

EDITORIAL COMMENT

In the meantime ...: Further progress in transparency and democracy while the Constitution is dormant

The period of reflection decided by the European Council is drawing to a close, and the debate on the fate of the Constitution is due to resume in 2007; but in the meanwhile, the Council has just adopted two important measures. One of these increases the transparency of the Council's deliberations, and the other steps up the role of the European Parliament in the framework of the adoption of implementation measures under "comitology". This is an important development, because these two measures both appeared – although in a somewhat different form – in the Constitution, and the official line adopted has been to avoid splitting up the Constitution into a series of successive reforms in order to preserve some hope for the overall package, which itself was the result of complex negotiations. The constitutional hiatus decreed by the European Council has been infringed in these two particular cases, because the adoption of new measures is intended to meet pressing requirements.

1. Increased transparency for the Council's deliberations

Since the Treaty of Maastricht, the Council has made efforts to improve the transparency of its work. A number of general debates, such as those on the Presidency's programme, have been opened to the public. Such general debates – which usually give rise to a succession of twenty-five statements without any real discussion – are of very limited interest however as, contrary to legislative work, they do not cover any genuine issues and remain extremely academic. After the European Council of Seville, the rules of procedure opened the final deliberations on acts adopted under codecision to the public. In practice, the Council adopted a broad definition of "final deliberations" in order to give this provision its full effect. In fact, a text is usually adopted in two stages. First, the Council approves a political agreement which does not always exist in all the languages of the Community, since it is finalized during the Council's discussions; then, after legal/linguistic revision, the Council adopts the text in all the language versions, generally as an

item under part A of the agenda (adoption without debate). A narrow interpretation of the rules of procedure would have meant making public only that last stage, which was uninteresting. The Council therefore decided to make public the debates leading to a political agreement. However, the situation was still not satisfactory in the eyes of partisans of transparency, because they considered that the real debates take place even before the final stage of reaching political agreement. For them, *all* the debates in the Council on the acts under codecision had to be made open to the public. This is, moreover, what is envisaged under Article I-24(6) of the Constitution for all debates on draft legislative acts.

The reasons for the measure

In the circumstances, any progress in transparency should really have followed the destiny of the Constitution. However, there was a feeling that the public's ignorance with respect to the Union's achievements could be one of the explanations for the negative referenda. Opening up to the public all legislative work might make it possible to reverse this tendency. Not that the Member States were so naïve as to think that citizens would all be fascinated by the deliberations of the Council! However, making them public would enable the media to give a better account of the course of discussions and of the position of each government. Europe would thus lose a little of its mysteriousness, and feelings of proximity would be strengthened.

The amendment of the rules of procedure

In order to make these changes, the rules of procedure were amended¹ to allow the opening to the public – via webcast (in a kind of video called c-span) on the Council's Internet site – of all the debates on measures subject to codecision, from the Commission proposal up to the final adoption. Article 8 of the rules of procedure provides that, for acts adopted under codecision, the Commission proposal and the ensuing debate is open to the public, as this proposal is part of the presentation to the Council. The same applies to the final deliberations. The intermediate deliberations will now also be made public, unless the Council or the Permanent Representatives Committee decide differently. It will, however, be politically difficult to oppose the opening up of these deliberations too, without arousing a certain suspicion among the public. As for legislative work on acts which are not subject to the

1. This amendment has not yet been formally adopted, but the Council decided that it would apply by anticipation. The formal adoption should take place in September 2006.

codecision procedure, the Presidency may decide to make these open to the public unless the Council or the Permanent Representatives Committee decide otherwise.

The effects of the reform

From now on, transparency is almost total. But will this measure produce positive effects? For that to be the case, two conditions must be met. The first concerns the interest of the debates. If the debates simply comprise a juxtaposition of national positions read out one-by-one by the relevant minister, this will quickly lead to boredom or frustration on the part of the public. The success of the operation lies in the organization of genuine debates, relating to the essential aspects of a text – and the abandonment of the Community politico-administrative jargon, so that everyone can follow the debates. The second condition lies in the attitude of the media. Up until now, despite the relative openness of deliberations, the media have hardly paid much attention to them, but preferred to echo the national press conferences given at the end of each of the Council meetings. There they found an already prepared version of their articles, even if sometimes what they extracted ran counter to what really happened in the debates. The press needs to learn to follow the deliberations of the Council and decipher them itself in order to render a true account.

In the real world, total transparency is an illusion. Even within the European Parliament, the real discussions are often held in closed rooms between the political groups. Similarly, in the Council, nothing will prevent ministers from exchanging points of view within an informal framework, far from the view of the public. The paradox of transparency is that it often produces the opposite effect. Excessive requirements on publicity of deliberation simply encourage the holding of purely formal debates, while the real decision-making takes place beforehand, in another framework. There is even a risk of depriving the ministers of their decision-making power, and transferring this power to the preparatory bodies whose deliberations are not public. It will be up to the successive presidencies and the Permanent Representatives Committee to avoid this pitfall.

2. The reform of comitology

The European Parliament was never really satisfied with the provisions concerning comitology. On the one hand, it had resigned itself to the Decision of 1999, which conferred on it certain rights as regards information and which

set up an early warning system enabling it to address the Commission and Council if it seemed that implementation measures exceeded the limits of the delegation authorized to the Commission by the legislature; on the other hand, it did not despair of seeing its hope of possessing a power equal to that of the Council triumph in the long term. The Commission had moreover submitted a new proposal which, as usual, appeared to go in this direction, but in fact strengthened its own powers in particular.² Moreover, by interinstitutional agreement, a special system had been set up in the field of financial services. In view of the delays occurring in this field, and following Mr Lamfalussy's suggestion, it was decided that in this sector framework legislation would be adopted which left very broad room for the implementation measures. In order to make this system acceptable, Parliament had insisted that in relation to delegation for these measures, the framework legislation should contain a sunset clause setting a temporal limit for the delegation and making renewal of delegation dependent on an examination of the use made of it. On this basis, the situation seemed stable and everyone simply awaited the reforms bound to be introduced by the Constitution. Indeed, the Constitution laid down a new procedure based on a distinction between basic legislation, delegated legislation and implementing acts, and it gave Parliament a power equal to that of the Council as far as delegated legislation was concerned (Art. I-36) These provisions satisfied Parliament, which awaited the entry into force of the Constitution.

The reasons of the reform

But when it became obvious that entry into force of the Constitution would be postponed, Parliament renewed its claims, and made use of the opportunity offered by the fact that the sunset clauses would become effective. It took the opportunity to refuse to renew the various delegations, as long as there had not been a reform of comitology.³ Under these conditions, the Council had no choice and was forced to re-consider the Commission pro-

2. COM(2002)719 final. The Commission did envisage the possibility that its proposal would be opposed, but in that case it could choose between submitting a legislative proposal or adopting the act, after having amended it if necessary

3. For its part, the Council was not entirely satisfied with the current operation of the comitology procedures. The environment Council had tackled the question several times in connection with the authorization of GMOs. Indeed, for this type of file, the Council does not have the majority to approve the measures proposed by the Commission, nor the majority to reject them. The consequence is that the Commission proposal enters automatically into force. It is not excluded that certain delegations may have hoped that the intervention of Parliament would make it possible to resolve this situation, although in fact, the new procedure will not be applicable in this field.

posal. In fact, this proposal played scarcely more than a formal role, because the Council did not wish to go further than what was strictly necessary to appease Parliament. It did not want any major reform of the comitology procedures, but simply some kind of modification. Admittedly, the agreement of Parliament was not absolutely necessary in formal terms, since Article 202 EC only provides for consultation of Parliament; however, in actual fact, failure to win the agreement of Parliament would have made it impossible to solve the crisis on the sunset clauses. This is a nice example of the fact that parliamentary power can go well beyond what is provided for in the treaties, since Parliament may link the adoption of an act in relation to which it has merely a consultative power with that of an act under codecision.

Two different conceptions

In this constitutional debate, two positions confronted each other. That of Parliament is of biblical simplicity: as it shares the legislative power with the Council, it considers that it should have the same powers as the Council in executive matters. The position of the Council is more sophisticated. Inspired by German federalism, this position is based on the fact that implementing power belongs, as a rule, to the Member States. Implementation should only take place at Community level when it seems that the requirements of uniform application make this necessary. But, in that case, since the Community exercises a power which normally belongs to the Member States, the latter must have the possibility of reviewing the use made of it by the Commission. This is where comitology plays a role, and Parliament does not have a place in that system. However, when delegation permits the Commission actually to modify a legislative act, the implementation procedures have been diverted from their proper function. In that case, the result of legislative work by Parliament and the Council is amended and it is only normal that each branch of the legislative power has the right to challenge such amendments. With this in mind, the Constitution created the category of delegated regulations, as distinct from that of implementing acts.⁴ This point of view was at the basis of the Decision amending the 1999 Comitology Decision.⁵

4. Art. I-37, on implementing acts, is indeed inspired by the views of the Council, since it provides in its first paragraph that implementation is normally the power of the Member States, and permits, in paragraph 2, implementing powers to be conferred on the Commission only “when uniform conditions for implementing legally binding Union acts are needed.”

5. Council Decision 2006/512/EC of 17 July 2006 amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, O.J. 2006, L 200/11.

The new procedure

The existing formal procedures remain, and a new procedure is created in addition under the name of “regulatory procedure with scrutiny”. This procedure is of course only applicable for acts subject to the codecision procedure. It is to be used for the adoption, as implementation measures, of “measures of general scope designed to amend non-essential elements of that instrument, inter alia by deleting some of those elements or by supplementing the instrument by the addition of new non-essential elements”. It is clear from this text that the procedure applies only when delegation permits the Commission to modify the basic act, with the understanding that such modification may involve either additions or eliminations. The criterion is therefore formal. Anything which modifies a legislative act must be subject to this procedure. The reference to the general scope of the measures is not very important, since it would be most surprising if a legislative act contained provisions which were not of a general nature. As for the non-essential elements, this is simply restating the case law, which forbids delegating the power to adopt acts which affect essential elements, the latter being the legislature’s exclusive competence.⁶

The procedure

Once delegation occurs of the kind indicated, the regulatory procedure with scrutiny applies obligatorily, and is superimposed on the simple regulatory procedure. The Commission consults a Committee, composed of representatives of the Member States. In the event of a positive opinion of this committee, the draft measure is forwarded to Parliament and Council for scrutiny. If one of these institutions expresses its opposition, the Commission has the choice between restarting the procedure with an amended draft, or submitting a legislative proposal. Opposition can be justified only on one of the following grounds: exceeding the implementing powers in the basic instrument, incompatibility with the aim or the content of the basic instrument, or violation of the principles of subsidiarity and proportionality.⁷ It is therefore a review of legality, and not of the advisability or suitability of the measures. In the event of an adverse opinion of the committee, or in the absence of an opinion, the Commission submits a proposal relating to the measures to be taken to the Council and to Parliament. The Council can adopt the measures by a qualified majority, or oppose them also by qualified majority. The adop-

6. Case 22/70, *Köster*, [1970] ECR 1611.

7. The text confirms that subsidiarity does apply to implementation measures, a fact which the Commission sometimes doubted.

tion of the measures involves subsequent submission to Parliament for scrutiny; rejection of the measures ends the procedure, the Commission remaining free to restart it with an amended proposal or by submitting a legislative proposal. It should be noted that, as in the traditional regulation procedure, the absence of decision of the Council⁸ does not impede the process continuing before Parliament. Parliament has the power to oppose the measures on the grounds listed above. In fact, in such a case, the Council may review the merits of the measures, justified by the absence of approval by the committee, while Parliament remains limited to a review of legality. A rejection by Parliament ends the procedure, with the possibility for the Commission of taking it up again or of submitting a legislative proposal.

The effects of the new procedure

The new formula does not, therefore, replace the previous procedures. It preserves all the powers of the Council, but gives Parliament a “call-back” power for limited reasons. It remains to be seen how such a procedure will function – in any case, certain elements will perhaps call for clarification by the Court, in particular regarding the cases of invocation of the right of “call-back” by Parliament. It is, indeed probable that Parliament will be tempted to exercise a review on grounds of advisability, and that it will try to widen the limits placed on its intervention. Emphasis must also be placed on the duration of the process, which adds three to six months to the normal deadlines. There is, indeed, a procedure which, “for urgent and pressing reasons” permits the Commission to implement immediately the measures in the event of assent of the committee, even if it means having to repeal them or to submit a modified proposal if Parliament or the Council oppose the measures adopted within a period of one month after these have been notified. But it may be assumed that the Commission will be reticent in applying provisions that it may later have to repeal.

At a political level, since the new procedure only applies when the basic instrument is modified via the comitology procedure, this could incite Parliament to include provisions which in fact relate to implementation in the basic text. Indeed, this practice would enable it to acquire supervisory powers in relation to implementing measures which would normally escape its scrutiny. If this were to take place, basic legislation would be strewn with complex technical provisions, which would hardly improve the general legibility.

8. Which is in practice the most frequent case.

3. Conclusion

Thus, with maximum publicity, two important changes which had been envisaged in the Constitution have already entered into force.⁹ Does that create a precedent? Will we see the Constitution emerging in bits and pieces? For the moment, this situation is not to be feared, because the changes made here were in reaction to constraints which could not be circumvented otherwise, and do not touch the real heart of the compromise which permitted the adoption of the Constitution. But if the current situation lasts, there is no doubt that similar tendencies would appear in other fields. For instance, the Commission has proposed using the “*passerelle*” of Article 42 TEU in order to communitarize Title VI of the TEU (police and judicial cooperation in criminal matters). Moreover, regarding the membership of the Commission, the Nice Treaty provides (in the Protocol on Enlargement) that when the Union comprises twenty-seven Member States, the Commission shall comprise less than one commissioner per Member State. The Union will have reached this stage after Romanian and Bulgarian accessions. A decision will have then to be taken for the nomination of the new Commission. All these arguments militate for a more rapid standpoint on the Constitutional Treaty than provided for at the moment.

9. In addition, the Commission recently decided to transmit to the national parliaments all the documents it makes public. This is not a particularly substantial innovation, since these documents were already available via other channels (national governments, the Council, etc.). The Commission also invites the national parliaments to submit observations, but at present they will not formally possess any more power than other interested parties. This represents more window dressing than a fundamental step along the path of subsidiarity.