

CONV 363/02

WG IX 9

NOTE

from:	Secretariat
to:	Convention
Subject:	Note summarising the meeting of Working Group IX (Simplification) on 17 October 2002

The Chairman drew the Group's attention to two new working documents: one from the Secretariat, listing instruments used by the Union (WD 04), and the other from one of the Group's members, Mr G. Cisneros, on implementing powers and committee procedures (WD 05). He also highlighted the importance of the link between decision-making procedures and types of instrument used for action. Simplification of budgetary procedure would be considered again at a later date.

Some members pointed to the relevance to this Group of discussions in the Working Group on complementary competence, as well as those on external action and on justice and home affairs.

1. Simplification of the codecision procedure and reduction of the number of decision-making procedures

The Group discussed this question in the light of the views given by the experts heard at the meeting on 2 October 2002. A general point made was the need to reduce the present number of legislative procedures. Some members suggested reducing procedures to the following: codecision, cooperation, assent, consultation of the European Parliament and non-consultation of the European Parliament (with the Council acting by a qualified majority or unanimously, as appropriate). Other members could also contemplate doing away with the cooperation procedure. In any event, many of the Group's members considered that the codecision procedure should constitute the Union's main decision-making procedure, without prejudice to consultation of other institutions or bodies as appropriate.

With regard to simplification of the codecision procedure, many speakers took the view that the procedure worked quite well and thus did not need extensive amendment. However, a number saw a need to eliminate cases in which the Council acts unanimously throughout the codecision procedure and thought that a qualified majority should always be the rule for that procedure. On the other hand, one of the Group's members considered that codecision should not automatically go hand in hand with qualified-majority voting, while another member did not regard this in itself as a matter of procedural simplification.

A point was made of the need for trialogue meetings between the European Parliament, the Council and the Commission to continue to be held informally. One of the Group's members nevertheless thought that a Council presence in the European Parliament when Parliament was discussing draft acts during the codecision procedure (particularly at committee stage) would smooth the course of proceedings. The same applied to the presence of Parliament's rapporteur at meetings of the Council working party considering such an act. Mention was also made of the need to retain the Commission's present role in the procedure, particularly in acting as a go-between.

Discussions further raised the possibility of reducing the number of members of the Conciliation Committee and of establishing a standing legislative Council of Ministers for European Affairs, open to the public.

Doubts were voiced as to the need to set first-reading time limits.

Lastly, one of the Group's members proposed that the codecision procedure be extended to cover all "legislative" business, albeit without specifying what was meant by legislative. Another member thought it necessary to exclude from the codecision procedure the adoption of technical measures, which should be enacted by way of executive implementing measures. A need was seen more generally to clarify the coverage of "legislative" and "executive" business respectively.

2. Simplification of instruments: hearing of experts and initial discussion

The Group heard three experts on the subject: Mr Koen Lenaerts, Judge at the Court of First Instance and Professor at the Catholic University of Leuven, Mr Michel Petite, Director-General of the Commission Legal Service, and Mr Jean-Claude Piris, Legal Adviser to the Council and Director-General of the Council Legal Service. The three experts explained that the views put forward were their own personal ones. Their statements will be distributed to Group members in writing.

Hearing of Mr Lenaerts:

Mr Lenaerts argued that a clear distinction between legislative and executive action, based not on the identity of the enacting authority but on the type of procedure, formed one of the key issues for the Convention. This was not just out of reverence for the separation of powers, as posited by Montesquieu, but rather to clarify the political responsibilities of all parties involved and arrange for decision-making procedures best suited to each role, in terms of democratic legitimacy and effectiveness.

The first category comprised **legislative acts**. In his view, legislative acts, confined to "basic policy options", should always be accompanied by the codecision procedure. Apart from "organic laws", there would basically be two types of legislative act: "laws" (equivalent to the present regulations and decisions (of the *Beschluss* kind)) and "framework laws" (equivalent to the present directives

and framework decisions under Title VI of the TEU), or even a third type: "coordinating laws" designed to coordinate Member States' action. It would then be for the legislature to specify the purpose of its enactment ("law harmonising ..." or "law establishing a programme for ..."). Mr Lenaerts added that the appropriate degree of detail in legislation would also be left to the legislature, but cases in which only framework laws were permissible should be specified in the treaty.

The second category comprised **executive acts**. The expert pointed here to many cases, under the present system, of "free-standing regulation", i.e. provisions enacted **directly on the basis of the Treaties** either by the Council alone (e.g. anti-dumping rules, under Article 133 of the TEC) or by the Council after consulting Parliament (e.g. common agricultural policy rules, under Article 37 of the TEC), or again in a few cases by the Commission (e.g. directives concerning public undertakings as regards competition rules, under Article 86(3) of the TEC). In Mr Lenaerts' view, it would be only logical to distinguish, among all such acts, between those which should become legislative acts, adopted under the codecision procedure, as they reflected "basic policy options" (legislative acts), and those constituting "executive acts", since they implemented "legislative" provisions (setting out basic options) contained in the Treaty (e.g. acts applying competition principles, under Article 83 of the TEC). In other words, this amounted to "delegated legislation" whereby the Treaty empowered one arm of the executive, the Council or the Commission, to adopt acts of general application. In other cases, provisions constituted executive acts proper, implementing in specific instances such legislative options as were laid down in the Treaty (e.g. Commission decisions on state aid, under Article 88 of the TEC).

Moreover, where executive acts were adopted at Community level (and not at national level, as was the rule) in **implementation of a legislative act**, a distinction could be drawn between two kinds of executive act: firstly acts of "delegated legislation" under powers conferred by the legislature, e.g. where the executive was required to make amendments to the legislative act or given very broad authority, and secondly executive acts proper, whether general or individual in scope. In the first case, the committee procedure could be more demanding than in the second (where advisory committees might suffice). In some cases, lastly, executive implementation proper might also be entrusted to agencies or other technical bodies.

Mr Lenaerts concluded by suggesting that the conditions for public entitlement to apply to the Community courts should relate to and depend on the democratic basis for acts, i.e. the nature of the act concerned.

Hearing of Mr Petite:

In his introduction, Mr Petite pointed to the need to simplify the Union's instruments for action, which had proliferated beyond reason and been used in unclear ways, thus in his view detracting from the comprehensibility and credibility of the system. In its simplest form, the system envisaged by Mr Petite centred on laws, adopted by the legislature under the codecision procedure, and implementing regulations or decisions. In his view, although approached from a different angle, that system was very similar to the one suggested by Mr Lenaerts.

He distinguished the following categories of **acts adopted by the legislature**:

- constitutional or "organic" laws, concerning key aspects of the Union's organisation, e.g. the Decision on own resources, the Decision on the Commission's implementing powers (committee procedures), the Financial Regulation, the Statute of the Court of Justice, etc. Such organic laws would rank below constitutional provisions but above normal legislation;
- ordinary laws or "European laws", as a rule laying down general principles, objectives and basic rules, but also more detailed provisions if the legislature so wished (as in most national traditions). Such laws could contain directly applicable provisions, framework provisions (as for directives at present) or a combination of the two. They could cover a wide range of action, including incentives or programmes. In Mr Petite's view, the legislature was of course constrained by the limits of the powers conferred, the principle of subsidiarity and even any other restrictions such as the exclusion of all harmonisation;
- the finance law adopting the budget. The present procedure would be simplified if the distinction between compulsory and non-compulsory expenditure were abolished and by bringing it up to date with codecision in mind.

Laws would be adopted, on a proposal from the Commission, by Parliament and the Council under the codecision procedure, to implement the Union's policies and activities, with the Council acting by a qualified majority. Enhanced majorities would be required for the adoption of organic laws.

The principle that **executive implementation of laws** was a matter for Member States would continue to apply. It would be for a law itself to show whether any implementing measures at Union level were necessary, which would depend in particular on the degree of detail given in the law. In Mr Petite's view, implementing measures should take the form of "regulations" or "decisions" (individual acts). They would be adopted by the Commission, under scrutiny from the Union's legislature, in accordance with the procedures laid down by organic law.

That general system would be subject to special arrangements in three basic areas: economic and monetary union, external relations and police cooperation. Without laws being ruled out altogether in those areas, legislative power would in principle remain with the Council alone. Action would take the form of "Council regulations" or "Council decisions", adopted by a qualified majority, after consultation of the European Parliament as appropriate, on a proposal from the Commission.

Non-binding acts should also be rationalised. Recommendations would provide the appropriate instrument for the open method of coordination.

Mr Petite explained that such a system would thus be simple, clear, legitimate, democratic, effective (particularly as a result of general use of qualified-majority voting) and balanced.

Hearing of Mr Piris:

Mr Piris began by pointing out that one of the reasons for the complexity of the present Treaties lay in the large number of legal instruments (fifteen) available to the institutions for action, as a result of the Maastricht Treaty (only five under the Treaty of Rome). Moreover, the Treaties contained similar definitions for acts going by different names ("directive"/"framework decision" or "joint action"/"decision") and, conversely, different definitions for acts going by the same name ("decisions" or "common positions"). Lastly, the Treaties varied in the verbs used and in the manner of referring to prospective acts, without this reflecting any significant difference in substance.

In Mr Piris' view, it would be conceivable to reduce the number of instruments available from fifteen to five by applying to the common foreign and security policy and to justice and home affairs the five forms of act defined in Article 249 of the TEC, which would not prevent the treaty's drafters from adding precise specifications for any kind of act in a particular article; the Working Group could thus consider:

- (1) abolishing "framework decisions" (JHA) and replacing them by "directives" (TEC);
- (2) cutting out the present four meanings of the term "decision" ¹ and using the one in the ECSC Treaty, which defines it as a binding act that may or may not designate any parties addressed;
- (3) abolishing "joint actions" (CFSP) and replacing them by "decisions" as redefined;
- (4) abolishing "common positions" (CFSP and JHA) and replacing them by "decisions" as redefined;
- (5) removing "principles and general guidelines" from the CFSP instruments, as they do not constitute a legal instrument and this may give rise to confusion;
- (6) removing "common strategies" from the list of CFSP instruments, as they have not lived up to the expectations of the Treaty's drafters;
- (7) discontinuing the use of conventions between Member States (EC and JHA) and replacing them by other legal instruments binding upon Member States merely through adoption by the Council, without requiring any national ratification procedure for entry into force.

Mr Piris put forward some suggestions for rationalising the wording of Treaty articles conferring powers of action on the institutions: "measures" should be the only term used where the choice of instrument was to be left to institutions; generic uses of "decision" or "directive" should be avoided and replaced by "measure", "act" or some other term fitting the context; the terminology used in provisions conferring "complementary" competence should be harmonised by opting for one or two common terms (e.g. "recommendations", "action" or "programmes") and it should be made clear by

¹ A decision under Article 249 TEC (designating its addressees), a decision under Title V of the TEU (CFSP), a decision under Title VI of the TEU (cooperation in criminal matters) and lastly a *sui generis* decision (*Beschluss* in German), often used where, while binding, it does not designate any addressees. The last type has been used in particular for "complementary" competence, in order to incorporate the various kinds of action involved (incentives, programmes, etc.).

what type of legal act, defined in the Treaty, such action and programmes were to be adopted (probably by means of a "decision"); stylistic variations in the use of decision-making verbs ("adopt", "take", "establish", "lay down", "set", "frame", "specify", "determine", "draw up" or "decide") should be avoided by opting, where the context permitted, for "adopt" etc.

In the case of non-binding acts used by the institutions but not provided for in the Treaties (resolutions, conclusions, declarations, etc.), Mr Piris considered that the Council, in its legislative capacity, should refrain from adopting such acts when it had legislative proposals before it.

Mr Piris pointed lastly to the difficulty of clearly transposing to the Union the customary distinction between legislative and executive authority, i.e. between some institutions empowered only to pass laws and others merely implementing legislation or issuing regulations. The powers conferred on the institutions by the Treaties were so convoluted that such a distinction between legislative and executive authority could not be made without upsetting the existing balance. As the Treaties currently stood, then, acts directly based on the Treaty could be adopted not only by the European Parliament and the Council, under the codecision procedure, but also by the Council alone, under the cooperation and consultation procedures, and also in some cases by the Commission (Article 86 of the TEC) and by the European Central Bank (Article 110 of the TEC).

The Council, the Commission and other institutions could also adopt regulatory or executive acts directly based on the Treaty: internal organisational measures, appointments, decisions to negotiate or conclude international agreements, etc. Lastly, the Council, the Commission and the ECB could adopt acts of executive implementation proper, pursuant to and using powers delegated by a basic act.

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Avenues to be explored:

- (1) Should the legal bases laid down in the Treaties be simplified and have their wording standardised? In what way?
- (2) Should the number of legal instruments available under the Treaties be reduced? Would it be possible to apply the same instruments in all areas, including foreign policy and police cooperation in criminal matters. In what way? What adjustments would need to be made to the definitions and effects of the present instruments?
- (3) Once adjustments have been made, should the names of acts be changed? In what way? Should regulations be replaced by laws? Directives by framework laws? Any other changes?
- (4) Should a clear distinction be made in the Treaty between legislative matters and executive matters?
- (5) If so, how should a legislative act be defined? Should it be determined by reference to its adoption procedure (e.g. codecision)? By reference to its content? By reference to basic policy options? Should the legislature be left to determine in each individual case what action is to be regarded as legislative, or should this be determined in the Treaty itself? Should special rules be laid down in some areas?
- (6) Should a specific act be introduced for cases in which the Council adopts acts directly on the basis of the Treaty? What might such an act be called?
- (7) Should the use of non-standard acts be restricted? In particular, should they be disallowed where the legislature has legislative proposals or initiatives before it?

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