

Working Group IX

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Working Group IX « Simplification »

SUBJECT : « Simplification of legislative procedures and instruments »
- Paper by Mr Jean-Claude Piris

Members of Working Group IX « Simplification » will find attached a paper from Mr Jean-claude Piris, Legal Adviser to the Council of the European Union, Director-General of the Council Legal Service.

SPEAKING NOTE

Presentation by Jean-Claude Piris¹ to Working Group IX
"Simplification of legislative procedures and instruments"
of the Convention on the future of the Union
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RATIONALISATION OF THE UNION'S LEGAL INSTRUMENTS

I. INTRODUCTION

This presentation **deals only with the Union's legal instruments**. It does not address the question of whether it is necessary to amend the provisions of the Treaties which determine the institutions that adopt these instruments, the question of the procedures for adopting the instruments (co-decision, consultation and other procedures), or that of the voting procedures used by the Council to adopt the instruments (unanimity, qualified majority). All of these provisions are essentially political, and have implications, inter alia, for the balance of the Union's institutions, and are thus outside my sphere of competence as a jurist.

One aspect of the complexity of the current treaties is the **large number of forms of legal instrument (15)** now available to the institutions, whereas the Treaty of Rome provided for only five. The reason for this proliferation is that the authors of the Treaty on European Union wished to clearly mark out the new areas of CFSP and JHA in different ways, in particular by choosing new names for the legal acts used in these areas. Moreover, the Treaties give similar definitions for acts going by different names ("directive/framework decision" or "joint action/decision") and, conversely, different definitions for acts going by the same name ("decisions/common positions").

Legal analysis shows that certain acts, despite having different names, produce equivalent effects. It would thus be conceivable to **reduce the number of instruments available from fifteen to five by applying to the common foreign and security policy and to justice and home affairs the five forms of act defined in Article 249 of the TEC**.

¹ Mr Jean-Claude PIRIS, Legal Adviser to the Council of the European Union, Director-General of the Council Legal Service, stated that he was speaking in a purely personal capacity.

This would not prevent the authors of the Treaty, if they so wished, from adding precise specifications in a particular clause conferring powers of action, i.e. in one of the articles of the Treaty. Such specifications could relate to the content of acts to be adopted in an area of activity (e.g. a prohibition on harmonising national laws) or to the type of act that the legislator could adopt (e.g. by restricting the choice to a directive or a recommendation, thus excluding a regulation or a decision).

I will also say a few words on **the lack of consistency in the wording of the clauses conferring powers of action**. They vary in the verbs used and in the manner of referring to prospective acts, although these variations do not reflect significant differences intended by the authors of the Treaties. Here again, I believe that it would be possible to harmonise the wording of the Articles of the Treaty, without having to sacrifice the possibility of inserting specific features that may be desirable in certain areas.

I will conclude my presentation by touching on other complex features of the Treaties that need to be taken into account in proposals to simplify the instruments.

II. THE 15 EXISTING LEGAL INSTRUMENTS

The Treaties define 14 forms of legal instrument ², to which must be added a fifteenth (the *sui generis* decision), which is not defined in the Treaties but is often used by the institutions.

The five Community instruments, defined in Article 249 ³ of the TEC, are the following:

- (1) Regulation: general application, binding in its entirety and directly applicable in all Member States;

² This list excludes international agreements, which are usually concluded by the Council in the form of *sui generis* decisions.

³ Article 110(2) TEC gives identical definitions of a regulation, decision, recommendation and opinion, as acts that may be adopted by the European Central Bank (ECB) in the context of the powers conferred on it by the Treaty.

- (2) Directive: binding, as to the result to be achieved, upon each Member State to which it is addressed, but leaves to the national authorities the choice of form and methods;
- (3) Decision: binding in its entirety upon those to whom it is addressed;
- (4) Recommendation: no binding force;
- (5) Opinion: no binding force ⁴ (however, an assent is binding on those to whom it is addressed).

The five CFSP instruments defined in Articles 12 to 15 of the TEU are as follows:

- (6) Principles and guidelines defined by the European Council; this is not really a legal instrument as such (no act with this name has ever been adopted), but is rather the expression of the general role of the European Council in providing impetus, as reflected in the "Presidency Conclusions";
- (7) common strategy: decided by the European Council and implemented by the Union; it sets out the objectives, duration and the means to be made available by the Union and the Member States;
- (8) joint action: ⁵ these address specific situations where operational action by the Union is deemed to be required; they commit the Member States in the positions they adopt and in the conduct of their activity.

⁴ In particular, the opinions of the European Parliament under the consultation procedure and the opinions of the Economic and Social Committee, the Committee of the Regions and the ECB when they are consulted. The opinions given by the Court of Justice (under Article 300 TEC) have the same binding nature as its "judgments".

⁵ The Council acts by qualified majority when adopting an action or a common position implementing a common strategy or when adopting a decision implementing a joint action or a common position.

(9) common position: ⁵ these define the approach of the Union to a particular matter of a geographical or thematic nature. Member States must ensure that their national policies conform to the common positions and uphold them in international organisations and at international conferences in which they participate;

(10) decision: ⁵ taken by the Council to define and implement the CFSP on the basis of general guidelines defined by the European Council.

The **four JHA instruments** defined in Articles 34 and 37 of the TEU are as follows:

(11) common position: defines the approach of the Union to a particular matter. Member States uphold it in international organisations and at international conferences in which they participate;

(12) framework decision: binding on the Member as to the result to be achieved, but leaves to the national authorities the choice of form and methods. Adopted for the purpose of approximation of the laws and regulations of the Member States, they cannot entail direct effect;

(13) decision: ⁶ binding. Adopted for any other purpose consistent with the objectives of this title (JHA), excluding any approximation of the laws and regulations of the Member States, they cannot entail direct effect;

(14) convention: ⁷ established by the Council, which recommends their adoption by the Member States in accordance with their respective constitutional requirements. They must begin the procedures applicable within a time limit set by the Council. Once adopted by at least half of the Member States, they enter into force for those Member States.

⁶ Measures implementing decisions are adopted by the Council acting by qualified majority.

⁷ Measures implementing conventions are adopted by a majority of two thirds of the contracting parties.

What is the source of the fifteenth instrument to which I referred?

It arose because the institutions invented an instrument – the **so-called *sui generis* decision** – in order to remedy a flaw in the 1957 Treaty of Rome which, by stating that a TEC Decision was binding on those to whom it was addressed, gave it too narrow a definition. The Treaty conferred on the institutions the power to adopt a whole series of decisions which are not addressed to a specific party. This difficulty did not arise in connection with the ECSC Treaty, which provided for a wider definition of decisions as being "*binding in their entirety*" (Article 14, second paragraph) and mentioned the parties concerned as simply a possibility and not as a condition.⁸

Some actors have presented *sui generis* decisions as being binding only within the Community's institutional structure. In reality, they can in certain cases have legal effects for third parties.⁹

In the jargon of the institutions, decisions of this type are identified by their German name - "*Beschluss*" – which allows them to be distinguished from the type of decision described in Article 249 TEC, which is known as "*Entscheidung*". Most other languages use the same term ("decision") for both, which leads to considerable confusion. Small textual differences with which only the initiated are familiar (whether or not the final clause refers to the party to whom the decision is addressed, and the use, at the beginning of "*has decided as follows*" (for a "*Beschluss*") or "*has adopted this decision*" (for a "*Entscheidung*"), are the sole clue to the type of decision being dealt with.

In Community practice, a large number of (sometimes very important) acts are adopted in the form of *sui generis* decisions.¹⁰

⁸ Pursuant to Article 15, second paragraph, of the ECSC Treaty: "*where decisions (...) are individual in character, they shall become binding upon being notified to the party concerned*". It should be noted that Article 34 TEU, which defines a JHA decision, states simply that it is "*binding*" and does not require it to be addressed to a particular party. This definition is therefore close to the definition of a decision as a legislative act envisaged originally in the ECSC Treaty.

⁹ These third parties may thus request the Court to review their legality. The Court has refused to limit the admissibility of action for annulment to the categories of acts provided for in Article 249 on the grounds that Article 230 states that action may be brought in respect of all provisions adopted by the institutions intended to produce legal effects (see points 27 and 28 of the judgment *Les Verts c/ Parlement européen*, 23 April 1986, Case 294/83 ECR p. 1358).

¹⁰ For example:

Are there other legal instruments apart from the 15 to which I have already referred?

Contrary to what a reading of the articles of the Treaty might lead one to believe, the means of action mentioned by the TEC in connection with the so-called "complementary" areas of competence (employment, education, culture, health, research and development, and development cooperation), such as "guidelines", "incentive measures", "multiannual framework programmes" and other "specific" or "complementary" programmes, are not legal instruments and do not take the form of separate instruments different from the fifteen instruments already referred to. These names do not designate legal forms, but rather describe the content of the possible actions, by emphasising that they are "low-intensity" competences where the Community legislator cannot legislate but rather merely supports action by Member States. These actions take the form of decisions and, in most cases, *sui generis* decisions. Where they are addressed to all Member States, such decisions take the form of addressed decisions, i.e. the form defined in Article 249 TEC.

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- acts through which the Council exercises its powers to revise the treaties autonomously, such as increasing the number of judges and advocates-general (Articles 221 and 222) or determining the classes of action or proceeding referred to the Court of First Instance (Article 225(2));
 - the final adoption of the budget by the President of the European Parliament;
 - decisions on the association of overseas countries and territories (Article 187);
 - miscellaneous decisions concerning Community programmes or other "incentive measures" (in fields of complementary competencies), and decisions relating to trans-European networks;
 - decisions authorising the Commission to negotiate international agreements and decisions on the conclusion of such agreements;
 - internal organisational decisions, e.g. decisions through which the institutions adopt their rules of procedure, or decisions setting up committees or working groups;
 - instruments of appointment (Economic and Social Committee, Committee of the Regions).

III. ANALYSIS AND PROPOSALS FOR SIMPLIFICATION: PROPOSAL TO REDUCE THE NUMBER OF LEGAL INSTRUMENTS FROM FIFTEEN TO FIVE

It is clear from the analysis and the seven proposals set out below that it is legally possible to consider reducing the number of the Union's legal instruments from fifteen to five.

(1) Proposal to abolish the "framework decision" (JHA) and replace it with the "Directive" (TEC)

Like the framework decision, the Directive is an act which *"is binding, as to the result to be achieved, upon [each/the] Member State[s] to which it is addressed, but leaves to the national authorities the choice of form and methods"*. However, the TEU makes two additional specifications: JHA framework decisions *"shall be adopted for the purpose of approximation of the laws and regulations of the Member States"* and *"shall not entail direct effect"*.

The first specification – the approximation of legislation – adopts a wording familiar from the TEC (e.g. Article 94 TEC). It merely reflects those cases in which a Directive is used in practice. It thereby draws no distinction between a TEC Directive and a TEU framework decision.

The aim of the second specification – the absence of direct effect – is to attempt to draw a fundamental distinction between the two acts.

The concept of direct effect is one of the fundamental concepts of Community law created by the decisions of the Court, permitting individuals to invoke a Community provision before the national court.¹¹

¹¹ Judgment of 5 February 1963, 26/62, van Gend & Loos, ECR p. 7. The Court deduced that effect *inter alia* from the objective of the TEC, *"which is to establish a common market, the functioning of which is of direct concern to interested parties in the Community"*, and from the role conferred upon the Court by Article 234 TEC (preliminary rulings concerning interpretation or validity raised by national courts in cases brought by individuals), which, according to the Court, *"confirms that the States have acknowledged that Community law has an authority which can be invoked by their nationals before their courts and tribunals"*. The concept of direct effect is to be differentiated from that of direct applicability (one of the legal effects of regulations), whereby the act in question is incorporated directly into Member States' legal systems without the need for national transposing measures.

Direct effect was conceived by the Court of Justice as a means of increasing the effectiveness of Community law by making the individual an "agent" of compliance with Community law.¹² The Court has recognised that the provisions of a directive whose deadline for transposition has expired may have direct effect.¹³

Direct effect is deduced in specific cases from an analysis of the nature and terms of the provision in question: in order to have such an effect, the provision must be sufficiently precise and unconditional, i.e. it must not leave discretionary power to the Member States. Consequently, any provision which satisfies these conditions may have direct effect. In order to prevent a directive from having direct effect, the legislator must therefore word its provisions in such a way that they do not satisfy the conditions laid down by the Court's decisions.

Having said this, the fact that Article 34 TEU expressly prohibits framework decisions from having direct effect establishes a fundamental distinction with respect to directives.

The jurisdiction which Article 35 TEU accords to the Court to give preliminary rulings in the JHA field is apparently similar to that provided for by the TEC. In reality, the express exclusion of direct effect prevents individuals from invoking before their national courts the benefit of a right which would be granted to them by a provision of a framework agreement satisfying the conditions for having direct effect as laid down by the Court's decisions, thereby denying individuals the possibility of instituting proceedings against a defaulting State for its failure to act.¹⁴

¹² The Court expresses this as follows: "*The vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles 169 and 170 [now Articles 226 and 227, concerning action for failure to fulfil an obligation] to the diligence of the Commission and of the Member States*" (van Gend & Loos judgment, as referred to above, p. 25).

¹³ Judgment of 4 December 1974, Case 41/74, van Duyn, ECR p. 1337, paragraph 12: "(...) *It would be incompatible with the binding effect attributed to a Directive by Article 189 to exclude, in principle, the possibility that the obligation which it imposes may be invoked by those concerned (...) the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it into consideration as an element of Community law*". However, this is an exceptional effect which penalises Member States for failing to transpose Directives within the given deadline or transposing them incorrectly.

¹⁴ It may be noted that is no judicial remedy against such failure to act. The TEU does not provide for action against defaulting States for failure to fulfil an obligation in JHA matters. The binding nature of the framework decision and the uniformity of the application of JHA law in the Member States are therefore at risk.

In any case, **"framework decisions" could be renamed "directives"** since the legal definition of those two acts is identical. If they consider it appropriate, the authors of the Treaty could specify in the JHA chapter that the provisions of directives adopted on the legal basis of all or some of the articles included in that chapter cannot entail direct effect.

(2) Proposal to abolish the four current meanings of the term "decision" and replace them with a single definition as contained in the former ECSC Treaty

The term "decision" is used in at least four different senses in the Treaties (not to mention the generic use of the term "decision" with the meaning "act"):

- an addressed decision within the meaning of Article 249 TEC ("*Entscheidung*");
- an unaddressed decision (a "*sui generis*" decision) ("*Beschluss*");
- a JHA decision within the meaning of Article 34 TEU which is "*binding*" and which does not have to be addressed to a specific party (also referred to as a "*Beschluss*" in the German version);
- a CFSP decision within the meaning of Article 13(3) TEU "*necessary for defining and implementing the CFSP*" (which, although unaddressed, is referred to as an "*Entscheidung*" in the German version), and a decision within the meaning of Article 23(2) TEU "*implementing a joint action or a common position*" (referred to as a "*Beschluss*" in the German version).

All these "decisions" are legally binding.

However, there are certain differences:

- (1) the "Article 249 TEC" decision is the only one which has to be addressed to a specific party;
- (2) the "Article 249 TEC" decision is "*binding in its entirety*" while the "JHA" decision is simply "*binding*" (CFSP decisions are also considered to be legally binding in practice);

- (3) the "Article 249 TEC" decision may entail direct effect if the provision in question satisfies the criteria of preciseness and unconditionality laid down by the Court ¹⁵, whereas Article 34 states that a JHA decision "*shall not entail direct effect*";
- (4) the "JHA" decision may be used only for the purpose of "*approximation of the laws and regulations of the Member States*".

The *sui generis* decision was invented in response to the first difference – the requirement for a decision to be addressed to a specific party. Taking as a basis the wording of Articles 14 and 15 of the former ECSC Treaty, the simplest solution would be to widen the definition of a decision as laid down in Article 249 TEC in such a way that it does not necessarily have to be addressed to a specific party.

The second difference – "*in its entirety*" – is only superficial. In both the TEU and the TEC, decisions are differentiated on the one hand from directives or framework decisions in that they are not only binding "*as to the result to be achieved*", but may contain detailed requirements including the means of achieving the specified result; on the other hand, they differ from directly applicable regulations in that – in principle – they require the adoption of national implementation measures, albeit with a generally limited margin for manoeuvre.

As explained above with regard to framework decisions, the third difference – the possibility of direct effect – draws a fundamental distinction between "Article 249" decisions and "JHA" decisions. As in the case of framework decisions, it would be enough to specify in the JHA chapter of the treaty that the provisions of decisions adopted on the legal basis of all or some of the articles included in that chapter cannot entail direct effect. There is no need for a separate legal instrument for that purpose.

As in the case of direct effect, the fourth difference – the approximation of laws – is merely a specification which the authors of the treaty could incorporate in the JHA chapter if they so wish without it affecting the legal form of the act.

It would therefore be possible to **standardise the definition of a decision on the basis of the provisions of the former ECSC Treaty** without such standardisation having any appreciable legal

¹⁵ Judgment of 6 October 1970, Case 9/70, Grad, ECR p. 838, paragraphs 5 and 6.

effect, and to use that act in the Community, CFSP and JHA spheres. A decision could be defined as follows: *"a decision shall be binding [in its entirety]. Where it specifies the parties to whom it is addressed, it shall be binding upon those parties."*

(3) Proposal to abolish the "joint action" (CFSP) and replace it with the newly defined "decision"

From a legal viewpoint, the definition of the effects of the CFSP joint action, which "[commits] *the Member States in the positions they adopt and in the conduct of their activity*", is not very different from the definition of the decision, which is *"binding"*. The other elements of the definition of the joint action merely provide information on the structure and content of the act, but do not alter its status as a binding act.

Legally speaking, **the CFSP joint action could therefore be called a "decision"** while retaining the precise specifications regarding its content.

(4) Similarly, proposal to abolish the "common positions" (CFSP and JHA) and replace them with the newly defined "decision"

The definition of a CFSP "common position" differs only slightly from that of a JHA "common position". Both define the approach which Member States must adopt in an international context or with regard to a particular matter. CFSP and JHA common positions are binding on Member States. By way of comparison, where the Council adopts this type of position in the field of external Community relations, it does so through a *sui generis* decision which is binding on Member States. From a legal viewpoint, a CFSP or JHA common position may be analysed in the same way as a decision. The use of the term "common position" therefore does not make any difference, nor does it bring any added value.

The use of the term "common position" in the TEU creates an unfortunate degree of confusion with the act referred to as a "common position" which the Council adopts under the TEC in connection with codecision and cooperation procedures (Articles 251 and 252 TEC), i.e. an intermediate legal act prior to the adoption of a Community legislative act implementing those two procedures. **It is therefore proposed that the term "decision" rather than "common position" be used in the TEU (CFSP and JHA).**

(5) Proposal to delete the "principles and general guidelines" from the list of CFSP instruments

The "principles and general guidelines" referred to in Articles 12 and 13 TEU are not a legal instrument. Rather, they express the role of the European Council, which is to define the Union's "general political guidelines" (Article 4 TEU). Moreover, no act by that name has ever been adopted by the European Council, which expresses its views by means of Presidency conclusions. **It is proposed that this reference be deleted from the list of CFSP instruments (if appropriate, by amplifying Article 4), as it leads to confusion.**

(6) Proposal to remove the "common strategies" from the list of CFSP instruments

Common strategies were added to the TEU by the Amsterdam Treaty, their purpose being "*to create an instrument setting the global vision of the Union within the area of external relations in the medium or long run towards a specific area or theme and, in the CFSP (second pillar) to provide for decision-making by QMV in implementing decisions*"¹⁶. However, so far the instrument has not lived up to the expectations of the drafters of the Treaty, either in operational terms, or in respect of the use of qualified majority voting. The Secretary-General/High Representative stated that:¹⁴ "*the wide scope of the CS and the particular, sometimes detailed concerns of individual Member States resulted in a "Christmas tree" approach based on the "lowest common denominator" (...) as far as substance was concerned the CS did not cover new ground and instead tended to become inventories of existing policies (...) the CS has tended increasingly to become a bureaucratic exercise*". And, "*so far, CS have not been used as basis for QMV decisions in CFSP (...) policy issues related to CFSP are formulated in such a manner that the main aim of Common Strategies to introduce QMV in CFSP has not so far been realised*". That verdict still stands, very little progress having been made one year on from the High Representative's report.¹⁷

The usefulness and the added value of the common strategy are therefore debatable and we could consider abolishing this instrument.

¹⁶ See report by the Secretary-General/High Representative for the CFSP of 21 December 2000 on common strategies, 14871/00 (declassified). Only three common strategies have been adopted: Russia (OJ L 157, 26.6.1999, p. 1); Ukraine (OJ L 331, 23.12.1999, p. 1); Mediterranean Region (OJ L 183, 22.7.2000, p. 5).

¹⁷ A new report presented by the Secretary-General/High Representative and the Commission to the Council on 28 January 2002 (5607/02) confirmed the previous conclusions.

(7) Proposal to discontinue the instrument of conventions between Member States (EC and JHA)

In order to contribute to the attainment of certain objectives of the Treaties, Articles 293 TEC and 34(2)(d) TEU provided for the possibility of concluding conventions, that is to say treaties, between Member States. These conventions are considered to form part of the Community or Union "*acquis*" which the States acceding to the Union must adopt. The other legal instruments of the TEC (regulation, directive, decision) or of the TEU (joint action, common position, framework decision, decision) are binding on the Member States simply by virtue of having been adopted by the Council (in accordance with the procedures and conditions laid down by the Treaties). The instrument of the convention, however, requires a national ratification procedure in order to enter into force. Thus it can be prevented from entering into force by the absence of a single Member State. The sole and partial remedy for this situation is the possibility provided by Article 34 of the TEU that a JHA convention may enter into force when half the Member States have ratified it, but will be in force only between those States.

Article 293 of the TEC stipulates that the Member States shall, "*so far as is necessary, enter into negotiations with each other*" in a number of fields (e.g. company law, double taxation, recognition of judgments) in order effectively to supplement the "*acquis communautaire*" in areas where the Community cannot (or could not) act and with the aim of attaining the general objectives of the TEC. As subsequent amendments to the TEC gave new powers to the Community, the scope of Article 293 was reduced. In Amsterdam, the drafters of the Treaty nevertheless decided to keep this article.

Six conventions have been drawn up under Article 293 TEC (ex-220). Three of them have not been ratified¹⁸. Two (the "Brussels I" Convention and the Insolvency Convention) were replaced by a

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- Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels I) (OJ L 299, 31.12.1972), which entered into force on 1 February 1973. This Convention has since been replaced by a Council Regulation which entered into force on 1 March 2002 (OJ L 12, 16.1.2001, p. 1);
- Convention on the Elimination of Double Taxation in connection with the Adjustment of Profits of Associated Enterprises (OJ L 225, 20.8.1990, p. 10), which entered into force on 1 January 1995;
- Convention of 19 June 1980 on the Law applicable to Contractual Obligations (Rome Convention) (OJ L 266, 9.10.1980), which entered into force on 1 April 1991. The Commission has said it intends to submit a proposal for a Regulation to replace this Convention.

Community Regulation based on Articles 61(c) and 67(1) TEC, i.e. the new title of the TEC containing the JHA provisions "communitarised" by the Amsterdam Treaty. So the list is not long: two conventions currently in force.

Article 34(2)(d) of the TEU also provides for the Council to establish Conventions between Member States in order to achieve the aims of Title VI (JHA) of the TEU. This instrument was widely used on the basis of Title VI of the TEU before it was amended by the Amsterdam Treaty: 10 conventions, and their respective protocols, were adopted. But only one, the Europol Convention, has been ratified. Furthermore, since the Amsterdam Treaty, only one convention has been adopted (not yet ratified) and two are under examination, with the trend being clearly towards the adoption of framework decisions. Again the list is very small: of 11 JHA conventions, only one has been ratified by the 15 Member States (Europol); the other 10 have still to be ratified and, in the case of some, Council acts that could replace them are already under examination.

The enlargement of the Union to 25 Member States will render the instrument of the convention even less practical. It is therefore time to consider deleting the relevant provisions of Articles 34(2)(d) TEU and 293 TEC, i.e. to eliminate the possibility of attaining the aims of the Treaties by means of conventions between Member States.

IV. RATIONALISATION OF THE WORDING OF ARTICLES OF THE TREATY THAT CONFER POWERS OF ACTION ON THE INSTITUTIONS

The terminology used for the successive amendments to the Treaties is ill-defined and inconsistent. Several examples spring to mind.

(1) A number of Treaty provisions that confer a power of action on the Community legislator **specify the type of act** by means of which it must or may act, for example Article 44 (freedom of establishment): "*the Council (...) shall act by means of directives*" or Article 150(4) (culture): "*the Council shall adopt (...) recommendations*". In certain provisions the type of act can be deduced from the verb used, for example Article 97(1) (internal market): "*the Commission shall recommend to the States concerned such measures as may be appropriate*".

The Conventions on the Mutual Recognition of Companies and Legal Persons, on Insolvency Proceedings and on Bankruptcy have never entered into force. The draft Convention on Insolvency was replaced by a Council Regulation which entered into force on 31 May 2002 (OJ L 160, 30.6.2001, p. 1).

Sometimes, however, the type of act indicated ("decisions" or "directives") has a generic meaning, signifying "act" or "measure" and does not refer to the type of act whose name it bears. Thus Article 139(2) (social policy, agreements between management and labour) provides that "*Agreements concluded at Community level shall be implemented (...) by a Council decision*", while what is actually intended is a directive. Similarly, the second subparagraph of Article 133(3) (common commercial policy) refers to "*such directives as the Council may issue to it*", while in practice this means a decision *sui generis* giving the Commission negotiating powers.

(2) On the other hand, numerous provisions **leave the institutions extensive freedom of choice** by providing for:

- the adoption of "measures", for instance in Article 42 (freedom of movement for workers, social security): "*The Council (...) shall adopt such measures (...) as are necessary to provide freedom of movement for workers*";
- the adoption of "provisions", for instance in Article 93 (taxation): "*The Council shall (...) adopt provisions for the harmonisation of legislation (...)*";
- the adoption of "detailed arrangements", for instance in Article 19(1) and (2) (right to vote and stand as a candidate): "*This right shall be exercised subject to detailed arrangements adopted by the Council*".

The term most often used in the Treaty – over 30 times – is "**measures**". It allows for adoption of the full range of acts provided for by Article 249 (regulation, directive, decision, recommendation), as well as *sui generis* decisions, depending on the degree of legislative force sought by the legislator. Experience has shown that the legislator does indeed exercise this freedom of choice, matching action to requirements, and thereby putting into practice the principle of proportionality enshrined in the third paragraph of Article 5 of the TEC, to the effect that "*any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty*".

In my opinion, it would therefore **be unwise to create a general, horizontal relationship between the kind of act and the kind of competence exercised**. That kind of restriction only makes sense on a case-by-case basis, in the actual clause conferring competence, where it lays down specific conditions. For example, in the fields of "complementary" competencies, a specific provision such as

a prohibition on adopting measures to harmonise national legislations naturally excludes recourse to the instrument of the directive.

While the terms "measures" and "provisions" are clearly interchangeable, the term "detailed arrangements" is sometimes also used in the sense of "specifications", "procedural arrangements", which means that it is not entirely interchangeable with "measures" or "provisions".

We should therefore endeavour **as far as possible to iron out these variations in drafting terms**, for instance:

- **by using only** the word "measures", and no other term, when we wish to leave the choice of instrument to adopt to the institutions;
- **by ending** the generalised use of the words "decision" or "directive", replacing them by "measure", "act", or another term appropriate to the context;
- **by harmonising** the terminology used in provisions conferring "complementary" competencies¹⁹ by choosing to use one or two common terms (for example, "recommendations", "actions" or "programmes");
- **by stating** the form of legal act as defined by the Treaty by which the abovementioned actions and programmes are to be adopted (probably in the form of a "decision", as is already the case in most cases).

(3) In some provisions, **it is the verb, rather than the noun, which may lead to confusion**. For instance, although the verb "decide" indicates in general the type of act to be adopted, i.e. a decision (generally speaking more often decisions *sui generis* than decisions of the Article 249 kind), there are times where this verb is used in the general sense, i.e. in place of the verb "adopt" . For example, Article 175(1) (environment) states that "*The Council (...) shall decide what action is to be taken by the Community*", while in actual fact it has been used as the basis for the adoption of regulations, directives, decisions and recommendations.

¹⁹ Which refer to where it is intended to adopt "guidelines", "general guidelines", "conclusions", "broad lines", "incentive measures", "specific action", "action", a "multiannual framework programme", "general action programmes", "multiannual programmes", "specific programmes" or "supplementary programmes".

Again, in clauses conferring competence use is made of a very wide range of verbs, more or less synonymous in meaning, a number of which contribute only stylistic variation without adding anything to the clarity of the text. For instance, apart from the typical "adopt", we find "take", "decide", "establish", "lay down", "set", "frame", "specify", "determine" or "draw up".

However, other verbs, such as "confirm", "amend", "repeal", "grant", "entrust", "authorise", "institute", etc. have a useful function in that they qualify an action, and thus add value.

We should therefore consider the possibility of ending generic uses of the verb "decide" and stylistic variations in the use of verbs denoting the taking of a decision ²⁰, replacing them, where allowed by the context, by the verb "adopt".

V. NON-STANDARD ACTS NOT PROVIDED FOR IN THE TREATIES BUT USED BY THE INSTITUTIONS

Apart from the 15 forms of legal act which I have mentioned, the institutions use other forms of act, sometimes called "innominate" or "non-standard" acts, not provided for in the Treaties. These acts are in theory without binding legal effect (resolutions, conclusions, statements, communications, etc.). They were severely criticised (in my view, too severely) by the institution from which I come, the French Conseil d'Etat, in a 1992 report. ²¹

(1) The **resolutions** adopted by the Council are in general the most structured of the non-standard acts. They often have recitals and articles, sometimes quite detailed. They are used:

- in fields in which the Council has legislative capacity (TEC and JHA), as a means of directing Community action, establishing a framework and deadlines for an action, etc.;
- in fields where Community powers are not legislative, but "complementary" (health, education, culture, etc.); resolutions confuse the public who may get the impression that the Community is legislating in these fields (hence the criticism).

²⁰ Such as "adopt", "take", "establish", "lay down", "set", "frame", "specify", "determine" or "draw up".

²¹ Report published in 1992, Etudes & Documents, No 44, "Considérations générales sur le droit communautaire", pp 15 et seq.

Resolutions are also the form in which the European Parliament usually expresses itself, both on legislative matters and on topical subjects or particular themes.

(2) The **declaration** is an instrument used by the Council, particularly in the CFSP, to express the position of the Union or of the Council Presidency on the situation in a particular region or third State.

Declarations must be distinguished from statements [*déclarations* in French] entered in the Council's minutes at the request of the Commission or of a member of the Council. Like conclusions, statements may serve to request or announce a future action, clarify certain provisions of an instrument, etc.

(3) **Conclusions** are adopted by the Council:

- in the field of the CFSP, and to express the EU's position on the situation in a third State, a particular region or subject;
- for a wide range of situations in Community and JHA areas: to express the Council's position on a suggestion from the Commission, to ask the Commission to prepare a study, a report, a proposal, to set itself certain procedural rules of conduct, to summarise progress made in negotiations not yet completed, and so on;
- in two cases, the Treaty provides that the European Council shall adopt a conclusion or "conclusions" (conclusion on the broad guidelines of the economic policies or BEPG (second subparagraph of Article 99(2)) and conclusions on the employment situation in the Community (Article 128(1)).

(4) The **communication** is an instrument used by the Commission in the framework of its powers of implementation and application, e.g. if a legislative act requires it to publish certain technical information or if it wishes to inform those concerned how it intends to interpret and apply certain provisions, particularly in the areas of State aid and competition law. It also uses this instrument in the context of its power of initiative to organise wide consultation before a legislative initiative, or to suggest new guidelines on a given EU policy.

The use of these "non-standard acts" by the Council ²² raises no problems in non-legislative areas. In contrast, the misuse of such acts in areas where the Treaty has granted legislative powers to the EU or to the Community impairs the clarity of their action. These acts have been very aptly described by one of the participants in the Convention as "*incantatory procedures*" ²³ that "*provide a restful illusion of action*" while in fact giving rise to no legal obligations whatever. It is therefore in this legislative area that the use of these non-standard acts should be proscribed, for instance by a **rule of conduct for the legislator, enjoining it to refrain from using such instruments in the legislative field**, in order to avoid giving the impression of making laws through this type of instrument.

The second subparagraph of Article 7 of the Council's Rules of Procedure could serve as a model for the rule. It states that the Council, "*where legislative proposals or initiatives are submitted to it (...) shall refrain from adopting acts which are not provided for by the Treaties, such as resolutions or declarations other than* [statements in the Council minutes]."

In other (non-legislative) fields, it does not seem to me **appropriate to seek to define and regulate these non-standard acts in the Treaty**. It would be preferable for them to retain their characteristic flexibility.

VI. SOME CONSIDERATIONS ON OTHER ASPECTS OF THE COMPLEXITY OF THE TREATIES

(1) Be it noted first that it would be very difficult to transpose to the Union the **customary clear distinction between legislative and executive authority**, i.e. between some institutions empowered only to pass laws and others merely implementing legislation or issuing regulations. It is certainly open to the Treaty's authors, should they see fit, to undertake such a project, but the powers conferred on the institutions by the Treaties are so convoluted that such a distinction between legislative and executive authority could not be made without upsetting the existing balance. The present institutional system of the Union is not modelled on that of a State. It is a unique, groundbreaking system, an "unidentified institutional object" as Jacques Delors once called it.

²² This therefore does not concern European Parliament resolutions or Commission communications.

²³ See document 3 submitted to Working Group X on the area of freedom, security and justice (intervention by Professor Henri Labayle), pages 8 and 14.

In any case, merely to simplify the forms of legal instruments would not be enough, even if they were given new names.

If on the other hand the aim is to enable courts, administrations, citizens and all users of EU law to tell simply by reading the title of a legal act whether it is a *legislative* or an *implementing* measure, then renaming a given act according to its type could be a worthwhile step forward from the current situation, so long as it were done with the necessary precautions.

Under the current versions of the Treaties, given the nature of the powers conferred on the various institutions, legislative acts, characterised as "second-level rules"²⁴ by the Convention Praesidium's Note on the allocation of competence, may be adopted not only by codecision by the European Parliament and the Council, but also by the Council alone, by means of the cooperation and consultation procedures. Furthermore, in some cases, second-level rules can also be adopted by the Commission²⁵ and the ECB²⁶, using legislative powers conferred on them directly by the Treaty. The Commission and the ECB do not act solely on the basis of powers delegated by the legislator (third-level rules), but also on the basis of the Treaty directly. Thus, the Court of Justice has recognised that Article 86(3) of the Treaty conferred on the Commission a "*legislative power*", i.e. the power "*to lay down general rules specifying the obligations arising from the Treaty which are binding on the Member States*", which exceeds "*mere surveillance to ensure application of the existing Commission rules*".²⁷

²⁴ CONV/17/02, 28 March 2002.

²⁵ Article 86(3) of the TEC on public undertakings and undertakings granted special or exclusive rights provides that "*the Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.*" The Commission has adopted four Directives on this basis: one on the transparency of financial relations between Member States and public undertakings (OJ L 195, 29.7.80, p. 35) and three on competition in the markets in telecommunications terminal equipment (OJ L 131, 27.5.88, p. 73), telecommunications services (OJ L 192, 24.7.90, p. 10) and electronic communications networks and services (OJ L 249, 17.9.02, p. 21).

²⁶ Article 110(1) of the TEC confers legislative powers on the ECB: "*in order to carry out the tasks entrusted to the ESCB, the ECB shall (...) make regulations (...)*".

²⁷ Judgment of 19 March 1991, France v. Commission, Case C-202/88, ECR p. I-1223, paragraph 14. See also judgment of 17 November 1992, Spain, Belgium and Italy/Commission, joined cases 271/90, C-281/90 and C-289/90, ECR p. I-5833, paragraphs 11 and 12.

Likewise, the Council, the Commission and other institutions may on the basis of the Treaty directly adopt acts which are not legislative but are regulatory or executive acts, without however being "implementing" acts taken pursuant to a legislative act; internal organisation measures, appointments, decisions to negotiate or to conclude an international agreement, etc.²⁸ Some of these acts, based directly on the Treaty, may even be individual decisions.²⁹ They are nevertheless "second-level" acts.

Lastly, the Council³⁰, the Commission³¹ and other institutions³² may adopt acts of "executive implementation" proper, i.e. acts adopted pursuant to, and using powers delegated by, a basic act. Implementing acts may be regulatory (third-level rules), individual (fourth-level rules, essentially in the fields of competition and implementation of funds and aid programmes).

The committee procedure system was developed in the context of "implementing" acts entrusted to the Commission on the basis of Article 202 of the TEC; it is one area where the problem of the distinction between legislative and executive authority arises acutely and gives rise to differences between the European Parliament and the Council.³³

²⁸ For example, the decisions whereby the institutions adopt their internal or procedural rules (Court of Justice), decisions to appoint committee members, adoption of the statute of the European Ombudsman by the European Parliament, etc.

²⁹ For example, Commission decisions in the field of State aids or concerning public undertakings, for which Article 86(3) also authorises individual decisions addressed to a single Member State (see for instance the Decision of 23.10.01 concerning the French undertaking La Poste (OJ L 120, 7.5.02, p. 19)).

³⁰ For example anti-dumping regulations concerning individual dumping cases, adopted by the Council on the basis of the basic anti-dumping regulation.

³¹ All the implementing measures adopted by the Commission, with or without the committee procedure, in the fields of agriculture, customs, technical standards, programme management, etc.

³² For example the measures adopted by the ECB pursuant to rules adopted by the Council.

³³ When the Community legislator, departing from the principle that Community law is implemented by the Member States (Article 10 TEC) delegates implementing powers to the Commission (pursuant to Article 202 TEC), representatives of the Member States take part in the development of these implementing measures through committees, in order to ensure that the measures will be practicable when they have to apply them. These committees are not Council bodies, but committees of Member States, organised and chaired by the Commission. Nevertheless, two committee procedures provide, in a "practical" if unorthodox manner, that in the event of disagreement between the committee and the Commission, the dossier is submitted to the "*Council*", which can take a decision other than that which the Commission envisaged. It is in this referral to the Council that the crux of the problem lies. In my view two cases should be distinguished:

This complex reality could not be ignored if there were a desire to rename a particular type of instrument to stress its legislative nature, e.g. by calling it a "framework law" or "law". If it were decided to replace Directives and Regulations by, respectively, "framework laws" and "laws", what would become of Decisions, currently also among the instruments at the legislator's disposal? Besides, the "classic" instruments (Regulation, Directive, Decision) would probably have to be retained so that they could continue to be used for regulatory and executive powers as well as for "implementing" powers (in the sense of third-level rules). I would stress this point: oversimplification could create more confusion than clarity. It could even rob the institutions of instruments which are invaluable in the day-to-day exercise of their functions.

Likewise, given this complexity and the institutional balances underlying it, it is hard to argue that a given form of legal instrument should be associated always and exclusively with a particular adoption procedure, which would deprive the legislator of any flexibility in deciding the intensity of its action, contrary to the principle of proportionality.

(2) The simplifications I have suggested in this presentation will still be inadequate unless accompanied by other simplifications. The complexity of the Treaties is not limited to the number of instruments and the variety of procedures governing their adoption, which you are already examining. I will give two examples:

Thus, **first example, the phenomenon of "opt-outs" has created a variable geometry whose complexity is sometimes impenetrable.** Here are two examples:

- such-and-such a Regulation is indeed directly applicable, but not in all Member States (judicial cooperation in civil matters);

(1) Genuine implementing measures are in question. In this case, referral to the Council as an institution and as legislator is not admissible. To avoid a deadlock, provision must be made for arbitration at the highest level, i.e. ministerial level, by the Member States. The logic of the system requires that referral to the Council be replaced by referral to "representatives of Member States' governments", i.e. a sort of super-committee under the committee procedure, at ministerial level;

(2) Alternatively, true implementing measures are not at issue, because the Commission project goes beyond the implementing powers conferred on it by the primary legislative act, in order to amend the latter or its Annexes, which are one of its "essential elements" according to the case law of the Court. In this case, the European Parliament seems to me to be right: referral to the Council as the Council, i.e. as legislator, is correct. It therefore seems to me logical that the European Parliament should request provision of a procedure for referral back to the legislator – a "call-back" procedure involving referral to the lawmaking institutions (Parliament and Council or Council alone).

- such-and-such a Directive is described as "developing the Schengen acquis", which means it triggers one special procedure for the United Kingdom and Ireland³⁴ and another for Denmark;
- Denmark does not apply at all, and cannot "opt into", acts which do not "develop the Schengen acquis" and are based on the provisions of Title IV of the TEC (i.e. the JHA part which was "communitarised" by the Amsterdam Treaty);³⁵
- the opt-outs prevent an act from being adopted on a double legal basis where the opt-out applies in relation to one basis and not the other;
- the opt-out arrangements for the United Kingdom, Ireland and Denmark give rise to almost insoluble problems in the exercise of the Community's external powers, especially as regards judicial cooperation in civil matters.

This complexity becomes daily more difficult to grasp and handle, even for the real experts. **In these circumstances, it is quite a challenge to bring about an "area of freedom, security and justice" providing all guarantees of legal security and comprehensibility for citizens, to say nothing of the lack of uniformity of the rules applicable to the Union's citizens within that area.**

Second example: variations as regards the powers of the Court of Justice are also a source of great complexity. For example, they also make it impossible to adopt an act on a double legal basis where the Court does not have identical powers in relation to both bases. This type of situation exists within the TEC itself, where Title IV establishes the limits of the Court's powers (Article 68 TEC).³⁶ In such a situation, the legislator has to do what the institutions' jargon calls "*splitting*", that is, splitting the single proposal for an act into two parts.

In short, the opt-outs and the differing specifications concerning the Court's powers and the legal effects of acts to be adopted (e.g. whether or not direct application is prohibited) could undermine efforts at simplification suggested elsewhere in this presentation.

³⁴ In addition, for the United Kingdom and Ireland, the "opt-in" procedures provided for by the Protocol on the integration of the Schengen acquis are different from those provided for by the Protocol on the position of the United Kingdom and Ireland, which can cause problems with acts based on Title IV of the TEC and described as "developments of the Schengen acquis".

³⁵ Such as judicial cooperation in civil matters or various provisions concerning asylum.

³⁶ For instance, it would not be possible to adopt an act based both on a Title IV legal basis and a basis contained in one of the other TEC Titles, because the Court's powers in Title IV are limited. This is a recurring problem for proposals for acts based on Articles 63(4) and the fourth indent of Article 137(3) of the TEC concerning employment conditions of third country nationals.