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EUROPEAN CONVENTION

**Contribution by
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on the subject
“The legal instruments available to the European Union
to carry out its missions”**

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THE LEGAL INSTRUMENTS AVAILABLE TO THE EUROPEAN UNION TO CARRY OUT ITS MISSIONS

(CONVENTION Note 50/02)

The instruments of secondary legislation provided for in Article 249 of the TEC

The features of the individual legislative instruments listed in Article 249 are not correlated with specific competences. In other words, they do not reflect the greater or lesser degree to which the Union is involved in a given sector. Rather, they correspond, especially as regards the two fundamental instruments (directives and regulations), to the need to leave Governments a greater degree of freedom in applying Community policies in the case of directives and for more direct effectiveness and more specific provisions in the case of regulations. But there can be regulations on matters, such as culture and health, for which the competence of the Union is limited and directives on others, such as competition, for which the Union has almost exclusive competence.

To provide for different instruments according to the competences involved and, in particular, to reserve directives to the field of competing competences would make the system too rigid; it is better to choose the instrument best suited to the nature of the provisions under discussion.

However, with a view to rationalizing the legal instruments available to the Union, its powers of guidance and execution should ideally be set within a simplified legal framework akin to that of national legislation (as Italy has recommended at every revision of the Treaties, from Maastricht to Nice), according to the nature of each act, leaving the legislator to decide which type of instrument to use in each case.

Such a classification or hierarchy of acts should have three fundamental categories: constitutional rules, legislative measures and implementing provisions. This arrangement would satisfy the need for transparency and clarity in Community acts. It would naturally be up to the body with the power of initiative, the Commission, to select the instrument deemed most appropriate for the purpose in hand, especially as regards the choice between primary and secondary legislation.

Acts adopted under Title V of the TEU

As regards foreign policy instruments (Article 12), the inclusion of common strategies was intended to create a framework within which Council decisions could be taken by majority vote. In the event they have proved of little practical value because they are too general to provide guidance for Union action in the international field. For example, when it was a question of deciding on Middle East policy by majority vote within the framework of a common strategy, an objection was raised and decisions continued to require unanimity. Yet it would have been extremely useful, not only in that case but also in that of the Palestinians sent to Cyprus, to be able to decide by majority vote.

The key foreign policy instruments remain joint actions and common positions, since coordination among the Member States, which is also provided for in Article 12, is of a residual nature. However, two innovations are indispensable if these instruments are to be made more effective: for common actions, the possibility to decide by majority vote, except for the use of military force; for common positions, the ability to speak with a single voice in the leading economic and financial international institutions and in the Security Council of the United Nations.

Acts adopted under Title VI of the TEU

The instruments referred to in Article 34 for matters assigned to the third pillar are also the result of a compromise, owing to the unwillingness of the majority of Member States to transfer these matters to the first pillar (the Treaty of Amsterdam only brought immigration, asylum, judicial cooperation and administrative cooperation within the Community sphere). Recent events, from the fight against terrorism to clandestine immigration have made this the field public opinion is most sensitive about.

The best solution would again be to do away with the pillar-based architecture and to replace framework decisions by the more general instrument of directives, to be adopted by majority vote, with the introduction, as for decisions, of the principle of direct effect. In a larger Europe it will otherwise be impossible to create an area of freedom, security and justice embracing the whole continent. Conventions, which are also provided for in Article 34 and enter into force only after they have been adopted by at least half the Member States, are now outdated and should be eliminated, especially because the hypothesis of closer cooperation renders them largely superfluous.

Atypical instruments

The existence of atypical instruments — such as inter-institutional agreements, Council conclusions and resolutions, reservations of Member States and attached declarations — are inevitable and help to make the system flexible. However, they should be formulated in such a way as to be recognizable, i.e. that is close to the legal culture of the Member States. This objective can also be attained by doing away with the present pillar-based architecture of the EU Treaty (at least as regards justice and home affairs) and establishing a precise hierarchy for these instruments.

Legislative power

The wide variety of the legislative instruments available, as regards the ways in which they are adopted, is reflected in there currently being nine different types. Until the Treaty of Amsterdam, there were no less than eighteen, but there is still room for a further reduction.

The most rational solution would be to make qualified majority voting the rule in the Council, complemented by the European Parliament's power of codecision in legislative matters, including the budget; while outdated solutions, such as cooperation, should be eliminated.

In order to avoid an excess of rules, as, for example, in agricultural matters, the extension of the codecision procedure would need to be accompanied by the introduction of the three-pronged division referred to earlier between constitutional rules, legislative measures and implementing provisions: It would therefore be necessary for all acts to be adopted by qualified majority, except for those of a constitutional nature (such as amendments to the Treaties and the accession of new members), for which unanimity should continue to be required.

Implementing provisions

Executive activity should be reserved to the Commission and the Member States, with primary legislation restricted to establishing the basic rules and the more technical matters left to implementing provisions. For the latter, a mechanism could be devised whereby a mandate would be given to the Commission and the Council granted a power to step in so as to ensure adequate control.

The proposed arrangement would nonetheless be rendered systematic by means of a mechanism establishing a hierarchy of provisions. For its legislative functions, the Council should have the nature of a second Chamber, comparable to that of the states in a federal system. In such a context it is possible to envisage a further simplification of the so-called “comitology” procedure.

The quality of legislation

The quality of legislation already suffers from the compromises reached between Governments with different priorities. It will inevitably be further impaired by the enlargement of the Union and the even greater disparity between the Member States. Before putting forward proposals, the Commission consults and informs civil society, for instance by publishing white and green papers on single policy issues. In the lengthy process of approving legislation, which lasts almost two years, the components of civil society can make their voice heard in the institutions involved (the Commission, Governments and Parliaments).

All told, the key to accelerating the legislative process and improving the quality of legislation remains more majority voting in the Council.

The replacement of unanimity by a majority eliminates the need for laborious compromises among the Member States, achieved all too often at the expense of clarity. In fact, the simplification of instruments and procedures is the key prerequisite for improving the quality of the production of Community legislation.