

European Scrutiny Committee

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NOTE ON THE DEFINITION OF LEGISLATIVE ACTS UNDER THE EU TREATIES

Implications for national parliaments of the definition of legislative acts

1. The definition of a “legislative act” under the EU Treaties is of particular importance to national parliaments because it determines the scope of application of Protocol 1 on the role of national parliaments¹ and Protocol 2 on subsidiarity and proportionality².
2. Under Protocol 1, the eight-week period between the publication of a draft legislative act in all EU languages and the date when it is placed on a provisional Council agenda for adoption applies only to draft legislative acts.
3. Under Protocol 2, the following duties on the EU institutions apply only to draft legislative acts or legislative acts:
 - the obligation on the Commission to consult widely, including to take into account regional and local considerations;
 - the obligation on the EU institutions to forward their proposals to national parliaments;
 - the obligation on the EU institution proposing a measure to prepare “a detailed statement”. A detailed statement should appraise compliance with subsidiarity and proportionality; should assess financial impact; in the case of a Directive, should assess its implications for existing rules in Member States, including regional legislation; should substantiate the conclusion that an objective can be better achieved at EU level by “qualitative and, where possible, quantitative indicators”; and should take account of any burden on national governments, regional or local authorities, economic operators and citizens to be minimised and commensurate with the objective to be achieved;
 - the “reasoned opinion” (yellow/orange card) procedure; and
 - the right of national parliaments to bring an action in the Court of Justice against a legislative act on grounds of infringement of the principle of subsidiarity.

¹ Protocol on the Role of National Parliaments

² Protocol on the Application of the Principles of Subsidiarity and Proportionality

4. The definition is also likely to affect Article 5(3) of the Treaty on European Union (TEU), which states that *the institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality*; and Article 69 TFEU, which states that *national parliaments ensure that the proposals and legislative initiatives submitted under chapters 4 and 5 comply with the principle of subsidiarity*.

What amounts to a legislative act?

5. The term ‘legislative act’ is defined in Article 289 of the Treaty on the Functioning of the European Union (TFEU) as follows:

1. The ordinary legislative procedure shall consist in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission. This procedure is defined in Article 294.

2. In the specific cases provided for by the Treaties, the adoption of a regulation, directive or decision by the European Parliament with the participation of the Council, or by the latter with the participation of the European Parliament, shall constitute a special legislative procedure.”

3. Legal acts adopted by legislative procedure shall constitute legislative acts. (Emphasis added.)

6. Under Article 289 TFEU there are, therefore, two types of legislative act. One adopted by the ordinary legislative procedure which requires “joint adoption” by the Council and European Parliament (formerly co-decision). The other adopted by a special legislative procedure, which involves “participation” (other than joint adoption) between the Council and the European Parliament. The use of the definite article indicates there is only one type of ordinary legislative procedure; the use of the indefinite article that there is more than one type of special legislative procedure. A review of the relevant provisions shows that “participation” means the Council obtaining the “consent” of the European Parliament or “consultation” with it.

7. No other type of legislative procedure is defined in the Treaty on European Union (TEU) or TFEU.

8. It should be noted that Article 289(2) TFEU states that participation between the Council and European Parliament in the adoption of Regulation, Directives, and Decision will constitute a special legislative procedure *in the specific cases provided for by the Treaties*.

9. There are, however, several instances in the TFEU where an act is adopted by the Council with the consent of the European Parliament, or after having consulted with it (i.e. through “participation” for the purposes of Article 289(2) TFEU), but where a special legislative procedure is not mentioned. These provisions cover significant EU policies including (under “Freedom, Security and Justice”) administrative and judicial cooperation, criminal procedure and emergency asylum procedures; competition and state aid; and employment, transport and economic policies. (A list of the provisions is annexed to this Note.)

10. Because of the participation of the European Parliament provided for in these provisions, the European Scrutiny Committee thought they would be deemed to be special legislative procedures. But in correspondence with the Committee the UK Government disagreed, stating that “the relevant Treaty legal base must explicitly refer to the legislative procedure, whether special or ordinary, for it to constitute a legislative act”. In a guidance letter to Departments, the UK Government has also confirmed that this is the interpretation applied by the Commission and Council legal services.

Consequences of a restrictive interpretation of special legislative procedure

11. The UK Government and EU interpretation of Article 289 TFEU means that certain draft Regulations, Directives or Decisions, although adopted with the “participation” of the European Parliament, do not constitute a special legislative procedure, and are not therefore legislative acts.

12. As a consequence, none of the safeguards (listed above) introduced by the first two Protocols will apply to these treaty provisions. This, in the Committee’s view, will significantly undermine the powers of national parliaments under the new Treaty of Lisbon architecture.

13. It would be surprising if this could have been the intention of the authors of the Lisbon Treaty when throughout the TFEU other legal acts adopted with the same participation of the European Parliament constitute special legislative procedures; and also when the significance of the policy areas — e.g. competition, state aid, family law, criminal law — is taken into account.

14. In the Committee’s view, a teleological, rather than literal, interpretation of Article 289(2) TFEU is to be preferred: it is the actual legislative procedure between the Council and the European Parliament, rather than the absence of a reference to a legislative procedure, which should carry more interpretative weight. And the qualification *in the specific cases provided for by the Treaties*

could as easily be read as referring to provisions in the Treaty which provide for participation between the Council and European Parliament, rather than an explicit reference to a special legislative procedure.

15. In addition, this restrictive interpretation leads to unintended anomalies. For example, if Protocol 2 is said not to apply to extension of EU competence over criminal procedure (Article 82(2)(d) TFEU), logic would suggest that a further argument could be raised that subsidiarity principles should not apply to this policy area at all under Article 5(3) TEU given that the Protocol is not applicable.

Way forward

16. The European Scrutiny Committee alone is not able to change the interpretation of these provisions by the EU institutions, other than by legal redress if it were possible. But a significant proportion of national parliaments which share the same opinion may have greater impact. This topic may therefore be a useful matter on which, under the umbrella of COSAC, national parliaments could effectively cooperate in the post-Lisbon framework.

1 February 2010

Annex 1

Treaty provisions (legal bases) in the TFEU where an act is adopted by the Council with the consent of the European Parliament, or after having consulted with it, but where no legislative procedure is mentioned:

- Article 74: Council to adopt measures to ensure administrative cooperation between Member States' authorities under Title V (Freedom, Security and Justice).
- Article 78(3): Council taking provisional measures where one or more Member States are confronted with an emergency situation in the form of a sudden influx of third country nationals.
- Article 81(3)(2nd para): Council decision that aspects of family law with cross-border implications may be subject to the ordinary legislative procedure.
- Article 82(2)(d): Council decision on “other” specific acts of criminal procedure to fall under competence of the EU.
- Article 95(3): Council provisions on non-discrimination in relation to transport charges and conditions for carriage of goods.
- Article 103(1): Council Regulations and Directives in the field of competition policy.
- Article 109: Council Regulations in the field of state aid policy.
- Article 125(2): Council to define “overdraft facility/credit facility” with ECB or central banks of Member States and “privileged access” by EU institutions.
- Article 129(4): Council decisions on operation of the ECB and ESCB.
- Article 148(2): Council guidelines on Member State employment policies.
- Article 150: Council to establish an Employment Committee to promote coordination of employment policies between Member States.

- Article 160: Council to establish a Social Protection Committee to promote coordination of social protection policies between Member States.
- Article 329: Council to authorise “enhanced cooperation” between Member States (where fewer than 27 arrange to cooperate).