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Simply Simplification?

The Proposal for a Hierarchy of Legal Acts

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PREFACE

Sieps, the Swedish Institute for European Policy Studies, conducts and promotes research, evaluations, analyses and studies of European policy issues, with a focus primarily in the areas of political science, law and economics.

Sieps has commissioned a number of reports relating to issues that, in the opinion of Sieps, will be of importance in the upcoming intergovernmental conference. The reports will be dealing with a range of constitutional, procedural and material questions. Each report will outline the key principal problems of the issue area, the work and the proposals of the Convention and analyse these proposals from clearly stated assumptions or aims and finally to be firmly grounded in the academic debate. The reader shall consequently be able to get an overview of the state of the art as well as a comprehensive introduction to the issues in question.

One of the missions of the Institute is to act as a bridge between academics and policy-makers and one of the primary aims of these reports is to build this bridge. Furthermore, in a broader sense the reports shall contribute to increased interest in current issues in European integration as well as increased debate on the future of Europe.

Tomas Dahlman
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SIMPLY SIMPLIFICATION? THE PROPOSAL FOR A HIERARCHY OF LEGAL ACTS

1 INTRODUCTION

1.1 Question

The report will dicuss the proposal for a hierarchy of legal acts as that has resulted from the work of the European Convention. One objective with this proposal is to reduce the number of legal instruments and give them names which are readily understandable to the public. But the content of the proposal go far beyond that pedestrian objective. In order to fully understand the implications of the proposal it will be placed in a legal and, indeed, political context. This will show that the rather technical and boring-looking proposal belies its appearance: highly controversial issues are at stake which are of central concern in the debate on the future European Union.

1.2 Outline

The report will start with a brief summary followed by conclusions (Part 2). The main body of text is divided in three parts. In the first of these, the factual situation underlying the proposal for a hierarchy of legal acts is explained (Part 3). Thereafter, an attempt is made to identify the political interests at stake and the positions taken by the leading actors: the Council and the Governments, the European Parliament and the Commission (Part 4). Finally, the work of the European Convention leading up to the current proposal will be examined (Part 5).

2 SUMMARY AND CONCLUSIONS

2.1 Summary

In close to all fields of co-operation covered by the EC Treaty, the formal competence to adopt legislation has been assigned with the Council which must normally collaborate, in one way or another, with the European Parliament. Likewise, the formal competence to prepare the necessary proposals – the right to initiate legislation – has been assigned with the Commission. The Commission has also been assigned with a rather extensive competence to monitor the application of the legislation at the national level. But over the years it has become clear that the reality is a lot more complex than suggested by the above scheme for distribution of competence. In this report focus is set on the fact that a substantial part of the responsibility for adoption of legislation is being exercised by the Commission subject to delegation of powers.

In order to appreciate the full significance of the existing arrangement for delegation (Article 202) it should be noted that it is subject to two qualifications: that the Council may reserve the responsibility for exercise of these powers to itself (in "specific" cases) and that the Council may require the Commission to work together with committees representing the national administrations (comitology). The basic idea is that the committees shall ensure the Governments continuous influence and provide them with formal mechanisms of political control. Today there are more than 244 such committees in operation througout all fields of co-operation.

Unsurprisingly, delegation and comitology has come to give rise to much controversy within the European Community and Union. To sum up, briefly, a long development, it may be concluded that the Council and the Commission seem to be in full agreement that there is a need, for efficiency, to make full use of delegation. But the European Parliament is very hesitant. The reason is that delegation may involve matters of political significance and that the European Parliament has no real access to mechanisms of control. Despite its protests, more and

more measures are being adopted by the Commission subject to delegation. The response from the European Parliament is to block, or threat to block, new initiatives.

At present, the need to make full use of delegation is more pressing than ever. But this, it seems, will only be possible if concessions are made to the European Parliament. During the last ten years a number of solutions has been advanced. The more ambitious ones have been presented in the form of a proposal for a hierarchy of legal acts which distinguishes between acts adopted by the legislator and acts adopted by the executive. This is also the way in which the matter has now been approached by the European Convention. Under the guise of 'simplification', a new proposal has been presented which envisages that the Council's role will be consumed by that of 'the legislator' and clearly separated from – the executive: – the Commission.

2.2 Conclusions

A procedural reform intended to make 'the legislator' delegate more

The proposal for a hierarchy of legal acts stretches far beyond mere simplification and must, primarily, be appreciated for its ambition to encourage the legislator to look solely to the "essential elements" and to delegate more to the executive. The ambition is far from new. The trick, this time, is to style the most controversial group of acts currently adopted under the arrangement in Article 202 a 'new' type of delegated acts. But this is misleading. The important difference relates, not to substantive scope, but to the mechanisms for political control. It is concluded, therefore, that the proposal for a hierarchy of legal acts, if adopted, will have the effect of bringing about a procedural reform. The implications of this reform are far-reaching.

Perhaps most obviously, the proposal for a hierarchy of legal acts resulting from the work in the European Convention seeks to delimit the legislative acts which establish the "essential

elements" of an area. Like before, these acts will require negotiations between the Governments, within the Council, and, then between the Council and the European Parliament. All other matters (i.e. everything but the essential elements) shall be possible to deal with in non-legislative acts adopted under simplified procedures.

With respect to substantive scope, the distinction between legislative acts and non-legislative acts amounts to nothing more than a codification of the existing situation: the non-legislative acts are those currently covered by the notion of implementation (see *infra* 3.1). For this reason, the proposal must primarily be appreciated for its ambition to "encourage the legislator to look *solely* to the essential elements of an act and to delegate the more technical aspects to the executive" (emphasis added). The ambition is far from new (see *infra* 3.1 and 4.1).

The trick, this time, is to style the most controversial group of measures currently covered by a very wide notion of 'implementation' – those which supplement or amend the non-essential elements of legislative acts – a new subcategory to non-legislative acts: the delegated acts. But this is misleading. The matters to be dealt with in delegated acts are already dealt with in acts adopted under the arrangement in Article 202. It is not difficult to find examples (see *infra* 5.2 The Report of the Working Group). Clearly, the fact that the new acts are not so new is something which an elite within the European Convention is well aware of but probably not the majority of members.

The important difference between the existing type of delegated acts and those foreseen by the European Convention relates to procedures and, in particular, the mechanisms for political control. Today, the acts are adopted, either by the Council itself (in "specific cases") or, most commonly, by the Commission subject to comitology and the most restrictive procedure: the regulatory committee procedure. If the proposal is successful, in the future, many of these acts will be adopted by the Commission alone (those which supplement or amend non-essential

elements). Against that background, it must be concluded that the proposal for a hierarchy of legal acts stretches far beyond mere 'simplification' and that it will have the effect of bringing about a fundamental reform of the arrangement in Article 202. This, indeed, is what the European Parliament and the Commission have always asked for but the Governments rejected.

An ambiguous and inconsistent terminology

> The proposal for a hierarchy of legal acts is quite attractive from a structural point of view. But there are several problems. Perhaps most strikingly, the proposal is based on an ambiguous and rather inconsistent terminology. This is the case with the re-naming of some existing instruments and, in particular, with the distinction between 'delegated' and 'implementing' acts. The fact that the substantive difference between these acts is not clarified will be problematic since they entail very different types of mechanisms for control: it is likely that the Commission will have much discretion to decide itself whether it is more advantageous to style its acts as delegated or merely implementing.

Quite clearly, there is much support for the submission that the Council and the European Parliament will have to focus their own efforts and make better use of the possibility to delegate to the Commission. This in particular so in the light of the imminent enlargement and a radical increase in the number of interests represented in the Council (even if the Council will learn to enforce voting, in the future qualified majority will require greater support than unanimity today). But experience shows that the potential for full use of the possibility to delegate is hampered by political concerns, within both the Council and the European Parliament. Therefore, any proposal hoped to encourage them to make better use of the possibility to delegate will only be successful if it can satisfy these concerns.

The proposal of the European Convention is to introduce a hierarchy of legal acts based on the idea of a clear-cut separa-

tion of powers. Here, the label 'implementing acts' is reserved for the less controversial group of acts that the Commission may be authorised to adopt. The principal responsibility for implementing acts rests with the Member States rather than the Council and the European Parliament (the legislator). As argued, therefore, it is reasonable that these acts continue to be subject to comitology (defined as "monitoring by committees made up of representatives of the Member States"[1]). The most controversial type of acts – those which are intended to release the Council and the European Parliament from some of their legislative burden – are branded 'delegated acts'. Here, the reasoning with respect to control is the reverse: since the principal responsibility for delegated acts rests with the Council and the European Parliament (the legislator), comitology is inappropriate and is replaced, therefore, by a new type of mechanisms of control operated by the Council and the European Parliament on equal conditions.

From a logical or, at least, structural point of view, the proposal of the European Convention is quite attractive. But, unfortunately, there are many problems with respect to its function. Perhaps most strikingly, the proposal is based on an ambiguous and rather inconsistent terminology. If the proposal is adopted, this will inevitably cause problems. An example can be found in the re-definition of legal instruments: the new 'laws' would have the same legal effect as 'regulations' and, seemingly, also 'decisions' (see *infra* 5.2 The Report of the Working Group). There are several other examples. The most unsatisfying ones relate to the distinction between delegated acts and implementing acts.

It may be noted, first, that the word 'delegated' relates to the origin of an act and that the word 'implementing' relates to its function. In principle, the envisaged implementing acts will also be delegated (or, in other words, acts resulting from a conferral of powers). Therefore, if an attempt should be made to di-

[1] See, in particular, the Praesidium's Draft of Articles (*infra* note 81), at p. 17.

stinguish between these acts, it would be more consistent and, indeed, clear if delegated acts were also given a label which would relate to their function (for example 'complementary acts'). But the confusion with respect to the distinction between delegated acts and implementing acts go far beyond their names into their substance.

None of those who have had a decisive influence over the current proposal has managed to come up with anything but a negative definition of non-legislative acts (i.e. acts not containing the essential elements of an area) and none of those has managed to clarify what the substantive difference will be between delegated acts and implementing acts. This is problematic since the two types of acts entail fundamentally different procedures. If the proposal is adopted, it is likely that the Commission will have considerable discretion to pick and chose: to decide itself whether it is more advantegous to style its acts as 'delegated' or merely 'implementing'. Whatever it will chose in a given situation, there will always be someone – the European Parliament, the Council or a Member State (Government) – who can make this a reason to bring a legal action for annulment to the Court of Justice.[2]

The new mechanisms of control: operative disadvantages

The problems with respect to terminology are added to by operative disadvantages. Delegation is not only an inter-institutional matter but also, and perhaps primarily, an inter-governmental matter. Therefore, to abolish comitology in the context of delegated acts (and reduce it in the context of implementing acts) will deprive the Governments of their most valuable means for control and continuous influence. This, in turn, is likely to discourage rather than encourage them to make effective use of delegation. In comparison with comitology, which is very much based on the idea that any disagreements are sorted out already at the stage of

[2] In accordance with the procedure currently provided for in Article 230 of the EC Treaty.

drafting, the new mechanisms for control are a lot less flexible and, probably, quite difficult to operate.

The legal or technical problems are added to by operative disadvantages. In order to fully understand these problems it should be recalled that delegation is not only an inter-institutional matter but also, and perhaps primarily, an inter-governmental matter. The history of the Union tells us that delegation is not the produce of a constitutional choice but of a pragmatic approach to the need to manage an inability to agree within the Council (see *infra* 4.1). The same history tells us that delegation had never been permitted to become what it is without comitology (see *infra* 3.2 and 4.1).

To abolish comitology in the context of delegated acts for the reason that committee-members are representatives of the Member States and not of the Council (whose members are representatives of the same Member States) is unnecessarily formalistic and rather strained. Both committee-members and members of the Council are designated by the Governments and, ultimately, it is the interests of the Governments that they are all set to protect (cf. *infra* 3.3). This, in fact, explains why comitology was invented in the first place. To abolish comitology in the context of delegated acts (and reduce it in the context of implementing acts) will deprive the Governments of their most valuable means for control and continuous influence. This, in turn, is likely to have a negative effect on their readiness to entrust the Commission with powers to adopt delegated acts. If so, the reform will fail in its ambition to encourage the legislator to delegate more.

Of course, one must not ignore the fact that the proposal of the European Convention provides of use of a new type of mechanisms of control. This, indeed, is the most significant novelty (see *infra* 5.2 The Praesidium's Draft Articles). The main advantage with the new type of mechanisms is that it seems to satisfy the European Parliament's demand for equality and, at the same time, gives the Governments a feeling that the Coun-

cil will not loose control. But compared with comitology, which is very much based on the idea that any disagreements are sorted out already at the stage of drafting, the new mechanisms are a lot less flexible and, probably, quite difficult to operate. Essentially, they all leave 'the legislator' with a right only to react but not to participate at the stage of drafting. This may lead to an increasing number of situations where the need is felt to let the mechanisms of control enter into force (cf. *infra* 3.3) with a resulting loss of time. Furthermore, the mere likelihood that the mechanisms of control will enter into force will cause both legal uncertainty and political unrest.[3]

A highly political exercise

The proposal for a hierarchy of legal acts evades the crucial fact that there is a huge grey-zone between the two extremes "essential elements" and "more technical aspects". Both delegated and implementing acts may very well concern matters which are felt to have political implications. This, indeed, is a matter whish deserves to be taken seriously. But it does not justify a reform where the responsibility of the national administrations within comitology is automatically transferred to the Commission: there is an obvious risk that the role of national experts and bureaucrats will only be taken over by other experts and bureaucrats (who might be even less suited to participate in political decision-making). Therefore, the proposal ought not be adopted before it is known on what political or idelogical ground the main beneficiary, the Commission, can claim a right to

[3] In this respect the possibility to prescribe that provisions of delegated acts will have a limited period of duration (sunset clause) stands out. Accordingly, it will be possible to build up a new legal regime during several years, which states, citizens and business shall adapt to, and then make the continous existence of that regime dependent upon the ability of both the Council and the European Parliament to take a new affirmative decision (presuming that they are satisfied with the way the Commission has handled its responsibility). A real example if this dilemma can be found in the context of the so called Lamfalussy-process and the reform of the securities market (see *infra* 4.2).

exercise powers of political decision-making a lot more autonomously than today.

Yet another problem, of political and even idelogical significance, relates to the vagueness with respect to the substantive scope of delegated acts. As hoped by the European Convention, these acts "could encourage the legislator to look solely to the essential elements of an act and to delegate the more technical aspects to the executive" (see *infra* 5.2).[4] But this evades the fact that there is a huge grey-zone between the two extremes 'essential elements' and 'more technical aspects'. The existing forms of delegated and, indeed, implementing acts, may very well concern matters which are felt to have political implications. This, indeed, is the key to understanding why:

- the Council has only been prepared to delegate subject to comitology and often insisted on the most restrictive procedure: the regulatory committee procedure;
- the Council is sometimes unable to agree to delegate and prefers to reserve the responsibility to itself;
- the European Parliament is objecting so stubbornly: the way it sees things, the normal procedures for adoption of legislation are currently being drained by a systematic transferral of important matters to simplified procedures.

Naturally, the existence of such a grey-zone should have been admitted when the members of Working Group sat down to come up with their proposals for simplification. But, for some reason, the Working Group and, indeed, the Praesidium preferred not to address the grey-zone and, thus, the most central aspect of a long-lasting inter-institutional controversy (see *infra* 4).

The most forceful criticism which can be made against comitology and the existing arrangement for delegation in Article 202

[4] See Final Report of Working Group IX (*infra* note 75), at p. 9. See also the Praesidium's Draft of Articles (*infra* note 81), at p. 3: "The aim is to encourage the legislator to concentrate on the fundamental aspects, preventing laws and framework laws from being over-detailed."

is not that it grants the national administrations a privileged position in the adoption of acts which concern 'the more technical aspects' of legislation but that it gives experts and bureaucrats an effective right to participate in political decision-making. This, indeed, is a matter which deserves to be taken seriously. But the criticism against comitology does not justify a reform where much of the responsibility of the national administrations is automatically transferred to the Commission. An obvious risk with this is that the role of national experts and bureaucrats will only be taken over by other experts and bureaucrats (who might be even less suited to participate in political decision-making).

The above reasoning supports the conclusion that simplification, as that has been approached in the European Convention, is a highly political exercise which is bound to have serious repercussions on the institutional balance (see *infra* 5.2 The Report of the Working Group). Therefore, the core proposal for a hierarchy of legal acts ought not be adopted before some of the 'big' questions have been answered. In particular, there is a need to know on what political or idelogical ground the proposal's main beneficiary, the Commission, can claim a right to exercise powers of political decision-making a lot more autonomously than today.

A sufficient solution

Since the Council and the European Parliament value different functions, it is a mistake to search for a new type of mechanisms of control over delegation which would apply to them equally. Instead, they would both have a lot to win from keeping the mechanisms separated. An appropriate solution would be to maintain comitology but to strengthen the European Parliament's possibility to react. Efforts are already being made to ensure its right to be kept informed. This should be supported through the inrtroduction of a limited right of call-back. Even if the solution is not ideal for anyone, it would be a realistic compromise which both the European Parliament and the Council should be able to accept as sufficient.

The merits of the European Convention's proposal for a hierarchy of legal acts are that it clarifies a number of existing practices and that it seeks to establish an arrangement for delegation of powers which can encourage both the Council and the European Parliament to focus their negotiations on essential elements. The most serious flaws in the proposal are caused by oversimplification – a wish to clarify more than absolutely needed – and overambition with respect to (ideo-)logical thinking. If this is not corrected before the proposal is passed on to the Intergovernmental Conference, the debate is bound to reopen. For that reason, in particular, the question should be addressed, finally, if there are any other solutions than that envisaged by the European Convention in the current proposal? The answer, of course, is yes: there are always other solutions. But which of these that is most appropriate depends upon what one wants to achieve.

Here, focus will be set on the ambition to encourage both the Council and the European Parliament to make full use of the possibility to delegate (rather than to make the system of legal acts readibly understandable to the public or to guarantee a clear-cut separation of legislative and executive powers). The inter-institutional controversy shows that it is very difficult to find a solution which will please all parties (see *infra* 4). But those who must be able to agree are the Council or the Governments and the European Parliament. At present, the most difficult matter to settle between the two of them is that of mechanisms of political control. Clearly, the European Parliament will never agree to make full use of the possibility to delegate, if it is not given an effective right to exercise its responsibility for political supervision.

It is submitted that it is a mistake to search for a type of mechanisms which would apply equally to the Council and the European Parliament. The main reason for this is that they value different functions. A major advantage with comitology is that it does not treat the Council as one but gives each Government a feeling of control and, indeed, participation. Like it or not but this may be a precondition for common action. But that formula

would not work for the European Parliament. If the European Parliament is not treated as one, how should it be treated? For this reason, in particular, the Council and the European Parliament would both have a lot to win from keeping their respective mechanisms of control over delegation (and implementation) separated. This leads to the conclusion that it would be an appropriate solution to maintain comitology but strengthen the European Parliament's possibility to react if it believes that the Commission is exceeding its powers. Efforts are already being made to ensure that the European Parliament's right to be kept informed is respected. This should be supported through the introduction of a limited right of 'call-back' (which it would operate alone). Even if this solution is not ideal, neither from the viewpoint of the European Parliament nor from that of the Council, it would be a realistic compromise which they should both be able to accept as sufficient (cf. *infra* 4.2).

3 LEGISLATION AND DELEGATION

3.1 Article 202: an arrangement for division of responsibility

In close to all fields of co-operation covered by the EC Treaty, the formal competence to adopt legislation has been assigned with the Council which must normally collaborate, in one way or another, with the European Parliament.[5] Likewise, the formal competence to prepare the necessary proposals – the right to initiate legislation – has been assigned with the Commission. The Commission has also been assigned with a rather extensive competence to monitor the application of the legislation at the national level. But over the years it has become clear that the reality is a lot more complex than suggested by the above scheme for distribution of competence.[6] In the following, focus will be set on the fact that a substantial part of the responsibility for adoption of legislation is being exercised by the Commission subject to delegation of powers.

An early expression of this division of responsibility can be found in a judicial ruling from 1970 where the Court of Justice explained that it was not necessary that all the details of legislation were established under normal procedures but that the Council could "delegate to the Commission an implementing power of appreciable scope" (which enabled it to adopt legislation of a general nature).[7] A later expression can be found in the reform of the EC Treaty introduced by the Single European Act in 1987. The main objective of this reform was to speed up the

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[5] It should be noted that in the legal sense also acts adopted under the co-decision procedure are acts adopted by the Council. This follows directly from the wording of the various legal bases laid down in the EC Treaty ("the Council, deciding in accordance with the procedure referred to in Article 251"). See also Case C-378/00 Commission v European Parliament and Council; and Case C-259/95 European Parliament v Council (*infra* note 39).

[6] See, for example, Farrell, H. and Héritier, A., The Invisible Transformation of Codecision: Problems of Democratic Legitimacy (Sieps 2003:7).

[7] See Case 25/70 Einfuhr- und Vorratsstelle für Getreide und Futtermittel v Köster, Berodt & Co [1970] ECR 1161, paragraphs 6 and 9.

process for adoption of legislation by minimising the risk that situations would occur in which one or a few Governments could block decision-making in the Council. Parallel to an extension of the possibility to have recourse to voting by qualified majority a rule was introduced which stated that the Council should no longer only be permitted but *obliged* to "confer... powers for the implementation of the rules which [it] lays down" on the Commission. Today that rule is found in Article 202 of the EC Treaty.[8] If complied with, the rule means that the Council, in its legislation, will only seek to establish a basic framework and, then, explicitly authorise the Commission to prepare and adopt the additional legislation needed to give that framework its operative meaning.

In order to appreciate the full significance of the rule laid down in Article 202 it should be noted that it is subject to two qualifications. The first is that the Council may reserve the responsibility for exercise of implementing powers to itself, a possibility which is only open in "specific" cases.[9] The second qualification is that the Council may impose "certain requirements" on the Commission. In practice this provides the formal basis for a systematic use of committees which obliges the Commis-

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[8] Prior to the renumbering of the EC Treaty (1999) the rule was found in Article 145. The relevant parts of Article 202 read: "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."

[9] See, for example, The Better Law Making Report 1997, COM (97) 626 final, at p. 2; and Commission Communication to the Council of 10 January 1991: conferment of implementing powers on the Commission (SEC (90) 2589 final), at p. 8. According to the Court of Justice, the Council will have to explain the grounds for a decision to reserve implementing powers to itself. See, for example, Case 16/88 Commission v Council [1989] ECR 3457, paragraph 10; and Case C-240/90 Germany v Commission (*infra* note 10), paragraph 39.

sion to act in close co-operation with the national administrations. The implications of this will be explained below (se *infra* 3.2).

As repeatedly stated by the Court of Justice, the solution embodied in Article 202 rests on the idea that it is possible and, indeed, recommendable to "distinguish between rules which, since they are *essential* to the subject matter envisaged, must be reserved to the Council's power, and those which being merely of an *implementing* nature may be delegated to the Commission" (emphasis added).[10] Clearly, this idea has many similarities with national constitutional law where the existence of a clear hierarchy of legal acts makes it possible to distinguish between the different types of legal acts that stem from the legislative authority and those that stem from the executive.

But despite such similarities one must be careful when comparing acts adopted by the Council (in collaboration with the European Parliament) with those of a national parliament and acts adopted by the Commission with those of a national government. In Article 249 of the EC Treaty, listing those instruments that may qualify as legislation, there is no indication that it is intended to be read as a principle of separation of powers or correspond to a hierarchy which, in the legal sense, would make acts adopted by one institution superior to those of another. Instead it is explicitly provided that the Commission may make use of the same instruments as the Council and the European Parliament and that the legal effects of those instruments are the

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[10] See, for example, Case 25/70 Einfuhr- und Vorratsstelle für Getreide und Futtermittel v Köster, Berodt & Co (*supra* note 7); and Case 240/90 Germany v Commission [1992] ECR I-5383, paragraph 36.

[11] See, for example, Case 188-190/80 France et al. v Commission [1982] ECR 2545, paragraphs 5 and 6. Here the argument was advanced (by the British Government) that directives adopted by the Commission were not of "the same nature" as those adopted by the Council: only the latter could contain general legislative provisions and the former should merely deal with a specific situation. The argument was not accepted by the Court. In its view it followed from Article 249 of the EC Treaty that "the Commission, just as the Council, has the power to issue directives in accordance with the provisions of the Treaty."

same.[11] This means, for example, that acts adopted by the Commission can claim 'direct effect' and 'supremacy' as forcefully as acts adopted by the Council.[12]

Of course, the fact that the same type of instruments may be used with the same legal effects does not mean that there is not a qualitative difference with respect to content and that matters dealt with by the Council are not of another calibre than those dealt with by the Commission. On the contrary, this must be seen as a logical consequence of the distinction between 'essential' and 'implementing' rules. But it must not be forgotten that this distinction is not so easy to uphold in practice, since the meaning of these two notions is uncertain. Today, the closest one gets to a general definition is the Court's explanation that the classification of rules as essential to the subject matter "must be reserved for provisions which are intended to give concrete shape to the fundamental guidelines of Community policy."[13] But this includes a political evaluation which the Court itself has been reluctant to make. The conclusion this leads to is that the potential scope of implementing rules is not so much determined by legal criteria as by political necessity and, therefore, that it can only be ascertained through a careful analysis of each individual case.

3.2 A close co-operation with the national administrations

It has been emphasised, above, that the rule laid down in Article 202 expects and, indeed, requires the Council to transfer a considerable part of its responsibility for adoption of legislation to

[12] This, indeed, was confirmed by the spectacular Solange-ruling of 1987. Here the German contitutional court, the *Bundesverfassungsgericht*, refrained from examining whether Commission Regulation 3429/80/EEC of 29 December 1980 adopting protective measures applicable to imports of preserved mushrooms (OJ 1980 L 358/66) was not in conflict with the German constitution. See Wünsche Handelsgesellschaft [1987] 3 CMLR 225.

[13] See Case C-240/90 Germany v Commission (*supra* note 10), paragraph 37.

the Commission. As manifested in the discussions which led to the reform introduced by the Single European Act, this is above all hoped to encourage the Council to apply a greater selectivity in the choice of cases for action.[14] Apparently, it was felt that the Council was attempting to make far too much itself and that it was necessary, therefore, to seek to distinguish better between major and minor issues so as to make it possible to distribute the burden to others. It must be observed, however, that the rule laid down in Article 202 entails also a possibility for the Council, when it confers powers on the Commission, to impose "certain requirements". As noted introductorily, this offers the legal basis for a systematic use of committees which obliges the Commission to act in close co-operation with the national administrations. The underlying idea is that this shall ensure the Council and the Governments continuous influence and provide them with formal mechanisms of political control.

The idea that delegation to the Commission could be accompanied by the requirement that it must work together with committees was formalised for the first time in 1961, when the initial attempts were made to establish a common commercial policy.[15] Already one year later it became the "balanced solution" for future management of the common agricultural policy[16] and in 1969 it was classified as a "solution in principle" for progress with respect to the free movement of goods.[17] Following the introduction of Article 202 the requirement that

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[14] See, for example, the Report of the Committee of Three Wise Men (*infra* note 31), at pp. 46-47 and 73.

[15] See Council Decision of 9 October 1961 concerning a consultation procedure in respect of the negotiation of agreements concerning commercial relations between Member States and third countries (OJ 1961 71/1273).

[16] See, for example, Council Regulation 19/62/EEC of 4 April 1962 on the progressive establishment of a common organisation of the market in cereals (OJ 1962 30/933).

[17] See Council Resolution of 28 May 1969 on the adaptation to technical progress of the Directives for the elimination of technical barriers to trade which result from disparities between the provisions laid down by law, regulation or administrative action in Member States (OJ 1969 C 76/8).

the Commission must work together with committees is now generally applied in all fields of co-operation and there are more than 244 committees in operation.[18]

During the period before the reform introduced by the Single European Act much time was spent in the Council to debate the terms of the procedures which regulated the relationship between the Commission and the committees: some Governments favoured procedures which left much room for political discretion and others insisted that more restrictive ones had to be used. In order to come to terms with this, in the discussions which preceded the reform, the solution was arrived at that the Council should only be permitted to choose between a limited number of fixed procedures (cf. *infra* 4.2). This was also the solution embraced by the Single European Act. Therefore, the new Article 202 came to include an explanation that any requirements imposed on the Commission had to 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." The result of this was seen only a few weeks after the entry into force of the Single European Act, with the adoption of Council Decision 87/373/EEC (the First Comitology Decision). This was replaced in 1999 by Council Decision 99/468/EC (the Second Comitology Decision).[19]

The details of the fixed procedures will not be examined in this report. It is sufficient, for present purposes, to note that they all oblige the Commission to discuss the framing of implementing measures with representatives of the national administrations within a committee which is also expected to deliver a formal

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[18] See Commission Report of 20 December 2001 on the working of the committees during 2000, COM (2001) 783 final, at p. 8.

[19] See, respectively, Council Decision 87/373/EEC of 13 July 1987 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ 1987 L 197/33); and Council Decision 99/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ 1999 L 184/23).

opinion. The essential difference between the procedures is found in the coerciveness of that opinion. Under the most restrictive procedure, the regulatory committee procedure, anything but a positive opinion will stop the Commission from proceeding and force it to place the matter in the hands of the Council.

The expression commonly used to denote the relationship between the Commission and the above type of committees is 'comitology' (French: *comitologie* and German: *komitologie*).[20] It is not completely clear where that expression comes from and a good many jokes have been made about its origins. One explanation which seems to circulate in the corridors of the European Parliament is that it has developed from the French expression *kremlilogie*, used as a depreciatory label for a highly politicised bureaucratic system. Entirely different from this explanation, with its obvious link to the word committee, is the one advanced in the British House of Lords: that comitology is "a Brussels-created word deriving, not from the word committee but from the word 'comity'."[21] That, in turn, is a Sixteen Century term for courtesy which is used in diplomatic circles in the phrase 'comity of nations' (i.e. the mutual recognition among nations of one another's laws, customs and institutions).[22] But even if both these explanations may be appropriate today, none of them can claim the same historical accuracy as the one which traces the expression back to a classical parody from 1958:

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[20] The spelling follows the usage of the Court of Justice, first established by Advocate General Marco Darmon in Case 302/87 European Parliament v Council [1988] ECR 5616, at p. 5627.

[21] See Baroness Park of Monmouth in House of Lords Debate of 1 November 1997, column 118.

[22] See the Oxford Concise Dictionary of English Etymology (Oxford University Press 1996).

[23] See Northcote Parkinson, C., Parkinson's Law or The Pursuit of Progress (John Murray 1958), at p. 31. It may be pointed out that in the functional, rather than etymological, sense the term comitology is not intended to cover all types of committees with which the Commission interact. For a general study, see Larsson, T., Precooking in the European Union – the World of Expert Groups, Ds 2003:16 (at internet: regeringen.se/eso).

Parkinson's Law.[23] Here, the term comitology is introduced to denote the study of public committees and the way they operate. According to the author's colourful description:

> The life cycle of the committee is so basic to our knowledge of current affairs that it is surprising more attention has not been paid to the science of comitology. The first and most elementary principle of this science is that a committee is organic rather than mechanical in its nature: it is not a structure but a plant. It takes root and grows, it flowers, wilts, and dies, scattering the seed from which other committees will bloom in their turn. Only those who bear this principle in mind can make real headway in understanding the structure and history of modern government.

3.3 Comitology: a conflict of interests?

Since comitology provides the Council and the Governments with formal mechanisms for political control over the Commission, it is often thought to manifest a conflict of interests. This, indeed, is a fundamental assumption for many of those who are most critical.[24] Importantly, the same assumption is also central for those who promote comitology: the more sensitive the matter involved, the greater the demand that a committee procedure should be used which will make it possible to intervene and correct the final result. An illustration of this can be found in the Swedish Government's Guidelines for Management of EU-affairs.[25] Here it is explained that the different committee procedures "reflect the division of powers between the Council and the Commission" and that the choice of one procedure

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[24] A leading example, in that respect, can be found in the textbook on EU law by Kapteyn and VerLoren van Themaat. Here the fact that "committee procedures afford a means of ensuring that the Commission takes account of national views" is taken to mean that they are also "a means of tying down its freedom to act in the wider Community interest..." See Kapteyn, P.J.G. and Verloren van Theemaat, P., Introduction to the Law of the European Communities (Kluwer Law International 1990), at pp. 180 and 243–244.

[25] See Riktlinjer för handläggningen av EU frågor, UD PM 1999: 1–8, at pp. 95–100 (at internet: regeringen.se).

rather than another is decisive for the possibility to exercise "a direct influence" over the Commission's work. For that reason, the Swedish Government's position with respect to the choice between the different procedures should be established on a case-by-case basis after an analysis has been made of "the Commission's capability and possibility to make use of the resources intended for a specific purpose in a manner which is beneficial to Swedish interests."

But even if there is much support for the assumption, in principle, that comitology entails a conflict of interests, in practice, it is characterised by the opposite. Already in 1968 findings were presented which demonstrated that the role of committees was less cramping than feared: of more than 1,000 opinions which had been issued that far only 5 had not been positive.[26] The findings were confirmed by the Commission itself in 1989 in a special report which stressed that "instances of [it] having to refer proposed measures to the Council in the absence of support from national experts are virtually non-existent."[27] A more recent example can be found in a report from 1998 where the Commission explained that only in 32 of 3000 situations dealt with under the regulatory committee procedure during the period 1993–1998 had "difficulties" arisen over the adoption of a decision.[28] The conclusion this leads to is remarkable: comitology does not give rise to the type of conflicts of interests many expect or fear but appears to be "a fruitful collaboration between [the Commission] and those Member State administrations which are most often faced with having to apply, on the ground, the implementing measures adopted at Community level."[29]

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[26] See the Jozeau-Marigné Report (*infra* note 37), at p. 263.

[27] See Commission Report to the European Parliament of 28 September 1989: delegation of executive powers to the Commission, SEC(89) 1591 final, at pp. 10-11.

[28] See Commission Document SG.B1/D(98)34174. The findings with respect to the management committee procedure were more or less identical.

[29] See Ciavarini-Azzi, G. (Chief Adviser of the Commission Secretariat-General), Comitology and the European Commission, Comitology and the European Commission, in Joerges, C. and Vos, E. (Eds.), EU Committees: Social Regulation, Law and Politics (Hart Publishing 1999), at p. 53.

4 AN INTER-INSTITUTIONAL CONTROVERSY

It has been seen above that the EC Treaty envisages that a substantial part of the responsibility for adoption of legislation is being passed on to the Commission subject to comitology: committee procedures which ensure the Council and the Governments continuous influence and provide them with mechanisms of political control. This provides the formal background to the question of simplification of legislation as that has been approached by the European Convention. But before the work of the European Convention and, indeed, its core proposal for a hierarchy of legal acts is examined, an attempt shall be made to identify the political interests at stake and the positions taken by the leading actors: the Council and the Governments, the European Parliament and the Commission. This, it is submitted, will make it possible to understand current problems and needs.

4.1 The Council: managing the inability to agree

Already from the start it was clear that the Community was bound to find its own ways of functioning and developing. Even if some specific objectives had been formulated beforehand, most notably the establishment of a common market, it was far from clear what this meant and how it should be achieved. The lack of preciseness was not the result of a slipshod preparatory work but of political disagreements. In spite of that a decision was taken to go ahead. Even if old problems would persist, these were now to be dealt with within a new framework by new institutions.

It is submitted that the uncertain destination, with respect both to political objectives and modes of operation, was something which would characterise the Community throughout its existence and, therefore, something with which it would have to learn to live. The motto which was to show the way out of constant disagreements was pragmatism: to postpone any discussion on matters of principle and concentrate on compromise solutions to the specific problems that were most pressing at a

given time. Over the years, however, it became clear that some solutions worked better than others. Therefore, even if it was still regarded as the result of pragmatism rather than a final settlement of matters of principle, a pattern emerged and, paradoxically, without choosing the Community still made its choice.

One of the central components of the pattern which emerged was that of delegation of implementing powers to the Commission and, as an integral aspect of this, comitology. This was born out of the Governments' awareness that they were not able to agree as much as they could agree was needed. Unwilling to choose a clear-cut solution with ideological implications – either to entrust the necessary powers with the Commission or to consolidate the existing prerogatives of the national administrations – a mixed solution was opted for. By providing that the Commission should work in close co-operation with the national administrations, the Governments had not only been able to postpone the discussion on matters of principle but they had discovered a miraculous medicine which would enable them to continue to disagree and still manage.[30]

The general validity of the above logic was to be confirmed again and again. While the Governments' inability to agree only became more evident after the first enlargement in 1973, the use

[30] A leading example can be found in the introduction of the management committee procedure in 1962. Far from all disagreements on matters of principle had been overcome and several governments felt that the last word had not yet been said. But in order to keep up with the tight schedule, an agreement was reached in the Council to postpone further discussion until the end of the transitional period and to decide, then, "in the light of experience" whether the procedure should be retained or amended. See, for example, Article 28 of Council Regulation 19/62/EEC (*supra* note 16). When the time came to decide the Governments no longer found the matter controversial and it was unanimously stated that the procedure should "be retained beyond expiry of the transitional period." See Council Regulation 2602/69/EEC of 18 December 1969 on retaining the management committee procedure (OJ 1969 L 324/23).

of delegation and committees became a condition for living.[31] No better illustration of this can be found than the steady increase in the number of committees. At the start of 1970 the total number of committees was 27; in 1985 the number was 154.[32] The final recognition of the pattern which had emerged came with the Single European Act. Here the mixed solution sprung out of pragmatism was finally given constitutional status through the inclusion into the EC Treaty of the rule that the Council should "confer... powers for the implementation of the rules which [it] lays down" on the Commission (see *supra* 3.1).

Clearly, the rule in Article 202 contained nothing really new but did only codify an existing practice. It is submitted, therefore, that the fact that the Governments still bothered should be seen as a declaration of intent: that there was political agreement to continue to use the possibility of delegation of powers, not less than before but more and also more systematically. Further support for that submission is found in the First Comitology Decision. This was adopted immediately after the rule in Article 202 entered into force (see *supra* 3.2) and was aimed to consolidate existing committee procedures so as to make them more easy to operate.

With the First Comitology Decision the focus of attention was shifted away from the primary function of comitology, to provide a forum for co-operation (between the Commission and the

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[31] The matter was addressed, very clearly, in the Report of the Committee of Three Wise Men: "[w]hen the Community moves into a new area of action States find it difficult to anticipate all of the problems that may arise in execution; apparently small practical implementing decisions could create political difficulties or alter the impact of the policy itself in unforeseen ways. Hence the reluctance of some States to delegate any implementing powers to the Commission unless some kind of emergency procedure for dealing with cases of political difficulty can be agreed. And if anxieties of this kind are not satisfied, no delegation will take place at all." See the Report of the Committee of Three Wise Men, in Bulletin EC 11-1979, at p. 47.

[32] See the list of committees included in the General Budget of the European Community for the financial year 1984 (OJ 1984 L 12/1), at pp. 351–354; and the list in the Jozeau-Marigné Report (*infra* note 37).

national administrations and, even more importantly, between the national administrations *inter se*) towards its secondary function: to provide formal mechanisms of control. Judging from the text of the Decision, it looked as if comitology was now based on a conflict of interests between the Commission and the Council. This was deceptive. The relationship between the Commission and the committees with which it was required to work was surprisingly friendly (see *supra* 3.3) and the conflicts comitology was intended to counteract, or at least manage, were, primarily, those which arose within the Council itself, between the Governments.

The continuous significance of the arrangement laid down in Article 202 was affirmed during the years that followed. Perhaps most striking in that respect was the internal market programme, based on the adoption of a rather extensive package of legislation before the end of 1992.[33] Clearly, the relative success of the internal market programme was a result of the fact that there was a strong political support from all Governments combined with effective use of qualified majority voting but also of extensive delegation to the Commission and an interpretation of the notion of 'implementation' which was so generous that it made possible to adapt and even amend basic legislation.[34] The

[33] See Article 14 of the EC Treaty and Commission White Paper on the Completion of the Internal Market, COM(85) 310 final. The programme included 297 time-tabled proposals for the removal of so-called non-tariff barriers to trade: national rules setting differing standards on matters relating to the movement of goods, persons, services and capital.

[34] See, for example, Commission Directive 88/195/EEC of 24 March 1988 adapting to technical progress Council Directive 80/1269/EEC on the approximation of the laws of the Member States relating to the engine power of motor vehicles (OJ 1988 L 92/50); Commission Directive 89/178/EEC of 22 February 1989 adapting to technical progress Council Directive 88/379/EEC on the approximation of the laws, regulations and administrative provisions of the Member States relating to the classification, packaging and labelling of dangerous preparations (OJ 1989 L 64/18); and Commission Directive 90/612/EEC of 26 October 1990 amending Council Directive 78/663/EEC laying down specific purity criteria for emulsifiers, stabilizers, thickeners and gelling agents for use in foodstuffs (OJ 1990 L 326/5).

trick which made such delegation possible was comitology and, in particular, use of the regulatory committee procedure.[35] Apparently satisfied with the rights this offered them to substitute and, sometimes, even block unwanted action, the Governments proved prepared to entrust the Commission with powers wich enabled it to take many of those steps which they themselves had not been able to take before.

It follows from the above that the driving force behind the establishment and spread of comitology was to be found in the Governments' fundamental inability to agree and their painful awareness of the need for common action. This became even more obvious after they had enlarged the circle of interests which had to be reconciled: by admitting new Governments into the Council and, eventually, granting the European Parliament a genuine right to participate. For each new interest which could claim a say in the process for adoption of legislation, the reason to delegate and have matters dealt with under the simplfied procedures of 'implementation' only got more compelling.

4.2 The European Parliament: fearing a sliding in powers

Somewhat paradoxically, it was only the Council (and, therefore, the Governments) who could afford to rely on delegation without loosing control. For its partner in the legislative process, the European Parliament, the situation was entirely different. Already in 1962 a report had been presented in which the chairmen of twelve parliamentary committees expressed their concern at the potential scope of matters dealt with by the Com-

[35] The increasing reliance on the regulatory committee procedure was specifically addressed by the Commission in its Communication to the Council of 10 January 1991 (se *supra* note 9). It may be noted that in 1980 the number of committees operating under the regulatory committee procedure was 41; in 2000 the number was 109. See the List of Committees published by the Commission in Bulletin EC, Supplement 2/80 and the Commission Report of 20 December 2001 on the working of the committees during 2000 (COM (2001) 783 final), at p. 9.

mission subject to comitology.[36] According to that report, there was a risk that matters of a legislative bearing could be adopted in the form of implementing measures and that this would upset the institutional balance.

Only a few years later such suspicions were confirmed when evidence was presented that implementing measures were far from limited to day-to-day management but could very well involve matters of political significance.[37] Quite naturally, this sliding in powers was less difficult for the European Parliament to live with as long as its right to participate in the process for adoption of legislation was limited to that provided for under the old consultation procedure. But after the introduction of the new co-decision procedure the situation became intolerable.

Through the introduction of the co-decision procedure in 1993 the European Parliament was granted a much stronger right to participate in the process for adoption of legislation than it had ever had before: for the first time it was enabled to take an active part in the negotiations on legislation and, if it was not satisfied, block adoption. But nothing had changed with respect to the arrangement for exercise of implementing powers. Therefore, a resolution was adopted in which the European Parliament declared that it was no longer ready to accept that the political responsibility for delegation should rest only with the Council.[38] In particular it was argued that the exercise of implementing powers in those fields were the co-decision procedure applied could not be considered to fall within the scope of Article 202

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[36] See Rapport du 5 octobre 1962 fait au nom du comité des présidents sur le cinquième Rapport général sur l'activité de la CEE, (rapporteur: Arved Deringer), PE Doc 74/62.

[37] See Rapport du 30 septembre 1968 fait au nom de la commission juridique sur les procédures communautaires d'exécution du droit communautaire dérivé (rapporteur: Léon Jozeau-Marigné), PE Doc 115/68.

[38] See European Parliament Resolution of 16 December 1993 on questions of commitology relating to the entry into force of the Maastricht Treaty (OJ 1994 C 20/176). For comments, see Bradley, K., The European Parliament and Comitology: On the Road to Nowhere? (1997) 3 European Law Journal 230.

(since this referred only to "acts which the Council adopts" alone, cf. *supra* 3.2). According to the European Parliament, this, indeed, was an omission which had to be dealt with through further revision of the EC Treaty.[39] Pending that an alternative to the First Comitology Decision had to be adopted which could fill its place in those fields were the co-decision procedure applied.

Not surprisingly, the European Parliament had a rather clear idea of what the contents of the new Decision ought to be. First of all, it should only permit the use of the most liberal form of procedure: the advisory committee procedure (providing for co-operation with the national administrations without formal mechanisms of control). Then, it should grant the European Parliament a legally enforceable right to be informed about matters expected to lead to the adoption of implementing "legislation" and to state its opinion. Parallel to this *droit de regard*, a substitution or 'call-back' mechanism should be introduced which would enable the Council and the European Parliament to agree to repeal implementing legislation (and require the Commission "to formulate a new decision, taking account of any guidelines approved by the two arms of the legislative authority").

To underline its demands, the European Parliament launched an offensive which it had no intention of abandoning until agreement had been reached on an adequate solution. During the first year of operation of the co-decision procedure "the issue was fought out on each individual item of legislation" and disputes over 'comitology' became a central feature of most negotia-

[39] It should be noted that this argument has recently been rejected by the Court of Justice. According to the Court: "Article 202 EC must be held to refer both to measures adopted by the Council alone and to measures adopted by the Council together with the European Parliament under the co-decision procedure." See Case C-378/00 Commission v European Parliament and Council, Judgment of 21 January 2003, paragraph 40. Cf. also Case C-259/95 European Parliament v Council [1997] ECR I-5303, paragraphs 24 and 26.

tions.[40] The precedent was set in the very first matter dealt with under the co-decision procedure: the proposal for a Council Directive on the application of open network provision (ONP) to voice telephony.[41]

As envisaged in the proposal, the Commission should be authorised to determine "the modifications necessary to adapt... the Directive to new technological developments or to changes in market demand" in accordance with an advisory committee procedure. The proposal was backed by the European Parliament but the Council took the position that it had to be amended so as to replace the advisory committee procedure by the more restrictive regulatory committee procedure. At previous occasions, this would have been the final solution. But this time, before the Council could adopt an amended proposal, the co-decision procedure entered into force. Following so called conciliation and a failure to reach a compromise, the Council confirmed its initial position which was rejected by the European Parliament.[42] This was no triumph. Even if the European Parliament – for the first time in history – had been permitted to exercise a decisive influence, much time and energy had been spent on an important proposal which, in the end, was not adopted.

Importantly, it is at this stage of the development, when the European Parliament gets a real say in the process for adoption of legislation, that comitology becomes a truly institutionalised phenomenon. This means, above all, that it was no longer pos-

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[40] See Corbett, R., The European Parliament's Role in Closer EU Integration (Macmillan Press 1998), at pp. 258 and 347 to 348. See also Bradley (*supra* note 28), at p. 238.

[41] See Commission Proposal of 28 August 1992 for a Council Directive on the application of open network provision (ONP) to voice telephony (OJ 1992 C 263/20) and amended Commission Proposal of 7 May 1993 for a Council Directive on the application of open network provision (ONP) to voice telephony (OJ 1993 C 147/12).

[42] See European Parliament Decision of 19 July 1994 on the text confirmed by the Council following the conciliation procedure on the proposal for a European Parliament and Council Directive on the application of open network provision (ONP) to voice telephony (OJ 1994 C 261/13).

sible for the Governments to treat the question of its function and design as a matter of own convenience, without having to consider the interests of others: from now on the combined use of delegation and committees was to entail a lot more than a pragmatic solution for the Governments to manage their inability to agree.

The transformation of comitology was confirmed by the negotiations which led to the adoption of the Second Comitology Decision in 1999. Even if it was not formally obliged to do so, the Council proved prepare to bargain with the European Parliament. The result was far from revolutionary and most, if not all, essential bits of the First Comitology Decision were preserved in the Second. But, at the same time, there were concrete expressions of the fact that all Governments had realised the importance of making concessions. Probably most important, in that respect, was the inclusion of a right for the European Parliament to 'blow the whistle' when felt that the Commission was exceeding its powers. If this happened, the Commission was compelled to re-examine the matter, taking the European Parliament's objections "into account".[43]

Despite the concessions which had been made in the negotiations which led to the adoption of the Second Comitology Decision, the question remained whether the result was sufficient to bring the battle over comitology to an end? It was "a real step forward in comparison with the previous situation" but far from all the European Parliament's demands had been satisfied.[44]

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[43] See Article 8 of the Second Comitology Decision (*supra* note 19); and also Article 5 (5)–(6). See also the Agreement between the European Parliament and the Commission on procedures for implementing Council Decision 99/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ 2000 L 256/19).

[44] See European Parliament Resolution of 17 February 2000 on the agreement between the European Parliament and the Commission on procedures for implementing Council Decision 99/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (based on report A5-21/00).

Therefore, even if some MEP's argued that this was "the end of a saga", there were those who warned that "the issue will no doubt come back in a few years' time."[45]

The current agenda of the European Parliament, and most likely the agenda for the next few years, is not entirely clear. On the one hand, there are signals that the European Parliament will continue to defend its traditional position: to insist on a narrow definition of the notion of implementation and fight comitology. On the other hand, there are also signals that the European Parliament is becoming increasingly aware of the need for pragmatism: to admit the usefulness of wide delegation subject to formal mechanisms of control.

The best illustration of the current situation can be found in the recent controversy surrounding the so called Lamfalussy-process. Following calls that renewed efforts were urgently needed to build an integrated financial market, on 17 July 2000 the decision was taken by the Council to set up a special committee which should examine the conditions for regulation of the securities market. As a result, a procedural reform was recommended which would make speedy adoption of legislation possible. Essentially, the reform was to be based on delegation to the Commission subject to comitology and a regulatory committee procedure (combined with enhanced consultation of market actors). Against the background of previous failures and persistent disagreements within the Council, the conclusion was drawn that there was "no serious alternative available."[46]

The plan for reform was welcomed by the Council and the Commission but before it could be initiated, the approval was needed from the European Parliament (in accordance with the co-decision procedure), something which soon proved proble-

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[45] See, respectively, the statements by Monica Frassoni and Richard Corbett in the Debates of the European Parliament on 16 February 2000 (internet at: europarl.eu.int).

[46] See Final Report of the Committee of Wise Men on the regulation of European securities markets (Brussels 15 February 2001), at p. 8 (at internet: europa.eu.int).

matic. Not surprisingly, the European Parliament feared that the reform would give the Commission and the comitology committee too wide powers and that there was a lack of adequate mechanisms of control. It was only after a one-year deadlock that a compromise was reached. The compromise entailed a clarification of the scope of powers conferred on the Commission and the inclusion of a so called sunset clause: a legal provision fixing a specific date when the delegation is automatically repealed.[47] The practical implication of this solution was that any further delegation beyond that date – and, thus, completion of the reform – will require fresh support from the European Parliament.

The compromise on which the Lamfalussy-process is currently resting shows that the European Parliament is ready to admit the need for pragmatism; to accept delegation and comitology, if it is only granted a real possibility to exercise its responsibility for political supervision. But, importantly, it also shows that the European Parliament has not given up the intention to insist on its old demands. This, indeed, was manifested in the statement made by the European Parliament when accepting the compromise, stressing that it was only a provisional solution pending an amendment of Article 202 at the next Intergovernmental Conference (2004).[48]

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[47] See, for example, Article 24 of amended Commission Proposal of 9 August 2002 for a European Parliament and Council Directive on the prospectus to be published when securities are offered to the public or admitted to trading (OJ 2003 C 20 E/122).

[48] See European Parliament Resolution of 5 February 2002 on the implementation of financial services legislation, (based on report A5-11/02). Here it is explained that the the European Parliament endorses the objective of establishing a securities market as quickly as possible and that it considers "that the requisite measures must be taken to improve the effectiveness of the decision-making process and to speed up legislative procedures, in a manner entirely consistent with the provisions of the Treaties and the inter-institutional balance." But at the same time it it is emphasised "that, according to Article 202 of the EC Treaty, the comitology procedure as set out in Decision 99/468/EC is aimed at the adoption and application of implementing measures by the Commission

4.3 The Commission: mediating in own interest

Whether the fear for what it could do if it was granted full responsibility for the exercise of implementing powers was grounded or not, the Commission immediately understood that without comitology it would have no such powers at all. Therefore, even if it voiced some verbal objection, the Commission soon satisfied itself with a shared responsibility and proceeded to the order of the day. But during the process leading up to the reform introduced by the Single European Act, the Commission's split attitude towards comitology became more pronounced. Here, a political support for extended use of delegation was exploited by the Commission to argue that the time had come to unfetter it from existing constraints and replace the system of case-by-case conferral of implementing powers with a birthright. As proposed by the Commission, an amendment should be made to the EC Treaty, clarifying that it would be permitted to exercise implementing powers without prior authorisation from the Council.[49] Parallel to this, the role of comitology should be rationalised through the introduction of a limited number of fixed committee procedures.[50]

The argument that the time had come to give the Commission an autonomous legal basis for exercise of implementing powers

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in accordance with the relevant provisions of the basic instrument (directive or regulation), and cannot be regarded as a 'simplified' or 'delegated' system for the adoption of 'secondary' legislation by that institution." For an expression of the European Parliament's position within the context of the European Convention, see European Parliament Resolution of 17 December 2002 on the typology of acts and the hierarchy of legislation in the European Union. The Resolution is based on European Parliament Report of 3 December 2002 on the typology of acts and the hierarchy of legislation in the European Union (rapporteur: Jean-Louis Bourlanges), A5-425/02.

[49] See the Commission's proposal to the IGC 1985, in Bulletin EC 9-1985 (point 1.1.16) and Bulletin EC 10-1985 (point 1.1.5).

[50] See, in general, Ehlermann, C-D. (Director General of the Commission Legal Service), The Internal Market Following the Single European Act (1987) 24 Common Market Law Review 361.

did not manage to convince the Intergovernmental Conference. From a practical viewpoint, this seemed to have little significance. Only two years later, the Commission prided itself with the statistical fact that it had "always been able to secure the backing of experts representing the Member States on the various committees."[51] But in spite of that the Commission was deeply concerned from what appears to have been a principal point of view. As rhetorically asked by the Commission, if co-operation with the national administrations was working so well, why did the Council continue to insist on formal mechanisms of control (the regulatory committee procedure was being used not less than before but more[52])?

Parallel to the above the Commission begun to justify its ideas for reform of the arrangement for exercise of implementing powers by reference to the concerns of the European Parliament. In particular, it was argued that the existing mechanisms of control should be replaced by new ones which would allow the Council and the European Parliament to react on equal terms. However reasonable and, indeed, symphatetic that may seem, there are good reasons to be sceptical about the Commission's real intentions.

It is more than evident that the Commission was never very sensitive to the European Parliament's demands. Already at an early stage, concerns were expressed in the European Parliament that an increasing number of matters with a legislative bearing were being dealt with in the form of implementing measures. This was not eased by the fact that the European Parliament had no right to be kept informed about the opera-

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[51] See Commission Report to the European Parliament (*supra* note 27), at pp. 10–11.

[52] See Commission Communication to the Council of 10 January 1991: conferment of implementing powers on the Commission, SEC(90) 2589 final, at p. 11. As explained here: "the Council's tendency, when delegating powers, to attach a blocking mechanism whereby it can prevent a decision being taken has, far from waning, actually grown since the Single Act entered into force."

tions of comitology. The rather insensitive response of the Commission was that the MEPs should not worry: even if it had not been envisaged at the start, the development was normal:[53]

> The powers of the Commission are increasing for a very simple reason which was not foreseen from the start: we have left the period of construction to enter the period of management of common policies. However normal it may be for decision relating to construction to be taken by the Governments in the Council by unanimity, the daily administration of politics relating to tariffs, trade, agriculture, evidently requires an organ with sufficient powers. In agricultural matters one has already had to delegate powers to us which were not written into the Treaty. This is a growing necessity. I do not believe that we can step back since the obvious necessity, by contrast, is to reinforce these powers with reasonable precautions.

It was only in the 1980s – after the European Parliament had learnt to make aggressive use of its budgetary powers – that the Commission proved itself prepared to provide the European Parliament with information about the operations of comitology. Once that point had been passed, however, the Commission soon transformed its vice into virtue and made several 'generous offers.

A recent example of the Commission's attitude with respect to the demands from the European Parliament can be found in its proposal for a Second Comitology Decision. Here the Commission deliberately reduced the idea that the European Parliament should be granted a right to contest implementing legislation (if they felt that the Commission was exceeding its powers) into a formula for reform of the regulatory committee procedure from which only the Commission itself would benefit.[54] It was only

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[53] Speech by Commission President Jean Rey to the European Parliament, in Europe (Agence Europe) 3 October 1968. See also Bulletin EC 12-1968, at p. 65.

[54] The envisaged reform of the regulatory committee procedure did not foresee any possibility to contest an implementing measure other than that left to the committee: only in situations where the committee made use of that possibility could the European Parliament hope to be able to exercise

thanks to the European Parliament's stubborn insistence that the final result was more advantageous.

At this occasion and other when the concerns of the European Parliament were interpreted by the Commission, there were always important nuances which all had that in common that they were favourable to its own original position: much room for exercise of implementing powers and little room for effective use of formal mechanisms of control. Since this is a position which is impossible to reconcile with the concerns of the European Parliament, it is difficult not to arrive at the conclusion that the purported support of the Commission to the European Parliament's cause has not been the result of institutional affinity but of tactical thinking. The full implication of this can only be appreciated in the light of the fact that the Commission's position is not only impossible to reconcile with the concerns of the European Parliament but also with those of the Council.

The most recent and, indeed, undisguised expression of the Commission's position can be found in its White Paper on European Governance.[55] Here the outlines are presented of a model for the Union's future organisation based on a clear separation

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some influence. The practical significance was minimal. Not only were these situations "virtually non-existent" (cf. *supra* 3.3) but if, exceptionally, they did occur, the matter should still not come before the European Parliament by default but only as the result of a decision by the Commission to present a normal proposal for legislation. Cf. the pending Commission Proposal of 11 December 2002 for a Council Decision amending Decision 99/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, COM(2002) 719 final. Also this envisages a reform of the regulatory committee procedure from which only (or at least mainly) the Commission itself would benefit.

[55] See European Governance – a White Paper (25 July 2001), COM(2001) 428 final, in particular at pp. 31 and 34. See also the follow-up Report from the Commission on European Governance of 11 December 2002, COM(2002) 705 final. For an expression of the Commission's position within the context of the European Convention, see Commission Communication of 11 December 2002 on the institutional architecture – For the European Union: peace, freedom, solidarity, COM(2002) 728 final/2.

of powers. As envisaged by the Commission, legislation should be "stripped back to essential principles and a framework setting out how they should be implemented." The legislation should be adopted by the Council and the European Parliament jointly, and the regulations or decisions implementing that legislation should be adopted by the Commission. At a first glance this seems to correspond quite well to the existing situation. But, importantly, the Commission argues that the conditions under which it currently adopts implementing measures would have to be reviewed. In the end, this should lead to a situation where legislation defines the limits within which the Commission carries out its "executive" role and new mechanisms of control allows the "legislature" (the Council and the European Parliament) to monitor the result. The centre-piece of the proposed reform is found in the call for a review of comitology and the arrangement in Article 202. According to the Commission, if its orientations are followed, the need to maintain existing committees will be put in question:[56]

> This adjustment of the responsibility of the Institutions, giving control of executive competence to the two legislative bodies and reconsidering the existing regulatory and management committees touches the delicate question of the balance of power between the Institutions. It should lead to modifying Treaty article 202 which permits the Council alone to impose certain requirements on the way the Commission exercises its executive role. That article has become outdated given the co-decision procedure which puts Council and the European Parliament on an equal footing with regard to the adoption of legislation in many areas. Consequently, the Council and the European Parliament should have an equal role in supervising the way in which the Commission exercises its executive role...

[56] At p. 31.

5 THE PROPOSAL FOR A HIERARCHY OF LEGAL ACTS

5.1 Background

Already in 1984, in its Draft Treaty on European Union, the European Parliament had advanced the idea that the rather complex relationship between legislation and delegation should be sought to clarify through the introduction of a formal hierarchy of legal acts.[57] But the idea was rejected by the Intergovernmental Conference (1985) that led to the Single European Act. Apparently, the Governments felt that a more cautious construction had to be opted for which would make it possible to maintain a flexibile division of responsibility: the result was that manifested in Article 202 (see *supra* 3.1 and 3.2).

The next opportunity for reform came with the Intergovernmental Conference (1991) which led to the Treaty on European Union. Here the old idea that the relationship between legislation and delegation should be sought to clarify through the introduction of a hierarchy of legal acts was re-launched by the Commission.[58] The proposal envisaged a set of amendments to the EC Treaty which would enable a qualitative distinction to be made between different types of legal acts and, then, link this to the procedure for their adoption. An integral aspect of the proposal was that directives should be replaced by a new type of legal instrument: the Law.

Clearly, the proposal had been designed to ensure the Commission a greater responsibility for exercise of implementing powers. But trying to convince the Governments, the Commission preferred to stress that the introduction of a hierarchy of legal acts would place institutional relations on "a balanced footing" and strengthen the European Parliament's role by removing "matters of detail" from its agenda. According to the

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[57] See European Parliament Resolution of 14 February 1984 on the Draft Treaty establishing the European Union (OJ 1984 C 77/53).

[58] See Commission Contributions to the IGC 1991, in Bulletin EC, Supplement 2/91.

proposal, 'laws' would be used to establish "fundamental principles, general guidelines and basic elements" of legislation. All other aspects would be considered "implementation" and dealt with in the form of 'regulations' or 'decisions'. The significance of the distinction was above all a procedural one: laws were to be adopted by the Council and the European Parliament, and regulations and decisions by the Commission.

In order to provide a unambiguous basis for the proposed arrangement in the EC Treaty, the Commission restated its old suggestion that the rule laid down in Article 202 should be replaced by a new one which would enable it to exercise implementing powers without specific delegation (cf. *supra* 4.3). This should be supplemented by the inclusion of a separate provision on the use of comitology. Accordingly, the Council would be permitted to require the Commission to follow the advisory or management committee procedure but the most restrictive procedure – the regulatory committee procedure – would be replaced by a 'call-back' mechanism which would enable both the Council and the European Parliament to block the entry into force of a regulation (if they felt that the Commission was exceeding its powers).

When the new Treaty on European Union was presented it became clear that the Intergovernmental Conference had been far from willing to accept the proposal for a hierarchy of legal acts and the amendments suggested by the Commission were completely ignored. But at the same time an awareness shone through that a number of problems would persist and that it was necessary, therefore, to continue to consider the need for further reform. For that reason it had been decided that a new Conference would have to be convened in 1996.[59] Among other things, this should permit a new examination of the question "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."[60]

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[59] See Article N(2) of the EU Treaty (1993).
[60] See Declaration No. 16 attached to the EU Treaty.

Less than a year after the entry into force of the Treaty on European Union, the decision was taken by the European Council to set up a 'reflection group' (consisting of representatives of their Foreign Ministries and of the Commission President) to prepare the new Intergovernmental Conference.[61] The final result of the discussions in the Reflection Group was presented in a report which fixed the major themes around which the negotiations were to centre. Focusing here on the findings in respect of the question of a hierarchy of legal acts, it should be noted that, according to the report, it had not been possible to agree on a solution since two conflicting positions had emerged.[62]

The first position was that embraced by a number of representatives who favoured the introduction of a formal hierarchy of legal acts and were willing, therefore, to replace the existing rules for exercise of implementing powers with rules that would give the Commission autonomous powers subject to control by both the Council and the European Parliament. In their view, this would above all serve to clarify the functions of the institutions. The second position was that taken by those who were opposed to the introduction of a hierarchy of legal acts. These seem to have been the large majority. Although not denying that this could bring clarity, they refuted the logic which they felt was based on the idea of separation of powers within a state (and, therefore, in conflict with their notion of a flexible institutional balance). For the same reason they were also objecting the suggestion that the Commission should be granted autonomous powers. But, admitting that comitology was rather complicated, they declared themselves prepared to consider a simplification of existing committee procedures "which would not undermine the Council's executive functions." This, they said, would not require any reform of the EC Treaty, but only a revision of the First Comitology Decision.

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[61] See General Report on the Activities of the European Union 1994, point 1176.

[62] See Final Report from the Chairman of the Reflection Group on the 1996 Intergovernmental Conference – A Strategy for Europe (Brussels 5 December 1995), paragraphs 111 and 126 to 128.

The European Council warmly welcomed the report of the Reflection Group and judged it a good basis for the upcoming Intergovernmental Conference.[63] The Intergovernmental Conference was commenced on 29 March 1996 and finalised little more than a year later, with the signature of the Treaty of Amsterdam. Even if the result was less ambitious than that of the previous two Conferences, it was far from insignificant. Perhaps most notably, a number of changes were agreed which strengthened the role of the European Parliament in the process for adoption of legislation. But, as in 1991, nothing had been done to meet its demand with respect to the exercise of implementing powers. Obviously unable to agree on an alternative to the arrangement in Article 202, the Governments confined themselves to the solution which had already won broad support within the Reflection Group: a revision of the First Comitology Decision. Therefore, the Commission was requested to submit a proposal for amendments by the end of 1998.[64] The result of this was the Second Comitology Decision.

Only one year after the entry into force of the Second Comitology Decision, the Intergovernmental Conference (2000) was commenced which led to the Treaty of Nice. Clearly, this was never intended to be anything more than a tidying-up operation, completing the changes necessary for accession of new Member States. Already at the time of signature of the Treaty of Nice the call was made for a deeper and wider debate on the future of the European Union which would end with a new Intergovernmental Conference in 2004.[65]

The terms of reference for the debate on the future of the European Union were laid down by the European Council on 15 December 2001, in its so called Laeken Declaration.[66] Here it was

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[63] See General Report on the Activities of the European Union 1995, at point 1027.

[64] See Declaration No. 31 attached to the Treaty of Amsterdam.

[65] See Declaration No. 23 attached to the Treaty of Nice.

[66] See the Presidency Conclusions of the European Council meeting in Laeken on 14–15 December 2001 (at internet: europa.eu.int).

stated that the European Union was standing "at a crossroads, a defining moment in its existence." For that reason, the decision had been taken to convene a Convention composed of the main parties involved in the debate of the future. The European Convention should have as its task "to consider the key issues arising from the Union's future development and try to identify the various possible responses." The findings were to be presented in a final document which, together with the outcome of national debates, was to provide a starting point for the discussions in the Intergovernmental Conference.

Of all questions adressed in the Laeken Declaration those which are most relevant for present purposes were listed under the heading "simplification of legal instruments". The key questions were whether a distinction should be introduced between *legislative* and *executive* measures and whether the number of instruments should be reduced?

5.2 The Proposal of the European Convention

The Report of the Working Group

The European Convention began its work on 28 February 2002. But it was not before 23 May 2002 that questions relating to 'simplification' were discussed. The overall conclusion was very clear: there was a real need for simplification of both instruments and procedures. In response to that, the Convention Praesidium decided to assign a specific working group with the task of devising a method for simplification, "bearing in mind the point made during the debate that we must sacrifice neither democracy nor efficiency in our quest for simplicity."[67] Two types of questions were addressed: the first relating to procedures for decision-making in the Council and the European Parliament and, above all, the potential for streamlining; and the second, which is most relevant for present purposes, relating to the complexity of legal instruments.

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[67] See the Mandate of Working Group IX on the simplification of legislative procedures and instruments (CONV 271/02), in particular at pp. 6–8.

According to the Praesidium, there was a broad consensus in the Convention on the need to reduce the number of instruments and an awareness that this would serve no purpose unless a genuine effort was made to rationalise the instruments by re-defining them.[68] Apparently, many members of the Convention called for a classification of instruments that was clear to the public and there were suggestions that basic acts could be called 'laws' and 'framework laws' with the names 'regulations' and 'decisions' being reserved for implementing measures. As emphasised, there were also some members who linked the result of such an exercise; the introduction of a hierarchy of legal acts, to the issue of a clear-cut separation of powers. Therefore, the need was specifically addressed to clarify *who* adopts implementing rules. According to the Praesidium, this meant that the arrangement in Article 202 and, in particular, the existing mechanisms of control was something which would "need to be studied closely by the Working Group."

The deliberations of the Working Group (IX) on simplification were begun on 19 September 2002 and only two months later the result was presented in a final report. In the report a series of proposals was advanced on the basis of conclusions that had enjoyed a wide support from the Working Group's members (headed by the Vice-Chairman of the Convention Praesidium, Giuliano Amato). The key proposal concerned the estabslishment of a new system for legislation based on a hierarchy of legal acts. Before that proposal is examined, however, it is useful to note that the Working Group had based its deliberations on the views stated by three legal experts: Jean-Claude Piris (Director-General of the Council Legal Service), Michel Petite (Director-General of the Commission Legal Service) and Koen Lenaerts (Judge of the Court of First Instance). Quite strikingly, the experts did all agree that simplification of legal instruments was a highly political exercise which was bound to have repercussions on the institutional balance. But the conclusions this led them to went far apart.

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[68] See the Mandate of Working Group IX (*supra* note 67).

According to Jean-Claude Piris, the powers of the institutions were so convoluted that a distinction between legislative and executive *authority* could not be made without upsetting the institutional balance.[69] This did not mean that he was not aware of existing problems. In this respect comitology was specifically pointed out. As admitted by Piris comitology is "one area where the problem of the distinction between legislative and executive authority arises acutely and gives rise to differences between the European Parliament and the Council." But, importantly, since the problem of the distinction between legislative and executive authority was so closely linked to the institutional balance, he felt that it should be addressed in a different forum. According to him, it was "certainly open to the Treaty's authors should they see fit, to undertake such a project" but it was not a matter for the European Convention. The only thing he proved prepared to accept, in principle, was a simple renaming of existing legal instruments. But also this, he felt, was something which shoud be avoided since it could create more confusion than clarity and "even rob the institutions of instruments which are invaluable in the day-to-day exercise of their functions."[70]

The views presented by the expert from the Commission, Michel Petite, were quite different from those of Jean-Claude Piris and did certainly not reflect any fear for upsetting the institutional balance.[71] Quite the contrary, Petite expressed him-

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[69] See Simplification of Legislative Procedures and Instruments, paper submitted by Jean-Claude Piris to Working Group IX on 17 October 2002 (Working Document 06), at pp. 2 and 20–23.

[70] As argued by Piris, "[t]he 'classic' instruments (regulation, directive, decision) would probably have to be retained so that they could continue to be used for regulatory and executive powers as well as for implementing powers... given this complexity and the institutional balances underlying it, it is hard to argue that a given form of legal instrument should be associated always and exclusively with a particular adoption procedure."

[71] See Simplifying Legislative Procedures and Instruments, paper submitted by Michel Petite to Working Group IX on 17 October 2002 (Working Document 08), in particular at pp. 2 and 7–8.

self very much in favour of a clear-cut separation of powers and the introduction, therefore, of a hierarchy of legal acts based on the distinction between 'laws' and implementing acts. This, indeed, is what the Commission has sought to achieve for a long time (see *supra* 5.1 and 4.3), a fact which he did not omit to mention. As recalled by Michel Petite, "the Commission has, since Maastricht and through Amsterdam, taken a rather consistent position on simplifying the instruments of the Union. On those two occasions, the time was simply not ripe for its proposals to be taken up." In compliance with those previous proposals, the solution advanced by Petite was based on the idea that the Commission alone should be permitted to adopt implementing measures (in the form of regulations or decisions) subject to mechanisms of control which were operated by the Council and European Parliament on equal conditions. The exact design of the envisaged mechanisms was not specified.

Clearly, the views stated by both Jean-Claude Piris and Michel Petite did not depart substantially from the positions taken by their respective institutions at previous occasions. For that reason, the views of the third expert, Koen Lenaerts, were particularly interesting.[72] Presumably, these could offer a more nuanced picture with respect to the quest for simplification. Like the other two also Lenaerts based his reasoning on the conclusion that it was not possible to achieve any real simplification of legal instruments without a clear distinction between legislative and executive acts. But according to him the distinction should be based not on the identitiy of the author of a legal act, but on the type of procedure followed for its adoption. This made it possible for him to distance himself from the rather infected question of pros and cons of a clear-cut separation of powers and to focus, instead, on the necessity to identify what procedures are best suited for the exercise of the legislative and executive *functions* of the institutions of the Union.[73]

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[72] See How to Simplify the Instruments of the Union? paper submitted by Koen Lenaerts submitted to Working Group IX on 17 October 2002 (Working Document 07).

[73] At pp. 2–3.

Lenaerts' conclusion was that a simplification of legal instruments could be organised by reference to two categories of acts: legislative acts and executive acts. The legislative acts would be those containing the essential elements of an area (or "the basic policy options"). According to him these should be adopted by the Council together with the European Parliament in compliance with the co-decision procedure. The executive acts, then, would be those containing either delegated legislation or executive acts in the strict sense. This, indeed, was the centre-price of Lenaertes' proposal. In principle it meant that all acts currently embraced by the very wide notion of 'implementation' should be split into two more specific subcategories.

The first subcategory, he said, could be used to update and modify legislative acts, for example for reasons of technical adaptation, and would be adopted by the Commission (and sometimes the Council) on the basis of powers granted in legislative acts. The second subcategory, which he only defined very vaguely, should be used for day-to-day management and would be adopted by the Commission. Importantly, as reasoned by Lenaerts comitology would continue to apply to both subcategories. For executive acts in the strict sense a "light comitology" would suffice. But for delegated legislation it would be necessary to provide for a "heavy comitology" coupled with a strict control by the European Parliament (which could include a right of 'call back' in certain cases).[74]

As a result of the discussions which ensued in the Working Group after the experts had stated their views, a final report was

[74] It may be noted that Lenaerts has later expressed his preference, in the first place, for "a 'simple' and balanced legislative call-back system, as opposed to the complicated and biased comitology system." It would seem that the solution presented to the Working Group ("heavy comitology" coupled with a right of call-back for the European Parliament) is something which he sees as a less ideal but, perhaps, more realistic alternative. See Lenaerts, K. and Desomer, M., Simplification of the Union's Instruments, in de Witte, B. (Ed.), Ten Reflections on the Constitutional Treaty for Europe (European University Institute 2003), at p. 117.

presented on 29 November 2002.[75] Here it was admitted that "it is difficult to make a crystal-clear distinction, as is done in national systems, between matters falling to the legislative arm and those falling to the executive." But the Working Group thought that it was still possible to make a clearer distinction than the existing one. Quite obviously, in this respect, the members of the Working Group had let themselves be inspired by Koen Lenaerts. In their report the proposal was advanced to clarify a hierarchy of legal acts by demarcating the acts containing the essential elements of an area ('legislative acts')[76] and split all 'non-legislative acts' currently embraced by the general notion of implementation into two more specific subcategories: 'delegated acts' or 'implementing acts'. The legislative acts would be adopted by the Council together with the European Parliament and the non-legislative acts by the Commission (and, exceptionally, the Council).[77]

Thereby subscribing to suggestions for which support had already been won in the Convention, the Working Group envisaged that legislative acts should be adopted in the form of 'laws' and 'framework laws' with the names 'regulations' and 'decisions' being reserved for delegated and implementing acts. The definition of 'laws' and 'framework laws' would be identical to that of regulations and directives as that is currently established in Article 249 of the EC Treaty. Somewhat confusingly, the definition of the new 'regulations' would continue to be that of the existing ones. This meant that both 'laws' and

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[75] See Final Report of Working Group IX on Simplification (CONV 424/02).

[76] As explained by Giuliano Amato, "the Working Group had focussed on defining the concept of a legislative act as containing essential elements in a given field or new policy choices. The legislature would still have some degree of discretion in interpreting this concept." See Summary Report on the plenary session on 5 and 6 December 2002 (CONV 449/02), at p. 2.

[77] See Final Report of Working Group IX (*supra* note 75), at pp. 10 and 12. It may be noted that the Working Group had "broached the idea" of introducing into the new Treaty the possibility of assigning decentralized agencies (or "regulatory authorities") the task of adopting certain implementing acts.

'regulations', as they would appear after reform, would have exactly the same legal characteristics. The definition of 'decisions' introduced the new element that they would be generally binding and not only binding upon those to whom they are addressed. That is quite remarkable since it would transform 'decisions' into something very similar to 'regulations' (and, thus, also 'laws').[78]

As had been the case with the simplification envisaged by Lenaerts, the most radical part of the reform proposed by the Working Group was found in the first subcategory of executive acts. When presented by the working group, the 'delegated acts' were styled as a *new* category. But this was misleading: everything that would be possible to do in these acts is already possible to do in acts covered by the notion of implementation: "to flesh out the detail or amend certain elements of a legislative act" (cf. *supra* 4.1).[79] The only novelty was that the 'delegated

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[78] It may be noted that this problem and a number of other technical or legal problems have been addressed by the House of Lords Select Committee on the European Union in The Future of Europe: Constitutional Treaty – Draft Articles 24-22, (Session 2002-03 12th Report).

[79] A unambiguous statement to this end can be found in Article 2(b) of the Second Comitology Decision (see *infra* note 19). Here it is explained that the regulatory committee procedures should be used for measures of a general scope designed to apply essential elements of legislative acts and to adapt or update non-essential elements. It has already been noted that the internal market programme was very much based on this type of acts (see *supra* note 33). For some more recent examples, see Commission Directive 2002/41/EC of 17 May 2002 adapting to technical progress European Parliament and Council Directive 95/1/EC on the maximum design speed, maximum torque and maximum net engine power of two- or three-wheel motor vehicles (OJ 2002 L 133/17); and Commission Directive 2001/101/EC of 26 November 2001 amending European Parliament and Council Directive 2000/13/EC on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs (OJ 2001 L 310/19). It should be noted, also, that the Court of Justice has made it abundantly clear, first, that not all provisions in basic legislation (adopted by the Council in collaboration with the European Parliament) qualify as containing the "essential elements" of the relevant subject matter and, second, that those provisions which do no qualify as containing essential elements, are covered by the

acts' entailed a different logic for exercise of political supervision. Accordingly, comitology and the privileges it grants the national administrations (or, strictly speaking, the Member States) should be replaced by mechanisms which enable "the legislator" to delegate whilst retaining control. The shift was explained accordingly:[80]

> 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.
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> To remedy this situation, the Group proposes 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, as it were, its power to legislate.

Despite all other similarities, this solution was entirely different from the one foreseen by Koen Lenaerts, who had sought to avoid a solution which rested on the highly controverisal idea of a separation of powers. But apparently the members of the Working Group had not let themselves be discouraged. Clearly,

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wide notion implementation. For that reasons they may also be amended by the Commission, subject to comitology, or by the Council (in "specific cases"). See, in particular the rulings of the Court of Justice in Case C-156/93 European Parliament v Commission [1995] ECR I-2019, paragraphs 18 and 22; and Case C-417/93 European Parliament v Council [1995] ECR I-1185, paragraphs 30 to 32. Finally, it should be pointed out that those measures currently embraced by the wide notion of implementation which cannot be considered to fall within the 'new' subcategory of delegated acts will fall within the more general subcategory of implementing acts.

[80] See Final Report of Working Group IX (*supra* note 75), at pp. 8–9. Cf. the Praesidium's Draft of Articles (*infra* note 81), at p. 3: "The aim is to encourage the legislator to concentrate on the fundamental aspects, preventing laws and framework laws from being over-detailed."

the findings and, indeed, preferences presented in the report of the Working Group were to have much influence on the result finally embraced by the Convention. The most important step on the way, however, was taken by the Praesidium.

The Praesidium's draft articles

Three months after the Working Group had finalised its report, on 26 February 2003, a series of draft articles were presented by the Praesidium, for inclusion in the new Treaty.[81] According to the Praesidium, there was a broad consensus in the European Convention in favour of the Working Group's proposal to reduce the number of legal instruments and give them names which were readily understandable to the public: laws, framework laws, regulations and decisions.[82] Apparently, many members of the Convention had also accepted the idea that the Treaty should include a hierarchy of legal instruments, with essential elements or basic policy choices being the preserve of laws and framework laws (but opinion had been divided with respect to delegated acts).[83]

The hierarchy of legal acts resulting from the draft articles presented by the Praesidium, did not depart substantially from that of the Working Group: a basic distinction between 'legislative' and 'non-legislative' acts with the latter being split in two subcategories. The legislative acts would have the form of laws or framework laws and the non-legislative acts would have the

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[81] See the Praesidium's Draft of Articles 24 to 33 of the Constitutional Treaty (CONV 571/03).

[82] See Draft Article 24. These legal instruments would apply in all areas, including those which currently fall under the second and third pillars. But they could be subject to special rules (to be specified in the light of the conclusions of the other Working Groups and discussions in the Convention). In addition to the binding legal instruments there would also be two regular types of non-binding legal instruments: recommendations and opinions (as today). See the Praesidium's Draft (*supra* note...), at p. 1–2.

[83] See the Praesidium's Draft of Articles (*supra* note 81), at p. 1. See also Summary Report on the plenary session on 5 and 6 December 2002 (CONV 449/02), at pp. 5 and 8.

form of regulations of decisions. In compliance with the solution advanced by Koen Lenaerts and embraced by the Working Group, the centre-piece of the reform was found in the two subcategories of non-legislative acts and, in particular, the delegated acts (or, as they were specified by the Praesidium, 'delegated regulations'). The characteristics were set out in Draft Article 27:

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.

For whatever reasons, the (ideo-)logical consequences of the rather bold conclusions reached by the Working Group were not clearly stated in its final report. But this, indeed, was something which the Praesidium proved prepared to remedy. Not only did the draft articles relating to simplification of legal instruments offer clarification but they reflected a fearless and unreserved

stand in favour of a shift from the existing system based on a flexible division of responsibility towards a clear-cut separation of powers.

The most obvious expression of this stand is found in the submission that the co-decision procedure should be styled "the legislative procedure" and that the Council and the European Parliament would be transformed into 'the legislator'.[84] Another expression, certainly not less significant, is found in the conclusion that the Council's current possibility to reserve the right to adopt delegated acts to itself would have to be abolished (see *supra* 3.1). Also this was based on the idea of a separation of powers, where the activities of the Council are consumed by those of the legislator and, therefore, never permitted to provide an alternative to the activities of the executive (the Commission).

In order to secure that the executive would not abuse its powers to adopt delegated acts, thus trespassing the domain of the legislator (the "essential elements"), the legislator should have access to mechanisms of control which were to be determined on a case-by-case basis by reference to an exhaustive list laid down in Draft Article 27. Significantly, the construction was almost identical to that provided for in Article 202 (see *supra* 3.2). The essential difference, once again, was that the existing mechanisms of control, operated by the Council alone, would be replaced by mechanisms that were operated by the legislator.[85] The exclusive list enshrined in Draft Article 27 included three types of control mechanisms for delegated acts:

- a right of call-back: a possibility to prescribe that the legisla-

[84] That this was very much a matter of 'styling' is clear from the fact that use of the co-decision procedure was to remain only a general rule. See Draft Article 25.

[85] The existing mechanisms of control are those of comitology: to require the Commission to comply with a limited number of committee procedures which have been fixed in the Second Comitology Decision (see *supra* note 19).

tor (the Council *and* the European Parliament[86]) shall be permitted to retrieve the right to legislate on a given subject;

- a period of tacit approval: a possibility to prescribe that delegated acts will only enter into force if the legislator (the Council *or* the European Parliament) has not expressed any objections:
- a sunset clause: a possibility to prescribe that provisions of delegated acts will have a limited period of duration which may be extended by the legislator (the Council *and* the European Parliament).

Yet another expression of the Praesidium's stand in favour of a shift towards a clear-cut separation of powers is found in Draft Article 28, setting out the specifics of the second subcategory of non-legislative acts: the implementing acts.[87] As envisaged already by the Working Group, these were the only acts in respect of which comitology would continue to apply.[88] But

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[86] It is important to note that the word "and" rather than "or" make an enormous difference. Since the preferences of the Council and the European Parliament are often quite the opposite, it is likely that will have difficulties to agree when their right of call-back should be invoked. In practice, this means that they will block each other and, thus, the effective operation of this mechanism for control. The use of the word "and" rather than "or" is one of several 'nuances' in the proposal which makes it very much in line with the Commission's position (see *infra* 4.3).

[87] See Draft Article 28(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." It should be pointed out that the existing possibility for the Council to adopt implemeting acts (in "specific cases") would continue to apply. See Draft Article 28(2).

[88] See Final Report of Working Group IX (*supra* note 75), at p, 12. It may be noted, in this context, that the question of reform of comitology and the arrangement in Article 202 was something which the Working Group said went beyond its terms of reference. The reasoning behind that conclusion is rather mysterious. According to its mandate the arrangement in Article 202 and comitology (the mechanisms for control) was something which would "need to be studied closely by the Working Group" (see *supra* 5.2 The Report of the Working Group).

according to the Praesidium, comitology could not continue to apply without adapting it to the logic that the operation of mechanisms of control of the executive was no longer a matter for the Council alone but for the legislator. Therefore, the procedure for defining the "principles and rules" on which comitology rested (currently laid down in the Second Comitology Decision) had to be shifted to co-decision (see *supra* 3.2). The implications were considerable. Not only had the most controversial group of matters handled under comitology been cut out and re-introduced in the form of 'delegated acts' (subject to a completely different type of mechanisms of control) but that which was left required "principles and rules" which the European Parliament could agree to. In practice, this meant that comitology would be stripped of everything but its purely advisory functions (cf. *supra* 4.2).

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