

Working Group IX

Working document 24

Working Group IX on Simplification

Subject: « Simplifying Legislative Procedures and Instruments »
- Paper by Mr Matti Vanhanen

Members of Working Group IX “Simplification” will find hereafter a paper by Mr Matti Vanhanen, member of the Convention.

**PAPER BY MR MATTI VANHANEN, MEMBER OF THE CONVENTION,
TO THE WORKING GROUP IX**

1) TOWARDS A CLEARER DEFINITION OF LEGISLATIVE MATTERS

The Convention has discussed the need to clarify the scope of the legislative procedure and even to reduce the number of matters needing a legislative procedure. Also, there is a need to reduce the level of detail of EU legislation. At present, the European Parliament and Council of Ministers produce legislation that frequently is far too technical.

This is not the task of a legislator. Legislators should decide the essential aspects of legislation, leaving details and technicalities for executive measures.

The Commission and the legislative bodies could already limit the technicality of the legislative process. However, due to the particular character of the EU legal order and the variety of legal traditions represented in the Community, such self-restraint is rare.

Improving the regulatory environment, as proposed by the Commission, is one way to move forward. Setting up a hierarchy of norms could be another possibility, but these two options are not mutually exclusive. In any case, the Constitutional Treaty should lay down guidelines or principles to define the concept “legislative matters”.

When the European Union has the competence to adopt binding norms, the legislative procedure should in principle be reserved for the following matters:

- Legal norms, which affect the exercise of basic rights and freedoms;
- Legal norms, which include principles governing rights and obligations of individuals;
- Legal norms formulating the basic principles of common policies, including norms and decision which constitute binding obligations for Member States (for instance by setting up binding goals or establishing binding financial obligations);
- Legal norms including principles governing the functioning of public authorities;
- Legal norms or decisions establishing organs or agencies exercising public authority.

In the legislative process QMV in the Council with co-decision should be applied as the general rule. Exceptions might be needed, for instance in some areas of Justice and Home Affairs as well as for the European Monetary Union and the Common Agricultural Policy.

In case harmonised implementation is needed at the EU level, the legislative authority should delegate implementing powers either to the Council or to the Commission. If appropriate, a “comitology committee” could be set up to assist the Commission. Both branches of the legislative authority should have efficient scrutiny of implementing legislation (for example on the basis of suspected *ultra vires*).

Where harmonised implementing measures are not necessary, technicalities should be left in the national competence with mutual recognition of national norms and practices.

2) COMMENTS TO THE WORKING DOCUMENTS 11 AND 16

The proposal included in the *working document 11* is a rather good basis for discussion with only some details I am a bit hesitant to accept. I very much agree with its starting point that a legislative act has to be defined by its content, the substance, and not by its adoption procedure.

The first category (Legislative acts) is in principle logical and clear. However, in my view it would be better to define more comprehensively what is “legislative”. My proposal for a more thorough definition of legislative matters is set out above in chapter 1). The adoption procedure (co-decision as a general rule with exceptions in some areas) is all right as proposed. The acts could be called EU-laws and EU-framework laws to avoid confusion with national laws.

The third category (Implementing Acts) is logical and clear as well. Also the adoption procedure and the types of acts seem acceptable.

The second category (Delegated/subordinate acts) is, however, a little bit unclear to me. In principle the definition “delegated acts are those acts which expand on the elements defined in the legislative acts” seems comprehensible to me. However, I’m not totally convinced if also all the “acts, which expand on the elements defined in the Treaty in certain cases” should be included in this category. I remind of the before said principle that a legislative act has to be defined by its content and not by its adoption procedure. Therefore, all those cases (where it is the Treaty itself which establishes the essential elements in an area and instructs the Council or Commission to adopt the acts which expand on them) have to be analysed case by case to see if they belong to the first category (EU-laws or EU-framework laws, maybe as exceptions from the co-decision procedure) or to the second category (regulations, framework regulations or decisions).

I agree with the proposal in the working document 11 that these “delegated” acts could be adopted by the Council or by the Commission. The pure separation of functions or powers (as set out for instance in the *working document 16*) is not possible in the European Union. The union is not a sovereign state and nor will it become one even if it gets a legal personality. The Council must not become a purely legislative chamber but keep some other functions as well, including some degree of execution powers.

Furthermore, the “call back” arrangements suggested to be included in the second category could be defined more clearly. A good model for the call back could be the arrangements set out in the article 8 of the Council Comitology decision (1999/468/EC).

3) COMMENTS TO THE WORKING DOCUMENT 12 ON PROCEDURES

General comment: Simplification of the Treaty is an important and challenging goal. However, this should not be any excuse for changes in competencies or unintended shifts in decision making powers.

Codecision procedure

I agree with the beginning of the document stating that it is not necessary to amend the provisions of Article 251 of the TEC. I do agree with those arguing that the wording could be better but at the same time I have to remind that it was decided in the plenary of the Convention that the working groups must not draft articles.

I disagree with the proposal to amend the provision about the *composition of the Conciliation Committee* (article 151(4)) so as to enable the Council and the Parliament to review the composition of the Committee via their rules of procedure. Firstly, this is an institutional question that do not belong to the mandate of our working group. Secondly, it is very important, actually a question of legitimacy, that each member country has a representative in the Conciliation Committee. It has to be stipulated in the Treaty itself and not in the rules of procedure.

I agree with the proposal to *replace the unanimous voting in the Council by qualified-majority voting in the four cases mentioned in the document 12* (article 18(2), article 42, article 47 and article 151).

The term “co-decision procedure” is not included in the Treaty but it might be a good idea to have it included therein in future. It cannot, however, be called “legislative procedure” because there will also in future be legislation that has not gone through the codecision procedure. Therefore the term “legislation procedure” would not make the procedure more comprehensible but be misleading.

Cooperation procedure (article 252)

The working document 12 suggests that in those remaining articles in the EMU chapter in which the reference to the cooperation procedure (article 252) has survived, it should be replaced by some other decision making procedure. However, it should be taken into account that the EMU chapter is not only a legal construction. It is also relevant and sensitive from the economic policy point of view. The Working Group on economic governance was especially reserved as regards changing these articles and the competences. The sensitive balance of regulations concerning the economic and monetary union should not be disturbed. Furthermore, it should also be taken into account old and new Members States should be treated equally during the euro area accession process.

Despite the common monetary policy the main competences and decision making powers in economic policy questions will further remain in the hands of national Governments and Parliaments. This should be reflected also in the relevant decision making procedures. At the same time, it would also be important that the opinion of the European Parliament will be heard in due course.

Assent procedure

There has also been some discussion in the Working Group on how to amend certain articles (e.g. 107(5), 105(6)) in which the assent procedure has referred, if this procedure will be reserved only for ratification of certain international agreements. The argumentation has not been valid. The abandonment of the assent procedure in these cases would not lead to major simplification of the Treaty and procedures concerned. The procedure would still exist and be applied as a legal instrument.

Furthermore, it should be noted that the above mentioned articles concerning the ESCB and the ECB are also relevant and sensitive from the EMU point of view and should not be changed according to the conclusions of the economic governance Working Group. The work of working group IX should be in line with these conclusions. If the assent procedure will, however, be abandoned, the most appropriate option would that the opinion of the EP will be heard.

Budgetary procedure

The budgetary procedure is commented in a separate contribution.

4) COMMENTS TO THE DOCUMENT CONV 392/02

- 1) Should the terminology of the legal bases set out in the treaties be simplified and standardised? If so, how?*

It would be useful to simplify and standardise the terminology of the legal bases. However, at this stage of the convention, I would avoid raising any additional substantive questions solely in the interest of linguistic clarification.

- 2) Should the number of legal instruments in the treaties be reduced? Is it possible to apply the same instruments in every area, including foreign policy and judicial cooperation in criminal matters? How might this be done? What changes would be needed in the definition and the effects of the existing instruments?*

The number of legal instruments should be reduced to make the union's legal regime clearer and more comprehensible. It would be desirable for the same instruments to apply in as many areas as possible. Similar instruments used for similar purposes could be combined. For instance, I pillar instruments could also apply in judicial co-operation; framework decisions could become directives (or framework laws). Special arrangements will, however, be needed also in the future. For example, for constitutional reasons, instruments that have direct effect cannot be used in the realm of material criminal law.

The II pillar instruments will depend on the convention's conclusions on CFSP decision-making. Conceivably, a distinction will be made between instruments that define policy and those implementing policy. Implementing instruments could be identical with the I pillar instruments.

- 3) *Once any such change has been made, should the title of the acts be amended? If so how? Regulation by "law"? Directive by "framework law"? Others?*

The words "regulation" and directive" are confusing and could usefully be changed. However, it should be underlined that changing titles is mostly a cosmetic action and does not solve any real problems. Therefore, it should only be a part of the suggestions for the convention by the working group. If the working group cannot agree on any substantial changes to the instruments it should not suggest the changes of the titles either.

The title of a legislative act should indicate if the instrument is directly applicable or not. To avoid confusion with national laws the new titles could be "EU law (meaning act, statute)" and "EU framework law". Implementing acts could become "EU regulations".

- 4) *Should a clear distinction be introduced into the treaty between that which is legislation and that which is implementation?*

Yes, a distinction between legislation and implementation should be introduced in the treaty. The treaty should lay down guidelines or principles to define the concept of "legislative matters". To this end, working paper 11 is most useful. However, I would like to have more information and grounds for the proposal to divide the acts into three categories (instead of two).

Despite the above I have to remind that simplification, incl. these plans to make a distinction between legislation and implementation might effect the division of competence between the union and the member states as well as the balance between the union institutions. Therefore, we have to analyse effects carefully and introduce necessary exceptions to general rules to avoid unintended changes to the division of competence or to the institutional balance.

- 5) *If so, what should be the meaning of a legislative act? Should it be defined by its adoption procedure (for example that which is covered by co-decision)? By its content? When that implies a basic political choice? Should it be left to the legislator to decide in each case what is legislative, or should it be set out in the treaty itself? Should specific rules be set out in particular areas?*

A legislative act should be defined by its content, i.e, by its substance and not by its adoption procedure. The "content" in this case includes the definition that a legislative act implies a political choice. The basic definition (the principles) should be set out in the treaty itself.

- 6) *Should a specific act be created for cases where the Council adopts acts directly on the basis of the treaty? What could it be called?*

No specific act (or title) is needed for those cases. The content of the act should decide the title (as defined above in chapters 4 and 5), not the adoption procedure. The preambulum of an act could include a mention that the act was adopted by the council.

7) Should the use of atypical acts be restricted? In particular, should their use be excluded when the legislator is in the process of examining a legislative proposal?

Yes, the use of atypical acts should be restricted. They should obviously be restricted to areas where the union has some degree of competence. The main principles and general rules for the use of atypical acts should be defined in the treaty.

One atypical act is the open method of coordination. It has in practice become a significant steering instrument within the Union. In future, the application of this method should be limited to wider political objectives that cannot be achieved by conventional methods of community legislation or intergovernmental co-operation. The application of the open method of coordination should not entail any changes in competences nor must it engender any. The distribution of competence between the Union and its member states follows a functional logic and for the sake of legitimacy, the open method of coordination should only be used in policy areas, which have some degree of community competence. In order to preserve a considered use of the method, its application to any give issue should be decided by the European Council upon a joint initiative by the Council and the Commission.
