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The legal acts in the European Constitution

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La Rédaction de la Revue prie l'auteur ainsi que ses lecteurs de bien vouloir excuser la confusion qui avait conduit à attribuer le présent article à un tiers.

A ce point, c'est incertain si ou quand la Constitution Européenne entre dans la force. Néanmoins, elle introduit de nouveaux actes juridiques pour l'Union Européenne. Ceci est la première tentative pour définir une hiérarchie des normes plus claire. Pourquoi de nouveaux actes juridiques étaient-ils nécessaires ? Et les provisions dans la Constitution sont-ils une amélioration en comparaison du système actuel ?

Introduction and background

During the Intergovernmental Conference (IGC) of 2000 there existed a broad consensus between the Member States of the European Union that qualified majority voting ('qmv') in the Council should be linked to the co-decision procedure*. Because of the length and complexity of the co-decision procedure, the Member States were of the opinion that this procedure should only apply when enacting "legislative acts". There was however confusion over the question : what is a legislative act ?¹

Therefore, the Portuguese presidency of the EU put forward in the course of the IGC that resulted in the Treaty of Nice a definition of a "legislative act". This proposal did not find its way into the Treaty of Nice². During the European Convention –which prepared the European Constitution– the discussion over the legislative acts and instruments was breathed new life into. Convention Working Group IX stated that : "The starting point must necessarily be the perception – which a large majority of Convention Members conveyed - of the confusion and complexity prevailing with regard to instruments and procedures, and the concomitant need for simplification and rationalisation. There was a clear consensus in that direction³."

In this article will firstly be discussed in more detail the need for the development of new legislative acts for the European Union. Then attention is paid to the Portuguese proposal of 2000 and the provisions as laid down in the European Constitution⁴. Throughout the article the question will be answered whether the Portuguese proposal and the provisions in the Constitutions are an improvement compared to the current system, and, if not (and where appropriate), of what alternatives we can think of.

Why new legislative acts?

The Portuguese Presidency stipulated that :

"Given the ever-increasing number of co-decision procedures, including a possible further extension during this IGC, and the increasing administrative burden imposed on the Parliament and the Council, interest has been expressed, including by the Parliament itself, in clarifying the notion of legislative acts (as opposed to implementing or administrative acts). Parliament's role as co-legislator should have full effect at the level of defining the broad objectives and principles of Community legislation, rather than in highly technical detailed

* Les opinions exprimées dans le présent article sont propres à l'auteur.

¹ Until now, the only existing yet unclear definition of a legislative act appears in Article 6 of the Council's rules of procedure on the basis of Article 207(3) of the EC Treaty.

² Mainly because the Member States could not reach consensus over how to reach a qualified majority in the Council in an enlarged European Union.

³ CONV 271/02, at p. 1.

⁴ Articles I-33 till I-39

provisions which, in many, but not all, cases, belong more rightly in implementing acts. This would have the advantage of simplifying and speeding up legislative work.”

Here, two objectives are simultaneously tried to be reached, namely clarifying the definition of a legislative act in order to reduce and limit the application of the co-decision procedure to the adoption of these legislative acts.

The Treaties of Maastricht, Amsterdam and Nice have considerably increased the number of cases in which the co-decision procedure is applied. This has imposed an increasing (administrative) burden on the Parliament, the Commission, the Council and other *gremia* that are involved in the decision-making process of the EU. No need to say that after the enlargement of the EU from 15 to 25 Member States this burden will only increase further⁵. It is therefore a legitimate question to ask when it is “necessary” to apply the co-decision procedure.

Quite a few acts currently subject to the co-decision procedure are of a highly technical nature and the frequent technical adaptations which in some cases have to be made are also adopted using the co-decision procedure⁶. Apart from the question whether or not the Union should deal in the first place with, for example, uniform technical requirements of windscreen-wiper systems⁷, one can note that these kinds of acts should not be subject to this time-consuming decision-making procedure, but to a “lighter” procedure.

Furthermore, there is an obvious need to simplify and to reduce the more than *twenty* different decision-making procedures that currently exist. This high number of procedures, the fact that sometimes different procedures are applied in areas which are closely related (or appear in the same provision of the Treaty), their complexity, and the need to maintain and/or improve their efficiency in an enlarged Europe, are all arguments in favour of an effort to rationalise and simplify legislative procedures⁸.

How to achieve all this?

The Portuguese proposal

The Portuguese proposed the following draft of article 249 EC :⁹

“In order to carry out their and in accordance with the provisions of this Treaty :

- the European Parliament acting jointly with the Council shall adopt legislative acts under the procedure referred to in Article 251;
- the Council and the Commission shall make regulations, issue directives, take decisions, make recommendations or deliver opinions.

A legislative act shall have general application. It shall, as far as possible, having due regard for the nature of the subject matter, define the general principles the objectives to be achieved and the essential elements of the measures to be taken to implement them. A legislative act may include provisions which are:

- binding ad directly applicable in the Member States ;
- binding upon each Member States as to the result to be achieved, but which leave to the national authorities the choice of form and methods.

⁵ The legal adviser of the Council produced during the IGC 2000 a discussion paper with the subject : “The concept of legislative act adopted by the co-decision procedure within the framework of the hierarchy of Community legal acts and in the context of forthcoming enlargement of the Union. In that paper is to read: “For example, if the number of Member States rises from 15 to 27, the conciliation committees involved in the co-decision procedure, which currently require 40 people to meet, would then require about 70 people. It is inevitable that the time taken up by each of these procedures will increase and the time available to members of the European Parliament, the Council and the Deputy Permanent Representatives, who usually represent members of the Council on the conciliation committees, will be reduced, while the number of procedures will proliferate. As a result, less attention will of necessity be paid to the quality of the most important legislative acts”. See, SN 3068/00, to be found at: <http://ue.eu.int>.

⁶ See for examples, SN 3068/00.

⁷ Directive 78/318/EEC.

⁸ CONV 216/02.

⁹ Normal letter type indicates existing Treaty text. Suggested amendments are in **bold**.

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A directive shall be binding, as to the result to be achieved, upon each Member States to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A decision shall be binding in its entirety upon those to whom it is addressed.

Recommendations and opinions shall have no binding force”.

The Presidency thus suggested that a legislative act conceived in these terms would be mandatory for all Member States and might consist either (i) of provisions having the same legal effect as those of a regulation, or (ii) provisions with the legal effect of a directive, or provisions of both kinds together¹⁰. It follows that the provisions of both types could be included in the same legislative act. One of the final articles of the act would have to list the articles of the act belonging to either category. The suggestion, which would have the advantage of granting the legislator greater flexibility, is not however without its drawbacks. Below, this issue will be dealt with further.

The provisions in the European Constitution

Title V of Part I of the European Constitution (hereafter: the Constitution) sets out the new legislative acts for the so-called first, second and third pillar EU co-operation¹¹. These are called “European laws”, “European framework laws”, “European regulations”, “European decisions”, and “recommendations and opinions”¹². The title of article I-33 (“the legal acts of the Union”) suggests that the listing of these acts is limitative. However, as in the current Treaties, so-called “instruments” such as “resolutions”, “recommendations”, “measures”, *etcetera* remain to be found throughout the Constitution¹³.

In article I-33 a distinction is made between binding and non-binding acts. The binding acts can be divided in :

Legislative acts

Non-legislative acts

Ad a) Legislative acts

A European law is described as a legislative act of general application. It shall be binding in its entirety and directly applicable in all Member States.

This is the current definition of a regulation (Article 249 EC).

A European framework law is described as a legislative act binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

This is the current definition of a directive (Article 249 EC).

Ad b) Non-legislative acts

A European regulation is described as follows :

“A European regulation shall be a non-legislative act of general application for the implementation of legislative acts and of certain provisions of the Constitution. It may either be binding in its entirety and directly applicable in all Member States, or be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.”

This is a similar provision as in the Portuguese proposal, albeit for a non-legislative act. In the first proposals of the drafters of the Constitution – the praesidium of the European Convention – article I-33 did not foresee the possibility that European regulations could take the form of a current directive. Many Member States successfully objected to this¹⁴.

A European regulation can take the form of a current directive or a current regulation.

¹⁰ SN 3068/00, at p. 6.

¹¹ For the second and third pillar co-operation (JHA and CFSP), articles I-40, I-41, and I-42 contain however exceptions regarding the procedure and contents.

¹² Article I-33.

¹³ R. Barents, “Een grondwet voor Europa (IV): besluitvorming”, NTER, 12, 2004, p. 352.

A European decision shall be a non-legislative act, binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.

Here, the “decision” as laid down in Article 14 of the expired ECSC Treaty is re-introduced. It implies that a European decision can have no specific addressees, but so it seems, a general scope. The difficulties that sometimes arise when attempting to distinguish current decisions from regulations, therefore will, when the Constitution enters into force¹⁵, unfortunately not belong to the past. If the decision does have addressees, the decision is of a non-legislative nature yet binding. Although some scholars argue that at present the EU can *only* enact legislation through regulations and directives, in practice it does occur that decisions are *de facto* and *de iure* of a legislative nature.

As far as the **non-binding** acts concerned, these can be divided into the recommendations and opinions. In this respect, no changes have been put forward.

Article I-33(2) stipulated that when considering draft legislative acts, the European Parliament and the Council shall refrain from adopting acts not provided for by the relevant legislative procedure in the area in question.

This rule implies that the legislator (Parliament / Council) should abstain from adopting “non-standard acts” (resolutions, conclusions, declarations, etcetera), 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 instruments¹⁶.

Article I-34, 1st paragraph provides that European laws and framework laws shall be adopted, on the basis of proposals from the Commission, jointly by the European Parliament and the Council under the ordinary legislative procedure as set out in Article III-396. If the two institutions cannot reach agreement on an act, it shall not be adopted. This “ordinary legislative procedure” is the current co-decision procedure, as laid down in article 251 EC. In the Constitution the co-decision procedure remains unchanged¹⁷ and will be applicable in 79 areas as opposed to the present 34¹⁸. Otherwise, the “shared” right of initiative of the Commission and the Member States is foreseen in the paragraph of article I-34¹⁹. Article I-34 2nd paragraph stipulates that in the specific cases provided for in the Constitution, European laws and framework laws shall be adopted by the European Parliament with the participation of the Council, or by the latter with the participation of the European Parliament, in accordance with special legislative procedures. This raises the question why a distinction has been made between these two legislative procedures. The “official” reading is that “the special legislative procedures relate to a certain number of other legal bases and cover the equivalent of the former consultation, cooperation and assent procedures”. True, but if we look in part III of the Constitution we will find that regarding the “sensitive” areas the Council decides (mostly with unanimity) after consulting the European Parliament²⁰ whereas when the Parliament enacts legislative acts after obtaining consent of the Council, these acts concern mostly its own functioning²¹. In this respect, compared to the current situation, nothing really changes. Article I-35 reads :

“1. The European Council shall adopt European decisions in the cases provided for in the Constitution.

¹⁴ The Dutch government stipulated in an amendment on this article: “It is important that the European regulation can take the form of a directive. This instrument is most suitable for the implementation of framework laws.” See, <http://www.minbuza.nl>.

¹⁵ Or must I write, “if the constitution enters into force”?

¹⁶ According to Convention Working Group IX. See, CONV 424/000, at p. 6 and 7.

¹⁷ Including the often criticised “third reading”.

¹⁸ And “qmv” is extended to 19 new areas. See, <http://europa.eu.int>.

¹⁹ Regarding the area of freedom, security and justice, see article III-264. In this respect the so-called “pillar structure” of the EU remains intact.

²⁰ Article III-270 (Judicial cooperation in criminal matters) requires consent of the European Parliament.

²¹ E.g. Article III-330.

2. The Council and the Commission, in particular in the cases referred to in Articles I-36 and I-37, and the European Central Bank in the specific cases provided for in the Constitution, shall adopt European regulations and decisions.”

3. The Council shall adopt recommendations. It shall act on a proposal from the Commission in all cases where the Constitution provides that it shall adopt acts on a proposal from the Commission. It shall act unanimously in those areas in which unanimity is required for the adoption of a Union act. The Commission, and the European Central Bank in the specific cases provided for in the Constitution, shall adopt recommendations.”

When the Commission and the ECB adopt European regulations and decisions there can be no doubt about the nature of these acts: these are non-legislative. Simply because these institutions *cannot* adopt legislative acts. However, article I-26(2) states that union legislative acts may be adopted only on the basis of a Commission proposal, *except* where the Constitution provides *otherwise*.

Thus, when the Council adopts an act, it may concern a “normal” legislative act, it may concern a special legislative act adopted at the initiative of a group of Member States, the European Parliament, on a recommendation from the European Central Bank or at the request of the Court of Justice or the European Investment Bank or it concerns a non-legislative act, adopted directly on the basis of the Constitution itself. Cases in which the institutions can adopt non legislative acts directly on the basis of the Treaty, include:

- internal organisation measures, for example the rules of procedure of the institutions or the setting of the salaries, allowances and pensions of Members of the Commission and the Court of Justice or setting the conditions of employment, salaries, allowances and pensions of Members of the Court of Auditors, *etcetera*;
- appointments, such as for example the appointment of members of the Economic and Social Committee of the Regions;
- cases where the institutions act as technical authorities, for example measures adopted by the Commission in the area of competition and control of aids granted by States²² or certain tasks entrusted to the ECB²³ ;
- cases where the Institutions exercise executive functions and develop in detail the policy choices already expressed in the Treaty in a particular area²⁴.

Articles I-36(1) stipulates that European laws and framework laws may delegate to the Commission the power to adopt delegated European regulations to supplement or amend certain non-essential elements of the law or framework law. The objectives, content, scope and duration of the delegation of power shall be explicitly defined in the European laws and framework laws. The essential elements of an area shall be reserved for the European law or framework law and accordingly shall not be the subject of a delegation of power.

In order to supervise the correct use of the delegation, the Constitution proposes two control mechanisms :

- The European Parliament or the Council may decide to revoke the delegation.
- A comparable form of review already exists nowadays in the regulation of financial services (including banking and insurance activities), under the so-called *Lamfalussy* procedure²⁵. If the Commission is authorized to adapt technical aspects of financial services regulation in order to respond quickly to market situations, this procedure also allows for a recall of this early form of delegated regulation to the European legislature, i.e, the European Parliament and Council of Ministers²⁶.
- The delegated European regulation may enter into force only if the European Parliament has expressed no objection or the Council within a period set by the European law or framework law.

Wouldn't it be more precise if the Parliament and the Council decide together instead of separately to “callback” the delegation or express no objections ? After all, together they

²² III-168(4), III-232(2)

²³ III-190.

²⁴ CONV 424/02.

²⁵ Final Report of the Committee of Wise Men (“Lamfalussy Report”) on the Regulation of European Securities Markets, Brussels, 15th February 2001.

²⁶ K. Lenaerts, “A Unified Set of Instruments”, *EuConst*, 1, 2005, p.60.

delegate. Apart from that, these mechanisms seem to be in accordance with the principle of legal certainty²⁷. That cannot be said about a third option that initially was presented by the Convention, namely the so-called “sunset”-clause: the provisions of the delegated act would have a limited duration; once this deadline has passed, the delegation of powers would have to be renewed by the legislator. This option will probably lead to numerous legislation, and it would be inappropriate – for obvious reasons – that an act that entered into force and that established legal effect can be revoked after some time.

This brings us to the necessity of introducing the so-called delegated acts. Workgroup IX stipulates²⁸.

“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. As things stand, 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, subject to the control of the Member States, in accordance with the provisions of Article 202 TEC.”

Thus, the legislator is encouraged to look solely to the essential elements of an act and to delegate the more technical aspects to the executive. And indeed, this mechanism has to be preferred over –for example– a right of “callback” over implementing acts. These do not concern the legislator, but the Member States. This being said, Barents is more suspicious about the necessity of the introduction of the delegated acts. According to him, the reason for distinguishing “European laws” from “European regulations” lies in the fact that, by doing so, “important matters”²⁹ are subject to decision-making by the Council, instead of the ordinary or special legislative procedure³⁰.

Article I-37 completes the system in the Constitution. The first paragraph of that article stipulates that Member States shall adopt all measures of national law necessary to implement legally binding Union acts. The second paragraph forms the exception of the first : “Where uniform conditions for implementing legally Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Article I-40, on the Council”. Here we are about to enter into the twilight zone called “comitology”³¹, “a phenomenon which requires its very own science which no single person has mastered”³². Although that seems slightly exaggerated, the zone will not be entered here. Let me just point out that the second paragraph of article I-37 introduces formally the possibility of the “Lamfalussy method”³³. The “comitology-committees” that advice the Commission in drafting uniform conditions for implementing acts need not – contrary to the current situation³⁴ – necessarily to consist out of representatives of the Member States³⁵.

²⁷ Legal certainty (an unwritten principle of EU Law) relates to the principle of non-retroactivity and the protection of legitimate expectations in particular, but more profoundly it can be related to the conceptual scale for weighing up and balancing between formal justice and material fairness in legal decision-making. See: J. Raitio, *The Principle of Legal Certainty in EC Law*. Dordrecht, London, Boston: Kluwer Academic Publishers, Vol. 64, 2003.

²⁸ CONV 424/02.

²⁹ For example articles III-162 (rules on competition) and III-167 and III-168 (Aid granted by Member States).

³⁰ R. Barents, *op. cit.*

³¹ Council Decision of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ, L 184, 1999/468/EC.

³² See, J.H.H. Weiler, “Democracy and Legitimacy in the European Union”, in: G. Edwards, A. Pijpers (eds), *The Politics of European Treaty Reform. The Intergovernmental Conference and Beyond*. London/Washington: Pinter, 1997, p. 275.

³³ *Supra*, footnote 26.

³⁴ Articles 3, 4, 5 of the Council decision, *supra*, footnote 25.

³⁵ W. Voermans, “Besluiten onder de Europese Grondwet”, *Ars Aequi*, 2004, 54, p. 63-70.

Final Remarks

The main difficulty of both the Portuguese proposal and the provisions in the European Constitution is to develop criteria to distinguish measures requiring co-decision from those that can properly be adopted by a lighter procedure. In other words, the main difficulty lies in distinguishing the essential elements of a “law” from the non-essential elements. This could be achieved in two ways³⁶. The first approach would consist in trying to establish the dividing line in precise legal terms in the Treaty. Such a formulae would be difficult if not impossible to implement. A second approach would consist, on the contrary, in confirming in the Treaty the freedom that legislative institutions currently have, compliance with the Treaty’s provisions, when adopting a specific act, to decide whether or not to confine themselves to establishing the general principles, main rules and objectives in a given area. Thus, the Treaty would contain a political incentive for institutions to act in this way, without making this political obligation into a formal legal obligation. Both the Portuguese proposal and the provisions in the European Constitution choose for the second approach. The European legislator is thereby encouraged, yet not legally bound not to arrange things in detail. In this respect, again, probably little will change compared to the current situation. Furthermore, the Portuguese proposal and the European Constitution seem to take to little into account the role of the European Commission. There the Commission holds the exclusive right of initiative, it is she who decides in the first place what is “essential” and what is not.

In conclusion, the provisions in the European Constitution seem to be an improvement compared to the current situation because it seemingly introduces a clearer hierarchy of norms (which might enhance legal certainty) and it seemingly reduces the number of legislative acts. In reality, nothing really changes. The whole set-up of part V, Chapter I of the European Constitution is rather artificial.

³⁶ SN 3068/00, op. cit.