

- "Forenkling af lovgivningsprocedurerne og EU's instrumenter"

Generalsekretæren for konventet har modtaget vedlagte bidrag fra Józef Olesky, medlem af konventet.

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The simplification of legislation procedures and European Union instruments

I Introduction

An important subject in the context of the work of the European Union Convention preparing proposals for the 2004 Intergovernmental Conference is the ordering and simplifying of procedures constituting treaty executive law, particularly derived community law, as well as the ordering and modification of the system of sources of law created in the European Union. *Declaration no. 23 regarding the future of the European Union*, adopted in the final Act on the occasion of the signing of the Nice Treaty in 2000¹, did not make clear reference to this issue (it only referred to the need to simplify Founding Treaties). However, questions discussed in the Declaration have not been treated as a closed list of issues for reform. For this reason, the decisions of the European Council at Laeken (Council Conclusion, of 14-15 December 2001²), regarding the broadening of the effective range of the reforms with new material are entirely justified. Therefore, the *Laeken Declaration regarding the future of the European Union* specified that the simplification of the European Union instruments is also the subject of intended reforms.

The Declaration points out that the development of the integration process and the resulting treaty modifications has led to the proliferation of executive instruments and to a change in their character. The nature of the directives especially has changed, as they have become legislative acts and also increasingly specific. As a result, the question has arisen as to whether instruments should not be better defined and limited in number. In particular, the problems have been set out in terms of the following questions: 1) Should not a distinction be made between legislative and executive instruments? 2) Should not the number of legislative instruments be limited to direct norms, framework legislation and non-binding instruments (opinions, recommendations, open coordination)? 3) Would it be desirable to fall back on framework legislation, allowing more leeway for member countries in the implementation of their political goals? 4) What instruments are most appropriate to coordinational competences and in the field of mutual recognition? 5) Should the principle of proportionality remain a fundamental principle?

The Laeken Declaration did not take up the serious problem of legislative procedures. This may have been connected with the fact that, in the context of the long-running process of ordering the legal system, the Commission has carried out work in the area of law simplification, consolidation, codification and reworking³. European Union institutions are also making efforts aiming to improve

¹ O.J. 2001, C 80, p. 85.

² Text available on European Union server, on the European Council site

³ *Vide* C. Mik, *Europejskie prawo wspólnotowe. Zagadnienia teorii i praktyki* (European Community law. Problems of theory and practice), vol. 1, Warszawa 2000, p. 641 *et seq.*

the quality of the revision of Community laws¹. This work has been speeded up and deepened, in the context of the acceptance of the *White Paper on European Governance*² and the beginning of the process of simplifying the regulatory environment and the inclusion of social factors in the decision process³. Nevertheless, these were finally included in the mandate of the Convention.

Currently, European Union reform in the area under discussion is being handled by Working Group IX, under the leadership of G. Amato. It is charged with giving answers to two groups of questions. The first group is connected with legislative procedures. The key questions are: How to reduce the number of legislative procedures provided for by the Treaty? Can certain of the procedures be simplified? They are supplemented moreover in a non-exhaustive way by the following questions: 1) Should the cooperation procedure be scrapped? 2) Should co-decision be used for all legislative issues? 3) Should qualified-majority voting be extended to all the legal bases to which co-decision applies? 4) For the co-decision process, should conciliation committee session procedures be simplified? 5) What other opportunities are there for the simplification of legislative procedures? 6) How can the budgetary process be simplified? In particular, is the continued distinction between types of spending necessary? The second group of questions, on which more stress has so far been laid, is limited to formal instruments. It consists of two questions: 1) How can the number of legal instruments provided for the Treaty be reduced? 2) Can they be given names that would indicate their effects? Further detail regarding the problems facing the European Union can be found in the Presidium note entitled "*Legal instruments: current system*"⁴. Here, the questions to be answered have been put into three groups: 1) simplification and clarification of instruments; 2) improvement of the procedures for the adoption of legal instruments; 3) quality of regulation. These will be commented upon in Part III.

II. Conditions for reform

In considering issues relating to the reform of legislative procedures and the ordering of the system of means of operation of the European Union, it is important to understand the significant conditions for the changes, which to a large extent determine their possible scope and intensity. The system of formal instruments and procedures for their acceptance is the result of the long, complex integration process, full of pragmatic compromises. It has certainly been subject to considerable complication, as a result of the process of creation of the European Union. The system under discussion was not created with the intent of assuring a perfect legal system, rather its goal was to maximize the achievement of the Treaty goals. In effect, it is the result of political pragmatism, and not the work of legal theoreticians.

It is also particularly important to realise that political pragmatism is itself the chance operation of various forces within the integration process. Simplifying matters, these forces can be categorised as follows: member nations, EU supranational institutions and the European Parliament. Clearly, the member nations are not a monolithic group: they tend to have divergent interests. However, there can be no doubt that they remain a key force in the integration process. Their national interests also prevent the conversion of the European Union into a federal state, and so the setting up of a legal system analogous to those existing in such states. Even the creation of a European constitution may not be, in my firm conviction, considered as a symptom of the EU's coming of age. Member states that have slowed the pace with regard to the deepening of the integration

¹ *Ibid*, p. 626 *et seq.*

² O.J. 2001, C 287, p. 1.

³ *Vide* a range of Commission communiqués dated 5 June 2002 in this area.

⁴ CONV 162/02.

process have an interest in maintaining the consultation process, and especially the rule of unanimous voting on sensitive issues. The second of the forces are the supranational institutions, especially the European Commission, most interested in system reform and ensuring the effective operation of the EU. It is from them that the greatest number of specific initiatives comes, although these forces are relatively weak, being dependent on the member states. Finally, the third body of considerable significance in the European Parliament. Its strength does not lie in its real power, which is very limited, but in the cause of EU democratisation, it being the only institution to be directly elected by the EU's citizens. Its interests would be particularly served by any change of procedures to make the Parliament's role more prominent; in practice, this means the promotion of the co-decision procedure, in the context of which the European Union Council takes decisions through qualified majority voting. It should however at the same time be realised that Parliament's actual legitimacy is quite weak, as evidenced by low election turnout. It therefore comes as no surprise that the Commission's most recent proposals are aimed primarily at the activation of an organised society within the European Union (co-regulation, consultation, dialogue).

III. Range and assessment of proposed reforms

A. OPERATING INSTRUMENT SYSTEM REFORM

In connection with the existing operating instrument system, it should be noted that it is completely non-transparent and in need of major reconsideration. In the comments made, this assessment is limited to the specific questions posed to Working Group IX by the Convention Presidium.

1) Is the existing number of instruments necessary? Should a catalogue of them be established in a single regulation, containing an exhaustive description of their number and legal character? Should those instruments be written into the treaties, and the effects of instruments developed through institutional practice be clarified?

According to European Union law, three legal orders exist, one for each of the three pillars. Only the general and final regulations of the EU Treaty, plus those relating to strengthened cooperation constitute the *chapeau* of the EU pillars (in the last case, only for pillars I and III). In each of those pillars there exists, in addition to legal acts, a whole range of unnamed acts (e.g. communiqués, conclusions, resolutions), which are generally non-binding. In addition, aside from acts for external audiences, there exists a whole group of internal acts of institutions and other organs of the EU (e.g. inter-institutional declarations, inter-institutional understandings, regulations). In such a situation, the ordering of matters is desirable.

In my belief, it should be categorically stated which acts in each of the pillars have legal force (regulations, directives, decisions) and which are legally non-binding (e.g. recommendations, declarations, proclamations), which of them are normative acts (regulations, directives), and which are acts of legal application (decisions – see below). Non-binding acts, on the borders of legalism, may of course be used in legal practice, e.g. as an interpretative element of law. There is only the question whether a catalogue of these should be established or not. In my opinion, the primary necessity is to establish a catalogue of legal and normative acts, as well as those of legal application. Acts outside the catalogue would be either illegal or else not have the intent of having legal effects. In the case of non-binding acts, I would tend towards the creation of a general clause, allowing institutions to make legally non-binding acts that could not form the basis for legal action before EU or national law-enforcement bodies, and which could serve to ensure the effective and

transparent functioning of EU institutions and bodies (including, for example interpretative communiqués or Commission announcements). I would abandon the idea of classifying opinions as a separate category of act (*vide* e.g. EC Treaty article 249), since they are not independent acts, being an element of policy definition or manner of expressing an opinion in the process of making derivative law). I would however dedicate a separate regulation to the possibility of making inter-institutional acts.

2) Should the instruments in each of the three pillars and their legal effects be standardised? Should the instruments of pillar III not be harmonised with the instruments of Community law?

This is a problem of a deeper nature, related to the complex, three-part nature of the European Union. It seems that the European Union has not yet matured to the level that would eliminate the basic reasons for making the distinctions between the pillars. They have differing characters and the EU sets itself differing goals in each of them (compare especially EU Treaty articles 11, 29, EC Treaty article 2), differing instruments are necessary for their realisation (EU Treaty articles 12, 34, EC Treaty articles 249 and 110). The ability to making international agreements is different (compare EU Treaty articles 24, 38, EC Treaty article 300). On the other hand, pillar III law is in effect (the criminal judiciary, the police) relatively close to community law. However, the possibility of bringing together the instruments of both pillars seems to be contradicted by the positions of certain member states that are unwilling to communitise police and criminal-judicial cooperation. Criminal law has always been considered an especially important instrument of state policy. It is therefore not surprising that the reservation of national competences should have been included even in the treaty establishing the European Community (*vide* EC Treaty article 135). The current pillar III also includes instruments unknown to community law, such as common positions setting out the EU approach to certain questions. Also appearing here are conventions agreed between member countries, which *prima facie* are also in Community law (EC Treaty article 293; this regulation is virtually a dead letter), but whose significance in pillar III is greater; here, executive acts can be issued by the Council (there is no such possibility in article 293), these are in any case ratified by member countries. Pillar III also contains numerous unnamed acts, such as declarations, resolutions, conclusions, which have a certain political significance.

3) Should a correlation be established between legal instruments and the intensity of EU/EC action? Should they be classified relative to different types of competences? Should links be sought instead between certain types of intervention and intensity of action?

A certain correlation between EC exclusive and non-exclusive competences on the one hand, and regulations and directives on the other, already exists, as well as between the regulations and directives and law unification and national law harmonisation, although regulations are often also used to ensure coordination, while directives are used in the context of mutual recognition. Such a situation appears to be quite satisfactory. The rigid linking of competences of a certain type with a specific category of legal acts is unnecessary and would excessively formalise and hamper EU operations. Situations do occur where a regulation needs to be issued in an area covered by non-exclusive competence, and the other way around (e.g. in the area of the free movement of goods, we have both directives harmonising various elements of trading or aspects of goods, but also regulations, for example on the elimination of barriers to trade). In addition, it seems that to the extent that this would be possible in the area of Community law, it would be infeasible in the other pillars of the EU, where it is not even clear whether the EU has any competences.

4) Should the names of the instruments be changed in order to improve understanding of their effects and scope? Would it be useful to have special terminology for executive regulations?

The procedure of changing the names of the acts, especially those having legal effects, which already function in integration practice should be limited to cases where a fundamental change in the character of the means is being made. Given the current state of Community law (EU pillar I), more significant change should be refrained from. However, it would be sensible to have a clear differentiation between normative basic acts and executive acts, and between normative acts and acts of legal application (individual acts). In the first case, normative acts should be only regulations and directives. In case of executive acts, they should be called executive regulations or executive directives. Acts of legal application should be limited exclusively to decisions. At the same time, the name “decision” should not be used in connection with current acts *sui generis*. The use of the name “decision” also does not seem appropriate to acts other than the acts of legal application of pillar III acts. In this context, neither is the name “framework decision” in pillar III fortunate, given that the only feature differentiating it from a Community directive is that it does not give rise to direct effects (the exclusion contained in article 34 is the result of resistance by member states, although in the context of the matters to which framework decisions refer and of the fact also the context that they often related directly to units, it would be desirable to recognise the direct effect to at least the same extent as a directive). In this situation, it would be desirable to replace this term with another, appropriate only to pillar III, or to replace it with the term Directive, were a rising convergence between pillars I and III to be acknowledged.

5) Is it possible to limit in the treaties legislative acts merely to general principles and basic provisions, so that executive provisions would cover more technical issues? Should the legislator be encouraged to make more frequent use of the delegation of normative functions in favour of the Commission, while providing for the right to rescind such delegation?

The first question can be replied to in the affirmative, but with the reservation that, for the benefit of the legislator being guided by treaty rules and legislative technique, a distinction is due, between what is basic and what is technical. The boundary between the two is frequently quite subjective. I would also reply yes to the second question, since institutions creating basic acts should not be issuing executive acts in relation to basic acts approved by them. However, it should be remembered that, in principle, the Commission should not be a legislator.

6) Should committee procedures be simplified? Should their role be reduced to a consultative function?

Committee procedures are clearly excessively complex. Over 400 different committees currently function. The aim should therefore be to significantly simplify their functioning and to clearly indicate that their role should be limited to consultation. On the other hand, it should be borne in mind that the Commission must depend upon such government-expert bodies, often having necessary technical, social and economic knowledge that even the best-functioning Commission staff cannot have.

B. PROCEDURAL REFORM

1) Could a reduction in the number of procedures be contemplated? Are the general regulations in need of adjustment? Should qualified-majority voting and the co-decision procedure be made widespread? Which matters should be reserved for unanimous voting, and what criteria should be used to distinguish them? Would it be necessary, in certain sensitive matters, to provide for the substitution of unanimity by super-qualified majority?

It is clear that the number of legislative procedures in European Union practice is excessive, although this is the result of numerous compromises. Obviously, from the point of view of the transparency of the law-making system, a reduction in the number of such procedures is by any measure desirable. Evolution in this area to date indicates that two main directions of change exist: the abandoning of procedures other than co-decision, and qualified-majority voting. Such modifications are to a certain extent being slowed down by member states opposed to over-close integration. However, it would seem appropriate to recognise those procedural principles (the co-decision process, qualified-majority voting) as the rule, while at the same time recognising exceptions in sensitive areas (*vide*, e.g. articles 13, 19, 22, 67, 93, 94). In such cases, the consultation procedure would remain. The retaining of European Parliament approval for Council acts is sensible only in the case of the budgetary procedure and in the making of international agreements.

In discussing the simplification of procedures, the joint desires to democratise the decision process and to strengthen the position of the Economic and Social Committee should also be borne in mind. This must certainly mean the increasing of the number of cases where consultation with it is mandatory. Perhaps consideration should be given to giving the Committee the right to lodge complaints with the European Court.

In my opinion, it is not possible to define criteria for unanimous, as opposed to majority, voting. The division is a political decision, based on a wide variety of factors. I am also in favour of retaining the principal division of unanimous versus qualified-majority voting. At the same time, I am not in favour of creating complexity in the form of super-qualified-majority voting; better then, to retain unanimity.

In the general context of procedures, I would suggest breaking the Commission's legislative initiative in pillar I. As pillar III practice demonstrates, member states are in a position to contribute much enlivening thinking. Perhaps the giving of the initiative to them individually would be an over-democratic move; however, the entitlement of any group of at least (for example) three states to introduce an initiative may prove practical.

2) Is it necessary to designate in treaties the legislative and executive functions, and to specify which institutions have such functions and in which areas? Is it essential to make a clearer distinction between legislative and executive acts, and to define their names? Is it necessary to define a hierarchy of norms by treaty?

Given the current state of integration, it does not seem appropriate to divide functions as in the case of national political systems. In any event, the division in those systems is only directional, far from being precise or clearly delineated. In consequence, the attribution to specific EU bodies of executive powers in relation to just one of the functions specified is inappropriate. It should at this point be noted that the Commission is currently in principle executor (executive legislator and legal executor), while the Council, either alone or together with the European Parliament is in principle the legislator. In consequence, a directional separation of functions does exist.

The question of the hierarchy of norms (acts) has long been the subject of doctrinal discussion. However, in my opinion, the only hierarchy that can be established and conceived of in the current state of the integration process is the differentiation of basic acts from executive acts. At the same time, Commission acts in principle should not change acts of the Council or of the European Parliament and Council (as is the case currently). It would also be appropriate to organise the process of the origination of derivative law, so that the acceptance of the basic act and executive act(s) would be concurrent and linked through publication in the Official Journal.

In this context, I would also suggest a reform of the Official Journal. Series L should exclusively cover legal acts. It should also be subject to internal ordering: normative acts – acts of legal application, in the context of normative acts, Community international agreements, regulations and directives, with basic and executive acts being clearly separated (the former being moved to the front of the Journal). Series C should only contain non-binding acts serving to clarify the operating principles of institutions and relations between them (known as European Union internal law) and also non-binding acts of more general significance (e.g. Council resolutions or resolutions of member-state Council representatives). Other legislative work should be left to a separate series.

3) In the hierarchy of acts, should a correlation be maintained between decision making procedures and different levels of norm? Should legal instruments be classified not only with regard to their form and effects, but also by their adoption process?

If hierarchy is understood to mean the basic act – executive act relation, it would be possible to consider whether to simplify the executive act acceptance procedure. If they were to be enacted by the Commission, the boundaries would have to be specified in such a way that the Commission would no longer have to consult acts with other bodies.

C. REFORM OF QUALITY OF REGULATION

How can the regulatory environment be made more effective? Should privileges be given to make use of informal mechanisms used in practice? Should deeper reform of the treaties be considered? Should certain informal mechanisms be introduced into the treaties?

The European Parliament and European Commission are both in favour of the democratisation of legislative procedures and the introduction to the legislative process of a broadly defined social factor. It should however be borne in mind that only through the shifting of activity “downward”, i.e. towards self-regulation in certain areas of integration, is it possible to relieve institutions of the burden of law origination. However, the inclusion of social entities, as with the formal inclusion of national parliaments, would certainly complicate and draw out the legislative process. I am not in favour of formalising informal procedures; lack of formalism is often an advantage of such procedures.

I am also opposed to treaty reform that would amount to a half-measure. However, more serious reform will always be the cause of numerous disputes and may run the risk of disaster in the reform process, in the event of refusal by member countries to ratify such a treaty.