

Working Group IX

Working document 10

## **Working Party IX on Simplification**

**SUBJECT:**      **Working document submitted by the Chairman of the Working Party,  
Mr Amato: "Examples relating to acts adopted directly on the basis of the  
treaties by the Council, the Commission or the European Central Bank"**

Members of the Working Party will find attached examples relating to acts adopted directly on the basis of the treaties by the Council, the Commission or the European Central Bank.

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**Examples relating to acts adopted directly on the basis of the treaties by the Council, the Commission or the European Central Bank**

The hearings at the last meeting of the Working Party revealed that there were a large number of cases of what some have called "autonomous legislation". Such legislation consists of mandatory acts of general application (and also of individual application) adopted directly on the basis of the Treaties (second-level):

- either by the Council alone
- or by the Council, with the European Parliament's straight opinion or assent
- or by the Commission
- or by the European Central Bank.

Members of the Working Party will find below, by way of example, a number of cases classified according to the different decision-making procedures (see list of EC Treaty procedures in WD 03).

**1. Acts adopted by the Council by a qualified majority, with consultation of the European Parliament**

**(a) Competition and State aid: Article 83(1) and Article 89**

The legislation on competition tends to extend certain substantive rules in the Treaty which set out the main principles of competition. Thus, Article 83 of the TEC stipulates: *"The appropriate regulations or directives to give effect to the principles set out in Articles 81 and 82 shall be laid down by the Council, acting by a qualified majority on a proposal from the Commission and after consulting the European Parliament."* It was on this basis that the First Regulation implementing Articles 81 and 82, which essentially contains procedural rules, was adopted<sup>1</sup>. Other regulations

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<sup>1</sup> Regulation No 17 of 6 February 1962, OJ P 013, 21.2.1962.

authorise the Commission to adopt regulations concerning group exemptions by sector <sup>2</sup>.

The same applies to legislation on State aid (Article 89): the Council *"may make any appropriate regulations for the application of Articles 87 and 88 and may in particular determine the conditions in which Article 88(3) shall apply and the categories of aid exempted from this procedure."* On that basis, the Council adopted a general Regulation concerning the procedure for monitoring State aid <sup>3</sup>, and a Regulation on the application of Articles 87 and 88 to certain categories of aid <sup>4</sup>. This Regulation contains an authorisation for the Commission to adopt specific block exemption regulations <sup>5</sup>.

#### **(b) Common agricultural policy: Article 37(2)**

According to paragraph 2 of Article 37 TEC, on a proposal from the Commission and after consulting the European Parliament, the Council, acting by a qualified majority, makes regulations, issues directives or takes decisions for working out and implementing the common agricultural policy. The wording of the legal basis is very broad. In practice, however, the acts which are directly adopted on the basis of Article 37 serve in turn as a basis for other "implementing" acts adopted by the Council or, most often, by the Commission. Of 3000 agricultural acts published on average in the Official Journal each year, the Article 37 procedure is applied to approximately 60 (although the differences between the years is very great <sup>6</sup>). <sup>7</sup>

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<sup>2</sup> Implementation of Article 87(3).

<sup>3</sup> Regulation No 659/99, OJ L 083, 27 March 1999.

<sup>4</sup> Regulation No 994/98, OJ L 142, 14 May 1998.

<sup>5</sup> These are regulations which exempt from notification small amounts of aid, and regulations setting out compatibility criteria for training aid and for aid to SMEs (Regulations Nos 68, 69 and 70/2001, OJ L 10, 13 January 2001).

<sup>6</sup> 125 in 1991, 140 in 1992, 109 in 1993, 61 in 1994, 65 in 1995, 62 in 1996, 48 in 1997, 53 in 1998, 34 in 1999, 15 in 2000.

<sup>7</sup> This brings to mind the Commission proposal at the Nice IGC to submit to the codecision procedure some of the rules adopted on the basis of Article 37, i.e. precisely those which make fundamental choices. The Commission defined them as "fundamental measures" in a range of areas:

- (a) common market organisations,
- (b) application of the provisions of the chapter on competition rules to the production and marketing of agricultural products,
- (c) creation of one or more guidance and guarantee funds,

**(c) Liberalisation of services: Article 52**

For the liberalisation of a specific service, the Council issues directives acting by a qualified majority. As regards these directives, *"priority shall as a general rule be given to those services which directly affect production costs or the liberalisation of which helps to promote trade in goods"*.<sup>8</sup>

**(d) Visa policy: Article 67(3)**

Within the context of the crossing of the Member States' external borders, the Council adopts, after consulting the European Parliament, *"rules on visas for intended stays of no more than three months, including:*

- *the list of third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement;*
- *a uniform format for visas"*.<sup>9</sup>

**2. Acts adopted by the Council unanimously, with the European Parliament's straight opinion or assent**

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- (d) veterinary and phytosanitary areas, for the protection of animal welfare, animal feedingstuffs and seeds,
  - (e) rural development in the agricultural sector and structural measures in the fisheries sector,
  - (f) quality of agricultural products,
  - (g) Community system for fisheries and aquaculture.

The fundamental nature of the measures was determined by their general political importance for the idea of and approach to the common agricultural policy or the common fisheries policy, by their budgetary implications and by their multi-annual character.

<sup>8</sup> Article 50 states that *"services shall be considered to be "services" ... where they are normally provided for remuneration, insofar as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.*

*"Services" shall in particular include:*

- (a) activities of an industrial character;*
- (b) activities of a commercial character;*
- (c) activities of craftsmen;*
- (d) activities of the professions."*

<sup>9</sup> Article 62(2)(b).

In the cases presented below, the Council adopts acts unanimously, consulting the Parliament (straight opinion), except for point (2) concerning the Structural Funds and the Cohesion Fund: in this case, the Parliament's approval is required (assent).

**(a) Measures to combat discrimination: Article 13**

Following this procedure, the Council *"may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation"*.

**(b) Electoral rights of citizens of the Union: Article 19(1)**

Likewise, the Council may adopt arrangements concerning the right of a citizen of the Union to vote and to stand as a candidate at municipal elections and at elections to the European Parliament in the Member State where he resides, including derogations where warranted by problems specific to a Member State.

**(c) Tax harmonisation: Article 93**

With regard to tax, the Council adopts *"provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment ... of the internal market ..."* <sup>10</sup>.

**(d) Structural Funds and Cohesion Fund: Article 161**

According to the first paragraph of Article 161, the Council, acting unanimously on a proposal from the Commission and after obtaining the **assent** of the European Parliament and consulting the Economic and Social Committee and the Committee of the Regions, defines the tasks, priority objectives and the organisation of the Structural Funds, which may involve grouping the Funds. The Council, acting by the same procedure, also defines the general rules applicable to the Funds

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<sup>10</sup> See also Article 175(2) for taxation in connection with the environment.

and the provisions necessary to ensure their effectiveness and the coordination of the Funds with one another and with the other existing financial instruments.

In practice that means a single multiannual Regulation containing all the fundamental rules on the matter.<sup>11</sup>

The second paragraph of Article 161 stipulates that a "*Cohesion Fund set up by the Council in accordance with the same procedure shall provide a financial contribution to projects in the fields of environment and trans-European networks in the area of transport infrastructure*". A single multiannual Regulation is adopted on that basis. It serves as the basis for a single implementing Regulation adopted by the Council itself.

#### **(e) Matters of institutional and political relevance**

It will also be noted that Council adoption by unanimity with the opinion of the Parliament is also applied for a number of important institutional matters, such as determining the classes of action or proceeding before the Court of First Instance<sup>12</sup> or amending the Statute of the Court of Justice<sup>13</sup>. Other cases relate to highly sensitive political matters such as extension of the common commercial policy to services and intellectual property<sup>14</sup>, the adoption of the Financial Regulations<sup>15</sup> or Article 308 of the TEC.

#### **4. Acts adopted by the Council acting alone by a qualified majority**

Among the approximately thirty legal bases listed in this category, few cases can be regarded as

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<sup>11</sup> It is interesting to note that a specific procedure is used for each of the Structural Funds. While the general rules are adopted by the above procedure, the specific rules ("implementing decisions" in the terminology of the Treaty) governing the Social Fund (Article 148) and the ERDF (Article 162), which should, logically, fit into the general framework, are adopted by codecision.

<sup>12</sup> Article 225(2).

<sup>13</sup> Article 245, paragraph 2.

<sup>14</sup> Article 133(5).

<sup>15</sup> Article 279.

being of a legislative nature. We will however mention:

**(a) Common commercial policy: Article 133(4) <sup>16</sup>**

Unilateral regulations, such as those referred to as the "anti-dumping" and "anti-subsidy" Regulations, are adopted by the Council acting alone by a qualified majority. The same applies to fixing Common Customs Tariff duties <sup>17</sup> and in general for any other measure implementing the common commercial policy.

**(b) Determining the salaries of members of various bodies or institutions:  
Articles 210, 247(8) and 258**

The bodies or institutions concerned are the Commission and the Court of Justice, the Court of Auditors, and the Economic and Social Committee respectively.

**(c) Coordination of economic policies: Article 99(2)**

Article 99(2) of the TEC provides that:

*"The Council shall, acting by a qualified majority on a recommendation from the Commission, formulate a draft for the broad guidelines of the economic policies of the Member States and of the Community, and shall report its findings to the European Council.*

*The European Council shall, acting on the basis of the report from the Council, discuss a conclusion on the broad guidelines of the economic policies of the Member States and of the Community. On the basis of this conclusion, the Council shall, acting by a qualified majority, adopt a recommendation setting out these broad guidelines. The Council shall inform the European Parliament of its recommendation."*

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<sup>16</sup> See also Article 132(1) on the harmonisation of systems for granting aid.

<sup>17</sup> Article 26.

#### **(d) International agreements: Article 300**

In the case of international agreements, the authorisation to open negotiations, the decision to conclude an agreement and, where appropriate, the suspension of an agreement, are generally adopted by the Council acting by a qualified majority.

#### **5. Acts adopted by the Council acting alone by unanimity**

In this category practically no procedure gives rise to the adoption of mandatory acts of general application. We will however mention:

##### **(a) Important institutional matters**

We point to a number of procedures of institutional importance, such as altering the number of members of the Commission <sup>18</sup> or increasing the number of Judges or Advocates-General <sup>19</sup>.

##### **(b) Social policy: Article 144**

There is also an interesting case where the Council authorises the Commission to implement common measures, particularly with regard to social security for migrant workers <sup>20</sup>.

#### **6. Acts adopted by the Commission**

Among the cases where the Commission acts directly on the basis of the Treaties, a large number concern either recommendations <sup>21</sup>, initiatives to promote coordination in the context of certain policies <sup>22</sup>, or specific decisions relating to the management of certain policies <sup>23</sup>. In certain cases, these are decisions authorising a Member State to maintain national measures <sup>24</sup> or take protective measures <sup>25</sup>.

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<sup>18</sup> Article 213(1).

<sup>19</sup> Articles 221, paragraph 4, and 222, paragraph 3.

<sup>20</sup> incl. Article 202, third indent.

<sup>21</sup> See the general power of recommendations (Article 211) or in particular areas such as the liberalisation of services (Article 53(2)).

<sup>22</sup> Public health (Article 152(2)), industrial policy (Article 157(2)), research and development (Article 165(2)) and development cooperation (Article 180(2)). See also Article 140 (decisions intended to encourage cooperation and facilitate coordination).

<sup>23</sup> Decisions fixing countervailing charges or other agricultural measures (Article 38); decisions concerning State aid.

<sup>24</sup> Internal market (Article 95(6)).

<sup>25</sup> Commercial policy (Article 134).



The Commission adopts mandatory acts of general application in two cases.

**(a) Competition rules for public undertakings: Article 86(3)**

This refers to Article 86(3) on the arrangements for public undertakings. This Article provides that *"The Commission shall ensure the application of the provisions of this Article (86(1) and (2)) and shall, where necessary, address appropriate directives or decisions to the Member States"* <sup>26</sup>. To date these directives, which are in this case of general application, concern the transparency of financial relations between Member States and public undertakings and, in particular, the liberalisation of the telecommunications market. Decisions are addressed to Member States individually.

**(b) Free movement of workers: Article 39(3)(d)**

The Commission is empowered by the Treaty to adopt "implementing Regulations" establishing the conditions relating to the right of workers to remain in the territory of a Member State after having been employed in that State. Only one Regulation has, in 1970, been adopted on this basis <sup>27</sup>.

**7. Acts adopted by the European Central Bank**

Article 110 of the TEC indicates that the acts adopted by the ECB are practically identical to those

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<sup>26</sup> The Court of Justice considers that Article 86(3) empowers the Commission to lay down general rules specifying the obligations arising from the Treaty and that consequently the extent of that power depends on the scope of the rules with which compliance is to be ensured (Judgment of the Court of Justice of 19 March 1991, French Republic v Commission, ECR I-1223, points 14, 15 and 21).

<sup>27</sup> Regulation No 1251/70 of 29 June 1970, OJ L 140. It will be noted that an identical measure was adopted by the Council for self-employed workers wishing to remain in the host country following their retirement or invalidity (Directive 75/34 of 17 December 1974, OJ L 14).

set out in the classification of acts within the meaning of Article 249. The legal bases relating to ECB acts are set out in the Protocol on the Statute of the ESCB and of the ECB.

For example, Article 26.4 of the Statute provides that the Governing Council should establish the necessary rules for standardising accounting procedures. Article 28.3 establishes that the Governing Council should determine the extent to which and the form in which the capital shall be paid up. Articles 29.4, 30.6 and 32.7 of the Statute provides that the Governing Council should take all (other) measures necessary for the application of Article 29 concerning the key for capital subscription, Article 30 concerning the transfer of foreign reserve assets to the ECB, and Article 32 concerning the allocation of monetary income of national central banks.

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