

Working Group IX

Working document 21

Working Group IX on Simplification

Members will find attached a preliminary draft of the final report of Working Group IX on Simplification.

INTRODUCTION

When the Working Group began its deliberations, one thing was certain: nothing is more complicated than simplification. The simplification of the Union's instruments and procedures, as sought by the Convention, is an operation with considerable repercussions and a direct bearing on the level of democracy of our institutions.

The Union's system as we know it is not very clear or comprehensible to its citizens. However, the ability to criticise the system is a key factor of democracy. Citizens must be able to understand the system so that they can identify its problems, criticise it, and in the end control it.

To simplify therefore firstly means "to make comprehensible", but also to provide a guarantee that acts with the same legal/political force have the same foundation in terms of democratic legitimacy. If the democratic legitimacy of the Union is founded on its States and peoples, then an act of a legislative nature must always come from bodies, which represent those States and peoples, namely, the Council and the Parliament. Procedures must therefore be reviewed to ensure that they respect this simple principle: acts, which have the same nature and the same legal effect, must be produced by the same democratic procedure.

This brings us directly to a clearer hierarchy of legislation, which is the consequence of a better separation of powers. This is not with the aim of paying tribute to Montesquieu, but out of concern for democracy.

The arduous task of the Working Group has been to translate such principles into concrete proposals; before beginning discussion of its recommendations to the Convention, the Group questioned experts who have a very thorough knowledge of Community practice regarding instruments and procedures ¹.

The Group's report addresses separately the simplification of instruments, including the hierarchy of legislation, and the simplification of legislative and budgetary procedures.

The report presents recommendations, which have achieved consensus within the Group. A brief summary of the other proposals heard appears in Annex II.

¹ A list of the experts heard by the Group is in Annex I.

During its discussions, the Group addressed a number of issues, which did not come within its terms of reference. Annex III sets out those which the Group believes need to be passed on to the Convention meeting in plenary session.

Part I

SIMPLIFICATION AND RANKING OF UNION ACTS

I. SIMPLIFICATION OF UNION ACTS

(A) Simplification of the number of Union instruments

At present the Union has 15 different legal instruments. Some of these instruments, although bearing different names, have similar effects. The Working Group considers that the number of legal instruments available to the Union's institutions should be significantly reduced, with the aim of reinforcing the democratic foundations of the Union's legal system by improving the comprehensibility of the system. However, this reduction must not compromise their flexibility and efficiency. Nor must it prevent the introduction of particular specifications regarding the use of a given instrument in a given area. The Group thus proposes limiting the instruments of the Union to the following:

1. Binding instruments

(a) Regulation (it is proposed that these should be called "laws" in future)

This would be an act of general application, binding in its entirety and directly applicable in all Member States. Its definition would correspond to that currently existing in Article 249 of the TEC.

(b) Directive (it is proposed that these should be called "framework laws" in future)

The directive would be an act which is binding, as to the result to be achieved, upon the Member States but which leaves to the national authorities the choice of form and methods.

Its definition would correspond to that of the directive referred to in Article 249 of the Treaty.

(c) **Decision**

The decision would be an act which was binding in its entirety. It might or might not designate specific addressees. If it had addressees, it would be binding upon them. The definition of the decision would therefore be broader than that currently set out in Article 249 of the Treaty, which stipulates that the decision is always specifically addressed.

The difference between a Regulation ("law" in future) and a Decision would be that the latter might not have general scope or not be directly applicable in every Member State, as the case may be. A very flexible instrument, which could prove very useful particularly in the CFSP field, would then be available to the legislator.

2. **Non-binding instruments**

- (d) **Recommendation**: it would be defined as an act without binding force (the same definition as that given in Article 249 of the TEC).
- (e) **Opinion**: would also be defined as an act without binding force (so no change compared with the current Article 249).

The Group suggests that Part One of the constitutional treaty should contain an article listing and defining these five types of Union instrument.

(B) **The scope of the Union's legal instruments**

The Group suggests applying the new typology of instruments defined under (A) both to the areas currently covered by the EC Treaty and to the area currently covered by Title VI of the Treaty on European Union (judicial and police cooperation in criminal matters). The "framework decisions" provided for in Title VI would thus become "directives" ("framework laws").

The only difference between the two types of act is that, at present, the former have no direct effect. Working Group X is to examine whether this type of act should have direct effect when adopted under Title VI. Nevertheless, the Group considers that it is possible to make

provision in the new treaty for directives ("framework laws") adopted in the area of judicial and police cooperation in criminal matters to be characterised as not having direct effect, if that were to be the case.

With regard to the conventions concluded under Title VI of the TEU (Article 34(2)(d)) and those referred to in Article 293 of the TEC, they would be abolished and replaced by one of the instruments mentioned under (A), in most cases by regulations ("laws"). There are several reasons why they should be abolished: the convention is an instrument which has rarely been used since the Treaty of Amsterdam entered into force, most conventions have never entered into force and most have been replaced by regulations.

With regard to Title V of the Treaty on European Union, all the members of the Group agree on the need to retain the specific characteristics of the instruments in this field. However, while some members are in favour of retaining a specific name for these instruments (i.e. "common strategies", "joint actions" and "common positions"), especially with regard to "joint actions", other members of the Group could agree that all three instruments should be replaced by a "decision" as defined above under (A), on condition that for CFSP matters the content of decisions be further specified. They also suggest that, in order to retain the current mechanism according to which the Council adopts by qualified majority joint actions and common positions which implement a common strategy, as well as any decision implementing a joint action or a common position (Article 23(2) of the TEU), provision should be made in the Treaty for decisions implementing a "decision" adopted by the European Council or by the Council in the area covered by Title V of the Treaty to be adopted by the Council by a qualified majority.

(C) Change of name

The Group suggests changing the name of the two legislative instruments par excellence, i.e. replacing "regulations" by "laws" and "directives" by "framework laws". If the Group's suggestion that a hierarchy of legislation be introduced were to be adopted

(see point 2 below), the name "regulation" could be reserved for the adoption of "delegated" acts and implementing acts ¹.

(D) Non-standard acts

With regard to acts used by the institutions but not provided for in the Treaty and in principle devoid of any binding legal force (resolutions, conclusions, declarations, etc.), the Group considered that any simplification should be effected with caution in order to safeguard the flexibility required in the use of such acts.

The Group suggests including in the Treaty a rule whereby the legislator (Parliament/Council) should abstain from adopting non-standard acts on a subject when legislative proposals or initiatives on the same subject have been submitted to it. The use of non-standard acts in legislative areas may give the erroneous impression that the Union legislates through the adoption of non-standard instruments.

(E) Harmonisation and standardisation in the wording of Treaty articles conferring powers of action on the institutions

The Group suggests standardising and clarifying the terminology of the legal bases set out in the Treaty, for example by avoiding using the same term with different meanings, by only using the term "measure" where the choice of instrument to be adopted is to be left to the institutions, and by abolishing the generic uses of "decision " or "directive". The Group recommends that the Convention agree that the necessary technical adjustments be made in the legal bases of the Treaty in order to standardise and clarify linguistically the terminology used. However, the Group considers that this work of standardisation and clarification should be effected with caution, on a case-by-case basis, and without affecting the institutional balance resulting from the political choices made by the Convention.

(F) Open method of coordination

The Group recommends defining in the Treaty the rules for recourse to the open method of

¹ The effects of the regulation could be different, depending on whether it were adopted on the basis of a "law" or a "framework law".

coordination¹. This should not give rise to changes in the respective powers of the Union and its Member States.

The Group suggests making provision in the Treaty that the "recommendation" should be the instrument used when recourse is had to the open method of coordination. Such a recommendation should specify clearly what must be implemented by the Member States and by the institutions respectively, in accordance with the rules of the Treaty.

II. HIERARCHY OF UNION LEGISLATION

Taking account of the special features of the Union's institutional system, it is difficult to make a clear and obvious distinction, as is done in national systems, between matters falling to the legislative and those falling to the executive. The Group thought that it was still possible to make a clearer distinction than at present, based on the principles set out in the introduction above.

The Group proposes to clarify the hierarchy of Community legislation adopted on the basis of the Treaty by demarcating, as far as possible, matters falling within the legislative area and by adding a new category of legislation: delegated acts.

The excessive detail in Community legislation has often been criticised within the Convention. This excessive detail has been considered inappropriate, in particular in certain economic areas in which an ability to adapt to a changing environment is very important. The Community legislator is thus confronted with a dual requirement: that of producing legislation whose democratic legitimacy is beyond dispute, something which can only be guaranteed by legislative procedures, and that of responding rapidly and effectively to the challenges and demands of the real world and therefore retaining a degree of flexibility.

At present there is no mechanism which enables the legislator to delegate the technical aspects or details of legislation whilst retaining control over such delegation.

¹ It should be remembered that the open method of coordination concerns the concerted action of the Member States, outside the competences attributed to the Union by the Treaties. It must not be confused with the coordinating competences conferred on the Union by various legal bases, particularly in the economics and employment fields.

At present the legislator is obliged either to go into minute detail in the provisions it adopts, or to entrust to the Commission the more technical or detailed aspects of the legislation as if they were implementing measures, in accordance with the provisions of Article 202 of the TEC.

To remedy this situation, the Group proposes a new type of "delegated/subordinate" act which, accompanied by strong control mechanisms, could encourage the legislator to adhere to the essential elements of an act and to delegate the more technical aspects to the executive, provided that it had the guarantee that it would be able to retrieve, as it were, its power to legislate.

The Group thus proposes to consider three levels with regard to the adoption of acts within the framework of the European Union:

1. Legislative acts: acts adopted on the basis of the Treaty and containing essential elements in a given field.
2. "Delegated/subordinate" acts: these acts would supplement or develop the detail of a legislative act or adapt certain elements of the actual legislative act, always under the powers defined by that act.
3. Implementing acts: acts applying or implementing legislative acts or "delegated/subordinate" acts.

It is the legislative act – and therefore the legislator – which would determine on a case-by-case basis to what extent it was necessary to have recourse to "delegated/subordinate" acts and/or to implementing acts and what their scope would be.

(A) Legislative acts

- (a) Definition: legislative acts are adopted directly on the basis of the Treaty and contain the essential elements and the fundamental policy choices in a certain field, with the scope of such a concept to be determined on a case-by-case basis by the legislator.

It is consequently up to the legislator to determine just how detailed a "delegated/subordinate" act should be in a specific field and whether and to what extent certain elements of the said act should be delegated by way of "delegated/subordinate" acts.

- (b) Adoption procedure: codecision should be the general rule for the adoption of "legislative acts". Once this principle has been incorporated in the first part of the constitutional treaty, the legal bases of the second part should then be reviewed, of course with the possibility of providing for exceptions.
- (c) Type of act: "laws", "framework laws" and "new-type decisions" ¹.

(B) "Delegated/subordinate" acts

- (a) Definition: legislative acts may provide for delegating to the Commission the power to adopt delegated acts. The powers delegated may range from legislation on the technical and detailed elements which supplement or develop a legislative act, to the subsequent adaptation of certain aspects of the legislative act itself.

It is the legislative act itself – and therefore the legislator – which determines whether or not recourse should be had to a delegated act which lays down the content and scope of the delegated powers and which establishes the control mechanisms at the legislator's disposal.

- (b) Control mechanisms: through delegated acts the legislator delegates a power which is specific thereto. It must therefore be sure of being able to monitor its use. Effective control mechanisms must therefore be made available to the legislator by the Treaty. Examples of such mechanisms could be as follows:
 - right of call-back: which would consist in being able to retrieve the power to legislate on the subject, should the delegated powers be exceeded (*ultra vires*) or even in the case of the legislator not approving the provisions laid down in the delegated act;
 - approval by the legislator: the delegated act must be expressly approved by the legislator before it enters into force;

¹ See above: point I(A)(1)(c).

- sunset clause: the provisions of the delegated act would have a limited duration; once this deadline has passed, the delegation of powers should be renewed by the legislator;
- period of tacit approval: the provisions would enter into force if, after a certain period, the legislator had not expressed any objections.

(c) Adoption procedure: by the Commission [*Option*: as a general rule and in exceptional cases by the Council acting by a qualified majority ¹].

(d) Type of act: delegated regulations ².

(C) Implementing acts

(a) Definition: acts for the implementation of legislative acts or "delegated or subordinate" acts.

(b) Procedure: at present the basic principle of the Treaty is that it is for the Member States to adopt implementing acts (Article 10 of the TEC). Where implementation by the Union is necessary, in accordance with the principle of subsidiarity, the procedure must remain that laid down in Article 202 of the TEC: adoption by the Commission (the rule), with or without a mechanism for monitoring by the Member States (committee procedure) or by the Council (the exception).

However, if it was decided to create the new category of delegated acts, it might be possible to simplify certain committee procedures. This being said, it must be pointed out that any change would not involve the Treaty directly but secondary legislation, and specifically the Decision laying down the procedures for the exercise of implementing powers conferred on the Commission, adopted on the basis of Article 202 of the TEC. This issue therefore goes beyond the Working Group's terms of reference ³.

(c) Type of act: implementing regulation or implementing decision.

¹ In particular in the area of the CFSP.

² The regulation could be adopted on the basis of a "law", "framework law" or decision.

³ Article 202 raises the question of the exercise of executive functions at Union level; this goes beyond the Working Group's terms of reference and should be addressed by the Convention in the context of the debate on the institutions.

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Finally, the Group would draw attention to the fact that in certain cases the institutions adopt acts which are not legislative acts directly on the basis of the Treaty. These include internal organisation measures, appointments, individual decisions on competition, etc.

The Group suggests that acts adopted on this basis by the Institutions should be in the form of decisions or internal regulations.

Part II

SIMPLIFICATION OF PROCEDURES

(A) Introduction

The Group noted that the large number of different procedures in the Treaty (about 30) was explained by the variety of procedures for consulting various bodies or institutions (Economic and Social Committee, Committee of the Regions, ECB, etc), and by the two main voting methods in the Council (unanimity or qualified majority). If these factors are left out of account and only the respective roles of the European Parliament and the Council are considered, there are basically five decision-making procedures: codecision, cooperation, simple opinion and assent by the Parliament, and decision-making by the Council alone. The Group concentrated its attention on these five procedures.

The Group recommends that the decision-making procedures should be listed in the first part of the constitutional treaty, and a description of the way they operate should be given in the second part.

(B) Codecision procedure (Article 251 of the TEC):

The Working Group considers that codecision works well in general. However, it feels that

certain improvements are possible, and it therefore recommends:

(a) Generalising qualified-majority voting in the Council to all cases where the codecision procedure applies

Apart from four cases (three after the entry into force of the Treaty of Nice ¹), the Council acts by a qualified majority during the codecision procedure. The Group agrees that the logic of the codecision procedure requires qualified-majority voting in the Council in all cases. Accordingly, the exceptional cases where the Council still acts unanimously should be amended. ²

(b) Making the composition of the Conciliation Committee more flexible

The composition of the Conciliation Committee is currently laid down by the Treaty (Article 251(4)): it is composed of "the members of the Council or their representatives and an equal number of representatives of the European Parliament". In an enlarged Union, the Conciliation Committee will grow from 30 to 50 members.

The Group proposes that the composition of the Conciliation Committee should be made more flexible. The Treaty must enable the Council and the Parliament to decide on the number of their representatives on the Committee, whilst still preserving the principle of parity between the two institutions.

(c) Changes of wording

As the "codecision" procedure is the principal legislative procedure, it is suggested that this designation should be used in the constitutional treaty: [option 1: legislative procedure] [option 2: codecision legislative procedure] [option 3: codecision procedure]. This designation might also replace the references in the Treaty to Article 251.

¹ When the Treaty of Nice enters into force, the codecision procedure referred to in Article 18(2) of the TEC will be subject to qualified-majority voting in the Council (provisions to facilitate the exercise of citizens' right to move and reside freely within the territory of the Member States).

² These are:

- social security measures for Community migrant workers (Article 42);
- the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking-up and pursuit of activities as self-employed persons, and the coordination of the existing principles laid down by law governing the professions with respect to training and conditions of access for natural persons (Article 47);
- incentive measures in the area of culture (Article 151).

Furthermore, some forms of words in the Treaty give the impression that the European Parliament and the Council are not on an equal footing. This is so in all cases where it is stated that it is the Council, acting in accordance with the procedure referred to in Article 251, which adopts the act in question. Article 251 itself, describing the procedure, implies that it is the Council which adopts acts.

The Group recommends amending the wording of Article 251 and of the various legal bases which refer to codecision to make clear the parity between the Parliament and the Council as legislators in the context of that procedure.¹

(C) Cooperation procedure (Article 252 of the TEC)

A broad consensus has emerged, both during the debates in plenary session and in the Working Group, to abolish the cooperation procedure and replace it either by the codecision procedure or by the consultation procedure (simple opinion of the European Parliament). The cooperation procedure still exists at present in four cases, all in the area of economic and monetary union.

The Group suggests changing these four legal bases to the consultation procedure (simple opinion) because of its mainly technical nature:

- for adopting the detailed rules for the multilateral surveillance system referred to in Article 99(3) and (4) of the TEC in the context of the coordination of economic policies (Article 99(5));
- for specifying definitions for the application of the principle of prohibition of privileged access by Community and national public authorities to financial institutions (Article 102(2));
- for specifying definitions for the application of the principle that central banks are

¹ Other suggestions for improving the codecision procedure have been put forward, such as setting binding deadlines at first reading, or making a reference in the treaties to the informal meetings between the institutions ("trialogues"). There was not enough support for these suggestions. The first reading in the codecision procedure is an essential stage for bringing positions closer together. Setting deadlines might bring about premature failure in many procedures. As regards the institutional "trialogues", their effectiveness derives from their flexibility and informal nature. They should thus not be formalised in the Treaty.

prohibited from granting overdraft facilities or any other type of credit facility to Community and national public authorities, and the principle that the Community and its Member States are prohibited from being liable for or assuming commitments contracted by those public authorities (Article 103(2));

- for adopting measures to harmonise the denominations and technical specifications of coins (Article 106(2)).

(D) Assent procedure

The Treaty requires the assent of the European Parliament in certain cases ¹.

The Working Group proposes that the assent procedure should be limited to the ratification of certain international agreements ². Given their major political significance, the Group recommends a change to the codecision procedure with qualified-majority voting in the Council for the other cases which are currently subject to the assent procedure, i.e.:

- rules for the Structural Funds and the Cohesion Fund (Article 161);
- amendment of certain articles of the Protocol on the Statutes of the ESCB and of the ECB (Article 107(5));
- conferring of specific tasks on the ECB relating to the prudential supervision of credit institutions and other financial institutions (Article 105(6)).

As regards the uniform electoral procedure for the European Parliament, the Group takes note that this is a special procedure which also calls for ratification by national parliaments (Article 190(4)) ³.

¹ The Parliament gives its assent, according to the general rule, acting by an absolute majority of the votes cast (Article 198 of the TEC). There is only one exception to this rule: the decision on the uniform electoral procedure, which requires a majority of the members of the Parliament.

² This is already the case at present for some international agreements, i.e. association agreements, agreements establishing a specific institutional framework, agreements having important budgetary implications, and agreements entailing amendment of an act adopted by the codecision procedure (second subparagraph of Article 300(3) of the TEC).

³ The present Article 190(4) of the TEC lays down, apart from the assent procedure, that the Council must recommend provisions relating to the electoral procedure to Member States for adoption "in accordance with their respective constitutional requirements".

(E) Simple opinion

Those legal bases which stipulate the simple opinion of the Parliament as the procedure for adoption should also be reviewed in the light of the general principle set out in II(A)(b) above.

(F) Budgetary procedure:

In its examination of questions linked to simplification of the budgetary procedure, the Group noted that practice had rendered null and void the articles of the EC Treaty devoted to the budgetary procedure. It also took note of the fact that the distinction between compulsory and non-compulsory expenditure, which is one of the principal causes of the complexity of the budgetary procedure, no longer reflects a real difference in nature. Finally, the Group noted that the interinstitutional agreements on budgetary discipline and improvement of the budgetary procedure, including the financial perspective, have guaranteed budgetary peace and stability in the Union since 1989.

Taking these observations into account, the Group recommends:

- A. That a separate article in the constitutional part of the treaty¹ should clearly enshrine the principles governing the budgetary provisions, particularly the principle of balance between revenue and expenditure (third paragraph of Article 268 of the TEC), the principle of the unity of the budget (first paragraph of Article 268 of the TEC), the principle of budgetary discipline (Article 270 of the TEC), the principle of necessary means (Article 6(4) of the TEU), the principle of an annual budget (Article 271 of the TEC) and the principle of the prior adoption of a basic act (as set out in paragraph 5 below).
- B. Simplifying and updating the budgetary procedure on the basis of the following principles:
 1. There must continue to be a dual budgetary authority: European Parliament and Council. The Council must have the final word on revenue and the European Parliament on expenditure. The annual procedure would take place within a framework of the financial perspective given legal force by the Treaty.
 2. The procedural distinction between compulsory and non-compulsory expenditure should be

¹ See Articles 38, 39 and 40 of the preliminary draft constitutional treaty.

abolished, although the concept of legally binding expenditure must logically be retained.

3. The annual budgetary procedure could consist of a simplified codecision procedure, on the basis of the following outline:
 - Initiative of the Commission, which submits a preliminary draft budget, first reading by the EP, which adopts a draft budget, position of the Council, which proposes amendments to the draft budget and second reading by the European Parliament, which adopts the budget definitively.
 - Conciliation meetings should be provided for between the first reading by the Parliament and the adoption of the Council's position, and between then and the second reading by the Parliament. The rules concerning the Conciliation Committee would apply.
 - The majorities should be those laid down at present for non-compulsory expenditure: majority of members of the EP for the first reading, qualified majority of the Council for adoption of its position. If the Council does not propose amendments within a certain deadline, the budget is deemed adopted; if the Parliament accepts all the amendments proposed by the Council, the budget could be adopted by a majority of votes. On the other hand, a majority of the members of the European Parliament and three-fifths of the votes cast in the Parliament would be required to amend or reject the Council's amendments ¹.
 - The timetable consolidated by the practice of the institutions should be incorporated into the treaty.
4. A new legal basis should be included in the Treaty so as to insert a medium-term financial planning mechanism which would incorporate the general principles of the agreements on budgetary discipline and improvement of the budgetary procedure, including the financial perspective, as follows:

¹ The outcome of the codecision procedure depends on agreement being obtained between the Parliament and the Council. Unlike legislative procedures, the budgetary procedure needs a definite outcome. This proposal guarantees that a decision will be taken at the end of the procedure by giving the Parliament the last word (as is already the case now for non-compulsory expenditure). The interplay of majorities should be able to guarantee institutional balance.

If the option of giving the Parliament the last word is rejected, and the procedure is to be concluded by agreement between the two branches of the budgetary authority, provisional remedies should be stipulated for use if the procedure fails: for example, by a readjusted system of provisional twelfths or by the application of the Commission's proposal.

- The planning mechanism would be adopted on the Commission's initiative by the two arms of the budgetary authority by [option 1: the codecision procedure] [option 2: unanimity in the Council with the assent of the European Parliament (this is the current procedure in practice)].
- The planning mechanism would include a global resources ceiling and annual expenditure ceilings per heading. A procedure could be laid down to safeguard a margin of flexibility.
- It should constitute a binding framework for the annual budget.

5. The Treaty should also regulate the links between legislation and the budgetary procedure more fully. Article 270 should be amended to include the provision established by the Interinstitutional Agreement of 1999 that the entry of appropriations in the budget for any Community action requires the prior adoption of a basic act, understood as an act of secondary legislation which provides a legal basis for the Community action and for the implementation of the corresponding expenditure entered in the budget. It could take the form of a "law", a "framework law", a "decision" or a "regulation".

Hearing of experts

Codecision - the experience of the institutions (Meeting held on 2 October 2002)

- Mr. Dimitrakopoulos, vice-chairman of the European parliament in charge of conciliation
- Mr. Jacqu  , director of the codecision unit in the Council

Budgetary procedure: How to simplify it? (Meeting held on 2 October 2002)

- Mr. Wynn, chairman of the Committee on budgets of European parliament
- Mr. Romero-Requena, Budget director-general in the Commission

Instruments and how to simplify them (Meeting held on 17 October 2002)

- Mr Michel PETITE, Director-General, Commission Legal Service;
- Mr Koenraad LENAERTS, Judge, Court of First Instance;
- Mr Jean-Claude PIRIS, Legal Adviser and Director-General, Council Legal Service.

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