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THE FUTURE OF EUROPE: CONSTITUTIONAL TREATY—DRAFT ARTICLES 24-33

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11 MARCH 2003

By the Select Committee appointed to consider European Union documents and other matters relating to the European Union.

ORDERED TO REPORT

THE FUTURE OF EUROPE: CONSTITUTIONAL TREATY—DRAFT ARTICLES 24-33

CONV 571/03 Draft of Articles 24 to 33 of the Constitutional Treaty

PART 1: INTRODUCTION

1. This is our second Report on the draft Treaty Articles now being discussed in the Convention on the Future of Europe.[1]

2. The text of the new Constitutional Treaty is appearing in stages. In our first Report[2] on the Treaty we considered Articles 1 to 16 (Titles I–III, Definition and objectives of the Union, Union citizenship and fundamental rights and Union competences and actions). In paragraph 2 of that Report we drew attention to the unsatisfactory nature of a procedure which required us to review groups of Articles without sight of the full text of the Treaty. We repeat that comment now.

3. In this Report we consider the second batch of Articles prepared by the Praesidium. This comprises Articles 24–33 (Title V—Implementation of Union Action), which set out the instruments available to the Union's institutions for the exercise of their competences. There is new terminology ("European laws" and "European framework laws") and an attempt to separate legislative from executive functions and to establish a hierarchy of measures with the creation of a new level of EU legislation, "delegated acts".

4. The format of this Report follows that of our Report on Articles 1–16. Each Article is followed by an Explanatory note[3] (the text of which has been prepared by the Convention Secretariat) and a Commentary added by the Committee.

5. **We make this Report to the House for information**.

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1 See Appendix 1 for membership of the European Union Committee, and of Sub-Committee E (Law and Institutions) which undertook the detailed scrutiny work.

2 *The Future of Europe: Constitutional Treaty–Draft Articles 1-16*, 9th Report, 2002-03, HL Paper 61.

3 The Convention document uses the term "Technical comment".

PART 2: ANALYSIS OF ARTICLES 24-33

Article 24: The legal acts of the Union

1 In exercising the competences conferred on it in the Constitution, the Union shall use as legal instruments, in accordance with the provisions of Part Two, European laws, European framework laws, European regulations, European decisions, recommendations and opinions.

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

A European framework law shall be a legislative act which shall be binding, as to the result to be achieved, on the Member States to which it is addressed, but shall leave the national authorities entirely free to choose the form and means of achieving that result.

A European regulation shall be a non-legislative act having general application for the implementation of legislative acts and of certain specific provisions of the Constitution. It shall be binding in its entirety and directly applicable in all Member States.

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.

Recommendations and opinions adopted by the institutions shall have no binding force.

2 When considering proposals for legislative acts, the European Parliament and the Council shall refrain from adopting acts not provided for by the Constitution.

Explanatory note

"This Article lists the instruments which the Institutions may use to implement competences. The list is an exhaustive one, which applies to all areas covered by the Constitution in accordance with the provisions of Part Two. In the case of the common foreign and security policy, the common defence policy and the policy on police matters and crime, the report from Working Group IX had envisaged maintaining their specific characteristics while harmonising the legal instruments. Those characteristics will be the subject of Articles 29, 30 and 31.

The definitions of the new instruments are in line with the proposals of Working Group IX, the acts themselves having been classified into two groups: legislative and non-legislative.

The definitions of laws and framework laws reproduce the current definitions of regulations and directives under Article 249 of the TEC.[4]

The full titles are European law and European framework law. The Working Group's conclusions proposed "European Union law and European Union framework law". The titles proposed here take account of the need to distinguish Union laws from national laws, which was the priority for the Working Group, but is without prejudice to the name which the Convention will give to the European entity.

The definition of a European regulation reproduces the current definition of regulations in Article 249[5] *applied, as a non-legislative act, to the implementation of legislative acts and certain specific provisions of the Constitution.*

The definition of a European decision – again in line with Working Group IX's conclusions corresponds to the definition in Article 14 ECSC.[6] *Unlike the definition in Article 249,*[7] *it is not necessary to indicate those to whom it is addressed. One aim of this broader definition is to make decisions the legal instrument in the CFSP area, in place of "the joint action" and the "common position".*

Paragraph 2 limits the use of non-standard acts, which is in line with Working Group IX's conclusions. The Working Group considered that non-standard acts (resolutions, conclusions, declarations, etc.), while they had no binding force, nonetheless afforded the Institutions a degree of flexibility which should be safeguarded. However, the Working Group suggested including in the Treaty a rule whereby the legislator (Parliament/Council) should refrain from adopting non-standard acts on a given subject when legislative proposals or initiatives on the same subject had been submitted to it. Such a rule already appears in Article 7[8] *of the Council's Rules of Procedure. The aim is to avoid the impression that the Union legislates through a multiplicity of non-standard instruments."*

[4] The second and third paragraphs of Article 249 specify that "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,

COMMENTARY

6. Title V of the Constitution is based on the recommendations of Working Group IX on Simplification. Their recommendations were essentially threefold: to reduce the number of Union legal instruments; to give the instruments names more readily understandable to the public; and to introduce a hierarchy of legislation. In giving effect to those recommendations the draft also makes a distinction between "legislative" and "non-legislative" measures in an attempt to establish a clear line between the legislature (the Council and the European Parliament) and the executive (the Commission). But that distinction is blurred because, as Articles 26 and 28(2) show, sometimes the Council or the European Central Bank may constitute the executive.

7. Article 24 lists six types of instrument, of which one, the "European regulation", is new. The Article also introduces new terminology: "European law", "European framework law", and "European decision". These terms replace "regulation", "directive" and "decision" respectively. Only "recommendations" and "opinions" have remained unchanged.

8. The definitions of "European laws" and "European framework laws" follow those in Article 249 TEC for regulations and directives respectively but both have the additional feature of being expressly classified as being "legislative acts". In this context, as Article 25 explains, a "legislative act" is one made by the legislature (the Council and the Parliament or, exceptionally, the Council acting alone).

9. "European laws" will be, as "regulations" currently are, directly applicable, having the force of law without national legislatures normally having either the need or the right to intervene.[9] The main difference in future will be that while at the moment the Commission, when authorised by or under the Treaty, can make regulations, it will not be able to make "European laws". The Commission will, however, be able to make "delegated regulations" (under Article 27) and "European implementing regulations" (under Article 28). These measures would, according to Article 26, be "European regulations" as defined in Article 24. But for the fact that they are stated to be "non-legislative acts", "European regulations" have the same legal effects as "European laws", having, in words similar to Article 249 TEC, general application and being binding in their entirety and directly applicable in all Member States.

10. The authors of the new Constitution contend that this new categorisation of measures and terminology will add to transparency. But what added value, if any, there might be in trying to distinguish some generally applicable and legally binding rules as "legislative acts" and some as "non-legislative acts" is at first sight obscure. The reality is that at present there is no single Union legislature and Union legislation is made by the Council, the Parliament and the Commission. Further, there is no neat separation of powers. It may be that the scheme of Articles 24-26 is seeking to distinguish the Legislature from the Executive in the new Constitution of the Union. But what seems clear is that if that is the objective any separation will remain blurred, at least so long as the Treaty provides for the Council to take executive action (which we imagine will continue to be the case at least as regards the CFSP for some time) and for the Commission to have a virtual monopoly of the right of initiative as regards Union legislation and the extensive power to make directly applicable secondary legislation. **In the meantime creating a new category of "regulation" and categorising some Union legislation "legislative acts" and some "non-legislative acts" does not seem helpful.**

11. A further difficulty is created by the use of the term, in English, "European law". This hardly adds to the clarity. While the German and French texts may translate well into "*europaisches Gesetz*" and "*loi européenne*"[10] the term does not work in English. In English, "laws" derive from many sources (including Parliament, the courts, local authorities, the judges and, not least, the Union). Calling a rule "a law" does not indicate its origin or status compared with other laws. "European law"

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upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods".

5 See footnote 4.

6 The second paragraph of Article 14 ECSC specifies that "decisions shall be binding in their entirety".

7 The fourth paragraph of Article 249 TEC specifies that "a decision shall be binding in its entirety upon those to whom it is addressed".

8 The second paragraph of Article 7 of the Council's Rules of Procedure specifies that "Where legislative proposals or initiatives are submitted to it, the Council shall refrain from adopting acts which are not provided for by the Treaties, such as resolutions or declarations other than those referred to in Article 9" (the declarations referred to in Article 9 are those entered in Council minutes relating to the adoption of legislative acts).

9 Member States may exceptionally need or have the right to intervene. This will not change: see Article 28(1).

10 It is interesting that 50 years on the word "*loi*" is now being proposed. It is understood that it was deliberately avoided in the original Treaty of Rome lest its use put at risk ratification of the Treaty by national parliaments, according to an observation made by the late Professor J.D.B. Mitchell in *Legal Problems of an Enlarged European Community* (1972) at p 89.

and "European laws" in current parlance simply means law made by or emanating from the Union. Yet another problem, at least in the English language, is the recognition that European law is not restricted to European legislation but also includes principles laid down by the Court of Justice. The new Constitution recognises this (see, for example, Article 5(3) of the new Treaty). **The term "a European law" in Article 24 raises difficulties which need further consideration**.

12. "European framework laws" replaces "directives". The terminology is not entirely new in the sense that "framework decisions" are currently used in the Third Pillar (TEU Title VI—Police and Judicial Cooperation in Criminal Matters). But it is expressly provided there that they shall not entail direct effect (Article 34(2)(c)). Whether, with the collapse of the Pillar system in the new Treaty, "European framework laws" will replace both First Pillar directives and Third Pillar "framework decisions" remains to be seen. There is to be a special provision (Article 31) dealing with Police and criminal justice policy. Whether framework decisions/laws in this sector should continue not to have direct effect (*ie* confer rights on individuals which national courts will protect) is a sensitive issue. **Working Group IX (on Simplification) recognised that the new Treaty might continue to provide that instruments adopted in the area of police and judicial cooperation in criminal matters be characterised as not having direct effect. We agree**.

13. The term "European decision" is also not trouble-free. It is said to have been derived from Article 14 ECSC and the definition of "decision" in Article 24(1) is significantly different from that currently in Article 249 TEC. First, European decisions are expressed to be "non-legislative" acts. As already mentioned that does not mean that they are devoid of (general) legal effect but, it would appear, merely that they emanate from the Council or the Commission (as the executive?). As we have indicated above (para 10) it is very confusing to say that something is a "non-legislative act" when it results in a binding legal rule to which sanctions are or may be attached. Second, the words "upon those to whom it is addressed", currently in the Article 249 TEC definition of "decision", are not necessary for the definition of "European decision". This is the influence of Article 14 ECSC. Under the ECSC Treaty, "decision" covered acts providing general rules of law (*ie* "regulations" in EC terms) as well as those which were individually addressed to specific persons. And later Articles of the ECSC Treaty distinguished between "general decisions" and "individual decisions". The intention in adopting the ECSC definition in preference to Article 249 TEC appears to be to enable *inter alia* European decisions to replace the "joint actions" and "common positions" currently used in the Common Foreign and Security Policy (CFSP). A European decision will, however, be "binding in its entirety", except where it specifies those to whom it is addressed when it will only be binding on them. What "binding in its entirety" will mean in this context is uncertain. In the ECSC context it meant that a general decision could establish a legal principle, impose abstract conditions for its implementation and set out the legal consequences entailed thereby.[11] Whether and when "European decisions" might have a general normative effect is unclear. Such an effect might not always be appropriate for "European decisions" in CFSP, where if no addressee is specified the decision is presumably intended only to be binding on those party to it (*ie* the Member States under the CFSP).

14. The final paragraph of Article 24(1) reproduces the last paragraph of Article 249 TEC with the addition of the words "adopted by the institutions". As mentioned above, "recommendations" and "opinions" have not changed.

15. Article 24 is intended to limit the number of types of legal instrument available to EU institutions. But, as the Explanatory note to Article 24(2) suggests, the list in Article 24(1) may not be exhaustive, at least as regards measures not intended to have binding effect. Further, instruments under the CFSP and Police and criminal justice policy are to have their own "specific characteristics". **Limiting the number of types of act to a few (six in Article 24(1)) may be a useful simplification but corralling what are essentially different types of acts (particularly under the CFSP) under one name is far from desirable and could be counterproductive.**

[11] Case 13/57 *Eisen- und Stahlindustrie v High Authority* [1957-8] ECR 265, at p 275.

Article 25: Legislative acts[12]

1 European laws and European framework laws shall be adopted, on the basis of proposals from the Commission, jointly by the European Parliament and the Council in accordance with the rules of the legislative procedure referred to in Article X (Part Two of the Constitution). If the two institutions cannot reach agreement on an act, it shall not be adopted.

Specific provisions shall apply in the cases referred to in Article Z (ex-third pillar).

2 In the specific cases provided for by the Constitution, European laws and European framework laws shall be adopted by the Council.

3 When acting under any procedure for the adoption of a European law or a European framework law, the European Parliament and the Council shall meet in public.

Explanatory note

"As proposed in Working Group IX's report and accepted by the plenary, the general decision-making rule is that laws and framework laws are to be adopted under the codecision procedure, as currently referred to in Article 251 TEC.

Neither the discussions in the Working Group nor those in the plenary could settle the name of that procedure. The Working Group's report notes the proposal that it should be called "legislative procedure" but also that some members preferred "codecision procedure". The Praesidium proposes the name "legislative procedure" as this is more comprehensible to members of the public and in order to emphasise that this procedure is the general rule for the adoption of legislative acts.

The report of Working Group IX recommends that decision-taking procedures should be listed and their key elements outlined in Part One of the Constitutional Treaty, whereas a detailed description of the way they operate should be given in Part Two. The procedure as outlined in Article 25 is therefore limited to the key elements: Commission initiative, joint decision of the Parliament and the Council, parity between the two institutions and transparency. The detailed rules are to be laid down in Part Two of the Treaty.

In accordance with Working Group X's conclusions, specific procedural rules are laid down for the area covered by the present third pillar. They concern the right of initiative which could also be exercised by the Member States in accordance with rules to be determined in Article 31.

Working Group IX recommended generalising qualified-majority voting in the Council in all cases where the legislative (former codecision) procedure applies. This rule will need to be reflected in the adjustments to Part Two of the Constitution. The majorities in the Council and in Parliament, which, moreover, change from stage to stage of the legislative procedure, are aspects of the latter's detailed rules.

Paragraph 2 recognises that there are exceptions to the general rule that legislative acts are adopted by the codecision procedure. Those exceptions must be expressly specified in Part Two of the Constitution. The Praesidium intends to submit the list of exceptions for consideration by the Convention so that it can take it into account in the debate on these draft Articles.

Only the institution that takes the decision is mentioned, namely the Council. The question has arisen as to whether the Parliament's role (consultation) and the Commission's initiative should not also be mentioned.

The Praesidium has elected not to do so in order to highlight the exceptional nature of this procedure and avoid giving the impression that it might be an alternative for the adoption of legislative acts. Acts will of course be adopted in accordance with the provisions of Part Two, particularly in the case of legislative initiative and opinions.

It should also be noted that the Working Group's report proposes that Article 251 should be simplified and its wording amended in order to make clear the parity between Parliament and Council.

Lastly, the codecision procedure is the only procedure that need be considered here. In all other cases (decision taken by the Council acting unanimously or by a qualified majority, alone or after receiving the Parliament's opinion or its assent), the procedure corresponds to each institution's general decision-making rules or to special voting rules laid down in given legal bases."

[12] Article 29 will stipulate that legislative acts cannot be used for the CFSP.

COMMENTARY

16. The principal aim of Article 25 is to establish co-decision as the normal legislative procedure subject to limited exceptions. Though co-decision is now well-established, making it the universal rule, albeit with some exceptions, is controversial. But the debate is likely to focus on those areas/matters that should continue to be the exceptions. We note that a list of exceptions is to be produced to assist the discussion of this Article in the Convention Plenary.

17. Successive Treaty amendments have seen the growth of co-decision. The Maastricht Treaty introduced the co-decision procedure into the legislative processes of the Community, thus according the Parliament an enhanced role as legislator alongside the Council. The Amsterdam Treaty extended substantially the range of matters to which co-decision applied. The number of policy areas subject to the procedure was extended from 15 to 38. The Amsterdam Treaty also simplified the procedure itself and gave the Parliament a definitive veto, though the position (currently set out in Article 251 TEC) remains somewhat complex. Further extension of the co-decision procedure was discussed in the run-up to the Nice Inter-Governmental Conference (IGC) but extension of co-decision was not as great as some parties (the Commission and the Parliament) had wished. Another 12 matters were added by the Nice Treaty, but there was no amendment of the procedure itself.

18. The main areas where co-decision currently applies are the Single Market, Transport, Environment, Freedom of Movement, Equal Pay for men and women, Public Health, Customs cooperation, Vocational Training, Development Aid, Countering fraud, Research, Transparency and Access to Information. Co-decision is therefore well-established in the First (EC) Pillar. There are, however, some notable exceptions (such as Article 37—Agriculture, Article 94—approximation of laws, Article 161—administration of regional aid, and Article 279—the Budget). Most significantly, co-decision does not apply in the Second (Common Foreign and Security Policy) or the Third (Police and Judicial Cooperation in Criminal Matters) Pillars.

19. Article 25 provides for, but itself does not list, exceptions. The Third (Police and Judicial Cooperation in Criminal Matters) Pillar is an acknowledged special case. There is no reference to CFSP, presumably because it is not envisaged that it will involve "European laws" and "European framework laws". But First Pillar measures (for example under Article 301 TEC) may be used to give effect to Second Pillar policies.

20. Article 25(1) presumes that in all matters subject to co-decision the Commission will have the sole right of initiative (note the words "on the basis of proposals from the Commission"). Whether, if co-decision is to apply generally, the Commission should have such a monopoly needs consideration. In particular, Member States currently have the right of initiative in certain Justice and Home Affairs matters (Title IV TEC) and under the Third Pillar. The Explanatory note acknowledges that the special rule on the Third Pillar might preserve Member States' right of initiative.

21. As the Praesidium notes, only the "essential components" of the procedure are set out in Article 25 (*ie* parity between the Parliament and the Council, the legislative initiative of the Commission and the transparency of the procedure). The detail of the co-decision procedure, currently contained in Article 251 TEC, is to be set out in Part Two of the new Treaty.[13] What appears to be assumed is that the present complex procedure will largely remain. It is noteworthy that the Convention Working Group IX did not offer any proposals for its amendment save making the composition of the Conciliation Committee more flexible in order to maintain the parity of the Council and the Parliament.

22. Further, Article 25 is silent on the question of whether decisions in the Council on proposals subject to co-decision will be subject to qualified majority voting (QMV). Convention Working Group IX (Simplification) recommended that "co-decision should become the general rule for the adoption of legislative acts" and that "the logic of the co-decision procedure requires qualified majority voting in the Council in all cases".[14] The Group recognised, however, that there would be exceptions to the QMV/co-decision rule "where the special nature of the Union requires autonomous decision-making, or in areas of great political sensitivity for the Member States".[15]

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[13] Doc CONV 571/03. Introduction at p 2.

[14] Final Report, Doc CONV 424/02, at pp 14-15.

[15] *Ibid,* at p 15. It is also significant that Working Group X (Freedom, Security and Justice) also anticipated that QMV and co-decision would become the standard legislative procedure in the new Treaty (Final Report Doc CONV 426/02). Accordingly the Group recommended that QMV should be applicable to minimum rules defining certain crimes and penalties, criminal procedure, and police and judicial cooperation (pp13-15). (Unanimity would be retained for "co-operation in criminal matters concerning core functions" such as the creation of Union bodies with operational powers, approximation of substantive criminal laws, rules on action by police authorities, joint investigation teams and law enforcement agencies (p14).

23. It is proposed that the co-decision procedure should in future be known as the "legislative procedure". According to the Praesidium, this is "a name which is more fitting for its status as the general rule for the adoption of legislation and more comprehensible for citizens".[16] In one way this is helpful. The Treaty currently uses the somewhat awkward (and inaccessible) phrase, "in accordance with the procedure referred to in Article 251", to refer to what is more familiarly called "co-decision". But while the term "legislative procedure" may be meaningful in other languages it is not helpful in the English text. There will be other ways in which European laws will be made. The procedure for making those laws will also be "legislative" in the normal sense of the word. To call one particular procedure by which laws are made "legislative" to the exclusion of other legislative procedures is a recipe for confusion. Accordingly we disagree with the Praesidium. **"Co-decision" would be a better and far more accurate term to describe the type of legislative procedure in question.**

24. **Article 25(3) is especially welcome**. The Committee has previously urged greater openness in the Council of Ministers.[17] Some improvements were agreed at the Seville European Council. But a general rule in the Treaty requiring "any procedure for the adoption of a European law or a European framework law" to be public would be a major step forward. We assume that "any procedure" would include meetings of the Conciliation Committee in the co-decision procedure.[18]

Article 26: Non-legislative acts

The Council and the Commission as well as the European Central Bank, shall adopt European regulations or European decisions in the cases referred to in Articles 27 and 28 and in cases specifically laid down in the Constitution.

Explanatory note

"This Article covers all non-legislative acts, in particular (last sentence) cases where the Council and the Commission adopt non-legislative acts directly on the basis of the Treaty.

Where acts are adopted by the Commission, there can be no question as to whether an act is legislative or non-legislative in nature, since it is not able to adopt legislative acts. However, when an act is adopted by the Council, a question arises as to whether it is:

— *a legislative act that is exceptionally adopted by a procedure other than codecision;*

or

— *a non-legislative act adopted by the Council directly on the basis of the Treaty.*

The issue has repercussions in cases where the current Treaty explicitly provides which instrument (currently a regulation or a directive) is to be used. With a legislative act, these will need to be replaced by law and framework law; with a non-legislative act, the terms regulation or decision will need to be used. In practice the legal bases in the Treaties rarely specify the instrument to be used and when they do, there can be no doubt as to its nature, as it is always a legislative act. Of course, if acts adopted directly on the basis of the Constitution were classified as "non-legislative", codecision would not apply in any case.

Conversely, where provisions do not specify any particular instrument, the issue would have no repercussions, since the procedure is determined by each specific legal basis. In any case, once the list of exceptions to the legislative procedure has been decided on, the other legal bases providing for the Council to take the decision would result in non-legislative acts.

The European Central Bank also adopts non-legislative acts in carrying out its task as is now already the case in accordance with Article 110.[19]"

[16] Doc CONV 571/03. Introduction at p.2.

[17] See our Reports *The Convention on the Future of Europe* 30th Report, Session 2001-02, HL Paper 163; and *Review of Scrutiny of European Legislation* 1st Report, Session 2002-03, HL Paper 15.

[18] The problems of exercising effective Parliamentary scrutiny when a co-decision measure becomes subject to the conciliation process, and our recommendations for change, are set out in our Report *Review of Scrutiny of European Legislation,* 1st Report, 2002-03, HL Paper 15, at paras 32-35.

[19] Paragraph 1 of Article 110 specifies that: "In order to carry out the tasks entrusted to the ESCB, the ECB shall, in accordance with the provisions of this Treaty and under the conditions laid down in the Statute of the ESCB:

— make regulations to the extent necessary to implement the tasks defined in Article 3(1), first indent, Articles 19(1), 22 and 25(2) of the Statute of the ESCB and in cases which shall be laid down in the acts of the Council referred to in Article 107(6);

— take decisions necessary for carrying out the tasks entrusted to the ESCB under this Treaty and the Statute of the ESCB;

— make recommendations and deliver opinions".

COMMENTARY

25. Working Group IX proposed a three level hierarchy of Union legislation[20]:

— Legislative Acts ("acts adopted on the basis of the Treaty and containing essential elements in a given field");

— Delegated Acts ("these acts would flesh out the detail or amend certain elements of a legislative act, under some form of authorisation defined by the legislator"); and

— Implementing Acts ("acts implementing legislative acts, "delegated legislation" or acts provided in the Treaty itself").

26. In advocating this tripartite division, the Group sought to clarify which matters should fall to the legislator and which to the executive (though it recognised that a clear legislator/executive distinction might not be possible to attain). The Group also sought to produce a system which would enable the legislator to produce legislation whose democratic legitimacy was beyond dispute but would retain a degree of flexibility to respond "rapidly and effectively to the challenges and demands of the real world".[21]

27. The establishment of a hierarchy of Community/Union acts (a so-called "hierarchy of norms") is not new. The question of the classification of Community acts was raised at the time of Maastricht and a Declaration was annexed to the Treaty on European Union (TEU) requesting the 1996 IGC (Amsterdam) to examine "to what extent it might be possible to review the classification of Community acts with a view to establishing an appropriate hierarchy between the different categories of act". When we ourselves considered this issue in 1996 we doubted whether the form of Community legislation was capable of denoting its importance any more than was the case within the UK's legal system. There was a case for setting clear criteria for the use of directives and regulations. But the replacement of regulations, directives and decisions by instruments with new names and descriptions was not the solution.[22] We have commented above on the new terminology being put forward in the Praesidium's text. We consider below (when commenting on Articles 27 and 28) the "hierarchical status" of the different forms of act being proposed.

28. Article 26 paves the way into Article 27 (Delegated regulations) and Article 28 (Implementing acts). It also envisages implementing measures being taken under other Articles of the new Treaty, presumably in relation to particular subject matter.

29. We have commented above on the inaptness of the title "non-legislative acts". It is clear that "European regulations" will be subordinate legislation directly applicable in the Member States. "European decisions" may also give rise to generally, if not directly,[23] applicable rules. European decisions will be "binding in their entirety". If they are not directly applicable, that will simply mean that they may need implementation. But what is the difference between a European implementing regulation and a European implementing decision? Neither Article 26 nor Article 28(4) explains. Both are binding in their entirety and both may, but will not necessarily, require implementation. Both are presumably capable of producing direct effects (*ie* of conferring rights on individuals which national courts will protect). Neither is "legislative".

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[20] Final Report, Doc CONV 424/02, at pp 8-11.

[21] Final Report, Doc CONV 424/02, at p 8.

[22] See *1996 Inter-Governmental Conference*, 21st Report, 1994-95, HL Paper 105, at para 291.

[23] Whether European decisions will be directly applicable is not clear. Commentators took the view that ECSC general decisions were akin to EC regulations and were directly applicable – see the analysis of Prof Eberhard Grabitz in *Thirty years of Community law* (1981) at p 84. But whereas the definitions of "European law" and "European regulation" in Article 24 expressly say that such measures are "directly applicable in all Member States" those words do not appear in the definition of "European decision".

Article 27: Delegated regulations

1 European laws and European framework laws may delegate to the Commission the power to enact delegated regulations in order to supplement or amend certain non-essential elements of the law or framework law.

The objectives, content, scope and duration of the delegation shall be explicitly defined in the laws and framework laws. A delegation may not cover the essential elements of an area. These shall be reserved for the law or framework law.

2 The conditions of application to which the delegation is subject shall be explicitly determined in the law or framework law; they shall consist of one or more of the following possibilities:

— the European Parliament and the Council may decide to revoke the delegation;

— the delegated regulation may enter into force only if no objection has been expressed by the European Parliament or the Council within a period set by the law or framework law;

— the provisions of the delegated regulation are to lapse after a period set by the law or framework law. They may be extended, on a proposal from the Commission, by decision of the European Parliament and of the Council.

For the purposes of the preceding paragraph, the European Parliament shall act by a majority of its members, and the Council by a qualified majority.

Explanatory note

"This paragraph takes on board Group IX's recommendations on delegated acts. The component parts of the definition are as follows:

— *It is always the legislator (via the law or framework law) who decides on a case-by-case basis whether recourse is to be had to delegation.*

— *It is also the legislator who decides on a case-by-case basis on the scope of the delegation as well as on the objectives and content.*

— *It is imperative that the essential features of the issue in question be covered in the legislative act. They may in no circumstances be the subject of the delegated act*

Control mechanisms are determined by the legislator on a case-by-case basis by reference to an exhaustive list laid down in Article 27 itself."

COMMENTARY

30. As mentioned above Working Group IX proposed creating a new category of act, "delegated acts", whose purpose would be to supplement or amend certain non-essential elements of legislative acts. As the Praesidium explains, "the aim is to encourage the legislator to concentrate on the fundamental aspects, preventing European laws and European framework laws from being over-detailed. The legislator may decide to delegate the more technical aspects, while subjecting this delegation to stringent conditions enabling it, if necessary, to retrieve its power to legislate".[24]

31. Article 27(1), however, raises the question as to what is "essential" and what "non-essential". We are sympathetic to the view that Community legislation can become overloaded with technical detail (matters which would not be dealt with as primary legislation in any national parliament) and may not be able to respond quickly and flexibly to technical and market development. There is a need to distinguish between core policy decisions and technical issues. In practice the legislator (the Council and the Parliament or, exceptionally, the Council acting alone) will decide in the particular case whether there should be any delegation under Article 27 and/or 28. What is "essential" (or "fundamental" or "important") is a subjective and imprecise concept. Similarly there will be differing views on what is "technical" in relation to any subject area. Under Article 27 the legislator is given a discretion, but is not under any obligation, to delegate. This is entirely sensible, both politically and in practical terms, but it shows the nonsense of the "legislative"/"non-legislative" split. If a technical/detailed rule is formulated by the Council and the Parliament and contained in the basic act it is part of a "legislative act", but if it is devised by the Commission and included in a delegated act it will be characterised "non–legislative".

[24] Doc CONV 571/03, at p 3.

32. The basic instrument, a European law or European framework law, must specify the terms of the delegation and the "conditions of application", *ie* one or more of the means of exercising control over the Commission listed in Article 27(2). The decision of the legislator (the Council and the European Parliament) whether to "delegate" to (under Article 27) and/or to "confer implementing powers" on (Article 28) the Commission will have to be taken case by case. Whether the use of "delegated regulations" will improve the efficiency of Union law-making will have to be seen. Further, how the creation of the new category of measures, "delegated acts", will affect the balance of power as between the Commission and the Member States and, in co-decision cases, the European Parliament is unclear. Any assessment may need to await any reform of "comitology" procedures (see Article 28 below). **In the meantime we welcome the overall objective of Article 27**.

Article 28: Implementing acts

1 Member States shall adopt all measures of national law necessary to implement the Union's legally binding acts.

2 Where uniform conditions for the implementation of the Union's binding acts are needed, those acts may confer implementing powers on the Commission or in specific cases and in the cases provided for in Article [CFSP], on the Council.

3 Implementing acts of the Union may be subject to control mechanisms which shall be consonant with principles and rules laid down in advance by the European Parliament and the Council in accordance with the legislative procedure.

4 Implementing acts of the Union shall take the form of European implementing regulations or European implementing decisions.

Explanatory note

"The first sentence clearly sets out the principle that competence for the implementation of Union acts belongs to the Member States. The second sentence concerns the exception to this principle, namely implementation by the institutions of the Union where uniform implementing conditions are necessary. It essentially repeats and clarifies the third indent of Article 202 TEC.[25]

Article 28 maintains the status quo as regards the adoption of implementing acts: as a general rule they are adopted by the Commission and exceptionally by the Council. The specific case of the CFSP is dealt with by means of a reference to the Article concerned.

As regards the means of monitoring the implementing acts (committee procedure), the text proposed takes Article 202 as its starting point. The proposed decision-making procedure is codecision. It should be remembered that the present procedure is unanimity within the Council plus ordinary consultation of the European Parliament. Although Group IX discussed the decision-making procedure, it made no recommendations on the subject.

However, the Group pointed out that if the concept of the delegated act were to be adopted, the procedures for monitoring the implementing acts would need to be simplified and, in particular, the Council call-back procedure under the regulatory committee procedure abolished.

In that context and on such premises the Group recommended resolving the problem by introducing a new category of acts (to be found in various guises in the Constitutions of a number of Member States).

Distinction between delegated acts and implementing acts

Working Group IX recommended the introduction of a new category of delegated acts in response to the frequent criticism of the excessive detail in Community legislation and the inflexibility and slowness of procedures. Group IX's report states that "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. 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."

To remedy this situation, the Group proposed "a new type of "delegated" act which, accompanied by strong control mechanisms, could encourage the legislator to look solely 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, in some way, its power to legislate."

Some thought that the problem could be resolved more simply by giving the legislator (the European Parliament and the Council) a right of call-back over implementing acts (Article 202 TEC). In its conclusions, the Working Group rejected that option for the following reasons:

- *implementing acts fall in principle within the competence of the Member States and are only exceptionally adopted by the Commission (or in certain cases by the Council)*
- *for the same reason, implementing acts adopted by the Commission are subject to monitoring by committees made up of representatives of the Member States*
- *implementing acts are consequently not matters which concern the legislator.*

In that context and on such premises the Group recommended resolving the problem by introducing a new category of acts (to be found in various guises in the Constitutions of a number of Member States)."

COMMENTARY

33. In its introduction to this Title of the new Treaty, the Praesidium describes Article 28 as "a clarification of Article 202 TEC, which currently governs implementing powers exercised at Community level".[26] It is more than that. Article 28 deals with two things: the obligation on Member States to implement Union laws and, second, the conferring of implementing powers on the Commission or the Council to make (*pace* Article 27) delegated legislation.

34. Article 28(1) is new and appears to impose an express duty on Member States to implement Union law. In effect it consolidates existing Community law under which Member States are, by virtue of the duty of cooperation and the principle of the supremacy of Community law, obliged to implement Community law. Where provisions of Community law are not directly applicable (*eg* an EC directive), Member States are required by the Treaty to adopt legislative measures where necessary to achieve compliance with the Treaty. Where measures are directly applicable (*eg* an EC regulation) they may have to remove or qualify any contradictory or inconsistent national measures.

35. Under Article 202 TEC the Council can "confer" power on the Commission or "reserve" them to itself. The latter is, however, in practice exceptional. Article 28(2), as the Explanatory note says, reflects the *status quo* under Article 202 TEC. It also anticipates the need for a special provision to deal with implementation of CFSP.

36. Article 28(3) raises two questions. The first relates to the meaning of "implementing acts of the Union". This appears to refer solely to implementing measures to be taken pursuant to Article 28(2) and presumably does not extend to measures taken by Member States pursuant to Article 28(1). The Commission can, and regularly does, bring proceedings against Member States where there is a failure to implement Community obligations. Giving the Commission greater powers here would be objectionable, as it might undermine/interfere with the discretion of a Member State to implement in the way it considers most appropriate, and would offend the principle of subsidiarity. In the last resort it is for the Court of Justice to determine whether a Member State has exceeded the bounds of its discretion.

37. The second question concerns the reference in Article 28(3) to "control mechanisms". This would seem to be a reference to "comitology", the system of procedures involving committees, made up of representatives from Member States and chaired by the Commission, whereby the Member States can exercise some control over implementing powers delegated to the Commission by the Council. What is new is that the control mechanisms must be "consonant with principles and rules laid down in advance by the European Parliament and the Council in accordance with the legislative procedure". Comitology procedures are currently governed by Council decision (made by Council decision under Article 202 TEC, and supported by inter-institutional agreements between the Council and the Parliament). As the Convention Secretariat has pointed out, Working Group IX did not address the possibility of amending this legal basis. The Praesidium proposes that it be subject to the legislative (co-decision) procedure. **We have for some time argued that the Parliament should have a greater role in comitology.[27] That will now extend to establishing the ground rules for comitology. We therefore welcome this**.

38. As the Praesidium's Explanatory note makes clear, the introduction of the new category of measure, "delegated acts", will have implications for "comitology" and the Praesidium envisages a weakening (at least from the standpoint of the Member States) of the regulatory committee procedure. We have under scrutiny a Commission proposal to amend the current arrangements.[28] This is described as a transitional measure but it would also involve a strengthening of the position of the Commission. **The future of comitology under the new Treaty is something to which we will want to return**.

39. Article 28(4) refers to "European implementing regulations" and "European implementing decisions". This might suggest two further categories of legislative instrument. But it seems clear from

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[25] In accordance with the third indent of Article 202 TEC, the Council "shall […] confer on the Commission, in the acts which the Council adopts, powers for the implementation of the rules which the Council lays down. The Council may impose certain requirements in respect of the exercise of these powers. The Council may also reserve the right, in specific cases, to exercise directly implementing powers itself. The procedures referred to above must be consonant with principles and rules to be laid down in advance by the Council, acting unanimously on a proposal from the Commission and after obtaining the Opinion of the European Parliament".

[26] Doc CONV 571/03, at p 4.

[27] See our earlier Reports: *Delegation of Powers to the Commission: Reforming Comitology*, 3rd Report, 1998-99, HL Paper 23; and *Review of Scrutiny of European Legislation*, 1st Report, 2002-03, HL Paper 15.

[28] Doc 15878/02: Proposed Council Decision amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission. Currently held under scrutiny in Sub-Committee E (Law and Institutions).

Article 26 that "European implementing regulations" and "European implementing decisions" are merely types of "European regulations" and "European decisions" as defined in Article 24.

Article 29: [Common foreign and security policy]

Article 30: [Common defence policy]

Article 31: [Police and criminal justice policy]

COMMENTARY

40. The instruments listed and defined in Article 24 (European laws, European framework laws, European decisions etc) are intended to apply in all areas of the Constitution, including those which currently fall under the Second (CFSP) and Third Pillars (Cooperation in police and criminal matters). But as the Praesidium notes, what are now Second and Third Pillar matters could, as recommended by Working Group IX, be subject to special rules (to be specified in Articles 29, 30 and 31) in the light of the conclusions of the other Working Groups (*ie* Group VII on External Action, VIII on Defence, and X on Freedom, Security and Justice) and discussions in the Convention. The text of Articles 29, 30 and 31 "will be presented with the relevant chapters of Part Two of the Constitution in order to facilitate overall comprehension".[29]

Article 32: Principles common to acts of the Union

1 Unless the Constitution contains a specific stipulation, the institutions shall decide, in compliance with the procedures applicable, on the type of act to be adopted in each case, in accordance with the principle of proportionality set out in Article 8.

2 European laws, European framework laws, European regulations and European decisions shall state the reasons on which they are based and shall refer to any proposals or opinions required by this Constitution.

Explanatory note

"It is helpful to refer to the proportionality principle in this context since it constitutes the criterion which determines the choice of instrument. The intention is to provide a transparent reply to the question of how a decision is taken on the intensity of action by the Union.

The second paragraph draws on the wording of the current Article 253 TEC.[30]*"*

COMMENTARY

41. Article 32(1) merely sets out a particular application of the principle of proportionality (the general principle is defined in Article 8(4)).

42. The requirement to state the reasons is currently contained in Article 253 TEC and relates to all "regulations, directives and decisions" adopted by the EP and the Council (*ie* by co-decision) and by the Council or the Commission. The obligation to give reasons, whether in relation to a legislative or non-legislative act and whether the act has general application or is restricted to a particular addressee or group, is an important safeguard against misuse or abuse of power. Adequacy of reasoning is a matter on which the Court of Justice frequently has to rule. In applying Article 253, the Court of Justice has consistently held that the reasoning required by Article 253 must show clearly and unequivocally the reasoning of the Community authority which adopted the contested measure so as to enable the persons concerned to ascertain the reasons for it and to enable the Court to exercise judicial review. This does not mean that the Community authority in question is necessarily required to go into every relevant point of fact and law.[31]

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29 Doc CONV 571/03, at p 5.

30 Article 253 stipulates that "Regulations, directives and decisions adopted jointly by the European Parliament and the Council, and such acts adopted by the Council or the Commission, shall state the reasons on which they are based and shall refer to any proposals or opinions which were required to be obtained pursuant to this Treaty."

31 Case C-122/94 *Commission v Council* [1996] ECR I-881, at para 29.

Article 33: Publication and entry into force

1 European laws and European framework laws adopted in accordance with the legislative procedure shall be signed by the President of the European Parliament and by the President of the Council. In other cases they shall be signed by the President of the Council. European Union laws and European Union framework laws shall be published in the Official Journal of the European Union and shall enter into force on the date specified in them or, in the absence of such a stated date, on the twentieth day following that of their publication.

2 European regulations of the Commission or of the Council and European decisions which do not specify those to whom they are addressed or which are addressed to all Member States shall be published in the Official Journal of the European Union and shall enter into force on the date specified in them or, in the absence of such a stated date, on the twentieth day following that of their publication.

3 Other decisions shall be notified to those to whom they are addressed and shall take effect upon such notification.

Explanatory note

"This Article corresponds to the text of the current Article 254 TEC, which has been revised in the light of the earlier draft articles. Although the preliminary draft Constitution makes no provision for such an article, it needs to be introduced since the conditions for entry into force of laws (promulgation and publication) are fundamental constitutional factors for legal security."

COMMENTARY

43. Article 33 provides for the promulgation, publication and entry into force of acts. As the Explanatory note indicates such provisions are essential to ensure legal certainty.

44. Article 254 TEC requires "regulations, directives and decisions adopted in accordance with the procedure referred to in Article 251" (*ie* by co-decision) to be published in the Official Journal of the Union, along with "regulations of the Council and of the Commission, as well as directives of those institutions which are addressed to all Member States". Other directives and decisions are only required to be notified to those to whom they are addressed, though they may be, and often are, published. Article 33 adapts the current Article 254 to the new legal instruments ("European laws", "European framework laws" etc).

APPENDIX 1

Membership of the European Union Committee and Sub-Committee E (Law and Institutions)

The members of the European Union Committee are:

Baroness Billingham
Lord Brennan
Lord Cavendish of Furness
Lord Dubs
Lord Grenfell (Chairman)
Lord Hannay of Chiswick
Baroness Harris of Richmond
Lord Jopling
Lord Lamont of Lerwick
Baroness Maddock
Lord Neill of Bladen
Baroness Park of Monmouth
Lord Radice
Lord Scott of Foscote
Earl Selborne
Lord Shutt of Greetland
Baroness Stern
Lord Williamson of Horton
Lord Woolmer of Leeds

The members of Sub-Committee E (Law and Institutions) are:

Lord Brennan
Lord Fraser of Carmyllie
Lord Grabiner
Lord Henley
Lord Lester of Herne Hill
Lord Mayhew of Twysden
Lord Neill of Bladen
Lord Plant of Highfield
Lord Scott of Foscote (Chairman)
Baroness Thomas of Walliswood
Lord Thomson of Monifieth