A Unified Set of Instruments

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Articles 249 EC; I-32 ff. Draco[1]

A powerful development by the European Constitution exists in the rationalisation of the instruments through which the Union may exercise the competences conferred upon it. This has constituted a particularly sensitive issue for the Convention. Under the EC and EU Treaties, the Union uses no less than 15 different instruments, some having the same appellation but entailing different legal effects, others being rarely used. This diversity has contributed to the development of an obscure patchwork of norms with ill-defined scope, legal effects and institutional origin. That situation consequently limits democratic control over governance at the European level.

The Constitution reorganizes the Union's instruments, under Title V of Part I, and is inspired by the crucial distinction between legislative and executive acts, which are common to all Member State legal systems. It clarifies the separation of powers at the European level and enables the establishment of a true hierarchy of norms, which, however, is not defined as such in the Constitution.[2] In view of the peculiarities of the Union's institutional system, the Constitution proposes an innovative distinction between legislative (Article I-33) and non-legislative acts (Article I-34).

Legislative acts

Union legislative action is to be conducted through two sets of instruments, Eu-

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[1] All references in the text are to the Convention's Draft Constitution of 18 July 2003 (here Draco) unless identified otherwise. The Constitution's provisions have been renumbered upon its conclusion. The final numbering was not yet established at the time of printing.

[2] The hierarchy implied is the following (top down): the Constitution, European laws and framework laws, European regulations adopted as delegated acts, European regulations and decisions adopted directly under the Constitution, European regulations and decisions adopted as implementing acts.

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ropean laws and European framework laws. The former are defined as legislative acts of general application, binding in their entirety and directly applicable in all Member States. The latter are conceived as legislative acts binding as to the result to be achieved while leaving the national authorities free to choose the form and means of achieving that result (Article I-32). In this new typology, European laws are to replace current EC regulations and 'third pillar' decisions where these instruments are used to enact legislation (i.e., to lay down rules based on a Treaty provision and containing basic policy choices in the field concerned),[3] whereas European framework laws are to replace the current EC directives and 'third pillar' framework decisions (again when they are used as legislative instruments). The common denominator of legislative acts lies with the fact that the adoption of both instruments should be subject to the 'ordinary' legislative procedure, i.e., joint adoption by the European Parliament and the Council of Ministers by qualified majority (Article I-22), on the basis of a proposal from the Commission (Article I-33(1)). This method best incarnates the double democratic legitimacy of the Union's legislative process, as a common expression of European citizens' interests through the Parliament and of the Member States' interests through the Council. The expansion of the scope of co-decision is nevertheless balanced by the maintenance of special legislative procedures 'in the specific cases provided for by the Constitution' (Article I-33(2)), which entails adoption of laws or framework laws by the sole Council of Ministers under unanimity-voting, after mere consultation of the Parliament.[4] This choice reflects a rather realist and pragmatic approach which tends to suffer from a lack of democratic legitimacy, but which simply testifies to the particular sensitivity of those matters to some, if not all, Member States.

Non-legislative acts

The use of acts of a non-legislative nature is also significantly rationalized by the Draft Constitution, which limits them to two types of instruments, European

[3] The category of European laws should also cover the current decisions of a '*Beschluß*'-type, which have no particular addressees and are used for the adoption of financing programmes or supporting actions.

[4] See for example Articles I-53(3) (setting of the limits of the Union's own resources), III-10 (right to vote and to stand as a candidate in municipal and European elections), III–62 (harmonisation of turnover taxes, excise duties and other forms of indirect taxation), III-64 (approximation of legislations), III-68 (setting up of a centralized Union-wide authorisation, co-ordination and supervision of intellectual property rights protection), III-104(3) (various matters in the filed of social policy), III-175(1) (measures combating serious crime with cross-border dimension), III-176(3) (operational police co-operation), III-178 (measures setting the conditions under which police authorities of one Member State can operate in the territory of another Member State), etc.

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regulations and European decisions. A European regulation is of general application and can be either binding in its entirety and directly applicable or binding only as regards the result to be achieved on all Member States to which it is addressed. A European decision is binding in its entirety, either generally or, when stated in the decision, specifically for those to whom it is addressed. (Article I-32). This particularly broad definition enables the replacement, in the field of Common Foreign and Security Policy, of all instruments of a decisional nature, i.e., the current 'common strategies', 'joint actions' and 'common positions' (Article 12 TEU) by European decisions (Articles III-195(3) and III-201). It has also, regrettably, enabled certain political trade-offs to take place moving the adoption of some specific measures provided for by the Constitution to the non-legislative side, escaping thereby the 'ordinary' legislative procedure. Recourse can be had to those non-legislative acts either when a provision of the Constitution directly calls for it, or when a law or framework law delegates to the Commission the power to enact delegated regulations to supplement or amend them (delegated acts), or again when it is necessary to ensure the uniform implementation of binding European acts at the national level (implementing acts; Articles I-34, I-35 and I-36).

The introduction of a category of 'delegated regulations' within the Union nomenclature of normative instruments is aimed at limiting the level of detail of basic legislation, which can affect its ability to respond promptly to changes in circumstances in specific regulatory environments, while guaranteeing the democratic legitimacy of the Union action. Pursuant to Article I-35(1) of the Draft Constitution, legislative acts, including those adopted on the basis of special legislative procedures, may delegate to the Commission the power to enact delegated regulations to supplement or amend certain non-essential elements of those acts. It belongs to the legislature to define the objectives, content, scope and duration of the delegation, provided that the enactment of measures dealing with essential elements of an area are reserved for legislative action. Given the novelty of this ability for the legislature to delegate its power, Article I-35(2) also offers a list of 'conditions of application' through which the European Parliament and the Council of Ministers may control the execution of the delegation by the Commission. Under a 'call back' provision, the European Parliament or the Council of Ministers may thus revoke the delegation.[5] The legislature might also explicitly determine that delegated regulations may enter

[5] A comparable form of review already exists nowadays in the regulation of financial services (including banking and insurance activities), under the so-called *Lamfalussy procedure*. If the Commission is authorized to adapt technical aspects of financial services regulation in order to respond quickly to market situations, this procedure also allows for a recall of this early form of delegated regulation to the European legislature, i.e., the European Parliament and Council of Ministers.

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into force only if no objection is expressed by the Parliament or the Council of Ministers within a specific period of time. It is worth underlining two important aspects of the delegation process and of its monitoring in particular, which denote the concern of the drafters of the Constitution for a better clarification of the separation of powers at Union level. First, the power to enact delegated regulations is reserved to the Commission, thereby reinforcing its status of European executive (Common Foreign and Security Policy excluded). Hence, neither the Council of Ministers, nor a specialized agency, nor any comitology committee might be empowered with that capacity. Second, acknowledging that it would be improper to endow a comitology committee with the ability to monitor the execution of the delegation,[6] Article I-35(2) stresses that the 'conditions of application' to which the delegation is subject must be explicitly determined in the habilitating law or framework law, which normally enables the European Parliament to fully participate in the designing of the monitoring process (at least in the overwhelming number of cases where the ordinary legislative procedure applies).

As far as the executive sphere as such is concerned, the Draft Constitution, while conceding to Member States the primary competence to implement European measures (Article I-36(1)), grants nonetheless executive powers to the Union 'where uniform conditions for implementing binding Union acts are needed' (Article I-36(2)). These implementing powers will be conferred by the act in question primarily to the Commission. The Council of Ministers can only be given implementing powers 'in specific cases duly justified', as well as in the field of Common Foreign and Security Policy (Article I-39; since foreign policy resorts primarily to the State's 'diplomatic function', it is inherently susceptible to be carried out through executive measures). Article I-36(3) provides also that the mechanisms for control by Member States of the Union implementing acts (comitology) must be laid down in European laws, to be adopted by the ordinary legislative procedure and no longer by the sole Council of Ministers acting unanimously as is currently the case (Article 202 EC).

A better hierarchy of norms?

The new architecture of the Union instruments is thus built around the pivotal notion of 'legislation', against which the other acts are defined. The breakdown between legislative and non-legislative acts may nevertheless be questioned to some extent, with a direct impact on the hierarchy of norms the Draft Constitution aims to introduce. Although Article I-32(1) does not expressly mention

[6] See *contra* M. Dougan, 'The Convention's Draft Constitutional Treaty: bringing Europe closer to its lawyers?', 28 *ELRev.* (2003) 763, 786.

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it, a careful reading of Article I-35 and of Part III of the Constitution suggests that the allotment between legislative and non-legislative acts has been realized in agreement with the jurisprudential *acquis*, in particular, by saving the qualification of 'legislative acts' for those laying down the 'basic elements of the matter to be dealt with'[7] and containing fundamental political choices. It is not clear however to what extent certain non-legislative acts adopted directly on the basis of the Constitution will really deal with less basic or fundamental regulatory choices, especially when adoption procedures are comparable to special legislative procedures (see for instance Article III-52(1)). Hence, one may wonder why those important measures should escape a truly legislative debate with full involvement of the European Parliament and, as a corollary, whether the introduction of a somehow shaky hierarchy of norms would really reach its intended objectives in terms of clarity, transparency and legitimacy.

It remains that with the proposed clarification of the Union's instruments, and as the consequence of a better separation of powers, the Constitution presents a first attempt to define a clearer hierarchy of norms, albeit with the necessary nuances that dealing with sensitive matters at the European level entails. Separation of powers is itself a guarantee of democracy; a clear hierarchy of norms is a guarantee of transparency and of democratic control. With such restructuring of the tools to design and implement its policies and of the procedures and institutions responsible for their adoption, the Union is endowed with a political system comparable to the Member States' ones and reaffirms thereby its autonomy as a political authority based on the rule of law.

Questions

1. Is henceforth recourse to comitology procedure excluded in the context of delegated regulations (Article I-35)?
2. Does Article III-52(1) of the Constitution, by conferring on the Council of Ministers the power to give effect to the rules on competition by a non legislative instrument (a regulation), disturb the hierarchy of norms and the separation of powers at the Union level?

Literature

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[7] See notably Case 25/70, *Köster* [1970] ECR 1161, para. 6; [1972] CMLR 255.

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