### **The necessity of a cardinal distinction between legislative and executive acts**

2. In my view<sup>1</sup>, the debate concerning the simplification of the instruments of the Union must, as a starting point, make a clear distinction between the legislative and executive acts of the Union. This distinction, based not on the identity of the author of the act, but on the type of procedure followed for its adoption, is not so much inspired by the principle of separation of powers in a Union based on the rule of law, as it is concerned with the necessity to identify, in a transparent way, the procedure which is best suited – in terms of legitimacy and efficiency – for the exercise of the legislative and executive functions of the institutions of the Union. It will thus be necessary to clearly identify these two functions and the future basic

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<sup>1</sup> See also the views which I expressed in the article “La déclaration de Laeken: premier jalon d’une Constitution européenne?”, *Journal des Tribunaux – Droit européen*, 2002, p. 29-43, in particular points 56 to 76, as well as in the article (with Marlies Desomer) “Bricks for a Constitutional Treaty of the European Union: Values, Objectives and Means”, *European Law Review*, 2002, p. 377-407, in particular section D.

treaty will need to clarify the borderline between, on the one hand, the legislative action and, on the other hand, the executive action of the Union.

Within this framework, the acts expressing a basic policy choice<sup>2</sup> and adopted in compliance with the co-decision procedure of Article 251 EC should be regarded as legislative acts. All acts based on other procedural provisions are kinds of executive acts.

3. In the light of this fundamental distinction, the simplification and rationalisation of the instruments of the Union of both the first pillar (Community pillar) and the third pillar (police and judicial cooperation in criminal matters) could be organised by reference to two categories of acts.

### **First category: legislative acts**

4. The first category – containing the “legislative acts” – consists of all acts which are directly based on a Treaty provision, express a basic policy choice and are adopted in co-decision by the Council and the European Parliament on a proposal from the Commission. This first category must be further subdivided by reference to the effects of the measure in the internal legal orders of the Member States.
5. The “laws” would constitute the first subdivision. These measures do not need any legislative intervention in the Member States in order to become fully effective<sup>3</sup>. The “framework laws” would be the second subdivision<sup>4</sup>. In order to become fully effective, the latter have to be implemented by the Member States which remain free to make some policy choices while respecting the results to be achieved.
6. In my view, these two subdivisions are sufficient. A further subdivision of the category of legislative acts, as proposed by some, into “uniform laws”, “(minimal) harmonisation laws”, “programme laws”, “finance laws”, etc. would add nothing to the already proposed subdivision between “laws” and “framework laws”. It rather belongs to the legislature itself to specify, on a case by case basis, the subject-matter of the law or framework law (for instance, “framework law concerning the harmonisation in the field of ..”, “law establishing a multiannual framework programme in the field of ...”).
7. Nevertheless, if it would seem necessary to clarify the legal status of the “co-ordination” as one of the means of action of the Union, mention could be made within the first category of “co-ordination laws” or “co-ordination framework laws” which would set forth the procedural rules for the co-ordination and, possibly, also the common indicators and the objectives to be achieved in a given field, while leaving to the Member States the choice of form and methods to attain these objectives as well as the political responsibility for peer review.

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<sup>2</sup> Judgment of the Court of Justice of 17 December 1970, *Köster*, 25/70, ECR 1161, paragraph 6.

<sup>3</sup> The current equivalent is the regulation or the Community decision within the meaning of "Beschluss" or "besluit".

<sup>4</sup> The current equivalent is the Community directive or the framework decision in the third pillar.

## The second category: executive acts

### a) *The core of the problem – the case of “autonomous regulations”*

8. The second category currently comprises, amongst others, acts which are sometimes referred to as “autonomous regulations”. It concerns acts which are adopted by the Council or by the Commission and which are directly based on a Treaty provision.
9. These acts form the core of the problem. Indeed, it cannot be denied that various acts adopted by the Council alone<sup>5</sup> or after consulting the European Parliament<sup>6</sup>, or by the Commission alone<sup>7</sup>, include basic policy choices. Normally, such acts should be subject to the co-decision procedure and belong to the first category.
10. As a result, it seems to be necessary to identify, on the one hand, the autonomous regulations which imply basic policy choices. These acts, which need to enjoy representative democratic legitimacy<sup>8</sup>, should be adopted by the legislative power in its entirety (European Parliament and Council) and belong, as such, to the first category. On the other hand, the autonomous regulations of a more technical nature do not justify a direct intervention of the legislator (otherwise the co-decision procedure would become completely “congested”). These acts, which should also be identified, would correctly fall within the second category, and take the form either of “delegated legislation”<sup>9</sup>, or of executive acts *sensu stricto*<sup>10</sup>.

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<sup>5</sup> For example, the basic anti-dumping regulation is adopted on the basis of Article 133 EC (common commercial policy).

<sup>6</sup> This is the case in the field of the common agricultural policy.

<sup>7</sup> For example, the directives adopted by the Commission on the basis of Article 86 (3) EC concerning the position of public undertakings in the light of the European competition rules.

<sup>8</sup> And not only an executive legitimacy.

<sup>9</sup> For example, the act by which the Council, albeit after consulting the European Parliament, empowers the Commission to adopt a block exemption regulation in the field of competition law. The act of the Council is indeed directly based on the Treaty (Article 83 EC). In the future, such act could either be considered as "legislative" and be adopted in compliance with the co-decision procedure, or be regarded still as "autonomous" since it "only" puts into effect the "legislative" options expressed in the Treaty itself. In both cases, the implementing act adopted by the Commission would be "delegated legislation".

<sup>10</sup> For example, the decisions adopted by the Commission in the field of State aid, which "execute" in particular cases the "legislative" options expressed in this field in the Treaty itself – see *infra*, under c).

11. One should be aware of the fact that this exercise will give rise to at least two kinds of problems. On the one hand, the distinguishing factor being the existence, or not, of a basic policy choice underlying the act concerned, the exercise presupposes that for each Community policy, it is clarified what constitutes in terms of material content, a basic policy choice (for instance, in the field of common agricultural policy). On the other hand, one should take into account the national sensitivity related to the fact that in some Member States, different fields concerned by this exercise fall within the primary responsibility of the executive branch notwithstanding the basic policy choices involved (for instance, in the field of common commercial policy).

*b) Delegated legislation*

12. “Delegated legislation” concerns the legislation adopted by the Council or, more frequently, by the Commission on the basis of a power granted either in a precise Treaty provision or in a legislative act (first category). In the latter case, the delegated legislation often (but not always) adapts to technical progress the provisions of the legislative act<sup>11</sup>. If the direct intervention of the legislative power were necessary for the adoption of such acts, the activities of the European Parliament might become “congested” which would prevent it from concentrating on its primary constitutional function, namely the legislative function. However, whenever a power is granted to modify a legislative act, it is necessary to provide for a “heavy” comitology (intervention of a regulatory committee or of a management committee comprising representatives of the Member States<sup>12</sup>) and of a strict control by the European Parliament, which could include a right of call back for the legislator in certain cases<sup>13</sup>.

*c) Executive acts “sensu stricto”*

13. Some acts are adopted, on a Community or on a national level, on the basis of a “legislative” provision of the Treaty<sup>14</sup>, of a legislative act (adopted in compliance with the co-decision procedure) or of an act of delegated legislation.

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<sup>11</sup> Instruments of this kind are also known in some Member States. In Belgium, for instance, the law concerning the control of financial services empowers the executive branch to adapt the law in order to take account of the obligations deriving from Community law (for instance, implementation of co-ordination directives).

<sup>12</sup> See, for instance, the committees in the field of consumer health and of food safety (judgments of the CFI of 11 September 2002, T-13/99, *Pfizer v. Commission*, and T-70/99, *Alpharma v. Commission*, not yet reported).

<sup>13</sup> The idea is that one who gives a mandate can withdraw that mandate. See, in that regard, the proposals for the simplification of the adoption procedure for the European legal framework for financial services, better known as the “Lamfalussy method”.

<sup>14</sup> See footnote 10.

14. For the executive acts thus adopted by the Commission, a “light” comitology will suffice (assistance of a consultative committee, for instance) leaving the final word to the Commission, under the control of the European Parliament.

## **Final observations**

15. With regard to the simplification of the instruments of the Union, two questions still merit particular attention. The first concerns the agreements concluded on a European level between management and labour on the basis of Articles 138 and 139 EC. The second concerns the access of individuals to the Community courts.

- Agreements between management and labour

16. On the occasion of a consultation concerning a Commission initiative, management and labour may inform the Commission of their wish to initiate a social dialogue [Article 138 (4) EC]. This dialogue between management and labour may lead, if they so desire, to contractual relations, including agreements [Article 139 (1) EC]. If they conclude an agreement, management and labour may address a joint request to the Commission in order to have it implemented at a Community level. The Commission will then decide whether it will submit a proposal to that effect to the Council. The Council may then adopt an act incorporating the content of the agreement and rendering it legally binding on a Community level.

17. While the agreement concluded between management and labour and rendered binding by the Council is similar in terms of content to a “framework law”, the declaratory act rendering the agreement binding takes the form of an autonomous regulation (second category) to which the co-decision procedure is not applicable. Indeed, Article 139 EC does not provide for an intervention of the European Parliament. One may wonder whether under these conditions it would not be appropriate – as a compensation for the absence of co-decision – to grant to management and labour, of which the negotiation rights allegedly have been violated, the right to bring an action for annulment (limited to the examination of the respect of procedural rules) before the Community courts<sup>15</sup> against the act of the Council.

- Access to the Community courts and typology of instruments

18. The abovementioned example of agreements between management and labour rendered legally binding by an act of the Council makes one wonder, in a more general way, whether it would be appropriate to make the conditions for access to the Community courts for private parties dependent on the degree of democratic foundation of the contested Community measure. In other words, should the strictness of the admissibility conditions for actions for annulment lodged against a general Union act not decrease depending on whether the act falls under the first category or under one of the subdivisions of the second category?

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<sup>15</sup> Notwithstanding the fact that private parties cannot attack general acts which do not concern them directly.