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Cortes Generales
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Excelentísimo Sr. Presidente:

Thank you for your letter of 16 February 2010 in which you request clarification concerning the interpretation of the term "legislative acts" for the purposes of Protocol (No 1) on the Role of national Parliaments in the European Union and Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality of the Treaty, ahead of the COSAC meeting starting on 30 May 2010 in Madrid.

I have submitted your request to our Committee on Legal Affairs, responsible for the interpretation and application of European law. After examining the issue at its meeting of 17 May 2010, the Committee on Legal Affairs unanimously decided to adopt the following response to your request.

1. The Treaties touch on the concept of "legislative acts" in the following manners:

- Article 289(3) TFEU states that "legal acts adopted by legislative procedure shall constitute legislative acts";
- Article 3 of Protocol (No 2) and Article 2 of Protocol (No 1) state that "for the purpose of [those] protocols", "draft legislative acts" mean "proposals from the Commission, initiatives from a group of Member States, initiatives from the European Parliament, requests from the Court of Justice, recommendations from the European Central Bank and requests from the European Investment Bank for the adoption of a legislative act".

2. The concepts "legislative acts" and "draft legislative acts" are central to the operation of Protocols (No 1) and (No 2) and therefore to the application of the principle of subsidiarity as defined in Article 5(3) EU. In particular, the "reasoned opinion" procedure applies only to "draft legislative acts". It appears from correspondence between the Commission, the Council and national Parliaments that the former two institutions intend to adopt the interpretation whereby "legislative acts" within the meaning of both Protocols would consist exhaustively of legal acts adopted either under the ordinary legislative procedure or under a special legislative procedure.

3. Such a principled interpretation should be upheld, given that the Treaties are particularly clear and unambiguous as to what the definition of a legislative act is. Furthermore, not only do the Treaties define this novel concept, they go on, in each individual legal basis, to identify precisely whether the procedure is legislative (ordinary or special) or not. In places where an individual legal base does not specify that the acts to be adopted under it are legislative, the only conclusion can be that the authors of the Treaties intended the resulting acts to be non-legislative, with the resulting consequences, including under Protocols (No 1) and (No 2).
4. This interpretation should be refined in two ways. Firstly, it is common ground that the Treaties¹ exclude the application of the principle of subsidiarity for areas falling within exclusive Union competence², irrespective of whether a draft legislative act is at stake or not.
5. Secondly, a subsidiarity test is obviously not appropriate for certain Union acts of an internal organisational character. Such acts, even if not expressly mentioned in Article 3 TFEU, can also be considered to fall within the Union's exclusive competence. Legislative acts adopted under a special procedure or the ordinary procedure falling under this category would include the Staff Regulations of Officials³, the Statute for Members of the European Parliament⁴, the Statute of the Ombudsman⁵ and the Statute of the Court of Justice⁶.
6. Considering the changes brought about in the structure of the Treaties by the Treaty of Lisbon with the systematic introduction of the terms "legislative acts" and "draft legislative acts", the above interpretation is necessary for the purpose of interpreting Protocols (No 1) and (No 2) in a way that ensures a proper application of the subsidiarity principle.

I trust that the European Parliament's response to the questions you raised will further assist COSAC's consideration of this matter.

Yours sincerely,

Jerzy Buzek

¹ Article 5(3) EU.

² On which, see Article 3 TFEU.

³ Article 336 TFEU.

⁴ Article 223(2) TFEU.

⁵ Article 228(4) TFEU.

⁶ Article 281(2) TFEU.