

NOTE

from: Praesidium

to: Convention

Subject: **Draft of Articles 24 to 33 of the Constitutional Treaty**

INTRODUCTION

In the opening Articles of the Constitution, the Convention addressed matters relating to the Constitution's nature, values, objectives and competences. With the (attached) draft of Title V on the exercise of competences, the Praesidium now asks Convention members to examine the means of action available to the Union for the performance of its tasks.

The simplification of the Union's instruments was a key component of the Laeken Declaration. The Convention devoted two plenary sessions, those on 23 and 24 May and on 12 and 13 September, to the matters raised in it. A working group was then established and the Convention discussed its conclusions at its plenary session on 5 December 2002.

The draft of Title V of the Constitution (Articles 24 et seq.) which the Praesidium is submitting for the attention of Convention members is based on the conclusions of Working Group IX on Simplification in the light of the discussion held in the Convention.

A broad consensus had welcomed the Working Group's proposal to reduce radically the number of legal instruments available to the Union for the exercise of its competences and to give these instruments names which were more readily understandable to the public. The proposed instruments also respond to the concern voiced by a number of Convention members that a hierarchy of legislation be introduced into the Constitution.

Hence the distinction in the draft between legislative acts, European laws and European framework laws, and non-legislative acts, European regulations and European decisions. Recommendations and opinions will, as is currently the case, be non-binding acts. Also in compliance with the conclusions of Working Group IX, and for the sake of clarity for citizens, when a legislative procedure is in progress the second paragraph of Article 24 restricts recourse to acts other than those listed in that Article.

The instruments defined in Article 24 apply in all areas of the Constitution, including those which currently fall under the second and third pillars. However, in line with Working Group IX's report, they could 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 and discussions in the Convention.

Legislative procedure

Laws and framework laws, the definition of which corresponds to that of regulations and decisions in the current Article 249 TEC, are jointly adopted by the two institutions sharing legislative powers, the European Parliament and the Council, under the codecision procedure. The Praesidium proposes styling the codecision procedure the "legislative procedure", a name which is more fitting for its new status as the general rule for the adoption of legislation and more comprehensible for citizens. Article 25(2) accommodates the exceptions to this rule, thus reflecting the concern voiced by the Working Group and a considerable number of Convention members. These exceptions will be specifically set out in the provisions of 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.

In order to take into account the conclusions of Working Group IX, only the essential components of the legislative procedure will be included in Part One of the Constitution: parity between the Parliament and Council, the legislative initiative of the Commission and the transparency of the procedure. The detailed description will be the subject of a specific provision in Part Two which, with some changes, will correspond to the current Article 251. The obligation to act in public also concerns the Council when, in exceptional cases, it adopts legislative acts under a procedure other than the legislative procedure.

In accordance with the conclusions of Working Group X, in the area of police and judicial cooperation in criminal matters the legislative procedure is subject to special rules, particularly in respect of the right of initiative. Although these are already mentioned in Article 25, they will be addressed in greater detail in Article 31.

Non-legislative acts

Non-legislative acts are adopted by the two institutions exercising executive powers, i.e. either the Council or the Commission. This concerns European regulations, the definition of which takes up that of the current Article 249 TEC, and European decisions, with a broader definition than the current Article 249. In accordance with the conclusions of Working Group IX, decisions should become the only legal instrument of the Common Foreign and Security Policy under the provisions of Article 29.

Regulations and decisions serve to implement not only legislative acts but also certain specific provisions of the Constitution. Indeed, in certain cases the Commission, but in particular the Council, adopts non-legislative acts directly on the basis of the Treaty. Working Group IX's report mentions some criteria for identifying this type of act ¹ which should be specifically laid down in Part Two of the Constitution. The European Central Bank will also adopt regulations and decisions in the course of fulfilling its duties, as is already the case today.

Delegated acts

Working Group IX proposed creating a new category of act, delegated acts, which supplement or amend certain non-essential elements of legislative acts. The aim is to encourage the legislator to concentrate on the fundamental aspects, preventing laws and 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. Convention members found this proposal to be of interest; some sought further clarification.

¹ See the technical note below, p. 12.

The draft of Article 27 specifies and defines the conditions and rules for delegation. Following a majority view within Working Group IX and the Convention, the Commission is the only institution to which power may be delegated. It is the legislator which, on a case-by-case basis, decides on the objectives, content and scope of the delegation, which may not under any circumstances cover the essential elements of an area. For the sake of transparency, the conditions of application for the delegation, also to be decided by the legislator on a case-by-case basis, are listed in the Constitution, as are the voting arrangements for their implementation in the European Parliament and the Council. As these are acts of a legislative nature, they will take the form of regulations, hence the specific name of delegated regulations.

Implementing acts

Regulations and decisions are also used for the implementation of legislative acts. The draft of Article 28 is a clarification of Article 202 TEC, which currently governs implementing powers exercised at Community level.

Article 28 first of all states the general rule: the Union's acts are implemented by the Member States. This rule flows from the application in this area of the principle already enshrined in a more general context in Article 9 of the Constitution. The exception, justified by the need for uniform implementing conditions, is constituted by the conferral of implementing powers on the Commission or, as appropriate, on the Council, particularly in respect of the CFSP.

Lastly, Article 28 establishes the legal basis for the adoption of control mechanisms for implementing powers when these are exercised by the Commission (this concerns the current "committee procedure" decision). Although Working Group IX did not address the possibility of amending this legal basis, the Praesidium, in the light of views expressed by a number of Convention members, proposes that it be subject to the legislative procedure. The Praesidium considers that if re-examination of specific control mechanisms (committee procedure) for implementing acts proves necessary, it should be conducted under the provisions of Part Two.

Special rules for the implementation of certain policies

Articles 29, 30 and 31, concerning special rules for the implementation of the common foreign and security policy, common defence policy and police and criminal justice policy respectively, will be presented with the relevant chapters of Part Two of the Constitution in order to facilitate overall comprehension.

Common provisions

Article 32 states that the principle of proportionality governs the choice of a particular legal act for the exercise of competences. This Article also takes up the principle of stating the reasons for acts which is currently contained in Article 253 TEC.

Article 33 contains provisions relating to the promulgation, publication and entry into force of acts (which are essential for guaranteeing legal certainty). It adapts the current Article 254 to the new legal instruments.

TITLE V: EXERCISE OF UNION COMPETENCE

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.

Article 25: Legislative acts¹

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*).

¹ Article 29 will stipulate that legislative acts cannot be used for the CFSP.

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.

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.

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.

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.

Article 29: [Common foreign and security policy]

Article 30: [Common defence policy]

Article 31: [Police and criminal justice policy]

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.

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.
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TECHNICAL COMMENTS

Article 24

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 ¹.

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 ² applied, as a non-legislative act, to the implementation of legislative acts and certain specific provisions of the Constitution.

¹ *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, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods".*

² *See footnote 3.*

The definition of a European decision – again in line with Working Group IX's conclusions corresponds to the definition in Article 14 ECSC¹. Unlike the definition in Article 249², 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 7³ 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.

Article 25

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.

¹ *The second paragraph of Article 14 ECSC specifies that "decisions shall be binding in their entirety".*

² *The fourth paragraph of Article 249 TEC specifies that "a decision shall be binding in its entirety upon those to whom it is addressed".*

³ *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).*

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.

Article 26

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 110¹.

¹ *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".*

Article 27

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.*

Article 28

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 TEC¹.

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.

¹ *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."*

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.

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).

Article 32

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 TEC¹.

¹ *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."*

Article 33

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.

